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.1 PURPOSE AND SCOPE

This chapter is concerned with practices and procedures to be followed by complaint counsel in the trial of an administrative complaint before an Administrative Law Judge (hereinafter ALJ). It does not provide a review or restatement of the Commission's adjudicative rules, although much of what is discussed stems from provisions of the rules as interpreted and applied by the ALJs and the Commission. Since its primary thrust is upon the role of complaint counsel, the chapter does not discuss the ALJs initial decision, the Commission's interlocutory or final decisions, nor review or enforcement by the courts. The subjects which are treated are: (1) pleadings and related motions; (2) voluntary and compulsory discovery, admissions, sanctions; (3) interlocutory appeals, summary decisions, proposed findings, appeals, and (4) recommended forms of motions, briefs, and memoranda of law.

The chapter does not deal with tactics or strategies, nor is it concerned with substantive law, and it should be noted from the outset that matters in litigation are under the general supervision of the appropriate Bureau Director. Attorneys are advised to review available manuals, texts, and other materials, and to consult with their supervisors and associates, for guidance in these areas. Regarding the conduct of litigation of administrative complaints, there is no substitute for thorough knowledge of the rules of evidence and of the Commission's adjudicative rules, and for keeping abreast of the construction and application of these rules by the Commission and the ALJs (see .8 below). A section of this chapter concerns recommended standard forms for use in trial. Certain aspects of each form are mandatory, such as the citation of the rule under which a motion is made (in accordance with internal Commission policy); Rule 3.22 for the general authority for motions, and specific rules for those which are specially authorized. The purpose of the citation of the rule in the first paragraph of a motion is to enable the Commission's word processing system to properly index the motion. It has no substantive or "due process" connotation or purpose.

Attorneys are advised to examine carefully the typical ALJ orders in Illustration 4. These orders relate to the initial phases of discovery and indicate very clearly the state of readiness for the pretrial stage which should be reached by the time the orders issue. Much of this preparation should have been accomplished in conjunction with the drafting of the complaint (see OM Ch. 4.14.5 re complaints). It is the policy of the Commission that to the extent practicable and consistent with the requirements of law, adjudicative proceedings shall be conducted expeditiously. The ALJ and counsel for all parties must make every effort at each stage of a proceeding to avoid delay. Complaint counsel should become aware of the legal support services which are becoming available for facilitating and expediting all types of Commission proceedings, including litigation. (See OM Ch. 18 re support services).

.2 GENERAL NATURE OF COMMISSION'S ADJUDICATIVE PROCEEDINGS

Adjudicative proceedings are those formal proceedings which are required by statute to be determined on the record after opportunity for an agency hearing. The term does not include negotiations for the entry of consent orders, investigational hearings as distinguished from proceedings after issuance of complaint, or hearings for the purpose of inquiring into the manner and extent of compliance with outstanding orders. (For a definitive statement of exclusions from the term "Adjudicative Proceedings," see Rule 3.2 of the Commission's adjudicative rules). Since this chapter is concerned only with Administrative Litigation, it does not cover court proceedings (see OM Chs. 11 and 13).

.3 PROCEEDINGS ARE GOVERNED BY ADMINISTRATIVE PROCEDURE ACT AND COMMISSION'S RULES OF PRACTICE

Adjudicative proceedings are governed generally by the provisions of the Administrative Procedure Act, Subchapter II -- Administrative Procedures -- of Chapter 5 of Title 5 of the United States Code and, specifically, by Rules 3.1 to 3.72 and 4.1 to 4.7 of the Commission's adjudicative rules (hereinafter "Rules") which comport with the requirements of the Act. The Commission has held that its ALJs may, as a matter of discretion, apply the procedures set out in the Manual for Complex Litigation when warranted by the facts and otherwise consistent with the Commission's rules.

.4 ALJ PRESIDES OVER PROCEEDINGS

Ordinarily, the first order in an adjudicative proceedings is issued by the Chief ALJ, designating an ALJ to preside over the proceedings. (For a general statement as to the ALJ's duties and powers, see Rule 3.42.)

.5 CONDUCT OF COUNSEL

.5.1 IN GENERAL

Rule 4.1 governs appearances of counsel in adjudicatory proceedings. The conduct of counsel, Commission and respondents, must conform to the ethical standards required of practitioners in federal courts and by the bars of which they are members (Rule 4.1(e)), and to the Code of Professional Responsibility of the American Bar Association. As employees of the Commission, complaint counsel are also bound by the standards of conduct set out in Part 5 of the Commission's Procedures and Rules of Practice.

.5.2 CONTACTS THROUGH COUNSEL

Commission counsel should contact respondents and witnesses only through their duly authorized counsel, when counsel have filed a notice of appearance with the Commission on behalf of respondents, or when written notice of the representation has been given complaint counsel on behalf of witnesses represented by counsel. Counsel representing a corporate respondent or witness is not by that fact to be recognized as counsel for an employee of the corporation unless the employee is an officer. However, it is customary in Commission practice to contact counsel for a corporate respondent or witness prior to dealing with employees of the organization. (For further discussion of this subject see .13.6.3.4 below.)

.5.3. CONTACTS WITH MEDIA

Complaint counsel, or other employees of the Commission who are engaged or assisting in the trial of a complaint, should refrain from commenting on the case in public media or other forums. This would not preclude references to matters of public record, such as, recitals without characterization of a complaint or publicly available information about the status of the proceeding. Any requests from the media should be referred by complaint counsel to the Commission's Office of Public Information. (For a more general treatment of this subject see OM Ch. 17.2.5 and, as to complaint counsels' responsibilities as custodians of materials gathered during the investigation and litigation stages, see .13.6.4.3 below.)

.6 ADMISSIBILITY OF EVIDENCE

The admissibility of evidence in a Commission proceeding is governed by Rule 3.43 of the Commission's rules, e.g., relevancy, materiality and reliability are the main tests; thus hearsay might be admissible if it is reliable. However, Rule 3.40 provides for the exclusion of evidence, under certain circumstances, in advertising substantiation cases. The Federal Rules of Evidence have not been adopted by the

Commission, but can be extremely useful in persuading an ALJ in ruling on admissibility of evidence.

.7 APPLICATION OF FEDERAL RULES OF CIVIL PROCEDURE

The adjudicative rules of the Commission, as interpreted by the Commission and the courts and by ALJs during litigation, are the authority under which proceedings are conducted. However, since many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists.

.8 CONSTRUCTION OF RULES OF PRACTICE

An indication of prior interpretations of Commission rules may be found in "FTC Rules Annotated" (1975) and in the Commission's legal information retrieval system (LEXIS). Assistance in use of the system's computer is available through the Commission's Library or from the trained personnel in each Regional Office. (See OM Ch. 18 concerning legal support services.)

.9 PLEADINGS

.9.1 COMPLAINT INITIATES PROCEEDINGS

An adjudicative proceeding commences upon the affirmative vote of the Commission to issue a complaint. Thereafter, the rules concerning ex parte communications apply and case-related contact with Commissioners or with others involved in the decisional process is not permitted and all communications concerning conduct of the proceedings must be addressed or directed to the ALJ, even before a complaint has actually been mailed to or served on the respondent. Thus, for example, if a mistake is discovered in a complaint before it has been mailed, complaint counsel may not communicate the mistake to the Commission. The appropriate procedure is a motion to amend the complaint, addressed to the ALJ. (See also .11 below re ex parte communication with the ALJ.)

.9.2 STATUS OF NOTICE ORDER

The legal status of the notice order, although it has been approved by the Commission in conjunction with its issuance of the complaint, is nevertheless somewhat indefinite. In the event respondent defaults, the notice order may be adopted by the ALJ. Should respondent wish to negotiate a settlement, the provisions of the notice order will provide a basis for a consent agreement. However, after evidence has been presented, the precise terms of the notice order may become less important and complaint counsel are not bound by them. Evidence may be received at trial which bears upon the form of necessary relief, which might therefore vary from that stated in the notice order. Such evidence may be considered by the ALJ in framing an order. The order which issues at the close of trial is entirely within the discretion of the ALJ and the Commission, as supported by the evidentiary record.

.9.3 STATUS OF NOTICE OF CONTEMPLATED RELIEF

A Notice of Contemplated Relief is a memorialization of the Commission's belief that, based upon the allegations of the complaint, the relief outlined in the Notice is of the type which would probably correct the practices against which the complaint is directed. It describes generally the types of relief which should be considered.

.9.4 ANSWERS

.9.4.1 General Requirements

The requirements of the answer are contained in Rule 3.12. While there are provisions for admission answers and default, this section discusses answers which contest the allegations of the complaint. The answer must specifically admit, explain, or deny each allegation. Complaint counsel should examine the answer carefully to determine that each allegation has been so treated, identify those allegations which are admitted in order that no additional proof need be adduced; identify those which are denied so that proof may be marshalled for each such allegation; and identify those which have been factually explained in order to determine whether the explanation is sufficient and consistent with an alleged defense or is basically false or sham. Admissions in an answer bind only the admitting respondent.

.9.4.2 Denial on Lack of Information

All denials for lack of information and belief should be tested for validity by ascertaining whether the purportedly denied fact must be within the knowledge of respondent. When appropriate, complaint counsel during the prehearing stage should move to require respondent to clarify or amend the answer.

.9.4.3 Denial of Preamble Recitals

Occasionally an answer attempt to deny portions of the preamble paragraph of the complaint. Such denials to noncharging recitals may be disregarded by the ALJ since they create no issue or complaint counsel may move to strike them as sham. Complaint counsel should oppose any attempted discovery based on such denials.

.9.4.4 Affirmative Defense Based on Conclusory Statements

Particular attention should be paid to attempted pleading of affirmative defenses by conclusory statements. Rule 3.12 requires that the answer contain a concise statement of the facts constituting each ground of defense. Accordingly, a conclusory statement that the Commission is without jurisdiction over respondent or over the subject matter is insufficient to raise the defense affirmatively and is insufficient ground for respondent's discovery. Similarly, a statement that it is not in the public interest to issue a complaint or to proceed to order on the issued complaint is conclusory and an insufficient basis for an affirmative defense or discovery. Contrarily, a statement that the respondent was chartered in England, had never sold or shipped products in interstate commerce in the United States, had never transmitted business communications into the nation or across state lines nor advertised products for sale within its borders, or in any way engaged in trade or commerce with United States citizens or corporations or businesses, would appear to constitute a sufficient statement of facts on which to raise an affirmative defense of lack of jurisdiction.

.9.4.5 Challenge to "Reason to Believe"

An attempted affirmative defense occasionally raised in answers is the conclusory statement that the Commission lacked the requisite "reason to believe" at the time it issued the complaint. Aside from insufficiency because of its conclusory nature (lack of a statement of facts) the apparent purpose of the statement is to furnish a ground for discovery of the information or data which the Commission considered in determining whether a complaint should issue. However, once the Commission has resolved that it has "reason to believe," and has issued the complaint, the issue to be litigated is not the adequacy of the precomplaint investigation or the Commission's consideration of this material, but whether the alleged violation has, in fact, occurred. Accordingly, this attempted affirmative defense should be attacked with a

motion to strike both for its conclusory and its substantive natures or by opposition to discovery requests.

An affirmative defense of similar nature is that averring "lack of public interest," where a finding of public interest is a necessary factor in the decision to issue a complaint or enter an order. The defense refers essentially to triviality, i.e., the practices are so trivial that the public has no interest in their inhibition by Commission action. In the absence of a concise statement of facts demonstrating triviality, complaint counsel should move to strike the purported affirmative defense as sham and frivolous.

.9.4.6 Motion to Strike Affirmative Defense

A Motion to Strike Affirmative Defense should carefully be considered by complaint counsel both from the aspect of the defense's sufficiency and its possible use as a basis for discovery. A harmless affirmative defense might be passed over. However, if the defense is one on which respondent may predicate discovery on third parties or on the Commission, it should be subjected to a motion to strike where appropriate.

.9.5 MOTION FOR MORE DEFINITE STATEMENT

A Motion for a more Definite Statement is authorized by Rule 3.12(a). Its purpose is to aid pleading, but not to be a means of discovery. The motion is concerned with the respondent's claimed inability to answer a charge and, therefore, only reaches an allegation which, on its face, is arguably ambiguous or unintelligible. However, it is not unusual for counsel to assert ambiguity or unintelligibility in inferences they would draw, rather than in the actual language of the allegation, and to demand a recitation of each fact to be proven. Such "factual" demands are often attempts at premature discovery or to obtain prematurely complaint counsel's trial brief rather than to accomplish the proper purpose of this motion, which should be to secure clarification of the allegations. When properly resisted, such demands usually fail although the ALJ may direct complaint counsel to disclose the elements of their case (see .13 below re pretrial procedures).

A motion for a more definite statement may, however, provide an opportunity for complaint counsel to reappraise the allegations of the complaint. For perhaps the first time, an adversary has taken a critical look at the complaint and has, perhaps unwittingly, pointed up problems which may inhere in its proof. Complaint counsel may discover the presence of avoidable difficulties which may add to the burden of proof, or which needlessly complicate discovery or trial. In the event a major difficulty is discovered, the proper procedure, aside from providing a more definite statement, may be a stipulation with counsel or a motion to amend the complaint. A motion which is not directed to actual ambiguity or unintelligibility should be resisted.

.10 DEFAULT

.10.1 IN GENERAL

Default is specifically authorized in Rule 3.12(c) for failure to answer the complaint, in Rule 3.38(b)(5) concerning noncompliance with discovery orders and, implicitly, in Rule 3.42(c)(8) which empowers ALJs to rule upon procedural and other motions appropriate to an adjudicative proceeding.

.10.2 DEFAULT FOR FAILURE TO FILE ANSWER

A finding of default on the failure, refusal, or neglect of respondent to contest the allegations of the

complaint terminates the proceeding. It may be entered on motion of complaint counsel, or by the ALJ sua sponte. Commission rules do not require that notice be given respondent prior to entry of default, as is required by the federal rules. However, as in the federal rules, defaults may be reopened upon a satisfactory showing of circumstances excusing the failure. (See Rule 3.42(c)(8) authorizing the ALJ to rule on motions to open defaults.) Some ALJs, in an abundance of caution, enter an order resetting the due date for the answer and giving notice to the respondent that, in the event of failure to plead by the due date, a default will be entered. If answer has not been filed upon expiration of the reset due date the ALJ will enter the default. In most cases, the provisions of the notice order (if there is one) are entered as the final order on default. Evidence to support the complaint and order need not be introduced or any hearing held.

.10.3 DEFAULT FOR DISCIPLINARY PURPOSES

Default for disciplinary purposes is authorized by Rules 3.38(b)(5) and 3.42(c)(8). There are logical uses for the remedy. Unjustified failure to appear at hearings or conferences, refusal to produce documents, unjustified delay in making discovery, failure to answer requests for admissions within the requirements of Rule 3.32, misconduct or refusal or failure to follow ALJ orders during trial or pretrial, delay by counsel in the adjudicative process particularly when unauthorized; all of these actions by counsel may be the basis of a motion seeking entry of default with respect to the particular action or the entire cause. Although there is no requirement for notice, a motion seeking default for disciplinary purposes necessarily would give such notice.

.11 EX PARTE COMMUNICATION WITH ALJ

Rule 4.7 governs all such communications. However, a distinction must be drawn between communications which concern the merits, as distinguished from those dealing with procedural and ministerial matters such as hearing schedules. Ex parte communications touching the merits of a case are prohibited.

Exceptions are for those specially authorized procedures which are intended to be ex parte, such as applications for and issuance of subpoenas. Theoretically discussions concerning procedures are allowed. However, procedural points are often fought as hard as the substantive factual points of a case and in those circumstances, any ex parte communication with an ALJ on these matters is inadvisable.

.12 MOTIONS

.12.1 IN GENERAL

During the time a proceeding is before an ALJ, motions and answers to motions, (except for disqualification) must be addressed to the ALJ and filed with the Secretary. If beyond the ALJ's authority, they will be certified to the Commission by the ALJ (Rule 3.22). Direct appeals (see .14.2.1 below) are not addressed to the ALJ. Rule 4.2 requires that 10 copies be filed.

12.2 STANDARD FORM OF MOTION TO ALJ

A standard form is required for motions to the ALJ. (Illustration 1). Among other requirements such as addressing the motion directly to the ALJ, the opening paragraph should state the identification of counsel offering the motion, the rule or rules authorizing the motion (e.g., a motion for a more definite statement would be authorized under both Rules 3.12 and 3.22), and a concise statement of the relief sought. A good procedure is to state the motion separately, usually on one page, with a separate supporting memorandum

attached. The filling should include the number of copies required by Rule 4.2, with courtesy copies to the ALJ and for each party.

.12.3 MEMORANDUM OF LAW

The primary purpose of a memorandum of law is to give the ALJ a sound factual and/or legal basis for granting or denying the relief sought in a motion. Counsel must be prepared to advise the ALJ on the status of the law for each contested point; must state their facts and arguments concisely and forcefully; must distinguish opposing authorities; and must move for suitable relief (Illustration 2).

.12.4 PREFERRED ORDER FOR CITING AUTHORITIES

Complaint counsel's legal memoranda should cite persuasive authorities which, in descending order, are: Supreme Court opinions in Commission cases; appellate court opinions in Commission cases; district court opinions in Commission cases; Commission decisions in Commission cases. Other persuasive authorities are the court decisions in government actions enforcing the Sherman or Clayton Acts and private treble damage actions. Parallel authorities which are less persuasive, but usable generally where none of the above are in point are: Supreme Court, appellate court, and district court opinions. Two authorities which may be helpful for guidance purposes, but are not considered binding precedents, are ALJ opinions on Commission rules, and district court opinions on those federal rules which are parallel to, or were the model for Commission rules.

.12.5 ANSWER TO MOTION

An answer to a motion should be prepared with the same care and within the same limitations as a memorandum supporting a motion. Legal or factual reasons for denying the requested relief should be given, authorities carefully cited and distinguished, and a request for denial made. Rule 3.22(c) provides an opposing party must answer a motion or be deemed to have consented to the granting of relief sought in the motion.

.12.6 REPLY NOT FAVORED

Rule 3.22 (c) provides a moving party shall have no right to reply except as permitted by the ALJ or the Commission. The reply is unnecessary if the original memoranda accompanying the motion and answer discuss and distinguish opposing authorities. It should be avoided as cumbersome, dilatory, and usually unproductive. Complaint counsel may request the ALJ during the prehearing conference to establish guidelines on the filing of reply briefs. If an attempt is made to move for permission while attaching a reply to the motion, complaint counsel should move to strike any such attached reply as being contrary to the rules.

.12.7 ALJ RULING ON MOTION

For each written motion and answer, a written order will be issued. Complaint counsel should examine the order carefully, particularly the "it is ordered" paragraphs, to determine their obligations, and should also examine carefully any stated reasons to determine the general trend of the ALJ's thinking of the procedural progress of the case. It must be recognized that the ALJ has wide authority to control this stage of the preceding and generally will be supported by the Commission in the exercise of this granted discretion.

.12.8 MOTIONS TO COMMISSION

Motions to the Commission prior to appeal from the initial decision are extraordinary and are governed very strictly by the rules. For this reason, the primary element of the motion is the paragraph which indicates the rule under which the motion is brought to the Commission. Details must be given which demonstrate on the face of the motion, and without requiring additional research into the status of the case, that it is properly before the Commission, that the Commission may decide it under the rules, and that it is timely. (See Illustration 3 for the standard form of motion to the Commission, .14 below re interlocutory appeals and .25 below re appeals.) Thus, a statement that an initial decision has been rendered by the ALJ on a certain date demonstrates the motion is properly before the Commission. Counsel are advised to observe this formality, to avoid peremptory rejection of their motions.

.13 PRETRIAL PROCEDURES

.13.1 PURPOSE OF PREHEARING CONFERENCE

Rule 3.21(a) provides that in every case, one or more pretrial conferences will be called by the ALJ (either public or nonpublic as determined by the ALJ) for the purpose of considering:

(1) Simplification and clarification of issues;

(2) Necessity or desirability of amendments to pleadings, subject, however, to the provisions of Rule 3.15;

(3) A plan and schedule of discovery, and such limitations on discovery as may promote expedition;

(4) Stipulations, admissions of fact and of the contents and authenticity of documents;

(5) Expedition in the discovery and presentation of evidence, including but not limited to restriction of the number of expert, economic, or technical witnesses;

(6) Matters of which official notice will be taken and matters which may be resolved by reliance upon trade regulation rules pursuant to Rules 1.8 and 1.22(c);

(7) Such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and documents or other physical exhibits which will be introduced in evidence.

Rule 3.21(b) provides a mechanism whereby the issues in complex cases will, within set deadlines, be more precisely delineated. See Rule 3.21(b) for these procedures.

.13.2 PREPARATION FOR CONFERENCE

Complaint counsel should be prepared to make an opening statement at the first conference since Commission complaints often omit time frames, legal theories, etc., or these may not immediately be ascertainable from examination of the complaint and notice order or notice of contemplated relief. The statement should include a description of the nature of the case, the substance of what complaint counsel expect to prove, and the theory on which they seek to establish a law violation. [If some of these elements

depend on discovery, complaint counsel should so indicate.] Ordinarily, it will not be necessary that this matter be furnished in specific detail during the conference, since there will be discovery and trial briefs prior to trial. In some situations an oral outline may be adequate. The ALJ may also expect indications of the time periods involved in order that discovery may be appropriately limited. A forthright statement is essential.

.13.3 RESULTS OF CONFERENCE

Ordinarily, the ALJ will enter an order reciting the results of the conference. It will establish a plan and schedule of discovery, including limitations on discovery and such other provisions as are necessary for the proper management of discovery and, perhaps, a statement of the date on which hearings will begin. Typical orders appear in Illustrations 4A and 4B. Counsel should examine these illustrations carefully before the complaint is issued and be prepared to act quickly, on this type of order. Pretrial procedures will move very swiftly after the order is issued and any delay by counsel will appear in the record.

.13.4 AMENDMENT OF PLEADINGS

.13.4.1 In General.

Pretrial is the appropriate stage to move for amendment of pleadings, particularly of the complaint, Rule 3.15. Amendments are permitted by the ALJ if they are reasonably within the scope of the original complaint. They should not be used for minor details without first attempting to obtain clarification during prehearing conferences, since amendment is not ordinarily treated as a routine procedure. However, in appropriate cases, and in matters of some importance, amendment should be sought.

.13.4.2 Express Amendments

Express amendments are those in which the pleading, that is, the complaint or the answer, is reformed on its face. As noted earlier, the amendment may be ordered by the ALJ only it reasonably within the scope of the complaint as issued by the Commission. In practice, this means that the ALJ may permit an elaboration of, or technical corrections to the practices alleged in the complaint. The ALJ's authority to order amendments does not extend to adding or deleting parties. [The best recent case on amendment of complaints is Capital Records, Inc., et al., 58 F.T.C. 1170 (1961). This decision was somewhat narrowed in a few subsequent cases, but was again affirmed in Fisher Foods, Inc., et al., Dkt. No. 9062, interlocutory order, March 17, 1976.1

Pursuant to the FTCA and other statutes it enforces, the Commission is required, before issuing a complaint, to find reason to believe that a person, partnership, or corporation has engaged in a law violation. Since this authority is reserved to the Commission, any amendment which proposes to add entirely unrelated charges, or to substitute, add, or change a party respondent, must be addressed to the ALJ with a request for certification to the Commission for its determination. A mere correction in the name or title of a respondent does not go beyond the ALJ's authority, but anything which touches the "reason to believe" must be referred for exercise of that discretion by the Commission.

.13.4.3 Implied Amendments

Implied amendments generally occur during trial. In a trial in which both complaint counsel and respondents try the merits or an issue not directly raised by the complaint, it may be deemed that the complaint has suitably been amended and the issue may be considered in subsequent decisions and appeals.

(See Rule 3.15(a)(2).) However, in instances of substantial variance, it is appropriate to move for amendment or the complaint to conform to proof.

.13.5 MOTIONS TO STRIKE AND ALTERNATIVES

Motions to strike are sometimes useful during the pretrial phase of a case. Such motions may correct pleadings and may discourage delay or dilatory tactics by counsel. However, a motion to strike is a sweeping remedy and should not be resorted to without first considering alternatives, e.g., motions to clarify ambiguous or equivocal language in pleadings. On a motion to strike, an ALJ may instead grant an order requiring clarification. Unless the substance of a pleading or other action is insufficient in law, an order to strike includes leave to amend or to plead over.

.13.6 DISCOVERY

.13.6.1 In General

Discovery after complaint is limited to the complaint's allegations, to the proposed relief, or to the defenses of any respondent (Rule 3.31). Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions (Rule 3.33); written interrogatories (Rule 3.35); production of documents or things for inspection and other purposes (Rules 3.34 and 3.36); and requests for admission (Rule 3.32). Unless the ALJ orders otherwise, the frequency or sequence of these methods is not limited. To the extent that post-complaint discovery involves information or documents located in foreign countries, the liaison and notification requirements of OM Ch. 3.1.3.7-.9 apply.

.13.6.2 Scope of ALJ Authority Over Discovery

Discovery in Commission cases is closely supervised by the ALJ, whose power to control this phase is almost plenary. ALJs possess and exercise, for example, the power to limit discovery as to certain time periods and geographical areas, to modify subpoenas or orders for depositions or other discovery devices, to rule on issues arising during the taking of depositions or the returns on subpoenas, and to cut off discovery by either party when it wanders too far afield. objection to such exercise of power may be disposed of by a statement on the record that the ALJ will permit further discovery in the desired direction when and if a need is shown. This procedure has been upheld on appeal as a proper exercise of authority. ALJs may encourage the parties to agree to procedures that will expedite the proceedings and issue orders that reflect their undertakings. While ALJs do not have the "contempt" powers of district court judges, they do have power to impose sanctions as a consequence of failure to comply with their orders (see Rule 3.38), and to find default on disciplinary grounds, as discussed in .10.3 above.

.13.6.3 "Voluntary" Stage of Discovery

Discovery ordinarily starts with a "voluntary" phase, during which the parties are urged to comply with their adversary's requests for information and documents. This may be followed by a compulsory phase where necessary. At an early prehearing conference, the ALJ usually schedules the dates on which counsel for each side must turn over a list of witnesses, a list of exhibits which will be introduced and, although less frequently, counsels' trial briefs. At that early stage, or later, counsel may also be required to turn over to opposing counsel a list of intended expert witnesses, with notation as to documentation and bibliography on which they rely, and their respective curricula vitae. Based upon agreements or understandings reached during a pretrial conference, the ALJ may require counsel for one or both sides to turn over specific types or items of evidence sought by the other side. In particular, complaint counsel may not agree to turn over

nonpublic Commission minutes, Commissioner circulations, or similar documents prepared by the Commission or an individual Commissioner, or documents prepared by the Office of the General Counsel. Complaint counsel should not hesitate to enter any such agreements calling for the turnover of confidential materials such as interview reports and the like, but must exercise caution with respect to sensitive materials (see also, .13.6.4.3 below). Complaint counsel must be aware of these requirements and prepare to meet their turnover obligations without delay. It is foreseeable, during the prehearing or trial stages, that the ALJ may cut back on the number of experts and other witnesses to be called in order to avoid mere cumulation of evidence.

A typical voluntary discovery may involve the following steps: The ALJ enters an order authorizing one or both parties to make written requests upon the other for the delivery of certain documents, in general categories, to be delivered "voluntarily" within a limited time period. The order may specify simultaneous or consecutive discovery efforts.

Complaint counsel write the necessary letters to respondent's attorney seeking those documents in respondent's possession which tend to prove the allegations of the complaint and are within the scope of the turnover order. Such letters should specifically instruct recipients to indicate when responsive material has been withheld based on claims of privileges or the like. For further discussions of the procedures which must be followed to assert such claims, see OM Ch. 3.3.6.7.5.4. Counsel seek interviews with employees and officers of respondent to identify not only the probative facts within their knowledge, but any further documentation which should be sought by letter. Counsel, by written request, seek the further documentation, and after examination of documents submitted, such further production of documents as may be indicated. In this process, a suitable record is kept of documents, information, or interviews falling within the scope of the ALJ's order, which were refused by counsel for respondents.

6.3.1 Exchange of Exhibit Lists

A list of exhibits is required to be filed in advance of trial and usually near the close of discovery. (See .17 below re marking of exhibits and Illustration 13, which includes a form of motion to receive the list into the record as an exhibit of convenience.)

The mere listing of an exhibit does not require its use at trial. However, documents should not be listed unless counsel intends to use them as evidence in the proceedings. The exhibits should be identified by the number and the title of the documents or other adequate characterization. Lists are "penultimately" final; i.e., it may become necessary to add other documents, but not a great number. Counsel should make an effort to submit "final" lists in the first instance. Ordinarily, the documents identified on the exhibit list must be made available to respondent's counsel to complete discovery for the trial. However, if the listed exhibits are copies of numerous documents originating in the respondent's files and records, proper identification of and access to the exhibits may be deemed adequate by the ALJ and copies need not be furnished.

.13.6.3.2 Exchange of Witness Lists

Witness lists must be prepared showing the names and addresses of all witnesses counsel expect to call, with such additional information, whether in summary or detailed form, as may be ordered by the ALJ. Forms indicating the manner of preparation of such lists are provided (Illustration 14).

The list must be turned over to respondent's counsel within the time ordered by the ALJ.

.13.6.3.3 Witness Interviews - by Respondent

Notification may be given prospective witnesses that complaint counsel have turned over their names to respondents, in accordance with an order of the ALJ, and that respondent's counsel may seek interviews with them. The permitted notification is limited. See United States v. IBM, 415 F. Supp. 668 (S.D.N.Y. 1976).

.13.6.3.4 Witness Interviews - Complaint Counsel

Interviews with respondent's witnesses may be obtained, but care should be taken that complaint counsel is contacting a witness and not a party. For definition purposes, it may be considered that an officer of a respondent corporation is a party, although not formally named as such, while an employee of a respondent is not a party unless so named. Thus, contacts with officers of a corporate respondent should be made through respondent's counsel, in accordance with the Code of Professional Responsibility, and contacts with a nonrespondent employee may be made directly. If the employee or any witness is represented by counsel, contacts should be made through that counsel. Again, it is emphasized, an attorney representing a corporate respondent or corporate witness is not by that fact to be necessarily recognized as attorney also for individual employees (as distinguished from officers) of that corporate respondent or corporate witness. However, it is customary in Commission practice to work through such attorneys.

.13.6.4 Compulsory Stage of Discovery

.13.6.4.1 In General

Since the more difficult discovery issues are not always resolved during the voluntary phase, recourse to compulsory process follows in the usual course. The ALJ's order may, depending upon the circumstances, permit immediate compulsory process upon the direct refusal to produce, or permit interviews on a voluntary basis, or it may call for the termination of the voluntary stage by a stated date.

During the compulsory stage, complaint counsel should apply for all necessary depositions and subpoenas duces tecum of respondents and third parties. Where appropriate, complaint counsel should request the ALJ to supervise the returns. (During this period complaint counsel, if they have not done so previously, should ascertain what admissions of fact may be requested of respondents under the admissions procedure discussed in .13.7 below.)

.13.6.4.2 FOIA Requests Not Under Discovery

Freedom of Information Act requests are not properly directed to the ALJ. They should be made instead to the Secretary of the Commission, properly identified as FOIA requests, and processed through the prescribed authorities and appeals (See Rule 4.11). FOIA requests are acted upon within specified time limits and appeals from Commission decisions can be taken by suit in the district courts.

However, in the event of a request for materials in a case in litigation, complaint counsel must examine and provide any disclosable document to the Secretary or the staff members assigned to such matters. (For a full discussion of FOIA Procedures see OM Ch. 15.)

.13.6.4.3 Responsibility for Case Files.

Complaint counsel are custodians of the case files and records, which include all materials obtained during investigation and litigation, and are thus responsible for their safekeeping and proper disposition. They are bound by Commission rules concerning unauthorized disclosure of the file's contents, e.g., copies of the material are not available to the press or the public. Complaint counsel are authorized, under Rule 3.43(c), to utilize and disclose the contents for purposes of the litigation. They may, for example, make necessary disclosures to an expert witness and may also turn over materials such as "Attorney Work Product" or "Jencks" statements (see .13.6.4.5 and .13.6.4.6 below) to respondent's counsel upon order of the ALJ. There is no obligation on the part of complaint counsel to resist any such order where sensitive materials are not involved.

However, complaint counsel must make a very careful judgment with respect to a turnover order and should exercise caution with respect to any agreement reached during the voluntary stage upon which any such ALJ order may be premised. This is particularly the case where a "voluntary turnover" would not be consistent with Rule 3.36 which, the Commission has held, was "designed to protect sensitive information" from disclosure, absent an adequate showing of need (Bankers Life and Casualty Co. Dkt. No. 9075; Order Granting Application for Review, 12/20/76). Since a voluntary turnover would not require the showing provided for by Rule 3.36, complaint counsel should insist that any demand for sensitive material (but not, e.g., routine interview reports and the like) be made through application for subpoena pursuant to Rule 3.36. Except where a protective order would be appropriate (see .13.6.6 below), resistance to the order must be by way of a motion to limit or quash a subpoena (see .13.6.4.7.5 below), or by an interlocutory appeal (see .14 below). While the Commission will not interfere with the exercise of discretion by an ALJ unless there has been a clear abuse, it may nevertheless entertain a direct interlocutory appeal, and it may, sua sponte, stay the subpoena return or review the order under Rule 3.23(a).

.13.6.4.4 Custody Over Other Files and Records

The Secretary of the Commission is the custodian of all other Commission records, except for the personal files of the individual Commissioners. Access to confidential materials in these records and files may be obtained only by application to the Secretary under the prescribed procedure set out in Rule 4.11. Materials under the Secretary's custody and control, and which are public, can be obtained by any person, including litigants, and complaint counsel are not required to obtain them for respondent either on request or in response to a subpoena. This includes the sometimes voluminous materials assembled for trade regulation rule proceedings once they have been placed on the public record, even though the proposed rule pertains to practices alleged in the complaint which complaint counsel are prosecuting. Public records are defined in Rule 4.9 and confidential information is defined in Rule 4.10.

.13.6.4.5 Interview Reports and Other Attorney Work Product

The ALJ has practical authority under Rule 3.42 to issue such orders as may be appropriate for supervising discovery. Such rulings concerning otherwise privileged documents may sometimes go beyond the law pertaining to privilege. Material in the file, such as interview reports and other "attorney work product," are ordinarily exempt from discovery under Hickman v. Taylor, 329 U.S. 495 (1947), and Commission decisions. However, this is not an unqualified privilege and, should an ALJ conclude that the evidence contained in the attorney work product is not reasonably available from other sources, counsel may be ordered to turn over an item of attorney work product. (See .13.6.4.3 above and .13.6.4.6 below.)

.13.6.4.6 "Jencks" Statements

The Jencks Act (18 U.S.C. § 3500) provides that a defendant in a federal criminal prosecution is entitled to

see a witness's prior statements, as defined in that act under certain circumstances. The Commission has determined in effect to apply this statute to its adjudicative proceedings. Under case law, there is no duty to turn over to opposing counsel any statement containing a witness's verbatim or substantially verbatim statements until the close of direct examination, and if the witness does not testify at all the duty does not arise. For a quick review of case law bearing on the underlying rationale and implementing procedures for applying the Jencks Rule in Commission cases, see Star Office Supply Co., 77 F.T.C. 383, 447-454 (1970). USLIFE Credit Corp., Dkt. 9057, pp. 25-32.

The staff is under no obligation to retain rough notes or other product of witness interviews, unless: (1) the notes or other nonverbatim written account of the interview is approved and signed or initialed by the interviewee, or the interviewee states explicitly and unambiguously that he adopts or approves the written account; or (2) the product of the interview is a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the interviewee and recorded contemporaneously with the making of such statement. If either of these requirements is satisfied, the notes or other product of witness interviews should be preserved whether or not the information in them is later incorporated into an interview report.

The question of whether any particular material preserved must be made available to respondents under the Jencks Act principle, as adopted by the Commission, is reserved for determination in the first instance by the ALJ, and ultimately by the Commission. The question of appropriate action should material be destroyed in contravention of these instructions is likewise reserved for determination in particular cases by the ALJ and the Commission.

It should be understood that the Jencks Rule pertains to producibility of documents during trial and has no bearing upon discoverability of documents or the rights of parties during discovery. It is irrelevant to a discovery request during the voluntary stage, or to a demand during the compulsory stage, that the documents sought are Jencks statements. Thus, it may occur, during the voluntary discovery stage, that the ALJ may order "Jencks type" statements to be turned over prior to trial. As noted with respect to disclosure of Commission records in complaint counsel's custody (see .13.6.4.3 above), any such order should probably be complied with, unless there is a good reason for resistance. For example, it is conceivable that resistance could be justified if the order would impose serious disadvantage in supporting the charges, although this might not be a very strong argument. In contrast, resistance would always be justified where the interview reports pertain to matter which may, for reasons known to complaint counsel, be considered sensitive information that should not be disclosed unless and until the Commission has determined that such would be proper under the particular circumstances. When sensitive material is not involved, complaint counsel may lessen the disadvantage of an early turnover order by requesting postponement until shortly before trial begins. The request, if reasonable, will ordinarily be granted by the ALJ.

.13.6.4.7 Subpoenas

.13.6.4.7.1 In General

Subpoenas are authorized under Rule 3.34 to obtain evidence for Commission proceedings. A subpoena ad testificandum, which is used to secure the appearance of a witness at a stated time and place in order to testify either at a deposition or a hearing, must be signed by the ALJ. A substantial portion of each Commission case is based upon documentary evidence produced under compulsion through subpoenas duces tecum, and problems stemming from reluctance and resistance associated with this type of subpoena are not at all uncommon. The subpoena duces tecum is discussed immediately below. In addition to

calling for returns at depositions and hearings, this type of subpoena may also call for production of documents at a prehearing conference. (See Illustration 6 of this chapter for a sample subpoena duces tecum and also see OM Ch. 18.11.2.2 for procedures and illustrations of subpoenas, forms and accompanying letters.) (See also OM Ch. 3.3.6.7.5.4 for instructions regarding the drafting of subpoenas to require recipients to assert claims for privilege when withholding responsive material.)

.13.6.4.7.2 Policy re Subpoena Directed at Public Agencies

Before a subpoena is directed at any federal or state agency for production of documents or testimony of employees, complaint counsel should first attempt to secure production or appearance by voluntary means. Where issuance of compulsory process may involve sensitive questions of intergovernmental relations (because of the person or issues involved), the General Counsel's Office or the appropriate liaison officer may be consulted (see OM. Ch. 14). Rule 3.36 governs applications for such subpoenas and Rule 3.23(a) permits a direct interlocutory appeal on the ALJ's rulings with respect to such applications.

.13.6.4.7.3 Tests for Subpoena Duces Tecum

There are three tests for every subpoena duces tecum: is it definite, is it relevant, and is it reasonable. " Definite" refers to the language of the subpoena; it must identify the kind of documents to which it refers. "Relevant" refers to the relationship between the documents sought and (unlike an investigational subpoena) the allegations of the complaint. The documents must in some manner prove, tend to prove, or lead to proof of the allegations. Finally, "reasonable," means, in essence, that the specifications of documents to be produced are not unduly burdensome. This last test of burdensomeness is generally the ground of contest and, as noted below, involves a balancing of interests. Briefly, the more the documents sought are critical to prove the alleged charges, the less likely it is that the amount of time or effort the respondent or witness may have to spend in providing the documents will be found to be fatally burdensome. On the other hand, as the documents sought become less clearly necessary, the ALJ, the Commission, or the courts will be likely to cut the subpoena back to reasonable limits.

Counsel are therefore advised to review carefully the specifications of their subpoenas duces tecum to assure that they meet all three tests, so that it will not be necessary for the ALJ or other authority to limit or quash them and that ultimately, if necessary, an order of the court may issue enforcing them.

.13.6.4.7.4 Application for Subpoena Duces Tecum

Application must be made to the ALJ for issuance of a subpoena duces tecum. The application must identify the documents sought in general terms, must show the general relevancy of the material sought, and must show the reasonableness of the scope of the subpoena. Rule 3.34 specifies the requirements.

Rule 3.35 authorizes application ex parte, subject to the discretion of the ALJ, who may order the applications to be made on the record. All ex parte applications must be titled ex parte and filed with the Secretary who will send them directly to the ALJ. Some ALJs tend to place all applications on the record; some will place a few of them on the record when they believe a good cause exists; others tend to follow the wishes of counsel making the application. In any event, complaint counsel should keep in mind that any application may be placed on the public record. (See Illustration 5 for form of application and Illustration 6 for form of subpoena duces tecum and OM Ch. 18.)

.13.6.4.7.5 Application for Subpoena of Commission Documents or Testimony

An application by respondent for subpoena to procure testimony or documents from Commission employees must be made in the form of a motion and filed in accordance with Rule 3.22 and meet the special requirements set forth in Rule 3.36. Complaint counsel have certain duties with respect to such applications, including a determination of whether the application and subpoena tend to invade the confidentiality of Commission records and to reach sensitive information (See .13.6.4.3 above.) If such is the case, complaint counsel should resist the application on that ground, by way of motion to limit or quash, unless, under the particular circumstances, a protective order would suffice (see .13.6.6.1 below). Further, if an adverse ruling is made to such resistance, the question may be appealed to the Commission directly, without a certificate of the ALJ, in order to protect the Commission's records. (See Rule 3.23(a).) Except where an overriding reason is thought to exist, an ALJ will not ordinarily authorize a subpoena which seeks confidential Commission records, particularly of the type upon which the Commission relied in determining whether to issue the complaint.

.13.6.4.7.6 Application for Third Party Subpoenas

Another class of subpoenas duces tecum is that directed to third party witnesses. Third party witnesses may be understandably reluctant to become involved in administrative proceedings. Nevertheless, complaint counsel have the duty and respondent has the right to obtain all necessary testimony and documents to prosecute or defend the action.

If a third party subpoena to a competitor of a respondent calls for information, the exchange of which between competitors in other circumstances might entail a risk of anticompetitive action, complaint counsel should consider suggesting an appropriate protective order concerning disclosure and use of the information. (See .13.6.6.2 below and Illustration 8.)

.13.6.4.7.7 Standing of Counsel for Subpoenaed Third Parties

Attorneys for third party witnesses have standing to appear before the ALJ in a Commission proceeding to move to quash or limit the third party subpoena as well as to move for a "Mississippi River," or other type of protective order (see .13.6.6 below) or for in camera status for any exhibits produced under the subpoena. (See Rule 3.45.)

.13.6.4.7.8 Compensation for Subpoenaed Third Parties

Third party witnesses may move for recompense to cover the cost of producing voluminous records in response to a subpoena. When appropriate, the ALJs have entered such an order; in such event, the proponent of the subpoena must tender payment.

.13.6.4.7.9 Subpoena Calling for "All Documents".

The most important parts of the "Definitions" and "Instructions" in a subpoena are the definition of "All Documents" used in the specifications, and the instruction that the required documents should be mailed to complaint counsel at a particular time prior to the return date of the subpoena. (See Illustration 7.) "All Documents" is a phrase designed to procure for counsel the materials pertinent to the proof of a particular allegation. It generally has the broadest possible definition in order that no form of documentation will be overlooked. However, in practice it is advisable to provide an alternative in the subpoena specifications themselves which will reduce the number of documents to be produced and analyzed. A specification may require "All documents, or such documents as will show"; or "All documents, or in lieu thereof a tabulation

which will show"; and the like. Some attorneys prefer to list the alternative, or its variations, in a footnote to the subpoena specifications and then mark individually with an asterisk those "All documents" phrases for which the alternative may be used.

A portion of the definition of "documents" in Illustration 7 refers to system documentation and data, numeric or textual, in machine-readable form. The terms are broad enough to include not only computer tapes and discs, but also microfilm records readable by machine, and the underlying description of the methods by which data has been entered on, maintained, and may be recovered from the tapes or discs. When the documentation and data are produced at the time of subpoena return, it is advisable to require the company's Data Processing Manager to appear and testify concerning the operation of the systems, the methods of search, and the screening of the data, if any. Assistance of a computer expert in the Commission's Information Systems Division should be sought for the subpoena return. other experts in the division can assist in analyzing and researching the data after it is produced.

.13.6.4.7.10 Informal vs. Supervised Subpoena Returns

An informal return on the subpoena can be secured by including an instruction which specifies a date prior to the return date on which the documents should be mailed or delivered to complaint counsel. Enough time should be allowed prior to the return date to permit a thorough examination of the documents being provided under the subpoena. Upon receiving the documents, they should be examined carefully to determine whether there has been complete compliance. If necessary after the preliminary examination, counsel should move prior to the return date for ALJ supervision of the subpoena return at a prehearing conference requested for that purpose. However, it may be inadvisable to seek an informal return if there has already been a period of voluntary discovery, since it may provide only an additional opportunity for delay of the discovery process.

.13.6.4.7.11 Formal Return on Subpoena

A motion for a prehearing conference to accept return on a subpoena may be appropriate. The conference hearing provides an opportunity for complaint counsel to determine the adequacy of the search for documents called for by the specifications of the subpoena, and to determine the justification for any withholding of documents which have not been produced.

The terms of the subpoena require a corporation, or a named or described individual, to appear and testify and bring documents. The individual appearing under the subpoena at the prehearing conference should be sworn and subjected to interrogation concerning the return. Among the points which may be appropriate for probing at this stage are the following: who conducted the search for the documents; what method was used in the search; what files were searched; were there other files which were not searched; what files were excluded and why; how are the files and records designated; how long are files maintained; when and how are they disposed of in the ordinary course of business; where are the files located; were indices used; who prepared the indices, and what method was used to prepare the indices or determine their effectiveness for this file search; is there documentation also on computer tapes or discs; what programs are used to search the computer files and were they used in this search; are both the tapes or discs and the programs produced under the subpoena; and the like.

It is important to determine the manner used to screen the documents obtained in the search to determine which would be produced: who screened the documents; what method was used, if any; how was relevancy determined and by whom; were there documents which constituted or contained evidence which were not provided and why; was a descriptive list of privileged documents prepared and by whom; is the list or the

documents available for examination by the ALJ; and the like.

The goal of the subpoena and the conference hearing is to make certain that all of the required evidence is obtained with the least amount of delay and with the least inconvenience to oneself, the person making the return and the ALJ.

If a conference hearing is required to accept the return, notify the ALJ as soon as possible that a formal return will be required and of the preferred date of return, and ask that the conference be scheduled accordingly.

.13.6.4.7.12 Determining Status of Withheld Documents

Another purpose of the prehearing conference to accept return of subpoena is to determine the status of any documents which have been withheld as privileged. (For instructions regarding the drafting of subpoenas to require respondents to assert claims of privilege when withholding responsive material, see OM Ch. 3.3.6.7.5.4.) The usual claims of privilege are the Fifth Amendment when the respondent is a natural person (see Rule 3.39); attorney-client privilege covering communications between the client and attorney, but not extending to the business records underlying such communications; attorney work product, protected (but not absolutely) under Hickman v. Taylor, 329 U.S. 495 (1947); and trade secrets or other confidential business data.

Trade secrets are not privileged solely because they are trade secrets. Respondent's attorney can protect them from public view by applying for a protective order during discovery and at trial by a motion for in camera status. The ALJ will take appropriate action to protect them when the claim is meritorious.

The method to test the legitimacy of a withholding under one of the claimed privileges is to move the ALJ to require the respondent to separately list, characterize, and describe each document and portion thereof for which a privilege is claimed. A statement that the privilege has not been waived for each document should be required. The description should indicate the authorship and origin of the document and each recipient of a copy of the document should be identified. The description must be adequate to the extent that counsel and the ALJ can determine if a privilege does or does not exist. For each document concerning which there is doubt of privilege for the whole or any part thereof, counsel should move to have the document itself submitted to the ALJ for in camera examination. The ALJ may then determine the appropriateness of the claimed privilege.

.13.6.4.7.13 Enforcement of Subpoenas

Enforcement of subpoenas for refusal to produce documents or testimony may be sought by motion to the ALJ with a request for certification to the Commission for an instruction to the General Counsel to commence an enforcement action in the courts. Complete justification must be shown in the motion. The ALJ will append any recommendation to the certification. Complaint counsel are not authorized to proceed in the courts, and ALJs cannot give instruction to the Commission's "attorney"; i.e., its General Counsel. Accordingly, the matter must be considered by the Commission. The General Counsel, who represents the Commission in court proceedings, will be appropriately instructed by the Commission.

.13.6.4.7.14 Sanctions

Sanctions, as specified in Rule 3.38, may be invoked against respondents or complaint counsel for refusal to make adequate return on a subpoena. A motion requesting that sanctions be invoked should be addressed to the ALJ, and should seek the imposition of an appropriate penalty. The specific sanction most frequently sought (and granted) is that the ALJ will infer that the admission, testimony, documents or other evidence would have been adverse to the refusing party, since this sanction has a long history in Law. Where circumstances aggravating the refusal are present, the other specified sanctions should also be sought. Rule 3.38 has not been extensively used in the past. However, its use is authorized and ALJs are tending now toward invocation of these additional sanctions in order to maintain forward progress and to prevent frustration of Commission proceedings. (See Illustration 10A for sanctions of striking answer and entering default, and Illustration 10B for establishing requested admissions as proven facts.) Discovery requests should, wherever appropriate, be trained with an eye toward facilitating the use of such sanctions in the event of non-compliance.

.13.6.5 Depositions

.13.6.5.1 In General

Deposition Rule 3.33(a) authorizes the taking and use of depositions for discovery and to preserve testimony, and Rule 3.34 authorizes subpoenas ad testificandum and duces tecum for depositions (see .13.6.4.7.1 above).

Counsel should read the deposition rule carefully since it contains limiting conditions. The two primary qualifying conditions are that the deposition is necessary for purposes or discovery, and that discovery could not be accomplished by voluntary means. Both qualifications must be treated in the application for deposition. Depositions may also be taken to prepare for cross-examination of an opponent's witnesses. (A form of application for depositions is provided, see Illustration 11, as is a format for depositions, see Illustration 12.)

.13.6.5.2 Types and Uses of Depositions

There are certain practical considerations surrounding the taking of a deposition. Since the failure of voluntary methods must appear affirmatively, except in depositions to preserve evidence (see .13.6.5.3 below), it is often inferred by ALJs that a request for voluntary interview be made of the witness through counsel, even though the witness is an officer of the respondent corporation and believes to be uncooperative. A refusal of interview is a failure of voluntary methods, as is a refusal to answer questions during an interview, although the refusal may be on advice of counsel. In these cases, the deposition is the logical solution, and all refusals should be recorded in a sworn document. It is entirely proper to ask an ALJ to supervise the taking of depositions, and it is recommended that an ALJ supervise the taking of a deposition to preserve evidence.

Although deposition on written interrogatory and cross-interrogatory is authorized, such depositions are often unsatisfactory. They depend on written semantics and a purported advance knowledge by counsel of all necessary facts. While counsel may be reasonably expected to have this degree of knowledge when the case is actually being tried, it is considerably less likely during discovery. Thus, oral depositions should be used whenever possible.

Interviews and depositions of witnesses should be used to ascertain the knowledge of the witness concerning the case, which may have inherent value either as proof, or as a lead to proof, and also to obtain documentation and leads to documentation.

The manner or extent to which depositions are expected to be used at trial should be considered at the time they are being taken. If use at trial is likely, the interrogation should be so conducted as to meet the requirements of an examination during trial. Ordinarily, discovery depositions are broad, exploratory, and wide-ranging and vary widely in content and effect. Thus, they are seldom suitable for introduction as evidence.

Depositions taken of an opponent's witnesses, if sought for impeachment purposes during trial, should attempt to elicit the witnesses' testimony by positive, direct answers. Depositions to preserve evidence are most strict in their requirements. Since these depositions will probably be introduced at trial, they must be probative of the facts to which the witness can furnish evidence.

Again, counsel are advised to read carefully Rule 3.33 and pertinent cases, and to adhere strictly to the requirements surrounding the taking and use of depositions.

.13.6.5.3 Depositions to Preserve Evidence

Depositions to preserve evidence are authorized by Rule 3.33(f) and may be used at trial if the ALJ finds the deponent is unavailable by reason of death; by absence from the United States or location at a distance which makes attendance at hearing impractical; by age, sickness, infirmity, or imprisonment; by failure to answer a subpoena; or that unusual circumstances make it desirable to allow the deposition to be used. When applying for this type of deposition, complaint counsel must be able to allege, in anticipation, at least one of these grounds to demonstrate the necessity of the deposition. At the actual taking of the deposition, counsel should notify the officer before whom it will be taken, preferably the ALJ, that the deposition transcript should be read to and subscribed by the deponent.

.13.6.6 Protective orders

.13.6.6.1 In General

Protective orders are issued by the ALJ under Rule 3.31(c)(1) to protect a party or other person from annoyance, embarrassment, or oppression, or to prevent undue delay in the proceeding. Protective orders with respect to assertedly confidential business information are issued under the ALJ's general authority in Rules 3.21 and 3.42. Such orders are issued to prevent the unnecessary disclosure or publication of information contrary to the public interest and beyond the requirements of justice in the particular proceeding. Protective orders may direct that certain testimony shall not be taken or that trade secrets and names of customers shall not be disclosed.

In general, the ALJ will issue a protective order to prevent disclosure of the commercial and financial information of a respondent or third party witness where a preliminary showing of its sensitivity is demonstrated. Such protection may be accorded to trade secrets and names of customers as well as other sensitive information which is not and should not be in the public domain. The order may control the actions of either of the parties, complaint counsel and staff, as well as respondent and staff. When the order issues, it generally names the class of persons allowed to examine the protected information and requires permission of the ALJ before additional named persons may examine it, and an affirmation by the individual that it will not be improperly disclosed. (See Illustration 9.)

.13.6.6.2 Modified "Mississippi River" Treatment

A second more rigorous protective order is the modified "Mississippi River" Treatment (Mississippi River

Fuel Corp., 69 F.T.C. 1186 (1966)), which prevents respondent, its officers, and employees, from examining documents obtained from a third party witness, even though produced in response to the respondent's subpoena. In this instance, the basic information from third parties may be examined only by respondent's outside counsel, and assistants and accountants employed by them for this trial, and by complaint counsel and their similarly-employed experts. It is applied to competitive information almost exclusively, in order to prevent the taking of undue advantage by respondent or others of otherwise privileged information. (See Illustration 8.)

Complaint counsel should be alert to detect circumstances which require this treatment and, in the absence of a motion by third party witness's attorney, should consider seeking this protective order on their own motion. The "Mississippi River" type protective order has been approved by the courts.

.13.7 ADMISSIONS

.13.7.1 In General

Requests for Admissions, authorized by Rule 3.32, are used to establish conclusively facts on the record and to limit the issues to be tried. An appropriate use of the request can restrict trial and discovery time and effort to the proof necessary to establish the disputed issues. Complaint counsel should pursue this procedure, particularly in any case involving significant or multifaceted issues.

Requests may be made at any time after 30 days from the issuance of the complaint. An early request may be used to limit discovery which might otherwise be required. Later requests are generally made when counsel have become aware, generally through discovery, of certain facts which opposing counsel must admit. This contemplates a knowledge of those facts counsel can prove, if necessary, and which opposing counsel cannot deny or refute.

The procedure is as follows: counsel files a request for admissions; answering counsel files answers or objections to each of the requests, setting forth the grounds for objection; requesting counsel thereupon moves for a determination of the sufficiency of the answers and objections (an evasive answer should be challenged in the motion); the ALJ rules upon the motion and enters an order. The effect of a well-conceived request and a satisfactory answer is to establish conclusively for the purposes of the proceeding the facts admitted. Counsel should move the introduction of the admissions into evidence at the earliest appropriate time as a cautionary measure. While this is perhaps contrary to the theory of admissions, and to the Commission practice in establishing the record of a case, some decisions under the parallel Federal Rule have indicated introduction is necessary to complete the record in those cases. Rule 3.31 requires that admission requests and answers are served by a party on any other party and one copy is filed with the Secretary (see also Rule 4.2).

.13.7.2 Types of Facts Which May be Used in Admission Requests

The most effective technique for obtaining admissions is to state the desired admissions positively, each as a single fact, and in such manner that each can be categorically admitted or denied with a minimum of qualification. (See Illustration 15.) The types and categories of facts concerning which admissions may be secured include: jurisdiction; corporate charter, organization and history; interstate commerce and its approximate amount; size of business; lines of products; channels of distribution; principal markets and perhaps dollar sales; the role (title and duties) of corporate officers, and the controls and direction of corporate affairs exercised by particular officers; the genuineness of documents originated by respondent or retrieved from its records as communications received and accepted in the normal course of business by

respondent; the accuracy of summary data based on documents (ordinarily copies must be provided); the accuracy of mathematical computations and extensions based on documents; the accuracy of tabulations summarizing contents of documents in respondent's possession or to which it has access; the accuracy of industry data extracted from official or highly regarded sources (e.g., Census, Statistical Abstract, etc.); in short, practically all facts relating to the practices alleged in the complaint and put in issue by the pleadings can be proper subjects for admission requests.

.13.7.3 Opposition to Admission Requests

Answers to admissions are governed by Rule 3.32(b). (See Illustration 16.) There are recognized objections which answering counsel may raise for determination: 1) the admission requested is privileged; 2) the request calls for an irrelevant admission; 3) the admission would be inadmissible at trial under an exclusionary rule of evidence; 4) the request attempts to cover the entire case; 5) the request concerns a matter of "opinion of law" rather than a matter of "fact" or of the "application of law to fact"; 6) the request is patently absurd; or 7) the answering party, because of insufficient knowledge, cannot determine the truth or falsity of the admission requested.

Answering counsel may not refuse to admit or deny for lack of information or knowledge unless they can state truthfully that reasonable inquiry was made and the information known to, or readily obtainable by them, is insufficient to form an answer. This rule is rigidly followed. Complaint counsel should consider a motion to determine sufficiency of answers and objections to test an answer for insufficiency. (See Illustration 17.)

An objection that the subject matter is a contention which will be disputed at trial cannot properly be raised under the rules. Counsel must deny it, and if the denial is frivolous or without good ground, the sanctions provided in Rule 3.38 may be invoked. A frivolous denial is one which denies a fact necessarily within the answering party's knowledge and known to be true.

In general, the sanctions are: decision of the proceeding against the party; an inference that the admission would have been adverse if the denial is frivolous on its face; a ruling that the denying party may not object to the introduction of secondary evidence on the matter denied. Complaint counsel should be alert to their obligation to move for sanctions (see .13.6.4.7.13 above) for any denial of facts which should have been admitted.

Rule 3.38, pertaining to sanctions, specifically applies to failures to follow ALJ orders with respect to admissions. In addition, Rule 3.32, requires answers to requests to be sworn. Thus, a false or frivolous denial of a request may subject a party to penalties for false oath or false report. The ALJ may also compel admissions on his own initiative under Rule 3.42(c)(4).

The Admissions rule requires all objections to be in writing, supported by reasons, and filed within 10 days of receipt of the request.

.13.7.4 Withdrawal or Amendment of Admissions

The ALJ may, on motion, permit withdrawal or amendment of an admission when it will aid presentation of the merits of the proceeding and the party obtaining the admission cannot show withdrawal or amendment will prejudice it in maintaining its case on the merits. (See Rule 3.32(c).)

.13.7.5 Qualified Answers to Admission Requests

Complaint counsel, in answering respondent's requests for admissions, should carefully examine each individual request to determine whether a categorical admission or denial can be made. Requests which are multifarious or which assume facts not previously admitted should be treated with qualifications or with objections in the answer, and determinations should be requested when replying to a motion to determine sufficiency. Complaint counsels' admissions, if any, should fairly meet the requests.

.13.8 STIPULATIONS

Stipulations between counsel are useful tools for establishing facts and application of law, which might otherwise be expensive or time-consuming to establish. Accordingly, where counsel are able to agree on such matters the stipulation is a preferred means of procedure. Complaint counsel are advised to have their case well in hand and their facts well under control, before endeavoring to enter into a stipulation of fact with opposing counsel. Stipulate only to facts known or shown to be true. Unwary counsel may stipulate themselves out of court. A general form of stipulation is provided. (See Illustration 18.) All stipulations must be approved by the ALJ.

.13.9 CONCLUSION OF PRETRIAL STAGE

By the time discovery has been completed and appropriate answers to requests for admissions have been received and appropriate stipulations have been agreed upon and approved, complaint counsel should consider whether to dispose of the case by motion for summary decision if there are no issues of fact remaining, or whether to further narrow or resolve the issues by a motion for partial summary decision. (See .13.11 below.) Thus, time in actual trial should have been substantially shortened by well-conceived recourse to the procedures for discovery, admissions, stipulations, and summary or partial summary decision, by the time the pretrial stage has been concluded. This is also a propitious time for serious negotiations looking toward settlement of the case by means of a consent agreement (see .13.10 below).

.13.10 CONSENT AGREEMENTS DURING LITIGATION

Proposed consent agreements during litigation are permitted under Rule 3.25. Since this chapter is concerned with litigation, it furnishes no guidance on policies and procedures to be followed in negotiation of consent agreements (see OM Ch. 6.11.1). Complaint counsel should secure whatever preapproval may be required for that type of case before executing a negotiated consent agreement. Having reached agreement on a settlement as to one or more respondents, complaint counsel and respondent's counsel should file a joint motion with the ALJ to withdraw the case from adjudication. (For a form of joint motion see Illustration 19 of this chapter or, for a shorter form, see Illustration 8 of OM Ch. 6.) At the same time, counsel must attach the executed agreement containing the consent order to their motion for transmittal to the Commission. Where the agreement executed by a respondent has been signed by complaint counsel and the appropriate bureau director, proceedings before the ALJ will be stayed as to consenting respondents. In addition, the ALJ also has authority to forward by certification a unilateral motion and agreement proffered by a respondent, even though complaint counsel opposes the motion and the proposed agreement.

In such instances, the ALJ's written determination on the likelihood of settlement and recommendations may accompany the certification to the Commission. See OM Ch. 6 for procedures after a matter has been

withdrawn from adjudication.

.13.11 MOTION FOR SUMMARY DECISION

Motions for Summary Decision are authorized under Rule 3.24. Complaint counsel are urged to study this rule, the expositions of the use of summary decision or judgment under the Federal Rules of Civil Procedure and available treatises. It is an extremely useful procedure when applied properly. By Commission case law, the jurisprudence pertaining to Federal Rule 56 applies in Commission cases. This is an exception to the general statement that the Federal Rules are inapplicable.

Review of the opportunities counsel may have to narrow issues in a case indicates the summary decision to be a culmination of authorized procedural steps. Both the answer to the complaint and answer to the request for admissions permit a narrowing of issues. The summary decision procedure permits a delineation of those facts which are established and those issues remaining to be tried.

If complaint counsel began the case with a complaint containing direct factual allegations, and thereafter requested admissions going beyond the mere genuineness of documents and reaching toward the truth of matters of fact, and finally, compelled full and complete answers where necessary, they should reach this stage of the proceeding with a good preparation for a successful motion for summary decision.

The following types of orders may be issued on a motion for Summary Decision: a grant of decision for the entire case (Rule 3.24(a)(1)); a grant of decision of the issue of liability, leaving the issue of relief for trial (Rule 3.24(a)(2)); a grant of an order specifying the facts which are deemed established (Rule 3.24(a)(5)) and, implicitly, specifying the issues remaining for trial.

A form of a motion for summary decision is provided. (See Illustration 20.) The motion itself is not difficult. However, it must be supported with documentation, or, if opposed, resisted with documentation.

The following documents may be attached to the motion to support its contentions: affidavits, stipulations, admissions, pleadings, depositions, transcripts of investigational hearings, answers to interrogatories--all showing that there is no genuine issue as to any material fact sought to be established.

If it is a Motion for Complete Summary Decision, it should have attached to it a form of order, based on the record, which is appropriate to the complaint and the facts of the case. A Motion for Partial Summary Decision may also be made to obtain determination of the issue of liability while postponing until trial the issue of remedy. Both motions should contain a prayer for such other and further relief as may be merited. If the ALJ denies the motion, or grants less than the relief requested, it is required that an order be entered under Rule 3.24(a)(5), reciting those facts to which there is no issue, and further specifying the issues remaining for trial. (See Illustration 21.)

The burden is on the moving party to demonstrate there is no genuine issue of any material fact. Even in the absence of counter-affidavits, the burden does not shift to the party resisting. A motion by a respondent, as well as by complaint counsel, cannot be resisted by affidavits of counsel, except in unusual cases, since counsel's statements would generally not be admissible. Affidavits must be those of the person having direct knowledge of the facts. Counter-affidavits must be filed except in unusual cases.

It is a defense to the motion to show that a genuine issue of material fact does exist, or that the moving party is not entitled to judgment as a matter of law, or that the time necessary to procure counter-affidavits or evidence would unduly delay the trial.

.13.12 MOTION TO DISMISS

Motions to Dismiss are permitted under Rule 3.22 and, particularly if filed after there is a substantial trial record, should be given very serious consideration. The important aspects of Motions to Dismiss are: whether they are grounded in facts of record, proven facts, unproven allegations of facts or suppositions of facts. Facts of record and proven facts are valid bases for such motions; other categories are not. Such motions are ordinarily of little merit if made during pretrial because relatively few facts are established on the record at that stage of the proceeding.

Motions to Dismiss, because of the peculiar nature of Commission discretion under the terms of the FTCA, are often used for diversionary tactics. These motions are sometimes accompanied by a motion to stay the proceeding in order to procure delay, and may merely serve to multiply the issues in litigation without adding substantially to the proper disposition of the case.

ALJs are limited in their authority to rule on a Motion to Dismiss (see .15 below). An ALJ may rule on a motion which challenges the legal power of the Commission. However, one which challenges the discretion of the Commission is beyond the ALJ's power to decide and must be certified. Numerous cases emphasize these points.

Motions to Dismiss grounded on contentions that the complaint is discriminatory; that the challenged practices should be dealt with on an industrywide basis; that there are changed circumstances such as discontinuance of a business or a practice; that Commission or court proceedings involving the same questions are pending; that new legislation has been passed or other governmental regulations relating to the subject matter of the complaint exist; and finally that the proceeding is barred by collateral estoppel or res judicata: all are affirmative defenses which must be pleaded in the answer and proven at trial.

Accordingly, complaint counsel should analyze any pretrial Motion to Dismiss to determine whether the respondent's allegations in support of its motion are actually affirmative defense allegations which should be included in the answer. If the motion is filed with affidavits or other evidence attached, it may actually be a motion for summary decision subject to the requirements of Rule 3.24. In these circumstances, complaint counsel should move the ALJ to disregard the title of the motion and to consider its substance. The ALJ may be persuaded that the so-called Motion to Dismiss is actually a motion to amend the answer or for summary decision. The ALJ has specific power to rule on amendments to pleadings under Rule 3.15 (see .13.4 above) and on summary decisions under Rule 3.24 (see .13.11 above). For a discussion concerning attempted interlocutory appeals where an ALJ denies a Motion to Dismiss, see .14.2.3 below.

In addition to the answer to the motion which requests the ALJ to consider the substance as a motion to amend respondent's answer, complaint counsel should, where appropriate, resist the granting of a motion to amend and resist also the legal arguments of the motion to dismiss.

.14 INTERLOCUTORY APPEALS

.14.1 IN GENERAL

Interlocutory Appeals to the Commission are authorized by Rule 3.23 and, whatever their grounds, have certain things in common. The application for review must not exceed 15 pages in length and must be filed within 5 days of notice of the ALJ's order being appealed. The answer to the application must be filed by the opposing party within 5 days of receiving the application. Beyond that, substantial differences exist in each type of appeal.

.14.2 TYPES OF INTERLOCUTORY APPEAL

The three types of interlocutory appeal are: 1) the direct appeal, 2) the appeal by permission of the ALJ, and 3) the appeal without permission, usually by respondent's counsel, alleging an ALJ's abuse of discretion in not granting permission to appeal. The last ground is almost always frivolous and should be opposed as such.

.14.2.1 Direct Appeal

The first method, the direct interlocutory appeal, is authorized by Rule 3.23(a) and is initiated by an application filed with the Secretary and served on the opponent. It must be filed within 5 days of notice of the ALJ's order. Rule 4.2 requires that 20 copies be filed.

This appeal is available to complaint counsel on four separate grounds: 1) an order that improperly requires disclosure of Commission records or testimony by Commission personnel; 2) an order that improperly requires appearance of officials or employees from other government agencies; 3) an order that improperly suspends an attorney for misconduct; and 4) an order that improperly grants or denies intervention. (The last two grounds are also available to respondents.)

The most frequent ground, improper requirement for disclosure of Commission records or testimony of Commission personnel, may stem from the simultaneous use by respondents of a subpoena for Commission records and of a request under the Freedom of Information Act for the same information. Strict separation of the two procedures is still required and complaint counsel should remain alert to resist those ALJ discovery orders which may go beyond the proper requirements (see .13.6.4.3 above) and, occasionally, even beyond the exemptions of the FOIA.

Another often troubling ground for direct appeal is the request for subpoenas to other government officials and agencies. (See .13.6.4.7.2 above.) The necessity for and the relevancy of the subpoenaed material must be demonstrated. If respondents succeed before the ALJ, complaint counsel must consider the need for the direct appeal specifically authorized under those circumstances by Rule 3.23(a)(2) if they do not agree with the ALJ's order.

.14.2.2 Appeal Upon ALJ Determination

The second type of appeal is authorized by Rule 3.23(b) and begins with a motion to the ALJ requesting a determination in writing, with justification in support, that the ruling involves a controlling question of law or policy as to which there is a substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy. This is a mandatory prerequisite for this type of appeal and a detailed discussion of its rationale is provided in Illustration 22. Rule 4.2 requires that 20 copies of such motions be filled.

A strong statement of the facts which justify appeal must be made by counsel in this motion. A mere conclusory recitation of the words of the rule is insufficient to obtain a favorable determination. Again, counsel are urged to point to the facts in the record as it exists at that time, and to the law, pleadings, depositions, admissions, etc., which demonstrate that interlocutory review is a necessary step. Typical failures of petitions for review have included statements that litigation will be expensive either for the Commission or the respondent and for that reason interlocutory appeal should be granted. Courts almost uniformly reject that plea, as does the Commission.

.14.2.3 Appeal From Refusal to Dismiss

An appeal from refusal to grant a motion to dismiss (see .13.12 above) often constitutes an attempt to misuse the interlocutory appeal process. Complaint counsel should examine all such attempts to determine whether their opponents allege and argue facts outside the record. The duplication of "facts outside the record" is more serious in this instance, since it represents an effort directly to prejudice the Commission in respondents' favor before any trial or proof of facts has been offered and adjudicated by the ALJ. Thus, all the devices for testing truth: sworn testimony, cross-examination, and countervailing evidence, would be bypassed in an effort to convince the Commission, with mere words, that the adjudication should be discontinued in favor of counsel's representations of what the truth may be. It is entirely proper for complaint counsel to call this matter to the attention of the ALJ and the Commission.

.15 CERTIFICATION TO COMMISSION

As noted earlier, there are certain actions which can be taken only by the Commission rather than its ALJs. Chief among them is the making of administrative, rather than adjudicative, decisions. Thus, a motion to dismiss a complaint for administrative reasons, assuming it is a valid motion (see .13.12 above) must be certified to the Commission, which in the original instance made the necessary determination to issue the complaint. Any type of action which touches the "administrative" discretion of the Commission must be certified.

Another class of certifications involves proposed actions to be taken by the General Counsel in the courts. Parties or witnesses feeling burdened with broad subpoenas in actions to which they are not parties may move to quash or limit the subpoenas. Failing that, the party or witness may refuse to respond entirely or in part. In that instance, counsel should move the ALJ for certification to the Commission of a request that it instruct the General Counsel to seek enforcement in the courts. This motion must be adequately supported by the original application, the subpoena, the motion to quash, the orders of the ALJ regarding its issuance, the facts pertaining to the refusal to respond, and a showing that the materials are necessary to counsel's case. The ALJ will not make the certification unless a showing has been made that the other relief authorized by Rule 3.38(a) would be insufficient.

It should be noted that no one operating at the adjudicative level, including counsel for respondent, complaint counsel, or the ALJ, is authorized to give instructions or make requests to the General Counsel to enforce a subpoena. The General Counsel is the Commission's lawyer, and is not subject to authorities other than the Commission in cases under in-house adjudication. Therefore, when the General Counsel's assistance is necessary to obtain actions from the courts, grand juries, or prosecutors, appropriate requests must be addressed to the ALJ with a request for certification to the Commission for its discretionary instruction to its lawyer.

.16 INTERVENTION

Intervention in a Commission proceeding is specifically authorized in FTCA § 5(b) for any person, partnership or corporation, for "good cause shown." See Rule 3.14. However, it is a privilege and not a right, and requires that the following must be demonstrated: (1) the persons seeking it desire to raise substantial issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in the light of other important matters pending before the Commission. However, satisfaction of these conditions will not necessarily or automatically result in a grant of intervention.

The following additional facts will generally be considered: the applicant's ability to contribute to the case; the Commission's need for expedition in the handling of the case; and the possible prejudice to the rights of the original parties if intervention is allowed.

The exercise of discretion on a question of intervention depends on an assessment of all the facts and circumstances of a particular case, and each grant or denial will have minimal, if any, precedential value. In case of a grant or denial of intervention by an ALJ, a direct appeal may be made by complaint counsel, respondent's counsel, or intervenor, under the provisions of Rule 3.23(a). Finally, where circumstances warranting intervention are not shown the Commission may merely permit the filing of an amicus curiae brief on appeal from the initial decision.

Of more immediate concern to counsel is the effect of intervention. If it is granted, and if there is any disposition to move for withdrawal of the case from adjudication for the purpose of entering into a consent order, it is, as a practical matter, difficult to accomplish without consent of the intervenor.

.17 MARKING AND IDENTIFICATION OF EXHIBITS

The official Reporter's Contract controls marking and identification of exhibits used in adjudicative proceedings. (See OM Ch. 18.) In general, the marking of exhibits is as follows: a one page exhibit is designated, e.g., CX-1. If there is relevant matter on the back of the page, the exhibit is marked CX-1-A for one side and CX-1-B for the other side. Capital letters must be used in marking. In the event the document has many pages which are not bound together, each page and each back side of each page containing relevant matter must be numbered CX-1-A through CX-1-Z-1. Then the items are numbered CX-1-Z-2, Z-3, Z-4, Z-5, to Z-5000, as necessary.

Arrange the documents with some degree of uniformity--some system, e.g., according to subject matter or chronologically. A properly prepared mass of documents should be arranged according to the issues to which they pertain and then cross-referenced according to the names of the witnesses through whom they will be introduced.

For example, documents CX-1 through CX-85 may pertain to the issue of jurisdiction, and may be cross-indexed to the names of witnesses such as Jones, Smith, and Dale.

Each document which will be used and which pertains directly to an issue on which counsel has the burden of proof should be introduced into the case-in-chief and not reserved for rebuttal. Should opposing counsel shorten or abandon a defense on which they have the burden, withheld probative documents may become irrelevant for rebuttal purposes and the usefulness of the documents lost.

As previously mentioned (at .13.6.3 above), counsel will be required during pretrial to provide the ALJ and opposing counsel with a list of exhibits, correctly marked and characterized or identified with descriptive titles to indicate their general character. A properly prepared list may be introduced into the record, as an exhibit of convenience, solely for the purpose of identification. This procedure will save the time of orally identifying the documents in the record and will save many pages of transcript.

.18 OFFERS OF PROOF

Offers of proof are authorized under Rule 3.43(g) for excluded testimony and generally may be made in either of two forms: as a summarization (in writing or read into the record) of the testimony counsel expects a witness would give if permitted to testify, or as a reception in full of the testimony by the ALJ,

but with a ruling excluding it.

A summarization in writing of the proffered testimony should be prepared in advance when it is known that admission of the testimony is unlikely. A form containing an appropriate introductory paragraph is provided. (Illustration 23.) Both the introduction and the careful drafting of the summarization are necessary. This method is cumbersome and least satisfactory in Commission cases. At best, it may persuade the ALJ, on a motion to reconsider, to permit the witness to testify. Failing that, it is unlikely that the Commission will reverse the ALJ, since this would necessitate remand.

The reception in full of the testimony by the ALJ is the preferred offer of proof. The actual swearing, testimony, and demeanor of the witness occur in the presence of the ALJ, and the statement itself is preserved within the record in the same manner as rejected exhibits. There is then no doubt concerning what is expected to be proved by the witness. Complaint counsel should request cross-examination of the witness whose full testimony is being received under an offer of proof. Upon completion of a witness's direct testimony under the offer, and if opposing counsel declines to cross-examine, complaint counsel should immediately move the ALJ for an order compelling opponent to either cross-examine or to waive the opportunity.

Although preserved within the record, testimony received under an offer of proof is not part of the record and cannot support a finding unless ultimately received in the record upon grant of motion to reconsider the exclusionary ruling by the ALJ, or if the ruling is reversed by the Commission.

.19 REJECTED EXHIBITS FILE

It frequently occurs during trial that some exhibits are rejected for various evidentiary reasons. As required by Rule 3.43(g), all such exhibits should be adequately marked for identification and placed in a separate file for retention as a part of the record. in order that they may be examined by reviewing authority when appropriate reasons exist for such examination. Complaint counsel must keep careful note of their rejected exhibits and of the basis for their rejection since this might be cured. For example, if they are rejected as not being probative, as immaterial, or as unduly repetitious, probably very little can be accomplished with them. However, if they have been excluded on other grounds such as lack of authentication or relevance, complaint counsel should, before the close of their case-in-chief, reoffer each of the rejected documents for which they can point to testimonial or documentary evidence which establishes the authenticity or relevance of the exhibits, or which otherwise overcomes the basis of the original rejection. Rejected exhibits cannot support a finding unless ultimately received in the record by the ALJ or by the Commission.

.20 IMMUNITY PROCEDURES

Self-incrimination is a valid objection which a witness may make to the giving of testimony or to the answering of a question during an FTC hearing. (See Rule 3.39.) While we are concerned here with immunity arising during litigation, the procedures for dealing with it during the investigative stage are also pertinent here. (See OM Ch. 3.3.6.7.6.9) Immunity is usually claimed by the witness in the words: "I respectfully decline to answer for the reason that the answer may tend to incriminate me." However, that is not the end of the matter. The ALJ may question the witness to obtain reasonable indication that a criminal proceeding against the witness exists or may exist under federal or state law. If the privilege is improperly invoked, a sanction may be imposed directly by the ALJ, if the witness is a party, or may be sought by certification to the Commission of a recommendation of criminal prosecution for willful refusal to testify, as indicated in FTCA § 10.

Assuming the witness has validly claimed the privilege against self-incrimination, complaint counsel, deprived of the answer to their question, may move through the appropriate Bureau Director, or Assistant Director, or Regional Director or Assistant Regional Director, for relief under Rule 3.39(a). This is accomplished by an administrative request to the Attorney General for the issuance of an order requiring the witness to testify or provide other information and granting immunity under Title 18, § 6002, U. S. Code. If the order is approved by the Attorney General or a designee, the ALJ is authorized to issue the order and grant immunity. The Attorney General normally requests two weeks to process such a request. Complaint counsel should remain aware that they are authorized in this instance to proceed administratively, rather than adjudicatively through the ALJ, and, of course, to act ex parte.

In the case of respondent's counsel seeking similar relief, the procedure is slightly different: they must proceed through the ALJ by an ex parte request for issuance of an; order and grant of immunity, as outlined in Rule 3.39(b). It also requires the approval of the Attorney General or a designee.

.21 PROVISION OF COUNSEL FOR INDIGENT RESPONDENTS

The Commission has issued a policy statement concerning the provision of counsel for individual indigent respondents as follows:

POLICY STATEMENT

"If, at any time following the issuance of a proposed complaint, a request for counsel on the grounds of indigency is made by a natural person or partnership, the Commission shall immediately assign an Administrative Law Judge for the purpose of making findings on the indigency claim. The Administrative Law Judge shall furnish the claimant with the Statement of Financial Status form, a copy of which is attached hereto,* shall require its prompt execution, and may conduct such interrogations of the claimant or require the production of such documents as he deems necessary in order to make findings on the claimant's alleged financial inability to retain counsel. Such findings shall be promptly forwarded to the Commission which shall then rule on the claim on the basis of the claimant's financial condition, including his present and potential income and assets in relation to his existing obligations to provide himself and his dependents with the necessities of life.

If the Commission concludes that the claimant is financially unable to retain counsel, the matter will then be referred to the Committee on the Federal Trade Commission of the Antitrust Section of the American Bar Association for the designation of counsel from a panel of attorneys screened by such Committee as competent and available to represent respondents in Federal Trade Commission proceedings. Claimant shall thereupon have the option to accept the services of said designated counsel or to appear pro se in any subsequent proceedings."

*The Statement of Financial Status is Form FTC 6-49.

.22 WITNESS VOUCHERS

Witnesses, in general, are entitled to payment for their time, subsistence and mileage when called to testify in a Commission proceeding. See OM Ch. 18 for procedures and standard forms for payment of witness fees. Respondents must make their own arrangements for payments to witnesses called by them.

A supplementary form of payment for witnesses is available in the Bureau of Consumer Protection. That

bureau uses an advance authorization and agreement on fees which conforms to the rules of Budget and Finance. It is intended for use only with voluntary witnesses. Complaint counsel are advised to bring out on direct examination the existence of such a contract and the fees involved. For necessary witnesses, complaint counsel must obtain the issuance of a subpoena.

.23 EXPERT WITNESS FEES

Expert witnesses may be retained by complaint counsel through the use of a consultant's contract. The entire step-by-step procedure is outlined in Chapter 5 of the Administrative Manual. Also see OM Ch 18.9.2 and 18.11.4. There is a limit to expert witness fees and complaint counsel must stay within that limit when using these procedures.

.24 PROPOSED FINDINGS

.24.1 IN GENERAL

A very helpful, although somewhat generalized description of the method of preparing proposed findings may be found in the Attorneys' Manual, page 304. A more specific description is included here. A title page for proposed findings is provided in Illustration 24. Tables of contents and abbreviations are provided in Illustration 25. Forms for proposed findings and conclusions are provided in Illustration 26. Rule 4.2 requires that 10 copies be filed.

Rule 3.46 permits any party to file proposed findings of facts, conclusions of law, a proposed order and supporting reasons. It requires that such documents must contain adequate references to the record and to the authorities relied upon. It is standard procedure for complaint counsel to file proposed findings. Rule 3.51 requires that the ALJ's initial decision must contain a statement of findings with a specific page reference to principal supporting items of evidence in the record, conclusions and order. It must be based on a consideration of the whole record and on reliable, probative, and substantial evidence. These two rules, and particularly 3.51 on initial decisions, are the guidelines for proposed findings.

Proposed findings are usually filed simultaneously by the parties. There is, however, an alternative: consecutive findings and briefs. That is, the ALJ, as a matter of discretion, may require complaint counsel to file their findings and brief first; a certain number of days later, respondent files; then some days later complaint counsel file a reply brief. The days allotted for each step may vary. The Commission has indicated it does not favor this alternative except in the most extraordinary situation.

Counsel writing findings must go to the actual transcript for their basic material and should not rely upon any previously prepared digest of the record, except as a lead to locate the pertinent material in the transcript. A digest cannot be used as a reliable basis for a citation in support of a finding. Counsel must cite the page and, where appropriate, the line number on the transcript page (e.g., Tr. 399/14) for specific portions of a witness's testimony. Do not merely give the number of an exhibit having several pages. Cite the exact page of the exhibit, and cite the approximate location or line of the page where the cited material appears.

Support each factual statement with a record citation. Propose only the findings which are necessary to support the theory of the case and to sustain a conclusion of illegality or unlawful activity. Check all citations against the transcript or the exhibit to be sure the findings are supported exactly by the citations. Save the legal argument and legal citations for the brief; do not mix findings of fact and legal arguments.

Use quotations of testimony sparingly, since an accurate summarization is the best method for bringing out the essentials. Where an excerpt would provide strong and direct support for your theory and give a hard-hitting impression, quote it, with specific page and line citations, but limit such excerpts to that material which supports your case directly on that specific point or theory.

Proposed findings should be organized as follows:

1) A preliminary statement should summarize the complaint allegations, the history of the proceedings, and any important ALJ or interlocutory rulings or orders.

2) Findings of Fact should consist of short, numbered paragraphs, factual in content--don't mix argument with facts--don't merely use the language of the complaint-identify argument when it is used to support an inference of fact.

3) A brief applying law to the facts. Don't repeat the facts in the brief. Merely state that they exist and refer to the numbered findings demonstrating their existence.

4) Conclusions of Law are short boilerplate conclusions.

5) A proposed order should be reasonable; it should not try to remedy all ills of the world in one proceeding, but should respond to the unlawful practices alleged and proven. Ordinarily, the proposed order should track the Notice Order or should elaborate upon the Notice of Contemplated Relief (see .9.2 and .9.3 above), unless there is reason for departure.

.24.2 PROPOSED FINDING OF FACT

Findings of fact, the second category above, must tell a complete story. There must be findings as to the identity of the respondents, jurisdiction, and of all elements necessary for finding that the practices are unlawful. It is good practice to use captions to characterize groups of findings. Ordinarily, this means a topical breakdown by captions. For example:

a. Identity and Business of Respondents.
b. Recruiting Practices.
c. Selling Practices.
d. Mail Order Book Program.
e. Debt Collection Practices.

Captions of this general nature may be broken down further into subtopics according to a logical organization. Tell the complete story as logically and succinctly as possible.

In the event the ALJ has ordered consecutive rather than simultaneous findings, complaint counsel will be filing a second series. This series should be narrow and directed solely at respondent's proposed findings. Complaint counsel should support any new material being presented to controvert respondent's findings by precise citations to the record. Do not restate material presented in the first series; merely summarize its thrust and refer to the old material as Proposed Finding Number 21, or whatever its correct number may be. Stay on the point. If old material must be combined with new material, in order to support a request that an inference be drawn from the combination, cite the old Proposed Finding Number 21, the new material with its precise page and line citation (e.g., Tr. 291/25), and then identify the argument for the inference.

.24.3 MEMORANDUM OF LAW SUPPORTING PROPOSED FINDINGS

The brief, or memorandum of law, should be the vehicle by which the theory of the case and the argument are conveyed. Summarize the facts briefly by citing to the numbers of the proposed findings previously made. State the inferences to be drawn from these facts and the legal authority which says these inferences of fact, and of fact and law, lead to a conclusion that the law has been violated as alleged in the complaint. State your proposed order, remedy, and the legal authority to support the issuance of this type of order. Enter your prayer for adoption of the proposed findings, conclusions and order.

The organization of the brief ordinarily is as follows:

1) Introduction containing brief factual summary of case.

2) Statement of the Issues (topical outline).

3) Table of Authorities

(see .12.4 above.)

Note that in the table of authorities the names of legal authorities must be separately organized by category and listed alphabetically within each category and correctly cited. Opposite each case name, insert the page of the brief on which the case is cited. Check the citations both for volumes and pages cited and internally within the brief. Briefs to the ALJ should cite only the controlling authorities; perhaps two or three citations to the leading cases. The most important case should be cited first. Where cases are of equal importance, cite the latest case first, the oldest case last. Within the citations, follow the Uniform System of Citation (a copy of the current 12th edition may be procured from the Library). Keep the list of cited authorities to a modest length.

If a theory being advanced is new and requires argument on which there is no Commission precedent, cite cases from other jurisdictions if directly in point. Complaint counsel are advised to remember in writing findings and legal memoranda that matters on which they have the burden of proof must be dealt with in their original brief. There may be no opportunity on reply. Selected pages of a memorandum of law supporting proposed findings are provided. (See Illustration 27.)

.25 APPEAL FROM INITIAL DECISION

.25.1 IN GENERAL

Rule 3.51 controls the ALJ's Initial Decision and Rule 3.52 controls the taking of an appeal by any party to the proceeding.

.25.2 APPROVAL FOR FILING APPEAL

Complaint counsel should obtain approval from the appropriate Bureau Director before the filing of a Notice of Intention to Appeal, and therefore, immediately after receipt of the Initial Decision, should confer with the appropriate Assistant Director or Regional Director, specifying those portions of the decision with which they disagree and why. If the Regional Director or Assistant Director agrees that an appeal should be filed, a recommendation to that effect should be forwarded to the Bureau Director. No Notice of Intention to Appeal should be filed without Bureau Director approval. Upon securing approval,

complaint counsel should prepare and, within 10 days of service of the Initial Decision, file their Notice of Intention to Appeal.

.25.3 NOTICE OF INTENTION TO APPEAL

The Notice of Intention to Appeal is a very simple document, filed with the Secretary within 10 days after service of the Initial Decision (Rule 3.52(a)) or within 5 days in response to another party's timely notice of intention to appeal. The notice merely states the intention of the aggrieved party to appeal the Initial Decision. (See Illustration 28.) No specification of grounds of appeal is necessary.

.25.4 APPEAL BRIEF

The appeal brief specifies the grounds of appeal and the factual and legal arguments in support of the appeal. Requirements for the construction of the appeal briefs are set out in Rule 3.52(b). Rule 4.2 requires 20 copies to be filed for all briefs before the Commission. The brief must be filed within 30 days of the service of the Initial Decision, unless the time is extended by the Commission. Counsel are advised to pay particular attention to the formal requirements enumerated in the rule. Among other things, it requires that a table of contents, with page references, be included in appeal and answering briefs. (See Illustration 29 for construction of index/table of contents.) It also requires that the brief includes a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with appropriate page references. (See .12.4 above and Illustration 30 for appropriate citation of cases and other materials.) Rule 3.52(b)(2) further requires a concise statement of the case. "Concise" is the key word. At this stage, counsel should be adequately prepared to make such a summary statement. It should be complete, but it should be concise.

Complaint counsel might note, when defending an appeal, that if the respondent's appeal brief contains a factual statement based on omissions or distortions, they may make a counterstatement of the case in the answering brief, although it is not specifically authorized by the rules. Care should be taken to assure that counsel's statement (or counterstatement) is fair and accurate on its face and requires no further parenthetical elaboration or definition during argument. Do not make citations to the transcript or record in the statement or counterstatement.

Rule 3.52(b)(3) requires a specification of the questions intended to be urged. In short, a statement of the issues is called for. Define the issues of the Commission's case rather than those of the respondent. "Issues" means factual or legal issues. This is an appropriate stage at which to consider dropping issues. If the case contains subordinate or collateral issues which are not necessary to the central theme of the case, or if the proof of the issues is weak, self-contradictory in nature, or ambiguous within complaint counsel's own evidence, consideration may be given to dropping the issue from the appeal or from the case. However, it is not a weak issue merely because countervailing proof has been offered by respondent.

Rule 3.52(b)(4) requires that the argument present clearly the points of fact and law relied on in support of the position taken for each question urged, with specific page references to the record and the legal and other material reflection. Here again, we make specific page and line references to the record and cite persuasive authorities as outlined in .12.4 above.

Check all case citations, internally within the brief and in the table of cases in the brief, and externally in the volumes which are cited. Cite to non-Commission oriented material if you have to use outside authorities, but be certain of the applicability or the cases to the instant material.

Consult the briefs of other Commission attorneys who have recently argued to the Commission on similar issues. Preserve your own style, but obtain as much guidance as possible from the good work others may have done.

Rule 3.52(b)(5) requires the submission in the opening brief of a proposed form of rule or order for the Commission's consideration in lieu of the rule or order contained in the initial decision. (See also, in this connection, .25.7 below.)

.25.5 ANSWERING BRIEF

The answering brief authorized by Rule 3.52(c) is approximately the same in format as the opening or appeal brief. Unlike the former, which ordinarily attempts to define the issues in a manner best tailored to the appeal, the answering brief must confront such attempts to control the outcome. Where necessary, complaint counsel's answering brief may have to redefine the issues to reach their own case. Thus, if respondent has defined the issue as "whether the advertisement did in fact deceive the consumer," complaint counsel might redefine it as "whether the advertisement had the capacity and tendency to deceive the consumer"; a vastly different issue with a different standard of proof.

.25.6 REPLY BRIEF

Reply briefs are distinguished principally by their limitations as defined by Rule 3.52(d): they may be used only to reply to matter in the answering brief, and must be filed within 7 days of receipt of the answering brief (or the day before oral argument) whichever comes first. The 7 days usually come first. The Rule specifically prohibits an answer to the reply brief.

.25.7 LENGTH OF BRIEFS

Rule 3.52(e) provides that all appeal briefs are limited to 60 pages, including appendices. Accordingly, if the instant case requires more than 60 pages for adequate presentation on appeal, the appropriate motion is to the Commission for permission to enlarge the brief. It is not sufficient to ask enlargement solely on the ground that the brief is being double-spaced; more compelling reasons must be shown: the size of the case, the size of the record, the numerous and important issues to be presented. In meritorious cases, enlargement may be granted.

With this limitation in mind, Rule 3.52(b)(5) might be considered. It requires submission in the appeal brief of a proposed form of rule or order for the Commission's consideration in lieu of the rule or order contained in the Initial Decision. When complaint counsel are required to seek on appeal a modified initial decision, the limitation on the size of the brief becomes very burdensome. It may be appropriate, for example, to devote space in the brief only to the disputed portions of a lengthy rule or order, since the entire context can be read in the Initial Decision.

.25.8 ORAL ARGUMENT

Oral argument can only supplement the points made in counsel's briefs. Where close review of the record will be necessary for the proper determination of the appeal, the brief must be the main vehicle for persuasion. Rule 3.52(f) states that the "purpose of oral argument is to emphasize and clarify the written argument appearing in the briefs and to answer questions. Reading at length from the briefs or other texts is not favored." Argument before the Commission on appeal is limited to 45 minutes, unless extended on a prior motion. It is generally considered advisable for complaint counsel making an appeal to reserve 10

minutes for rebuttal of respondent's argument. If complaint counsel are responding to an appeal, their 45 minutes is usable in one segment. This is the last word within the Commission that complaint counsel will have.

It should be noted that complaint counsel have the responsibility to see that the entire record, including all exhibits, are in the hearing room at the time of oral argument on appeal.

It is advised that the opening argument, or the opening segment of an answering argument, begin with a history and an explanation of the theory of the case. Ordinarily, this should be the same theory which complaint counsel initiated when complaint issued and which they have followed through the trial.

It must be well-defined and understandable to persons who have little prior knowledge of the case or its facts.

With an adequate statement of the history and the theory of the case having been made by counsel, the remaining argument becomes almost entirely factual. Usually, there is a great deal of question and answer interchange between Commissioners and counsel. Every question should be answered factually by counsel and at the time it is asked, whether or not they may consider it pertinent to that particular stage of argument.

Select two or three major points, central issues of the case, on which to argue. Time does not permit more. Argue complaint counsel's case and point up the weaknesses in respondent's strongest issue; do not waste time on respondent's general contentions. However, when in rebuttal, select respondent's weakest principal argument and shred it. A 10-minute rebuttal period will not permit more.

Decorum before the Commission must be exemplary. A suggested opening line before beginning argument is, "May it please the Commission," and the form of address to an individual Commissioner is, "Chairman____" or "Commissioner___."

Close the argument with approximately the same prayer for relief as was used at the end of the appeal brief. Sit down.

If a question is asked of complaint counsel during or at the end of respondent's argument, as very occasionally happens, rise from the chair and walk back to the lectern. Speak directly from the lectern.

Remain at the counsel table until the Commission has left the hearing room or has indicated it wishes to hear argument on another appeal.

Motion to ALJ

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of	)	
	)	
XXX CORPORATION,	)	DOCKET NO. 0000
a corporation	)	
(Need not recite entire	)	
caption if lengthy, but	)	
add: et al.)	)	
	)	

MOTION (or other document, giving brief descriptive title indicating purpose of the paper)

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint move, pursuant to Rule _____ of the Commission's Rules of Practice, (identify action to be taken, i.e., that the Administrative Law Judge certify to the Commission the attached Motion . . . or that the complaint issued _____ on be amended as follows . . ., etc.)

Respectfully submitted,

_____

_____
Counsel Supporting
the Complaint

[Date]

Memorandum of Law

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

MEMORANDUM OF LAW

Counsel supporting the complaint submit this memorandum in support of their motion, made pursuant to Rule 3.22 (add also the number of any rule specially authorizing the motion) of the Commission's Rules of Practice, to (state purpose of motion such as: to strike, to amend, etc.), filed this date.

(State procedural history to extent pertinent to the motion and memorandum.)

(State briefly operative facts on which motion is based.)

(State legal rationale.)

(Distinguish opposing authorities.)

(State conclusions.)

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

[Date]

Motion to Commission

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
XXX CORPORATION, a corporation (Need not recite entire caption, if lengthy, but add: et al.)	)	DOCKET NO. 0000

MOTION (or other document, giving brief descriptive title indicating purpose of the paper)

To the Commission:

Counsel supporting the complaint, having filed herein notice of intention to appeal (or other description of the posture of the case which permits the motion to be filed with the Commission), move, pursuant to Rule ____ of the Commission's Rules of Practice, (here identify the action to be taken) . . .

Respectfully submitted,

_____

_____
Counsel Supporting
the Complaint

(Date]

Order on Results of Pretrial Conference

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

ORDER ON RESULTS OF PRETRIAL CONFERENCE
AND SETTING DATES FOR HEARINGS

A pretrial conference in this matter was held on ___, in _____ at which the following appearances were made by counsel for the respective parties: _____ _____.

After discussion of the issues raised, the type of evidence to be offered, the state of preparation of each side, and other matters, the following schedule was established:

October 24, 19 .

On or before this date complaint counsel will file and provide respondent with (1) a list of the witnesses complaint counsel intend to call with a brief summary of the testimony expected from each, and (2) a list of the documents complaint counsel intend to offer in evidence with exhibit numbers assigned (CX_) and a brief description of each.

Complaint counsel will provide respondent with copies of all documents to be offered in evidence, unless respondent already has copies or the originals, in which event the foregoing list will be sufficient.

October 28, 19 .

On or before the foregoing date, respondent will comply with the subpoena duces tecum issued by the undersigned except for specification thereof which was quashed after objection and argument of counsel for respondent.

November 7, 19 .

On or before this date, complaint counsel will file and provide respondent with the names of any additional witnesses which complaint counsel determine to call, and any additional documents which complaint counsel decide to offer in evidence, as a result of the subpoena duces tecum issued to

respondent, complying with the requirements set out above.

November 21, 19 .

On or before. this date, respondent will file and will provide complaint. counsel with (1) a list of the witnesses respondent intend's to call with a brief summary of the testimony expected from each, and (2) a list of the documents respondent intends to offer in evidence with the exhibit numbers assigned (RX_) and a brief description of each.

Respondent will provide complaint counsel with copies of all documents to be offered in evidence, unless complaint counsel already have copies or the originals, in which event the foregoing list will be sufficient.

Respondent will initiate any discovery, applications for subpoenas duces tecum, etc., without delay so as to have such matters completed or resolved by this date.

December 3, 19 .

Hearings will commence on this date in _____ at a courtroom to be hereafter designated, and will proceed to a conclusion, respondent commencing its case-in-defense at the conclusion of complaint counsel's case-in-chief.

_____
Administrative Law Judge

October 14, 19

Prehearing Order

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
XXX CORPORATION,	)	DOCKET NO. 0000
a corporation.	)	
	)	

PREHEARING ORDER

As a result of the prehearing conference held on April ____, 19 ,

IT IS ORDERED that complaint counsel shall, on May 7, 1976, submit requests for voluntary discovery to respondent _____. Respondent shall, by May 21, 19 , inform complaint counsel to what extent they will voluntarily comply with complaint counsel's requests. If respondent indicates it will not voluntarily submit certain information to complaint counsel, complaint counsel shall apply to me for the issuance of subpoenas respecting that information by June 4, 19 .

IT IS FURTHER ORDERED that complaint counsel shall submit requests for discovery from third parties within two weeks of their receipt of a list of customers from respondent.

IT IS FURTHER ORDERED that complaint counsel shall begin voluntary interviews or shall request me to order depositions by June 18, 19 or within 14 days of respondent's satisfactory compliance with voluntary discovery requests or subpoenas issued by me.

_____
Administrative Law Judge

[Date]

Application for Subpoena Duces Tecum

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION, a corporation.	)	

APPLICATION FOR ISSUANCE OF
SUBPOENA DUCES TECUM

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint, pursuant to Rule 3.34 of the Commission's Rules of Practice, apply to the Administrative Law Judge for issuance of the attached subpoena duces tecum directed to respondent XXX Corporation.

HISTORY OF THE PROCEEDING

(This paragraph is not strictly necessary and should be omitted unless the history is pertinent in a special way to the request, or unless the history is necessary to enable the ALJ to grasp quickly the necessity of the subpoena. Such things as issuance of the complaint, answer, order for voluntary discovery, order provision for compulsory process, failure of voluntary discovery and only partial return on compulsory process, might be included.)

SPECIFICITY

(The specifications of the subpoena should be stated to define as closely as possible those documents or exhibits which are required to prove the allegations of the complaint or the rebuttal of respondent's defenses raised in its answer. Explain the specific nature briefly.)

GENERAL RELEVANCE

(Show the relationship of the specifications to the allegations of the complaint, that the materials to be returned will prove or lead to proof of the allegations. Some counsel arrange their specifications in the order of the allegations to be proved, and in their justifications follow the same order. Each specification should be justified for relevance in the application. If a third-party subpoena is intended, extra effort should be made to also show necessity.)

REASONABLENESS OF SCOPE OF SUBPOENA

(The justification must demonstrate to the greatest extent possible that burdensomeness has been minimized. Factors that limit the documents to be produced, such as an instruction that documents are sought certain dates, i.e., from May 19 until 20 to the issuance of the subpoena; limitation marketing or geographic area; limitation to product line; the availability of documents central files; sampling of certain types of documents where that is effective for proof; an alternative that counsel be allowed to inspect and screen voluminous documents; all those types of limitation which may reduce the burden of compliance with the subpoena may be stated.)

THE DOCUMENTS (OR EXHIBITS)
CONSTITUTE (OR CONTAIN) EVIDENCE

(This justification and the next are added only when counsel wishes to require production and inspection and copying of the documents or exhibits in discovery. This generally applies to third party documents and a stronger showing must be made of the necessity. The key phrase is "constitute or contain evidence" and this should be emphasized in the justification. The phrase "relevant to the subject matter involved' is construed with the word "evidence" to mean that the subpoena may request documents which may be evidentiary or which reasonably may lead to the uncovering of evidentiary documents or to their proper interpretation.)

POSSESSION, CUSTODY OR CONTROL OF THE DOCUMENTS

(Here, again, counsel may be seeking production and inspection and copying of third party documents and should be able to show that the documents are in the third party's possession. Usually, this will follow from examination of respondent's files which reveal a course of dealing with the third party. However, where competitive information is necessary to prove allegations of the complaint, such respondent evidence may not be available. Then, prior investigation or good sense may demonstrate that the third party must necessarily have such information, in its operational or planning records, books and papers.)

* * * * *

Counsel supporting the complaint therefore respectfully request the Administrative Law Judge to approve the application for issuance of a subpoena duces tecum directed to [ ] and to issue the subpoena hereto attached.

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

[Date]

Subpoena Duces Tecum*

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
Federal Trade Commission

To XXX Corporation

007 Bond Street

New York, N.Y. 10022

You are hereby required to appear before Honorable

[Name of ALJ]

an Administrative Law Judge of the Federal Trade Commission, at

Room 7007, The 1101 Building, 414 11th Street, N.W.

in the City of Washington, D.C. 20005

on the 7th day of April , 19 , at 10:00a.m.,

to testify at the instance of Counsel Supporting Complaint

in the matter of XXX Corporation, Docket 0000

and you are hereby required to bring with you & produce at said time & place the following books, papers, and documents:
Described in the attached Definitions, Instruction and

Specifications which are made a part hereof.

*See OM Ch. 18 for procedures and accompanying documents.

Fail not at your peril.

In testimony whereof, the undersigned, an Administrative Law Judge of the Federal Trade Commission, has hereunto set his hand and the said Federal Trade Commission has caused its seal to be

affixed at Washington, D.C., this ___ day of ____, 19_ .

_____
Administrative Law Judge

[SEAL]

Subpoena Duces Tecum Specifications

DEFINITIONS

(Note: Definitions and instructions should be varied to fit the individual case.)

For the purpose of making a return to this subpoena, the following definitions shall apply:

1. "Company" refers to the XXX Corporation, each of its subsidiary companies, and each predecessor of any of these companies. A subsidiary is any company in which XXX Corporation owns 50% or more of the outstanding equity interest.

2. "Documents" refers to all written, printed, typed, or otherwise imprinted materials, including but not limited to correspondence, memoranda, manuals, summaries, reports, analyses, surveys, studies, forecasts, records, tabulations, compilations, diary entries, voice recordings, and all records maintained for or by mechanical or electrical data processing, including system documentation and data, numeric or textual, in machine-readable form, which are under the or constructive care, custody, or control of any officer, director, employee, or agent of the company. (Note: Complaint counsel should subpoena the company's data processing manager for examination on subpoena return concerning the system documentation and data in machine-readable form.)

3. "Documents sufficient to show" encompasses all those documents which are necessary to provide the information requested. However, where summaries, tabulations, compilations, statistical accumulations, charts, or other synopses are available which provide all the information sought, these should be furnished in lieu of all underlying documents. where summary data are provided, identify the author, the source(s) used, and explain the method(s) employed to accumulate and/or interpret the data.

4. "Relevant Years" refers to the calendar years 19 through 19 .

INSTRUCTIONS

1. The official(s) of the XXX Corporation responsible for preparing the subpoena return should appear on the specified return date.

2. Each document submitted in response to this subpoena return should be clearly and conspicuously identified as to the specification(s) it is meant to answer.

3. If for any specification there are no documents under the actual or constructive care, custody or control of the company which are responsive, indicate by a certified statement from a corporate officer of the company whether documents which would have been responsive were destroyed or mislaid, and if so, the circumstances under which they were destroyed or mislaid.

4. (Optional) At your option, a certified statement from an officer of the company may be provided in lieu of documents for any specification in which the word "documents" is followed by an asterisk. However, where this alternative is elected, the officer's affidavit should include:

(a) affiant's name and corporate title;
(b) the number(s) of the specification(s) to which affiant is responding;
(c) the date of execution of the affidavit;
(d) a statement that the information provided is excerpted or summarized from the books and records of the company;
(e) the name of the custodian and the location of the pertinent books and records;
(f) a grant of permission to complaint counsel to inspect the pertinent books and records during normal working hours at the company's offices;
(g) any additional explanation of the research or compilation methods used to accumulate the information.

5. (Optional) The XXX Corporation may comply informally with this subpoena by making full return of all documents or exhibits specified in the subpoena to complaint counsel at their office at Room , Federal Trade Commission Building, 6th and Pennsylvania Avenue, N.W., Washington, D.C. 20580 not less than ten days prior to the formal return date.

6. If any material responsive to this subpoena is withheld on the basis of privilege (e.g., attorney-client privilege or the Fifth Amendment), or judicial order, you must assert all such claims of privilege or the like on or before [the date set for the subpoena return). In addition, you are required to provide the Commission with a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and the date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged. You should not file a motion to limit or quash the subpoena solely for the purpose of asserting claims of privilege or the like. However, a motion to limit or quash compulsory process must be filed if you wish to object to the subpoena on other grounds such as burdensomeness or relevance.

SPECIFICATIONS

(Note: Specifications should be varied to fit the individual case.)

1. Provide documents sufficient to show the organization of the company, its subsidiaries and affiliates, and the officers and directors of each.

2. Provide all documents which refer or relate to the proposed or actual terms for acquisition of the ZZZ Corporation by the company, including but not limited to the closing date, the acquisition price, and descriptions of the production plants owned by ZZZ Corporation.

3. Provide all documents which refer or relate to all shipments of company products from its plant in [city and state] to its customer ZZZ Corporation in [city and state) during the relevant years.

* * * * *

Protective Order
Modified "Mississippi River" Type

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

PROTECTIVE ORDER

On motion of counsel supporting the complaint for a protective order, to be issued pursuant to Rule 3.21 and Rule 3.42, covering documents generated by third parties in response to subpoenas issued to them, and which are hereafter referred to as Confidential Third Party Documents, IT IS ORDERED that:

1. All Confidential Third Party Documents may be disclosed only to:

   (a) independent counsel of record for respondent in this proceeding, their associated attorneys, employees, and legal assistants, none of whom may be employees or officers of the respondent;

   (b) independent experts, statisticians, consultants, and their clerical assistants who are engaged in assisting independent counsel for respondent in the preparation of this proceeding for hearing, none of whom may be employees or officers of the respondent.

2. Disclosure of Confidential Third Party Documents to any person described in Paragraph 1 of this Order shall be strictly and exclusively for the purpose of the preparation, pretrial and trial of this proceeding and for no business, competitive, governmental, or other purpose whatsoever.

3. Confidential Third Party Documents shall be kept in secure, segregated facilities and access to those facilities shall be permitted only to persons designated in Paragraph 1 of this Order.

4. Confidential Third Party Documents shall not be disclosed to any person described in Paragraph 1 of this Order unless such person executes an affidavit stating that he/she has read and understands this Order and agrees to be bound by the terms thereof. Copies of such affidavits, which shall include the name and employer of each affiant, shall be filed with the Administrative Law Judge. Counsel for respondent shall maintain a list of the names of all persons to whom Confidential Third Party Documents have been disclosed.

5. At the time that participation in this proceeding by any person described in Paragraph 1 of this Order concludes, all Confidential Third Party Documents as well as all copies, notes, memoranda, or other papers containing information derived from said documents that are in the possession of such person, shall be returned to independent counsel for respondent in this proceeding, who shall dispose of the documents in accordance with Paragraph 7 of this Order.

6. In the event counsel for respondent decides to offer into evidence any Confidential Third Party Documents, counsel seeking to offer such material shall notify the various third parties who generated the material at least fifteen (15) days prior to offer into evidence, so that third parties may have an adequate opportunity to seek in camera treatment of such information. If advance notice cannot be provided pursuant to this Order, the third party shall be so notified at the time of introduction of such material into evidence, and the material shall be accorded in camera treatment pending a ruling by the Administrative Law Judge upon any request by the third party for such treatment, which request must be filed within fifteen (15) days of receipt of the notice described herein.

7. After the record of this proceeding is closed by the Administrative Law Judge and except for Confidential Third Party Documents which were offered in evidence (whether received or rejected) all copies of all Confidential Third Party Documents are to be destroyed by independent counsel for respondent. In addition, at the same time, independent counsel for respondent is to destroy all copies, notes, memoranda, or other papers which contain information derived from Confidential Third Party Documents which were not offered in evidence.

_____
Administrative Law Judge.

[Date]

Protective Order - General Type

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

PROTECTIVE ORDER

ZZZ Corporation, a third party witness, has requested that a protective order be issued, pursuant to Rule 3.21 and 3.42 of the Commission's Rules of Practice, covering its data and documents described in the specifications of the subpoena issued to it on April__, 19 , and already supplied to counsel supporting the complaint. The witness has represented that the data and documents furnished are of a highly sensitive and confidential business nature and disclosure thereof to other persons would be detrimental to its business.

Accordingly, IT IS ORDERED that:

1. Complaint counsel and respondent's counsel shall keep confidential the data and documents described in the specifications of the subpoena issued on April__, 19 to ZZZ Corporation and shall not disclose such data and documents to any other person, except so far as it may be necessary to disclose them to the independent consultants and economic advisors of complaint counsel or respondent's counsel, or to legal personnel or other persons assisting counsel in this proceeding, and then only to the extent necessary for preparation, pretrial and trial of this proceeding. Any person to whom such data and documents shall be disclosed shall be instructed that they are to be kept confidential and to be used only in the preparation, pretrial and trial of this proceeding and that each such person shall be subject to the provisions of this order.

2. Complaint counsel, respondent's counsel and all persons to whom such data and documents are disclosed by counsel (including the independent consultants and economic advisors of counsel) shall treat as confidential, as herein provided, the information obtained from such data and documents, and shall preparation, pretrial and trial of this proceeding.

3. Nothing contained in this order shall be construed to prejudice any party's right to use at the trial of this proceeding any of the data or documents or information contained therein designated as confidential; provided, however, that the confidentiality in the formal record of this proceeding of any such data or documents or information contained therein shall be protected as determined and directed by the Administrative Law Judge. After a determinative order in this matter has become final, all such data, documents and information shall continue to be kept confidential except to the extent incorporated in the formal record of this proceeding.

4. All data, documents and information designated as confidential thereby shall bear the following designation:

CONFIDENTIAL
UNDER PROTECTIVE ORDER

_____
Administrative Law Judge

[Date]

Motion to Impose Sanctions
(Failure to Comply with Order)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

MOTION TO IMPOSE SANCTIONS

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint, pursuant to Rule 3.38 of the Commission's Rules of Practice, move that the Administrative Law Judge impose sanctions on respondent for failure to comply with an order entered in this matter on April __, 19 , requiring respondent to comply with a subpoena duces tecum issued April __, 19 on behalf of complaint counsel.

(Rule 3.38 provides sanctions to redress prejudice which results from failure to comply with an order of the ALJ. Counsel should state the facts of an order, failure to comply, the prejudice created by the failure, and then move for a sanction to cure the prejudice.)

The subpoena issued to respondent on April 19 required return of documents related directly and integrally to proof of law violations charged in Paragraphs 5, 6, and 7 of the complaint. The order to comply with the subpoena required return no later than May 1, 19 . To this date, May 10, 19 , no return has been made of the documents subpoenaed. Complaint counsel are unable to proceed with further discovery and preparation for trial of this matter in September of 19 .

Counsel supporting the complaint therefore move that the Administrative Law Judge enter an appropriate order striking the answer of respondent and entering default judgment against it for the relief sought by the complaint and notice order.

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

[Date]

Motion to Impose Sanctions
(Frivolous Answer to Requested Admissions)

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

MOTION TO IMPOSE SANCTIONS

To the Honorable
Administrative Law Judge

Counsel supporting the complaint, pursuant to Rule 3.38 of the Commission's Rules of Practice move that the Administrative Law Judge impose sanctions on respondents for failure to respond properly to request for admissions pursuant to Rule 3.32.

Complaint counsel's request for admissions of April __, 19 , requested admission of the following acts by respondent:

1. That the respondent is a corporation organized and existing under the laws of the State of Delaware;

2. That respondent's books and records show that respondent shipped from its plant in [state] 1000 cases of its product to customer ZZZ Corporation in [city and state] on June 1, 19 ;

3. That respondent's books and records show it paid to ZZZ Corporation on September 1, 19 , as advertising and promotional allowances for said product.

Respondent answered that it could not admit or deny for lack of information or knowledge, that it had made reasonable inquiry and the information known to, or readily obtainable by it is insufficient to enable it to admit or deny.

An order issued on April __, 19 , by the Administrative Law Judge required respondent to admit or deny the requests for admissions no later than May 1, 19 . To this date, May 10, 19 , respondent has not admitted or denied the requests. Complaint counsel are therefore needlessly compelled to prepare to adduce proof of the facts for trial of this matter in September of 19 .

Counsel supporting the complaint therefore move that the Administrative Law Judge enter an appropriate order establishing as proven the foregoing facts for which admissions were requested.

Respectfully submitted,

Counsel Supporting the Complaint

[Date]

Application for Taking Depositions

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

APPLICATION FOR TAKING DEPOSITIONS

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint, pursuant to Rule 3.33(b) of the Commission's Rules of Practice, and to the Order of the Administrative Law Judge, dated ___, 19 , hereby make application to take the depositions, on oral examination, of the persons identified in the attachment to this application. This application is made ex parte in accordance with Rule 3.31(e). The depositions are necessary for purposes of discovery; such discovery cannot be obtained by voluntary means, will not result in undue burden to any other party, and will not unduly delay the proceeding.

The Administrative Law Judge is requested to issue an order granting the application in sufficient time to allow a period of 5 days from the service of the order to the time when the first deponent is to be examined, that is, ____, 19 . Subpoenas ad testificandum are hereto attached and their issuance with appropriate return dates is requested. (Note: In the event a subpoenas duces tecum is to accompany the deposition, it must be justified as required in Rule 3.34.)

THE DEPOSITIONS ARE NECESSARY FOR DISCOVERY

(Identify the type of subject matter sought to be discovered, how the knowledge of the proposed witness deponent relates to it, and how the subject matter relates to allegations of the complaint.)

* * * * *

THE PROPOSED DISCOVERY CANNOT BE
OBTAINED BY VOLUNTARY MEANS

(Relate circumstances of requested interviews and refusals, other matter indicating necessity of compulsory process.)

* * * * *

DEPOSITIONS WILL NOT RESULT IN UNDUE BURDEN

(Indicate the relative economies of time and distance which occur by reason of time and place of taking deposition for deponent and opposing counsel, if counsel will be present, lack of inconvenience for respondent, comparative convenience of voluntary interviews which were refused and the soon to be authorized depositions, etc.)

* * * * *

DEPOSITIONS WILL NOT UNDULY DELAY THE PROCEEDING

(Indicate the necessity to complete discovery as quickly as possible, that depositions will narrow discovery field and expedite further efforts to obtain testimony and documents, avoid cumbersome subpoenas, and bring matter to trial.)

* * * * *

TIME AND PLACE OF THE DEPOSITIONS

(Specify the exact time and location of the taking of deposition of each deponent.)

* * * * *

OFFICER TO TAKE DEPOSITIONS

Complaint counsel propose that the Administrative Law Judge designate a notary public (most conveniently the reporter recording the deposition) as the official before whom the deposition is to be taken.

CONCLUSION

It is respectfully requested that the Administrative Law Judge approve the application for depositions, the schedule of times, places, and presiding officer, as set forth in this application.

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

[Date].

Attachments: List of proposed deponents, (with addresses, schedule of dates, and subject matter of testimony sought.)

Subpoenas ad testificandum.

(Note: This form applies to discovery depositions. The requirements for depositions to preserve testimony are different and may be found in Rule 3.33.)

Deposition Format

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION, a corporation.	)	

DEPOSITION OF JOHN J. JONES

Deposition of John J. Jones, taken on behalf of counsel supporting the complaint in the above-entitled action, at (address) , pursuant to an order of the Administrative Law Judge entered on ____ , 19 , beginning at ___ o'clock a.m., on _____, 19 , before ___(name)___, (title, such as Notary Public in and for the County of ___, State of _____).

APPEARANCES:

John Smith; Smith, Dale and Vale, Attorneys,
Washington, D.C., for Respondent
XXX Corporation;

Frank A. Doe, Counsel Supporting the Complaint,
Federal Trade Commission,
Washington, D.C.

PROCEEDINGS

John J. Jones, (address) , being first duly sworn, testified as follows:

* * * * *

(JURAT)

Exhibit List
and Motion to Receive in Evidence

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

EXHIBIT LIST
AND MOTION TO RECEIVE IN EVIDENCE

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint, pursuant to Rule 3.22 of the Commission's Rules of Practice, and the Administrative Law Judge's order of _____, 19 , herewith submit their final exhibit list, do move that this final list be received in evidence as an exhibit of convenience and as their exhibit CX-182.

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

I certify that I have today served the foregoing motion by delivery of the original and requisite number of copies to the Secretary of the Federal Trade Commission and by mailing a copy thereof to counsel for respondent.

_____

[Date]

Exhibit List - Summary

COMPLAINT COUNSEL'S EXHIBIT LIST

CX-l - Newspaper Advertisement, Washington Post, 4/1/77, re (product features).

CX-2 - Newspaper Advertisement, New York Times, 4/3/77, re (product features).

CX-3 - Newspaper Advertisement, Chicago Sun Times, 4/3/77, re (product features).

* * * * *

CX-11A - 11K - Curriculum Vitae and Bibliography for Dr. John J. Jones.

CX-12A - 12R - Curriculum Vitae and Bibliography for Dr. Henry Smith.

CX-13A - 13Y - Curriculum Vitae and Bibliography for Dr. Jane Doe.

* * * * *

CX-182A - 182N - Complaint Counsel's Exhibit List (date)

Exhibit List - Detailed

COMPLAINT COUNSEL'S EXHIBIT LIST

CX Number	Description	Witness	Subject
CX-1	Newspaper Advertisements, Washington Post, 4/1/77, re (product features)	Miller	Representations, Commerce
CX-2	Newspaper Advertisement, New York Times, 4/3/77, re (product features)		Commerce
CX-3	Newspaper Advertisement, Chicago Sun Times, 4/3/77, re (product features)	French	Representations, Commerce
	* * * * *		
CX-11A-11K	Curriculum Vitae and Bibliography for Dr. John J. Jones	Jones	Efficacy of Drug Expertise of Witness
CX-12A-12R	Curriculum Vitae and Bibliography for Dr. Henry Smith	Smith	Efficacy of Drug Expertise of Witness
CX-13A-13Y	Curriculum Vitae and Bibliography for Dr. Jane Doe	Doe	Efficacy of Drug Expertise of Witness
	* * * * *		
CX-182A-182N	Complaint Counsel's Exhibit List	None	Identification of Exhibits for Convenience.

Witness List

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

	)	
In the Matter of	)	
	)	DOCKET NO. 0000
CORPORATION,	)	
a corporation.	)	
	)	

COMPLAINT COUNSEL'S WITNESS LIST

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint submit, pursuant to the order entered by the Administrative Law Judge on ___, 19 , a list of witnesses which counsel intend to call to testify in this proceeding, together with a brief summary of their expected testimony.

1.	John J. Jones, (address)	It is anticipated that Mr. Jones will offer testimony regarding the business operations of respondent corporation and his involvement in the business.
2.	Richard C. Roe (address)	Same.
3.	Mary H. Doe (address)	Same.
4.	Robert A. Smith (address)	Mr. Smith is a patent attorney and will offer testimony regarding the patent system, and the document disclosure program.

* * * * *

Respectfully submitted,

_____

Counsel Supporting the Complaint

[Date]

Request for Admissions

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION, a corporation.	)	

REQUEST FOR ADMISSIONS

To XXX Corporation:

Counsel supporting the complaint, pursuant to Rule 3.32 of the Commission's Rules of Practice, request that respondent XXX Corporation make admissions of the truth of the following statements or opinions of fact, or documents, including the genuineness of any document described in the requests or attached to or transmitted with the requests.

(Note: In framing the requests, complaint counsel should stick as closely as possible to facts within the knowledge of respondent. Necessarily, a system should be followed, especially after discovery of respondent's records. The following system is for demonstration only; other systems may be used. State one fact at a time. Build the subordinate admissions until respondent cannot truthfully deny the ultimate fact, such as corporate organization or interstate commerce, although usually these are admitted in the answer. If subordinate admissions are made and the ultimate fact denied, there has probably been a frivolous denial. Seek an order from the ALJ for a new answer. This will become the basis for a later imposition of sanctions if affirmative evidence on the issue created by denial is not offered by respondent during trial. When the knowledge of the respondent concerning its own records is exhausted, move to third party material. Append also a request for genuineness of respondent and third party documents from respondent's files. Seek admissions to support as many of the allegations of the complaint as possible.)

1. Respondent XXX Corporation is a corporation organized and existing under the laws of the State of Delaware.

2. Respondent maintains its principal office and place or business at 007 Bond Street, New York, N.Y. 10022.

* * * * *

5. Respondent in 1976 declared and distributed to its shareholders a dividend in the amount of $3.42 per share.

6. Respondent is a corporation organized to carry on a business for its own profit or that of its members.

* * * * *

16. Respondent manufactures its (product) in its plant located in [city and state].

17. Respondent's records, books, and papers show that in May 1970 and at intervals thereafter until the present time it shipped its products from [city and state] to its customer ZZZ Corporation in [city and state]. (Refer to specific documents. Request genuineness of documents.)

18. Respondent's records, books, and papers show that in May 19 and at intervals thereafter until the present time it shipped its products from [city and state] to its customer YYY Corporation in [city and state]. (Refer to specific documents. Request genuineness of documents.)

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

[Date]

Answer to Request for Admissions

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

ANSWER TO COMPLAINT COUNSEL'S
REQUEST FOR ADMISSIONS DATED [ ]

To Counsel Supporting the Complaint:

Pursuant to Rule 3.32 of the Commission's Rules of Practice, Respondent XXX Corporation hereby answers complaint counsel's requests for Admissions dated [ ].

(Note: Counsel are urged to treat the answer with caution. It is supported by more serious sanctions than a request for admissions under the federal rules. The answer is required to be sworn, and a false admission or denial by a party may occasion imposition of sanctions under Rule 3.38 or, more seriously, suspension, contempt citation or penalties for a false oath or false report. The sworn answer must be filed with the Secretary with the requisite number of copies. Other than answers to the requests, the important characteristic is its form. Answers should contain a statement of the full text of the request, followed by the admission, denial, or objection with reasons therefor. An ALJ may order this form to permit its use as an exhibit of convenience.)

1. Respondent is a corporation organized for profit and exists under the laws of the State of Delaware.

Answer: Admitted.

2. Respondent maintains its principal office and place of business at 007 Bond Street, New York, N.Y. 10022.

Answer: Admitted.

3. Respondent is a corporation within the meaning of § 4 of the Federal Trade Commission Act.

Answer: Objection. The request calls for an opinion of law rather than of fact. [Note

improper objection; the request calls for the application of law to facts, which is permitted by Rule 3.32(a), and the request must therefore be answered]

* * * * *

_____
Counsel for Respondent.

VERIFICATION

* * * * *

(Note: Varies with Local Usage)

_____
Signature

(Seal)

_____
Notary Public

Motion to Determine Sufficiency
of Answers or Objections

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

MOTION TO DETERMINE SUFFICIENCY
OF ANSWERS OR OBJECTIONS

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint, pursuant to Rule 3.32 of the Commission's Rules of Practice, move the Administrative Law Judge to determine the sufficiency of respondent's answers and objections filed herein in response to complaint counsel's Request for Admissions dated [ ].

The individual requests, their answers or objections, are listed separately below, and the particular matter which requires determination is stated with respect to each of them.

(Note: Counsel should examine the filed answer first to find whether it is sworn. Absent the oath, move the ALJ to deem the requests admitted or to order the filing of an amended answer. Then, counsel may proceed to the individual requests. The following is for demonstration only.)

1. Respondent is a corporation organized and existing under the laws of the State of Delaware.

Answer: Respondent cannot answer for lack of information and knowledge. Reasonable inquiry has been made and the information known to or readily obtainable by respondent is insufficient to enable it to admit or deny.

Response: The answer is frivolous. Respondent has only to consult its own charter to obtain the necessary information. It is moved the request be deemed admitted.

* * * * *

8. Respondent's records, books, and papers show that in May 19 and at intervals thereafter until the present time it shipped its products from [city and state] to its customer ZZZ Corporation in [city and state]. (Reference to specific documents with request for genuineness. Read Lenox, Inc., 73 F.T.C. 578, 603-4 (1968)).

Answer: Denied. Genuineness or documents admitted.

Response: The denial is false and frivolous. Respondent has admitted the genuineness of the documents which are copies from respondent's own records and demonstrate the truth or the request. Respondent seeks to create an additional issue for trial, contrary to Rule 3.31. It is moved that an order be entered requiring respondent to file a true and correct answer.

* * * * *

Counsel supporting the complaint therefore move the Administrative Law Judge to enter an order herein to deem certain requests admitted, to require respondent to file true and correct answers to requests falsely or frivolously denied, and to provide ultimately for imposition of sanctions at trial or pretrial for any failure by respondent to comply with such order.

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

[Date]

Stipulation

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION, a corporation.	)	

STIPULATION

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint and counsel for respondent, with respect to Count V of the Complaint, stipulate and agree that the following facts shall be found:

1. Respondent's wholesaler contracts (complaint, App. B) and discount schedules (complaint, App. D) do not by their terms require that the maximum discounts be given to any retailer. However, when applicable to any resale, said contracts and schedules do require that retailers purchasing in lesser quantities be sold at lesser discounts.

2. In at least some instances, respondent's fair trade state wholesalers grant the maximum quantity discounts allowed by respondent's wholesaler discount schedules (complaint, App. D) to retail customers qualifying therefor. Retail customers of said wholesalers purchasing in lesser quantities are sold at the lesser discounts required by said schedules.

3. To the extent the respondent's wholesaler resale prices are merely suggested prices, many of respondent's wholesalers adopt and follow said suggested prices.

It is further stipulated and agreed that the facts set forth above are admitted and incorporated as a part of the stipulated record in this case and may be referred to by the parties herein in connection with the above captioned proceeding.

Dated: ____

Respectfully submitted,

_____
Counsel Supporting the Complaint

_____
Counsel for Respondent XXX Corporation

APPROVED:

_____
Administrative Law Judge

Joint Motion to Withdraw
Matter from Adjudication

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCUMENT NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

JOINT MOTION TO WITHDRAW
MATTER FROM ADJUDICATION

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint and counsel for respondent, pursuant to Rule 3.25(c) of the Commission's Rules of Practice, move that the above-captioned matter be withdrawn from adjudication for the purpose of considering an executed proposed consent agreement which accompanies this motion. Counsel represent that in their views the agreement is appropriate to settle the issue in this proceeding and that it conforms to the requirements of Rule 2.32 of the Rules of Practice.

Respectfully submitted,

_____

_____ _____
Counsel Supporting the Complaint Counsel for Respondent

[Date]

Motion for Summary Decision

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

MOTION FOR SUMMARY DECISION

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint move, pursuant to Rule 3.24 of the Commission's Rules of Practice, for Summary Decision in their favor of the above-captioned matter on the ground there is no genuine issue as to any material fact.

1. The pleadings, admissions, stipulations, and other materials on file in this matter disclose that no fact, material to the violations alleged in the complaint, is in dispute.

2. As a matter of law, complaint counsel are entitled to a finding that respondent has violated the Federal Trade Commission Act (or other Act being enforced) as alleged in the complaint.

3. Pursuant to Rule 3.24 of the Commission's Rules of Practice, complaint counsel move for Summary Decision in their favor on each of the counts contained in the complaint, and, further, that an Order to Cease and Desist proposed by complaint counsel be entered against respondent, and for such other and further relief as may seem just.

4. Complaint counsel's memorandum setting forth the undisputed facts, the law upon which this motion is based, and the alternative forms of relief deemed appropriate in this case, and materials in support of this motion, are submitted herewith and made a part hereof.

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

[Date]

Order Denying Summary Decision
and Establishing Facts

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

ORDER DENYING SUMMARY DECISION
AND ESTABLISHING FACTS

Having heard the motion of counsel supporting the complaint for summary decision pursuant to Rule 3.24(a) of the Commission's Rules of Practice, and having considered the pleadings in the action, the deposition, answers to interrogatories, admissions on file, affidavits, and stipulations in support of the motion, and the affidavits and other exhibits in opposition thereto, and having heard the arguments of counsel, it appears to the Administrative Law Judge that counsel supporting the complaint is not entitled to a decision in favor of the Commission as a matter of law, but that the following facts appear without substantial controversy:

1.

2.

3. Etc.

IT IS ORDERED that the motion of counsel supporting the complaint for summary decision be and the same is hereby denied; and,

IT IS FURTHER ORDERED that the aforesaid facts be deemed established, and that trial be had on the following issues:

1.

2.

3. Etc.

Administrative Law Judge

[Date]

Motion for Determination
and Application for Review

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO.
XXX CORPORATION,	)	
a corporation.	)	
	)	

MOTION FOR DETERMINATION
AND APPLICATION FOR REVIEW

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint, pursuant to Rule 3.23(b) of the Commission's Rules of Practice, move the Administrative Law Judge to determine that the order entered in this matter on ____, (describe order) , involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, (or that subsequent review will be an inadequate remedy). It is requested the Administrative Law Judge certify to the Commission, with justification, this application for appeal from such order.

(Note: The grounds for interlocutory appeal are viewed restrictively by the Commission. Although an application may be certified by the ALJ, the Commission may refuse to accept it. The motion and application should be self-contained. A copy of the contested order may be attached to the motion.)

CONTROLLING QUESTION OF LAW OR POLICY

(Note: Point to the legal or policy question which has arisen. Cases hold that a controlling question of law "is not equivalent merely to a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, or a wide spectrum of cases." Kohn v. Royall, 59 F.R.D. 515, 525 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974).

SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION

(This phrase cannot be construed to mean disagreements among counsel or with the ALJ's ruling since, otherwise, every order would be appealed by aggrieved counsel. A substantial ground would be provided by, among others, disagreement among other legal authorities which have considered the same question. Thus, a split between two circuit courts, a split in Commission decisions, and if the question has not before been considered a split between commentators; all may furnish substantial ground.)

IMMEDIATE APPEAL MAY MATERIALLY
ADVANCE THE ULTIMATE DETERMINATION

(A movant may choose this ground or the one discussed below. This is not a very useful or probable ground. It is difficult to demonstrate. If facts showing possible acceleration in pretrial and trial are available, use them. Statements that the use of alternative tactics necessary to overcome the effect of the order will cause delay will probably not be considered, since the ALJ has adequate authority to regulate the proceedings.)

SUBSEQUENT REVIEW WILL BE
AN INADEQUATE REMEDY

(This is the more usual ground. If the order causes immediate harm from which there can be no recovery during pretrial or trial, and which subsequent decision cannot cure, the review will be inadequate. The continuing harmful effect must be made apparent and stressed. State the ground logically and strongly.)

* * * * *

Counsel supporting the complaint therefore request that the Administrative Law Judge make the appropriate determinations and certify this request, with his justification, to the Commission for its consideration and review.

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

[Date]

Attachments: [See Rule 3.23(b)]

Written Offer of Proof

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

OFFER OF PROOF

Counsel supporting the complaint offer, pursuant to Rule 3.43(g) of the Commission's Rules of Practice, to prove by the testimony of the witness, John J. Jones, and the witness would testify, if he were permitted to testify, as follows:

(Recite the facts to which the witness would testify)

Proposed Findings - (Title Page)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 0000

In the Matter of

XXX CORPORATION,
a corporation.

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Counsel Supporting the Complaint

[Date]

Proposed Findings -
(Table of Contents and Abbreviations)

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TABLE OF ABBREVIATIONS

CPF	Complaint Counsel's Proposed Findings of Fact
RA	Respondent's Answer
CX	Complaint Counsel's Exhibit
RX	Respondent's Exhibit
	(Others, if necessary)

Proposed Findings of Fact,
Conclusions of Law, and Order

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	DOCKET NO. 0000
XXX CORPORATION, a corporation.	)	

PROPOSED FINDINGS OF FACT,
CONCLUSION OF LAW, AND ORDER

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint, pursuant to Rule 3.46 of the Commission's Rules of Practice, submit their Proposed Findings of Fact, Conclusions of Law, and Order, together with a memorandum in support thereof.

FINDINGS OF FACT

Identity and business of respondent.

1. Respondent XXX Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 341 Main Street, New York, New York (RA, 1).

2. Respondent is now, and for some time past has been, engaged in the manufacture and advertising of various products, including widgets. Respondent's wholly-owned subsidiary, XXX Company, Ltd., is now, and at all times relevant hereto has been, engaged in the distribution and sale of widgets. (RA, 2).

3. Etc.

* * * * *

CONCLUSIONS OF LAW

* * * * *

ORDER

Counsel supporting the complaint respectfully request that the Administrative Law Judge adopt the Proposed Findings of Fact, Conclusions of Law, and Order submitted herewith.

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

Memorandum of Law Supporting
Proposed Findings
(Title Page)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 0000

In the Matter of

XXX CORPORATION,
a corporation.

MEMORANDUM OF LAW IN SUPPORT
OF PROPOSED FINDINGS
OF FACT, CONCLUSIONS OF
LAW, AND ORDER

Counsel Supporting the Complaint

[Date]

Memorandum of Law Supporting
Proposed Findings
(Table of Contents)

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* * * * *

Memorandum of Law Supporting
Proposed Findings
(Table of Citations)

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Memorandum of Law Supporting
Proposed Findings
(Introductory Page)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

MEMORANDUM OF LAW SUPPORTING PROPOSED FINDINGS
OF FACT, CONCLUSIONS OF LAW,
AND ORDER

To the Honorable _____
Administrative Law Judge

Counsel supporting the complaint, pursuant to Rule 3.46 of the Commission's Rules of Practice, submit this memorandum supporting their Proposed Findings of Fact, Conclusions of law, and Order.

INTRODUCTION

(State any elements necessary to introduce your argument and to place the case in its status at the time of submission of the memorandum.)

ARGUMENT

I. (State your first point as listed in the table of contents and argue it briefly, effectively, factually, and legally.)

II. Etc.

* * * * *

CONCLUSION

Respondent has violated § 5 of the Federal Trade Commission Act and the proposed order should be entered. Counsel supporting the complaint respectfully urge the Administrative Law Judge to adopt the Proposed Findings of Fact, Conclusions of Law, and Order.

Respectfully submitted,

_____

_____
Counsel Supporting the Complaint

[Date]

Notice of Intention
to Appeal

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	DOCKET NO. 0000
XXX CORPORATION,	)	
a corporation.	)	
	)	

NOTICE OF INTENTION TO APPEAL

Counsel supporting the complaint hereby give notice, pursuant to Rule 3.52 of the Rules of Practice, of their intention to appeal from the Initial Decision entered in this matter on ___ 19 , and served on counsel supporting the complaint on ___, 19 .

_____

_____
Counsel Supporting the Complaint

[Date]

Answering Appeal Brief (Table of Contents)

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Answering Appeal Brief (Table of Citations)

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