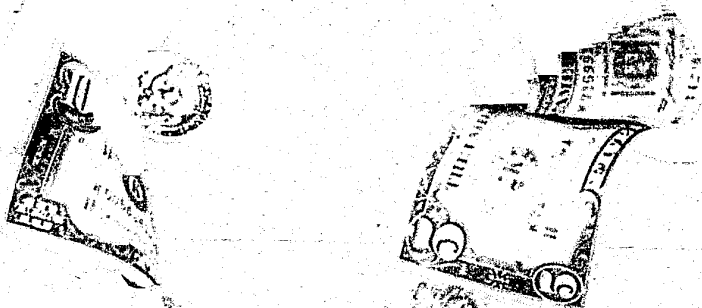




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Cover: Health care fraud directly challenges law enforcement. This issue focuses on law enforcement's concerted efforts to strategically address this crime problem. (Cover photo © 1992, M. Simpson, FPG International Corp.)

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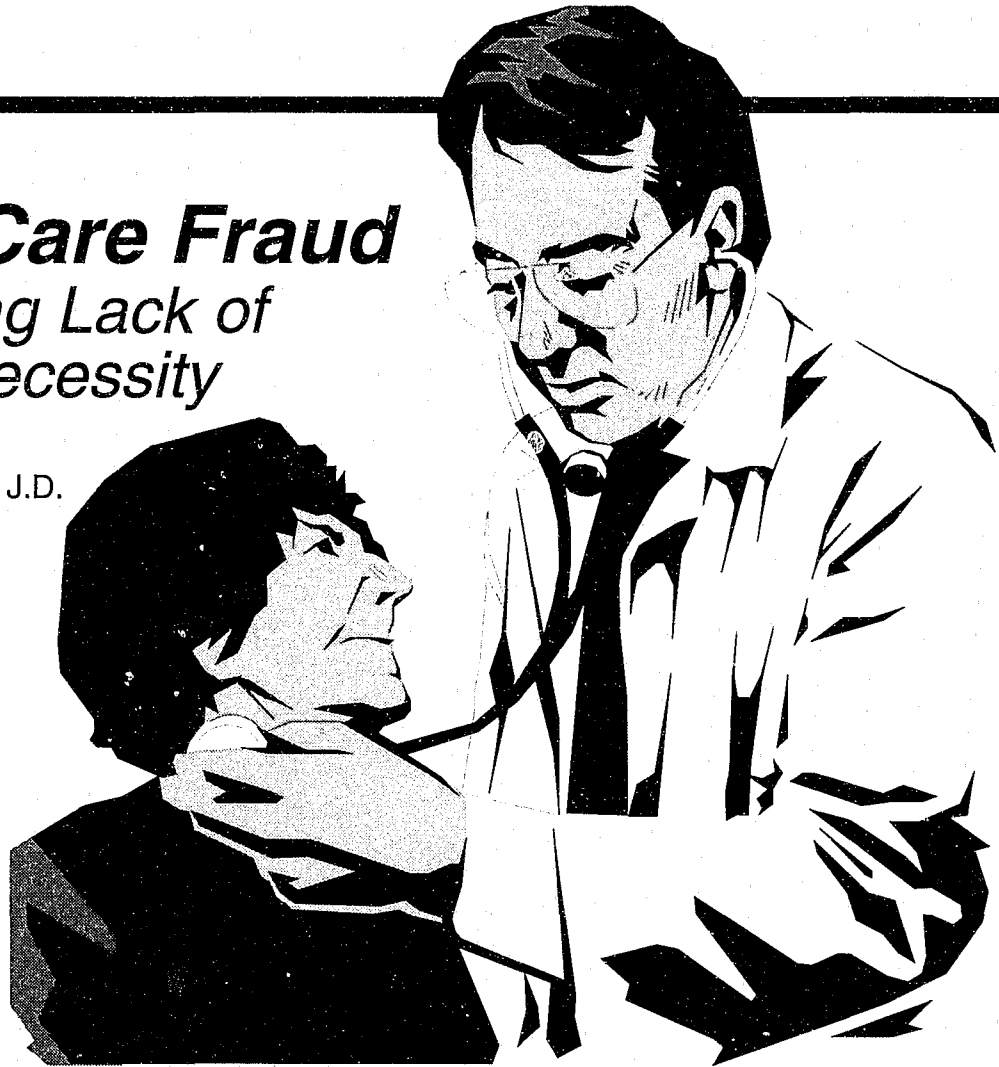
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Health Care Fraud

Prosecuting Lack of Medical Necessity

By
ANDREW GROSSO, J.D.



Health care providers who authorize unnecessary treatment, services, or supplies commit fraud against their patients and against insurance carriers that cover those patients. Law enforcement, however, may be reluctant to give adequate attention to this type of fraud.

Reasons for such reluctance vary. Some believe that such targets are "too insulated." Others say that the prosecutions are "too risky" or that the investigations are "too resource intensive." These views, if they result in refusals to act, would permit the smartest criminals to continue to defraud the health care system of billions of dollars, while

small-time and less-sophisticated offenders are prosecuted.

Law enforcement should not hesitate to pursue such challenging criminal schemes. Not only can such cases be successfully prosecuted, but the magnitude of the resulting deterrence effect can be enormous, producing benefits that more than justify the resources expended. The case account presented here is but one concrete example of the success that prosecutors can experience by bringing these criminals to justice.

Background

During 1988, Oswaldo Mora founded a small company in Tampa,

Florida, called Osmomedic, Inc. This business supplied durable medical equipment (DME) to elderly people on Medicare. The company specialized in one particular type of DME—transcutaneous electrical nerve simulators, also known as TENS units. A TENS unit uses pulsating electrical currents to ease the suffering of chronic pain, such as that caused by arthritis.

Most Medicare beneficiaries, who are usually elderly, suffer from arthritis. Osmomedic used a sales force to seek out these beneficiaries, telling them that they were working with Medicare and that Medicare wanted them to have TENS units. Many beneficiaries gave their

names, addresses, and insurance identification numbers to the sales representatives, who then relayed the information to Osmomedic. For their efforts, the sales people received between \$80 and \$150 for each unit eventually prescribed and sold.

Osmomedic bought these units wholesale at \$65 apiece, and then billed Medicare \$685 for each TENS unit sold. In turn, Medicare "reimbursed" Osmomedic \$484 per unit.

Clearly, Osmomedic and its owner had an incentive to maximize the number of units prescribed. To do this, the owner enlisted the aid of medical doctors, in addition to the services of Osmomedic's large corp of sales representatives.

Osmomedic would give the name and address of each Medicare beneficiary to one of three medical doctors—Nelson Ramirez, Betty Bertonicini, and Felix Cruz. Then, one of these doctors would visit a beneficiary at home. While there, the doctor would examine the patient, find that the person suffered from arthritis, and then prescribe a TENS unit.

Osmomedic made no payments to the doctors, because the doctors billed Medicare separately for their services. During a 6-month period, Medicare paid Osmomedic and these doctors more than \$500,000.

The activities of Osmomedic came to the attention of law enforcement when Medicare beneficiaries in elderly care facilities began complaining that Osmomedic's sales representatives were making unsolicited calls and were pressuring the senior citizens to order TENS units. These complaints

“ ...health care providers who engage in fraud are merely con artists who believe they can outsmart the system because of their medical expertise. ”



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eventually reached the Inspector General's Office of the U.S. Department of Health and Human Services in Clearwater, Florida. This agency, together with the State Medicaid Fraud Control Unit and the Inspector General's Office of the U.S. Railroad Retirement Board, opened the criminal investigation.

Actions Taken

In February 1990, a Federal grand jury returned a 29-count indictment charging Osmomedic, Oswaldo Mora, Nelson Ramirez, Betty Bertonicini, and Felix Cruz with conspiring to defraud the Medicare Program by prescribing and billing for medically unnecessary services and supplies. Both Osmomedic and Oswaldo Mora pleaded guilty.

After a 2-week trial, at which Mora testified for the government, Nelson Ramirez and Betty Bertonicini were convicted of multiple counts and were sentenced, respectively, to 42 months and 30 months imprisonment. Dr. Cruz

fled to Ecuador, his native country, prior to trial and was subsequently indicted for flight from prosecution. He remains a fugitive. Oswaldo Mora received a 24-month prison sentence, and Osmomedic, Inc., has since been dissolved.

Prosecuting the Crime

The gravamen of what the defendants did in this scheme is simple: They gave physical exams to Medicare beneficiaries, ordered TENS units that weren't necessary, and then billed Medicare for these exams and units. The problem facing the prosecution team was how to prove to the unanimous satisfaction of a jury, beyond a reasonable doubt, that Oswaldo Mora, his company, and the medical doctors engaged in a scheme to defraud Medicare by ordering and billing for examinations and TENS units that were not medically necessary.

Each Medicare claim form contains a statement requiring certification that the item being billed is medically indicated and necessary.

When there is no medical indication or necessity, signing this form constitutes a lie. Such a lie can be prosecuted under various statutes of Title 18 of the U.S. Code.

However, to minimize the extent to which the trial would become a battleground for experts, prosecutors approached these false statements from a slightly different angle. The primary thrust of the indictment was that *all* TENS units and exams had been provided in *conscious disregard* of medical necessity, not that any single unit or exam had been medically unnecessary.

For the most part, prosecutors relied on the general conspiracy statute (sec. 371) and the mail fraud statute (sec. 1341) of Title 18, U.S. Code, to charge this fraud scheme. Specifically, prosecutors used a clause in sect. 371, which makes it an offense to conspire to defraud the United States.

The Trial

At the trial, the prosecution presented 12 Medicare beneficiaries in support of its case. When called to the stand, these beneficiaries all testified that they had their own personal physicians, whom they saw regularly, and that they had no need to be examined by another doctor. They stated that they allowed Osmomedic's doctors to see them only because the sales representatives told them (falsely) that Medicare would be sending doctors to examine them. Prosecutors also demonstrated that in no case had a beneficiary's personal physician (who knew the medical condition of the patient far better than Osmomedic's doctors) ordered a TENS unit for that individual.



The prosecution then entered testimony that focused on the specific practices of each of the defendant doctors. The doctors employed various tactics to commit the fraud.

Dr. Ramirez was the most active participant, and perhaps, the greediest of the three doctors indicted. He examined some 300 patients. For each beneficiary, with very few exceptions, Dr. Ramirez performed a routine physical, an electrocardiogram (EKG), and a holter monitor exam. Each claim submitted by Ramirez to Medicare for these three exams totaled over \$500, excluding the separate bill for the TENS unit submitted by Osmomedic.

The fact that 300 patients received identical tests raised the question as to whether these tests were truly necessary. The prosecution addressed this issue by calling experts to the witness stand to explain the purpose of a holter monitor

and how a physician conducts an exam using this device.

A holter monitor is a device that records the electrical activity of the heart. In order to interpret the record produced by the monitor accurately, a patient wears the device for 24 hours and maintains a diary to show what the patient was doing at various times of the day (walking, sitting, sleeping, etc.). The patient also notes any chest discomfort experienced. Without such a diary, holter monitor results cannot be interpreted and are virtually worthless.

During the trial, prosecutors pointed out that Dr. Ramirez never asked his patients to keep a diary. This fact demonstrated that he provided the holter monitors without any intentions of using the results recorded. Further, Dr. Ramirez interpreted *all* 300 holter monitor recordings as being "normal."

Toward the end of the government's case, prosecutors called an expert cardiologist to testify. Prior to trial, this cardiologist examined the physical exam reports, the EKG results, and the holter monitor reports.

To begin his testimony, this expert explained to the jury how a holter monitor works and when use of one is indicated. He then gave his opinion as to the medical necessity of holter monitors for 80 randomly selected Medicare beneficiaries from the 300 patients seen by Dr. Ramirez.

As a basis for his opinion, the cardiologist used Dr. Ramirez's own medical files, which contained the results of the physical exams and the EKGs. The cardiologist found that holter monitors were not medically necessary for an overwhelming number of those 80 patients.

Dr. Bertoncini was somewhat more sophisticated than Dr. Ramirez. She varied the tests given to Medicare beneficiaries to fit their medical needs more closely.

Sometimes, she performed only a physical exam, for which she billed Medicare a mere \$90. Other times, she performed the same tests as Dr. Ramirez and more. For these services, Medicare was billed in excess of \$1,000.

In addition, however, Dr. Bertoncini took 12 kickbacks, totaling \$600, from one sales representative. The indictment charged her with 12 felony counts under 42 U.S.C. sec. 1320a-7b for those kickbacks. These charges were in addition to the fraud counts filed under Title 18 of the U.S. Code.

“Medical Necessity” of TENS Units

The prosecution also addressed the medical necessity of the TENS units, focusing on the fact that Medicare requires a trial period and that Osmomedic and the doctors ignored this requirement. Prosecutors showed that most, but not all, of the beneficiaries either never used or stopped using the units for various reasons.

Some beneficiaries claimed they received no relief when using the units. Others stated that they didn't know how to use the units because the doctors failed to explain how the device worked. In addition, a few patients said that they feared the sensations of the electrical currents and refused to use the units for this reason. Since the doctors failed to conduct the required trial periods, they did not learn of these problems.

Simply stated, the doctors prescribed TENS units without taking

simple steps to ensure that the beneficiaries could make use of the device. This fact buttressed the allegation that the units were prescribed “in conscious disregard” of any medical necessity.

Another important point was that the prescription forms, signed by the doctors and submitted to Medicare, contained false statements that indicated the doctors successfully conducted trial periods. The prosecution used these prescription forms as the basis for additional counts charging false statements (sect. 1001) and false claims (sect. 287).

“
**...criminals...continue
to defraud the health
care system of
billions of dollars....**

”

To strengthen its case even more, the prosecution called a research scientist to testify as an expert in pain and pain relief. This witness explained to the jury the physical nature of pain, how a TENS unit works, and what is necessary for such a unit to be medically indicated. He then gave his opinion, as an expert, that without conducting a trial period, a physician could not truthfully certify that a TENS unit was medically necessary.

Furthermore, this expert went on to describe how a TENS unit can be adjusted with regard to the frequency and intensity of its pulses, and how the human body adapts to these pulses. The research scientist

then explained that for this reason, the unit must be continuously adjusted during the trial period so as to identify the combination of frequency and intensity that best eases the pain of the patient once the adaptation process stabilizes. According to the expert, without such adjustments, the medical value of prescribing a TENS unit for chronic pain would be, at best, dubious.

Deterrence Effect

Prior to the indictment, the practice engaged in by Osmomedic and the doctors was common in central and south Florida. Two much larger companies, named as co-conspirators during the trial, each grossed several million dollars yearly in the DME market

Prosecution of Osmomedic had a salutary effect on the industry. In the aftermath of the Osmomedic indictment, the yearly disbursement by Medicare alone for TENS units in Florida dropped from more than \$10 million to approximately \$500,000.

Points for Prosecutors and Investigators

The keys to a successful prosecution of a medical necessity case, such as Osmomedic, can be summed up as follows:

- 1) Understand the technology and medical conditions involved
- 2) Identify how the suspects misused or ignored a crucial requirement of the technology involved (If suspects prescribed unnecessary medical equipment or services, this factor will definitely be present.)

Police Practices

- 3) Avoid a head-on collision of medical experts by using a "conscious disregard" theory rather than one of outright "no medical necessity" (Again, focus on suspects' misuses of technology and work that misuse into a pattern.)
- 4) Hit suspects from multiple directions (Call beneficiaries to the stand, demonstrate patterns of abuse by introducing charts that summarize the physicians' own medical records, have experts explain the technology, ask witnesses for their expert opinions as to the presence or lack of medical necessity, etc. In other words, leave the defendants with no safe grounds on which to rest the defense.)
- 5) Search for and exploit minor but clear-cut offenses, e.g., Dr. Bertocini's 12 kickbacks of \$50 apiece (Offenses too minor, in and of themselves, to prosecute criminally can help in the context of a medical necessity case. These offenses can convince a jury that the suspects exhibited the fraudulent intent necessary for a finding of guilt on the overall scheme.)

Conclusion

Investigators and prosecutors should remember that health care providers who engage in fraud are merely con artists who believe they can outsmart the system because of their medical expertise. Your jobs are to prove these criminals wrong. ♦

The One-A-Day Plan for Drug Dealers

The mass arrest of criminals indicted on drug charges is common practice among police agencies. Usually, the officers gather at a central location where they are briefed on the details of the operation, given their assignment, and moved into position to make the arrest.¹ Generally, the unit commanders schedule mass arrests at a time when the suspects can be found at their residences, such as early in the morning. The intended goal is to surprise them, while actively showing citizens that the police are working to stem the flow of drugs into the community.

This approach presents potential problems, including communication difficulties, safety concerns, and logistic dilemmas. Also, in many cases, arrest warrants from other jurisdictions are not served, or investigators do not obtain sufficient information.

To lessen the impact of such problems and to provide added safety to officers, a multiagency drug enforcement unit developed an alternative to the mass arrest technique. Undercover officers proposed what is now known as the "one-a-day" plan, which brought about lasting changes and immediate results in curtailing illegal drug sales.

Arrest Procedure

Under the one-a-day plan, investigators select one individual each day from among those indicted by a grand jury. The

indictments remain sealed throughout the seizure process to prevent public disclosure of the suspects.

By using this procedure, the lead investigator no longer needs to assemble a large number of officers. Selecting one individual for capture each day not only reduces the number of officers needed but also increases the safety of those involved. Assignment of personnel to arrest teams, determination of radio frequency assignments, and issues of command and control no longer represent major considerations. Investigators now make arrests at the time and place they believe the maximum outcome can be achieved. Preplanning of arrests reduces dangers to officers, allows prosecutors to provide legal input, and results in efficient police action.

Media Involvement

Prior to implementation of the program, members of the unit met with the police reporter for the local newspaper. The newspaper expressed a willingness to track each defendant through the entire court process, from arrest through conviction and sentencing. The program received maximum press coverage through front page articles accompanied by pictures and lists of pending charges.

This had two important effects. First, the public interest generated by the media unified the court system, creating a force that