

# The Metropolitan Corporate Counsel®

National Edition

www.metrocorpcounsel.com

Volume 22, No. 9

© 2014 The Metropolitan Corporate Counsel, Inc.

September 2014

## Jones Day's New York Office Includes Busy False Claims Act Practice

*The Editor interviews Heidi Wendel, Partner in the New York City Office of Jones Day, having served as Chief, Civil Frauds Unit of the U.S. Attorney's Office, Southern District of New York, and as Special Deputy Attorney General in New York State's Attorney General's Office.*

**Editor:** Please tell our readers about the kind of work you do in Jones Day's New York office.

**Wendel:** I am a litigator, working predominantly on False Claims Act cases. Ninety percent of my practice for the past ten or so years has been False Claims Act work both federal and state. I'm also involved in various types of contract litigation, including residential mortgage-backed security (RMBS) cases. I think probably every litigator in New York does some work in that area. I enjoy all litigation, but I find False Claims Act work to be one of the most fascinating areas in which to practice.

**Editor:** You returned to the firm after extensive service for the Southern District United States Attorney's Office and the State Attorney General's Office. Can you talk about that?

**Wendel:** I came to Jones Day's New York office in 1992 after a clerkship for Judge Milton Pollack in the Southern District, where I worked on the Boesky, Drexel and Milken litigations. During my clerkship, we had 156 cases against Michael Milken transferred to us in the Milken MDL, and I worked for Judge Pollack in resolving those cases in a matter of about eight or nine months. Judge Pollack concluded a brilliant settlement of all of the Milken cases within a very short stretch of time. He was an absolute genius at litigation, widely considered one of the greatest judges of the Southern District at that time. He was a tremendous role model, and I was very fortunate to have had the opportunity to

work for him from 1991 to 1992.

I came to Jones Day as a brand new associate and remained through January of 1997, when I went to the U.S. Attorney's Office, Civil Division. I was encouraged to go to the U.S. Attorney's Office by the former AUSAs at Jones Day, such as Charlie Carberry and Bob Gaffey. They particularly encouraged me to go to the Civil Division because I love doing research and writing briefs.

Jones Day was a terrific place to cut my teeth as a young lawyer. I had tremendous responsibility at a very early period in my career, including taking a number of depositions during my first couple of years as an associate. Jones Day makes a big effort to give its young attorneys a lot of experience. One of the first depositions I took in fact was in a case that went up to the Second Circuit on the issue of the evidentiary value of changes a deponent can make to his deposition when he completely alters his answers at the depositions. In addition to the interesting nature of the work I got to do at Jones Day, the responsibility I was given and the arguments I had in court, I also worked with really wonderful partners like Fred Sherman.

**Editor:** When were you in the State Attorney General's Office?

**Wendel:** I worked at the State Attorney General's Office from 2007 through 2010. I went to the AG's office to work for Andrew Cuomo as part of a group of AUSAs from both the Southern District and the Eastern District of New York that Andrew Cuomo recruited to produce what he termed "real results in real time." It was a very exciting time to be at the AG's office. I was the director of the



Heidi Wendel

Medicaid Fraud Control Unit, and I worked very closely with the National Association of Medicaid Fraud Control Units (NAMFCU), including serving as vice president of NAMFCU in 2010.

I left the AG's office in September 2010 to return to the U.S. Attorney's Office in the Southern District's Civil Division as chief of Civil Frauds.

**Editor:** Before we get into your practice area, please give us a general picture of Jones Day's large New York office.

**Wendel:** Jones Day's New York office was opened in 1986, and since its opening, it has provided a full range of legal services to local, national and global clients. With particular emphasis on transactional matters (including mergers and acquisitions, private equity, capital markets, banking and finance, and real estate); business restructuring; tax; intellectual property; and a full array of litigation and arbitration services in areas such as appellate, labor and employment, general commercial, and products liability, it has grown in three decades from 21 lawyers to almost 300.

The firm's collegial culture is evident in New York, so the office certainly does not function in an impersonal way. We have lots of Jones Day events – there's even a Jones Day band – and various partners and associates often have lunch together in the cafeteria or meet up at neighborhood places. In the New York office we do all sorts of fascinating pro bono work, which is a very high priority of the firm, including asylum work, criminal appeals, and domestic violence cases. We serve as regular counsel to local nonprofit organizations such as The Doe Fund, The East Harlem School, The American Jewish Committee, Brooklyn Child and Family Services and several arts organizations. One of the great things about Jones Day is that it does pro bono for the sake of helping people as opposed to trying to garner attention.

*Please email the interviewee at [hwendel@jonesday.com](mailto:hwendel@jonesday.com) with questions about this interview.*

**Editor: How did you first become involved in FCA work?**

**Wendel:** I got my very first FCA case in 1997 from Jane Booth, who was then the chief of the Civil Division at the U.S. Attorney's Office. I had a docket like any new assistant U.S. attorney in the Civil Division that consisted of car accident cases, slip and falls, Bivens, that type of thing. About three months into my first year, Jane Booth assigned me to work on a False Claims Act case as the junior person. We brought a case alleging fraud in the foster care system by the City and the state of New York. The government's allegation in the case was that six-month reviews to ensure that the children were properly placed and that they were safe and that were required for federal subsidies were not being conducted. That was our case. We won a nearly \$50 million settlement against the city and the state.

**Editor: What is the current environment for False Claims Act cases in New York?**

**Wendel:** It's an incredibly exciting time to practice in this area with all the changes that are constantly occurring in the field. Among other changes, in the last couple of years, relators have begun to litigate a lot of cases in which the government does not intervene. When I first got into the False Claims Act area, if the government did not intervene in a case, that was essentially the end of the case. When the government does not intervene today, often relators go forward with cases.

Another major development is the plethora of circuit splits in this area. There are an unbelievable number of issues that are hotly litigated in the False Claims Act arena, everything from the applicable statute of limitations (including the War Time Suspension of Limitations Act), how particularized a complaint has to be with respect to specifying false claims, what is meant by reckless disregard under the mens rea standard in the False Claims Act, and many other fascinating legal issues that are constantly in play. The False Claims Act area may have the largest numbers of circuit splits in any area of practice currently and among the largest number of cases that are going up to the Supreme Court. It's such an interesting area to practice in currently.

**Editor: There seems to have been an increase in False Claims Act cases over the most recent period. Do you account for that by virtue of the fact that relators are so active?**

**Wendel:** I think that is part of the reason. Some of the increase in False Claims Act litigation is due to relators going forward even if the government has declined a case. Some

of it is due to a huge increase in enforcement by the government in this area. It's a very significant government priority, partly because this is a money-making area for the government. There is tremendous pressure from Congress, taxpayer protection groups and others to make this a priority because taxpayers don't want to be funding large government programs without enforcement of anti-fraud rules. I think that all those different considerations have led to an increase in the number of False Claims Act investigations, prosecutions and litigation in general.

**Editor: How have recent developments in the healthcare industry affected your FCA work?**

**Wendel:** Healthcare is the area in which there are the most circuit splits, with many frontline issues, including kickback issues, Stark issues, particularization of claims, and statute of limitation issues. Some of those issues also arise outside the healthcare area, but many of them have arisen in the healthcare area. The size of the Medicare and Medicaid programs, as well as other federal healthcare programs, partly explains why there are so many False Claims Act cases in the healthcare area.

**Editor: What about whistleblower cases?**

**Wendel:** The majority of False Claims Act cases are brought by whistleblowers, at least outside the RMBS area. The government also brings its own investigations, but the largest number of those have come in the mortgage fraud area. When I was at the Southern District, we initiated a lot of our own investigations, particularly in the mortgage fraud area, with somewhat fewer investigations initiated without whistleblowers in the healthcare area.

**Editor: What has it been like dealing with your former colleagues on the government side now that you are in private practice?**

**Wendel:** I have a unique perspective on False Claims Act litigation because I've served in both federal and state governments and now am a defense lawyer. I have a lot of perspective on how the government thinks about its investigations, about when to intervene, when to decline, how to respond to a relator in the event of declination if the case goes forward, and how to view internal investigations by companies in False Claims Act cases. I very much enjoy encountering my former colleagues across the table. The False Claims Act community is really a fairly small community of lawyers, even in New York City. We all pretty much know each other on both sides of the table.

**Editor: Do you have any general advice for our corporate counsel readers if they should ever get hit by an FCA case?**

**Wendel:** I think corporate counsel's first response should be to try to assess whether or not the investigation or case is criminal or civil or a parallel investigation. To some extent that can be determined from the type of process that's been served. For example, if a company receives a civil investigative demand that means one thing, if it gets a HIPAA subpoena, that can mean something else. Of course, a grand jury subpoena means the case is criminal.

What companies often want to do when they get a subpoena is conduct an internal investigation, which can be the right instinct. It makes a lot of sense to get outside counsel involved in that, partially based on decisions that have come down recently with respect to the privileges that apply to internal investigations. A company should take steps to ensure any internal investigation is conducted in the most effective manner with an eye toward making a presentation to the government. If there are positive findings for the company from the internal investigation, then that presentation will be focused on denying liability or at least reducing exposure. If the negative findings predominate, then the focus may be on trying to negotiate a good settlement from the outset. Reaching out to a good False Claims Act lawyer is your best bet if you're a company trying to respond to a subpoena or other process from the government.

**Editor: Are there any steps they can take to help ward off such litigation in the first place?**

**Wendel:** A strong compliance program can be very helpful in ensuring that there are open channels to employees who identify or believe that they have identified a problem in the company and to bring that problem to the attention of the senior people without fear of retaliation. That is crucial to ensuring there are vehicles through which employees can report their real or perceived grievances with the company. All of that is extremely helpful to preventing whistleblower cases down the line.

**Editor: I understand you've somehow found time to write fiction. How does that relate to your legal career?**

**Wendel:** I write a serial column in a free, daily newspaper in Portland, Maine that's run by a family friend of ours. One of the characters in the weekly column is a criminal defense lawyer, partly based on my experience as head of a criminal unit at the AG's office. It does bear some relation to my career in a way, but it's just a fun hobby.