ADMINISTRATIVE PROCEEDINGS

Warren E. Blair
Hearing Examiner

Discussion Outline:

I. Pre-hearing.

A. Order for Proceedings.

1. Selection of allegations.

a. Allegations that cannot or will not be proved should not be included simply as a matter of form. For example, an allegation that respondents acted "in concert" when satisfactory evidence of a concert of action is lacking will unnecessarily complicate and prolong the proceeding.

b. Charges of relatively minor violations which are not susceptible of strong proof should not be added to charges of serious violations. For example, a charge of a net capital violation which is subject to dispute provides respondent with an argument unavailable if charges are limited to a flagrant fraud which is the primary issue.

2. Form of allegations.

a. Allegations and charges should be set forth in sufficient detail to permit respondents not only to understand the nature of charges, but to file a meaningful answer. Use of statutory language and generalities may suffice to meet requirements of notice, but the usual result is loss of time and effort required to respond to a motion for more definite statement. (See Rule 7(d))

b. Allegations and charges should be reviewed for ambiguities or inadvertent errors in construction and language. For example, (1) improper charge of violation of Section 15(c)(1) of the 1934 Act against a respondent who is not a broker or dealer, or (2) a charge that incorporates by reference a previous paragraph where some but not all of the incorporated allegations are applicable.

B. Request for Default.

1. Request for default order under Rule 6(e) or 7(e) should not be made prior to commencement of hearing unless every respondent has failed to file notice of appearance or answer, excepting when it is known that a respondent has abandoned a defense.

2. Before a default order is requested, effort should be made to determine whether a respondent has actually received notice of the proceeding and if he intends a defense.

C. Motions Prior to Hearing.

1. Division as movant.

a. Motions and applications must set forth the specific relief requested, the material facts to be considered, and the reason why the Division believes the request should be granted. If respondents consent or have no objection to the granting of the request, that fact should also be stated.

b. Where issues of law or complex factual questions are involved, a brief of the points and authorities relied upon must accompany the motion. (See Rule 11(e))

c. Regardless of the nature of the motion or application, it should be filed in proper form and to the extent possible in sufficient time to afford respondents the five (5) days prescribed by Rule 11(e) within which to answer.

2. Answers by Division.

a. Counterstatement of facts by Division should be included only when there is disagreement with movant's statement.

b. If Division can and is willing to provide the relief requested, in part or in whole, such as in the case of a motion for more definite statement or application for production of exhibits, the answer should set forth the information requested by the movant, or the appropriate understanding by the Division without awaiting an order on the motion.

c. Regardless of the form in which a respondent files a motion or application, the Division's answer should be formal in style.

D. Negotiations.

1. Willingness to negotiate with respect to any and all issues of fact and law should be made known to respondent.

2. Respondent should be made aware of extent of authority to commit Commission or Division in connection with negotiations.

3. Since "discovery" procedures are not available to respondent, full and detailed disclosure of evidence should be made to extent possible without prejudice to Division's case.

E. Pre-hearing Conference.

1. If negotiations without presence of Hearing Examiner are of no avail, request for pre-hearing conference should be considered.

a. Request should specify matters to be considered.

b. Sufficient time prior to commencement of hearing should be allowed to afford parties time to consider results achieved at the pre-hearing conference in terms of possible settlement of issues and to furnish information or exhibits.

2. Cooperative spirit should be evidenced at pre-hearing conference with respect to stipulations of evidence and introduction of exhibits.

3. Preparation should be made for presentation of a succinct but detailed outline of the evidence, oral and documentary, to be introduced at the hearing.

F. Subpoenas.

1. Review content of subpoena to eliminate inadvertent errors and excessive demands for production of documents.

2. If prospective witness is not hostile, advise him of intended service of subpoena and arrange for most convenient time for his appearance. If hostile, accompany subpoena with letter that any question regarding his appearance should be taken up with Division counsel immediately.

3. To extent practicable, do not require any witness to appear until shortly before he actually takes the witness stand. Arrangements to notify local witness by telephone a half-hour prior to the time needed is customary.

G. Trial Brief.

1. Outline essential elements of charges to be proved, and manner or means by which those elements will be proved.

a. Indicate witnesses and testimony expected from each.

b. Describe exhibits and how introduction into evidence will be effected.

2. Anticipate legal questions that may arise during hearing and note citations to support position to be argued.

II. Hearing.

A. Preliminaries.

1. File Notice of Appearance (Form SEC 200) as Division counsel with Hearing Examiner.

2. File motions of procedural or substantive character that for good reason were not submitted earlier. Motions to correct inadvertent errors in Order for Proceedings or to exclude witnesses are examples of motions which may be necessary.

3. Be prepared to make an opening statement in sufficient detail to acquaint the Hearing Examiner with specific information relating to the charges. An opening statement may be requested by the Hearing Examiner even though Division counsel may not have intended to make one. It is not sufficient for the Division counsel to

merely read the allegations of the Order for Proceedings into the record.

4. Request that official notice be taken by name and file number of any of the Commission's public files having pertinence to the issues, and if the entire file is not relevant, specify the particular portion on which reliance will be placed.

B. Presentation of Evidence.

1. Testimony on Direct.

a. Ask witness to state name, address, and occupation.

b. Put witness at ease by asking a few preliminary questions that lend themselves to ready answers. For example, marital status, length of time with present employer, or years of residence at home address.

c. Elicit testimony through short, simple questions. Ordinarily, questions that bring out the story in chronological sequence will prove most effective in helping witness recall the pertinent events and in making his testimony clear on the record.

(1). Do not lead the witness by asking questions in form of recitals of the testimony being sought from the witness.

(2). Do not ask witness to simply state what happened in his own words. Such g' ral request usually results in an unsatisfactory, discursive statement.

(3). Once a point has been made, do not go back to it hoping to strengthen or emphasize it.

(4). Be certain that the answers are clear and responsive to the questions. Interrupt the witness if necessary to bring him back to the question or to determine if the question has been understood, but don't interrupt a responsive answer before its completion.

d. Call respondent as an adverse witness whenever his testimony will bring out additional facts or clarify other evidence in the record.

2. Documentary Evidence.

a. To the extent possible, permit respondent to examine the documents which are to be offered prior to the commencement of the hearing. If appropriate stipulations for introduction into evidence cannot be obtained, be certain that a competent witness is available to testify regarding the source of any document and the pertinent circumstances relating to it.

b. Have witness clarify any unclear portion of a document, and if a schedule, state the method followed and the meaning of captions and entries.

c. Refrain from burdening record with documents that are simply repetitious of testimony that is unchallenged. For example, it is unnecessary to introduce confirmations and checks of every investor witness when respondent does not deny that the purchase or sale of the securities had been effected with the witness.

d. Without good cause, do not ask the witness to read aloud all or part of a document.

e. If only a part of a document or record is relevant, identify and offer into evidence only the relevant portion.

(1). If relevant portion of a document or record cannot be physically separated from remainder because of damage or business problems, make photocopy of the desired portion.

(2). Do not offer the entire transcript of a respondent's testimony taken in the course of an investigation as admissions. Excerpt the testimony that may be so construed.

2. Cross Examination.

a. Undertake cross-examination only when some purpose will be served. Aimless cross-examination usually results in nothing more than a repetition of the direct testimony.

(1). Limit cross-examination to specific areas that appear fruitful.

(2). Drop cross-examination as soon as it becomes clear the purpose has been or cannot be accomplished.

b. Do not accept vague or evasive answers. Insist upon direct and responsive answers.

3. Rebuttal Evidence.

a. Limit rebuttal evidence to absolute minimum and to matters that must be clarified.

b. Avoid introducing new matters through rebuttal witnesses.

C. Rules of Evidence.

1. Introduction of Evidence.

a. Liberality in construction of rules of evidence is not license for the offer of immaterial, irrelevant, or incompetent evidence.

(1). While hearsay inadmissible in judicial proceedings may be accepted in an administrative proceeding, its probative value is questionable and cannot be relied upon as the sole basis of proof of a fact.

(2). Evidence inadmissible in a judicial proceeding should not be offered unless competent corroborative evidence is or will be placed in the record.

2. Objections to Evidence.

a. Objections to testimony or documents should not be made unless necessary for the protection of the record.

b. Reasons for the objection should be stated in succinct form and without argument. (See Rule 11(e))

c. Do not attempt to argue after a ruling has been made unless permission is granted by the Hearing Examiner, and do not request permission without strong basis for doing so.

D. Production of Witnesses' Statements.

1. Within limitations applicable to production of witnesses' statements under the Jencks Act, 18 U.S.C. 3500, Division counsel must produce any statement or part thereof of any witness who has been called as a witness and has given direct testimony at the hearing at the instance of Division counsel. (See Rule 11.1)

a. Statement may be that which has been signed or adopted by witness.

b. Statement may be that which is a substantially verbatim transcript of oral statement which is made to government agent and recorded contemporaneously.

2. While statements are not required to be produced until after witness has given his direct testimony, voluntary production of such statements prior to witness taking the stand expedites hearing.

3. When in doubt as to whether statement falls within production requirement, resolve doubt in favor of production.

III. Post-Hearing.

A. Determination of Procedures.

1. Relative merits of simultaneous or successive filings of proposed findings of fact, conclusions of law, and brief must be considered.

2. Time within which filings are to be made should be realistic. Maximum period should not be requested as a matter of course. (See Rule 16(e))

B. Proposed Findings of Fact.

1. Form is optional, but proposed findings must encompass salient facts which will establish each and every essential element of charges.

2. Page references to transcript of testimony or to exhibits which directly or indirectly support proposed findings must be shown.

3. If evidence does not support a charge, state position at outset and move for dismissal of that charge.

C. Proposed Conclusions of Law.

1. Form is optional, but proposed conclusions of law must cover each and every conclusion of law relevant to issues.

2. Legal argument should not be included in proposals.

3. Recommend appropriate sanction.

D. Brief.

1. Be incisive, clear, and direct in arguing facts and law.

2. Quality rather than quantity of citations in support of arguments should be criterion for legal references.

3. Observe formalities specified by Rules of Practice. (See Rules 22 and 23)

E. Reply Brief.

1. Limit reply to answering respondent's arguments, but do not merely repeat original arguments.

2. Do not use as a vehicle for additional proposed findings of fact.

F. Requests for Extension of Time for Filing.

1. Application for extension of time should be filed as soon as need for additional time becomes known.

2. Application must show good cause for granting extension regardless of whether respondent consents to extension.

S.E.C. FORM 72

S.E.C. STAFF CIRCULAR

NO. : 79 (Revision 1)

DATE: July 1, 1969

TO : ALL PROFESSIONAL STAFF MEMBERS

FROM : Ernest L. Dessecker
Records and Service Officer

SUBJECT: Records Handbook - Records Procedures in Administrative Proceedings

Attached is a copy of "Records Procedures in Administrative Proceedings," dated July 1969. The new edition has no changes from the original edition of September 1967 except on the front cover and in the preface.

The purpose of the handbook is to inform you about the work of the Administrative Proceedings Records Section and guide you in meeting essential records requirements involved in the conduct of administrative proceedings.

The Office of Records and Service will welcome any suggestions concerning this handbook. Please address them to Mr. Charles A. Moore (Room 295).

RECORDS HANDBOOK

Records Procedures in Administrative Proceedings

July 1969

OFFICE OF RECORDS AND SERVICE

SECURITIES AND EXCHANGE COMMISSION

P R E F A C E

This handbook has been prepared to help the Commission's staff understand and apply the records procedures involved in conducting and disposing of administrative proceedings. It is intended to answer questions that arise frequently, particularly those occuring to new attorneys on the staff.

The staff of the Administrative Proceedings Records Section will be happy to give you further information and assistance in solving any specific problem which arises in connection with the procedures.

July, 1969 Office of Records and Service

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I. RESPONSIBILITIES AND FUNCTIONS

A. Office of the Secretary

The Secretary of the Commission is responsible for preparation and maintenance of the Minute Record of all official actions of the Commission. He serves as acting chief hearing examiner with respect to matters such as scheduling hearings, assigning hearing examiners, postponing hearings, granting extensions for filing legal papers, and performing related duties.

B. Office of Opinions and Review

The Office of Opinions and Review assists the Commission in the preparation of findings, opinions and orders in cases which come before the Commission for decision in the exercise of its quasi-judicial functions.

The Commission has delegated to the Director of this Office the authority to issue certain categories of interlocutory orders and, in consent and default cases, final orders; and to grant petitions for review of initial decisions of a hearing officer and requests to vacate defaults. Further, this Office exercises joint responsibility with the Office of General Counsel in dealing with general problems arising under the Administrative Procedure Act and the adoption or revision of the Rules of Practice.

C. Office of Hearing Examiners

Hearings for the purpose of developing evidentiary records in the Commission's administrative proceedings are conducted before its Hearing Examiners. They rule on the admissibility of evidence and on legal and other issues which arise during the course of such proceedings.

Unless waived by the parties, an initial decision is prepared and filed by the Hearing Examiner in each case setting forth his conclusions as to the factual and legal issues presented and including an order disposing of the issues involved in the proceeding. If review by the Commission is not sought by the parties or otherwise ordered by the Commission, the initial decision becomes final and the Examiner's order becomes effective.

D. Administrative Proceedings Records Section

The Administrative Proceedings Records Section ("APRS"), Branch of Records, Office of Records and Service, is responsible for the procedural conformance of documents submitted in administrative proceedings. It is the official repository, in behalf of the Secretary, for documents submitted in connection with administrative proceedings.

The section coordinates and controls the processing and disposition of formal documents relating to administrative proceedings; certifies records to the Commission in behalf of the Records

and Service Officer; enters default requests in accordance with Rules 6(e) and 7(e) of the Rules of Practice for disposition; prepares records on appeal; makes formal service to appropriate parties; prepares and assigns hearing rooms; prepares attestations, etc.; manages the Commission's contract of official reporting services; and arranges for and checks records of reporting services rendered to the Commission.

II. RULES OF PRACTICE

The Rules of Practice of the Commission are generally applicable to proceedings before the Commission under the statutes which it administers, particularly those which involve a hearing or opportunity for hearing before the Commission or its duly designated officer.[1/] In connection with any particular matter, reference should also be made to any special requirements of procedure and practice that may be contained in the particular statute involved or the Rules and Forms adopted by the Commission thereunder, which special requirements are controlling.[2/]

The code of behavior governing ex-parte communications between parties and decisional employees was adopted in conformity with a recommendation of the Administrative Conference of the United States designed to insulate the administrative process from improper influence.[3/]

1/ See Rules Relating to Investigations for information in connection with investigatory matters.
2/ Rule 1 - Rules of Practice
3/ See Section 200.110, Ibid

III. PROCEDURES

A. Responsive Pleadings.

In any order for proceeding issued by the Commission, the Commission "may direct that any party respondent shall file an answer to the allegations contained in the order for proceeding and any party in any proceeding may file an answer."[4/] Responsive pleadings are generally required in most proceedings instituted by the Commission which are adversary in nature. All answers, motions and replies thereto, are filed with the Secretary; however, APRS is responsible for the acceptance, recordation and distribution of such documents. Rulings of hearing officers on pre-trial and other motions (including requests for postponement of hearings and for extensions of time for filing of proposed findings and briefs), are served by APRS.

B. Service of Commission Process and Default Procedures.

When the Commission authorizes the institution of administrative proceedings, APRS serves copies of the order for proceeding by certified (or registered) mail on all of the respondents at the addresses listed upon the service list provided by the regional office. When service is effected upon a respondent, APRS sends copies of a "Notice of Service" (Form SEC-35) to the division and the appropriate regional and/or branch office advising the staff of the date upon which service was made and the date upon which an

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4/ Rules 6(e) and 7(e), Ibid

answer or notice of appearance is due. If service cannot be made upon a particular respondent at the address provided on the service list, APRS will advise the division who will contact the regional office in an attempt to obtain further addresses at which service might be effected.

The default procedures, although of general application, are of most significance in broker-dealer proceedings. The Commission in recent years has taken various steps in the direction of streamlining procedures to relieve the Commission and staff of unnecessary burdens. The adoption of the initial decision procedure and the adoption of the present default provisions in the Rules of Practice were two major steps in this general program.

The 1964 amendments to the Rules of Practice made it clear that a proceeding could be disposed of by default not only against any person named in the order who fails to file an answer but also against any person named in the order who failed to file a notice of appearance if no answer is required, and against one who fails to appear at the hearing.[5/] The Office of Opinions and Review was delegated authority to issue orders based on defaults in broker-dealer cases. Consistent with the Commission's past practice and policy, the practice in default cases is to act solely on the basis of the order for proceeding to make the findings of

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5/ Rules 6(e) and 7(e), Ibid

violation as alleged in the order for proceeding, and to impose the appropriate ultimate sanction.

The default provisions do and are intended to permit an expeditious disposition of proceedings against respondents who do not wish to contest the charges alleged by the division.

If counsel in the regional office has not received respondent's answer or notice of appearance in the time specified in the notice, counsel contacts the division and asks that it file with APRS a "Request to Enter Default" (Form SEC-530A, SEC-530B or SEC-530C). The division than contacts APRS to assure that an answer or notice of appearance has not been received in the headquarters office. If not, the division will file an appropriate request with APRS to have the proceeding be determined by default.

In all cases when a Form SEC-530A, B or C is filed with APRS, the division will also serve the defaulting respondent with a copy thereof and will provide a certification of such service. APRS will retain the form for 10 days to provide the defaulting party with ample time to oppose the entry of the default if he so desires.[6/] If a respondent does not reply within the 10 day period, APRS submits the form and a copy of the order for proceeding to the Office of Opinions and Review for appropriate disposition.

6/ See Rule 12(d), Ibid

In order to prevent injustices, the hearing officer at any time prior to the filing of his initial decision or the Commission at any time, may for good cause, and such conditions as may be appropriate, set aside a default under Rule 6(e) or Rule 7(e). Any motion to set aside a default must be made within a reasonable time, and must state the reasons for the failure to file or appear and specify the nature of the proposed defense in the proceeding.

C. Consents.

Whenever a consent is filed, APRS immediately forwards the consent to the Office of Opinions and Review for issuance of the appropriate order. The division will file an original and seven copies with APRS for distribution.

D. Offers of Settlement.

Parties may propose offers of settlement in writing to be considered by the interested division of the Commission where time, nature of proceeding, and the public interest permit.[7/] The interested division presents an offer of settlement to the Commission with its recommendation, except that an offer is not presented to the Commission by the division where the division's recommendation is unfavorable, unless the party making the offer so requests. In the event the division recommends that the Commission accept an offer of settlement, copies of the original offer and the recommendation

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7/ See Rule 8(a), Ibid

are forwarded to the Commission. When the Commission accepts an offer, the division will promptly submit to APRS the original and seven copies thereof.[8/]

E. Service of documents filed with the Commission.

All amendments to moving papers, motions or applications made in the course of a proceeding (unless made orally during a hearing), proposed findings and conclusions, petitions for review of initial decisions, and briefs must be filed with the Commission and must, at the time of personal delivery or dispatch to the Commission, be served by the filing person upon all other parties to the proceeding. Service is made by personal service, or by mail, to the party or his attorney. Where mail service is made on a person located more than 500 miles from point of mailing, airmail must be used. Service is deemed made at the time of personal service or of deposit in the mails properly addressed and post-paid.[9/] Proof of service must be made by filing with the Commission an affidavit of service or, in the case of attorneys, a certificate simultaneously with the filing of the required number of copies. (Note: There is no special requirement that proposed findings, etc. be served by certified or registered mail.)

8/ See Rule 8(a), Ibid (An offer of settlement is not officially accepted until the Commission issues its findings and opinion concerning the settlement.)

9/ See Rule 23, Ibid

F. Exhibits introduced at hearings.

Statutes, court rules, and the Commission's Rules of Practice require that most careful attention be given to assuring that the record is complete, meets specific and general requirements, and is properly certified to reviewing officials and the Commission. In order to maintain concise records, the following suggestions are made:

1. Identify exhibits clearly in the transcript of hearing: (a) describe them so they can be easily recognized from the description in the record; (b) if only a certain portion of a document (e.g., a given page from a ledger) is made an exhibit, show this fact in description; (c) indicate clearly whether the exhibit is offered in evidence, is withdrawn, or is excluded; (d) if material is incorporated by reference, indicate whether or not an exhibit number is assigned to it[10/]; and (e) similarly, indicate when an exhibit number is reserved for material to be submitted later.

2. If reproductions are to be substituted and the original exhibit returned to the respondent or a witness, an agreement should be made to that effect and APRS made aware of it so that office can have reproductions made.

3. In a proceeding at the Headquarter's Office, all exhibits should be given to APRS immediately after the close of the hearing so they may be bound.

4. In a field proceeding, send all exhibits to APRS at the time the reply brief is mailed so that the entire record can be served promptly on the hearing officer.

IV. ADMINISTRATIVE PROCEEDING FILE NUMBER

As a result of the 1964 Act amendments to the 1934 Act, the Commission was authorized to conduct in personam proceedings.

10/ See Rule 24(a), Ibid

Since individual salesmen, etc. are not registered with the Commission under any of the acts, a special key number has been assigned to administrative proceedings, and all such proceedings, regardless of their nature, are filed under that key number.[11/] The file number is assigned by APRS when it first receives an order for proceeding; or at the time a notice of filing is prepared.[12/]

Once proceedings have been authorized and an administrative proceeding file number has been assigned, ALL subsequent material prepared should contain the administrative proceeding file number in the format as shown on the initial order. The administrative proceeding file number is placed in the upper right-hand corner of the document in two lines.

"ADMINISTRATIVE PROCEEDING
FILE NO. 3-000"

The regular file number is placed beside the name of the registrant with the words "File No." omitted. Each individual party is listed beneath the registrant's name.

V. FILING FORMALITIES

See Rules 22 and 23 of the Rules of Practice for filing requirements and related procedures. Note particularly the provisions of Rule 23(c).

11/ This number also serves as the identification code for computer input.

12/ A notice of filing (i.e., application for exemption, etc.) is assigned an administrative proceeding file number but files are not physically established unless a hearing is ordered.

VI. SOME "DO'S" IN ADMINISTRATIVE PROCEEDINGS

1. When stating the division's position in matters that might affect respondents adversely, DO prepare the document formally, serve it on the parties, and file a certificate of service with APRS.[13/] Even if you do not oppose a motion by respondents, file a statement indicating that you do not oppose so that the particular motion can be disposed of promptly.

2. Any written communication sent to you should be made part of the official record, so DO forward it immediately to APRS.

3. DO request extensions of time to file proposed findings, etc. before the time expiration, if you intend to file any. The other parties must have adequate time to respond to your request. (In order to expedite requests of this nature, obtain consent of parties and state their position in document.)

4. DO send to the Commission copies of offers of settlement instead of the originals and forward the originals to APRS when the Commission accepts the offer.

5. DO file with the Commission only LEGIBLE copies of documents.[14/]

6. DO place the administrative proceeding file number on ALL documents filed in connection with administrative proceedings.

13/ See Code of Behavior Governing Ex-Parte Communications. (Rules of Practice)

14/ See attached SEC Staff Circular No. 38

E X H I B I T A

ADMINISTRATIVE PROCEEDING
FILE NO. 3-

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

In the Matter of	NOTICE OF SERVICE

Respondent(s)_____

_____

_____ (was)

(were) served with a copy of the order for proceedings in the above captioned matter on_____.

The answer(s) (notice(s) of appearance) of respondent(s) is due on_____.

_____ By:_____
(Date) Administrative Proceedings Records Section

cc:

FORM SEC 224 (SIDE 1)

AFFIDAVIT OF SERVICE
Form Guide

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

(CAPTION OF PROCEEDING AND FILE NUMBER)

AFFIDAVIT OF SERVICE

(Rule 23(c) - Rules of Practice)

STATE OF)
) ss:
CITY OF)

The undersigned, being duly sworn, deposes and says that on the _____ day of _____, 19____, he caused to be served by United States mail (by airmail to all such persons listed more than 500 miles from point of mailing), postage prepaid, or by personal service (a) true copy (copies) of the _____ *(TITLE OF DOCUMENT)* upon those persons whose names and addresses are hereinafter set forth:

_____
(Signature)

_____
(Address)

_____
(City and State)

Subscribed and sworn to before me this
_____ day of _____, 19____.

_____
Notary Public

(See other side for Form Guide of CERTIFICATE OF SERVICE)

FORM SEC 224 (SIDE 2)

CERTIFICATE OF SERVICE
Form Guide

(To be used by Attorneys entitled to practice before the Commission)

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

(CAPTION OF PROCEEDING AND FILE NUMBER)

CERTIFICATE OF SERVICE

(Rule 23(c) - Rules of Practice)

I hereby certify that on the_____ day of _____, 19____. I caused to be served by United States mail (by airmail to all such persons listed more than 500 miles from point of mailing), postage prepaid, or by personal service (a) true copy (copies) of the _____ *(TITLE OF DOCUMENT)* _____ upon those persons whose names and address are hereinafter set forth:

_____
(Signature)

_____
(Address)

_____
(City and State)

Date _____

(See other side for Form Guide of AFFIDAVIT OF SERVICE)

E X H I B I T C
Page 1

ADMINISTRATIVE PROCEEDING
FILE NO. 3-

U. S. SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

In the Matter of	REQUEST TO ENTER DEFAULT

Respondent(s)

in the above captioned matter having failed to appear at the hearing after being duly notified, the Division of Trading and Markets hereby requests that a default be entered with respect to said respondent(s) and that the Commission determine the proceedings pursuant to Rule 6(e) of the Commission's Rules of Practice.

Date_____

_____
Counsel for the Division of
Trading and Markets

SEC 530-A

ADMINISTRATIVE PROCEEDING
FILE NO. 3-

U. S. SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

In the Matter of	REQUEST TO ENTER DEFAULT

Respondent(s)

in

the above captioned matter having failed to file a notice of appearance within the time prescribed by the Commission's Rules of Practice, the Division of Trading and Markets hereby requests that a default be entered with respect to said respondent and that the Commission determine the proceedings pursuant to Rule 6(e) of the Commission's Rules of Practice.

Date_____

_____
Counsel for the Division of
Trading and Markets

E X H I B I T C
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ADMINISTRATIVE PROCEEDING
FILE NO. 3-

U. S. SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

In the Matter of	**REQUEST TO ENTER DEFAULT**

Respondent (s)

in the above captioned matter having failed to file an answer within the time prescribed by the Commission's Rules of Practice, the Division of Trading and Markets hereby requests that a default be entered with respect to said respondent and that the Commission determine the proceedings pursuant to Rule 7 of the Commission's Rules of Practice.

Date_____

_____
Counsel for the Division of
Trading and Markets

SEC 830-C

E X H I B I T D

ADMINISTRATIVE PROCEEDING
FILE NO. 3-

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

PROCEDURAL DISPOSITION MEMORANDUM

TO: Office of Opinions and Review

Re:

The record of proceedings in the subject matter is referred to you for appropriate disposition as noted below:

- ☐ Default-Failure to file Answer or Notice or Appear
- ☐ Settlement-Tentatively accepted by Commission on _____
- ☐ Consent-Accepted by Division on _____
- ☐ Other: _____

REMARKS: _____

_____

_____

_____

_____

_____ By: _____
(Date)

cc: Office of the Secretary

Form SEC-661 (8/67)

S.E.C. FORM 72

S.E.C. STAFF CIRCULAR

NO. : 38

DATE: February 1, 1963

TO : ALL STAFF ATTORNEYS

FROM : Orval L. DuBois
Secretary

SUBJECT: Legibility of Documents Submitted to the Commission

The Commission wishes to remind the staff that special care must be taken in typing and reproducing orders, memoranda, briefs, stipulations, and other documents for inclusion in the records of administrative proceedings, to assure that not only the original but all copies thereof are completely legible.

It should be borne in mind that five of the copies are destined for ultimate review by the five Members of the Commission, and that they must be completely legible if each Member is to be able to review the documents without calling for the original file. There have been numerous instances in the past in which documents submitted to the Commission for review were completely illegible, and others were so nearly illegible as to sorely tax the eyes of the reader. This is particularly true of written stipulations or agreements tendered for the record when the evidentiary hearing is waived, and also with respect to certain typewritten motions and briefs filed in such proceedings.

The requirement of complete legibility of documents and copies extends in general to any document or copy which is to become a part of the Commission's official records. Such materials also must be permanent in a physical sense. Some processes, such as "azograph" and "thermofax" do not produce durable or non-fading copies which can be handled or retained for an extended period.

The responsibility for legibility of documents and all copies thereof rests initially upon the person submitting them. Generally, the Office of Records and Service is responsible for assuring that all copies of documents filed under the Rules of Practice are acceptable as to legibility and other requirements of Rule 22 thereof. It would be very helpful, however, if hearing examiners, attorneys, and other members of the staff would direct the attention of respondents to Rule 22, which is applicable to all papers submitted in proceedings and sets forth filing requirements as to legibility, number of copies, kind of paper, etc.

The following suggestions may help staff members to achieve proper legibility and durability:

Standard of Legibility

The standard of legibility required for typed or printed original, reproduced, or carbon copy is that the document must be for all practical purposes as readable as a properly typed ribbon original; that is, it should be possible to read the document or copy without hesitation, eyestrain, or error resulting from the typography. Reproduced copies of handwritten documents must be for all practical purposes as readable as the original handwritten document.

Standard of Durability

The standard of durability required for an original, reproduced, or carbon copy to go into the Commission's records is that the document or copy should be printed, typed, or written in a reasonably permanent ink on a reasonably durable paper, free of any chemicals, etc., which might injure adjoining materials in the files. Black carbon ribbon, xerox, photostatic, and offset printed copies on the paper commonly used for such copies are suitable, if completely legible; however, copies produced by the ditto, azograph, thermofax, or similar copying processes are usually suitable only for temporary use no matter how legible they may be at the time they are prepared.

Achieving Legibility in Copies

1. If the number of copies required exceeds the number of sharp carbon copies which can be produced in one typing, prepare a good ribbon original and have it reproduced by the Xerox or offset processes.

2. If possible, use an electric typewriter with a carbon ribbon to type documents which will be or may be reproduced. If such equipment is not available, use a good cloth ribbon, and clean the type before beginning work. If letters are blurred, "filled", faint, or broken, the reproduced copies may not be legible. If these faults cannot be corrected, find a better machine for the job.

3. Avoid erasures and corrections, insofar as possible. If the ribbon copy is to be used only as a master for reproduction, pasted-in corrections will be superior to conventional erasure corrections.

4. Signatures on documents must be written legibly in black or blue-black ink in order to reproduce satisfactorily. If a correction has to be made in the document by the person signing, the correction should be typed or inked. Any other markings are restricted by Subsection .05 of Section III:120 of the Manual of Administrative Regulations to those showing receipt or acceptance of material.

EXHIBIT F

SECURITIES AND EXCHANGE COMMISSION

RECORDS SECTION

FILE NO.

FILE NO. 3-000-1
ORIGINAL

THIS IS AN OFFICIAL FILE OF THE COMMISSION

PAPERS ARE NOT TO BE REMOVED FROM OR ADDED THERETO

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PETER BROWN
WILLIAM SAMUEL
PETER JOHNSON

ADMINISTRATIVE PROCEEDINGS

RULES OF PRACTICE

— and —

RULES RELATING TO INVESTIGATIONS

and

CODE OF BEHAVIOR GOVERNING EX PARTE COMMUNICATIONS

Between Persons Outside the Commission and Decisional Employees

May 17, 1971

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

PRINCIPAL OFFICE OF THE COMMISSION

Washington, D.C. 20549. Phone 755–1160

Mail should be addressed as follows:
Securities and Exchange Commission, Washington, D.C. 20549

REGIONAL AND BRANCH OFFICES

REGION 1—New York, New Jersey.
26 Federal Plaza, New York, N.Y. 10007. *Phone,* 264-1612.

REGION 2—Massachusetts, Connecticut, Rhode Island, Vermont, New Hampshire, Maine.
Suite 2203, John F. Kennedy Federal Bldg., Government Center, Boston, Mass. 02203. *Phone,* 223–2721.

REGION 3—Tennessee, Virgin Islands, Puerto Rico, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Florida, and that part of Louisiana lying east of the Atchafalaya River.
Suite 138, 1371 Peachtree St., NE., Atlanta, Ga. 30309. *Phone,* 526–5844.
Branch, Room 1504, Federal Office Bldg., 51 SW., First Ave., Miami, Fla. 33130. *Phone,* 350–5765.

REGION 4—Illinois, Indiana, Iowa, Kansas City (Kansas), Kentucky, Michigan, Minnesota, Missouri, Ohio, Wisconsin.
Room 1708, Everett McKinley Dirksen Bldg., 219 South Dearborn St., Chicago, Ill. 60604. *Phone,* 353 7390.
Branches, Room 779, Federal Office Bldg., 1240 East 9th at Lakeside, Cleveland, Ohio 44199. *Phone,* 522–4060.
230 Federal Bldg., Detroit, Mich. 48226. *Phone,* 226 6070.
Room 1452, 210 North Twelfth St., St. Louis, Mo. 63101. *Phone,* 622–4872.

REGION 5—Oklahoma, Arkansas, Texas, that part of Louisiana lying west of the Atchafalaya River, and Kansas (except Kansas City).
Room 503, U.S. Courthouse, 10th and Lamar Sts., Fort Worth, Tex. 76102. *Phone,* 334–3393
Branch, Room 6617, Federal Office and Courts Bldg., 515 Rusk Ave., Houston, Tex. 77002. *Phone,* 226–4986.

REGION 6—Wyoming, Colorado, New Mexico, Nebraska, North Dakota, South Dakota, Utah.
Room 7224 Federal Bldg., 1961 Stout St., Denver, Colo. 80202. *Phone,* 837–4424.
Branch, Room 6004, Federal Bldg., 125 South State St., Salt Lake City, Utah 84111. *Phone,* 524 5796—97.

REGION 7—California, Nevada, Arizona, Hawaii, Guam.
450 Golden Gate Ave., Box 36042, San Francisco, Calif. 94102. *Phone,* 556–5264.
Branch, Room 1043, U.S. Courthouse, 312 North Spring St., Los Angeles, Calif. 90012. *Phone,* 688-5871.

REGION 8—Washington, Oregon, Idaho, Montana, Alaska.
900 Hoge Bldg., Seattle, Wash. 98104. *Phone,* 442–7990.

REGION 9—Pennsylvania, Maryland, Virginia, West Virginia, Delaware, District of Columbia.
Ballston Center Tower III, 4015 Wilson Blvd., Room 300, Arlington, Va. 22203. *Phone,* 557–8201.

RULES OF PRACTICE

And

RULES RELATING TO INVESTIGATIONS

and

CODE OF BEHAVIOR GOVERNING EX PARTE COMMUNICATIONS

between Persons Outside the Commission and Decisional Employees

As in effect May 17, 1971

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

THE RULES OF PRACTICE, RULES RELATING TO INVESTIGATIONS, AND CODE OF BEHAVIOR GOVERNING EX PARTE BETWEEN PERSONS OUTSIDE THE COMMISSION AND DECISIONAL EMPLOYEES OF THE SECURITIES AND EXCHANGE COMMISSION ARE PUBLISHED IN THE CODE OF FEDERAL REGULATIONS AS TITLE 17, PARTS 200, 201 AND 203. THUS RULE 1 OF THE RULES OF PRACTICE SHOULD BE CITED AS 17 CFR 201.1 AND RULE 1 OF THE RULES RELATING TO INVESTIGATIONS SHOULD BE CITED AS 17 CFR 203.1. THE CODE OF BEHAVIOR GOVERNING EX PARTE COMMUNICATIONS BETWEEN PERSONS OUTSIDE THE COMMISSION AND DECISIONAL EMPLOYEES SHOULD BE CITED AS 17 CFR 200.110 THRU 200.114.

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PREFACE

On June 30, 1960, the SECURITIES AND EXCHANGE COMMISSION adopted a revision of its RULES OF PRACTICE in the interest of providing for more efficient and expeditious conduct of and disposition of administrative proceedings before the Commission. The revision was designed largely to clarify existing procedures, restate the rules in more logical sequences, eliminate obsolete and redundant provisions, and generally improve the administrative process.

On June 30, 1964, various rules were adopted and others were amended relating to initial decisions by hearing officers and to default procedures, effective as to all proceedings instituted on or after August 1, 1964. In addition various other rules have been adopted or amended since the general revision in 1960.

See page 19 for Table I, showing Derivation of Revised Rules in Relation to Former Rules, and Table II, showing Location in Revised Rules of Provisions of Former Rules.

On March 12, 1964, as announced in Securities Act of 1933 Release No. 4677, the SECURITIES AND EXCHANGE COMMISSION adopted its RULES RELATING TO INVESTIGATIONS, effective April 1, 1964, and made conforming amendments in its Rules of Practice. The Rules Relating to Investigations are designed to clarify existing procedures, incorporate certain established Commission policies and adopt certain recommendations of the Administrative Conference of the United States.

On April 26, 1963, as announced in Securities Act Release No. 4600, the SECURITIES AND EXCHANGE COMMISSION adopted its CODE OF BEHAVIOR GOVERNING EX PARTE COMMUNICATIONS BETWEEN PERSONS OUTSIDE THE COMMISSION AND DECISIONAL EMPLOYEES, effective June 1, 1963, and made conforming amendments to its Canons of Ethics. The Code of Behavior Governing *Ex Parte* Communications, adopted pursuant to a recommendation of the Administrative Conference of the United States, is designed to prohibit certain *ex parte* communications to any member of the Commission and certain members of the Commission's staff with respect to "on the record" administrative proceedings.

See page 24 for Table III, showing Derivation of Rules Relating to Investigations in Relation to Former Rules of Practice, and Table IV, showing Location in Rules Relating to Investigations of Provisions of Former Rules of Practice.

IMPORTANT NOTICE

Persons who wish to receive all changes, proposed or adopted, in the RULES of PRACTICE, RULES RELATING TO INVESTIGATIONS and CODE OF BEHAVIOR GOVERNING EX PARTE COMMUNICATIONS BETWEEN PERSONS OUTSIDE THE COMMISSION AND DECISIONAL EMPLOYEES of the Commission are requested to fill in this coupon and forward it promptly to the Securities and Exchange Commission, Washington, D.C. 20549

Name_____
(Please type or print)

Street_____

City_____ State_____ Zip Code_____

THIS REQUEST RELATES TO CHANGES AFTER MAY 17, 1971

RULES OF PRACTICE

(Cite as 17 CFR 201)

CONTENTS

RULES RELATING TO INVESTIGATIONS

(Cite as 17 CFR 203)

In General

Formal Investigative Proceedings

SUBPART F—CODE OF BEHAVIOR GOVERNING EX PARTE COMMUNICATIONS BETWEEN PERSONS OUTSIDE THE COMMISSION AND DECISIONAL EMPLOYEES

(Cite as 17 CFR 200)

SUBJECT INDEX TO THE RULES OF PRACTICE

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RULES OF PRACTICE OF THE SECURITIES AND EXCHANGE COMMISSION

(These Rules are published as Part 201 of Title 17 of the Code of Federal Regulations. Thus the Code citation for Rule 4 would be 17 CFR 201.4)

Rule 1. Scope of Rules of Practice.

These rules of practice are generally applicable to proceedings before the Commission under the statutes which it administers, particularly those which involve a hearing or opportunity for hearing before the Commission or its duly designated officer. In connection with any particular matter, reference should also be made to any special requirements of procedure and practice that may be contained in the particular statute involved or the rules and forms adopted by the Commission thereunder, which special requirements are controlling. These rules do not apply to investigations, except where made specifically applicable by the Rules Relating to Investigations.

Rule 2. Appearance and Practice Before the Commission.[1]

(a) **By non-lawyers.** An individual may appear in his own behalf, a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association, and an officer or employee of a State commission or of a department or political subdivision of a State may represent the State commission or the department or political subdivision of the State, in any proceeding.

(b) **By lawyers.** A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia.

(c) **Representation only as specified.** A person shall not be represented at any hearing before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this rule or except as otherwise permitted by the Commission.

(d) **Notice of appearance; designation for service; power of attorney.** When an individual appears in his own behalf before the Commission or a hearing officer in a particular proceeding which involves a hearing or an opportunity for hearing, he shall file with the Commission or otherwise state on the record an address at which any notice or other written communication required to be served upon him or furnished to him may be sent. When an attorney appears before the Commission or a hearing officer in a representative capacity in a particular proceeding which involves a hearing or an opportunity for hearing, he shall file with the Commission a written notice of such appearance, which shall state his name, address and telephone number and the name and address of the person or persons on whose behalf he appears. Any additional notice or other written communication required to be served or furnished to the client may be sent to the attorney at the attorney's stated address. Any person appearing or practicing before the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his authority to act in such capacity.

(e) **Suspension and disbarment.**

(1) The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integ-

[1] Additional restrictions upon practice by former employees of the Commission are contained in Rule 6 of the Commission's Conduct Regulation (Article 36 of the Statement of Organization, Conduct and Ethics, and Information Practices).

rity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the federal security laws (15 U.S.C. §§ 77a—80b–20), or the rules and regulations thereunder.

(2) Any attorney who has been suspended or disbarred by a Court of the United States or in any State, Territory, District, Commonwealth, or Possession, or any person whose license to practice as an accountant, engineer or other expert has been revoked or suspended in any State, Territory, District, Commonwealth, or Possession, or any person who has been convicted of a felony, or of a misdemeanor involving moral turpitude, shall be forthwith suspended from appearing or practicing before the Commission. A disbarment, suspension, revocation or conviction within the meaning of this rule shall be deemed to have occurred when the disbarring, suspending, revoking or convicting agency or tribunal enters its judgment or order, regardless of whether appeal is pending or could be taken, and includes a judgment or order on a plea of *nolo contendere*.

(3) (i) The Commission, with due regard to the public interest and without preliminary hearing, may by order temporarily suspend from appearing or practicing before it any attorney, accountant, engineer or other professional or expert who, on or after July 1, 1971, has been by name

(A) permanently enjoined by any court of competent jurisdiction by reason of his misconduct in an action brought by the Commission from violation or aiding and abetting the violation of any provision of the federal securities laws (15 U.S.C. §§ 77a–80b–20) or of the rules and regulations thereunder; or

(B) found by any court of competent jurisdiction in an action brought by the Commission to which he is a party or found by this Commission in any administrative proceeding to which he is a party to have violated or aided and abetted the violation of any provision of the federal securities laws (15 U.S.C. §§ 77a—80b–20) or of the rules and regulations thereunder (unless the violation was found not to have been willful).

An order of temporary suspension shall become effective when served by certified or registered mail directed to the last known business or residence address of the person involved. No order of temporary suspension shall be entered by the Commission pursuant to this paragraph (i) more than three months after the final judgment or order entered in a judicial or administrative proceeding described in subparagraph (A) or (B) has become effective upon completion of review or appeal procedures or because further review or appeal procedures are no longer available.

(ii) Any person temporarily suspended from appearing and practicing before the Commission in accordance with paragraph (i) may, within thirty days after service upon him of the order of temporary suspension, petition the Commission to lift the temporary suspension. If no petition has been received by the Commission within thirty days after service of the order by mail the suspension shall become permanent.

(iii) Within thirty days after the filing of a petition in accordance with paragraph (ii), the Commission shall either lift the temporary suspension or set the matter down for hearing at a time and place to be designated by the Commission or both, and after opportunity for hearing, may censure the petitioner or may disqualify the petitioner from appearing or practicing before the Commission for a period of time or permanently. In every case in which the temporary suspension has not been lifted, every hearing held and other action taken pursuant to this paragraph (3) shall be expedited in every way consistent with the Commission's other responsibilities.

(iv) In any hearing held on a petition filed in accordance with paragraph (ii), the staff of the Commission shall show either that the petitioner has been enjoined as described in paragraph (i) (A) or that the petitioner has been found to have committed or aided and abetted violations as described in paragraph (i) (B) and that showing, without more, may be the basis for censure or disqualification; that showing having been made, the burden shall be upon the petitioner to show cause why he should not be censured or temporarily or permanently disqualified from appearing and practicing before the Commission. In any such hearing the petitioner shall not be heard to contest any findings made against him or facts ad-

mitted by him in the judicial or administrative proceeding upon which the proceeding under this paragraph (3) is predicated, as provided in subparagraph (i) hereof. A person who has consented to the entry of a permanent injunction as described in subparagraph (i)(A) of this paragraph (3) without admitting the facts set forth in the complaint shall be presumed for all purposes under this paragraph (3) to have been enjoined by reason of the misconduct alleged in the complaint.

(4)(i) An application for reinstatement of a person permanently suspended or disqualified under paragraphs (1) or (3) of this Rule may be made at any time, and the applicant may, in the Commission's discretion, be afforded a hearing; however, the suspension or disqualification shall continue unless and until the applicant has been reinstated by the Commission for good cause shown.

(ii) Any person suspended under paragraph (2) of this Rule shall be reinstated by the Commission, upon appropriate application, if all the grounds for application of the provisions of that paragraph are subsequently removed by a reversal of the conviction or termination of the suspension, disbarment or revocation. An application for reinstatement on any other grounds by any person suspended under paragraph (2) of this rule may be filed at any time and the applicant shall be accorded an opportunity for a hearing in the matter; however, such suspension shall continue unless and until the applicant has been reinstated by order of the Commission for good cause shown.

(5) Any person appearing or practicing before the Commission who has been the subject of an order, judgment, decree or finding as set forth above shall promptly file with the Secretary of the Commission a copy thereof (together with any related opinion or statement of the agency or tribunal involved). Failure to file any such paper shall not impair the operation of any other provision of this rule.

(6) Any proceeding brought under any of the above sections shall not preclude a proceeding under any other section.

(7) All hearings held under this Rule 2(e) shall be non-public unless the Commission on its own motion or the request of a party otherwise directs.

(f) **Contemptuous conduct.** Contemptuous conduct at any hearing before the Commission or a hearing officer shall be ground for exclusion from said hearing and for summary suspension without a hearing for the duration of the hearing.

(g) **Practice defined.** For the purposes of this rule, practicing before the Commission shall include, but shall not be limited to (1) transacting any business with the Commission; and (2) the preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other expert.

(h) **Service on attorneys.** In any proceeding where an attorney has filed an appearance pursuant to paragraph (d) hereof, any notice or other written communication required to be served upon or furnished to the client should also be served upon or furnished to the attorney (or one of such attorneys if the client is represented by more than one attorney) in the same manner as prescribed for his client, regardless of whether such communication is furnished directly to the client.

(Amended para. (d), eff. April 1, 1966, Release 33-4827; para. (e) amended eff. Sept. 24, 1970, Release 33-5088; further amended May 10, 1971, eff. July 1, 1971, Release 33-5147.)

Rule 3. Rescinded April 1, 1964—Release 33-4677.

Rule 4. Issuance, Amendment and Repeal of Rules of General Application.

(a) **By petition.** Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary of the Commission. Such petition shall include a statement setting forth the text of any proposed rule or amendment desired or specifying the rule, the repeal of which is desired and stating the nature of his interest and his reasons for seeking the issuance, amendment or repeal of the rule. The Secretary shall acknowledge receipt of the petition and refer it to the Commission for such action as the Commission deems appropriate, and shall notify the petitioner of the action taken by the Commission.

(b) **Notice of proposed issuance, amendment or repeal of rules.** Except where the Commission finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interests, whenever the Commission proposes to issue, amend, or repeal any rule or regulation of general application other than an interpretative rule, general statement of policy, or a rule of agency organization, procedure, or practice, or any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts, there shall first be published in the FEDERAL REGISTER a notice of the proposed action. Such notice shall include (1) a statement of the time, place, and nature of the rulemaking proceeding, with particular references to the manner in which interested persons shall be afforded the opportunity to participate in such proceedings; (2) reference to the authority under which the rule is proposed; and (3) the terms or substance of the proposed rule or a description of the subjects and issues involved.

Rule 5. Business Hours.

The principal office of the Commission, at 500 North Capitol Street, Washington, D.C. 20549, is open each day, except Saturdays, Sundays, and legal holidays, from 9 a.m. to 5:30 p.m., eastern standard time or eastern daylight-saving time, whichever is currently in effect in Washington. Legal holidays consist of New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday in the District of Columbia by the President or the Congress of the United States.

(Amended Rule 5, eff. May 17, 1971, Release 33–5150.)

Rule 6. Notice of Proceedings and Hearings.

(a) **Notice of proceedings; order for proceedings.** Whenever an order for proceeding is issued by the Commission, appropriate notice thereof shall be given by the Secretary or other duly designated officer of the Commission to each party to the proceeding and any other person entitled to notice or to the person designated by any such party or person as being authorized to receive on his behalf notices issued by the Commission. The parties or persons entitled to notice shall be timely informed of the time, place and nature of any hearing and the legal authority and jurisdiction under which the hearing is to be held, and furnished a short and simple statement of the matters of fact and law to be considered and determined. In proceedings in which an answer is directed pursuant to Rule 7, the order for proceeding shall set forth the action proposed and the factual and legal basis alleged therefor in such detail as will permit a specific response thereto.

(b) **Notice of hearing; service of notice.** The time and place for any hearing in a proceeding shall be fixed with due regard for the public interests and the convenience and necessity of the parties or their representatives. Each party or person

entitled to notice shall be given notice of hearing a resonable time in advance of the hearing, and such notice may be given by personal service, by confirmed telegraphic notice or, in any proceedings other than those pursuant to section 8 of the Securities Act of 1933 or sections 305 or 307 of the Trust Indenture Act of 1939, by registered mail or certified mail, addressed to his last known business or residence address or to the address of his agent for service.

(c) **Publication of notice of hearing.** Unless otherwise ordered by the Commission, notice of any public hearing shall be given general circulation by release to the public press and, where ordered, by publication in the FEDERAL REGISTER.

(d) **Amendment of order for proceedings.** In any proceeding amendments to the matters of fact and law to be considered may be authorized, for cause shown, by the hearing officer during the course of the hearing, or by the Commission at any time.

(e) **Effect of failure to appear.** If any person who is named in an order for proceeding as a person against whom findings may be made or sanctions imposed in the proceeding does not file a notice of appearance in the proceeding within 15 days after service upon him of the order for proceeding (unless a different period is specified in the order), or if he fails to appear at a hearing of which he has been duly notified, such person shall be deemed in default and the proceeding may be determined against him upon consideration of the order for proceeding, the allegations of which may be deemed to be true. For the purpose of this paragraph an answer shall constitute a notice of appearance.

Rule 7. Answers.

(a) **When required.** In any order for proceeding issued by the Commission, the Commission may direct that any party respondent shall file an answer to the allegations contained in the order for proceeding, and any party in any proceeding may file an answer.

(b) **Time to file answer.** Except where a different period is provided by rule or by order, a party respondent directed to file an answer as provided in paragraph (a) of this rule shall do so within 15 days after service upon him of the order for proceeding. Any other person admitted to such a proceeding (except a person becoming a party under Rule 9(a)) may be required to file an answer within such time as is directed by the hearing officer or the Commission. Where amendments to the matters of fact and law to be considered in such proceeding are authorized subsequent to the institution of the proceeding, the parties may be required to answer within a reasonable time the matters of fact and law to be considered as amended.

(c) **Requirements of answer; effect of failure to deny.** Unless otherwise directed by the Commission, an answer required by this rule shall specifically admit, deny, or state that the party does not have and is unable to obtain sufficient information to admit or deny, each allegation in the order for proceeding. A statement of a lack of information shall have the effect of a denial. Any allegation not denied shall be deemed to be admitted. When a party intends in good faith to deny only a part or a qualification of an allegation, he shall specify so much of it as is true and shall deny only the remainder.

(d) **Motion for more definite statement.** A party may file, with an answer required by this rule, a motion for a more definite statement of specified matters of fact or law to be considered or determined. Such motion shall state the respects in which, and the reasons why, each such matter of fact or law should be required to be made more definite. If the motion is granted, the order granting such motion will set the periods in which such statement, and any answer thereto, shall be filed.

(e) **Effect of failure to file answer.** If a party fails to file an answer required by this rule within the time provided, such person shall be deemed in default and the proceeding may be determined against him by the Commission upon consideration of the order for proceeding, the allegations of which may be deemed to be true.

(f) **Signature on answer; requirement and effect.** Every answer filed pursuant to this rule shall be signed by the party filing it or by at least one attorney, in his individual name, who represents such party. This signature constitutes a certificate by the signer that he has read the answer; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

Rule 8. Settlements, Agreements, and Conferences

(a) **Offers of settlement.** (1) Parties may propose in writing offers of settlement which shall be submitted to and considered by the interested division of the Commission where time, the nature of the proceeding, and the public interest permit. Such offers may be made at any time during the course of the proceeding; and (2) the interested division shall present an offer of settlement to the Commission with its recommendation, except that where the division's recommendation is unfavorable, the offer shall not be presented to the Commission by the division unless the party making the offer so requests. Where the Commission deems it appropriate, it may also give the party making the offer an opportunity to make an oral presentation to the Commission. Where the Commission rejects an offer of settlement, the party making the offer shall be notified of the Commission's action and the offer of settlement shall be deemed withdrawn and such offer and any documents relating thereto shall not constitute a part of the record. Final acceptance by the Commission of any offer of settlement will be only by its Findings and Opinion issued in the proceedings.

(b) **Specification of procedures.** In any proceeding the moving party shall, in the moving papers or the notice of hearing if that is practicable, or, if not, as early as practicable in the course of the hearing, specify the procedures considered necessary or appropriate in the proceeding, with particular reference to (1) whether there should be an initial decision by a hearing officer, (2) whether the interested division of the Commission may assist in the preparation of the Commission's decision, and (3) whether there should be a 30-day waiting period between the issuance of the Commission's order and the date it is to become effective. Any other party may object promptly or within such time as shall be designated by the hearing officer, having due regard to the circumstances of the case and to the procedure so specified, and such party may specify such additional procedure as he considers necessary or appropriate; in the absence of such objection or specification of additional procedure, such party may be deemed to have waived objection to the specified procedure and to the omission of any procedure not specified, unless the Commission, for good cause shown and upon taking into account any resulting prejudice to other parties, determines the contrary.

(c) **Agreements on procedure.** Any proposal as to the procedural matters enumerated in paragraph (b) of this rule which is agreed upon by all parties present and which is not contrary to any specific provision of this part, shall, subject to the approval of the hearing officer, be embodied in an appropriate stipulation, which shall become part of the record, and shall determine the procedure in that respect, except that the Commission may order that the hearing officer prepare an initial decision notwithstanding any waiver by the parties.

(d) **Conferences.** At the opening of a hearing or at any other time during the course of any proceeding, to the extent practicable, where time, the nature of the proceeding and the public interest permit, the hearing officer shall, at the request of any party or upon his own motion, hold conferences for the purpose of clarifying and simplifying issues by consent of the parties, including where practical and reasonable, considering (1) the possibility of obtaining stipulations and admissions of facts and of authenticity and contents of documents which will avoid unnecessary proof; (2) expedition in the presentation of evidence; (3) the exchange of copies of proposed exhibits; and (4) such other matters as will promote a fair and expeditious hearing or aid in the disposition of the proceeding. At the conclusion of a conference the hearing officer shall enter a ruling or order which recites the matters agreed upon by the parties and any procedural determinations made by the hearing officer.

(Amended Title and paras. (c) and (d) eff. Aug. 2, 1966, Release 33-4842.)

Rule 9. Parties and Limited Participation.

(a) **Who may become parties; interested division a party.** Any interested representative, agency, authority or instrumentality of the United States or any interested State, State commission, municipality or other political subdivision of a State shall become a party to any proceeding upon the filing of a written notice of appearance therein. The interested division of the Commission shall be deemed a party to all proceedings.

(b) **Parties in broker-dealer proceedings.** (1) In proceedings under Sections 15(b), 15A (1)(2) or 19(a)(3) of the Securities Exchange Act of 1934, any person associated with a member of a national securities association, a member of a national securities exchange, a broker or a dealer, whose interests may be affected by the proceedings, shall be entitled to participate as a party. If he participates generally in the proceedings or files a notice of appearance, he shall be deemed a party of record and will be given notices of intermediate developments in the proceedings. In any event he may inform himself of such developments by attendance at the hearings or examination of the record (whether the proceedings be public or private) or by arrangement with a party of record so that he can determine whether he desires to be heard at any time. The term "person associated" as used in this rule shall mean a person associated with a member, broker or dealer in any of the capacities specified in Sections 15(b) and 15A (b)(4) of the Securities Exchange Act of 1934.

(2) Unless the Commission otherwise directs, paragraph (b)(1) above shall apply only to proceedings instituted prior to August 20, 1964. The term "person associated" referred to therein shall mean a person associated with a member, broker or dealer in any of the capacities specified in Sections 15(b) and 15A(b)(4) of the Securities Exchange Act of 1934 as in effect prior to August 20, 1964.

(c) **Limited participation; leave to be heard.** Any person may, at the discretion of the hearing officer, be given leave to be heard in any proceeding as to any matter affecting his interests. Requests for leave to be heard shall be in writing, shall set forth the nature and extent of the applicant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 2 days prior to the date fixed for the commencement of the hearing, or where a respondent is required to answer, requests for leave to be heard shall be filed within the time provided for the filing of the answer. The hearing officer or the Commission may direct any person requesting leave to be heard to submit himself to examination as to his interest in the proceeding.

(d) **Rights of participant.** Leave to be heard pursuant to paragraph (c) of this rule may include such rights of a party as the hearing officer may deem appropriate, except that oral argument before the Commission may be permitted only by the Commission upon written request therefor. Persons granted leave to be heard shall be bound, except as may be otherwise determined by the hearing officer, by any stipulation between the parties to the proceeding with respect to procedure, including submission of evidence, substitution of exhibits, corrections of the record, the time within which briefs or exceptions may be filed or proposed findings and conclusions may be submitted, the filing of initial decisions, the procedure to be followed in the preparation of decisions, and the effective date of the Commission's order in the case. Where the filing of briefs or exceptions or the submission of proposed findings and conclusions are waived by the parties to the proceedings, a person granted leave to be heard pursuant to paragraph (c) of this rule shall not be permitted to file a brief or exceptions or submit proposed findings and conclusions except by leave of the Commission or of the hearing officer, if the hearing is pending before the hearing officer. Except as may otherwise be specifically directed by the hearing officer at the request of any person granted leave to be heard, such person shall be expected to inform himself by attendance at public hearings and by examination of the public files of the Commission as to the various steps taken in the proceeding including continuances, the filing of amendments, answers, motions, or briefs by parties to the preceeding, or the fixing of time for any such action, and such person shall not be entitled as of right to other notice thereof, or to service of copies of documents.

(e) **When intervention as party granted.** Except as provided in paragraphs (a) and (b) of this rule, no person shall be admitted as a party to a proceeding by intervention unless the Commission is satisfied on the basis of the written application of such person (and any evidence taken in connection therewith) that his participation as a party will be in the public interest, and that leave to be heard pursuant to paragraphs (c) and (d) of this rule would be inadequate for the protection of his interests.

(f) **Permission to state views.** Any person who has not complied with the requirements of paragraph (c) of this rule may, in the discretion of the hearing officer, be permitted to file a mem-

orandum or make an oral statement of his views, and the hearing officer may accept for the record written communications received from any such person. Unless offered and admitted as evidence of the truth of the statements therein made, the memoranda and oral or written communications submitted pursuant to the provisions of this paragraph will be considered only to the extent that the statements therein made are otherwise supported by the record.

(g) **Certain persons entitled to leave to be heard.** The hearing officer is directed to grant leave to be heard under paragraph (c) or (f) of this rule, whichever may be applicable, to any person to whom it is proposed to issue any security in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the Commission is authorized to approve the terms and conditions of such issuance and exchange after a hearing upon the fairness of such terms and conditions.

(h) **Review by Commission; modification of participation provisions.** Any ruling of the hearing officer as to matters within the scope of this rule is subject to review by the Commission at the close of the proceeding, or at the Commission's discretion, in the course of the proceeding. The Commission may, by order in any case, modify the provisions of this rule which would otherwise be applicable, and may impose such terms and conditions on the participation of any person in any proceeding as it may deem necessary or appropriate in the public interest.

Rule 10. Consolidation.

By order of the Commission, proceedings involving a common question of law or fact may be joined for hearing of any or all the matters in issue in such proceedings and such proceedings may be consolidated; and the Commission may make such orders concerning the conduct of such proceedings as may tend to avoid unnecessary costs or delay.

Rule 11. Hearings for the Purpose of Taking Evidence; Motions and Applications to Hearing Officer.

(a) **When held.** Hearings for the purpose of taking evidence shall be held as ordered by the Commission.

(b) **Presiding officers; public hearings.** All such hearings shall be held before the Commission or a hearing officer, who shall be a hearing examiner or other officer duly designated by the Commission or shall be one or more members of the Commission. The hearings shall be conducted in an impartial and orderly manner. All such hearings, except hearings on applications for confidential treatment filed pursuant to the provisions of Clause 30 of Schedule A of the Securities Act of 1933, section 24(b) of the Securities Exchange Act of 1934, section 22(b) of the Public Utility Holding Company Act of 1935, section 45(a) of the Investment Comany Act of 1940, section 210(a) of the Investment Advisers Act of 1940, or the rules and regulations promulgated under such sections, shall be public unless otherwise ordered by the Commission. No hearing shall be private where all respondents request that the hearing be made public.

(c) **Disqualification of hearing officer.** In any hearing for the purpose of taking evidence a hearing officer may withdraw from a case when he deems himself disqualified. In such event he shall immediately notify the Commission of his withdrawal and inform it of his reasons for such action. Any party or any person who has been granted leave to be heard pursuant to Rule 9 may in good faith request a hearing officer to withdraw on the grounds of personal bias or other disqualification. The person seeking disqualification shall file with the hearing officer a timely affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the hearing officer may file a response thereto. If the hearing officer believes himself not disqualified, he shall so rule and proceed with the hearing. If the person seeking disqualification excepts from the ruling of the hearing officer, the hearing officer shall certify the question together with the affidavit and any response filed in connection with it, to the Commission. The Commission may rule on the question without hearing or it may require testimony or argument on the issues raised. The affidavit and response, any testimony taken, and the decision thereon shall be part of the record in the case.

(d) **Functions of hearing officer.** The hearing officer shall regulate the course of the hearing and shall perform the functions specified in Rule

11(e). Upon notice to all parties, the hearing officer may reopen any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission.

(e) **Rulings by hearing officer; exceptions.** Except as otherwise directed by the Commission, or where these rules specifically provide otherwise, all applications, motions and objections made during a proceeding prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Commission, shall be made to or referred to and decided by the hearing officer, except that where his ruling would dispose of the proceeding in whole or in part, it shall be made only in an initial decision submitted after the conclusion of the hearing. Except where the hearing officer prescribes or permits a different procedure, any application or motion shall be in writing and shall be accompanied by a written brief of the points and authorities relied upon in support of the same and any party may file an anwser within 5 days after service upon him of such motion or application as provided in Rule 23. Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds of objections relied upon, and the transcript shall not include argument or debate thereon except as ordered by the hearing officer. Rulings by the hearing officer on all applications, motions and objections shall be part of the record. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling in order to be urged before the Commission. Such exceptions will be deemed waived however, unless raised (1) in accordance with Rule 12(a), (2) in the manner of a proposed finding in accordance with Rule 16(d), or (3) in a petition for Commission review of an initial decision in accordance with Rule 17.

(f) **Transcript of hearings.** Hearings for the purpose of taking evidence shall be stenographically reported, and a transcript thereof shall be made.

Rule 11.1 Production of Witnesses' statements.

After a witness called by the attorney for the interested Division of the Commission has given direct testimony in a hearing, any other party may request and obtain the production of any statement, or part thereof, of such witness, pertaining to his direct testimony, in the possession of the Division, subject, however, to the limitations applicable to the production of witnesses' statements under the Jencks Act, 18 U.S.C. 3500.

(Adopted Rule 11.1 eff. Aug. 2, 1966, Release 33-4842.)

Rule 12. Interlocutory Review; Motions and Applications to Commission.

(a) **Review of hearing officer's rulings.** The Commission will not review a ruling of the hearing officer prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. Except as provided in Rule 11(c), a hearing officer shall not certify a ruling for interlocutory review by the Commission unless a party so requests and (1) the hearing officer finds, either on the record or in writing, that in his opinion a subsequent reversal of his ruling would cause unusual delay or expense, taking into consideration the probability of such reversal, or (2) his ruling would compel testimony of Commission members, officers or employees or the production of documentary evidence in their custody. The certification by the hearing officer shall be in writing and shall specify the material relevant to the ruling involved. The Commission may decline to consider the ruling certified, if it determines that interlocutory review is not warranted or appropriate under the circumstances. If the hearing officer does not certify a matter, a party who had requested certification may apply to the Commission for review, or the Commission on its own motion may direct that any matter be submitted to it for review. An application for review shall be in writing and shall briefly state the grounds relied on. Review will not be granted unless the Commission concludes that the hearing officer erred in failing to certify the matter. Unless otherwise ordered by the hearing officer, the hearing before the hearing officer shall continue whether or not such certification or application is made. Failure to request certification or to make such application will not waive the right to seek review of the ruling of the hearing officer after the close of the hearing pursuant to Rules 16(d) and 17. The Commission will prescribe the procedure for each application hereunder and paragraph (c) of this rule shall not apply.

(b) **Motions to Commission.** All motions and applications not required to be made to the hearing officer pursuant to Rule 11 shall be made to and ruled upon by the Commission.

(c) **Filing of motions to Commission; briefs; stays.** Motions or applications calling for determination by the Commission shall be filed with the Secretary or other duly authorized officer of the Commission in writing, provided that motions or applications calling for determination by the Commission but made in the course of a hearing may be filed, in writing with the hearing officer, who shall refer such motion or application to the Commission. Any such motion or application shall be accompanied by a written brief of the points and authorities relied upon in support of the same. Any party may file an answering brief within 5 days after service upon him of such motion or other application as provided in Rule 23 unless otherwise directed by the Commission. Motions and applications will be considered on the briefs filed following the time for filing the answering brief, unless otherwise directed by the Commission. No oral argument will be heard on such matters unless the Commission so directs. Unless otherwise ordered by the Commission or the hearing officer, the hearing shall continue pending the determination of the motion or application by the Commission. Where a stay of effectiveness of an order of the Commission is sought, application therefor shall be made prior to the filing of a petition to review or, in connection with a petition pursuant to Section 15A(b)(4) of the Securities Exchange Act of 1934, at any time when a petition for review of the disqualifying order of the Commission is not pending.

(d) **Motions to set aside defaults.** In order to prevent injustice and on such conditions as may be appropriate, the hearing officer at any time prior to the filing of his initial decision or the Commission at any time, may for good cause, set aside a default under Rule 6(e) or Rule 7(e). Any motion to set aside a default shall be made within a reasonable time, and shall state the reasons for the failure to file or appear and specify the nature of the proposed defense in the proceedings.

Rule 13. Extension of Time and Adjournments.

(a) **Commission or hearing officer may extend, postpone or adjourn.** Except as otherwise provided by law, the Commission at any time, or the hearing officer at any time prior to the filing of his initial decision or, if no initial decision is to be filed, at any time prior to the closing of the record, for cause shown, may extend or shorten any time limits prescribed by these rules for filing any papers and may postpone or adjourn any hearing.

(b) **Limitation on extensions.** In no event shall any extensions of time for filing papers granted by a hearing officer pursuant to this rule exceed a total of 30 days.

(c) **Limitations on postponements and adjournments.** A hearing before a hearing officer shall begin at the time and place ordered by the Commission, provided that, within the limits provided by statute, the hearing officer may for good cause postpone the commencement of the hearing for not more than 30 days or change the place of hearing. Any convened hearing may be adjourned to such time and place as may be ordered by the Commission or by the hearing officer. It is the policy of the Commission that such adjournments shall be for not more than 30 days and in no event shall a hearing officer order an adjournment for a period in excess of 45 days.

Rule 14. Evidence.

(a) **Presentation and admission of evidence.** All witnesses at a hearing for the purpose of taking evidence shall testify under oath or affirmation, which shall be administered by the hearing officer. Every party shall have the right to present such oral or documentary evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts. The hearing officer shall receive relevant and material evidence, rule upon offers of proof and exclude all irrelevant, immaterial or unduly repetitious evidence.

(b) **Subpoenas; motions to quash or modify; service.**

(1) **Issuance of subpoenas ad testificandum and subpoenas duces tecum.** The hearing officer, or in the event he is unavailable, any member of the Commission, or any other officer designated by the Commission for the purpose, in connection with any hearing ordered by the Commission, shall issue subpoenas requiring the attendance and testimony of witnesses and subpoenas requiring the production of documentary or other tangible evi-

dence at any designated place of hearing upon request therefor by any party; provided, however, that, where it appears to the person requested to issue the subpoena that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he may in his discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show the general relevance and reasonable scope of the testimony or other evidence sought. In the event the person requested to issue the subpoena shall after consideration of all the circumstances determine that the subpoena or any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, where he can do so without undue inconvenience to the participants in the proceeding, the person requested to issue the subpoena may inquire of the other participants whether they will concede the facts sought to be proved; but in this connection, except with permission of the person seeking the subpoena, he shall not disclose the identity of the person sought to be subpoenaed. A person whose request for a subpoena has been denied or modified may not request any other Commission official to issue the subpoena; but he may appeal to the Commission from the denial or modification.

(2) **Motions to quash.** Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 5 days after the date of service of such subpoena, apply to the hearing officer, or if he is unavailable, to the Commission, to quash or modify such subpoena, accompanying such application with a brief statement of the reasons therefor. The hearing officer or the Commission, as the case may be, may deny the application, or upon notice to the person upon whose request the subpoena was issued, and opportunity for reply, may, (i) deny the application, (ii) quash or modify the subpoena or (iii) condition denial of the application to quash or modify the subpoena upon just and reasonable conditions, including, in the case of a subpoena duces tecum, a requirement that the person in whose behalf the subpoena was issued shall advance the reasonable cost of transporting documentary or other tangible evidence to the designated place of hearing.

(3) **Service of subpoenas.** Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena to such person and by tendering the fees for 1 day's attendance and the mileage as specified by Rule 14(c). When the subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service. Whenever service is to be made upon a person who is represented in the pending proceeding by an attorney, the service may be made upon the attorney. Delivery of a copy of a subpoena and tender of the fees to a natural person may be made by handing them to the person; or leaving them at his office with the person in charge thereof; or, if there is no one in charge, leaving them in a conspicuous place therein; or leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; or mailing them by registered or certified mail to him at his last known address; or by any method whereby actual notice is given to him and the fees are made available prior to the return date. When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees may be effected by handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person, or by mailing them by registered or certified mail to such representative at his last known address; or by any method whereby actual notice is given to such representative and the fees are made available prior to the return date. The provisions of Rule 14(b)(3) shall apply to investigations as well as hearings.

(c) **Witness fees and mileage.** Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear.

(d) **Official notice.** In any proceeding official notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. If official notice is requested or taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to establish the contrary.

(Amended Rule 14(b)(2), eff. Apr. 1, 1966, Release 33-4827.)

Rule 15. Depositions and Interrogatories.

(a) **Applications and orders for depositions.** Any party desiring to take a deposition shall make written application therefor, setting forth the reasons why such deposition should be taken, the name and residence of the witness, the matters concerning which it is expected to question the witness, and the time and place proposed for the taking of the deposition. If it appears that a prospective witness may be unable to attend or may be prevented from attending a hearing, that his testimony is material and that it is necessary to take his deposition in the interest of justice, the hearing officer or the Commission, as the case may be, may in his or its discretion, issue an order which will name the witness whose deposition is to be taken, state the scope of the testimony to be taken, and specify the time when, the place where, and the designated officer before whom the witness is to testify. Such order shall be served upon the parties by the Secretary, or other duly designated officer of the Commission, a reasonable time in advance of the time fixed for taking testimony.

(b) **Testimony on depositions.** Witnesses whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to them. Each question propounded shall be recorded and the answers shall be taken down in the words of the witness. Examination and cross-examination of deponents may proceed as permitted at the hearing.

(c) **Objections to questions or evidence.** Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon, but no transcript filed by the officer shall include argument or debate. Objections to questions or evidence shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevance of evidence. Failure to object to questions or evidence before the officer shall not be deemed a waiver unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(d) **Filing of depositions.** The testimony shall be reduced to writing by the officer, or under his direction, after which the deposition shall be subscribed by the witness and certified in usual form by the officer. The original deposition and exhibits shall be forwarded under seal to the Secretary of the Commission with such number of copies as may be requested by the Secretary of the Commission. Upon receipt thereof the Secretary or other duly designated officer shall file the original in the proceeding and shall forward a copy to each party or his attorney of record.

(e) **Form of depositions.** Such depositions shall conform to the specifications of Rule 22(e), (f) and (g), but deficiencies of form shall not invalidate the deposition if properly executed.

(f) **Depositions as part of the record.** At a hearing, a part or all of a deposition, so far as otherwise admissible in the proceeding, may be used if it appears: (1) that the witness is dead; (2) that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; (3) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment; (4) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (5) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used. If only part of a deposition is offered in evidence by a party, any other party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. Any part of a deposition not received in evidence at a hearing before the Commission or a hearing officer shall not constitute a part of the record in such proceeding, unless the parties so agree or the Commission so orders.

(g) **Interrogatories.** Depositions may also be taken and submitted on written interrogatories in substantially the same manner as depositions taken by oral examination upon application of any party as provided in paragraph (a) of this rule. The interrogatories shall be filed with the application in triplicate. Within ten (10) days after service, any party may file with the Secretary his objections, if any, to such interrogatories, and may file such cross-interrogatories as he desires to submit. Such objections and cross-interrogatories shall be filed in triplicate and all other parties shall have ten (10) days after service to file their objections, if any, to such interrogatories. Objections to interrogatories or cross-interrogatories shall be settled by the hearing officer. Objections to interrogatories shall be made before the order for taking the deposition issues and if not so made shall be deemed waived. When a deposition is taken upon written interrogatories and cross-interrogatories, no party shall be present or represented, and no person other than the witness, a stenographic reporter, and the officer shall be present at the examination of the witness, which fact shall be certified by the officer, who shall propound the interrogatories and cross-interrogatories to the witness in their order. The testimony shall be reduced to writing by the officer or under his direction and shall be subscribed by the witnesses and certified in usual form by the officer.

(Amended paras. (a), (b), and (f) eff. Aug. 2, 1966, Release 33-4842.)

Rule 16. Proposed Findings and Conclusion; Initial Decision.

(a) **Content of initial decisions.** An initial decision shall include: findings and conclusions, with the reasons or bases therefor, upon all the material issues of fact, law or discretion presented on the record; an appropriate order; a statement of the time within which a petition for review of the initial decision may be filed; a statement that pursuant to Rule 17(f) of these rules the initial decision shall become the final decision of the Commission as to each party unless he files a petition for review of the initial decision (pursuant to Rule 17(b) of these rules) or the Commission (pursuant to Rule 17(c) of these rules) determines on its own initiative to review the initial decision as to him; and a statement that if a party timely files a petition for review or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

(Adopted para. (a), eff. Apr. 1, 1966, Release 33-4827.)

(b) **When initial decision required.** The hearing officer shall make an initial decision in any proceeding in which a hearing is required to be conducted in conformity with Section 7 of the Administrative Procedure Act, unless an initial decision is waived by all parties who appear at the hearing and the Commission does not subsequently order that an initial decision nevertheless be made by the hearing officer, and in any other proceeding in which the Commission directs him to make such a decision.

(c) **Rescinded.**

(d) **Proposed findings and conclusions; briefs.** In any proceeding involving a hearing or an opportunity for hearing, the parties may file in writing proposed findings and conclusions. Proposed findings of fact shall indicate the basis therefor by appropriate citations to the record. Briefs in support of such proposals may be filed therewith or as a part thereof, and any proposed finding or conclusion not briefed may be regarded as waived.

(e) **Time for filing proposed findings and briefs prescribed by hearing officer.** At the end of every hearing, the hearing officer shall, after consultation with the parties, prescribe the period within which such proposed findings and conclusions and supporting briefs are to be filed and shall direct such filings to be either simultaneous or successive, provided, however, that the period within which the first filing is to be made normally should be no more than 30 days, and shall not exceed 60 days, after the close of the hearing. If successive filings are directed the proposed findings and conclusions of the moving party shall be set forth in serially numbered paragraphs and any counter statement of proposed findings and conclusions must, in addition to any other matter, indicate as to which paragraphs of the moving party's proposals there is no dispute. Reply briefs may be filed by the moving party or, where simultaneous filings are directed, reply briefs may be filed by all parties, within the period prescribed therefor by the hearing officer.

(f) **Service of record; preparation and filing of initial decision.** In proceedings in which an initial decision by a hearing officer is to be made, the record in the proceeding shall, promptly after the time for the last filing of briefs in reply to proposed findings, be served by the Records Officer upon the hearing officer. The hearing officer shall file his initial decision with the Secretary within 30 days after such service. The Secretary shall promptly serve the initial decisions upon the parties and shall promptly publish notice of the filing thereof in the Securities and Exchange Commission News Digest; provided, however, in private proceedings, no such notice shall be published unless the Commission otherwise directs.

(g) **Oral argument.** At his discretion the hearing officer may hear oral argument by the parties any time before he files his initial decision with the Secretary.

(Amended para. (f), eff. Apr. 1, 1966, Release 33-4827.)

Rule 17. Review by the Commission of Initial Decisions by Hearing Officers.

(a) **Petition for review; when available.** In any proceeding in which an initial decision is made by a hearing officer, any party to the proceeding, and any person who would have been entitled to judicial review of the final order entered in the proceeding if the Commission itself had made the initial decision, may file a petition for Commission review of the initial decision.

(b) **Petition for review; procedure.** Any person who seeks Commission review of an initial decision by a hearing officer shall, within 15 days after service of such initial decision, serve and file a petition for Commission review containing exceptions thereto indicating specifically the findings and conclusions as to which exceptions are taken together with supporting reasons for such exceptions. These reasons may be stated in summary form. Any objections to an initial decision not saved by written exception filed pursuant to this rule will be deemed to have been abandoned and may be disregarded.

(c) **Review by the Commission on its own initiative.** The Commission may on its own initiative order review of any initial decision by a hearing officer within 30 days after the initial decision has been served on all parties. When parties who do not intend to file a petition for review desire this determination to be made in a shorter time, they may so advise the Commission in writing, stating that they waive their right to file a petition for review. Notice of any order of the Commission directing review on its own initiative shall be served on all parties by the Secretary.

(d) **Review by the Commission pursuant to petition for review.** After a petition for review has been filed the Commission may decline to review the initial decision except that it will order review where

(1) the initial decision:

(i) suspends, denies or revokes a broker-dealer registration pursuant to Section 15(b) of the Securities Exchange Act of 1934; or

(ii) suspends, denies or withdraws any registration or suspends or expels a member of a national securities exchange pursuant to Section 19(a) of the Securities Exchange Act of 1934; or

(iii) suspends trading on an exchange pursuant to Section 19(a) of the Securities Exchange Act of 1934; or

(2) the petition for review makes reasonable showing that:

(i) a prejudicial procedural error was committed in the conduct of the proceeding; or

(ii) the initial decision embodies

(A) a finding or conclusion of material fact which is clearly erroneous; or

(B) a legal conclusion which is erroneous; or

(C) an exercise of discretion or decision of law or policy which is important and which the Commission should review.

After ordering review the Commission may summarily affirm the initial decision except where the petition for review presents a matter within subparagraph (2) hereof.

(e) **Time for filing briefs.** (1) Unless the Commission has summarily affirmed the initial decision, the petitioner and any other person entitled to Commission review may serve and file briefs in support of the petition within 30 days after the Commission has ordered review pursuant to a petition for review. Other persons entitled to Commission review in the proceeding may serve and file reply briefs within 30 days after service of a brief in support of the petition. (2) When the Commission orders review on its own initiative

pursuant to paragraph (c) hereof, within 30 days after the Commission has ordered review, any person entitled to Commission review may serve and file cross briefs in support of their positions and reply briefs within 30 days after service of the original briefs. (3) The time periods specified in this paragraph shall not be applicable where the order for review specifies other time periods.

(f) **Effect of initial decisions.** Unless a party or other person entitled to seek review of an initial decision timely files a petition for review, or unless the Commission on its own initiative orders review, such initial decision shall become the final decision of the Commission with respect to those parties who have not timely filed a petition for review of the initial decision. In the event that the initial decision becomes the final decision of the Commission with respect to a party, such party shall be duly notified thereof by the Secretary of the Commission and a notice thereof shall be published, unless the Commission otherwise directs, in the Securities and Exchange Commission News Digest. The notice to the party shall state that the time for filing of a petition for review of the initial decision by the party has expired and that the Commission has determined not to order review of the initial decision on its own initiative and shall specify the date on which the order shall become effective. If a petition for review is timely filed by a party or if action to review as to a party is taken by the Commission upon its own initiative, the initial decision shall not become final as to that party.

(g) **Scope of review.** (1) Review by the Commission of an initial decision by a hearing officer shall be limited to the matters specified in the order for review. On notice to all parties, however, the Commission on review may raise and determine any other matters which it deems material, with opportunity for oral or written argument thereon by the parties. (2) On review the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision by the hearing officer and make any findings or conclusions which in its judgment are proper on the record.

(h) **Petition for review a prerequisite to judicial review.** Pursuant to the provisions of Section 10(c) of the Administrative Procedure Act, a petition to the Commission for review of an initial decision in any proceeding is a prerequisite to the seeking of judicial review of a final order entered pursuant to the initial decision.

(Amended paras. (b) and (f), eff. Apr. 1, 1966, Release 33-4827.)

Rule 18. Briefs.

Briefs shall be confined to the particular matters remaining at issue. Briefs not filed at or before the time provided will not be received except upon special permission of the Commission. Each exception which is briefed shall be supported by a concise argument and by citation of such statutes, decisions and other authorities and by page references to such portions of the record, as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief with appropriate references to the transcript. Reply briefs shall be confined to matters in original briefs of other parties.

Rule 19. Special Provisions Relating to Proceedings for Suspension of Broker-Dealer Registrations Pending Final Determination.

In any proceeding pursuant to section 15(b) of the Securities Exchange Act of 1934 on the question of suspension of registration of a broker or dealer pending final determination whether such registration shall be revoked, the following time limits shall be applicable, unless otherwise ordered by the Commission, in lieu of the time limits prescribed by other provisions of these rules:

(a) **Proposed findings and briefs.** Proposed findings and conclusions and briefs in support thereof may be filed within 3 days after the close of the hearing.

(b) **Service of record; filing of decision.** In proceedings in which an initial decision by a hearing officer is to be prepared, the record in the proceedings shall, promptly after the time for filing proposed findings and conclusions and briefs in support thereof, be served by the Records Officer upon the hearing officer. The initial decision shall be filed with the Secretary within 5 days after such service.

(c) **Petition for review.** Any petition for review must be filed within 3 days after receipt of the initial decision.

(d) **Briefs.** Briefs in support of a petition for review, or in support of or in opposition to any

portion of an initial decision, may be served and filed within 5 days after receipt of notice that the Commission has ordered review of the initial decision. Reply briefs may be served and filed within 5 days of receipt of an original brief.

(e) **No review by the Commission on its own initiative.** The provisions of Rule 17(c) of these rules shall not be applicable to proceedings to which this rule applies.

Rule 20. Contents and Certification of Record.

(a) **Contents of Record.** (1) The record in every proceeding before the Commission for final decision shall include:

(i) The order for proceedings, the notice of hearing and any amendments thereto;

(ii) Any responsive pleading and any amendments thereto;

(iii) The moving papers to the extent the same are not comprehended under subdivision (i) of this subparagraph;

(iv) Any other document or portion thereof which constitutes part of the official public records of the Commission and which is specified in the documents listed in subdivision (i), (ii) or (iii) of this subparagraph, unless the hearing officer shall determine the same to be irrelevant, immaterial or unduly repetitious;

(v) Any affidavit and response, testimony taken and decision in connection with a request to withdraw under Rule 11(c);

(vi) Proofs of service;

(vii) Any application, motion or objection made in the course of the proceedings, rulings thereon and exceptions thereto;

(viii) Any stipulation between the parties as to any matter of fact, law or procedure;

(ix) The transcript of testimony and any specification of corrections thereof;

(x) Any exhibit received at the hearing, including any document or portion thereof constituting part of the official public records of the Commission which the hearing officer during the course of the hearing may incorporate by reference upon a determination that it is relevant, material and not unduly repetitious;

(xi) Any written communication accepted by the hearing officer pursuant to Rule 9(f);

(xii) Any proposed findings and conclusions; and

(xiii) Any initial decision and any petition for review.

(2) At the beginning of the hearing, the hearing officer shall read into the record a list of the documents which at that time constitute the record.

(3) The documents or portions thereof referred to in subdivisions (iv) and (x) of subparagraph (1) of this rule shall be deemed to have been received in evidence as exhibits whether or not they have been physically introduced.

(4) Promptly after the close of the hearing, the hearing officer shall transmit to the Records Officer of the Commission or his designated deputy a list of documents or portions thereof constituting part of the public official records of the Commission which during the course of the hearing have been admitted as exhibits pursuant to subparagraph (1)(x) of this rule, or excluded pursuant to subparagraph (1)(iv) of this rule, and a copy of any written communication accepted pursuant to Rule 9(f), application, motion, objection, ruling or stipulation made in writing during the proceeding which has not theretofore been filed with the Secretary or other duly designated officer of the Commission or included in the transcript. Promptly after the last date of filing briefs, where the Commission has ordered review of the intial decision, or at such earlier time as the Commission may direct after receipt of a petition for review, and prior to any oral arguments before the Commission, the Records Officer of the Commission or his duly designated deputy shall certify the entire record to the Commission, provided that documents or portions thereof constituting part of the official records of the Commission may be incorporated by reference and need not be physically transferred to the record.

(b) **Retention of documents not admitted in evidence; substitution of copies.** (1) Documents offered in evidence during the course of a hearing but excluded by the hearing officer, and documents marked for identification but not offered as exhibits, shall not be considered as a part of the record, but any such document shall be retained in the custody of the Commission.

(2) With the consent of the parties a copy may be substituted for a document which is retained pursuant to the provisions of this paragraph.

(c) **Correction of transcript.** Any party may submit a timely request to the hearing officer to

correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation of the parties, or by a motion by any party, and, upon notice to all parties to the proceeding, the hearing officer may specify corrections of the transcript. A copy of such specification shall be furnished to all parties and made a part of the record.

(d) **Scandalous or impertinent matter.** Any scandalous or impertinent matter contained in any brief or pleading or in connection with any oral presentation in a proceeding may be stricken on order of the Commission or at the direction of the hearing officer.

Rule 21. Hearing before the Commission.

(a) **Oral argument.** Except as to motions and applications dealt with in Rule 12 and determinations whether to order review of an initial decision by a hearing officer, upon written request of any party a matter to be decided by the Commission will be set down for oral argument before the Commission unless exceptional circumstances make oral argument impractical or inadvisable. Such request must be made within the time provided for filing the original briefs.

(b) **Time allowed.** Unless otherwise directed by the Commission, not more than one-half hour will be allowed for oral argument by any participant and, where the same or similar interests are represented by more than one participant, an aggregate of not more than one-half hour will be allowed the interests so represented irrespective of the number of participants, the time to be divided equally among such participants. In appropriate cases the Commission may, in its discretion, extend, shorten or reallocate the time prescribed herein. Oral argument should be succinct.

(c) **Basis for Commission determinations.** The Commission shall determine the matter on the record, any briefs of the parties and any oral argument before the Commission.

(d) **Leave to adduce additional evidence.** The Commission, upon its own motion or upon application in writing by any party for leave to adduce additional evidence which application shall show to the satisfaction of the Commission that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence at the hearing before the Commission or the hearing officer, may hear such additional evidence or may refer the proceeding to the hearing officer for the taking of such additional evidence.

(e) **Petition for rehearing.** Any petition for rehearing by the Commission shall be filed within 10 days after the entry of the order complained of, or within such time as the Commission may prescribe upon request of the party, if made within the foregoing 10-day period. The petition for rehearing shall clearly state the specific matters upon which rehearing is sought.

(f) **Participation of Commissioners.** Any member or members of the Commission who were not present at the oral argument may participate in the decision of the proceeding. Any Commissioner participating in the decision who was not present at oral argument will review the transcript of such argument.

(Adopted paras. (b), (e) and (f), eff. Apr. 1, 1966, Release 33-4827.)

Rule 22. Filing; Formalities; Computation of Time.

(a) **Filing with Commission.** All papers required to be filed with the Commission in any proceeding shall be filed with the Secretary, and must be received at the office of the Commission in Washington, D.C., within the time limit, if any, for such filing.

(b) **Rescinded.**

(c) **Number of copies.** Unless otherwise specifically provided in these rules or by a particular rule or order of the Commission an original and seven (7) copies of all papers shall be filed.

(d) **Length and form of briefs.** All briefs, filed with the Commission or with a hearing officer containing more than 10 pages shall include an index and table of cases. The date of each brief must appear on its front cover or title page. No brief shall exceed 60 pages in length, except with the permission of the Commission.

(e) **Paper, spacing, type.** All papers filed under these rules shall be typewritten, mimeographed or printed, shall be plainly legible, shall be on one grade of good unglazed white paper approximately 8 inches wide and 10½ inches long, with left-hand margin 1½ inches wide, and shall be bound on the left-hand side. They shall be double spaced, except that quotations shall be

single-spaced and indented. If printed, they shall be in either 10- or 12-point type with double-leaded text and single-leaded quotations.

(f) **Signatures.** All papers must be signed in ink by the party filing the same, or his duly authorized agent or attorney, and must show the address of the signer.

(g) **Title page.** All papers filed must include at the head thereof, or on a title page, the name of the Commission, the title of the proceeding, the names of the parties, and the subject of the particular paper or pleading, and the file number assigned to the proceeding.

(h) **Signature on orders.** All orders of the Commission shall be signed by the Secretary or such other person as may be authorized by the Commission.

(i) **Time allowances for residents of distant States.** Wherever these rules provide a specific limitation as to the time within which any papers are required to be filed with the Commission in any proceeding, an additional period of 3 days shall be available for the hearing officers and parties who are residents of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

(j) **Computation of time.** In computing any period of time prescribed or allowed by these rules or by order of the Commission the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday (as defined in Rule 5) in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Intermediate Saturdays, Sundays and legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less.

(Amended para. (j), eff. May 17, 1971, Release 33–5150.)

(k) **Entry of orders.** In computing any period of time involving the date of the entry of an order by the Commission, the date of entry shall be (1) the date of the adoption of the order by the Commission, as reflected in the caption of the order, or (2) in the case of orders reflecting action taken pursuant to delegated authority, the date when such action is taken, as reflected in the caption of the order. The order shall be available for inspection by the public from and after the date of entry, unless it is a nonpublic order. A nonpublic order shall be available for inspection from and after the date of entry by any person entitled to inspect it.

(Amended para. (d) Aug. 19, 1968, Release 33–4920, eff. Aug. 19, 1968.)

Rule 23. Service of Pleadings, etc., Other than Moving Papers.

(a) **Service of documents filed with Commission.** All amendments to moving papers, all answers, all motions or applications made in the course of a proceeding (unless made orally during a hearing), all proposed findings and conclusions, all petitions for review of any initial decision, and all briefs shall be filed with the Commission and shall, at the time of personal delivery or dispatch to the Commission, be served by the filing person upon all other parties to the proceeding (including the interested division of the Commission), provided that such papers relating to proceedings concerning confidential treatment pursuant to provisions of Clause 30 of Schedule A of the Securities Act of 1933, section 24(b) of the Securities Exchange Act of 1934, section 22(b) of the Public Utility Holding Company Act of 1935, section 45(a) of the Investment Company Act of 1940, or section 210(a) of the Investment Advisers Act of 1940, and the rules and regulations promulgated under such sections, shall be served only by filing the appropriate number of copies thereof upon the Commission.

(b) **How service made.** Service of such documents shall be made by personal service on, or by mail addressed to, the party or his attorney or other agent for service. Where service is made by mail on a person located more than 500 miles from the point of mailing, airmail must be used. Where the document being served is printed, two copies shall be served on each party or his attorney or other agent for service. Service shall be deemed made at the time of personal service or of deposit in the mails properly addressed and post-paid. Where a party makes service by mail, any specific limitation on the time within which the person on whom such mail service has been made may respond thereto shall be increased by 2 days.

(c) **Proof of service.** Proof of service must be made by filing with the Commission an affidavit of service or, in the case of any attorney-at-law, a certificate, simultaneously with the filing of the required number of copies with the Commission.

(d) **Service of decisions and orders.** Copies of all rulings by the Commission on any written application and decisions and orders of the Commission (including those pursuant to delegated authority) shall be served by the Secretary or other duly designated officer of the Commission on the applicant and, if made in connection with a pending proceeding, on all parties thereto.

Rule 24. Incorporation by Reference.

(a) **Requirements.** Where rules, regulations, or instructions to forms permit incorporation by reference, a document may be so incorporated only by reference to the specific document and to the prior filing in which it was physically filed, not to another file which incorporates it by reference. No document which has been on file with the Commission for a period of more than 10 years may be incorporated by reference in a current filing except basic documents as designated under paragraph (b) of this rule.

(b) **Basic documents.** The Commission, on its own initiative or upon request, may classify as basic documents certain documents filed under the various Acts administered by the Commission, which appear to the Commission to possess such administrative, legal, historical or other values as to warrant being retained and considered available for incorporation by reference for an indefinite period. Requests for such classification shall be submitted to the Commission in duplicate and shall contain (1) a precise description of the document and of the filing in which it is physically filed and (2) the reasons for the request. A request will be considered to have been granted if notification of denial is not given within 60 days of the receipt of the request. If the Commission grants a request pursuant to this paragraph, it may subsequently dispose of any basic document the retention of which would in its opinion no longer serve a substantial purpose, after giving the person who made the request notice of the proposed disposition and an opportunity to object thereto.

Rule 25. Confidential Treatment of Certain Matters.

(a) **Requests for confidential treatment.** Confidential treatment of material listed in Rule 25(a) may be requested for good cause where authorized by statute. Request for confidential treatment may be made pursuant to the provisions of Clause 30 of Schedule A of the Securities Act of 1933 and Rule 485 thereunder, section 24(b) of the Securities Exchange Act of 1934 and Rule 24b–2 thereunder, section 22(b) of the Public Utility Holding Company Act of 1935 and Rule 104 thereunder, section 45(a) of the Investment Company Act of 1940 and Rule 45a-1 thereunder, or section 210(a) of the Investment Advisers Act of 1940. In any case where a hearing for the purpose of taking testimony relating to whether confidential treatment should be granted or continued is to be held, the Commission may in its discretion, prior to the hearing, require the person desiring the confidential treatment to furnish in writing additional information in respect of its grounds of objection to public disclosure. Failure to supply the information so requested within 15 days from the date of receipt by the registrant of a notice of the information required, shall be deemed a waiver of the objections to public disclosure of that portion of the information filed confidentially with respect to which the additional information required by the Commission relates, unless the Commission shall otherwise order for good cause shown at or before the expiration of such 15-day period.

(b) **Procedure in confidential treatment cases.** All papers containing data as to which confidential treatment is sought, together with any application making objection to the disclosure thereof, or other papers relating in any way to such application, shall be made available to the public only in accordance with orders of the Commission and/or the applicable provisions of Rule 485 issued under the Securities Act of 1933, Rule 24b–2 issued under the Securities Exchange Act of 1934, Rule 104 issued under the Public Utility Holding Company Act of 1935, section 45 of the Investment Company Act of 1940 and Rule 45a–1 issued under that Act, or section 210(a) of the Investment Advisers Act of 1940.

Proposed findings and conclusions and briefs in support of such proposed findings and conclu-

sions, an initial decision, any petition for Commission review thereof, and any briefs pursuant to Commissions order for review, which are filed in connection with any proceeding concerning confidential treatment shall, unless otherwise ordered by the Commission, be for the confidential use only of the hearing officer, the Commission, the parties and counsel. The initial page of copies of such an initial decision will contain a statement that such decision is nonpublic. The order of the Commission sustaining or denying the application for confidential treatment shall be made available to the public. Any findings or opinion issued by a hearing officer or by the Commission in any proceeding relating to confidential treatment shall be made public at such time as the material filed confidentially is made available to the public.

(c) **Rescinded.**

(d) **Purchase of transcripts of private hearings.** Transcripts of private hearings will be supplied to the parties at the prescribed rates.

(Formerly designated as Rule 26: Para. (c) deleted, Mar. 12, 1964, eff. Apr. 1, 1964, Release 33-4677; para. (b) amended, June 30, 1964, eff. Aug. 1, 1964, Release 33-4705; rule redesignated as Rule 25 when former Rule 25 was repealed, June 30, 1967, eff. July 4, 1967, Release 33-4871.)

Rule 26. Review by the Commission of Determinations at a Delegated Level.

(a) **Scope of rule.** This rule is applicable to determinations at a delegated level made pursuant to authority delegated in Articles 30-1 to 30-6 of Subpart A of the Commission's statement of Organization, Conduct and Ethics, and Information Practices, 17 CFR 200.30-1 to 200.30-6.

(b) **Petition for review; when available.** Petition for review by the Commission may be made by any party to or intervenor in any matter in which there is a determination at a delegated level made pursuant to the authority delegated in.

(1) Article 30-1(a)(6)(ii), 17 CFR 200.30-1(a)(6)(ii), regarding the filing of financial statements in addition to, or in substitution for, the statements required in the indicated forms;

(2) Article 30-1(f)(2)(ii), 17 CFR 200.30-1(f)(2)(ii), regarding the filing of financial statements in addition to, or in substitution for, the statements required in the indicated forms;

(3) Article 30-3(b)(5), 17 CFR 200.30-3(b)(5), regarding the denying of applications by brokers and dealers who are nonresidents of the United States for time extensions for filing the reports indicated in Article 30-3(b)(5);

(4) Article 30-4(c), 17 CFR 200.30-4(c), regarding the denying of applications by brokers and dealers for time extensions for filing the reports indicated in Article 30-4(c).

(c) **Petition for review; procedure.** Any party or intervenor who seeks review of a determination at a delegated level shall communicate to the Secretary of the Commission by telegram or otherwise a notice of intention to petition for review. Such communications shall be made within 1 day after receipt of actual notice of the determination or within 5 days after notice has been mailed to the person's last address listed with the Commission, whichever is shorter. The notice of intention to petition for review shall identify the petitioner and the determination complained of. Within 5 days after such notice has been communicated, a petition for review containing a clear and concise statement of the issues to be reviewed and the reasons review is appropriate shall be filed with the Commission.

(d) **Review by the Commission on its own initiative.** The Commission may on its own initiative order review of any determination at a delegated level at any time; except that any review by the Commission on its own initiative will be ordered within 5 days after the determination where there are parties to or intervenors in the matter.

(e) **Effect of delegated determinations; stays, etc.** Any determination at a delegated level shall have immediate effect and be deemed the action of the Commission. Upon communication to the Secretary of a notice of intention to petition for review as provided in paragraph (c) hereof, the determination at a delegated level shall thereafter be stayed until the Commission orders otherwise. An order directing review on the Commission's own initiative or granting a petition for review will set forth the procedure to be followed thereafter, including the time within which any party or intervenor may file a statement in support of or in opposition to the determination, whether a stay should be granted or continued and whether oral argument will be heard. As against any person who shall have acted in reliance upon any determination at a delegated level, any stay or any

modification or reversal by the Commission of such determination shall be effective only from the time such person receives actual notice of such stay, modification or reversal.

(Adopted as Rule 27, Mar. 8, 1963, eff. Mar. 25, 1963, Release 33–4588; para. (b) amended, eff. Nov. 15, 1963, Release 33–4654; para. (a) amended, eff. Mar. 5, 1964, Release 33–4674; rule redesignated as Rule 26, June 30, 1967, eff. July 4, 1967, Release 33–4871.)

TABLE I. SHOWING DERIVATION OF REVISED RULES IN RELATION TO FORMER RULES

Revised Rules	Former Rules
1	—
2	II
4	XIX
5	I
6(a)(b)(c)	III(a)(b)(c)
6(d)	IV(a)(b)
7	III(d)
8(a)	—
8(b)(c)	III(e)
8(d)	V(e)
9(a)	XVII(a)
9(b)	Rule 15b–9, SEA of 1934
9(c)(d)(e)(f)(g)(h)	XVII(b)(c)(d)(e)(f)(g)
10	XVIII
11(a)(b)	V(a)(b)
11(c)	V(d)
11(d)	V(e)
11(e)	V(h)
11(f)	V(c)
12(a)	V(h)
12(b)(c)	VI(a)(b)
13	VII
14(a)	V(c)(e)
14(b)(c)	V(f)(g)
14(d)	—
15	VIII
16(b)	IX(b)
16(d)	IX(f), XI(a)(c)
16(e)	IX(f), XI(e)
16(f)	IX(e)
16(g)	IX(d)
17	X, XI(a)(c)(e)
18	XI(b)(f)
19	--
20(a)	V(c)(h), IX(a)
20(b)	--
20(c)	—
20(d)	XI(b)
21	XII
22(a)	XIII(a)
22(c)	XIII(e)
22(d)	XI(d)
22(e)(f)(g)	XV(a)(b)(c)
22(h)	XVI(a)
22(i)(j)	XIII(c)(d)
23(a)(b)	XI(e), XIV(a)(b)
23(c)	—
23(d)	XVI(b)
24 (Effective Jan. 1, 1961)	—
25(a)(b)	XIII(g)(h)
25(d)	V(c)

TABLE II. SHOWING LOCATION IN REVISED RULES OF PROVISION OF FORMER RULES

Former Rules	Revised Rules
I	5
II	2
III(a)(b)(c)	6(a)(b)(c)
III(d)	7
III(e)	8(b)(c)
IV	6(d)
V(a)(b)	11(a)(b)
V(c)	11(f), 14(a), 20(a), 25(d), 26(d)
V(d)	11(c)
V(e)	8(d), 11(d), 14(a)
V(f)	14(b)
V(g)	14(c)
V(h)	11(e), 12(a), 20(a)
V(i)	—
VI(a)	12(b)
VI(b)	12(c)
VII	13
VIII	15
IX(a)	20(a)
IX(b)	16(b)
IX(d)	16(g), 26(b)
IX(e)	16(f)
IX(f)	16(d)(e)
X(a)(b)	17(a)(b)(c)
XI(a)	16(d), 17(b)
XI(b)	18, 20(d)
XI(c)	16(d), 17(b)
XI(d)	22(d)
XI(e)	17(b), 23(a)
XI(f)	18
XII(a)(b)(c)(d)(e)	21(a)(b)(c)(d)(e)
XIII(a)	22(a)
XIII(c)(d)	12(i)(j)
XIII(e)	22(c)
XIII(f)	25(a)
XIII(g)(h)	26(a)(b)
XIII(j)(k)	25(b)(c)
XIV(a)(b)	23(a)(b)
XV(a)(b)(c)	22(e)(f)(g)
XVI(a)	22(h)
XVI(b)	23(d)
XVII(a)	9(a)
XVII(b)(c)(d)(e)(f)(g)	9(c)(d)(e)(f)(g)(h)
XVIII	10
XIX	4

RULES RELATING TO INVESTIGATIONS

(CITE AS 17 CFR 203)

RULES OF THE SECURITIES AND EXCHANGE COMMISSION RELATING TO INVESTIGATIONS

(These Rules are published as Part 203 of Title 17 of the Code of Federal Regulations. Thus the Code citation for Rule 1 would be 17 CFR 203.1.)

IN GENERAL

Rule 1. Application of these Rules.

These rules apply only to investigations conducted by the Commission. They do not apply to adjudicative or rulemaking proceedings.

Rule 2. Information obtained in Investigations and Examinations.

Information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record, shall be deemed nonpublic.

Rule 3. Suspension and Disbarment.

The provisions of Rule 2(e) of the Commission's Rules of Practice are hereby made specifically applicable to all investigations.

FORMAL INVESTIGATIVE PROCEEDINGS

Rule 4. Applicability of Rules 4 through 8.

(a) Rules 4 through 8 hereof shall be applicable to a witness who is sworn in a proceeding pursuant to a Commission order for investigation or examination, such proceeding being hereinafter referred to as a "formal investigative proceeding."

(b) Formal investigative proceedings may be held before the Commission, before one or more of its members, or before any officer designated by it for the purpose of taking testimony of witnesses and receiving other evidence. The term "officer conducting the investigation" shall mean any of the foregoing.

Rule 5. Nonpublic Formal Investigative Proceedings.

Unless otherwise ordered by the Commission, all formal investigative proceedings shall be nonpublic.

Rule 6. Transcripts.

Transcripts, if any, of formal investigative proceedings, shall be recorded solely by the official reporter, or by any other person or means designated by the officer conducting the investigation. A person submitting documentary evidence or testimony in a formal investigative proceeding shall be entitled to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees. In any event, any witness (or his counsel), upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

(Amended Nov. 27, 1970, eff. with respect to all testimony given in private investigations commencing on or after Nov. 27, 1970, Release 33-5110.)

Rule 7. Rights of Witnesses.

(a) Any person who is compelled or requested to furnish documentary evidence or testimony at a formal investigative proceeding shall upon request be shown the Commission's order of investigation. Copies of formal orders of investigation shall not be furnished, for their retention, to such persons requesting the same except with the express approval of a Director of the Division or Divisions conducting or supervising the investigation. Such approval shall not be given unless the Division Director in his discretion is satisfied that there exist reasons consistent both with the protection of privacy of persons involved in the investigation and with the unimpeded conduct of the investigation.

(b) Any person compelled to appear, or who appears by request or permission of the Commission, in person at a formal investigative proceeding may be accompanied, represented and advised by counsel, as defined in Rule 2(b) of the Commission's Rules of Practice; provided, however, that all witnesses shall be sequestered, and unless permitted in the discretion of the officer conducting

the investigation no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding.

(c) The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any formal investigative proceeding and to have this attorney (i) advise such person before, during and after the conclusion of such examination, (ii) question such person briefly at the conclusion of the examination to clarify any of the answers such person has given, and (iii) make summary notes during such examination solely for the use of such person.

(d) Unless otherwise ordered by the Commission, in any public formal investigative proceeding, if the record shall contain implications of wrongdoing by any person, such person shall have the right to appear on the record; and in addition to the rights afforded other witnesses hereby, he shall have a reasonable opportunity of cross-examination and production of rebuttal testimony or documentary evidence. "Reasonable" shall mean permitting persons as full an opportunity to assert their position as may be granted consistent with administrative efficiency and with avoidance of undue delay. The determination of reasonableness in each instance shall be made in the discretion of the officer conducting the investigation.

(e) The officer conducting the investigation may report to the Commission any instances where any witness or counsel has been guilty of dilatory, obstructionist or contumacious conduct during the course of an investigation or any other instance of violation of these rules. The Commission will thereupon take such further action as the circumstances may warrant, including suspension or disbarment of counsel from further appearance or practice before it, in accordance with Rule 2(e) of the Commission's Rules of Practice, or exclusion from further participation in the particular investigation.

Rule 8. Service of Subpoenas.

Service of subpoenas issued in formal investigative proceedings shall be effected in the manner prescribed by Rule 14(b) of the Commission's Rules of Practice.

TABLE III. SHOWING DERIVATIONS OF RULES RELATING TO INVESTIGATIONS IN RELATION TO FORMER RULES OF PRACTICE

Rules Relating to Investigations	Former Rules of Practice
1	3(a)
2	26(c)*
3	—
4	—
5	—
6	3(b)
7	--
8	—

*Prior to July 4, 1967. On that date, the Rule 26 referred to was redesignated Rule 25 (Release 33-4871).

TABLE IV. SHOWING LOCATION IN RULES RELATING TO INVESTIGATIONS OF PROVISIONS OF FORMER RULES OF PRACTICE

Former Rules of Practice	Rules Relating to Investigations
3(a)	1
3(b)	6
26(c)*	2

SUBPART F—CODE OF BEHAVIOR GOVERNING EX PARTE COMMUNICATIONS

BETWEEN PERSONS OUTSIDE THE COMMISSION AND DECISIONAL EMPLOYEES

(CITE AS CFR 200)

SUBPART F—CODE OF BEHAVIOR GOVERNING EX PARTE COMMUNICATIONS BETWEEN PERSONS OUTSIDE THE COMMISSION AND DECISIONAL EMPLOYEES

(These sections are published in the Code of Federal Regulations as Title 17, Part 200.110 to 200.114. Thus should be cited as 17 CFR 200.110 etc.)

Section 200.110 Purpose.

This code of behavior is adopted in conformity with a recommendation of the Administrative Conference of the United States designed to insulate the administrative process from improper influence.

(Adopted April 26, eff. June 1, 1963, Release 33-4600.)

Section 200.111 Prohibitions; Application; Definitions; Limitations.

(a) Except as set forth in Section 200.111(g) hereof, no person who is not an employee of the Commission should make any unauthorized ex parte communication directly or indirectly about an on-the-record proceeding to any Commission member or decisional employee or solicit any other person to make an ex parte communication which the solicitor has reason to know is unauthorized; nor should any Commission member or decisional employee in a proceeding request or consider any unauthorized ex parte communication.

(b) "On-the-record" proceedings within the meaning of this Code are all suspension proceedings instituted pursuant to the provisions of Regulations A, B, E and F of the Securities Act of 1933, all review proceedings instituted pursuant to Section 15A(g) of the Securities Exchange Act of 1934, and all other proceedings where an evidentiary hearing has been ordered pursuant to a statutory provision or rule of the Commission and where the action of the Commission must be taken on the basis of an evidentiary record. In addition an "on-the-record" proceeding may include any other proceeding to which the Commission by specific order makes this Code applicable.

(c) These prohibitions shall commence when the Commission issues an order for hearing: *Provided, however*, (1) That in suspension proceedings pursuant to Regulations A, B, E and F of the Securities Act of 1933, these prohibitions shall commence when the Commission enters an order temporarily suspending the exemption; and (2) that in proceedings under Section 15A(g) of the Securities Exchange Act of 1934 these prohibitions shall commence from the time that a copy of an application for review has been served by the Secretary upon the registered securities association. These prohibitions shall continue until the time to file a petition for rehearing from the final order of the Commission has expired. In the event a petition for rehearing is filed these prohibitions shall cease if and when the petition for rehearing is denied. The Commission may by specific order entered in a particular proceeding determine that these prohibitions shall commence from some date earlier than the time specified herein or that they shall continue until a date subsequent to the time specified herein.

(d) A "decisional employee" shall consist only of the following:

(1) The hearing officer assigned to the case;

(2) The members of the staff of the Office of Opinions and Review;

(3) The legal and executive assistants to members of the Commission; and

(4) Any other employee of the Commission who has been specifically named by order of the hearing officer or the Commission in the proceeding to assist thereafter in making or recommending a particular decision.

(e) "Participants to the proceeding" shall consist of all parties to the proceeding (including the interested division of the Commission) and any other persons who have been granted limited participation pursuant to the provisions of Rule 9(c) of the Commission's Rules of Practice, 17 CFR 201.9(c).

(f) Unauthorized ex parte communications shall consist of:

(1) Any written communication of any kind about the proceeding unless copies thereof are served by the communicator contemporaneously with the transmittal of the communication in accordance with the requirements of Rule 23 of the Rules of Practice, 17 CFR 201.23, upon all participants to the proceeding (including the interested division of the Commission).

(2) Any oral communication of any kind about the proceeding unless:

(i) 48 hours advance written notice that it will be made is given by the communicator to all participants to the proceeding (including the interested division of the Commission); or

(ii) its contents are disclosed by the communicator at the time of its presentation to all the participants to the proceeding (including the interested division of the Commission); or

(iii) the substance of the contents of the oral communication is reduced to writing and personal or telegraphic service of copies thereof is made by the communicator within 24 hours following the presentation of the oral communication upon all the participants to the proceeding (including the interested division of the Commission).

(g) Notwithstanding the foregoing the following classes of communications shall not fall within the prohibitions of this Code:

(1) Any oral or written communication which relates solely to matters which the Commission member or decisional employee is authorized by law to dispose of on an ex parte basis;

(2) Any oral or written request for information solely with respect to the status of a proceeding;

(3) Any oral or written communication which is authorized by statute or Commission rule, or which all the participants to the proceeding agree, or which the Commission or hearing officer formally rules, may be made on an ex parte basis;

(4) Any oral communication made openly or on the record at a scheduled hearing session in a particular proceeding, regardless of whether all the participants are present;

(5) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation and the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive or procedural issue in a pending proceeding;

(6) Any communication by persons other than:

(i) A participant (including a party) or person seeking admission as a participant in a proceeding or any person who might be adversely affected by a determination in the proceeding; or

(ii) A person who intercedes in a proceeding by volunteering a communication which he may reasonably be expected to know might advance or adversely effect the interest of a particular participant in the proceeding, whether or not he acts with the knowledge or consent of any participant or participant's agent; or

(iii) An agent of any of the foregoing.

(7) Any communication made with respect to a proceeding about which no public notice has been issued, if the communicator has no actual notice of the pendency of the proceeding.

(Adopted April 26, eff. June 1, 1963, Release 33 4600.)

Section 200.112 Duties of Recipient.

(a) Any Commission member or decisional employee who receives a written communication which he knows is unauthorized, or which he concludes, in fairness, should be brought to the attention of all participants to the proceeding, should transmit the communication promptly to the Secretary of the Commission, together with a written statement of the circumstances under which it was made, if they are not apparent from the communication itself. The Secretary should promptly place the communication and the statement in the public file of the Commission, should send copies of the communication to all participants to the proceeding with respect to which it was made, and should notify the communicator of the provisions of this Code prohibiting ex parte communications. If the communications are from persons other than participants to the proceeding or their agents, and the recipient determines that it would be too burdensome to send copies of the communications to all participants because: (1) the communications are so voluminous, or (2) they are of such borderline relevance to the issues in the proceeding, or (3) the participants to the proceeding are so numerous, the Secretary may, instead, notify the participants that the communications have been received and placed in the

public file where they are available for their examination.

(b) Any Commission member or decisional employee who receives an oral communication which he knows, at the time it is received, is unauthorized, or which he concludes in fairness should be brought to the attention of all participants to the proceeding should put the substance of the communication in writing and transmit the writing promptly to the Secretary of the Commission, together with a written statement of the circumstances under which it was made. The Secretary should promptly place the writing and the statement in the public file of the Commission, should send copies of the writing to all participants to the proceeding with respect to which it was made, and should notify the communicator of the provisions of this Code prohibiting unauthorized ex parte communications. If the communications are from persons other than participants to the proceeding, or their agents, and the recipient determines that it would be too burdensome to send copies of the writings containing the substance of the communications to all participants because: (1) the communications are so voluminous, or (2) they are of such borderline relevance to the issues in the proceeding, or (3) the participants to the proceeding are so numerous, the Secretary may, instead, notify them that the communications have been received and writings containing their substance placed in the public file where they are available for their examination.

(c) Any Commission member or decisional employee who receives a communication which would be prohibited by this Code, but for the fact that it was received subsequent to the date when the prohibitions imposed hereby have ceased, shall comply with the provisions of Section 200.112 hereof with respect to such communication in the event that he is to act in a decisional capacity in the same proceeding pursuant to remand where he concludes, in fairness, that such communication should be brought to the attention of all participants to the proceeding.

(Adopted April 26, eff. June 1, 1963, Release 33-4600.)

Section 200.113 Opportunity to Rebut; Interception.

(a) All participants to a proceeding may request an opportunity to answer any allegations or contentions contained in an unauthorized ex parte communication or in any other ex parte communication brought to the attention of the participants in accordance with Section 200.112 above. The Commission will grant such a request whenever it determines that the dictates of fairness so require. If the record has not yet been certified to the Commission this determination shall be made in the first instance by the hearing officer.

(b) All written communications addressed to the Commission respecting a proceeding will be deemed to be communications to the staff of the interested division and will be directed to that division by the Commission's mail room. A Commission member or decisional employee may instruct any of his assistants who are nondecisional employees to intercept any communication directed to him which might appear to violate this Code and authorize them either to transmit any such written communication to the staff of the interested division of the Commission, if it appears from the contents of the communication that the intent of the sender is consistent with such action, or to return the communication to the sender.

(Adopted April 26, eff. June 1, 1963, Release 33-4600.)

Section 200.114 Sanctions.

(a) The Commission may, to the extent not prohibited by law, censure, suspend, or revoke the privilege to practice before it of any person who makes, or solicits the making of, an unauthorized ex parte communication.

(b) The relief or benefit sought by a participant to a proceeding may, in the Commission's discretion, be denied if the participant, or an agent of the participant makes, or solicits the making of, an unauthorized ex parte communication.

(c) The Commission may censure, suspend or dismiss any Commission employee who violates the prohibitions or requirements of this Code.

(Adopted April 26, eff. June 1, 1963, Release 33-4600.)

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CIVIL INJUNCTIVE LITIGATION

I. STATUTORY AUTHORITY.

A. Section 20(b), Securities Act of 1933 (Securities Act).

B. Section 21(e), Securities Exchange Act of 1934 (Exchange Act).

C. Section 18(f), Public Utilities Holding Company Act.

D. Section 321(a), Trust Indenture Act of 1939.

E. Section 42(e), Investment Company Act of 1940, and Section 209(e), Investment Advisers Act of 1940.

While the sections referred to in paragraphs A through D above authorize the Commission to bring civil injunctive actions against "any person who is engaged" or is about to engage, the latter two sections authorize the Commission to seek an injunction where any person "has engaged" or is about to engage in any violation of the Investment Company or Investment Advisers Acts.

II. SHOULD AN INJUNCTION BE SOUGHT?

A. Nature of violations.

(1) Registration violations only.
(2) "Technical" violations.
(3) "Office injunctions."

B. Equity.

(1) Threat of future violations. (SEC v. Culpepper, 270 F.2d 241, 249 (2d Cir. 1959).

(2) Cessation of activity. (SEC v. Culpepper, supra; Hecht Co. v. Bowles, 321 U.S. 321, 327 (1944).

C. Alternative remedies.

(1) Administrative proceedings.

(a) Broker-dealers.
(b) Investment Companies.
(c) Issuers.

(2) Criminal Proceedings.

(a) Criminal contempt.
(b) Prosecutions for mail fraud, wire fraud, perjury, false personation, and State prosecutions.

III. RECOMMENDATION FOR INJUNCTION.

A. T & M instruction form.

(1) Memorandum should be succinct and pointed.

(2) Identify fully each defendant and his relationship to:

(a) The issuer.
(b) The violation.

(3) State misreps and omissions in following manner:

(a) Defendants stated that _____ when in fact _____.

(b) Defendants omitted to state _____ even though _____.

(4) Don't overlook jurisdiction.

B. Unusual and Novel Theories.

(1) Be certain to note in memorandum requesting authority that this case involves a novel or unusual theory; then set forth what that theory is and your reasons for believing such theory to be correct, including citations to cases and commentators where appropriate.

IV. THE COMPLAINT.

A. Format.

(1) Enforcement manual.
(2) Rose form.

B. Speaking or summary.

(1) Where case involves complicated scheme with numerous participants, a speaking Complaint is very helpful.

(2) In all other instances Complaint should be summary in form.

C. To 10b-5 or not to 10b-5?

(1) Purchases and sales.
(2) Offers.

D. Keep the number of defendants to a minimum.

E. Prayer for relief.

(1) ". . . their officers, directors, subsidiaries, affiliates, servants, employees, successors, attorneys and assigns, and each of them."

(2) ". . . corporations, partnerships or other business entities under their control or in which they have an interest."

(3) "Any other securities language." (Williams v. U.S., 402 F.2d 47 (10th Cir. 1967); U.S. v. Hill, 298 F.Supp. 1221 (D.C.Conn. 1969); SEC v. Keller Corp., 323 F.2d 387, 402 (7th Cir. 1963); NLRB v. Associated Musicians of Greater New York, 422 F.2d 850 (2d Cir. 1970)).

F. Ancillary relief.

(1) Receiverships. (Deckert v. Independence Shares Corp., 311 U.S. 282 (1940); L.A.T.D. v. SEC, 285 F.2d 162 (9th Cir. 1960); SEC v. Charles Plohn & Co., 433 F.2d 376 (2d Cir. 1970); SEC v. Bowler, 427 F.2d 190 (4th Cir. 1970)).

(a) Nor is it necessary for the Commission to establish insolvency for a receiver to be appointed. (SEC v. Keller Corp., 323 F.2d 397 (7th Cir. 1963); SEC v. Charles Plohn & Co., supra)).

(b) The Commission's interest in the receivership action does not terminate upon the appointment of the receiver (L.A.T.D., supra; 3 Loss 1508-14; 6 Loss 3728-34; SEC v. Bartlett, 294 F.Supp. 1233 (W.D.Ark. 1969), aff'd, 422 F.2d 475 (8th Cir. 1970)).

(2) SIPC trusteeships.

(a) Statutory basis.
(b) SIPC forms.

(3) Restitution or disgorgement of profits. (SEC v. Texas Gulf Sulphur Co., 312 F.Supp. 77 (S.D.N.Y., 1970), aff'd, 446 F.2d 1301 (2d Cir. 1971); SEC v. VTR, Inc., SEC Lit.Rel. No. 3311 (S.D.N.Y. 1965); SEC v. Parvin Dohrmann Co., 69 Civ. 4543 (ELP); SEC v. Manor Nursing Center, Inc., CCH Fed.Sec.L.Rep. para. 93,245 (S.D.N.Y. 1971), aff'd, CCH Fed.Sec.L.Rep. para. 93,344 (2d Cir. 1972), remand, CCH Fed.Sec.L.Rep. para. 93,359 (S.D.N.Y. 1972)).

(4) Mandatory unjunctions.

G. Jurisdictional averment.

(1) Use of mails or means of interstate commerce.

(a) Use may be by any person acting in concert with defendants.

(b) Intrastate use of telephone may be basis for jurisdiction. (Lennerth v. Mendenhall, 234 F.Supp. 59 (D.C.Ohio 1964); Nemitz v. Cunny, 221 F.Supp. 571 (D.C.Ill. 1963); Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

(2) Exemptions are matters of affirmative defense to be pleaded and proved by defendants and do not have to be negated in the Complaint. (SEC v. Sunbeam Gold Mines Co., 95 F.2d 699, 701 (9th Cir. 1938); SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953); U.S. v. Custer Channel-Wing, Inc., 247 F.Supp. 481 (D.C.Md. 1965), 376 F.2d 675 (4 Civ. 1967), cert. denied, 389 U.S. 850 (1967), rehearing denied, 389 U.S. 998 (1967)).

H. Venue.

Securities Act, Section 22(a), says venue shall be "in the district wherein the defendant is found or is an inhabitant or transacts business or in the district where the offer or sale took place if the defendant participated therein." The Exchange Act, Section 27, states that venue shall be "in the district wherein the defendant is found or is an inhabitant or transacts business." The provisions of the Investment Company Act are similar to the Exchange Act.

I. Service.

(1) F.R.C.P., Rules 4(a) and (b) describe the issuance and form of the summons. Rule 4(c) provides that it shall be served by a U.S. Marshal or his deputy.

(2) Rule 4(d) specifies that service on an individual shall be made in person or by leaving a copy with a person of suitable age at his abode, and on a corporation by leaving a copy with an officer or person designated by law to receive service.

(3) Service may be made in any district where the defendant is an inhabitant or may be found pursuant to the provisions of the Securities, Exchange and Investment Company Acts cited above.

V. INTERLOCUTORY RELIEF.

A. F.R.C.P., Rule 65.

B. Temporary Restraining Order. (Rule 65(b)).

(1) A TRO may not be granted without written or oral notice to the adverse party or his attorney unless you can show immediate and irreparable injury or efforts have been made to reach the attorney and he is not available.

(2) The TRO expires by its terms in ten days and may be extended for only a maximum of an additional ten days.

C. Preliminary Injunction.

(1) F.R.C.P., Rule 65(a).

(2) A preliminary injunction may not issue without notice.

(3) The Court may order a trial on the merits to be consolidated with the hearing on the application for temporary injunction.

(4) It is the position of the Commission that all that is necessary to obtain a preliminary injunction is a strong prima facie case. (SEC v. Boren, 283 F.2d 312 (2d Cir. 1960); SEC v. Bennett & Co., 207 F.Supp. 919, 923 (D.C.N.J., 1962)). Since 1962, the Second Circuit has eroded this principle to some degree in the cases of SEC v. Capital Gains Research Bureau, Inc., 300 F.2d 745, 746 (2d Cir. 1961), aff'd en banc, 306 F.2d 606 (2d Cir. 1962), rev'd on other grounds, 375 U.S. 180 (1963); SEC v. Frank, 388 F.2d 486 (2d Cir. 1968); and SEC v. Great American Industries, Inc., 407 F.2d 453, 455 (2d Cir. 1969)).

(5) Order of Preliminary Injunction should be identical to prayer for relief and Order of Permanent Injunction except for the word "preliminarily."

(6) Order should be served on defendants in person.

(7) Order continues in effect until decision at trial on the merits.

D. Summary Judgment. (F.R.C.P., Rule 56).

VI. DISCOVERY.

A. Interrogatories. (F.R.C.P., Rule 33).

B. Depositions upon oral examinations. (F.R.C.P., Rule 30).

(1) Service of deposition subpoena. (Rule 45(d)).

(2) Scope of discovery. (Rule 26(b)).

(3) Sequence and timing of discovery. (Rule 26(d)).

(4) Protective orders. (Rule 26(c)).

(5) Use of depositions in court proceedings. (Rule 32).

C. Request for admission. (Rule 36).

D. Sanctions for failure to make discovery. (Rule 37).

VII. PRETRIAL CONFERENCES.

A. Stipulations.

(1) Facts.
(2) Documents.

B. Trial Brief.

(1) Securities law.
(2) Evidentiary questions.
(3) Statement of Facts.

C. Pretrial Order.

VIII. CONDUCT OF TRIAL.

A. Burden of proof on Commission.

B. Common evidentiary problems.

(1) Federal Business Records Rule (Title 28 U.S. Code, Section 1732 (1964)).

(2) Proof of official record. (F.R.C.P., Rule 44).

(3) Hearsay testimony.

(4) Defendants as adverse witnesses. (Rule 43(b)).

C. Service of trial subpoenas.

(1) Rule 45(e).

(2) Service of a subpoena must be in person by the marshal or any person not a party. (Rule 45(c)).

(3) The subpoena may not be served on anyone outside the district unless the place of service is within 100 miles of the place of trial. (Rule 45(e)(1)).

D. Opening statement.

E. Closing argument.

F. Exemptions. (See IV G (2)).

IX. ORDER OF PERMANENT INJUNCTION.

A. Should be prepared in accordance with prayer for relief in Complaint.

(1) Consent Decrees.

(a) Must include all relief requested in Complaint unless Commission authorization obtained.

(b) Must say "without admitting or denying."

(c) Corporate consent must include resolution of board.

B. This Order and the Order of Preliminary Injunction must include comprehensive findings of fact and conclusions of law.

(F.R.C.P., Rule 65(d); SEC v. Frank, supra; SEC v. Great American Industries, supra; U.S. v. Ingersoll-Rand Co., 320 F.2d 509 (5th Cir. 1963)).

C. Order must be served on named defendants personally.

D. Order applies to "the parties to the action, their officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the Order by personal service or otherwise."

E. Consequences of the Order.

(1) Disqualification from utilization of Reg. A (Securities Act, Rule 252(c)(4)).

(2) Disqualification from association with registered investment company or the adviser or depositor thereof. (Investment Co. Act, Section 9(a)(2)).

(3) May also be a disability under the Exchange Act (Sections 15(b)(5) and (7)) and the Advisers Act (Sections 203(e) and (f)).

(4) The Commission may upon application waive these disabilities. (Securities Act, Rule 252(f); Section 9(c), Investment Co. Act.)

(5) Attorneys, accountants, and other professionals subject to possible disqualification under Rule 2(e) of the Commission's Rules of Practice.

F. Default Judgments. (Rule 55, F.R.C.P.).

X. RESPONSIBILITY FOR VIOLATIONS OF FEDERAL SECURITIES LAWS.

A. "Aider and Abettor Doctrine."

(1) Duty to act. (SEC v. National Bankers Life Ins. Co., 324 F.Supp. 189 (N.D.Tex. 1971); Brennan v. Midwestern United Life Ins. Co., 259 F.Supp. 673, 286 F.Supp. 702 (N.D.Ind., 1966), aff'd, 417 F.2d 147 (7th Cir. 1968), cert. denied, 397 U.S. 989 (1968); Hecht v. Harris Upham & Co., 283 F.Supp. 417 (N.D.Cal. 1968); Pettit v. American Stock Exchange, 217 F.Supp. 21 (S.D.N.Y. 1963); Buttery v. Merrill Lynch, Pierce, Fenner & Smith, 410 F.2d 135 (7th Cir. 1969), cert. denied, 396 U.S. 838 (1969); SEC v. Barraco, 438 F.2d 97 (10th Cir. 1971; Nees v. SEC, 414 F.2d 211 (9 Cir. 1969)).

(2) Responsibility of corporate officers and directors for failure to act. (Ashby v. Peters, 258 N.W. 640 (1935); People v. Photocolor Corp., 281 N.Y.Supp. 130 (1935); Bowerman v. Hamner, 250 U.S. 504 (1919); SEC v. North American Research & Development Corp., 424 F.2d 63 (2d Cir. 1970)).

B. Liability of Co-Schemers.

(1) Pinkerton v. U.S., 328 U.S. 640 (1946).

(2) SEC v. North American Research, supra. As stated in the latter case at page 82, "whether their conduct is to be classified as joint participation or aiding and abetting . . . ." is immaterial.

C. Pledge as sale.

(1) SEC v. Guild Films Co., Inc., 279 F.2d 485 (2d Cir. 1960), cert. denied sub nom., Santa Monica Bank v. SEC, 364 U.S. 819 (1961).

(2) SEC v. NBL, supra; U.S. v. Custer, supra.

XI. APPELLATE REVIEW.

A. Notice of appeal must be filed within sixty days of the entry of the final judgment.

B. Brief on appeal prepared and argued by Office of General Counsel.

BASIC TRIAL PREPARATION

Basic trial preparation should be a part of the investigative process. During the course of an investigation the information developed should be collected and organized in a way which will enable the case to be made ready for trial as soon as possible after the complaint is filed. During the investigation stage, five basic work products should be prepared: (1) digests of investigation testimony; (2) a case outline; (3) a document list; (4) an evidence analysis; and (5) a memorandum of law.

The preparation of these materials necessarily involves a tailoring to the particular fact pattern of the case since their form is shaped by the substantive facts developed during the investigation. A brief description of what each of these items ought to contain is set forth below.

1. "Digests of Investigation Testimony" - These should be prepared as soon as possible after the testimony is taken and by the attorney who questioned the witness.

2. "Case Outline" - This is the basic skeleton or thread of the case and should be carefully sketched out in terms of logical subdivisions of the violations involved and the evidence thereof.

3. "Document List" - This should reflect all documents in the file in numerical order with appropriate indications to show which documents should be used and which are irrelevant.

4. "Evidence Analysis" - This work product should marshal the evidence by aligning the testimony (from the digests) and documentary proof (from the document list) into logical relevant groupings (case outline).

5. "Memorandum of Law" - This should highlight the specific questions of law presented by the case and substantiate the Commission's position.

SUGGESTED FORM FOR AN INVESTIGATIVE DOCUMENT LIST

DOCUMENT LIST

Exhibit No.	Description	Document Date	Copy Marked	Depository	Comment

PART I

A MANUAL ON TRIAL TECHNIQUE IN ADMINISTRATIVE PROCEEDINGS

Prepared by

THE HONORABLE E. BARRETT PRETTYMAN, JUDGE,

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I

INTRODUCTORY

Administrative proceedings differ in material respects from the usual courtroom trial. Some important differences in trial technique are therefore desirable, if not necessary. Administrative proceedings include several different types of proceeding, and these differ in hearing procedure. There are rule-making proceedings, which are legislative in character. They concern a subject rather than issues; they are not adversary in form; there are no parties as such; broadly speaking there are no rules of evidence; the objective is not the decision of disputed points but a complete treatment of the designated subject, so that the resulting rules may be complete and accurate. Then there are proceedings in which a private person is an applicant before the agency. These may be applications for licenses or certificates or for exemptions from general rules. In such a proceeding the burden is upon the applicant; the tribunal has no previous knowledge of the particular matter; there are established requirements as to the information necessarily to be furnished and the form in which it must be supplied, and all such requirements must be met in meticulous detail; no issues are formulated in advance, but issues may develop in the course of the proceeding; if the proceeding is competitive or comparative, as where there are two or more applicants for one available certificate, each applicant must endeavor not only to meet the requirements of the agency but also to exceed all other applicants in demonstrated qualifications. Thirdly, there are adversary proceedings which concern relatively small matters or few facts and are of short duration. Such, for example, are tax cases involving small amounts or few and simple questions, or uncomplicated applications for licenses or certificates. These proceedings usually last a few hours, or not more than a couple of days, and only a few witnesses and exhibits are presented. Fourth, there are adversary proceedings of great complexity, involving large amounts or important issues and many facts. Such are utility rate cases, complicated tax cases, airline

area route cases, comparative radio license cases. These proceedings may last weeks, months or years and may result in thousands of pages of record and hundreds of documentary exhibits. They require not only enormous preparation but exceedingly skillful trial organization and staff work. The parts played by young lawyers in such proceedings are usually those of assistants to seniors at counsel table.

This manual does not purport to treat the details of any of these classes of proceedings. It is devoted to some fundamentals in the technique of presenting matters to an administrative agency where a hearing is held. These fundamentals may be useful, if not essential, in any type of proceeding.

The differences between an administrative proceeding and a courtroom trial may be summarized briefly. They are important to the practitioner and should be thoroughly understood and constantly kept in mind. In a courtroom trial (unless there has been a reference to a master or an auditor), the person (or persons) who sees the witnesses and hears the evidence finds the facts and decides the case. In administrative proceedings generally (there are exceptions), the person (or persons) who hears the evidence does not make the final findings or decide the case; he (or they) makes proposed findings, or a report to the agency, or tentative findings. In a courtroom trial, usually, the decision follows immediately or very shortly after the conclusion of the hearing, and the result depends principally upon what the judge or jury has seen and heard in the courtroom. In an administrative proceeding, usually, the findings and decision are derived weeks or months after the hearing from the written record, and the result depends upon what the tribunal finds upon reading that record. In a trial by jury, there is a simple verdict for one party or the other—no detailed findings. In a non-jury trial in court, the judge, usually, reaches his judgment for one party or the other upon generalized conclusions as to the facts sufficient for his purposes, and thereafter he prepares or requires counsel to prepare the detailed formal findings. In an administrative proceeding, usually, the decision evolves from a sequence of events; namely, findings of the basic facts, drawn from the written record (transcript and exhibits); findings of ultimate facts, drawn from the basic facts; and conclusions drawn from the ultimate facts. In the courtroom the trier of the case has no knowledge of the controversy prior to the hearing (unless the judge has reviewed the pleadings filed openly by the parties) and has no interest whatever in the conclusion. In an administrative proceeding, it frequently happens that the persons who make the final decision also directed the investigation which initiated the proceeding and ordered the bringing of the complaint or entry of the initiating order; frequently they are fully advised of the views of the Government staff before the proceeding begins; and frequently they have necessarily formed tentative opinions that a given result should be reached upon the evidence developed preliminarily by their staff. These latter characteristics of administrative proceedings are widely recognized as undesirable, and many efforts, by the bar, the Government, and the Congress, have been made to devise solutions. But where the same agency has both regulatory and adjudicatory duties, a solution is not easy, and the situation remains as one which trial practitioners must recognize as a sober reality. When before a regulatory agency, counsel frequently has not only the usual burdens of a party but the added difficulty of upsetting tentative conclusions already reached or of reversing a policy already adopted.

The consequence of these characteristics is that to the trial lawyer the most important feature of an administrative hearing is the record, *i.e.*, the transcript of the testimony and the accompanying exhibits. The findings and the conclusions will be drawn from those documents. Upon their completeness, clarity and accuracy the result depends. The chief task of the trial lawyer, therefore, is to BUILD A WRITTEN RECORD by which facts are established which lead to conclusions in his client's favor. Histrionics have no part in that task. Psychological impressions, witty repartee, quick coups, attitudes, personalities—all fade out or make cold reading when the finder of the facts sets about his task weeks or maybe months after the actors have departed. The clearer the facts appear in the written record, the better the chance to win the case.

The foregoing is not to rule out the importance of the hearing officer. He does make the initial, or proposed, findings, and those findings are important. To win before this hearing officer is a major objective. But even a hearing officer who has heard the testimony makes his findings from the written record. He must, because otherwise the findings would not withstand attack.

There are occasional clashes with opposing counsel or a witness which provide opportunity or necessity for histrionics, but they are by-plays, not important factors as they frequently are in the courtroom. And there are cases in which obfuscation is a better ally than clarification. And sometimes sheer volume is impressive. But these are infrequent exceptions. Almost universally the great task of trial counsel in an administrative proceeding is to produce a written record in which appear, as clearly as the ability of counsel permits, the facts which lead to the result he desires. The accomplishment of that task requires a trial technique which differs in material respects from that of the usual courtroom trial.

II

PREPARATION

A. *Office Preparation*

Office preparation is the great key to results in contested administrative matters. Its first object is the production of a trial memorandum. Whether or not the following suggested procedure is followed, the chief essential to skillful trial technique in an administrative matter is this memorandum, prepared in advance of the hearing. Without it the trial lawyer is lost. There is no successful trial "out of his hat" in an administrative proceeding.

The trial memorandum has four principal parts: first, and most important, a guide to the presentation of evidence; second, an analysis of the probable opposing position; third, notes on authorities in support of points; and, fourth, notes on questions which may arise in the course of the proceeding.

The reasons for a trial memorandum are several. The tribunal will not find facts which do not appear in the written record; counsel cannot be sure that every needed fact will be in the record, unless he is absolutely certain when he walks into the hearing room that he is prepared to present every such fact. Facts not clearly understood by the tribunal are not likely to be found by it; counsel must be sure that the facts he presents are presented clearly. Unnecessarily long, fuzzy, uncertain records do not produce desirable results; "ad lib" presentations are not usually succinct, clear or certain.

These memoranda vary greatly in size and character. If the case is short and simple, the memorandum may be in one or two pages, which can be prepared in a few hours or days. If the case is complex and a long hearing is anticipated, the memorandum may be a sizable volume, requiring months for its preparation. But the memorandum, though short, is just as essential to success in small cases as the elaborate memorandum is to the great case. And the basic essentials of the short memorandum are the same as those of an extended one.

The physical form of these preparatory memorandum is a matter of personal choice. Some lawyers prefer parallel tabulations; some prefer looseleaf booklets. The only requirement is that the work be complete and in such form as to be readily usable at counsel table.

Pre-trial preparation is usually a tedious and exasperating chore. It possesses neither glamour nor drama, but it may breed inspiration and it may produce occasional exhilaration. Patience is the essence.

How does one prepare that part of a trial memorandum which is to be the guide to the presentation of the evidence? There are several steps to be taken.

Step One. Analyze the case into its ultimate factual details. This involves several and varied tasks. It involves the ascertainment and analysis of the questions involved and then the ascertainment of the facts pertinent to the several issues.

If the presentation is to be in a rule-making proceeding, counsel must ascertain in the fullest detail the position which his client desires to take upon the subject to be treated, and must then ascertain what facts support that position. This latter task often requires a large measure of skill and perseverance. Frequently in such proceedings few facts are to be presented and the presentation is by argument. But very frequently the result in a rule-making proceeding follows from facts presented by some person participating in the proceeding. The skillful lawyer exhausts every possibility in that respect and prepares for the effective presentation of those facts.

If the hearing is upon an application, as for a license, the required facts will be indicated on the form specified by the agency or in a rule on the matter. Counsel must be meticulous in meeting such requirements. If the application is in a competitive hearing, counsel must use the utmost of his ingenuity in ascertaining the superior qualifications of his client and the weaknesses of his client's competitors. Properly done, this study will yield a considerable list of facts.

If the hearing is of an adversary adjudicatory type, the ascertainment of the essential facts begins with the issues presented by the pleadings or such agency orders as frame the scope of the proceedings. To define the issues in this type of proceeding is not always as simple as it would appear. Pleadings are not usually sharply drawn. Orders initiating proceedings are often very general in their terms. But, whatever the difficulties, it is absolutely necessary that counsel ascertain what the issues are or what will be the question to be tried. He should set those questions or issues down in writing. They should be set down in narrow, specific form. General statements are of no value at this point. For example, a statement that the issue is the reasonableness of the rates of X Company, or is whether Y Company is guilty of an unfair labor practice, is of no value. In the rate case, the statements should be: What is the used and useful property of X Company? What was the original cost of that property?

What depreciation should be deducted from that original cost? Etc. Etc. And in the labor case the issues might be: Did the Y Company discharge A and B? For what reason were they discharged? Etc. Etc.

Having analyzed and stated the issues, counsel should turn to the facts. The mental process of counsel is: "The issue is such-and-such. What facts bear upon that issue?" At this point he should endeavor to ascertain every fact—not just some facts but every infinitesimal relevant fact bearing upon the issue. It is surprising to realize the number of contested cases which are actually won or lost at this point in the office preparation of counsel. Here an essential fact may be overlooked and fail to appear in the final record of the hearing, and so fail to be found as a fact by the tribunal. Here also skillful counsel discovers that obscure but determinative fact which tips the scales in a close case. This ascertainment of facts requires inquiry, sometimes of the most persevering and extensive sort.

The remainder of this manual deals chiefly with the trial technique in an adjudicatory adversary proceeding, but many parts of it also apply to the other types of hearing above mentioned.

Counsel makes a list of issues and a list of the facts relevant to each issue.

At this point the decided cases bearing upon the questions in the pending case should be analyzed and studied. The facts in the case at hand then should be reexamined and the questions presented by them restated in the light of what has been learned from the decided cases. A pattern of proper procedure may thus appear. If it does not, then the legal acumen of the lawyer may be his sole reliance as he plots his course. In any event, the search for *all* the facts should be pressed with zeal and thoroughness. Re-study, re-analysis, re-synthesis should follow repeatedly until at length the lawyer has ascertained what questions his case really presents and what the precise and complete facts in his case are.

Often in administrative proceedings the issue framed by the statute involved, or the initiating order of the agency, is so broad and indefinite as to require a considerable degree of ingenuity on the part of the counsel in dissolving it into definable issues to be presented. For example, "public interest, convenience and necessity" is a frequent statutory criterion, and it offers a wide field for skill and inventiveness on the part of counsel in offering evidence that will present new issues or new facets of old issues.

Step One may be a matter of hours, if the case is comparatively simple (*e.g.*, a salary deduction in an income tax case), or it may be a matter of months, if the case is complicated (*e.g.*, a utility rate in a federal power case). The material gathered in the course of this step forms a sort of supply reservoir, from which counsel can draw the material he needs for the rest of his preparation. It may also be invaluable later for purposes of briefs and arguments.

Step Two. Put down in writing in simple fashion every ultimate fact (*i.e.*, conclusion of fact) which the lawyer will want the tribunal to find. The question here for the lawyer is: "If the agency is to reach the decision I want, what facts must it find?" A high order of legal skill may be required to analyze each question in the case into its components of fact. The list of the ultimate facts involved in each issue must be complete; if one is omitted, the desired conclusion may fail. If Step One has been carefully performed, the information there gained will be helpful here.

Step Three. List every basic fact which the tribunal must find in order to reach the ultimate facts listed in Step Two.

Step Four. List the items of evidence necessary to establish each basic fact set down in Step Three. In this list of evidence, care must be taken to include all basic material needed by expert witnesses in the preparation of their opinions, a subject discussed in detail later under "Expert Witnesses."

Step Five. List the witnesses or exhibits by which each bit of evidence set down in Step Four will be presented.

If the witnesses and exhibits listed are presented, and if through them the evidence listed is put into the record, the tribunal should find the basic facts listed, and from them it should reach the conclusions listed. The lawyer should leave no foreseeable contingency to an inspiration of the moment. He should know that when the record made at the hearing contains the evidence listed in his preparatory memorandum he can urge with confidence the decisions he seeks. Thorough office preparation results in a convenient and reliable trial memorandum which, if followed, will result in the exact written record for which the lawyer is striving.

Step Six. Reexamine the lists of facts, evidence and witnesses, and annotate in some readily available form the debatable points which may arise in respect to any of them.

Step Seven. Learn all you can about the subject matter of the case. Usually administrative cases concern some special field of knowledge—accounting, engineering, chemistry, electricity, gas, finance, business practice, etc. Wise trial counsel absorbs all the knowledge of the subject which time and money permit. At the very least, the lawyer must acquire a working knowledge of the language of the field. Moreover, he ought to acquire all possible first-hand knowledge of the actual case at hand—visit the factory, examine the machinery, go over the records, personally perform the calculations, watch the experiments, etc. Knowledge thus gained is never lost and gradually builts into a valuable stock of information available for other later cases.

We come now to the next principal part of the trial memorandum. This is an analysis of the opponent's probable case. Care at this point often pays rich dividends. As a matter of fact, a lawyer rarely knows the strength and weakness of his own case until he has stepped into the shoes of his adversary. He should place himself on the opposite side of his case and work out the probable points and program there. Once noted, methods of meeting them should be outlined in the trial memorandum. Maybe this study will reveal more facts to be added to the lists already made up. They and the necessary evidence should be carefully incorporated in the program of presentation. Maybe counsel will discover in this study a probable point of law useful against him. If he can find authorities in reply, he should note them in this section of his memorandum. Careful counsel is not often surprised in the course of a hearing.

The next principal part of the trial memorandum is the notation of useful authorities. This is merely the usual legal memorandum, and its characteristics need not be discussed here. In this connection the lawyer should remember that not only the reported opinion in a pertinent case but also the record itself may be very useful.

The last principal part of the memorandum consists of notations on questions which may arise in the course of the hearing, such as matters of evidence, tactics, alternative courses of action, etc.

The foregoing description of a proper trial brief seems complicated indeed. Let it again be emphasized that if a case is minor the whole memorandum may be on a couple of sheets of scratch-paper. But, however informal or short it is, a trial memorandum there must be, and its basic essentials are the same whether it be long or short, formal or informal. Those essentials are (1) an analysis of the law and the facts involved, (2) a readily available guide to every bit of evidence that is essential to the desired result, and (3) a notation of the means (witness or exhibit) by which that evidence is to be put into the record. A lawyer who fails to prepare in this manner, because he deems his case to be simple, is courting disaster and is not serving his client.

B. *Stipulations*

Frequently much time, trouble and expense can be saved by stipulations between counsel. Moreover, a trial lawyer is wise if he meets and measures his opponent before facing him at counsel table. So a consultation with opposing counsel is an important part of proper preparation. If a case is a simple and short one, a brief interview is sufficient. If the case is complicated and promises to be a long one, a series of conferences may be required. These interviews and conferences have several objectives. The first, and most important, is the elimination of minor possible controversies and the crystallization of issues. A case which really has one or a few main points of controversy may incidentally involve many small conflicts which consume inordinate time and energy if left to the hearing room or to the hearing officer for disposition. Skillful counsel accomplishes much by clearing away these incidental disputes by conference with his opponent before the hearing. Also, oftentimes issues which are to be tried can be formulated in clear terms by pre-trial agreements. Another objective of conferences of counsel is to reach stipulations as to evidence. The most frequent subjects of stipulation are the authenticity and identification of documents and books. Recorded facts which can easily be checked for accuracy are also frequently stipulated. So-called formal facts and some scientific facts may be stipulated. Proof of these kinds of facts by the orthodox methods of proof and under the strict application of the rules of evidence often consumes much time, unlimited effort and considerable expense. This should be avoided as far as possible by pre-trial agreement.

How far one should go in attempting to stipulate facts other than those just described is a matter of judgment. A stipulation of facts lacks all the development, the coloring, and the accompanying details which appear when testimony is taken. Moreover, neither party will stipulate where any doubt exists. By resting his case upon stipulated facts alone a lawyer foregoes the possibility of establishing successfully facts as to which his opponent is either skeptical or merely unenthusiastic.

The other objective, less important, of a pre-trial conference with opposing counsel is to ascertain (by inquiry, if feasible, but, if not, then by mere estimate) how insistent the adversary will be upon compliance with every technicality in the course of the hearing. In colloquialism, will the opponent be tough or will he be cooperative? An accurate estimate on this point will be helpful in preparation for a long hearing.

Once agreed upon, stipulations should be carefully reduced to writing and associated with the appropriate documents, if any, in a form ready for introduction into the record. The requisite number of copies, for the record, for the members of the tribunal, for opposing counsel, etc., should be prepared and filed away ready for use.

C. *Preparation of Witnesses*

Prospective witnesses must be talked to, if that course is at all possible. If they are too widely scattered over the country, correspondence has to be substituted for conversation, but it is not a good substitute.

In courtroom trials it is sometimes considered advantageous to ask an opposing witness whether he has talked to the lawyer who put him on the stand. The idea persists from ancient times, when all observers of an event were presented to testify and were supposed to give their own uncolored version. In the present, the only advantage of the maneuver is that an unwarned witness sometimes senses a trick and thinks it wise to deny any such conversation, and thus shows himself to be a potential liar. But, whatever may be the courtroom practice, in an administrative proceeding it is not only proper but necessary for a trial lawyer to interview carefully a witness before presenting him to testify. It is bad practice, and even to be censured, for a lawyer to present a witness unless he knows that the witness knows something about the subject at hand and unless he believes that the testimony will be competent, relevant, material and credible.

It is unethical, even criminal, for a lawyer to tell a witness what to say. It is proper, and part of his duty, for the lawyer to explain to a suggested or prospective witness the nature of the subject matter involved, to ascertain what the witness may know about the matter, to frame questions which will elicit from the witness, when on the stand, the full of his knowledge, and then to advise the witness what those questions will be.

Before some agencies, it is thought proper to reduce to writing beforehand both questions and testimony, to be read, respectively, by counsel and witness at the hearing. The practice, when permitted, is usually restricted to complicated matters. Its advantages are that testimony thus presented is more direct, more succinct, more complete, more accurate, and phrased in better language than is the case when the testimony is given from recollection in the chance phraseology and under the excitement of the hearing room. The practice is a most satisfactory one, where permitted, when the evidence is so complicated or extensive that the ordinary instantaneous recollection of the witness while on the witness stand cannot be expected to be accurate or complete.

If the prospective witness has never been on the witness stand, it is wise to advise him generally concerning his attitude, conduct, etc. Most people change in important respects when they take the stand; the garrulous may become frightened, the taciturn vociferous, the timid confident, the wise foolish, and the foolish careful. Counsel can do nothing about such changes, but the probabilities should be known and watched.

It is well to advise a prospective witness concerning cross-examination by opposing counsel: "Don't argue. Don't fence. Don't guess. Don't make wisecracks. Don't take sides. Don't get irritated. Think first, then speak. If you do not know the answer to a question, say so. If you do not know the answer, but have an opinion or belief on the subject based on information, say exactly that and let the hearing officer decide whether you shall or shall not give such information as you have. If a 'yes or no' answer to a question is demanded but you think that a qualification should be made to any such answer, give the 'yes' or 'no' and at once request permission to explain your answer. Don't worry about being bulldozed or embarrassed; counsel will protect you. Don't worry about the effect an answer may have. If you know the answer to a question, state it as precisely and

succintly as you can. The best protection against extensive cross-examination is to be brief, absolutely accurate, and entirely calm."

It is wise to tell the witness of questions which may be expected on cross-examination.

D. *Exhibits*

Documentary evidence usually requires considerable preparation in making the necessary number of copies, etc., all discussed later under "Documentary Evidence."

E. *Organization for Trial*

A case of small or merely ordinary proportions usually involves only one lawyer and no staff organization is necessary. If the trial lawyer is alone at his table, the need for organization must be met by the arrangement and location of his own notes and other papers. But an administrative case often involves several parties and a number of lawyers. Eight or ten lawyers in a case are not infrequent, and fifteen or twenty are not unknown; as a matter of fact, a hundred lawyers may appear in a general rate case before the Interstate Commerce Commission. Sometimes the interests of the several parties conflict, but more often their interests are the same and all the lawyers on that side are seeking to establish the same objectives. If the general interests of parties on the same side are the same but conflict in detail, good organization requires elimination, so far as possible, of conflicts by conference of parties and their counsel to prevent the hearing from degenerating into a battle royal. Even in cases in which only one party participates, more than one lawyer may appear. In all these cases, it is wise to organize the legal staff for the hearing. There are many facets to the trial work, and organization means efficiency, a good record, and a minimum of time consumed.

Chief of the trial staff is, of course, the lawyer who will actually conduct the direct and cross-examination of witnesses and speak on the record for the client. Of course, the direct or cross-examination of the various witnesses may be assigned to different counsel, although this is not always the best practice. Other tasks at trial are the checking of the trial memorandum as the evidence goes into the record; the maintenance of a set of the exhibits which have gone into the record; arrangements with witnesses as to time, etc., so that a minimum of their time is wasted (administrative hearings may last days, weeks, or even months); emergency research into legal problems; current indexing of the record; and calculations as opposing witnesses testify. In an ideal arrangement at counsel table in a long and complicated proceeding, the lawyer who is conducting the case is wholly free of papers and of all tasks except the actual conduct of the trial; but every needed paper, note, record and memorandum is instantly made available to him. Moreover, these hearings usually require long hours of work during the evenings and nights while the hearing is on. Proper organization would make certain that the leading trial lawyer is spared as much of this after-hours work as possible. The order in which witnesses are to appear, responsibility for obtaining them, and producing them at the proper time are matters of staff organization, to be settled by conference when there are several parties or several attorneys.

The several parts of a trial other than the speaking parts afford invaluable opportunities. A young associate counsel who would otherwise be a

mere brief-carrier and onlooker can become an active participant by volunteering for one or more of the less spectacular tasks involved. Senior lawyers rarely decline such suggestions, but even if he is rebuffed the young lawyer should try to make himself useful, as, for example, by indexing the record daily in a long hearing or doing research on his own on legal questions which arise unexpectedly.

III

THE HEARING

A. Opening Statement

A statement by counsel, carefully prepared, advising the hearing officer of the probable course of the evidence, is often advisable. It makes a helpful introductory chapter to the record, and it supplies the hearing officer with a standard by which to tell what is pertinent and to put the parts of the testimony into their proper places in his mind and notes.

Sometimes the hearing officer states at the opening of the hearing his version of the issues. If he does so, it is vital that the trial lawyer understand and agree with the statement. If the subject is opened, it should not be abandoned until it is thoroughly understood by all participants.

B. Oral Evidence

1. *Oral Evidence on Direct.* The very best form of oral testimony is a series of short, accurate and complete statements of fact. Again it is to be emphasized that the testimony will be read by the finder of the facts, and he will draw his findings from what he reads. Confused, discursive, incomplete statements of fact do not yield satisfactory findings. This may not be so in the courtroom, where impressions mean so much, but it is absolutely true in an administrative proceeding, where the written record is the key to all subsequent events. There is little that counsel can do about a confused, uncertain, forgetful witness, except to attempt to remedy the damage at some later stage of the hearing. However, there are a few helpful practices that the lawyer can follow.

(a) *Let the witness testify.* The lawyer should inquire, not testify. Many lawyers have the habit of stating a fact and letting the witness merely acquiesce. Upon hearing such a recitation and response, the impression may be that the witness has stated the fact; at least, there is usually no disturbing sense of lawyer testimony. But reading a stenographic report of such an examination produces a most unsatisfactory result. When one reads statements of fact by counsel and one-word responses—"Yes"—by the witness, it is awkward to make a finding of fact that the witness said what the lawyer actually said. The facts are supposed to come from the witnesses and should appear in the record in their language. Skillful trial counsel asks questions and lets the witness tell the facts.

"Yes or no" answers, frequently so vehemently demanded by counsel upon cross examination, have little, if any, proper place in direct examination. Of course, some questions requiring such answers are unavoidable, and questions can be in that form if they are not intended to elicit facts as to which findings must be made.

By way of example, the following is proper direct examination:

"State your name, address and occupation."

"What, generally speaking, are your duties as Comptroller of the X Company?"

"Who is the custodian of the books of account of X Company?"

"Under whose supervision are the accounts kept?"

"Did you, at my request, bring with you to this hearing room the books of original entry of the X Company for the years 1945 to 1947?"

"Where are they?"

"Will you please describe the books to which you have just pointed?"

On the other hand, the following is an illustration of the less skillful way of covering the same ground:

"You are John Smith, Comptroller of the X Company, 1400 New York Avenue, Washington, D. C., are you not?"

"You supervise the books of account of that company, do you not?"

"Are you also the custodian of those books?"

"Are these books here in this box the cash books and journals of the X Company for the years 1945 to 1947?"

"These cash books and journals are the books of original entry of the X Company, are they not?"

(b) *Be brief and to the point in questions.* Do not ask ten questions when one will elicit the whole answer. It is difficult to distill a succinct finding of fact from a broken, piecemeal examination.

It is a very good practice to write out questions ahead of time. Such a list of questions cannot always, or evenly usually, be followed without deviation upon the hearing. But they furnish a guide for counsel, and, in so far as they prove to be usable, they are more likely to evoke accurate answers than are haphazard questions phrased at the moment at counsel table. One needs only to read the stenographic reports of the off-the-cuff questions put to witnesses even by eminent counsel to get the full import of this suggestion. Accurate, well-worded questions produce the best results from the witness.

It should be added that the use of written questions is not practicable in the courtroom.

(c) *Don't repeat.* One clear and succinct statement of a fact is as good as a dozen in a written record; unless, of course, a number of witnesses must testify to the same fact, as in the case of a vigorously disputed fact.

(d) *Don't leave a vague or incomplete statement of fact unclarified in the record.* If the witness is vague or incomplete in an answer, question him further on the same topic until the answer is clear and complete. In courtroom practice, it may be best to skip over such lapses and try to cause them to be forgotten. This cannot be done in an administrative trial. If a fact is essential to the eventual decision, it must appear in the record in such form that a finding can be made in respect to it. There is no way to forget it or skip it. One of the important functions of trial counsel in administrative proceedings is to visualize the testimony as it will appear in the record and to make sure that no essential statement of fact remains uncertain, ambiguous or incomplete.

(e) *Carefully check off on the trial memorandum each bit of evidence as it goes into the record.* Listen carefully as the witness states the fact, make sure that he has stated it fully (ask additional questions for that purpose, if necessary), and then check it off on the trial memorandum. By

this method, counsel can be sure upon the conclusion of the hearing, without waiting for the transcript of the stenographic notes, that all the evidence necessary to his case is in the record. If the nature or size of the case is such that more than one lawyer is engaged on a side, the task of checking the testimony against the trial memorandum should be assigned to one other than the examiner of the witnesses.

2. *Rules of Evidence.* It is frequently said, and sometimes provided by statute, that the "ordinary" or "usual" rules of evidence do not apply in administrative proceedings.

There are three usual or ordinary rules of evidence: (1) evidence must be relevant to the issues involved in the case; (2) it must be competent; and (3) it must be material to a decision upon the issues. Reflection shows that these rules must necessarily apply in all adversary proceedings, whether judicial or administrative. The idea that they do not, or should not, apply is erroneous. The idea came about largely as part of a rebellion against the mass of technicalities with which the bench, the bar and the textwriters have encumbered the rules. The hair-splitting, even metaphysical, super-refinements which have become part of the law of evidence have no place in administrative proceedings. The basic rules, in their fundamental meaning, must and do apply.

Lawyers have a habit of combining the three rules in one phrase—"irrelevant, incompetent and immaterial"—and assigning the combination by rote as an objection. Actually the three rules differ and, when understood, are valuable tools in trial proceedings.

"Relevant" means bearing upon an issue in the case. Clearly, a tribunal cannot admit without restriction evidence which has no bearing upon any issue in the case. To do so would prolong the hearing until the strength or ingenuity of the lawyers became exhausted, would run the expenses to impossible amounts, would bury the facts upon which the case rested in an impenetrable maze of valueless data, and would prevent the disposition of any considerable docket. An administrative tribunal must, therefore, as a matter of necessity, deny the admission of evidence which has no bearing upon the issues before it, *i.e.*, it must admit into the record only "relevant" evidence.

"Competent" means having the nature of evidence. Many statements which a witness may make are not evidence of a fact. For example, if witness M says that he read in a newspaper that A was in town X on a certain day, M's statement is not evidence that A was there, because it is not known who wrote the article in the paper, whether the writer knew the facts, etc. Consideration for the ascertainment of the truth prevents acceptance of that sort of testimony as evidence of a fact. The simple justice of the rule can easily be demonstrated. M testifies that he sold N a book for five dollars. O takes the stand and says that N told him that the purchase was for two dollars. N does not take the stand. O could not be cross-examined about the transaction itself, because he knows nothing about it. Clearly, O's testimony could not be received as contradicting M. O's testimony is not "competent" evidence of the purchase price of the book. This is the essence of the so-called "hearsay rule" of competency. Similarly, in the case of documents, X testifies that a proffered document is a copy of a written contract. He has the original document. Simple justice requires that he exhibit the original, lest differences, inadvertent or intentional, between the original and the copy distort the fact. This is the essence of the so-called "best evidence rule" of competency.

"Material" means having weight. Evidence which makes no difference one way or the other in the decision of the case has no place in a record. Usually those facts which are relevant to the issue are material in its decision, but this is not necessarily so and there is a difference between relevancy and materiality. The latter is relative.

The sum of the matter is that the refinements to be found in decided cases and textbooks upon the admissibility of evidence are not usually applied in administrative proceedings, but the basic rules of relevancy, competency and materiality must necessarily be applied. The meaningless recitation of "irrelevant, incompetent and immaterial" is useless as an objection to the admission of evidence, but the intelligent application of any or all of the three rules in their real meaning is part of proper trial technique in these proceedings. Evidence which is not relevant, not competent or not material, in the true sense of those terms, should not be admitted to the record. Common considerations of practicalities and of simple justice dictate that such evidence be excluded. A trial lawyer should object to the admission of such evidence, not by a meaningless mumbo-jumbo but by an understood and meaningful reference to the essence of the rule which he invokes.

In an administrative proceeding the hearing officer does not always have the power possessed by a judge in respect to the admission of evidence. He has to defer decision to the agency. In that event he may receive the evidence tentatively. The trial lawyer should be very careful to have the record clear and complete, both as to the evidence involved and as to the objections to it.

3. *Cross Examination.* The necessity for cross-examination has been greatly exaggerated. If a witness has lied and opposing counsel knows it and knows what the truth is, the falsehood can sometimes but not often be developed by cross-examination. Also, cross-examination is useful in highlighting the weak or false spots in the testimony—as where counsel on cross has the witness repeat and emphasize the parts of the testimony which counsel intends later, by other testimony, to attack. But, generally speaking, cross-examination has very limited usefulness in administrative cases. Self-contradiction under cross-examination is a rarity in these proceedings.

In a courtroom cross-examination may serve a useful purpose in creating an impression, and failure to cross-examine may leave an impression that the direct evidence in invulnerable. But mere impressions are of little importance in administrative proceedings. In these proceedings cross-examination is a useful weapon only if counsel has a definite purpose in mind and has a plan into which he may fit the answers he probably will get.

The use of cross-examination depends largely upon the nature of the proceeding. If the disputed fact is one as to which observers are testifying, and if they differ as to their observations, careful cross-examination may develop the error of some, may expose the critical point of difference, or may disclose the superior opportunity or means of observation of others. For example, in a labor case the question may be company domination of a union; or in a mail fraud case the question may be the impression made upon readers by certain advertisements; or in a radio license case the question may be the nature of a community. In such cases the witnesses are people who are not experts, are not experienced witnesses, and are reciting their personal observations. If they disagree, careful

questioning often develops the truth. But usually administrative proceedings involves technical questions (such as accounting, engineering, business, finance, economics, science), and the witnesses, by and large, are people of affairs or of professional training and must be dealt with accordingly. These witnesses are usually above average in intelligence and, even if they are lying, do not fall into simple traps. They are not merely individuals who happen by accident to be at a given spot at a given time, as is the situation in the usual criminal, negligence or other tort, divorce, and similar cases in court.

If trial counsel has a definite reason for cross-examination and has a plan into which the probable answers will fit, he is justified in such an examination. One such reason is that sometimes counsel can elicit from an opposing witness helpful information which he would otherwise have to prove by some other method. If a witness presented by one party testifies, even upon cross-examination, to a fact useful to the opposite party, his testimony is quite naturally given great weight by the tribunal; moreover, such testimony usually estops dispute upon the point. Another frequent reason for cross-examination is that counsel desires to emphasize an error made by the witness. Where a witness has made an erroneous statement, which counsel knows he can destroy by other witnesses, a carefully sympathetic inquiry often brings a repetition of the erroneous statement and makes certain that no later explanation can erase it. Other valid reasons justifying corss-examination occur. But cross-examination as a mere fishing expedition, or for the purpose of badgering or embarrassing a witness, or merely in the hope that something may turn up, or to fulfill some notion on the part of counsel that he must cross-examine or else lose face, is not only useless and a waste of time but is a decided reflection upon the trial ability of counsel.

Generally speaking, what might be sought by cross-examination can be presented in better fashion by witnesses on rebuttal.

C. *Expert Witnesses*

1. *On Direct.* Much use is made of expert testimony in administrative proceedings, and these witnesses constitute a problem for trial counsel different from that presented by other witnesses.

With a few established exceptions, a witness who expresses an opinion on a subject must be an expert. The exceptions to this necessity are that (a) an officer of a corporation, member of a partnership, or owner of a business or property will usually be permitted to express an opinion upon phases of the business of that corporation, partnership, business or property without other qualifications as an expert; and (b) if the subject is one upon which laymen usually, in the ordinary course of affairs, have opinions, they may be allowed to express them, *e.g.*, the speed of a moving automobile, or the excited, nervous or other apparent state of mind of a person.

The direct testimony of an expert witness consists of four parts, (a) his qualifications as an expert, (b) the material from which he fashions his opinion, (c) the process or reasoning by which he gets from the material at hand to his conclusion or opinion, and (d) the conclusion or opinion itself.

In ordinary course the qualifications of an expert are shown by (1) his education, (2) his professional or business experience, (3) his membership in learned or professional societies, (4) his authorship of papers