Defending an SEC Administrative Proceeding

By

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I. In General

A. Think of an A.P. like a bench-tried criminal case -- that’s what it most closely resembles procedurally (except for burden of proof, which is preponderance of the evidence\(^2\)), and that’s how your client will view it if his/her license is on the line.

B. As soon as it is instituted by the Commission, an A.P. will be referred to an Administrative Law Judge (“ALJ”), who will hear the evidence and initially decide the case. Although the ALJ is a Commission employee whose decision can be reviewed \textit{de novo} by the SEC, winning before the ALJ is possible, and very important.\(^3\)

C. There are two distinct kinds of A.P.s that are prosecuted by the Division of Enforcement:

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3. One of the reasons that the ALJ’s initial decision is important is that the law judge, unlike the Commission, actually sees the witnesses testify, and the Commission normally will not second-guess the ALJ’s assessment of credibility. \textit{See, e.g., In the Matter of Robert Thomas Clawson}, Exchange Act Rel. No. 48143 at 3, 2003 SEC LEXIS 1598 at *7 (July 9, 2003) (“We accept a fact finder’s credibility finding absent overwhelming evidence to the contrary”); \textit{In the Matter of Brian A. Schmidt}, Exchange Act Rel. No. 45330 at n.5, 2002 SEC LEXIS 180 at n.5 (Jan. 24, 2002); \textit{In the Matter of Laurie Jones Canady}, Exchange Act Rel. No. 41250, 1999 SEC LEXIS 669 at *27 (April 5, 1999) (“As we have consistently held, ‘credibility determinations by an initial fact finder are entitled to considerable weight [and] can be overcome only where the record contains “substantial evidence” for doing so.’”). However, the Commission will not always defer to the ALJ’s credibility determinations. \textit{See, e.g., In the Matter of Kenneth R. Ward}, Exchange Act Rel. No. 47535 at 11-12, 2003 SEC LEXIS 687 at *41-*42 (March 19, 2003).
1. “Original” A.P.s, in which the ALJ is required to consider whether the respondent broke the law at all;

2. “Follow-on” A.P.s, in which the only issue is whether an already-existing injunction or criminal conviction against the respondent should lead to a further sanction such as revocation or suspension of a license.

Respondents historically have been able to win a number of “original” A.P.s; in “follow-on” proceedings, which ALJs never dismiss outright, the only practical upside for a respondent is a light sanction. The Commission has made life hard for a respondent in a “follow-on” A.P. based on an SEC injunction, by ruling that such a respondent cannot contest the allegations that were contained in the SEC’s complaint in the injunctive case. See, e.g., In the Matter of Marshall E. Melton, et al., Exchange Act Rel. No. 48228, Investment Advisers Act Rel. No. 2151 at 8-10, 2003 SEC LEXIS 1767 at *22-*30 (July 25, 2003); see also In the Matter of Harold F. Harris, et al., Exchange Act Rel. No. 53122A at 9 n.21, 2006 SEC LEXIS 68 (Jan. 13, 2006) (noting possible exception for injunction entered on default if the respondent lacked a full and fair opportunity to litigate the issues in the district court).

D. Procedure in SEC A.P.s is governed by the Commission’s own Rules of Practice, 17 C.F.R. §§ 201.100 et. seq., which perform basically the same function as the Federal Rules of Civil Procedure.4

E. Effective July 17, 2003, the Commission adopted rules under which each A.P., at institution, is to be designated to be completed at the ALJ level within 120 days, or 210 days, or 300 days.5 Each overall limit comes with sublimits for the prehearing, briefing, and decisional phases, as follows:

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4 The Rules of Practice are reprinted in 15 U.S.C.A. following Section 78u, and are available on the SEC’s Website at www.sec.gov/litigation. In this outline, the Rules are cited simply by their three-digit number.