



March 31, 2017

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43rd Conviction in Lab Scam Kickback Case: What You Need To Know

The cell doors slammed shut.

Another physician is likely headed off to federal prison. He's the 29th physician convicted (out of a total of 43 convictions) for involvement in a New Jersey laboratory kickback scheme. Based on the sentences handed down in the prosecutions of other participants in the scheme, he might be spending up to 5 years behind bars. Or more.

But query this: Was his conviction due to ignorance over what the federal Anti-Kickback Statute (AKS) safe harbors really mean?

Physician Bernard Greenspan, a family medicine doctor, was convicted of receiving bribes totaling approximately \$200,000 from Biodiagnostic Laboratory Services, LLC (BLS) its employees and associates. In return, Greenspan referred blood samples worth approximately \$3 million in billings to BLS.

Interestingly, and frightening for those physicians, and others, who misunderstand the AKS and its place in the pantheon of prosecutorial weapons, Greenspan received the money from BLS and its affiliates through rental, services, and consulting agreements that were apparently vetted for "compliance" with the AKS's space rental and personal services safe harbor.

After all, Greenspan's attorney argued that the doctor had entered into legal agreements for rent and services and that there was no evidence that he ever made referrals in exchange for remuneration. So, how could the payments be kickbacks?

What You Need To Know

1. Fitting a deal within one of the AKS safe harbors is not, never was, and never will be a guaranty that you are immune from AKS prosecution, because the safe harbors do not protect sham arrangements. Accordingly, Greenspan was indicted and convicted of violating the AKS, also known as 42 U.S. Code § 1320.7b.

Unfortunately, too many deals that facially fit within a safe harbor are "ass backward" arrangements designed to cover up illegal arrangements: Lab owner Joe tells Dr. Sally that he'll give her a little "taste" if she sends some patients his way. Sally feigns horror, but sees no problem with Joe's comeback: Joe's cousin Lou will rent space from Sally for \$X pursuant to a lease that meets all of the check-the-box requirements of the space rental safe harbor. That includes the fact that the rent will be within the range of FMV. Sally will send her patients' blood samples to Joe's lab.

Like the old expression goes, you can put lipstick on a pig, but it's still a pig. The lease was just the lipstick. The acceptance of \$X, even if it is fair market value, was the pig, the crime.

2. Even if compliance with a safe harbor is legit, compliance with it protects you from AKS prosecution **only**. There are *many* other laws that prohibit much of the same conduct and to which the AKS safe harbors have absolutely no relevance.

For example, in addition to the AKS violation, Dr. Greenspan was also indicted for, and found guilty of, violating:

18 U.S. Code § 371 - Conspiracy to commit offense or to defraud United States: The conspiracy with BLS and its owners and managers to defraud Medicare.

18 U.S. Code § 1343 - Fraud by wire, radio, or television: The Medicare payments sent by interstate bank wire (the electronic payments from the Medicare contractor to BLS's bank account).

18 U.S. Code § 1952 - Interstate and foreign travel or transportation in aid of racketeering enterprises (the Travel Act): Both (a) the payments by the Medicare contractor to BLS's bank account by bank wire, and (b) the fact that the payments constituted commercial bribery under New Jersey state law, thus triggering violation of this federal law. (See my article [Why Your Compliance Efforts May Be Worthless](#) in the January issue of the E-Alert.)

3. I've written many times that those you work with are potential witnesses against you. For example, people often turn employees into whistleblowers in respect of civil prosecution for violation of the False Claims Act.

As anyone who watches crime story movies or TV shows should know, the same situation, but on steroids, plays out in respect of criminal prosecution: Other participants in the scheme flip on you to reduce their charges or punishment.

In the case of Dr. Greenspan, the two brothers at the center of the BLS scheme, the company's president, David Nicolls, and Scott Nicolls, testified that they entered into a conspiracy with Greenspan to get the blood samples in exchange for kickbacks. The Nicolls pleaded guilty and, while they await sentencing, are cooperating in the prosecution of their co-conspirators.

4. Unfortunately, most "compliance" planning is done by people with no real world experience in deals gone wrong and government prosecution. Text book situations are not real world situations.

Unfortunately, the real world is much more cruel.

What You Must Do

Every new, and every existing, financial relationship with anyone or any entity with which physicians and other healthcare providers do business must be vetted or re-vetted in light of today's enforcement reality. Immediately. If they're violative, they must be unwound.

As to Dr. Greenspan, at 79 years old it's conceivable that he'll spend the rest of his life behind bars.

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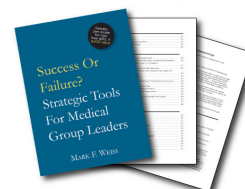
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Having fallen for the fallacy that there's profit in market share, hospitals have gorged on acquisitions and on employment and alignment of physicians. But it's becoming evident that physician employment leads to losses and that integrated care delivers 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?

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Most medical groups have a two-level physician engagement/compensation structure: owners and non-owners. There may be a *better* way.

All Things Personal

I'd crested the hill and was heading down the narrow two lane road toward the underpass. Just then, the gray Ford Taurus in front of me slammed to a halt and began to do a three point turn.

Yes, in the middle of the road. And yes, blocking traffic in both directions.

We've all run into people with no situational awareness. Or, even worse, into people with no sense of anyone's but their own importance.

Years ago, a client group had a physician who'd regularly run to the hospital CEO to rat out his colleagues, thinking that that would put the CEO in his debt. It didn't, but it sunk the group. Another had a member who'd wear tennis togs to negotiations for exclusive contracts. A third had a physician who'd drive over the landscaping in his 4-wheel drive truck instead of using the exit to the doctors' parking lot.

Do you have one, or more, of them in your group? How are they blocking your group's route to success?

It's time to straighten them out, or tow them off, before they cause a pile up to your progress.

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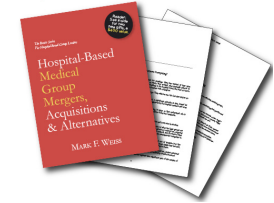
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disruptive ventures. Yet at the same time, the future of healthcare offers medical groups tremendous opportunity.

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



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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.

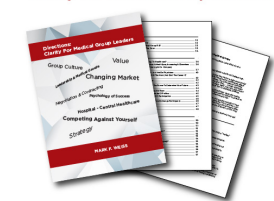
The reality is that some practices can be sold, some can't, and some have nothing to sell.

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



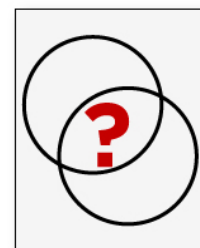
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The healthcare market is changing rapidly, bringing new problems.

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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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](#).