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Maintained

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This practice note discusses best practices defending "parallel proceedings," which are a related set of investigations or legal actions arising out of a single event or series of events but brought by different authorities or parties such as criminal and civil government regulators, state and federal agencies, or government and private plaintiffs. For example, imagine a case involving an alleged misstatement by a publicly traded company with respect to its financial performance. That company, its affiliates, and its officers, directors, and employees might face overlapping, contemporaneous investigations and prosecution or litigation from the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), state prosecutors, and state securities regulators. Parallel proceedings may also involve investigations and litigation by private plaintiffs, including putative class actions, shareholder derivative suits, and more.

Advising clients facing parallel proceedings like these can be an extremely complex task, from both legal and managerial perspectives, because the parallel cases will affect one another, sometimes in unpredictable ways. It is essential to maintain consistent factual and legal positions across the different cases, prioritizing the resolution of cases to protect your clients' interests. Failing to integrate the defenses for these various cases can introduce a host of problems, such as loss of credibility with courts and government entities, complications in discovery and motion practice, estoppel issues among the cases, and even further prosecution for perjury or obstruction of justice. As a result, few decisions in parallel proceedings can be made in isolation for a single case. Legal theories and factual narratives must be robust enough to survive in each of the parallel cases—or, if they are not, you will need to make careful decisions about which cases should take priority. Some defenses might be off the table entirely as a result, even if they might be meritorious in a standalone case. Even more complications can arise if your client has engaged multiple "specialist" law firms or third-party consultants in different proceedings, which can lead to inadvertent failures to share important information and strategic concerns.

For information regarding possible liability and proceedings, see [Corporations, Directors, and Officers: Potential Criminal and Civil Liability](#). For additional information related to parallel proceedings, including investigations, of suspected Foreign Corrupt Practices Act violations, see [Foreign Corrupt Practices Act Internal Investigations and Enforcement Proceedings](#). For specific information regarding SEC settlement issues, see [Settling SEC Enforcement Actions](#).

Understand the Liability Landscape

One of the first steps you should take when defending parallel proceedings is to develop a thorough understanding of what claims your clients will face from each separate proceeding and, importantly, what the differences are in the elements of those claims. These differences will be responsible for many of the strategic trade-offs your client and you will face as you build the defense. These differences can also point you to areas where you will have more flexibility to deploy facts and arguments without affecting other related cases.

As an example, consider the array of charges and claims your clients may face in the illustration above regarding a misstatement of financial performance. The DOJ has an arsenal of criminal statutes from which it might bring

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charges, such as securities fraud, mail and wire fraud, accounting fraud, conspiracy, and more. The SEC can proceed under several statutory provisions and regulations, most notably its anti-fraud regulations, such as [Rule 10b-5 \(17 C.F.R. § 240.10b-5\)](#) of the Securities Exchange Act of 1934 (Exchange Act). Private plaintiffs can also bring claims under [Rule 10b-5](#) and a range of state securities laws, among others.

Even when relevant laws superficially appear similar, they can vary in critical ways. For example, even though private plaintiffs and the SEC can both bring claims under [Rule 10b-5](#), private plaintiffs face more rigorous standards of pleading and proof thanks to the Private Securities Litigation Reform Act of 1995 (PSLRA) (*104 Pub. L. No. 67*), which requires private plaintiffs (but not the SEC) to plead and prove elements like loss causation. A criminal case brought by the DOJ under Section 32(a) of the Exchange Act ([15 U.S.C. § 77ff\(a\)](#)) for violating the Exchange Act or regulations under it requires the government to prove a "willful[]" violation, whereas a charge brought under the criminal securities fraud statute ([18 U.S.C. § 1348](#)) requires only "knowing[]" conduct. Some relevant state laws, such as New York's Martin Act ([N.Y. Gen. Bus. L. § 352-c](#)), require the plaintiff to prove less demanding levels of scienter, including negligence or even strict liability for certain claims.

Statutes of limitations and repose can also vary tremendously. For example, federal criminal actions for securities fraud are subject to a six-year statute of limitations ([18 U.S.C. § 3301\(b\)](#)), while SEC enforcement actions for disgorgement under [Rule 10b-5](#) are subject to a ten-year statute of limitations ([15 U.S.C. § 78u\(d\)](#)), and private actions under the same [Rule 10b-5](#) are subject to a two-year statute of limitations ([28 U.S.C. § 1658\(b\)](#)). These differences highlight only a narrow example of alleged securities fraud statute of limitations and repose issues. Related statutes can be wildly different; for example, if an alleged fraud "affected a financial institution," a ten-year statute of limitations for criminal prosecutions under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ([18 U.S.C. § 3293\(2\)](#)) can be triggered.

These differences are crucial to understand as you consider your strategic options. They can point you to places where you might have more leeway to mount a defense without compromising your position in other cases, but also may take you to places where a defense might not absolve your client of liability across the board. For example, if your clients want to challenge scienter by showing that they were largely ignorant of the topic at issue, that might defeat a claim of willfulness under Section 32(a) of the Exchange Act but might walk right into a Martin Act violation. Arguing that the alleged fraud was completed three years ago can extinguish the private securities fraud claims on statute of limitations grounds but will destroy that defense in any criminal or enforcement proceeding. These are trade-offs that your client may be willing to make, but you need to make sure you have analyzed all the relevant claims first so that your client can make the decision with eyes open.

Consider Discovery Substance and Timing

You should also consider the relative substance and timing of discovery in the various proceedings and how they relate to one another. You can assume that any information produced in one proceeding will almost certainly be subject to production in the others. Plaintiffs frequently request production of documents produced in parallel proceedings, and it is common to find opposing counsel from the various parallel proceedings sharing information with one another on an informal basis as well. One notable exception to opposing counsel sharing documents and information in a parallel proceeding is grand jury materials, which the prosecution is required to keep secret, but that burden applies only to the prosecution, and defendants may still be compelled in parallel proceedings to produce all documents they previously produced pursuant to a grand jury subpoena. See [Fed. R. Crim. P. 6\(e\)](#).

Because of the likelihood of receiving discovery requests and of seeing informal sharing by opposing counsel in parallel proceedings, it is very difficult to limit disclosures of information to just one of the many related cases. Trying to do so is often misguided as well: absent persuasive distinctions between the discovery requests, producing documents in one case but not another can lead to accusations of discovery misconduct or even obstruction of justice. It is important to engage in careful thought and negotiations over discovery in criminal and enforcement cases, as information produced in those cases can have wide-ranging spillover consequences if provided to private plaintiffs' counsel.

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Beyond substance, another important discovery concern is timing. Civil cases generally afford a broader scope of discovery than criminal cases. As a result, it is common for the DOJ to file a motion to stay parallel civil proceedings (for both private plaintiff litigation and enforcement actions by other agencies) pending resolution of the criminal case. E.g., [SEC v. Telexfree, Inc., 52 F. Supp. 3d 349 \(D. Mass. 2014\)](#). Defendants frequently oppose that motion; but that is not always the best strategic decision, and defendants need to weigh their interests carefully in response.

A stay might not make sense if your clients can benefit from expansive or immediate discovery. The broader scope of civil discovery can give defendants a chance to collect helpful information they would not be able to access in criminal proceedings, especially from third parties beyond the scope of criminal discovery. In some cases, a long delay might prejudice the defendants' civil case regardless of how the criminal case progresses. For example, a delay could put at risk your ability to obtain helpful, high-quality evidence from a witness who may retire, find a new job, or relocate beyond the relevant court's subpoena power while the stay is in place.

On the other hand, there can be persuasive reasons to agree to the prosecution's stay request. A discovery stay can help keep individual witnesses from needing to invoke the [Fifth Amendment](#) at depositions or in response to discovery requests in a parallel civil matter in a manner that might undermine the civil defense of themselves or of an affiliated corporation. A stay can also keep the defendants' strategy better hidden from the criminal prosecution team, rather than previewing a case theory in a civil action and thereby allowing the prosecutors to sharpen their trial presentation. A stay additionally can limit the criminal prosecution's ability to obtain evidence that might be harmful to your client, especially if, for example, that evidence might not be uncovered in the absence of civil discovery tools like depositions.

Weigh the Pros and Cons of Cooperation and Engagement

Government agencies often seek to incentivize cooperation in their investigations, offering reduced penalties or other credit for defendants who cooperate. But cooperation frequently comes at a cost.

Most notably, some agencies insist on partial waivers of the attorney-client privilege as a precondition to cooperation credit. And partial waivers rarely stay partial: even if the agency agrees to a limited scope of waiver, other parties in related proceedings, such as private plaintiffs, may have a strong basis to argue for a broader subject matter waiver. You should carefully evaluate your client's privileged materials in their entirety—not just within the scope of an agency's proposed waiver—before agreeing to waive any applicable privileges.

Even engagement short of full cooperation can come with risks. Many prosecutors and regulatory agencies allow informal "pitches" explaining why they should not bring a case. For example, the SEC allows defendants to make a "Wells submission" before the agency decides whether to bring an enforcement action. [17 C.F.R. § 202.5\(c\)](#). The Wells submission gives defendants a chance to make their case, including related to the facts, law, policy, and litigation risks, to dissuade the SEC from bringing certain claims or an enforcement action entirely. But that opportunity comes with strings attached. Among other drawbacks: (1) the SEC may share Wells submissions with the DOJ, which can use them in criminal prosecutions; (2) Wells submissions are ordinarily discoverable in civil litigation and may even be disclosable in response to Freedom of Information Act requests once the investigation concludes; and (3) Wells submissions are generally treated as admissible statements of a party-opponent when used against the party that submitted them.

There are tools available to minimize the risks of engagement. To the extent possible, you can try to make sure communications come in the form of proffers from counsel rather than statements or testimony from defendants. These proffers are still likely to be admissible—a defendant's lawyer is an agent of the defendant, so the lawyer's statements may be statements by a party-opponent—but they carry much less risk of setting up a subsequent perjury charge or of inadvertently waiving a defendant's [Fifth Amendment](#) privilege.

Consider How Case Resolutions May Affect Each Other

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Another question that goes to both timing and substance is how the parallel cases might interact with one another when they resolve.

In certain circumstances, a criminal conviction (through trial or a guilty plea) can be introduced as evidence of the facts charged in the indictment when introduced in related civil litigation. E.g., [SEC v. Thompson, 2019 U.S. Dist. LEXIS 168704, at *12–13 \(S.D.N.Y. Sept. 27, 2019\)](#). As a result, if a criminal case proceeds to a conviction while related civil cases are still pending, it can make those civil cases more difficult to defend on the merits. On the other hand, an acquittal generally has no legal bearing on a civil case, and civil or administrative verdicts generally have no bearing on criminal cases.

The [Fifth Amendment](#) is another important area of intersection between civil and criminal cases. Individual defendants, or even non-defendant witnesses, may invoke the [Fifth Amendment](#) to avoid giving potentially incriminatory testimony while a criminal case remains pending. Corporations, by contrast, do not have a [Fifth Amendment](#) right against self-incrimination. But the [Fifth Amendment](#) does not protect against civil liability: an individual's invocation of the [Fifth Amendment](#) in a civil case can support an adverse inference. E.g., [Brink's Inc. v. City of New York, 717 F.2d 700, 709 \(2d Cir. 1983\)](#). Where the individual is an employee, officer, or director of a corporation (current or former), that adverse inference may also be drawn against the corporation in certain circumstances. [Rad Servs., Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271 \(3d Cir. 1986\)](#). This means a [Fifth Amendment](#) invocation can severely compromise defenses in civil proceedings.

You can take affirmative steps to help avoid the need for certain [Fifth Amendment](#) invocations. Because corporations do not have a [Fifth Amendment](#) privilege, for example, having corporate defendants shoulder most of the burdens of discovery production can prevent individuals from needing to invoke the [Fifth Amendment](#) to avoid making a "testimonial" production of documents. Likewise, witnesses may feel less of a need to invoke the [Fifth Amendment](#) if they are confident that the threat of criminal prosecution has passed, so ensuring that other testimonial acts, such as depositions and interrogatories, are not scheduled until after the criminal proceedings end can alleviate some of the pressure. In some states, like New York, witnesses who testify before grand juries receive immunity from prosecution as to the particular transaction at issue. [N.Y. Crim. Proc. L. § 50.20\(3\)](#). Accordingly, arranging for civil testimony to happen only after that grand jury testimony occurs can also be helpful.

While civil proceedings generally have no bearing on criminal cases, they can have greater effects on one another. Prohibitions on double-recovery of damages, for example, may later bar plaintiffs from making a full monetary recovery even if they prove liability; it is therefore important to be precise about whether earlier judgments are for damages, disgorgement, civil monetary penalties, or something else. Stare decisis and judicial comity are also helpful. Even if an earlier decision is not formally preclusive, judges typically give due consideration to the outcomes of earlier cases when reaching their decisions; it would be anomalous, for example, for a court to grant summary judgment in defendant's favor (e.g., against the SEC) while another court grants it in the plaintiff's favor (e.g., for a private class action) on the same claims and same facts. And if different courts do still reach those opposing results, you may be able to advance a compelling case on appeal—potentially all the way to the Supreme Court—based on that inconsistency.

One tool to reduce the chances of conflicting decisions like these is multidistrict litigation (MDL); you should give thought early in the process to whether an MDL will be advantageous for your clients. MDLs ensure that major pretrial decisions are made by a single judge, which can help ensure consistency across the various consolidated cases.

One final important area of intersection is insurance and indemnification. Insurance policies and indemnity agreements often include terms that extinguish coverage or require repayment in the event of a final judgment finding that the defendant committed intentional misconduct. This means that an early guilty verdict or adverse judgment might cut off your clients' access to funds for their defense costs in the remaining proceedings. It is important to understand the precise scope of coverage and repayment obligations as you advise your clients on how they might resolve the various proceedings they face.

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It is worth noting one way in which parallel civil cases often do **not** affect one another: the related doctrines of res judicata and issue preclusion. Defendants in parallel proceedings are often eager to invoke these concepts, based on an intuitive feeling that they are being subjected to the same claims repeatedly and risking conflicting judgments. Typically, however, res judicata and issue preclusion will not apply in parallel proceedings of the sort at issue here. With certain limited exceptions, res judicata and issue preclusion require the parties to be identical for an earlier final judgment to have preclusive effect on a later case. As an example, even if your clients are subject to one lawsuit by the SEC and another by private class action plaintiffs alleging virtually identical securities fraud claims under [Rule 10b-5](#), the required elements for res judicata or issue preclusion would not be satisfied because even though the claims are virtually identical, the parties are not. You should, of course, confirm whether your case fits one of the narrow exceptions before deciding that these concepts are inapplicable in your case.

Know Your Clients' Priorities

As the above examples show, defending parallel proceedings involves thorny questions of strategic trade-offs at every step. To evaluate those strategic options effectively, it is critical that you understand what your clients' ultimate priorities are. In virtually all cases, avoiding a criminal conviction is the first and foremost priority. But other unique preferences and goals can influence your strategy. A corporation, for instance, might want to prioritize (1) avoiding the reputational taint of a criminal conviction, regardless of what that may cost in civil proceedings; (2) protecting its employees from criminal prosecutions; (3) minimizing the total amount it will have to pay in defense costs and judgments, regardless of the ultimate recipient of the funds; or (4) having its day in court, even in a criminal trial, in order to vindicate itself publicly after being charged with misconduct. An individual client may be focused primarily on (1) avoiding jail time; (2) avoiding any finding of deliberate conduct that would nullify an indemnification right; or (3) obtaining a judgment showing that, regardless of that individual defendant's role, another defendant bore greater responsibility.

These are just a handful of possibilities; an unlimited number of others exist. In order to represent your clients effectively, you need to have a solid understanding of your clients' own preferences, as well as those of any co-defendants or other critical players (such as an unindicted corporate employer or material witness).

Maintain Strong Coordination

Defending parallel proceedings can be as much a managerial challenge as a legal one. Effective representation in this context requires close coordination among all parts of the related cases.

Clients should weigh hiring a single law firm to handle the entirety of parallel proceedings on their behalf rather than hiring "specialty" firms for each component of the proceedings. Clients may believe that hiring different firms with different focus areas will benefit them—for example, they might hire a firm that does extensive administrative work to handle a regulatory investigation, another firm to defend a related criminal prosecution, and yet another firm to work on a related class action. This may prove effective in certain situations. But in other instances, the benefits of specialization with such an arrangement may be outweighed by the inefficiencies of coordinating and communicating among the different firms, in which case engaging a single firm to litigate all facets of the parallel cases may be a wiser decision.

Whether your client has hired one firm or many, it is important to make sure that the lawyers working on any part of a set of parallel proceedings are well informed about **all** the matters at hand. Significant written work product like motions, opposition briefs, or interrogatory responses should be reviewed by all teams, not just the individuals working on that particular case. Important documents, helpful or harmful, should be circulated to the full defense team when they are discovered and not remain in a case-specific silo. Strategic decisions, such as what to argue in a summary judgment motion, whether to call a particular witness, or how to address specific evidence should be discussed as a multidisciplinary team so that everyone can fully understand the pros and cons of the specific and global strategy. And the attorneys on each individual case should always keep in mind their roles within the broader universe of the parallel proceedings, so that they remain alert to crosscutting issues and can flag them for broader

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consideration as they arise. Failing to maintain a strong basis of coordination can burden your clients with decisions or positions that were taken without adequate discussion and analysis, that can no longer be undone, and that can limit your clients' future decisions and actions.

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