



Jan. 31, 2017

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Why Your Compliance Efforts May Be Worthless

It's a riddle almost as inscrutable as that of the Sphinx: How can a physician or pharmacist or facility owner be convicted of a federal crime for violating a state law?

The answer is, unfortunately, quite simple, quite questionable, and quite dangerous. It turns what many think about federal healthcare law compliance on its head.

It signals that many compliance efforts and, probably, most attempts to skirt the bounds of federal law, have been in vain and must immediately be reinvestigated, re-planned, and, in many cases, retired.

Context

To put things into context, let's use the concept of a kickback and the federal Anti-Kickback Statute to frame the discussion.

In everyday terms, the AKS prohibits remuneration, that is, the transfer of anything of value for referrals of federal health care program patients. The affected programs include Medicare, Medicaid, TRICARE, and about a dozen others.

The AKS is a criminal statute. Violation can lead to fines and prison time. There are physicians and hospital administrators doing time in the federal penitentiary right now.

Carveouts

Many physicians, healthcare business owners, and facilities have turned to what they think is a solution, the so-called "carveout" to avoid federal scrutiny. In large part, that's because they saw their state's law, and sometimes their state's enforcement of state law, as either permissive or lacking in "teeth."

As a result, they structure deals in which no federal healthcare program patients are treated or served. For example, a pharmacy deal in which only commercially insured patients are the customers. They believe that any issue of remuneration to referral sources, or of remuneration demanded from referral recipients, is outside of federal scrutiny.

Or, they structure deals in which all sorts of patients are treated but in which payments that might be challenged as remuneration are limited to being in respect of non-federal patients only. For example, a deal in which an ASC charges the anesthesiologists a management fee only in connection with commercially insured patients. (Note that this sort of carveout has never been viewed as valid by the OIG, but those planning this type of deal have turned a blind eye to that fact.)

Carveouts Carved Out

Despite these "best efforts" (yes, that's meant to be tongue-in-cheek), federal prosecutors are demonstrating a willingness to charge healthcare providers with federal crimes related to underlying state law violations, including those in respect of state laws that have nothing in particular to do with healthcare fraud and abuse.

For instance, in a current case, prosecutors obtained an indictment under the Travel Act, a law that can be used to "federalize" underlying state law violations.

In pertinent part, the Travel Act makes it a crime to use the mail or any facility in interstate commerce (e.g., email, the phone) with the intent to further any "unlawful activity." Unlawful activity is defined to include, among other things, bribery in violation of the laws of the State in which committed.

Depending how a particular state law defines bribery, conduct in a carved out healthcare deal can (and actually has) trigger federal prosecution under the Travel Act.

The Bottom Line For You

For a variety of reasons, not the least of which is that the federal government collects huge multiples in settlements and fines for every dollar put into investigating and prosecuting physicians and others for healthcare related crimes, physicians, other providers, and facilities now have targets painted on their backs.

Deal planning, deal vetting, and ongoing compliance efforts that consider only federal healthcare laws, or only federal and state healthcare laws, are no longer sufficient.

Getting paid and staying out of jail now requires careful scrutiny of conduct against a filter of a wide range of federal and state laws that transcend application to any one industry, from statutes relating to commercial bribery, wire and mail fraud, to, as mentioned above, the Travel Act.



NEW BOOK OFFER

The Impending Death of Hospitals



COMPLIMENTARY BOOK DOWNLOAD

Having fallen for the fallacy that there's profit in market share, hospitals have gorged on acquisitions and on employment and alignment of physicians. But it's becoming evident that physician employment leads to losses and that integrated care delivers neither better care nor lower costs. And now, technology is about to moot many of the reasons for a hospital's existence. How can your practice survive and even thrive in the post-hospital world?

The Impending Death of Hospitals is available for download below.

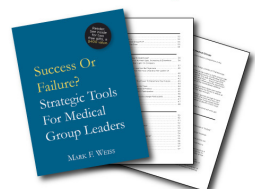
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Wisdom. Applied. 97 - Why Your Price Has Nothing To Do With Cost

We all place a different value on what we receive, and we're willing to pay a comparable price. It has nothing to do with the cost to the producer or provider.

Success Or Failure? Strategic Tools For Medical Group Leaders



COMPLIMENTARY BOOK DOWNLOAD

Today's medical groups must confront multiple challenges, including the impact of Obamacare. Increasing commoditization. More competition, not just from other physicians and medical professionals, but also from hospitals, investor-owned groups and also

All Things Personal

Value isn't putting an check in a box, either physically or virtually, to indicate that you did such and such.

Despite what anyone tells you (or tries to sell you), value is determined by the buyer. It's the excess of what the buyer believe he receives over the price the buyer pays.

And, because value is determined by the buyer, different buyers have different concepts of what it is. Like two twins, 50-50 business partners, each making \$500,000, one of whom buys a Mercedes and and the other of whom buys a Mazda rather than waste her money.

Sometimes sellers try to fake the perception of value. Like the Post Office with its tracking feature for Priority Mail designed to compete with FedEx.

You can ship an envelope Priority Mail from, say, Columbus to Kansas City for about \$6.50. Sounds cheap compared to FedEx's price of around \$21.00 (for 2 day delivery), doesn't it? Both can be tracked. But that's where the perception ends.

Here's the tracking info for a recent Priority Mail package sent by one of our vendors in Santa Barbara to our Dallas office:

DATE & TIME	STATUS OF ITEM	LOCATION
January 9, 2017 , 9:20 am	Delivered, In/At Mailbox	DALLAS, TX 75202
Your item was delivered in or at the mailbox at 9:20 am on January 9, 2017 in DALLAS, TX 75202.		
January 9, 2017 , 4:40 am	Departed USPS Facility	DALLAS, TX 75260
January 8, 2017 , 1:51 pm	Arrived at USPS Destination Facility	DALLAS, TX 75260
January 7, 2017 , 11:57 am	Arrived at USPS Facility	DALLAS, TX 75398
January 6, 2017 , 4:58 am	Arrived at USPS Facility	LOS ANGELES, CA 90009
January 6, 2017 , 3:50 am	Departed USPS Facility	SANTA CLARITA, CA 91383
January 6, 2017 , 12:26 am	Arrived at USPS Facility	SANTA CLARITA, CA 91383
January 5, 2017 , 10:43 pm	Departed USPS Facility	GOLETA, CA 93199
January 5, 2017 , 9:39 pm	Arrived at USPS Origin Facility	GOLETA, CA 93199
January 5, 2017 , 4:51 pm	Acceptance	SANTA BARBARA, CA 93108
January 2, 2017 , 4:35 am	In Transit to Destination	
January 2, 2017 , 3:04 am	Departed USPS Facility	NORTH TEXAS PROCESSING AND DISTRIBUTION CENTER
December 31, 2016 , 4:35 pm	Arrived at USPS Destination Facility	NORTH TEXAS PROCESSING AND DISTRIBUTION CENTER
December 5, 2016 , 8:13 pm	Notice Left (No Secure Location Available)	DALLAS, TX 75202
December 5, 2016 , 10:33 am	Out for Delivery	DALLAS, TX 75202
December 5, 2016 , 10:31 am	Sorting Complete	DALLAS, TX 75202
December 5, 2016 , 8:33 am	Arrived at Post Office	DALLAS, TX 75201
December 5, 2016 , 3:02 am	In Transit to Destination	
December 4, 2016 , 6:15 am	Departed USPS Facility	DALLAS, TX 75260
December 4, 2016 , 3:02 am	Arrived at USPS Destination Facility	DALLAS, TX 75260
December 2, 2016 , 8:56 pm	In Transit to Destination	
December 2, 2016 , 12:42 am	Departed USPS Facility	GOLETA, CA 93199
December 1, 2016 , 8:56 pm	Arrived at USPS Origin Facility	GOLETA, CA 93199
December 1, 2016 , 4:38 pm	Acceptance	SANTA BARBARA, CA 93150
December 1, 2016 , 12:38 pm	Shipping Label Created, USPS Awaiting Item	SANTA BARBARA, CA 93108

Yes, we could track it all the way, as the package circled back and forth for 39 days.

You see, it's one thing to track (just like it's one thing to check the box for MACRA), while it's completely something else to actually deliver the package in a timely fashion, which is the element that matters (tracking plus speed of delivery), the value that a shipper is paying for.

If shipping isn't a commodity (first class mail at 47 cents; Priority Mail at \$6.50; FedEx at \$21.00) why do so many believe the lie that medical care is one?

And, for those who understand that what they're selling isn't a commodity, note that various price points can be used to denote various value propositions to your patients/customers/clients, just as airlines segment the market with offerings from first class to basic economy.

Recently Published Blog Posts

Monday, January 30

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[Avoid The Clenching Tentacles of Compliance](#)

Monday, January 23

[How To Avoid The Second Biggest Mistake Medical Group Leaders Make](#)

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disruptive ventures. Yet at the same time, the future of healthcare offers medical groups tremendous opportunity.

This small book is a collection of essays, of thoughts as tools for your success. Read. Think. Succeed. Repeat.

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Hospital-Based Medical Group Mergers, Acquisitions & Alternatives



COMPLIMENTARY BOOK DOWNLOAD

Some days, it seems as if everyone, from anesthesia or vascular surgery practices, is talking about selling their larger group, to private equity investors, or to a hospital.

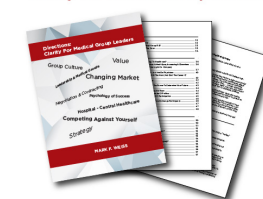
The reality is that some practices can be sold, some can't, and some have nothing to sell.

The reality also is that there are a number of strategic a practice sale.

A perfect storm of factors is accelerating the market for based medical group mergers and acquisitions.

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Directions: Clarity For Medical Group Leaders



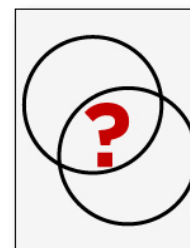
COMPLIMENTARY BOOK DOWNLOAD

The healthcare market is changing rapidly, bringing new problems.

How can you find a solution, how can you engage in the development of strategy, and how can you to plan your group's, future without tools to help clarify your think

Directions is a collection of thoughts as thinking tools, to instruct, inform, and even more so, cause you to give instruct and inform yourself.

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Recent Interviews and Published Articles

Mark was quoted in the article **ASC Regulatory Areas That Developers Need To Pay Attention To** published on The Ambulatory M&A Advisor. Read [here](#).

Mark's article **OIG Advisory Opinion Secrets and Strategy** published in the Summer 2016 volume of Communique. Read [here](#).

Finders keepers, losers weepers. Except in connection with overpayments from Medicare, then it's a violation of False Claims Act leading to significant liability, that is, to repay the overpaid sum within 60 days. **CMS Resets the Clock for Return Of Medicare Overpayments**, was published on AnesthesiologyNews.com on May 2016. Read [here](#).

Mark's article **A New Strategy To Profit From Interventional Radiology**, co-authored with Cecilia Kronawitter, was published on Auntminnie.com. Read [here](#).

Forward This!

Feel free to forward this newsletter to your friends. They can sign up for their own copy [here](#).

Whenever you're ready, here are 3 ways I can help you and your business:

1. Download a copy of the *Success or Failure?* Book

My book *Success or Failure? Strategic Tools For Medical Group Leaders* provides you with a framework for thinking about your success. You can buy it on Amazon or, for free, download a copy at the following link - [Click Here](#).

2. Be a guest on Wisdom. Applied. Podcast.

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3. If You're Not Yet a Client, Engage Me to Represent You.

If you're not yet a client, and you're interested in increasing your profit and managing your risk of loss, just reply to this message and put "One-on-One" in the subject line. I'll contact you to set up a call or meeting.

Three of Mark's blog posts were republished as entitled **Practice Challenges** in the Spring 2016 issue of Pennsylvania Society of Anesthesiologists Newsletter. Read [here](#).

Mark's article **Is There An Interventional Radiology ASC In Your Future?** was published in the April/May 2016 version of Radiology Business Journal. Read [here](#).

Mark's article **Impending Death of Hospitals: Will You Anesthesia Practice Survive?** was published in the winter volume of Communicate. Read [here](#).

Mark was quoted in the article **Practice Patterns Change While Outcomes Remain Steady Among Older Anesthesiologists**, published in the December 2015 issue of Anesthesiology News. Read [here](#).

Mark's article **Anesthesia Group Mergers, Acquisitions And (Importantly) Alternative s,** was published in the summer volume of Communicate. Read [here](#).

Mark was quoted in the article **Anesthesiology Acquisitions Still at Fevered Pace**, published in the July 2015 issue Anesthesiology News. Read [here](#).

Mark's article **Seeking Certainty In Radiology: Merger Acquisitions and Alternatives** was published in June 2 Imagingbiz.com. Read [here](#).