

# Chapter 52

## Crimes by Health Care Providers

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Health Care Frauds  
Prosecutorial Criteria for Health Care Frauds

Understanding Criminal Law

The vast majority of health care providers are honest and upright practitioners of the healing arts. There is unfortunately a small number of dishonest physicians, pharmacists, pharmaceutical manufacturers, therapists, and a variety of health care facilities that through fraud, deceit and outright theft besmirch the reputation of the many in the health care field. It is among this group that there appears to be virtually no limit to the ingenuity and ease for a massive bilking of federal, state, and private health care providers. This chapter addresses the most egregious instances of health care fraud and gives a brief overview of the applicable criminal laws and punishment incurred by some of these culprits.

Accurate estimates of private and public health care expenditures are almost impossible to obtain, but the March 2006 issue of *Consumer Reports* gives an estimate of \$1.9 trillion in 2004.<sup>1</sup> The United States Treasury estimates 2004 public health care expenditures at some \$380 billion annually.<sup>2</sup> In addition to the Federal Bureau of Investigation (FBI), health care frauds are also investigated by a variety of agencies, which include, among others, the U.S. Department of Health and Human Services and similar state agencies, the Internal Revenue Service (IRS), postal inspectors, state Medical Fraud Control Units, state attorney generals and district attorneys, and a host of other law enforcement agencies, professional regulatory agencies, and private health care insurers. Health care frauds are primarily prosecuted under a variety of statutes, which include, among others, both public and private health care plans. Penalties under these statutes include imprisonment, civil and criminal fines, penalties, restitution and revocation of professional licenses, and disqualification from federal and private provider reimbursements. The most potent laws used in the prosecution of health care frauds include the False Claims Act;<sup>3</sup> anti-kickback statutes;<sup>4</sup> mail and wire fraud statutes;<sup>5,6</sup> a variety of conspiracy laws;<sup>7</sup> false statement laws;<sup>8</sup> criminal and civil racketeering statutes (RICO);<sup>9</sup> submission of fictitious/fraudulent claims laws;<sup>10</sup> the Civil Monetary Penalties Act; the Physicians Self Referral Act; and a host of federal and state laws and regulations.

The September 2005 Joint Report by the U.S. Department of Health and Human Services and the Department of Justice<sup>11</sup> is the most comprehensive summary of investigative and prosecutorial activities and recovery by federal agencies. During fiscal year 2004, the last full year for which comprehensive data are available, the report shows recoveries of \$1,756,327,134. This figure includes criminal fines,

forfeitures, civil settlements, judgments, and administrative penalties, but excludes restitutions, which vary widely. These recovered funds were deposited with the Department of the Treasury and the Centers for Medicare and Medicaid Services, transferred to other federal agencies administering health care programs, or paid to affected private individuals. Since this program was started in 1997, recoveries paid to the Centers for Medicare and Medicaid Services exceeded \$7.3 billion. These figures do not include forfeitures obtained in numerous health care fraud cases prosecuted under federal mail and wire fraud statutes, other related offenses, and/or fines and forfeitures by the states. The FBI estimates health care frauds, involving doctors, pharmacists, medical equipment companies, and other health-related frauds, at approximately \$100 billion a year.<sup>11</sup> Enforcement actions by U.S. attorneys in 2004 included 1002 new criminal fraud investigations involving 1685 potential defendants, while an additional 1626 health care fraud criminal investigations were pending involving 2361 potential defendants. A total of 459 federal defendants were convicted for health-related crimes while an additional 1362 civil health care fraud federal investigations were initiated.<sup>12</sup>

To combat health care frauds, the federal government and the states have created new units specializing in health care fraud and have embarked on vigorous programs of criminal prosecutions, example setting, and fraud prevention. The most notable of such new units are state attorney general Medical Fraud Control Units (MFCUs). Local and state prosecutors also are increasingly deputized as special assistant U.S. attorneys, enabling them to more fully enlist the aid of federal law enforcement and to prosecute their cases both in federal and state courts. In addition to health care frauds, these prosecutorial activities also focus heavily on many aspects of drug abuse. Boards licensing health care professionals also are allowing many of these special prosecutors to press for suspensions and revocations of physicians', nurses', and pharmacists' licenses in conjunction with criminal proceedings.

### HEALTH CARE FRAUDS

#### Billing Frauds

In most instances, criminal prosecutions for health care fraud usually involve fraudulent billing for services and equipment, all or part of which is paid by the federal government.

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Physicians should also be aware that criminal responsibility may arise from any material false statements made to the federal or state governments and to private insurance companies. Sending false and fraudulent statements by mail, fax, or e-mail also constitutes a federal crime, which may be prosecuted separately under mail and wire fraud laws. Conviction for such frauds generally results in imprisonment for felonies (more than one year imprisonment), criminal fines, restitution, suspension or revocation of medical licenses, and prohibition against participating in federal health care programs. Medical fraud also may involve misrepresentations of certain therapies, other treatments, or untested remedies that allegedly produce miraculous cures. Criminal prosecutions are often vigorously pursued against physicians who offer these false cures to patients either verbally or through the mail. When criminal convictions are difficult to obtain, prosecutors usually succeed in getting professional license revocations or, at least, suspensions or revocations of narcotic licenses. Such proceedings, although not criminal in nature, can be professionally devastating and require a much lesser burden of proof than criminal prosecutions. The Inspector General of the Department of Health and Human Services is now actively pursuing health care frauds by focusing mostly on revocations and suspensions of federal reimbursements. Because these revocations and disqualifications from federal reimbursements range in the hundreds of millions of dollars and can last for many years, they are a strong deterrent to both institutions and individual practitioners.

Cases regarding “billing errors” usually center on massive, flagrant, and pervasive fraudulent billing and mail and wire fraud. These frauds are usually perpetrated on numerous patients, insurers, and the government with the clear intent to rip off the health care system through “creative billing” over an extended period of time. These “billing error” cases primarily include charges for services that were never performed; repetitious patterns of unnecessary procedures, hospitalizations, or both; giving and receiving of kickbacks, mostly for purchase of motorized wheelchairs and other equipment, bribes, or rebates; and false representations for certification of hospitals, nursing homes, intermediate care facilities for the mentally retarded, and home health agencies. Most frequently, individual physicians are charged with fraud for using higher billing codes or for “unbundling” Current Procedural Terminology (CPT) codes. Each CPT code specifically describes the procedure performed. When a physician uses a higher code (called *upcoding*), he or she is misrepresenting what was actually done and is billing and getting paid for services that were not performed. Patient visits under the coding system are categorized as brief, limited, intermediate, comprehensive, and extended. These categories are based on the amount of time spent and the services performed. If a physician charges for 30 minutes for writing a prescription and/or designates it as an “extensive” consultation instead of a “minimal” consultation, the fraud is evident. Hospital records or office notes also indicate what else the physician did. If he or she consistently used higher or highest codes, the criminal *modus operandi* will be obvious. Testimony that each case was very complex

and required the physician to spend an inordinate amount of time with patients is easily refuted. When a physician is “unbundling” codes, he or she is double-billing for services performed. The physician is paid once for the whole job (called a *global fee*, which includes all the services rendered) and a second time for the specific things the physician did. The defense of making “mistakes” in using the incorrect codes is not very credible when it can be shown that the same mistakes were made over and over again on numerous patients and always in favor of the physician. Billing for treatment given to dead patients is increasingly picked up by computers that record the date and time of death.

Other fraudulent transactions included double-billing for fees as attending physician and as a consultant on the same patient at the same time. Another fraud involves billing separately for different medications prescribed to the same patient because the physician was already paid for his or her diagnosis and treatment, which includes prescribing. In virtually all such cases of Medicare and Medicaid fraud the courts have ordered imprisonment, full restitution, civil and/or criminal fines, while medical boards have imposed suspension and/or revocation of licenses. A physician who is prosecuted in a criminal case may subsequently be left defenseless in a civil action because factual matters litigated in the criminal action will act as a bar to their re-litigation in civil action where the heavier burden of proof in a criminal case has already been met.

Medicare and Medicaid investigators hired by private insurance companies now include hundreds of retired FBI agents. Insurance beneficiaries and patients are encouraged to report what they perceive as fraud. What often passed as a “clerical error” in the past, is now increasingly viewed as a crime. The medical masterminds of financial fraud are also being sanctioned with losses of medical licenses and fines far exceeding the moneys obtained through fraud. Another focus of criminal investigations includes doctors, motivated by greed, who inappropriately prescribed costly procedures, and/or overbilled for actual and imagined procedures. In the past, private insurance companies reported spending approximately \$1 billion annually on such investigations. The results of these investigations are usually referred to federal and state agencies for prosecution and to licensing agencies for suspension and/or license revocation. Criminal wrongdoers can also be sued by individual victims by filing so-called *qui tam* lawsuits whereby the victims can recover substantial amounts of money for reporting frauds.<sup>13</sup>

### Common Fraud Schemes

The essence of health care crimes is fraudulent billing for services, equipment, and medications that were neither provided nor received by the purported claimants. In many instances, they were different from and/or inferior to what was paid for. Fraudsters often use other people’s Medicare cards to get medical care, supplies, or equipment, and frequently are billing Medicare for home medical equipment after it has been returned, or continue billing for services after the patient died. They also seek payment for laboratory tests that were never performed, medical services, including

some major surgeries, that were not performed or needed, or actually harmed the patient; testing or screening for nonexistent problems; or billing for unnecessary non-emergency ambulance services. The perpetrators of these crimes range from some of the largest corporations to unscrupulous physicians and nursing home operators to telemarketing solicitors and con artists representing themselves as employees of hospitals, insurance companies, or even governmental agencies. Since a large number of these frauds are perpetrated over the phone, the FBI recommends that individuals ask for written materials about any offer, do not pay in advance for services, never send money or give out personal information such as credit card numbers and expiration dates, dates of birth, or Social Security numbers, and, if possible, record the telephone numbers and report them to law-enforcement agencies.<sup>14</sup>

### Typical Crimes and Punishment

Some of the most recent and largest frauds, reported by the Department of Justice in the September 2005 report,<sup>15</sup> included, among others, large pharmaceutical companies, e.g., Pfizer, a division of Warner-Lambert Company, which in 2004 paid \$430 million for fraudulent promotion of the drug Neurotin, and another criminal fine of \$240 million after pleading guilty to other federal Food, Drug and Cosmetic Act violations, and a civil fine of \$83.6 million, plus interest, for losses to the federal portion of Medicaid programs. The company also paid \$68.4 million for losses to state Medicaid programs to resolve other civil liabilities. In addition, Warner-Lambert paid an additional \$38 million to state consumer protection agencies for harm caused to consumers. Schering Sales Corporation pleaded guilty and paid \$5 million for paying kickbacks to keep the drug Claritin on an HMO formulary (the list of drugs that the HMO covers for its beneficiaries). Schering-Plough also paid \$293 million to the United States, 50 state Medicaid programs, and the Public Health Service for failing to report the company's true best price for the drug Claritin to Medicaid. In addition, Schering-Plough paid the United States and the state of Texas \$27 million for false pricing of its generic line of allergy and respiratory drugs.<sup>16</sup>

### Pharmaceutical Misbranding and Distribution Frauds

Some 150 patients, mostly paraplegics or quadriplegics, paid up to \$10,000 to Nampa, an Idaho company, for treatment based on false advertising claims that the drug Neuralyn was 85% to 95% effective and would allow them to move or even walk by regrowing nerve cells. The company falsely represented that its clinics were staffed by medical doctors with training in biochemistry and that Neuralyn had undergone clinical studies and that a patent application and FDA approval were pending. Nampa charged \$300 to \$500 for a vial of Neuralyn, which cost them only \$15. Two Nampa defendants were sentenced to 51 months in prison and more than \$800,000 in restitution. In Virginia, 11 defendant physicians were convicted for writing prescriptions for

individuals with whom they did not have a legitimate doctor-patient relationship. The U.S. Department of Justice reported that other than on-line questionnaires, these physicians did not have any contact with the people ordering the medication, and did not monitor, or provide any means to monitor, medication response. Two pharmacists in Texas were convicted for filling 38,000 Internet prescriptions for controlled substances with roughly \$5.6 million in pharmacy income. Neways, Inc., a distributor of Bio-Gevity, a supposedly rejuvenating prescription medication, was given a \$500,000 criminal fine and forfeited \$1.25 million. Adult misuse of this drug created a risk of developing enlargement and distortion of facial features, hands, and/or feet, excessive growth of parts of the skull, thickening of the skin, development of hypertension, muscle weakness, enlargement of internal organs (including the heart, liver, and spleen), and other syndromes, some of which are irreversible and possibly fatal.<sup>17</sup>

### False Prescriptions

Rite Aid Corporation, a national retail pharmacy chain, paid the United States \$5.6 million and an additional \$1.4 million to participating states for submitting false prescription claims for drugs that were never delivered to the beneficiaries of government health care programs and were later returned to stock.<sup>17</sup> Numerous other pharmacies were also convicted of similar crimes.

### Durable Medical Equipment Frauds

One of the largest and most recent convictions under the Medicare and Medicaid Anti-Kickback statute and Obstruction of Justice laws was obtained against Abbott Laboratories, Inc., which, through its Ross Products Division, paid the federal government a \$382 million fine and another \$32 million to states for defrauding Medicare and Medicaid in connection with enteral feeding equipment. CG Nutritional, Inc., also a part of the Ross Products Division, paid \$200 million in criminal fines for an admitted obstruction of a criminal investigation by advising suppliers of nursing homes how to falsely bill the government. CG Nutritional has also been permanently excluded from participation in Medicare and Medicaid programs. Perpetrators of such frauds, often including owners of pharmaceutical supply companies, usually also receive lengthy prison sentences and are ordered to pay restitution and suffer a criminal forfeiture of assets. One such defendant in Indiana, in addition to the prison sentence, lost his \$1 million home and two other businesses. The first penalty under the new Civil Monetary Penalties Law resulted in a \$9.5 million restitution and fines imposed on St. Francis Hospital, Inc., in North Carolina, even though the hospital itself discovered and reported significant errors and documentation lapses.<sup>18</sup>

Peddlers of wheelchairs and other medical equipment frequently target senior citizens by promising "free" products and offer to handle all paperwork if the seniors would only provide their Medicare numbers. Because physicians

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have to sign forms attesting that the equipment is needed, these con artists habitually fake signatures or bribe corrupt doctors to sign the forms. Senior citizens are also more apt to buy fraudulent “anti-aging” products and are often too embarrassed to admit to having been defrauded. They are also frequently forgetful and make poor witnesses. The FBI advises to hang up when importuned by such “offers,” but, apparently, most seniors are too polite to do it. Prison sentences ranging from 53 to 87 months were imposed on seven individuals, plus restitution of approximately \$5 million, and fines were imposed in one such fraud scheme in Miami, Florida, where kickbacks were used to photograph the patients in “their” new power wheelchairs, which were then taken away, or retrieved, later. Similar schemes, uncovered in California, Texas, other locations in Florida, as well as in other states, also resulted in prison sentences, restitution, and criminal fines running into millions of dollars and forfeitures of homes and luxury cars.<sup>19</sup>

### Physician Frauds

The most widespread frauds committed by individual physicians include overbilling, overtesting, and overprescribing unneeded medications, treatments and kickbacks from pharmacies, and unneeded referrals to specialists. Another large area of health care fraud includes conspiracies between unscrupulous attorneys, medical professionals, and laboratories, who submitted multimillion-dollar bills for the most expensive tests or for tests that were neither needed nor performed. A variety of such frauds are being investigated with the help of insurance companies. Medical licensing board complaints are also being investigated to determine if criminal overbilling has occurred. Nationwide, scores of convictions were obtained based on computer-generated statistical leads. These computer printouts list physicians who have billed several times for the same procedures on the same patients, and allegedly performed many more procedures, largely heart catheterizations, than most of their peers. Each billed Medicare several million dollars.

Other major frauds being investigated by the FBI include fraudulent hospitalization claims made to U.S. private insurers. In some instances, patients had plastic surgeries that were billed to insurance companies as emergency medical services or procedures were significantly overbilled, or not performed at all. Numerous convictions were also obtained against physicians who billed for more than 24 hours a day; billed for house calls when they were out of state; charged higher rates for private house calls when they saw patients in group calls or in the defendants’ homes; or for calls made by unlicensed individuals. While the University of Washington Medical System agreed to pay Medicare and Medicaid \$35 million in restitution, damages, and penalties, two university physicians were convicted on criminal fraud charges—a neurosurgeon pleaded guilty to obstruction of a federal criminal health care investigation, and a nephrologist confessed that for 11 years he wrote false notes in patients’ dialysis records that he was present when he was not. A Houston physician was sentenced to 5 years in prison and ordered to pay restitution and fines of \$1.39 million

for using seven unlicensed, unqualified, and unsupervised physical therapy technicians for whom he billed the Texas Medicaid program. Other physicians charged for childhood vaccines received free of charge from the joint federal/state Vaccines for Children Program. One physician in Indiana was sentenced to 7 years in prison for intimidating Medicaid beneficiaries by telling them that they would lose their benefits if they did not make cash payments to him. A New York dentist was sentenced to 63 months in prison and ordered to pay \$225,000 in restitution for fraudulent claims for work that was never performed and for performing unneeded root canals and other oral surgeries.<sup>20</sup>

### Nursing Homes

Enforcement and oversight of fraud and abuse in skilled nursing facilities, particularly issues relating to quality of care in these facilities, have been greatly intensified. Enforcement actions included questionable nursing and therapy services and charges. The cost reports overstated the number of hours that the nursing staff spent caring for Medicare patients, and some nursing homes billed for therapy on Medicare patients that was not performed. Nursing staff frequently falsified, altered, or forged their résumés and licensing status, while numerous others were convicted of physical abuse of patients. Other nursing home violations involved defrauding the federal government by failing to provide nursing home residents with adequate staffing or adequate services, including medical, pharmaceutical, dietary, transportation, and social services.

## PROSECUTORIAL CRITERIA

The U.S. Department of Justice lists prosecution criteria for health care frauds. Among others, these include the following: (1) the nature and seriousness of the wrongdoing; (2) the pervasiveness of the misconduct; (3) the individual’s or organization’s history of similar wrongdoing; (4) voluntary disclosure or a willingness to cooperate in the investigation; (5) the existence or inadequacy of corporate compliance programs; (6) the corrective actions taken; (7) the collateral consequences of the lawbreaking; and (8) the sufficiency of noncriminal sanctions. The directive points out that even minimal wrongdoing may justify criminal prosecution, if the misbehavior was pervasive, was carried out by employees, and was known by the company’s managers. Conversely, the document states that single acts by a rogue employee may not be sufficient justification for criminally charging the employer.<sup>21</sup>

## UNDERSTANDING CRIMINAL LAW

The purpose of criminal law is to define socially intolerable conduct and to make specific prohibitions punishable by law. Criminal procedure deals with constitutional safeguards and the working mechanism of American courts to ensure justice and fairness. A health care provider who runs afoul

of criminal law may be consoled by the array of constitutional safeguards that ensure a fair trial. The Anglo-American system of justice provides more safeguards for the criminal defendant than any other system in the world. In this system the accused is deemed innocent until proved guilty. In other judicial systems the criminal defendant must prove innocence.

In a civil case (e.g., medical malpractice), the facts at issue must be proved by a “preponderance of the evidence.” In a criminal case (e.g., health care frauds), the state or federal government must prove its case “beyond a reasonable doubt.” Some legal scholars define *preponderance of the evidence* as being merely more likely than not, something more than a 50% probability; this is the standard for civil litigation. In contrast, when a criminal defendant is tried, the prosecution must prove beyond a reasonable doubt that a crime was committed and that the defendant committed the crime. This means that a rational and fair juror would be convinced of the defendant’s guilt and would not reasonably hesitate to vote for the conviction. In criminal cases, this usually means that a jury must be unanimous or that at least two-thirds of the jurors approve the conviction. A conviction of a felony in any state or foreign country, even if unrelated to medical practice (e.g., tax evasion, possession of an unlicensed gun, intimidation of expert witnesses in a malpractice action, conspiracy to murder a spouse, sexual misconduct with a minor, etc.), often carries a mandatory revocation or suspension of license and hospital privileges.

Modern criminal law recognizes two major classes of crimes and a number of miscellaneous offenses and violations. By definition a *felony* is a crime punishable by imprisonment for one year or more. Felonies include crimes such as murder (e.g., unauthorized withdrawal of a comatose patient’s life support), manslaughter, rape, robbery, larceny, kidnapping, arson, burglary, most narcotics and insurance frauds, and sex with a minor. Misdemeanors are crimes that are punished with imprisonment of no more than one year. The term *misdemeanor* is applied to the widest range of criminal activity and includes the broadest gradation of offenses and degrees of unpermitted activity (e.g., failure to report child abuse, refusal to allow patients to examine and copy their medical records, and willful disclosure of health care information to unauthorized people). Another category of criminal and quasi-criminal offenses, both felonies and misdemeanors, are the so-called *strict liability offenses*. The major significance of such offenses is that certain defenses, such as mistakes, are generally unavailable. These are usually offenses that are part of regulatory schemes (e.g., practicing medicine or nursing without a license, writing prescriptions without a valid registration from the Drug Enforcement Agency [DEA] or narcotics license from the state).

In the health care field, federal and state agencies, under delegation from Congress or state legislatures, have created a multitude of rules and regulations, the violation of which may be punishable as a crime. These rules and regulations include the DEA’s wide-ranging regulations on the licensing and the supervision of prescribing, storing, and dispensing controlled substances; IRS regulations; and various regulations by the health departments, including reporting requirements

of certain contagious diseases. Violations of these regulations may be enforced either criminally or administratively by revocation of licenses and heavy fines.

After charges are filed, the accused may be held pending a preliminary hearing that will in turn determine whether there are sufficient grounds to hold the accused for trial or for presentation to a grand jury; the case may also be taken directly before a grand jury. The preliminary hearing magistrate may release the accused on bond or may hold the accused for a grand jury hearing or trial. The grand jury and the magistrate may dismiss the allegations and free the suspect. Also, the prosecuting attorney may refuse to proceed, which is known as a case of *nolle prosequi*.

## Elements of a Crime

The essential elements of a crime are (1) intent (*mens rea*) and (2) the act (*actus reus*). To constitute a crime, the act must be volitional, and the intent must be to accomplish the criminal purpose. In the case of misdemeanor offenses and violations the law does not always inquire whether the criminal intent was present. (For example, the traffic court judge does not inquire into the intent of a person who went through a red light, failed to stop at a stop sign, or made a left turn without signaling.) However, “pulling the plug” on a patient without complying with living will and other statutes, presupposes the intent to kill combined with an act to further that purpose. For misdemeanors and petty offenses the element of intent is not normally a consideration. Lack of intent is not a defense for the category of crimes committed while the defendant was intoxicated or under the influence of drugs. The law takes the position that such acts are voluntary and that a misconduct in such a state is predictable; therefore criminal liability should be attached.

## Lesser Included Offenses

Another concept that underlies criminal law in American jurisprudence is the theory of “lesser included offenses.” For example, murder usually includes such lesser offenses as manslaughter and battery; robbery usually includes larceny with the added element of force or threat of force against a person; and burglary includes an unlawful trespass into a dwelling with the intent to commit a larceny or another crime. The significance of lesser included offenses comes into play when a jury cannot agree on a major crime or when because of extenuating circumstances the jury decides to punish the wrongdoer for a lesser included offense. Although pulling the plug may be premeditated murder, if there are extenuating circumstances, the jury may convict the defendant only of a lesser included offense of manslaughter. Similarly, culpable nurses, accountants, and office personnel testifying against physicians can strike deals with prosecutors for lesser included offenses.

## Vicarious Culpability

The physician may be vicariously liable for the acts of his or her employees when allowing them unsupervised access

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to controlled substances, when allowing them to call in prescriptions without consulting him or her, or when inducing, encouraging, or ordering them to fill out fraudulent insurance claims or commit other criminal acts. Nurses, medical assistants, secretaries, and bookkeepers often have been prosecuted as accomplices for helping falsify billing records or as accessories after the fact for helping cover up Medicare frauds. The accessory after the fact is treated differently and is not liable for acts performed before his or her involvement. However, when threatened with criminal prosecution, office workers almost invariably make deals with prosecutors. Such former employees are often the most devastating witnesses against physicians, clinics, and hospitals.

### Accessory After the Fact

An accessory after the fact is anyone who renders assistance to a felon after an offense has been committed, even though the accessory had no prior knowledge of the commission of the crime. In Medicare and insurance fraud cases, this often involves helping falsify or destroy medical and/or billing records. In modern American jurisprudence, failure to report a felony generally no longer makes one an accessory after the fact.

### Conspiracy

Conspiracy is a separate and distinct crime from the substantive criminal acts committed pursuant to the plan. Conspiracy consists merely of an agreement or plan by two or more people who have the specific intent to commit a crime or engage in dishonest, fraudulent, or immoral conduct that is injurious to public health and morals. Previously, in addition to intent, it was required that some overt act in furtherance of the conspiracy must have been committed. This requirement has been virtually abandoned in American jurisprudence. For instance, if a hospital administrator and a physician agree to fill hospital beds with nursing home patients (who do not require hospitalization) to create revenue for the hospital, the administrator may be convicted of conspiracy even though his or her acts in furtherance of the conspiracy consisted only of a conversation, telephone call, or no act at all. It may be sufficient that the administrator and the physician tacitly agreed to defraud Medicare or an insurance carrier by filling more beds in the hospital.

A factual impossibility to commit a crime (e.g., when conspirators agree to kill somebody who is already dead) is no defense. However, there can be no conspiracy when the objective of the conspiracy is not illegal. Conspiracies may be punished as criminal and civil acts. Thus a conspiracy to destroy a physician's practice by excluding that physician from hospitals or otherwise defaming or disgracing him or her may be punishable as a crime, even though the mere denial of privileges would not have been a criminal offense. The physician may concurrently seek civil remedies in a lawsuit for damages. In practice, however, unless the circumstances of the case involving civil wrongs are particularly

outrageous, the district attorney usually refrains from prosecution, letting the victim seek remedy in civil law.

### Defenses to Crimes

The substance of the criminal laws and procedures involving criminal trials and convictions is governed by the strict application of constitutional standards of due process and equal protection. These concepts are constantly redefined by the courts in a tug-of-war between liberal, socially oriented standards and more conservative approaches that balance the rights of the accused against the rights of society and victims of crime. The defense of entrapment is being raised frequently in prosecutions resulting from the crackdown on physicians who overprescribe drugs to "professional patients" and undercover agents in the absence of adequate need or examination, or prescribe drugs in return for sexual favors.

In addition to allowing admission of office charts, the courts allow virtually unlimited production of records kept by accountants, attorneys, and others. This virtually eliminates the defense of self-incrimination from records held by a third party (e.g., hospital, insurance company, or even the physician's professional corporation). The courts also extend virtually unlimited access to bank records when requested under grand jury subpoenas. The courts hold that such compulsion, even though incriminating, is not within the privilege against self-incrimination. The Fifth Amendment privilege against self-incrimination does not protect against compulsion to furnish specimens of body fluids, pubic hair, or head hair; to provide a handwriting sample or a voice exemplar; to stand in a lineup; or to wear particular clothing.

The courts allow physicians great latitude to conduct physical examinations and tests. These procedures may include involuntary minor surgery to remove bullets that may be evidence, rectal and vaginal examinations, penis scraping to reveal menstrual blood that may be a rape victim's type, fingernail scraping, and blood tests, provided they are done in a medically acceptable manner. Because taking x-ray films is potentially harmful and more invasive, the courts are more hesitant to allow them. Forcibly taken impressions of a defendant's teeth for comparison with bite marks on the body of a homicide victim have been permitted by the court. Procedures requiring general anesthesia and potentially risky procedures generally are not permitted. Statements by criminal suspects can be used against them if they had been warned about self-incrimination (read *Miranda* rights). Statements made to a psychiatrist generally may not be used because they may constitute self-incrimination. One court decided that it was self-defense when a physician shot and wounded a patient with acquired immunodeficiency syndrome (AIDS) who threatened to bite him. Similarly a psychiatric nurse claimed self-defense after using a fatal chokehold on a threatening patient.

### Causation

Before a criminal defendant can be convicted, it must be shown that his or her act was indeed the cause of the criminal result or was a substantial contributing factor in

causing the criminal result. Criminal law recognizes both acts of commission and acts of omission as causes of crime. The gravity of the crime varies if the physician or nurse who had the duty to care for a patient failed negligently or intentionally to provide life-sustaining medications or deliberately provided an overdose, causing that patient's death. For purposes of criminal law, a victim's preexisting conditions do not release the defendant from liability. For instance, victimizing a person who has the unusual and unknown fragility, hemophilia, or heart disease is a risk that the wrongdoer takes, even though the same act might not have caused death or serious injury to a healthy individual. Among the most frequently invoked defenses excusing criminal culpability are infancy, mental illness, intoxication, mistake, entrapment, and duress.

### Mental Illness

Theoretically, mental illness presumes incapacity to hold the defendant responsible for his or her conduct. It is usually defined in law as "insanity." However, *insanity* is not a medical term, and it is beyond the scope of this chapter. So are definitions in medical and legal quagmires and controversies that surround the defense of insanity. *Insanity*, as defined by the traditional M'Naughten rule, postulates that a person is not guilty by reason of insanity if the following four conditions are met: (1) at the time of the criminal act, (2) the person was laboring under a mental disease or defect (3) that prevented him or her from knowing (4) either the nature and quality of the act or that the act was wrong. Whereas the M'Naughten rule focuses on capacity for blameworthiness, the "irresistible impulse" test focuses on volitional controls. It extends the insanity defense to a myriad of situations in which the accused may have known that his or her conduct was wrong and criminal but was supposedly incapable of controlling the conduct. However, the question of what constitutes an "impulse" remains unanswered. This test absolves defendants of criminal responsibility if the following three conditions are met: (1) as a result of the mental disease or defect, (2) the defendant lacks substantial capacity (3) to either appreciate the criminality of his or her conduct or to conform it to the requirements of law.

### Drunkenness

Intoxication caused by alcohol or drugs may impair the individual's ability to appreciate the significance of his or her criminal conduct and under certain circumstances may negate culpability. However, voluntary intoxication is increasingly held to be an invalid excuse for general intent crimes such as rape, battery, and trespass. Voluntary intoxication is not a defense to strict liability offenses such as statutory rape, mishandling of drugs, or serving liquor to minors. Performing surgery while under the influence of alcohol or drugs is almost invariably prosecuted as criminal negligence. Intoxication may serve as a defense to such subjective intent crimes as honest mistakes, which negate the mental state.

### Mistakes of Law

The following are a few exceptions to the rule that ignorance of the law is no excuse:

1. When the government has not made information about the law reasonably available to all those who may be affected. This exception usually applies to situations in which the laws punish inaction or omission, such as failure to obtain a license or permit or failure to file certain information with appropriate governmental agencies (e.g., if reporting venereal diseases, AIDS, or certain birth defects is mandatory).
2. When there is reasonable reliance on an official government pronouncement and the defendant has made reasonable efforts to find out about such a law and reasonably believes that his or her conduct is not criminal.
3. When the defendant reasonably relies on erroneous official interpretation of the law by a public officer or agency responsible for the interpretation and enforcement of the law, such as an erroneous interpretation of controlled substance laws by ranking DEA officials.

### Attempted Crimes

Attempted crimes are criminal offenses if some significant act with the intent to commit a criminal act is established. Mere preparation to commit a crime is not enough. A person can be convicted of attempted murder for pulling the plug, even when the plug was reinserted and the patient did not die.

### Intentional and Negligent Conduct

The criminal liability of physicians, dentists, nurses, and pharmacists frequently results from a high degree of reckless and negligent conduct. What the law calls criminal negligence is largely a matter of degree, incapable of a precise definition. Whether or not criminal negligence exists is a question for the jury. The law requires a showing of "gross lack of competency or gross inattention, or wanton indifference to the patient's safety, which may arise from gross ignorance of the science of medicine and surgery or through gross negligence, either in the application and selection of remedies, lack of proper skills in the use of instruments, and failure to give proper attention to the patient" (e.g., "practicing fraudulently with gross incompetence and gross negligence" by failing to take and record vital signs of a patient to whom the physician administered anesthesia, using investigational and non-FDA-approved substances). The fact that the patient consented to a specific treatment or operation is no defense to the criminal action against the physician. The courts have been very careful not to hold physicians criminally responsible for patient deaths resulting from a "mere mistake of judgment" in the selection and application of remedies or for inadvertent deaths. However, willful and wanton conduct is clearly criminal.

## 520 Crimes by Health Care Providers

### Endnotes

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1. *Consumer Reports* (Mar. 2006) at 41.
2. National Center for Public Policy, *Fraud in Medicare* (Congressional Budget Office).
3. False Claims Act, 31 U.S.C. §3729–33.
4. Medicare Anti-Kickback Statute, 42 U.S.C. §1320a ff.
5. Mail Fraud, 18 U.S.C. §1341.
6. Wire Fraud, 18 U.S.C. §1343.
7. Conspiracy to Defraud the Government, 18 U.S.C. §287.
8. False Statements, 18 U.S.C. §1001.
9. Civil RICO Statute, 18 U.S.C. §1964 (c).
10. Submission of Fictitious and Fraudulent Claims, 18 U.S.C. §287.
11. Joint Report by the Department of Health and Human Services and the Department of Justice, *Health Care Fraud and Abuse Program, Annual Report for FY 2004* (Sept. 2005).
12. *Id.*
13. *Qui tam* Actions, 31 U.S.C. §3730.
14. FBI, Common Fraud Schemes ([fbi.gov/majcases/fraud](http://fbi.gov/majcases/fraud)).
15. DHHS/DOJ Joint Report, *supra* note 11.
16. *Id.*
17. *Id.*
18. *Id.*
19. FBI Common Fraud Schemes, Fraud Target: Senior Citizens ([fbi.gov/majcases/fraud/seniors](http://fbi.gov/majcases/fraud/seniors)).
20. *Id.*
21. U.S. Department of Justice, Prosecutorial Guidelines.