



WHITE COLLAR CRIME REPORT



VOL. 3, NO. 11

MAY 23, 2008

Reproduced with permission from White Collar Crime Report, Vol. 03, No. 11, 05/23/2008. Copyright © 2008 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

PARALLEL INVESTIGATIONS

‘Pay No Attention to the Man Behind The Curtain’: *United States v. Stringer* and the Government’s Obligation to Disclose

By W. WARREN HAMEL & DANETTE R. EDWARDS

Mr. Hamel is a partner at the law firm Venable LLP and co-chairs the firm’s SEC and White Collar Crime Group. Mr. Hamel specializes in defending individuals and entities being investigated for or charged with white collar crimes, conducting internal investigations, and advising clients on internal controls and preventive programs for corporate clients. He was an Assistant U.S. Attorney in the U.S. Attorney’s Office for the District of Maryland from 1990 to 2002, and was chief of the office’s Environmental Crimes and Enforcement Unit for the last five years of his service.

Ms. Edwards is an associate in Venable’s SEC and White Collar Crime Group. Her practice includes white collar criminal defense, complex civil cases, and advising clients on corporate compliance and internal control issues, including records management policies and a range of matters related to the Sarbanes-Oxley Act. Ms. Edwards also focuses on environmental criminal defense and internal investigations.

What are government civil attorneys obliged to disclose to defense counsel about the existence of a parallel criminal investigation? On April 4, the U.S. Court of Appeals for the Ninth Circuit, in a highly anticipated opinion in *United States v. Stringer*, ___ F.3d ___, 2008 WL 901563 (9th Cir. 2008) (*Stringer II*), announced a very broad and, for the government, forgiving standard to evaluate government civil counsel’s obligation to disclose the fact of a parallel criminal investigation.

The pro-government standard announced in *Stringer II* threatens to chill cooperation by defendants subject to civil enforcement actions, and it highlights the care with which defense counsel must advise clients about the decision to cooperate, and with which they must communicate with government counsel about the possibility of a parallel criminal investigation. *Stringer II* also raises a number of questions that point to the need for U.S. Supreme Court guidance to clarify what constitutes permissible conduct by the government where parallel proceedings lead to both civil and criminal enforcement actions.

The *Stringer* Cases: A Question Of Governmental Misconduct

Stringer II involved an appeal by the Department of Justice from a final district court order dismissing indictments charging three defendants with multiple counts of criminal securities violations.¹ The charges stemmed from the defendants' alleged falsification of the financial records of their company, FLIR.

The district court's decision dismissing the indictments was based on a finding that the government engaged in deceitful conduct² to conceal a criminal investigation that was active simultaneously with a civil securities investigation being carried out by the Securities and Exchange Commission and that this conduct violated the defendants' due process and Fifth Amendment rights. The court also held that if the indictments were reinstated on appeal, an alternative sanction would be the suppression of all evidence provided by the individual defendants in response to SEC subpoenas, including testimony under oath.³

The district court went on to determine that, should there be a criminal trial, certain information provided by an attorney acting as counsel for both FLIR and one of the defendants, J. Mark Samper, should be suppressed. The court reasoned that suppression was warranted because the government improperly intruded into Samper's attorney-client relationship by neglecting to notify him of a conflict of interest inherent in the joint representation of FLIR and Samper by one counsel and then exploiting his disclosures to that counsel after the representation of Samper ended.

District Court's Analysis Rejected *in Toto*. The Ninth Circuit rejected the district court's analysis *in toto*, reinstated the indictments, held that evidence received in response to the subpoenas should not be suppressed, and reversed the order excluding evidence received from the attorney for FLIR and Samper. If other circuits follow the Ninth Circuit's lead, the government will have far more leeway to conduct clandestine criminal investigations in close coordination with a civil investigation, or to use a civil enforcement investigation as a stalking horse to gather evidence for a criminal investigation.

This will create a very high-risk environment for defendants. The decision to cooperate with the civil investigation, in the hope that a civil resolution can be reached that would avoid criminal prosecution, will be much harder to make. One result, paradoxically, may be a substantial decrease in defendants who agree to cooperate with the civil investigation, on the view that the negative consequences of raising a Fifth Amendment defense, such as an adverse inference in the civil case, are far outweighed by the potential negative re-

¹ *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Ore. 2006) (*Stringer I*).

² As discussed in more detail *infra*, the district court expressed considerable outrage at the government's conduct, characterizing it as "trickery," "evasive," and a "subterfuge."

³ Although sometimes referred to as depositions, the SEC's authority to take testimony under oath prior to the filing of an enforcement action is characterized as taking investigative testimony, which testimony is given under oath and before a court reporter, resulting in a transcript.

sults of cooperating with a civil investigation seamlessly integrated with a clandestine criminal investigation.

Close Coordination Between SEC Civil, DOJ Criminal Units Kept Secret

The SEC began its investigation in early June 2000. In or about mid-June 2000, the U.S. Attorney's Office (USAO) in Portland, Ore., and the FBI opened a criminal investigation into the same matters. From that point on, the coordination between the civil and criminal arms of the government was extensive.⁴

The DOJ criminal attorneys and the SEC civil attorneys met often to discuss the case.⁵ In October 2000, the SEC provided the USAO and the FBI with five notebooks of documents and an analysis paper presenting the SEC's theory of the case. Numerous memoranda and e-mails further confirmed the cooperation between the agencies. For example, in a February 2001 interoffice memorandum, an FBI agent described a prosecutor's advice against carrying out an overt FBI investigation due to the level of cooperation FLIR was extending to the SEC. Likewise, one of the DOJ attorneys noted in an April 2001 interoffice memorandum that DOJ would not open a grand jury investigation in light of the SEC's good investigative results. Additionally, an SEC attorney's notes from June 2001 indicated that the SEC and the USAO had jointly decided to wait before commencing parallel proceedings because "with such proceedings the SEC action would be stayed."

The district court found that the SEC chose to conduct investigative testimony sessions with the individual defendants in Oregon so that the Portland office of the USAO would have venue over any false statements that might arise during the testimony. Even the Ninth Circuit conceded that "the SEC facilitated the criminal investigation in a number of ways," including offering to conduct the investigative testimony so as to create "the best record possible" in support of "false statement cases" and coordinating with the USAO on how best to achieve those results. The SEC staff attorney also asked court reporters to refrain from mentioning to defense counsel that there was an Assistant U.S. Attorney (AUSA) involved.

Criminal Investigation Was Underway. By the time the defendants testified in Oregon, the criminal investigation had been underway for approximately 16 months.

⁴ The district court concluded that the close coordination rose to the level of an improper merger. Specifically, the court agreed with the defendants that the SEC and the USAO worked together on a single investigation, with the USAO "hiding behind the SEC to sidestep defendants' constitutional rights that they would have otherwise asserted in the criminal proceeding, and build up its criminal case against them." *Stringer I*, 408 F. Supp. 2d at 1087. On the other hand, the court of appeals determined that the criminal investigation constituted a parallel proceeding that was separate from the civil investigation. The circuit court found it "significant" that the SEC investigation began prior to the DOJ investigation, and it said that this sequence tended to "negate any likelihood that the government began the civil investigation in bad faith, as, for example, in order to obtain evidence for a criminal prosecution." *United States v. Stringer*, __ F.3d __, 2008 WL 901563 (9th Cir. 2008), slip op. at *7-8 (*Stringer II*).

⁵ See *Stringer I* at 1085 (highlighting status/strategy meetings between agencies in August 2000, October 2000, and late January or early February 2001).

During the investigative testimony, defense counsel specifically questioned the SEC attorneys about whether there was a pending criminal investigation into the same circumstances, in order to determine how to advise their clients on whether to cooperate and testify under oath. The court of appeals set forth a portion of the exchange in *Stringer II*:

Q: The other questions I have relate to whether or not, in connection with your investigation, the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice.

A: As laid out in the 1662 form, in the "routine use of" section there are routine uses of our investigation, and it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned.⁶

When defense counsel then asked which U.S. Attorney's Office he should inquire with, the SEC staff attorney told him that it would be "a matter up to [his] discretion."⁷

The SEC and DOJ continued to share information and coordinate on strategy after defendants gave their testimony under oath. In December 2001, the SEC and the USAO agreed that it was "still premature to surface [the criminal investigation], and that the presence of the USAO would impede a scheduled meeting with FLIR."⁸

In light of these facts, the defendants argued that the responses of the SEC staff attorney to the questions above—i.e., directing defense counsel to Form 1662⁹ when asked about other agency involvement and declining to identify a specific U.S. Attorney's Office—were affirmatively misleading. The defendants also argued that the request to the court reporters was a form of trickery, again designed to mislead and conceal the fact of the simultaneous criminal investigation.¹⁰

Conflict Exploited. Finally, defendant Samper argued that by concealing the criminal investigation, the SEC violated his attorney-client relationship with his prior attorney, who had represented him and FLIR at one point but then ceased representing Samper and represented only FLIR. Samper argued that the attorney informed the SEC about an allegedly fraudulent accounting entry—which Samper had earlier described to the attorney—and provided documents relating to it to the SEC, all in order to curry favor with the SEC on behalf of FLIR. The entry was later included in Samper's indictment, apparently as a direct result of counsel's deliberate disclosure to the SEC and the SEC's seamless relationship with the criminal investigators.

⁶ *Stringer II* at *3.

⁷ *Id.* at *4.

⁸ *Stringer I* at 1086.

⁹ Form 1662 is a standard SEC form that is provided to all defendants who are subpoenaed to testify before the commission. Forms 1662 were given to the *Stringer* defendants in this case.

¹⁰ See *Stringer I* at 1087-88 (specifically pointing to AUSA's April 2001 interoffice memorandum memorializing decision not to pursue parallel grand jury investigation in light of SEC's good investigative work).

***Stringer I*: Holding Government To a Strict Standard of Disclosure**

The district court agreed with the defendants on almost all points, and the opinion in *Stringer I* reflects a deep outrage against the government's tactics in the case. The court described the SEC staff attorney's responses to defense counsel during investigative testimony under oath, related above, as "evasive and misleading, particularly in light of the close association between the USAO and the SEC throughout the investigation and the early identification [of defense counsel's client] as a criminal target."¹¹ The court held that the SEC attorney's responses alone constituted a due process violation.

In addition, the court concluded that the government violated the defendants' due process and Fifth Amendment rights when it "did not advise defendants that it anticipated their criminal prosecution."¹² Because the *Stringer* defendants had been consistently identified as targets and/or subjects in communications between the SEC and the USAO prior to the investigative testimony,¹³ the district court deemed the mere provision of Form 1662, without further warning or disclosure, to be inconsistent with "proper standards in the administration of justice" and insufficient to apprise defendants of what they needed to know to knowingly invoke their Fifth Amendment rights against self-incrimination.¹⁴ Thus, *Stringer I* set a very high standard for judging what the government must disclose in such cases, and the court found that the government's conduct fell woefully short.

Disqualification Proper Course. The district court also agreed with Samper's specific complaints about the government's violation of his attorney-client privilege. The government's awareness of the likelihood of criminal prosecution (and thus of the extent of counsel's conflict of interest in representing both Samper and FLIR) also led the lower court to hold that the government should have moved for disqualification of counsel. The court found that the government took advantage of the conflict of interest and obtained information about Samper's accounting entry that it might not have otherwise received. The court then concluded that the government's behavior regarding the conflict of interest warranted dismissal of Samper's indictment and that, if the court of appeals were to find complete dismissal of the indictments to be in error, the evidence relating to the accounting entry and anything derived from that evidence should be suppressed and the count related to the entry should be struck.

¹¹ *Stringer I* at 1089.

¹² *Id.* at 1088-89 (emphasis added).

¹³ See *id.* at 1085 (in summer of 2000, an AUSA "indicated [to an SEC officer] that defendants were the subjects of a Department of Justice investigation"). See also *id.* at 1086 (in July 2001, an AUSA "identified to the SEC that Samper and Stringer were targets"). Defendant Stringer testified before the SEC in October 2001—well after DOJ had communicated to SEC attorneys that the defendants were targets. *Id.* at 1087.

¹⁴ *Id.* (internal quotation marks omitted).

Essential Appellate Holding: Boilerplate Disclosures Trump Deceitful Conduct

The Ninth Circuit took a very different, and quite benign, view of the events leading up to the *Stringer* prosecution. The clearest message from *Stringer II* is that providing SEC Form 1662 to a defendant cures any violation of a defendant's rights caused by the government's deceitful conduct, because the form fully discloses the possibility that information received in the course of the civil investigation could be used in a criminal proceeding.

The court of appeals quoted the following disclosure language from the "Routine Uses of Information" section of the form: "The Commission often makes its files available to other governmental agencies, particularly the United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate."¹⁵ The court also quoted the following disclosure language from the "Fifth Amendment and Voluntary Testimony" section of the form: "Information you give may be used against you in any federal . . . civil or criminal proceeding brought by the Commission or any other agency. You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment of the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty, or forfeiture."

To buttress its reliance on these boilerplate disclosures, the Ninth Circuit highlighted defense counsel's questions concerning the existence of a criminal investigation. In the circuit court's view, the fact that defense counsel "*actually questioned* the SEC Staff Attorney about the involvement of the USAO" suggested that the Form 1662 disclosures were effective and further undermined any allegation that the government's conduct was deceitful.¹⁶

Court's Dismissive Attitude. The court of appeals' focus on the *fact* of the exchange, as opposed to the *content* of the SEC's responses, and its generally dismissive attitude toward challenges to the forthrightness of the SEC's responses is remarkable, to say the least. The Ninth Circuit called both the SEC's responses to defense counsel and its request to the court reporters to refrain from mentioning the presence of an AUSA in sessions prior to the investigative testimony nothing more than "collateral facts." Additionally, the court pointed out that the SEC warned each defendant at the beginning of each testimony session that "the facts developed in this investigation might constitute violations of . . . criminal laws." The appeals court also observed that "[w]hile this [request to the court reporters] indicates an intent to prevent disclosure to defendants of the *actual* criminal investigation, the *possibility* of

¹⁵ The mechanisms by which the information is shared are embodied in Section 20(b) of the Securities Exchange Act of 1933 (codified at 15 U.S.C. § 77(b)), and Section 21(e) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. § 78u(d)). These statutes similarly provide that whenever it appears to the SEC that a violation of the relevant act has occurred, the SEC may "transmit such evidence as may be available concerning such acts or practices to the Attorney General" who may, in his or her discretion, institute the necessary criminal proceedings.

¹⁶ Emphasis added.

criminal investigation should have been well known to both the defendants and their counsel."¹⁷

The court of appeals' focus on the fact of the exchange, as opposed to the content of the SEC's responses, and its generally dismissive attitude toward challenges to the forthrightness of the SEC's responses is remarkable, to say the least.

The Ninth Circuit also rejected Samper's argument that the government violated his Fifth Amendment right to due process, including, specifically, his right to effective assistance of counsel, by exploiting his prior counsel's conflict of interest. The court once again based its holding on Form 1662. It highlighted the following language from the form: "You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest." On the basis of that warning, the appellate court concluded that Samper had full knowledge of a potential conflict and that there was no impropriety on the government's part.

Ultimately, the Ninth Circuit stated that nothing in the government's actual conduct of the investigations amounted to deceit or an affirmative misrepresentation, and that "at most, there was a government decision not to conduct the criminal investigation openly"¹⁸

Stringer II: Its Predecessors And Likely Progeny

What is striking about the widely divergent opinions in *Stringer I* and *Stringer II* is that both purport to follow the guidance provided by the Supreme Court in *United States v. Kordel*, 397 U.S. 1 (1970), concerning the proper relationship between parallel civil and criminal proceedings. Almost 40 years old, *Kordel* is the most recent Supreme Court decision to address standards for government conduct in parallel proceedings. The *Kordel* court held that the government may conduct parallel civil and criminal investigations without violating the due process clause, *so long as it does not act in bad faith*.¹⁹ In dicta, the Supreme Court gave several examples that might constitute bad faith on the part of the government, such as "where the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defen-

¹⁷ *Stringer II*, slip op. at *10 (emphasis added).

¹⁸ *Id.* at *1.

¹⁹ *United States v. Kordel*, 397 U.S. 1, 11 (1970). *Kordel* held that the government did not violate the due process rights of defendants when it used evidence it obtained from a Food and Drug Administration civil investigation to convict them of criminal misbranding. The court explained that the FDA did not act in bad faith when it made a request for information, which ultimately was used in the criminal investigation, since similar requests were routinely made in 75 percent of its civil investigations.

dant in its civil proceeding that it contemplates his criminal prosecution . . . or any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.”²⁰

Stringer II stands at one end of the spectrum in its interpretation of the standard announced in *Kordel*. The Ninth Circuit obviously did not read a heightened disclosure requirement (i.e., that criminal prosecution was not only possible but contemplated) into *Kordel*'s “failure to advise” prohibition. The Ninth Circuit’s summary of this particular prohibition, however, includes a key editorial change from the language just quoted: The court of appeals uses the conjunctive term “and” in place of the disjunctive term “or,” thus redefining circumstances that constitute bad faith on the part of the government as where the civil investigation was brought solely to aid the prosecution *and* the government fails to make any disclosure that criminal prosecution is contemplated by the government.²¹

Stringer I, of course, represents the other end of the spectrum. The trial court explicitly declared that the government’s failure to advise of the anticipated prosecution and its resort to “subterfuge” to maintain the secrecy of its criminal investigation “clearly [fell] within the scenario contemplated by the Supreme Court as a ‘violation of due process or a departure from proper standards in the administration of justice.’”²² *Stringer I*'s focus on the insufficiency of the SEC’s disclosures to targets of criminal investigations tracks more closely the Supreme Court’s analysis in *Kordel*, and the standard set by the court in *Kordel* has the virtue of precluding government attorneys from playing a squalid game of cat-and-mouse with defense counsel solely for the purpose of hiding a criminal investigation from the target of that investigation, while allowing a civil investigation to gather further evidence against that target to be used in the criminal prosecution.

Consistent with *Stringer I*, other courts have applied a more stringent standard to the government’s failure to disclose the fact of a criminal investigation while seeking information in a civil investigation. For instance, in *United States v. Scrusby*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005), the U.S. District Court for the Northern District of Alabama took the government to task for how it conducted civil discovery and indicated what it must convey to defendants about an impending criminal prosecution. The court in *Scrusby* dismissed perjury charges that had been brought against former Health-South Chief Executive Officer Richard Scrusby and suppressed his SEC deposition.

U.S. Attorney Suggested Questions. Prior to Scrusby’s SEC deposition, the U.S. Attorney’s Office for the Northern District of Alabama contacted the SEC attorney and suggested questions of relevance to a criminal case along with areas to avoid so that Scrusby would be unaware that a criminal case was looming. The USAO asked the SEC to move the deposition to a location within its jurisdiction in order to facilitate the involvement of a particular SEC accountant at the deposition.

²⁰ *Id.* at 11-12 (emphasis on disjunctive added).

²¹ The opinion goes on to quote the relevant portion of *Kordel* accurately, although it is not apparent from the text of the opinion which formulation the Ninth Circuit ultimately applied.

²² *Stringer I*, 408 F. Supp. 2d at 1088.

At the time, the USAO recognized that the location change conferred the added benefit of venue in a subsequent criminal case.

What is striking about the widely divergent opinions in *Stringer I* and *Stringer II* is that both purport to follow the guidance provided by the Supreme Court in *United States v. Kordel*.

Relying on *United States v. Teyibo*, 877 F. Supp. 846 (S.D.N.Y. 1996),²³ the *Scrusby* court held that the government’s conduct departed from the standard of proper administration of justice in that the government failed to advise Scrusby (1) that the deposition had been moved to accommodate the needs of the USAO and, in part, for venue purposes, and (2) that Scrusby was the target of an ongoing criminal investigation. The court held that the SEC deposition should therefore be suppressed. The court also stated that the two investigations became improperly commingled.²⁴ As a result, the danger was greater that the government could eviscerate constitutional rights that would exist in a criminal investigation by conducting a *de facto* criminal investigation under the auspices of an overtly civil investigation.

In articulating its analysis, the *Scrusby* court lamented the lack of clear guidance on what distinguishes a legitimate, parallel investigation from an improper one. The court noted that neither the parties nor

²³ *Teyibo* cites to the Ninth Circuit case *United States v. Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987), which in turn cites to *Kordel* (397 U.S. at 12-13), as laying out the principle that “the prosecution may use evidence acquired in a civil action in a subsequent criminal proceeding unless the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of justice.” *Stringer II* also cited *Teyibo*, although not for the controlling principle by which the government’s conduct should be judged. Rather, *Stringer II* attempts to use *Teyibo* as additional support for its findings concerning the sufficiency of the Form 1662 disclosures. While *Teyibo* did view the provision of Form 1662 as evidence that the defendant had been notified of possible use of his SEC testimony in a subsequent criminal investigation, the case differed markedly from the *Stringer* case. *Teyibo*, 877 F. Supp. at 856 (defendant’s claim that he never received any warnings of possible criminal liability belied by provision of Form 1662). In *Teyibo*, the defendant did not ask any questions about the existence of a criminal investigation, and the SEC did not make any representations on this subject. Such an argument (i.e., that the SEC made misrepresentations) would have been hard to make since the USAO never advised the SEC on how to proceed with its civil investigation, and there was no evidence to suggest that the SEC had even been informed that the USAO had convened a grand jury to investigate *Teyibo*’s actions. In sum, in *Teyibo* the defendant’s knowing waiver of his Fifth Amendment rights when he testified before the SEC was not a product of circumstances in any way similar to the circumstances in *Stringer*. *Stringer II* fails to address any of these factual differences between *Stringer* and *Teyibo*.

²⁴ *United States v. Scrusby*, 366 F. Supp. 2d 1134, 1139-1140 (N.D. Ala. 2005) (noting that parallel investigations “should be like the side-by-side train tracks that never intersect”).

the court could find clear controlling law on this question. *Scrushy's* explicit reliance on *Teyibo* rather than *Kordel*, and the completely divergent results in *Stringer I* and *Stringer II*, both ostensibly based upon the *Kordel* standard, suggest that it is time for the Supreme Court to take up this issue again in order to provide clearer guidance to prosecutors, civil enforcement counsel, defense counsel, and the courts.

The Need for Supreme Court Guidance

In light of the government's increasing use of parallel proceedings to accomplish law enforcement goals, and the murky state of the law post-*Stringer II*, confusion is likely to proliferate about what constitutes bad faith in the conduct of parallel civil and criminal investigations. Not only are there already two differing trends concerning the requisite specificity of government disclosures (embodied by *Scrushy* and *Stringer I* on the one hand and *Stringer II* on the other), but the *Stringer II* opinion itself leaves open a number of questions. Most prominent, of course, is the lack of a clear and unambiguous test for when the government's failure to disclose a parallel criminal matter crosses the line and becomes a bad-faith denial of constitutional rights.

Stringer II's heavy reliance on Form 1662 as a cure-all is very fact-specific, and it obscures rather than illuminates broader application of the court's analysis. For instance, what if the SEC attorney had answered a direct question about a parallel criminal investigation with an affirmative false statement? What if a grand jury had been convened at the time of the SEC investigative testimony? Would the Form 1662 disclaimer have cured such circumstances? *Stringer II* also provides little guidance for cases arising in other areas of enforcement, where either there is a different disclaimer form, disclaimers are made orally, or no disclaimers are made at all.²⁵

²⁵ Of course, parallel proceedings can arise in any number of areas of federal law enforcement, ranging from tax matters, to environmental and worker safety enforcement, to investigations conducted by agency inspectors general. Some agencies have policies that provide more specific guidance in circumstances involving parallel proceedings. For instance, the Environmental Protection Agency's Parallel Proceedings Policy (Sept. 24, 2007) states that "[i]n addition to complying with all legal and ethical requirements, enforcement personnel should follow practices that avoid even the appearance of overreaching or unfairness." Policy at p. 5. The policy also states that the criminal program may not direct the civil investigation, the civil program may not direct the criminal investigation, and that "the government must not intentionally mislead a person as to the possible use of any responsive information in the criminal context" in such a way as to violate the person's constitutional rights. Policy at 6-7. Accordingly, the policy states that it is common practice to include a warning in information requests that the information may be used in criminal, civil, or administrative proceedings, and then goes on to state that "any information request issued by EPA's criminal program must clearly reflect that the information is being requested by that program." *Id.*

DOJ's Environment and Natural Resources Division has a policy that mirrors the EPA policy in many respects. See Integrated Enforcement Policy, Directive 99-21 (April 20, 1999). The ENRD policy states that the "administrative and civil discovery process may not be used as a pretext to obtain information for a criminal investigation." ENRD policy at 2. As to disclosures, however, the ENRD policy states explicitly that

In addition, the *Stringer II* court relied heavily on the fact that the initiation of the SEC investigation preceded the start of the criminal investigation.²⁶ If the criminal case had been launched first, would that change in fact pattern alone have made the difference for the Ninth Circuit? Does the latter sequence, infrequent as it might be, call for a presumption of bad faith to be extended to parallel proceedings in every instance where there is close cooperation and nondisclosure of the criminal investigation? These questions highlight the need for a clear standard.

Possible Standard. The Supreme Court should take a parallel proceedings case, if one is presented, in order to clarify the standard and provide a bright-line rule to guide not only prosecutors and civil enforcement counsel, but also defense counsel and defendants as they make their separate ways through the thicket of parallel proceedings.

For instance, a standard that would provide a clear test might look like the following:

The government must disclose the presence of a parallel criminal investigation where (a) the criminal investigation has been commenced, (b) the criminal investigators are coordinating with the civil investigation and receiving information from the civil investigation, and (c) the criminal investigation has identified the defendant who is subject to the civil investigative demand as a target or subject of the criminal investigation.

Since a civil investigation can be manipulated to gather information for a criminal investigation regardless of whether the civil or criminal investigation started first, the sequential timing issue should not be a consideration. Likewise, the use in such circumstances of a general disclosure or notice, used in every civil investigation, warning of the possibility of coordination with a criminal investigation should not suffice to place the defendant on notice. The disclosure should give notice of the fact of the criminal investigation. Only then can the individual defendant make a knowing and voluntary decision with regard to waiver of his constitutional rights in order to cooperate with the civil investigation.

"[c]ivil attorneys engaged in litigation against an individual who is the subject of a criminal investigation should not inform the defendant about that investigation" or "make any statements to a witness regarding the status" of the investigation. Instead, the ENRD policy instructs that "[c]ivil attorneys should refer all questions by witnesses regarding a criminal investigation to the appropriate criminal attorney." *Id.* at 5. Applying this policy to the facts of *Stringer*, if the word "pretext" means that the civil proceedings were initiated solely for the purposes of gathering information for the criminal investigation, the result would be the same as in *Stringer II*. If it means that civil discovery is being directed by and coordinated with the criminal investigation such that civil discovery is being used in lieu of criminal investigation precisely so that the defendants will not be alerted to the criminal investigation, then the outcome would more likely be consistent with *Stringer I*. These two policies carry the common disclaimer that they provide internal guidance only and do not create any rights, substantive or procedural, that are enforceable against the government.

²⁶ See *supra* note 4.

In short, the trigger for disclosure should be the facts of the coordination of the civil and criminal investigations at the time of the civil investigative demand, and the disclosure itself must be full, accurate, and specific. Such a rule would provide a bright-line standard to government prosecutors and defense counsel, and it would serve a prophylactic function in the same way Miranda warnings safeguard defendants' Fifth and Sixth Amendment rights upon arrest.

Conclusion

Until the Supreme Court acts to provide better guidance, defense counsel will want to carefully and extensively question government counsel about whether a parallel criminal investigation exists, and they should gauge the answers for any sign that the government is being less than fully candid in its answers. Where in the past counsel may have taken routine statements that the civil counsel could neither confirm nor deny the presence of a criminal case at face value, defense counsel needs to make a much more concerted effort to get satisfactory answers, and must make it plain (assuming

the client can afford to do so and agrees) that without some real, affirmative assurance by the government, the client is not likely to cooperate with the civil enforcement action.

As long as *Stringer II* stands as good law in the Ninth Circuit, and the overall standard remains ambiguous, individuals who are subjects of a civil investigation or proceeding may be less likely to provide information to the SEC or other agencies in civil enforcement contexts. This is an unfortunate dilemma for many. Defendants who choose not to cooperate with the SEC or with other agencies in order to try to avoid or mitigate the threat of civil enforcement will have to weigh the benefits of cooperation against, on the one hand, the risk that a criminal investigation lurks in the shadows, and on the other hand, the possibility of harsher civil penalties and/or subsequent referral to DOJ *because* of a decision not to cooperate.

The civil enforcement efforts of the SEC and other agencies will likely suffer from reduced cooperation. In other words, DOJ's and the SEC's short-term victory in *Stringer II* may, in the long term, make civil investigations much more difficult to successfully prosecute.