

## Q&A With Choate's Melissa Tearney

*Law360, New York (May 09, 2012, 2:58 PM ET)* -- Melissa Tearney is a partner in the Boston office of Choate Hall & Stewart LLP.

Tearney represents individuals and corporations in criminal matters in several substantive legal areas, including health care fraud and abuse. Her practice is currently focused on the medical device and pharmaceutical industries, where she represents corporate executives and companies against allegations that they have violated federal statutes, such as the False Claims Act, the Anti-Kickback Statute and the Federal Food, Drug and Cosmetic Act.

Tearney routinely represents clients before state and federal grand juries and investigative bodies and has extensive trial and appellate experience. She is a cum laude graduate of Harvard Law School.

### **Q: What is the most challenging case you have worked on and what made it challenging?**

A: The truth is, every case I work on is challenging, but the most complex involve representing individuals in criminal matters. The government has been increasingly aggressive about pursuing corporate executives criminally.

Often, the executives are not involved in, nor even aware of, the conduct at issue. Nonetheless, the government pursues them because they hold senior positions in the company and are deemed responsible for the actions of their subordinates.

The law may not require a showing of intent in certain instances, and charging decisions often rest solely on prosecutorial discretion. As a result, these cases are difficult to defend and require extensive discussions and negotiations with the prosecutors.

Moreover, the stakes are high because the criminal offenses at issue can result in imprisonment. Needless to say, it is hugely rewarding when the government decides not to prosecute.

### **Q: What aspects of your practice area are in need of reform and why?**

A: There are very serious collateral consequences arising out of health care-related investigations. In addition to the imposition of large fines and imprisonment, federal law permits the government to exclude companies and individuals from participation in the federal health care system, including Medicare and Medicaid.

In certain instances, exclusion is mandatory. Exclusion is often described as the “death knell” for corporations because they cannot survive without receiving government reimbursement for their products. The government is their biggest customer. Individuals may be deprived of their livelihood in the pharmaceutical or medical device industries if the government excludes them.

Over the past year, the government has only hardened its position on exclusion. The exclusion authority provides the government with tremendous leverage over those entities under its scrutiny.

Companies and individuals often feel compelled to resolve cases with unfavorable terms just to avoid exclusion. The exclusion rules should be reformed to “even the playing field” between the government and those being investigated.

**Q: What is an important issue or case relevant to your practice area and why?**

A: Under the federal False Claims Act, the court seals cases filed by whistleblowers to provide the government with an opportunity to investigate the allegations outside of public scrutiny.

Traditionally, the cases remained sealed until the government and the company settle any criminal and civil matters. The court then simultaneously dismisses the whistleblower case when the settlement is announced without the case ever being litigated.

Increasingly, the judiciary has lost patience with the slow pace of the government’s investigations, which often take several years. Judges now are unsealing complaints more quickly, even while the government still is conducting its investigations and bringing witnesses before grand juries. This puts defense counsel in the position of defending the whistleblower’s civil case and the government’s criminal investigation at the same time.

The parallel proceedings raise complex legal and strategic issues. One issue is whether or not the government will decide to intervene in the whistleblower litigation and what that means for the defense of the case. Another important issue is how to conduct aggressive motion practice while potentially negotiating a resolution with the government.

There are also many issues around the scope and conduct of discovery. Clearly, there are Fifth Amendment implications when civil discovery is ongoing before the resolution of criminal liability for the company or individuals. As a result, government targets can find themselves in a particularly difficult and uncomfortable legal position.

**Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.**

A: I have worked closely with Reid Weingarten at Steptoe & Johnson. Reid is practical, insightful and a fierce defender of his clients. He is a trial lawyer in the old-fashioned sense of the word. Reid knows how to try and win cases, which is an increasingly rare skill. He also isn’t afraid to try cases against the government, and does so aggressively and adeptly.

**Q: What is a mistake you made early in your career and what did you learn from it?**

A: Early in my career, I typically focused on the task immediately at hand. I put all of my energy toward completing the specific issue a partner asked me to handle, whether it was researching a point of law, drafting a specific motion in limine or conducting a document review.

I never looked at the client's overall needs or tried to understand the risks they generally faced in their business. Over time, I have learned to view my role much more broadly.

Now, I work diligently to assess client's needs beyond the specific matter that led them to initially hire me. I view my role as spotting issues for them even before they become aware of problems. I increasingly have become an "adviser" to my clients. This is particularly important in criminal defense work.

Many of my clients are in heavily regulated industries and they confront daily risks in their business. The more I understand my clients' business, the more I can proactively help them to limit their criminal and civil liability.

I teach the associates working on cases with me that they need to look up from the computer screen more frequently and think about the client in a holistic way.

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