

THE CRIMINALIZATION OF MEDICINE
Daniel G. Giaquinto, Esq.*

The New Jersey Attorney General's Office has just announced another indictment of a physician, charged with healthcare fraud. This is just the latest in a growing list of physicians faced with criminal prosecution for acts which, only a few years ago, would have been addressed in the civil, rather than the criminal courts.

One reason for the recent rise in the "criminalization of medicine" is the enactment, in 1998 of the Health Care Claims Fraud Act. This Act makes it easier for prosecutors to prove crimes against physicians, and substantially increases penalties. The Act gave prosecutors the incentive to move civil cases into the criminal arena, where the stakes are far higher, including jail and ruinous monetary penalties. Since the Act applies to conduct which occurred only after the Act's effective date, it has taken a number of years for its effects to be realized.

To better understand the impact of this new law it is necessary to understand a little about the gradation of crimes and corresponding sentences under New Jersey criminal law. Crimes are graded from the first through the fourth degree, with first-degree crimes being the most serious. For each degree of crime there is an authorized range of sentence, including term of imprisonment, fines and restitution, that corresponds in seriousness to the grade. A crime of the first or second degree carries with it a presumption of incarceration, meaning that a term of imprisonment must be imposed unless the court finds that it would be a serious injustice which overrides the need to deter such conduct by others. A crime of the third or fourth degree carries a presumption of non-incarceration in cases where the defendant has no prior record, meaning that a sentence will not include a term of imprisonment, unless the court finds that the imprisonment is necessary for the protection of the public. A second-degree conviction should result in a sentence of imprisonment, and a third-degree conviction, where the defendant has not been previously convicted, should result in a probationary sentence.

Before the new law, to seek criminal sanctions against a physician the government had to charge fraudulent conduct, theft or attempted theft. In order to prove a second degree theft, prosecutors would have to prove the aggregate pecuniary benefit obtained or sought exceeded \$75,000. In many cases reaching the \$75,000 mark in terms of proofs was either impossible or too difficult, and thus second degree thefts could not be charged.

For a number of reasons, it is now much easier to establish the proofs necessary to prove a second degree crime. First, the Act defines health care fraud broadly to include a "false, fictitious, fraudulent, or misleading statement of material fact", or omission or causing an omission of material fact, in or from "any record, bill, claim or other document" submitted or caused to be submitted or attempted to be submitted "for payment or reimbursement for healthcare services."

Second, the State no longer needs to prove a dollar amount to impose severe sanctions. A single act of fraud knowingly committed by a practitioner is a second-degree crime. An act of fraud recklessly committed by a practitioner is a third degree crime. There is no longer a minimum dollar amount associated with the crime. Any knowing act of fraud, even if only for a few dollars, constitutes a second degree crime.

Third, there are special penalties associated with a violation of the Act. In addition to the normal

sentences corresponding to a second or third degree crime, a fine can be imposed of up to five times the pecuniary benefits sought or obtained.

Because ‘runners’ have often been associated with and instrumental in health care fraud, a second Act the Criminal Use of Runners Act was enacted in 1999. A runner is defined as “a person who, for a pecuniary benefit, procures, or attempts to procure a client, patient or customer at the direction of, request of or in cooperation with a” a legal or medical provider “whose purpose is to seek to obtain” insurance benefits or to submit an insurance claim for “services to the client, patient or customer”. This law criminalizes the use, solicitation, direction, hiring, or employing of a runner by an attorney, healthcare professional, or the owner or operator of a healthcare practice or facility. A violation of the statute is a third degree crime. However, unlike other third degree crimes, there is no presumption of non-incarceration. Rather, the statute imposes a presumption of incarceration, meaning that a conviction of this crime should result in a term of imprisonment.

The Insurance Fraud Statute, enacted in 2003 is even broader in scope and encompasses any fraudulent or misleading statement of material fact in, or omission from, any record or document submitted, attempted to be submitted or caused to be submitted in support of or in connection with: 1) any benefit obtained or sought to be obtained under an insurance policy or from an insurance company; 2) an application to obtain or renew an insurance policy; 3) any payment made or sought to be made pursuant to an insurance policy or premium finance transaction; and 4) an affidavit, certification, record or other document used in any insurance or premium finance transaction. A second degree violation of this statute occurs if the fraud is committed knowingly and includes five or more acts and a pecuniary benefit obtained or sought to be obtained in excess of \$1000. All other “knowing” violations are third degree crimes.

In addition to the severe criminal penalties imposed by these laws, a separate statute entitled the “License Suspension or Forfeiture for Health Care Claims Fraud Act” requires forfeiture of license and permanent removal from the practice of medicine for a first conviction for second degree health care claims fraud or second degree insurance fraud, or second convictions for third degree health care claims fraud or third degree insurance fraud. A first conviction for a third degree health care claims fraud or third degree insurance fraud results in a suspension for one year.

In summary New Jersey has broadened the types of conduct that are considered fraud in the health care arena, has lowered the thresholds necessary to prove a second degree crime, and has substantially increased the penalties.

*Daniel G. Giaquinto is a Senior Attorney with the Healthcare Law Firm of Kern Augustine Conroy & Schoppmann, P.C. He will focus his practice on the defense of health and law enforcement professionals in criminal and administrative matters. Before joining Kern Augustine, Mr. Giaquinto was an Assistant Attorney General/Director of State Police Affairs for New Jersey where he successfully led the State’s efforts to implement the reforms of the federal consent decree to address allegations of racial profiling. Prior to joining the Attorney General’s Office, he served for five years as the Prosecutor of Mercer County, New Jersey. He has also served in the past as a Municipal Court Judge for the City of Trenton and the Township of Hopewell and as a Deputy Attorney General in the Major Fraud Section of the Division of Criminal Justice.

Mr. Giaquinto received his Juris Doctor from the Rutgers School of Law, has served on active duty with the U.S. Army as a Judge Advocate and continues to serve with the New Jersey Army National Guard in the rank of Colonel as the Staff Judge Advocate.