

Navigating Parallel Proceedings: The Challenges When Representing Clients in Simultaneous Criminal, Civil, and Regulatory Matters

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What Is a Parallel Proceeding?

What immediately comes to mind is a federal criminal case with a related SEC case. But today's presentation is broader than that, and includes:

- State criminal cases and Bureau of Securities cases;
- Federal civil forfeiture;
- State criminal cases and related forfeiture proceedings; and
- The interplay between the Attorney General's Office and the Comptroller's Office in the prosecution of physicians.

Defining the Representation

What are you getting yourself into?

- This is the basic first question that must be asked, both to adequately define the scope of representation and be certain that you are thinking about the representation holistically.
- Your paramount goal: do not harm your criminal case or, worse, create criminal exposure where none exists.

Hypothetical 1: Federal Criminal and SEC

When the criminal case comes first and the SEC case second (or they are brought in tandem), the strategy is easy: move for a stay.

But what about when the SEC case comes first?

- Is there criminal exposure?
 - Engage with the U.S. Attorney's Office.
- Can you settle the matter?
 - Can you settle with no or limited discovery?

Hypothetical 2: State Criminal and BOS

The considerations here are very much the same as the previous slide.

Let's discuss an actual example:

- BOS is investigating defendants for selling unregistered securities. A civil complaint is filed, the defendants' motion to dismiss denied, and discovery unfolds.
- Defendants make harmful—and unrelated—admissions during their depositions, which leads to prosecution by the U.S. Attorney's Office for mortgage fraud.
- What could have been done differently?

Hypothetical 2: State Criminal and BOS (cont.)

When do you instruct your client to invoke his 5th Amendment privilege against self-incrimination?

- Benefits of doing so.
- Burdens of doing so.

Hypothetical 3: Federal Civil Forfeiture

Civil action *in rem* pursuant to 18 U.S.C. § 981.

Government must show a “substantial connection” between the property sought to be forfeited and the criminal activity alleged.

However, no crime needs to be charged.

So, what do you do when confronted with such a case?

- Benefits of fighting.
- Burdens of fighting.

Hypothetical 4: State Forfeiture

When the State seeks to forfeit assets (other than prima facie contraband) as part of a criminal case, it must bring a standalone civil action pursuant to N.J.S.A. 2C:64-3.

- Stay provision is built into the statute at 2C:64-3(f).
- Does RICO grant the State greater forfeiture power? *See* N.J.S.A. 2C:41-1 et seq.

Hypothetical 5: Physician Cases

The State Comptroller can suspend a physician from the Medicaid program or suspend Medicaid payments to the physician based on the existence of a “credible allegation of fraud.”

- The State Comptroller and the Office of the Insurance Fraud Prosecutor work in tandem.
- OAL challenge?
 - Benefits.
 - Burdens.
- What about the Board of Medical Examiners?

The Important Role of Pre-Indictment Advocacy in Parallel Proceedings

A basic question runs throughout these examples: can the multiple agencies and proceedings be used to your client's advantage in the form of a global (and favorable) resolution?

Questions and Contact Information

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