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Disciplining Physicians in Pennsylvania: Licensing Problems Arising from Medicare Fraud Convictions

Joy Flowers Conti

INTRODUCTION

Recently, the professional lives of physicians practicing in Pennsylvania have been subject to increased scrutiny by the commonwealth. An examination of the Index to Legal Periodicals, however, revealed that the only commentary dealing with disciplinary actions involving physicians was one casenote. In order to fill a part of the void that exists in legal literature on the topic of medical disciplinary actions, this article will analyze licensing problems in Pennsylvania arising from medicare fraud convictions.

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1. For example, the number of complaints in 1978 and 1979 were:

<table>
<thead>
<tr>
<th>Year</th>
<th>Active complaints</th>
<th>Processed complaints</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>208</td>
<td>208</td>
<td>416</td>
</tr>
<tr>
<td>1979</td>
<td>148</td>
<td>404</td>
<td>552</td>
</tr>
</tbody>
</table>

Pennsylvania Dep't of State, Bureau of Professional & Occupational Affairs, State Bd. of Medical Education & Licensure, Summary of Complaints (1978-1979).

2. 8 CUM. L. REV. 295 (1977) (discussed due process considerations concerning hearing required before imposing disciplinary sanctions against a physician).

3. A medicare fraud conviction for purposes of this article is defined to include a conviction under any or all of the following three federal laws: a) The Federal Fraud and False Statements Statute, which provides in pertinent part:

   Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry,
One difficulty that first presented itself in the writing of this article was the lack of a legal reference work on the development of the law regarding licensing of physicians in Pennsylvania. In an effort to make the discussion on the medicare conviction problems more facile and understandable, the initial portion of the article will address the

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1976); b) the Federal Mail Fraud Statute, which provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1976); and c) the Federal Health Insurance for the Aged and Disabled Act, which provides:

Whoever—

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under this subchapter,

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to any such benefit or payment,

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, or

(4) having made application to receive any such benefit or payment for the use and benefit of another and having received it, knowingly and willfully converts such benefit or payment or any part thereof to a use other than for the use and benefit of such other person,

shall (i) in the case of such a statement, representation, concealment, failure, or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under this subchapter, be guilty of a felony and upon conviction thereof fined not more $25,000 or imprisoned for not more than five years or both, or (ii) in the case of such a statement, representation, concealment, failure, or conversion by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both.

history of the regulation of the practice of medicine in Pennsylvania. The second part of the article will specifically concentrate on whether medicare fraud convictions give rise to the possibility of the imposition of disciplinary sanctions."

I. HISTORICAL BACKGROUND

Under its police power a state regulates the right of physicians to minister to the medical needs of people. The state's authority is broad; yet, it cannot act in an arbitrary fashion because of the physician's interest in protecting his property—the medical license. Thus, a state's regulations are required to relate reasonably to the practice of medicine and cannot be vague, indefinite or uncertain.

   (b) When the board finds that the license of any person may be refused, revoked or suspended under the terms of subsection (a) above, the board may:
      (1) Deny the application for a license.
      (2) Administer a public or private reprimand.
      (3) Revoke, suspend, limit, or otherwise restrict a license as determined by the board.
      (4) Require a licensee to submit to the care, counseling or treatment of a physician or physicians designated by the board.
      (5) Suspend enforcement of its finding thereof and place a licensee on probation with the right to vacate the probationary order for noncompliance.
      (6) Restore or reissue, in its discretion, a license to practice medicine and surgery, and may impose any disciplinary or corrective measure which it might originally have imposed.

5. Barksy v. Board of Regents, 347 U.S. 442 (1954) (upheld validity of state law governing licensing of physician); Watson v. Maryland, 218 U.S. 173 (1909) (Maryland law requiring license to practice medicine and setting forth qualifications for physicians was valid); Steinbach v. Metzger, 63 F.2d 74 (3d Cir. 1933) (Pennsylvania law which regulated the practice of medicine was valid under the police power of the state); In re Campbell, 197 Pa. 581, 47 A. 860 (1901); Reisinger v. Commonwealth, 41 Pa. Commw. Ct. 553, 399 A.2d 1160 (1979). See Vodicka, Medical Discipline, 233 J.A.M.A. 1106 (1975).


7. Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 P. 39 (1906) (since license to practice medicine is a valuable property right, regulations providing authority for the revocation of license must be certain and definite); Rogers v. State Bd. of Medical Examiners, 371 So. 2d 1037, 1040 (Fla. Dist. Ct. App. 1979) ("The legislature has a right to prescribe reasonable rules and regulations that shall control the practice of medicine. [citation omitted] Such authority is, however, limited in that such rules and regulations must bear a reasonable relationship to the public safety, health, morals and general welfare."); Oliver v. Commonwealth, 45 Pa. Commw. Ct. 195, 197, 404 A.2d 1386, 1387 (1979) (regulation of practice of psychology valid if there is "direct, substantial, and
The actual regulation of the practice of medicine by the commonwealth in Pennsylvania began during the mid-nineteenth century. Initially, the practice of medicine was regulated on a county-by-county basis. The earliest requirements specified that the physician had to be "regularly graduated." There were exceptions for physicians, similar to exceptions that existed for lawyers, who were not graduates of a medical school but who had been in regular practice for a number of years or who had read medicine under the guidance of another physician. Practicing medicine without first meeting the requirements to practice medicine constituted a misdemeanor, which was punishable by fine and at a later date, was also punishable by imprisonment. In 1875, the commonwealth began regulating the practice of medicine on a statewide basis.

The first time a physician was required to pass an examination was in 1893. Upon passing the examination the physician was entitled to a license. The commonwealth, however, did not otherwise regulate a physician's conduct subsequent to the issuance of a license. In 1911, Pennsylvania rectified that omission by creating the Bureau of Medical Education and Licensure and authorizing it to:

refuse, revoke, or suspend the right to practice medicine or surgery in [Pennsylvania] for any or all of the following reasons, to wit: The conviction of a crime involving moral turpitude, habitual intemperance in the...


10. Act of April 11, 1866, No. 666, § 1, 1866 Pa. Laws 679 (repealed 1870).


12. E.g., Act of March 31, 1870, No. 657, § 1, 1870 Pa. Laws 705 (repealed 1875); Act of April 15, 1869, No. 1057, § 1, 1869 Pa. Laws 1067 (repealed 1875).


15. Act of April 12, 1875, No. 55, §§ 1-6, 1875 Pa. Laws 51 (repealed 1877) (required, inter alia, good moral character and registration with prothonotary in county in which physician practiced).

16. Act of May 18, 1893, No. 52, §§ 13-14, 1893 Pa. Laws 94 (repealed 1911) (also established a Medical Council and three State Boards of Medical Examiners, the precursors of the present State Board of Medical Education and Licensure).

17. Id. § 12.

use of ardent spirits or stimulants, narcotics, or any other substance which impairs intellect and judgment to such an extent as to incapacitate for the performance of professional duties.\textsuperscript{19}

Under that provision, chiropractors brought one of the earliest challenges to the commonwealth's right to regulate the practice of medicine. They argued that the licensing act in effect at that time deprived them of their ability to practice chiropractic because the act did not contain provisions for the licensing of chiropractors.\textsuperscript{20} They claimed that their constitutional rights were invaded because they were deprived of their property without due process of law, they were being denied the equal protection of the laws and their privileges and immunities were abridged. The federal court which considered those issues held that the commonwealth was acting within its police power and accordingly, the chiropractors' federal constitutional rights were not invaded.\textsuperscript{21} The Pennsylvania Supreme Court had previously construed the act to require chiropractors to be licensed physicians\textsuperscript{22} and the federal court was therefore without ability to aid the chiropractors.

The next major revision concerning the disciplining of physicians after licensure was in 1935 when the 1911 law was amended to provide for the imposition of disciplinary sanctions for:

The conviction in a state or Federal court of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits or stimulants, narcotics, or any other substance or any condition which impairs intellect and judgment to such an extent as to incapacitate for the performance or [sic] professional duties, the board may so act upon satisfactory proof of grossly unethical practice, or of any form of pretense which might induce citizens to become prey to professional exploitation.\textsuperscript{23}

In 1963 the provision regulating a physician's conduct after licensure was again amended and made somewhat more explicit. A physician was subject to disciplinary sanctions:

Upon entry of a plea of guilty or nolo contendere or being found guilty in

\textsuperscript{19} Id. § 12.
\textsuperscript{20} Steinbach v. Metzger, 63 F.2d 74 (3d Cir. 1933) (state did not act unreasonably by requiring that chiropractors be licensed physicians).
\textsuperscript{21} Id. at 76. The court held that state law which had the effect of requiring all chiropractors to be physicians was valid since it comported with policy under police power of assuring people of "skilled treatment of their ills." Id.
\textsuperscript{22} Long v. Metzger, 301 Pa. 449, 152 A. 572 (1930) (state law regulating practice of medicine was constitutional even though it required chiropractors to be physicians); Commonwealth v. Seibert, 262 Pa. 345, 105 A. 507 (1918) (state law regulating practice of medicine held constitutional despite claim of neuropath who was precluded from practicing his profession because of it).
a state or Federal court of a crime involving moral turpitude, habitual in-
temperance in the use of ardent spirits or stimulants, narcotics or other
habit-forming drugs, or any other substance or any condition which im-
pairs intellect and judgment to such an extent as to incapacitate for the
performance of professional duties. The board may so act upon satisfac-
tory proof of grossly unethical practice, or of any form of pretense which
might induce persons to become a prey to professional exploitation or for
violation of the rules and regulations of the board.\textsuperscript{24}

The applicable law governing the authority of the State Board of
Medical Education and Licensure\textsuperscript{25} to oversee the conduct of physicians
after licensure today is the Medical Practice Act of 1974.\textsuperscript{26} That act ex-
panded the coverage of the regulation of a physician's professional con-
duct by setting forth eight provisions which would permit the State
Board of Medical Education and Licensure to take action against a
physician's license.\textsuperscript{27} In general, the provisions reflect a concern with a

\begin{enumerate}
\item\textsuperscript{24}Act of August 14, 1963, No. 440, sec. 10, § 12, 1963 Pa. Laws 957, 968 (repealed
1974).
\item\textsuperscript{25}The State Board of Medical Education and Licensure was established in 1929. Act
of April 9, 1929, No. 175, § 412, 1929 Pa. Laws 177, 205 (current version at PA. STAT. ANN.
tit. 71, § 122 (Purdon Supp. 1979)).
\item\textsuperscript{26}PA. STAT. ANN. tit. 63, §§ 421.1-.18 (Purdon Supp. 1979)).
\item\textsuperscript{27}The act provides in pertinent part as follows:
\begin{enumerate}
\item The board shall have authority to refuse, revoke or suspend the license of a
physician for any or all of the following reasons:
\begin{enumerate}
\item Failing to demonstrate the qualifications or standards for a license contained
in this act or regulations of the board.
\item Making misleading, deceptive, untrue or fraudulent representations in the
practice of medicine; practicing fraud or deceit in obtaining a license to practice
medicine and surgery; or making a false or deceptive biennial registration with the
board.
\item Being convicted of a felony in the courts of this Commonwealth or any other
state, territory or country. Conviction as used in this paragraph shall include a find-
ing or verdict of guilt, an admission of guilt, or a plea of nolo contendere.
\item Having his license to practice medicine and surgery revoked or suspended or
having other disciplinary action taken, or his application for a license refused,
revoked or suspended by the proper licensing authority of another state, territory
or country.
\item Being unable to practice medicine with reasonable skill and safety to patients
by reason of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or
any other type of material, or as a result of any mental or physical condition.
In enforcing this clause (5), the board shall, upon probable cause, have authority
to compel a physician to submit to a mental or physical examination by physicians
designated by it. Failure of a physician to submit to such an examination when
directed shall constitute an admission of the allegations against him unless failure is
due to circumstances beyond his control, consequent upon which a default and final
order may be entered without the taking of testimony or presentation of evidence.
A physician affected under this paragraph shall at reasonable intervals be afforded
an opportunity to demonstrate that he can resume a competent practice of medicine
with reasonable skill and safety to patients.
physician's competency and ethical fiber.

A little over a year after the enactment of the Medical Practice Act, the Pennsylvania legislature passed the Health Care Services Malpractice Act which essentially set up a system designed to make professional liability insurance available to physicians at reasonable cost. As part of the Health Care Services Malpractice Act, the legislature established mechanisms to fully implement the authority of the State Board of Medical Education and Licensure to deal with problems relating to the regulation of the practice of medicine. The act provided for the hiring of investigators and attorneys and also established a panel of hearing examiners to conduct the disciplinary hearings. The hearing examiner's decision is final, subject to a right of appeal to the State Board of Medical Education and Licensure. A further right of appeal lies from the decision of the State Board of Medical Education and Licensure to the Commonwealth Court of Pennsylvania.

After reviewing the statutory provisions governing the physician's right to practice medicine, it is necessary to consider the form of enforcing the commonwealth's proscriptions—the disciplinary pro-

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(6) Violating a lawful regulation promulgated by the board or violating a lawful order of the board, previously entered by the board in a disciplinary proceeding.

(7) Knowingly maintaining a professional connection or association with any person who is in violation of this act or regulations of the board or knowingly aiding, assisting, procuring or advising any unlicensed person to practice medicine contrary to this act, or regulations of the board.

(8) Being guilty of immoral or unprofessional conduct. Unprofessional conduct shall include any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, in which proceeding actual injury to a patient need not be established.

Id. § 421.15(a). Subsections 2, 3 and 8, quoted above, are relevant to the problems raised in the second portion of this article concerning medicare fraud convictions.

28. Id. §§ 421.15(a)(1), (4), (5), (8).

29. Id. §§ 421.15(a)(2), (3), (7).


31. Id. § 1301.102. In order to effectuate the system, the act requires mandatory insurance. Id. § 1301.701(a). That requirement was held to be constitutionally permissible in McCoy v. Commonwealth, 37 Pa. Commw. Ct. 530, 391 A.2d 723 (1978).


33. Id. § 1301.901.

34. Id. § 1301.902 (hearing examiners are appointed by the State Board of Medical Education and Licensure with the approval of the governor).

35. Id. § 1301.903.

36. Id. § 1301.905 (application for review must be made within twenty days from decision of hearing examiner and State Board of Medical Education and Licensure may hear arguments and additional evidence).

37. Id. § 1301.906.
ceeding. The most frustrating aspect of dealing with disciplinary proceedings is that they are unique. They are neither necessarily criminal nor civil in nature, although some courts have labeled them "quasi-criminal." Thus, it is difficult to know whether a given problem should be considered in light of cases dealing with criminal law or should be based on considerations arising out of civil disputes. The reason disciplinary proceedings involve criminal considerations is that disciplinary sanctions have the effect of depriving the physician of the ability to earn a living—a property right—and therefore may be viewed as civil penalties. The civil aspect involved in a disciplinary proceeding is that a purpose of the proceeding is to protect the public from incompetent, unqualified and unethical physicians and accordingly, the sanctions are not perceived as punishing the physician but as protecting the public.

39. In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970) ("disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis"); Office of Disciplinary Counsel v. Campbell, 463 Pa. 472, 345 A.2d 616 (1975) (disciplinary proceeding commenced against an attorney after acquittal on criminal charges arising from the same conduct held not to violate double jeopardy clause of fifth amendment to United States Constitution).
41. In Spevack v. Klein, 385 U.S. 511 (1966), the Supreme Court held that the fifth amendment privilege against self-incrimination was applicable in a disciplinary proceeding brought against an attorney. The Court stated:

The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him ...."


42. See Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 73 n.6, 435 P.2d 553, 558 n.6, 64 Cal. Rptr. 785, 790 n.6. ("purpose of an action seeking revocation of a doctor's certificate is not to punish the doctor but rather to protect the public"); Dean v. State, 233 Ind. 25, 116 N.E.2d 503, 505 (1954) ("purpose . . . is to protect people afflicted with disease or illness in any degree from their own incredulity"); Younge v. State Bd. of Registration
It appears, therefore, that there are two competing interests involved in a disciplinary proceeding—the interest of the physician in protecting his ability to practice medicine and the interest of the public in insuring that physicians are competent, qualified and ethical. In some circumstances, a tribunal must choose between these interests. Essentially a balancing process is involved in determining under what circumstances the physician's interest should be protected over the public's interest and alternatively, under what circumstances the public's interest needs to be protected over the physician's interest; for example, the standard of proof applicable in a disciplinary proceeding has been weighed in favor of the public interest. The standard of proof is a civil standard which permits the imposition of a disciplinary sanction if a violation of the Medical Practice Act has been demonstrated by a preponderance of the evidence. This contrasts to a criminal standard of proof which would have protected the physician by requiring that proof beyond a reasonable doubt be established prior to the imposition of sanctions. In contrast, the physician's interest has

for the Healing Arts, 451 S.W.2d 346, 349 (Mo. 1969), cert. denied, 397 U.S. 1018 (1970) ("These revocation proceedings are not penal, they are not 'quasi-criminal,' they do not contemplate 'punitive' sanctions and the provisions against double jeopardy do not apply"); State Bd. of Medical Examiners v. Macy, 92 Wash. 614, 159 P. 801 (1916) (law regulating physician's profession was not a criminal statute).

43. For example, if the physician's interest against self-incrimination means that he cannot be compelled to testify concerning the charges against him, the public interest may be jeopardized because of an inability of the state to obtain facts requisite to a finding of professional misbehavior. See Spevack v. Klein, 385 U.S. 511, 520, 530 (1966) (4-1-4 decision) (Harlan, J., dissenting) ("Today's application of the privilege serves only to hamper appropriate protection of other fundamental public values"). See also Vodicka, Medical Discipline, 234 J.A.M.A. 1062 (1975).

44. See, e.g., Mack v. Florida State Bd. of Dentistry, 430 F.2d 862, 863 (5th Cir. 1970), cert. denied, 401 U.S. 954 (1971) ("Board in proceeding to revoke a professional license was not limited to evidence beyond a reasonable doubt"). The Pennsylvania Supreme Court in Berlant Appeal, 458 Pa. 439, 328 A.2d 471 (1974), cert. denied, 421 U.S. 964 (1975), stated:

While we recognize the severe impact that such sanctions [censure, suspension or disbarment] may have on an individual's career, we are also mindful of our duty to uphold the quality and integrity of the Bar. Accordingly, we shall not require proof beyond a reasonable doubt, but shall retain the standard this Court has consistently utilized in disciplinary cases through the years: "that a preponderance of evidence is necessary to establish an attorney's unprofessional conduct and the proof of such conduct must be clear and satisfactory."


46. See the example discussed at note 43 supra.
been protected in disciplinary proceedings by entitling him to assert the privilege against self-incrimination.47

One problem over which state court decisions are in conflict is whether the law regulating the right to practice a profession should be liberally or strictly construed. If the legislation is viewed as penal in nature because of the potential impact upon the physician, it will be subject to strict construction against the state.48 If, however, the state places paramount emphasis upon protecting the public, the legislation will be subject to liberal construction.49 Pennsylvania follows those jurisdictions which strictly construe the legislation,50 a practice which engenders difficult problems of statutory interpretation.51

49. See, e.g., Younge v. State Bd. of Registration for the Healing Arts, 451 S.W.2d 346 (Mo. 1969), cert. denied, 397 U.S. 1018 (1970); Dean v. State ex rel. Board of Medical Registration & Examination, 238 Ind. 25, 116 N.E.2d 503, 505 (1954) ("The Medical Practice Act is clearly not a criminal statute and the rules pertaining to criminal statutes which appellant here asserts have no application to the case at bar."); Hughes v. State Bd. of Health, 348 Mo. 1236, 159 S.W.2d 277 (1942) (stated that a 1913 decision by that court which held the medical disciplinary act to be penal and subject to strict construction against the state had been overruled); State Bd. of Medical Examiners v. Macy, 92 Wash. 614, 159 P. 801 (1916) (medical disciplinary law was not criminal statute).
51. The discussion in Part II-A, infra, concerning the interpretation of the term
The conduct involved in the disciplinary complaints brought in recent years under the Pennsylvania Medical Practice Act\(^2\) ranges from a failure to obtain mandatory medical malpractice insurance as required by the Health Care Services Malpractice Act\(^2\) to gross incompetence.\(^4\) It would be impossible to thoroughly analyze and consider the legal problems arising from such a variety of conduct in the space available in this article. Thus, the focus of the second portion of this paper will be upon certain problems that arise in a disciplinary action initiated by reason of a conviction of medicare fraud.

II. MEDICARE FRAUD CONVICTIONS

A conviction of medicare fraud may subject a physician to disciplinary action under three provisions of the Medical Practice Act. The physician's license may be in jeopardy if such a conviction is a felony,\(^5\) is the result of misleading, deceptive, untrue or fraudulent representations in the practice of medicine,\(^6\) or results from immoral or unprofessional conduct.\(^7\) Those problems will be examined in seriatim.

A. Felony Under Pennsylvania Law

The Pennsylvania Medical Practice Act\(^8\) provides that a physician may be subject to discipline if he has been "convicted of a felony in the courts of this Commonwealth or any other state, territory, or country."\(^9\) The power of a state to impose disciplinary sanctions for convictions of crimes was addressed by the Supreme Court of the United States in Barsky v. Board of Regents.\(^6\) There, the Supreme Court discussed the appropriateness of disciplining a physician who had been convicted of a misdemeanor in federal court for failing to produce papers subpoenaed by a congressional committee. The applicable

"felony," illustrates a problem of statutory interpretation arising from the application of the rule of strict construction.

54. E.g., Pa. Dep't of State Bureau of Professional & Occupational Affairs, State Bd. of Medical Education & Licensure, Summary of Complaints (1979) (other subjects of complaints included disciplinary sanctions imposed by other states, personal use of drugs, psychiatric problems, drug law violations, etc.).
56. Id. § 421.15(a)(2).
57. Id. § 421.15(a)(8).
59. Id. § 421.1(a)(9).
60. 347 U.S. 442 (1953) (6-3 decision).
state law provided that a physician could be subject to discipline upon being “convicted in a court of competent jurisdiction, either within or without this state, of a crime.” The Supreme Court found that the state under its police power was able to take action against a physician’s license for a misdemeanor conviction even if it did not involve moral turpitude and even though that conduct would not have been criminal under the state’s law.

The state was able to proceed against a physician for conviction of a crime no matter how minor because of its interest in protecting the standards of character and law observance required of physicians. Such a broad power, when enforced, did not deprive the physician of his property rights or due process of law. The Court, however, noted that it was relevant that the state did not automatically impose a sanction, but was able to determine the measured discipline on an ad hoc basis. Thus, at least under the federal constitution a state may appropriately impose disciplinary sanctions based upon the conviction of a crime whether or not that crime is of a serious nature and whether

61. Id. at 446.
62. The current version of the New York law provides:
Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

(5) Being convicted of committing an act constituting a crime under:
(a) New York State law or,
(b) Federal law or,
(c) The law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York state law.
N.Y. EDUC. LAW § 6509 (McKinney Cum. Supp. 1979). Thus, the difference between the current law and the law applicable in Barsky is that under the current law, if one had been convicted of a crime in another state which would not have amounted to a crime in New York, that conviction would not be considered professional misconduct. Of interest to this issue is a decision which held that a conviction of medicare fraud is professional misconduct under the current New York law quoted above. Mosner v. Ambach, 66 App. Div. 2d 912, 410 N.Y.S.2d 937 (1978).
63. 347 U.S. at 452. The Court stated:
This statute is readily distinguishable from one which would require the automatic termination of a professional license because of some criminal conviction of its holder. Realizing the importance of high standards of character and law observance on the part of practicing physicians, the State has adopted a flexible procedure to protect the public against the practice of medicine by those convicted of many more kinds and degrees of crime than it can well list specifically. It accordingly has sought to attain its justifiable end by making the conviction of any crime a violation of its professional medical standards, and then leaving it to a qualified board of doctors to determine initially the measure of discipline to be applied to the offending practitioner.

Id. at 452 (footnote omitted and emphasis added).
Medical Disciplinary Action

or not that crime was based upon conduct which occurred in the practice of medicine."

Although Pennsylvania, at least under the Federal Constitution, would be entitled to subject physicians who had been convicted of a crime, no matter how serious, to the disciplinary process, it has not chosen to do so. The only kind of conviction sanctionable under the Medical Practice Act is a felony. There is no statutory interpretation problem if the physician has been convicted of a felony by a Pennsylvania court. That would be a clear violation of the Medical Practice Act. There, however, is an interpretation issue when the criminal conviction arises in another jurisdiction. Under that circumstance, there are at least two possible interpretations of the term "felony." It might be interpreted to refer only to a conviction in another jurisdiction which would be viewed as a felony under Pennsylvania law. Alternatively, the term "felony" may be interpreted to refer to a conviction resulting from a felony as defined by the jurisdiction which imposed the conviction.

64. Cf. Durante v. Board of Regents, 70 App. Div. 2d 692, 416 N.Y.S.2d 401 (1979), in which a nurse's license was suspended for a violation of N.Y. EDUC. LAW. § 6509(5) (McKinney Cum. Supp. 1979) (the same section is applicable to physicians) even though the convictions for obtaining marijuana without having paid the applicable transfer tax, for smuggling marijuana into the United States and for attempted criminal possession of a weapon conceivably did not arise from conduct related to the practice of his profession.

65. See In re Donegan, 282 N.Y. 285, 26 N.E.2d 260 (1940). Donegan involved the construction of a statute requiring disbarment of an attorney upon his being convicted of a felony. The attorney in question had been convicted of a federal felony which would only have amounted to a misdemeanor under New York law. The court stated that the disciplinary statute was:

ambiguous as to the following three situations: (1) Where an offense is a felony under federal law and also a felony under the New York law; (2) where an offense is a felony under federal law but is a crime less than a felony in this State; (3) where an offense is a felony solely under Federal law and is not cognizable at all under our laws.

The Donegan court held that given the application of the rule of strict construction, the term "felony" encompassed only federal felonies which would amount to felonies under New York law; since there was no analogous New York felony the attorney was not automatically disbarred. The dissent noted that even though there was not an analogous New York felony in terms of the elements of the offense, the potential punishment for the federal felony, conspiracy to use the mails to promote frauds, was sufficient under New York law to have constituted the crime a felony. Id. at 293, 26 N.E.2d at 264. Apparently, therefore, there may also be divergent considerations as to whether one should consider the elements of the offense or the potential punishment for the offense in determining when a conviction of a felony in another jurisdiction would amount to a felony under the state law.

New York recently changed its attitude towards the interpretation to be given the term "felony" in the disciplinary provision affecting attorneys. In Chu v. Association of the Bar, 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977), the court held that an attorney was automatically disbarred for a conviction of a mail fraud and noted that
The statutory interpretation problem is significant in situations where medicare fraud convictions are involved because, in Pennsylvania, if a physician engaged in conduct similar to that required for a medicare fraud conviction under the federal law, he would not be guilty of a felony. The lowest degree of felony in Pennsylvania is felony of the third degree and it is classified as such "if it is so designated in this title or if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than seven years." 66 A felony under federal law, however is "[a]ny offense punishable by death or imprisonment for a term exceeding one year." 67 An examination of the potential sentence involved in any of the medicare fraud crimes reveals that five years is the maximum term of imprisonment. 68 Under Pennsylvania law, that term of im-

\[\text{Donegan was not controlling: "[W]e now perceive little or no reason for distinguishing between conviction of a Federal felony and conviction of a New York State felony as a predicate for professional discipline. Certainly this is so when, as here, there is a New York State felony of substantially the same elements." Id. at 494, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003 (footnote omitted). See In re Thies, 45 N.Y.2d 865, 866, 382 N.E.2d 1351, 410 N.Y.S.2d 575, 576 (1978) (upheld automatic disbarment for federal felony conviction, stating that "it is inmaterial that there is no felony analogue under our State statutes matching the Federal felony").}\\
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One reason the recent New York decisions may not be applicable to the issues raised under Pennsylvania law is that the New York change is based upon policy favoring the protection of the public's interest, which apparently overrides the applicability of the strict construction rule. Missouri is another jurisdiction which has abrogated the applicability of the rule of strict construction to disciplinary statutes. Compare Younge v. State Bd. of Registration for the Healing Arts, 451 S.W.2d 346 (Mo. 1969), cert. denied, 397 U.S. 1018 (1970) with State ex rel Spriggs v. Robinson, 253 Mo. 271, 161 S.W. 1169 (1913) (overruled in State ex rel Lentine v. State Bd. of Health, 334 Mo. 220, 65 S.W.2d 943 (1933)). Thus, in a jurisdiction which adheres to the rule of strict construction for disciplinary statutes the Donegan result may still be warranted.

Additionally, as noted in the dissent in Donegan, if a "felony" is defined by considering the potential punishment, a federal felony would amount to a New York state felony. Compare 18 U.S.C. § 1(1) (1976) (felony is "[a]ny offense punishable by death or imprisonment for a term exceeding one year") with N.Y. PENAL LAW § 10(5) (McKinney 1975) ("'Felony' means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed"). See also In re Minner, 133 Kan. 789, 3 P.2d 473 (1931) ("felony" depends on punishment prescribed); Mingo Co. Medical Soc'y v. Simon, 124 W. Va. 493, 20 S.E.2d 807 (1942) (whether an offense is a felony is determined by the punishment). As discussed at notes 66-74 and accompanying text infra, Pennsylvania probably would not classify a medicare fraud conviction as a felony on either the elements of the offense or the nature of the potential punishment. Thus the recent New York decisions may not be directly applicable when interpreting the Pennsylvania disciplinary statute.

68. 18 U.S.C. § 1001 (1976) (not more than five years); 18 U.S.C. § 1341 (1976) (not more than five years); 42 U.S.C. § 1395n(a) (Supp. I 1977) (not more than five years).
prisonment would classify the crime as a misdemeanor of the first degree\(^9\) rather than as a felony.

Therefore, Pennsylvania differs from the federal government because it views a felony as a more serious offense.\(^7\) Additionally, the Pennsylvania Crimes Code, which classified the lowest degree of felony as the conviction of a crime with the potential maximum punishment of a term of imprisonment of seven years, was in existence at the time the Medical Practice Act of 1974 was passed\(^7\) and accordingly, the legislature should have been aware that Pennsylvania considered a felony to be a serious offense and differentiated between various degrees of felonies as well as between various degrees of misdemeanors.\(^7\)

If one considers the actual elements of the crime instead of the potential punishment, the Pennsylvania crime most analogous to the federal medicare fraud crimes is the crime of unsworn falsification to authorities, which is a misdemeanor of the second degree.\(^3\)

\(^69\). 18 PA. CONS. STAT. ANN. § 106(b)(6) (Purdon 1973) provides: “A crime is a misdemeanor of the first degree if it is so designated in this title or if a person convicted thereof may be sentenced to a term of imprisonment, the maximum of which is not more than five years.”

\(^70\). That is evidenced by the Pennsylvania specification that the lowest class of felonies reaches crimes which carry a potential punishment of not more than seven years. 18 PA. CONS. STAT. ANN. § 106 (Purdon 1973). See generally Jerome v. United States, 318 U.S. 101, 106-07 (1913), wherein the court defined the term “felony” as used in a federal statute to include only federal felonies and stated:

"Moreover, the difficulty of giving “felony” in [the federal law] a state law meaning is emphasized when we turn to the law of such a state as New Jersey. There we find crimes classified as “misdemeanors” and “high misdemeanors” . . . . The inference is strong that if Congress had designed [the federal law] to include the more serious state offenses . . . it would have used language which would have afforded that protection in all states.


\(^72\). Compare 18 PA. CONS. STAT. ANN. § 106(b)(2) (Purdon 1973) (felony of the first degree) with id. § 106(b)(4) (felony of the third degree) and id. § 106(b)(6) (misdemeanor of the first degree) with id. § 106(b)(8) (misdemeanor of the third degree).

\(^73\). Section 4904 of the Pennsylvania Crimes Code provides:

(a) In general.—A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he:

(1) makes any written false statement which he does not believe to be true;
(2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or
(3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(b) Statements “under penalty.”—A person commits a misdemeanor of the third
tion of the most analogous Pennsylvania crime, since it is not a felony, would not be a violation of the provision of the Medical Practice Act permitting action against a physician's license for conviction of a felony." Accordingly, whether one examines the punishment or the

degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

(c) Perjury provisions applicable.—Section 4902(c) through (f) of this title (relating to perjury) applies to this section.

18 PA. CONS. STAT. ANN. § 4904 (Purdon 1973). Cf. Commonwealth v. Mascaro, 394 A.2d 998 (Pa. Super. Ct. 1978), in which the court held that state prosecution of a defendant under, inter alia, 18 PA. CONS. STAT. ANN. § 4904 (Purdon 1973), was barred by a prior conviction in federal court for violations of 18 U.S.C. §§ 1001, 1341 (1976), because both the state and the federal statutes were "designed to guard against theft and fraud . . . [and] to protect a similar governmental interest." 394 A.2d at 1001-02.

74. But see Grounds for Complaints, 49 Pa. Code § 17.251(a)(4) (1979), which provides in pertinent part:

(a) A complaint against a physician must allege that a licensee is practicing medicine in violation of law, regulation, or good and acceptable medical practice. Such grounds include those specifically enumerated in section 13 of the Act (63 P.S. § 421.15). The term unprofessional conduct shall include, but is not limited to, the following:

(4) Conviction of a felony, defined as such under the laws of this Commonwealth, or under the laws of any other state, territory, or country.

Section 17.251(a)(4) indicates that if a physician has been convicted of a federal felony whether or not that amounts to a Pennsylvania felony, that physician has engaged in unprofessional conduct which is subject to sanctions by reason of PA. STAT. ANN. tit. 63, § 421.15(a)(4) (Purdon Supp. 1979) (provides that disciplinary sanctions may be imposed if physician is guilty of immoral or unprofessional conduct). An interesting problem raised by the regulation's interpretation of the term "unprofessional conduct" is whether the State Board of Medical Education and Licensure exceeded its power. It is fundamental that a court will enforce an administrative regulation only insofar as that regulation is consistent with the statute under which it was promulgated. See Lumadue v. Commonwealth, 37 Pa. Commw. Ct. 428, 391 A.2d 22 (1978) (Pennsylvania Department of Public Welfare regulation, which required a claimant to seek employment in order to qualify for assistance, was ruled to be invalid since it was inconsistent with the statutory standard, which required only that a claimant accept work). If the Medical Practice Act refers only to felonies as determined under Pennsylvania law, the State Board of Medical Education and Licensure would be imposing an inconsistent requirement on physicians by seeking through a definition of "unprofessional conduct" to encompass criminal convictions which the legislature did not intend to be actionable under the disciplinary provisions. Cf. Dauphin Deposit Trust Co. v. Myers, 388 Pa. 444, 462, 130 A.2d 686, 695 (1957) (reversed Pennsylvania Department of Banking preclusion of a merger of two banks because the agency exercised "powers beyond those granted or possessed"). See also Commonwealth v. DiMeglio, 385 Pa. 119, 122 A.2d 77 (1956), in which the court held invalid a Pennsylvania Department of Agriculture regulation requiring all baking products to be free from "added color" because it went further than the statutory norms: "The power of an administrative agency to prescribe rules and regulations under a statute is not the power
conduct involved, Pennsylvania would not consider a conviction of medicare fraud to be a felony under Pennsylvania law.

A review of prior Pennsylvania laws regulating the practice of medicine reveals that prior to 1974, the state subjected physicians to discipline for conviction of crimes involving moral turpitude. There was no limitation in the law requiring the crime to be a felony. A conviction for medicare fraud has been held to be a crime involving moral turpitude. Thus, if a physician had been convicted of medicare fraud by a federal court prior to 1974, he would have been subject to sanctioning under the provisions of the law then in force.

That the legislature was aware of the differences between convictions of crimes involving moral turpitude and convictions of felonies and that it knows how to differentiate the two is made clear by the statutory provisions applicable to osteopaths, which were adopted in 1978. Those provisions provide that an osteopath may be subject to disciplinary action upon the “[c]onviction of a felony, a crime involving moral turpitude, or a crime related to the practice of osteopathic medicine.” The inference which arises from the reference to the term “felony” as differentiated from the term “crime” is that Pennsylvania intended to subject a physician’s license to the sanctioning power of the state only for felonies and not for other offenses which might be viewed as serious convictions because the crimes involve moral turpitude. Therefore, since Pennsylvania, unlike the federal government, would not view a medicare fraud conviction as a felony, it arguably would not be in accordance with the policy of Pennsylvania to impose disciplinary sanctions for that kind of conviction.

Given the application of the rule of strict construction, the language of the act, if it is subject to differing interpretations, must be inter-
interpreted in the manner most favorable to the physician. Since the most restrictive interpretation would be to require the conviction to be considered a felony under Pennsylvania law, a physician should not be subject to discipline for a conviction of medicare fraud under the section of the Medical Practice Act which refers to felonies. To interpret the term “felony” otherwise would mean that a physician convicted in a Pennsylvania court for submitting false statements to a Pennsylvania agency would not be automatically subject to discipline while a physician for similar conduct involving a federal agency who was convicted in federal court would be subject to discipline. Such an incongruity would not appear to be in conformity with the penal nature of disciplinary actions.

Other jurisdictions have interpreted the term “felony” with varying results. Those jurisdictions which have held the term “felony” to include conduct or convictions which would not have amounted to a felony within the particular state in question have based their broad interpretation upon the purpose of the licensing act, which is seen as being primarily the protection of the public—thus using a liberal construction. In cases where the doctrine of strict construction was held to be applicable, the term “felony” was interpreted to mean that the conviction in the other state, territory or country had to amount to a felony under the law of the particular state which was imposing the disciplinary sanction. Since Pennsylvania has provided for strict con-

79. See Bruni v. Department of Registration & Educ., 59 Ill. 2d 6, 319 N.E.2d 37 (1974), cert. denied, 421 U.S. 914 (1975) (on basis of legislature’s subsequent acts held “felony” as used in Illinois Medical Practice Act included federal felonies whether or not those felonies would amount to state felonies); In re Minner, 133 Kan. 789, 3 P.2d 473 (1931) (attorney properly disbarred for conviction of federal felony since state statute extended to federal felonies as well as state felonies); State v. Estes, 130 Tex. 425, 109 S.W.2d 167 (1937) (primary object of law providing for disbarment of attorney upon conviction of felony was to protect public and thus term “felony” was not restricted to state felonies but rather included federal felonies). Cf. State ex rel. Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934) (governor properly removed from office for conviction of federal felony which would have amounted to only a misdemeanor under state law; term “felony” included federal felony since purpose was to protect the public and not to punish the individual); State ex rel. Beckman v. Bowman, 38 Ohio App. 237, 175 N.E. 891 (1930) (policeman lost pension because of conviction of federal felony; term “felony” construed under law of jurisdiction where committed).

80. See note 62 supra. See also Merritt v. Jones, 259 Ark. 380, 533 S.W.2d 497 (1976) (looked to state definition of “felony” to determine whether conviction of federal felony came within state statute which authorized removal of individual’s name from voter registration list for conviction of felony); In re Weathers, 159 Fla. 390, 31 So. 2d 543 (1947) (statutory law authorizing disciplinary action against physician expressly provided that foreign felony conviction, to be actionable, must have amounted to state felony); In re Cohen’s Will, 254 App. Div. 571, 2 N.Y.S. 2d 764, aff’d, 278 N.Y. 584, 16 N.E.2d 111 (1938) (foreign felony conviction not sufficient to deny application for letters testamentary).
struction, and as long as that strict construction doctrine continues to be applicable, the term "felony" in the Medical Practice Act arguably would be interpreted to include only convictions which would have amounted to felonies under Pennsylvania law. Thus, a conviction for medicare fraud possibly may not subject a physician to sanctioning under the section of the Medical Practice Act which authorizes disciplinary sanctions for the conviction of a felony.

A question might be asked as to why the interest of the physician should outweigh the interest of the public when deciding whether a conviction of a federal felony should automatically subject the physician to a disciplinary proceeding. In other words, why should not the public interest have predominance? Is the public being harmed by allowing physicians who have been convicted of federal felonies to continue freely to practice medicine? It is important to acknowledge that the protection of the public is directed by the legislature through the exercise of its police power in the enactment of statutes.

The Pennsylvania legislature specifically provided only that the conviction of felonies—not all crimes or even crimes involving moral turpitude—would subject a physician to a disciplinary action. The legislature, although making sanctionable only the conviction of felonies, at the same time expressly provided that other kinds of conduct linked to the practice of medicine would be sanctionable. Therefore, the legislature protected the public interest by providing that when the conduct underlying a conviction of a non-felony crime is seen as harmful to the public the physician will be subjected to the disciplinary process. For example, if a physician were convicted in a Pennsylvania court of indecent assault arising from conduct which oc-


82. Section 3126 of the Pennsylvania Crimes Code provides:
A person who has indecent contact with another not his spouse, or causes such other to have indecent contact with him is guilty of indecent assault, a misdemeanor of the second degree, if:
(1) He does so without the consent of the other person;
(2) He knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct;
(3) He knows that the other person is unaware that an indecent contact is being committed;
(4) He has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the knowledge of the other drugs, intoxicants or other means for the purpose of preventing resistance; or
(5) The other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

curred during the examination of a patient, that conviction would be only a misdemeanor and would not be directly actionable. The conduct, however, would arguably subject the physician to discipline because it constitutes "unprofessional conduct." Thus, the legislature has chosen to protect the public by examining the conduct underlying certain crimes, rather than by making the mere conviction of such crimes actionable.

Given the concern over protecting the public expressed in other provisions subjecting physicians to the disciplinary process, it behooves one to consider whether the conduct which gave rise to the medicare fraud conviction violates any other provision of the Medical Practice Act.

B. Misleading, Deceptive, Untrue or Fraudulent Representations

A conviction for medicare fraud in and of itself probably does not violate the Medical Practice Act. The conduct underlying the medicare fraud conviction, however, arguably does violate the act since it may be categorized as "misleading, deceptive, untrue or fraudulent representations in the practice of medicine." A criminal conviction resulting from a verdict of guilt or an admission of guilt may be used in other proceedings, such as a disciplinary proceeding, to establish the facts underlying the conviction. Thus, if a physician is convicted of mail fraud, the mail fraud conviction could be used to establish the fact that the physician had devised a scheme for the obtaining of money by means of false or fraudulent pretenses, representations or

83. Id.
84. It probably would be classified as one of "[t]hose breaches of the trust, confidence and reliance, necessarily attendant upon the intimate relationship of physician and patient, which amount to gross abuses of the standards of professional conduct generally recognized as essential to the proper practice of medicine and surgery." Pennsylvania State Bd. of Medical Educ. & Licensure v. Ferry, 172 Pa. Super. Ct. 372, 378, 94 A.2d 121, 124 (1953) (quoting the lower court opinion).
85. See note 27 supra.
87. Kravitz Estate, 418 Pa. 319, 211 A.2d 443 (1965) (record of conviction of murder conclusively barred convicted murderer from relitigating in civil proceedings the question of murder or guilt or innocence); Hurtt v. Stirone, 416 Pa. 493, 206 A.2d 624, cert. denied, 381 U.S. 925 (1965) (record of conviction of extortioner was conclusive evidence of fact of extortion). The same result does not flow from a conviction arising from a plea of nolo contendere. If the plea of nolo contendere is accompanied by an assertion of innocence, the facts charged in the indictment are not conclusively established. See State Dental Council & Examining Bd. v. Friedman, 27 Pa. Commw. Ct. 546, 367 A.2d 363 (1976).
promises. A conviction under the false statements statute—a conviction under the false statements statute would establish the fact that a physician had knowingly and willfully made false, fictitious or fraudulent statements or representations. Such conduct involving schemes to obtain money by false pretenses or the making of fraudulent representations would violate the Medical Practice Act if it involves the practice of medicine. The primary problem, therefore, is to determine whether the conduct involved in medicare fraud, the sending of fraudulent bills for medical services to third-party payors, involves the practice of medicine.

Important to this inquiry is whether the "practice of medicine" entails all aspects of a physician's professional conduct or only the intimate, direct relations between a physician and his patient. The resolution of that question is somewhat easier in jurisdictions which have liberally interpreted their statutes. It is a difficult issue in Pennsylvania since the language of the disciplinary statute must be strictly construed in favor of the physician. The act, however, even using strict construction, cannot be interpreted in a way which would defeat its purpose.

Physicians have recognized that the practice of medicine entails a physician's billing practices. For example, the Principles of Medical Ethics refer to the professional responsibilities of a physician with respect to billing:

In the practice of medicine a physician should limit the source of his professional income to medical services actually rendered by him, or under his supervision, to his patients. His fee should be commensurate with the services rendered and the patient's ability to pay. He should neither pay nor receive a commission for referral of patients.
Thus, a physician would violate the Principles of Medical Ethics by submitting false statements for fees to third-party payors since he would receive income for medical services not rendered by him.

The Commonwealth Court of Pennsylvania, in *Catena v. Commonwealth*, 941 A.2d 869 (Pa. Commw. Ct. 1980), considered the issue of whether third-party billing practices are included in the practice of medicine and held that they were. 95

These principles are intended to aid physicians individually and collectively in maintaining a high level of ethical conduct. They are not laws but standards by which a physician may determine the propriety of his conduct in his relationship with patients, with colleagues, with members of allied professions, and with the public.

AMA, PRINCIPLES OF MEDICAL ETHICS, preamble (1959).


95. Cases from jurisdictions referred to by the court in *Catena* are from jurisdictions which liberally construe their medical practice acts and, therefore, may not be entirely applicable when determining what is "the practice of medicine" in a jurisdiction like Pennsylvania, which strictly construes its acts. For example, in Matanky v. Board of Medical Examiners, 79 Cal. App. 3d 293, 144 Cal. Rptr. 826 (1978), a physician who had been convicted under 18 U.S.C. § 1001 (1976) by reason of billing for medical services he did not provide, argued, *inter alia*, that such conduct was not sanctionable since it did not relate to the practice of medicine. The court held that the conduct need not necessarily relate to the practice of medicine since the act is not penal. Moreover, in the court's view, even if required to come within the practice of medicine, such conduct was related to the physician's activities. 79 Cal. App. 3d at 306, 144 Cal. Rptr. at 835. In another decision cited by the *Catena* court, Kaplan v. Department of Registration & Educ., 46 Ill. App. 3d 968, 361 N.E.2d 626 (1977), a physician, who had been convicted under 18 U.S.C. § 1341 (1976) because of preparing fraudulent medical reports which he sent to insurance companies, contended that there was no connection between the conviction and the purpose of the medical practice act. The Illinois court noted that a proceeding under the medical practice act is not a criminal proceeding, and that the purpose of that statute is to maintain sound professional standards. Moreover, such conduct constituted an act of fraud or deceit in the practice of medicine. 46 Ill. App. 3d 975, 361 N.E.2d at 631. The third case cited in *Catena* was Wassermann v. Board of Regents, 11 N.Y.2d 173, 182 N.E.2d 264, 227 N.Y.S.2d 649, appeal dismissed, 371 U.S. 23 (1962). In that case, the submission of false and exaggerated medical reports for use in settling personal injury cases was found to be fraud or deceit in the practice of medicine. Id. at 178, 182 N.E.2d at 266, 227 N.Y.S.2d at 652. The term "practice of medicine" was not limited to direct patient contact. In considering the Wassermann decision, however, it should be noted that New York emphasizes the public interest, *see* note 62, *supra*, and has consistently followed the Wassermann rationale, *see* e.g., Holmstrand v. Board of Regents, 419 N.Y.S.2d 223 (App. Div. 1979); Dilluvio v. Board of Regents, 60 App. Div. 2d 699, 400 N.Y.S.2d 871 (1977); D'Alois v. Allen, 31 App. Div. 2d 983, 297 N.Y.S.2d 826 (1969); Glashow v. Allen, 27 App. Div. 2d 625, 275 N.Y.S.2d 994 (1966).

Massachusetts, a state which liberally construes its medical practice act, has also decided that the fraudulent billing of third-party payors is conduct related to the practice of medicine. In Levy v. Board of Registration & Discipline in Medicine, 392 N.E.2d 1036 (Mass. 1979), the court upheld the revocation of a physician's license based on his conviction of a crime arising out of improper billings to the state—a third-party payor. The court stated:

Even if we accept [the physician's] premise that the Board lacked jurisdiction to discipline a physician for crimes unrelated to the practice of medicine (which we do
The court noted that to hold otherwise would be to subject physicians to a lesser professional standard than dentists, which would be illogical. Additionally, the court examined prior case law which required that a physician's conduct must involve the doctor-patient relationship before the imposition of sanctions would be justified. The Catena court concluded that those decisions were inapplicable because the provision under consideration in those cases had been "grossly unethical conduct" and not fraud or misrepresentations in the practice of medicine. The Medical Practice Acts discussed in the prior decisions also contained other grounds for discipline. Thus, the earlier decisions could not be read to exclude from scrutiny all conduct outside the doctor-patient relationship.

Additionally, third-party billing practices of physicians arguably do relate to the doctor-patient relationship. Patients who pay for insurance or whose employers pay for insurance provided by third-party payors, or patients whose tax dollars provide for the coverage of individuals under federal programs are affected since fraudulent billing practices increase the cost of insurance or taxes paid by or on behalf of patients. Furthermore, the government or third-party payor only not), [the physician's] claim still fails . . . . [T]he crimes are closely related to the practice of medicine . . . .

The practice of modern medicine involves financial management as well as the care and treatment of patients. A substantial portion of persons seeking medical assistance are assured that a portion of their costs will be paid by a third party . . . . Therefore, an intentional misdeed relating to third-party payors reflects adversely on a physician's fitness to practice medicine. It is irrelevant that it is a third party, and not a patient, who is being defrauded.

Id. at 1040-41.

96. Dentists are subject to disciplinary sanctions if they are guilty "of fraudulent or unlawful practices, or fraudulent, misleading or deceptive representations . . . ." Pa. Stat. Ann. tit. 63, § 122(l) (Purdon 1968). The difference between the provision affecting dentists and that affecting physicians is that the dental provision does not specifically require the representation to be in the practice of the profession. See Moses v. Commonwealth, 42 Pa. Commw. Ct. 105, 400 A.2d 664 (1979) (submission of false claims to an insurance company subjected a dentist to disciplinary action since they were misleading or deceptive representations); Miller v. Commonwealth, 39 Pa. Commw. Ct. 613, 396 A.2d 83 (1979) (false claim reports filed by dentist with a third-party payor were fraudulent or unlawful practices, or fraudulent, misleading or deceptive representations).


98. See Miller v. Commonwealth, 29 Pa. Commw. Ct. 613, 396 A.2d 83 (1979), which concerned false claims filed by dentists with insurer. The court stated that the State Dental Council "was not dealing with unprofessional conduct alone but rather with fraudulent practices and fraudulent, misleading or deceptive representations. Certainly, every Pennsylvania citizen who is a subscriber to Pennsylvania Blue Shield benefits has an interest which must be protected by the Council under the authority of the Law." Id. at 621, 396 A.2d at 88.
pays the physician because of the physician's professional status and rendering of medical services." To permit a physician to abuse his license by making false representations in order to obtain income could well contravene a primary purpose of the act, which is to protect the public by having only competent, moral persons minister to their medical needs.100

C. Immoral or Unprofessional Conduct

The conviction of a physician for medicare fraud also potentially violates the provision of the Medical Practice Act which makes a physician's license sanctionable if he is "guilty of immoral or unprofessional conduct." Unprofessional conduct is defined statutorily to "include any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, in which proceeding actual injury to a patient need not be established." One objection to this provision of the Medical Practice Act is that the term "unprofessional conduct" is too broad and accordingly, it would be inappropriate for the state, on an ad hoc basis, to determine that the billing practices of a physician might constitute unprofessional conduct.103

99. Cf. Matanky v. Board of Medical Examiners, 79 Cal. App. 3d 293, 144 Cal. Rptr. 826 (1978) (involving a state in which a liberal construction was applicable). The Matanky court ruled, however, that even if the liberal construction were not applicable, medicare fraud was within the practice of medicine:

Further, in this case the conduct upon which [the physician] was convicted was related to professional activities. If he had charged a patient for services not actually rendered, there could be no question that such conduct was related to medical practice. We see no distinction in fact that he attempted to defraud the federal government. Though it was not a patient, the federal government, who paid the bills, was nonetheless a "client" in the professional practice of [the physician]. He also defrauded the patient for the federal government only pays on behalf of the patient.

Id. at 306, 144 Cal. Rptr. at 835.

100. PA. STAT. ANN. tit. 63, § 421.6(a) (Purdon Supp. 1979), sets out the qualifications necessary to obtain a license. That section requires an applicant to furnish evidence that he "is of legal age, is of good moral character, and is not addicted to the intemperate use of alcohol or the habitual use of narcotics or other habit-forming drugs, and that he has completed the educational requirements prescribed by the board." Id.


102. Id.

103. In Tuma v. Board of Nursing, 100 Idaho 74, 593 P.2d 711 (1979), the court held a nurse's license was suspended improperly under statutory provision authorizing disciplinary action for "unprofessional conduct" since there were no rules or regulations establishing that the conduct in question was improper. The court noted there cannot be an after-the-fact determination of whether certain conduct is unprofessional. To be actionable, it must be a clear case of a serious offense.
A number of decisions which considered similar issues recognized that the use of a term such as “unprofessional conduct” was necessary because it would be impossible to set out explicitly in the statute all the kinds of activities the state may find objectionable. In addition, unprofessional conduct is related to the ever-changing standards of acceptable and prevailing medical practice; if a broad term such as “professional conduct” were not used, every change in the standards would require an amendment to the statute—a time-consuming and perhaps impossible proposition. The use of standards prevalent at a given time should not be offensive to physicians who may be concerned with determining the parameters of professional conduct, as long as there is evidence in the disciplinary proceeding which would support a finding that practitioners in the community in which the physician practices recognize that the conduct in question, such as fraudulent billing practices, does in fact violate a standard of acceptable and prevailing medical practice.

Since the statutory definition of “unprofessional conduct” refers to the standards of acceptable and prevailing medical practice, it requires that the conduct be related to the practice of medicine. It is therefore appropriate to question, as in the previous section, whether conduct sanctionable under that provision must be related to activities directly occurring between a physician and a patient, or whether it may relate to activities occurring between a physician and a third-party payor which indirectly affect the physician’s patients and the public. As discussed earlier, it arguably would defeat a purpose of a Medical Practice Act to conclude that the billing practices of a physician are not part of the practice of medicine.

The Commonwealth Court of Pennsylvania, however, in *Catena v. Commonwealth* rejected the argument that “unprofessional conduct”
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embraced all conduct related to the professional aspects of a physician's life. The court noted that although other disciplinary provisions of the Medical Practice Act may encompass all aspects of professional conduct, not all the provisions do. The court held that the term "unprofessional conduct" is statutorily defined and is:

concerned with competence in the art of healing and, in contrast with [the provision on misleading, deceptive, untrue or fraudulent representations], seems limited to the doctor-patient relationship. [The provision concerning 'unprofessional conduct'] is the only subsection . . . that relates to competence and is clearly not meant to be a catch-all phrase.°

Since the court found that the conduct underlying a medicare fraud conviction did not occur directly between a doctor and a patient, it was not "unprofessional conduct" within the meaning of the Medical Practice Act. In a concurring opinion, Judge Mencer argued that the statutory definition refers to the standards of acceptable medical practice and that medicare fraud would not be classified as an acceptable practice. "The practice of medicine certainly encompasses more than

107. Id. at 872. But cf. Boehm v. North Carolina Bd. of Podiatry Examiners, 41 N.C. App. 567, 255 S.E.2d 328 (1979) (filing of claims with State Blue Cross and Blue Shield for services not performed constitutes immoral or unprofessional conduct).

108. See Lester v. Department of Professional & Occupational Regs., 348 So. 2d 923 (Fla. Dist. Ct. App. 1977) (applying the rule of strict construction, court held physician's receipt of kickbacks from a hospital was not unprofessional conduct). Given the interpretation of the term "unprofessional conduct," the following regulations of the State Board of Medical Education & Licensure are apparently invalid insofar as they define "unprofessional conduct" by reference to conduct not directly involving the doctor-patient relationship:

The term unprofessional conduct shall include, but is not limited to, the following:

(1) Misrepresentation or concealment of a material fact in obtaining a license to practice medicine or a reinstatement thereof.

(2) Commission of an offense against any provision of the laws of the Commonwealth relating to the practice of medicine or any rule or regulation adopted thereunder.

(3) The commission of any act involving moral turpitude, dishonesty, or corruption when such act directly or indirectly affects the health, welfare, or safety of citizens of the Commonwealth. If the act constitutes a crime, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action.

(4) Conviction of a felony, defined as such under the laws of the Commonwealth, or under the laws of any other state, territory, or country.

(5) All advertising of medical business which is intended or has a tendency to deceive the public.

(13) Gross, willful, and continued overcharging for professional services including payments by all third-party payors.

(14) Violation of any Board provision of this chapter fixing a standard of professional conduct.

mere technical skill." Additionally, Judge Mencer stated that the conduct underlying a medicare fraud conviction is immoral and therefore within the proscription of the act since the act addresses both immoral as well as unprofessional conduct. An examination of the points raised in the concurring opinion establishes their validity.

Prior Pennsylvania decisions defined the term "unprofessional conduct" to mean "those breaches of the trust, confidence and reliance, necessarily attendant upon the intimate relationship of physician and patient which amount to gross abuses of the standards of professional conduct generally accepted as essential to the proper practice of medicine and surgery." The standards of professional conduct referred to are those of the physicians practicing in the same community. Thus, if the current standards of acceptable and prevailing medical practice would encompass the billing practices of physicians, the submission of fraudulent bills to third-party payors arguably would involve a breach of the standards and would therefore constitute unprofessional conduct. Other jurisdictions which have considered the problem of fraudulent billing, even in the absence of statutory law or regulations defining the term "unprofessional conduct" to include fraudulent billing practices, have decided that fraudulent billing practices with respect to third-party payors are "so obviously wrong and violative of the standards of ethics expected of a physician that they constituted 'unprofessional conduct.'"

Moreover, the provision of the Medical Practice Act in question encompasses immoral as well as unprofessional conduct. The term "im-

109. 411 A.2d at 874 (Mencer, J., concurring).
110. Id. at 873-74 (Mencer, J., concurring). Cf. Forziati v. Board of Registration in Medicine, 333 Mass. 125, 128 N.E.2d 789 (1955) (fee-splitting arrangements with attorney were in conflict with physician's moral obligations); Kansas State Bd. of Healing Arts v. Seasholtz, 210 Kan. 694, 504 P.2d 576 (1972) (osteopath's filing of false claims for medical services constituted immoral, unprofessional or dishonorable conduct).
113. See Wassermann v. Board of Regents, 11 N.Y.2d 173, 182 N.E.2d 264, 227 N.Y.S.2d 649 (1962) (distinguished by the majority in Catena because of the differences in the way New York statutorily provided for "unprofessional conduct"). See also In re Shigon, 462 Pa. 1, 329 A.2d 235 (1974), where the court, in a disciplinary proceeding brought against lawyers based upon, inter alia, the submission of fraudulent and inflated medical claims, quoted from the lower court as follows: "This case presents a melancholy record of unprofessional conduct on the part of doctors, as well as unprofessional conduct on the part of lawyers, in violation of the Code of Ethics governing both professions." Id. at 20-21, 329 A.2d at 245.
moral conduct” relates to the moral character of an individual. Arguably, one who engages in immoral conduct lacks good moral character. The term “good moral character” is important since an applicant for a license must certify that he is of good moral character and may be denied a license if he lacks the requisite character.

“Good moral character” is a term which has been given a restrictive meaning in cases involving licensing problems. It is not ambiguous. In Konigsberg v. State Bar the United States Supreme Court considered an issue of whether an applicant for admission to the bar in California had been unconstitutionally denied his certification to practice law on the ground, inter alia, that he was not of good moral character. The Court, in considering what was encompassed in good moral character, reviewed California decisions in which “good moral character” had been defined to include the absence of any conduct which manifested “moral turpitude.” The applicant’s conduct under examination in Konigsberg involved unorthodox political beliefs or membership in a political party. That conduct did not manifest “moral turpitude” and it was therefore improper for the bar admission authorities to conclude that the applicant lacked good moral character.

court commented on why the state legitimately may be concerned with a physician’s morals:

Soundness of moral fiber to insure the proper use of medical learning is as essential to the public health as medical learning itself. Mere intellectual power and scientific achievement without uprightness of character may be more harmful than ignorance. Highly trained intelligence combined with disregard of the fundamental virtues is a menace.

Id. at 429, 132 N.E. at 176. See Forziati v. Board of Registration in Medicine, 333 Mass. 125, 128 N.E.2d 789 (1955). See also AMA, PRINCIPLES OF MEDICAL ETHICS § 4 (1959) (“The medical profession should safeguard the public and itself against physicians deficient in moral character or professional competence”).

115. Immoral is defined as “contrary to good morals.” BLACK’S LAW DICTIONARY 885 (rev. 4th ed. 1968).

116. PA. STAT. ANN. tit. 63, § 421.6(a) (Purdon Supp. 1979). In contrast, the provision applicable to attorneys with respect to character presumes good character:

The general requirements for admission to the bar of this Commonwealth are:

(3) Absence of prior conduct by the applicant which in the opinion of the Board indicates character and general qualifications (other than scholastic) incompatible with the standard expected to be observed by members of the bar of this Commonwealth.

PA. BAR. ADMISSION R. 203. The attorney provision is in keeping with the United States Supreme Court decisions concerning moral character. Id. (explanatory note).


118. Id. at 263 (“These cases ... appear to define ‘good moral character’ in terms of an absence of proven conduct or acts which have been historically considered as manifestations of ‘moral turpitude’”).
In another case involving an attorney, the California Supreme Court held that a California law permitted the disciplining of an attorney upon proof that he had been convicted of a crime involving moral turpitude or had committed an act involving moral turpitude. The court recognized that the concept of moral turpitude varies depending upon the community and the time in which the conduct is brought into question. Criminal activity which involves an intent to defraud or purposeful deceit in order to attain personal gain was seen as involving moral turpitude. In the particular case in question, a conviction based upon the failure to file income tax returns without an additional showing of an intent to defraud or an intent to improperly secure personal gain did not amount to the conviction of a crime involving moral turpitude—even though that kind of conduct lowered the reputation of lawyers in the community.

The Commonwealth Court of Pennsylvania has determined that Medicare fraud convictions involve moral turpitude. In a case involving the appropriateness of revoking an osteopath's license the court held that a plea of guilty to crimes involving Medicare fraud constituted the conviction of a crime involving moral turpitude. The Commonwealth Court of Pennsylvania recognized that the professional law provided for discipline upon “conviction of a crime involving moral turpitude”.

119. In re Fahey, 8 Cal. 3d 842, 505 P.2d 1369, 106 Cal. Rptr. 313 (1973) (resolved all reasonable doubts in favor of attorney in determining whether crime or act involved moral turpitude). See Bartos v. United States Dist. Court, 19 F.2d 722 (8th Cir. 1927) (attorney could not be disbarred for conviction based on his making beer for personal use since it was not crime of moral turpitude); Hummel v. Board of Chiropractic Examiners, 103 Colo. 476, 87 P.2d 248 (1939) (since term “immoral conduct” was used with reference to term “unprofessional conduct” the immoral conduct, to be actionable, had to be related to the practice of the profession); In re Weisenssee, 88 S.D. 544, 224 N.W.2d 830 (1975) (followed Fahey analysis in a disciplinary action brought against an attorney).

120. 8 Cal. 3d at 853, 505 P.2d at 1376, 106 Cal. Rptr. at 320 (“Offenses that do not involve moral turpitude or affect professional performance should not be a basis for professional discipline simply because they fall short of the highest standards of professional ethics or may in some way impair the public image of the profession”).


licensing board was a "watch dog" entrusted by the commonwealth to insure that the high standards which the public expects of osteopaths are maintained. Since a conviction resulting from fraudulent billing practices constituted a crime involving moral turpitude, the court upheld the revocation of the osteopath's license.

By direct inference, therefore, the conduct of submitting fraudulent bills for payment to third-party payors by physicians involves moral turpitude and a physician should reasonably be expected to know that such conduct is "immoral." Furthermore, since such conduct arguably is related to the practice of medicine, the physician should know that he engaged in immoral or unprofessional conduct in violation of the Medical Practice Act.

CONCLUSION

This discussion illustrates that there are serious questions raised when a physician is involved in a disciplinary proceeding because of prior medicare fraud convictions. Hopefully, physicians and attorneys will be alerted that the entry of a plea of guilty or nolo contendere or a conviction following a trial for medicare fraud will not only subject the physician to criminal sanctions but will impact upon his continued ability to practice medicine.123

The potential arguments concerning the interpretation of the terms "felony," "in the practice of medicine," and "immoral or unprofessional conduct" are issues which the Pennsylvania courts will be facing. In that regard it might be advisable for the legislature, particularly with respect to whether physicians are subject to discipline for convictions of federal felonies which would not amount to felonies under Pennsylvania law, to clarify the statutory language so that the sensitive issues discussed in this article need not be raised in disciplinary proceedings. Additionally, since the statutory provisions regulating the various health care professions such as dentistry, osteopathy and medicine differ, it might be pertinent to examine the differences, and if the differences are not reasonable, to enact some uniform standards with respect to such professionals.124

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123. In a few disciplinary proceedings conducted by the author sitting as a hearing examiner for the State Board of Medical Education and Licensure, the physicians involved stated they were alarmed when they learned that their pleas of guilty or nolo contendere caused the state to initiate disciplinary proceedings against them.