

HOW TO SUCCEED IN SEC ADMINISTRATIVE PROCEEDINGS

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November 5, 2015
Bloomberg BNA Live Webinar

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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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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

Commission Deadline for Initial Decision	Approx. Time Between OIP and Trial	Approx. Time Allotted for Post-Trial Briefing	Approx. Time for ALJ to Issue a Decision
120 days	1 month	2 months	1 month
210 days	2.5 months	2 months	2.5 months
300 days	4 months	2 months	4 months

- 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

- September 24, 2015 Announced Proposed Changes to the Rules of Practice,
<http://www.sec.gov/news/pressrelease/2015-209.html>
 - 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?

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