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May 26, 2010

When the Law Is the Perp

Guest Blogger - Op Ed

By **Cynthia Hujar Orr**, President, **National Association of Criminal Defense Lawyers (NACDL)**

With more than 20 years as an American criminal defense lawyer, I have witnessed the drafting and enforcement of innumerable federal criminal laws and regulations that patently fail to meet the basic requirements of fairness and justice. More and more, ordinary, hard-working people are being prosecuted for doing seemingly lawful, everyday things that run afoul of federal authorities or the tax collector. And then their nightmare begins.

Recently, I represented a physician who with other physicians and a medical supply company were involved in what can only be described as a profound personal and professional nightmare for them. Federal prosecutors decided to publicly investigate the clients for making treatment referrals that were not covered by Medicare or Medicaid. The patients in question, a number of whom were injured on the job and on worker's compensation, came to the clients seeking to be made well again. When the clients made referrals for special treatment for patients with private insurance, sometimes the claims would be covered and honored by the insurance carrier, and sometimes they would not. It would depend on the carrier and the individual's circumstances. To be sure, the treatment in question in this case has been covered by multiple insurance carriers whose names we all recognize.

Well, buried deep in the criminal code and the accompanying regulations, there are criminal penalties for making certain types of medical referrals when the patient's medical care is covered by, in this

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- SSRN Criminal Law & Procedure
- American Criminal Law Review
- American Journal of Criminal Law
- Buffalo Criminal Law Review
- California Criminal Law Review
- Journal of Criminal Law and Criminology

Criminal Law

Congress

- Federal Criminal Law (Title 18)
- Federal Securities Laws (Title 15)

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- Code of Federal Regulations (Dept. of Justice)
- U.S. Attorney's Manual
- Securities Lawyer's Deskbook

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- Federal Bureau of Investigation
- Financial Crimes Enforcement Network (FinCEN)
- Drug Enforcement Administration
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case, (federally funded) Texas Medicaid or Medicare. In fact, a referral for more than \$100 of the particular treatment in this case for a Medicaid/Medicare-covered patient can result in many years in prison – if dishonesty is involved. But today, the federal prosecution bar is set much lower than the bar for ordinary crimes such as theft. Even a mere paperwork mix-up can result in a major criminal investigation where federal regulations are concerned.

After three years of search warrants, subpoenas, interrogations, public embarrassment and scrutiny in the media, threats to their professional licenses, and significant legal and other expenses, it was determined that, as the clients knew all along, they had done nothing wrong. No indictments were issued. Their lives, the lives of their patients, and necessarily the lives and practices of other physicians and professionals seeking nothing more than to do right by their patients and clients, will never be the same. They must now live with the knowledge of what we as criminal defense attorneys have been watching unfold for decades – we are all potential victims of poorly drafted laws that can be improperly and selectively applied by prosecutors. The irony has not been lost on me. These doctor-clients were prosecuted not because they harmed anyone, but because they tried to help people.

To be sure, health care fraud is a pretty big business in America, with significant costs to all of us. But when the laws passed to deter and punish those who are actually committing those crimes are so poorly crafted that they lead to honorable, decent, everyday people becoming ensnared in our criminal justice system, there is no better evidence that we have a serious problem that must be addressed at the highest levels. We have reached a point where the federal criminal code rivals or exceeds the federal tax code in volume and complexity.

For nearly two years, the National Association of Criminal Defense Lawyers and the Heritage Foundation have studied this problem, and its causes, in great depth. Noting that the federal criminal code alone now has an estimated 4,450 federal crimes, with an estimated tens of thousands more criminal provisions buried in the federal regulatory code, our organizations set out to see how defective laws, specifically those lacking adequate intent requirements, actually get enacted. The conclusions of this study, and the common sense recommendations to stop and reverse this trend and return the federal criminal law to its rightful role in our

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Books [1]

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Contempt

Corruption

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Defense Counsel

Deferred Prosecution Agreements

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Courts

- Federal Rules of Criminal Procedure
- Grand Jury**
- U.S. Dept. of Justice Grand Jury Manual
- Grand Jury Information

Organizations

- ABA Criminal Justice Section
- ABA Business Law Section
- Association of Federal Defense Attorneys
- National Association of Assistant United States Attorneys
- National Association of Criminal Defense Lawyers
- National District Attorneys Association
- National White Collar Crime Center

Recommended Websites

- The 10b-5 Daily
- Anti-Money Laundering Source Tools
- Crimes of Persuasion
- Federal Securities Laws
- Findlaw Corporate Counsel Center: White Collar Crime
- Findlaw Corporate Counsel Center: Securities Litigation
- Legal Information Institute: White Collar Crime
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- NASD, SEC & Regulatory Defense Blog
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- White Collar Crime FYI
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free nation, are set forth in a recently released report, **"Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law."**

As a practicing member of the criminal defense bar, I know that a lawyer's job is to protect everyone's rights, not just those of the criminally accused. Congress makes that job harder when it fails to recognize that a criminal law that no one understands – particularly one that can be violated accidentally, with no intent to hurt anyone – disserves society. Congress is eroding a core element of the criminal law – the intent to do harm or unjustly enrich one's self. I hope members of Congress and their staff will consider that, and our report, the next time someone says, "There oughta be a law."

(cho)

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Great job, Cynthia. The crime du jour, health care fraud, had its intent requirement diminished on March 21, 2010 with passage of the American Patient Protection & Affordability Act, Pub. L. No. 111-148. The amended 18 USC §1347 not only eliminates 'knowingly,' it adds Congressionally mandated increases in the HCF Sentencing Guidelines.

Posted by: [benson weintraub](#) | May 27, 2010 5:41:09 PM

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Statutes
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- May 16, 2010 - May 22, 2010
- May 9, 2010 - May 15, 2010
- May 2, 2010 - May 8, 2010
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