conferences and encourage more active prehearing case management by administrative law judges. Under the proposed rule, no initial prehearing conference was required. In accordance with suggestions by commenters, revised Rule 221 requires that except where the emergency nature of a proceeding would make a prehearing conference clearly inappropriate, both an initial and a final prehearing conference shall be held. The initial conference is to be held within 14 days of service of an answer, or if no answer is required, within 14 days of the issuance of an order instituting proceedings. The final conference is to be held as close to the beginning of the hearing as is reasonable.

The Rules make an initial prehearing conference mandatory in most cases because such a conference can eliminate unnecessary delay and improve the quality of adjudicative decisionmaking by sharpening the preparation of cases and presentation of issues. The increased role for prehearing conferences will facilitate the new procedures that provide for access to certain categories of investigation file documents in enforcement and disciplinary proceedings and for the prehearing production of documents pursuant to subpoena.

5. *Prehearing Access to Certain Investigative Documents.* Pursuant to new Rule 230, in an enforcement or disciplinary proceeding, the Division of Enforcement will provide any party with an opportunity for inspection and copying of certain categories of documents obtained by the Division in connection with the investigation leading to the Division's recommendation to institute proceedings. The rule codifies the prevailing practice of the Division of Enforcement staff in the Headquarters Office and various regional offices. A respondent's right to inspect and copy documents under this Rule is automatic; the respondent does not need to make a formal request for access through the hearing officer.

Documents to which access must be provided include: (1) Each subpoena issued; (2) every other written request to persons not employed by the Commission to provide documents or to be interviewed; (3) the documents turned over in response to any such subpoenas or other written requests; (4) all transcripts and transcript exhibits; (5) any other documents obtained from persons not employed by the Commission; and (6) any final examination or inspection reports prepared by the Division of Market Regulation or the Division of Investment Management. The Division of Enforcement's obligation under this rule relates only to documents obtained by the Division of Enforcement. Documents located only in the files of other divisions or offices are beyond the scope of the rule.

The Division of Enforcement may withhold a document if: (1) The document is privileged; (2) the document is an internal memorandum, note or writing prepared by a Commission employee, other than certain examination or inspection reports prepared by the Divisions of Market Regulation or Investment Management, or is otherwise attorney work-product and will not be offered in evidence; (3) the document would disclose the identity of a confidential source; or (4) the hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

Rule 230 is not the exclusive means by which a respondent may obtain access to documents. Production of documents prepared by the staff may be required under the doctrine of *Brady* v. *Maryland*, 373 U.S. 83 (1963), or pursuant to Jencks Act requirements made applicable to the Commission pursuant to rule, or may be sought by subpoena or through other procedures. *See, e.g.*, the Freedom of Information Act, 5 U.S.C. 552.

The document access policy in Rule 230 has been revised significantly from the proposed rule. Under the proposed rule, the staff was required to make a relevancy determination before a document would be produced. The Commission decided to change this rule, based in part upon comments received that contended that a relevancy determination by the staff was problematic.[12]

6. *Prehearing Document Production Pursuant to Subpoena.* Rule 232(a) allows for production of documents pursuant to subpoena prior to the start of a hearing. The Rule states that a party may request ''subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place.'' Under former Rule 14(b)(1), such documents were only to be turned over at the hearing. As adopted, the rule will reduce delay and eliminate the need for postponements by allowing for documents to be reviewed and copied, and for proposed exhibits to be selected, all prior to a final prehearing conference.

7. *Summary Disposition.* Under former Rule 11(e), a motion that would dispose of a proceeding in whole or in part could not be made, or considered by a hearing officer, prior to the completion of the interested division's case or the conclusion of the hearing. *See* 17 CFR 201.11(e) (1994). Rule 250 makes substantial changes to these procedures. The Rule provides for a motion for summary disposition by any party after each party required to file an answer has done so and, in an enforcement or disciplinary proceeding, after documents have been made available to the respondent for inspection and copying. If the interested division has not completed presentation of its case in chief at the hearing, a summary decision motion may be made only with leave of the hearing officer. The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noted. In accordance with suggestions of a commenter, the Rule now provides that if a party cannot, for good cause, present facts essential to justify opposition to the motion by affidavit prior to hearing, the hearing officer shall deny the motion.

A motion for summary disposition is subject to a 35-page limit.

8. *Protective Orders.* The revised Rules contain provisions allowing certain persons involved in an evidentiary hearing to obtain a protective order for confidential information. Documents and testimony introduced in a public hearing are presumed to be public. Rule 322 allows any party intending to introduce material as evidence during a hearing, any person who is the subject or creator of such material, or any witness who testifies at a hearing to file a motion requesting a protective order for such material or testimony. A protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.

The former Rules of Practice contained a confidential treatment provision that related solely to applications for materials filed in connection with registration statements and other statutorily required filings; it required that confidential treatment be sought at the time of filing. *See* 17 CFR 201.25 (1994). Proposed Rule 33 would have responded to this situation by

[12] Specifically, it was suggested that the proposed standard might deny respondents access to documents that ''while possibly not directly relevant to any of the Commission's allegations, may bear directly on the lines of defense the respondent is developing.'' ABA comment letter dated Feb. 28, 1994, at 59. It was also suggested that asking the staff to make such a determination was inappropriate because of the staff's ''outlook and allegiance.'' *Id.*