

Parallel proceedings or piling on?

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A major industrial incident causing substantial environmental harm. Widespread fraud leading to the evasion of the statutes or regulations designed to protect human health and the environment. A history of repeated administrative or civil violations. Any of these situations can increase the risk of parallel proceedings for your client. While parallel proceedings are an exception to the norms in environmental enforcement, to navigate them strategically on behalf of your client, you must understand the challenges that they present and the balancing acts that they involve.

Parallel proceedings are the simultaneous *or successive* investigations by criminal, civil, administrative, and, potentially, even congressional authorities arising out of the same set of overlapping facts. Because most environmental protection statutes provide for both criminal and civil enforcement, potential violations of environmental law pose a particularly uncertain risk of parallel proceedings. Both the U.S. Department of Justice's (DOJ's) Environment and Natural Resources Division (ENRD) and the U.S. Environmental Protection Agency (EPA) have long had policies that control the conduct of the attorneys and staff in their investigation and prosecution of environmental enforcement actions. The DOJ and EPA policies each state that, "when proceeding with both criminal and civil enforcement, the [agencies] generally will delay the civil case until criminal proceedings are resolved." [DOJ Policy](#) at 6; [EPA Policy](#) at 5. Although these policies suggest a general outcome (an orderly procession of cases one by one), there are enough examples of coinciding criminal and civil investigations or actions from both agencies that neither counsel nor client should rely on the guidance.

Because of the unique set of challenges inherent for clients at risk of a parallel proceeding, defense counsel should be aware of the following practice tips:

First, remember that counsel responding to what appears to be only a civil investigation or action should not have a false sense of security about a lack of criminal inquiry. Indeed, it is prudent to assume that there *will be* a parallel proceeding under the conditions set out above until proven otherwise. Since criminal investigations often proceed in secrecy for some period of time, investigations that appear to be only civil or administrative are potentially much more wide-sweeping than you or your client may appreciate. Indeed, the civil investigation may serve not only to conceal the criminal investigation, but also to aid it. Counsel who rarely cross over to the "other side" from civil to criminal defense should be especially cognizant of the need to educate

themselves on the dramatic differences between responses to civil and criminal investigations in such a low-information environment, or risk inadvertently waiving privileges, objections, etc., that may be applicable in one proceeding but not the other.

Second, counsel should not rest easy on the assumption that the promised information-sharing between the civil and criminal programs will occur—or occur to the benefit of the client—without monitoring and intervention. Assuming that the investigations are simultaneous, the parallel proceedings policies require “active consultation” between the civil and criminal components. However, the initiation of grand jury proceedings often frustrates this consultation. Once a prosecutor begins issuing subpoenas for documents or taking testimony before the grand jury, there may be heightened secrecy concerns that preclude “active consultation” from happening. Evidence obtained through a civil or administrative investigation may be shared with federal prosecutors as long as that evidence is not used exclusively to further a criminal proceeding. [DOJ Policy](#) at 5, 7.

After a grand jury in a criminal case has been convened, prosecutors are more restricted in their ability to share information obtained during a criminal investigation with civil attorneys. If a counsel recognizes these limitations, it may be in the client’s best interest to cooperate with the civil attorneys by disclosing information to which those government attorneys might not otherwise be able to gain access. For example, agreeing to supply the government with information may relieve the company or individual from having to face a search warrant or respond to a subpoena where additional, damaging information about the company may emerge.

Overall, counsel should not shy away from asking the government attorneys how to be helpful in the coordination and information-sharing process. Developing a cooperative relationship with the government not only may benefit the clients directly by potentially forestalling invasive and duplicative requests, but also can have exponential positive effects. Early and open cooperation may favorably influence prosecutorial discretion in several direct and indirect ways, including penalty reductions.

Third, counsel should keep up to date on the latest agency policies on parallel proceedings, particularly with the latest DOJ shift in policy, which may provide some relief in the face of future and ongoing parallel proceedings. Deputy Attorney General Rod Rosenstein announced this new policy on [Coordination of Corporate Resolution Penalties](#), which was incorporated directly into the United States Attorney’s Manual (USAM) as Section 1-12.100. In his remarks introducing the policy, Rosenstein noted that parallel proceedings can result in “[p]iling on, [depriving] a company of the benefits of certainty and finality ordinarily available through a full and final settlement.” Rosenstein noted that the “aim” of the new policy “is to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties.” The new policy has four key components: (i) reaffirming that criminal enforcement authority should not be used for purposes unrelated to the criminal investigation and prosecution (i.e., threatening criminal prosecution to get a better civil

settlement); (ii) directing DOJ components to coordinate when dealing with the same misconduct in order to achieve an “equitable” result; (iii) encouraging coordination with other federal, state, local or foreign enforcement authorities; and (iv) identifying factors that attorneys can use to determine whether multiple penalties for the same underlying misconduct serve the interests of justice. As with any new policy, the practical implications of this amendment to the USAM will depend on how the changes are implemented internally. However, counsel handling parallel proceedings should welcome as positive developments the DOJ’s continuing recognition of the potential unfairness of duplicative penalties and its policy to provide greater transparency and coordination in corporate enforcement.

Finally, counsel engaged in parallel proceedings may want to consider pursuing a global resolution for their clients, which may provide the client benefits of both a legal and nonlegal nature, including folding all “bad news” into one day rather than multiple DOJ press announcements and coverage related to resolution of the matter. Negotiating a global resolution will require counsel to work, often as an intermediary, among all investigative components in the negotiations. In negotiating a global resolution, it is important to keep in mind that engagement with senior officials in both proceedings will be necessary; so, timing will be an important factor in a successful agreement. As always, counsel will need to balance the needs and desires of their clients in the resolution with the different burdens of proof and preferred policy outcomes of the civil and criminal attorneys.