

How To Recognize A Government Investigation



Catherine Salinas

Acree, a shareholder at Carlton Fields' Atlanta office, handles civil and criminal litigation in federal and state court, as well as corporate internal investigations and responses to governmental subpoenas and investigations.

Her litigation practice currently involves complex insurance coverage disputes and other actions between insurers and their insureds. Acree also advises insurance clients on Georgia bad faith law and provides coverage opinions. Prior to entering private practice, Acree clerked for the United States District Court for the Northern District of Georgia and worked as a staff attorney for the Eleventh Circuit Court of Appeals. She began her legal career representing migrant farmworkers as an attorney with Texas Rural Legal Aid and then worked as a criminal defense attorney.



Ed Page, a shareholder at Carlton Fields' Tampa office, is a former federal and state prosecutor with more than 30 years of legal experience. He has tried more than 100 jury trials in state and federal courts and more than 250 bench trials. In 1987, he became

Tampa's first Florida Bar Board Certified Criminal Trial Lawyer. Page handles federal and state criminal and civil matters, including white collar criminal, aviation, family law, and complex commercial litigation matters. His white collar criminal representation covers both individuals and corporate clients, healthcare fraud (including False Claims Act matters), environmental crimes, asset forfeiture, attorney general office investigations, and regulatory enforcement, including FBI, IRS, ATF, SEC, FDA, and Customs and Border Patrol investigations.

Catherine Salinas Acree and Ed Page

Spot the criminal exposure before it's too late.

WHILE CRIMINAL LAW is getting more complex, with landmines for the unwary lurking everywhere, defenses to crimes seem to have gotten simpler. Today, there are only two real defenses in a criminal case: "I didn't do it" and "It didn't happen that way." While the burden of proof is high in a criminal case — beyond a reasonable doubt — prosecutors can easily meet that standard when the defendant previously admitted to the crime or the bad conduct in a deposition or in an interview. Civil lawyers many times simply do not see or comprehend a client's criminal exposure in a civil case until it is too late. Indeed, the risks for civil lawyers abound when their clients also have criminal problems. Civil lawyers should learn to spot the issues and the risk to the client, and promptly involve competent counsel to avoid a later professional liability claim. Sometimes, advising a client to seek a continuance of a deposition, or to invoke the Fifth Amendment right to remain silent, or to refuse to participate in an informal interview with the government, could be the difference between the client's freedom and his going to jail. This article will provide some background about where civil and criminal law overlap and how civil practitioners can spot red flags.

OVERLAP BETWEEN CIVIL LAW AND CRIMINAL LAW: FRAUD AND CONSPIRACY

Perhaps the most common way for a civil dispute to morph into a criminal prosecution is when fraud is involved. Fraud is commonly alleged in civil litigation, and the line is not always clear when fraud moves from civil to criminal. Other examples of civil claims that overlap with criminal laws are securities litigation and professional liability claims.

A typical civil cause of action for fraud has the following five elements:

- Misrepresentation;
- Knowledge of falsity;
- Intent to defraud, i.e., to induce reliance;
- Justifiable reliance; and
- Resulting damage.

Many statutes criminalizing fraud, such as the federal mail fraud statute, have fewer elements than their civil counterparts. For example, the pattern jury instruction in the Eleventh Circuit for mail fraud describes the federal offense as follows: “It’s a Federal crime to use the United States mail (or transmit something by private or commercial interstate carrier) in carrying out a scheme to defraud someone.” See www.ca11.uscourts.gov/documents/jury/crimjury.pdf (p. 307). Wire fraud has the same elements as mail fraud but requires the use of an interstate telephone call or electronic communication (such as email) made in furtherance of the scheme. These crimes are defined extremely broadly and do not require proof of reliance or damage. Thus, attorneys representing persons or entities accused civilly of fraud should be on guard for any indications that the government might be interested in the case.

Making potential criminal exposure even greater is the threat of conspirator liability. Claims for civil conspiracies serve only to impute liability to additional defendants. See *W. Page Keeton et al., Prosser and Keeton on the Law of Torts* § 46 (West, 5th ed. 1984). Thus, a civil conspiracy plaintiff must first prove that someone in the conspiracy

committed a tortious act that proximately caused his injury; only then can the plaintiff hold other members of the conspiracy liable for that injury. Criminal law, however, makes conspiracies themselves illegal, regardless of whether the conspiracy actually achieved the criminal purpose. Under 18 U.S.C. section 371, a conspiracy is a crime, separate from the underlying bad conduct. The pattern jury instruction for the Eleventh Circuit includes the following explanation:

“It’s a separate Federal crime for anyone to conspire or agree with someone else to do something that would be another Federal crime if it was actually carried out. A ‘conspiracy’ is an agreement by two or more people to commit an unlawful act. In other words, it is a kind of “partnership” for criminal purposes. Every member of a conspiracy becomes the agent or partner of every other member. The Government does not have to prove that all the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The Government does not have to prove that the members planned together all the details of the plan or the “overt acts” that the indictment charges would be carried out in an effort to commit the intended crime. The heart of a conspiracy is the making of the unlawful plan itself followed by the commission of any overt act. The Government does not have to prove that the conspirators succeeded in carrying out the plan.”

See www.ca11.uscourts.gov/documents/jury/crimjury.pdf (p. 147).

Thus, if a civil conspiracy is alleged, practitioners should be on guard because even if the civil conspiracy liability is not established, proof of the conspiracy itself could be used in a later criminal prosecution.

These are just a few of examples of how civil claims and criminal violations can potentially over-

lap, and civil practitioners should remain vigilant to protect their clients in this regard.

RED FLAGS OR CLUES THAT A GOVERNMENT INVESTIGATION IS UNDERWAY

- Although litigants routinely are found liable for fraud, conspiracy, and other civil causes of action when no criminal charges are levied, it is not uncommon for civil actions to trigger the interest of some governmental agency and thus raise the specter of a criminal investigation. In view of the broad criminal statutes, how can attorneys protect their clients and be alerted to situations in which their clients may have become targets of a government investigation? Below are a few “red flags” that may indicate that the government has taken an interest in your client or in some aspect of your case.

Issuance Of A Government Subpoena

This is perhaps the most common and clearest indication that the government is conducting an investigation. Subpoenas can be either for testimony, for documents, or for other information. Even if it appears from the information requested in the subpoena that the government is targeting a third party, the subpoena should not be taken lightly. It is a big red flag concerning your client. Often investigations start out focused on one individual or entity but then broaden to others. Great care must be taken with respect to subpoena compliance as mistakes and omissions can lead to obstruction of justice charges and devastating admissions.

Receipt Of A “Target” Letter

A “Target Letter” is one sent by the government (such as an Assistant United States Attorney) requesting a voluntary appearance before the grand jury. Such a letter should be treated with the same caution and care as a government subpoena. According to the United States Attorneys’ Manual, a “target” is “a person as to whom the prosecutor or the grand jury has substantial evidence linking

him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” See United States Attorneys Manual 9-11.151. The government uses Target Letters before issuing subpoenas because in a particular case, a subpoena “may carry the appearance of unfairness” and “the potential for misunderstanding is great.” The Manual also explains that if the voluntary cooperation cannot be obtained, a subpoena may be issued. A sample Target Letter can be found on the Department of Justice website. See *id.* at 9-11.150.

Client Is Informed That He Or Another Is A “Subject” Of An Investigation

The United States Attorneys’ Manual defines a “Subject” of an investigation as “a person whose conduct is within the scope of the grand jury’s investigation.” See *id.* at 9-11.151. It is Justice Department policy to advise both “Targets” and “Subjects” of their rights when providing testimony to the grand jury. If your client has been identified as a “Subject” or a “Target,” it is past time to involve an attorney knowledgeable in criminal law.

Government Interviewing Witnesses

Another clear indication that the government is conducting an investigation is when government agents or even private investigators attempt to interview witnesses. This could manifest itself in a formal way, such as a letter requesting the witness to meet with law enforcement officers. Or it could be less formal, with government agents conducting a “knock and talk” — in which officers knock on someone’s door, identify themselves, and request entry. Then, once inside, the officers inform the resident that they are conducting an investigation and ask for permission to search the home or request an interview.

Missing Money

Civil fraud claims can cover a wide spectrum of misrepresentations, from alleged misrepresentations about a product, to misrepresentations of a party's intent to honor his obligations in a contract. But when the misrepresentations involve missing money, there is a very real risk that a criminal investigation could be in the works.

Behavior Of Other Lawyers And Parties In The Civil Case

When civil lawyers start asking criminal-type questions, such as "What did you do with the money you took from the business?" or "Was all of the information you provided the buyer before he signed the contract truthful and accurate?" or a witness in the case invokes the Fifth Amendment in an interview or deposition, these are red flags. Similarly, if other parties or witnesses hire criminal counsel, you should pay close attention. The same is true, of course, if there are any arrests of persons related to the litigation or to your client and if any threats are made against witnesses in the case.

Badges Of Fraud

The phrase "badges of fraud" generally means the facts or circumstances surrounding a transaction that indicate that one party is trying to defraud another party. Badges of fraud include, among other things, the transfer of property in anticipation of litigation, understatement of income, accounting irregularities (two sets of books, false entries on documents), refusal to cooperate with auditors, implausible or inconsistent explanations of behavior, concealment of assets, deletions of information stored on computers, engagement in illegal activities (drug dealing) or attempting to conceal illegal activities, dealing in cash, and failure to file tax returns. Attorneys should be extremely careful when faced with such facts, not only to protect their clients but also to protect themselves from potential liability.

Taped Conversations

If your client has taped conversations or been taped by another, this could be a clue that someone — whether the government or an adversary of some sort — is attempting to obtain evidence in support of a criminal prosecution.

SOLUTIONS: MAINTAIN THE STATUS QUO •

Attorneys should not wait to learn of a criminal problem. Rather they should be proactive and alert to the clues and take immediate action when a red flag appears. They can do this by conducting a thorough fact-finding interview when looking for a possible criminal problem. Great care should be taken in this regard, as difficult issues of attorney-client privilege and conflicts of interest often must be addressed. Civil lawyers should consult a trained and competent criminal lawyer once the civil lawyer identifies a red flag.

If a potential criminal issue is identified, it is incumbent upon the civil lawyer to maintain status quo until a criminal lawyer is retained. This may mean invoking the Fifth Amendment. Most civil lawyers are not prepared (emotionally or legally) to advise their clients about their right to remain silent. Often, they do not like the Fifth Amendment, as it suggests that the client did something illegal. Such biases may prevent lawyers from acting in their clients' best interests.

When attorneys allow their clients to testify under oath, such as at a deposition, or to talk to government officials, the outcome can be devastating for the client. Such admissions can lead to civil enforcement actions, licensure issues, and criminal charges. The Fifth Amendment provides that a person shall not be "... compelled in any criminal case to be a witness against himself," and the right has been found applicable to civil actions as well. Individuals who are either facing criminal charges or who may face such charges may invoke the Fifth Amendment to avoid testifying, answering interrogatories, and producing documents concerning issues potentially

incriminating to them. Such issues could include a “bad” fact as well as the individual’s intent regarding that fact. No penalties attach to the invocation of the right to remain silent although some courts may permit the civil fact-finder to make an adverse inference based on refusal to testify. The potential risks and benefits should be evaluated before any testimony being given when the specter of criminal charges is afoot.

In working to maintain the status quo until the possible criminal implications of testimony can be addressed, one option is for the civil practitioner is to file a motion to stay proceedings. Although such motions are more likely to be granted when criminal charges have already been filed, it may be possible to obtain a stay during a pre-indictment or investigative stage by explaining to the civil court the circumstances and the necessity of a stay to protect the parties’ Constitutional rights. Just as civil lawyers are often uncomfortable delving into criminal law, many judges are loath to take any action that could interfere with a criminal prosecution or even a potential criminal case. Issues that may be raised in a motion to stay include:

- The extent to which there is overlap between the civil case and the criminal case/investigation;
- The status of the criminal case/investigation;
- The interests of the litigants in proceeding with the civil case, as balanced against the prejudice to the individual whose Constitutional rights are in jeopardy; and
- The interests of the court and the public in having the civil case resolved.

CONCLUSION • We live in a highly regulated society where new crimes are added to the books regularly. Couple this with the fact that there are many ambitious state and federal prosecutors and law enforcement agents, it is important to be cautious when allowing the client to speak when the possibility of a criminal investigation or case is looming.

Recognizing the clues that indicate a government investigation is pending is one of the most important skills a civil litigator can try to develop and hone so that a white collar lawyer can be brought in to the case in a timely manner to help protect your client from inadvertent admissions.