

Health-Care Fraud Misdemeanors Are a Middle Path to Deterrence

By Elisha Kobre, Kate Rumsey, and Jason Hoggan2024-11-21T04:30:03000-05:00

- *Sheppard Mullin, Bradley attorneys assess use of misdemeanors*
- *This legal tool exacts penalties while encouraging cooperation*

Misdemeanors are rarely charged or even considered in the federal system, especially among health-care white collar cases. The phrase “Let’s not make a federal case out of this” comes from the idea that federal courts should be reserved for significant cases, which in the criminal context means serious violations generally involving high-value fraud or large-scale wrongdoing.

The Department of Justice manual [requires](#) that a prosecution serve a substantial federal interest. The federal misdemeanor is punishable by one year of imprisonment or less and doesn’t result in many of the collateral consequences that come with a felony conviction.

Recent DOJ policy [seeks](#) to encourage cooperation through benefits such as avoiding charges, whether through declinations or deferred prosecutions—the main alternative being a felony charge with a promise that the government will advocate for leniency at sentencing.

But the choice between a felony and an outright declination often provides no middle ground acceptable to both parties. Dropping or not bringing charges may impede the government’s legitimate prosecutorial interests in deterrence, punishment, and promoting respect for the law, while a felony may be more severe than necessary. This is true particularly in the health-care fraud context, where a felony conviction is virtually guaranteed to prevent a licensed health-care provider from continuing to practice.

A misdemeanor is a middle-of-the-road alternative that meets the legitimate interests of both parties, providing effective deterrence and punishment, while avoiding severe consequences of a felony conviction.

Because federal misdemeanor dispositions are so rare, particularly in the white collar context, few prosecutors or defense counsel are aware of misdemeanor alternatives. One key misdemeanor in the

health-care context is “theft or embezzlement in connection with health care,” where the value of the stolen property doesn’t exceed \$100, in violation of Title 18, US Code, Section 669.

Section 669

Section 669 criminalizes “theft or embezzlement in connection with health care.” The statute encompasses a range of criminal conduct relating to health-care fraud due to its coverage of all means of misappropriation and theft and its broad definition of a “health care benefit program,” including public and private plans or entities that provide a medical benefit or service.

The elements of a Section 669 violation are that the defendant embezzled, stole, or converted without authority assets belonging to a health-care benefit program, and the defendant did so knowingly and willfully.

If the property embezzled or stolen is worth more than \$100, the violation is a felony. If, on the other hand, the amount stolen is valued at \$100 or less, then the violation is a misdemeanor. Even with a misdemeanor, the government can still receive a criminal conviction, while also potentially seeking a fine up to \$100,000, restitution, and forfeiture.

Recent Litigation

Parties already use this misdemeanor as a valuable bargaining tool. Over the past 24 years, at least 32 cases have been resolved through Section 669 pleas, six of which were initially charged as felony offenses.

Sentences imposed in many of these cases included imprisonment and probation, and many included stiff monetary penalties, including substantial fines, restitution, and forfeiture. Defendants still faced criminal convictions, while avoiding a felony conviction.

In *US v. Frankel*, the defendant, a medical doctor, was initially charged with five felony health-care fraud counts for improperly billing government and private insurance for more than \$17 million in connection with mobile Covid-19 testing sites he operated.

The defendant had a long and successful career as a doctor, including serving poor and underserved populations, and provided care during the Covid-19 pandemic. The medical billing codes and definitions at issue were ambiguous and subject to multiple interpretations.

Undoubtedly due to these factors, the defendant pleaded guilty to a superseding misdemeanor, information charging him with one count of Section 669 for the submission of a single fraudulent claim to an insurer in the amount of \$41.91.

He was sentenced to one-year probation and ordered to pay approximately \$3.5 million in restitution and a similar amount in criminal forfeiture. *Frankel* is a good example of the use of a Section 669 misdemeanor to navigate competing interests.

The government obtained a conviction and deterred serious criminal conduct, and the defendant, with his positive history and characteristics and whose intent would be difficult to prove because of ambiguities in the regulations, avoided the devastating consequences of a felony conviction.

Though long ignored, misdemeanors should be given a close look in the appropriate circumstances to resolve health-care fraud and white collar cases.

A misdemeanor disposition gives the government a criminal conviction that may include stiff monetary penalties, while at the same time allowing licensed professionals the hope of avoiding severe consequences of a felony, which can include revocation of a license and credentialing.

A misdemeanor plea may be beneficial to the government in other ways. It has the potential to result in quicker pleas or cooperation. White collar defendants typically aren't detained pending trial and have greater means to put on a defense.

As a result, prosecutors often find it difficult to elicit expedient pleas or cooperation, particularly when the only options for a defendant are accepting a felony plea or going to trial.

Securing an early plea to a felony is already challenging in white collar cases because the cases often turn on evidence of intent and ambiguities in highly-regulated complex areas of the federal health care statutes and regulations. Felony defendants within health care and other highly regulated industries are often inclined to roll the dice at trial instead of pleading early or cooperating.

These considerations show that both the government and defense counsel in white collar cases should carefully consider misdemeanor violations, such as Section 669, particularly in complex cases involving numerous defendants.

Such defendants will likely plead early, allowing the government to efficiently meet its prosecutorial objectives, while also allowing defendants to avoid the severity of a felony conviction and its devastating consequences.

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Author Information

[Elisha Kobre](#) is partner in Bradley's government enforcement and investigations and litigation practice groups.

[Kate Rumsey](#) is special counsel in Sheppard Mullin's governmental practice group.

[Jason Hoggan](#) is special counsel in Sheppard Mullin's white collar defense and corporate investigations practice group.

Rebecca James contributed to this article.

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To contact the editors responsible for this story: Jada Chin at jchin@bloombergindustry.com; Alison Lake at alake@bloombergindustry.com