

Criminalization of Civil Law

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2008 Advanced Civil Trial Course

Enron Aftermath – since bankruptcy 12/01

- 34 Criminal Indictments
- 187 Civil Cases Filed



Parallel Civil and Criminal Proceedings in Practice – some examples

- You represent a client who is a defendant, target, or subject in a criminal case or matter and at the same time a defendant in a civil case arising out of the same series of events.
- You represent an alleged victim who is a plaintiff or potential plaintiff in a civil case and claims money damages, and who is at the same time the “victim” in a parallel criminal case.
- You represent a witness summoned for an interview with case agents or to appear before the grand jury, who must appear, as well, for a deposition in a related civil case.

U.S. Department of Justice

- **Criminal Prosecution** -- usually under Title 18.
- **Affirmative Civil Enforcement (“ACE”) under the False Claims Act, 31 U.S.C. §§ 3729-32.**
 - \$5,500 - \$11,000 per occurrence
 - 3x damages (2x for prompt acceptance of responsibility)
 - Liable for Government’s costs
 - Not applicable to claims under the Internal Revenue Code
 - § 3730 – vehicle for *qui tam* suit – relator receives 15-25% if the Government intervenes in successful case; 25-30% if the Government does not intervene and case is successful.
 - Criminal conviction estops defendant from denying essential elements in *qui tam* action involving same transaction.
- **Administrative Action** – Licensing and Permitting.

United States Attorneys' Manual

■ 1-12.000

Coordination of Parallel Criminal, Civil, and Administrative Proceedings

- The Attorney General issued a Memorandum on July 28, 1997, requiring a system for coordinating the criminal, civil and administrative aspects of all white-collar crime matters within every United States Attorney's office and each Department Litigating Division. The system should contain management procedures to address issues of parallel proceedings including:
 - timely assessment of the civil and administrative potential in all criminal case referrals, indictments, and declinations;
 - timely assessment of the criminal potential in all civil case referrals and complaints;
 - effective and timely communication with cognizant agency officials, including suspension and debarment authorities, to enable agencies to pursue available remedies;
 - early and regular communication between civil and criminal attorneys regarding *qui tam* and other civil referrals, especially when the civil case is developing ahead of the criminal prosecution; and
 - coordination, when appropriate, with state and local authorities.
- The Attorney General has further directed that appropriate staff in each office receive comprehensive training regarding parallel proceedings utilizing a course of instruction and training materials to be developed by the Council on White-Collar Crime and the Office of Legal Education.
- The full text of this Memorandum is in the [DOJ Organization and Functions Manual at 27](#).
- [Updated February 1998] [cited in [USAM 4-4.110](#); [5-11.112](#)]

Memorandum on Parallel Proceedings

- 27.

- **Coordination of Parallel Criminal, Civil, and Administrative Proceedings**

- **July 28, 1997 MEMORANDUM FOR ALL UNITED STATES ATTORNEYS
ALL ASSISTANT UNITED STATES ATTORNEYS
ALL LITIGATING DIVISIONS
ALL TRIAL ATTORNEYS**

- FROM: THE ATTORNEY GENERAL The key to the Department's federal white-collar crime enforcement effort is to use the Government's resources as efficiently and effectively as possible in order to punish offenders, recover damages, and prevent future misconduct. In recent years, we have pursued greater numbers of complex cases, in which the Government has been required to employ the full range of criminal, civil and administrative remedies and sanctions. The challenge requires greater cooperation, communication and teamwork between the criminal and civil prosecutors who are often conducting parallel investigations of the same offenders and matters. Although policies and procedures on parallel proceedings have been adopted by many of the United States Attorneys' offices, and Department components, I am issuing the following policy statement to clarify the Department's priorities and responsibilities in this new litigative environment.
- We have experienced significant change in the way the Government fights white-collar crime. We have also experienced enormous growth of affirmative civil enforcement (ACE), and with additional ACE resources, annual recoveries have increased by hundreds of millions of dollars. Enforcement priorities encompass not only government procurement and health care fraud, but also consumer protection, the environment, tax, and securities fraud, which implicate a variety of civil, criminal, and regulatory remedies.
- In order to maximize the efficient use of resources, it is essential that our attorneys consider whether there are investigative steps common to civil and criminal prosecutions, and to agency administrative actions, and that they discuss all significant issues that might have a bearing on the matter as a whole with their colleagues. When appropriate, criminal, civil, and administrative attorneys should coordinate an investigative strategy that includes prompt decisions on the merits of criminal and civil matters; sensitivity to grand jury secrecy, tax disclosure limitations and civil statutes of limitation; early computation and recovery of the full measure of the Government's losses; prevention of the dissipation of assets; global settlements; proper use of discovery; and compliance with the Double Jeopardy Clause. By bringing additional expertise to our efforts, expanding our arsenal of remedies, increasing program integrity and deterring future violations, we represent the full range of the Government's interests.

Memorandum (cont.)

- Consistent with our responsibility to make our enforcement efforts more efficient and effective, prosecutors should consult with the government attorneys on the civil side and appropriate agency officials regarding the investigative strategies to be used in their cases. With proper safeguards, evidence can be obtained without the grand jury by administrative subpoenas, search warrants and other means. Evidence can then be shared among the various personnel responsible for the matter. This information-sharing can provide a mechanism through which the Government can achieve a comprehensive settlement of all of the Government's various interests.
- I welcome the participation of the various law enforcement agencies in this effort. I encourage those agencies and offices with investigatory responsibilities to recognize, through workplans and credit in the review process, accomplishments in the civil and administrative areas that arise from the work of their agents. I also encourage the United States Attorneys, Litigating Divisions and administrative agencies to similarly recognize those contributions.
- To help offices in overcoming impediments to coordination that may arise from a lack of resources, experience or expertise, I also direct that appropriate staff in each office receive comprehensive training regarding parallel proceedings utilizing a course of instruction and training materials to be developed by the Council on White-Collar Crime and the Office of Legal Education.
- [cited in [USAM Chapter 1-12.000](#); [Civil Resource Manual 228](#); [Criminal Resource Manual 2464](#)]
- Accordingly, every United States Attorney's office and each Department Litigating Division should have a system for coordinating the criminal, civil and administrative aspects of all white-collar crime matters within the office. The system should contain management procedures to address issues of parallel proceedings including:
 - timely assessment of the civil and administrative potential in all criminal case referrals, indictments, and declinations;
 - timely assessment of the criminal potential in all civil case referrals and complaints;
 - effective and timely communication with cognizant agency officials, including suspension and debarment authorities, to enable agencies to pursue available remedies;
 - early and regular communication between civil and criminal attorneys regarding *qui tam* and other civil referrals, especially when the civil case is developing ahead of the criminal prosecution; and
 - coordination, when appropriate, with state and local authorities.

Areas of Potential Conflict and Overlap

- Discovery and Use of Discovery
- Waiver or Preservation of Fifth Amendment Rights
- Waiver of Attorney-Client Privilege and Work Product Protection
- Collateral Estoppel

Whether to seek a stay of civil proceedings - may depend on an assessment of your relative knowledge of the case and access to evidence.

Objectives of the Criminal Law - 18 U.S.C. § 3553(a)

“The court, in determining the particular sentence to be imposed shall consider -

1. the nature and circumstances of the offense and the history and characteristics of the defendant;
2. the need for the sentence imposed -
 - A. To reflect the seriousness of the offense, to promote respect for the law, and to provide just compensation for the offense [retribution];
 - B. to afford adequate deterrence to criminal conduct [general and specific deterrence];
 - C. to protect the public from further crimes of the defendant [public safety]; and
 - D. to provide the defendant with needed educational or vocational training; medical care, or other correctional treatment in the most effective manner [rehabilitation];

.....

7. The need to provide restitution to any victims of the offense.”

Discovery Available in Criminal Cases – What Must Be Requested

- Rule 16 – Federal Rules of Criminal Procedure

- (A) defendant's oral statements before or after interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial;
- (B) defendant's written or recorded statements (including any grand jury testimony);
- (C) the same for organizational defendants, if the government contends the person making the statement was legally able to bind the defendant organization;
- (D) defendant's prior criminal record;
- (E) documents and objects material to preparing a defense that the government intends to use in its case-in-chief or that were obtained from or belong to defendant;
- (F) reports of physical and mental examinations and scientific tests or experiments material to preparing the defense or that the government intends to use in its case-in-chief; and
- (G) summaries of expert testimony under FRE 702, 703, and 705.

- In state court – TEX. CODE CRIM. PROC. ANN. Art. 39.14

Jencks Material

- *Jencks v. United States*, 353 U.S. 657 (1957);
- 18 U.S.C. § 3500(a)

Applies, on motion, for testifying witnesses only after the witness has completed his or her direct examination.

Gaskin Rule in state court.

What else?

- *Brady* material – *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution has an affirmative duty to reveal arguably exculpatory evidence upon timely motion.
- *Giglio* material – *Giglio v. United States*, 405 U.S. 150 (1972). ...this includes material tending to impeach the character or testimony of a government witness in a criminal trial.

Why the difference between criminal and civil discovery? ... 74 Harv. Law Rev. 940, 1052 (1961)

- Fear broad disclosure of the prosecution's case would result in perjury and manufactured evidence;
- Revealing confidential informants would create an opportunity for intimidation and discourage people from giving information to the government; and
- The self incrimination privilege would allow the defendant to resist all discovery and then surprise the prosecution.

Vasilas – harbinger or aberration?

- Defense counsel's client convicted of lesser included offense of possession of marijuana but acquitted of delivery.
- Counsel files petition to expunge under Art. 55.01 of the Criminal Procedure Code.
- Client not entitled to that remedy under the statute, despite layman's reasoning that he might be.
- Counsel prosecuted for tampering with a governmental record and making false entries in a governmental record under Section 37.10 of the Penal Code.
- Counsel (now defendant) files motion to quash arguing pleadings are not governmental records and that even if they were, Section 37.10 to that extent is *in pari materia* with Rule 13.

Result so far...

- Four reported opinions: 2 Dallas Court of Appeals; 2 Texas Court of Criminal Appeals opinions.

-*State v. Vasilas*, 153 S.W.3d 725 (Tex. App.—Dallas 2005), *rev'd and remanded*, 187 S.W.3d 486 (Tex. Crim. App. 2006)

-*State v. Vasilas*, 198 S.W.3d 480 (Tex. App.—Dallas 2006), *aff'd*, 253 S.W.3d 268 (Tex. Crim. App. 2008).

-What we can say:

* A pleading or petition (or answer, or response, or proposed order or brief?) is a governmental record for purposes of the Penal Code prohibition on tampering with a governmental record – **and the Court of Criminal Appeals has held this does not lead to an absurd result the legislature could not possibly have intended.**

* This reading does not render the Section *in pari materia* with Rule 13.

Sarbanes Oxley

Section 802(a): “Whoever 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 or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, *or in relation to or contemplation of* any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both. 18 U.S.C. § 1519 (emphasis added).

Final Notes

1. Presenting a case on behalf of a victim to the District Attorney or USAO.
2. Submissions at Sentencing (Restitution).