

BOOK REVIEWS

White Collar Crime: Health Care Fraud (2010-2011 ed.)

By Benson Weintraub and
Robert David Malove
Thomson West (2010)
Reviewed by Jon May



Health care fraud costs American taxpayers an estimated \$60 billion a year. While this is a significant amount, it is only a small fraction of the \$3.3 trillion that the nation is expected to expend on health care

in 2012. This may be the reason health care fraud was not a major priority of the Department of Justice until the last few years. But health care fraud is a priority today, and DOJ is expanding support for task forces around the country to target this crime.

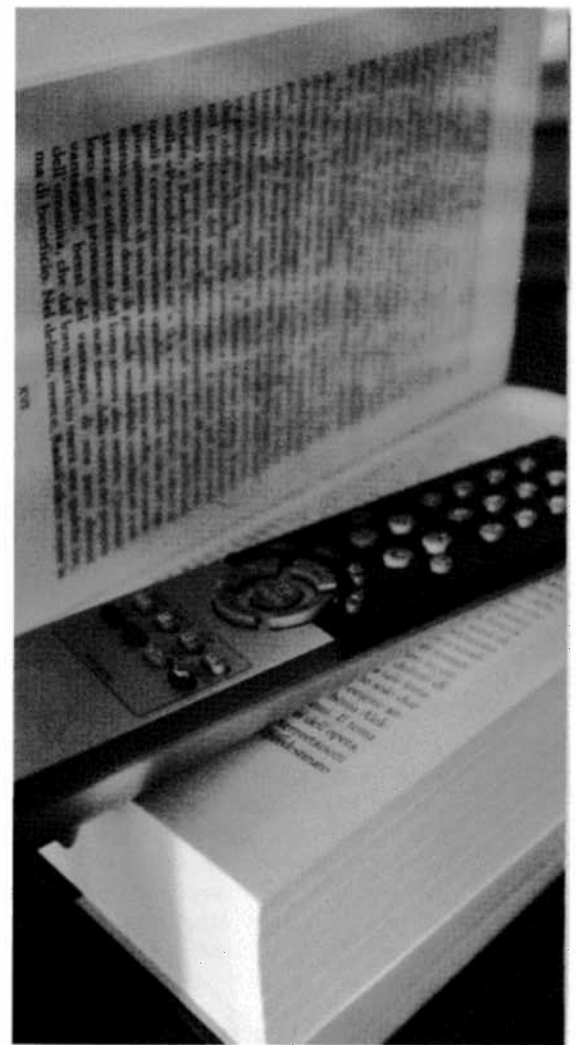
This is good news, both for taxpayers and criminal defense lawyers. But representing an individual charged with health care fraud is unlike defending most other federal offenses. The delivery of health care services is highly regulated and the difference between conduct that is permissible and conduct that is proscribed is often quite subtle. A lawyer who is unfamiliar with the territory will be faced with having to learn a whole new vocabulary of acronyms. Although the FBI is often the agency an attorney will encounter after a case has been indicted, much of the investigation will have been conducted by agents from HHS (Department of Health & Human Services). Most of the regulations the attorney will need to learn will have been promulgated by CMS (Centers for Medicare & Medicaid Services). If the allegations of fraud concern the pricing of pharmaceuticals, the defense attorney will need to understand the difference between AWP (average wholesale price) and WAC (wholesale acquisition cost). If corporate fraud is

alleged, counsel will need to know the requirements of SOX (Sarbanes Oxley Act) and the FCA (False Claims Act).

Navigating this labyrinth of agencies and regulations is a daunting task. Fortunately, Benson Weintraub and Robert Malove have provided a road map in their treatise, *White Collar Crime: Health Care Fraud*. This book can be consulted on a particular topic or read cover-to-cover. I read the book cover-to-cover and I recommend that any lawyer not already an expert in the field do so as well. Unlike treatises where the writing style is practically impenetrable, Weintraub and Malove's prose is eminently readable. This is important because it is not sufficient to know what sort of conduct is made unlawful under 18 U.S.C. § 1347(b) (the general health care fraud statute) or 42 U.S.C. § 1320a-79b(h) (the anti-kickback statute) (Chapter 4); defense counsel must also know what conduct is permitted by the Stark Act (Chapter 5). While these regulations may not be as extensive or complex as tax or securities regulations, they are complicated enough.

Intent is often the central issue in white collar cases. So too with health care fraud. The Patient Protection and Affordable Care Act of 2010 (PPACA) significantly altered the government's burden to prove *mens rea* in prosecutions under 18 U.S.C. § 1347(b) and 42 U.S.C. § 1320a-7b(h). While *Health Care Fraud* addresses this change in the law, it also includes a discussion of decisions that had previously rejected constitutional challenges to these statutes on the grounds that the greater scienter required under the law mitigated any vagueness in the statutes. Upon reviewing Weintraub and Malove's discussion of these decisions (Chapters 4 and 9), counsel may decide that the PPACA has now rendered these statutes vulnerable to attack.

Finally, in order to craft a response to the government's allegations, it is essential for practitioners to understand the mechanics of certain frauds. If practitioners think the law is complicated, then they might be in for a surprise when they first consider how the pharmaceutical indus-



try has gone about selling drugs for thousands of times more than the cost of manufacturing them. Gram for gram, the distribution of licit drugs is far more profitable than trafficking in cocaine, heroin, or marijuana — which is why so many ex-drug traffickers are now being prosecuted for health care fraud.

Unlike some areas of tax or securities law, defense lawyers need not devote their entire practice to health care fraud to master the subject. This is an area they can learn. Nevertheless, there is a mountain of material to consider. With Weintraub and Malove's *Health Care Fraud* as a guide, they will be able to avoid stepping off into the abyss. And at \$120, it is the cheapest malpractice insurance they will ever buy. ☞

About the Reviewer

Jon May, a partner at May & Cohen P.A., is a past chair of NACDL's White Collar Crime Committee.

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