

# business crime

---

CRIMINAL  
LIABILITY  
OF THE  
BUSINESS  
COMMUNITY

# BUSINESS CRIME

## Criminal Liability of the Business Community

---

**STANLEY S. ARKIN**

*Member of the Federal, New York  
and California Bars*

**MICHAEL EISENSTEIN**

*Member of the Federal and New York Bars  
Group Managing Editor—Editorial Staff*

**EARL C. DUDLEY, Jr.**

*Member of the Federal, District  
of Columbia and Virginia Bars*

**JED S. RAKOFF**

*Member of the Federal and New  
York Bars*

**DONALD M. RE**

*Member of the Federal  
and California Bars*

**JOHN S. SIFFERT**

*Member of the Federal  
and New York Bars*

---

## VOLUME 6

---

1981



**MATTHEW  
BENDER**

235 E. 45th Street, New York, N.Y. 10017

Copyright © 1981

by

MATTHEW BENDER & COMPANY  
INCORPORATED

---

All Rights Reserved

Printed in United States of America

Library of Congress Catalog Card Number 180-70544

With the Assistance of  
Publisher's Editorial  
Staff

---

**JOHN K. DUNLEAVY**

*Member of the Federal, Vermont,  
and New York Bars*

**MARK A. EVANS**

*Member of the Federal  
California and Florida Bars*

**SAUL D. BRUH**

*Member of the New York Bar*

**DONNA BLEIBERG KRYSTAL**

*Member of the New York Bar*

# **TABLE OF CONTENTS**

## **PART I PRETRIAL, TRIAL AND POST-TRIAL PROCEEDINGS**

---

### **VOLUME 1**

---

#### **CHAPTER 1**

##### **Grand Jury Practice**

---

#### **CHAPTER 2**

##### **Parallel Civil and Criminal Proceedings**

---

#### **CHAPTER 3**

##### **Trial Preparation; Problems of Investigation and Representation**

---

#### **CHAPTER 4**

##### **Pretrial Motions**

---

### **VOLUME 2**

---

**BUSINESS CRIME**

**CHAPTER 5**

**Guilty Pleas and Plea Bargaining**

---

**CHAPTER 6**

**[Reserved]**

---

**CHAPTER 7**

**Jury Selection**

---

**CHAPTER 8**

**Opening Statement**

---

**CHAPTER 9**

**Direct Examination**

---

**VOLUME 3**

---

**CHAPTER 10**

**Cross-Examination**

---

**CHAPTER 11**

**Motions for Judgment of Acquittal**

---

**TABLE OF CONTENTS**

**vii**

**CHAPTER 12**

**Closing Argument**

---

**VOLUME 4**

---

**CHAPTER 13**

**Jury Instructions**

---

**CHAPTER 14**

**Sentencing**

---

**CHAPTER 15**

**Appellate Practice**

---

**PART II**

**SUBSTANTIVE LAW OF  
BUSINESS CRIMES**

---

**CHAPTER 16**

**Vicarious and Strict Liability**

---

**CHAPTER 17**

**Securities Fraud**

---

**BUSINESS CRIME**

**CHAPTER 18**

**The Foreign Corrupt Practices Act of 1977**

---

**VOLUME 5**

---

**CHAPTER 19**

**Criminal Antitrust**

---

**CHAPTER 20**

**Bank Fraud**

---

**CHAPTER 21**

**[Reserved]**

---

**CHAPTER 22**

**Commercial Bribery**

---

**CHAPTER 23**

**The Hobbs and Travel Acts**

---

**CHAPTER 24**

**RICO**

---



**CHAPTER 25****Federal Labor Law Violations****CHAPTER 26****Fraud in the Health Care Industry****CHAPTER 27****Corporate Tax Fraud****VOLUME 6****CHAPTER 28****Commercial Espionage**

	PAGE
¶ 28.01. Theft of Trade Secrets. ....	28-4
[1]—History of Criminalization .....	28-4
¶ 28.02. Federal Prosecutions Under the National Stolen Property Act—18 U.S.C. § 2314. ....	28-5
[1]—The Statute .....	28-5
[2]—Scope of 18 U.S.C. § 2314 .....	28-6
[a]—Generally—Elements of the Statute .....	28-6
[b]—“Goods, Wares or Merchandise” ....	28-6
[i]—Geophysical Maps .....	28-6
[ii]—Documents .....	28-7
[c]—Jurisdictional Value of \$5,000 or More .....	28-8
[i]—Strict Adherence to “Market Value” Test .....	28-9
[ii]—Courts Not Adhering to “Mar- ket Value” Standard .....	28-10
[3]—Prosecution Under Federal Mail Fraud Statutes—18 U.S.C. § 1341 .....	28-11
¶ 28.03. Criminal Liability Under State Law for Theft of Trade Secrets. ....	28-12
[1]—Generally .....	28-12

	PAGE
[2]—Prosecutions Under Traditional Larceny Statutes .....	28-13
[a]—Trade Secret Not Considered Property .....	28-13
[b]—Trade Secret Considered Property ..	28-13
[i]—The Larceny Elements of Asportation and Market Value ....	28-14
[c]—Prosecution Under Embezzlement Statutes .....	28-15
[3]—Specific Trade Secret Theft Statutes .....	28-16
[a]—California .....	28-16
[i]—Statute Not Intended to Inhibit Use of on the Job Experience ..	28-16
[ii]—The Statutory Prohibitions .....	28-17
[iii]—Return of Secret—No Defense ..	28-17
[b]—Prosecutions Under California Penal Code § 499c .....	28-18
[i]—The Supremacy Clause Argument .....	28-18
[ii]—Vagueness Argument .....	28-18
[iii]—Selective Enforcement .....	28-19
[c]—Other Trade Secret Theft Statutes ..	28-20
[i]—New York's Statute .....	28-20
[ii]—New Jersey's Statute .....	28-20
[iii]—Ohio's Statute .....	28-21
[iv]—Other States .....	28-22
[4]—Reasons for Paucity of Prosecutions Under Trade Secret Theft Statutes .....	28-22
[a]—Corporate Failure to Press Charges ..	28-22
[i]—Negative Publicity on the Corporate Entity .....	28-22
[ii]—Trade Secret Exposure .....	28-23
[iii]—Possible Civil Sanctions .....	28-23
[iv]—Complexity of Case .....	28-24
[5]—Theft of Computer Information By Corporate Competitors .....	28-24
[a]—Generally .....	28-24
[b]—Prosecution Under Traditional Larceny Statute .....	28-25
[i]—Programs are Property .....	28-25
[ii]—Programs Have Value .....	28-25
[c]—Prosecution Under California's Specific Trade Statute—§ 499c .....	28-26
[i]—Telephone Impulses Not a Tangible Article .....	28-26

# TABLE OF CONTENTS

xi

	PAGE
[ii]—Copy as Article .....	28-27
[iii]—Asportation .....	28-27
¶ 28.04. Violations of the Federal Wiretap Law—18	
U.S.C. § 2511 for Commercial Purposes .....	28-27
[1]—Generally .....	28-27
[a]—Commercially Related Prosecutions .....	28-28
[b]—Legislative History .....	28-28
[2]—Prosecutions Under 18 U.S.C. § 2511 ....	28-29
[a]—Spying on Employees by Employers .....	28-29
[i]—Jurisdictional Requirements ....	28-29
[ii]—Not a Violation of § 2511 .....	28-30
[iii]—Private Communications Sys- tem Not Covered by Statute ..	28-30
[iv]—No Expectation of Privacy .....	28-31
[v]—Constitutional Basis for Exer- cise of Congressional Authority .....	28-31
[vi]—Vagueness .....	28-32
[vii]—No Corporate Right to Monitor Employee Conversations .....	28-33
[viii]—Not Selective Prosecution .....	28-33
[b]—Spying on Business Competitors .....	28-34
[i]—Willfullness Required .....	28-34
[c]—Eavesdropping on Internal Revenue Service Agents Conducting an Audit .....	28-34
[i]—Expectation of Privacy—Gen- erally .....	28-35
[ii]—Mere Suspicion Not Enough to Nullify Expectation of Privacy .....	28-35
[iii]—Owner's Consent to Eavesdrop- ping is Not Transmittable to Visitors .....	28-36
[iv]—Evidence of History of Hostility is Not Relevant .....	28-36
[v]—Stranger Doctrine Not Applica- ble .....	28-37
[vi]—Thin Walls Theory .....	28-37
[vii]—Effects Upon Interstate Com- merce .....	28-38
[d]—Spying on Political Opponents .....	28-39

## APPENDIX

App. ¶ 28A. Tactical Cross-References. ....	App. 28-1
---	-----------

(Pub. 265)

## BUSINESS CRIME

	PAGE
App. ¶ 28B. Checklist. ....	App. 28-2
App. ¶ 28C. Bibliography .....	App. 28-6
App. ¶ 28D. Glossary .....	App. 28-7
App. ¶ 28E. Statutory References .....	App. 28-9

## CHAPTER 29

## Occupational Safety and Health Act Violations

¶ 29.01. Background. ....	29-2
¶ 29.02. Elements. ....	29-4
[1]—Jurisdiction. ....	29-4
[2]—Establishment of a Criminal Violation. ....	29-5
[a]—“Willful Violation.” .....	29-5
[b]—Knowledge of Hazardous Condition and Applicable Standard. ....	29-6
[c]—Violation Must be Cause of Death. ....	29-6
¶ 29.03. Procedure. ....	29-7
[1]—Investigation. ....	29-7
[2]—Referral. ....	29-8
¶ 29.04. Defenses. ....	29-9
[1]—Jurisdictional Defenses. ....	29-9
[2]—Constitutional Defenses. ....	29-9
[3]—Defenses to the Requirement of Willful Conduct. ....	29-10

## APPENDIX

¶ App. 29A. Tactical Cross-References. ....	App. 29-1
¶ App. 29B. Checklist. ....	App. 29-2
¶ App. 29C. Bibliography. ....	App. 29-3
¶ App. 29D. Glossary. ....	App. 29-4
¶ App. 29E. Statutory References. ....	App. 29-6

## CHAPTER 30

## Federal Food and Drug Violations

¶ 30.01. Introduction .....	30-2
-----------------------------	------

## TABLE OF CONTENTS

xiii

	PAGE
¶ 30.02. Federal Food, Drug and Cosmetic Act. ....	30-3
[1]—Generally .....	30-3
[2]—Jurisdiction .....	30-5
[3]—Inspections—Search and Seizure .....	30-6
[a]—Requirement of a Warrant .....	30-6
[b]—Authority of a Statute .....	30-8
[c]—Reasonableness of the Search .....	30-9
[d]—Taking of Samples .....	30-9
[e]—Necessity of <i>Miranda</i> Warnings .....	30-9
[4]—Vicarious Liability of Corporate Officers .....	30-10
[a]—Unintentional Violations .....	30-10
[b]—Intentional Violations .....	30-14
[5]—Defenses .....	30-14
[a]—Guaranty .....	30-14
[b]—No Duty to Comply with the Act ....	30-15
[c]—Objective Impossibility .....	30-15
¶ 30.03. Poultry Products Inspection Act .....	30-16
¶ 30.04. Federal Meat Inspection Act .....	30-17
¶ 30.05. The Controlled Substances Act .....	30-20
[1]—Background .....	30-20
[2]—Liability of Physicians and Pharmacists ..	30-21
[3]—Defenses .....	30-22
[a]—Good Faith in Dispensing Drugs ....	30-22
[b]—The Indictment .....	30-24
[c]—Constitutional Challenges .....	30-25
¶ 30.06. Effect of Federal Statutes on State Prohibitions	30-25

## APPENDIX

App. ¶ 30A. Tactical Cross-References .....	App. 30-1
App. ¶ 30B. Checklist .....	App. 30-2
App. ¶ 30C. Bibliography .....	App. 30-4
App. ¶ 30D. Glossary .....	App. 30-5
App. ¶ 30E. Statutory References .....	App. 30-8

## CHAPTER 31

### Environmental Law Violations

¶ 31.01 Introduction .....	31-2
----------------------------	------

	PAGE
¶ 31.02 Criminal Violations of the Water Act .....	31-7
[1]—Development of the Criminal Sanctions ..	31-7
[2]—Natural Pollution Discharge Elimination System (NPDES) .....	31-11
¶ 31.03 The Refuse Act of 1899. ....	31-14
[1]—Validity of the Act .....	31-14
[2]—Elements of the Offense .....	31-16
[a]—Strict Liability .....	31-16
[b]—Refuse .....	31-18
[c]—Navigable Waters .....	31-19
[3]—Simple and Multiple Discharges .....	31-21
[4]—Enforcement Authority .....	31-22
[5]—Equal Protection Considerations .....	31-24
[6]—Fourth Amendment Considerations .....	31-24
¶ 31.04 The Water Act .....	31-25
[1]—Criminal Proceedings—Enforcement Au- thority .....	31-25
[2]—Section 1319(c)(1) Enforcement Provisions	31-28
[3]—Effluent Limitations from a Point Source	31-30
[4]—Navigable Waters .....	31-33
[5]—The terms “Person” and “Willfully or Neg- ligently” .....	31-35
[6]—Section 1321.—Oil and Hazardous Sub- stance Liability .....	31-36
[a]—Person in Charge .....	31-39
[b]—Immediate Notification .....	31-42
[c]—Use of Section 1321(b)(5) Informa- tion in a Section 1321(b)(6) Civil Pen- alty Action .....	31-42
[7]—Reporting Requirements—Section 1318 ..	31-44
[a]—Constitutionality .....	31-44
[b]—False Reporting—Criminal Sanc- tions Under Section 1321(c)(2) .....	31-47
[c]—Criminal Liabilities of Employer ....	31-49
¶ 31.05. Developments in the Criminal Aspects of the Pollution Control Laws .....	31-50

## APPENDIX

App. ¶ 31A. Tactical Cross-References .....	App. 31-1
App. ¶ 31B. Checklist .....	App. 31-2
App. ¶ 31C. Bibliography. ....	App. 31-4
App. ¶ 31D. Glossary. ....	App. 31-5

	PAGE
App. ¶ 31E. Rule and Statutory References. ....	App. 31-6

## CHAPTER 32

### Mail and Wire Fraud

¶ 32.01. Introduction. ....	32-3
¶ 32.02. Use of the Mails. ....	32-5
[1]—Scope. ....	32-5
[2]—Mailings in Furtherance of Scheme. ....	32-8
[a]—Mailings in the Ordinary Course of Business. ....	32-13
[3]—Mailings Which Occasion Delay in Detec- tion and Mailings Which Otherwise “Lull” Victims. ....	32-20
[a]—In General. ....	32-20
[b]—Mailings Which Occasion Delay and Continuing Schemes. ....	32-21
[4]—Mailings by Co-Schemers and Co-Con- spirators. ....	32-26
[5]—Proof of Mailing. ....	32-27
¶ 32.03. Schemes to Defraud and Scope of the Mail Fraud Statute. ....	32-29
[1]—Scope—Generally. ....	32-29
[a]—Schemes to Defraud Need Not Con- cern Money or Property. ....	32-30
[b]—Existence of Potential State Prosecu- tion Does Not Preclude Prosecution Under Section 1341. ....	32-32
[2]—How Courts Treat the Phrase “Scheme to Defraud” in Section 1341. ....	32-33
[a]—District of Columbia Circuit. ....	32-33
[i]—Showing of Exact Dollar Amounts Not Required. ....	32-33
[b]—First Circuit. ....	32-34
[i]—Deception is Essential to Prove Scheme to Defraud. ....	32-34
[c]—Second Circuit. ....	32-34
[i]—Contemplated Injury Required. ....	32-34
[ii]—Preemption. ....	32-37
[d]—Fourth Circuit. ....	32-37

	PAGE
[i]— Section 1341 Prosecutions Against Public Officials. ....	32-37
[e]— Fifth Circuit. ....	32-38
[i]— Abuse of Fiduciary Position. ..	32-38
[ii]— Actual Loss Need Not Be Proved to Show Scheme. ....	32-39
[f]— Sixth Circuit. ....	32-41
[i]— Scheme to Defraud is Not De- fined According to a Technical Standard. ....	32-41
[g]— Seventh Circuit. ....	32-42
[i]— Deprivation of Right to a Public Official's or Private Employee's Faithful Service. ....	32-42
[ii]— Existence of Possible Pecuniary Injury is Sufficient to Satisfy Scheme to Defraud Element of Mail Fraud. ....	32-44
[h]— Eighth Circuit. ....	32-45
[i]— Kickbacks to Public Officials May Not Always Support Mail Fraud Convictions. ....	32-45
[i]— Ninth Circuit. ....	32-46
[i]— Not all Schemes Fall Within Mail Fraud Statute. ....	32-46
[j]— Tenth Circuit. ....	32-46
[i]— Proving a Fiduciary Duty is Not an Essential Element of a Mail Fraud Prosecution. ....	32-46
[3]—Preemption and Multiplicity in Mail Fraud Prosecutions. ....	32-47
[a]— Preemption. ....	32-47
[b]— Multiplicity. ....	32-49
[4]—Intent to Defraud. ....	32-50
[5]—Good Faith Defense. ....	32-54
¶ 32.04. The Wire Fraud Statute. ....	32-56
[1]—Purpose and Scope. ....	32-56
[2]—Jurisdiction. ....	32-57
[a]— Interstate or Foreign Commerce. ....	32-57
[b]— Meaning of "Wire" Communications. ....	32-58
[3]—Elements. ....	32-59
[a]— Scheme to Defraud. ....	32-59
[b]— Use of Interstate Wire. ....	32-60
[4]—The "Blue Box" Cases. ....	32-62
[5]—The Foreign Payments Case. ....	32-65



## APPENDIX

App. ¶ 32A.	Tactical Cross-References. ....	App. 32-1
App. ¶ 32B.	Checklist .....	App. 32-2
App. ¶ 32C.	Bibliography .....	App. 32-5
App. ¶ 32D.	Glossary .....	App. 32-6
App. ¶ 32E.	Statutory References .....	App. 32-7

---

## Index

---