

HCCA Healthcare Enforcement Compliance Conference

NAVIGATING PARALLEL PROCEEDINGS

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I. Introductions

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II. Main Learning Points

- A. Government investigations of alleged healthcare fraud are often *far more complex and multi-faceted* than they may first appear, particularly to the entities or persons under investigation.
- B. Parallel investigations—whether state/federal or civil/criminal/administrative—present *significant challenges and pitfalls* for all parties.
- C. A *global resolution* of all aspects of an investigation is generally in the *best interest* of all parties, but often *difficult to achieve*.

III. Initial Survey of Audience Members

- A. Do you have direct experience of a parallel investigation? [Yes/No] If so, which types: (1) state and federal; (2) civil and criminal; (3) civil and administrative; (4) all of the above?
- B. Have you ever been worried that conduct you have become aware of in your capacity as a compliance professional could possibly expose yourself, someone else in your organization, or the organization itself, to not just civil, but criminal, liability? [Yes/No]
- C. Are you confused by how state and federal law enforcement decides whether alleged misconduct might be criminal in nature? [Yes/No]
- D. If your organization has been (or is being) investigated, do you think that it is in the best interest of your organization to resolve *all types* of potential liability—state, federal, civil, criminal, administrative—at the same time as part of a “global” resolution? [Yes/No]

IV. Background on Parallel Proceedings

A. What is a parallel proceeding?

- 1. Definition: A state and/or federal government investigation that proceeds civilly and criminally (and/or administratively) against at least one or more of the same defendants at the same time.

2. Recent examples of parallel investigations:
 - Opioid MDL litigation (D. Ohio) – state and federal
 - *Insys* (D. Mass.) – civil and criminal; feds indicted individuals but did not intervene in relator’s FCA complaint; however global resolution achieved.
 - NY AG prosecution of Medford skilled nursing home

B. Are parallel proceedings *legal*? Don’t they give the government an unfair advantage?

1. Courts generally approve the use of parallel proceedings. *See, e.g., SEC v. Dresser Industries*, 628 F.2d 1368, 1374 (D.C. Cir. 1980).
2. Parallel proceedings don’t violate due process rights as long as government attorneys don’t act in bad faith. *See U.S. v Kordel*, 397 US 1, 11 (1970).
 - a. *U.S. v Stringer*, 535 F.3d 929 (9th Cir. 2008). Reverses dismissal of indictment; SEC made no affirmative misrepresentations about existence of criminal investigation and didn’t use civil investigation as pretext for criminal.
 - b. *U.S. v. Edwards*, 526 F.3d 747 (11th Cir. 2008). No constitutional violation where SEC shared discovery from civil suit with USAO for use in criminal prosecution; no evidence of bad faith or improper exploitation of the SEC case by the USAO.
3. The government acts in *good faith* if it uses investigative tools for their proper purposes and in appropriate ways.
4. Government attorneys act in *bad faith* if they use criminal investigative tools as a *pretext* to advance a civil investigation, or civil tools to advance a criminal investigation.
 - a. *U.S. v Tweel*, 550 F.2d 297 (5th Cir. 1977). Evidence suppressed b/c IRS deceived taxpayer into believing investigation was civil only, *i.e.*, DOJ involvement concealed.
 - b. *U.S. v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005). Government manipulated simultaneous civil and criminal investigations of defendant, including SEC moving defendant’s deposition location for criminal venue purposes and USAO directing SEC on content of deposition, while defendant didn’t know of criminal investigation. Court suppressed deposition in criminal perjury case.

5. Generally, with the notable exception of grand jury proceedings (see below), so long as government attorneys act in good faith, they can share the fruits of their investigation (documents, testimony, *etc.*) with their counterparts in another division or office. And often, federal prosecutors will share with state prosecutors, and vice versa. But not always.

C. Are government attorneys *required* to engage in parallel proceedings?

1. DOJ policy *requires* that civil and criminal attorneys engage in parallel proceedings, when legal and appropriate. *See, e.g., AG Reno memo* (1997); *AG Holder memo* (2012); *AAG Yates memo*; U.S. Attorneys Manual (USAM).
 - USAM 1-12.000: “Every USAO and Department litigating component should have policies and procedures for appropriate coordination of the government’s criminal, civil, regulatory, and administrative remedies.”
 - “Such policies should stress early, effective, and regular communication between criminal, civil, and agency attorneys to the fullest extent appropriate to the case and permissible by law ...”
 - “Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued.”
 - While parallel proceedings must be handled carefully in order to avoid allegations of improper release of grand jury material or abuse of civil process, when conducted properly, they can complement one another and serve the best interests of law enforcement and the public.”
2. From a law enforcement perspective, there are many *advantages* of parallel investigations:
 - a. Help achieve greatest deterrent impact and financial recovery.
 - b. Maximize efficient use of resources and avoid duplication of work.
 - c. Civil law enforcement team gets benefit of criminal investigative tools:
 - Search warrants
 - HIPAA subpoenas
 - Undercover operations
 - But generally NOT grand jury
 - Defendants may take case more seriously / act more quickly.

d. Criminal law enforcement team gets benefit of:

- Civil expertise and resources
- Evidence from civil discovery
- Larger scope of civil remedies (SOL 6/10 years instead of 5; treble damages; creative remedies – garnishment, 18 USC 1345).

D. Other than when acting in bad faith, are there any other limits on what government attorneys can share among themselves?

1. Government attorneys must be very careful with respect to Grand Jury proceedings. Unless criminal prosecutors obtain a court order under Fed. R. Crim. P. 6(e), GJ proceedings are confidential and any matters “before the GJ” cannot be disclosed to civil attorneys.

- Matters occurring before GJ may not be disclosed.
- Obligation of secrecy applies to grand jurors, court reporters, government.
- Does NOT apply to non-law enforcement witnesses.
- Bottom line: criminal can’t share matters occurring before GJ with Civil.
- Govt best practices – segregate information; cross-designation.

2. What is subject to Grand Jury secrecy?

- Matter occurring before the GJ. Information that reveals the strategy or direction of the investigation, the nature of the evidence produced before the GJ, the views expressed by members of the GJ, or anything else that actually occurred before the GJ.
- For example: GJ transcripts, exhibits or demonstratives shown to GJ, interview reports or other docs commenting on or describing what occurred in GJ room, oral accounts of what occurred in GJ room, identification of witnesses

3. Not subject to Grand Jury secrecy:

- Govt attorneys can seek a Rule 6(e) order from the court allowing disclosure of certain GJ materials.

- Some circuits say preexisting documents such as business records are NOT subject to 6(e) just because they were subpoenaed by the GJ. Some USAOs will still get a 6(e) order.
4. Other types of information that in some circumstances may not be automatically shared between government attorneys/investigators:
- Tax records require special handling.
 - Evidence produced in response to a federal CID from DOJ/USAO may be shared with other agencies within the federal government to further the investigation, but DOJ/USAO must seek internal authorization to share outside the government (*e.g.*, with state investigators).
 - Depending on scope of state FOIA rules, federal attorneys/investigators may be reluctant to share evidence with their state counterparts.
 - Another surprising informal hurdle: “Turf” and “Silo” issues between agencies, and even within offices.

V. Parallel Proceedings and Healthcare Investigations

A. What makes healthcare fraud investigations susceptible to parallel investigations?

1. HCF investigations tend to be complex and involve many different agencies and actors:
 - Federal agencies – CMS, FDA, etc.
 - State agencies – Medicaid programs, Medical Boards, etc.
 - Multiple law enforcement – DOJ, FBI, HHS OIG, USAOs, State AGs/MFCUs, etc.
 - Contractors – MACs, fiscal intermediaries, etc.
2. Tremendous amount of government spent on healthcare.
3. Potential for significant patient harm.

B. Why do some healthcare cases lead to parallel proceedings but not others?

1. Every case evaluated on the merits. How did the case come in?
 - Self-disclosure
 - Hot-line complaint
 - Whistleblower

- Publicity about incident involving patient harm
2. Which office is handling the matter? Practices may vary.
 - Some USAOs are better at doing parallel proceedings than others.
 - Strong parallel proceeding practices: MA, SDNY, CDCA. Generally, offices that handle a lot of organized crime cases.
 - USAO practices and enforcement priorities evolve over time. Are attorneys cross-designated? NJ USAO has joint intake for all HCF cases.
 - Some states have stronger FOIA statutes (e.g., FL), which make federal authorities more wary of interacting with the state offices, lest federal work product get produced in the state proceeding.
 3. How much money is at stake and is there actual or potential patient harm?

C. Signs that there may be a parallel criminal HCF investigation:

1. Prosecutors send out a target or subject letter.
2. Government has taken steps to freeze or seize assets, *e.g.*, Anti-fraud Injunction Act, 18 USC 1345 (requires probable cause fraud occurred)
3. Undercover surveillance.
4. Grand jury convened.
5. Presence of FBI agents by itself is not indicative of a criminal case.
6. Civil case is stayed to avoid criminal defendant's (civil) deposition of government agents, other govt witnesses via civil discovery.
7. Criminal prosecutor attends witness interview
8. Can you ask government investigators whether there is a parallel proceeding?
 - Yes – but civil attorneys will not confirm nor deny existence of criminal case; and vice versa. If pressed, will direct you to speak to particular attorney within other division. But be careful – may raise interest level; don't want to precipitate a parallel investigation.
 - Consider asking instead whether attorneys are criminal or civil, or cross-designated. Government attorneys must accurately identify themselves as being either civil or criminal attorneys – can't misidentify themselves.

D. What are the potential challenges and pitfalls of parallel civil/criminal investigations?

1. For *Defendants*:

- Don't want client to go to prison!
- Possible asset forfeiture/seizure.
- Higher risk – facing increased government resources and attention.
- Each witness needs counsel. More expensive.
- Criminal judgment can be used in subsequent civil case.

3. For *whistleblowers/relators*:

- Government can reduce or dismiss WB from case if WB was a “planner or initiator” of the misconduct.
- Will government mistakenly identify client as a planner/initiator?
- Criminal case may indicate government considers case worthy and will intervene in the civil case.
- Criminal judgment can be used to establish civil liability.
- But criminal case may also delay resolution of the civil case. Criminal usually “goes first.”
- If witnesses are concerned about their potential criminal liability, they may plead 5th in CID interviews or depositions. Govt can get adverse inference but not necessarily the info the govt needs to resolve the case.

E. Why is a global resolution generally in the best interest of all parties?

1. For Defendants:

- Global peace. Gives defendant most benefit and certainty.
- Defendant doesn't want to keep paying legal fees, subject to govt scrutiny
- End threat to reputation
- Note: There is no requirement of global resolution. Defendant may plead criminally but litigate civilly or settle civilly but litigate criminally.

2. For the Government:

- Limited resources
- Resolve and move on
- Issue press release and move on
- Recoup government funds

- Deterrence value not realized until resolved
 - Clarify rules
3. For whistleblowers/relators:
- Get it done and move on!
 - Litigation is expensive
 - Don't get paid until resolved.
 - Typically, civil not resolved until criminal resolved first.

F. Why is a global resolution sometimes hard to achieve?

1. Hard to get all the different players on same page. Shifting strategies, different objectives, and conflicting personalities.
2. Government attorneys must stay in their lane! Have to be careful not to use threat of criminal prosecution to resolve civil case.
 - Most USAOs will only hold joint discussions/global resolution if defendant requests.
 - Govt wants to avoid appearance of trading prison time for money, money for exclusion issues, etc.
 - Some USAOs will ask defendants to sign letter confirming that it wants joint negotiations. So not accused later by Defendant of using one to influence the other.
 - Criminal plea must be negotiated and approved through criminal channel. Civil settlement must be negotiated and approved through civil channels.
 - Admin release must be negotiated and approved by the agency – DOJ has no authority re: admin release.
 - State release must be approved by the state.
3. In global resolutions involving qui tam cases, govt may consider including fine in criminal plea and satisfy resolution through damages in civil settlement.
4. Debarment/exclusion issues. Negotiated by agency, but defendant unlikely to sign criminal plea or civil settlement w/o resolving. Can be D's biggest concern. Often is piece that is longest to work out.
5. *See* Medford/MDL Ohio settlement.

VI. Conclusions:

- A. Government investigations of alleged healthcare fraud are often *far more complex and multi-faceted* than they may first appear, particularly to the entities or persons under investigation.
- B. Parallel investigations—whether state/federal or civil/criminal/administrative—present *significant challenges and pitfalls* for all parties.
- C. A *global resolution* of all aspects of an investigation is generally in the *best interest* of all parties, but often *difficult to achieve*.

VII. Questions/Answers: