

## Practice Tips

### A Primer for Litigating Against the Massachusetts Securities Division

By Jonathan L. Kotlier and Allison D. Burroughs

**T**he Massachusetts Securities Division (the “MSD”) possesses extraordinary power as it can put a broker-dealer or investment advisor out of business in the Commonwealth. The MSD enforces the Massachusetts Uniform Securities Act, G.L. c. 110A *et seq.*, which prohibits unlicensed and/or fraudulent activity by anyone who offers or sells a security in the Commonwealth. If it finds a violation, the MSD can impose financial sanctions, order a person to cease and desist from the unlawful practices, or suspend or revoke the registration of any broker-dealer, investment advisor, agent, or representative. (*Id.* at §204(a)).

In matters that are actually litigated, the MSD has a home-court advantage. The Presiding Officer of an adjudicatory proceeding is usually an employee of the Secretary of the Commonwealth, not a neutral third party. In addition, the MSD has the advantage of having conducted an extensive investigation, including subpoenaing documents and deposing witnesses. And yet, the MSD does not voluntarily produce any discovery, except what it discloses in a “pre-trial memorandum,” which is often no more than a summary of the Administrative Complaint.

In carrying out its stated (and laudable) goals of protecting investors and doing so expeditiously, the rights of respondents can sometimes be given short shrift. This article suggests strategies for best overcoming the significant tilt of the playing field and for positioning your case for review by the Superior Court.



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## 1. Presiding Officers

After conducting its investigation and recommending charging a respondent, the MSD also gets to appoint the Presiding Officer for the administrative proceeding. By its own regulations, the Director of the MSD is designated as Presiding Officer, although he is empowered to delegate that authority to another person inside or outside the MSD. 950 CMR 10.02. In practice, the Director usually appoints an employee of the Secretary of the Commonwealth. While the employees of the Secretary of the Commonwealth are, no doubt, fair-minded and of high character, it is not unreasonable to be concerned that in exercising discretion, the Presiding Officer might lean in favor of the MSD.

This concern was on display in *Cohmad Securities Corp.*, where the Presiding Officer, the Acting Director of the MSD, found the respondent in default when it filed its answer *seven days* late. On subsequent review, Judge Hinkle of the Superior Court reversed, holding that entry of a default judgment was an abuse of discretion where there was insufficient evidence that the respondent willfully violated the MSD's regulations. *Cohmad Sec. Corp. v. Galvin*, Civ. A. No. 2009-02226, 2009 WL 2450537, \*7-8 (Mass. Super. Ct. Aug. 10, 2009). In an action currently pending before the Business Litigation Session of the Superior Court (10-3633-BLS), the respondent in *Cohmad* has subsequently alleged that the Presiding Officer participated in the investigation of the matter prior to serving as the hearing officer and, therefore, should have been disqualified.

If a respondent believes that the appointed Presiding Officer might show a bias in favor of the MSD, the respondent should carefully consider moving for the Presiding Officer to recuse herself. While such a motion is unlikely to succeed, the issue is preserved for subsequent review by the courts.

## 2. Discovery

Getting adequate discovery in adjudicatory proceedings is unlikely as the MSD typically opposes a respondent's efforts to use civil discovery tools. The MSD has stated that it is not required to engage in civil discovery and has frequently and strenuously resisted efforts to obtain such discovery. This position, however, runs counter to the regulations governing administrative procedures, which provide for civil discovery and set forth mechanisms to ensure due process in administrative hearings. See Massachusetts Administrative Procedure Act, M.G.L. c. 30A ("the Mass. APA") and regulations promulgated thereunder at 801 CMR 1.00 *et seq.* The MSD takes the position that these regulations only apply to executive offices of the Commonwealth, which do not include the Secretary of the Commonwealth. Respondents should nonetheless cite to these regulations with the hope that a Presiding Officer or a reviewing court will be troubled by the argument that due process protections afforded respondents in other Massachusetts administrative actions are not available in proceedings before the MSD.

It has been the MSD's view that 950 CMR § 10.09 only contemplates an exchange of trial evidence through the submission of pre-trial memoranda, which are generally due shortly prior to the actual hearing. MSD resists all attempts at earlier or additional discovery, claiming that all of the relevant and necessary materials will be provided in the pre-trial memoranda, which they advertise as being a comprehensive road map. In reality, MSD's memoranda are often legal boiler plate and a restatement of the allegations set forth in the complaint, without a summary of anticipated testimony by witnesses. If the MSD's memorandum is bare bones, Respondent should file a motion for a more definite statement. Respondent should also move the Presiding Officer for permission to delay its own pre-trial submission until after it has reviewed the MSD's memorandum.

### **3. The Administrative Hearing And Appellate Review**

The Mass. APA provides guidelines for conducting adjudicatory proceedings, but much is left to the discretion of the Presiding Officer. As part of those guidelines, it provides that every "party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence." See §11. If these "rights" are not afforded during the administrative proceeding, a respondent may have a solid basis for appeal. For example, if the Presiding Officer refuses to preserve testimony through the deposition of unavailable witnesses, it can be argued that the respondent has been denied the right to call and examine witnesses. Similarly, if the Presiding Officer refuses to order the MSD to turn over prior inconsistent statements of its witnesses (which the MSD maintains it is not required to disclose), has the respondent really had an opportunity to cross-examine witnesses? Such refusals could provide a solid basis for an appeal to the Superior Court, which can set aside a decision of an agency if it finds that the agency decision was made upon unlawful procedure, based upon an error of law, or in violation of constitutional provisions. M.G.L. c. 30A, §14.

Litigating a case against the MSD, although it can be expensive and time consuming, can be beneficial and can produce a better result than settling earlier in the process. First, litigation may expose the warts on MSD's case and may create a better environment for settling. There will be a delay between the close of evidence and a decision by the presiding officer. This time may be used to negotiate a settlement more favorable than might have been possible at the outset, particularly if the hearing process has exposed weaknesses in enforcement's case or there are viable issues preserved for appeal. Second, getting the case before the Superior Court can produce a good result. Appeals have been successful. In *Bergin v. Galvin*, No. Civ. A. 98-6016-H, 2000 WL 744567 (May 18, 2000), the Superior Court (Gants, J.) outright dismissed claims against two respondents and remanded for further findings of fact and law against the others because the record was so "tainted by errors of law of the Hearing Officer." ■