# Chapter 19
# Criminal Statutes Affecting Medical Providers


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## Introduction to Criminal Law

Criminal law is the body of law that relates to criminal prosecutions and defense. Crime is variably defined through social and humanistic lenses as "behavior against order," "behavior against public feelings and emotions," and "behavior incongruent with social conscience and common sense [1]." Crime, from a sociological viewpoint, relates to human behavior incongruent with the common norms and values of a society [2]. Merriam-Webster defines "crime" as an illegal act for which someone can be punished by the government or a grave offense especially against morality [3]. The gravity of criminal behavior, and therefore its punishment, is that, unlike civil actions, crimes may be punishable by fines (monetary loss), incarceration (loss of liberty), lifelong criminal records (loss of certain freedoms), and/or death (loss of life).

Crimes can be defined by federal or state statutes, and the jurisdiction for criminal prosecution may be federal, state, or both; therefore, a number of overlapping laws define crime and its punishment in America. Federal criminal law is governed entirely by statute; there are no federal common law crimes. States variably retain common law crimes. Criminal jurisdiction refers to both the authority to create or legislate substantive criminal laws and the authority of a court to enforce laws as a matter of criminal procedure. The "police powers" of states are derived from the Tenth Amendment to the US Constitution which gives states the rights and powers

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"not delegated to the United States" [4], thereby giving the states the power to establish and enforce laws protecting the welfare, safety, and health of the public. The US Constitution prohibits federal and state governments from enacting ex post facto laws [5]. An ex post facto law is one which (1) makes criminal an act that was innocent when done, (2) aggravates a crime or increases the punishment thereof, (3) changes the rules of evidence to the detriment of a defendant, or (4) alters the rules of criminal procedure which may deprive defendants of their substantive rights.

A person accused of a crime is generally charged in a formal accusation called an indictment (for felonies or serious crimes) or information (for misdemeanors). Criminal cases are not brought privately but rather by the government, on behalf of the people of the USA, prosecuting the case either through the US Attorney's Office in the case of a federal crime or through the state's attorney's office ("District Attorney") in the case of state crimes. The Fifth Amendment to the US Constitution, as a provision of the Bill of Rights, enumerates protections for those accused of federal crimes including (1) protection from prosecution for crimes unless indicted by a grand jury, (2) protection from "double jeopardy" or being prosecuted more than once for the same criminal act, (3) protection from "self-incrimination" during testimony, and (4) protection against being deprived of life, liberty, or property without "due process of law" [6]. The right to grand jury indictment under the US Constitution is not binding on the states.

Crimes may be classified by Congress or the states as either a misdemeanor or a felony. Infractions are not considered crimes, although they may be punishable by fines. Classification of a crime as a misdemeanor or a felony depends on its maximum potential punishment, which is specific to the criminal code for a jurisdiction. Behavior that may constitute a misdemeanor in one state may be considered a felony in another. In some jurisdictions, a crime may result in either a misdemeanor or felony charge, to be determined at the discretion of the prosecutor. Also, repeated offenses for a misdemeanor offence may be prosecuted subsequently as felonies. The crime of "driving under the influence" or DUI may be classified as a misdemeanor or a felony, depending on the circumstances.

A misdemeanor is a crime for which the punishment is usually a fine and/or up to 1 year in a county jail. In a sense, a misdemeanor is a class defined by exclusion; it is a crime that is not a felony. Thus, a criminal act that is less serious than a felony is considered to be a misdemeanor. In general, there are four classes of misdemeanors (1–4 or A–D), although Class 4/D misdemeanors are often referred to as "unclassified" misdemeanors, prosecuted and sentenced primarily on the basis of discretion. A Class A or Class 1 misdemeanor refers to the most serious misdemeanors and may include assault causing bodily injury, DUI without bodily injury, resisting arrest, perjury, unlawful possession of a controlled substance, or the violation of a restraining order. A Class B or Class 2 misdemeanor may include criminal trespass, indecent exposure, or property theft of a worth greater than $50 but less than $500. Finally, a Class C or Class 3 misdemeanor are minor offences for which punishment may, but does not usually, include jail time, for example, disorderly conduct, criminal mischief, or reckless damage or destruction.

A felony is a crime punishable by at least 1 year in prison but may also include fines and a penalty or death. Felonies are further classified as violent and nonviolent felonies. Common laws and statutes in most states further classify felonies into degrees, 1–4 or A–D felonies, each associated with greater penalties, as specifically outlined in a state's criminal code. Federal felonies are classified differently and range A–E, where, in contradistinction to state felonies, Class A federal felonies are the gravest and associated with the harshest penalties.

Moral turpitude is defined vaguely as "a legal concept that refers to any conduct that is believed to be contrary to the community standards of honesty, justice, or good moral values. While there is no one exact definition of acts that are considered under moral turpitude, they are typically described as any acts of vileness or depravity, or of sexual immorality, whether in a private or social context" [7]. US law designates "moral turpitude" as a reason to restrict the licensing of professionals, including, but not limited to, doctors and lawyers, and also as a criterion for denial of admission to the US Black's Law Dictionary which defines the phrase "good moral character," in part, as:

> [a] pattern of behavior that is consistent with the community's current ethical standards and that shows an absence of deceit or morally reprehensible conduct .... A pattern of behavior conforming to a profession's ethical standards and showing an absence of moral turpitude. Good moral character is usu[ally] a requirement of persons applying to practice a profession such as law or medicine. [8]

A conviction involving a crime of moral turpitude may have significant implications regarding professional licensing, medical staff credentialing, or other certifications. Moral turpitude has been used by the American Bar Association (ABA) and in medical licensing as a reason for disbarment or licensure revocation. In 1983, the ABA removed the term because it was too broad and vague. Many licensure applications require that the applicant answer "have you been convicted of a misdemeanor involving moral turpitude?" Arguably, although any misdemeanor, by definition, involves the breach of a social duty that man owes to his fellow man or to society in general, the specific legal issue is whether the misdemeanor translates in conduct that constitutes baseness, vileness, or depravity.

In 1992 an Ohio physician, Lawrence J. Rossiter, failed to file one of his employee's quarterly federal tax returns, a misdemeanor, and in 1995 he failed to pay estimated taxes of about $160,000, a felony; in 1998 he pled guilty in federal court and paid, in addition to restitution, a $2000 fine and served 6 months of monitored home confinement, but subsequently in 2000, the Ohio board of medical licensure suspended his license for 90 days based on the interpretation of the law that the misdemeanor crime involved "moral turpitude." The physician challenged the decision of the medical board in court, but the court affirmed the board's license suspension [9]. The physician then appealed the trial court's decision, and, in 2002, an Ohio court of appeals reversed the trial court's decision opining "We believe appellant's misdemeanor offense under the circumstances of the present case did not rise to the level of baseness, vileness, or the depravity in private and social duties which

man owes to his fellow man, or to society in general." The appeals court made a request to the licensing board to review the case; however the board reaffirmed the suspension [10].

## The Elements of a Crime

In order to prove culpability under criminal law, the prosecution is required to prove specific elements: (1) "actus reus" (guilty action) which refers to a voluntary physical act or omission, (2) accompanied by (2) "mens rea" (guilty mind) which refers to a state of mind at the time of the act, (3) concurrence in time of "actus reus" and "mens rea," and (4) a harmful result caused both factually and proximately by the defendant's action(s). Strict liability crimes, such as statutory rape, do not require a proof of a mens rea; in this circumstance the law does not require that the prosecution shows that defendants have actual factual knowledge of the child's age.

The Model Penal Code and most state statutes require a showing of "purposely," "knowingly," or "recklessly" for most crimes. Providers should be aware that these terms, frequently included in a medical malpractice compliant, do not generally, but still may, impute criminal liability. Rather, the term "reckless" in terms of medical malpractice or personal injury refers to the proposition that a person knew or should have known that a certain conduct would likely cause harm, thus alleging a greater level of liability than pure negligence, which is a failure to exercise reasonable care resulting in the injury of another person. These terms in a medical malpractice complaint are mostly intended as a basis for supporting an award for punitive damages.

A finding of guilt for any given crime also requires that the prosecution proves each element of a crime, as defined by jurisdiction. For example:

- False imprisonment: (a) unlawful, (b) confinement of a person, and (c) without valid consent
- Larceny: (a) a taking, (b) and carrying away (asportation), (c) of tangible property, (d) of another, by trespass, (e) with the intent to permanently deprive another person of his interest in that property
- Assault: (a) an act intended to cause apprehension of harmful or offensive contact and (b) apprehension in the victim that harmful or offensive contact would occur
- Fraud: (a) a making of a false statement, (b) with knowledge that the statement is false or with reckless disregard as to whether or not the statement is false or true, (c) with the intent that the listener rely on the statement, (d) with the result that the listener relies on the statement, and (e) with the result that the listener is harmed
- Conspiracy: (a) an agreement between two or more persons, (b) with an intent to enter into an agreement, and (c) an intent to achieve the objective of the agreement (noting that most states now also require an overt act in furtherance of the conspiracy in addition to mere preparation)

## Basics of Criminal Procedure

The US Constitution guarantees specific rights of individuals faced with criminal prosecution. Specifically, Amendments IV, V, VI, and VIII have important provisions regarding the rights of accuseds. The Fourth Amendment [11] includes both the prohibition against unreasonable searches and seizures and the exclusionary rule which prohibits the introduction of evidence obtained in violation of a defendant's Fourth, Fifth, or Sixth Amendment rights. The admissibility of evidence is governed by a preponderance of the evidence test. The Due Process Clause of the US Constitution provides that guilt in a criminal trial must be established by jury, finding the defendant "guilty beyond a shadow of a doubt" [12].

Evidentiary searches and seizures must be reasonable under the Fourth Amendment; a Fourth Amendment rights arises when (a) there is governmental conduct, (b) where the defendant has a reasonable expectation of privacy, and either a warrant is served or there is a valid warrantless search and seizure. Where a warrant is served, in order to be valid, it must (a) be issued by a neutral and detached magistrate [13], (b) be based in probable cause [14] based in facts obtained under oath or affirmation [15], and (c) describe with particularity the premises [16]. Only the police and not private citizens may execute a warrant; the presence of third parties, such as private citizens or the media, who are not critical to the warrant's execution, renders the search unreasonable. There are exceptions to the requirements for a warrant, such as a search incidental to a lawful arrest, items in plain view, automobiles, or consent.

The Fifth Amendment, applicable to the states through the Fourteenth Amendment, provides, in part, that no person will be compelled to give self-incriminating testimony [17]. The case of *Miranda v. Arizona* [18] defined the basis for the admissibility of a confession based on the Fifth Amendment rights. The Miranda Court opined that police interrogation as conceived and practiced at the time was inherently coercive and the resulting intimidation, though informal and without legal sanction, was contrary to constitutional protections. There are several elements to Miranda, including the following: (1) Miranda warnings must be given prior to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" [19]; (2) Miranda warnings must precede custodial interrogation; (3) prior to interrogation of a suspect in custody, he or she must be given full warnings, or the equivalent, of his rights; and (4) once a suspect who has been appraised of his or her rights asserts the *right* to *silence* and requests *counsel*, the police must respect that assertion [19]. Once an accused invokes his right to counsel, all questioning must cease until the accused is provided with attorney representation. Miranda rights may be waived; that waiver must be knowing, voluntary, and intelligent [20].

The Sixth Amendment right to a jury trial applies to the states. The defendant has a right to counsel under the Fifth and Sixth Amendments, which applies at all critical stages of a criminal prosecution after formal criminal proceedings are initiated.

The Sixth Amendment also grants a defendant in a criminal proceeding a right to confront his or her accuser and also to confront adverse witnesses.

There are four main insanity defenses in a criminal proceeding: (a) M'Naghten, (b) irresistible impulse, (c) substantial capacity, and (d) Durham. The M'Naghten insanity defense, created in England in 1843 [21], is the most common insanity defense in the USA. M'Naghten is a cognitive test which focuses on the defendant's awareness, rather than the ability to control his or her conduct. There are two elements of M'Naghten: (a) First, the defendant must be suffering from a mental defect at the time he or she commits the criminal act. (b) Second, the trier of fact must find that because of the mental defect, the defendant did not know either the nature and quality of the criminal act or that the act was wrong. The "substantial capacity test" is a defense created by the Model Penal Code and states that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law" [22]. The Durham insanity defense [23] is used only in the state of New Hampshire.

## Accomplice Liability

At common law there are potentially four types of parties to a felony: (1) the principal in the first degree, (2) a principal in the second degree (those who command, aid, or encourage and are present at the crime), (3) accessories before the fact (person(s) who aid, abet or encourage but are not present at the crime), and (4) accessories after the fact (who may assist the principal after the crime is committed). Modern statutes have combined the principal in the second degree with the accessories before the fact, leaving (1) the principal, accomplices, and accessories after the fact. The principal is the one who with the requisite mental state actually engages in the act or omission which results in the criminal act. The accomplice is the one who, with the requisite intent for a crime to be committed, knowingly, voluntarily, or intentionally aids, counsels, or encourages the principal before or during the commission of a crime. The accessory after the fact is the one who assists another, knowing that he or she has committed a felony, with the intent of helping to escape arrest, trial, or conviction.

An accomplice is criminally liable to the same extent as the principal. The accomplice is liable for complicity, the act of helping or encouraging another individual to commit a crime or failed to prevent it. The elements of proof necessary to establish complicity vary by state but generally include (1) the commission of a crime by another; (2) the accomplice "aided, counseled, commanded, or encouraged" the other person in the commission of the crime; and (3) the accomplice acted with the requisite mental state (as defined within the jurisdiction) to assist in commission of the crime. Furthermore the accomplice is liable for additional separate and subsequent crimes, resulting from the initial crime, as long as the subsequent crimes were probable or foreseeable.

## Burden of Proof and Presentation of Evidence

There is a presumption of innocence as a component of a fair trial [24]. The Due Process Clause of the Constitution requires that the state proves guilt "beyond a reasonable doubt." Thus, the level of proof required in criminal cases is substantially greater than that required in civil cases, where the degree of proof is "by a preponderance of the evidence." The prosecution must prove all elements of the crime. In addition, the prosecution must meet the burden of proof to overcome any affirmative defenses.

## Guilty Pleas and Plea Bargaining

A guilty plea is "more than a confession which admits that the accused did various acts"; it is a "stipulation that no proof by the prosecutor need be advanced" [25]. "A guilty plea is the 'legal equivalent' of a 'verdict' and is 'tantamount' to a 'finding'" of guilt [26]. A plea of guilty results in a waiver of the Sixth Amendment right to a jury trial for criminal cases. The judge must advise the accused personally [27] regarding the nature of the charge for which a plea is offered [28], the maximum penalty and any applicable mandatory minimum sentences, and the right to not plead guilty. If the court accepts the plea, the case proceeds to sentencing.

The laws regarding plea bargains vary between jurisdictions. California makes a distinction between "(1) a conditional plea, where a plea is conditioned upon receiving a particular disposition, and (2) an unconditional or open plea" [29]. In general, a plea bargain is an agreement between a defendant and a prosecutor, in which the defendant agrees to plead guilty or "no contest" ("nolo contendere") in exchange for the use of prosecutorial discretion to drop one or more charges, reclassify the crime to one of a less serious nature (and penalty), or recommend lenience in sentencing to the presiding judge. In general, plea bargains represent enforceable contracts as between defendant and prosecutor; however, the judge is neither bound by the agreement nor required to accept the plea. Nonetheless, although a court is not bound to a plea bargain until it sentences the defendant, it also must allow the defendant to withdraw the plea if it refuses to sentence the defendant according to the agreement [30].

## Federal Criminal Statutes with Risks to Medical Providers

Medical liability in the setting of usual clinical medical practice is rare. For the most part, criminal liability in medicine occurs as a result of administrative activities such as billing and coding, inappropriate contractual relationships, or nonclinical

activities with patients or staff. Nonetheless, providers must realize that recent high-profile medical malpractice cases have resulted in felony manslaughter convictions.

## *Criminal Prosecution for Medical Malpractice*

The elements of proof necessary to sustain an allegation of medical malpractice under civil law are (1) duty, (2) breach, (3) causation, and (4) damages (see Chap. 17). In order for medical malpractice to rise to a criminal cause of action, a fifth element must be established, that is, "mens rea" – the state of mind. Once again, mens rea would require proof, beyond a shadow of a doubt, that the provider acted "purposely," "knowingly," or "recklessly." Thus, in order to demonstrate criminal negligence, there must be a gross and unjustifiable deviation from the standard of care, and in addition the provider must also be shown to have had a criminally culpable state of mind at the time that the malpractice occurred. Moreover, the departure from the duty of ordinary standard of care in a criminal malpractice setting requires the prosecution to show that the departure was objectively unjustifiable and the risk was substantial. Filkins has suggested that particular patterns of physician conduct generally influence a prosecutor's decision to file criminal charges against a physician and that the same patterns influence the jury in their verdict. The patterns of conduct which triggered a sense of criminal culpability included (a) recurrences of identical issues, (2) a failure to act in a timely manner, and (3) an appearance of improper motive such as "practicing outside of one's area of expertise" or "attempting to cover up a clinical mistake" [31]. Filkins' research suggested that a jury might find an accused physician criminally guilty "even if the prosecution fails to establish causation or the standard of care" so long as the jury finds that the physician was "irresponsible or indifferent" [31]. The court in *United States v. MacKay* [32] opined that:

> [T]he case presented the jury with the .. even more difficult task of deciding whether such behavior constituted a kind of medical malpractice, which, although negligent, is not criminal, or whether the doctor had knowingly and intentionally left the field of medicine…
> *United States v. MacKay* at 1297

Perhaps the best known, well-publicized case of a physician accused of criminal medical negligence was that of Dr. Conrad Murray, the personal physician of performer Michael Jackson [33]. Murray was arrested and charged with involuntary manslaughter in the death of Jackson after he administered propofol, an intravenous anesthetic to Jackson, following a prior ingestion of lorazepam, a benzodiazepine, outside the hospital setting, at Jackson's residence. Jackson died June 25, 2009; jury selection began on September 8, 2011; the trial began on September 27, 2011; and on November 7, following 8 hours of deliberation, Murray was found guilty of involuntary manslaughter and was sentenced to 4 years in prison. Murray was released after two serving years.

Criminal prosecution of healthcare professionals is not limited to just physicians, and both the Department of Justice and state attorney general have begun to also indict nurses and nursing assistants with criminal charges for alleged neglect or abuse of resident patients in nursing homes. The concern and justification for criminal prosecution is the protection of the vulnerable adult population in nursing homes. In 2009, prosecutors filed charges for second-degree criminal mistreatment against Virginia Munger, a CNA employed by HomeWell Senior Care in Seattle, WA, after prosecutors concluded that Munger failed to provide appropriate medical interventions for an elderly patient she was responsible for [34]. Also in 2009, California Attorney General charged Kern Valley Hospital administrators with eight felony counts of elder abuse based on allegation that they allowed staff to forcibly administer psychotropic medications to patients for convenience, rather than for their patients' therapeutic interests purportedly resulting in deaths of three of the nursing home residents [35]. In 2017, The Broward State Attorney's Office filed charges of "aggravated manslaughter of an elderly person or disabled adult" as against four staff members of a Hollywood Hills nursing home where several residents died after the air-conditioning system failed following Hurricane Irma in September 2017 [36].

In 2017, a Dallas neurosurgeon, Christopher Duntsch, was convicted of five felony counts of aggravated assault of serious bodily injury and sentenced to life in prison [37]. Apparently, Duntsch, a trained and licensed neurosurgeon, operated on 38 patients, leaving 31 paralyzed, seriously injured, or dead from surgical complications, over a span of 2 years [38]. The prosecution argued that Duntsch was not only incompetent but carried malice toward his patients and intentionally that put them in grave danger.

In 2019, Dr. William Husel was charged in the death of 25 critical care patients at hospitals in and around Columbus, Ohio, through prescribing fatal doses of fentanyl, a powerful opioid [39]. Husel has pleaded not guilty to 25 counts of murder in the deaths of the patients arguing that he was providing comfort care for dying patients rather than intentionally to kill them. Husel has brought suit against the Columbus-area Mount Carmel Health System and its parent organization, Trinity Health Corp. for defamation, with the claim that he did not deviate from hospital policy on end-of-life care [40]. The trial date has been moved to April 2021 [41].

The issue of opiate prescriptions for the management of pain is and will likely continue to be a public policy, regulatory, and legal risk for providers. The US Drug Enforcement Agency (DEA) enforces controlled substances law, and the federal Food and Drug Administration ("FDA") is responsible for standards of protection of the public in drug use through the Federal Food, Drug, and Cosmetic Act [42]. The Department of Justice enforces the Controlled Substances Act (CSA), which is a federal criminal drug law that prohibits illegal drug manufacturing and distribution. Providers may be charged with violations of the CSA for misprescribing and violations of the FDCA for misbranding or adulterating a drug sold in interstate commerce. The subsequent penalties may range from civil monetary penalties to criminal misdemeanors or felonies, on a legal theory that the provider did not issue a valid prescription (pursuant to legitimate medical practice) and therefore

introduced a "prescription only" drug into the market without a prescription, rendering it misbranded [43]. Misprescribers, under the CSA, may face state or federal criminal charges. For liability to attach to physicians, they must prescribe controlled substances (1) knowingly, (2) without a legitimate medical purpose, and (3) outside the course of professional practice [44]. The challenge faced by prosecutors in criminal medical liability cases is a complex assessment of (1) the point at which a medical indication becomes illegitimate, (2) a determination of the boundaries of standard of care, and (3) the extent at which crossing those boundaries warrants criminal liability [45].

## *Harassment and Criminal Harassment*

Harassment can occur in the workplace, potentially creating a hostile workplace environment, which may be actionable under various civil laws including federal statutes. Harassment in the workplace usually takes one of two forms: (1) discriminatory offensive conduct directed against a protected class or "quid pro quo" harassment, which occurs in cases in which employment decisions or treatment are based on submission to or rejection of unwelcome conduct, typically conduct of a sexual nature. Discriminatory harassment may be based in race, gender, religion, disability, sexual orientation, or age. Nondiscriminatory workplace harassment is usually based in workplace roles or positions of power. Workplace harassment may violate Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), and the Americans with Disabilities Act of 1990 (ADA); such types of harassment are investigated and enforced by the US Equal Employment Opportunity Commission. In the context of noncriminal harassment, the aggrieved party may also bring a private civil suit.

Criminal harassment differs workplace or discriminatory harassment; criminal harassment is defined and governed by individual state laws. Here, harassment generally refers to unwanted, unwelcomed, and uninvited verbal or physical conduct directed against a person or persons which demeans, intimidates, threatens, or offends the victim and results in a hostile environment or puts a person in fear of their safety. Harassment encompasses "bullying." Harassment can take many forms including verbal, physical, stalking, or a display or signage. In such cases, a variety of state statutes may interplay regarding the form through which harassment is communicated. Harassment can occur through the use of the mail or electronic devices such as a phone or computer which are forms of cyberbullying or cyberstalking. In general, state laws require some showing of a credible threat to one's safety. The form, duration, or intensity of the behavior affects the potential criminal harassment charge, which can range from a misdemeanor to a high-level felony charges.

The following examples illustrate the criminal statutes of one state, New York, as they apply to criminal harassment (readers should consult the applicable laws of their own state). For example, New York's harassment law defines the offense of harassment as follows: (1) the accused makes a communication likely to cause

annoyance or alarm; (2) the accused threatens to strike, kick, or shove another individual; and (3) the accused participates in any course of alarming conduct or repeated committed acts with the intention to alarm or significantly alarm another individual. The crimes of menacing, harassment, and aggravated harassment are similar; the circumstances and the discretion of the prosecution will determine the severity of the penalty sought.

New York State Penal Law § 120.13 defines "Menacing in the First Degree" which in New York is classified as a Class E felony as:

> A person is guilty of menacing in the first degree when he or she commits the crime of menacing in the second degree and has been previously convicted of the crime of menacing in the second degree or the crime of menacing a police officer or peace officer within the preceding ten years.

New York State Penal Law § 120.14 defines "Menacing in the Second Degree" which in New York is classified as a Class A misdemeanor as:

A person is guilty of *menacing in the second degree* when:

1. He or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearms; or
2. He or she repeatedly follows a person or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place another person in reasonable fear of physical injury, serious physical injury or death; or
3. He or she commits the crime of menacing in the third degree in violation of that part of a duly served order of protection, or such order which the defendant has actual knowledge of because he or she was present in court when such order was issued, pursuant to article eight of the family court act, section 530.12 of the criminal procedure law, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, which directed the respondent or defendant to stay away from the person or persons on whose behalf the order was issued.

New York State Penal Law § 120.15 defines "Menacing in the Third Degree" which in New York is classified as a Class B misdemeanor as:

> A person is guilty of menacing in the third degree when, by physical menace, he or she intentionally places or attempts to place another person in fear of death, imminent serious physical injury or physical injury.

New York State Penal Law § 240.25 defines "Harassment in the First Degree" which in New York is classified as a Class B misdemeanor as:

> A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury….

New York State Penal Law § 240.26 defines "Harassment in the Second Degree" which in New York is classified as a violation as:

> A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:

1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
2. He or she follows a person in or about a public place or places; or
3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose…

New York State criminal law further distinguishes "harassment" from "aggravated harassment" which is a felony. New York State Penal Law § 240.31 defines "Aggravated Harassment in the First Degree" a Class E felony as:

> A person is guilty of aggravated harassment in the first degree when with intent to harass, annoy, threaten or alarm another person, because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct, he or she:

1. Damages premises primarily used for religious purposes, or acquired pursuant to section six of the religious corporation law and maintained for purposes of religious instruction, and the damage to the premises exceeds fifty dollars; or
2. Commits the crime of aggravated harassment in the second degree in the manner proscribed by the provisions of subdivision three of section 240.30 of this article and has been previously convicted of the crime of aggravated harassment in the second degree for the commission of conduct proscribed by the provisions of subdivision three of section 240.30 or he or she has been previously convicted of the crime of aggravated harassment in the first degree within the preceding ten years; or
3. Etches, paints, draws upon or otherwise places a swastika, commonly exhibited as the emblem of Nazi Germany, on any building or other real property, public or private, owned by any person, firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property;
4. Sets on fire a cross in public view; or
5. Etches, paints, draws upon or otherwise places or displays a noose, commonly exhibited as a symbol of racism and intimidation, on any building or other real property, public or private, owned by any person, firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property.

New York State Penal Law § 240.30 defines "Aggravated Harassment in the Second Degree" a Class A misdemeanor:

> A person is guilty of aggravated harassment in the second degree when:
>
> 1. With intent to harass another person, the actor either:
>    (a) communicates, anonymously or otherwise, by telephone, by computer or any other electronic means, or by mail, or by transmitting or delivering any other form of communication, a threat to cause physical harm to, or unlawful harm to the property of, such person, or a member of such person's same family or household as defined in subdivision one of section 530.11 of the criminal procedure law , and the actor knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person's physical safety or property, or to the physical safety or property of a member of such person's same family or household; or
>    (b) causes a communication to be initiated anonymously or otherwise, by telephone, by computer or any other electronic means, or by mail, or by transmitting or delivering any other form of communication, a threat to cause physical harm to, or unlawful harm to the property of, such person, a member of such person's same family or household as defined in subdivision one of section 530.11 of the criminal procedure law , and the actor knows or reasonably should know that such communication will

cause such person to reasonably fear harm to such person's physical safety or property, or to the physical safety or property of a member of such person's same family or household; or

2. With intent to harass or threaten another person, he or she makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication; or
3. With the intent to harass, annoy, threaten or alarm another person, he or she strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct; or
4. With the intent to harass, annoy, threaten or alarm another person, he or she strikes, shoves, kicks or otherwise subjects another person to physical contact thereby causing physical injury to such person or to a family or household member of such person as defined in section 530.11 of the criminal procedure law ; or
5. He or she commits the crime of harassment in the first degree and has previously been convicted of the crime of harassment in the first degree as defined by section 240.25 of this article within the preceding ten years.

Within the medical practice setting, harassment behavior may be on the part of the provider but may also be engaged in by patients, friends, or families. Furthermore, workplace harassment, or disruptive behavior, may escalate to the point of harassment. Thus, providers should be aware of not only their rights but also their duties and the attendant legal risks.

## *Assault/Battery*

The definition of "assault" varies by jurisdiction; however, in general, the elements of "assault" is generally defined as (1) an action, (2) with the intent to cause reasonable apprehension of an imminent harmful or offensive contact in another, and (3) the defendant's action causes the victim to reasonably apprehend such a contact. Assault requires an overt or direct act that would put a "reasonable person" in fear for their safety. The standard for a "reasonable person" is the jury or trier of fact. No actual physical contact is necessary for an assault to occur; however, spoken words alone are not sufficient to constitute an assault unless the defendant also engages in an act in furtherance of the spoken words. The "intent" sufficient to constitute assault is a "general intent" such that intentional actions which would be considered dangerous by reasonable people are sufficient to sustain a charge of assault.

The definition of "battery" varies by jurisdiction; however, the elements of "battery" is generally defined as (1) intentional touching, (2) which must be either harmful or offensive, and (3) without the victim's consent. Battery generally does not require the intent to harm the victim, only the intent to cause a physical contact. Battery also does not require that the victim is harmed by the physical contact, as long as an intentional offensive contact actually occurs. The standard for the determination of whether a contact was in fact offensive is evaluated from the perspective of the "ordinary person" or the jury or trier of fact. There are both civil and criminal liabilities for battery, and a defendant may face both civil and criminal liabilities for

the same act. Not all states have actions for criminal battery; for example, New York does not prosecute criminal battery and rather combines battery into the crime of assault. Consent is a defense to the crime of battery. Informed consent is a basic requirement for medical care, unless certain specific exceptions apply.

For medical treatment or procedural interventions without a patient's consent or in the case of an informed refusal, the patient may have a legitimate legal claim for a cause of medical battery, even in the absence of the provider's intent to cause harm. In a medical battery claim, there is generally no need to prove injury or negligence. However, as in all battery cases, it is necessary to prove that the medical personnel was engaged in unauthorized touching, contact, or handling of the victim. Medical battery is not the same as medical malpractice and therefore is unlikely to be covered under standard medical malpractice liability policies. Medical battery, similar to all crimes, is also likely to be investigated by the State Department of Health and be a basis for potential professional licensure sanctions.

In the 1993 case of *Craig L. Miller v. Rhode Island Hospital*, Miller et al. became intoxicated and was involved in a serious motor vehicle accident. Miller was transported to Rhode Island Hospital where his blood alcohol level was found to be 0.233. Based on the level of Miller's intoxication and the nature of the accident, physicians decided to perform a diagnostic peritoneal lavage which Miller refused. Miller was physically restrained, and the procedure was performed anyway. Subsequently, it was determined that Miller was not competent to make a decision based on his level of intoxication, and he later brought suit for battery [46].

In the 2014 case of *Shuler v. Garrett*, PLLC LLC, Pauline Sloan Shuler died in the intensive care unit of Baptist Memorial Hospital-Memphis on June 23, 2011, allegedly from an allergic reaction to heparin injections that had been administered despite her objections and despite that she wore a medical bracelet noting her heparin allergy and her medical records also documenting the allergy. The Tennessee Court noted that "[p]erformance of an unauthorized procedure constitutes a medical battery" [47] and that "[m]edical battery is also distinct from, although closely related to, a tort arising from a doctor's failure to obtain informed consent. Whereas the threshold question in an informed consent case is whether the patient's lack of information negated her consent, the question in a medical battery case is much simpler: Did the patient consent at all?" [47].

## Criminal Federal Fraud and Abuse Laws

Although alleged violations of the federal "fraud and abuse" statutes, such as the federal False Claims Act or the Anti-Kickback Statute, are managed by the Office of the Inspector General (OIG), the enforcement of these statutes is through the Department of Justice and therefore the Federal Bureau of Investigation (FBI).

Potential fraud and abuse violations may come to the attention of the OIG through digital database analysis, Recovery Audit Contractors ("RACS"), Medicaid data, private insurers, whistleblowers, or patients and families. Once a complaint or

a pattern is discovered, preliminary examination, based on all available data under the provider's Medicare National Provider Identification Number, is culled and confirmed. Medicare investigators will almost certainly work through the office of US Attorney General (USAG), with the collaboration of the Office of the Medicaid Inspector General at the state level and with the local oversight of the local Assistant US Attorney (AUSA). The provider is unlikely to be aware that such preliminary investigations are underway. If there is sufficient preliminary evidence to support further prosecution, the next step are the service of search warrants for the physician's office and home and initiation of grand jury subpoenas. The search warrants are likely to be executed unannounced by many armed FBI and other federal agents with the objective of securing potentially evanescent incriminating evidence. Providers should be advised that cooperation in such settings is essential and that any interference with the execution of the search warrant is grounds for further liability and criminal charges; however, the provider should not make statements to the agents and immediately seek legal counsel.

Where the investigating agency serves a grand jury subpoena upon the provider, the objective is to obtain additional evidence in support of an indictment. Defense counsel is not permitted at the grand jury proceeding. The grand jury is likely to be followed by a formal pre-indictment conference, with the intent of explaining the charges and the evidence and potentially securing a plea, or to begin negotiations. Any criminal conviction, or plea of nolo contendere, involving any offense related to the practice of medicine is ground for denial or revocation of licensure.

## *Criminal False Claims Statute*

The federal False Claims Act ("FFCA") statutorily prohibits provider conduct involving the submission of false claims to the government and also the knowing and improper retention of overpayments of government funds (see Chap. 12). The FFCA has been effectively used to prosecute healthcare providers for the (a) billing for services or supplies not actually provided, (b) billing for non-reimbursable services, (c) using false diagnoses to justify claims, and (d) misrepresentations on government performance evaluations.

> The criminal False Claims Statute, 18 U.S.C. § 287 provides that:
>
> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

In order to prove guilt under 18 USC § 287, the government prosecution must establish that the defendant (1) made or presented a false, fictitious, or fraudulent claim to a department of the USA; (2) knew such claim was false, fictitious, or fraudulent; and (3) did so with the specific intent to violate the law or with a consciousness that what he was doing was wrong [48]. In contradistinction to the Civil False Claims

Act [49], there may not be a requirement that the statements or claims be material or that specific intent to defraud is required [50]. Here, presentation of a claim is considered to represent more than an intention to make a claim [51]. Under the criminal FCA, individuals found guilty of knowingly presenting a false may be sentenced to a maximum prison sentence of 5 years in addition to criminal fines for each submitted claim.

Related statutes for 18 USC § 287 False Claims Act under which additional liability may be imposed include:

- 18 U.S.C. § 285 – Taking or using papers related to claims
- 18 U.S.C. § 286 – Conspiracy to defraud Government with claims
- 18 U.S.C. § 288 – False claims through postal service
- 18 U.S.C. § 289 – False claims for pensions payments
- 18 U.S.C. § 290 – Discharge papers withheld by claim agent
- 18 U.S.C. § 291 – Purchasing claims for fees by court officials
- 18 U.S.C. § 292 – Solicitation of employment and receiving unapproved fees
- 18 U.S.C. §§1341 - Federal Mail Fraud
- 18 U.S.C. §§1343 - Federal Wire Fraud
- 18 U.S.C. § 201 - Bribery
- 42 U.S.C. § 132Oa-7b(a) - Social Security Act False Claims
- 42 U.S.C. 132Oa-7b(b) - Social Security Act "anti-kickback" provision

Federal statutes can overlap with a number of other federal criminal statutes. An important intersection of the FFCA occurs with the federal mail and wire fraud statutes, which proscribe (1) causing the use of the mail or wire communications, including email; (2) in conjunction with a scheme to intentionally defraud another of money or property; and (3) by means of a material deception. The actual offenses, as well as attempts or conspiracies to commit them, carry a potential term of imprisonment of up to 30 years.

## *Criminal Anti-Kickback Statute (AKS)*

The Medicare Anti-Kickback Statute [52] "provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit or receive remuneration in order to induce business reimbursed under the Medicare or State health care programs. The offense is classified as a felony, and is punishable by fines of up to $25,000 and imprisonment for up to 5 years" (see Chap. 12). In effect the AKS prohibits the receipt anything of value (including nonmonetary items such as free or below market value rent, below free market value exchanges, excessive compensation for medical directorships, excessive relocation agreements) to induce or reward referrals or otherwise generate income through reimbursements from any federal healthcare programs such as Medicare, Medicaid, and Tricare.

## Criminal State Fraud and Abuse Laws

Medicaid Fraud Control Units (MFCUs) investigate and prosecute Medicaid provider fraud as well as patient abuse or neglect in healthcare facilities and board and care facilities. The MFCUs operate in 50 states, the District of Columbia, Puerto Rico, and the US Virgin Islands generally under the authority of the State Attorney General's Office [53]. The MCFUs will collaborate with the Office of the State Attorney General, and also the federal OIG, to appropriately investigate and potentially secure civil or criminal penalties.

## Federal Sentencing Guidelines

The Federal Sentencing Guidelines were developed and authored by an independent government agency, the US Sentencing Commission. The Federal Sentencing Guidelines [54] are non-binding rules that set out an advisory guideline sentencing range for defendants. The Guidelines provide for "very precise calibration of sentences, depending upon a number of factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his facts" [55]. Since the Guidelines may result in a sentence based on facts that were not proven beyond a reasonable doubt to a jury, in violation of the Sixth Amendment, they are not mandatory [56]. Nonetheless, judges must consider the Guidelines when determining a criminal defendant's sentence, and if and where there is a departure, the judge must explain the basis for the discretion and discuss the factors he or she used in his or her determination.

The guidelines assign federal crimes to 43 "offense levels" and assign offenders to one of six "criminal history categories." The combination of the scores within the Commission's sentencing table provides a guideline range for sentencing the defendant.

## Conclusions

The risk of a medical provider facing a criminal prosecution during his or her career is increasing; where historically the primary legal risk to providers was that of medical negligence or malpractice, federal statutes and state prosecutions under alternative theories of liability are increasing. Criminal convictions can result in fines, jail time, loss or medical staff privileges, loss of licensure, exclusion from payer panels, adjunct civil or regulatory sanctions, and a lifelong criminal record. Medical professionals faced with any criminal-level allegation should immediately seek attorney

counsel. Furthermore, in the event of even lower level prior misdemeanor convictions, providers should seek legal counsel and guidance when completing any applications for employment, privileges, medical staff membership, or professional licensure or renewal.

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