



## Frank A. Libby, Jr.

**Partner**

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 [falibby@lhbmlegal.com](mailto:falibby@lhbmlegal.com)

## About Frank Libby

Over the course of his 35-plus years as a trial attorney, including service as an Assistant U.S. Attorney for the District of Massachusetts, Frank has tried more than 40 jury trials to verdict, and has represented numerous clients whether as a party or witness - at bench (judge only) trials. Frank appears frequently in federal and state courts and before regulatory and administrative agencies, on behalf of public companies, corporate executives and private individuals drawn into government investigations and related civil and/or criminal proceedings. In particular, Frank's practice regularly includes counseling and representing clients appearing at government (or agency) interviews, before grand juries and in open court, in matters brought by (among others) the U.S. Department of Justice, the Massachusetts Attorney General's Office and the Securities and Exchange Commission. For the past twenty years, Frank's practice has been virtually exclusively dedicated to defending individuals suspected of involvement in, or actually charged with federal white collar crimes.

Frank has an expertise in minimizing corporate exposure to government regulators, where there may be reason to suspect possible senior management or other employee misconduct. He also has significant experience in configuring and conducting confidential internal investigations on behalf of public or privately-held companies, and other business entities, where employee wrongdoing exposes the client to both governmental and private scrutiny and possible (fines and penalties; debarment and other injunctive) sanctions, including criminal and shareholder action.

Frank has both prosecuted and successfully defended companies and individuals charged with (among many others): false claims for governmental payment brought under the Federal False Claims Act; mail and wire fraud; tax fraud; money laundering and structuring offenses; criminal anti-trust; Federal pension fund fraud; health care (Medicare/Medicaid; adulteration and misbranding/off label promotion) fraud; telemarketing fraud; labor racketeering ; securities fraud and corresponding charges of conspiracy to commit these offenses.

#### Education

Suffolk Law School, J.D.,  
*cum laude*  
U.S. Military Academy at  
West Point

#### Bar Admissions

Massachusetts

#### Memberships

Boston Bar Association  
American Bar Association

#### Court Admissions

U.S. Supreme Court  
U.S. Court of Appeals,  
First Circuit  
U.S. District Court,  
Massachusetts

#### Seminars and Panels

## Representative Cases:

- On July 20, 2016, a federal Boston jury acquitted Libby Hoopes Brooks & Mulvey's medical device company executive client of all 14 felony fraud charges brought by the government against him. In particular, the jury unanimously acquitted his client (and his co-defendant) of the single conspiracy count, three counts of wire fraud and 10 counts of distributing adulterated and misbranded medical devices, "with intent to defraud or mislead."

The *Wall Street Journal* quoted Frank Libby: "After five years of investigation and a six week trial, the jury flatly rejected the government's core fraud and conspiracy theories."

*Law 360* reported: "Libby... said that even after the jury verdict Wednesday, 'the fight is far from over. It's a case that could reverberate in the medical device field.' Appeals issues will include due process and First Amendment concerns, Libby said. Defense lawyers argued that because of the First Amendment, the convictions could not be based on truthful, non-misleading statements about the off-label use of the implantation device. 'The takeaway here is that executives in the healthcare field or the device fields are looking at ... these confusing, chaotic regulations which require no proof of wrongful intent,' Libby said. 'That's a major concern. We're not done!'"

- Secured dismissal - after a federal jury trial (United States v. Stryker Biotech, et als) was underway in the District of Massachusetts -- of all felony health care fraud and conspiracy charges brought against his client, a Regional (spinal implant medical device) Sales Manager.

## Frank also:

- Secured dismissal of all federal criminal charges - including embezzlement, mail and ERISA (pension) fraud, and related conspiracy - brought against a trucking company executive in connection with high-profile indictment involving union officials;
- Successfully represented an Investment Advisor (so-called "'40 Act") company in connection with extensive (parallel) federal grand jury and U.S. Securities and Exchange Commission proceedings, involving "soft dollar" brokerage allocation issues;
- Successfully represented a manager of a financial division of a "Fortune 100" company, in connection with an SEC-Boston "revenue recognition" investigation (SEC declined to recommend enforcement action);
- Obtained a "Decline to Prosecute" decision from the U.S. Attorney's Office while representing a supervisor physician-target of a U.S. Department of Health and Human Services-Office of Inspector General health care investigation (Medicare claims reimbursement);
- Obtained a "Decline to Prosecute" decision from the U.S. Attorney's Office on behalf of a senior mutual fund executive in connection with a federal investigation into claims of securities fraud and embezzlement involving several millions of dollars; thereafter, successfully negotiated (pre-trial) resolution of all SEC and FDIC enforcement action claims;
- Represented a large-scale New Bedford manufacturing company, and its president-owner, in connection with resolution of federal criminal charges stemming from a March, 2007 "worksite enforcement" raid, conducted by Immigration and Customs Enforcement Agency of the Homeland Security Department;
- Obtained a "Decline to Prosecute" from the U.S. Attorney's Office on behalf of a management consultant (a Permanent (so-called "Green Card") U.S. Resident)-client, in connection with a federal grand jury investigation into claims of kickback and money laundering conspiracy, involving contracting undertaken for a large-scale condominium association;
- Successfully represented a nationally-known institutional food distributor in connection with an investigation, conducted by the U.S. Department of Justice, into "anti-dumping" activities across the nation; brought client into full compliance with import and tariff laws; no loss of licensing or interruption of business;
- Conducted an internal investigation on behalf of a major municipal school department in connection with senior executive wrongdoing, and brought the matter to a successful close;
- Obtained "Pre-Trial Probation" (requiring no admission of guilt and leaving no permanent record) on behalf of a supervisor-target of a Medicare/federal Grand Jury "False Claims Act" investigation into payment received for specialty health care services;
- Successfully defended an elected official in connection with highly-sensitive claims of wrongdoing (civil Complaint against the client was withdrawn within days of appearance in the matter);• Successfully represented executives and managers of nationally known health care providers in connection with various federal grand jury investigations into Medicare billings, including so-called "false statement;" "pay to play;" and "off label promotion" activities.
- On July 20, 2016, a federal Boston jury acquitted Libby Hoopes Brooks & Mulvey's client, Patrick Fabian, of all 14 felony fraud charges brought by the government against the medical device executive. In particular, the jury unanimously acquitted Fabian (and his co-defendant William Facticeau) of the single conspiracy count, three counts of wire fraud and 10 counts of distributing adulterated and misbranded medical devices, "with intent to defraud or mislead."

The *Wall Street Journal* quoted Fabian lead counsel and Libby Hoopes Brooks & Mulvey partner Frank Libby: "After five years investigation and a six week trial, the jury flatly rejected the government's core fraud and conspiracy theories."

Importantly, proof at trial made clear that no injuries were associated with use of the implantation device, widely used by surgeons to successfully treat patients with chronic sinus problems.

Mr. Fabian had been Vice President of Sales, while Mr. Facticeau was CEO at medical-device maker Acclarent, a unit of Johnson & Johnson. In April 2015, a federal grand jury indicted Fabian and Facticeau on

felony charges including conspiring to market a sinus-opening device for an "intended use" not approved by the U.S. Food and Drug Administration, and conspiring to commit securities fraud by not disclosing the alleged conduct to Johnson & Johnson when it acquired Acclarent in 2010 for \$785 million.

In addition to the felony counts, the indictment included 10 "strict liability" misdemeanor misbranding and adulteration counts under the Food, Drug & Cosmetic Act (FDCA). These counts required no proof of any wrongful intent - indeed, required no evidence that the defendant even knew of any wrongful conduct - in order to convict. Under the law governing these counts, the jury could deem Facteau and Fabian "responsible corporate officers" and thus hold them individually liable for lack of filing premarket notification to the U.S. Food and Drug Administration of its intended use.

With these lowest-of-threshold counts available as part of the overall indictment, the jury specifically rejected the government's theories that the device's labeling was false and misleading, and that the device lacked "adequate directions for use" but ultimately convicted the two executives for the misdemeanors on this "strict liability" theory.

*Law 360* reported: "Libby... said that even after the jury verdict Wednesday, 'the fight is far from over. It's a case that could reverberate in the medical device field.' Appeals issues will include due process and First Amendment concerns, Libby said. Defense lawyers argued that because of the First Amendment, the convictions could not be based on truthful, non-misleading statements about the off-label use of the Stratus. 'The takeaway here is that executives in the healthcare field or the device fields are looking at ... these confusing, chaotic regulations which require no proof of wrongful intent,' Libby said. 'That's a major concern. We're not done!'"

The Libby Hoopes Brooks & Mulvey trial team included: Frank A. Libby Jr., Kristen A. Kearney, Daniel C. LaPenta and Brian J. Sullivan of Libby Hoopes Brooks & Mulvey PC.

Facteau is represented by Reid Weingarten, William Hassler and Jessica Urban of Steptoe & Johnson LLP, Michael J. Pineault of Clements & Pineault LLP and Leo Cunningham and Lisa Davis of Wilson Sonsini Goodrich & Rosati PC.

In recognition of the foregoing, the *American Lawyer's* "AmLaw Litigation Daily" recently named Libby and Weingarten "Litigators of the Week."

The case is U.S. v. Facteau et al., case number 1:15-cr-10076, in the U.S. District Court for the District of Massachusetts.

Frank is a 1982 *cum laude* graduate of Suffolk Law School, where he served as an Editor of the *Suffolk Law Review*. Thereafter, Frank served as law clerk to the Honorable Richard B. Kellam, Senior U.S. District Judge for the Eastern District of Virginia. On his graduation, in 1974, from the United States Military Academy at West Point, Frank was appointed a commissioned officer in the U.S. Army and served as a military Air Rescue helicopter pilot on active duty, both overseas and stateside, and with the Massachusetts National Guard.

Frank is a member of the Boston Bar Association and the American Bar Association (including the White Collar Crime Section), and is admitted to practice before all courts and agencies of the Commonwealth of Massachusetts, the U.S. District Court for the District of Massachusetts, the First Circuit Court of Appeals and the U.S. Supreme Court.

Frank has earned Martindale-Hubbell's highest (AV) rating, and has been listed in *Woodward/White's The Best Lawyers in America* every year since 2008.

Frank has been invited to share his federal criminal trial experiences (including his defense of felony health care fraud charges) at various symposia hosted by the Boston Bar Association, Northeastern Law School, and major pharmaceutical and medical device companies. He has made numerous guest appearances, on radio and television, commenting on high profile cases and legal issues in the news.

## Seminars and Panels

- October 30, 2018. Panel Member: "Theranos Corp. A Case Study: Where Was the Board of Directors?"
- March 29, 2018. Panel Member: "The Board's Duties in Response to Allegations of Sexual Harassment in the Workplace"
- May 21, 2009. Panel Member: "Defending the Director's Deposition." [More]
- May 28, 2008. Panel Member: "The Board's Role in Crisis Management." [More]
- April 16, 2008. Panel Member: "Board Responsibility When Communicating with the SEC." [More]
- February 6, 2008. Moderator: Boston Bar Association. "The Subprime Mortgage Mess: Is It Coming? Is It Already Here?" [More]
- June 19, 2007. Panel Member: Board Leaders Seminar. "Crisis Management: Legal Considerations for the Board." [More]
- October 19, 2006. Moderator. ABA Regional White Collar Crime Young Lawyers Subcommittee. "Nuts and Bolts of Qui Tam Actions: Perspectives from the Relator, Government and Defense." [More]