

The Commission solicits views about what might constitute sufficient evidence of completion of facsimile service. See current Rule 150(d). The Commission also seeks comment as to whether parties making service by facsimile, or the Commission serving orders and decisions by facsimile, should be required to transmit a non-facsimile original contemporaneously with service by facsimile. The current Rule allows parties to specify in the written agreement providing for service by facsimile whether a non-facsimile document is to be provided.

9. Rule 151 currently does not permit filing of documents with the Commission by facsimile transmission. The proposed amendment would allow such filing. The proposed amendment makes clear, however, that one who seeks to file by facsimile assumes the risk that the transmission will not be completed in a timely or legible fashion. As proposed, Rule 151 would require that parties filing by facsimile should be required to transmit a non-facsimile original contemporaneously. At present, the Commission receives a hard copy of filings to satisfy Rule 153(a), which requires that filings be signed by at least one counsel of record, or if a party is acting as his or her own counsel, by the party. The Commission requests comments as to how the signature requirement should be implemented if filings are by facsimile and if no hard copy original is required to be filed.

In addition, the Commission requests comments as to whether filing by e-mail should be permitted. If such filing is permitted, the Commission requests comments as to whether the requirements applicable to filing by facsimile transmission would also be appropriate in that context.

Current Rule 151 requires that papers required to be served on a party shall be filed with the Commission "at the time of service or promptly thereafter." To conform with other Rules, the proposed amendment would require filing with the Commission "contemporaneously" with service on a party.

10. Rule 152(a)(2) currently allows the use of either 10-point or 12-point type in papers filed in Commission proceedings. To enhance the legibility of filings, the proposed amendment would require the use of 12-point or larger type.

11. Current Rule 154 limits a brief in support of or in opposition to a motion to 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. The Commission has received filings by parties who attempt to circumvent this page limitation by filing 10-page briefs

and extremely lengthy motions. The proposed amendment seeks to establish a combined page limit of 15 pages for the motion and brief.

12. Current Rule 151 provides that persons must file papers with the Commission within the time limit for filing. Rule 160 gives an additional three days for service by mail. Questions have been raised about whether a person receives three additional days to respond if service is made by mail when the Commission's or hearing officer's order specifies a date certain for filing a response. The proposed amendment to Rule 160 would make clear that the person does not receive additional time. If a party requires a short extension, the Commission believes that the party could request that extension under Rule 161.

13. Rule 201 currently provides for the consolidation of proceedings. The proposed amendment would permit the Commission also to order any proceeding severed with respect to some or all of the parties. The proposed amendment would provide that motions to sever must be addressed to the Commission and represent that a settlement offer has been submitted to the Secretary for Commission consideration, or otherwise show good cause. The Commission asks for comment as to whether the law judges should have the power to sever parties from a proceeding.

14. Current Rule 230(a)(1)(vi) requires the Division of Enforcement to make available for inspection and copying by any party any final examination or inspection reports prepared by the Office of Compliance Inspections and Examinations, the Division of Market Regulation, or the Division of Investment Management that have been obtained by the Division of Enforcement prior to the institution of the proceedings, in connection with the investigation leading to the Division of Enforcement's recommendation to institute proceedings. The proposed amendment would state that such reports must be produced only if the Division intends either to introduce them into evidence, or to use them to refresh the recollection of any witness.

Examined parties receive notice of examination findings in the examination process, and do not require notice through the Rules of Practice. Therefore, in order to protect the confidentiality of examination reports, the proposed amendment would limit production of examination and inspection reports to circumstances where the Division intends to introduce the report into evidence, either in reliance on the report to prove its case,

or to refresh the recollection of any witness.

The proposed amendment would not alter the requirement that the Division produce documents that contain material exculpatory evidence as required by *Brady v. Maryland*.¹⁹

Current Rule 230(c) permits the hearing officer to require the Division of Enforcement to submit for review a list of withheld documents. The proposed amendment would provide that when similar documents are withheld, those documents may be identified by category instead of individual document. Under the proposed amendment, the hearing officer would retain discretion to determine when an identification by category is insufficient. The proposed amendment would also correct typographical errors in the cross-reference to paragraphs pursuant to which documents may be withheld.

15. Current Rule 231(a), relating to production of witness statements, refers to "any statement * * * that would be required to be produced by the Jencks Act, 18 U.S.C. 3500." There has been some question as to what constitutes a "statement" under this provision. The proposed change would make clear that the Commission will rely on the definition of "statement" contained in the Jencks Act²⁰ in applying this Rule.

16. Current Rule 232(e)(1) allows only the person to whom a subpoena is directed or a person who is an owner, creator, or the subject of the documents to be produced pursuant to a subpoena, to oppose the subpoena. The proposed amendment would add that any party may also oppose a subpoena.

Subpoenas directed at third party witnesses can be overly broad. Some recipients of such subpoenas may lack the sophistication or resources to dispute the scope of the subpoenas, and it would be unfair to require them to make filings in opposition. The proposed amendment would allow the Division of Enforcement, or any other party, to present arguments about whether subpoenas to any witnesses are unreasonable, oppressive, or unduly burdensome.

17. Current Rule 235(a) provides that a hearing officer may grant a motion to introduce a prior sworn statement of a witness who is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement. Current Rule 233, however, which sets forth the basis for ordering a deposition, does not permit the taking of a deposition when it is anticipated that a

¹⁹ 373 U.S. 83, 87 (1963).

²⁰ 18 U.S.C. 3500(e).