



Flipping The Script In Parallel White Collar Criminal Proceedings

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Parallel proceedings are a boon for prosecutors in criminal investigations. When parallel civil enforcement investigations or third-party lawsuits occur concurrently with criminal cases, the government will take full advantage of the information-sharing opportunities they provide.

The U.S. Department of Justice encourages parallel proceedings, as reflected in Chapter 27 of its Organizations and Functions Manual, which advises:

“Department policy is that criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law, whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, regulatory, and/or agency administrative parallel (simultaneous or successive) proceedings.”

The manual warns of only one limit on civil-criminal information sharing: that criminal prosecutors may not direct how civil investigators collect evidence to benefit the criminal investigation.

Parallel proceedings multiply the risks for targets. The government will use evidence gathered in concurrent civil proceedings and from the record of civil court proceedings, including trials. Targets in parallel civil lawsuits must decide whether to invoke Fifth Amendment protections in depositions and at trial and risk losing the ability to speak in their own defense. Invoking the Fifth

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Amendment endows plaintiffs with favorable “adverse inferences” for use at trial.

To avoiding parallel third-party lawsuits during criminal proceedings, defendants will typically seek a stay of civil proceedings until criminal matters are finished. The government will often concur, especially when it has already reaped the benefits of the civil investigation. Plaintiffs typically object to such stays to avoid delaying recovery, to lessen the risk that recoverable assets will be depleted by criminal convictions and to lose the advantages of the aforementioned adverse inferences against targets who are civil defendants.

Defense Opportunities for Expanded Discovery

In a criminal investigation, access to discovery for a target is limited. Targets must stand by until charges are filed to obtain discovery while the government pursues evidence with agents, subpoenas and search warrants, and harvests evidence from parallel proceedings. Though parallel proceedings are daunting for the defense, there are opportunities to accelerate the discovery timeline for a criminal case by accessing information from concurrent civil investigations.

Targets who are defendants in civil suits may depose witnesses who might have relevant knowledge, issue subpoenas for documents, and serve written discovery. (Note that for federal agencies, a [Touhy request](#) is needed to obtain testimony when the agency is not a party and the request may very well be denied.)

Evidence from agency civil enforcement may also be useful. Targets can review agency documents sent to them and to related parties, such as inspection reports, notices of violation, and information requests. Relevant information from agencies also can be obtained informally from cooperative agency personnel or formally using the federal Freedom of Information Act and state open records laws. If a parallel civil administrative or judicial civil case is headed for a hearing, formal discovery that defendants can use is likely to be required and opportunities to examine government witnesses may arise.

Targets of criminal investigations need to use all possible tools to level the playing field with the government. Information gleaned from parallel proceedings can be one of these tools.