HOW TO SUCCEED IN SEC ADMINISTRATIVE PROCEEDINGS

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PANELISTS

**Kit Addleman:** Defends companies, executives, and directors in investigations and litigation by the SEC and DOJ. Also counsels public companies, investment advisers, hedge funds, and broker-dealers on SEC compliance. Has more than 20 years of experience with the SEC in the Atlanta, Ft. Worth, Denver, and Philadelphia offices and is a former Regional Director of the Atlanta Office.

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**Scott Ewing:** Defends companies, directors, and officers in DOJ, SEC, and internal investigations. Has tried complex litigation matters in state and federal court, arbitrations, and administrative proceedings. Regularly counsels clients on wide variety of antitrust issues.

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AGENDA

• Introduction

• Before the OIP
  – Create your own investigative record
  – Stay consistent in factual theories

• Before the Trial
  – Retain experts early
  – Interview trial witnesses early and often
  – Research the judge and master the law
  – Reach agreements with division counsel
  – Ask for opening and closing statements
  – Ask for limited direct of experts
  – Consider using character witnesses

• After the Trial
  – Submit fulsome findings of fact and conclusions of law

• Latest AP Challenges and Rule Change Proposals
INTRODUCTION

- Administrative Proceedings
- Home Court Advantage
- Appellate Process
- Our Victory
- Inside Tips
BEFORE THE OIP

• Investigative process

• Challenges for potential respondents
  – Investigative timeline vs. AP timeline
  – Lack of access to documents
  – No right to witness testimony
  – Biased investigative record
  – No traditional summary disposition
CREATE YOUR OWN INVESTIGATIVE RECORD

• Relationships with other counsel

• Confidentiality/Joint defense agreements

• Transcript exchange

• Informal interviews
  – Directly with witness
  – Through counsel

• Voluntary discovery
STAY CONSISTENT IN FACTUAL THEORIES

• Consistency in your client’s investigative testimony, Wells submission, and trial testimony is critical.

• Wells submission challenges
  – Minimal or no access to the investigative record
  – Admissibility at trial
  – Impeachment concerns

• Safest route is to focus on legal arguments unless confident in factual assertions.
BEFORE THE TRIAL . . .

- Understanding the current timeline
- Rule 360

<table>
<thead>
<tr>
<th>Commission Deadline for Initial Decision</th>
<th>Approx. Time Between OIP and Trial</th>
<th>Approx. Time Allotted for Post-Trial Briefing</th>
<th>Approx. Time for ALJ to Issue a Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>120 days</td>
<td>1 month</td>
<td>2 months</td>
<td>1 month</td>
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<tr>
<td>210 days</td>
<td>2.5 months</td>
<td>2 months</td>
<td>2.5 months</td>
</tr>
<tr>
<td>300 days</td>
<td>4 months</td>
<td>2 months</td>
<td>4 months</td>
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</tbody>
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- Most cases that proceed to trial are on 300 day timeline
RETAIN EXPERTS EARLY

• Target or retain experts before OIP is filed, if possible

• Research Division’s “go-to” experts

• Invest in good experts

• Don’t underestimate expert reports
  – Often admitted as direct testimony
INTERVIEW WITNESSES EARLY & OFTEN

• Continue building the investigative record
  – Start with everyone who provided investigative testimony
• No automatic right to depositions in APs
• Prepare knowing a testimony transcript will likely be your only control over the witness
• Reluctant witnesses
RESEARCH THE JUDGE & MASTER THE LAW

• Learn everything you can about your ALJ
  – Research previous opinions & orders
  – Talk with familiar counsel
  – Observe court proceedings, if possible

• Navigating the AP docket system is difficult

• AP case law is not always friendly to respondents or easy to decipher
AGREEMENTS WITH DIVISION COUNSEL

• Necessity due to timeline restrictions

• Examples:
  – Service rules
  – Use of email
  – Logistical issues
  – Pre-admission of majority of exhibits
  – Advance notice of witnesses
ASK FOR OPENING & CLOSING STATEMENTS

• Trial likely your first appearance before the ALJ

• Critical to telling your story

• Humanizes your client

• Streamlines the facts and law at issue

• Request may be denied, but stay optimistic
ASK FOR LIMITED DIRECT OF EXPERTS

• Not uncommon for expert reports to serve as direct testimony in APs

• APs often become a “battle of the experts”

• Direct examination can...  
  – Be more effective in explaining the issues than through briefing alone  
  – Enhance the credibility of your expert  
  – Allow your expert a “warm-up” before cross-examination
CONSIDER USING CHARACTER WITNESSES

• References to character witnesses in previous rulings

• Know your client’s reputation and history

• Limit your character witnesses to those who are both powerful and relevant

• If confident, consider asking character-type questions of fact witnesses
AFTER THE TRIAL . . .

• Standard timeline for post-trial briefing is 2 months

• Standard filings include:
  – Post-Trial Briefs (and Responses)
  – Proposed Findings of Fact (and Responses)
  – Proposed Conclusions of Law (and Responses)

• Can take a great amount of effort and time
  – Our Findings of Fact briefing totaled over 300 pages
SUBMIT FULSOME FINDINGS OF FACT & CONCLUSIONS OF LAW

• Provide a roadmap for a long and unwieldy record

• Craft creative legal arguments
  – Synthesize the law
  – Don’t be deterred by dated AP case law

• Make the ALJ’s job easier and shape the opinion
LATEST AP CHALLENGES & DECISIONS

• Leading constitutional challenge based on Article II/Appointments Clause violations

• Injunctions granted
  – Hill (N.D. Ga.)
  – Gray Financial (N.D. Ga.)
  – Duka (S.D.N.Y)
  – Tilton (2nd Cir.)

• Injunctions denied
  – Timbervest (N.D. Ga.)
  – Bebo (7th Cir.)
SEC’S PROPOSED CHANGES

  – Depositions allowed
  – Longer pre-hearing preparation, up to 8 months
  – Streamlined appeals process
  – Updated filing process

• Uneven field remains
  – SEC staff advantage of investigation
  – Permits hearsay including investigative transcripts
  – Allows withholding of documents
  – No ALJ flexibility
POSSIBLE CONGRESSIONAL FIX

• October 22, 2015, Representative Scott Garrett, Republican of New Jersey, introduced the “Due Process Restoration Act of 2015”
  – Allows Respondent to remove an action from an AP to district court
  – Requires higher burden of proof in APs
    • “clear and convincing evidence” would be required to find a violation rather than district court “preponderance of the evidence”
QUESTIONS?
HOW TO SUCCEED IN SEC ADMINISTRATIVE PROCEEDINGS

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