

PANEL DISCUSSION: CORPORATE INVESTIGATIONS AND PARALLEL PROCEEDINGS

**Moderator:
SCOTT O'CONNELL
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Special Corporate Investigations: Practical Considerations for Avoiding Traps for the Unwary

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Panel

Dan Rikard
V. Pres., Gen. Counsel & Sec.
Polymer Group, Inc.

Andy Upton
Director, Assoc. Gen. Counsel
Citigroup Global Markets

Joel Hoxie
Snell & Wilmer

This panel will explore through the use of a progressive hypothetical—crafted from current events—the many competing and perilous decisions that often need to be made during the life of an internal investigation.

1. The Subject of the Investigation—Initial considerations
 - a. Nature of allegation—what conduct is implicated
 - b. Whose conduct is implicated—what level of the organization
 - c. How extensive is alleged conduct
 - d. Is the alleged conduct criminal
 - e. Source of the information
 - i. Whistleblower? If so, what protections are mandated
 - ii. Aggrieved former employee trying to manufacture leverage?
 - iii. Allegations made by competitor in litigation?
 - iv. Routine discovery of information discovered in the ordinary course of business?
 - v. Analyst Report
 - vi. Newspaper Article
 - f. Public disclosure obligations

2. Initial Actions

- a. Sarbanes Oxley Compliance
 - i. Up the ladder reporting
 - ii. Chief Legal Officer
 - iii. Chief Ethics Officer
 - iv. Audit Committee
- b. Decision on whether to conduct an investigation
- c. Decision on who will conduct investigation
 - i. In-house legal team
 - ii. Outside legal team
- d. Decision on who the client is for purposes of the investigation
 - i. Audit Committee
 - ii. Outside directors of the board
 - iii. Special Committee of the board
 - iv. Company Officers
- e. Determine Protocol For Investigation
 - i. Timeline?
 - ii. Talking points concerning investigation
 - iii. Written acknowledgement from interviewee that the investigating attorneys are not the interviewee's counsel
 - iv. Company counsel permitted to participate in interviews?
 - v. Private counsel of interviewee permitted to participate in interviews?
 - vi. Union representatives or counsel?
 - vii. Form of written product documenting investigation
 - viii. Nature of reports to clients
- f. Identification of Individuals with Information
- g. Identification of Potentially Relevant Records
 - i. Electronic data and communications—Preservation obligations?
 - ii. Paper records
 - iii. Third party information

3. Conducting the Investigation—Best Practice Considerations

- a. Number of participants on interview team

- b. Witness statements—form and content
 - c. Acknowledgements--
 - d. Confidentiality issues
 - e. Form and manner of final presentation
- 4. Interim Actions During Investigation
 - a. Suspension or adverse employment actions of certain individuals
 - b. Interim reports to client
 - c. Regulatory disclosure considerations
 - d. Public disclosure considerations
- 5. Special Challenges—Dealing with uncooperative employee witnesses
- 6. Special Challenges—Parallel Proceedings
 - a. Derivative actions
 - b. Securities class actions
 - c. Regulatory proceedings
 - d. Criminal investigations



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Scott O'Connell is the leader of the firm's Financial Services and Securities Litigation Practice Group. He represents integrated financial service companies—including banks, securities firms, insurance companies, and regulated subsidiaries of nonfinancial parents—in federal and state court litigation and before regulatory agencies.

Mr. O'Connell has extensive experience defending financial institutions in class actions concerning lender liability, breach of contract, breach of fiduciary duty, breach of good faith, unfair and deceptive trade practices, fraud, misrepresentation, fair debt collection practices, and civil RICO. He has particular trial experience litigating complex financial relationships between parties. His trial experience includes disputes between majority/minority shareholders in closely held businesses, partners, joint venturers, and co-developers. He has also successfully defended companies and their professional advisors sued under various theories of securities fraud.

While at law school, Mr. O'Connell served as an editor of the *Cornell Law Review* and as chancellor of the Moot Court Board. He was also an instructor in the Cornell undergraduate government course, "Law: Its Nature and Function."

Mr. O'Connell has been recognized for exceptional standing in the legal community in *Chambers USA: America's Leading Lawyers for Business 2008* for his Securities Litigation work. He has also been recognized as a "New England Super Lawyer" in Securities Litigation based on a peer-review survey by *Boston Magazine* (2007). Mr. O'Connell has earned an AV rating from Martindale Hubbell.