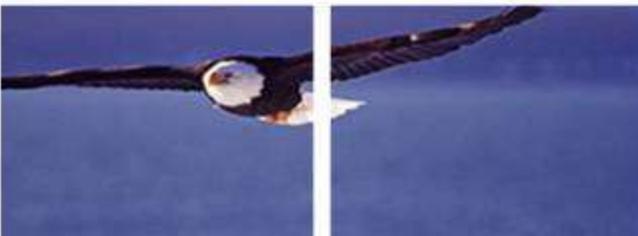




Case Development,
Information Sharing, and
Parallel Proceedings



LEADS

- Citizen complaints
- “Whistleblowers”
- Third-party Tips
 - NGOs
 - Business competitors
 - Newspaper reports/investigative journalism
 - Others?

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BUGMAN PEST & LAWN

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THEATRES



the MOVIE
starring PHIL & GUY

Rodent poison may have killed girl

Layton » Investigators say phosphine may have infiltrated home where 4-year-old lived.

By **ERIN ALBERTY**
The Salt Lake Tribune

Investigators say a toxic chemical used to exterminate rodents may have wafted into a Layton home, killing a 4-year-old girl.

The girl’s mother initially called fire crews Friday night after a carbon monoxide detector sounded at their home, near 1500 North and 2400 West. Carbon monoxide readings in the air and in one of the residents’ blood were slightly elevated, but not dangerously so, said Layton Fire Chief Kevin Ward.

Questar Gas crews ventilated the house and investigators found no leaks in carbon monoxide sources.

“Vehicles, furnaces, all the typical things — we couldn’t find anything,” Ward said.

On Saturday night, the mother brought the 4-year-old to the Wee Care Pediatrics clinic near the Davis Hospital because the child was struggling to breathe, Ward said. The girl was taken to the hospital, where she died.

The girl’s mother told authorities that the entire family — including the father, and

Please see PHOSPHINE, B4

LEADS

- Government efforts
 - Referrals from inspections
 - Review of Reported Data
 - Targeted enforcement efforts
 - Undercover operations
 - Controlled buys/deliveries
 - Surveillance

LEADS

- PROPERLY DOCUMENT THE COMPLAINT OR INFORMATION PROVIDED

- Who
- What
- When
- Where
- How



- Promotes public confidence and shows professionalism

LEADS

- Major events
 - US: Deep Water Horizon, Exxon Valdez
 - Europe: Hungarian red sludge spill



Assembling the Case Team

- Investigators
- Prosecutors
- Agency Counsel
- Scientific/Technical Experts
- Regulators



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CASE TEAM: Investigators

- Conducting the investigation
 - Witness interviews
 - Subpoenas
 - Search warrants
 - Surveillance
 - Site visits
 - Document review
- Jurisdiction
 - National vs. Local
 - Conflicts with other agencies





CASE TEAM: Prosecutors

- Handle legal matters and present evidence in court
- Making charging decisions and drafting charging documents
- Jurisdiction
- Involvement in investigations
 - Advising investigators
 - Assisting with investigation tasks such as subpoenas, search warrants, or other measures that may need judicial approval
 - Participating in witness interviews, site visits, document review



CASE TEAM: Agency Counsel

- Handle matters and present evidence before the judiciary in certain circumstances
- Involve in investigations
 - Advising investigators and prosecutors with respect to the application and interpretation of statutes and regulations
 - Assisting in locating experts within the agency
 - Participating in witness interviews, site visits, document review
- May serve as coordinator (or liaison) between other agency components :
 - Response, removal, remediation, and civil enforcement

CASE TEAM: Experts

- Provide expertise and testimony to help prove elements of the offense
- May assist with evidence gathering
 - Ensure evidence is properly obtained, documented, sampled, explained.
- Experts: Government, private sector, academic, regulatory
- Think early about need for experts





Case Team:

Developing an Action Plan

- Establish points of contact across agencies
- Establish and know procedures for referrals and inter-agency information sharing
- Know your options for inspections and technical support
- Think through potential logistical issues
 - How to share access to evidence if team members are not in same local area
 - How to obtain approvals through multiple chains of command

Primary Tools to Develop A Case

- Interviews & Reports



Witness Interviews

- One of the most important tools in developing a case
 - (Witness interviewing techniques will be covered later)
- To Record or Not to Record?
- Interview Notes and Report:
 - Should be accurate and consistent
 - Clear and factual
 - Document the entire interview



Primary Tools to Develop A Case

- Interviews & Reports
- Obtain Records



Obtaining Records...

- From subject of investigation:
 - Do you need to compel and how do you do it?
 - May be absolutely critical to the case
 - Don't allow to be destroyed; seize them
- From witnesses and other sources:
 - Banking and financial records
 - Business and personal records
 - Electronic records
 - Management, review and safe-keeping of records after seizure
 - Chain of custody

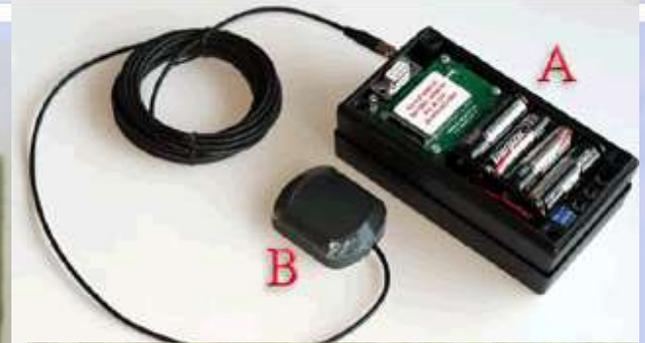
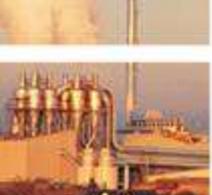


Primary Tools to Develop A Case

- Interviews & Reports
- Obtain Records
- Surveillance



Surveillance



Benefits of Surveillance

- First hand observations are direct evidence
- Electronic devices save time and effort
- Chance to “Catch them in the Act”
- May support other evidence
- Can be quickest way to prove a crime
- Need to be sure of legal authority



Primary Tools to Develop A Case

- Interviews & Reports
- Obtain Records
- Surveillance
- Informants



Informants

- May Provide Good Information for Years
- Takes Time and Effort to Develop
- Information Needs to be Qualified
- Need to Protect as a Source
- Can Provide “Inside View” of Things
- Investigator/Prosecutor → Control Actions
- Informant is not a Case Agent or “Assistant”
- May or May Not Be Involved in Crime

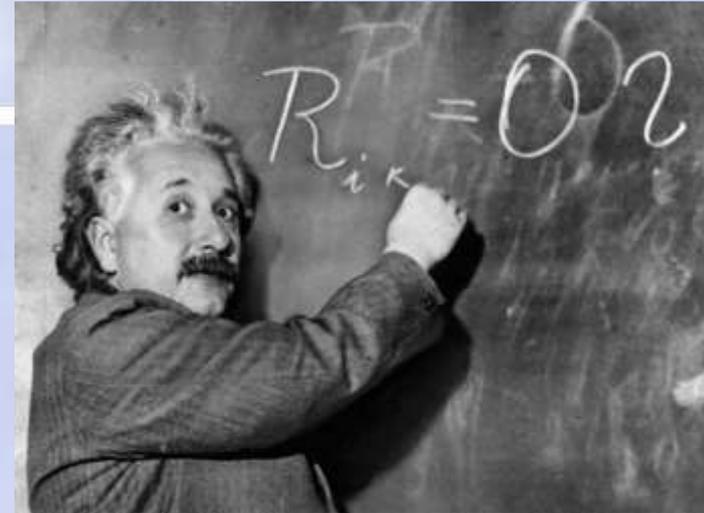
Primary Tools to Develop A Case

- Interviews & Reports
- Obtain Records
- Surveillance
- Informants
- Experts



Experts

- May help in understanding the case or potential violation
 - Can we prove there is a violation?
 - Industrial processes and requirements
 - Waste generation or treatment
 - Safety and Health
 - Damages
- Address technical issues such as sampling and testing protocols
 - Hazardous Waste Characterization
 - Type of Endangered Flora of Fauna



Primary Tools to Develop A Case

- Interviews & Reports
- Obtain Records
- Surveillance
- Informants
- Seek out Experts
- Search Warrants



Search Warrants

- Is there Probable Cause?
- Do we know what are we looking for?
- Logistics
 - Seizing documents, computers, equipment, sampling and testing
 - Storage
- Chain of Custody



Primary Tools to Develop A Case

- Interviews & Reports
- Obtain Records
- Surveillance
- Informants
- Seek out Experts
- Search Warrants
- Employees





Current and Former Employees

- Can provide good inside information, unique perspective and context
- Disgruntled employees can be helpful
 - But be aware of motivation and potential bias
- Can provide good indication of records to be seized
 - Document retention policies, document location, where violation occurred, equipment, computers, *et cetera*

Primary Tools to Develop A Case



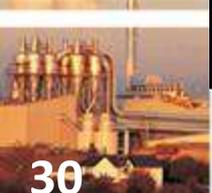
- Interviews & Reports
- Obtain Records
- Surveillance
- Informants
- Seek out Experts
- Search Warrants
- Employees
- Photography and Videotaping

Photographs

- Can be an extremely powerful way to tell story.
- Can be very helpful to witnesses during testimony.
- Photo must fairly and accurately depict the events on a date and time; can provide a good sense of the scene



The Violation





CAUTION
HAZARDOUS
WASTE



The Investigation



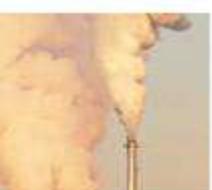


Can show lapse in security procedures.

Recordings

- Videotapes
 - With or without sound?
- Wiretaps
- Consensual monitoring
- Voicemails
- Prepare transcriptions whenever possible
- Have proper voice identification





Confronting Technical and Legal Issues



Technical Issues

- Experts and Environmental Forensics
 - Sampling and Testing
 - Representative Samples
 - Split Samples
- Complex Processes
- Reconstructing condition at the time of violation
- Extrapolating from data
- Causation and Harm



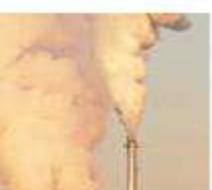
Legal Issues encountered during case development:

- Unenforceable regulations
- Overwhelming potential scope
- Overwhelming volume of evidence to organize
- Represented persons
- Ongoing conduct/parallel proceedings



Sharing Information

- How do you get information from other government entities who may have information relevant to your case?
 - How about other countries?
- Certain entities may be very restrictive about how they share information
 - Due to the nature of the agency and the type of information they generally handle
- Countries may also be reluctant to share information
 - Circumstances, type of violation, other issues



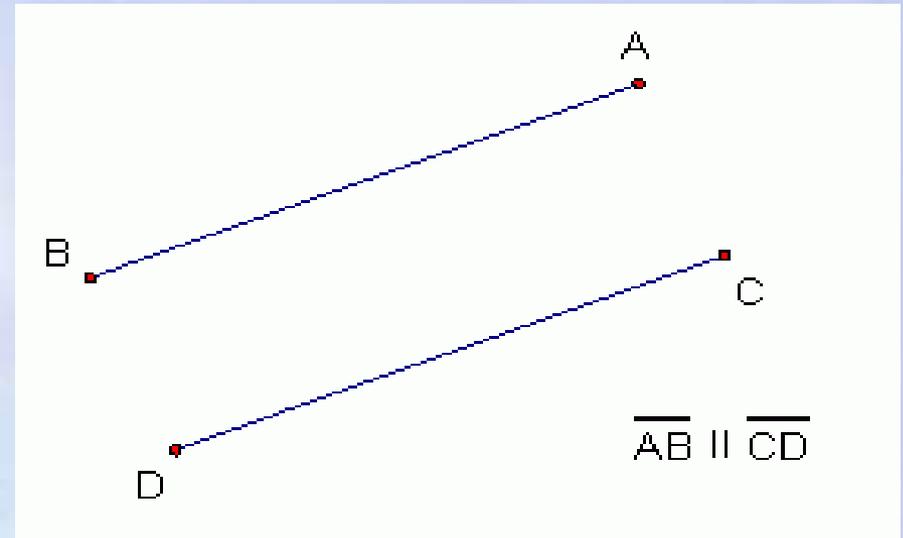
Inter-Agency Cooperation and Evidence Gathering

Types of Assistance You May Need

- Obtain Documentary Evidence
- Record of compliance or non-compliance
- Agency expertise
- Institutional knowledge
- Other

EPA's Parallel Proceedings Policy

- EPA's Office of Enforcement and Compliance Assurance (OECA) Parallel Proceedings Policy
 - September 24, 2007
 - Signed by former Assistant Administrator Granta Y. Nakayama





General Premise

- Criminal enforcement actions generally proceed first, before civil or administrative penalty-based actions.
- BUT, Civil can always move forward with compliance oriented actions that address threats to human health or the environment

Parallel Proceedings

- While a penalty-based civil or administrative action may not be appropriate at first, other types of civil/administrative actions (*e.g.*, compliance, injunctive relief, liability, clean-up and cost-recovery actions) may still be appropriate, depending upon the circumstances.
- And, once again, Civil can always move forward to address threats to human health and the environment!

Parallel Proceedings

- Parallel criminal and civil actions where nature of conduct justifies both civil and criminal responses.

BP Texas City Refinery explosion , March 23, 2005



\$137 million in criminal, civil, and administrative fines; approximately \$1.4 billion in corrective actions

Deepwater Horizon Disaster

- BP agrees to plead guilty to felony manslaughter, environmental crimes, and obstruction of justice.
- \$4 billion in civil and criminal fines:
 - Half of which is dedicated to acquiring, restoring, preserving marine and coastal environments, ecosystems and bird and wildlife habitat in the Gulf of Mexico and bordering states harmed by oil spill.
 - DOJ has asked the National Academy of Science and its partner institutions, the National Academy of Engineering and the Institute of Medicine, to establish a \$350 million, 30-year program on human health and environmental protection in the Gulf Coast.



EPA's Policy in general

- Encourages active consultation and participation between EPA's civil and criminal programs, to ensure the overall success of enforcement effort.
 - Civil and criminal program shall coordinate to achieve the most complete and appropriate relief.
 - Programs shall complement and not interfere with each other.



Legal and Practical Implications

- Factors that may favor bringing criminal action first:
 - Significant deterrence and punitive effect of criminal sanctions
 - Ability to use criminal conviction as collateral estoppel in civil case
 - Possibility that imposing civil penalties might undermine criminal prosecution
 - Preserving secrecy of criminal investigation
 - Preserving incriminating evidence



Legal and Practical Implications

- Other factors that may favor bringing criminal action first:
 - Avoiding unnecessary litigation
 - Avoiding duplicative interview of witnesses and subjects
 - Self-Incrimination Issues
 - Speedy Trial Concerns
 - Possible Suspension and Debarment
 - Potential for civil discovery of criminal files



Other Factors

- DOJ – Petite Policy – precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on the same act(s) or transaction(s), unless three substantive prerequisites are satisfied:
 - (1) Substantial federal interest;
 - (2) Prior prosecution left interest un-vindicated; and
 - (3) Defendant's conduct constitutes a federal offense, and that there is a reasonable probability of conviction.
- USAM Sec. 9-2.031



A Note on Civil Discovery

- In responding to civil discovery in general, government attorneys may assert a law enforcement privilege to protect responsive files in a parallel criminal case.
 - Prevent disclosure of law enforcement techniques and procedures
 - Preserve the confidentiality of sources
 - Protect witness and law enforcement personnel
 - Safeguard the privacy of individuals involved in an investigation
 - Prevent interference/obstruction of criminal investigation, etc.
- But, it is a qualified privilege that may be overcome if a litigant's need outweighs the government's interests in keeping the information confidential.

Civil Discovery

- Therefore, the possibility that criminal investigation files might have to be produced is a factor to consider when determining whether civil litigation should go forward while the criminal proceeding is pending.



Legal and Practical Implications

- Factors that may favor initiating or continuing a civil or administrative action (prior to conclusion of criminal action):
 - Threat to human health or the environment
 - injunctive relief or response action
 - Threat of dissipation of defendant's assets
 - Statute of limitations or bankruptcy deadlines
 - Only marginal relationship between civil and criminal actions
 - Civil case is in advanced state and criminal is not
 - Civil case is integral to a national priority and postponement could adversely affect implementation of national effort



Parallel Proceedings Memo

- Once the civil and criminal programs decide to pursue parallel proceedings and agree upon their timing, the Agency memorializes these decisions in a case-specific Parallel Proceedings Memorandum.
- Memo includes:
 - A brief description of the key factual allegations and potential statutory and regulatory violations.
 - A brief summary of the decisions regarding the timing and scope of the parallel proceedings.

GOOD FAITH BASIS

- Government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it acts in “good faith.”





GOOD ↔ BAD

- BAD FAITH → Civil or administrative investigation conducted solely for criminal enforcement purposes
- GOOD FAITH → Civil or administrative investigation based on a legitimate noncriminal purpose, even if government uses the information gained in the civil or administrative context to pursue criminal action
 - SEC v. Dresser, Inc., 628 F2d 1368 (D.C. Cir. 1980)



CAVEAT

- Criminal program (or Prosecution Team) should never direct the civil program's investigative activities.
- Civil program should never direct the criminal program's investigative activities.

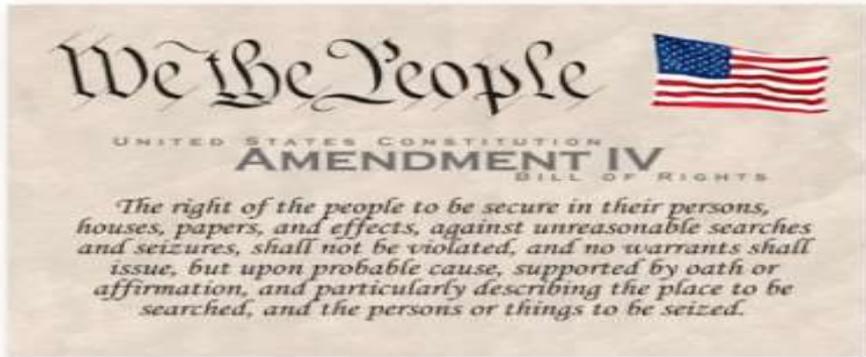
ANOTHER CAVEAT

- Government official must not affirmatively mislead the subject of parallel civil and criminal investigations into believing that the case is exclusively civil in nature and will not lead to criminal charges.
 - Unites States v. Stringer, 521F.3d1189 (9th Cir. 2008)
- It is a common EPA practice to include a warning in EPA civil information requests that all information sought may be used in an administrative, civil or criminal action.

A Note on Regulatory Inspections

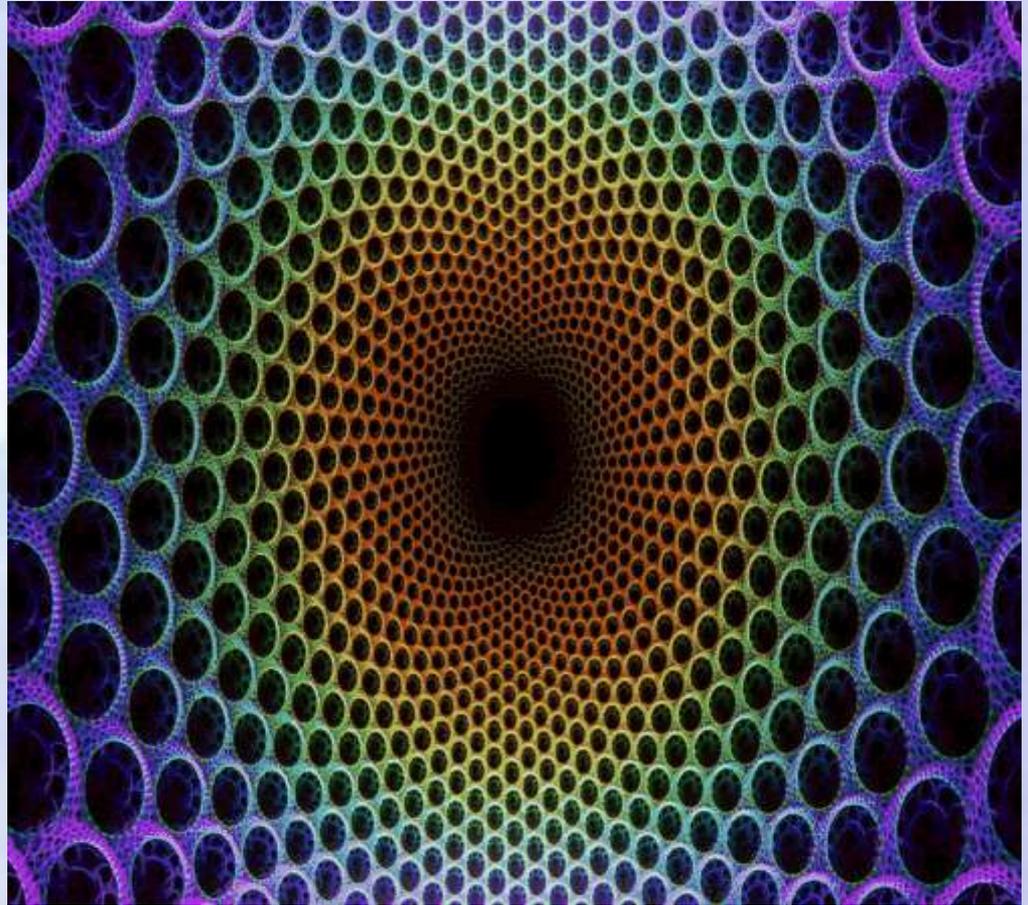


- EPA's Parallel Proceeding Policy:
 - "...regulatory inspections, including administrative searches with a warrant, must be objectively reasonable and properly limited within the scope of the authorizing statute and warrant....
 - "In every situation, the government has a duty to act in good faith and must ensure that its use of administrative entry authorities is properly within the mandate of the Fourth Amendment."



COMMON MISCONCEPTION

- While civil program may generally share information gathered in the civil or administrative case with the Prosecution Team...
- ... the Prosecution Team may not share any information with civil side.



BLACK HOLE

INFORMATION SHARING

- Prosecution Team may NOT share GRAND JURY information with the civil program
- The Prosecution Team may, however, share “other information.”





Grand Jury Secrecy

- Fed. R. Crim. P. 6(e) – relates to matters occurring before a Grand Jury (information obtained through GJ investigation)
- Rule provides that persons* to whom information is disclosed under Rule 6(e) may use that information only to assist a federal prosecutor in his/her duty to enforce federal criminal law
- In other words, the Prosecution Team is obligated to keep any GJ information secret



Grand Jury Secrecy

- *As relevant here, duty of secrecy applies to:
 - Attorney for the government for use in performing attorney's duty
 - Any government personnel (including state, Indian tribe, or foreign government) that attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law
 - The "Prosecution Team:" criminal investigators and any government personnel investigating matter and/or assisting federal prosecutor
- ❖ Note that secrecy obligation does not apply to GJ witnesses (who are not part of Prosecution Team)

Grand Jury Secrecy

- Knowledge drawn from the GJ record must not be used in civil enforcement activities (absent a court order authorizing the use)
- Rule 6(e)(3)(E) provides for limited circumstances where court can authorize disclosure of GJ matter for use in other judicial proceedings including state, foreign and military criminal actions, and even civil actions (although this is rare)
 - ❖ Practical tip: Personnel who received GJ information should not be assigned to parallel civil enforcement matter



Prosecution Team May Share “Other information”

- Prosecution Team may share “other information” such as:
 - Evidence obtained prior to GJ involvement or independent of GJ
 - Witness interviews
 - Company records
 - Other records
 - Evidence seized under Search Warrant or by consent
- Prosecution Team may choose NOT to share information:
 - To Protect confidentiality of witnesses and confidential sources
 - To Prevent destruction of evidence
 - To Protect information that may compromise investigative actions
 - Prosecutorial “Territoriality”



A Note on Seized Evidence

- Civil program can use evidence seized as part of criminal case
- And, even if illegally seized, civil program may still be able to use evidence in civil corrective action:
 - INS v. Lopez-Mendoza, 468 U.S. 1032, 1046-7 (1984):
 - “...presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order has been improperly obtained.”)

Civil Program May Share Information with Prosecution Team

- Civil program may generally share information gathered in civil or administrative discovery with Prosecution Team but must have good faith basis for discovery
 - Good faith is presumed if information was obtained prior to commencement of criminal case
 - Otherwise, government may need to show that information was sought for a legitimate civil or administrative basis
 - Compliance/civil enforcement
 - Liability assessment
 - Clean-up, damages, cost-recovery determinations
 - Need for injunctive relief



Two Final Caveats

ONE

- Do not threaten the initiation of a criminal case to gain an advantage in a civil proceeding

TWO

- Be aware of the potential consequences that seeking punitive civil sanctions may have on parallel criminal case



Hudson v. United States,

522 U.S. 93 (1997)

- Bank officers and directors convicted on banking law violations.
- The Office of the Comptroller of the Currency had previously imposed civil monetary penalties.
- Defendants argued that subsequent criminal action (based on same civil violations) violated Double Jeopardy Clause,
 - Defendants relied on U.S. v. Halper, where Supreme Court had ruled that a solely punitive civil sanction could be considered punishment under double jeopardy clause.
- Supreme Court (J. Rehnquist) disavowed Halper and ruled that double jeopardy was not a bar to parallel federal criminal prosecution.



Hudson v. United States

- Supreme Court held that:
 - Double Jeopardy Clause does not prohibit the imposition of any (civil) sanction that could, in common parlance, be described as “punishment.”
 - Double Jeopardy Clause protects only against the imposition of multiple criminal punishments for the same offense in successive proceedings.
- However,...

Hudson v. United States

- ... Supreme Court also ruled that whether a particular punishment is considered “criminal” or “civil” is a matter of statutory construction, and that
- Courts must determine whether the legislature indicated an expressed or implied preference for one label or the other.

Hudson v. United States

- Thus, even where statute provides for a “civil penalty,” courts must determine whether scheme is so punitive either in purpose or effect as to transform what was intended as a civil remedy into a criminal penalty.
- How do courts make this determination?

Factors courts may consider:

- Whether:
 - 1) Sanction involves an affirmative disability or restraint;
 - 2) Sanction has historically been regarded as a punishment;
 - 3) Sanction comes into play only on a finding of *scienter* (guilty knowledge or culpability);
 - 4) Sanction will promote the traditional aims of punishment -- retribution and deterrence;



Factors courts may consider include whether

- Whether:

- 5) Behavior to which sanction applies is already a crime;
- 6) There is an alternative purpose to sanction; and
- 7) Sanction appears excessive in relation to the alternative purpose assigned.
 - a. These factors must be considered in relation to the statute on its face, and only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

Punitive Civil Penalties

- Thus, punitive civil penalties may have an impact as to:
 - Whether federal prosecutor can or will bring criminal action, and
 - Whether federal judge can or will impose a (significant) criminal penalty/fine.

Questions?

Report an Environmental Violation

www.epa.gov/tips/

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