

# WEISS



**September 30, 2021**

## **Reverse Engineering of AKS Safe Harbor Will Cost a Surgeon His Freedom**

I swear I can't remember where I saw it, but over the last few days there was something online about a genius working in some stall in some foreign marketplace who's said to be able to recreate any fragrance.

Perhaps reverse engineered perfume smells great. On the other hand, reverse engineering oneself into a federal Anti-Kickback Statute safe harbor can really stink. At the risk of mixing metaphors, if it sounds like a duck and walks like a duck, it might not actually be a duck, although what it is might rhyme.

Just ask Jason Montone, DO, a Missouri orthopedic surgeon and John Balzer, a medical device distributor, how things are quacking. In August 2021, they agreed to plead guilty in connection with a kickback scheme facially reverse engineered to appear as a legitimate consulting arrangement of the type protected by the AKS safe harbor for personal services contracts.

Specifically, Dr. Montone will plead guilty to one count of conspiracy to violate the Anti-Kickback statute and one count of obstruction, and Mr. Balzer will plead guilty to one count of conspiracy to violate the Anti-Kickback statute and one count of witness tampering.

The charges brought against Montone and Balzer, and other alleged co-conspirators, related to claims that a medical device company and its CEO and CFO paid Montone a total of \$379,000 pursuant to a sham consulting program under which the surgeon received \$500 to \$750 per hour for supposedly performing consulting services.

The government alleged that although the medical device company's physician-consulting program was purportedly directed at gathering technical feedback about its products from surgeons, the company and its CEO and CFO used the program, and the kickbacks they paid pursuant to that program, to induce and reward Montone's decision to use the company's products.

Purportedly, the medical device company tracked Montone's use of the company's products and used that information to determine how much the company would pay Montone for "consulting", regardless of how much true consulting was actually performed.

In exchange for the payments he received, Montone used over \$4.5 million of the company's products in his surgeries, including on patients who were Medicare or Medicaid beneficiaries, often in Balzer's presence or at his prompting, including excessive amounts of certain of the company's products. The medical device company agreed to pay Balzer a 25% commission on all of the medical device company's products that Montone used in his spine surgeries.

Sentencing hasn't been scheduled. But note well that the government alleged the participation of other conspirators while only Montone and Balzer have entered into plea deals. Has their sentencing been delayed while the two cooperate as witnesses against the others? It's likely, though not known.

But combine that thought with the following:

The charge of witness tampering provides for a sentence of up to 20 years in prison, three years of supervised release, a fine of \$250,000 or twice the gross loss to the victims and restitution. The charges of conspiracy to violate the Anti-Kickback Statute and obstruction of a criminal health care fraud investigation each provide for a sentence of up to five years in prison, three years of supervised release, a fine of \$250,000 or twice the gross loss to the victims, and restitution.

However, Dr. Montone and Mr. Balzer are lucky ducks: According to the U.S. Attorney's office, per the plea deals, they will recommend sentences at the low end of the sentencing guides, one year of supervised release, plus, as to Montone, forfeiture of \$379,000 – the amount that he received in sham consulting fees from the medical device company, and, as to Balzer, forfeiture of \$1,264,501 – the amount that he received in commissions from the medical device company for products Montone used in his spine surgeries.

Kickbacks are kickbacks, no matter how much you make them look like legitimate payments pursuant to a safe harbor.

Before you do some consulting, consult with someone who can advise you of the risk inherent in what you're about to actually do.

Otherwise, you might not end up a lucky duck like Montone and Balzer; you might just be ducked.



### **How to Deploy the Secret Sauce of Opportunistic Strategy - Webinar On Demand**

They say that COVID-19 has changed the world, creating the "new normal." Many of your colleagues and many hospital administrators are running scared.

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Let me provide you with the strategic tools and insights that you need in order to seize opportunities, whether they're in the context of your current business relationships, the expansion of your business activities, or the creation of new ventures.

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The price to attend is \$479. The cost of not attending is astronomical.

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## Newsflash: Business Life In the Time of Coronavirus - The Way Out

The coronavirus crisis, especially as it has become politicized, raises a number of business issues and, quite frankly, business opportunities in regard to future disruptive events.

Check out our [mini-series](#), with actionable business lessons for medical group leaders.

Sooner or later this crisis will end. You can't allow yourself to be too busy, too occupied, too concerned with current events, to devote time and effort to strategizing for your future.

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## Wisdom. Applied. 154 - CMS Opines That Stark Isn't That Stark – Advisory Opinion Guidance...

Learn more about a CMS advisory opinion issued in June 2021 providing guidance that a parent-subsidiary medical practice entity structure in which the subsidiaries themselves don't qualify as "group practices" under Stark can, in total, qualify as a "group".

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## UPCOMING PRESENTATIONS

**December 10, 2021**

***The ASC Ophthalmic Surgery  
Landscape: Opportunities***

**December 11, 2021**

***How to Structure and Operate Your  
ASC to Maximize a Potential Sale***



*Presented by Mark F. Weiss*

American College of  
Perioperative Medicine

December 10 & 11, 2021  
JW Marriott Orlando,  
Grande Lakes, FL

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## All Things Personal

I was heading to the airport in Charlotte, driving in a rental car as Google Maps was driving me crazy. Turn left (no road). U-turn now (cement barrier).

There's a strong tendency to believe that reality matches maps which is, of course, patently ridiculous. Sometimes roads are under construction (as in Charlotte). The map, the plan is just a representation, not reality. Reality isn't required to match the map.

We all start with maps, called plans, for our lives. Sometimes we revise those plans, believing that they will revise our lives, professional, personal, or both.

But then, a contract is cancelled, the hospital sends out an RFP, or leadership of the cardiac surgery program is shifted to someone else.

We all need plans. Not as maps from where we are but as maps sketched backward from where we want to be.

Just don't be too upset when those plans fail you. Tell yourself the truth, assess the reality. Then devise a new plan. But never blame it if it turns out to be wrong; it's just a plan, not reality, so just revise again.

In Charlotte, I just kept following the actual road.

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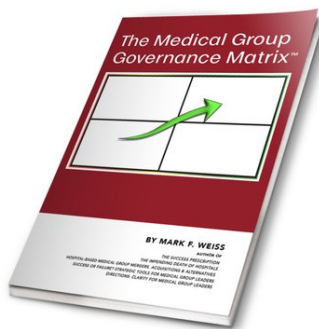
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- [Why You Must Understand the Biden Administration's Crackdown on Healthcare Mergers](#)
- [An Emoji Can Send You To Prison](#)
- [CMS Opines That Stark Isn't That Stark – Advisory Opinion Guidance](#)

## Published Articles

- [You Have Enough Problems. Why Buy Compliance Risk?](#), Summer 2020 Issue of [MiraMed Focus](#)
- [Who Really Owns Your Anesthesia Group?](#), Summer 2020, [Communique](#)
- [The Practical Essentials of the False Claims Act](#), March 2020, on [AnesthesiologyNews.com](#) and in the May 2020 issue of [Gastroenterology & Endoscopy News](#)



## Books and Publications

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 in 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](#).

## Whenever you're ready, here are 4 ways I can help you and your business:

- 1. Download a copy of The Success Prescription.** My book, The Success Prescription provides you with a framework for thinking about your success. Download a copy of The Success Prescription [here](#).
- 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.