



WHITE COLLAR CRIME

HEALTH CARE FRAUD

2010-2011 EDITION

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White Collar Crime: Health Care Fraud

**2010-2011 Edition
Issued in October 2010**

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with contributions by
Robert David Malove, Esq.

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Dedication

For my family, without whose inspiration I could not have persevered. This book is dedicated to the memory of my late wife, Hope Weisman Weintraub, and our children, Rachel, Molly, Hannah, and Charlie.

Benson Weintraub
September 2010
Miami, Florida

It is my greatest pleasure and highest honor to dedicate this book to my wonderful children, Jonathan and Julia, my selfless mother and to our entire family and network of friends without whose support and encouragement this would not have been possible.

Robert David Malove
September 2010
Fort Lauderdale, Florida

About the Author

One of the nation's leading academic and practice-based white collar criminal defense lawyers, Benson Weintraub represents physicians, institutions, and medical providers in matters relating to health care fraud. Central to his practice is corporate compliance programming to develop standards and procedures that reduce claims of corporate fraud, waste, and abuse.

Benson Weintraub has distinguished himself as a versatile lawyer and scholar. In 2004, he served as a visiting professor at Hofstra University School of Law from which he graduated in 1979. He has been widely published or cited in *Federal Sentencing Reporter*, *Harvard Law Review*, *Yale Law Journal*, *Federal Probation Quarterly*, and dozens of other legal journals.

Appointed to the U.S. Sentencing Commission's advisory board by Judge Billy Wilkins of the Fourth U.S. Circuit Court of Appeals, Mr. Weintraub assisted in the development of the guidelines for corporate sentencing; he is a recognized expert in the application of the Federal and Corporate Sentencing Guidelines.

Mr. Weintraub provides technical assistance, particularly with respect to the sentencing consequences of health care fraud cases and business crimes, to members of the bar. He has been a frequent lecturer for the National Association of Criminal Defense Lawyers, American Bar Association, and Health Care Compliance Association.

Benson practices law in Miami, Florida and in federal courts throughout the nation. www.bensonweintraub.com.

About the Contributor

ROBERT DAVID MALOVE is Board Certified as a specialist in criminal trial law by the Florida Bar Board of Legal Education and Specialization. Mr. Malove is distinguished trial lawyer with more than 24 years of experience in federal and state courts. He concentrates on legal issues relating to the white collar crime defense and healthcare fraud defense for which his Health Care Fraud Blog has received widespread recognition.

In 2007, Mr. Malove completed post-graduate studies in Healthcare Corporate Compliance at George Washington University and furthered his comprehensive knowledge in the various state and federal laws regarding healthcare fraud and corporate compliance. Also, in 2007, Mr. Malove attended the Health Care Compliance Association's Compliance Academy has successfully completed the Certified in Healthcare Compliance Examination, thus earning the "CHC" designation which was renewed for another two years in September 2009.

Prior to serving as an Assistant Public Defender in cases ranging from murder, fraud, to DUI, he graduated with a Doctor of Jurisprudence from Pepperdine University School of Law. Consistent with staying on the cutting edge of developments in criminal defense, one of Mr. Malove's signature trademarks, he earned a Masters Degree in Forensic Science, from the George Washington University in 1981—long before forensic science became part of our everyday lexicon. Before that, Mr. Malove was conferred a BS in the Administration of Justice from The American University School of Justice.

He has served as a guest commentator on COURT-TV and maintains membership in the National Association of Criminal Defense lawyers and Florida Association of Criminal Defense Lawyers. Mr. Malove is rated AV by Martindale-Hubbell® as a pre-eminent lawyer.

Robert Malove practices law in Fort Lauderdale and Miami, Florida and in federal courts throughout the United States. robertmalove@yahoo.com.

Acknowledgments

Jon A. Sale, Co-Chair of the National White Collar Crime Practice Group at Epstein, Becker Green, was instrumental in formulating many of the substantive points essential to white collar lawyering that are presented.

Much gratitude is owed to my sister, Jayne Weintraub, Esq., one of the nation's leading criminal trial lawyers, who laboriously edited and inspired sections of this work. Without Jayne's assistance on so many levels this work would not have been possible.

My friends and colleagues, Paul D. Petruzzi, Esq., a notable criminal defense lawyer in Miami, and Alan J. Chaset, former Special Counsel to the US Sentencing Commission, contributed significantly to review of the manuscript and provided editorial assistance.

I am grateful to Aaron Micheau, Senior Attorney Editor at West Publishing, who set the tone for the synthesis of legal and policy issues relevant to white collar crime and health care fraud in particular.

Finally, Robert David Malove conceived and developed the concept of this book. Rob is a forward thinking trial lawyer with an insightful perspective of health care law. Malove is a leading health care lawyer and owner/writer of the critically acclaimed Health Care Fraud Blog. His contribution is apparent throughout this volume. Rob's commitment, dedication, and friendship is deeply valued.

Benson Weintraub

September 2010

Miami, Florida

Acknowledgments

When first invited to consider taking on this project, I knew I would not be able to complete it without enlisting the participation of a qualified legal scholar with practical, real-world experience.

There can be no doubt that this volume would not have become a reality without the inexhaustible efforts of Benson Weintraub. Calling on his 30 + years of experience as a criminal defense lawyer and law school professor, Benson, made whatever sacrifices were necessary, often burning the midnight oil, to ensure that this practice guide would evolve into an invaluable resource to any criminal defense attorney—from novice to the seasoned white collar practitioner—shouldered with the daunting responsibility of representing the accused in a HCF prosecution.

High marks also go to Senior Editor Aaron Micheau and his entire team at Thomson Reuters/West for the final form of the book. An attorney, Aaron proved to be more than up to the task of editor, and turned out to be quite skilled at organizing and managing a publishing project.

I would be remiss were I to overlook and to fail to acknowledge colleagues Bernie Cassidy and Barry Wax, both fine lawyers, who offered me encouragement, support and suggestions along the way. Thanks to Mark Cohen who has always been there for me and who has shared with me over three decades of fantastic friendship and sage advice. And to Jonathan Kartman, the original “brother from a different mother.”

In his epic memoir, *Man’s Search For Meaning*, Viktor Frankl recalls Nietzsche’s words, “He who has a *why* to live for can bear almost any *how*.” Having these precious gems: Nadia, Jonathan and Julia (to whom this work is dedicated) as my *raison d’etre*, there is no way this effort could fail.

By the grace of G-d, I am filled with gratitude and humbled to be part of the WCC: Health Care Fraud Practice Guide.

Robert David Malove
Fort Lauderdale, Florida
November 2009

Preface

The 2009-2010 edition of this book was introduced with the following passage: “The American health care system is in crisis: its cost is escalating at an astronomical pace; the delivery of medical services is entrenched in bureaucratic quagmire; and polarizing legislative prerogatives dominate the national discourse.”

This book is not about health care reform *per se*; rather, it focuses upon the economic, social, and political dynamics of health care fraud by identifying weak spots in the system to promote a more rational administration of HHS regulations and public policy.

Since publication on the eve of passage of the Patient Protection and Affordability Act of 2010, the initial statement retains its vitality as States struggle to reconcile the new systems.

Portions of the Act pertaining to criminal health care fraud are addressed in detail in this edition. Amendment of the general health care fraud statute, 18 U.S.C.A. § 1347, is now subject to a diminished *mens rea* requirement since the Act deleted the requirement that the actor’s criminal conduct be “knowingly” or willfully done to violate the law. Health care professionals accused under § 1347 face enhanced criminal liability by virtue of Congressionally mandated increases in the Sentencing Guidelines for health care fraud.

“For centuries, ‘guilty mind’ or *mens rea*, requirements restricted criminal punishment to those who were truly blameworthy and gave individuals fair notice of the law. No person should be convicted of a crime without the government having proved that he acted with a guilty mind—that is, he intended to violate a law or knew his conduct was unlawful or sufficiently wrongful so as to put him on notice of possible criminal liability.”¹

This book, however, offers more than an analysis of criminal health care fraud statutes. It presents an overview of ancillary civil matters, including litigation under the civil False Claims Act, the Stark Act, EMTALA, and HIPAA.

As a practice guide for white collar practitioners, this work examines in detail the nuances of health care lawyering, emphasizing the origins of civil

¹ NACDL and The Heritage Foundation, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, www.nacdl.org/withoutintent (Executive Summary) (May 1, 2010).

Interestingly, the Medical Cartel—the AMA, pharmaceutical industry, and allied associations—supported health care “reform” because they were the primary beneficiaries of imperfect universal access guaranteed to cover some payment for an increased universe of patients. Facing the reality of reform, their lobbyists invaded The Hill pushing for sanctioned coverage.

The section concerning national security implications of health care fraud is both frightening and timely. False certifications give way to demonstrable means of compromising the public safety and national security. The federal government has prosecuted offenders for false certifications involving the acquisition of ricin. Moreover, medical institutions can be sources of low grade radioactive materials capable of producing a small nuclear “dirty bomb.” Such materials can only be put to unauthorized use by falsifying certifications.

The lack of affordable health care services is due largely to unchecked fraud, waste, and abuse. Though the number of criminal health care fraud prosecutions is rising, and there has been increased Federal and State enforcement, such efforts still cannot keep pace with the increasing proliferation of “pill mills,” fraudulent infusion clinics, and durable medical equipment companies based upon a business model of simple fraud and kickbacks.

Fraudulent pain management clinics continue to predominate the forefront of physician fraud. This itself is deleterious to patient care, not only for the specific harms presented but more critically, they undermine the services of legitimate anesthesiologists and pain management specialists serving those with end stage disease, those requiring palliative treatment, and significantly, chronic pain. The increased operation of sketchy “pain clinics” provokes issues of medical necessity and its intersection with criminal prohibitions against the distribution of narcotics.

As lawyers and health care professionals, the reader owes a duty not only to his or her client or patient, but to promotion of increased access to health care, especially by the disenfranchised. This, of course, may be counter-intuitive to conservative sentiment, yet the mandate is apolitical, especially during these trying economic times.

Finally, we seek to contribute to the literature a simple practice guide to focus new practitioners and experienced lawyers on the salient legal, social, economic, and political issues which are consequences of health care fraud.

Benson Weintraub

Miami, Florida
September 2010

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