ATTORNEYS CAUGHT IN THE WEB OF MEDICARE/MEDICAID FRAUD

AN OVERVIEW OF AN ATTORNEY’S ETHICAL DUTIES AND CRIMINAL LIABILITY IN THE WAKE OF UNITED STATES V. ANDERSON

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INTRODUCTION

Attempting to recoup some of the billions of dollars lost each year to Medicare and Medicaid fraud, the government has prosecuted physicians and hospitals whose actions appeared questionable. Until recently, attorneys could be fairly confident that they would not face criminal or even civil litigation if they wrote Medicare referral contracts for physicians. However, with losses from fraud in the healthcare industry estimated between $80 and $90 billion per year, federal prosecutors have begun to target their investigations toward attorneys working in the healthcare field. In 1998, the government indicted two attorneys, along with several former hospital officials and physicians, “for an alleged scheme to solicit, receive, and pay $2.2 million in bribes” in connection with Medicare fraud. Although

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1 In 1997, the United States Department of Health and Human Services reported that health care fraud investigations, prosecutions, and convictions by the Federal Bureau of Investigation have increased significantly. Investigations more than tripled, going from 657 in FY 1992 to about 2,200 in FY 1996. At the same time, criminal prosecutions increased from 83 cases and 116 defendants to 246 cases and 450 defendants. Similarl, convictions rose from 90 defendants to 307. Civil health care fraud investigations also increased. Report Details Increases in Fraud Investigations/Prosecutions, ANDREWS HEALTH CARE FRAUD LITIG. REP., Aug. 1997, at 16.


the attorneys ultimately were acquitted of all charges—the evidence showed that the attorneys merely attempted to advise their clients—shock waves are still being felt throughout the health law community.\(^5\)

This case, discussed in depth later in this commentary, has changed the playing field for attorneys whose only previous concern was their own malpractice. Now, attorneys also must consider the possibility of criminal prosecution for legal services they provide to their health care clients, in a world of increasingly complex rules, regulations, and statutes regulating the health care field. To practice law in this complex area, attorneys should familiarize themselves with professional ethical standards as well as federal health care fraud and abuse statutes, which may be utilized against them.

Part I of this commentary takes an in-depth look at the unprecedented case of *United States v. Anderson*\(^6\) which identifies federal statutes that may be used against attorneys who represent physicians and health care providers accused of defrauding the government in health care claims. Part II examines several federal statutes that may be used to prosecute attorneys who either knowingly or unwittingly entangle themselves with their clients. Part III discusses ethical duties of attorneys concerning their clients’ criminal activities and their obligation to disclose possible future crimes.

**I. HEALTH CARE ATTORNEYS CHARGED IN A CONSPIRACY TO DEFRAUD THE GOVERNMENT: UNITED STATES V. ANDERSON**

*United States v. Anderson* may be the only case where attorneys have been charged criminally for conspiracy to defraud the federal government in a scheme with their physician clients. This unprecedented case caused two attorneys—Ruth Lehr and Mark Thompson—to defend their actions arising out of the attorney-client relationship in writing Medicare and Medicaid referral agreements.\(^7\) Their court ordeal is one no attorney would choose to undergo.

Early in 1999, the federal district court judge in Kansas granted a Rule 29 motion for judgment of acquittal\(^8\) in favor of attorneys Lehr and Thompson.\(^9\) In

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7 *Id.* at *2. In addition to the two attorneys who were indicted, three former hospital executives of Baptist Medical Center, along with two osteopaths in Kansas City, Missouri, were indicted for conspiracy. See *supra* note 4.

8 A motion for judgment of acquittal is similar to a state court motion for a directed verdict, which is generally made at the end of the prosecution’s case. The court may grant the motion on one or more offenses if the evidence is insufficient to sustain a conviction of the defendant(s). See *Fed. R. Crim. P.* 29(a).

9 *Federal Judge, supra* note 5, at 437. See also *supra* note 5 & accompanying text.
making its decision, the court found that, based on the government’s evidence, neither attorney actively participated in the alleged conspiracy. Instead, the evidence showed that the attorneys merely attempted to advise their clients.

The court stated that “no reasonable jury could find beyond a reasonable doubt that [the lawyers] willfully committed any of the criminal acts charged in the indictment.”

Because of the important implications of this case for attorneys practicing in the health care field, this section provides an in-depth analysis of this case. Included is an examination of the indictment, the problems associated with withdrawing from and terminating a conspiracy, and a discussion of the “Pinkerton rule.”

A. The Indictment

In this case, after a five-year investigation, a federal grand jury indicted two physicians along with their attorneys, Lehr and Thompson, for a scheme to defraud the federal government under the Medicare and Medicaid programs.

In the indictment, the grand jury charged Ruth Lehr and Mark Thompson with facilitating “the offer and payment of monetary bribes and other remuneration by crafting sham agreements to conceal the fact that Baptist Medical Center was paying for patient referrals.” The indictment also charged Lehr with aiding two osteopaths in their efforts to solicit and receive monetary bribes and other payments from other hospitals.

The indictment alleged that the attorneys negotiated and designed consulting agreements to cloak lucrative kickback arrangements under the Medicare and Medicaid system. The government charged that, over a 10-year period, the attorneys violated the anti-kickback statute by structuring business ventures so their hospital client could continue to receive patient referrals from nursing homes. Attorney Lehr allegedly told attorney Thompson the agreement for the physicians was a “clean-up deal” and the physicians were trying to “sell old folk referrals.”

The government further alleged that both Lehr and Thompson used several methods to conceal illegal payments for referrals. These methods
included disguising payments as consulting fees in sham consulting agreements, modifying existing agreements by eliminating express references to patient referrals, and using the attorney-client privilege to protect discussion of referral arrangements.\(^{21}\) In March of 1999, the judge dismissed the case against both attorneys; however, two of the physicians later were found guilty.\(^{22}\)

In dismissing the government’s case against the attorneys, the judge said no evidence precluded the parties from entering into a legal relationship under these circumstances.\(^{23}\) He added that the evidence showed the attorneys, who were not engaged to monitor the activities of the hospital’s consultants, relied on their clients and, when a problem was brought to their attention, they urged their clients to make sure that fair market value for real services was required.\(^{24}\)

**B. Difficulty in Withdrawing from a Conspiracy**

The case against the attorneys in *Anderson* demonstrates how difficult it is for a co-conspirator to withdraw from a conspiracy and how difficult it is to stop a conspiracy once it begins.\(^{25}\) Lehr sought complete dismissal of the charges against her.\(^{26}\) Lehr contended that she withdrew from the alleged conspiracy prior to the statute of limitations’ critical date.\(^{27}\) The parties agreed that a five-year statute of limitations under 18 U.S.C. section 3282 applied to the indicted crimes.\(^{28}\) Therefore, the critical date for statute of limitations purposes was July 15, 1993.\(^{29}\)

Lehr believed she could show that she did not perform legal work for Baptist or Health Midwest from July of 1992 until the time the alleged conspiracy ended in January of 1995.\(^{30}\) Lehr conceded that she served as in-house counsel for Baptist from late 1984 to early 1985, and that she had represented Baptist as outside counsel from the date she left her employment as in-house

\(^{21}\) See *id.*

\(^{22}\) See *id.*

\(^{23}\) See *id.*

\(^{24}\) See *id.*

\(^{25}\) See *Unindicted Co-Conspirator Label Violated Attorneys’ Rights, DKS Rules, ANDREW HEALTH CARE FRAUD LITIG. REP., July 1999, at 7*, a government memorandum during a pretrial motion in the *Anderson* case named three prominent Baltimore health care attorneys as unindicted co-conspirators in addition to charging Lehr and Thompson in the indictment. They moved the court to expunge all references to them as unindicted co-conspirators from the record. The court held the government had violated all three attorneys’ due process rights by naming them as unindicted co-conspirators in pretrial motion papers and ordered their names stricken from the government’s memorandum. The court declined to make a factual finding as to their innocence because the trial concerned the guilt or innocence of the named defendants and not that of the attorneys.

\(^{26}\) *Anderson*, 1999 WL 84290, at *5*.

\(^{27}\) *Id.*

\(^{28}\) *Id.*

\(^{29}\) *Id.*

\(^{30}\) *Id.*
counsel through March of 1991. At that time, Baptist became part of a holding company, Health Midwest. From March of 1991, Lehr said she provided occasional legal services to Baptist and/or Health Midwest at least through July of 1992.

The Anderson court denied Lehr’s motions for dismissal “because factual issues necessary to decide them . . . [were] inextricably bound up with the general issues for trial.” In arriving at its determination, the court rejected Lehr’s reliance on the Eighth Circuit’s decision in United States v. Grimmett. Lehr had argued that Grimmett required the court to hold a hearing to resolve the statute of limitations motions before trial.

The Anderson court disagreed, saying Lehr misconstrued the meaning of the Grimmett ruling. First, the Anderson court said Grimmett did not require a hearing to determine statute of limitations issues. Rather, the Anderson court interpreted Grimmett as saying the district court should determine if a hearing is necessary to determine the statute of limitations issues, or if the factual issues underlying the motion were so bound up with the issues for trial that such a hearing should not be held.

Second, the Anderson court determined the Grimmett court’s primary reason for reversal stemmed from the fact that it thought “the magistrate judge failed to recognize the distinction between withdrawal as a substantive defense to conspiracy and withdrawal as an event which triggers the running of a statute of limitations.” The Anderson court said that “the magistrate judge correctly reasoned that withdrawal is not a valid substantive defense to a § 846 conspiracy.” The Anderson court noted that the Eighth Circuit panel believed

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31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 150 F.3d 958, 959-62 (8th Cir. 1998). In Grimmett, the defendant pleaded guilty to participating in a drug conspiracy “conditioned on her right to appeal the denial of her motion to dismiss based on the statute of limitations.” The defendant claimed “she withdrew from the conspiracy immediately after another co-conspirator murdered Mr. Kerns on June 27, 1989”; however, she did not go to police until after the co-conspirator committed the murder. When the defendant did go to the police, she informed them of the drug activities and showed them where drug money and records were kept. After her conviction, more than five years after the murder, she requested an evidentiary hearing on her statute of limitations claim. The magistrate judge denied Grimmett’s request because withdrawal was not a defense and, that such conspiracies “do not require proof of an overt act.” The Eighth Circuit reversed and instructed the district court to make a determination whether the statute of limitations issue could be determined as a matter of law or at a pretrial hearing, or whether there were factual issues that were “inevitably bound up with the evidence about the alleged offense itself” that needed to be deferred to trial.
38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
the magistrate judge in *Grimmett* “failed to understand that withdrawal can trigger the statute of limitations.”\(^{43}\) The *Anderson* court distinguished Lehr’s case from that of *Grimmett* by concluding the underlying issues of the statute of limitation’s motion “are inherently more bound up with the general issues for trial than was the motion in *Grimmett*.,”\(^{44}\) The *Anderson* court said that “even if the bare facts alleged by these defendants (such as Ms. Lehr’s concluded legal representation of Baptist . . .) are true, the court would be unable to determine whether they [the attorneys] withdrew from the conspiracy without examining factual issues that will inevitably be part of the general issues for trial.”\(^{45}\)

C. Terminating the Conspiracy

In regard to terminating the conspiracy, the *Anderson* court essentially said that, if an individual withdraws from a conspiracy scheme but a co-conspirator continues with the conspiracy after the individual’s withdrawal, the withdrawing conspirator is still liable for any action taken prior to the withdrawal for up to five years after the withdrawal.\(^{46}\) Therefore, if a person “properly and adequately terminates his or her involvement with the conspiracy, he or she no longer can be held responsible for acts of his or her co-conspirator and the statute of limitations begins to run in his [or her] behalf.”\(^{47}\) However, simply ceasing conspiratorial activities does not constitute withdrawal from a conspiracy.\(^{48}\) Instead, for a conspirator to effectively withdraw, the individual “must act affirmatively by ‘either making a clean breast to the authorities or communicating his withdrawal in a manner reasonably calculated to reach co-conspirators.’ ”\(^{49}\)

Although the question of who bears the burden of proving withdrawal from a conspiracy for purposes of the statute of limitations is apparently an open question in the Tenth Circuit,\(^{50}\) one case explicitly addressed this issue. *United States v. Varah*\(^ {51}\) clearly placed the burden of proving withdrawal from a conspiracy on the defendant.\(^ {52}\) The *Varah* court said it was clear that establishing withdrawal meant the burden of persuasion was on the defendant.\(^ {53}\)

The *Anderson* court, however, had a problem with relying on *Varah*. First, the *Varah* case was unpublished and therefore had limited precedential value.\(^ {54}\)

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\(^{43}\) Id.

\(^{44}\) Id. at 7.

\(^{45}\) Id.

\(^{46}\) United States v. Antar, 53 F.3d 568, 582 (3d Cir. 1995).

\(^{47}\) Id.

\(^{48}\) Id. at 582.

\(^{49}\) United States v. Parnell, 581 F.2d 1374, 1384 (10th Cir. 1978).

\(^{50}\) *Anderson*, 1999 WL 84290, at 8.

\(^{51}\) 1992 WL 186530 (10th Cir. 1992).

\(^{52}\) Id. at 3.

\(^{53}\) Id.

\(^{54}\) *Anderson*, 1999 WL 84290, at 8 (citing *Varah*, 1992 WL 186530 (10th Cir. 1992)).
Second, it was not clear whether it was “written in the context of withdrawal for statute of limitations purposes.”\textsuperscript{55} Additionally, the \textit{Varah} opinion neither contained a detailed analysis, nor the arguments, for the two-stage burden of proof,\textsuperscript{56} which had been established by other cases.\textsuperscript{57}

The Anderson court did not resolve the issue of the burden of proof in Lehr’s case. Instead, it said Lehr’s motion to dismiss “must be denied because the issues necessary to resolve them . . . [were] inextricably bound up with the general issues for trial.”\textsuperscript{58} The court continued to list examples of these related issues. The court stated the issue as:

Whether Ms. Lehr withdrew from the alleged conspiracy will likely turn on whether she knew that her successors would rely on the contracts she allegedly drafted to conceal the true relationship between Baptist and the LaHues/BVMG when they attempted to design new ways to conceal the alleged relationship. It may also turn on issues such as Ms. Lehr’s historical relationship with the hospital and her co-defendants. These issues are simply more appropriate for resolution at trial.\textsuperscript{59}

The Anderson court warned that its denial of the pretrial motion to dismiss did not mean that facts would not be developed at trial that might entitle Lehr to an acquittal: “The court wishes to stress that its holding today is not that the facts alleged by Ms. Lehr . . . could never establish withdrawal. Rather, the court’s holding is that the determination of whether they withdrew will depend heavily on the evidence at trial.”\textsuperscript{60} In fact, the judge later granted a motion for judgment of acquittal in favor of Lehr and Thompson at the close of the government’s case.\textsuperscript{61}

\section*{D. Pinkerton Rule\textsuperscript{62}}

In its denial of the motion to dismiss, the Anderson court also discussed the Pinkerton rule, which applies in many conspiracy cases.\textsuperscript{63} In discussing the Pinkerton rule, the Anderson court said that “it has long been established that a substantive offense committed by one conspirator in furtherance of a conspiracy is attributable to his or her co-conspirators for the purpose of

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\item \textit{Anderson}, 1999 WL 84290, at *8.
\item \textit{Varah}, 1992 WL 186530, at *2-*3. Under this two-stage approach, the defendant must first provide evidence of withdrawal from a conspiracy and evidence that he or she withdrew prior to the statute of limitations. After the defendant provides this evidence, the burden of persuasion shifts to the prosecution to disprove the withdrawal defense beyond a reasonable doubt.
\item \textit{Id.}
\item \textit{Anderson}, 1999 WL 84290, at *7.
\item \textit{Id.}
\item \textit{Id. at *9.}
\item See supra note 5.
\item See Hyde v. United States, 225 U.S. 347, 369 (1912); United States v. Gold, 743 F.2d 800 (11th Cir. 1984); Iannelli v. United States, 420 U.S. 770, 791 (1975); United States v. Addo, 989 F.2d 238, 243-44 (7th Cir. 1993); United States v. Redwine, 715 F.2d 315, 322 (7th Cir. 1983). In these cases, the courts applied the Pinkerton rule, holding as long as fraudulent acts lie within the scope of the conspiracy, defendants can be held liable despite the fact they never personally submitted a fraudulent claim.
\item \textit{Anderson}, 1999 WL 84290, at *9.
\end{enumerate}
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holding the co-conspirators responsible for the substantive offense." The court said the Pinkerton rule meant Lehr was responsible for the acts of her co-conspirators “unless and until” she withdrew from the conspiracy.

The Anderson case illustrates the need for attorneys to be aware of the manner in which courts handle conspiracy charges to ensure they avoid even an appearance of co-conspiring with their clients. Although the United States Attorney charged attorneys Lehr and Thompson only with conspiracy and anti-kickback violations, it is possible they could have been charged under several other federal statutes as well. Therefore, it is incumbent upon attorneys practicing in the health care field to have a firm grasp of a number of federal statutes, as well as their ethical responsibilities, before providing advice to clients.

II. FEDERAL STATUTES THAT PROSECUTORS MAY USE AGAINST ATTORNEYS WHO PROVIDE IMPROPER LEGAL ADVICE TO THEIR CLIENTS

Health care providers have been prosecuted under at least 30 different federal statutes. Many of the statutes used to prosecute health care providers may also be used to prosecute attorneys who represent them. This section focuses on federal statutes that could be used to prosecute attorneys, including federal conspiracy statutes, the Medicare Anti-Kickback Act, the federal theft or conversion statute (theft of public money, property, or records), the False Claims Act, wire fraud, and the Racketeer Influenced and Corrupt Organizations Act (RICO).

64 Id.
65 Id. The Anderson court expressed reservations about denying this motion on the grounds of the Pinkerton rule because the government specifically failed to argue this theory of liability. The court believed, however, that a fair reading of the government’s briefs rendered its decision appropriate for two reasons. First, the court felt the government’s response tacitly assumed Pinkerton liability. Second, Lehr’s co-conspirator construed the government arguments “as being arguments that apply only if the conspiracy charges are dismissed.”
66 See Bucy, supra note 2. This commentator specifically discusses the following nine federal statutes used to prosecute physicians: (1) Submitting False Claims, 18 U.S.C. § 287; (2) False Statements, 18 U.S.C. § 1001; (3) Mail Fraud and Wire Fraud, 18 U.S.C. §§ 1341 & 1343; (4) Medicare and Medicaid Fraud, 42 U.S.C. § 1329-7b(a)1; (5) Kickbacks, 42 U.S.C. §§ 1320a-7b(b) & 1395; (6) Money Laundering, 18 U.S.C. §§ 1956-1957; (7) RICO, 18 U.S.C. §§ 1961-1968; (8) Conspiracy, 18 U.S.C. §§ 287 & 371; and (9) Theft of Government Property, 18 U.S.C. § 641. She also discusses state offenses of conspiracy, Medicaid fraud, kickback statutes, as well as theft, larceny, forgery, and false instruments. This commentator further contends that physicians have been prosecuted under so many federal and state statutes that it is difficult to track and evaluate trends in these cases. She concludes that one comprehensive federal law, with strict penalties, should be enacted to cover crimes of fraud in which physicians engage.
A. Federal Conspiracy Statutes

Primarily, attorneys have been charged with conspiracy under two federal statutes: 18 U.S.C. section 371, conspiracy to commit offense or to defraud the United States; and 18 U.S.C. section 1341, mail fraud. However, federal prosecutors recently have charged attorneys under 18 U.S.C. section 286, entitled “Conspiracy to defraud the Government with respect to claims.” Attorneys who represent physician-client and health care providers may wish to review these two conspiracy statutes, which prosecutors may use in an action against attorneys for providing improper legal advice to their clients.

1. Conspiracy to Commit Offense or to Defraud the United States

While physicians have been prosecuted in the past for conspiracies to defraud the government under 18 U.S.C. section 371, attorneys who either inadvertently or purposefully aid physicians with referral contracts that defraud the government are also vulnerable to conspiracy charges. Prosecutors may see the acts of the attorneys as furthering the conspiracy rather than as legitimate legal advice and services for their clients.

The United States Attorney in the Anderson case charged attorneys Lehr and Thompson with conspiring to commit fraud against the government through sham referral agreements for nursing home patients to their hospital and doctor clients. Lehr and Thompson were specifically charged with violations of 18 U.S.C. section 371, which prohibits conspiracies to defraud the

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67 See, e.g., United States v. Cavin, 39 F.3d 1299 (5th Cir. 1994) (two attorneys named in a 22-count indictment charging conspiracy to defraud state insurance regulators and others); United States v. Coven, 662 F.2d 162 (2d Cir. 1981) (attorney convicted of conspiracy and mail fraud in a scheme to defraud a district court and a receiver of funds in a civil case); United States v. Perez, 489 F.2d 51 (5th Cir. 1974) (prosecution of attorneys, physicians, and others, in a scheme involving staged automobile collisions creating false claims against insurance carriers).


70 See, e.g., United States v. Sidhu, 130 F.3d 644 (5th Cir. 1997) (physician and his employee were convicted of conspiracy to commit mail fraud relating to false claims made to insurers and certain government programs); United States v. Khan, 53 F.3d 507 (2d Cir. 1995) (physician and clinic organizer convicted of mail fraud and conspiracy in a racketeering enterprise to defraud the New York Medicaid system); United States v. Migliaccio, 34 F.3d 1517 (10th Cir. 1994) (conviction of physicians reversed in a case of conspiracy to defraud the United States from alleged false claims made under the CHAMPUS program); United States v. Gold, 743 F.2d 800 (11th Cir. 1984) (defendants convicted of conspiring to and defrauding the government by filing false Medicare claims); United States v. Porter, 591 F.2d 1048 (5th Cir. 1979) (convictions reversed for charges of, inter alia, conspiracy to defraud the United States in connection with Medicare services); United States v. Peterson, 488 F.2d 645 (5th Cir. 1974) (evidence insufficient as to the physician to sustain the conspiracy conviction); United States v. Iezzi, 451 F. Supp. 1027 (W.D. Pa. 1976) (evidence sufficient to sustain convictions for conspiracy to defraud insurance company by use of mail).


72 Id.
federal government. Section 371 states:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.\(^{73}\)

To obtain a conviction under section 371, “the government must prove beyond a reasonable doubt that the defendants agreed to defraud the United States, and that one of the conspirators committed an overt act in furtherance of the conspiracy.”\(^{74}\) The agreement between the conspirators is an essential element, and mere knowledge of the conspiracy does not make a person a co-conspirator.\(^{75}\) However, courts have recognized that such agreements or conspiracies are rarely express; thus, a conspiracy may be inferred from circumstantial evidence.\(^{76}\) The key issue in such a case then becomes whether the defendant “knowingly and voluntarily” joined the actions of his or her co-conspirator.\(^{77}\) Furthermore, to be implicated in a conspiracy under section 371, a person need commit only one act to be held accountable, and a defendant may be liable for the reasonably foreseeable conduct of his or her co-conspirator.\(^{78}\)

Although Anderson appears to be the first and only case in which attorneys were prosecuted criminally for conspiracy to commit health care fraud, attorneys have been prosecuted for conspiracy while representing clients in other situations.\(^{79}\) In a scheme to defraud insurance regulators, the court in United States v. Cavin\(^{80}\) ruled on the conviction of two attorneys and a broker for a conspiracy in violation of 18 U.S.C. section 371.

In Cavin, two attorneys were among the defendants named in a 22-count indictment charging conspiracy to defraud state regulators and policyholders of Alliance Casualty and Reinsurance Company (Alliance).\(^{81}\) The conspiracy

\(^{74}\) Migliaccio, 34 F.3d at 1521.
\(^{75}\) Id. (citations omitted).
\(^{76}\) See, e.g., Sidhu, 130 F.3d at 648.
\(^{77}\) Id.
\(^{78}\) Id. at 649.
\(^{79}\) See United States v. Perlstein, 126 F.2d 789 (3d Cir. 1942) (two attorneys were found guilty of criminal conspiracy for advising their clients to hinder the government in its investigation of an illegal strike); United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991) (an attorney was found guilty of violation of the law in a criminal conspiracy to defraud the United States in a bankruptcy matter).
\(^{80}\) 39 F.3d 1299, 1311 (5th Cir. 1994). The court reversed the convictions of Daigle (an attorney) and Cavin (a broker) on counts 23 and 24 of the indictment. Although the court said that, as a matter of law, the evidence was sufficient on the remaining counts to support the convictions of both Daigle and Cavin, the court vacated the judgments and remanded the case for a new trial based on erroneous evidentiary rulings and jury instructions. Seago’s (an attorney) conviction was reversed and remanded for a judgment of acquittal.
\(^{81}\) Id. at 1304.
began after David Ridgeway, an insurance executive, established Alliance.\textsuperscript{82} Ridgeway hired Gerald J. Daigle, Jr., an associate and soon-to-be partner of a prestigious New Orleans law firm, as his outside counsel.\textsuperscript{83}

Solvency was a problem for Alliance from the start.\textsuperscript{84} In an attempt to keep the struggling Alliance company afloat, Ridgeway acted through a holding company, Alliance Management Group (AMG), to repay a $1 million loan.\textsuperscript{85} Daigle reviewed documentation from AMG to Alliance for a stock transfer claimed to be valued at $1 million.\textsuperscript{86} Ridgeway testified that he and Daigle had joked about the purported value of the stock, as neither believed it was really worth $1 million.\textsuperscript{87} Even though the stock transfer closed in January 1989, the agreement was dated December 15, 1988, and it was reported on Alliance’s 1988 annual statement.\textsuperscript{88}

The 1989 annual statement reflected an unencumbered asset of a $1 million asset-backed bond issued by American Midwest Capital Corporation (AMCC).\textsuperscript{89} Cavin brokered this transaction, and Daigle reviewed it.\textsuperscript{90} When the insurance commissioner disallowed the AMCC asset along with other notes, Alliance had to raise an additional $1 million in six months.\textsuperscript{91} Ridgeway was unable to raise this amount of money, but he managed to obtain a $1 million check from Seago, whose law firm was seeking defense work with Alliance.\textsuperscript{92} Although this check was dishonored, it was included on the quarterly report as an asset.\textsuperscript{93} Ridgeway then began a series of check kiting transactions to make it appear as if he had $3 million.\textsuperscript{94} He asserted this scheme was orchestrated by Daigle.\textsuperscript{95}

The appellate court held that the evidence was sufficient to go to the jury with charges against Daigle (the attorney acting as “outside counsel”) and Cavin (the broker).\textsuperscript{96} However, two counts of the indictment, the illegal monetary transaction charges, were dismissed because there was insufficient evidence that the payments were proceeds of criminal activity.\textsuperscript{97}

\textsuperscript{82} Id. at 1302.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 1303.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. Fifty thousand shares of stock ultimately were sold for a total of $25,000, while the remaining shares were written off without value.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id. at 1304.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 1311.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 1307.
The court also determined that the evidence of bad check writing on the part of the second attorney, Seago, to accommodate a prospective client, was insufficient to support convictions of conspiracy and substantive counts. 98

The facts in the Cavin case demonstrate how attorneys can become involved in a conspiracy to defraud. Just as the attorneys in Cavin were engaged in helping the insurance company remain solvent, attorneys employed by hospitals and physicians may engage in writing contracts for patient referrals to help maintain lucrative businesses. Similarly, just as the attorneys in Cavin apparently crossed the line in aiding their client in a conspiracy to commit fraud against the government, attorneys in the health care industry may be susceptible to the same temptations.

2. Conspiracy to Defraud the Government with Respect to Claims

In addition to prosecuting physicians under 18 U.S.C. section 371, prosecutors have charged physicians 99 under 18 U.S.C. section 286, entitled “Conspiracy to defraud the Government with respect to claims.” 100 This statute specifically defines a conspiracy in the context of government claims. It also carries the potential for more severe punishment than 18 U.S.C. section 371. Like section 371, attorneys could also find section 286 troublesome. Section 286 states:

> Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both. 101

Sections 286 and 371 are the federal conspiracy offenses used most often in prosecuting physicians for health care fraud. 102 While both sections have some similarities—most notably that they involve conspiracies perpetrated against the federal government or its agencies—there are significant differences between them.

Section 286 prohibits specific conspiracies against the United States (or any of its departments or agencies), such as joint efforts or agreements to obtain payment for false, fictitious, or fraudulent claims. 103 Section 371 merely

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98 Id. at 1307-08.
101 Id.
102 See Bucy, supra note 2, at 625.
prohibits conspiracies to defraud the government or to commit an offense against the government.\textsuperscript{104} Thus, the reach of section 286 is narrower than section 371.\textsuperscript{105} However, courts have held that there is no double jeopardy violation if the government elects to prosecute a defendant under both statutes for one conspiracy, as each contains different required elements to obtain a conviction.\textsuperscript{106}

Potential penalties under these sections also differ. Section 286 carries a maximum penalty of 10 years in prison,\textsuperscript{107} whereas section 371 carries a maximum of five years in prison.\textsuperscript{108} However, both statutes also authorize a fine, either in addition to or in lieu of imprisonment.\textsuperscript{109} Additionally, at least one court has said that section 286 does not require an overt act.\textsuperscript{110} Instead, section 286 “requires proof that the conspirators agreed to defraud the government through a particular device: obtaining payment of a false claim.”\textsuperscript{111} On the other hand, section 371 requires an “overt act taken by one of the conspirators in furtherance of the conspiracy.”\textsuperscript{112}

While it appears federal prosecutors have favored section 371 over section 286 in the past, because of the amount of health care fraud and the potential for longer sentences, this trend could change in the future. Thus, attorneys and their clients should beware.

B. Related Federal Fraud and Abuse Statutes

Attorneys representing physicians or other health care clients engaged in defrauding the government may be charged with a conspiracy in relation to or stemming from several other federal criminal statutes.\textsuperscript{113} For example, an attorney could become entangled in a conspiracy to commit a theft (or conversion) by improperly advising a client to retain or conceal overpayments or billing errors charged to the government by a hospital.\textsuperscript{114} Or in some instances,
depending on the level of the attorney’s involvement with his or her client, the attorney may be charged with the underlying offense.\textsuperscript{115}

As stated previously, many of the criminal statutes under which United States Attorneys have prosecuted physicians also may apply to their attorneys. This section examines six federal statutes that are often used against physicians and other health care providers, and may be problematic for attorneys as well.\textsuperscript{116}

1. Medicare Anti-Kickback Act

One of the provisions of the Medicare Anti-Kickback Act, 42 U.S.C. section 1320a-7b (entitled “Criminal penalties for acts involving federal health care programs”), regulates self-referrals, referrals by a provider of patients to a clinic in which a physician has a financial interest, as well as payments for referrals of patients or medical business by one provider to another.\textsuperscript{117}

There are a number of important polices which are the foundation of the anti-kickback statute:

\begin{itemize}
  \item \textbf{W}hen referrals are not made on the basis of need, quality and cost, the amount paid by the government pursuant to programs like Medicare and Medicaid will be inflated, physician judgment may be impaired, and the quality of care given to patients will likely suffer.\textsuperscript{118}
\end{itemize}

The Medicare anti-kickback statute “prohibits the offer, payment, receipt, or solicitation of any inducement for referral of a service for which payment may be made under a federal health care program.”\textsuperscript{119} Punishments for those found guilty include up to five years in prison, an individual fine of $25,000 or a corporate fine of $500,000, exclusion by the Department of Health and Human Services from Medicare and Medicaid programs, and intermediate sanctions for tax-exempt violators or loss of their tax-exempt status.\textsuperscript{120} Notice of the conviction is sent to licensing boards and professional

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\textsuperscript{115} See, \textit{e.g.}, United States v. Console, 39 F.3d 641 (3d Cir. 1993) (attorneys, along with a physician, convicted for RICO and mail fraud violations).

\textsuperscript{116} The six laws identified in this section are by no means an exhaustive list of all the laws that may provide prosecutors with grounds for proceeding against attorneys for committing health care fraud. For example, the government also may use forfeiture laws to freeze and seize fees attorneys obtained from physicians engaged in defrauding Medicare and Medicaid. \textit{See generally} 18 U.S.C. §§ 981, 982 (1994); 21 U.S.C. § 853(p) (1994); 18 U.S.C. § 1345 (1994). For a further discussion of the government’s ability to freeze and seize health care provider assets, including attorneys’ fees, in cases involving alleged health care fraud, see Robert W. Biddle, \textit{Freezes and Forfeitures on Attorneys’ Fees in Health Care Fraud Litigation}, \textit{Andrews Health Care Fraud Litig. Rep.}, Mar. 1997, at 3.

\textsuperscript{117} 42 U.S.C. § 1320a-7b (1994).

\textsuperscript{118} Russell Hayman, \textit{Dissecting a Health Care Fraud Investigation}, 1129 PLI/Corp. 223, 234 (1999).

\textsuperscript{119} 42 U.S.C. § 1320a-7b. \textit{See also} United States v. Laughlin, 26 F.3d 1523, 1526 (10th Cir.).

\textsuperscript{120} \textit{Id.}
societies. Those convicted also may be subject to civil claims under the Civil Monetary Penalties Act. The statute classifies violations of the anti-kickback law as “kickbacks, bribes and rebates made directly or indirectly, overtly or covertly, in cash or in kind, and involving any item of service paid for by Medicare or any state health program.”

While there appear to be no reported cases where an attorney has been convicted under the Medicare Anti-Kickback Act, the two attorneys mentioned in the Anderson case were indicted for substantive violations under this Act. However, these attorneys were later acquitted, as the judge concluded the attorneys merely were advising their clients. Thus, even when attorneys believe they are acting in good faith, it is important for attorneys to avoid even the appearance of impropriety, as such actions may get them indicted.

2. Theft of Public Money, Property, or Records

Another statute under which the government prosecutes physicians is 18 U.S.C. section 641, which provides penalties for theft of public money, property, or records. There are basically two types of acts under this statute: (1) garden variety theft or embezzlement; and (2) the acts of receiving, concealing, and retaining government property with the intent to convert and knowledge that the property had in fact been stolen.

Anyone successfully convicted under this statute shall be fined or imprisoned not more than 10 years, or both. However, if the value of stolen property does not exceed $100, the defendant shall be fined or imprisoned not more than one year, or both.

Under the first portion of 18 U.S.C. section 641, there are four elements required to prove the offense: (1) embezzling, stealing, purloining, or

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121 See Bucy, supra note 2, at 609.
122 See Hayman, supra note 118, at 234.
123 Id.
125 See supra note 9.
127 See, e.g., United States v. Siddiqi, 959 F.2d 1167, 1168 (2d Cir. 1992) (remanded for evidentiary reasons). Here, a physician, Dr. Siddiqi, appealed his conviction for, inter alia, theft of government property. Dr. Siddiqi allegedly had billed Medicare for services rendered for the “supervision” of the administration of chemotherapy treatments, provided by hospital personnel, while he was out of the country. Dr. Siddiqi’s convictions ultimately were vacated, as the court said that the “defects in his conviction . . . [were] so fundamental as to constitute a miscarriage of justice.” United States v. Siddiqi, 98 F.3d 1427, 1440 (2d Cir. 1992).
129 Id.
130 Id.
knowingly converting,\textsuperscript{131} or selling, conveying, or disposing without authority; (2) for one’s use or the use of another; (3) any record, voucher, money, or thing of value;\textsuperscript{132} (4) of the United States or any department or agency of the United States or any property made or being made under contract for the United States or any department or agency of the United States.\textsuperscript{133}

Under this portion of section 641, courts generally have held that the standard five-year statute of limitations\textsuperscript{134} applies to such a violation.\textsuperscript{135} Thus, if a physician stole some tongue depressors from a government hospital to use in his or her private practice, then the statute of limitations would expire five years from the initial date of the theft. In such a situation, so long as the physician’s attorney does not counsel an unlawful act, the attorney can be fairly confident that he or she will not be implicated through his or her representation of the physician for the conversion.

The second portion of 18 U.S.C. section 641 involves an ongoing or “continuing offense.”\textsuperscript{136} Under this section, anyone who “receives, conceals, or retains” any of the government property listed in the first portion of the statute with the intent to convert this property to his or her own use or gain, may be held criminally liable if he or she knew the property to have been embezzled, stolen, purloined, or converted.\textsuperscript{137}

Because this section of the statute has been deemed a “continuing offense,” the statute of limitations is “toll[ed]”\textsuperscript{138} and prosecution is not barred by the five-year statute of limitations. This essentially means that there is no

\textsuperscript{131} See Morissette v. United States, 342 U.S. 246 (1952). The Court held that “knowing conversion” requires more than knowledge that the defendant was taking the property into his possession. The Court said a defendant must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion.

\textsuperscript{132} The term “thing of value” refers to property of the United States government. See, e.g., United States v. Littriello, 866 F.2d 713 (4th Cir. 1989); United States v. Benefield, 721 F.2d 128 (4th Cir. 1983); United States v. Tana, 618 F. Supp. 1393 (S.D.N.Y. 1985). A “thing of value” also includes both tangibles and intangibles. See, e.g., United States v. Collins, 56 F.3d 1416 (D.C.C. 1995) (holding 18 U.S.C. § 641 applies to intangible property such as computer time and storage). Thus, it would seem logical that money paid to a physician under Medicare and Medicaid would be considered a “thing of value” of the United States. Therefore, an attorney who knowingly aids a physician in improperly concealing such funds to defraud the government may be prosecuted for conversion.

\textsuperscript{133} 18 U.S.C. § 641.

\textsuperscript{134} Id. § 3282 (except as provided by law, for noncapital cases an indictment must be “found” or the information instituted within five years after the offense is committed).

\textsuperscript{135} See, e.g., United States v. Blizzard, 812 F. Supp. 79, 81 (E.D. Va. 1993) (“Embezzling, stealing, purloining and converting are acts that are complete and no further injury occurs once that act is accomplished”).

\textsuperscript{136} Id. (concealing and retaining stolen property is a continuing offense which tolls the statute of limitations).

\textsuperscript{137} 18 U.S.C. § 641.

\textsuperscript{138} Blizzard, 812 F. Supp. at 81. In Blizzard, the defendant received stolen government property in 1981 and 1982, and it had remained in his possession until it was seized by the government in 1987. In ruling that the 1992 prosecution of the defendant was not barred by the statute of limitations, the court said concealing and retaining stolen property was intended to be treated as a continuing offense. The district court relied on the United States Supreme Court’s test for a continuing offense, which was articulated in Toussie v. United States, 397 U.S. 112 (1970): an alleged crime is continuing if (1) the explicit language
statute of limitations for violating this portion of 18 U.S.C. section 641, that is, until the government learns who has possession of the property in question.

The second part of 18 U.S.C. section 641 could prove particularly problematic for attorneys who aid physicians and health care providers in billing the government for Medicare and Medicaid claims. For example, if there is an act which could constitute either a concealing or retaining of government property or funds—such as failure to rectify a past billing error once discovered—an attorney must be sure not to provide advice that would aid in the continuance of what may have initially been a seemingly innocent mistake. If an attorney advises a client to keep or otherwise conceal the converted property, then this act may constitute an aiding and abetting of a crime by the attorney.

Additionally, if a client refuses to disgorge property covered under the second portion of 18 U.S.C. section 641, then at least one commentator suggests that withdrawal by the attorney may be required. This is so because the attorney’s discussion with the client may be relevant to the client’s decision to retain and/or conceal the property, which makes the attorney a critical witness in the government’s investigation.

Furthermore, attorneys who receive payment from health care providers engaged in defrauding the government also may be receiving stolen government money and could be subject to prosecution for conversion. While there apparently are no reported cases involving attorneys being prosecuted for conversion by receiving converted funds as payment for legal services, the Department of Justice (DOJ) _Attorneys’ Manual_ provides some guidance as to how the government would proceed regarding legal fees paid to attorneys for representation in a criminal matter.

The _Manual_ notes that defense attorneys who knowingly “receive and deposit” tainted funds, either as part of a sham or fraudulent transaction, or as legal fees for representation of a client in any noncriminal matter, face criminal prosecution. In addition, defense attorneys who receive and deposit tainted

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139 Marc N. Garber, *New Federal Health Care Statute Expands Reach of Criminal Prosecutions*, ANDREWS HEALTH CARE FRAUD LITIG. REP., June 1999, at 13. The author, Marc Garber, an Assistant United States Attorney in Nevada, posits a scenario where a hospital discovers an accidental overbilling of $5 million. After consulting counsel, the hospital decides to keep the money. At that point, he suggests that the hospital has willfully converted the funds for its own use.

140 Id.

141 Id.

142 Id.

funds from a third-party payer as legal fees for representation of a client in a criminal case face prosecution.\textsuperscript{144} The \textit{Manual} insists that attorneys investigate to make sure they are not receiving tainted money as payment for services rendered to clients.\textsuperscript{145} However, the DOJ will not prosecute attorneys for receiving bona fide fees for legitimate representation in a criminal matter, except if the DOJ has proof beyond a reasonable doubt that the attorneys had actual knowledge of the illegal origin of the specific property they received. But evidence of willful blindness in and of itself does not generally rise to the level of prosecution.\textsuperscript{146} Additionally, the government likely will not prosecute if the evidence consists of confidential communications made during the course of the representation and made in an attempt to effectively represent the client.\textsuperscript{147}

3. \textit{Theft or Embezzlement in Connection with Health Care}

In an attempt to further curb health care fraud, in 1996 Congress amended chapter 31 of title 18, by adding section 669 entitled “Theft or embezzlement in connection with health care,”\textsuperscript{148} which is now codified at 18 U.S.C. section 669.\textsuperscript{149} Section 669 was patterned after 18 U.S.C. section 641,\textsuperscript{150} the federal theft and embezzlement statute, and serves as a companion to it. The first portion of this statute provides penalties for whomever knowingly and willfully embezzles, steals, or otherwise without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care benefit program.\textsuperscript{151}

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Section 1957 then refers to 18 U.S.C. §1956, Laundering of monetary instruments, for the definition of “unlawful activity.” Section 1956 forbids anyone from knowingly using proceeds from unlawful activity to conceal the nature, location, source, ownership, or control of the proceeds of specified unlawful activity. It also prohibits anyone from transporting, transmitting, or transferring such proceeds for the same purposes. Section 1956 further defines “unlawful activity” as an offense under 18 U.S.C. §641 (relating to conversion of public money, property, or records), as well as any act or activity constituting an offense involving a federal health care offense.
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\textsuperscript{144} \textsc{Attorneys’ Manual, supra} note 143, at 9-105.600.
\textsuperscript{145} \textit{Id}.
\textsuperscript{146} \textit{Id}.
\textsuperscript{147} \textit{Id}.
\textsuperscript{150} \textit{See} Garber, \textit{supra} note 139.
\textsuperscript{151} 18 U.S.C. § 669. The “Federal health care offense” and the “health care benefit program” are defined at 18 U.S.C.S. § 24 (Law. Co-op. 1993 & Supp. 1999). Section 24(a) states that the term “Federal health care offense” means: “a violation of, or a criminal conspiracy to violate—(1) section 669, 1035, 1347, or 1518 of the title; (2) section 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 of this title, if the violation or conspiracy relates to a health care benefit program.” Section 24(b) then defines “health care benefit program” as: “any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual and includes any individual, or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.”
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A conviction under section 669 subjects the defendant to the possibility of a fine or imprisonment of not more than 10 years, or both. However, if the value of the stolen or converted property does not exceed $100, then the perpetrator shall be fined or imprisoned for not more than one year, or both. It should be noted that this statute does not set a dollar amount limiting fines levied under it. Additionally, like the federal theft statute, section 669 does not contain a statute of limitations provision. Thus, the standard five-year statute of limitations provision should apply. However, attorneys also should be concerned whether certain acts under section 669 could be construed as “ongoing” offenses—for example, where the nature of the offense is a concealing of government funds—which may arguably toll the statute of limitations in certain situations until the government discovers the theft.

Because of the short amount of time since the enactment of 18 U.S.C. section 669 and this writing, there appear to be no reported cases testing its validity or interpreting its meaning. However, this statute will likely be interpreted in much the same way as its companion statute, 18 U.S.C. section 641.

4. False Claims Act

An increasingly popular law under which health care providers are prosecuted is the False Claims Act. The False Claims Act prohibits anyone from knowingly presenting or causing to be presented to a United States government officer, employee, or member of the Armed Forces, a false or fraudulent claim for payment or approval. It also prohibits anyone from knowingly making, using, or causing a false record or statement to be made to get a false or fraudulent claim paid or approved by the government. In addition, the

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153 Id.
154 Id. § 3282.
155 Apparently, no cases have yet been reported holding that 18 U.S.C. § 669 is a “continuing” offense. Unlike the “standard” federal theft or conversion statute, 18 U.S.C. § 641, section 669 does not appear to have the “explicit” language, such as “concealing” or “retaining,” that would make it a “continuing” offense. See, e.g., Blizzard, 812 F. Supp. at 81 (holding that concealing and retaining stolen property was intended to be treated as a continuing offense). However, one may argue that the catchall language in section 669—“or otherwise without authority converts to the use of any person other than the rightful owner”—encompasses a continuing offense, as this language would seemingly include acts of concealing or retaining stolen government property.
156 See, e.g., Peterson v. Weinberger, 508 F.2d 45 (5th Cir.) (false claims submitted by nursing home operation and physician for services allegedly performed by the physician); United States ex rel. Fahner v. Alaska, 591 F. Supp. 794 (N.D. Ill. 1984) (optometrist submitted hundreds of false claims to Medicaid for eye care services that were never performed). See also Margaret Cronin Fisk, The Whistleblower Juggernaut, Nat’l L.J., Aug. 9, 1999, at A1, A13 ($140 million settlement paid insurance company for violations under the False Claims Act).
158 Id. § 3729(a)(2).
False Claims Act makes it unlawful to conspire to defraud the Government by receiving payment for a false or fraudulent claim.\textsuperscript{159} The False Claims Act also creates an exception for prosecuting violators who furnish government investigators with all the information they know about the violation within 30 days after the date on which he or she first obtained the information.\textsuperscript{160} The violator must fully cooperate with the government.\textsuperscript{161} This provision in the False Claims Act applies only if “no criminal prosecution, civil action, or administrative action had commenced” and the violator did not have knowledge of the investigation.\textsuperscript{162}

The court in \textit{Boisjoly v. Morton Thiokol, Inc.},\textsuperscript{163} recognized three elements necessary for a conviction under the False Claims Act: (1) the claim must be submitted for payment to the government; (2) the claim must be false; and (3) the person submitting the claim must have knowledge of its falsity\textsuperscript{164} or “reckless disregard” or “deliberate ignorance” of the truth or falsity of the claim.\textsuperscript{165}

The False Claims Act contains a unique provision whereby private citizens who possess original knowledge of alleged false claims can stand in the shoes of the government and file a lawsuit based upon this statute.\textsuperscript{166} This provision acts as incentive for private citizen “whistleblowers,” known as relators, to expose the fraud by bringing suit on behalf of the government.\textsuperscript{167} The government must then decide if it wishes to intervene. In a false claims action, it is possible for the relator to collect up to 30\% of the recovery.\textsuperscript{168} But while the potential recovery for a relator may be large,\textsuperscript{169} the government intervenes in only about 20\% of the cases filed.\textsuperscript{170}

To bring a false claims lawsuit—which is also known as a “qui tam”\textsuperscript{171}—the relator must file it under seal and provide the government with a copy of the complaint.\textsuperscript{172} By doing so, the relator provides the government with enough

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\item \textsuperscript{159} \textit{Id.} \textsuperscript{3729(a)(3)}.\textsuperscript{37}
\item \textsuperscript{160} \textit{Id.} \textsuperscript{3729(a)(7)(A)}.\textsuperscript{37}
\item \textsuperscript{161} \textit{Id.} \textsuperscript{3729(a)(7)(B)}.\textsuperscript{37}
\item \textsuperscript{162} \textit{Id.} \textsuperscript{3729(a)(7)(C)}.\textsuperscript{37}
\item \textsuperscript{163} 706 F. Supp. 795 (N.D. Utah 1988).\textsuperscript{37}
\item \textsuperscript{164} 31 U.S.C. \textsuperscript{3729} (1994).\textsuperscript{37}
\item \textsuperscript{165} \textit{Boisjoly}, 706 F. Supp. at 808.\textsuperscript{37}
\item \textsuperscript{166} 31 U.S.C. \textsuperscript{3729}.\textsuperscript{37}
\item \textsuperscript{167} \textit{Id.} \textsuperscript{3730(b)(2)}. This statute sets forth the requirements a relator must meet in order to bring suit: (1) a relator must serve a copy of the complaint and written disclosure of all material evidence and information he or she possesses about the alleged events upon the United States; and (2) a relator must file the complaint in camera. The complaint remains under seal for 60 days and is not served on the defendant until the court orders it to be served.\textsuperscript{37}
\item \textsuperscript{168} \textit{Id.} \textsuperscript{3730(d)(1)}.\textsuperscript{37}
\item \textsuperscript{169} See Fisk, \textit{supra} note 156, at A13 (relator’s share of recovery was $29 million).\textsuperscript{37}
\item \textsuperscript{170} \textit{Id.}\textsuperscript{37}
\item \textsuperscript{171} A “qui tam” is “[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.” \textit{Black’s Law Dictionary} 1262 (7th ed. 1999).\textsuperscript{37}
\item \textsuperscript{172} \textit{Id.}\textsuperscript{37}
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information to make a well-reasoned decision on its possible future participation in the lawsuit. The secret filing prevents wrongdoers from finding out about the investigation until after the lawsuit has been made public. Secrecy also protects the defendant from unfounded public accusations and inconsistent pleading requirements. Finally, the government has time to determine if it previously possessed the information upon which the suit is based. If the government did, then the relator no longer has jurisdiction.

5. Mail Fraud

Prosecutors have successfully employed the federal mail fraud statute to convict health care providers in the past. Health care attorneys also may be implicated in a violation under this statute, and indeed attorneys have been prosecuted for other types of mail fraud violations in the past.

Under the federal mail fraud statute anyone who uses the mail or any private or commercial interstate carrier to defraud is guilty of mail fraud. The elements of mail fraud are: (1) devising or intending to devise, (2) any scheme or artifice to defraud or obtain money or property by false or fraudulent pretenses, (3) and, for the purposes of carrying out this scheme, places or causes to be placed anything in the mail. Penalties under this statute range from a fine to imprisonment for up to five years, or both.

This statute differs significantly from civil fraud because prosecutors do not have to show actual damage. Additionally, prosecutors do not have to show that the scheme was successful. Billing for services not performed, false descriptions of services actually performed, false representations as to the necessity of medical procedures, and billing for services performed unprofessionally have been determined to be schemes or artifices to defraud the government within the meaning of the mail fraud statute. This may be particularly relevant both to health care providers, as well as their attorneys, because of the frequent use of the mails in billing.
The mail fraud statute requires a minimum level of intent. A prosecutor is required only to show that the defendant acted “with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended.”186 The case of United States v. Perkal187 demonstrates the minimal level of intent required for the mailing element in the wire fraud statute.

In this case, Perkal, a physician, was convicted of mail fraud in connection with staged automobile accidents, even though the prosecutor failed to prove that Perkal mailed anything.188 The court said it was reasonably foreseeable that Perkal’s attorney, to whom Perkal sent the false information about patients’ medical treatment, would mail it to insurance companies.189 The court said that “it is enough if he [Perkal] knows that in the execution of the scheme letters are likely to be mailed, and in fact they are mailed.”190 Therefore, it is not required that the defendant actually place the material in the mail, just that the mails will be used.191

Attorneys who are concerned about any possible violations of the mail fraud statute should consult the DOJ Attorneys’ Manual. The Manual sets out the policy for prosecuting mail fraud charges: “Prosecution(s) of fraud ordinarily should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts.”192 Furthermore, schemes which, by their very nature, are directed at “defrauding a class of persons, or the general public, with a substantial pattern of conduct,” are given serious consideration for prosecution.193 In general, if an attorney was assisting a physician or health care provider in a fraudulent scheme to defraud the government, particularly in the Medicare and Medicaid programs, so long as the mails were used to facilitate the scheme, then it would seem likely that this statute would be utilized in pursuing the offenders.

6. RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO), a statute passed to penalize members of organized crime, has proven helpful to

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186 Pereira v. United States, 347 U.S. 1, 8-9 (1954).
187 530 F.2d 604 (4th Cir. 1976). See also United States v. Richman, 944 F.2d 323, 332 (7th Cir. 1991) (the court held it was immaterial that the fraudulent scheme in which the defendant attorney was involved had not progressed to the level where he had to make false representations directly to the insurance company).
188 Perkal, 530 F.2d at 605.
189 Id. at 606-07.
190 Id. at 606 (citations omitted).
191 Id.
192 Attorneys’ Manual, supra note 143, at 9-43.100.
193 Id.
prosecutors in convicting health care providers who cheat the government.194 RICO prohibits racketeering activities, which have been defined in a variety of state and federal crimes.195 These state crimes include murder, robbery, bribery, extortion, and illegal drug dealing.196 Federal crimes amounting to a pattern of racketeering activity include crimes ranging from drug dealing and gambling to white collar crimes.197

RICO has been used against physicians who have made false claims for medical services that were not actually provided198 and to prosecute physicians who conspire with attorneys and patients to submit false claims to insurers for fictitious automobile accidents.199 Specifically, 18 U.S.C. section 1962(c)200 prohibits “any person employed by or associated with any enterprise” that affects interstate or foreign commerce from being involved “in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” Section 1962(d)201 makes it unlawful to conspire to violate section 1962(c) or any other substantive RICO provisions.

United States v. Console202 illustrates how attorneys can become involved with physicians in a RICO operation. In this case, Dr. Markoff and two attorneys, Console and Curcio, unsuccessfully appealed their convictions of RICO and federal mail fraud violations, which had been described as a scheme to defraud insurance companies by submitting inflated medical bills on behalf of accident victims.203

The facts of Console are as follows. The attorneys developed a “relationship” with Dr. Markoff that continued for several years through the 1970s and 1980s.204 Dr. Markoff referred victims of automobile accidents to the attorneys’ firm for legal services, and in turn the attorneys referred their clients to Dr. Markoff for medical services.205 First, Dr. Markoff sent medical bills of clients of the firm to the attorneys.206 Next, the attorneys sent the medical bills to their clients’ insurance companies for payment of personal injury protection (PIP) under New Jersey’s no-fault law.207 If the attorneys made a special damages claim for a client, then they sent the medical bills either to

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195 See Bucy, supra note 2, at 623.
196 Id.
197 Id.
198 See, e.g., United States v. Worthington, 698 F.2d 820, 822 (6th Cir. 1983).
201 Id. § 1962(d).
202 13 F.3d 641 (3d Cir. 1993).
203 Id. at 648.
204 Id.
205 Id.
206 Id.
207 Id.
the client’s or the defendant’s insurance company.\textsuperscript{208} Dr. Markoff received the PIP payments for the medical bills he sent to the attorneys, and the attorneys took a share of any recovery.\textsuperscript{209}

In rejecting the attorneys’ claim that there was insufficient evidence to sustain their RICO convictions, the Third Circuit found that the government had presented sufficient evidence to prove an association between the attorneys’ law firm and Dr. Markoff’s medical practice, which was designed to “enrich its members through the pursuit of personal injury business.”\textsuperscript{210} The circuit court used the United States Supreme Court’s holding in \textit{United States v. Turkette}\textsuperscript{211} in establishing whether there was sufficient proof to establish the RICO enterprise.\textsuperscript{212}

First, the government was required to prove that there was an ongoing organization by showing that a decision-making structure existed within the group.\textsuperscript{213} The court found evidence that Console and Dr. Markoff met and agreed to “inflate medical bills of the law firm’s clients in exchange for continued patient referrals from the firm.”\textsuperscript{214} In accordance with this agreement, Dr. Markoff directed his staff to falsify patient bills and charts. Console, on the other hand, directed attorneys working for him to refer clients to Dr. Markoff, to specify dates and charges to be listed on the bills, and to coach clients to “make false statements regarding the extent of their medical treatment to support fraudulent insurance claims.”\textsuperscript{215}

The second element required the government to prove various associates functioned as a continuing unit by showing “that each person perform[ed] a role in the group consistent with the organizational structure established by the first element and which furthers the activities of the organization.”\textsuperscript{216} The government’s evidence showed the attorneys in the law firm and Dr. Markoff in his practice performed roles within the enterprise organization and thus advanced their scheme to defraud insurance companies. An attorney in the law firm referred clients to Dr. Markoff. He also coached them to make false statements about their medical treatment. Another attorney communicated dates and charges to be reflected on patient bills to Dr. Markoff and his billing clerk. The attorneys also provided lists of patient records to be falsified. Dr. Markoff’s employees then falsified records and submitted them to insurance companies. These activities, the court said, constituted a continuing unit.\textsuperscript{217}

\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} 452 U.S. 576, 583 (1981).
\textsuperscript{212} \textit{Console}, 13 F.3d at 650.
\textsuperscript{213} Id. at 651.
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
To prove the third element, the government had to demonstrate that the enterprise was an “entity separate and apart from the pattern of activity in which it engages.” To satisfy this element, the government was required to show that the enterprise had “an existence beyond that which . . . [was] necessary merely to commit each of the acts charged as predicate racketeering offenses.” However, the court believed that the government was not required to show that the enterprise had some wholly unrelated function to the racketeering activity, but instead merely that it had an existence beyond that which was necessary to simply commit each of the acts charged as the predicate racketeering offenses. On this element, the court concluded that Dr. Markoff and the attorneys “coordinated the commission of multiple predicate offenses . . . and continued to provide legitimate services during the period” of their racketeering activities.

In addition to challenging their conviction for insufficient evidence to prove a continuing racketeering enterprise, the defendants also argued that an association between two legal entities is not a RICO enterprise under section 1961(4). The court rejected this argument, saying the association between the law firm and Dr. Markoff’s medical practice constitutes a RICO enterprise under section 1961(4).

Attorneys and physicians alike can learn a lesson from the Console case. Even if attorneys and physicians are doing business as legal entities, they may still be subject to charges of racketeering.

C. Prosecution Problems in Proving Intent to Defraud the Government

One of the main difficulties in obtaining a conviction of conspiracy to commit fraud centers around establishing the accused’s intent. Statutes that define a crime or illegal activity often address whether or not specific intent to defraud is required.

The False Claims Act, for example, contains a “knowledge” (or “knowingly”) element in the statutory definition. Under this Act, the government must prove that the defendant had actual knowledge of the information, acted in deliberate ignorance of the truth or falsity of the information, or acted in reckless disregard of the truth or falsity of the false claim(s). Thus, to obtain a conviction, the prosecutor need not prove a specific intent to defraud.

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218 Id.
219 Id. at 652.
220 Id. at 651.
221 Id. at 652.
222 Id.
223 Id.
225 Id. § 3729(b)(1)-(3).
226 Id. § 3729(b)(3).
Under the federal theft or conversion statute (18 U.S.C. section 641), the prosecutor must prove that the “defendant had the specific intent to take the property in question but need not prove that the defendant knew the property belonged to the government.” Specific intent, however, is a state of mind, which is a question left for the trier of fact.

Appellate courts have interpreted the mail fraud statute—which does not specify intent—as requiring proof that the defendant acted knowingly, willfully, or unlawfully to defraud the government.

The anti-kickback statute, 42 U.S.C. section 1320a-7b, specifies that a violator must act “knowingly and willfully.” At least one circuit court recently held that proof of specific intent is required under these terms.

Finally, the RICO statutes require the plaintiff to prove the mens rea “required in the criminal statutes which serve as the ‘racketeering activity’ in the complaint.”

III. ETHICAL DUTIES OF ATTORNEYS

The rules governing attorneys’ conduct prohibit attorneys from participating or aiding in a crime or fraud. The rules state that attorneys who discover their clients intend to commit a crime “likely to result in imminent death or substantial bodily harm” may reveal information necessary to prevent this crime to authorities. Although the rules of ethical conduct prohibit attorneys from facilitating criminal or fraudulent activity, not all states require attorneys to inform authorities of a possible future fraud.

A. The Scope of Attorney Representation in Relation to a Possible Future Crime

Ethical rules prevent an attorney from advising or assisting a client in committing a crime or perpetuating fraud. According to the Model Rules of

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227 See Bucy, supra note 2, at 630.
228 United States v. Shackelford, 677 F.2d 422 (5th Cir. 1982).
230 See Bucy, supra note 2, at 649.
231 42 U.S.C. § 1320a-7b(a)(1).
232 See Bucy, supra note 2, at 649.
234 See Bucy, supra note 2, at 649.
235 MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2(d) (1998).
236 Id. Rule 1.6(b)(1).
237 Id. Rule 1.2(d).
239 MODEL RULES Rule 1.2(d). See also Miller v. Stonehenge/FASA-Texas, 993 F. Supp. 461, 464-65 (N.D. Tex. 1998) (citations omitted). The court held that an attorney is authorized “to interpose any defense or supposed defense” on behalf of a client. However, the court said an attorney is liable if he or she knowingly commits a fraudulent act that injures a third party or if he or she knowingly enters into conspiracy to defraud the third party.
Professional Conduct, Rule 1.2(d), an attorney “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” For instance, an attorney cannot tell a client which countries do not have extradition agreements with the United States. The client could use this information in planning and executing a kidnapping or bank robbery. The client could plan to escape to one of the countries that do not have extradition agreements with the United States, and the attorney would have helped the client escape prosecution.

Comment 6 to Rule 1.2(d) explains the difference between advising a client about the consequences of a past crime and helping the client commit further crimes. It states: “The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct.” Comment 6 also warns that there is a critical distinction between attorneys providing advice about the legal consequences of clients’ actions and counseling clients about the means by which a crime or fraud might be committed.

Attorneys may lawfully advise clients about the possible ramifications of their crimes, but they cannot tell clients how to commit crimes while avoiding detection. Often, however, the difference between these two courses of action is difficult to discern. One of the problems associated with Rule 1.2(d) is the line drawn “between directing, suggesting, or assisting in criminal or fraudulent conduct, on the one hand, and providing information about the law (‘legal consequences’) on the other.”

Moreover, it is often true that educating...
the client about the law is the functional equivalent of suggesting or assisting in its violation.\textsuperscript{246} It has been suggested that attorneys should be allowed to educate their clients about the legal consequences of certain acts or omissions, but attorneys also must exercise discretion in deciding how much to tell their clients about the current status of the law.\textsuperscript{247} Comment 7 to Rule 1.2 further elaborates on the problem of whether it is appropriate for attorneys to give their clients particular legal advice when the conduct is that of a continuing nature:

When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is not permitted to reveal the client’s wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed.\textsuperscript{248}

It also has been said that Model Rule 1.2(d) embodies several distinctions in legal ethics. First, there is the distinction between providing information about the law and when providing that information is the equivalent of assisting one in committing an act in violation of the law.\textsuperscript{249} In addition, there is a distinction between civil and criminal violations of law.\textsuperscript{250} An attorney may advise or assist a client in engaging in specific civil conduct that has certain “negative consequences.”\textsuperscript{251} For example, an attorney may assist a client in committing a breach of contract or in “interfer[ing] with a prospective business relationship not yet rising to the level of a contract.”\textsuperscript{252} However, this same exception does not exist for criminal conduct. An attorney may not assist a client in conduct that is expressly prohibited by criminal law.\textsuperscript{253} For example,

\begin{itemize}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} \textit{Id.} at 1589.
\item \textsuperscript{248} \textit{Model Rules} Rule 1.2 cmt. 7 (1998).
\item \textsuperscript{249} See Pepper, \textit{supra} note 245, at 1591.
\item \textsuperscript{250} \textit{Id.} at 1559.
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} There are a number of cases that hold attorneys cannot be found liable for the intentional tort of interference with contract. \textit{See, e.g.,} Los Angeles Airways v. Davis, 687 F.2d 321 (9th Cir. 1982); Schott v. Glover, 440 N.E.2d 376 (Ill. App. 1982); Beatie v. DeLong, 561 N.Y.S.2d 448 (App. Div. 1990). In fact, in most situations, attorneys are dismissed from the case in the pleading or summary judgment stages. \textit{See} Pepper, \textit{supra} note 245, at 1594.
\item \textsuperscript{253} \textit{See} Pepper, \textit{supra} note 245, at 1559. It is argued that, because individuals have a right to breach a contract, their attorneys should be able to advise them accordingly. \textit{Id.} at 1550. However, in some instances, an attorney may be forbidden by statute from advising a client to commit a breach of contract. \textit{See, e.g., Michigan Comp. Laws Ann. § 445.1628 (West 1989)} (any person licensed to do business in Michigan, while carrying on that business, may not knowingly advise a person selling or transferring property, securing a residential window period loan, to evade the enforcement (breach a contract with the lender) of a due-on-sale clause; any party breaching this provision shall be liable for a civil fine not to exceed $5,000 for each offense and shall be subject to revocation of his or her license).
\end{itemize}
an attorney may not advise a client on how to commit a fraudulent act or some other crime of serious moral wrongdoing.\(^{254}\)

It has been proffered that the test of whether the attorney is directing or suggesting the client’s behavior or merely providing advice of potential outcomes should hinge on whether it is the client or the attorney who proposes the conduct.\(^{255}\) Therefore, if the client proposes the conduct in question, the attorney may “educate” the client and doing so will not be the functional equivalent of counseling the client to violate the law.\(^{256}\) However, if the attorney somehow proposes the conduct—for example, by posing (or suggesting) a hypothetical situation—the attorney’s advice may be seen as the functional equivalent of counseling the client to violate the law.\(^{257}\) As one commentator on legal ethics has stated: “It simply doesn’t seem right that the lawyer should be the originator of client conduct contrary to the law.”\(^{258}\)

Finally, according to Comment 9, Rule 1.2(d) applies equally to defrauded parties who are parties to the transaction and to those who are not parties to the transaction.\(^{259}\) Comment 9 states that “a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability.”\(^{260}\) Furthermore, attorneys may be required to withdraw from representation of clients if, during the course of representing these clients, the attorney discovers the clients are engaged in committing a crime or perpetrating a fraud.\(^{261}\)

While Rule 1.2(d) may seem clear on its face, there is often a fine line between good advice and possible criminal conduct, upon which attorneys must balance. While attorneys may be honestly trying to educate and vigorously represent their clients, prosecutors may see such efforts as assisting or participating in illegal activity.\(^{262}\)

**B. An Attorney’s Ethical Duty to Disclose**

As noted in the previous section, attorneys may not ethically disclose confidential client information, except as specified under Model Rule 1.6.\(^{263}\) However, whether attorneys have an obligation to “blow the whistle” on their physician clients who are committing health care fraud is often unclear. To

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\(^{254}\) Pepper, *supra* note 245, at 1550.

\(^{255}\) *Id.* at 1590.

\(^{256}\) *Id.*

\(^{257}\) *Id.*

\(^{258}\) *Id.*

\(^{259}\) *MODEL RULES* Rule 1.2 cmt. 9.

\(^{260}\) *Id.*

\(^{261}\) *Id.* Rule 1.16(b)(1).

\(^{262}\) *See supra* part I.

\(^{263}\) *MODEL RULES* Rule 1.6(a).
help resolve uncertainly, though, attorneys may consult the Model Rules of Professional Conduct for guidance on their ethical responsibilities.

Model Rule 1.6 specifies what constitutes confidential client information.\textsuperscript{264} Under this rule, an attorney may disclose client information only to prevent a crime that would result in imminent death or substantial bodily harm.\textsuperscript{265} Thus, attorneys defending health care providers who defraud the government might conclude that they have no duty to inform authorities of criminal fraud, because death does not appear imminent to anyone and no physical harm is anticipated.

However, attorneys must do more than simply check the Model Rules. They also must check state regulations, which vary considerably. “Forty jurisdictions permit disclosure [of client confidences] to prevent a crime leading to substantial bodily harm,\textsuperscript{266} and 37 permit disclosure to prevent criminal fraud, though 33 forbid disclosure to rectify crime or fraud.”\textsuperscript{267} Presently, at least eight states have stricter rules than the current ABA disclosure rule.\textsuperscript{268} For example, attorneys in Illinois “shall reveal information about a client . . . necessary to prevent the client from committing an act that would result in death or serious bodily harm.”\textsuperscript{269} Attorneys in Florida\textsuperscript{270} and Virginia\textsuperscript{271} must disclose information they obtain from clients to prevent all serious crimes, including criminal fraud. Pennsylvania attorneys must disclose client confidences to prevent criminal fraud.\textsuperscript{272} Attorneys in New Jersey\textsuperscript{273} and Wisconsin\textsuperscript{274} must make disclosures to prevent all serious fraud, whether it is criminal or not. Attorneys in Ohio\textsuperscript{275} and Hawaii\textsuperscript{276} must disclose client confidences to rectify a crime or a fraud. On the other hand, California is the only state that forbids

\textsuperscript{264} Id.
\textsuperscript{265} Id. Rule 1.6(b)(1). Rule 1.6(b)(1), regarding confidentiality of information, states: “A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . .”
\textsuperscript{266} The following states have adopted Model Rule 1.6: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Florida; Hawaii; Idaho; Illinois; Indiana; Kansas; Kentucky; Louisiana; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nevada; New Hampshire; New Jersey; New Mexico; North Carolina; North Dakota; Oklahoma; Pennsylvania; Rhode Island; South Carolina; South Dakota; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; and Wyoming. ABA Compendium of Professional Responsibility Rules and Standards 525 (1999).
\textsuperscript{267} See Goldhaber, supra note 238, at A10.
\textsuperscript{268} Id. Among the states having stricter rules on disclosure of confidential client information than those of the ABA are Illinois, Florida, Hawaii, New Jersey, Ohio, Pennsylvania, Virginia, and Wisconsin.
\textsuperscript{269} Ill. Sup. Ct. Rules of Prof. Conduct 1.6(b).
\textsuperscript{270} Fla. St. Bar R. 4-1.6(b)(1).
\textsuperscript{271} Va. R.S. Ct. Pr. 6, § 2, RPC R. 1.6(c)(1)(2).
\textsuperscript{272} Pa. St. RPC R. 1.6(c)(1).
\textsuperscript{274} W. St. RPC. SCR. 20:1.6(b).
\textsuperscript{275} Ohio St. CPR. Dr. 4-101(c)(3).
\textsuperscript{276} Hi. Rs. Ct. Ex. A. RPC R. 1.6(c)(2).
all disclosure, even disclosures designed to prevent death or substantial bodily harm.\textsuperscript{277}

To standardize the disclosure rules throughout the country, the American Bar Association (ABA) is proposing the adoption of a newer version of Rule 1.6b.\textsuperscript{278} This rule would authorize an attorney to reveal information relating to the representation of a client or former client to the extent the attorney reasonably believes necessary

\begin{quote}
[1] to prevent the client from committing a crime or fraud that is likely to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; (3) to rectify or mitigate substantial injury to the financial interests or property of another resulting from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services…\textsuperscript{279}
\end{quote}

Under the proposed rule, a client’s past crimes still would not be disclosed; however, the rule would require the attorney to report a client’s intention to commit a new crime or fraud with the help of the attorney.\textsuperscript{280}

In addition to the new ABA proposed rule, the American Law Institute’s (ALI) \textit{Restatement of Law Governing Lawyers} takes a position similar to that taken by the ABA’s proposed Rule 1.6(b). Proposed \textit{Restatement} section 117B allows an attorney to disclose client confidentiality to prevent a future crime or fraud if it would cause substantial loss to a person.\textsuperscript{281}

Until all jurisdictions accept a clear, uniform rule, attorneys’ disclosure duties remain unclear. However, attorneys who believe they have an ethical problem should consult their state’s ethical rules. Additionally, attorneys may consult the Model Rules of Professional Conduct, the ALI’s \textit{Restatement of Law Governing Lawyers}, and any relevant state or federal statutes.

\begin{footnotes}
\item[277] \textit{CA. R. Evid.} §956.
\item[278] \textit{MODEL RULES} Rule 1.6b (Draft 1999).
\item[279] \textit{Id.}
\item[280] \textit{Id.}
\item[281] \textit{RESTATEMENT OF LAW GOVERNING LAWYERS} §117B (Draft 1999). The proposed \textit{Restatement} § 117B states: (1) A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes such use or disclosure is necessary to prevent a crime or fraud, and: (a) the crime or fraud threatens substantial loss to a person; (b) the loss has not yet occurred; the lawyer’s client intends to commit the crime or fraud either directly or through a third person; and (c) the client has employed or is employing the lawyer’s services in committing the crime or fraud. (2) In addition to a loss otherwise described in Subsection (1) but that has already occurred, a lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes such use or disclosure is necessary to rectify or mitigate the loss. (3) Before using or disclosing information pursuant to this Section, the lawyer must, if feasible, make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim or take other action to prevent, rectify, or mitigate the loss and, if relevant, to advise the client of the lawyer’s ability to sue or disclose pursuant to this Section and the consequences thereof. …
\end{footnotes}
CONCLUSION

Attorneys in the health care field face a difficult challenge. At times, they represent clients who defraud the government in an active, concerted manner. At other times, they represent clients who defraud the government because the physicians do not understand the complex Medicare and Medicaid rules. To avoid problems, attorneys must continue to research fraud and abuse statutes and case law, and keep abreast of the ethical standards of the profession.

The best defense against a charge of conspiracy to defraud the government in the health care field is innocence or, in other words, that the attorney did not engage in a conspiracy to defraud. How an attorney goes about proving his or her innocence may be a problem, though. First, an attorney may argue that he or she merely advised the client within the bounds of the law and his or her ethical duties. Other defenses an attorney may assert include attorney-client and work product privileges. However, before an attorney finds himself or herself in court, the attorney can take several precautions to prevent such severe consequences.

Some legal commentators strongly suggest that attorneys who represent clients seeking reimbursement from Medicare and/or Medicaid should put their advice in writing. Doing so also may “serve as evidence that clients were warned about potential illegal activities.” It also may provide the attorney additional documentation to prove that he or she was not in fact part of the conspiracy.

Mark Thompson, who was indicted along with Lehr in the Anderson case, contends attorneys should not only document advice to their clients, but also document their own responsibility in the case. Otherwise, Thompson warns, “contracts and communications between lawyer and client can be misunderstood.” For example, in a letter to a hospital executive, Thompson wrote that the contract would “cover the next three months.” Although Thompson intended the word “cover” to entail the time period of the contract, the prosecutor claimed that it pertained to hiding fraudulent transactions. Thompson’s example demonstrates how ordinary transactions and

283 Id. at *2. The attorneys in Anderson attempted to assert the work product doctrine and the attorney-client privilege, even after being granted “use” immunity. However, the government had obtained documents and communications from one of the other defendants, which the attorneys had provided prior to their use immunity. Thus, as to those documents, the immunity was ineffective because it was not information compelled under the immunity order.
285 Id.
286 Id.
287 Id.
288 Id.
289 Id.
communications—even things an attorney may ordinarily do and consider good practice, such as writing a client a letter—may cause a prosecutor to believe the attorney has furthered and involved himself or herself in the conspiracy.\(^{290}\)

Thompson also argues that clients should be advised to document their lawful intent to receive “fair market value” for their services and attorneys should clearly document the duties outside their scope of responsibility.\(^{291}\) For instance, attorneys should state in correspondence that the hospital bears the responsibility, not the attorney, to monitor the hospital-physician relationship.\(^{292}\) Once documentation is accomplished, Thompson further advises attorneys to “destroy notes because their sketchiness can be misconstrued.”\(^{293}\)

Conversely, other legal commentators caution against written advice, because prosecutors may misinterpret the documentation and use this misinterpretation to prosecute the attorney.\(^{294}\) Written advice also may harm the clients in some cases, as the attorney’s advice may establish the requisite intent by the defendant and knowledge that certain acts were illegal.\(^{295}\)

The American Health Lawyers Association (AHLA) Fraud and Abuse, Self-Referrals, and False Claims Substantive Law Committee is preparing guidelines for attorneys as well as their clients.\(^{296}\) The AHLA guidelines will help both attorneys and their clients adhere to fraud laws and regulations. *Best Practices Handbook in Advising Clients on Fraud and Abuse Issues* is now available, and a physician’s compliance manual is under way.\(^{297}\)

In the meantime, it may be beneficial for attorneys to follow the advice of one attorney who practices in the health law field.\(^{298}\) First, attorneys should understand their clients’ business.\(^{299}\) Second, attorneys should remember who they are representing and when to stop representing their clients.\(^{300}\) To that end, it is suggested that attorneys follow their instincts and stop representing a client when something seems awry.\(^{301}\) Third, it is suggested that health

\(^{290}\) *Id.*

\(^{291}\) *Id.*

\(^{292}\) *Id.*

\(^{293}\) *Id.*

\(^{294}\) See Pimley & Rockelli, * supra* note 284.

\(^{295}\) *Id.*


\(^{297}\) Telephone Interview with Robert Truhn II, Production Editor/Editor of *Health Lawyers News*, American Health Lawyers Association (June 14, 2000). According to Truhn, the book, written by the Task Force of the Fraud and Abuse, Self-Referrals and False Claims Substantive Law Committee, is available only through the AHLA website, which can be found at <healthlawyers.org/home.htm>. The cost of the book is $55 for members and $70 for nonmembers.

\(^{298}\) *Steps to Avoiding a “Kansas City” Outcome*, BNA’s *Health L. Rep.*, Feb. 11, 1999, at 227 (paraphrasing the advice of health care attorney Steven Schaars).

\(^{299}\) *Id.*

\(^{300}\) *Id.*

\(^{301}\) *Id.* Rule 1.16 of the Model Rules of Professional Conduct requires an attorney to withdraw “if the representation of the client will result in violation of the rules of professional conduct or other law.” In
care attorneys inform their clients about problems with the clients’ proposed transactions, even though the attorneys may lose those clients.\footnote{428} Finally, and perhaps most importantly, the moment it is clear that an attorney is going to be a witness, it is time for an attorney to give up that client.\footnote{303}

\addition, Rule 1.16 allows an attorney to withdraw if “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent [or] the client has used the lawyer’s services to perpetrate a crime or fraud.” When withdrawing, the attorney should give “reasonable notice to the client,” “allow time for employment of other counsel,” “surrender papers and property to which the client is entitled,” and “refund any advance payment of fee that has not been earned” at the time of withdrawal. Model Rules Rule 1.16. \footnote{302} See supra note 298. \footnote{303} Id.
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