



NOTICE OF CLE PROGRAM

Part I: "Effective, Efficient and Ethical Practice in Federal Court: What the Judges Want You to Know" Join us for a conversation with the Hon. Mae D'Agostino, Hon. Therese Wiley Dancks and Hon. Christian Hummel from the Northern District moderated by Michael J. Murphy, Esq., of Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C., exploring the practical and ethical barriers to effective presentation and adjudication of matters before the Court. The discussion will seek insight on best practices from the judges' perspective on nearly every phase of litigation from drafting pleadings and papers to courtroom conduct.

Part II: "Criminal Law for Civil Practitioners" The intersection of civil and criminal law can create unique consequences for clients. During this portion of the CLE, Tina Sciocchetti, Esq., of Nixon Peabody will discuss potential exposure in the criminal arena that can arise from civil litigation and provide practical guidance on recognizing and avoiding collateral harm.

2 Ethics credits and 1 Professional Practice credit.

Thursday, December 5, 2019

1:00 p.m. ending at 4:00 p.m.

(Registration at 12:30 p.m.)

James T. Foley Courthouse, 445 Broadway, Albany, NY, in the Jury Assembly

R.S.V.P. for CLE by November 25, 2019

The Northern District of New York Federal Court Bar Association has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York.

“Effective, Efficient and Ethical Practice in Federal Court: What the Judges Want You to Know and Criminal Law for Civil Practitioners” has been approved for both newly admitted and experienced attorneys, and is in accordance with the requirements of the New York State Continuing Legal Education Board for 2.0 credits toward the **Ethics** and 1.0 credit towards **Professional Practice**.

This is a single program. No partial credit will be awarded.

This program is complimentary to all Northern District of New York Federal Court Bar Association Members.

*** PLEASE REMEMBER TO STOP AT THE REGISTRATION DESK TO SIGN OUT AND TURN IN YOUR EVALUATION FORM.**

BIOGRAPHIES

Michael J. Murphy is a Director and Shareholder at Carter Conboy in Albany. Mr. Murphy is a trial attorney handling complex litigation with an emphasis on employment law. He is regularly retained by leaders in business, government, and the professions to represent their interests in sensitive, high profile litigation and investigation. He maintains an active trial practice in State and Federal courts, as well as before the EEOC and the New York State Division of Human Rights. Mr. Murphy is a Fellow of the American College of Trial Lawyers, and he formerly served as Chair of the Board of ALFA International and as President of the Northern District of New York Federal Court Bar Association. He is an AV Preeminent rated attorney by Martindale Hubbell, was named “Lawyer of the Year” by Best Lawyers in America® in 2020 for excellent in Litigation – Labor and Employment and has been consistently recognized by both Best Lawyers® in America and Super Lawyers®.

Tina Sciocchetti Tina Sciocchetti is a partner in our Government Investigations and White Collar practice group. Tina is a former federal prosecutor and data privacy watchdog. She served for over seventeen years as an Assistant United States Attorney in both Washington, DC, and Albany. At the U.S. Attorney’s office, she investigated and prosecuted a wide range of criminal and civil matters including health care, tax and financial fraud, false claims act (including qui tam/whistleblower provisions), public corruption, asset forfeiture, sexual assault and child pornography and violent crime.

Tina also served as an executive director at the New York State Education Department focusing on investigations and professional discipline, and as the Department’s chief privacy officer, monitoring the use of protected student and educator information. In that role, she developed privacy policies and practices, provided guidance concerning privacy protections and handled data breaches.

Tina now represents a wide range of corporations and individuals in state and federal investigations and provides counsel in the areas of health care, securities, government contracts, ethics and lobbying and false claims. She also counsels educational institutions regarding compliance with federal and state mandates, conducts investigations in school settings and oversees institutional responses to investigations and inquiries by state and federal regulators. Tina has particular experience in the areas of student affairs and discipline, investigations of historical sexual misconduct, FERPA/student privacy, student safety and sexual misconduct on campus, including Title IX, the Clery Act and New York State Education Law 129-B.

Hon. Mae A. D'Agostino

U.S. District Judge

Mae Avila D'Agostino is a United States District Judge for the Northern District of New York. At the time of her appointment in 2011, she was a trial attorney with the law firm of D'Agostino, Krackeler, Maguire & Cardona, PC. Judge D'Agostino is a 1977, magna cum laude graduate of Siena College in Loudonville, New York. At Siena College Judge D'Agostino was a member of the women's basketball team. After graduating from College, she attended Syracuse University College of Law, receiving her Juris Doctor degree in May of 1980. At Syracuse University College of Law, she was awarded the International Academy of Trial Lawyers award for distinguished achievement in the art and science of advocacy. After graduating from Law School, Judge D'Agostino began her career as a trial attorney. She has tried numerous civil cases including medical malpractice, products liability, negligence, and civil assault. Judge D'Agostino is a past chair of the Trial Lawyers Section of the New York State Bar Association and is a member of the International Academy of Trial Lawyers and the American College of Trial Lawyers. Judge D'Agostino has participated in numerous Continuing Legal Education programs. She is an Adjunct Professor at Albany Law School where she teaches Medical Malpractice. She is a past member of the Siena College Board of Trustees, and Albany Law School Board of Trustees. She is a member of the New York State Bar Association and Albany County Bar Association.

Hon. Therese Wiley Dancks

U.S. Magistrate Judge

Thérèse Wiley Dancks is a United States Magistrate Judge for the Northern District of New York. At the time of her appointment in February of 2012, she was a founding partner in the law firm of Gale & Dancks, LLC, where her practice centered on civil litigation and trial work. She was associated with the law firm of Mackenzie Hughes, LLP from 1991 to 1997. Judge Dancks graduated magna cum laude from LeMoyne College in 1985 and earned her J.D. degree cum laude from Syracuse University College of Law in 1991.

Judge Dancks is a past president of the Central New York Women's Bar Association and established the organization's award-winning Domestic Violence Legal Assistance Clinic during her term. She is a past director of the Onondaga County Bar Association and has been a board member of several charitable and community organizations. She served as Chairwoman of the Board of Directors of the Hiscock Legal Aid Society and the Secretary of the Board of Directors of St. Elizabeth College of Nursing. She has co-authored articles for the Syracuse Law Review and she frequently lectures for educational institutions, professional organizations and bar association.

Hon. Christian F. Hummel

U.S. Magistrate Judge

Christian F. Hummel is a United States Magistrate Judge for the Northern District of New York. At the time of his appointment in September 2012, he was the Rensselaer County Surrogate. Judge Hummel served as the Rensselaer County Surrogate from 2002 until September 2012. Judge Hummel was a Rensselaer County Family Court Judge from 1993 until 2002. Judge Hummel was a Town Justice in the town of East Greenbush from 1986 until 1993.

Prior to his election as Rensselaer County Family Court Judge, he was a partner in the Albany, New York law firm of Carter & Conboy where his practice centered on civil litigation and trial work.

EFFECTIVE, EFFICIENT AND ETHICAL
PRACTICE IN FEDERAL COURT:
WHAT THE JUDGES WANT YOU TO KNOW

Michael J. Murphy
Carter, Conboy, Case, Blackmore,
Maloney & Laird, P.C.

December 5, 2019

Introduction

- Justice is a Process
- What the Court wants the Bar to know about how to be effective, efficient and ethical
- Barriers
- Emphasis on moving cases and timely disposition

Pre-Suit Through Rule 16

- Preparing to be in Federal Court
- Filing
- Rule 16
 - Civil Case Management Plan
 - Discussion of ADR
 - Anticipating discovery issues

Non-Dispositive Motions/Discovery Disputes

- Good faith effort in advance of seeking permission to move
- Source of disputes
- Avoiding discovery disputes
- Role of Court in evaluating documents and data
- E-discovery

Dispositive Motions

- Motions to Dismiss
 - Rules for Motion to Dismiss
 - Federal v. State Motions to Dismiss
- Motions for Summary Judgment
 - Most frequent mistakes in making and opposing a motion for summary judgment
 - Role of Statement of Material Facts – Local Rule 56.1
 - Dealing with bad facts in making a motion for summary judgment
 - Consideration of how a decision may effect other cases

Oral Argument

- When to request oral argument on a non-dispositive motion
- When to request oral argument on a dispositive motion
- Presuming familiarity with motion papers
- Why Judges want oral argument
- Effective oral argument
- Demonstrative exhibits in oral argument
- What can the Court do to make oral argument more useful to the Court and the parties

Ethics

- General observations of Ethics and Collegiality in NDNY
- Where the Court sees lapses in ethical behavior
- Explicit and inherent authority of Court to demand and enforce ethical behavior
- Sanctions – how often and under what circumstances
- District Panels Local rule 83.4
- Board of Judges
- Special Rules for Government Attorneys
- Ex Parte communications – under what circumstances
- Issues with pro se litigants
- Communication with Court personnel

Settlement

- Role of court at different stages of case
- Situations in which Court avoids involvement in settlement discussions
- Use of “Pre-Trial Settlement Conference Statement”

Trials

- Reduction in numbers – effect on trial advocacy
- Training Trial Lawyers
 - Court encouraging opportunity for young lawyers in Courtrooms
- Developing trial skills in depositions
 - Creating and defending a record
- Importance of Pre-Trial submissions
 - Complete exhibit lists
 - Appropriate stipulations on exhibits and facts
- Handling the Trial
 - Objections
 - Side bars
 - Scheduling

Recommended Reading

- Standards and Regulation of Professional Conduct in Federal Practice, *The Federal Lawyer*, July 2017 - http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/July/Features/Standards-and-Regulation-of-Professional-Conduct-in-Federal-Practice.aspx?FT=.pdf
- Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function and Future, *Journal of Appellate Practice and Process*, Hon. Mark R. Kravitz, Volume 10, Issue 2, Article 3, 2009 - <http://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1280&context=appellatepracticeprocess>
- Effective Advocacy in My Court, *Michigan Bar Journal*, Hon. Avern L. Cohn, October 1990 - <http://www.mied.uscourts.gov/pdffiles/Cohneffadvo.PDF>

Criminal Law for Civil Practitioners



**NDNY-FCBA CLE, December 5, 2019
Presented by Tina Sciocchetti**

Civil v. Criminal

A *civil action* is prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong.

A *criminal action* is a proceeding by which a party is charged with a public offense, accused and brought to trial and punishment.

Some distinctions

Civil	Criminal
private rights, dispute between parties	offenses against state, victims
private and public plaintiffs	government prosecutor
negligence	intent
preponderance of evidence/clear and convincing	beyond a reasonable doubt
Rule 26 wide-ranging discovery any non-privileged matter relevant to a claim/defense	Rule 16 limited discovery
depos/interrogatories/admissions/doc requests	def's statements, criminal record, case-in-chief docs Brady/Giglio/Jencks material
settlement	plea agreement
financial recoveries, order changing behavior	incarceration, probation, fines
forfeiture	forfeiture



▼ Justice Manual

▼ Title 1: Organization and Functions

[1-1.000 - Introduction](#)

[1-4.000 - Standards Of Conduct](#)

[1-5.000 - Judicial Disqualification](#)

[1-6.000 - DOJ Personnel As Witnesses](#)

[1-7.000 - Confidentiality and Media Contacts Policy](#)

[1-8.000 - Congressional Relations](#)

[1-9.000 - Personal Use of Social Media](#)

[1-10.000 - Litigation Against State Governments; Relations With Client Agencies](#)

[1-12.000 - Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings](#)

[1-13.000 - Urgent Reports](#)

1-12.000 - COORDINATION OF PARALLEL CRIMINAL, CIVIL, REGULATORY, AND ADMINISTRATIVE PROCEEDINGS

1-12.000 Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings

1-12.100 Coordination of Corporate Resolution Penalties and/or Joint Investigations and Proceedings Arising from the Same Misconduct

1-12.000 – Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings

Every United States Attorney’s Office and Department litigating component should have policies and procedures for appropriate coordination of the government’s criminal, civil, regulatory, and administrative remedies. Such policies and procedures should stress early, effective, and regular communication between criminal, civil, and agency attorneys to the fullest extent appropriate to the case and permissible by law, and should specifically address the following issues, at a minimum:

- **Intake:** From the moment of case intake, attorneys should consider potential civil, administrative, regulatory, and criminal remedies, and discuss those remedies with the investigative agents and other government personnel;
- **Investigation:** During the investigation, attorneys should consider investigative strategies that maximize the government’s ability to share information among criminal, civil, and agency administrative teams, including the use of investigative means other than grand jury subpoenas for documents or witness testimony; and
- **Resolution:** At every point between case intake and final resolution (*e.g.*, declination, indictment, settlement, plea, and sentencing), attorneys should assess the potential impact of such actions on criminal, civil, regulatory, and administrative proceedings.

Parallel actions are important to the Department’s efforts to hold accountable individuals who commit corporate malfeasance. Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in these matters. Consultation between the

Parallel Proceedings – DOJ

- ❑ “Every United States Attorney’s Office and Department litigating component should have *policies and procedures for appropriate coordination* of the government’s criminal, civil, regulatory, and administrative remedies.”
- ❑ “Such policies and procedures should stress *early, effective, and regular communication* between criminal, civil, and agency attorneys *to the fullest extent appropriate to the case and permissible by law,...*”

Parallel Proceedings – DOJ

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- **Resolution:** At every point between case intake and final resolution (e.g., declination, indictment, settlement, plea, and sentencing), attorneys should *assess the potential impact of such actions* on criminal, civil, regulatory, and administrative proceedings.

Anticipate the possibility of criminal and/or regulatory consequences in every federal civil case.

Evidence Collection and Sharing

Consider the civil tools that could be used to develop evidence against Dr. Diane for a criminal case:

- ❑ Medicare Recovery Audit Contractor audit
- ❑ Possible qui tam relator/whistleblower suit
- ❑ FDA investigator questioning of employees and administrative subpoenas
- ❑ Search warrant
- ❑ Civil Investigative Demands (CIDs)
- ❑ Civil litigation by state and federal governments, patient plaintiffs
- ❑ Administrative/Regulatory actions

Evidence Collection and Sharing

- ❑ Limitations on sharing:
 - ❑ “matters occurring before the grand jury”
 - ❑ sealed search warrant applications
 - ❑ tax return or return information
- ❑ Criminal prosecutors often defer using the grand jury.
- ❑ Under certain circumstances, Fed. R. Crim. P. 6e allows a criminal prosecutor to disclose grand jury matters to civil authorities and the prosecutor can also seek a court order allowing access to civil authorities or state counterparts (“sharing order”).

Evidence Collection and Sharing

Is my client totally hosed?

- ❑ DOJ policy *prohibits* the use of civil or administrative investigations *exclusively to further* a criminal case.
- ❑ The government is not supposed to use civil process to obtain evidence from a criminal target where compliance is induced through *deceit, trickery, or misrepresentation* about the nature of the inquiry.
- ❑ Attorneys and agents should not use a civil or administrative proceeding as a *“stalking horse”* to develop evidence for the criminal case.

Evidence Collection and Sharing

- ❑ Always *assume* there is a criminal investigation and the potential for criminal charges lurking in the background.
- ❑ *Ask* if a criminal investigation exists.
- ❑ Beware of *covert techniques* such as undercover surveillance and wiretaps.
- ❑ Be mindful of potentially *cooperating employees. No retaliation!*

Fifth Amendment Considerations

Constitutional right against self-incrimination

Criminal case

- blanket invocation
- cannot be used against the defendant
- reversible error for the government to comment at trial

Civil case

- must be asserted question-by-question basis in discovery
- adverse inference instruction against the defendant at trial
- lose the ability to affirmatively use the evidence concealed

Fifth Amendment Considerations

Consider the circumstances under which Dr. Diane might make a statement that could tend to incriminate her:

- ❑ The FDA interview
- ❑ Interviews during the search warrant execution
- ❑ Deposition or requests for admission by civil AUSA
- ❑ Appearances before grand jury
- ❑ Civil settlement agreements with the government or civil plaintiffs
- ❑ Factual proffers in plea agreements

Fifth Amendment Considerations

Consider all the ways in which these statements can be used against Dr. Diane:

- ❑ Criminal cases (at grand jury, trial, sentencing)
- ❑ Civil cases (res judicata and collateral estoppel where criminal first)
 - State and federal FCA cases (treble damages)
 - Civil suits by qui tam relator and patients
- ❑ Administrative cases
 - Debarment
 - Civil Monetary Penalties
 - Licensure actions (DEA/Medical Board)

Fifth Amendment Considerations

“Plead the Fifth”

- Can you assert the Fifth on behalf of the practice?
 - Generally, business entities have no testimonial protection.
 - Does not apply to corporate records or records required to be kept by law, so typically subpoena addressed to custodian of records.
 - However, if the business is solely or closely held and the only people who can answer questions are criminal targets whose answers would incriminate, basis to invoke.

Fifth Amendment Considerations

- ❑ Can you assert the Fifth on behalf of the employees of the practice?
- ❑ What about records sought by the CID that you know are solely in Dr. Diane's possession?
 - ❑ “testimonial privilege” or “act of production immunity”
- ❑ Statement to press – Can they use that?
 - ❑ substantive and impeachment evidence
 - ❑ boxes her into a particular defense before discovery

Stays of Litigation and Limiting Tools

Government requests:

- ❑ When a criminal defendant attempts to use the civil process as a means to seek discovery of the government's criminal case.
- ❑ Might ask for a deferral of the production of evidence to the defendant.
- ❑ Grounds are that producing evidence in response to defendant's discovery requests might jeopardize an ongoing criminal investigation or prosecution.
- ❑ Courts typically grant.

Stays of Litigation and Limiting Tools

Defense requests to avoid:

- having to litigate on two fronts
- making statements/admissions in civil case that will further the criminal case
- forcing defendant to expose the basis of her defense and evidence in support before the criminal trial
- causing an adverse inference from invoking the Fifth A.
- depriving defendant of the beneficial use of self-incriminatory/concealed evidence and thereby risking an adverse civil verdict

Stays of Litigation and Limiting Tools

- ❑ Civil defendant is less likely to obtain a stay short of showing the government or plaintiff is making *bad faith use* of the civil process.
- ❑ Court might prefer to put things on hold so the civil case can follow a criminal case.
 - ❑ benefit from the resolution of evidentiary and liability issues
 - ❑ defendant has fuller range to defend herself without Fifth A. concerns
 - ❑ civil case may be more likely settled following a successful criminal prosecution
 - ❑ the government ultimately might abandon the matter if its interests are fully vindicated in the criminal case

Stays of Litigation and Limiting Tools

- ❑ Short of a stay, a court might entertain other limitations in the government/plaintiff civil case where there is the threat of, or pending, criminal prosecution:
 - ❑ protective order barring non-party access to discovery or trial
 - ❑ quashing or modifying subpoenas
 - ❑ an order limiting the scope of discovery

Bottom Line: Keep Eyes Open and Global Resolution

- ❑ Should be thinking about all possible criminal, civil and regulatory consequences with every response provided to a government entity.
- ❑ A *global resolution* that attempts to resolve all exposure is a must.
- ❑ Keep in mind: The government cannot use a criminal case to *induce* a civil settlement. You *must request* a civil settlement to resolve the government's criminal case.
- ❑ Civil and criminal counsel should work closely throughout.

Global Resolution

- ❑ Seek civil or administrative penalties in lieu of criminal.
- ❑ Use civil resolution to persuade administrative entity that client punished enough:
 - ❑ debarment/loss of licensure is not warranted
 - ❑ compliance training, monitoring, a term of suspension
- ❑ Resolve everything at once and wrap up all of the negative press about the client in one news cycle.

Parallel Proceedings or Piling On?

1-12.100 - Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct

In parallel and/or joint corporate investigations and proceedings involving multiple Department components and/or other federal, state, or local enforcement authorities, Department attorneys should remain mindful of their ethical obligation not to use criminal enforcement authority unfairly to extract, or to attempt to extract, additional civil or administrative monetary payments.

In addition, in resolving a case with a company that multiple Department components are investigating for the same misconduct, Department attorneys should coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture against the company. Specifically, Department attorneys from each component should consider the amount and apportionment of fines, penalties, and/or forfeiture paid to the other components that are or will be resolving with the company for the same misconduct, with the goal of achieving an equitable result.

The Department should also endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.

The Department should consider all relevant factors in determining whether coordination and apportionment between Department components and with other enforcement authorities allows the interests of justice to be fully vindicated. Relevant factors may include, for instance, the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities.

This provision does not prevent Department attorneys from considering additional remedies in appropriate circumstances, such as where those remedies are designed to recover the government's money lost due to the misconduct or to provide restitution to victims.

[new May 2018]

Parallel Proceedings or Piling On?

- “[I]n resolving a case with a company that multiple Department components are investigating for the same misconduct, Department attorneys *should coordinate with one another to avoid the unnecessary imposition* of duplicative fines, penalties, and/or forfeiture against the company.”
- “The Department should also endeavor, as appropriate, to *coordinate with and consider* the amount of fines, penalties, and/or forfeiture *paid to other* federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the *same misconduct*.”

**THANK
YOU**



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Criminal Law for Civil Practitioners, presented by Tina Sciocchetti

Hypothetical example

Your client Doctor Diane is a pain management doctor running a small practice that serves an economically diverse community. She calls you to report that an FDA investigator stopped in her office while she was out, interviewed some staff, and said he wanted to meet with Dr. Diane.

You ask, “Do you have any idea what this could be about?” Dr. Diane says a few months ago, a Medicare Recovery Audit Contractor requested copies of medical records related to specific patients. She thought it was a routine audit and told her office manager to provide the records. She did not think about it again.

You ask, “Is there anything about the records in retrospect that give you a clue what they want?”

Dr. Diane replies:

I’ve been administering a “generic” pain medication to patients in my office. It’s a drug intended for the treatment of anxiety, but works to block pain. A few doctor friends told me about it, and then a solicitation came in the mail and I decided to try it. I have been substituting it for the expensive brand-name drug for months. It’s a fraction of the cost and the patients don’t know the difference. It seems to work just as well and no patients have complained, so I have been billing the same price as the brand-name version of the drug.

You google the name of the “generic” medication and see the FDA is investigating because the drug is not FDA-approved.

You suspect there are two possibilities here: 1) investigators are following up on mailing lists of doctors who ordered the drug, or 2) they were notified of Dr. Diane’s use of the drug by a cooperator, including a possible whistleblower/qui tam relator employee (qui tam: one who has brought suit under the FCA on behalf of the government for a recovery of up to 30%).

You advise Dr. Diane not to speak to the FDA investigator. Instead, you give the investigator a call and say you will cooperate, but Dr. Diane will not agree to be interviewed. You say the FDA can get records through you, and the FDA investigator says he will provide you with an administrative subpoena for the records.

Two weeks later, the FDA, aided by HHS agents, the FBI, and state Medicaid fraud investigators, execute a search warrant at the practice. They seize patient files, electronic records, and billing files, and they attempt to further interview staff. Dr. Diane calls you and you advise her to send all non-essential staff home. You tell Dr. Diane to get a copy of the warrant, and speak to the lead agent to assert your representation for the practice and its employees. The investigators honor your request.

Shortly thereafter, Dr. Diane receives notice of a civil action by FDA for an injunction prohibiting her from using the non-FDA approved drug. On her behalf, you negotiate a resolution where you agree to stop using the drug, relinquish all remaining stock to FDA, and to observe a permanent injunction against future use.

Within weeks, you get a call from the civil AUSA, who says he is conducting a False Claims Act investigation related to the billings for the unapproved drug, and has civil investigative demands (CIDs) including document requests, interrogatories and deposition requests for specified employees. The civil AUSA tells you that because Medicaid billings are involved, the NYS Medicaid Fraud Control Unit is also working on the case. You ask the AUSA if there is a parallel criminal

investigation taking place in the NDNY or the State, and he tells you it's office policy not to confirm or deny. You tell him you will accept service of the CIDs on behalf of the company, and want to coordinate your responses to both state and federal investigators.

While you're reviewing the CIDs, Dr. Diane receives a notice of action seeking suspension of her DEA license, followed by notice from NYS Board of Professional Medical Misconduct that it is commencing an investigation into whether professional disciplinary action is warranted based on her lack of good moral character.

The civil AUSA serves you with a CID for records from the practice, and notices depositions for a number of employees, including Dr. Diane. You are aware that Dr. Diane has responsive records on her personal laptop and cellphone that identifiably are tied to her alone.

Several months into the civil matter, you learn that practice employees have been called to the grand jury. The federal and criminal prosecutors each send you a letter inviting Dr. Diane to testify in the grand jury.

The federal prosecutor obtains an indictment charging Dr. Diane with several felonies, including the strict liability offense of using a non-FDA approved drug and a felony drug misbranding charge. On the same day, the state prosecutor also obtains an indictment with multiple felonies related to Medicaid fraud. Not wanting to be left out, the civil AUSA files a federal civil false claims act complaint.

As you walk out of the courthouse on the date of the federal arraignment, Dr. Diane answers several questions by a reporter concerning her actions.

You receive criminal discovery which provides limited insight into the government's case, and as usual, does not include grand jury transcripts. In an attempt to ascertain the full scope of the case and what the witnesses have to say, you serve discovery requests in the pending federal civil action, and seek the affidavit in support of the search warrant and witness interview statements. The civil AUSA seeks to stay the proceedings pending the outcome of the parallel criminal case.

Dr. Diane weighs going to trial, but ultimately decides to enter a guilty plea to the federal strict liability offense in the hope of avoiding a prison sentence. She then walks up the hill and pleads guilty to a state felony. In both cases, the prosecutors insist on a factual proffer which strongly implicates your client.

Following the guilty plea, Dr. Diane receives notice of suspension and debarment from Medicaid and Medicare programs, along with an assessment of civil monetary penalties. Private pay insurers learn of the case and several send letters notifying Dr. Diane that she may be excluded from participation in their plans and owes them for related false claims. Also pending are the federal and state civil matters, and the DEA and NYS State licensure matters.

There is widespread press coverage of Dr. Diane's guilty plea, and several patients file personal injury and civil fraud suits against her.