ADVISORY E-ALERT

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Anesthesia Company Model Arrangement Fuels $1.718 Million Dollar FCA Settlement by a Surgeon and a Separate Guilty Plea By Another Doctor Defendant

Note: This month's lead article is based on my blog post on the same topic. From the tremendous outpouring of interest (and from others, alarm), I've decided to feature it in the January E-Alert.

In a recent set of go-rounds with the Department of Justice, the so-called company model of anesthesia services took a major hit: One alleged co-conspirator, Jonathan Daitch, M.D., agreed to a $1.718 million civil settlement and another, Michael Frey, M.D., plead guilty in a criminal prosecution. Frey appears to be a cooperating witness against other alleged co-conspirators.

A quick refresher: In its most direct form, the company model involves the formation, by surgeon-owners of an ASC, of an anesthesia services company to provide all of the anesthesia services for the center. But there's nothing inherently "anesthesia" about the set-up; the same issues apply in other referrer-controlled structures, such as in the relationship between a dermatologist and controlled pathologists.

The model has long been regarded either as a blatant violation of the Federal Anti-Kickback Statute . . . or, by others (surgeons), as a perfectly proper way of doing business. That latter viewpoint appears to be crumbling under a million dollar plus settlement and the prospect of years in federal prison.

The combined facts of the settled civil case against Daitch and the guilty plea in the criminal case against Frey included allegations that the two surgeons received kickbacks via Anesthesia Partners of SWFL, LLC. ("Anesthesia Partners"), an anesthesia "company" owned by the two physicians.

Daitch, an interventional pain management specialist, and Frey, a physiatrist and pain medicine physician, were also co-owners of their professional practice, Advanced Pain Management Specialists, P.A. ("Advanced Pain"), which is located in Fort Myers, Florida. Anesthesia Partners was the exclusive provider of anesthesia services for Advanced Pain.

Anesthesia Partners contracted with CRNAs to provide the anesthesia services. These CRNAs were paid a contracted rate. Anesthesia Partners then billed Medicare and TriCare directly for the anesthesia services they provided. Daitch and Frey shared the profits.

The U.S. Attorney alleged that Daitch's ownership interest in Anesthesia Partners, and the remuneration he received through that ownership interest, induced him to refer his patients for anesthesia services to Anesthesia Partners.

Although there's less information available as to Dr. Frey, he plead guilty in connection with what appears to have been a packaged deal. Never formally indicted, the U.S. Attorney for the Middle District of Florida filed both the Information (the set of criminal charges) against Frey and his signed plea deal on the same day.

Technically, Frey plead guilty to two counts of conspiracy to receive healthcare kickbacks, one having to do with kickbacks related to durable medical equipment and the other to kickbacks related to prescriptions for compounded pain creams. However, as a part of the deal, the government agreed not to prosecute him for kickbacks relating to his ownership of the anesthesia company, Anesthesia Partners.

These results are entirely consistent with the OIG's position in Advisory Opinion 12-06. In that opinion, the OIG stated that there was no safe harbor available in respect of distributions that the surgeons would receive from their anesthesia company. Even if the safe harbor for payment to employees applied, or if the safe harbor for personal services contracts applied, those safe harbors would protect payments to the anesthesia providers. But, they would not apply to the company model profits that would be distributed to the surgeons, and such remuneration would be prohibited under the AKS if one purpose of the remuneration is to generate or reward referrals for anesthesia services.

The failure to qualify for a safe harbor does not automatically render an arrangement a violation of the AKS. As a result, Advisory Opinion 12-06 then turned to an analysis pursuant to the 2003 Special Advisory Bulletin on suspect joint ventures and found that the physician-owners of the proposed company model entity would be in almost the exact same position as the suspect joint venture described in the bulletin: that is, in a position to receive indirectly what they cannot legally receive directly—a share of the anesthesia fees in return for referrals.

The results in the Daitch and Frey cases are also entirely consistent with the OIG's position in Advisory Opinion 13-15 (disclosure: I was counsel to the requestor of that opinion) centering on a proposed arrangement in which a psychiatry group performing ECT procedures at a hospital would capture the difference between the amount it collected for anesthesia to ECT patients and the per diem rate it would pay to the anesthesia provider.

The OIG found that the proposed arrangement would not qualify for protection under the AKS's safe harbor for personal services and management contracts.

That safe harbor protects only payments made by a principal (the psychiatry group) to an agent (the anesthesia group); no safe harbor would protect the remuneration the anesthesia group would provide to the psychiatry group by way of the discount between the per diem rate their group would receive and the amount that the psychiatry group would actually collect.

Because, again, failure to comply with a safe harbor does not render an arrangement per se illegal, the OIG in 13-15 then analyzed whether, given the facts, the proposed arrangement would pose no more than a minimal risk under the anti-kickback statute.

The OIG flatly stated that "the proposed arrangement appears to be designed to permit the psychiatry group to do indirectly what it cannot do directly; that is, to receive compensation,

in the form of a portion of the anesthesia group's revenues, in return for the psychiatry group's referrals of patients to the anesthesia group for anesthesia services."

The OIG concluded that the proposed arrangement could potentially generate prohibited remuneration under the AKS and that the OIG could impose administrative sanctions in connection with the proposed arrangement. In other words, the OIG declined to approve the arrangement.

Advisory Opinions 12-09 and 13-15, and, now, the civil settlement by Dr. Daitch and the guilty plea entered by Dr. Frey in his criminal prosecution, demonstrate a fact lost to many when discussing "company model" deals: they generally do not fit into an available safe harbor — either the personal services and management contract safe harbor or the employee safe harbor.

Not only is this because payment is not set in advance and will vary with the value or volume of referrals, but even more fundamentally because those safe harbors apply only to payments from the principal to the agent, not to payments (in the form of the discount), which is remuneration, from the agent to the principal.

Physicians and CRNAs currently engaged in company model deals would be well advised to immediately obtain counsel to evaluate their relationships in light of these new developments.

Wisdom. Applied. 122: Do You Understand Drive-By Negotiation?

To Dr. Bob, the hallway chat was just that: an exchange of pleasantries and an optimistic expression of the growth of the venture. But it was absolutely not a part of the negotiation process. The COO had engaged in "drive-by" negotiation.

All Things Personal

I was out of town and had a bit of extra time, so I wandered into a very small shoe store. I won't mention the brand because it's unimportant, but let's just say that they make very small batches of handmade, semi-custom shoes.

I tried on a few pairs to get an idea of style and fit and decided on a shoe in a certain shade of brown with such and such a sole, and such and such laces. The salesman (the only employee in the very small store) said that the production run for that combination wouldn't start for a couple of months.

I told him that that was fine and that I'd buy them. I asked if they could ship them to me. He told me that they shipped for free *and that I could order them online*.

What?

I was in the store. They sold the few shoes they had in stock, and some clothing accessories, in the store. So why couldn't he take my money now and lock in the order? They just don't, he told me, but he'd take my name and email address and contact me when they begin the production run.

Maybe he will contact me. Maybe I'll see the email. Maybe I'll open it. Maybe I'll order them. Maybe I won't.

What a moronic way to do business. Someone wants to pay you upfront and lock himself in to doing business with you and you put up a roadblock. And, it's not just one pair of pricey shoes we're talking about: if the shoe fits (sorry, couldn't resist) I'd likely be as loyal to their brand as I am to a few others, like the Asics running shoes I've been buying since 1976.

It's highly unlikely that anyone reading this sells shoes, but the point is the same. In business dealings of all sorts, timing is extremely important. Certainly, this applies to the timing of when someone is ready to hand you the cash: does your office or outsourced billing and collection service make it easy for patients to pay? If you think it's a dumb question, try to pay one of your own bills and see how easy it is. (It once took me close to 20 minutes to navigate through a physician's automated payment portal. I haven't been back since.)

And, the same notion of timing applies to transactions of all sorts – the timing of bringing any deal to conclusion.

Right now, I'm wondering if the reason that shoe company is so exclusive is that it's running a very effective sales prevention department.

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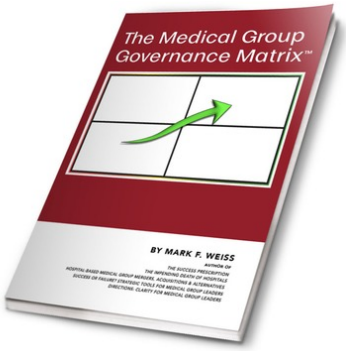
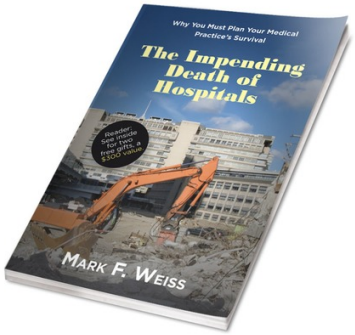
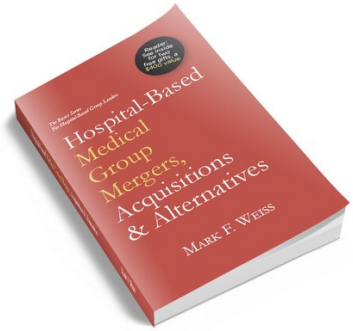


We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the “default” route. That’s the one is which you let someone else make the decisions that impact you; you’re just along for the ride. Of course, playing a bit part in scripting your own future isn’t the smart route to stardom. But despite your own best intentions, perhaps it’s your medical group’s governance structure that’s holding you back. In fact, it’s very likely that the problem is systemic. The Medical Group Governance Matrix introduces a simple four-quadrant diagnostic tool to help you find out. It then shows you how to use that tool to build your better, more profitable future. Get your free copy here.





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2. **Be a guest on "Wisdom. Applied. Podcast."** Although most of my podcasts involve me addressing an important point for your success, I'm always looking for guests who'd like to be interviewed about their personal and professional achievements and the lessons learned. Email me if you're interested in participating.

3. **Book me to speak to your group or organization.** I've spoken at dozens of medical group, healthcare organization, university-sponsored, and private events on many topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions, medical group governance, and succeeding at negotiations. For more information about a custom presentation for you, drop us a line.

4. **If You're Not Yet a Client, Engage Me to Represent You.** If you're interested in increasing your profit and managing your risk of loss, email me to connect directly.