

PARALLEL INVESTIGATIONS

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What are parallel investigations?

Independent, often simultaneous, criminal, civil, regulatory, or administrative investigations in support of enforcement actions or prosecutions involving allegations and parties that are substantially the same.

Are parallel investigations lawful?

- “There is nothing improper about the government undertaking simultaneous criminal and civil investigations” *United States v. Stringer*, 535 F.3d 929, 932 (9th Cir. 2008).
- “It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendations of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.” *Sec & Exchange Comm’n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980).

Examples of parallel investigations:

- A state agency investigation determined that an agency employee has engaged in work-related misconduct with possible criminal and/or Code of Ethics violation. This may trigger:
 - an agency/HR disciplinary proceeding
 - a criminal prosecution and/or
 - an administrative proceeding before the State Ethics Commission
- An OIG investigation uncovers evidence that a state contractor knowingly charged for services it did not render. This may trigger:
 - a criminal prosecution for theft of governmental funds
 - an administrative regulatory proceeding by a licensing authority to impose a remedial or suspension/revocation sanction

EXAMPLE:

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**Allegation -
employee
engaged in
activity other
than official
business during
state time**

Indiana Criminal Code –

- Criminal ghost employment
- Theft
- Official Misconduct

Indiana Code of Ethics –

- Ghost employment
- Misuse of State Property

Efficiency – recommendations

Indiana Supreme Court Cases



- *Ghosh v. Indiana State Ethics Commission*,
930 N.E.2d 23 (Ind. 2010)
- *Indiana State Ethics Commission v. Sanchez*,
18 N.E.3d 988 (Ind. 2014)

Ghosh v. Indiana State Ethics Commission

- IDEM terminated Ghosh for using a state credit card at gas station in which he had an ownership interest
- Ghosh appealed termination, and SEAC upheld the termination.
- OIG filed complaint with SEC
- SEC found Ghosh violated the misuse of state property provision and imposed a fine
- The Court held that SEAC is authorized to consider ethical violations among other grounds for termination, but the SEC has exclusive jurisdiction to interpret the State Ethics Code

Indiana State Ethics Commission v. Sanchez

- DWD fired Sanchez for alleged misconduct, including ghost employment, poor job performance and generally toxic behavior
- The Prosecutor charged her with theft
 - Sanchez filed a motion to suppress the fruits of a search, arguing that the information in the search warrant was stale
 - The charges were dismissed
- The OIG filed an ethics complaint against her for misuse of state property
 - Sanchez moved to suppress the evidence recovered in the search, arguing that the criminal court's suppression order was binding on the SEC
 - The SEC denied her motion and found she violated the misuse of state property rule; the SEC barred her from future state employment

Indiana State Ethics Commission v. Sanchez (con't)

- The Indiana Supreme Court found that the SEC's proceeding is independent of the criminal proceeding, even though they arise out of related wrongful conduct
 - The criminal case looked at whether there was probable cause to believe Sanchez had State property in her possession at the time the State applied for its search warrant
 - The SEC looked at whether there was probable cause to believe Sanchez made unauthorized personal use of her property at some time either during or after her employment
- The Court held that there was sufficient evidence to support the SEC's determination

Limits on Parallel Investigations:

To be parallel, by definition, the separate investigations should be like the side-by-side train tracks that never intersect.”

United States v. Scrushy,
366 F.Supp.2d 1134, 1139 (N.D. Ala. 2005)

Garrity v. New Jersey, 385 U.S. 493, 500 (1967)

- NJ police officers allegedly involved in fixing traffic tickets.
- Before being questioned, each officer was advised that (1) answers might be used against him in a criminal proceeding, (2) he could refuse to answer, but (3) refusing to answer would subject him to removal from office (and loss of pension benefits).
- State court convicted officers over their objections that their statements were coerced because they could lose their job by not answering questions

Garrity v. New Jersey, 385 U.S. 493, 500 (1967)

- U.S. Supreme Court reversed – found confessions were coerced and could not be used in criminal trial
- “We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.”

Garrity holding

When public employees are forced to choose between cooperating with an internal investigation or losing their jobs, any statements the employees make during the investigation are compelled and, as such, are inadmissible against them in subsequent criminal proceedings.

Kastigar v. United States, 406 U.S. 441, 453 (1972)

The sole concern of the 5th Amendment privilege against self-incrimination “is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts. Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. . . .”

Criswell v. State, 45 N.E. 3d 46 (Ind. Ct. App. 2015)

- A Fort Wayne police sergeant allegedly committed theft.
- An internal investigator interviewed the defendant and gave him *Garrity* warnings. The investigator also conducted FWPD interviews.
- At the defendant's criminal trial, the investigator related the substance of the additional interviews, which incriminated the defendant.
- The defendant moved for a Kastigar hearing to suppress the incriminating evidence. He argued that the additional interviews were "rife with phrasing, guidance and steering of the interview with information that could only have been learned" from the defendant's compelled statement.
- The trial court denied the defendant's motion.

Criswell v. State, 45 N.E. 3d 46 (Ind. Ct. App. 2015)

- The Indiana Court of Appeals reversed and remanded the case back to the trial court with instructions that the question on remand was whether the evidence of the State intended to present during trial was wholly independent of the defendant's suppressed statement.
- If the evidence was derived either directly or indirectly from his suppressed statement, it must be suppressed as it would be considered fruit of the poisonous tree. If the evidence was not derived from the defendant's suppressed statement, it could be admissible at trial.

Main types of investigations:



Role of the OIG

- Law enforcement agency pursuant to Ind. Code §35-31.5-2-185
- All OIG Special Agents are Tier 1 law enforcement officers
- IG and Special Agents have the powers of a law enforcement officer under the criminal code



If agency has already investigated and/or terminated employee . . .

The OIG will consider the following when deciding whether to open an investigation:

- Potential benefits of conducting an additional investigation vs. potential costs
- Potential for monetary recovery for the State
- Potential for increased public confidence in state government

Other Considerations:

- Different Burdens of Proof
 - Different Timing
 - Different Penalties
- Different Preventative Impact
 - Different Expectations

Even if *Garrity* renders a statement inadmissible in a criminal trial. . .

- The OIG may prove the facts described in the statement using evidence obtained from a source independent of the statement.
- The OIG can use the statement in an administrative or civil investigation (i.e. before the State Ethics Commission)

Independent Investigation

- The OIG communicates with the agency investigator on the front end regarding the case. We ask:
 - Did employee speak with anyone from the agency or SPD about the same allegations?
 - If so, with whom did the employee talk and what was discussed?
 - Did the employee sign any waiver forms or receive any warnings?
- The OIG does not use the compelled statement from the agency investigator during investigation of the criminal case.

What the OIG says to employees to avoid Garrity problems?

1. We do not have any power over his/her current job status with the agency or with any decision to discipline or terminate him/her.
2. The interview is voluntary.
3. The employee can refuse to answer any or all questions.

AND . . .

4. No disciplinary action will be taken against the employee solely for refusing to answer questions.
5. Any statement the employee furnishes may be used as evidence in any future criminal proceeding, administrative ethics proceeding or agency disciplinary proceeding.
6. We are not threatening or pressuring the employee to respond to any questions.

Why should we take a case to the OIG, even if employee terminated?

- Possible Criminal Prosecution
- Possible Ethics Complaint
 - State Ethics Commission has penalties available to them, such as fines and debarring individual from state employment, that may not be available to agency
 - The Commission has exclusive jurisdiction over Code of Ethics matters
- Deterrent Effect

THANK YOU &
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