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WITH CIVIL LAW:
When Criminal Statutes Rear Their Ugly Heads****Paul E. Coggins**Paul E. Coggins, Esq.
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I. INTRODUCTION

Civil attorneys litigate civil cases, criminal lawyers practice criminal law, and never the 'twain shall meet.....right? Not so fast. Although—if they're lucky—many civil practitioners will never encounter criminal issues in their practice, the potential for criminal issues to creep into civil litigation is real. Criminal issues often appear in one of two ways.

First, because some common practice areas have overlapping civil and criminal regulations, the possibility that certain civil issues can turn criminal is serious, scary, and increasingly common. Perhaps your client is the defendant in a civil securities lawsuit where the plaintiff uncovers misrepresentations your client made to a bank in connection with a stock offering. Or maybe a hotly-contested civil antitrust lawsuit reveals evidence of secret and widespread price fixing arrangements between your client and a competitor. Or a breach of contract lawsuit between a medical device company and one of its consulting surgeons exposes the payment of kickbacks in exchange for the surgeon's business.

Each of these scenarios could result in the introduction of new and likely unwelcome parties into the picture; namely, state and/or federal law enforcement agencies. In addition to the damages and other remedies which may result from the civil action, the involvement of law enforcement introduces the possibilities of criminal prosecution, jail time and criminal fines.

But the client is not the only person who faces criminal exposure in connection with a civil action. Infamous cases such as the Enron investigation have shown that attorneys are not immune from civil and criminal exposure in the course of representing their clients.

The strategy and management of parallel civil and criminal proceedings is a surface that can only be scratched in the time and space allotted here. Thus, this article outlines just a few of the basic rules every civil practitioner must follow to manage effectively the criminal issues likely to arise in civil practice today.

II. RULE ONE: KNOW THE LAW

In order to ensure compliance with the law, an attorney must be aware of what is and is not permitted in the course of civil practice. The most important but perhaps most overlooked rule is to be aware of the criminal issues that

could arise in civil practice and to know the substantive law behind them.

A. Research the Substantive Criminal Statutes Relevant to Your Practice Area.

Several common civil practice areas are governed by overlapping civil and criminal regulations. For example, independent of a civil litigant's right to file suit against a competitor for civil damages suffered as a result of anticompetitive conduct, the Antitrust Division of the Department of Justice has the authority to investigate and prosecute civil and/or criminal violations of the Sherman Act¹ (15 U.S.C. §1 *et seq.*). Allegations of anticompetitive conduct are often volleyed about during lawsuits between major competitors.

Similarly, the Medicare and Medicaid Patient Protection Act of 1987, as amended, 42 U.S.C. §1320a-7b² (commonly referred to as the "anti-kickback statute"), provides for criminal penalties for certain acts impacting Medicare and state healthcare (e.g., Medicaid) reimbursable services. Many states criminalize certain anticompetitive acts as well.

There are several additional examples where the civil and criminal laws overlap, so attorneys

¹ 15 U.S.C. § 1 (2006).

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

² 42 U.S.C. § 1320a-7b(b) provides, in part:

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe or rebate (directly or indirectly, overtly or covertly, in cash or in kind - (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under [Medicare] or a State health care program, or (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under [Medicare] or a State health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

must familiarize themselves with the relevant criminal laws that might be implicated by the cases common to their practices.

B. Be Aware of the Criminal Statutes Relevant to All Civil Cases.

In addition to the substantive practice areas where criminal and civil law overlap, other common criminal issues arising in a civil practice that might apply to a wide variety of cases are conspiracy,³ making false statements,⁴ obstruction of an agency⁵ or criminal⁶

³ 18 U.S.C. § 371 (2000).

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

⁴ 18 U.S.C. § 1001 (2000).

(a) ...[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representations; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

⁵ 18 U.S.C. § 1505 (2000), provides in part:

[...]Whoever corruptly, ... or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or joint committee of the Congress—

Shall be fined under this title or imprisoned not more than five years ... or both.

⁶ 18 U.S.C. § 1510 (2000).

(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under

investigation, tampering with a witness,⁷ and perjury.⁸ Violations of these federal statutes often result in heavy penalties. For example, an individual

this title, or imprisoned not more than five years, or both.

⁷ 18 U.S.C. § 1512 (2000), provides in part:

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

- (1) influence, delay, or prevent the testimony of any person in an official proceeding;
- (2) cause or induce any person to –
 - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
 - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
 - (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
 - (D) be absent from an official proceeding to which such person has been summoned by legal process; or
- (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense...shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

- (1) attending or testifying in an official proceeding;
- (2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense...shall be fined under this title or imprisoned not more than one year, or both.

⁸ 18 U.S.C. § 1621 (2000).

Whoever—

- (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, depositions, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true [...]

is guilty of perjury and shall...be fined under this title or imprisoned not more than five years, or both. [...]

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"When Civil and Criminal Law Collide: Recognizing when to Call a Criminal Lawyer"