



November 30, 2017

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Compliance Risk as Side Effect of the Shift to Outpatient Care

There's an unfortunate side effect of the increasing velocity of the movement of care from the hospital to the independent setting (for example, think independent ASC/outpatient setting instead of hospital outpatient department instead of inpatient surgery).

That's the fact that many independent facilities and ventures either lack the institutional structure (e.g., a compliance department or competent legal counsel) or are far more entrepreneurial and risk-desensitized than hospital systems (which are still not paragons of compliance) to appreciate the severity of what I call the "stupid compliance mistake," stupid in the sense that they're as obvious as a plate of pasta.

Let's look at kickbacks as an example.

In everyday terms, the federal Anti-Kickback Statute (AKS) prohibits the knowing and willful remuneration — that is, the offer, solicitation, receipt, or 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.

This is a *criminal* statute. Violation can lead to fines of up to \$25,000 for each kickback, in addition to even greater civil penalties, plus prison time of up to 5 years for each kickback. So, for example, paying a kickback in connection with 10 Medicare claims can land you in prison for 50 years.

Sure, maybe you won't end up doing that much time, but as I recently wrote on the blog [see [Drugs, Sentencing, and Lock \(and Roll on to Another Kickback Prosecution\)](#)] two former medical practice partners, Drs. John Couch and Xiulu Ruan, were sentenced, respectively, to 20 and 21 years in federal prison. (The duo was also ordered to make restitution of \$6,282,023.00 to Medicare, \$3,649,092.97 to Blue Cross/Blue Shield of Alabama, \$2,285,170.70 to Tricare, and \$1,695,929.00 to United Health Group.)

In addition, violations of the AKS can trigger other federal and state crimes. Most, perhaps all, states have some companion statute prohibiting kickbacks of "fee-splitting." Others have laws criminalizing "commercial bribery." The transactions and communications underlying kickback violations, for example the exchange of emails or even electronic banking transfers, constitute wire fraud. And, that's just the start.

Yet a chain of ASCs in Georgia seemingly entered into a deal with a CRNA group to accept drugs paid for by nurse anesthetists in exchange for exclusive contracts.

ASCs are reimbursed by both federal healthcare programs and commercial payors on a CPT code based system. Inherent in the reimbursement is payment for associated costs, including anesthesia drugs. Demanding or offering free drugs (or for that matter, free services such as "helpers" to "assist" the CRNAs in the ASC) leads both to AKS (as well as False Claims Act) hell.

In the fallout of that Georgia deal, the CRNA group involved, Sweet Dreams Nurse Anesthesia, paid \$1,034,416 to the United States government plus \$12,078.79 to the State of Georgia to resolve the AKS allegations.

In fact, the allegations were broader than just free drugs: the U.S. Attorney also alleged that an affiliate of Sweet Dreams agreed to fund the construction of an ASC in exchange for contracts for Sweet Dreams' selection as the exclusive anesthesia provider at that facility and a number of other ASCs. How did they miss the danger in that stupid idea?

In fairness, it must be noted that Sweet Dream fully cooperated with the governmental investigation and that, legally speaking, the claims were only allegations, in that there was no determination of, and Sweet Dreams did not admit, liability. (But Sweet Dreams is out the \$1,046,494.79 paid in settlement plus what one might guess is a huge amount of attorneys' fees.)

Yes, I know that as business moves from the hospital to the outpatient setting, many physicians and other providers are finding it harder to compete for business, and that many controlling the business are brazen about wanting something back. And, yes, I know that many who control facilities don't think (why they don't think is another question) about the compliance issues inherent in the business relationships they propose or accept.

However, the real world impact of ASCs (and pharmacies and clinical labs, etc.) gone wild is investigations (which cost money, lots of money, to deal with), whistleblower lawsuits (which cost money, lots of money, to deal with), and criminal prosecutions (which cost money, lots of money, to deal with plus, as with Drs. Couch and Ruan, decades behind bars).

If you can't trust a hospital that claims that the arrangement has been vetted by its attorneys and is compliant (you can't), you certainly can't trust an outpatient facility, or your co-owners of the outpatient facility, to tell you that a stupid compliance mistake isn't really a stupid compliance mistake.

The takeaways for you:

1. Be careful.
2. We can perform a compliance assessment of any proposed dealings with those who refer to you, or to whom you refer.
3. We can perform a "red team" compliance assessment (i.e., a simulated government investigation) of your current dealings. It's better to find your own weaknesses than to permit a whistleblower or an FBI agent to find them for you.

IS AN ASC OR OTHER OUTPATIENT CENTER RIGHT FOR YOU?

IN COORDINATION WITH OUR STRATEGIC PARTNER, HDA ENTERPRISES, ONE OF THE MOST EXPERIENCED AND SUCCESSFUL DEVELOPERS AND MANAGERS OF PHYSICIAN-OWNED OUTPATIENT FACILITIES, WE'RE OFFERING A LIMITED NUMBER OF INITIAL ANALYSES.

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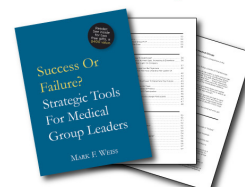
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Having fallen for the fallacy that there's profit in market share, hospitals have gorged on acquisitions and on employment and alignment of physicians. But it's becoming evident that physician employment leads to losses and that integrated care delivers 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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Regardless of how much you trust a certain hospital CEO's intentions with your medical group's business future, always get promises in writing. You never know who the next CEO will be.

All Things Personal

"A fork! a fork! my kingdom for a fork!"

Excuse the bad Shakespeare, but if a restaurant can lose business due to the lack of a clean fork for the entrée, think what this means for your business.

Last week, while dining at a very nice, and somewhat expensive, restaurant, the busboy clearing the salad plates, which followed the first, appetizer, course, saw one fork, the one nestled on the empty salad plate, at my place setting, and said, as he reached to remove the plate, "please keep your fork."

If I were eating at Denny's or the local pizza joint, I'd understand the request and be happy to keep my old fork. But at close to \$125 a person, it either boiled down to the management having hired an idiot or the managers having no idea how to manage, which is, in reality, the same thing: a *highly effective business prevention strategy*.

Years ago, I spoke at a national specialty healthcare conference and, following a quip that if the physician practices represented in the room didn't wake up to some significant managed-care contracting issues, they'd soon all find themselves working simply for Medicaid rates.

A hand popped up from the crowd, and the physician attached to it told me that his practice was almost entirely Medicaid and he was doing extremely well. I had to meet that guy on a more personal level, and I did; in fact, I represented him for years.

His model, which included the operation of many walk-in, as well as appointment based, clinics, competed by offering what could almost be described as white glove treatment (the interpersonal kind, the "we show that we care about you" kind) to patients that other practices viewed as low-paying. In essence, he gave them a metaphorical clean fork with each metaphorical course of service.

These small things, from the way that a receptionist answers the phone, to the speed at which you return a phone call, to the exchange of pleasantries, are like the clean fork, the warm bowl of nuts in first class, the offering of a black napkin instead of a white one to those wearing dark pants, that are, essentially, extremely inexpensive in cost but relationship-making in reality.

They are the small hinges that swing wide doors. They are the evidence that you understand the lifetime value of a customer/patient/what ever you call them. They are the fertile soil for relationships as opposed to one-off transactions.

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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.

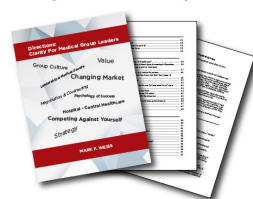
The reality is that some practices can be sold, some can't, and some have nothing to sell.

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



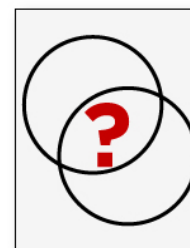
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The healthcare market is changing rapidly, bringing new problems.

How can you find a solution, how can you engage in the development of strategy, and how can you 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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