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Investigations by the U.S. Securities and Exchange Commission

By John S. Durrant, Adam M. Reich, and Neil J. Schumacher – March 12, 2015

The U.S. Securities and Exchange Commission (SEC) strives to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. To accomplish its mandate, the SEC investigates publicly traded companies and associated individuals suspected of violating federal securities laws. These investigations often lead to enforcement proceedings, with the SEC bringing “hundreds of civil enforcement actions against individuals and companies” annually.

The Decision Makers
The SEC is led by five commissioners—Luis A. Aguilar, Daniel M. Gallagher, Michael S. Piwowar, Kara M. Stein, and Chair Mary Jo White—appointed by the president of the United States with the advice and consent of the U.S. Senate. SEC staff must seek consent from the commission, which acts through a majority vote, for certain key actions, including whether to bring a case or to assess a penalty. Although recent reforms have delegated more responsibility to the staff for case management, the commission continues to provide oversight and serves as a de facto appeals court for decisions made by the SEC’s administrative-law judges.

Agency Organization
The SEC’s functional responsibilities are organized into 5 divisions, across 23 offices:

- **Enforcement.** Recommends the commencement of investigations of securities-law violations; recommends whether to bring civil actions, administrative proceedings, and criminal actions; obtains evidence of possible securities violations; and conducts private investigations.

- **Corporation Finance.** Focuses on disclosure issues with public companies, reviewing publicly filed documents and offering guidance to registrants, prospective registrants, and the public, including through no-action letters (i.e., advisory letters indicating whether Corporation Finance would recommend that the SEC take action against a company if it acted in a certain manner).

- **Trading and Markets.** Oversees major securities-market participants and the Securities Investor Protection Corporation (SIPC), and also assists the SEC in establishing rules and interpreting matters impacting operations of the securities markets.

- **Investment Management.** Oversees and regulates the investment-management industry (e.g., mutual funds, fund managers, analysts, and investment advisors), responds to non-action requests, and assists the SEC with enforcement matters relating to investment companies and advisors, including interpreting laws and regulations.

- **Economic and Risk Analysis.** Interacts with nearly every division and office, and provides economic and risk analyses to help inform agency policymaking, rulemaking, enforcement, examinations, and litigation.

SEC personnel working in these divisions may be located in any of the agency’s 23 offices throughout the country. The cross-office nature of these divisions is significant because it may prevent you or your client from identifying...
where the investigation is based, sponsored, or supported. In addition, any of the divisions may play a prominent role in an enforcement investigation, not just the Division of Enforcement.

**Origin of an SEC Investigation**

An SEC investigation may be prompted by several occurrences. SEC staff may, and often do, recommend an investigation without prompting by external sources. However, numerous external sources may provide information directly to the SEC, which prompts an investigation. As substantial awards are sometimes available to whistleblowers who provide original information to assist an SEC investigation, this has created something of a cottage industry for opportunistic plaintiff-side attorneys assisting whistleblowers’ efforts to recover an award. Apart from whistleblowers, other external sources of information for SEC investigations include:

- securities violators or those under investigation who self-report or implicate others in the course of an investigation;
- U.S. Department of Justice and other law-enforcement agencies;
- self-regulatory organizations involved in the public markets, including the New York Stock Exchange and the Financial Industry Regulatory Authority;
- Public Company Accounting Oversight Board;
- Congress;
- state securities regulators; and
- private attorneys.

**Five Stages to an SEC Investigation**

An SEC investigation can be divided into five stages: (1) Matter Under Inquiry (MUI); (2) formal order of investigation; (3) investigation; (4) Wells stage; and (5) enforcement actions.

**MUI.** At the first stage, the SEC staff evaluates whether a formal investigation is warranted. Essentially, at this point, the SEC conducts an investigation through informal requests for information without any formal order or subpoena power. Though the lack of these powers technically leaves compliance voluntary at this stage of an investigation, it is generally not advisable to ignore informal requests. For internal SEC administrative purposes, the MUI stage automatically converts to an investigation after 60 days.

**Formal order of investigation.** Rule 5(a) of the SEC’s Informal and Other Procedures gives the SEC discretionary authority to "make such formal investigations and authorize the use of processes as it deems necessary to determine whether any person has violated, or is violating, or is about to violate any provision of the federal securities laws or the rules of a self-regulatory organization of which the person is a member or participant." 17 C.F.R. § 202.5(a). Generally, investigations at this stage are nonpublic, but the formal order may provide for public disclosure. A formal order of investigation, based on a delegation of authority by the five-member commission, may be issued by senior officers of the Enforcement Division, including the director, deputy director, chief counsel, chief litigation counsel, and all supervisors responsible for enforcement matters at or above the level of associate director or associate regional director. SEC Enforcement Manual § 4.1.3. The showing required for this order to issue is minimal. Upon issuance, certain SEC staff members are delegated to act as officers of the commission for investigative purposes, and they may administer oaths and compel testimony. A formal order of investigation also permits delegated SEC staff to issue administrative subpoenas.
Lawyers retained by companies or individuals who have received a formal order of investigation may affirmatively request that the SEC provide a copy of the formal order. However, these orders are generally vague and often provide little information of value to defense counsel.

**Investigation.** During the investigation stage, SEC staff will issue subpoenas for testimony and documents. While these subpoenas are not self-enforcing, the SEC may apply to federal court for an order compelling subpoena compliance. To prevail upon a federal court to enforce a subpoena, the SEC must demonstrate four things: (1) a legitimate purpose for the investigation; (2) that the particular inquiry at issue may be relevant to that purpose; (3) that the SEC does not already possess the information sought; and (4) that all required administrative steps have been followed.

If your client is being investigated by the SEC, there are several things to consider:

- **With respect to subpoena itself:** You may have the opportunity to negotiate the scope of the subpoena, so as to avoid an undue burden. In addition, witnesses may have the right to invoke the Fifth Amendment privilege against self-incrimination. However, invoking this right may have adverse consequences, including the filing of charges by the SEC and adverse inferences in civil proceedings. Lawyers must advise their clients of these risks.

- **With respect to steps to take upon receiving a subpoena:** First, if you have not already done so, you should issue a document-preservation notice (generally, it is best to issue such a notice as soon as you learn about your client being a potential subject of investigation, including at the MUI stage). Second, you should evaluate your client’s insurance coverage and, if applicable, issue a notice to the relevant carrier(s). Third, you should identify dependable, cost-effective vendors who can assist with collection of electronically stored information (ESI) and also host a database (e.g., Ringtail) that you and your fellow attorneys may use to evaluate the responsiveness of any collected ESI to the subpoena. Fourth, you should identify custodians and develop search parameters for identifying responsive ESI. Finally, you need to strategize with your client about whether to disclose the investigation to the public and, if so, how to do it. The SEC has never given clear-cut guidance as to when an SEC investigation must be publicly disclosed, e.g., upon receipt of a subpoena or commencement of a civil action, etc.

- **With respect to responding to the subpoena:** First, you must determine with your client whether you are going to provide any response to the subpoena or force the SEC to file a miscellaneous action in federal court. On the one hand, forcing the SEC to file a federal enforcement action will allow you the benefit of a neutral, knowledgeable judge who has the authority to narrow the subpoena. On the other hand, a federal enforcement action could become a public-relations problem for your client, as the SEC’s filing may contain damaging or unsupported allegations. Second, if your client decides to respond to the subpoena, your client should consider requesting confidentiality under the Freedom of Information Act (FOIA) to preclude subsequent requests by the media, competitors, or plaintiffs’ attorneys. Finally, before responding to any subpoena, it is important that you carefully review the subpoena’s requirements for the document production. Failing to comply with the SEC’s specific requirements regarding organization of documents and ESI can strain your relationship with the SEC investigators.

- **With respect to cooperating with the investigation:** In many instances, cooperation with an SEC investigation is advisable. There is precedent for persons or entities who have committed securities violations to receive more lenient treatment if they cooperate substantively and meaningfully. While some evidence suggests that the benefits of cooperation are difficult to quantify, the SEC has stepped up its [Cooperation Initiative](#) in recent years. Your client’s cooperation ensures eligibility for alternative,
less severe dispositions, including a non-prosecution agreement, a deferred prosecution agreement, a cooperation agreement, or a request for immunity.

In the event that you and/or your client get the sense that an investigation is moving toward the Wells notice stage, there are two primary things to consider. First, your client may want to make a pre-Wells submission to the SEC with the hope that it allays SEC concerns and preempts a Wells notice. Second, to the extent your client has not done so already, your client should evaluate whether to publicly disclose the investigation in advance of the issuance of a Wells notice. Such disclosure may inure to your client’s benefit as studies have found such disclosures to cause on average negative, statistically significant stock price movements.

Wells notice stage. Once the investigation has been completed, the SEC may issue a Wells notice to individuals or companies identifying what the SEC believes to be improprieties or infractions. The Wells notice offers investigated parties the opportunity to present evidence countering or explaining away investigations’ conclusions, in the hope of avoiding any future enforcement action. See 17 C.F.R. § 202.5(c) (“Upon request, the staff, in its discretion, may advise such persons [involved in preliminary or formal investigations] of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the five-member commission for the commencement of an administrative or injunction proceeding.”). Once a Wells notice issues, the SEC has at most 360 days to bring an enforcement action (the Dodd-Frank Act calls for 180 days, but the SEC has discretionary authority to continue this for another 180 days).

If your client receives a Wells notice, you should consider requesting access to the testimony of any important witnesses, as well as to documents produced by third parties. In addition, upon receipt of a Wells notice, it is generally advisable to request an in-person meeting with the SEC staff to gather more detail. In the event that the SEC staff is uncooperative with your requests for a meeting or documents, you can emphasize this point in any response provided to a Wells notice.

Enforcement actions. Should the SEC commissioners approve an enforcement action, it may be brought in federal court or as an administrative proceeding before an SEC-employed administrative-law judge. Administrative proceedings generally have the advantage to the SEC of occurring on an expedited basis and before an SEC employee. However, administrative remedies are not self-enforcing and administrative actions provide for only limited discovery. Enforcement actions may result in injunctions and significant financial penalties. In addition, criminal liability may follow for violators of the securities laws.

Conclusion

Securities investigations are complex and may last for years. Companies and individuals operating in public markets under the SEC’s purview should be mindful of the formal progression from initiation to conclusion of SEC investigations as this may inform and improve day-to-day practices, investor relations, public relations, and corporate culture.

Keywords: litigation, young lawyer, SEC, securities, investigation, commission, agency, MUI, Wells, enforcement

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E-Discovery in Government Investigations: An Introduction
By Adam M. Reich – March 12, 2015

In 2013, Allison C. Stanton, Director of E-Discovery, FOIA, and Records for the Civil Division of the United States Department of Justice (DOJ), acknowledged that “electronic evidence plays a tremendous role in investigations.” Two years later, these words could not be truer. This article provides some basic guidance to attorneys new to counseling clients regarding production of electronically stored information (ESI) in response to government investigations.

Vendor Selection
There are many companies that offer ESI support, such as data collection, databases, and document-review tools—e.g., FTI Consulting; Evolve Discovery; Exterro; Advanced Discovery; Kroll Ontrack; 7safe; Atlaw; Compliance Discovery Solutions; Inventus; Servient. The similarities among these companies outnumber the differences, but there is more than price to consider in choosing the “right” vendor. Among other things, you should consider vendor data-collection capabilities; search/review capabilities (including technology assisted review (TAR), predictive coding, and redaction tools); processing capabilities (including ability to process and render searchable PDFs, emails, and TIFFs); production capabilities (including privilege-log generation and sequential bates numbering); and industry reputation.

Generally, it is advisable to send a request for information (RFI) to a short list of vendors, as the complexity or clarity of their responses to your pointed questions may help with the decision process. After receiving responses to an RFI, it is also worthwhile to ask vendors to demonstrate their technology, provide a list of references, and identify their security procedures and resources, both online and at any facility where they operate. Yet another thing to consider is the vendor’s database maintenance schedule (i.e., frequency and at what time) and quality control schedule, because when a database is down, attorneys cannot review documents.

Litigation Holds and Document-Preservation Notices
As a general rule, when a client learns that it is a subject of an investigation, it is advisable to issue a litigation hold and document-preservation notice. Federal law provides severe criminal penalties for anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation . . . within any matter within the jurisdiction of any department or agency of the United States. . . .” 18 U.S.C. § 1519. The DOJ is “very serious about prosecuting cases where there is destruction of evidence,” according to John Haried, e-discovery working group chair for the DOJ, so it is vital that attorneys take extra precaution to have clients maintain ESI as soon as there is reason to believe that clients have become subjects of investigations, no matter how preliminary. Per Tracy Greer, DOJ Senior Litigation Counsel for E-Discovery, Antitrust Division, this includes suspending preexisting short-term document-preservation policies.

Searches in ESI Databases
In 2012, U.S. District Court Judge Andrew J. Peck observed, “[i]n too many cases, however, the way lawyers choose keywords is the equivalent of the child’s game of ‘Go Fish.’” Moore v. Publicis Groupe, 287 F.R.D. 182, 191 (S.D.N.Y. 2012). This, in a nutshell, sums up the limitations of relying on search terms to hunt and peck for responsive documents in an ESI database. Indeed, this limitation is why many ESI vendors are pitching predictive coding and TAR (though these too have limitations). Lawyers conducting searches of ESI need to think about potential gaps from those searches as well as their precision and recall, as shoddy searches may damage any trust they have developed with the investigating government attorneys.
In February 2014, the DOJ’s Antitrust Division published a Model Second Request, which, according to Greer, is designed to help lawyers “recognize that they use words differently from most document custodians and that they are ill-suited to select search terms.” This is instructive for lawyers thinking about using keyword searches in response to government investigations. In pertinent part, the Model Second Request provides:

If search terms will be used, in whole or in part, to identify documents and information that are responsive to this Request, provide the following: (1) a list of the proposed search terms; (2) a word dictionary or tally list of all the terms that appear in the collection and the frequency with which the terms appear in the collection (both the total number of appearances and the number of documents in which each word appears); (3) a glossary of industry and company terminology (including any code words related to the Transaction); (4) a description of the search methodology (including the planned use of stem searches and combination (or Boolean) searches); and (5) a description of the applications that will be used to execute the search. The Department strongly recommends that the company provide these items prior to conducting its collection of potentially responsive information and consult with the Department to avoid omissions that would cause the company’s response to be deemed deficient.

Aside from conveying the deficiencies of keyword searches, this request indicates that conferring with government attorneys about search terms before conducting searches may save clients and attorneys money and time.

Double-Checking Production Sets Before Sending to the Government

Second- and even third-level review of ESI is a necessity when responding to a government subpoena or other request for ESI, most of the time with an eye toward privilege in addition to responsiveness. The double- and triple-checking should not stop there, though. Once you have a set of documents ready to produce to the government, it is best to take one more pass through, as the government, according to Stanton, “in many instances . . . may not be amenable to” [subscription required] clawback agreements, where you learn post-production that you inadvertently sent the government a privileged email or other document.

Other Considerations

The world of ESI is a complicated, overwhelming place. This article is only meant to provide a broad overview of a few concepts important to attorneys counseling clients in response to government investigations involving ESI. Other issues you should consider are budgeting appropriately; creating a succinct, comprehensible, effective document-review protocol; retaining contract document reviewers for first-level review; assembling a higher-level review team; liaising with the government attorneys and maintaining open lines of communication; keeping an eye toward potential litigation and letting that inform your strategy; and evaluating the benefits and place for TAR.

Keywords: litigation, young lawyer, e-discovery, electronically stored information, ESI, investigation, production

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The Nuts and Bolts of Your First Investigation
By Justin L. Heather – March 12, 2015

Investigations are a different animal, and can be quite intimidating for the uninitiated. As litigators, we are trained to be zealous advocates for our clients. In the context of investigations, that duty of advocacy is somewhat tempered by the fact-finding nature of investigations. More importantly, the procedures for conducting an investigation are somewhat different from traditional litigation methods.

The purpose of the following is to provide a general overview of some of the primary differences between standard litigation and investigations. This article does not address the peculiarities of different statutory frameworks and regulatory regimes, or provide a detailed analysis of the variances attendant to employee, accounting, or other types of investigations. Rather, this introduction should help young lawyers to better understand the investigations process.

Internal or Government-Initiated
There are essentially two types of investigations: internal investigations and those initiated by government entities or regulatory bodies. Internal investigations may arise as a result of governmental inquiries or may ultimately lead to some form of direct reporting to the government. Government investigations maybe self-initiated or prompted by external sources. It is important to understand the phase of any investigation, be it internal or government, as different phases have different dynamics and may require distinct approaches.

For example, in a purely internal investigation, lawyers must be aware if and how a client has been presented with a potential problem—e.g., through a whistleblower, government inquiry, or some other manner—and must determine whether an actual problem exists. As part of any internal investigation, counsel will be called upon to gather and marshal facts, determine whether a legal or ethical violation has occurred, and determine whether any such violation is systemic or a one-off occurrence. In this way, investigations are different from litigation because lawyers are not necessarily called on to “defend” a client in the typical sense. While counsel remains an advocate for the client, and must truly represent client interests and defend them where necessary, counsel must understand the unique nature of the investigative role.

Preservation and Documentation
Litigation holds are fairly routine once litigation is contemplated. No matter the sophistication of the client, lawyers must consider drafting and distributing litigation-hold letters/memoranda once there is a reasonable likelihood of litigation. In the absence of a litigation hold, files could be inadvertently destroyed as part of routine document retention and destruction policies and procedures. The destruction of documents during an investigation may lead to claims of spoliation, adverse factual findings, and severe monetary penalties. Indeed, in certain circumstances, criminal penalties may attach to the intentional or reckless destruction of evidence related to an investigation.

It is, therefore, imperative that investigative counsel document all steps taken to preserve electronic records and physical evidence relevant to an investigation. These procedures must be detailed, captured in written form, and often require extensive coordination with company management, in-house counsel, and internal and sometimes external information technology professionals. This detailed documentation will prove essential during later stages of an investigation to demonstrate the thoroughness and completeness of the investigation. Young lawyers are often called upon to draft such memoranda and should keep in mind that more is more when detailing the steps taken by counsel and the company to preserve information, including factual interviews to locate and preserve such records.

Ethical and Privilege Considerations
In the litigation setting, companies often retain counsel to represent both the company and its employees, subject to

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the potential of conflicts arising in the future. Under Upjohn v. United States, 449 U.S. 383 (1981), and its progeny, companies may invoke the attorney-client communications privilege between company lawyers and non-management employees, rejecting the prior, narrower “control group” test. In other words, employee interviews and communications with investigating counsel may be considered privileged during the course of investigations. Counsel should ensure that it makes clear to employees that conversations in the course of the investigation may be privileged but that the privilege lies with the corporation and not the individual.

Waiving privilege, at least intentionally, is virtually unheard of in civil litigation. These considerations are especially important in the context of investigations. As part of their efforts to cooperate with governmental authorities, and in turn to avoid criminal sanctions, companies often waive certain privileges with respect to government reporting following internal investigations. As a result, an Upjohn warning must be given prior to conducting any employee interviews to make clear both that counsel represents the company, not the employees individually, and that the company may later choose to waive the privilege.

Reporting
In litigation, lawyers typically do not provide a detailed factual report. Statements of facts in briefs on summary judgment, pretrial orders, etc., provide facts but are part of the advocacy process. On the other hand, investigations require that lawyers prepare detailed factual reports to either company management and directors or an outside entity. Indeed, the entire process of the investigation is designed for the purposes of gathering information and providing a detailed report on the matter.

A fundamental aspect of any investigation is the all-important employee interviews. Young lawyers often serve as “provers” for these interviews, attending interviews taken by more senior lawyers, taking notes during the course of those interviews, and preparing the first drafts of interview memoranda. Lawyers should make sure that Upjohn warnings are not only given at the outset of any employee interview but also noted in the resulting memorandum memorializing the interview as well. These memoranda may ultimately be produced as part of the written report resulting from the investigation, and they should be as complete as possible.

Consequences
Unless they have experience in white-collar or criminal matters, most litigation attorneys deal exclusively with civil actions where monetary damages and injunctive relief are the norm. Depending on the statutory framework, criminal sanctions are often a possible consequence of government investigations. The stakes are only higher where an individual’s liberty is at stake. For that reason, counsel must be mindful of the consequences of their actions and the results of any investigation. Understanding the overall nature of investigations, and how they differ from standard litigation, is essential to being a productive member of the investigative team.

Keywords: litigation, investigations, nuts and bolts, young lawyers

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Young Lawyers Must Create a Career Plan

By Justin L. Heather – March 12, 2015

Over the course of most of our lives, we have had clearly defined goals and plans to achieve those goals, whether we have realized it or not. Generally speaking, we all graduated from high school, did well on ACTs or SATs, graduated from college, tested well on LSATs, graduated from law school, and, most importantly, passed the bar. There were planned curricula, organized activities, as well as parents, teachers, and counselors to help along the way. No such structure exists for the practicing lawyer; we must plot our own legal course.

All lawyers have, or should have, their own plan for their legal career. This article is not meant to necessarily determine what that plan should be. Rather, it is meant to provide useful tools for accomplishing your ultimate career goal. Whether it be making partner, opening your own shop, going in-house, or returning to academia, it is hoped that these tips will help you achieve your career objectives.

Work Hard

During my big-law days, we used to joke that “the reward for good work was more work.” While nothing could be more depressing to a young lawyer in the midst of working overnight or on the weekend, what it meant was extremely important. Nothing impresses a boss or senior lawyer more than working hard and producing solid work product. Nor is there a better way to learn the legal profession than to work hard and obtain as many experiences as possible. As a natural result, those same individuals are more likely to “give” work to those who have worked hard, provided accurate advice, and done so without (too much) complaining. So, what is the reward you ask?

If your bonus is based on billables, the answer is obvious. On a related note, in light of the fact that the supply of lawyers far exceeds demand, a little job security can go a very long way. Looking at the matter in more of a long-term manner, however, working hard and impressing those senior to you will be useful when it comes to promotions, meeting new clients, or exploring new career opportunities. As the old adage goes, there is no substitute for hard work.

Find a (Career) Mentor

Many firms and companies have formal mentorship programs designed for newly minted attorneys. If no formal mentorship programs exist, young lawyers should seek out experienced lawyers to provide them guidance and advice. Many of these relationships evolve naturally, and young lawyers should be mindful of this process. These mentors can be invaluable sources of information for succeeding in your current position and may also serve as career guides.

On the other hand, young lawyers might want to consider looking outside their current employment environment for career mentors. For example, if you are a young associate in a firm but want to ultimately obtain an in-house position, you may be more comfortable discussing the topic with someone on the outside. Similarly, if you find yourself in a non-legal role fresh out of law school, consider seeking out experienced lawyers who may help guide your path into a more substantive practice role. Young lawyers should endeavor to learn as much as they can from those who have gone before, and keep in mind that some of the best lessons are learned the hard way.

Build a Relationship Network

The term “networking” is often overused and just as often misunderstood. Networking is not simply walking into a room and collecting business cards, increasing the number of LinkedIn contacts, or being introduced to someone through a mutual friend. More importantly, except in the most rare circumstances, such superficial contacts are neither going to generate business nor help you obtain the right job. Rather, building a network of relationships, one
that may be truly valuable for later business development or job search opportunities, requires time and a mutual interest in helping each other.

I recently had coffee with a young lawyer who was experiencing difficulty finding a legal position, having spent several years performing contract work and spending time in non-legal functions. After spending an hour discussing potential jobs, connections, and alternatives, the young lawyer turned to me and asked what he could do for me. His understanding of the need to build a relationship, rather than simply seeing what someone else can do for him, is something we can all learn from. You are not going to become close friends with everyone you meet, but having a healthy, professional relationship is fundamental to building a truly useful network.

**Pursue Your Interests, Whatever Way You Can**

For many lawyers, the first job out of law school is not the ideal position, and often it is not even in the right industry. Even for those who find themselves exactly where they want to be directly after law school, they in all likelihood have a better position in mind long-term. Bar associations and networking offer a host of opportunities for young lawyers to learn more about other industries and legal roles. For example, taking advantage of these opportunities is essential for the young law-firm associate who wants to be in-house to gain the necessary experiences for making that move. In the digital age, the Internet offers a wide variety of tools for learning (and even writing) about a particular practice area, industry, or legal role. If you are not where you want to be, do what you can to get there.

**Be Flexible**

The legal landscape has changed dramatically in the past decade. Good grades, a solid pedigree, and law review no longer ensure placement in a coveted clerkship or law-firm posting. Likewise, hard work and solid reviews do not guarantee promotion within a firm or organization. In light of this new reality, lawyers must think creatively about opportunities and alternative routes to their desired role.

Remember, no one cares more about your career than you do. Nor is it likely that anyone else truly understands your ultimate career objectives quite like you. While there is no golden five-year plan, and indeed five years may be three or eight, you can take steps now that will ultimately make sure that you remain in charge of your career.

**Keywords:** litigation, career, business development, networking, young lawyers

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NEWS & DEVELOPMENTS

March 4, 2015

Jury Find Palestinian Authority Responsible for Terrorist Attacks

On February 25, 2015, a jury in the U.S. District Court for the Southern District of New York found the Palestine Liberation Organization (PLO) and Palestinian Authority (PA) liable for six shootings and bombings carried out in or near Jerusalem between 2002 and 2004. In the case, Sokolow v. Palestine Liberation Org., No. 04 CIV. 397, the plaintiffs, made up of the estates and family members of U.S. citizens injured or killed in the attacks, filed suit in 2004, asserting claims under the Anti-Terrorism Act, 18 U.S.C. § 2331 et seq.

The jury found that the plaintiffs had proved by a preponderance of the evidence that the PLO and the PA, either acting through one of its employees or by providing support to Hamas and the Al-Aqsa Martyrs Brigade, two groups designated by the State Department as Foreign Terrorist Organizations, knowingly provided material support or resources used to carry out the attacks. See Docket No. 04 CIV 00397, Jury Verdict Form, Feb. 25, 2015, ECF No. 825. The jury awarded a total of $218.5 million to the plaintiffs, which may be trebled under 18 U.S.C. § 2333(a), which provides that a successful plaintiff under the Anti-Terrorism Act “shall recover threefold the damages he or she sustains.”

In a decision dated November 19, 2014, which paved the way for a trial, the court granted in part and denied in part the defendants’ motion for summary judgment. Sokolow v. Palestine Liberation Org., No. 04 CIV 397 (GBD), 2014 WL 6601023 (S.D.N.Y. Nov. 19, 2014). In that decision, the court reviewed the admissible evidence against the defendants and concluded that for six out of seven of the attacks that were the subject of the lawsuit, a reasonable jury could conclude that the PA, acting through one or more employees, knowingly provided support for terrorism. In this decision, the court pointed to evidence offered by the plaintiffs that the PA continued to pay the salaries of and promote employees who admitted to being involved in terror attacks and, even after the attacks, honored those individuals’ involvement and paid money to their families. See, e.g., id. at *6 (noting evidence that individual suicide bomber was “recognized as a martyr and his family was given money” and that PA employee who admitted his role in organizing suicide bombing in open court “remained on the PA payroll and has been promoted four times since his conviction.”).

The PLO and PA have stated that they will appeal the jury’s verdict.

Keywords: litigation, young lawyers, Anti-Terrorism Act, terrorism

— David Dobin, Cohen and Wolf, P.C., Bridgeport, CT

February 28, 2015

SCOTUS Opinion a Bridge over Troubled Waters?

The U.S. Supreme Court recently resolved exceptions raised to a special master’s report regarding an accounting of water use involving a dispute between the states of Kansas and Nebraska. In Kansas v. Nebraska, the high court was called upon to resolve certain exceptions to a special master’s report with respect to Nebraska’s use of waters governed by a state compact and prior settlement.

In 1943, Congress approved the Republican River Compact, which was an agreement between Colorado, Kansas, and Nebraska regarding the apportionment of “virgin water originating in” the Republican River Basin. Following a prior dispute, the parties entered into a settlement that established mechanisms for accurately measuring water

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consumption and promoting compliance with the compact. The dispute resolved by the Court arose in 2007, following the first post-settlement accounting period.

The Supreme Court first addressed its jurisdictional authority for resolving the dispute. The Court noted that proceedings under its original jurisdiction are “basically equitable in nature” and that in resolving disputes between states, the court may mold the process to best promote justice. Although the Court noted that it must generally enforce the terms of a compact between states, it may invoke equitable principles to devise fair solutions, remedy violations, and promote compliance, especially where the compact bears congressional approval.

Turning to the merits of the dispute, the Supreme Court adopted the recommendations made by the special master. Specifically, the high court agreed with the special master’s determination that Nebraska “knowingly failed” to comply with its obligations under the prior settlement and that disgorgement was an appropriate remedy for such breach. In so doing, the Court also rejected Kansas’s objection that partial disgorgement was insufficient. The Court also affirmed the special master’s recommendation that the accounting mechanisms be modified to avoid systematic error. Given the frequency of drought conditions and scarcity of water in the basin, it is likely not the last time this particular issue will be before the high court.

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