

March 26, 2018

## **D.C. CIRCUIT HOLDS THAT WITNESSES IN PCAOB INVESTIGATIONS HAVE THE RIGHT TO A TECHNICAL EXPERT**

To Our Clients and Friends:

On March 23, 2018, the U.S. Court of Appeals for the D.C. Circuit issued a unanimous opinion vacating an SEC order upholding sanctions issued by the Public Accounting Oversight Board against petitioner Mark E. Laccetti. The court held that petitioner was deprived of his right to counsel because the Board denied his request that a technical expert be present while he gave investigative testimony to the Board. The court therefore vacated the SEC's order and directed the Commission to vacate the sanctions.<sup>[1]</sup>

In 2007, the Board required petitioner, a partner with an accounting firm, to give investigative testimony in connection with an investigation into certain audits. Petitioner requested a technical expert to aid counsel on the complex accounting issues that would be the subject of the Board's questioning. The Board denied that request out of a supposed concern over "internal monitoring," because the expert petitioner had proposed was associated with the accounting firm under investigation. The Board did so despite using its own technical experts to question petitioner and despite allowing attorneys associated with the accounting firm to attend the testimony.

The Board ultimately instituted disciplinary proceedings against petitioner, and Gibson Dunn was brought in to represent him in his administrative trial before a Board hearing officer. Gibson Dunn secured a favorable disposition of several of the claims against petitioner, which the Board's Division of Enforcement appealed to the Board itself. The Board ultimately issued sanctions against petitioner, which the SEC upheld on appeal.

In his challenge to the SEC's order in the D.C. Circuit, petitioner advanced several arguments, including that the Board's denial of his request for a technical expert violated the right to counsel in Board investigative proceedings secured by Board Rule 5109. The D.C. Circuit agreed for three independent reasons. First, the court held that the Board's stated "internal monitoring" rationale made "no sense" because it allowed other individuals from the accounting firm to attend petitioner's investigative testimony.<sup>[2]</sup> Second, the court held that the Board's supposed rationale could not in any event support its refusal to allow petitioner to have *any* technical expert present.<sup>[3]</sup> And third, the court held that, under Rule 5109, the Board "may not bar a witness from bringing an accounting expert who could assist the witness's counsel during an investigative interview."<sup>[4]</sup> On this point, the court recognized that the Administrative Procedure Act's right to counsel (which arguably applied in SEC proceedings, but not Board proceedings) required the assistance of a technical expert.<sup>[5]</sup> In the court's view, there was "no meaningful distinction between the right to counsel in the APA and the right to counsel in the Board's rules."<sup>[6]</sup> Finally, the court rejected the Board's argument that the error was harmless—the agency

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admitted that its decision to institute proceedings may have been based on the tainted investigative testimony.[7]

The D.C. Circuit's opinion is significant because it makes clear that, under the Board's rules, the right to counsel in investigative proceedings includes the assistance of a technical expert. In this regard, the opinion reaffirms that the subjects of Board proceedings enjoy a right essential to procedural fairness and due process, and brings the Board's procedures in line with those governing similar administrative proceedings under the APA.

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[1] *Laccetti v. SEC*, No. 16-1368, slip op. 9 (D.C. Cir. Mar. 23, 2018).

[2] *Id.* at 4.

[3] *Id.* at 5.

[4] *Id.* at 7.

[5] *SEC v. Whitman*, 613 F. Supp. 48 (D.D.C. 1985).

[6] Slip op. 7.

[7] *Id.* at 8.



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