

## FIRST WARRANTLESS SEARCHES – NOW JAIL!

By: Steven I. Kern

As a result of new legislation physicians now face yet another government threat – jail!

In January Governor Whitman signed legislation making it a serious crime for a physician to engage in "health care claims fraud." While few can argue against a law that criminalizes fraud, the definition of "health care claims fraud" is not comforting for the practicing physician and goes well beyond traditional legal notions of fraud.

Historically, for an individual to be found guilty of insurance fraud three tests had to be met. The physician had to make a material misrepresentation of fact, that misrepresentation had to be made with the knowledge of its falsity and that knowing misrepresentation had to be made with the intention that the payor would rely upon that falsity to its detriment.

Under the new law, however, a physician has engaged in health care claims fraud whenever he either knowingly or recklessly makes a false, fictitious, fraudulent or misleading statement of material fact or if he omits a material fact from any record, bill, claim or other document submitted for payment for health services. Each time a health care claim is submitted that is false, fictitious, fraudulent or misleading, a separate crime is committed. It is no longer necessary for the State to prove knowledge or intent!

The legislation is tailored to make it easier for a prosecutor to convict a physician of "fraud." It is not necessary for the prosecutor to prove that the physician intended to submit a fraudulent claim. According to the legislation, the falsity, fictitiousness, fraudulence or misleading nature of a bill "may be inferred by the trier of fact" whenever the physician or his associate has failed to perform an assessment of the physical or mental condition of the patient necessary to determine the appropriate course of treatment. Falsity, etc., may also be inferred if the physician submits a bill for more treatments or procedures than can be performed during the time in which the treatments or procedures were represented to have been performed. (For example, if a physician submits six claims for patient encounters which, according to CPT coding requirements require 20 minutes of physician time, and the physician's appointment records indicate that only one hour of time was devoted to these patients, the inference of fraudulence could be triggered.)

If the physician has not acted with actual knowledge, but has acted in a manner deemed reckless (as opposed to merely negligent) the crime committed is a third degree crime. A third degree crime carries with it a punishment of three to five years imprisonment and a fine of up to \$7,500 plus five times the pecuniary benefit obtained or sought to be obtained.

If knowledge is proven, however, the offense is elevated to a second degree crime. In New Jersey, a second degree crime carries with it punishment of between five and ten years in jail and a monetary fine of up to \$100,000. In addition, the law provides for an additional fine of up to five times the pecuniary benefit obtained or sought to be obtained.

To make matters even easier for the prosecutor, the legislation further provides that the physician's signature

on the claim form gives rise to an inference that the physician has read and reviewed the claim. As such, the mere signature of the physician creates an inference that the physician had knowledge of the falsity of the claim. More importantly, a physician's signature on a claim form will lead to an inference that he acted with knowledge – thus raising the level of culpability to a second degree crime, subjecting the physician to five to ten years imprisonment and a \$100,000 fine.

Not only do physicians face severe criminal penalties, but any finding of "knowing" health care claims fraud, either by New Jersey or any other state, or by the federal government also carries with it an automatic and permanent forfeiture of the physician's license to practice medicine. This automatic permanent forfeiture can only be reduced if a court finds that permanent forfeiture would result in a serious injustice which overrides the need to deter such conduct by others. In such a case, the court may reduce the period of license suspension, but must still impose a minimum suspension of at least one year. A finding of reckless action requires a minimum one year mandatory suspension of licensure.

Any administrative staff who knowingly assists in committing health care claims fraud is guilty of a crime of the third degree unless the staff submits five or more false claims, in which case the staff member is guilty of a second degree crime. If the staff member is merely "reckless" with respect to the submission of false health care claims, that staff member is guilty of a fourth degree crime which carries penalties of up to eighteen months in jail and a \$7,500 fine. The threat of criminal sanctions will, no doubt, be used to turn staff against a physician.

#### Dual Threat:

This new law comes directly on the heels of the Board of Medical Examiners' ruling that the Attorney General has the unfettered discretion to conduct the equivalent of an unannounced warrantless search of every physician's office, including books, patient charts, appointment logs, and billing records. According to the Attorney General any violation of law found during the course of such a search can (and will) be used against the involved physician in any other proceeding – be it civil or criminal.

What this means, in practicality, is that the Board of Medical Examiners can come into your offices, unannounced, inspect your premises and every book, patient record, financial record, billing claim form and other item in your office. If the Board uncovers any suspect claim forms or other information, it can, and will, provide that information to the Attorney General to institute criminal action which could result in long imprisonment, huge fines, and permanent loss of license.

The Medical Society is aggressively seeking to have this serious abridgement of physicians' rights reversed in the Courts. Unfortunately, no immediate resolution seems likely.

#### BOXED SIDEBAR:

To help protect physicians faced with unannounced searches, and potential serious criminal, civil, and administrative actions, the Medical Society has tailored a new Physician Advocacy Program to meet the ever changing needs of Medical Society Members. By agreement with Kern Augustine Conroy & Schoppmann, beginning immediately, the new program is available to all physicians subject to insurance fraud investigations by the Department of Insurance, the Attorney General, or the United States Office of Inspector General (Medicare, Medicaid). Under the expanded program, Kern Augustine will provide legal representation in the event you are subject to such an investigation.

If you are not a member of the Physician Advocacy Program, the recent developments discussed in the accompanying article should convince you to wait no longer to join. A membership application is attached.

If you are a member, and have elected the extended coverage package, ProCounsel V (which includes representation at investigations by Medicare, Medicaid and the NJ Department of Insurance Fraud) you will receive this additional coverage at no additional charge and you need do nothing.

If you are a member of the Physician Advocacy Program, but do not have the extended coverage, call Linda Somers at Kern Augustine, 908-704-8585, to obtain information on upgrading your membership. For detailed information on plan coverage, visit the Kern Augustine Web Site at [WWW.DRLAW.COM](http://WWW.DRLAW.COM). You can enter this site directly or through the Medical Society of New Jersey's Home Page at [WWW.MSNJ.ORG](http://WWW.MSNJ.ORG).