

THE AM LAW LITIGATION DAILY

Litigators of the Week: Zuckerman Spaeder Gets a Post-Trial Acquittal for Doctor Accused of Fraudulent Billing for COVID Tests

Just before Christmas, a federal judge in Maryland granted an acquittal motion filed by Gregg Bernstein, Marty Himeles and Samantha Miller of Zuckerman Spaeder, overturning the healthcare fraud conviction of their client, Dr. Ron Elfenbein.

By Ross Todd

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Last year federal prosecutors in Maryland secured the conviction of Dr. Ron Elfenbein, an emergency room doctor and part owner of an urgent care clinic and COVID testing sites, on charges that his clinics overbilled Medicare and insurance companies for testing services. With the government alleging there were more than \$15 million in false and fraudulent claims, Elfenbein faced the prospect of significant prison time.

But just before Christmas, Elfenbein's defense lawyers—**Gregg Bernstein**, **Marty Himeles** and **Samantha Miller** of **Zuckerman Spaeder**—won their bid for a post-trial acquittal. Chief Judge James Bredar found that the government hadn't proven the way Elfenbein's testing locations coded their services was false beyond a reasonable doubt—especially in light of the shifting and ambiguous coding guidance issued during the pandemic. "The 'common sense' conclusions the government asks the jury (and now the court) to draw amount to speculation, and the court cannot allow a verdict to stand when it is based on speculation masked as common sense," he wrote.

Bernstein answered the Litigation Daily's questions about the case on behalf of the defense team.



Courtesy photos

L-R: **Gregg L. Bernstein**, **Martin S. Himeles** and **Samantha A. Miller** of **Zuckerman Spaeder**.

Lit Daily: Who is your client and what was at stake for him?

Gregg Bernstein: Our client is Ron Elfenbein, a 49-year old emergency room physician, who also was the part-owner of an urgent care center and affiliated facilities. He was charged with billing patient office visits in connection with COVID tests to Medicare and private insurance companies at reimbursement

rates allegedly higher than what was permitted under the applicable billing codes. Because the government contended that these billing practices caused millions of dollars of overpayments—had the conviction stood—he would have faced multiple years in prison; millions of dollars in restitution, forfeiture, and fines; separation from his wife and four young children; and the loss of his medical license.

How did this case come to you and the firm?

Dr. Elfenbein was referred to us by several lawyers who were familiar with Zuckerman Spaeder's reputation and experience defending health care practitioners and other professionals in white-collar criminal prosecutions.

Who is on the defense team and how have you divided the work?

In addition to myself, the defense team consisted of my partner and long-time friend, **Martin Himeles**, along with an associate in the firm, **Samantha Miller D'Ann Vermilye**, our paralegal extraordinaire, who has been with me in nearly all of my significant trials, kept the trains running on time with her usual extraordinary attention to detail. I handled the opening statement, closing argument, and the examination of witnesses, including our client; Marty handled the examination of the government's expert and other witnesses and our key expert (which proved to be crucial in the judge's decision reversing the conviction); and Samantha examined a number of witnesses and drafted many of the motions, including the Rule 29 Motion for Judgment of Acquittal and Rule 33 Motion for New Trial that the Court granted.

How difficult was this case to try to a jury? Were you surprised that they convicted your client on all counts?

All criminal cases are difficult to try before a jury. As many practitioners know, the presumption of innocence is a bit of a fiction, and indeed, some might argue that in practice, there is a presumption of guilt. Our experience suggests that many juries believe that if the government has charged a person with a crime, the person must be guilty of something. This case was particularly difficult because it required an understanding of ambiguous and complicated billing

guidelines that were difficult to apply, especially during a once-in-a-lifetime pandemic. It was much more challenging for a jury to understand these complex and often counterintuitive rules than to understand that the total payments to our client's urgent care facilities, which the government emphasized at every opportunity, were very substantial.

This case was different from other prosecutions in which the government asks juries to follow the rules and regulations. Here, the government attempted to circumvent the absence of credible expert testimony by arguing that the jury should disregard the complex billing rules and simply rely on common sense. The challenge for us was to emphasize that reimbursement is based on rules, not the jury's independent judgment, untethered to the controlling rules, concerning what they think would make sense. As the court ultimately found, the complex and changing rules that our client was required to follow were not necessarily based on common sense, and the "common sense conclusions" that the government asked the jury and the court to draw were "based on speculation masked as common sense."

In his decision, Chief Judge Bredar wrote that you "utterly impeached" the government's medical coding expert witness. How did you go about discrediting him?

The cross-examination was based on hundreds of hours of preparation that included a deep dive into the coding rules that health care providers use when submitting claims to government and private insurers, the government's regulations and guidance changing these rules during the pandemic, and coding guidance from third-party sources, with the assistance of our own expert, who was invaluable. We were able to establish that the government's expert was unfamiliar and testified inconsistently with binding rules promulgated by the government that made important changes to coding rules and public health guidance for health care providers during the pandemic—something the expert repeatedly admitted on cross-examination. We also established that the expert never reviewed the patient records for the individual patients who were the basis for the substantive counts in the superseding indictment.

Your client chose to testify. I know a lot of criminal defense lawyers are reluctant to let their clients take the stand and be subjected to a prosecutor's cross-examination. What's your philosophy on that front?

There is an old saying that "if you put your client on, you're losing." I believe, however, that each case is unique, and the decision whether to put your client on the stand should be based on the facts of the particular case. Here, because specific intent to defraud was one of the elements of the offense, we thought it was important for our client to explain to the jury his thought process and rationale in determining what he believed was the appropriate coding level for the patient encounters, particularly given our strong belief that our client was innocent—and very credible—and his coding decisions were supported by the applicable coding rules and guidance.

What stands out from the argument on your motion for judgment of acquittal?

Our central argument was that the government utterly failed to establish that the billing codes submitted (which were the alleged false statements in the superseding indictment) were incorrect. We were able to show that the coding rules were ambiguous at best and were subject to broad interpretation, and that there was substantial support for the codes selected by our client. Given this backdrop, the judge agreed with us that our client's interpretation was reasonable and that the government did not prove otherwise. We were particularly impressed by the judge's careful and detailed analysis of the arguments raised in our motions.

What can defendants in your client's position take from this outcome?

Health care practitioners must ensure that there is a sound basis in the controlling rules for their decisions as to which codes to use when submitting claims for reimbursement, including by having robust controls such as certified medical coders who review claims before they are submitted. Doing so may help them avoid the unwarranted and unjustified scrutiny our client faced, and it will certainly

protect them if they find themselves subject to such scrutiny.

What do you hope the government takes away from this case?

We felt that there was a rush to judgment by the government during its investigation that manifested itself throughout the case. The indictment was brought based on very little investigation, and without careful analysis of the applicable coding rules. The superficial nature of the case came through at trial, and fortunately for our client, was recognized by the court.

Before the government makes a prosecutorial decision, prosecutors must consider the complexity of the governing regulations and guidance and recognize that criminal sanctions are reserved for conduct that clearly and unambiguously violates binding rules, and that is carried out intentionally and willfully. Conduct based on a reasonable interpretation of ambiguous rules, even if later second-guessed by government investigators, is not a crime—especially when the government's second-guessing is based on the guidance of misinformed experts, as occurred here. Facts such as the volume of claims health care providers submit and the amounts they are paid may attract the government's attention, but they fall short of what the government must require before it pursues criminal sanctions.

What will you remember most about this trial and this outcome?

Two things: first, the elation of our client and his family when we told them that the judge had granted our motion for judgment of acquittal and that he was now a free man. It is impossible to overstate the stress and turmoil an individual faces when confronted by the full force of the government. It is extremely gratifying that justice was served in this case. Our client can return to his professional career caring for his patients and can continue to raise his children with his wife. Second, having the great fortune to try this case with superb lawyers and colleagues is an experience I will always cherish.