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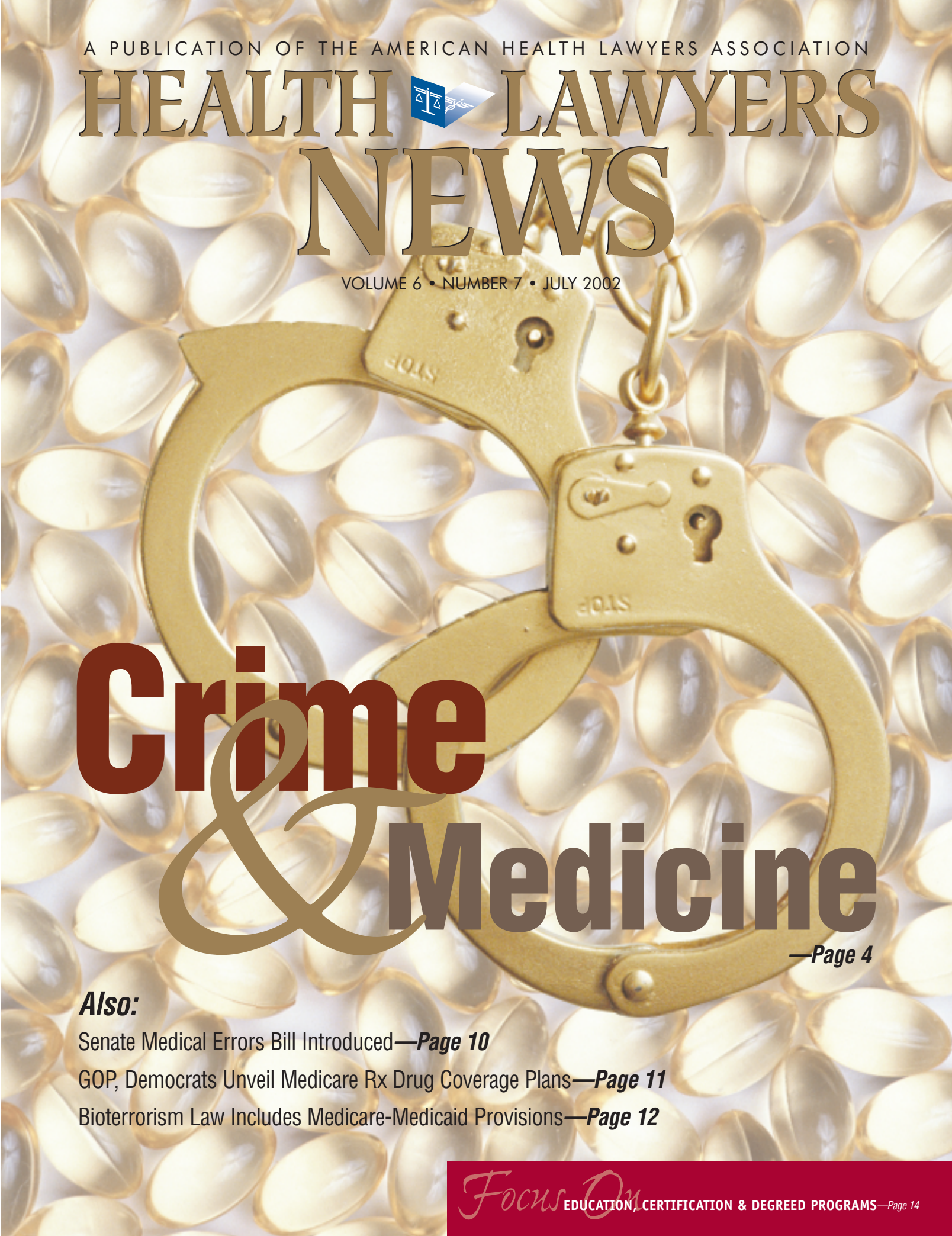

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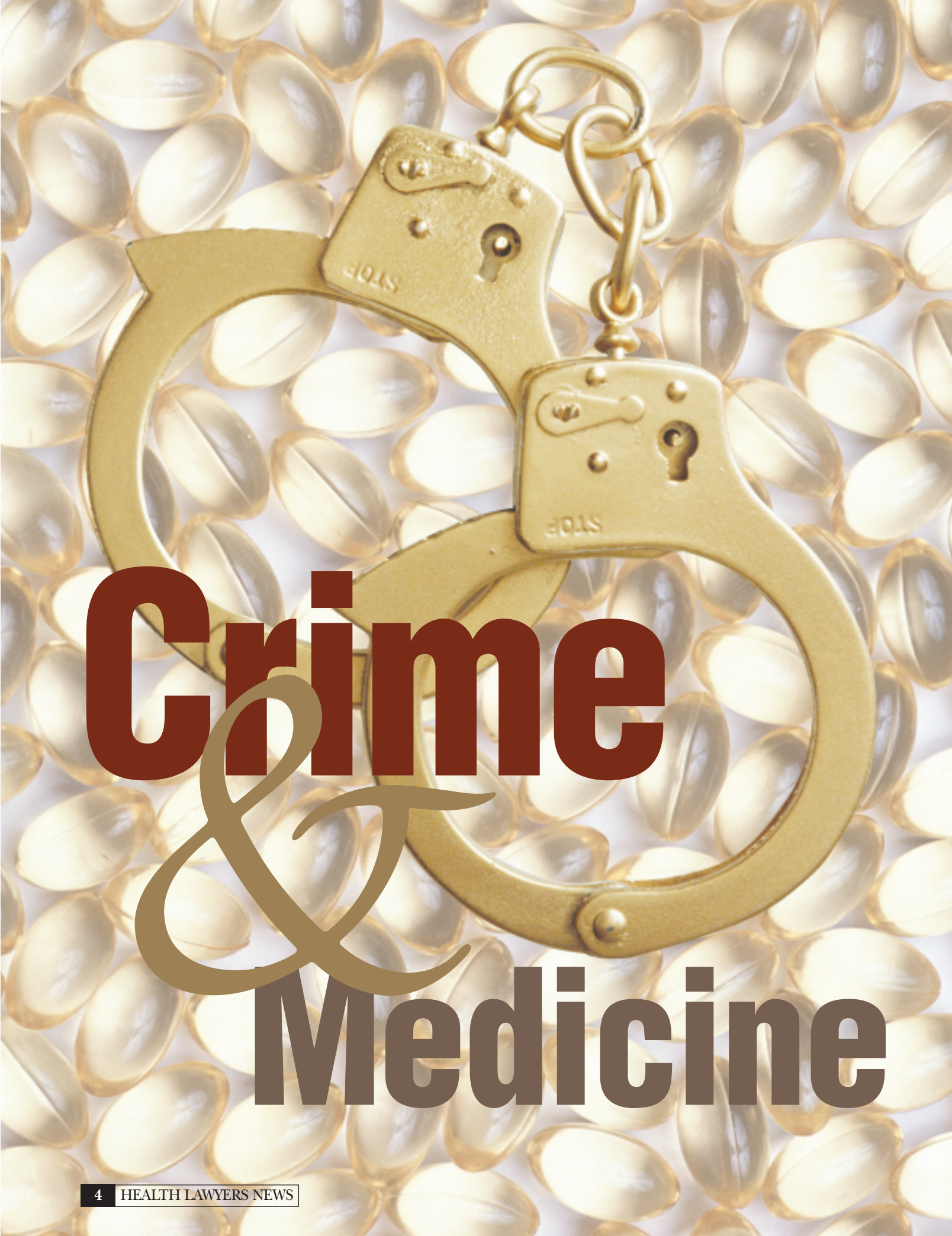

Crime & Medicine

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This article will examine when and under what circumstances physicians and other healthcare professionals may be charged with criminal offenses arising out of the practice of medicine.

Being charged with a criminal offense is very different from being named a civil defendant in a medical malpractice action. A physician in a civil action will be concerned about paying out of pocket on a judgment over his policy limits, being reported to the National Practitioner Data Bank, suffering increased malpractice premiums, and receiving discipline by the medical board. A physician facing criminal charges will be concerned about going to jail or prison.

Criminal prosecutors have considerable discretion. A prosecutor may proceed with a criminal action against a physician or other healthcare provider if a "reasonable likelihood of conviction" exists. Whether a crime has been committed is subject to interpretation.

Criminal actions against physicians were once unheard of, but the tide is changing. The trend toward criminal accountability for medical mistakes is gaining momentum. Medical decision-making continues to become more complex in light of technological advances, and physicians are under a great deal of pressure. Many people in today's society believe that someone must be held "accountable" for every bad result. Second guessing the judgment of physicians is becoming more common and acceptable. Public perceptions about managed care has added fuel to the fire. Disgruntled patients (and their families) are increasingly willing to forward complaints against physicians to governmental authorities and to bring medical malpractice lawsuits with a profound sense of entitlement. Lawyers are willing to help them through the process. And prosecutors are more likely than ever before to treat medical mistakes as crimes.

Negligent Homicide and Manslaughter

Negligent homicide and manslaughter are crimes with which a physician or other healthcare provider may be charged if the prosecutor can fit the facts into the applicable statutory elements of these offenses.

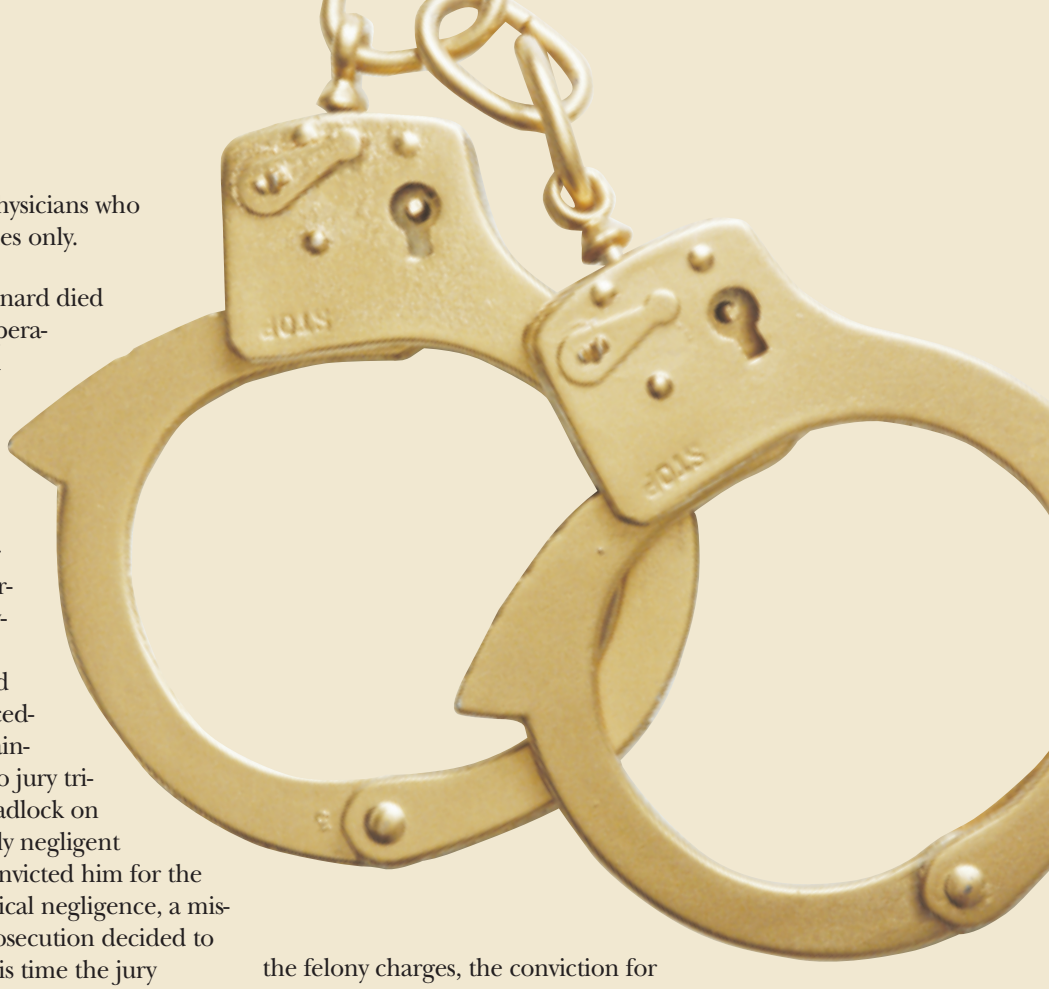
Generally, a physician may be charged with negligent homicide if he acts with criminal negligence and causes the death of one of his patients. Criminal negligence is typically defined as the failure to perceive a substantial and unjustifiable risk, which constitutes a gross deviation from the standard of care that would be observed by a reasonable physician. Physicians and attorneys who are familiar with civil medical malpractice cases will note the eerie similarity between the above definition of criminal negligence and the necessary elements of proof in a civil medical malpractice action.[1] Negligent homicide is a felony offense that may be punishable by a prison term, typically around four years, depending on state law.

Manslaughter is generally defined as recklessly causing the death of another person. Manslaughter is a more serious felony offense than negligent homicide and is typically punishable by up to twelve and a half years in prison. A physician may be prosecuted for manslaughter if he is aware of and consciously disregards a substantial and unjustifiable risk, which constitutes a gross deviation from the standard of conduct that a reasonable physician would observe in the situation. The criminal definition of manslaughter and the civil elements of proof for punitive damages in a medical malpractice action are similar.[2]

Punitive damages are awarded in a civil medical malpractice action to punish a physician. Who should decide whether punishment should be in the form of punitive money damages or the imposition of criminal sanctions? Most assuredly, plaintiffs and the lawyers who represent them in medical malpractice cases usually want money damages. However, the criminal system may be a way to exert settlement pressure. Regardless of the views of plaintiffs and civil lawyers, the ultimate decision whether to proceed with criminal charges rests with the prosecutorial authorities.

The subjective beliefs of the prosecutor may determine whether a physician is charged with negligent homicide or manslaughter. Negligent homicide and manslaughter are but two examples of crimes that are defined with a broad

brush, the reach of which may touch physicians who believe they are exposed to civil penalties only.



In July 1993, eight-year-old Richard Leonard died of a heart attack during a routine ear operation and his anesthesiologist, Dr. Joseph Verbrugge, a Colorado physician, was charged with reckless manslaughter and criminally negligent homicide, both felony charges. The case went to trial in 1996 and the prosecutor argued that Dr. Verbrugge had fallen asleep for twenty to thirty minutes during the operation—failing to address the boy's tachycardia and high temperature. Dr. Verbrugge argued that Richard Leonard died from a rare complication. He conceded that he made medical errors, but maintained that he committed no crime. Two jury trials ensued. The first trial ended in a deadlock on the reckless manslaughter and criminally negligent homicide charges. However, the jury convicted him for the lesser included offense of criminal medical negligence, a misdemeanor under Colorado law. The prosecution decided to retry him for the felony charges, and this time the jury reached an acquittal. Regardless of the eventual acquittal on the felony charges, the conviction for the misdemeanor charge resulted in a sentence of one-year probation and 200 hours of community service. In addition, Dr. Verbrugge's medical license was revoked. The Colorado Court of Appeals eventually overturned the misdemeanor conviction on procedural grounds in 1999, but by that time Dr. Verbrugge had been through a long, traumatic ordeal that wreaked havoc on his life. Media attention followed Dr. Verbrugge for several years, and his reputation was virtually demolished.

In February 1996, Wolfgang Schug, M.D., a board-certified family practice physician, saw an eleven-month-old child for an ear infection in the Emergency Department at Redbud Community Hospital in a small town in California. Dr. Schug told the child's parents to take the child to a better equipped hospital about fifty miles away to be admitted to a pediatric unit. The infant died en route from anoxic encephalopathy due to sepsis. The case was peer reviewed at the hospital, and it was determined that no basis existed to take action against Dr. Schug. His privileges were not changed in any way. However, in August 1997, Dr. Schug was arrested, taken to jail, and indicted for second degree murder and involuntary manslaughter. Although the case was eventually dismissed by the trial court, Dr. Schug was facing fifteen years to life in prison and had his life turned upside down during a lengthy legal battle.

In February 1999, six doctors in Franklin, PA were charged with criminal offenses arising out of their care and treatment of handicapped individuals in a group home.

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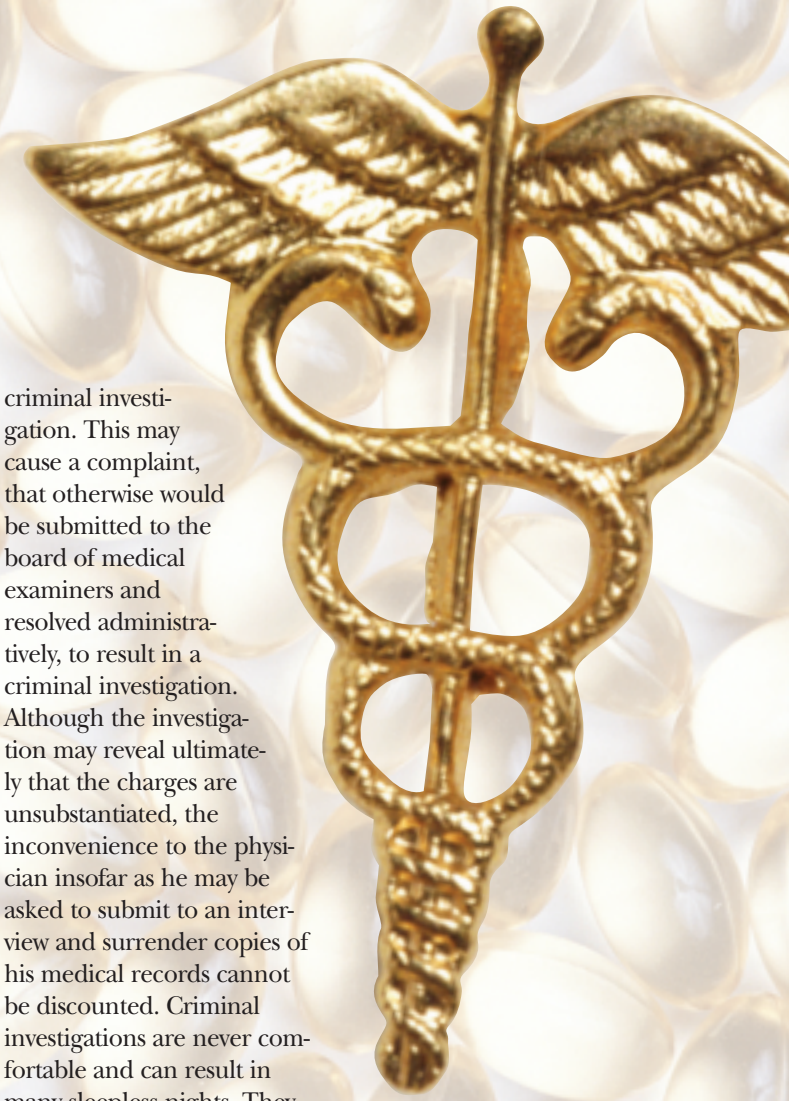
The Pittsburgh Attorney General waved a surgical stapler when he announced during a press conference that these physicians had been indicted on multiple felony and misdemeanor charges. (Some of the charges were centered around the failure to use anesthetic prior to using a surgical stapler.) Dr. Hyunchel Shin was charged with manslaughter for allegedly failing to order a brain scan of a patient. Dr. Cesar Miranda was charged with manslaughter for allegedly failing to examine properly a man with a blocked intestine. Four other doctors were charged with assault and neglect. Dr. Miranda pled guilty to two counts of reckless endangerment and was sentenced to two years probation; he also agreed to a permanent revocation of his medical license in Pennsylvania. All of the other doctors were eventually cleared of all charges, but only after extensive legal battles. One of those cleared, Dr. Samir Moussa, said that the charges made him lose his job at a veterans hospital. In speaking of the prosecutor, Dr. Moussa maintained, "He just is trying to make a name for himself so he can run for re-election or for governor." The prosecutor countered that the doctors were charged because evidence of mistreatment and neglect was found during a two-year investigation subsequent to the deaths of three patients.

In Arizona, Dr. John Biskind was convicted of manslaughter by a jury in May 2001, for which he received a five-year prison term after the death a patient, Lou Anne Herron. Dr. Biskind's clinical administrator was found guilty of negligent homicide and was sentenced to four-years probation. Ms. Herron died in Dr. Biskind's office after complications from bleeding after an abortion procedure. The prosecution argued that Dr. Biskind displayed a "reckless disregard for life" in failing to appropriately tend to Ms. Herron. Whether the prosecution would have pursued Dr. Biskind and his administrator with the same vigor had this situation involved a procedure other than an abortion is questionable.

Assault and Battery

Some states do not allow civil medical malpractice actions against licensed healthcare providers based on assault and battery. However, a licensed healthcare provider is not immune from criminal assault and battery charges. A physician may be charged with assault if the prosecutor believes that the physician recklessly caused physical injury to his patient or if the physician knowingly touched his patient with the intent to insult or provoke the patient.

Physicians and other healthcare providers who treat patients on government insurance programs should be particularly aware about issues surrounding assault. For example, in Arizona, the Arizona Health Care Cost Containment System (AHCCCS) may forward a patient complaint to the Criminal Division of the Arizona Attorney General's Office as a matter of course, where an assistant attorney general may launch a criminal investigation. This may cause a complaint, that otherwise would be submitted to the board of medical examiners and resolved administratively, to result in a criminal investigation. Although the investigation may reveal ultimately that the charges are unsubstantiated, the inconvenience to the physician insofar as he may be asked to submit to an interview and surrender copies of his medical records cannot be discounted. Criminal investigations are never comfortable and can result in many sleepless nights. They are traumatic, and mere allegations can forever tarnish reputations.



Drug Dealing

In Fort Lauderdale, Dr. Barbara Mazzella was arrested for dealing drugs after prescribing pain killers, depressants, and sleeping pills to eight patients who died of overdoses or suicides using the drugs she prescribed. Michael Kane, associate special agent in charge at the Miami DEA office was quoted as calling the physician a "drug trafficker with a fancy degree." The physician's attorney was quoted as saying, "she obviously is a physician in good standing in the community and has not broken any laws . . . the charges are serious, but they are unproven." Facing life in prison and up to $4 million in fines, Dr. Mazzella pled guilty in June 2000 to running a prescription drugs-for-cash scheme, among other charges, and was sentenced to twelve years in prison and ordered to pay more than $200,000 in restitution. Her conduct was allegedly linked to the deaths of twenty drug addicted patients, who either committed suicide or overdosed.

Did you notice that we've changed our name from SISLC to Practice Group?

Feedback from members indicates that this designation more accurately identifies who we are and what we do. We haven't changed our objectives though—AHLA's fourteen Groups are still composed of members who want to increase their level of expertise in and knowledge of health law issues, grow professionally, gain valuable leadership experience, and network with other health lawyers from across the country. So start looking for us on the Web site, in publications, and at programs, under our new name: **Practice Group**.

Endangerment

A physician may be convicted of endangerment, a felony, by recklessly endangering a patient with a substantial risk of imminent death. If the risk involves possible physical injury but not a substantial risk of imminent death, endangerment may be a misdemeanor, depending on state law.

Gerald Einaugler, M.D., a family care physician in New York, was convicted of reckless endangerment arising out of the practice of medicine. Dr. Einaugler's conviction was upheld by both the U.S. District Court for the Eastern District of New York and the Second Circuit.[3] The charges against Dr. Einaugler stemmed from his medical treatment of seventy-eight-year-old Alida Lamour, a patient at Brooklyn Jewish Hospital Nursing Home. Dr. Einaugler mistook a peritoneal dialysis tube in Ms. Lamour's abdomen for a gastrointestinal feeding tube and ordered for Ms. Lamour to be given the feeding solution Isocal through that tube. Ms. Lamour received several feedings through the dialysis catheter before the mistake was discovered by a nurse. A nephrologist was consulted and advised Dr. Einaugler to "get the patient to the hospital." Dr. Einaugler waited ten hours after his conversation with the nephrologist before transferring Ms. Lamour to the hospital. Ms. Lamour was ultimately diagnosed with peritonitis caused by the introduction of the feeding supplement into the peritoneal cavity. She died within days. Dr. Einaugler was quoted as saying, "every doctor is in their own little world . . . they don't realize that they're one vicious prosecutor away from being in the same position I am."

Dr. Einaugler's case illustrates the slowly emerging trend of holding physicians criminally responsible for mistakes in the practice of medicine. Some lawyers are pushing the trend towards criminal accountability for physicians. In fact, in an article in the *New England Journal of Medicine*, a prominent health lawyer, George Annas, has taken the following position: "[r]esponsible physicians have nothing to fear from the criminal law. When physicians intentionally or recklessly disregard their patients' safety, however, they properly face criminal prosecution."[4]

But who should decide what is intentional or reckless conduct on the part of a physician? Is this a jury question? Are the main purposes of criminal law—retribution, deterrence, and societal protection—well served by the institution of criminal charges against physicians?

Vulnerable Adult Laws

A person who is employed to provide care to an incapacitated or vulnerable adult and who causes or permits the life of the adult to be endangered or his or her health to be injured may be guilty of a criminal offense, depending on state law.[5] Typically, such laws apply when a patient is mentally ill, physically disabled, or elderly.

A civil claim under vulnerable adult statutes are sometimes alleged against physicians and other healthcare providers. This claim is separate and distinct from a medical malpractice claim. However, a vulnerable adult claim may be made in the same complaint as a medical malpractice claim. When a civil claim is made under the vulnerable adult statute, notice to the prosecutorial authorities may be required, which may result in a criminal investigation.

The Physician in the Whirlwind of the Criminal Process

Alleged criminal conduct of a physician may be brought to the attention of the prosecutorial authorities in several ways. A patient may complain to a state agency, which may forward the complaint to the Attorney General's Office. A patient may call the police. Disgruntled staff may contact the authorities or news media. Family or friends of a patient may involve the criminal authorities.

A criminal case will take on a life of its own after a prosecutor decides to bring a criminal action against a physician. Generally, the prosecutor will prepare a draft indictment, which will be presented to the Grand Jury, which ordinarily issues what is know as a "True Bill" as a matter of course.[6] A Grand Jury often functions as a rubber stamp. A criminal defendant has no voice in a Grand Jury proceeding. The prosecution controls all of the information submitted to the Grand Jury. Typically, prosecution witnesses present a one-sided version of the facts to the grand jurors. Hearsay is

admissible before the Grand Jury, and neither the defendant nor his lawyer is present. The defense has no opportunity to present witnesses. A physician will more than likely find himself indicted after the Grand Jury proceeding. All the complementary media hoopla may follow if the case is high profile.

Ultimately, the case will be presented to a jury unless a plea bargain is reached. The jury's verdict must be unanimous, a requirement in all criminal cases. A hung jury will result if all jurors cannot agree on the verdict, and the prosecution may retry the case.

What to Do for a Client Facing a Criminal Investigation

The phone in your office rings. One of your physician-clients is on the line and explains that he or she is the subject of a criminal investigation. What do you tell your client and what do you do to protect them? Of course, it depends.

Has the client been served with a Grand Jury subpoena? Has a search warrant been executed? Has the client been contacted by an investigator for a governmental entity or a police officer? Has the client been arrested? Does the client know the allegations, and if so, what are they? The answers to these questions (and many others) will determine how to proceed.

Initially, the healthcare lawyer should advise the physician-client not to say anything to anybody except the lawyer. (This will include friends, colleagues, spouses, confidants, the board of medical examiner investigators, risk managers, peer review committees, state investigators, police officers, and anyone else.) Furthermore, the client should be advised not to make any notes or records; and likewise, not to destroy any notes or records.

If the healthcare lawyer is uncomfortable handling criminal cases, a lawyer with criminal experience should be consulted. In most states, lawyers can move to quash Grand Jury subpoenas; however, search warrants are court orders and must generally be complied with immediately. The client will have the right to the presence of counsel during investigative interviews, and this right should generally be exercised.

The client also will have the right to refuse interviews and invoke his or her Fifth Amendment right to remain silent, but opting to do so may have severe ramifications. While remaining silent may be best for the criminal case, the board of medical examiners may show no mercy to a physician who refuses to cooperate. A civil jury may consider a physician's refusal to testify as evidence of liability. In addition, many liability insurance policies include a cooperation clause in which coverage is dependent upon the physician aiding in his or her own defense by making full and complete disclosure of pertinent information. Sometimes advising the client to present his or her side of the story is the best course, albeit with careful preparation. Ultimately, whether to remain silent is the decision of the client. The lawyer should confirm the client's decision in writing.

Conclusion

Criminal charges arising out of the practice of medicine still are relatively rare. However, a nationwide trend towards criminal accountability for healthcare providers appears to be emerging. The American Medical Association (AMA) opposes criminal prosecutions resulting from clinical decision making and has supported model state legislation to impede the criminalization of medicine. State medical associations have followed the lead of the AMA. Some argue, however, that physicians need to reclaim lost trust and that they should be held criminally liable under appropriate circumstances. Look for crime and medicine to be the subject of much debate and litigation in the near future.

Robert Feinberg is an attorney with the law firm of Snell & Wilmer LLP, in Phoenix, AZ, where his broad-based health litigation practice centers on the representation of physicians, nurses, other healthcare professionals and hospitals in malpractice and credentialing actions. Mr. Feinberg is a frequent speaker at medical malpractice and healthcare law seminars and has written manuals about the defense of malpractice cases and hospital corporate liability and institutional negligence. Mr. Feinberg was a criminal prosecutor with the Maricopa County Attorney's Office prior to becoming a healthcare litigator.

Special thanks to the Healthcare Liability and Litigation Practice Group for coordinating this month's feature article.

End notes

[1] Although state law varies, necessary elements of proof in a medical malpractice action typically include the following: (1) the healthcare provider failed to exercise that degree of care, skill, and learning expected of a reasonable, prudent healthcare provider in the profession or class to which he belongs within the state acting in the same or similar circumstances; and (2) such failure was the proximate cause of the injury. *See, e.g.*, ARIZ. REV. STAT. § 12-563.

[2] Punitive damages are generally awarded upon a showing that a physician's conduct was outrageous, oppressive, and intolerable and that his conduct created a substantial risk of, and, did in fact, cause harm.

[3] *See Einaugler v. Supreme Court of the State of New York, Kings County*, 208 A.D. 2d 946, 618 N.Y.S. 2d 414 (N.Y. App. Div. 1994); 918 F. Supp. 619 (E.D.N.Y. 1996); 109 F.3d 836 (2d Cir. 1997).

[4] *See Medicine, Death and the Criminal Law*, 333 NEW ENG. J. MED. 8 (Aug. 24, 1995).

[5] *See, e.g.*, ARIZ. REV. STAT. § 46-455.

[6] A prosecutor also can file what is known as an Information, upon which a determination of probable cause will be made by a magistrate or judge after a preliminary hearing.