

Recent "Outliers" in Health Care Criminal Cases - "A Report From The Wild West"

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A. INTRODUCTION

Distance from the Department of Justice or the uniqueness of La-La Land, or some combination, has resulted in at least a few outlier health care criminal prosecutions emanating from Los Angeles in the past year. The authors plan to discuss those out-of-the-norm cases, to the degree they are free to do so since the cases are still ongoing in some respects, and to engage Los Angeles-based prosecutor, Assistant U.S. Attorney Consuelo S. Woodhead, in discussion about some of the issues raised by those prosecutions, to the degree she can discuss those matters, and to benefit from the insights of other panelists.

The outliers consist of:

- the "Farah Fawcett" case, involving the prosecution of a UCLA Medical Center employee for violations of 42 U.S.C. § 1320d-6(a)(2) and b(3), the HIPPA prohibitions on wrongfully obtaining Individually Identifiable Health Information ("IIHI") for commercial advantage;
- the "City of Angels" case, involving the prosecution and apparent ongoing investigation of hospital administrators and others for allegedly paying kickbacks for the referral of homeless patients from skid-row streets and shelters, and the use of "street crime" investigative and prosecutorial techniques, including arrest and attempted detention, in that effort; and,

- the "Piling On" case, use of a novel parallel proceeding in the "City of Angels" case, a civil unfair competition lawsuit by state (in this case City of Los Angeles) prosecutors.

B. THE "FARAH FAWCETT" PROSECUTION

In October, 2006, the fact that television and movie star Farah Fawcett was diagnosed with cancer was first reported in what some people would call the "Tabloid" media. Her cancer treatments at UCLA Medical Center received attention in follow-up articles reporting that treatment was successful. Then, in May, 2007, there were stories reporting that her cancer had returned.

News articles in the Los Angeles Times and other outlets reported that a UCLA internal investigation started in March, 2008, and revealed that 8 doctors and 131 employees at UCLA Medical Center accessed the records of Britney Spears in January of 2008. The Times reported that there were at least 61 breaches of medical record privacy. U.S. News & World Report said that 68 workers at UCLA Medical Center were accused of "snooping."

The U.S. Attorney in Los Angeles appears to be investigating the illegal accessing of IIHI at UCLA Medical Center relating to the Farah Fawcett stories. How extensive that investigation is and where it will lead remains to be seen. One person has been prosecuted, an administrative employee

at UCLA Medical Center, Lawanda Jackson. The Indictment, Attachment A, alleges that Ms. Jackson, who herself is suffering from cancer and is confined to a wheelchair, “had an agreement with a national media outlet” to receive money for IIHI regarding celebrity patients.

The case was prosecuted as a violation of 42 U.S.C. § 1320d-6(a)(2) and b(3). Section 1320d-6(a)(2) defines as wrongful the obtaining of IIHI, and (a)(3) makes it wrongful to disclose IIHI. Section 1320d-6(b) sets forth three levels of maximum penalties: \$50,000 and 1 year in 6(b)(1); \$100,000 and 5 years if committed under false pretenses, in 6(b)(2); and \$250,000 and 10 years if for commercial advantage, personal gain, or malicious harm, in 6(b)(3).

Ms. Jackson was indicted in April, 2008. She is being prosecuted under the provisions of 6(b)(3) and faces the most severe penalties. She pled guilty in December, 2008, and is scheduled to be sentenced in May, 2009.

C. THE “CITY OF ANGELS” PROSECUTION

On August 6, 2008, scores of FBI, IRS and other agents carried out what is routine in many federal criminal cases, certainly those involving drug rings and investment frauds, but is not expected in the typical health care fraud case. A multi-agency force simultaneously swooped in on several hospitals and other locations to conduct searches and effect arrests. Two people, a referrer of patients and a hospital owner/administrator at City of Angels Medical Center in Los Angeles, were arrested and taken to the U.S. Courthouse in Los Angeles where the government sought detention. Computers were mirror-imaged and physical records were seized at the arrestees’ homes and offices, at City of Angels Hospital, and at multiple other hospitals in the Los Angeles area.

A legal scramble ensued in which those involved had to deal with the searches, an Indictment, the arrests, detention and bail hearings, an impending federal False Claims Act action, and the unconventional remedy of a state consumer protection lawsuit, discussed in the next section.

Since many health care lawyers handling criminal matters may be less familiar with some of the “street crime” law enforcement techniques and the difficulties they can generate, and since the consumer protection lawsuit seems to be unprecedented, the authors intend to provide an insight into what led to the traumatic events of that day, and a report on some of the issues and proceedings that are still underway.^{1/}

1. The Investigation

The roots of the case began almost two years earlier, in October, 2006, not with the customary and boring audit of some billing issue by the fiscal intermediary or the Department of Health and Human Services or administrators of the Medi-Cal program, but by the Los Angeles Police Department (“LAPD”) investigating instances of so-called “dumping” of patients on skid row in downtown Los Angeles. According to news reports, on October 22, 2006, LAPD officers observed ambulances drop off five patients who reportedly turned out to have been released from a local hospital, LA Metropolitan Medical Center. The alleged “dumping” of patients attracted some attention in the local press. Some news stations ran video of people in hospital gowns getting out of ambulances onto the sidewalks of skid row supposedly requiring, but not having, a wheelchair or other necessary devices.

The LAPD investigated further and within a few days was able to trace those patients to a skid-row “Assessment Center.” The LAPD ultimately was able to identify a man, referred to in the Indictment as a “Cooperating Witness” (“CW”), who had recruited a number of those patients from their skid row environs. The Indictment describes CW getting “production money” from the Assessment Center and using some of that money to pay skid row habitués with Medicare and Medi-Cal coverage who agreed to be hospitalized, taking them to any of a number of hospitals, including LA Metro and City of Angels. See Attachment B, an excerpt of the Indictment. The prosecutors claimed in open court that many homeless people went to the hospitals to have “three hot and a

cot," and that some were further induced by cash and/or cigarettes.

The Indictment goes on to describe how the hospitals had entered into marketing consulting contracts and paid marketing consulting fees to the owner of the Assessment Center, and later to the CW. The marketing consulting fees are described in the Indictment as a "sham" to cover up illegal kickbacks for referring patients to the hospitals.

The investigation did not stop with the initial LAPD investigation in 2006. Using undercover techniques that are not typical of a health care case, but are often used in cases involving drugs and public corruption, the FBI and IRS "wired up" the CW, and later the cooperating Assessment Center owner, for audio and video recordings of meetings with hospital administrators. The content of those conversations is not public, but the investigation has thusfar led to pleas by the CW, the Assessment Center owner, and one person associated with ownership of City of Angels. The defendants have entered into cooperation and plea agreements. The investigation apparently continues and, as is the custom in the Central District of California, sentencing of the defendants who have pled guilty and are cooperating is expected to be delayed until any resulting prosecutions are complete.

2. Bail Considerations for the Traditional Health Care Lawyer In the Non-Traditional Health Care Case

For health care practitioners who have only had the pleasure of receiving a polite "summons" asking their client to amble into the courthouse after a long and overt investigation, there are some things to consider if your client's day started with the unexpected pleasure of a battering ram at the front door and a pair of handcuffs on her or his wrists.

First, there is a bail rule you will not find in Title 18 that you need to understand. It is the "single test rule." Your worth as a defense lawyer in the next 48 hours depends totally on one thing—"Can you get your client out?" If you can't, about twen-

ty criminal defense lawyers, some of whom you probably have played golf with, will tell the client's family that they easily could have gotten the client out. If you don't get the client out, you are not likely to remain the lawyer for this client. If you can get your client out, you may be retained to handle the rest of the case. So if your client or potential client is arrested, make no mistake about where you need to be and what you need to do. If it comes down to whether to go to the scene of an ongoing search involving attempts to interview employees, going there to safeguard patient records and perhaps attorney-client privileged documents that your client may have had in her or his office, or to go to the jail to see your client and have time to prepare for the bail hearing, go to the jail.

Second, you need to have experience, or at least some knowledge, to cover some basics that can make a difference. If you don't have the experience, you should try to get a former Deputy Federal Public Defender or former Assistant U.S. Attorney or otherwise find an experienced "street crime" kind of lawyer familiar with federal court on your team immediately, if only for the detention and bail issues. If you don't get the client out, at least you will have someone else to blame.

Each case is different, of course, but in a health care case where there has been an arrest, between you and your teammate(s), try to cover as many of the following as you can in the first hour if you expect to get your client out so you can stay in the case:

- Get phone numbers for the client, his or her family, employer, friends, the agents, the prosecutor, and anyone else you will need to contact.
- Grab a copy of 18 U.S.C. § 3141, *et seq.*, which governs detention and bail matters.²
- Get word to your client not to talk to anybody!
- As clear and unequivocal as you want to make the prior point, at the same time tell your client absolutely to talk, but only

truthfully, to the Pretrial Services Agency (“PSA”). That agency is the friend of anyone with no record, a home, a job or business, and a spouse and family. Information provided to PSA so that it can report to the court on detention and bail issues is confidential and can only be used for those limited purposes. See 18 U.S.C. § 3153(c)(1). An arrestee’s refusal to talk to PSA is almost always a kiss of death on detention and bail issues. A lie to PSA is even worse.

- Get your client’s spouse, mother, father, employer, priest, rabbi, neighbor, anybody who knows and can vouch for your client, to the courthouse, where they can meet with PSA, sit in the courtroom, and be pointedly referred to by you.
- Always ask, regardless of status, title, wealth, age, gender, or anything else, as tactfully as necessary, if your client has any kind of criminal history, including juvenile, foreign, and little things like DUIs. And don’t necessarily presume your client knows that a misdemeanor is criminal or is telling you everything she or he recalls.
- Always ask if your client has a passport and get that to the courthouse.
- Always ask if your client is a citizen of the United States or has legal status and get whatever evidence you can on those issues.
- Always ask if your client (or someone, a relative or someone your client knows) owns real property, preferably with substantial equity, preferably located in the jurisdiction of the court. If so, get documents showing ownership and equity (purchase documents, a tax bill, a mortgage statement, the local real estate advertisements if that’s all you can get).
- Contact PSA to tell them whatever you know that is helpful. The mere fact that your client has a retained lawyer who knows something about the client, or has people on the way who know something about the client, is itself helpful.
- Visit your client in custody as soon as possible. Not figuring out how to do this, or not making the time, tends to cause the same result as a failure to meet the “single purpose rule.” If clients are locked up, they like their lawyer to visit them and answer their questions. If you don’t, they will tend to look for another lawyer. This also gives you an opportunity to do three things:
 - ask about any “bail killing” issues, such as: obstruction of justice (like destroying records and threatening witnesses); being a jerk (like kicking, scratching or swearing at agents); and lying to anyone about anything since the arrest. If you don’t ask, you might be unpleasantly surprised at the hearing in the next hour or so;
 - caution your client to remember that every other person on your client’s side of the bars has a problem that they think can be eased if they can testify to some jailhouse admission your client made to them, so don’t talk to anyone except you and PSA;
 - tell your client that even if the judge grants bail, the client could be in for several hours and jailhouse conversations, even with his or her spouse or children, can be listened to or recorded, so don’t talk about the case; and,
 - tell your client that even if the judge detains her or him, or sets a high bail, refrain from swearing and waving a fist or one-fifth of a fist, because you will probably be appearing before the same judge for any future bail hearings.

- Beware of and be prepared to counter any hint of “foreign connections.” Your client may have been in the United States since she or he was two years old, may not speak a foreign language, but if there are foreign connections (relatives, businesses, extensive or recent travel, bank accounts, that vacation condo in Costa Rica), it will come up and you will need an answer.
- If you think you are not ready and will likely lose, always postpone the detention hearing until the next day, if you can. It is better to spend a night in custody than to lose, because it is much harder to undo a judicial decision to detain someone than it is to obtain a decision not to detain.
- In general, try to under-promise and over-deliver to your client and his or her family on bail issues.

In the City of Angels case, the owner was released after about 36 hours, including two marathon hearings, thanks in part to his wife and civil lawyers being present for both hearings, his passport being surrendered, and the ability to post a substantial bail. The operator of the Assessment Center, who had already cooperated, was released on bail after about 24 hours. Both were released subject to curfews and electronic monitoring.

D. THE “PILING ON” CASE—CONSUMER PROTECTION REMEDY AS A NOVEL AND POTENTIALLY VERY EXPENSIVE PARALLEL PROCEEDING

The traditional attack in a health care fraud case is two-pronged—a criminal prosecution and a federal False Claims Act civil case seeking some multiple of actual damages—typically double or triple the actual fraudulent disbursements. So in virtually every health care fraud investigation, there are two fronts. What seems to be unique in the City of Angels case is the “piling on” of a third front in the form of a civil unfair competition lawsuit brought by the Los Angeles City Attorney. Whether that proceeding and similar extra prongs

will work and spread to other kinds of civil and quasi-civil actions by state attorneys general or local prosecutors remains to be seen.

California has a very broad unfair competition law. The statute, enacted first in 1977 and little changed, is alarmingly simple and broad: “[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice Cal. Bus. & Prof. Code § 17200. A suit may be brought by the state attorney general, or in certain circumstances by the county district attorney or county counsel, or the city attorney. *Id.* at § 17204. Relief is cumulative, *id.* at § 17205, and includes injunctive relief, *id.* at 17203, and civil penalties of up to \$2,500 per violation, *id.* at § 17206, and an additional \$2,500 per violation if the victim is 65 years of age or older, or is physically or mentally disabled. *Id.* at § 17206.1. The injunctive relief can, expressly by statute, include the appointment of a receiver and disgorgement. *Id.* at 17203. There is a strong incentive built into the statutory scheme, because out of the recovered civil penalties, half goes to the state and half to the county if the attorney general sues, all of it goes to the county if the district attorney or county counsel sue, and it is split between the county and city if the city attorney sues. *Id.* at 17206.

In the City of Angels case, the Los Angeles City Attorney lawsuit seeks injunctive relief and civil penalties, including the additional penalties for persons who are 65 years of age or more, or are disabled. See Attachment C, excerpt of Complaint.

The theory of recovery set forth in the City of Angels lawsuit is straightforward but multi-pronged. It relies on the “unlawful” prong to establish unfair competition under the statute. And of course, the City Attorney’s theory of “unlawfulness” is based on the alleged violations of each of the federal health care fraud and anti-kickback statutes, false statement statutes, conspiracy statutes (both health care and general), false claim statutes, and various California statutes that may apply, relying on *Poldosky v. First Healthcare Corp.* (1966) 50 Cal.App.4th 632, 647. The theory does not stop there, but also alleges “unfair” business practices,

including violation of public policy relating to the criminal statutes, relying on *State Farm Fire & Casualty Co. v. Superior Court (Allegro)*(1996) 45 Cal.App.4th 1093, 1103-04. And the theory additionally includes alleged “fraudulent” practices, including targeting and exploiting vulnerable homeless persons suffering from mental illness and alcohol and drug addiction, and paying people to be patients when they did not need hospitalization, regardless of whether anyone was deceived, relying again on *State Farm Fire & Casualty*.

The potential sanctions, disgorgement and penalties of up to \$5,000 per patient in a homeless population with a high incidence of mental and physical disability, could easily exceed the recovery under the federal False Claims Act. Whether the theory works, whether the action is quasi-criminal or otherwise is subject to California’s double jeopardy statute, how courts will decide liability and impose sanctions in specific cases,

are all open questions. How authorities in other states may team up with federal health care prosecutors and file parallel state civil actions is also an open question.

ENDNOTES

1. The case is pending. Although one of the authors represents one of the defendants, and the panel includes one of the prosecutors, the only information provided herein is public and the panelists will refrain from identifying individuals by name or commenting on matters relating to issues that may come before the Court.

2. The many issues involved in detention and bail hearings, including burdens of proof, presumptions, standards, and appeals, are beyond the scope of this article.