

**WHITE COLLAR CRIMINAL INVESTIGATIONS AND PARALLEL CIVIL PROCEEDINGS**

Today, every high-profile criminal matter – whether Harvey Weinstein, Varsity Blues academic cases, or Purdue Pharma – involves parallel civil litigation, such as an SEC enforcement action, a state attorney general lawsuit, a private class action, or a tort claim. For many defendants caught up in a criminal investigation, the consequences of companion civil litigation or regulatory proceedings may be as serious as the criminal investigation; companies may be barred from lines of business, or put out of business entirely, and individuals may face loss of a law, accounting or securities license.

Although criminal and civil law are traditionally separate disciplines, increasingly, the line between those disciplines has blurred. Criminal penalties may be monetary and involve restitution to victims, who are often private parties. Strict liability criminal statutes require no *mens rea*. These are more than definitional or theoretical issues, and this seminar explores the practical problems that arise at the crossroads of criminal and civil law.

No lawyer can competently represent a client confronting cases at these crossroads without analyzing the ramifications of an action taken in one context for the other. What are the consequences, for a related civil case, of asserting Fifth Amendment rights in the context of a criminal prosecution? What are the consequences, for related civil litigation, of entering a guilty plea in a criminal proceeding? Can a party provide the government with an internal investigation report, but withhold that report from adversaries in civil discovery?

This practice-oriented class addresses these issues, taking into account perspectives of the court, government prosecutors and regulators, and lawyers representing companies and individuals facing parallel civil and criminal litigation.

**Week 1: Introduction to the Topics and Issues**

- A. The syllabus and readings
- B. Pedagogical goals – issue-spotting and balancing competing interests
- C. Practice-oriented – how courts, government lawyers and regulators, and private counsel address these issues
- D. *United States v. Goyal*, 629 F.3d 912 (9<sup>th</sup> Cir. 2010)

**Week 2: Basic Background: The Importance of Collateral Estoppel**

What is the effect of collateral estoppel and how does that drive litigation strategy?

- A. *SEC v. Webb*, 11-cv-07152 (N.D.Ill. April 2, 2019)
- B. *Gray v. Commissioner of Internal Revenue*, 708 F.2d 243 (6th Cir. 1983)
- C. *SEC v. Monarch Funding Corp.*, 192 F.3d 295 (2d Cir. 1999)

**Week 3: Basic background: The Importance of Cooperation, and its implication for the Government, a Company, and Company Employees**

- A. The Justice Manual, Sections 9.28.100 through 9.28.1600
- B. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008)

**Week 4: Case Study: Ericsson’s Criminal and Civil Proceedings relating to the Foreign Corrupt Practices Act.**

This case study touches on many issues in the class. The readings discuss a criminal case and deferred prosecution agreement, a corporate monitor, a whistleblower, and related civil litigation, including an SEC action, a suit by a competitor, a securities class action, and a class action arising under the Anti-Terrorism Act.

- A. *United States v. Telefonaktiebolaget LM Ericsson*, 19 CR 884 (AJN) Deferred Prosecution Agreement (S.D.N.Y. Nov. 26, 2019)
- B. “*Ericsson to Pay Nokia \$97.2 Million to Settle Damages Claim*,” Dominic Chopping, The Wall Street Journal, May 12, 2021
- C. “*Ericsson Accused of Breaching Bribery Settlement with Justice Department*,” Dylan Tokar, The Wall Street Journal, Oct. 22, 2021
- D. *In re Telefonaktiebolaget LM Ericsson Securities Litigation*, 22-cv-1167 (WFK)(LB), Amended Class Action Complaint for Violation of Federal Securities Laws (E.D.N.Y Sept. 9, 2022)
- E. *Schmitz et al. v. Ericsson Inc and Telefonaktiebolaget LM Ericsson*, 22-cv-02317, Complaint for Violation of the Anti-Terrorism Act (D. D.C. Oct. 5, 2022)

**Week 5: The Blurred Line between Criminal and Civil law**

The line between criminal and civil law blurs when criminal liability can be imposed even absent *mens rea*. And how can corporations, which are legal “persons”, ever have criminal intent?

- A. *United States v. De Coster*, 828 F.3d 626 (8th Cir. 2016)
- B. Brief of the National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioners, *DeCoster v. United States*. United States Supreme Court.
- C. *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993) (*en banc*)
- D. *Commonwealth v. Life Care Center*, 456 Mass. 826 (2010)

**Week 6: Constitutional Issues**

Does a party faced with what can be an overwhelming onslaught of litigation have any constitutional protection?

- A. *United States v. Scrushy*, 366 F.Supp. 2d 1134 (N.D.Ala. 2005)
- B. *United States v. Stringer*, 408 F.Supp. 2d 1083 (D. Or. 2006)
- C. *United States v. Stringer*, 535 F.3d 929 (9<sup>th</sup> Cir. 2008)
- D. SEC Form 1662

**Week 7: The Fifth Amendment Privilege Against Self-Incrimination**

One of the most difficult tactical problems parallel proceedings raise is whether or not to invoke the privilege against self-incrimination. Can a witness simultaneously invoke the privilege and claim innocence? What are the consequences of invoking the privilege?

- A. *Ohio v. Reiner*, 532 U.S. 17 (2001)
- B. *Baxter v. Palmigiano*, 425 U.S. 308 (1976)
- C. *Steiner v. Minnesota Life Ins. Co.*, 85 P.3d 135 (Colo. 2004) (*en banc*)
- D. *La Salle Bank v. Seguban*, 54 F.3d 387 (7<sup>th</sup> Cir. 1995)

- E. *Sherrod v. VNA and LAN*, No. 5:17-cv-10164-JEL-KGA, Opinion and Order Denying Governor Snyder's Motion to Quash Trial Subpoenas (E.D. Mich., March 21, 2022)

**Week 8: More Readings On The Fifth Amendment Privilege**

What happens when an employer coerces cooperation?

- A. *Garrity v. New Jersey*, 385 U.S. 493 (1967)
- B. *Spevack v. Klein*, 385 U.S. 411 (1967)
- C. *D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002)
- D. Supplemental Information for Testimony Requests Pursuant to FINRA Rule 8210
- E. *United States v. Connolly*, No. 16-cr-0370 (CM) (S.D.N.Y. May 3, 2019).

**Week 9: Practical Considerations In Connection with Invoking The Fifth Amendment**

How does one invoke the privilege? What showing does one have to make to claim protection?

- A. *United States v. Morganroth*, 718 F.2d 161 (6<sup>th</sup> Cir. 1983)
- B. *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983)
- C. *United States v. Tuzman*, 15 Cr. 536 (PGG) (S.D.N.Y. Nov. 27, 2017)
- D. *United States v. Avenatti*, 19 Cr. 373 (PGG) (S.D.N.Y. Jan. 26, 2020)

**Week 10: Stay of Civil Proceedings**

Parties seek to avoid the privilege and discovery issues we have been discussing by seeking a stay of the parallel civil proceeding. Sometimes the government seeks a stay. In other cases, private litigants seek to stay civil discovery.

What circumstances might cause a private litigant to seek a stay? When might the government want to stay a parallel civil action? Some courts have questioned the fairness of the government's commencing simultaneous parallel actions and moving to stay civil discovery. Is there a rule that courts should follow in deciding these issues, or should such motions to stay be decided on a case-by-case basis because they are too fact-specific?

- A. *SEC v. Nicholas*, Case No. SACV 08-539-CJC (RNB) (C.D.C.A.) William J. Ruehle's Opposition to The Government's Motion to Stay Discovery
- B. *SEC v. Balwani*, Case No. 5:18-cv-1603 (EJD) (N.D.C.A)
  - United States' Motion to Intervene and Stay Action
  - Defendant's Opposition to United States' Motion
  - SEC's Response to Motion
  - United States' Reply Brief In Support of its Motion to Intervene and Stay
  - Order Denying in Part and Granting in Part Motion to Intervene and Stay

**Week 11: Discovery and Evidentiary Issues Other Than Fifth Amendment Questions and a Stay of Civil Proceedings**

Parallel proceedings raise a host of other discovery issues. How do courts balance discovery in civil litigation and the grand jury's role? Can a party in a civil trial comment on an adversary's failure to testify at an earlier, related criminal trial?

- A. Civil protective orders and criminal investigations  
*In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995)
- B. Grand Jury Secrecy  
*In re Air Cargo Shipping Services Antitrust Litigation*, 06 MD 1775 (JG)(VVP) (E.D.N.Y. March 19, 2013)
- C. Failure to testify at a criminal trial  
*Patrick v. City of Chicago*, 14-cv-3658 (N. D. Ill. March 21, 2017)

**Week 12: Still Other Discovery Issues**

Do *Brady* obligations extend to civil litigants and investigators? What is the effect of disclosing material to the government? Conversely, what are the consequences of a prosecutor disclosing material to a criminal defendant?

A. *Brady* Issues

*United States v. Martoma*, 12 Cr. 973 (PGG), 2014 U.S. Dist. LEXIS 566 (S.D.N.Y. Jan. 5, 2014)

B. *Inside the Biggest-Ever Hedge-Fund Scandal*, Patrick Radden Keefe, The New Yorker, Oct. 6, 2014

C. Document production and the selective waiver doctrine  
*Gruss v. Zwirn*, 09 Civ. 6441 (PGG) (MHD) (S.D.N.Y. July 10, 2013)

D. Wiretaps  
*SEC v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010)

**Week 13: Private Enforcement of Criminal Law**

A. Whistleblowers and Bounty-Hunters

1. *United States ex rel. Banigan v. PharMerica, Inc.*, 950 F.3d 134 (1<sup>st</sup> Cir. 2020)

2. *The Personal Toll of Whistle-Blowing*, Sheelah Kolhatkar, The New Yorker, Jan. 28, 2019

B. Monitors

*United States v. Apple Inc.*, 992 F. Supp.2d 263 (S.D.N.Y. 2014)