

TABLE OF CONTENTS

Volume 1

CHAPTER 1

Criminal Antitrust Enforcement

§ 1.01	Introduction	1-2
§ 1.02	The DOJ Antitrust Division	1-4
	[1] Organization	1-4
	[2] Manner and Methods of Investigations	1-4
	[3] Past Trends in Corporate Fines and Prison Time for Individuals	1-5
	[4] 2016-2022: Waning of Criminal Enforcement	1-8
§ 1.03	The U.S. Antitrust Laws and Federal Enforcement Policy	1-10
	[1] The Sherman Act	1-10
	[2] Antitrust Division Policy	1-13
	[3] The Rule of Reason	1-13
	[4] The <i>Per Se</i> Rule of Illegality	1-14
	[5] Lessons from More Contemporary Prosecutions	1-16
	[a] Heir Location Services	1-16
	[b] Foreclosed Real Property	1-18
	[c] Foreign Exchange Markets	1-19
	[d] Domestic Labor Markets	1-20
§ 1.04	Statute of Limitations	1-24
§ 1.05	Antitrust Division Leniency Program	1-26
	[1] Leniency Policy and Procedure	1-27
	[2] Corporate Leniency	1-28
	[3] Marker Process	1-31
	[4] Remediation and Compliance	1-32
	[5] Leniency Plus	1-32
	[6] Penalty Plus	1-34

WHITE COLLAR CRIME

	[7]	ACPERA: The Antitrust Criminal Penalty En-hancement and Reform Act.	1-34
	[8]	Revocation of Conditional Leniency.	1-35
	[9]	Uncertainty and the Leniency Program	1-36
	[a]	Municipal Bond Settlements	1-37
	[b]	LIBOR and EURIBOR Reference Rate Rigging Settlements	1-39
	[c]	Foreign Exchange Reference Rate Rigging Settlements	1-41
	[d]	Generic Pharmaceutical Price-Fixing Settlements	1-42
§ 1.06		Corporate Sentencing Considerations and Collateral Consequences.	1-43
	[1]	Corporate Compliance Programs.	1-43
	[2]	Use of the Alternative Fine Statute.	1-48
	[3]	Collateral Consequences	1-49
§ 1.07		Dynamics in the Prosecution of Individuals	1-51
	[1]	Leniency Program Risks	1-52
	[2]	General Intent Risks.	1-52
	[3]	Sentencing Risks	1-53
§ 1.08		Extraterritorial Jurisdiction and the FTAIA.	1-55
	[1]	Historical Cases	1-55
	[2]	FTAIA: Foreign Trade Antitrust Improvements Act of 1982	1-56
	[3]	The First Circuit Fax Paper Case	1-57
	[4]	Overview of the Circuit Split	1-58
	[5]	2017 DOJ/FTC Guidelines for International Enforcement and Cooperation.	1-59
	[6]	Challenges to the FTAIA.	1-60

CHAPTER 2**Banking Crimes**

§ 2.01		Introduction	2-3
§ 2.02		The Bank Secrecy Act	2-10
	[1]	An Outline of the CTR Filing Requirements.	2-10
	[a]	The Definition of Financial Institution	2-11

TABLE OF CONTENTS

xxxii

	[b]	Exemptions from the CTR Filing Requirements	2-12
	[c]	The Content of the CTR and Online Filing	2-14
	[d]	The Treatment of Multiple Transactions	2-15
[2]		Penalties for CTR Filing Violations	2-16
	[a]	Civil Penalties	2-16
	[b]	Criminal Penalties	2-17
[3]		Criminal Prosecutions of CTR Filing Violations	2-20
	[a]	Structuring	2-20
	[b]	Failing to File a Required CTR	2-22
[4]		SAR Filing Requirements	2-27
	[a]	An Outline of SAR Requirements	2-27
	[b]	Penalties for SAR Filing Violations	2-28
	[i]	Civil Penalties	2-28
	[ii]	Criminal Penalties	2-29
	[c]	Enforcement Actions	2-29
§ 2.03		Bank Bribery	2-31
	[1]	The Statute	2-31
	[2]	The History of the Current Statute	2-32
	[3]	Cases Applying the Statute	2-33
	[4]	Administrative Guidelines	2-35
§ 2.04		Misapplication	2-38
	[1]	Misapplication v. Embezzlement	2-39
	[2]	Elements of Misapplication—Illustrative Cases	2-41
	[a]	Affiliation With the Bank	2-42
	[b]	Status of the Bank	2-43
	[c]	Willful Misapplication of Bank Funds	2-45
	[d]	Intent to Injure or Defraud	2-48
§ 2.05		False Entries in Bank Records and Reports and Unlawful Participation	2-53
	[1]	False Entry	2-54
	[2]	Entry Made or Caused by the Defendant	2-57
	[3]	Intent to Injure or Defraud	2-58
	[4]	Bank’s Deposits Were Federally Insured	2-59
	[5]	Unlawful Participation	2-59
§ 2.06		False Loan and Credit Applications	2-61
	[1]	Elements of the Offense	2-61
	[a]	Falsity of the Statement	2-62

WHITE COLLAR CRIME

	[b] For the Purpose of Influencing . . .	2-63
	[c] Knowledge of Falsity	2-65
[2]	Cases Applying the Statute	2-66
	[a] Credit Card Cases	2-66
	[b] Influencing the Bank Indirectly Through Third Parties	2-67
	[c] Checks Drawn on Insufficient Funds	2-68
	[d] Schemes Involving Transactions Other Than Loans or Other Extensions of Credit	2-69
§ 2.07	Mail and Wire Fraud	2-71
	[1] Mailing of Bank Statements	2-73
	[2] Fictitious Banks	2-74
	[3] Credit Cards	2-74
	[4] Rate Manipulation Schemes	2-77
§ 2.08	Bank Fraud	2-79
	[1] Scope of Statute	2-79
	[2] General Principles of Interpretation	2-81
	[3] Cases Applying the Statute	2-82
	[a] <i>Loughrin v. United States</i>	2-83
	[b] The Differing Requirements of the Two Prongs of Section 1344.	2-84
	[c] Submission of False Statements	2-87
§ 2.09	The Banking Crimes Defined by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 and the 1990 Crime Control Act.	2-89
	[1] Wrongful Disclosure of Information Pertaining to a Subpoena for Financial Information	2-89
	[2] Concealment of Assets From a Receiver	2-90
	[3] Obstructing a Bank Examiner	2-92
	[4] Operating a Continuing Financial Crimes Enterprise	2-92

CHAPTER 2A

Money Laundering

§ 2A.01	Introduction	2A-4
§ 2A.02	Domestic and International Money Laundering: 18 U.S.C. § 1956	2A-7
	[1] Section 1956(a)(1): Domestic Money Laundering.	2A-7

TABLE OF CONTENTS

xxxiii

[a] The First Element: The Defendant Conducted or Attempted to Conduct a Financial Transaction 2A-8

[b] The Second Element: The Transaction Involved Property that Represents Proceeds of Specified Unlawful Activity . . . 2A-14

[i] Commingling 2A-20

[ii] The Temporal Component of “Proceeds” 2A-22

[iii] Reliance on Inferences to Establish that the Property Does in Fact Represent the Proceeds of Specified Unlawful Activity 2A-30

[c] The Third Element: The Defendant Knew that the Property Involved in the Transaction Represented Proceeds of Some Form of Unlawful Activity 2A-31

[d] The Fourth Element: *Scienter* 2A-38

[i] Subsection 1956(a)(1)(A)(i): To Promote the Carrying on of Specified Unlawful Activity 2A-38

[ii] Subsection 1956(a)(1)(A)(ii): To Engage in Conduct Constituting a Violation of Section 7201 or 7206 of the Internal Revenue Code 2A-46

[iii] Subsection 1956(a)(1)(B)(i): Knowing that the Transaction Is Designed to Conceal or Disguise Proceeds of Specified Unlawful Activity 2A-48

[iv] Subsection 1956(a)(1)(B)(ii): Knowing that the Transaction Is Designed to Avoid a Transaction Reporting Requirement Under State or Federal Law 2A-56

WHITE COLLAR CRIME

	[2]	Section 1956(a)(2): International Money Laundering.	2A-57
		[a] The First Element:	
		Transportation	2A-58
		[b] The Second Element: Monetary Instrument or Funds.	2A-59
		[c] The Third Element: Across the U.S. Border	2A-59
		[d] The Fourth Element: <i>Scienter</i>	2A-60
		[i] Subsection 1956(a)(2)(A): To Promote the Carrying on of Specified Unlawful Activity	2A-60
		[ii] Subsection 1956(a)(2)(B)(i): Disguising or Concealing Attributes of Specified Unlawful Activity.	2A-62
		[iii] Subsection 1956(a)(2)(B)(ii): Avoiding a Transaction Reporting Requirement	2A-64
	[3]	Section 1956(a)(3): Sting Operations	2A-65
		[a] The First Element: The Defendant Conducted or Attempted to Conduct a Financial Transaction	2A-66
		[b] The Second Element: Involving Property Represented to Be the Proceeds of, or Funding for, Specified Unlawful Activity	2A-66
		[c] The Third Element: Believing the Proceeds to Be the Product of Specified Unlawful Activity	2A-67
		[d] The Fourth Element: <i>Scienter</i>	2A-68
	[4]	Penalties	2A-68
	[5]	31 U.S.C. § 5332. Bulk Cash Smuggling into or out of the United States	2A-70
§ 2A.03		Engaging in Monetary Transactions in Property Derived From Specified Unlawful Activity: 18 U.S.C. § 1957	2A-72
	[1]	The First Element: The Defendant Engaged or Attempted to Engage.	2A-73
	[2]	The Second Element: In a Monetary Transaction.	2A-74
	[3]	The Third Element: Involving Criminally Derived Property	2A-76

TABLE OF CONTENTS

xxxv

[4] The Fourth Element: With the Property
in Fact Having Been Derived from
Specified Unlawful Activity 2A-81

[5] Penalties 2A-81

§ 2A.04 Selected Issues Common to Sections 1956
and 1957 2A-83

[1] Extraterritorial Jurisdiction 2A-83

[2] Venue 2A-85

[3] Constitutional Challenges 2A-88

[a] Void for Vagueness 2A-88

[b] Double Jeopardy 2A-91

§ 2A.05 Attorneys’ Fees 2A-95

[1] The Limited Statutory Exception for
Attorney’s Fees 2A-96

[2] The Scope of the Exception 2A-98

[3] Department of Justice Guidelines 2A-101

[4] The Need for Congressional Action 2A-103

CHAPTER 3

The Federal Law of Bribery and Extortion

§ 3.01 Introduction 3-2

§ 3.02 The Federal Statutory Framework 3-8.1

[1] 18 U.S.C. § 201: Bribery of Public
Officials and Witnesses 3-8.1

[a] Background 3-8.1

[b] Elements 3-9

[i] “Anything of Value” 3-9

[ii] Corrupt Intent 3-9

[iii] Public Official 3-10

[iv] Official Act 3-12

[2] 18 U.S.C. § 666: Federal Program
Bribery 3-20

[a] Background 3-20

[b] Elements 3-22

[i] Agent of the Government
or Organization 3-22

[ii] Federal Funding 3-23

[iii] In Connection with a
Transaction Involving
Value of at Least \$5,000 3-24

[iv] With Corrupt Intent 3-26

[3] 18 U.S.C. § 1951: The Hobbs Act 3-27

[a] Background 3-27

[b] Elements 3-28

WHITE COLLAR CRIME

	[i]	Extortion	3-28
	[ii]	Interference with Interstate Commerce.	3-32
	[iii]	Conspiracy and the Hobbs Act.	3-33
[4]		The Travel Act: 18 U.S.C. § 1952	3-34
	[a]	Use of Interstate Facilities.	3-36
	[b]	Intent.	3-37
	[c]	“Thereafter Act”	3-38
[5]		Deprivation of the Intangible Right to Honest Services: 18 U.S.C. § 1346	3-38
[6]		Fraudulent Schemes for Obtaining Property: 18 U.S.C. §§ 1343, 666(a)(1)(A).	3-40
[7]		The Foreign Corrupt Practices Act: 15 U.S.C. § 78dd-1, 2, 3.	3-43
§ 3.03		Constitutional Framework.	3-45
	[1]	Article I, Section 9, Cl. 8: The Foreign Emoluments Clause	3-45
	[a]	Background.	3-45
	[b]	Elements	3-46
	[i]	“Person holding any Office of Profit or Trust”	3-46
	[ii]	“Any present, Emolument, Office, or title, of any kind”	3-47
	[iii]	“From any King, Prince or foreign State”.	3-47
	[c]	Citizens for Responsibility and Ethics in Washington v. Donald J. Trump	3-48
	[d]	The District of Columbia and the State of Maryland v. Donald J. Trump	3-52
§ 3.04		Sentencing Guidelines.	3-57
§ 3.05		Conclusion.	3-59

CHAPTER 4**Defending Charges of Conspiracy**

§ 4.01		Introduction	4-3
§ 4.02		Basic Principles of the Law of Conspiracy.	4-5
	[1]	The Nature of the Crime of Conspiracy and Its Corollaries	4-5

TABLE OF CONTENTS

xxxvii

	[2] Statutes Involved	4-14
	[a] Introduction.	4-14
	[b] Conspiracies to Commit Offenses Against the United States	4-15
	[c] Conspiracy to Defraud the United States	4-16
	[d] RICO Conspiracy	4-18
	[3] Requirements of the Indictment	4-19
	[4] Overt Acts	4-20
	[5] Venue	4-22
	[6] The Required Plurality.	4-25
	[7] Joinder	4-28
	[a] “Wheel-Spoke” and “Chain” Conspiracies	4-32
	[8] Single and Multiple Conspiracies	4-34
	[9] Intent.	4-37
	[10] Evidence Admissible to Prove the Conspiracy	4-38
	[a] Coconspirator Declarations	4-39
	[i] In Furtherance of the Conspiracy	4-43
	[ii] During the Pendency of the Conspiracy	4-44
	[b] Single Act Doctrine	4-46
	[c] Circumstantial Evidence as Proof of Motive, Intent, or Association	4-46
	[11] Statute of Limitations	4-49
	[12] Duration, Termination, and Withdrawal.	4-50
	[13] Conspirator’s Liability for Substantive Crimes (The <i>Pinkerton</i> Doctrine)	4-52
	[14] Merger, Prior Adjudications, and Sentencing	4-56
	[a] Merger.	4-56
	[b] Prior Adjudications.	4-57
	[c] Sentencing.	4-59
§ 4.03	Techniques.	4-61
	[1] Introduction	4-61
	[2] Pre-Trial Techniques	4-61
	[a] Pre-Trial Discovery	4-61
	[b] Severance	4-62
	[c] Hearing to Determine the Admissibility of Coconspirator’s Statements	4-62
	[3] Trial Techniques.	4-63

WHITE COLLAR CRIME

	[a] Limiting Instructions	4-63
	[i] Coconspirator Declarations	4-64
	[ii] Other Evidence Received for a Limited Purpose	4-65
	[b] Motions at the Close of the Prosecution's Case and at the Close of All the Evidence	4-66
	[c] Requests to Charge, the Court's Charge, and Exceptions	4-66
	[i] Requests to Charge	4-66
	[ii] The Court's Charge and Exceptions	4-68
§ 4.04	Conclusion	4-69

CHAPTER 5**General Principles Governing the Criminal Liability
of Corporations, Their Employees and Officers**

§ 5.01	Introduction	5-2
§ 5.02	The Modern Acceptance of Entity Criminal Liability	5-6
§ 5.03	The Development of Corporate Criminal Liability Rules	5-11
	[1] The Black Letter Law Rule	5-11
	[2] Criticism of the Black Letter Rule	5-13
	[3] Corporate Compliance Programs	5-15
	[4] Developing a Second Track: The Organization as Actor	5-22
	[a] The Nature of the Act	5-25
	[b] Level of Intent	5-29
	[c] Causation	5-30
§ 5.04	The Liability of Corporate Employees and Officers	5-32
	[1] The General Issues: Responsibility and Intent	5-32
	[a] Proof of Intent	5-32
	[b] Understanding of the Law	5-34
	[c] Adequate Notice	5-39
	[2] Managerial Liability	5-43
	[3] Subordinate Liability	5-48
§ 5.05	Prosecutorial Policies	5-53
	[1] Introduction: Principles of Federal Prosecution of Business Organizations	5-53

TABLE OF CONTENTS

xxxix

[2] The Use of Non-Prosecution and
Deferred Prosecution Agreements . . . 5-56

[3] Special Problems of Internal Corporate
Investigations 5-59

[a] Risks and Benefits 5-59

[b] Attorney-Client Privilege 5-60.1

§ 5.06 Conclusion 5-65

CHAPTER 6

**The Law of Entrapment and
Governmental Overreaching**

§ 6.01 Introduction 6-3

§ 6.02 Development of Entrapment Law 6-7

[1] Common Law 6-7

[2] Emergence of Entrapment
in the United States 6-7

[3] United States Supreme Court
Development 6-9

[a] Sorrells v. United States (1932) 6-10

[b] Sherman v. United States (1958) 6-12

[c] United States v. Russell (1973) 6-14

[d] Hampton v. United States (1976) 6-14

[e] Mathews v. United States (1988) 6-15

[f] Jacobson v. United States (1992) 6-15

[g] Current State of Entrapment Law 6-17

§ 6.03 Subjective Entrapment 6-19

[1] The Elements and the Burdens 6-20

[a] Inducement 6-26

[b] Predisposition 6-36

[c] Government Involvement 6-46

[2] Inconsistent Defenses 6-51

§ 6.04 Outrageous Governmental Conduct 6-55

[1] Nature of the Defense 6-55

[2] Discussion of Relevant Case Law for
Outrageous Governmental Conduct 6-60

§ 6.05 Other Entrapment-Related Defenses 6-68

[1] Sentencing Entrapment
and Manipulation 6-68

[2] Perceived Governmental Authority 6-74

[3] Prosecutorial Misconduct 6-77

§ 6.06 An Examination of Specific Case Types 6-85

[1] Sting Operations 6-85

[2] Contingency Fee Informers 6-88

[3] Sex as an Inducement 6-91

WHITE COLLAR CRIME

	[4] Entrapment and Terrorism	6-94
	[5] Cyberspace	6-97
§ 6.07	Practitioner’s Corner	6-99
	[1] Discovery Materials	6-99
	[a] Motion to Compel Discovery: Confidential Informant	6-99
	[b] Motion to Dismiss: Destruction, Spoliation, Loss of Evidence	6-108
	[2] Guidance on Entrapment as an Alternative Defense	6-112
	[3] Motions for Judgment of Acquittal or Post-Verdict Raising Entrapment	6-113
	[a] Motion to Dismiss: Prosecutorial Misconduct	6-113
	[b] The Law of Entrapment as a Matter of Law	6-113
	[c] Motion for Acquittal: Entrapment as a Matter of Law	6-114
	[4] Jury Instructions	6-117
	[a] Jury Instruction on Derivative Entrapment	6-118
	[b] Jury Instruction on Permissible Law Enforcement Inducements	6-120
	[c] Jury Instruction on Government Informant Testimony	6-120
	[d] Jury Instruction on Objective Entrapment	6-121
	[e] Jury Instruction on Sentencing Entrapment	6-122
§ 6.08	Conclusion	6-124

CHAPTER 6A

Civil and Criminal Forfeitures

§ 6A.01	Introduction	6A-3
§ 6A.02	Federal <i>in Rem</i> Civil Forfeiture	6A-10
	[1] Civil Forfeiture Statutes	6A-11
	[2] Procedures for Seizing Property for Civil Forfeiture	6A-12
	[a] Seizure Warrant	6A-12
	[b] Restraining Orders	6A-12
	[3] The Scope of Property Subject to Restraint and Forfeiture <i>in Rem</i>	6A-13
	[a] Proceeds – Gross v. Net	6A-13
	[b] Proceeds – Traceability	6A-14

TABLE OF CONTENTS

	[c] Fungibility – Section 984	6A-16
	[d] Facilitating Property – The Substantial Connection Test	6A-17
	[e] Property Involved in Money Laundering	6A-17
[4]	Procedural Issues	6A-19
	[a] 41(g) Motions	6A-19
	[b] Initiation of a Civil Forfeiture Matter	6A-20
	[c] Claim and Answer	6A-20
	[d] Burden of Proof	6A-21
	[e] Stay of Civil Forfeiture Proceedings	6A-22
	[f] Real Property Forfeitures	6A-23
	[g] Court-Appointed Counsel and Attorney Fees	6A-24
	[h] Statute of Limitations for <i>in Rem</i> Proceedings	6A-25
[5]	Administrative Proceedings	6A-26
§ 6A.03	Federal Criminal Seizures, Restraints, and Forfeitures of Private Property	6A-29
	[1] Criminal Forfeiture Statutes	6A-29
	[2] Statutory Procedures for Restraining Property	6A-32
	[a] Before an Indictment or Information Is Filed	6A-32
	[b] After an Indictment or Information Is Filed	6A-34
	[c] Pretrial Post-Restraint Forfeiture Hearings	6A-34
	[d] After a Verdict or Plea but Before Sentencing	6A-35
[3]	The Scope of Property Subject to Restraint and Criminal Forfeiture	6A-37
	[a] Proceeds	6A-37
	[i] But For Test	6A-37
	[ii] Gross Proceeds v. Net Profits	6A-38
	[b] Facilitating Property	6A-41
	[c] Money Judgments and Substitute Assets	6A-42
	[d] Joint and Several Liability	6A-45
§ 6A.04	Third-Party Interests	6A-50
	[1] Asserting Third-Party Claims in Criminal Proceedings	6A-50

WHITE COLLAR CRIME

	[2]	The “Innocent Owner” Defense for <i>in Rem</i> Claims	6A-51
	[a]	The Meaning of “Knowledge”	6A-52
	[b]	The Meaning of “Consent”	6A-54
	[c]	The Effect of the Relation Back Doctrine – a Vesting Provision.	6A-55
	[3]	Ownership of Partial Interests.	6A-57
	[4]	Relief Defendants.	6A-57
	[5]	Property of Family Members and Ex-Spouses.	6A-58
	[6]	Civil Forfeitures of Funds Held at Foreign Banks	6A-64
	[7]	Restitution and Forfeiture	6A-65
§ 6A.05		Extraterritorial Application of Forfeiture Laws	6A-70
§ 6A.06		Constitutional Issues.	6A-73
	[1]	Procedural Due Process.	6A-73
	[a]	Pre-Seizure Notice and Hearing for <i>in Rem</i> Proceedings.	6A-73
	[b]	Post-Seizure Notice and Hearing for Criminal Forfeiture	6A-75
	[2]	Substantive Due Process	6A-76
	[a]	Innocent Owners.	6A-76
	[b]	Vagueness.	6A-77
	[c]	Due Process Proportionality	6A-78
	[3]	Taking Without Just Compensation	6A-80
	[4]	The Eighth Amendment.	6A-84
	[5]	Double Jeopardy.	6A-87
	[6]	The Fourth Amendment.	6A-88
	[7]	Seventh Amendment Jury Trial Right.	6A-89
	[8]	Inapplicability of the Sixth Amendment Jury Trial Right to Forfeiture	6A-91
	[9]	The Fifth Amendment Self-Incrimination Clause.	6A-91

CHAPTER 7

Government Contract Fraud: Understanding and Mitigating the Risk

§ 7.01	Introduction.	7-2
§ 7.02	How Contract Fraud Happens	7-4
	[1] Fraud Offenses.	7-4

TABLE OF CONTENTS

xliii

	[a]	Criminal Offenses.	7-4
		[i] Criminal False Claims Act (18 U.S.C. § 287).	7-4
		[ii] False Statements Statute (18 U.S.C. § 1001).	7-5
		[iii] Mail and Wire Fraud Statutes (18 U.S.C. §§ 1341, 1343).	7-5
		[iv] Major Fraud Act (18 U.S.C. § 1031)	7-6
		[v] Conspiracy to Defraud the Government	7-6
	[b]	Civil Offenses.	7-7
		[i] Civil False Claims Act (31 U.S.C. §§ 3729-3733)	7-7
		[ii] Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801-3812)	7-9
	[c]	Corruption-Related Offenses	7-9
		[i] Anti-Kickback Act (41 U.S.C. §§ 8701-8707)	7-10
		[ii] Bribery and Illegal Gratuities (18 U.S.C. § 201).	7-11
	[2]	Fraud in the Contracting Stages	7-12
		[a] Fraud in the Pre-Award Stage.	7-12
		[b] Fraud During Contract Performance	7-15
		[i] Certification of Claims.	7-15
		[ii] Fraud in the Context of Cost Accounting.	7-18
§ 7.03		The Arsenal of Government Remedies	7-19
	[1]	Criminal Proceedings.	7-19
	[2]	Civil Proceedings	7-20
	[3]	Administrative Suspension and Debarment Proceedings.	7-23
		[a] Suspension	7-23
		[b] Debarment.	7-25
	[4]	Simultaneous Proceedings	7-26
§ 7.04		Preventive and Responsive Measures	7-28
	[1]	Before the Government Investigates.	7-28
		[a] Compliance Programs	7-28
		[b] Compliance Audits.	7-29
		[c] Disclosing Misconduct.	7-29
		[d] Document Retention.	7-30
	[2]	Response to an Investigation.	7-30

WHITE COLLAR CRIME

[a]	Document Preservation and Notification of Employees	7-31
[b]	Conducting Internal Investigations	7-32

CHAPTER 8

Grand Jury Practice

§ 8.01	Introduction	8-3
§ 8.02	Composition of the Grand Jury	8-6
	[1] In General	8-6
	[2] Objections to Composition	8-7
	[a] Legal Standards	8-8
	[i] Systematic Underrepresentation	8-8
	[ii] “Substantial Failure to Comply” with the Jury Selection and Service Act	8-11
	[b] <i>Prima Facie</i> Case	8-12
	[i] Source Lists	8-12
	[ii] The Selection Process	8-14
	[iii] The Resulting Composition	8-15
	[c] Making the Motion	8-17
§ 8.03	Grand Jury Secrecy	8-19
	[1] In General	8-19
	[2] Court Orders Requiring Witnesses to Keep Their Testimony Secret	8-20
	[3] Disclosure of Grand Jury Material	8-23
	[a] Disclosure Without Court Order	8-26
	[b] Disclosure Pursuant to Court Order	8-27
	[4] Impermissible Disclosure of Grand Jury Matters	8-34
§ 8.04	Rights and Privileges of Grand Jury Witnesses	8-36
	[1] Fifth Amendment Privilege	8-36
	[a] Asserting the Privilege	8-36
	[b] The Act of Production Doctrine	8-37
	[c] Corporate Documents	8-42
	[d] Waiving the Privilege	8-45
	[e] Immunity	8-49

TABLE OF CONTENTS

xlv

	[2] Attorney-Client Privilege and Attorney Work Product	8-52
	[a] Attorney-Client Privilege	8-52
	[b] Waiving the Privilege	8-54
	[c] Attorney Work Product	8-57
	[3] Joint Defense Privilege	8-59
	[4] Previously Issued Protective Orders	8-60
	[5] Other Privileges	8-61
§ 8.05	Subpoenas to Attorneys	8-64
	[1] Attorney-Client Privilege	8-66
	[a] Client Identity and Fee Arrangement	8-67
	[b] Related Issues	8-69
	[i] Information Beyond Client Identity and Fee Arrangements	8-69
	[ii] Third-Party Fee-Payers	8-70
	[iii] Client Whereabouts	8-70
	[c] Crime-Fraud Exception	8-71
	[2] Attorney Work Product	8-72
	[3] Relevance and Necessity	8-72
	[4] Sixth Amendment	8-74
§ 8.06	Objections to the Grand Jury Process	8-75
	[1] Indictments Based on Hearsay	8-77
	[2] Illegal Search and Seizure	8-81
	[3] Indictments Based on Perjury	8-83
	[4] Failure to Disclose Exculpatory Evidence	8-84
	[5] Use of Grand Jury to Gather Evidence for Already Pending Indictment	8-85
	[6] Grand Jury Subpoenas Duces Tecum and Ad Testificandum	8-85
	[a] Reasonableness	8-85
	[b] Extraterritorial Subpoenas	8-89
	[7] Quorum Requirement	8-91
	[8] Prosecutorial Misconduct	8-92
	[a] Improperly Influencing Grand Jury	8-93
	[b] Presence of Unauthorized Persons	8-97
§ 8.07	Testifying Before the Grand Jury	8-98
	[1] Preparation	8-98
	[2] Testifying	8-99
	[3] Memorializing the Testimony	8-100

CHAPTER 9

The Federalization of Fraud: Mail and Wire Fraud Statutes

§ 9.01	Introduction	9-2
§ 9.02	The Elements of the Crime	9-12
	[1] The Meaning of “Scheme to Defraud”	9-16
	[a] Consumer Fraud	9-19
	[b] Trade Secrets and Other Confidential Business Information	9-25
	[c] Insurance Fraud	9-28
	[d] Franchise and Investment Frauds	9-29
	[e] Regulatory and Tax Prosecutions	9-31
	[f] Fiduciary Breaches and Honest Services	9-35
	[g] Rights to Privacy	9-43
	[2] The Jurisdictional Means	9-44
	[a] Mail Fraud	9-44
	[b] Wire Fraud	9-48
§ 9.03	Intent to Defraud	9-52
§ 9.04	Defenses and Tactics	9-57
	[1] The Good Faith Defense	9-57
	[2] Puffing	9-60
	[3] Lack of Authority	9-61
	[4] Constructive Frauds	9-62
	[5] Statute of Limitations	9-63
	[6] Preemption	9-64
	[7] Tactics: Injunctions and Discovery	9-65
§ 9.05	Conclusion	9-68

TABLE OF CONTENTS

Volume 2

CHAPTER 10

Crimes of Dishonesty: Perjury, False Statement and Obstruction of Justice

§ 10.01	Perjury: The Cover-Up That <i>Is</i> the Crime	10-4
	[1] Introduction	10-4
	[2] Background.	10-5
	[a] Perjury Generally (18 U.S.C. Section 1621).	10-6
	[b] Perjury in a Judicial Context (18 U.S.C. Section 1623).	10-9
	[c] Distinctions Between Sections 1621 and 1623	10-12
	[d] Prosecutorial Discretion in Perjury Charges	10-12
	[3] Subornation of Perjury (18 U.S.C. Section 1622)	10-13
	[4] Elements of Sections 1621 and 1623.	10-15
	[a] First Element: Oath	10-16
	[b] Second Element: Falsity	10-19
	[i] Ambiguous Questions and Answers.	10-21
	[ii] Unresponsive Is Not False	10-23
	[iii] Proof Requirement: The “Two-Witnesses” Rule for Section 1621 Only.	10-24
	[iv] No “Two-Witness” Rule for Section 1623	10-25
	[vi] Witness Stand-Induced Amnesia: “I Do Not Recall”	10-26
	[c] Third Element: Materiality	10-27

WHITE COLLAR CRIME

	[d]	Fourth Element: “Willfulness” (Section 1621) and “Knowingly” (Section 1623)	10-30
	[e]	Inconsistent Statements (18 U.S.C. Section 1623(c))	10-31
	[5]	Implications of Immunity	10-32
	[6]	Defenses	10-33
	[a]	Literal Truth and Ambiguity	10-34
	[b]	Recantation Under Section 1623	10-38
	[i]	Recantation Part 1: Admission of Perjury	10-39
	[ii]	Recantation Part 2: The Perjury Has Not Yet Affected the Proceeding	10-40
	[iii]	Recantation Part 3: Manifest Exposure	10-41
	[iv]	Double Jeopardy and Collateral Estoppel	10-41
	[7]	Sentencing Implications	10-43
	[8]	Ethical Considerations	10-45
	[9]	Counsel for Counselors	10-46
§ 10.02		False Statements	10-47
	[1]	Introduction	10-47
	[2]	Background	10-49
	[3]	Elements	10-50
	[a]	Statement	10-51
	[b]	Falsity	10-57
	[i]	The Literal Truth Doctrine	10-57
	[ii]	Fundamental and Arguable Ambiguity	10-59
	[c]	Knowledge	10-60
	[d]	Intent; Willfulness	10-61
	[e]	Materiality	10-63
	[f]	Matters Within the Executive, Legislative or Judicial Branch	10-64
	[g]	Section 1001 and International Investigations	10-66
	[4]	Defenses	10-66
	[5]	Statute of Limitations	10-68
	[6]	Venue	10-69
	[7]	Sentencing	10-70
	[8]	Other False Statement Statutes	10-72
	[9]	Advising Clients	10-72
§ 10.03		Obstruction of Justice	10-73
	[1]	Statutory Scheme	10-73
	[a]	Obstruction Generally (18 U.S.C. Section 1503)	10-75

TABLE OF CONTENTS

vii

	[i]	Clauses 1, 2, and 3: Obstructing Jurors and Court Officials	10-76
	[ii]	Clause 4: The Omnibus Clause	10-77
	[iii]	Defenses	10-86
	[b]	Tampering with Witnesses or Evidence (18 U.S.C. Section 1512).	10-89
	[i]	Elements of Section 1512(a): Tampering by Violence.	10-91
	[ii]	Elements of Section 1512(b): Tampering by Intimidation or Corrupt Persuasion	10-93
	[iii]	Elements of Section 1512(c): Tampering by Spoliation or General Obstruction of Official Proceedings	10-96
	[iv]	Elements of Section 1512(d): Tampering by Harassment.	10-98
	[v]	Defenses	10-98
	[c]	Destruction of Records Subject to Investigation (18 U.S.C. Section 1519)	10-100
[2]		Interplay of Obstruction Statutes	10-102
	[a]	Interplay Among Chapter 73 Statutes	10-102
	[b]	Interplay with RICO	10-103
	[c]	Interplay with Other Statutes	10-104
[3]		Guidelines Enhancement for Obstruction	10-104
[4]		Collateral Consequences	10-105
[5]		Advising Clients.	10-106

CHAPTER 11

Racketeer Influenced and Corrupt Organizations (RICO)

§ 11.01	Introduction	11-2
§ 11.02	The RICO Statute.	11-3
§ 11.03	Applicability to White Collar Offenses.	11-7
§ 11.04	Elements of the RICO Offense	11-9
	[1] The Existence of an Enterprise.	11-9
	[2] The Effect of the Enterprise on Commerce.	11-13
	[3] Defendants' Commission of Predicate Acts.	11-14

WHITE COLLAR CRIME

	[4]	The Acts Must Constitute a Pattern of Racketeering Activity	11-17
	[5]	Actions Prohibited by RICO	11-19
§ 11.05		Criminal Forfeiture	11-26
§ 11.06		Forfeiture of Attorney’s Fees	11-33
§ 11.07		The Federal Government’s Use of the Civil RICO Provisions	11-35
	[1]	The Difference Between Criminal RICO and Civil RICO	11-35
	[2]	The Difference Between Private Civil RICO Litigation and Civil RICO Actions Brought by the Government	11-36
	[3]	Civil Remedies Available for the Federal Government	11-37
	[4]	Civil RICO Suits Brought by the Federal Government	11-40
§ 11.08		Conclusion	11-45

CHAPTER 12**Securities Fraud**

§ 12.01		Introduction	12-2
§ 12.02		Federal Criminal Securities Fraud Investigations and Trials	12-4
	[1]	The Federal Statutory Framework Governing Criminal Offenses	12-4
	[a]	Willful Violations of the Securities Laws	12-5
	[b]	Section 10(b) of the Exchange Act and Section 17 of the Securities Act	12-7
	[c]	Sarbanes-Oxley	12-8
	[d]	Other Relevant Criminal Statutes	12-11
	[e]	Secondary Liability	12-12
	[f]	Statute of Limitations	12-13
	[2]	Representative Securities Fraud Prosecutions	12-13
	[a]	Accounting Fraud	12-14
	[b]	Insider Trading	12-15
	[c]	Parking	12-15
	[d]	Stock Manipulation	12-17
	[e]	False Advertising	12-20
	[f]	Sale of Unregistered Securities	12-21
	[g]	Ponzi Schemes	12-22
	[h]	Options Backdating	12-23
	[i]	Initial Coin Offerings and Digital Assets	12-24

TABLE OF CONTENTS

viii.i

	[j]	SPACs: Special Purpose Acquisition Companies.	12-26.1
	[3]	Defending Securities Fraud Cases	12-27
		[a] Defenses	12-27
		[b] Sentencing Issues in Securities Fraud Cases.	12-30
§ 12.03	SEC	Investigations and Enforcement Actions.	12-39
	[1]	Overview of Securities and Exchange Commission Investigations and Enforcement Actions	12-39
		[a] The Division of Enforcement	12-39
		[b] Commencing an Investigation.	12-40

(Text continued on p. ix)

TABLE OF CONTENTS

ix

	[c]	SEC Subpoenas	12-41
	[d]	Cooperation	12-41
	[e]	Attorney-Client Privilege	12-42
[2]		The Interplay Between Civil and Criminal Investigations and the Criminal Reference Process	12-43
	[a]	The Criminal Reference Process	12-43
	[b]	Fifth Amendment	12-47
	[c]	Stays	12-49
	[d]	The Wells Process	12-53
	[e]	Litigation	12-55
		[i] SEC Administrative Proceedings	12-55
		[ii] Federal Court Actions	12-56
		[iii] Remedies	12-56
		[iv] Statute of Limitation	12-57
§ 12.04		Enforcement by Self-Regulatory Organizations	12-59
	[1]	In General	12-59
	[2]	FINRA Investigations	12-59
§ 12.05		Overview of Criminal Securities Fraud Laws in New York, Illinois, and California	12-63
	[1]	New York: The Martin Act	12-63
	[2]	Illinois Securities Law of 1953	12-65
	[3]	California Corporate Securities Law of 1968	12-66

CHAPTER 12A

Insider Trading

§ 12A.01		Introduction	12A-1
§ 12A.02		The Applicable Statutes and Rules	12A-5
§ 12A.03		Judicial Interpretations of Section 10(b) and Rule 10b-5	12A-8
	[1]	Classical Theory	12A-8
	[2]	Misappropriation Theory	12A-11
§ 12A.04		SEC Rules 10b5-1 and 10b5-2	12A-14
	[1]	Rule 10b5-1	12A-14
	[2]	Rule 10b5-2	12A-17
§ 12A.05		Tippee Liability	12A-20
§ 12A.06		Civil Liability	12A-26.1
§ 12A.07		Criminal and Civil Penalties	12A-28
	[1]	Criminal Penalties	12A-28
	[2]	Civil Penalties	12A-29
§ 12A.08		Private Right of Action	12A-31
§ 12A.09		Insider Trading Legislation	12A-32

WHITE COLLAR CRIME

CHAPTER 13

Criminal Tax Offenses

§ 13.01	Representing Clients in Tax Fraud Cases	13-4
	[1] Overview	13-4
	[2] Administrative Tax Fraud Investigations	13-7
	[3] Grand Jury Investigations	13-9
	[4] IRS Investigative Procedures	13-11
	[a] Issuance of Administrative Summons	13-11
	[b] Summons Enforcement Actions	13-14
	[i] Jurisdiction and Procedure	13-14
	[ii] Substantive Standards	13-17
§ 13.02	Constitutional, Statutory, and Common-Law Limitations on Tax Investigations	13-20
	[1] In General	13-20
	[2] Fifth Amendment	13-20
	[3] Fourth Amendment	13-22
	[4] Third Party Challenges to Compelled Disclosure	13-23
	[a] In General	13-23
	[b] Particular Considerations Applying to Compelled Disclosure by Accountants and Attorneys	13-24
	[i] Constitutional Protections Under the Fourth and Fifth Amendments	13-24
	[ii] Attorney-Client Privilege	13-25
	[iii] Work Product Doctrine	13-27
§ 13.03	Strategy and Preparation	13-29
	[1] In General	13-29
	[2] Early Preparation	13-30
	[3] Strategic Decisions	13-31
§ 13.04	Voluntary Disclosures	13-33
	[1] Historical Context	13-33
	[2] Current Voluntary Disclosure Scheme	13-34
	[3] Civil Resolution	13-35
§ 13.05	Statute of Limitations	13-36
	[1] In General	13-36
	[2] Tolling	13-36
§ 13.06	Venue	13-38
	[1] General Principles	13-38
	[2] Venue for Continuing Offenses	13-39

TABLE OF CONTENTS

	[3]	Venue for Non-Continuing Offenses.	13-41
	[4]	Venue for Offenses Under Title 18.	13-42
§ 13.07		Tax Evasion (26 U.S.C. § 7201).	13-43
	[1]	In General.	13-43
	[2]	Elements of the Offense	13-43
		[a] Additional Tax Due and Owing	13-43
		[b] Affirmative Act of Evasion	13-45
		[c] Willfulness	13-46
	[3]	Common Defenses	13-48
	[4]	Lesser Included Offenses.	13-48
§ 13.08		Failure to File Tax Return or Pay Tax (26 U.S.C. § 7203)	13-50
	[1]	In General.	13-50
	[2]	Elements of the Offense of Failure to File	13-50
		[a] Taxpayer Required to File Return.	13-50
		[b] Failure to File Return When Due.	13-51
		[c] Willfulness	13-51
	[3]	Offense of Failure to Pay	13-52
§ 13.09		False or Fraudulent Tax Return or Other Document (26 U.S.C. § 7206(1))	13-53
	[1]	In General.	13-53
	[2]	Elements of the Offense	13-53
		[a] Making and Subscribing a Return, Statement, or Other Document	13-53
		[b] Return Was Materially and Knowingly False.	13-54
		[c] Willfulness	13-56
		[d] Return Contained Written Declaration That It Was Made Under Penalty of Perjury	13-56
	[3]	Defenses	13-56
§ 13.10		Aiding and Assisting in the Preparation of Fraudulent or False Returns or Documents (26 U.S.C. § 7206(2))	13-57
	[1]	In General.	13-57
	[2]	Elements of the Offense	13-57
		[a] Aided, Assisted, or Otherwise Caused the Preparation and Presentation of a Return	13-58
		[b] Fraudulent or False as to a Material Matter.	13-58
		[c] Willfulness	13-59
§ 13.11		Fraudulent Returns, Statements, or Other Documents (26 U.S.C. § 7207)	13-60

§ 13.12	Obstruction—Corrupt or Forcible Interference (26 U.S.C. § 7212(a))	13-61
	[1] In General	13-61
	[2] Scope of the Offense and <i>Marinello v. United States</i>	13-61
	[3] Elements: Omnibus Clause	13-62
	[a] Corruptly	13-62
	[b] Endeavors	13-63
	[c] To Obstruct or Impede the Due Administration of the Federal Tax Laws	13-64
	[4] Elements: Officer Clause	13-65
§ 13.13	Forcible Rescue of Seized Property (26 U.S.C. § 7212(b))	13-67
	[1] In General	13-67
	[2] Elements of the Offense	13-67
§ 13.14	Conspiracy (18 U.S.C. § 371)	13-69
	[1] <i>Klein</i> Conspiracy Elements	13-70
	[2] <i>United States v. Coplan</i> and the Continuing Viability of <i>Klein</i>	13-70
	[3] Can <i>Marinello</i> Be Used to Overrule <i>Klein</i> ?	13-71
§ 13.15	False Statements and Documents (18 U.S.C. § 1001).	13-73
§ 13.16	Methods of Proof	13-75
	[1] In General	13-75
	[2] Specific Items Method	13-75
	[3] Indirect Methods of Proof	13-76
	[a] Generally	13-76
	[b] Net Worth Method	13-78
	[c] Expenditures Method	13-80
	[d] Bank Deposits Method	13-81
§ 13.17	Sentencing Considerations	13-83
	[1] Background and <i>United States v. Booker</i>	13-83
	[2] Sentencing Guidelines Mechanics	13-85
	[a] Selection of the Operative Guidelines Manual	13-85
	[b] Calculation of the Guidelines Sentence	13-86
	[3] Guidelines for Particular Tax Offenses	13-87
	[a] Tax Evasion (26 U.S.C. § 7201), Willful Failure to File Return (26 U.S.C. § 7203), and False Statements (26 U.S.C. § 7206(1))	13-87
	[i] In General	13-87

TABLE OF CONTENTS

xiii

	[ii]	Offshore Accounts	13-88
	[iii]	Relevant Conduct	13-89
	[iv]	Aggregating Corporate and Individual Tax Loss	13-90
	[v]	Previously Untaken Deductions	13-91
	[vi]	Specific Offense Characteristics	13-92
	[b]	Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud (26 U.S.C. § 7206(2))	13-92
	[c]	Interference with the Administration of the Tax Laws (26 U.S.C. § 7212(a))	13-93
	[d]	Other Tax Offenses	13-94
[4]		Generally Applicable Adjustments	13-94
	[a]	Adjustments Based on Offense Conduct	13-94
	[b]	Acceptance of Responsibility	13-96
[5]		The “3553(a)” Factors	13-96
[6]		Plea Agreements	13-98
[7]		Contemporary Statistics on Sentencing	13-98

CHAPTER 14

Environmental Crimes

§ 14.01		Introduction	14-3
§ 14.02		Enforcement Offices	14-7
§ 14.03		Federal Statutes	14-9
	[1]	Overview	14-9
		[a] Resource Conservation and Recovery Act	14-9
		[b] Comprehensive Environmental Response, Compensation and Liability Act	14-9
		[c] Clean Water Act	14-10
		[d] Clean Air Act	14-11
		[e] Toxic Substances Control Act	14-11
		[f] The Federal Insecticide, Fungicide, and Rodenticide Act	14-12
		[g] The Act to Prevent Pollution from Ships	14-12
	[2]	General Behavior Proscribed	14-12

WHITE COLLAR CRIME

	[a]	General Prohibition Against Violating Environmental Statutory or Regulatory Requirements	14-13
	[b]	Failure to Obtain a Permit and Violation of the Terms or Conditions of a Permit	14-15
	[c]	Endangering Another Person or Property	14-16
	[d]	Government Notification, Recordkeeping Requirements and False Statements	14-17
§ 14.04		Case Selection Criteria	14-20
§ 14.05		Potential Defendants	14-22
	[1]	Officers and Directors	14-22
	[2]	Supervisory Employees	14-22
	[3]	Corporations	14-23
§ 14.06		<i>Mens Rea</i>	14-25
	[1]	<i>Scienter</i> and the Elements of an Offense	14-25
	[a]	Knowledge of the Regulatory Scheme	14-27
		[i] Knowledge of Permit Requirement	14-28
		[ii] Knowledge of Regulatory Hazardous Wastes	14-30
	[b]	Knowledge of Facts	14-31
		[i] Knowledge of Permit Status	14-31
		[ii] Knowledge of Pollution Discharge	14-36
	[2]	Proof of Knowledge	14-37
	[a]	Inapplicability of the Responsible Corporate Officer Doctrine	14-37
	[b]	Use of Circumstantial Evidence to Infer Knowledge	14-41
	[c]	Willful Blindness	14-44
	[3]	Negligent Violations	14-45
§ 14.07		General Federal Criminal Provisions	14-46
	[1]	RICO Implications	14-46
	[2]	False Statements	14-47
	[3]	The Sarbanes-Oxley Act Implications	14-48
§ 14.08		Crime Victims Rights Act implications	14-50
§ 14.09		Collateral Consequences of a Conviction—Debarment	14-51
§ 14.10		State Environment Statutes	14-53
	[1]	Hazardous Wastes	14-53

TABLE OF CONTENTS

xv

	[2] Water Pollution.	14-54
	[3] Air Pollution.	14-55
§ 14.11	Potential Defenses.	14-56
	[1] Constitutional Defenses.	14-56
§ 14.12	Compliance Programs and Voluntary Disclosure	14-60
	[1] Compliance Programs	14-60
	[2] Voluntary Disclosure	14-62
§ 14.13	Internal Investigations.	14-63

CHAPTER 15

Corporate Sentencing Under the Federal Guidelines

§ 15.01	Overview: The Evolving Law of Sentencing and the Role of Corporate Counsel.	15-3
§ 15.02	Underlying Theories of Corporate Liability and Sanctions.	15-7
§ 15.03	Corporate Sentencing Prior to the Organizational Guidelines	15-12
	[1] Fines	15-12
	[2] “Corporate Probation”	15-13
	[3] Corporate Probation in the Shadow of the Guidelines	15-15
§ 15.04	The Sentencing Reform Act, The Sentencing Commission, and the Guidelines.	15-18
	[1] Introduction	15-18
	[2] The Guidelines.	15-21
	[3] The Guidelines in the Supreme Court	15-25
	[4] The Statutory Scheme of the Sentencing Reform Act: Available Corporate Sentences	15-30
§ 15.05	The Sentencing Commission and Its Early Proposals for Organizational Guidelines.	15-32
§ 15.06	The Organizational Guidelines.	15-36
	[1] When the Guidelines are Applicable	15-38
	[2] Restitution, Remedial Orders, Community Service, and Orders of Notice to Victims	15-39
	[3] Determining the Fine.	15-40
	[a] “Corporate Death Penalty”	15-41
	[b] Computation of Base Fine	15-41
	[c] Culpability Score	15-44
	[i] Involvement In or Tolerance of Criminal Activity	15-45
	[ii] Prior History.	15-46

WHITE COLLAR CRIME

	[iii]	Violation of an Order	15-46
	[iv]	Obstruction of Justice	15-46
	[v]	Compliance Programs	15-47
	[vi]	Self-Reporting, Cooperation, and Acceptance of Responsibility	15-51
	[d]	Computing the Guideline Fine	15-52
	[e]	Departures and Variances	15-55
[4]		Probation	15-57
[5]		Special Assessments, Forfeitures, and Costs	15-60
§ 15.07		Offenses Not Solely Within the Organizational Fine Guidelines	15-61
	[1]	Antitrust Convictions	15-61
	[2]	Bribery Convictions and Related Offenses	15-62
	[3]	Other Offenses Not Covered Under Section 8C2.1	15-62

CHAPTER 16**The Foreign Corrupt Practices Act**

§ 16.01		Introduction	16-3
§ 16.02		The Anti-Bribery Provisions	16-7
	[1]	The Basic Prohibition	16-7
	[2]	Payments to Agents or Third Parties	16-8
	[3]	Definitions	16-8
	[a]	“Foreign Official”	16-8
	[b]	“Corruptly”	16-10
	[c]	“Knowledge”	16-11
	[d]	“Interstate Commerce” or “Alternative Jurisdiction”	16-13
	[e]	“Obtaining,” “Retaining” or “Directing” Business or “Securing Any Improper Advantage”	16-15
	[4]	Affirmative Defenses and Exception	16-17
	[a]	Affirmative Defense: Reasonable and <i>Bona Fide</i> Expenditures	16-17
	[b]	Affirmative Defense: Payments Were Lawful Under Written Laws	16-21
	[c]	Exception to FCPA: Facilitating or “Grease” Payments	16-21
	[5]	Regulator Guidance	16-22
	[a]	DOJ Review Procedure	16-22
	[b]	DOJ Guidelines	16-23

TABLE OF CONTENTS

xvii

	[c]	Yates Memo on Individual Accountability	16-24
	[d]	Compliance Program Guidance	16-25
	[e]	FCPA Corporate Enforcement Policy	16-26
[6]		Enforcement of the Anti-Bribery Provisions	16-28
	[a]	Criminal Enforcement and Penalties	16-28
	[b]	Civil Enforcement and Penalties	16-29
[7]		Charitable Contributions	16-30
[8]		Minority-Held Subsidiaries and Other Entities	16-33
	[a]	Legislative History	16-33
	[b]	Actions and Proceedings Instituted Under the FCPA	16-35
	[c]	Third Parties, Intermediaries, Agents and Other Representatives	16-38
[9]		DOJ Proceedings	16-41
	[a]	Plea Agreements	16-41
	[b]	Deferred Prosecution and Non-Prosecution Agreements	16-42.1
	[i]	Deferred Prosecution Agreements	16-42.1
	[ii]	Non-Prosecution Agreements (“NPA”)	16-43
[10]		SEC Enforcement	16-44
[11]		Alternative Statutes for Prosecuting Conduct Related to Foreign Bribery	16-46
§ 16.03		The Accounting Provisions	16-48
	[1]	SEC Chairman Williams’ January 13, 1981 Speech	16-48
	[2]	The 1988 Amendments to the Accounting Provisions	16-50
	[3]	SEC Regulations Regarding the Accounting Provisions	16-51
	[4]	Exception for National Security	16-52
	[5]	Enforcement of the Accounting Provisions	16-52
	[a]	Civil Enforcement	16-53
	[b]	Criminal Enforcement	16-56
§ 16.04		Compliance Programs	16-58
	[1]	Compliance Programs	16-58
	[2]	Third Parties, Intermediaries, Agents and Representatives	16-61
§ 16.05		Conclusion	16-63

CHAPTER 17

The Joint Defense Agreement

§ 17.01	Introduction	17-3
§ 17.02	The Joint Defense Privilege Defined	17-5
§ 17.03	Government Challenges	17-8
	[1] Challenges to the Existence of the Agreement	17-8
	[2] Motions to Compel Production of Certain Communications/Documents	17-9
	[3] Motions for Production of the Agreement	17-10
	[4] Motions to Disqualify Counsel	17-12
§ 17.04	Advantages of a Written Agreement	17-15
§ 17.04A	Dangers of Non-Disclosure of Conflict	17-16
§ 17.05	Elements of a Joint Defense Agreement	17-17
	[1] The Parties Share Common Issues and Interests	17-17
	[2] The Purpose of the Agreement Is to Promote Effective Representation	17-17
	[3] All Shared Communications, Documents, and Memoranda Fall Within the Attorney Client and Work Product Privileges	17-17
	[4] Both the Attorney and the Client Are Covered by the Agreement	17-18
	[5] The Material Shared May Not Be Disclosed to Others Outside the Agreement	17-18
	[6] Materials Shared May Be Used Only by Counsel to Prepare a Defense in the Current Investigation or Any Related Future Investigation	17-18
	[7] Disclosure Requires the Consent of the Supplying Parties	17-18
	[8] While Good Faith Sharing of Information Is Desirable, Each Lawyer's Obligations to His or Her Own Client May Prevent the Sharing of All Information	17-18
	[9] Agreement Not to Utilize Documents or Waive the Privilege in Future Civil Actions	17-19
	[10] Specific Remedies to Enforce Confidentiality	17-19
	[11] Procedures for Withdrawal from the Agreement and Return of Documents	17-19

TABLE OF CONTENTS

xix

	[12] Should One Party Agree to Plead, No Disclosure Without Written Permission. . .	17-20
	[13] Should One Party Agree to Cooperate, No Conflict of Interest Is Created That Would Result in the Disqualification of Any Attorney	17-20
	[14] Counsel Is Not Limited from Disclosing Documents Obtained from His Own Client or Independently of the Agreement.	17-21
	[15] Demands by the Government for Any Joint Defense Materials Must Be Immediately Communicated to All Counsel.	17-21
	[16] The Agreement Does Not Affect Independent and Separate Representation of Each Client	17-21
	[17] The Duty of Loyalty Is Limited to Each Attorney's Individual Client.	17-21
	[18] Provision for Return or Disposal of Documents Once the Matter Is Concluded.	17-22
	[19] Amendments Must Be in Writing, Unanimously Approved	17-22
§ 17.06	Sample Agreements	17-23
	[1] Confirmation of Agreement Regarding Confidentiality of Joint Defense Information	17-23
	[2] Joint Agreement Among Counsel for Parties with Common Defense	17-26
	[3] Joint Defense Agreement.	17-30
§ 17.07	Conclusion	17-37

CHAPTER 18

[RESERVED]

CHAPTER 19

Health Care Fraud and Abuse

§ 19.01	Introduction	19-3
§ 19.02	Criminal and Civil False Claims Liability	19-9
	[1] False Statements or Representations Involving Federal Health Care Payers (42 U.S.C. § 1320a-7b(a)).	19-9

WHITE COLLAR CRIME

	[a]	False Statements in Applications for Benefits	19-10
		[i] “Making or Causing to Be Made”	19-10
		[ii] Falsity	19-11
		[iii] Knowledge	19-12
		[iv] Materiality	19-13
	[b]	Concealment of Event Affecting Right to Benefits	19-13
		[i] “Event”	19-14
		[ii] Specific Intent	19-14
		[iii] Application by Prosecutors	19-15
	[c]	Conversion of Benefits	19-16
	[d]	Presentment of Claim for Services of an Unlicensed Physician	19-16
	[e]	False Statements Regarding the Condition or Operation of a Participating Institution	19-16
[2]		False Statements (18 U.S.C. § 1001)	19-17
	[a]	Concealment or False Representations	19-18
	[b]	Federal Jurisdiction	19-20
	[c]	“Knowingly and Willfully”	19-21
	[d]	Materiality	19-22
[3]		The Criminal False Claims Act (18 U.S.C. § 287)	19-23
	[a]	Falsity	19-24
	[b]	Presentment to a Federal Agency	19-26
	[c]	<i>Scienter</i>	19-27
	[d]	Materiality	19-30
	[e]	Relationship to Civil False Claims	19-32
[4]		The Civil False Claims Act (31 U.S.C. § 3729)	19-34
	[a]	“Claim”	19-38
	[b]	“False or Fraudulent”	19-39
	[c]	Knowledge	19-41
	[d]	Materiality	19-44
	[e]	Damage to the Federal Government	19-46
	[f]	Amount of Recovery	19-46
§ 19.03		The Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b))	19-48
	[1]	Overview: Elements of the Offense	19-48
	[2]	Case Law Developments	19-50
		[a] “Bribe or Kickback”	19-50
		[b] The “One Purpose” Test	19-51
		[c] “Knowingly and Willfully”	19-53
		[d] Other Statutory Elements	19-56

TABLE OF CONTENTS

	[3]	Statutory and Regulatory Developments . . .	19-58
		[a] Statutory Exceptions	19-58
		[b] The Regulatory “Safe Harbors”	19-58
		[i] Investment Interests	19-59
		[ii] Space and Equipment Rentals . . .	19-60
		[iii] Personal Services and Management Contracts	19-61
		[iv] Sale of Practice	19-61
		[v] Referral Services	19-62
		[vi] Discounts	19-62
		[vii] Warranties	19-62
		[viii] Employees	19-62
		[ix] Group Purchasing Organizations (GPOs)	19-63
		[x] Waiver of Medicare Copayments	19-63
		[xi] Managed Care Safe Harbors . . .	19-65
		[xii] Other Safe Harbors	19-66
	[c]	Advisory Opinions and Fraud Alerts	19-66
	[d]	The Physician Self-Referral Law	19-67
	[e]	The Civil False Claims Act (31 U.S.C. § 3729)	19-69
§ 19.04		Civil Money Penalties and Exclusion	19-71
	[1]	Civil Money Penalties (42 U.S.C. § 1320a-7a)	19-71
		[a] Proscribed Conduct	19-72
		[b] Requisite Intent	19-75
		[c] Sanctions	19-76
	[2]	Mandatory Exclusion (42 U.S.C. § 1320a-7(a))	19-78
		[a] Bases for Exclusion	19-79
		[i] Conviction for Program- Related Crimes	19-79
		[ii] Conviction Related to Patient Abuse	19-81
		[iii] Specified Felony Convictions . . .	19-82
		[b] Term of Exclusion	19-83
	[3]	Permissive Exclusion (42 U.S.C. § 1320a-7(b))	19-84
		[a] Bases for Exclusion	19-84
		[b] Term of Exclusion	19-85
		[c] Individual Liability	19-85
		[d] Fraudulent Behavior	19-86
	[4]	Overpayments	19-87

WHITE COLLAR CRIME

CHAPTER 20

[RESERVED]

CHAPTER 21

Computer Crime in the 21st Century

§ 21.01	Introduction	21-3
	[1] What Is Computer Crime?	21-3
	[2] How Frequent Is Computer Crime?	21-7
§ 21.02	Government Response to Computer Crime	21-10
	[1] Government Agencies	21-10
	[a] Department of Homeland Security	21-11
	[b] Federal Bureau of Investigation	21-11
	[i] The Internet Crime Complaint Center	21-12
	[ii] Cyber Action Team	21-12
	[iii] National Cyber Forensics & Training Alliance	21-13
	[c] Department of Justice	21-13
	[i] Computer Crime and Intellectual Property Section	21-13
	[ii] United States Attorney's Offices' Efforts	21-14
	[iii] National Cybersecurity and Communications Integration Center	21-15
	[iv] Computer Hacking and Intellectual Property Units	21-15
	[d] Federal Trade Commission	21-16
	[e] Federal and State Joint Task Force	21-16
§ 21.03	Computer Fraud and Abuse Act	21-18
	[1] Background and Key Definitions	21-18
	[a] Protected Computer	21-18
	[b] Without or in Excess of Authorization	21-19
	[2] Substantive Prohibitions—18 U.S.C. § 1030(a)	21-21
	[a] Unlawful Access and Transmission of Government Information	21-21
	[b] Obtaining Information from Protected Computers	21-22

TABLE OF CONTENTS

	[c]	Unlawful Access of a Government Computer	21-24
	[d]	Fraud or Theft Through a Protected Computer	21-24
	[e]	Transmission of Programs, Information, or Commands to Cause Damage	21-24
	[f]	Trafficking in Computer Passwords	21-26
	[g]	Computer Extortion	21-26
	[h]	Attempt	21-27
§ 21.04		Electronic Communications Privacy Act	21-28
	[1]	Introduction to the ECPA	21-28
	[2]	Interception of Communications Versus Retrieval of Stored Electronic Communications	21-29
	[a]	Distinction Between Types of Electronic Communications	21-29
	[b]	Courts Interpreting the Distinction Between Transmitted and Stored Communications	21-30
	[3]	Interception of Electronic Communications	21-32
	[a]	Interception by the Government of Electronic Information	21-32
	[b]	Exceptions to the Prohibition Against Interception by Private Individuals	21-34
	[4]	Unlawful Access of Stored Electronic Communications—18 U.S.C. § 2701 <i>et seq.</i>	21-35
	[a]	Exceptions Under 18 U.S.C. § 2701	21-36
	[b]	Punishment for Violations of 18 U.S.C. § 2701	21-36
	[5]	Voluntary Disclosure of the Contents of Electronic Communications	21-37
	[a]	Permitted Voluntary Disclosures	21-37
	[b]	Disclosures to Private Individuals or Entities	21-39
	[6]	Required Disclosure of the Contents of Electronic Communications to Government Entities	21-40
	[a]	Contents of Communications in Storage Fewer Than 180 Days	21-40
	[b]	Contents of Communications in Storage More Than 180 Days	21-40

WHITE COLLAR CRIME

	[7]	Disclosure of Informational Records Concerning Stored Electronic Communications	21-41
	[8]	Private Rights of Action and Limitation of Liability for the Disclosure of Information.	21-42
	[9]	Proposed Amendment to the ECPA	21-42
§ 21.05		Other Statutes	21-44
	[1]	Economic Espionage Act.	21-46
	[2]	Defend Trade Secrets Act	21-47
	[3]	National Stolen Property Act	21-49
	[4]	Mail and Wire Fraud	21-49
	[5]	State Laws	21-50
§ 21.06		Second Circuit Case Law Illustration of the Economic Espionage Act, the National Stolen Property Act and the Computer Fraud and Abuse Act	21-53

CHAPTER 22**Copyright Infringement, Trademark Counterfeiting
and Intellectual Property Crime**

§ 22.01		Introduction	22-4
	[1]	Trademark Overview	22-5
	[2]	Copyright Overview.	22-6
§ 22.02		State Statutes.	22-7
§ 22.03		The Trademark Counterfeiting Act	22-9
	[1]	The Elements	22-10
	[a]	The Defendant Trafficked or Attempted to Traffic in Goods, Services, Labels, Documentation, or Packaging	22-10
	[b]	The Trafficking, or Attempt to Traffic, was “Intentional”	22-12
	[c]	The Defendant Used the “Counterfeit Mark” on or in Connection with Such Goods, Services, Labels, Documentation, or Packaging	22-13
	[i]	Spurious Mark	22-13
	[ii]	Trafficking.	22-14
	[iii]	Identical.	22-14
	[iv]	Registration Requirement.	22-15
	[v]	Likelihood of Confusion	22-16

TABLE OF CONTENTS

	[d] The Defendant Knowingly Used the Counterfeit Mark	22-16
[2]	Proof Not Required	22-17
[3]	Defenses	22-18
	[a] In General.	22-18
	[b] Defenses in the Trademark Act.	22-18
	[c] Defenses Incorporated From the Lanham Act	22-20
	[i] Defenses Unrelated to the Victim’s Conduct.	22-21
	[ii] Defenses Based Upon the Victim’s Conduct.	22-22
	[iii] Defenses in Equity	22-23
[4]	Jury Instructions	22-24
[5]	Penalties	22-26
	[a] Trends in Law Enforcement	22-26
	[b] Statutory Maximums	22-26
	[c] Sentencing.	22-27
	[i] Individuals	22-28
	[ii] Corporations	22-30
	[d] Forfeiture	22-30
	[e] Restitution.	22-31
[6]	Trademark Counterfeiting and Other Criminal Statutes	22-32
§ 22.04	Criminal Copyright Infringement— Introduction.	22-33
§ 22.05	Criminal Copyright Infringement	22-35
[1]	The Elements	22-37
	[a] Existence of a Valid Copyright.	22-38
	[b] “Infringement” of Copyright by Defendant	22-39
	[i] Statutory Exceptions to Infringement	22-39
	[ii] Proving Infringement.	22-42
	[c] Willfulness	22-43
	[d] Alternative Elements	22-44
[2]	Defenses—Generally	22-45
[3]	Jury Instructions	22-46
[4]	Penalties	22-47
	[a] Statutory Maximums	22-47
	[b] Sentencing	22-48
	[c] Forfeiture and Destruction of Copies	22-48
	[i] Criminal Forfeiture.	22-48
	[ii] Civil Forfeiture.	22-49
	[d] Restitution.	22-49

WHITE COLLAR CRIME

	[5]	Copyright Infringement and Other Criminal Statutes	22-50
§ 22.06		Pseudo-Copyright Statutes	22-51
	[1]	Trafficking in Counterfeit Labels, Illicit Labels, or Computer Program Documentation or Packaging.	22-51
	[a]	Elements	22-55
		[i] Trafficking.	22-55
		[ii] Counterfeit Labels, Illicit Labels, or Counterfeit Documentation or Packaging.	22-55
		[iii] Affixed to, Enclosing, or Accompanying, or Designed to be Affixed to, Enclose, or Accompany Designated Work.	22-56
		[iv] “Knowing”	22-57
		[v] Federal Jurisdiction	22-57
	[b]	Penalties	22-57
	[2]	Unauthorized Fixation of and Trafficking in Sound Recordings and Music Videos of Live Performances.	22-58
	[a]	Elements	22-59
	[b]	Penalties	22-60
	[3]	Digital Millenium Copyright Act	22-60
	[a]	Circumvention of Copyright Protection Systems	22-61
		[i] Prohibitions.	22-61
		[ii] Exceptions and Defenses	22-63
	[b]	Integrity of Copyright Management Information	22-66
		[i] Elements	22-67
		[ii] Exceptions and Defenses	22-67
	[c]	Penalties	22-68
	[4]	Fraudulent Copyright Notice and Removal of Such Notices.	22-68
	[a]	Elements	22-69
	[b]	Defenses	22-69
	[c]	Penalties	22-69
	[5]	False Representation in Application to Register Copyright	22-69
	[a]	Elements	22-70
	[b]	Penalties	22-71

TABLE OF CONTENTS

xxvii

Appendices

APPENDIX A:	A-1
APPENDIX B:	A-39
APPENDIX C:	A-49
APPENDIX D-I:	A-57
APPENDIX D-II:	A-79
APPENDIX E:	A-83
INDEX	I-1