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## Primum Non Nocere: The Expanding "Honest Services" Mail Fraud Statute and the Physician-Patient Fiduciary Relationship

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# NOTES

## **Primum Non Nocere:<sup>1</sup> The Expanding “Honest Services” Mail Fraud Statute and the Physician-Patient Fiduciary Relationship**

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1. This Latin phrase meaning “first do no harm” is part of the Hippocratic Oath that physicians take before entering into practice.

Fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it.

—Lord Macnaghten in *Reddaway v. Banham*, 1896.<sup>2</sup>

## I. INTRODUCTION

In one case, a physician refers a patient to a certain hospital in return for an undisclosed referral fee from the hospital. In another, a physician decides not to refer a patient to a specialist for further examination. The physician, however, does not disclose to the patient that part of the cost of sending the patient to the specialist would come out of the physician's potential earnings. In the previous examples, has the physician breached her fiduciary duty to the patient by not disclosing her own financial interest in the patient's treatment? If so, the physician could be guilty of mail fraud under the federal "honest services" mail fraud statute<sup>3</sup> and subject to severe criminal penalties.

This Note explores the connection between the "honest services" mail fraud statute and the traditional physician-patient fiduciary relationship. At present, the connection is closer than one might expect and promises to become even closer in the near future. The federal judiciary and, most recently, Congress, have steadily expanded the mail fraud statute, which was originally enacted to protect the mail service,<sup>4</sup> to criminalize an undisclosed breach of public or private fiduciary duty, or rather, to protect the beneficiary's intangible right to "honest services."<sup>5</sup> This expansion of the mail fraud statute is partly a result of the statute's broad and ambiguous

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2. 1896 App. Cas. 199, 221 (appeal taken from Eng.).

3. 18 U.S.C. § 1341 (1994). The mail fraud statute provides, in pertinent part:

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, . . . 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 . . . shall be fined under this title or imprisoned not more than five years, or both.

*Id.* In November 1988, Congress added § 1346 to title 18 which reads, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 (1994).

4. See *infra* note 10 and accompanying text.

5. See discussion *infra* Part II.B.

language, which allows the statute, in the discretionary hands of a federal prosecutor, to criminalize breaches of fiduciary duties not previously covered under other criminal statutes, such as the fiduciary duty a physician owes the patient.<sup>6</sup>

Given the paradigmatic fiduciary relationship that exists between a physician and patient, a physician's breaching her fiduciary duty by failing to disclose a referral fee or other financial kickback appears to be subject to an honest services mail fraud prosecution. Likewise, in a managed health care setting, a physician's failure to disclose financial incentives to limit the patient's care and the resulting breach of fiduciary duty would logically come within the purview of the mail fraud statute. The application of the statute to the rapidly developing and evolving managed health care system raises even larger questions and concerns.<sup>7</sup> Although federal prosecutors have not relied extensively upon honest services mail fraud to prosecute health care fraud, they are beginning to make use of this powerful statute with some success.<sup>8</sup>

This Note will address the honest services mail fraud statute's use, and misuse, in this relatively unexplored area of the physician-patient fiduciary relationship. Part II traces the evolution and expansion of the mail fraud statute, with particular emphasis on the intangible right to honest services. Part III examines the physician's fiduciary obligations in the physician-patient relationship. In light of these fiduciary duties, Part IV discusses the actual and potential prosecution of physicians under the honest services mail fraud statute. Specifically, it analyzes the current judicial confusion over the application of the mail fraud statute and its relation to other federal anti-kickback statutes. Part V concludes by suggesting that the mail fraud statute can be an effective and appropriate weapon to protect patients from a physician's undisclosed breach of fiduciary duty.

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6. See discussion *infra* Part II.B.

7. See discussion *infra* Part III.B.

8. See, e.g., *United States v. Jain*, No. 94-00087-01, 1995 WL 9301 (W.D. Mo. Jan. 9, 1995), *aff'd in part, rev'd in part*, 93 F.3d 436 (1996), *cert. denied*, 117 S. Ct. 2452 (1997); *United States v. Neufeld*, 908 F. Supp. 491 (S.D. Ohio 1995). For an extensive discussion of these cases, see discussion *infra* Part IV.A.

## II. THE EXPANDING MAIL FRAUD STATUTE

### A. History and Development

The mail fraud statute was first enacted in 1872<sup>9</sup> to protect the integrity of the postal service from abuses by swindlers, counterfeiters, and other "rapscallions."<sup>10</sup> Since the statute's enactment, its language has not changed significantly.<sup>11</sup> Contrary to the narrow purpose for which the statute was adopted and the slight legislative alterations to the statute, however, federal courts and prosecutors have embraced a broad and sweeping interpretation of the statute.<sup>12</sup>

9. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 282, 323.

10. Congressman Farnsworth of Illinois introduced the bill in 1870 as an addendum to the recommendations of the Postal Revision Commission, stating that the bill's purpose was "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purposes of deceiving and fleecing the innocent people in the country." CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870). Aside from Representative Farnsworth's statement, almost no legislative history sheds light on the meaning of the bill or its subsequent amendments. "The sponsor of the 1909 legislation did not address the significance of the new language, stating that it was self-explanatory." *McNally v. United States*, 483 U.S. 350, 358 n.7 (1987) (citing 42 CONG. REC. 1026 (1908) (remarks of Sen. Heyburn)).

For an excellent discussion of the early history and development of the mail fraud statute, see Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 425-35 (1983) (describing the expansive growth of the mail fraud statute); Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771, 779-86 (1980) (examining the historical and political development of the mail fraud statute); W. Rebert Gray, Comment, *The Intangible-Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 567 (1980) (detailing the early legislative history of mail fraud statute).

11. Congress amended the statute first in 1889 first to provide for certain enumerated fraudulent schemes, and again in 1909 to incorporate the Supreme Court's holding in *Durland v. United States*, 161 U.S. 306 (1896). See Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 445-50 (1995); Donald V. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 45 n.2 (1980). Nominal updates of the statutory language occurred in 1949 and 1970, but the scope and aim of the statute remained intact. See Henning, *supra*, at 460 & n.126 (discussing amendments and their effect on the statute), and Morano, *supra*, at 45-47 ("[S]ince there's little, if any, extrinsic evidence of congressional intent in passing the first statute, and its subsequent revisions have been minor, the courts have been responsible for determining its meaning throughout the more than one hundred-year life of the statute."). In 1988, Congress added section 1346 to title 18, which clarified the term "scheme to defraud" in the mail fraud statute. See 18 U.S.C. § 1346 (1994). This addition was in response to the Supreme Court's holding in *McNally*. See *supra* note 3 (setting forth the language of section 1346). See also discussion *infra* Part II.C.

12. See Reger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 121 (1987) (arguing that judicial interpretation of the mail fraud statute has allowed the statute to be used as a "vehicle for the prosecution of an almost unlimited number of offenses bearing very little connection to the mails"); Morano, *supra* note 11, at 47 n.3 (noting the expansive interpretation of the mail fraud statute by prosecutors). The statute has been called the federal government's number-one weapon in the fight against crime, and one former

Conviction for mail fraud<sup>13</sup> requires proof of two basic elements: (1) a scheme devised to defraud for obtaining money or property (or depriving another of the intangible right to honest services under 18 U.S.C. § 1346) by fraudulent means; and (2) the use of the mails in furtherance of the fraudulent scheme.<sup>14</sup> Proof of fraudulent intent, which is commonly described as the third element of the statute, is also required.<sup>15</sup> Courts have liberally construed the "use of the mails" element, while expanding the definition of "scheme

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federal prosecutor even referred to it as "our Stradivarius, our Colt 45, our Louisville Slugger, [and] our Cuisinart." Rakoff, *supra* note 10, at 771. Chief Justice Burger's oft-quoted dissent in *Maze v. United States* provides an example of the wide support for an expansive use of the statute:

[The mail fraud statute] has traditionally been used against fraudulent activity as a first line of defense. When a "new" fraud develops—as constantly happens—the mail fraud statute becomes a stepgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.

414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting). The Chief Justice stated that even when particularized legislation is enacted, "[t]he mail fraud statute continues to remain an important tool in prosecuting frauds." *Id.* at 406 (Burger, C.J., dissenting). The expansive use of the statute, however, is not without its critics. See *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting) (denouncing the majority's overextended application of the intangible rights theory); *United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (Winter, J., dissenting in part) (condemning the "raw political power the freewinging club of mail fraud affords federal prosecutors").

13. A companion to the federal mail fraud statute is the federal wire fraud statute, which was enacted in 1952 and contains nearly identical language. It 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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (1994). The mail and wire fraud statutes have been construed identically in relation to the issues discussed here. Therefore, any discussion of mail fraud is applicable to wire fraud claims. See *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to the offenses here.").

14. 18 U.S.C. § 1341 (1994). See *supra* note 3 for the text of the statute. See also *Maze*, 414 U.S. at 398 (describing the elements of mail fraud); *Pereira v. United States*, 347 U.S. 1, 8 (1954) (describing the elements of the offense); *United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996) (listing the elements of mail fraud).

15. See Rachael Rosenblatt & Adam Michels, *Mail and Wire Fraud*, 34 AM. CRIM. L. REV. 771, 777 (1997) (finding that given the common law definition of fraud, courts traditionally read intent as a third element). Specific intent to defraud is implied from the phrase "scheme to defraud." Intent, however, is an issue for the jury that is usually proven through circumstantial evidence. See *United States v. Costanzo*, 4 F.3d 658, 664 (8th Cir. 1993) (asserting that intent is an essential element under the statute); *United States v. Porcelli*, 865 F.2d 1352, 1358 (2d Cir. 1989) (stating that the "specific intent required for mail fraud statute is intent to defraud . . . not intent to violate a statute"). See *infra* notes 39-40 and accompanying text for a discussion of specific intent.

to defraud."<sup>16</sup> Presently, courts require only a minimal link to the actual use of the mails, using it merely as a jurisdictional hook.<sup>17</sup> The use of the mails need not have been intended, and simple knowledge that the mails will be used is sufficient.<sup>18</sup> Thus, the mailing may be sent by someone other than defendant, even between innocent parties.<sup>19</sup> Given that the alleged federal interest behind the statute is to protect the mails, a strong connection between the mailing and the fraudulent scheme would be expected. Yet, when analyzing the connection between the mailing and the scheme, courts merely ask "whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time."<sup>20</sup>

Unlike the "use of the mails" element, determining what constitutes a "scheme to defraud"<sup>21</sup> has been central to the application of the statute. Early on, the Supreme Court determined that the term "defraud" in the mail fraud statute was not limited by common law

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16. The Supreme Court's approach has allowed courts to avoid careful analysis of the phrase "scheme to defraud," since arguably the actual purpose of the statute is to prohibit misuse of the mails. Rakoff, *supra* note 10, at 778. For a discussion of how courts have relaxed the mailing requirement, see Henning, *supra* note 11, at 450-60.

17. See Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 160-62 (1994) (concluding that the federal interest in the mail is now used merely to establish federal jurisdiction). *But see*, Rakoff, *supra* note 10, at 819 (arguing that the mailing requirement has always served primarily as a basis for federal jurisdiction).

18. See *Pereira*, 347 U.S. at 8 (noting that the defendant need not contemplate the use of mails as an essential element of the scheme). The statute originally applied only to U.S. Postal mailings. In 1994, however, Congress amended the statute to include private interstate delivery services, such as UPS and Federal Express. See Senior Citizens Against Marketing Scams Act, Pub. L. No. 103-322, § 25006, 108 Stat. 1796, 2081 (1994). See also Henning, *supra* note 11, at 466-77 (discussing and criticizing the expansion to private carriers because of the resulting uncertainties).

19. See *Parr v. United States*, 363 U.S. 370, 390 (1960). See also *Pereira*, 347 U.S. at 8 (explaining that when someone acts with the knowledge that the use of the mails will follow in the ordinary course of business, or when such use can be reasonably foreseen, even though not actually intended, then the person causes the mails to be used).

20. *Schmuck v. United States*, 489 U.S. 705, 715 (1989). Courts originally required a subjective showing that the mailing was essential to the scheme. See *United States v. Clark*, 121 F. 190, 191 (M.D. Pa. 1903). The Supreme Court later modified this requirement, however, asserting that such a showing is merely incidental. See *Badders v. United States*, 240 U.S. 391, 394 (1916). The use of the mails can also occur after the fraudulent scheme has been perpetrated. See *United States v. Sampson*, 371 U.S. 75, 79-80 (1962) (finding the requirement satisfied when subsequent mailings were designed to lull the victims into a false sense of security); *United States v. Isaacs*, 493 F.2d 1124, 1151-52 (7th Cir. 1974) (rejecting the defense that the mailings were too late to permit conviction). *But see United States v. Maze*, 414 U.S. 395, 402 (1974) (distinguishing *Sampson* and holding that the defendant's scheme had reached fruition, but that the success was in no way dependent on the settling of accounts through the mails).

21. Although the actual language of the statute reads "any scheme or artifice to defraud," the Supreme Court has interpreted "artifice" as part of a "scheme." See *Durland v. United States*, 161 U.S. 306, 313 (1896).

notions of fraud.<sup>22</sup> Unfastened from its traditional mooring, the definition of "scheme to defraud" has been interpreted broadly and courts have not seriously attempted to delineate its boundaries.<sup>23</sup> One reason for the judicial expansion stems from the vague notions that surround the concept of fraud itself. As one judge stated, "The law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity."<sup>24</sup> Furthermore, mail fraud is an inchoate crime, and as such, the government need not prove that the scheme to defraud was successful.<sup>25</sup> Arguably, this definition, or lack

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22. See *id.* (expanding mail fraud by permitting actions premised upon future intentions, rather than just past acts to defraud). See also *Hass v. Henkel*, 216 U.S. 462, 479-80 (1910) (allowing any conspiracy to impair to proceed regardless of actual loss).

23. See *United States v. McNieve*, 536 F.2d 1245, 1248 (8th Cir. 1976) ("The relative lack of definitive standards contained in § 1341 has permitted the courts to exercise wide latitude in determining what schemes are within the purview of that statute."). The imposition of few restrictions on the application of the "scheme to defraud" element has been essential in permitting an expansive reading of the mail fraud statute. See John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126 (1981) (noting that "courts have refused to define 'scheme to defraud' in terms of any objectively verifiable set of facts or circumstances"). In fact, as presently interpreted, the term "scheme to defraud" applies to virtually any conduct concerning deceit. See, e.g., *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (securities fraud); *United States v. Walters*, 997 F.2d 1219, 1221-22 (7th Cir. 1993) (sports agents forming contracts with college athletes); *United States v. Margiotta*, 688 F.2d 108, 120-21 (2d Cir. 1982) (political corruption fraud); *United States v. Bronston*, 658 F.2d 920, 926-27 (2d Cir. 1981) (nondisclosure of conflict of interest in attorney-client relationship); *United States v. Condolon*, 600 F.2d 7, 8 (4th Cir. 1979) (phony talent scout's seduction of women by promising them acting roles); *United States v. Louderman*, 576 F.2d 1383, 1387-88 (9th Cir. 1978) (customers deprived of privacy rights when telephone company gave out confidential information); *United States v. Serlin*, 538 F.2d 737, 745-46 (7th Cir. 1976) (franchise fraud); *United States v. Edwards*, 458 F.2d 875, 880 (5th Cir. 1972) ("divorce mill" fraud); *United States v. Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966) (diet drug fraud).

24. *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941). Another judge noted that to define fraud, the law looks to commonly accepted moral standards and "condemns conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967) (citation omitted).

25. See *United States v. Utz*, 886 F.2d 1148, 1150 (9th Cir. 1989) (stating that actual deprivation need not be shown); *DeMier v. United States*, 616 F.2d 366, 369 (8th Cir. 1980) (noting that it is not necessary to show that defendant profited from the scheme); *United States v. Pollack*, 534 F.2d 964, 971 (D.C. Cir. 1976) (finding that the statute does not require that the deception "bear fruit" for the wrongdoer). Because the success of the scheme is irrelevant, the mail fraud statute has long since distanced itself from the common law requirement that the plaintiff prove reliance and injury. For an insightful discussion of the idiosyncratic and inchoate nature of the mail fraud statute, see *Moohr*, *supra* note 17, at 161-62. Ms. Moohr expressed her concern with the double inchoate nature of the crime:

In contrast to attempt and conspiracy, which assign culpability for a substantive offense, mail fraud is facially inchoate—the substantive offense itself requires only that the actor scheme to defraud. In addition, because the actor may be charged upon an intention to devise a scheme, that is planning to plan, mail fraud, even on its face, is doubly inchoate.



thereof, has provided for virtually open-ended criminal liability for nearly any form of deceit.<sup>26</sup>

*B. The Intangible Right to Honest Services and the Criminalization of Fiduciary Duties*

Beginning in the 1940s, and increasingly in the 1960s and 1970s, courts began to expand the scope of the mail fraud statute by interpreting the term "scheme to defraud" to include a scheme to deprive one of the "intangible right to honest services."<sup>27</sup> Federal prosecutors primarily invoked the intangible right to honest services doctrine to combat political corruption at the state and local levels.<sup>28</sup>

*Id.* See also Rakoff, *supra* note 10, at 775-77 (comparing mail fraud with conspiracy and other inchoate crimes).

26. See John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of White Collar Crime*, 21 AM. CRIM. L. REV. 1, 11 (1983) (finding that "the substantive crime of mail fraud consists of little more than an evil scheme"); Hurson, *supra* note 10, at 425 (characterizing mail fraud as "element-free liability"). This lack of definition cuts in two directions:

Proponents hail the statutes as a versatile weapon against fraud - a "catchall" device that encompasses crimes not yet recognized or well defined in other statutes. Critics argue that this strength is also a weakness because these statutes afford prosecutors too much discretion and fail to give adequate notice of exactly what type of conduct the statutes proscribe.

John E. Gagliardi, Comment, *Back to the Future: Federal Mail and Wire Fraud Under 18 U.S.C. § 1346*, 68 WASH. L. REV. 901, 901 (1993).

27. Traditionally, the mail fraud statute was applied to schemes in which the victim of the fraud had transferred something of economic value to the defendant. See, e.g., Gray, *supra* note 10, at 563. The inclusion of intangible rights in the meaning of "scheme to defraud" gained support in *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924), when the Supreme Court held that "to defraud" included intangible, as well as tangible, rights. Two years later, however, in *Fasulo v. United States*, 272 U.S. 620, 624 (1926), the Court limited the statute to wrongful acts that fell plainly within the statute. Nevertheless, lower courts continued to interpret "scheme to defraud" broadly to include intangible non-property rights. This expansion of an already broad doctrine has met with criticism. See, e.g., *United States v. Weiss*, 752 F.2d 777, 791 (2d Cir. 1984) (Newman, J., dissenting) (calling the expansion "extraordinary" and "inexorable"); Gray, *supra* note 10, at 562 (concluding that the mail fraud statute should not be extended to political corruption cases); Donna M. Maus, Comment, *License Procurement and the Federal Mail Fraud Statute*, 58 U. CHI. L. REV. 1125, 1127-29 (1991) (pointing to the criticisms of the application of the broadly interpreted statute before *McNally*).

28. The following are examples of cases in which state and local officials were prosecuted under an honest services mail fraud theory: *United States v. Waymer*, 55 F.3d 564, 566-67 (11th Cir. 1995) (member of city education board); *United States v. Silvano*, 812 F.2d 754, 760 (1st Cir. 1987) (acting budget director for the City of Boston); *Margiotta*, 688 F.2d at 108 (chairman of both county and town Republican committees); *United States v. Diggs*, 613 F.2d 988 (D.C. Cir. 1979) (Detroit-area congressman); *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979) (governor of Maryland); *United States v. Brown*, 540 F.2d 364, 373-77 (8th Cir. 1976) (building commissioner); *United States v. Bnsh*, 522 F.2d 641, 646-49 (7th Cir. 1975) (mayor's press secretary); *United States v. Keane*, 522 F.2d 534, 544-45 (7th Cir. 1975) (city councilman); *United States v. Isaacs*, 493 F.2d 1124, 1124 (7th Cir. 1994) (former governor of Illinois, who was a judge on the United States Court of Appeals for the Seventh Circuit at the time of his conviction); *United States v. States*, 488 F.2d 761, 766-67 (8th Cir. 1973) (candidates

The prosecutors' theory was that a government official who receives undisclosed kickbacks violates citizens' rights to honest and faithful services.<sup>29</sup> The duty to provide such honest services springs from the official's fiduciary relationship with the citizens.<sup>30</sup> Because the kickback is considered material information, which should be disclosed under fiduciary obligations, the nondisclosure results in the public official's breach of fiduciary duty.<sup>31</sup> Thus, by accepting an undisclosed kickback, the public official breaches her fiduciary duty and deprives the beneficiary (the citizenry) of the right to honest services.<sup>32</sup>

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for city office). See generally Hurson, *supra* note 10, at 429-30 (reviewing the development of the intangible rights doctrine); Laura Eilers & Harvey Silikovitz, Note, *Ninth Survey of White Collar Crime: Mail and Wire Fraud*, 31 AM. CRIM. L. REV. 703, 708-11 (1994) (reviewing the intangible rights doctrine).

In many jurisdictions, the mail fraud statute has become the prosecutor's primary theory in the prosecution of political corruption. See Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 144 (1990) (finding that prosecutors use mail fraud charges in nearly 40% of public corruption cases).

29. See *McNally v. United States*, 483 U.S. 350, 362 n.1 (1987) (Stevens, J., dissenting) (listing cases in which courts have convicted public officials of "defrauding citizens of their right to honest services of their government officials").

30. To support an intangible right to honest services claim, a fiduciary relationship must exist between the defendant and the defrauded party. See *United States v. Lovett*, 811 F.2d 979, 984 (7th Cir. 1987); *United States v. Ginsberg*, 773 F.2d 798, 806 (7th Cir. 1985); *United States v. Neufeld*, 908 F. Supp. 491, 499 (S.D. Ohio 1995). But see *United States v. Sancho*, 957 F. Supp. 39, 41-42 (S.D.N.Y. 1997) (holding that an underlying fiduciary relationship is not necessary under § 1346). Also, bringing an intangible property claim without a fiduciary relationship is still possible. See *Mans*, *supra* note 27, at 1131-32 (examining the technical property requirement). Fiduciary relationships are quite common today and can take a wide variety of forms. See *Coffee*, *supra* note 26, at 15-19 (stating that the protean character of the term "fiduciary" has enabled prosecutors to reach areas of the law that Congress never contemplated would be subject to federal criminal sanctions); Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 796 (1983) (stating that "[t]he twentieth century is witnessing an unprecedented expansion and development of the fiduciary law"); *Morano*, *supra* note 11, at 60-75 (discussing the expansive use of § 1341 as a weapon against fiduciary fraud); William P. Bried, Noto, *Survey of the Mail Fraud Act*, 8 MEM. ST. U. L. REV. 673, 680 (1978) (discussing fiduciary relationships in public corruption cases). A fiduciary "who benefits from a misplaced trust is acting in an intuitively offensive manner, and the law tends to react strongly and indignantly to such wrongs." Donald C. Langevoort, *Fraud and Deception by Securities Professionals*, 61 TEX. L. REV. 1247, 1250 (1983). The standards governing this behavior seek to avoid a situation in which a fiduciary is tempted to favor an interest other than that of her principal. See RESTATEMENT (SECOND) OF AGENCY §§ 379-98 (1958) (discussing principles governing the principal-agency relationship); Gareth Jones, *Unjust Enrichment and the Fiduciary's Duty of Loyalty*, 34 LAW Q. REV. 472, 501-02 (1968) (discussing the judicial view of abused loyalty).

31. In *United States v. Silvano*, for example, the court held that "where a person occupies a fiduciary relationship to [another] and is aware of material information . . . that person has an affirmative duty to disclose the information." 812 F.2d at 759. See also *Waymer*, 55 F.3d at 572 (holding that a "substantial cut from a vendor's contract with the school system in exchange for the performance of virtually no services so obviously smacks of impropriety that it can hardly be characterized as a minor detail of which the Board need not be appraised").

32. Anyone who offers a kickback to a public official is also subject to liability under the mail fraud statute for depriving the citizenry of its right to honest services by inducing a public

Moreover, the nondisclosure of the kickback is sufficient proof to find a scheme to defraud.<sup>33</sup>

The development of the intangible right to honest services in the public sphere was paralleled in the private sector.<sup>34</sup> As in the public sphere, the duty to provide honest services in the private sector arises from the fiduciary relationship between the parties. In mail fraud cases, the fiduciary relationship typically exists between em-

fiduciary to breach her duty to the public. *See, e.g., Lovett*, 811 F.2d at 984 (convicting a defendant who bribed a mayor to secure a cable contract); *United States v. Alexander*, 741 F.2d 962, 964 (7th Cir. 1984) (convicting an attorney who paid off a tax assessor).

33. The nondisclosure of material information serves as the deception required by the doctrine of fraud. *See United States v. Altman*, 48 F.3d 96, 101-02 (2d Cir. 1995) (stating that the breach of fiduciary duty accompanied by concealment or deception satisfies the scheme to defraud requirement when the concealment or deception could result in harm); *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786, 790 (1st Cir. 1990) ("[T]he scheme must be intending to deceive another."). For example, in *Mandel*, 591 F.2d at 1361-62, the court concluded that schemes involving bribery or kickbacks squarely satisfy the fraud element. The court also found that nondisclosure or concealment of material information satisfies the fraud requirement as a breach of fiduciary duty, as long as the breach can be linked to a scheme to defraud. *See id.* at 1363-64. In analyzing the mail fraud statute, Professor Langevoort noted that, "[a]s a practical matter, however, the courts have by and large accepted the notion that secretive fiduciary misconduct . . . is the equivalent of an active fraud." Langevoort, *supra* note 30, at 1264. Given the fiduciary relationship, mere silence, even when it does not constitute an affirmation, satisfies the "deceit" element of fraud. 2 WAYNE LAFAVE & AUSTIN SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 8.7(b)(3) (1986).

Some courts, however, have found that a breach of fiduciary duty and nondisclosure are insufficient for conviction under the mail fraud statute. *See cases listed infra* note 42.

34. The first reported case to seize upon the intangible right of honest services as a breach of a private fiduciary duty was *Shushan v. United States*, 117 F.2d 110, 115-21 (5th Cir. 1941). For examples of more recent cases, *see United States v. Weiss*, 752 F.2d 777, 777 (2d Cir. 1984) (using right to honest services to convict a corporate officer); *United States v. Newman*, 664 F.2d 12, 15-20 (2d Cir. 1981) (reinstating indictment of securities trader who traded on information regarding corporate takeovers); *United States v. Von Barta*, 635 F.2d 999, 1007 (2d Cir. 1980) (upholding the indictment of a "trusted" employee of a securities firm who failed to disclose his interest in loans that he was making on the firm's behalf); *United States v. Bryza*, 522 F.2d 414, 416 (7th Cir. 1975) (applying right to honest services theory to securities trading); *United States v. George*, 477 F.2d 508, 514-15 (7th Cir. 1973) (convicting a purchasing agent who received kickbacks from a supplier and failed to disclose the scheme to his employer); *United States v. Proctor & Gamble Co.*, 47 F. Supp. 676, 678-80 (D. Mass. 1942) (finding that an employee breached his fiduciary duty by accepting bribes from a competitor company).

Some courts and commentators have drawn a distinction between public and private sector application of the honest services mail fraud doctrine. *See, e.g., United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996) ("[T]he transition from public to private sector in this context raises troublesome issues . . ."); *United States v. Lemire*, 720 F.2d 1327, 1336 (D.C. Cir. 1983) ("[P]remising a felony solely on a scheme to defraud an employer of the loyal services of his employee has spawned a fierce debate about potential over criminalization of employer/employee breakdowns, better handled in the civil courts."). Moreover, the reach of a general federal fraud statute to prosecute state officials has raised distinct federalism concerns. *See United States v. Brumley*, 116 F.3d 728, 736-46 (5th Cir. 1997) (Jolly, J., dissenting) (criticizing the majority's finding that section 1346 reaches state officials). *See generally* George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-Lopez Analysis*, 82 CORNELL L. REV. 225 (1997) (discussing whether the use of federal law for local corruption prosecutions is necessary and appropriate).

ployee and employer, however, the same principles have been applied to other fiduciary relationships such as attorney-client and trustee-beneficiary.<sup>35</sup> For example, if an employee accepts an undisclosed kickback or payment from a vendor, the kickback is a breach of the employee's fiduciary duty because the employee failed to disclose material information, and thus, deprived the employer of its agent's honest services.<sup>36</sup> The scheme to defraud is also found in the employee's nondisclosure of material information to the employer.<sup>37</sup>

Implicit in the "scheme to defraud" is the defendant's intent to defraud the victim of honest services.<sup>38</sup> Since intent can be inferred, the failure to disclose material information itself serves as sufficient evidence to demonstrate this intent.<sup>39</sup> Thus, since kickbacks are

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35. See, e.g., *United States v. Bronsten*, 658 F.2d 920 (2d Cir. 1981) (attorney-client relationship). See also cases cited *supra* note 34.

36. The nondisclosure of a kickback is fraudulent and is also a breach of an employee's fiduciary duty to act in the best interests of the employer, known as the duty of loyalty. See *George*, 477 F.2d at 513 ("Here the fraud consisted in [the employee's] holding himself out to be a loyal employee, acting in [his employer's] best interests, but actually not giving him his honest and faithful services."). Arguably, unlike public official cases, proof of a kickback in the private sector may mean that the vendor who offered the kickback was willing to accept a reduced price. Thus, the employee has defrauded her employer of not only her loyal services, but also money. The employer could have negotiated the contract at a better price, reflected by the amount the seller or bidder was willing to pay for the kickback. Perhaps courts have actually been concerned about the economic and tangible loss while relying upon a theory of honest services mail fraud, which does not require economic loss.

37. See, e.g., *United States v. Cassiere*, 4 F.3d 1006, 1022 (1st Cir. 1993) (approving a jury instruction that read, in pertinent part, "[a] failure to disclose a material fact may also constitute a false or fraudulent misrepresentation if . . . the person was under a general professional or a specific contractual duty to make such a disclosure"); *United States v. Keplingor*, 776 F.2d 678, 697 (7th Cir. 1985) (stating that "omissions or concealment of material information can constitute fraud cognizable under the mail fraud statute"); *Von Barta*, 635 F.2d at 1003 (stating that an employee's breach of fiduciary duty can give rise to liability under the mail fraud statute when accompanied by a failure to disclose material information); *United States v. Bush*, 522 F.2d 641, 647-48 (7th Cir. 1975) (stating that a breach of fiduciary duty constitutes mail fraud when combined with active concealment of fraud and material misrepresentation). See also *supra* note 33 (discussing the scheme to defraud). The scheme to defraud need not violate another state or federal law. See *United States v. Bryan*, 58 F.3d 933, 940 (4th Cir. 1995).

38. See *Cassiere*, 4 F.3d at 1022-23 ("[O]ne of the elements that transform[s] a fiduciary breach into mail fraud is where there is a recognizable scheme formed with specific intent to defraud."); *Morda v. Klein*, 865 F.2d 782, 785 (6th Cir. 1989) (holding that a "breach of fiduciary duty alone, without the 'something more' of fraudulent intent, cannot constitute mail fraud"); *Bryza*, 522 F.2d at 421-23 (asserting that specific intent to defraud must accompany a fiduciary breach to constitute a violation of mail fraud).

39. Intentional concealment of information that is known to be pertinent to proper decisionmaking is a basis for establishing fraudulent intent. See *United States v. Skeddle*, 940 F. Supp. 1146, 1149 (N.D. Ohio 1996) (noting that intent can be inferred from "nondisclosure that is intended or is contemplated to deprive the person to whom the duty is owed of some legally significant benefit"). Significantly, however, some courts require that the government produce independent evidence that the defendant possessed fraudulent intent when the scheme

almost always secretive and deceptive, the undisclosed kickback scheme serves as the necessary breach of fiduciary duty, the scheme to defraud, and fraudulent intent.<sup>40</sup>

The scope of the honest services mail fraud statute has encompassed not only the nondisclosure of kickbacks, but also the nondisclosure of other conflicts of interest.<sup>41</sup> Noting the breadth of this

did not cause injury. See *Jain*, 93 F.3d at 442; *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994).

Some circuits have allowed the breach of a professional code to be considered when determining intent. For example, in *United States v. Reamer*, 589 F.2d 769, 770 (4th Cir. 1978), the court allowed the jury to consider the defendant's violations of provisions of the Maryland Code of Professional Responsibility in determining his criminal intent. See also *United States v. Drury*, 687 F.2d 63, 65 (5th Cir. 1982) (permitting breach of the Louisiana Code of Professional Responsibility to be the sole evidentiary basis for finding the specific intent to defraud that is required for criminal conviction); *United States v. Rabbit*, 583 F.2d 1014, 1025 (8th Cir. 1978) (admitting evidence regarding the Missouri Code of Professional Responsibility, which governs the conduct of an attorney who is in public office). For further discussion of the use of rules of professional conduct in establishing violation of the mail fraud statute, see generally Ellsworth A. Van Graafeiland, *The Proposed Model Rules of Professional Conduct and the Mail Fraud Statute*, 48 BROOK. L. REV. 653 (1982).

40. The language from *Proctor & Gamble Co.* is typical:

When one tampers with [the employment] relationship for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right.

The actual deception that is practiced is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests.

*United States v. Proctor & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942). See also *Langevoort*, *supra* note 30, at 1265 (concluding that the phrase "scheme to defraud" has evolved into a concept equivalent to intentional breach of fiduciary duty).

Part of the problem stems from the fact that a duty to disclose exists when nondisclosure would result in harm. The harm, however, is the violation of the beneficiary's right to honest services or the duty of loyalty. Thus, the harm need not be economic or tangible. Indeed, the situation in which misconduct by a person in a position of trust and confidence serves as both a breach of fiduciary duty and fraud is not unusual. Both doctrines are conceptually quite similar. An antifraud provision encourages reliance on others by ensuring the flow of information necessary to make an informed decision. Fiduciary obligations further the same objective of protecting the principal's reliance by requiring that the fiduciary act loyally and in the best interests of the principal. See *id.* at 1252 (finding that "both doctrines serve to proscribe the appropriation of value . . . to which one party would not consent and could avoid if fully informed"). The difficulty courts have with adequately delineating the two doctrines may result from this common law tradition. Professor Langevoort explained that "it is not surprising that the common law has eschewed line drawing, using the concept of fraud, actual or constructive, nearly coextensively with breaches of fiduciary duty." *Id.* at 1257-58.

41. See, e.g., *United States v. Bronston*, 658 F.2d 920, 926 (2d Cir. 1981) (stating that the "concealment by a fiduciary of material information [regarding the conflict of interest] which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other" is actionable under the mail fraud statute). In *Bronston*, the defendant, a partner in a law firm, secretly worked for Client B, while his firm was representing Client A. Both clients were competing for a city contract. Although the defendant did not use his fiduciary position to harm Client A, to whom he owed a fiduciary duty, the court found him guilty of mail fraud for an obvious breach of professional responsibility. See *id.* at 926-30. See also *United States v. Johns*, 742 F. Supp. 196, 218 (E.D. Pa. 1990) (convicting an employee because he deprived his employer of its right to "his loyal, faithful and honest services, free from conflict of interest" (internal quotation marks omitted)). Although the court rested the conviction on an undisclosed conflict of interest, the conflict of interest was the receipt of

doctrine, however, some courts have indicated that the nondisclosure of a kickback or other conflict of interest, and the resulting breach of fiduciary duty, standing alone, are not sufficient to convict under the mail fraud statute.<sup>42</sup>

Typically, the fiduciary personally profits from the scheme, but her actual enrichment is not derived directly from anyone she defrauded or deceived.<sup>43</sup> Since the beneficiary need only be deprived of the fiduciary's honest services, the beneficiary need not have lost money as a result of the fraud.<sup>44</sup> Nor must the perpetrator have intended the victim to lose money.<sup>45</sup>

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kickbacks. See, e.g., *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) (stating that an official's violation of the mail fraud statute typically concerns bribery of the official or the official's failure to disclose a conflict of interest resulting in personal gain); *Coffee*, *supra* note 26, at 1-2 (criticizing the honest services doctrine because, by merely requiring proof of nondisclosure of a conflict of interest instead of proof of loss or illicit gain, it simplifies the prosecutor's case); Michael Kendall, *The Use of State Statutes in Federal Prosecutions*, 40 BOSTON B.J. 10, 13 (1996) (finding that successful prosecutions occur when an employee compromises her duty of loyalty or withholds material information from her employer).

42. See *United States v. Baldinger*, 838 F.2d 176, 181 (6th Cir. 1988) (reversing defendant's conviction on the ground that he had no motive to "gain," which is essential to a fraud case); *United States v. Lemire*, 720 F.2d 1327, 1336 (D.C. Cir. 1983) ("An intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under [the mail] fraud statute. There must be something which in the knowledge or contemplation of the employee imposes an independent business risk to the employer."); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997) (requiring "reasonable foreseeability by the employee of potential economic harm to his employer"); *Von Barta*, 635 F.2d at 1005 n.14 (stating that a mere breach of fiduciary duty by itself does not constitute criminal mail fraud offense). See *Rabbit*, 583 F.2d at 1024-26 (concluding that a breach of fiduciary duty and nondisclosure of kickbacks do not deprive citizens of honest services); *United States v. McNeive*, 530 F.2d 1245, 1251-52 (8th Cir. 1976) (stating that a mere breach of fiduciary duty is not sufficient under mail fraud because mail fraud requires tangible harm).

43. See *Moohr*, *supra* note 17, at 163 (finding that fiduciary fraud cases typically occur when the fiduciary receives a benefit from a third party, even though the fiduciary has not misled the third party). Whether the defendant personally profited from the scheme is relevant for purposes of determining intent. See *United States v. Dees*, 34 F.3d 838, 842 (9th Cir. 1994) (holding that jury instructions to consider whether defendant profited from the scheme to establish intent to deceive are valid).

44. See, e.g., cases cited *supra* note 36 (finding no economic or tangible harm). The harm in intangible rights cases is the loss of honest services. In fact, since mail fraud is an inchoate crime, the victim need not have been harmed at all. See *supra* note 25.

45. The intangible right to honest services doctrine rests on the principle that the beneficiary is entitled to the uncompromised loyalty of, and honest services provided by, its fiduciaries, and that any act compromising that loyalty is, in and of itself, a harm to the principal. See *United States v. Silvano*, 812 F.2d 754, 760 (1st Cir. 1987) (stating that biased decisionmaking for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services). With regard to the employer-employee fiduciary relationship, some courts, including the D.C. Court of Appeals, ask whether the employee could reasonably foresee that nondisclosure of information would cause the employer harm. See *Lemire*, 720 F.2d at 1337 (finding fraud when there is "a failure to disclose something which the knowledge or contemplation of the employee poses an independent business risk to the employer"). In *Lemire*, the defendant-employee provided information to a shipper that allowed the shipper to underbid competitors for his employer's shipping business. See *id.* at 1332-33. See also *United States v.*

C. Congressional Response to the Supreme Court's  
Holding in *McNally*

The judicial development of the intangible right to honest services doctrine came to an abrupt, albeit short-lived, halt in 1987 when the Supreme Court held in *McNally v. United States*<sup>46</sup> that the mail fraud statute did not protect the intangible right to honest services. By limiting the mail fraud statute's reach to fraudulent schemes to obtain property interests,<sup>47</sup> the Court unexpectedly overturned more than three decades of lower federal court decisions applying the intangible rights doctrine.<sup>48</sup> The Court weakened its pronouncement somewhat when, only five months later, it held that intangible property rights were protected under the mail fraud

Skedde, 940 F. Supp. 1146, 1149 (N.D. Ohio 1996) (stating that in addition to a fiduciary breach, a reasonably foreseeable economic harm to the victim must be present). *But see* *United States v. Margiotta*, 688 F.2d 108, 121 (2d Cir. 1982) ("In the private sector, it is now . . . commonplace that a breach of fiduciary duty in violation of the mail fraud statute may be based on artifices which do not deprive any person of money or other forms of tangible property.").

46. 483 U.S. 350 (1987). The case was typical of public corruption cases. In *McNally*, a chairman of the state Democratic Party, a former Kentucky state official, and a third individual schemed to collect commissions from channeling insurance contracts to certain companies. *See id.* at 352-55. The scheme arguably did not deprive the state of any money or property or violate any other federal or state law. *See id.* at 355.

47. The Court, in holding that the statute did not apply to intangible non-property rights, stated, "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 356. Justice Stevens, in a strong dissent, suggested, and even encouraged, an end-run around the Court's holding by recasting intangible rights as lost property rights. *See id.* at 377 n.10 (Stevens, J., dissenting). Several lower courts were receptive to Stevens's suggestion and creative property rights claims began to appear. *See* *United States v. Shyres*, 898 F.2d 647, 653 (8th Cir. 1990) (recognizing a property right in a corporation's "right to control spending of its own funds[,] . . . the right to pay for services alone, not services plus kickbacks[, and the right to] information relevant to its economic welfare concerning the existence of a kickback scheme"); *United States v. Richerson*, 833 F.2d 1147, 1157 (5th Cir. 1987) (recognizing that the indirect harm caused by undisclosed kickbacks constitutes economic harm); *United States v. Runnels*, 833 F.2d 1183, 1186 (6th Cir. 1987) (finding that the bribe accepted by the agent is the property of the principal); *United States v. Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987) (recognizing that the possibility that rental property could have been rented for less constituted economic loss). *See generally* Micheal R. Dreeben, *Insider Trading and Intangible Rights: The Redefinition of the Mail Fraud Statute*, 26 AM. CRIM. L. REV. 181, 220-225 (1988) (discussing Stevens's dissent and its application); Williams, *supra* note 28, at 168 n.221 (discussing Stevens's dissent). Another unsettled matter was the retroactive effect of *McNally* and the reversal of prior convictions. *See* M. Diane Duszak, Note, *Post-McNally Review of Invalid Convictions Through the Writ of Coram Nobis*, 58 FORDHAM L. REV. 979, 989-91 (1990) (tracing the effect of *McNally* on previous prosecutions).

48. The decision also dealt a major blow to federal prosecutors by limiting the mail fraud statute to protecting only property rights. *See, e.g.,* Neil A. Kaplan, *The Convictions That Weren't: How the McNally Bombshell is Exploding in the Prosecution's Face*, 2 CRIM. JUST. 4, 4 (1988) (discussing the effect of *McNally* on prosecutors' application of the mail fraud statute); Marcia Coyle, *U.S. Prosecutors Reel in Wake of Mail Fraud Ruling*, NAT'L L.J., July 20, 1987, at 1, 36 (same).

statute.<sup>49</sup> The potentially drastic effects of *McNally*<sup>50</sup> were cut short however, when Congress acted quickly to nullify the Court's interpretation of the statute.<sup>51</sup>

As part of the Anti-Drug Abuse Act of 1988,<sup>52</sup> Congress amended Title 18 of the United States Code, adding § 1346, which states that "the term 'scheme or artifice to defraud' includes a scheme to or artifice to deprive another of the intangible right of honest services."<sup>53</sup> In doing so, Congress specifically sanctioned the prior judicial expansion of the doctrine and squarely established that the protection of the intangible right to honest services was within the purview of the mail fraud statute. Unfortunately, the congressional enactment may have raised more questions than it answered because Congress neglected to define the essential term "honest services."<sup>54</sup>

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49. See *Carpenter v. United States*, 484 U.S. 19 (1987). In *Carpenter*, the Court upheld mail and wire fraud charges that were based upon the misuse of confidential information. The defendant, an influential columnist for the *Wall Street Journal*, had revealed confidential material, prior to publication, obtained through his position on the paper to friends who subsequently used the information to buy and sell stocks. See *id.* at 22-24. The Court found that the confidential information was an intangible property right recognized by the mail fraud statute. See *id.* at 26. For discussion and analysis of the effect of *McNally* and *Carpenter* on the mail fraud statute, see Craig M. Bradley, Foreword: *Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573 (1989); John C. Coffee, Jr., *Hush! The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121, 142-44 (1988); Brian C. Behrens, Note, 18 U.S.C. § 1341 and § 1346: *Deciphering the Confusing Letters of the Mail Fraud Statute*, 13 ST. LOUIS U. PUB. L. REV. 489, 509-14 (1993).

50. The potential effect of *McNally* on the future of the mail fraud statute was the source of considerable debate. For an overview of the discussions, see, for example, Caroline Aiken et al., Note, *Mail and Wire Fraud*, 28 AM. CRIM. L. REV. 591 (1991) (analyzing mail fraud in light of *McNally*); Jeffrey J. Dean & Doye E. Green, Jr., Note, *McNally v. United States and Its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?*, 39 MERCER L. REV. 697 (1988) (analyzing *McNally* decision); Douna M. Ducey, Note, *McNally v. United States, The Demise of the Intangible Rights Doctrine*, 66 N.C. L. REV. 1035 (1988) (placing *McNally* in the context of a trend toward strict interpretation of criminal statutes); Keith S. Hampton, Casenote, 19 ST. MARY'S L.J. 1115 (1988) (analyzing *McNally* decision); Maus, *supra* note 27, at 1125 (concluding that licenses are outside the *McNally* property requirement).

51. In *McNally*, the Court expressly invited congressional response by stating, "If Congress desires to go further, it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

52. Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (1988) (codified at 18 U.S.C. § 1346 (1994)).

53. 18 U.S.C. § 1346 (1994). See Maus, *supra* note 27, at 1129 (reviewing the bills introduced in Congress to overturn *McNally*). One author noted that, while this provision bears no resemblance to the surrounding provisions, its inclusion in the "amendment-ridden, election-year" anti-drug statute was to facilitate the provision's passage in Congress. Moohr, *supra* note 17, at 169 (detailing the passage of § 1346). See also Behrens, *supra* note 49 (describing the legislative history of § 1346).

54. This failure to define essential terms is typical of Congress when enacting general criminal statutes. See Dan Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 475 (1996) (citing mail fraud and RICO as examples of Congress's resort to general statutory language to reduce the institutional cost of resolving particular issues itself).



The sparse legislative history suggests that § 1346 was intended to restore the law to its pre-*McNally* status.<sup>55</sup> Because neither Congress nor the Supreme Court has since addressed the issue, however, the scope of § 1346 and the precedential value of pre-*McNally* cases are not precisely clear.<sup>56</sup> Most circuits that have addressed the issue have held that § 1346 restores the “honest services” law to its pre-*McNally* status.<sup>57</sup> Other courts have interpreted § 1346 to reach conduct beyond its pre-*McNally* definition by not even requiring an underlying fiduciary relationship between the parties.<sup>58</sup> Despite the statute’s

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55. The floor sponsor of the amendment, Representative Conyers, stated, “This amendment resteres the mail fraud provision to where that provision was before the *McNally* decision. . . . This amendment is intended to overturn the *McNally* decision.” 134 CONG. REC. H11,251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers). The Senate Judiciary Committee stated, “This section overturns the decision in *McNally v. United States* . . . . The intent is to reinstate all the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.” 134 CONG. REC. S17,360-62 (daily ed. Nov. 10, 1988). See also David B. Sweet, Annotation, *Validity, Construction, and Application of Federal Mail Fraud Statute*, 97 L. Ed. 2d 863, 878 n.24 (1987) (outlining the legislative history of § 1346). But see Behrens, *supra* note 49, at 515-16 (discrediting Representative Conyers’s comments because the bill was not adopted in its original form, but amended to make it narrower in scope). The honest services language had not been included in any previous bill in either the House or Senate, so it was never referred to any committee or subject to any committee reports or floor debate. See *United States v. Brumley*, 79 F.3d 1430, 1436 (5th Cir. 1996), *rev’d*, 116 F.3d 728 (5th Cir. 1997) (en banc) (noting the sparse legislative history behind the bill).

56. See B. JAMES GEORGE, JR., CONTEMPORARY FEDERAL CRIMINAL PRACTICE § 6-58 (2d ed. Supp. 1993) (“[I]t is not necessarily clear that ‘honest services’ embraces all the intangibilities that government prosecutors might want to advance as bases for § 1346 prosecution.”); Ellen S. Podger, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 236-239 (1992) (determining that the drafters clearly intended to restere mail fraud te its status prior to the *McNally* decision); Gaghardi, *supra* note 26, at 901 (concluding that § 1346 should effectively protect most, if not all, of those rights protected before *McNally*). Moreover, many pre-*McNally* cases did not employ the words “honest services,” but rather terms such as “good government,” *United States v. Margiotta*, 688 F.2d 108, 120 (2d Cir. 1982), and “duty of loyalty,” *United States v. Bronsten*, 658 F.2d 920, 922 (2d Cir. 1981). Thus far, courts have not weakened the precedential value of these pre-*McNally* cases even though the language does not directly correspond to that of § 1346.

57. See *United States v. Sawyer*, 85 F.3d 713, 732 n.16 (1st Cir. 1996) (“By enacting § 1346, Congress meant to overturn *McNally*.”); *United States v. Bryan*, 58 F.3d 933, 940 n.1 (4th Cir. 1995) (stating that pre-*McNally* caselaw upon which the Government relied still has persuasive effect); *United States v. Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995) (stating that § 1346 overrules *McNally*); *United States v. Little*, 889 F.2d 1367, 1369 (5th Cir. 1989) (stating that § 1346 “effectively overrules *McNally* by eliminating the requirement of property loss”); *United States v. Frost*, 125 F.3d 346, 364 (6th Cir. 1997) (finding that “[e]very court to address the effect of § 1346 has held that it overruled the holding in *McNally*”); *United States v. Johns*, 742 F. Supp. 196, 217 (E.D. Pa. 1990), *aff’d*, 972 F.2d 1333 (3d Cir. 1991) (stating that Congress intended to overrule *McNally* with § 1346); *United States v. Berg*, 710 F. Supp. 438, 442 E.D.N.Y. 1989), *aff’d in part, rev’d in part*, 924 F.2d 410 (2d Cir. 1991) (stating that Congress’s intend was to overrule *McNally*).

58. See, e.g., *United States v. Dempsey*, 768 F. Supp. 1256, 1270 (N.D. Ill. 1990) (“The fact is that the post-November 18, 1988 mail and wire fraud statutes impose a statutory duty on everyone not to defraud anyone of an intangible right to honest services by utilizing the mails or wires.”).

ambiguity, it has survived constant attacks alleging violations of due process on grounds of notice and vagueness and principles of federalism.<sup>59</sup>

The enactment of section 1346 appears to be a clear indication of Congress's desire to devolve to the lower federal courts the responsibility of deciding whether fiduciary misconduct, coupled with some tenuous connection to the mails, violates one's intangible right to honest services.<sup>60</sup> Under this interpretation of the statute, a mere breach of fiduciary duty and the nondisclosure of a kickback, conflict of interest, or other material information is sufficient for conviction under the mail fraud statute.<sup>61</sup> This interpretation has not gone unnoticed by federal prosecutors.

### III. THE PHYSICIAN-PATIENT FIDUCIARY RELATIONSHIP

#### A. *Traditional Fiduciary Obligations*

A basic tenet of modern medical practice recognized by the courts is the fiduciary relationship between the physician and patient.<sup>62</sup> This fiduciary relationship is premised on the special knowl-

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59. See, e.g., *Waymer*, 55 F.3d at 569 (holding that section 1346 is not constitutionally overbroad); *United States v. Goldberg*, 928 F. Supp. 89, 92-93 (D. Mass. 1996) (citing cases that have rejected claims that § 1346 and pre-*McNally* intangible rights doctrines are unconstitutional). See generally *Brown*, *supra* note 34, at 225 (discussing the mail fraud statute and its conflict with the doctrine of federalism); *Moohr*, *supra* note 17, at 170-209 (concluding that section 1346 runs afoul of federalism, separation of powers, and the First Amendment and should be void for vagueness); *Williams*, *supra* note 28, at 149-53 (criticizing the expansion of the mail fraud statute and arguing that the vagueness of the statute comes very close to violating due process rights when the target of a mail fraud indictment did not have fair warning that her acts may have broken the law).

60. See Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 490 (noting that the amendment "merely reinstates and perpetuates many of the irrational loopholes and inconsistencies" in the intangible rights mail fraud statute).

61. The expansive use of the mail fraud statute has wide ramifications. As Professor Coffee explains, the expansion of the mail fraud statute has provided "the federal prosecutor with what Archimedes long sought - a simple fulcrum from which one can move the world." Coffee, *supra* note 26, at 3. Prosecutors who bring mail fraud cases are U.S. Attorneys who have virtual free reign to decide when to use the "Stradivarius" to indict. See *Williams*, *supra* note 28, at 144 (discussing how federal prosecutors are allowed to exercise personal and political discretion to decide whether to bring mail fraud charges).

62. See *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1130 n.7 (E.D. Pa. 1991) (stating that the "doctor's obligation to his or her patient is in the nature of a fiduciary duty"); *Petrillo v. Syntex Lab., Inc.*, 499 N.E.2d 952, 957 (Ill. App. Ct. 1986) (noting that "public policy strongly favors both the confidential and fiduciary nature of the physician-patient relationship"); *Adams v. Ison*, 249 S.W.2d 791, 794 (Ky. Ct. App. 1952) (noting that the fiduciary relationship

edge and expertise the physician possesses in diagnosing and treating diseases and injuries.<sup>63</sup> The fundamental imbalance in information necessitates that patients place a significant amount of trust in their physicians.<sup>64</sup> The physician has powerful influence over how patients spend their money, patients' access to diagnostic and therapeutic treatment and intervention, patients' access to other physicians, and patients' medical outcomes.<sup>65</sup> Given the reliance and vulnerability of

resembles the relationship between a mother and son); *Melynchenko v. Clay*, 393 N.W.2d 589, 591 (Mich. Ct. App. 1986) (asserting that the physician's fiduciary duty requires confidence, trust, and good faith); *Black v. Littlejohn*, 325 S.E.2d 469, 482 (N.C. 1985) ("The relationship of patient and physician is generally considered a fiduciary one . . . [that] envisions an expectation by both parties that the patient will rely upon the judgment and expertise of the doctor."); *Lockett v. Goodill*, 430 P.2d 589, 591 (Wash. 1967) (declaring that the physician-patient relationship is a "fiduciary one of the highest degree [that] involves every element of trust, confidence and good faith"); *Omer v. Edgren*, 685 P.2d 635, 636-37 (Wash. Ct. App. 1984) (stating that the fiduciary relationship between physician and patient is analogous to the guardian-ward relationship and requires exercise of scrupulous good faith on the physician's part). For a general discussion of the obligations concerned in a fiduciary relationship, see PAUL P. FINN, *FIDUCIARY OBLIGATIONS* (1977).

63. See *Salis v. United States*, 522 F. Supp. 989, 997 n.10 (M.D. Pa. 1981) (stating that the doctrine underlying the existence of a fiduciary relationship is "generally by reason of superior knowledge to another"). Fiduciary law has evolved in response to the recognition that certain legal relationships are of such a special nature that the conduct of the parties, especially the more powerful party, ought to be subject to a higher standard than that imposed by traditional tort or contract principles. See Maxwell J. Mehlman, *Fiduciary Contracting: Limitations on Bargaining Between Patients and Health Care Providers*, 51 U. PITT. L. REV. 365, 390 (1990) (stating that the superior knowledge of the physician is the basis for the fiduciary relationship). See generally Frankel, *supra* note 30, at 795 (discussing the nature of fiduciary relations and the underlying policies and principles); Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J.L. & MED. 241, 243-45 (1995) (discussing the characteristics of the fiduciary relationship). In addition, if patients are sick or disabled by illness, they may be unable to educate themselves about their options and medical conditions, which increases their dependence. See David Orentlicher, *Health Care Reform and the Patient-Physician Relationship*, 5 HEALTH MATRIX 141, 148 (1995) (discussing the importance of physician-patient trust); Rodwin, *supra*, at 245 (noting that "[p]atients are often ill or anxious about their health, which increases their dependence").

64. See *United States v. Willis*, 737 F. Supp. 269, 272 (S.D.N.Y. 1990) ("It is difficult to imagine a relationship that requires a higher degree of trust and confidence than the traditional relationship of physician and patient."); *Cobbs v. Grant*, 502 P.2d 1, 9 (Cal. 1972) ("[T]he patient, being unlearned in medical sciences, has an abject dependence upon and trust in his physician for the information upon which he relies during the decisional process."); Alexander M. Capron, *Containing Health Care Costs: Ethical and Legal Implications of Changes in the Methods of Paying Physicians*, 36 CASE W. RES. L. REV. 708, 734 (1986) ("The nature of the material over which the physician has control is both personal and technologically sophisticated, which creates an imbalance between physician and patient."). Other commentators have also discussed this disparity in access to information. See, e.g., PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 5 (1982) ("The very circumstances of sickness promote acceptance of their [physicians'] judgment.").

65. See Francis Miller, *Secondary Income from Recommended Treatment: Should Fiduciary Principles Constrain Physician Behavior?*, in *NEW HEALTH CARE FOR PROFIT* 153-71 (B.H. Gray ed., 1983) (noting that patients cannot admit themselves to a hospital, schedule their own magnetic resonance imaging, or prescribe drugs such as antibiotics without the express medical order of a physician). The physician's power is magnified in managed health care

the patient, the physician's obviously dominant position in the relationship justifies the fiduciary duties.<sup>66</sup>

In the physician-patient fiduciary relationship, a physician has an affirmative duty to disclose information material to the patient's decision-making process.<sup>67</sup> A physician's breach of this duty by failing to disclose fully all material information typically results in a tort action for malpractice,<sup>68</sup> lack of informed consent,<sup>69</sup> or breach of fiduci-

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because the primary care physicians, who are called gatekeepers, control access to specialists and further medical treatment. See generally Edmund D. Pellegrino, *Rationing Health Care: The Ethics of Medical Gatekeeping*, 2 J. CONTEMP. HEALTH L. & POLY 23 (1986) (discussing physicians as gatekeepers).

66. Individuals in a superior position who enter into a relationship in which the other party is markedly vulnerable, whether that person is incompetent, unlearned, inexperienced, easily influenced, or infirm, bear legal obligations to use their superior position to promote the interests of the vulnerable party, even at the expense of their own interests. See E. Haavi Morreim, *Economic Disclosure and Economic Advocacy: New Duties in the Medical Standard of Care*, 12 J. LEGAL MED. 275, 289-93 (1991). See Frankel, *supra* note 30, at 802-04 (discussing how specialization and the peeling of resources has led to the development of fiduciary relationships).

67. This disclosure is required to help remedy the patient's information deficit. See Morreim, *supra* note 66, at 299. See also *Harrison v. United States*, 708 F.2d 1023, 1028 n.1 (5th Cir. 1983) (stating that concealing information from the patient violates the fiduciary relationship); *Nardone v. Reynolds*, 538 F.2d 1131, 1136 (5th Cir. 1976) (stating that the physician's duty to disclose stems from her fiduciary duty); *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972) ("[L]ong before the instant litigation arose, courts had recognized that the physician had the responsibility of satisfying the vital information needs of the patient."); *Ostojic v. Brueckmann*, 405 F.2d 302, 304 (7th Cir. 1968) (asserting that the existence of a physician's fiduciary duty requires full disclosure and informed consent); *Emmett v. Eastern Dispensary & Cas. Hosp.*, 396 F.3d 931, 935 (D.C. Cir. 1967) (finding that "in the fiducial qualities of [the physician-patient] relationship [it is] the physician's duty to reveal to the patient that which in his best interests it is important that he should know"); *Moore v. Preventative Medicine Med. Group*, 178 Cal. App. 3d 728, 737-39 (1986) (holding that the physician had a duty to disclose all material information that would allow the patient to make an informed decision regarding whether to see a specialist); *Sard v. Hardy*, 379 A.2d 1014, 1019 (Md. 1977) (noting that a physician is under a duty to disclose information to a patient); *Miller v. Keunedy*, 522 P.2d 852, 862 (Wash. Ct. App. 1974), *aff'd*, 530 Wash. 334 (1975) (finding that the fiduciary duty requires disclosure).

68. Medical malpractice is judged against a standard of competence. See generally 1 S. PEGALIS & H. WACHSMAN, *AMERICAN LAW OF MEDICAL MALPRACTICE* (1980 & Supp. 1988) (discussing medical malpractice law); ANGELA HOLDER, *MEDICAL MALPRACTICE LAW* 225-34 (2d ed. 1978) (discussing consent to treatment).

69. Common law principles recognize personal autonomy by requiring informed consent before a physician can touch a patient. See Marjorie M. Schultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 225-26 (1985). Justice Cardozo wrote in *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914), that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." The informed consent doctrine has been the subject of considerable academic commentary. See generally Lori B. Andrews, *Informed Consent Statutes and the Decisionmaking Process*, 5 J. LEGAL MED. 163 (1984) (discussing codification of informed consent); Mary Anne Bobinski, *Autonomy and Privacy: Protecting Patients from Their Physicians*, 55 U. PITT. L. REV. 291, 342 (1994) (concluding that "[t]he informed consent doctrine provides the major theoretical basis for a duty to disclose provider-associated risks"); Cathy J. Jones, *Autonomy and Informed Consent In Medical Decisionmaking: Toward a New Self-*

ary duty.<sup>70</sup> Although fiduciary obligations are distinct from the tort concept of informed consent,<sup>71</sup> a physician has a fiduciary duty to disclose material information to the patient so that the patient can provide informed consent.<sup>72</sup> Courts, nonetheless, generally discuss and provide remedies for physician fiduciary breaches under the negligence principles of informed consent.<sup>73</sup> Jurisdictions differ with regard to the appropriate standard for judging a patient's informed consent.<sup>74</sup> About half of the jurisdictions have adopted a reasonable patient disclosure standard for informed consent.<sup>75</sup> This standard

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*Fulfilling Prophecy*, 47 WASH. & LEE L. REV. 379 (1990) (discussing the law of informed consent).

70. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 485 (Cal. 1990) (finding lack of disclosure to be a breach of fiduciary duty); *Schaefer v. Miller*, 587 A.2d 491, 497 (Md. 1991) (addressing the plaintiff's failure to allege the independent tort of breach of fiduciary duty for failure to disclose material information). See generally Barry R. Furrow, *Forcing Rescue: The Landscape of Health Care Provider Obligations to Treat Patients*, 3 HEALTH MATRIX 31 (1993) (analyzing the legal duties that doctors owe to patients).

71. See RESTATEMENT (SECOND) OF TRUSTS § 2 (1984); DEBORAH A. DEMOTT, FIDUCIARY OBLIGATION, AGENCY, AND PARTNERSHIP 4 (1991); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 4-5 (5th ed. 1984).

72. See *Canterbury*, 464 F.2d at 782; *Schultz*, *supra* note 69, at 260 (noting that informed consent is a specific example of the fiduciary duty to disclose material information). Informed consent is analyzed under unconsented touch analysis, whereas fiduciary duties are analyzed under disclosure of relevant information standards. See *Schultz*, *supra* note 69, at 261.

73. See *Lambert v. Park*, 597 F.2d 236, 237 (10th Cir. 1979) (concluding that the physician's fiduciary duty required him to obtain the patient's informed consent); *Margaret S. v. Edwards*, 488 F. Supp. 181, 207 (E.D. La. 1980) (holding that "[i]nformed consent involves the fiduciary nature of the doctor-patient relationship"); *Spoor v. Serota*, 852 P.2d 1292, 1294 (Colo. Ct. App. 1992) (characterizing the relationship between the physician and patient as a fiduciary one requiring the physician to obtain the patient's informed consent); *Leach v. Shapiro*, 469 N.E.2d 1047, 1052 (Ohio Ct. App. 1984) ("A physician owes his patient a fiduciary duty of good faith and fair dealing which gives rise to certain specific professional obligations, including duty . . . to obtain patient's informed consent to treatment."); *Miller v. Kennedy*, 522 P.2d 852, 860 (Wash. Ct. App. 1974), *aff'd*, 530 Wash. 334 (1975) ("The duty of the doctor to inform the patient is a fiduciary duty."). *But see Trogun v. Fruchtnan*, 207 N.W.2d 297, 313 (Wis. 1973) (adopting a negligence-based standard and implicitly rejecting the fiduciary relationship as a basis for informed consent). Fiduciary duties and fiduciary law may provide greater protection to patients for nondisclosure than informed consent. See *Schultz*, *supra* note 69, at 261 (finding that fiduciary duty, rather than informed consent, sometimes more effectively vindicates patients' autonomy).

74. Courts have increasingly been moving from a professional model of informed consent to a patient model. See James F. Blumstein, *Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 CORNELL L. REV. 1459, 1474 (1994) [hereinafter Blumstein, *Legislation*]. In jurisdictions that have adopted the patient model, currently about half the states, the question of "what degree of disclosure is required before a patient's consent is deemed effective because informed" focuses on what information a reasonable patient would want disclosed. *Id.* See generally James F. Blumstein, *Rationing Medical Resources: A Constitutional, Legal and Policy Analysis*, 59 TEX. L. REV. 1345, 1392-95 (1981) [hereinafter Blumstein, *Rationing*] (analyzing the scope of a physician's duty to disclose); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899 (1994) (analyzing the current doctrine of informed consent); *Schultz*, *supra* note 69, at 226-27 (discussing informed consent and patient autonomy).

defines material information as any information that a reasonable patient would deem relevant or want disclosed.<sup>76</sup> A majority of jurisdictions, however, continue to use the traditional professional disclosure standard, which is measured by what the reasonable, prudent physician would disclose to the patient under the circumstances.<sup>77</sup> Thus, under an informed consent doctrine, a physician's underlying fiduciary duty to disclose material information varies among jurisdictions.

Information that is material to the patient's decision-making process typically concerns information directly pertaining to the medical treatment and the patient's health.<sup>78</sup> Other information, such as information pertaining to any economic conflicts of interest that could potentially affect the physician's judgment, also constitutes

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75. See Blumstein, *Legislation*, *supra* note 74, at 1474. The reasonable patient standard envisions the patient as more of a consumer, capable of processing information regarding health care decisions. See *id.* at 1479.

76. "The disclosure standard . . . is [what] would be sought by a prudent or reasonable patient." BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 336 (2d ed. 1991). Courts adopting the reasonable patient standard find that, since the doctrine of informed consent exists for the benefit of the patients, the medical profession should not be permitted to determine the responsibilities of its own members. See *Salis v. United States*, 522 F. Supp. 989, 998 (M.D. Pa. 1981). See also Schuck *supra* note 74, at 916 (discussing the application of the reasonable patient standard).

77. Under the professional disclosure standard, whether, and to what extent a physician has an obligation to disclose a particular risk must, in most cases, be determined by expert medical testimony establishing the prevailing standard of practice and the defendant's departure therefrom. See *Roberts v. Young*, 119 N.W.2d 627, 630 (Mich. 1963); *Collins v. Itoh*, 503 P.2d 36, 41 (Mont. 1972). On the other hand, under the reasonable patient standard, since the duty of disclosure is measured by the patient's need for information, expert testimony regarding medical standards is not required. The jury can decide without the testimony of a medical expert whether a reasonable person in the patient's position would have considered the risk material to her decision. See, e.g., *Canterbury*, 464 F.2d at 786-87 (discussing whether a one percent chance of harm from a procedure should have been disclosed); *Sard v. Hardy*, 379 A.2d 1014, 1020-22 (Md. 1977) (discussing the proper test for measuring the physician's duty to disclose information).

78. See, e.g., 464 F.2d at 779 (finding that failure by the physician to disclose the risks and alternatives of a treatment was a breach of fiduciary duty); *Logan v. Greenwich Hosp. Ass'n*, 465 A.2d 294 (Conn. 1983) (holding that the failure to disclose and discuss alternate procedures rendered consent invalid); *Theodore v. Ellis*, 75 So. 655, 660 (La. 1917) (stating that a physician must adequately disclose the risks and alternatives of the proposed treatment). See generally FURROW ET AL., *supra* note 76, at 338-39 (providing a list of items that a physician should consider disclosing: (a) the diagnosis, (b) the nature and purpose of the proposed treatment, (c) the risks of treatment, (d) the probability of success, and (e) the treatment alternatives). The physician's fiduciary duty also encompasses the duty to ensure the confidentiality of the relationship and to provide a level of care that meets accepted standards in the profession. See, e.g., *Manion v. N.P.W. Med. Ctr.*, 676 F. Supp. 585, 588 (M.D. Pa. 1987) (stating that the fiduciary duty requires confidentiality); *Estate of Loach v. Shapiro*, 469 N.E.2d 1047, 1052 (Ohio Ct. App. 1984) (stating that a physician's obligations include the duty to exercise due care and skill, as well as to inform the patient and obtain informed consent). See generally KEETON ET AL., *supra* note 71, at 187-88 (explaining the negligence standard as applied to physicians).

material information.<sup>79</sup> For example, in *Moore v. Regents of the University of California*,<sup>80</sup> the California Supreme Court held that "a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment."<sup>81</sup> The court based its holding, in part, on notions of informed consent and fiduciary duty.<sup>82</sup> Applying the reasonable patient disclosure standard, the court concluded that a reasonable patient, in deciding whether to consent to a particular medical treatment, would want to know if an interest unrelated to the patient's health possibly influenced the physician's judgment.<sup>83</sup>

Applying this analysis, one obvious economic conflict of interest that a physician would logically have a duty to disclose is a physician's acceptance of a kickback or other fee for referring a patient to a certain hospital, laboratory, or other service provider.<sup>84</sup>

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79. Arguably, principles of fiduciary law apply with even greater force to economic conflicts because the physician is in a position to exploit the patient for personal gain. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990) (stating that physicians must tell patients about economic interests that may affect professional judgment); Joseph M. Healey, Jr. & Kara L. Dowling, *Controlling Conflicts of Interest in the Doctor-Patient Relationship: Lessons from Moore v. Regents of the University of California*, 42 MERCER L. REV. 989, 999-1002 (1991) (discussing the application of the fiduciary duty to the physician-patient relationship in the context of conflicts of interest). See, e.g., Theodore N. McDowell, Jr., *Physician Self Referral Arrangements: Legitimate Business or Unethical "Entrepreneurialism"*, 15 AMER. J.L. & MED. 61, 84-85 (1989) (discussing the information required to be disclosed and distinguishing ethics codes from legal prohibitions); Arnold S. Rehnman, *Dealing with Conflicts of Interest*, 313 NEW ENG. J. MED. 749, 750-51 (1985) (arguing that physicians should separate themselves from economic interests in the medical marketplace).

80. 793 P.2d 479 (Cal. 1990). In *Moore*, the plaintiff underwent treatment for a rare type of leukemia at UCLA Medical Center. See *id.* at 481. The physician failed to disclose his preexisting research and economic interests in the patient's infected cells before obtaining consent to the medical procedures by which they were extracted. See *id.* at 481-82.

81. *Id.* at 483.

82. See *id.*

83. See *id.* at 484.

84. See *United States v. Neufeld*, 908 F. Supp. 491, 500 (S.D. Ohio 1995) (noting that "fiduciary duty encompasses more than mere disclosure"); Rodwin, *supra* note 63, at 244 (noting that a physician compromises her fiduciary duty of loyalty by creating a conflict of interest through financial interests or by performing competing roles). A recent Eighth Circuit case, *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996), however, holds otherwise as long as no harm comes to the patients. Further discussion and criticism of *Jain* are in Part IV.A.

Physician kickbacks can take many forms. One type of kickback occurs when physicians in private practice refer patients to hospitals in exchange for a fee. Hospitals depend on patients for revenue, and physicians, to a large extent, control the flow of patients by referring them to certain hospitals. Under this system, hospitals make payments directly to the physician in exchange for patient referrals. Some hospitals, however, have developed more elaborate schemes to induce physicians to refer patients, such as giving free office space in exchange for patient referrals. See *Polk County v. Peters*, 800 F. Supp. 1451 (E.D. Tex. 1992). Other types of kickbacks include: (1) payments by pharmaceutical firms to physicians for prescribing or ordering drugs, see MARC A. RODWIN, *MEDICINE, MONEY AND MORALS: PHYSICIANS' CONFLICTS OF INTERESTS* 60 (1993) (noting that kickbacks are paid to doctors in return for generating revenue for medical suppliers and drug manufacturers); 2) payments by manufacturers of

The danger, of course, is that the economic incentive to refer a patient will improperly influence the doctor's professional medical judgment. This incentive furthers a physician's own economic interest, abuses a patient's trust in the physician's uncompromised judgment, and places the patient's health at risk.<sup>85</sup> The physician, by basing her decision at least in part, on her own interests, exploits the fiduciary relationship by placing her interests above or in conflict with those of the patient.<sup>86</sup> The importance and obligation of disclosing conflicts of interest is reflected in the American Medical Association's and the American College of Physicians' ethics guidelines.<sup>87</sup>

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various medical devices to physicians for using their products; and 3) payments by service providers. See *United States v. Lipkis*, 770 F.2d 1447, 1449 (9th Cir. 1985) (discussing kickbacks to medical management company for referring labwork); *United States v. Greber*, 760 F.2d 68, 70 (3d Cir. 1983) (discussing kickbacks to doctors by a company focusing its diagnostic services in interpreting cardiac monitor results); *United States v. Tapert*, 625 F.2d 111, 113 (6th Cir. 1980) (discussing kickbacks by a laboratory to doctors for sending urine and blood samples to it); *United States v. Hancock*, 604 F.2d 999, 1001 (7th Cir. 1979) (analyzing payments by a blood and tissue testing laboratory to chiropractors for using its services); *United States v. Sadlier*, 649 F. Supp. 1560, 1561 (D. Mass. 1986) (analyzing kickbacks by a company to a doctor for referring the hospital's purchases of respiratory therapy supplies and equipment to it). See generally Charles J. Williams, *Toward A Comprehensive Health Care Anti-Kickback Statute*, 64 UMKC L. REV. 291 (1995) (discussing the anti-kickback statute and various kickback schemes).

85. See Office of Inspector General of the Dep't of Health & Human Servs. Bulletin (May 7, 1992) (stating that kickbacks may induce physicians to refer patients to hospitals providing kickbacks, rather than to hospitals offering the best services for patients). See also Arnold S. Relman, *The New Medical-Industrial Complex*, 303 NEW ENG. J. MED. 963, 967 (1980) (arguing that physicians should not have any economic conflicts of interest). In the traditional fee-for-service reimbursement method, kickbacks provide incentives to increase volume. See Pamela H. Bucy, *Health Care Reform and Fraud by Health Care Providers*, 38 VILL. L. REV. 1003, 1013 (noting that in a fee-for-service system, kickbacks routinely flow from one provider to another and are easily concealed within the legitimate payments simultaneously flowing between the providers). In addition, "absent a referral incentive, the physician might be more inclined to present the patient with a list of options or at least learn any patient preferences." Hugh E. Aaron, *Application of the Medicare and Medicaid Anti-Kickback Statute to Business Arrangements Between Hospitals and Hospital-Based Physicians*, 1 ANNALS OF HEALTH L. 53, 56 (1992).

86. See David S. Nalven, *Medicare and Medicaid Fraud: An Enforcement Priority for the 1990s*, 38 BOSTON B.J. 9, 16 (1994) ("Financial incentives to refer create a conflict of interest which can lead to referrals which would not otherwise occur. Moreover, even when referral is medically indicated, financial incentives could skew the health care practitioner's decision as to who should best perform the referral evaluation or treatment.").

87. In light of concerns about the effect of conflicts of interest on the physician-patient relationship, professional organizations such as the American Medical Association ("AMA") have taken steps to eliminate or limit conflicts of interest. For example, the AMA's Principles of Medical Ethics contains the following language: "Under no circumstances may the physician place his own financial interest above the welfare of his patients. . . . If a conflict develops between the physician's financial interest and the physician's responsibilities to the patient, the conflict must be resolved to the patient's benefit." AMA, CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS OF THE AMERICAN MEDICAL ASSOCIATION: INCLUDING THE PRINCIPLES OF MEDICAL ETHICS AND RULES OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, OPINION 8.07 (1986) [hereinafter AMA OPINIONS]. The American College of Physicians' ethics manual states: "The physician must avoid any personal commercial conflict of interest that



Because of the potential harm that stems from undisclosed physician referral fees and kickbacks, federal and state legislatures have begun to address the issue.<sup>88</sup> Congress, through broad anti-kickback legislation for Medicare and Medicaid programs,<sup>89</sup> has acknowledged that kickbacks not only lead to cost concerns but also can harm the patients.<sup>90</sup> Recognizing the potential for harmful

might compromise his loyalty and treatment of the patient." American College of Physicians, *Ad Hoc Committee on Medical Ethics, Am. College of Physicians, Ethics Manual, Part I*, 101 ANNALS OF INTERNAL MED. 129, 134 (1984).

An interesting question is whether professional medical ethics guidelines may serve as a basis of legal liability. The rapidly changing nature of medical ethical prohibitions and the divergence of opinion within the medical community pose initial problems. Professional codes are used as a basis of liability in other areas dealing with professionals, however. To regulate attorney behavior, states have adopted some version of either the Model Code of Professional Responsibility or Model Rules of Professional Conduct, both drafted by the American Bar Association. See Michael J. Benjamin, Note, *The Rules of Professional Conduct: Basis for Civil Liability of Attorneys*, 39 U. FLA. L. REV. 777, 778 n.4 (1987). Many courts have relied on the codes in actions against attorneys for breach of fiduciary duty. See *id.* at 780 (discussing the use of model codes of professional responsibility to determine attorneys' liability). See also Ishmael v. Millington, 241 Cal. App. 2d 520, 526 n.2 (1966) (using rules of professional conduct as standard in proving attorney's breach of duty to client).

88. Recent years have seen the growth of both state and federal regulation of economic incentives in the physician-patient relationship. Two different sources of regulation exist: (1) standards of professional conduct applicable to all physicians (ethical prohibitions, as well as state legislation); and (2) reimbursement-related codes relevant only to physicians seeking reimbursement for care from a particular funding source, such as Medicare and Medicaid. See Bobinski, *supra* note 69, at 324-35 (reviewing state and federal legislation regulating physician behavior such as receipt of kickbacks, fraud, and fee-splitting). Economic incentives to deny care to patients have received far less attention. See *supra* Part III.B.

89. The Medicare-Medicaid anti-kickback statute provides:

Whoever knowingly and willfully solicits or received any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under subchapter XVIII of this chapter or a State health care program, or

(B) . . . shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b(b)(1) (1994). Section 1320a-7b(b)(2) uses identical language, except that it provides for "[w]hoever knowingly and willfully offers or pays any remuneration. . . ." *Id.* § 1320a-7b(b)(2). A narrow range of "safe harbors" has been established by statute and federal regulations. See 42 C.F.R. § 1001.952 (1991) (setting forth exceptions).

For discussions of the anti-kickback statute, see generally James F. Blumstein, *The Fraud and Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy*, 22 AMER. J.L. & MED. 205 (1996) (discussing the anti-kickback statute and its implications on capitated care); Pamela H. Bucy, *Fraud by Fright: White Collar Crime by Health Providers*, 67 N.C. L. REV. 855, 914-21 (1989) (discussing legal remunerations); John J. Farley, Note, *The Medicare Antifraud Statute and Safe Harbor Regulations: Suggestions for Change*, 81 GEO. L.J. 167 (1992) (explaining the statute).

90. The principal rationale behind the legislation is that kickbacks contribute to increasing health care costs. In addition to potential patient harm, reasons offered for enacting the statute include: (1) kickback schemes preclude competing suppliers from entering the system; (2) they may mask the possibility of government price reduction; (3) they may misdirect program funds; and, (4) when proportional, they may create strong temptations to order more drugs and supplies than needed. See Blumstein, *supra* note 89, at 231 n.18 (concluding that

conflicts of interest, many states have enacted laws that prohibit referrals, making physicians subject to disciplinary action or criminal prosecution.<sup>91</sup> Furthermore, prior to the federal physician self-referral legislation of 1989,<sup>92</sup> state disclosure requirements, which required physicians to disclose to patients their ownership interests in facilities when referring patients to those facilities, were a key mechanism for preventing potential harm to patients.<sup>93</sup> At a minimum, a reasonable patient would want to know whether her physician was breaching professional ethics codes or violating federal or state law while advising treatment.<sup>94</sup>

In addition to a breach of fiduciary duty under an informed consent analysis, an undisclosed kickback or other economic conflict of interest is also a breach of the physician's fiduciary duty of loyalty to the patient.<sup>95</sup> The patient's best interests are at the heart of the fidu-

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[t]he antikickback provision should be given narrower scope, leaving to other provisions the appropriate balancing of interests regarding the fiduciary relationship between doctor and patient. [D]isclosure requirements and informed consent rules will be more fruitful policy pathways than outright prohibition."]; see also *United States v. Ruttenberg*, 625 F.2d 173, 177 n.9 (7th Cir. 1980) (noting that the law does not make increased cost to the government the only criterion of corruption). One may question the ability of medical ethics codes to govern fiduciary duties since the profession is self-regulated and member-optional.

91. See, e.g., ARIZ. REV. STAT. ANN. § 13-3713 (West Supp. 1997) (remunerated patient referral is a felony); CAL. LAB. CODE § 3215 (West Supp. 1997) (remunerated patient referral is "a crime"); COLO. REV. STAT. ANN. § 12-36-125 (West 1996) (remunerated patient referral is a misdemeanor); 225 ILL. COMP. STAT. ANN. ¶ 60/22(A)(14) (West 1993) (remunerated patient referral is grounds for disciplinary action); WASH. REV. CODE ANN. § 19.68.010 (West Supp. 1997) (remunerated patient referral is a misdemeanor).

92. Ethics in Patient Referrals Act of 1989 (Stark law), 42 U.S.C. § 1395nn (1994) (prohibiting physicians from referring patients to clinical laboratories in which the physicians have a financial interest). The rationale behind the statute was that physicians with a financial interest in facilities are in a position to generate more profits through the volume of referrals that they control. These types of arrangements could lead to unnecessary medical services and increased cost and have a detrimental effect on patients' health. See generally McCarty Thornton, *The Medicare/Medicaid Anti-Kickback Statute: An Enforcement Perspective*, C470 A.L.I.-A.B.A. COURSE OF STUDY 111 (1989) (available in Westlaw) (discussing the rationale behind the existence of the federal statutes).

93. See generally OFFICE OF THE INSPECTOR GENERAL, DEPT OF HEALTH & HUMAN SERV., FINANCIAL ARRANGEMENTS BETWEEN PHYSICIANS AND HEALTH CARE BUSINESSES: STATE LAWS AND REGULATIONS 4 (1989) (summarizing state laws regulating self-referral arrangements). See also McDowell, *supra* note 79, at 85 (listing various state disclosure requirements and prohibitions).

94. Likewise, a reasonable physician would disclose this information. In *United States v. Jain*, No. 94-00087-1, 1995 WL 9301 (W.D. Mo. Jan. 9, 1995) the defendant-physician admitted that kickbacks were unjustifiable and wrong. See *id.* at \*5.

95. See, e.g., *Calvert v. Sharp*, 748 F.2d 861, 863 (4th Cir. 1984) ("[A] physician owes his ethical obligation and undivided loyalty to his patient."); AMA, First Code of Ethics, in *ETHICS IN MEDICINE: HISTORICAL PERSPECTIVES AND CONTEMPORARY CONCERNS* 26 (Stanley J. Reiser et al. eds., 1977) (reprinting PROCEEDINGS OF THE NATIONAL MEDICAL CONVENTION 1846-47, § 7 at 83-106) ("In the practice of medicine a physician should limit the source of his professional

ciary relationship,<sup>96</sup> and the duty to place the patient's interests above all others, including the physician's, is implicated by the fiduciary duty of loyalty to the patient.<sup>97</sup> The obligation to place the patient's interests ahead of all others has been a key component of the physician-patient relationship, which dates back to the time of Hippocrates.<sup>98</sup> Disclosure of a physician's economic conflict of interest, such as a physician's participation in a kickback scheme, would be in the patient's best interest for the same reasons that the kickback scheme would be material information under the informed consent analysis. The kickback may improperly influence the

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income to medical services actually rendered by him, or under his supervision, to his patients. . . . [H]e should neither pay nor receive commission for referral of patients.").

Recognizing the division-of-loyalty problems, some courts have even labeled the solicitation of referrals as an inherently wrongful activity. *See, e.g.,* United States v. Neufeld, 908 F. Supp. 491, 496 (S.D. Ohio 1995). *But see* United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996) (finding without discussion that a patient would not consider referrals or kickbacks material information as long as the patient was not harmed by such action). One commentator has likened physician kickbacks to theft, stating that "it is considered wrong because it can be a form of theft, as one takes money even though he has done nothing to earn it[.]" Morreim, *supra* note 66, at 425.

96. *See* AMA OPINIONS, Opinion 2.03 (discussing the allocation of health resources); *see also* ROBERT M. VEATCH, A THEORY OF MEDICAL ETHICS 22 (1981) (discussing the Hippocratic tradition); Redwin, *supra* note 63, at 245 (stating that the physician-patient relationship presupposes that physicians remain loyal to their patients). *See generally* Austin Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539 (1949) (discussing who is a fiduciary and issues of consent). Of course, physicians can still be compensated for services rendered, but compensation is a matter of contract law. Some commentators have noted that the current physician reimbursement methods, whether fee-for-service or capitation, create divided loyalties when the physician's economic interest does not coincide with the patient's best interests. For example, in fee-for-service systems, physicians have an incentive to provide unnecessary or additional services that could potentially harm the patient. *See* Bobinski, *supra* note 69, at 302-03 (discussing economic incentives that promote the use of health care services); Deborah A. Demott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (noting that fiduciary law is applicable in a variety of contexts, has developed through a jurisprudence of analogy rather than principle, and resists "tidy categorization").

97. Divided roles, interests, or activities that compromise a physician's loyalty or judgment create a conflict of interest. Such behavior triggers judicial scrutiny and is usually regulated or prohibited. *See* Healey & Dowling, *supra* note 79, at 1000 (discussing the legal concept of fiduciary duty); Mehlman, *supra* note 63, at 388-98 (explaining that fiduciary contracting requires the physician to tell the patient information needed to maximize patient welfare); Schultz, *supra* note 69, at 260-63 (discussing the application of fiduciary principles).

The duty of loyalty generally means that the fiduciary must place the beneficiary's benefit above her own. *See* RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. a (1959) (discussing the nature of the fiduciary relationship). While stated within the context of the legal fiduciary relationship between a trustee and beneficiary, this concept applies to all fiduciaries. *See id.* The duty of loyalty includes the obligation "not to profit at the expense of the beneficiary." *Id.*

98. A portion of the Hippocratic oath, which many medical schools currently administer to graduating medical students, reads: "I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice." 4 ENCYCLOPEDIA OF BIOETHICS 1731 (1978). "[I]n the Hippocratic tradition, the actions of medical practitioners are supposed to promote the interests of patients above all others, including the physician." Capron, *supra* note 64, at 710.

physician's judgment since it furthers the physician's own economic interests.<sup>99</sup> Moreover, given that various state and federal statutes, as well as professional ethics guidelines, prohibit kickback schemes, the disclosure of any possible unlawful activity practiced at the patient's expense would also be in the patient's best interest.<sup>100</sup> In fact, by way of comparison, in many other fiduciary relationships an undisclosed kickback scheme can be the sole basis for a violation of a fiduciary duty.<sup>101</sup> Because of the potential for harm, a convincing argument can be made that an outright prohibition of kickbacks, regardless of whether they are disclosed, is necessary to enable a physician to fulfill her fiduciary duties.<sup>102</sup>

While courts describe physicians as fiduciaries, a gap exists between the fiduciary ideal and the legal reality. Unlike the extensive court rules and ethics codes that regulate the fiduciary duties of lawyers or the state corporation statutes and common law rules that regulate financial professionals, and corporate officers and directors, no such legal oversight of physicians' fiduciary duties exists.<sup>103</sup> Part of this "underenforcement" of physician breaches of

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99. See *supra* notes 84-87 and accompanying text. When a physician solicits or accepts a kickback in exchange for a referral, the health of the patient is certainly not her only concern.

100. It would obviously be in the best interests of the patient to know whether her physician is violating federal and state laws while advising the patient. See *supra* notes 88-94 and accompanying text (discussing federal and state legislative prohibitions on kickbacks and other referral schemes).

101. See Part II.B (discussing the breach of fiduciary duty caused by kickback schemes in the context of intangible right to honest services mail fraud).

102. While disclosure may not be a perfect cure, it should be sufficient to protect the patient's interests and preclude a breach of fiduciary duty. One commentator has noted that disclosure regarding the physician's direct financial interest in the medical treatment is not a totally effective method of protecting patients' best interests. See Deven C. McGraw, Note, *Financial Incentives to Limit Services: Should Physicians Be Required to Disclose These to Patients?*, 83 GEO. L.J. 1821, 1843-47 (1995) (discussing problems with a disclosure system). Moreover, since patients tend to have long relationships with specific physicians, a patient may fear that questioning the physician's ethics would disrupt the relationship. In the fee-for-service reimbursement method, patients would also be less likely to challenge a physician's kickback scheme, since, more than likely, a third party is ultimately paying for the service. In the managed health care setting, patients may not be able to seek medical care elsewhere. See *id.* at 1845 (noting that patients belonging to insurance plans may have limited choices for care).

103. See RODWIN, *supra* note 84, at 51 (noting that physicians have addressed conflicts of interest without much state, federal, or professional regulation). Professor Rodwin notes that while Medicare and Medicaid statutes prohibit physicians from paying or receiving kickbacks, they do not hold physicians accountable for the full range of fiduciary obligations. See *id.* at 43; see also Bobinski, *supra* note 69, at 348 (finding that there has been "little judicial analysis of the appropriateness of applying fiduciary-based disclosure obligations to the physician-patient relationship, and virtually no judicial analysis of the special problems presented by provider-associated risk"); Rodwin, *supra* note 63, at 247 (noting that although courts label physicians as fiduciaries, "fiduciary law principles have been applied to physicians for very few purposes"). One scholar has questioned whether fiduciary principles should even constrain physician behavior. See Miller, *supra* note 65, at 153-69 (concluding that the application of fiduciary

fiduciary duty may result from the fact that undisclosed kickbacks are nearly impossible for patients to discover.<sup>104</sup> The only judicial consideration of common law economic disclosure obligations occurred in *Moore v. Regents of the University of California*,<sup>105</sup> in which the court held that a physician must disclose economic interests that a reasonable patient would want to know.<sup>106</sup> Although there is sparse judicial precedent recognizing that undisclosed kickback schemes and other conflicts of interest are a breach of a physician's fiduciary duty, courts may not be far from applying analogous precedent to this area.<sup>107</sup>

### B. New Fiduciary Obligations in Managed Health Care

Motivated by the cost-containment efforts of both public and private payors, the traditional payment mechanisms for medical services are giving way to new organizational and payment structures.<sup>108</sup> The health care system has been moving from the delivery of health care through fee-for-service and independent physicians to integrated

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principles to physician behavior may be good for the medical profession). See also Lawrence A. Hamermesh, *Calling off the Lynch Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087 (1996) (discussing the extensive and elaborate laws and regulations for a corporate director's fiduciary duty of disclosure).

104. Given the covert and deceptive nature of kickback schemes, patients are not in a position to detect them. See *supra* note 84 for examples of these complicated payment schemes.

105. 793 P.2d 479, 479 (Cal. 1990). While *Moore* is the only case mandating disclosure of economic conflicts of interest under a fiduciary duty standard, it provides a logical foundation for other courts to follow.

106. See *id.* at 483. As discussed earlier, the *Moore* court concluded that "a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgment." *Id.*

107. See *supra* Part II.B (discussing the breach of fiduciary duty caused by kickback schemes in the context of the mail fraud statute).

108. Traditionally, the organizations responsible for the delivery of medical care were separate from the entities responsible for paying for the care. Under traditional reimbursement health insurance plans, the physician prescribed a course of treatment and submitted a bill to the insurer. Depending on the terms of the contract between the insurer and patient, the insurer paid either all or a portion of the bill. See Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1358 (1994) (discussing the history of fee-for-service and the development of private insurance). New integrated health care structures such as Health Maintenance Organizations (HMOs) and Preferred Provider Organizations (PPOs), however, combine the financing and delivery of care into integrated enterprises. Between 1970 and 1990, enrollment in HMOs grew more than tenfold, from 3.6 million to more than 35 million beneficiaries. See Stanley S. Wallack, *Managed Care: Practice, Pitfalls, and Potential*, HEALTH CARE FIN. REV. 27 (Supp. 1991). On a national level, over 51 million Americans currently receive their medical care through HMOs. See Michael J. Malinkowski, *Capitation, Advances in Medical Technology, and the Advent of a New Era in Medical Ethics*, 22 AMER. J.L. & MED. 331, 331 n.2 (1996).

and "managed" delivery systems.<sup>109</sup> Under the traditional fee-for-service reimbursement system, a physician's salary is tied to the patient's actual use of the services and payment is often made by a third party, usually a public or private insurance company.<sup>110</sup> Commentators have agreed that this reimbursement system is dominated by incentives for overutilization, unnecessary treatment, and potential for abuse.<sup>111</sup> Under the evolving managed health care system, however, reimbursement is based upon a system of prospective payments called capitation, an arrangement whereby a health care provider provides for all of a patient's needs for a pre-arranged fee.<sup>112</sup>

The most common organization associated with capitation is a prepaid practice plan known as an HMO.<sup>113</sup> While HMOs vary in structure, they are all designed to shift financial risk to the physician, who is offered economic incentives to limit costs and control the

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109. The number of employees in managed care plans increased 23% between 1992 and 1995. See Malinkowski, *supra* note 108, at 331 n.2.

110. By 1996, public and private insurers made 70% of payments to providers. See GEORGE J. ANNAS ET AL., *AMERICAN HEALTH LAW* 131 (1990).

111. Because insurance insulated both patients and physicians from the costs of care, it created no incentives to reduce services to contain costs. Physicians could expect full compensation for their services and the cost of care was not a factor in determining the treatment. Patients, depending on their insurance contract, were often responsible for very little of the bill. See Schwartz, *supra* note 108, at 1358-59. Under fee-for-service, a physician would be inclined to order a test or treatment even if it were costly and provided the patient with a small, but positive, expected value. See *id.* at 1359 ("The test is possibly advantageous; and its cost is no problem for the patient, who is adequately covered by insurance."); see also Bradford H. Gray, *Trust and Trustworthy Care in the Managed Care Era*, 16 *HEALTH AFFAIRS* 34, 36 (1997) (discussing the erosion of trust in fee-for-service care); Vernellia R. Randall, *Managed Care, Utilization Review, and Financial Risk Shifting: Compensating Patients for Health Care Cost Containment Injuries*, 17 *U. PUGET SOUND L. REV.* 1, 15 (1993) (noting the incentives to overtreat because more treatment results in more money).

112. For a full explanation of capitation, see Jerome R. Gardner & Roxy Maroney, *Positioning for Capitation by Redesigning Internal Processes*, *HEALTHCARE FIN. MGMT.*, July 1995, at 40; Mark A. Hall, *Rationing Health Care at the Bedside*, 69 *N.Y.U. L. REV.* 693, 772 n.289 (1994); Frances H. Miller, *Foreword: The Promise and Problems of Capitation*, 22 *AM. J.L. & MED.* 167 (1996).

113. An HMO is a system of health care delivery and finance for hospital and physician services in which both delivery and financing are offered for its enrollees. In exchange for an annual premium and perhaps a nominal per-visit sum, enrollees are entitled to receive complete medical care by HMO or contract physicians. See Capron, *supra* note 64, at 726 (describing the workings and structure of HMOs); Randall, *supra* note 111, at 20 (same). HMOs vary widely in structure, however. Some employ physicians ("staff model") to provide health care services to enrollees in exchange for prepaid premiums, while others contract with physician groups ("group model"). See *id.* In 1973, Congress approved the HMO structure. See Health Maintenance Act of 1973, 42 U.S.C. §§ 300e-300aaa (1994). Another managed care organization is the "Preferred Provider Organization" (PPO), which is a physician group arrangement that contracts to provide services to patients at discounted fees. See Thomas Bodenheimer & Kevin Grumbach, *Reimbursing Physicians and Hospitals*, 12 *JAMA* 971, 975-76 (1994).

utilization of health care services.<sup>114</sup> Under capitation reimbursement, a participating physician receives a pre-arranged fee for all of a patient's care. If the cost of services received by the patient exceeds the fixed rate, the physician is responsible for the difference.<sup>115</sup> In some staff model HMOs, salaried physicians are offered bonuses based on their ability to limit costly referrals to specialists and non-network providers.<sup>116</sup> Under other HMOs, contracting physicians receive a sliding scale percentage of their fee-for-service rates, which is adjusted according to their ability to control costs and utilization.<sup>117</sup> If the HMO administration finds that the physician is not reducing costs enough or is referring too many patients to specialists, the physician runs the risk of being de-selected or having her patient level reduced.<sup>118</sup> HMOs typically employ primary care physicians as "gatekeepers" who control access to specialists and inpatient services and whose salary is tied to the success or failure of cost-containment measures.<sup>119</sup> Primary care providers that make

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114. HMOs have strong incentives to limit costs because the provider is paid a fixed amount per case or patient, so ordering extra services or tests means additional costs, but no additional revenue. See Patricia M. Danzon et al., *Consolidation Is a Tonic for Health Care Providers*, NAT'L L.J., Sept. 18, 1995, at B14.

115. See Bodenheimer & Grumbach, *supra* note 113, at 992.

116. Bonus plans can be structured in many ways. For example, managed care plans commonly withhold a fixed percentage of physicians' compensation to cover end-of-the-year shortages in funds budgeted for expenditures on patient care. If no shortage exists at the end of the year, the funds are given to the physicians. See Peter R. Kongstvedt, *Compensation of Primary Care Physicians in Open Panels*, in THE MANAGED HEALTH CARE HANDBOOK 55-60 (Peter R. Kongstvedt ed., 2d ed. 1993); Orentlicher, *supra* note 63, at 157-58.

117. See Joanne B. Storn, *Bad Faith Suits: Are They Applicable to Health Maintenance Organizations?*, 85 W. VA. L. REV. 911, 916 (1983).

118. Unlike traditional fee-for-service arrangements in which hospitals depend on physicians for patients, many physicians now largely depend on managed care institutions for their patients. This power reversal has resulted in physician loss of control and made physicians more susceptible to economic pressures from HMOs. See Blumstein, *Legislation*, *supra* note 74, at 1478.

119. By examining a patient before she has determined whether the particular ailment requires the attention of a specialist, the primary care physician will decide if a visit to a specialist is medically necessary, thus preventing needless expenditure if, in fact, a specialist is not needed. The theory behind compensating primary care physicians through a capitated rate is that, by doing so, cost considerations will motivate the physician to prescribe only medically necessary treatment and choose the most cost-effective method of providing care. See Ronald Bronow, *HMO Physicians' Shared Risk Pools Are Dangerous to Patients' Health*, HEALTHSPAN, Jan. 1993, at 9 (describing the conflicting interests of HMO physicians and their patients); McGraw, *supra* note 102, at 1821 (discussing the ethical implications of physicians as caregivers and cost managers). See generally Edmund D. Pellegrino, *Rationing Health Care: The Ethics of Medical Gatekeeping*, 2 J. CONTEMP. HEALTH L. & POL'Y 23 (1986) (discussing the ethical implications of physicians serving their own needs as well as the needs of patients and society).

initial decisions about enrollees' needs for additional medical services receive a direct economic benefit from denying services.<sup>120</sup>

These practices have drastically changed the physician's role. Traditionally, the conflict between health care consumption and cost has been between the patient and her insurer, with doctors generally acting as patient advocates.<sup>121</sup> In contrast, managed health care has reversed the incentives, replacing the tendency for overutilization with economic incentives to physicians to provide less care to patients.<sup>122</sup> Under managed care, physicians cannot escape the potential for conflicts of interest, financial arrangements, and incentives to limit the provision of medical services.<sup>123</sup>

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120. See *Shea v. Esenstein*, 107 F.3d 625, 627 (8th Cir. 1997) (noting that HMOs create incentives designed to minimize referrals to specialists); *supra* note 116 (noting that gatekeepers are paid on a capitated basis or offered more money at the end of a year if costs are held down).

121. "The foundation of the patient-physician relationship is the trust that physicians are dedicated first and foremost to serving the needs of their patients. . . . No other party . . . has the kind of the responsibility that physicians have to advocate for patients. . . ." Council on Ethical and Judicial Affairs, American Medical Association, *Ethical Issues in Managed Care*, 273 JAMA 330, 336-337 (1995).

122. See, e.g., Rand E. Rosenblatt, *Medicaid Primary Care Case Management, the Doctor-Patient Relationship, and the Politics of Privatization*, 36 CASE W. RES. L. REV. 915, 922 (1986) (discussing the incentives that may motivate physician behavior). In 1986, Congress enacted legislation prohibiting HMOs that participate in the Medicare risk-contract program from using financial incentives to induce physicians to limit services. See Omnibus Budget Reconciliation Act of 1986 § 9313(c), 42 U.S.C. § 1320a-7(b) (1994). The managed care industry succeeded three times in having Congress delay the effective date of the prohibition. See RODWIN, *supra* note 84, at 165-66 (discussing legislation). In 1990, on the heels of special interest lobbying, Congress rescinded the law, with one exception, which prohibits HMOs that participate in Medicare programs from issuing specific incentive payments to physicians as inducements to reduce medical care to individual patients. See *id.*; 42 U.S.C. § 1320a-7(b) (regulating incentive payments to physicians). This law became effective in 1992. See *id.*

123. The change in health care delivery has produced an abundance of legal literature concerning the ethical and malpractice implications of cost containment and whether the existing legal and ethical duties of physicians can accommodate the new reimbursement systems. See generally Randall Bovbjerg, *The Medical Malpractice Standard of Care: HMOs and Customary Practice*, 1975 DUKE L.J. 1375 (discussing the application of malpractice law to HMO care); Barry R. Furrow, *The Ethics of Cost Containment: Bureaucratic Medicine and the Doctor as Patient-Advocate*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 187 (1988) [hereinafter Furrow, *Ethics*] (suggesting that pressures to control costs are not always counter to the patient's best interests); Barry R. Furrow, *Medical Malpractice and Cost Containment: Tightening the Screws*, 36 CASE W. RES. L. REV. 985, 1032 (1986) [hereinafter Furrow, *Malpractice*] (stating that ethicists look too narrowly at the dilemmas of choice confronting doctors); see also Mark A. Hall, *Institutional Control of Physician Behavior: Legal Barriers to Health Care Cost Containment*, 137 U. PA. L. REV. 431, 448-49 (1988) (discussing whether a strong degree of professional autonomy is necessary to ensure the quality of health care); Marshall B. Kapp, *Legal and Ethical Implications of Health Care Reimbursement by Diagnosis Related Groups*, 12 L. MED. & HEALTH CARE 245, 252 (1984) ("[L]egal and ethical principles must play a vital role in working out a balance with which we can all live."); Frank H. Marsh, *Health Care Cost Containment and the Duty to Treat*, 6 J. LEGAL MED. 157, 190 (1985) (stating that the changing health care scene will ultimately affect medicine as an institution).



Regardless of the method of cost containment used, however, the physician still holds a position of trust with the patient and has certain fiduciary obligations. The physician continues to have a fiduciary duty to disclose material information necessary to the patient's decisionmaking, including economic conflicts of interest. Analogous to undisclosed kickbacks, the economic incentives an HMO gives to physicians to limit care are considered material information that must be disclosed.<sup>124</sup> This conclusion was recently reached by the Eighth Circuit in *Shea v. Eesensten*,<sup>125</sup> in which it held that an HMO has a fiduciary duty under ERISA to disclose financial incentives to physicians that may influence health care decisions. The court found that, from a patient's perspective, HMO financial incentives "put in place to influence a treating doctor's referral practices . . . [are] certainly a material piece of information. . . . [and] the patient must know whether the advice is influenced by self-serving financial considerations created by the health insurance provider."<sup>126</sup> To a certain extent, patients are aware of an HMO's emphasis on cost containment; however, they are not aware of specific contractual provisions or strong economic pressures that may effect the quality of care.<sup>127</sup> These overt and subtle risk-sharing practices and financial

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124. Certainly, a reasonable patient would want to know about potentially beneficial procedures, financial incentives, and any independent cost-benefit analysis in which the physician is engaging. Failure to disclose the structural incentives misleads the patient regarding the motivations and reasoning behind the physician's decisions. Jurisdictions may differ in determining what a reasonable patient would consider material or may use the professional disclosure standard. See Blumstein, *Legislation*, *supra* note 74, at 1474-75 (discussing the shift from the reasonable doctor to the reasonable patient standard). Even under the professional disclosure standard, however, physicians arguably realize that patients should know about the existence of these contractual provisions. This assertion is, in part, the impetus behind the Health Care Financing Administration's recent letter to managed care plans, prohibiting the use of "gag" clauses, which limit what doctors can tell patients about treatment options, in managed health care plans that contract with Medicare. See WEST'S LEGAL NEWS, *Federal Agency Calls "Gag" Clauses Illegal in Medicare Plans*, 12-12-96 WLN 13286, 1996 WL 710183 (discussing the recent decision of the Health Care Financing Administration); *HCFIA Official Says 'Gag' Clauses in Risk Contract HMO's May Violate Law*, [1996] 4 HEALTH CARE POL'Y REP. (BNA) 1865 (same).

125. 107 F.3d 625 (8th Cir. 1997). The HMO's primary care physician would not authorize a referral to a cardiologist, despite the patient's request to see the specialist and offer to pay for the cardiologist visit himself.

126. *Id.* at 628. While the court found that ERISA preempted plaintiff's state law action against the HMO for nondisclosure of the financial incentives, the court noted that under ERISA, fiduciaries (the HMO) must comply with the common law fiduciary duty of loyalty to the plan participants. See *id.*

127. See *Shea*, 107 F.3d at 627 (noting that patients would not have known their doctors were penalized for making too many referrals and could earn a bonus by skimping on specialized care); see, e.g., CLARK C. HAVIGHURST, *HEALTH CARE CHOICES: PRIVATE CONTRACTS AS INSTRUMENTS OF HEALTH REFORM* 122 (1995) (noting that HMO and physician arrangements are not mentioned in plan-subscriber contracts); see also McGraw, *supra* note 102, at 1836

incentives of managed health care organizations create divided loyalties for the physician between the patient and the health care organization that employs or pays her.<sup>128</sup> Like kickbacks, the incentives force physicians to consider factors for medical care unrelated to, and independent from, the patient's best interests.<sup>129</sup> By not disclosing this material information, physicians breach their fiduciary duty of loyalty to act in their patients' best interests.<sup>130</sup>

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(concluding that the most troubling aspect of these arrangements is their covert nature since most HMO enrollees are unaware of the manner in which their providers are reimbursed).

128. Professor Jacobi correctly notes that, "[a]s if by sleight of hand, [patients] have been deprived of the keystone of their health quality assurance system: their physicians' loyalty." John V. Jacobi, *Patients at a Loss: Protecting Health Care Consumers Through Data Driven Quality Assurance*, 45 KAN. L. REV. 705, 706 (1997). See generally Edmund D. Pellegrino, *Ethics (Of Managed Health Care Plans)*, 271 JAMA 1668 (1994) (noting that under managed health care plans, a physician has divided loyalties to the patient, the needs of all patients, the plan's economic incentives, and her own self interest).

129. These financial incentives have been found to affect physician decisions. See Alan L. Hillman, *Financial Incentives for Physicians in HMOs: Is There a Conflict of Interests?*, 317 NEW ENG. J. MED. 1743, 1747, 1749 (1987); Susan J. Stayn, Note, *Securing Access to Care in Health Maintenance Organizations: Toward a Uniform Model of Grievance and Appeal Procedures*, 94 COLUM. L. REV. 1674, 1680 (1994) (stating that referrals depend not only upon doctors' judgments but upon the HMO's reimbursement structure); Clifford D. Stromberg, *Physician Incentive Plans*, HEALTHSPAN, Aug.-Sept. 1986, at 2 (discussing the likely growth of physician incentive plans and their various dangers). In fact, the whole managed health care system is built upon the ability to force physicians to reduce costs and care. See Jacobi, *supra* note 126, at 724.

130. Thus, to fulfill their fiduciary responsibilities, physicians would be required to inform patients of these incentives. The potential for physician liability is intensified by the fact that the standards governing fiduciary obligations are based on practices and case law developed during the time physicians used the traditional fee-for-service reimbursement method. See Edward B. Hirshfeld, *Should Ethical and Legal Standards for Physicians Be Changed to Accommodate New Models for Rationing Health Care?*, 140 U. PA. L. REV. 1809, 1838 (1992) (citing 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* §§ 166-68 (1981)). The fiduciary duty "prevents the physician from paying excessive attention to the societal interest in conserving resources when caring for a patient." *Id.* See Thomas H. Boyd, *Cost Containment and the Physician's Fiduciary Duty to the Patient*, 39 DEPAUL L. REV. 131 (1989). Some commentators have examined the possibility and need for a new, lower legal standard for physicians in a managed care setting. See Malinowski, *supra* note 108, at 355-57 (advocating the shifting of some legal liability from doctors in managed care systems to the health care managers and HMOs); Pellegrino, *supra* note 65, at 42 (noting with disapproval that the standard of care for physicians may be lowered).

## IV. CRIMINAL LIABILITY FOR PHYSICIAN BREACH OF FIDUCIARY DUTY

A. *Continued Judicial Confusion*

The mail fraud statute is commonly used to prosecute all varieties of fraud, and health care fraud is no exception.<sup>131</sup> Until recently, however, the use of the mail fraud statute in health care was limited to certain fraudulent practices, none of which entailed the breach of a physician's fiduciary duty.<sup>132</sup> Given the recent focus on health care fraud,<sup>133</sup> the application of the "honest services" mail fraud statute to physician referral and kickback schemes was inevitable, particularly since these schemes take place within clear fiduciary relationships, inherently present an economic conflict of interest, and are similar to kickback schemes in other prosecuted areas.<sup>134</sup> Indeed, two recent cases with contradictory holdings directly address the application of the mail fraud statute in the physician-patient relationship.

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131. The first cases of mail fraud prosecution in health care date back to the turn of the century. See *Hibbard v. United States*, 172 F. 66 (7th Cir. 1909) (upholding the conviction of defendant for using the mail to advertise and represent himself as part of an eminent medical institution); *United States v. Smith*, 222 F. 165 (E.D. Pa. 1915) (upholding the conviction of a person who used the mails to represent himself as a physician). See also Pamela H. Bucy, *Crimes by Health Care Providers*, 1996 U. ILL. L. REV. 589, 602-06 (discussing use of the mail fraud statute in prosecutions against health care providers); Bucy, *supra* note 89, at 895 (comparing fraud by health care providers with other types of white collar crime); Kristine DeBry et al., *Health Care Fraud*, 33 AM. CRIM. L. REV. 815, 823 (1996) (discussing mail and wire fraud statutes as one means to prosecute health care fraud).

132. The mail fraud statute has been used to prosecute a variety of fraudulent health care schemes, including: services not performed, *United States v. Siddiqi*, 959 F.2d 1167, 1170 (2d Cir. 1992); false descriptions of services that were performed, *United States v. Laughlin*, 26 F.3d 1523, 1529 n.9 (10th Cir. 1994); false representations that medical services were necessary, *United States v. Campbell*, 845 F.2d 1374, 1382 (6th Cir. 1988); and billing for services performed unprofessionally, *United States v. Talbott*, 590 F.2d 192, 195 (6th Cir. 1978).

133. The Department of Justice has designated health care fraud as its number two priority, behind terrorism. See *Federal Officials Using Unconventional Laws to Fight Health Care Fraud, Abuse*, HEALTH CARE DAILY (BNA) (May 2, 1996). A tremendous amount of attention is now being paid to what was once considered a greed-based, white-collar crime. Local United States Attorneys' Offices have been encouraged to establish working groups and task forces to coordinate the effort to combat health care fraud. See *id.* In addition, United States Attorneys and local FBI field offices have assigned as many as 25% of the attorneys and agents to health care fraud. See *id.*; see also Bucy, *supra* note 131 at 591 n.10 (discussing the federal personnel devoted to fighting health care fraud).

134. Just as the mail fraud statute has not been limited in other areas, the same inability to confine the statute will likely occur in health care fraud.

1. *United States v. Jain*

In *United States v. Jain*,<sup>135</sup> the Eighth Circuit Court of Appeals reversed the lower court's honest services mail fraud conviction of a psychologist who had received kickbacks for patient referrals to a hospital.<sup>136</sup> The defendant, a psychologist in private practice who operated an outpatient clinic, received payments totaling \$45,500 from a hospital for alleged marketing activities that the defendant had conducted on the hospital's behalf.<sup>137</sup> The defendant, however, was not publicly identified as an agent of the hospital and the payments were not disclosed.<sup>138</sup> Though the government had strong evidence of a patient referral kickback scheme, it had no evidence of tangible harm to the defendant's patients.<sup>139</sup>

The district court upheld the defendant's mail fraud convictions, concluding that "the jury was entitled to conclude not only that referral fees were received but that their solicitation and receipt was pursuant to a plan to create a conflict of interest, thus depriving patients of the 'intangible rights to honest services,' even though tangible losses cannot be established."<sup>140</sup> Noting that the government did not contend that any patients were inappropriately referred, the district court commented that the patients were entitled to receive professional advice "untainted by selfish interests."<sup>141</sup>

The Court of Appeals, however, rejected the district court's line of reasoning and reversed the defendant's mail fraud conviction.<sup>142</sup> The court expressed reluctance to apply the honest services mail fraud statute in the private sector absent evidence of some actual tangible harm.<sup>143</sup> By requiring proof of actual tangible harm,

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135. 93 F.3d 436 (8th Cir. 1996).

136. The court, however, sustained the defendant's conviction for violation of the federal Medicare & Medicaid anti-kickback statute. *See id.* at 436.

137. *See id.* at 439.

138. *See id.*

139. Witnesses testified that the hospital was probably the best acute-care psychiatric hospital in the region. In addition, no witnesses claimed that any patient received unnecessary care or excessive hospitalization. *See id.*

140. *United States v. Jain*, No. 94-00087-1, 1995 WL 9301, at \*3 (W.D. Mo. Jan. 9, 1995).

141. *Id.* Finding that the referral system posed more potential harm to patients than actual harm, the court likened kickbacks to bribery and held that beginning in 1988, bribery would be a per se violation of the mail fraud statute. *See id.* at \*2 (*citing United States v. Mittelstaedt*, 31 F.3d 1208, 1220 (2d Cir. 1984)).

142. *Jain*, 93 F.3d at 439-42.

143. The court stated:

[T]he transition from public to private sector in this context raises troublesome issues. . . . [I]n the private sector, most relationships are limited to more concrete matters. When there is no tangible harm to the victim of a private scheme, it is hard to

however, the court implicitly rejected the very foundation and purpose of the statute. Under honest services mail fraud, tangible harm is not a factor since the purpose of the fraud is not the deprivation of money or other tangible interests, but the beneficiary's *intangible right to honest services*.<sup>144</sup> The court's conclusion is particularly troubling in the physician-patient context because the patient generally does not directly pay for the services, so minimal potential exists for economic or tangible harm to the patient.<sup>145</sup> Also, since mail fraud is an inchoate crime, the scheme to defraud need not have been successful or complete. Therefore, the statute itself does not require the victim to have been injured.<sup>146</sup>

The circuit court's discussion of fraudulent intent is also puzzling. Noting that the "essence of a scheme to defraud is an intent to harm the victim,"<sup>147</sup> the court held that the government failed to prove that the defendant contemplated some actual harm or injury.<sup>148</sup> As a result of the absence of actual tangible harm, the court required the government to establish the defendant's fraudulent intent independent of the alleged scheme.<sup>149</sup> In other words, the court found that the

discern what intangible "rights" have been violated. . . . Thus, prior intangible rights convictions involving private sector relationships have almost invariably included proof of actual harm to the victims' tangible interests.

*Id.* at 441-42. This court is the only one to draw such a distinction. *See supra* note 34 (discussing application of the mail fraud statute to the private sphere).

144. *See* Part II.B (listing judicial decisions and discussing the intangible right to honest services).

145. In a fee-for-services system, a third-party insurance company pays the bills. Arguably, the patient suffers economic or tangible monetary harm because the patient ultimately pays the bills through premiums. *See* Schwartz, *supra* note 108, at 1358 (discussing the structure of the fee-for-service system).

In the employment setting, however, an employee's breach of fiduciary duty by accepting kickbacks deprives the employer of her honest services *and* has the potential to deprive the employer of money, for example, by precluding the employer from bargaining for a price less than the kickback. The kickback may be evidence that the vendor was willing to accept a reduced price.

146. *See supra* note 25 and accompanying text (discussing the implications of mail fraud as an inchoate crime).

147. *Jain*, 93 F.3d at 442.

148. The court stated that:

[A]ll the evidence suggests that [the defendant] intended to provide and did in fact provide his patients with the highest quality psychological services. While he also extracted undisclosed, unethical referral fees from an interested third party provider, there is no independent evidence proving that he thereby intended to defraud his patients.

*Id.*

149. *See id.* at 442 (quoting *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994)). The court, however, failed to include the first half of the sentence in *D'Amato*, *see id.* at 442, which indicated that a kickback scheme can serve as evidence of a scheme to defraud even absent actual harm. *See D'Amato*, 39 F.3d at 1257.

kickback scheme itself was not proof of a scheme to defraud.<sup>150</sup> The precedent that the court used to support such a finding is misplaced, however, because the single case cited was not an intangible right to honest services case, but a "tangible" mail fraud case under section 1341.<sup>151</sup> Moreover, the court's interpretation of the case ignores explicit language clearly indicating that a kickback scheme can serve as evidence of intent to defraud when the "necessary result" of a scheme to defraud is to cause injury.<sup>152</sup> The necessary result of any kickback scheme in an ongoing fiduciary relationship is to deprive the victim of her intangible right to honest services. This type of harm is all that is required under the statute.<sup>153</sup>

The court correctly noted that the nondisclosure would need to be material to constitute a scheme to defraud.<sup>154</sup> Acknowledging that the defendant failed to disclose the referral fees to the patients, the court found that this nondisclosure was not a scheme to defraud because, so long as the defendant's relationship with the hospital did not affect the quality or cost of a patient's services, the patient would not consider the information material.<sup>155</sup> In reaching this conclusion, however, the court glossed over the real harm that could result from the undisclosed kickback scheme and failed to give more than a cursory examination of what is material information to a patient.<sup>156</sup>

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150. The court's conclusion may also be interpreted to mean simply that the government, in this case, did not produce sufficient evidence of deception and concealment to find fraudulent intent. The defendant argued as much in his brief before the Eighth Circuit Court of Appeals, which stated:

The government could have put on evidence that a patient felt cheated or would have made a different decision had the patient known that Dr. Jain received fees from the hospital. There were any number of different approaches the government could have tried to use to show harm or intent to harm patients on the part of Dr. Jain.

Reply Brief of Appellants and Cross Appellees at 8-9, *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996) (No. 95-2820).

151. The two theories pursued in the case were "a right to control" theory, which is predicated on a showing that some person or entity has been deprived of potentially valuable economic information, and a "false pretense" theory. *D'Amato*, 39 F.3d at 1249.

152. The *D'Amato* court stated:

[D]eception must be coupled with a contemplated harm to the victim. In many cases, this requirement poses no additional obstacle for the government. When the "necessary result" of the actors's scheme is to injure others, fraudulent intent may be inferred from the scheme itself. . . . Where the scheme does not cause injury to the alleged victim as its necessary result, the government must produce evidence independent of the alleged scheme to show the defendant's fraudulent intent.

*Id.* at 1257 (emphasis added).

153. See Part II.B for judicial decisions that have relied on kickbacks for both the breach of fiduciary duty and the scheme to defraud.

154. See *Jain*, 93 F.3d at 442.

155. See *id.*

156. In fact, a discussion of the fiduciary relationship between the defendant and his patients was completely lacking.

In fact, the defendant even admitted that receiving kickbacks would be "unjustifiable" and "wrongful" as a matter of professional ethics.<sup>157</sup> One may wonder how a reasonable patient or physician could think that a physician's secret scheme to profit personally from patient referrals and unethical practices at the expense of the patient's welfare would not be material. A kickback scheme that affects a physician's professional medical judgment and is inimical to the welfare of the patient is material information that should be disclosed.<sup>158</sup>

## 2. *United States v. Neufeld*

In the second case to address the application of the mail fraud statute in the physician-patient relationship, *United States v. Neufeld*,<sup>159</sup> the court reached quite a different conclusion regarding the propriety of applying the intangible right to honest services to a physician kickback scheme.<sup>160</sup> The defendant, an osteopathic physician who focused his practice on HIV-positive patients, entered into consulting contracts with Caremark, a home infusion company, to serve as a consultant and to assist in the development of treatment and educational programs for its staff and patients.<sup>161</sup> The payments he received pursuant to these agreements served as the basis for the mail fraud charges brought by the government.<sup>162</sup> In rejecting the defendant's motion to dismiss the indictment, the court focused on the nature of the fiduciary duty owed to the patients by the defendant.<sup>163</sup> The court concluded that his patients "deserved medical opinions and referrals unsullied by mixed motives"<sup>164</sup> and that the alleged kickback scheme would be a breach of the physician's fiduciary duty.<sup>165</sup> While

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157. *United States v. Jain*, No. 94-00087-1, 1995 WL 9301, at \*5 (W.D. Mo. Jan. 9, 1995).

158. *See supra* Part III.A (discussing the physician-patient fiduciary relationship).

159. 908 F. Supp. 491 (S.D. Ohio 1995).

160. The court considered the defendant's motion to dismiss and held that the allegations of deceptive conduct were sufficient to withstand the motion. *See id.* at 501. The court, however, dismissed mail fraud claims based on harm to the United States Department of Health and Human Services and the Ohio Department of Human Services, because no fiduciary relationship existed between those parties and the defendant. *See id.* at 500.

No definitive statement from the district court has been forthcoming. In December 1996, the court vacated the jury's conviction on the basis of prejudicial error. As of October 1997 the case was still in the appellate stages. The government is alleging mail fraud and Medicare/Medicaid anti-kickback statute violations. *See United States v. Neufeld*, No. CR-2-94-144, 1996 WL 732071, at \*1 (S.D. Ohio Dec. 17, 1996).

161. *See Neufeld*, 908 F. Supp. at 493.

162. As in *Jain*, the government also brought charges against defendant alleging violation of the Medicare/Medicaid anti-kickback law. *See id.*

163. *See id.* at 500.

164. *See id.*

165. *See id.*

no proof of actual harm existed, the court found that the kickbacks could have affected the defendant's medical decisions, which could potentially harm his patients.<sup>166</sup> Citing with approval the district court's opinion in *Jain*, the court found that a breach of the physician's fiduciary duty to his patients supported a theory of fraudulent deprivation of the patient's intangible right to honest services.<sup>167</sup> Significantly, the court stated that the alleged kickbacks were sufficient evidence of deception required under the scheme to defraud, even given the absence of proof that any patient was hospitalized inappropriately.<sup>168</sup> According to the court, the kickbacks were equivalent to bribes, and as violations of the defendant's fiduciary duty, were a per se violation of the mail fraud statute.<sup>169</sup>

### 3. Other Court Decisions

Several other courts have recently discussed physician kickbacks or referral schemes without reaching the merits of the issue. In *North Shore Medical Center v. Evanston Hospital*,<sup>170</sup> the plaintiff, a competing hospital, brought a civil RICO action against another hospital, alleging the predicate act of mail fraud.<sup>171</sup> The mail fraud allegation consisted of the defendant's scheme of offering and paying remuneration to physicians to induce them to refer Medicare patients to the hospital.<sup>172</sup> The court held that the plaintiff could establish mail fraud by alleging that the *patients* of the doctors who were participating in the referral schemes were the victims of the fraud.<sup>173</sup> The court, citing *Jain* and *Neufeld*, noted that while the hospital was only deprived of a business opportunity, the alleged fraudulent scheme

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166. *See id.* at 496. The court stated that it was "reluctant to recognize as 'harmless' an activity for which a physician may be disciplined in Ohio and criminally prosecuted in other states." *Id.* The court found that because "an intangible rights theory of mail fraud by its very nature, implicates a deception of something other than money or property," the doctor need not personally gain from the victims to be guilty under the statute. *Id.* at 500-01.

167. *See id.* at 501-02.

168. *See id.* "While the characterization of a scheme to solicit referral fees as mail fraud may be novel, it does not fall outside the boundaries of the mail fraud statute." *Id.*

169. The court stated that "these alleged referral fees were essentially bribes and . . . a per se violation of the mail fraud statute." *Id.* (citation omitted).

170. No. 92-C-6533, 1996 WL 435192 (N.D. Ill. July 31, 1996). The court found that the evidence of fraud was insufficient to deny a motion to dismiss.

171. *See id.* at \*4.

172. *See North Shore Med. Ctr. v. Evanston Hosp. Corp.*, No. 92C6533, 1995 WL 723761, at \*2 (N.D. Ill. Dec. 5, 1995).

173. *See id.* at \*5. The court was in agreement with a recent Seventh Circuit case, *Israel Travel Advisory Serv. v. Israel Identity Tours*, 61 F.3d 1250, 1258 (7th Cir. 1995).



would deprive the patients of their intangible right to honest services protected under § 1346.<sup>174</sup>

Under similar facts, the court in *Lancaster Community Hospital v. Antelope Valley Hospital District*<sup>175</sup> examined a hospital's predicate mail fraud claim for civil RICO against a competing hospital.<sup>176</sup> Unlike the court in *North Shore Medical Center*, the court here found that the victim of the fraudulent scheme was not the patients, but the competing hospital, which was merely deprived of a business opportunity not recognized under the mail fraud statute.<sup>177</sup>

### *B. Implications of an Expansive Intangible Right to Honest Services*

As illustrated by the recent cases of *Jain* and *Neufeld*, federal prosecutors are beginning to make use of the honest services mail fraud statute to prosecute physician breaches of fiduciary duty. The future success of this theory, however, depends upon the recognition of the concepts advanced in Part III, namely, that a physician's undisclosed acceptance of money or other remuneration for referrals (a kickback scheme) is information material to a patient's decision-making process, either under a reasonable patient standard or the traditional professional standard, and therefore is a breach of the physician's fiduciary duty.<sup>178</sup> Also, when a physician accepts an undisclosed kickback, she is not acting in the best interests of the patient and, thus, breaches her fiduciary duty of loyalty to the patient.<sup>179</sup> This breach of the duty of loyalty would be considered material information. Once these aspects of the physician-patient relationship are accepted, a physician's undisclosed kickback scheme falls squarely within the purview of the statute.

Applying the above concepts to a typical honest services mail fraud conviction,<sup>180</sup> a physician's nondisclosure of a kickback or other

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174. *North Shore Med. Ctr.*, 1996 WL 435192, at \*5. Section 1346, however, does not provide a private cause of action for patients to seek a remedy. Also, the court assumed without discussion that the alleged activity would be a violation of § 1346. *See id.*

175. 940 F.2d 397 (9th Cir. 1991).

176. *See id.* at 404.

177. *See id.* at 406. Interestingly, one state court recently held that physicians who were offered kickbacks for referrals were public officials for purposes of the federal bribery statute. *See Pharmacare v. Caremark*, 965 F. Supp. 1411 (D. Haw. 1996).

178. *See supra* notes 74-94 and accompanying text for a discussion of undisclosed kickbacks under the material information standard.

179. *See supra* notes 95-101 and accompanying text (discussing undisclosed kickbacks as a breach of duty of loyalty).

180. As discussed earlier, a violation of the statute typically occurs when a fiduciary breaches her fiduciary duty by not disclosing material information, such as a kickback or a conflict of interest, to the victim. *See supra* notes 29-37 and accompanying text. Evidence of the

conflict of interest results in a breach of her fiduciary duty. This non-disclosure of material information also provides the necessary evidence to establish a scheme to defraud and an intent to defraud. Significantly, a physician's disclosure of the kickback scheme to the patient would be sufficient to preclude a violation of the statute.<sup>181</sup> Once disclosed, the kickback scheme cannot be considered a scheme to defraud since no deception or intent to deceive exists.<sup>182</sup>

With the national shift toward managed health care, prosecutors may only be a short step away from using the honest services mail fraud statute to prosecute physician fiduciary breaches occurring in capitation-based managed care organizations. The success of this theory depends upon the acceptance of two factors discussed in Part III. The first is that a managed care organization's financial incentives for physicians to provide less care are information material to a patient's decisionmaking, either under a reasonable patient standard or the traditional professional standard. Nondisclosure of these incentives results in the physician's breach of fiduciary duty.<sup>183</sup> In addition, these financial incentives create divided loyalties for the physician. By not disclosing these incentives, she is not acting in the patient's best interest, and thus, breaches her fiduciary duty of loyalty to the patient. This breach would be considered material information to the patient.<sup>184</sup> The scheme and intent to defraud are found in the nondisclosure of material information. While commentators have discussed the serious ethical and fiduciary problems that physicians face in managed care, perhaps they have overlooked the potential for criminal liability under the honest services mail fraud statute.

One explanation for the delay in bringing honest services mail fraud prosecutions in the health care arena may be a lack of both judicial and legislative precedent defining a physician's fiduciary obligations to disclose or prevent economic conflicts of interest.<sup>185</sup>

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scheme to defraud and the intent to defraud generally come from the actions that comprise the breach of fiduciary duty, namely, the nondisclosure of material information. See discussion *supra* Part II.B.

181. A kickback scheme may still result in a breach of the physician's fiduciary duty if the kickback scheme is not in the patient's best interest.

182. Fraud on the insurance company is still present, but no fiduciary relationship exists between these parties.

183. See *supra* notes 124-30 and accompanying text (discussing physicians' fiduciary obligations under managed care systems).

184. See *supra* notes 124-30 and accompanying text (discussing HMO cost-containment policies as material information).

185. See *supra* note 103 and accompanying text (discussing the paucity of precedent relating to the physician-patient relationship as a fiduciary relationship).

Courts may be reluctant to impose fiduciary duties that have not already been carefully defined through the rather amorphous federal mail fraud statute. This explanation, however, belies the history and purpose of the statute, as it has played a prominent role in the prosecution of fraudulent schemes.<sup>186</sup> Since the breach of fiduciary duty and fraud perpetrated by the physician give rise to a civil action for breach of fiduciary duty or lack of informed consent, the propriety of applying a federal mail fraud statute to cover the same conduct may be questioned.<sup>187</sup> One response is that a federal mail fraud statute can be more effectively enforced. The common law of fraud and breach of fiduciary duty provide an effective remedy only to the extent that the defrauded party is willing and able to bring suit. In many cases, however, the actual harm to the patient is minimal and the costs associated with prosecution are high. Moreover, since a kickback scheme is an undisclosed breach of fiduciary duty that is not readily discoverable, the patient may never become aware of it. Since both the possibility that a patient will prosecute a claim and the incentive for doing so may be relatively small, the likelihood that the fraud will go unpunished increases.<sup>188</sup>

Importantly, the mail fraud statute does not contain a private right of action.<sup>189</sup> Instead, federal prosecutors with wide discretion

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186. Chief Justice Burger's description of the statute as a stop-gap device that would permit prosecution of newly-conceived frauds until Congress enacted particularized legislation is illustrative of its prominent role. See *United States v. Maze*, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting).

187. Informed consent is largely a negligence concept. Patients must establish the elements of negligence, including proximate cause and injury, to succeed in a claim for breach of informed consent. For a claim of common law breach of fiduciary duty, the plaintiff must show proximate cause and harm. See Schuck, *supra* note 74, at 925 ("Under [the informed consent] doctrine, the only kind of injury that can constitute a compensable harm is an adverse medical outcome."); see also *Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir. 1972) (stating that the nondisclosure must be harmful to the patient to be actionable). This standard is higher than that under the mail fraud statute, since the statute does not require harm or injury. Professor Coffee notes that the "focus on the deprivation of a victim's right to loyal and faithful service from the fiduciary, significantly expands the [mail fraud statute] by downgrading the historic role of causation." Coffee, *supra* note 23, at 125 n.40.

188. See Rodwin, *supra* note 63, at 246 ("[P]atients are usually in a poor position to monitor physicians, to second-guess their judgment, or to discover and sanction breaches of trust."); see also Langevoort, *supra* note 30, at 1264 n.69 (noting that the mail fraud statute may act as a common law supplement since mail fraud usually concerns deceiving many people and the single federal action may act as a substitute for the numerous private suits that could be brought).

189. See Williams, *supra* note 28, at 146. Private plaintiffs may bring a civil RICO action with at least two violations of the mail fraud statute serving as the necessary predicate acts. See *McDonald v. Schenker*, 18 F.3d 491, 494 (7th Cir. 1994). Civil RICO, however, requires some financial loss to the victim. See *Steele v. Hospital Corp. of America*, 36 F.3d 69, 70 (9th Cir. 1994). Courts have found that because the party's insurance directly pays the physician's bill, the financial loss requirement is not met. See *id.*

are responsible for enforcing the statute.<sup>190</sup> The use of "honest services" mail fraud to combat physician kickbacks could be an important tool. As in other areas of health care fraud, a federal prosecutor could use the statute either as a fall-back when no other statute specifically addresses the conduct or as an "insurance" count in plea bargaining.<sup>191</sup> Significantly, current federal anti-kickback legislation only covers services under federally funded programs such as Medicare and Medicaid.<sup>192</sup> The honest services mail fraud statute could fill an important gap, reaching kickback schemes concerning services that were provided under non-governmental programs.<sup>193</sup> Critics of the expansion of the intangible right to honest services to health care may contend, however, that application of the statute comes at the expense of federal legislation specifically aimed at prohibiting kickbacks. Without an anchoring principle, prosecutions for violations of the intangible right to honest services could potentially override federal legislation designed to regulate the activities in question.<sup>194</sup> Critics may also argue that the mail fraud statute would impose criminal liability for a breach of a fiduciary duty, which Congress may have intended to leave unencumbered by the threat of criminal prosecution.<sup>195</sup>

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190. See Williams, *supra* note 28, at 146 (noting that the United States Attorney's Manual provides a "woeful lack of direction," and "U.S. Attorneys or their assistants decide largely on their own what improper practices warrant federal prosecution").

191. See Hurson, *supra* note 10, at 435 ("It has become standard practice for federal prosecutors to tack on mail fraud charges as 'insurance' counts, even when the facts of a case call for application of a different federal criminal statute."); Williams, *supra* note 84, at 304 ("The mail fraud statute, like the conspiracy statute, is a favorite catchall statute that prosecutors fall back on when no other statute specifically addresses the behavior in question.").

192. See *supra* note 89 and accompanying text.

193. In fact, the statute may be the only way to reach such harmful activity. See *supra* note 189 and accompanying text (discussing difficulties involved in bringing private suits for this kind of fraud).

194. The anti-kickback legislation and the mail fraud statute, while perhaps prohibiting similar activity, have distinct rationales and ideas driving their implementation. The anti-kickback statute seeks to address cost concerns, whereas the mail fraud statute seeks to protect a patient from deprivation of her physician's honest services. Also, if a physician discloses the kickback to the patient, she would be liable under the anti-kickback statute but not under the mail fraud statute.

195. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 202 (1991) ("The federal mail and wire fraud statutes supply the most obvious example of the criminal law being overlaid on civil law standards."); Coffee, *supra* note 23, at 166 ("[T]he pace of change in the federal criminal law of fraud has been so rapid over the last decade as to resemble not evolution but mutation."). Also, critics may claim that a scheme to defraud regarding intangible rights is a potential issue in almost every health care fraud case, because health care providers presumably deprive patients of their rights to honest and faithful services whenever the provider acts fraudulently, such as engaging in false billing practices. *But see* United States v. Kensington Hosp., 760 F. Supp. 1120, 1130 (E.D. Pa. 1991) (finding that the caselaw is unclear

## V. CONCLUSION

Undisclosed physician kickback schemes closely resemble kickback schemes in other fiduciary relationships that have been successfully prosecuted under the "honest services" mail fraud statute.<sup>196</sup> A physician's fiduciary duty to disclose material information to the patient and to act in the best interests of the patient may require the physician to disclose a kickback scheme or other economic conflict of interest. Thus, not surprisingly, prosecutors and courts are becoming receptive to the use of the mail fraud statute to prosecute physician kickback schemes. Consequently, the statute's uncertainties and its ambiguous nature will play themselves out in the area of physician-patient fiduciary relationships. The mail fraud statute's lack of clarity and potentially limitless reach in criminalizing undisclosed fiduciary breaches will continue to result in cases such as *Jain* and *Neufeld*, which concerned similar physician conduct, yet gave rise to different results. Although the mail fraud statute currently has little to do with protection of the mails, it can provide an important tool for a federal prosecutor in prosecuting health care fraud and protecting patients from a physician's harmful breach of fiduciary duty. While little case law exists that discusses honest services mail fraud in the context of the physician-patient fiduciary relationship, the statute should, and will, be used more frequently in the near future.

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regarding whether the physician's fiduciary obligations create a fiduciary obligation as to billing practices).

196. See *supra* Part II for kickback schemes prosecuted under the honest services mail fraud statute.

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