

# WEISS



**January 31, 2022**

## **OIG Changes Rules On Advisory Opinions**

My ball, my rules. That's one way of looking at the January 11, 2022, change in the OIG advisory opinion process.

The U.S. Department of Health and Human Services ("HHS") Office of Inspector General ("OIG") is the agency charged with enforcing, and regulating, the federal Anti-Kickback Statute ("AKS") and the related civil money penalty ("CMP") law. As you know, the AKS makes it a crime to pay remuneration to induce a referral of a federal health care program patient.

Among its roles, the OIG issues advisory opinions upon the specific request of a person or organization ("Requestor") involved in an existing arrangement or in an anticipated transaction in which the Requestor has good faith plans to undertake, that may be subject to either the AKS or the CMP. The OIG opines as to matters including whether the arrangement involves prohibited remuneration, whether the arrangement fits within a safe harbor, or whether, even if it doesn't, there are sufficient factors present such that the OIG would not impose sanctions.

For many physicians and other healthcare industry players, advisory opinions are seen in the sense of a process to seek a favorable opinion, i.e., a "there's no illegal remuneration here" or an "even if there might be, we won't impose sanctions" opinion.

But, there's another use as well. That's to seek a negative opinion to block someone's plans for you. For example, a hospital with which your group has an exclusive contract proposes that you do such and such, which you believe violates the AKS, and you seek an advisory opinion to drive home to them that it's likely illegal.

But wait, there's more, and here's where the OIG has moved the ball.

Historically, the regulations provided that the OIG had to reject a request when "the same or substantially the same course of action is under investigation or has been the subject of a proceeding involving HHS or another governmental agency."

As a result, there was another use for the OIG advisory opinion process. A participant in

some arrangement who feared they were under investigation, or that someone else's similar circumstances were under investigation, could request an opinion. If those concerns rang true, the OIG would within days respond with a rejection, informing the Requestor that the same or substantially the same course of action is under investigation.

The final rule announced on January 11th removed that provision. As a result, the OIG does not have to reject a request for an opinion due to a pending investigation.

The change is likely to cause other reverberations with the advisory opinion process, from lengthening the timeline from request to notice from the OIG that it is likely to issue an unfavorable opinion, to drawing strategies in which those fearing investigation and prosecution could seek an unfavorable opinion, which was previously unavailable, and then use it as the basis for a challenge in court, seeking a judicial ruling that the conduct is not violative of the AKS.

Although the OIG's rules have changed, strong strategic uses of OIG advisory opinions remain, and seeking a favorable ruling is only one of them.

---



### **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.

Others, leaders like you, know that *crisis means opportunity*.

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.

You will learn:

- Defense as a defective default: It's necessary, but not sufficient.
- Exploiting weakness: Drop the guilt and identify opportunity.
- Flat line negotiation is fatal: Understand its myths and limitations.
- Negotiation reality: Learn to identify and deploy on multiple planes to affect the outcome.
- Maneuver: Harness the power of maneuver, both in overall strategy and in specific negotiation strategy.

Others see a crisis and freeze in fear. Learn how to see the opportunities and obtain the tools to increase your odds of obtaining them.

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

**Get Access Now!**



## 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 regards 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.



## Wisdom. Applied. 158 - The Devaluation of Value-Based Billing

"Value based billing" remains dominant in the medical industry news, chiefly from the MACRA angle. Mostly, though, it's a lie because value is determined by the customer, not by some bean counter at CMS.

Sure, CMS may be paying the bill for Medicare patients, but the patients are the actual customers and only they can assess whether value was truly delivered.

### UPCOMING PRESENTATIONS

March 7, 2022

**How To Restructure Your Anesthesia Group for 2025 and Beyond.**

The Advanced Institute for  
Anesthesia Billing and Practice  
Management

March 6-9, 2022

The Cosmopolitan of Las Vegas,  
Las Vegas, Nevada



## All Things Personal

The reservation was for 7 o'clock. Despite constant checking and talking with the manager, they seated us at 7:45.

Famous place. Famous chef. Totally f\*\*\*ed-up management.

I've never been back. Would you?

Meeting with your administrator. Meeting with your accountant. Meeting with the hospital CEO. Meeting with the physician responsible for \$2 million worth of referrals to your group. Are you on time? Or, do you have a handy excuse?

Each of us has 24 hours each day. There's always enough time.

It's how you choose to allocate it. And, how you choose to allocate it speaks volumes. Show up on time.

For those who think this is a very simple lesson, ask yourself why hardly anyone follows it.

---

## Help Us Help You With Helpful Content

What tailored content would you most like to see during this time?  
How can we focus on solutions to your most pressing strategic concerns?

Please **fill out our confidential survey** to ensure we best serve your needs!



## Podcast Compilation Greatest Hits - Strategy Edition 1.0

We've curated our most popular podcasts on strategy into our first compilation album.

Sit back, enjoy, and think about your future.

Listen [here](#).

---

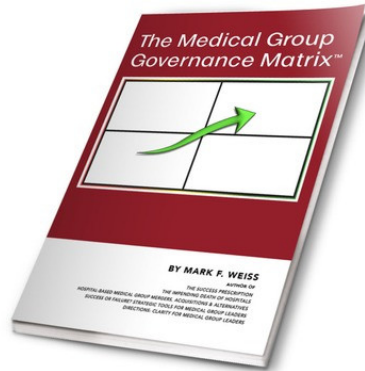
## Recent Posts

- [Upping the Odds of Medical Group Survival](#)
- [Three Lessons for Independent Medical Group Leaders](#)
- [Are You Governing Away Your Future?](#)
- [Why Contract Termination Provisions Are Like Highway Exits](#)
- [Termination Notice](#)
- [The Covid Impact on Healthcare Entity Valuation](#)

## Published Articles

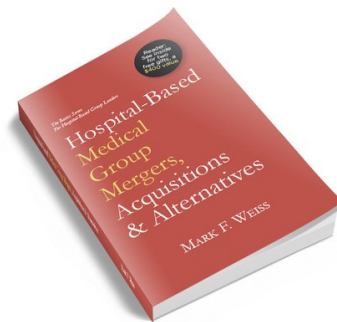
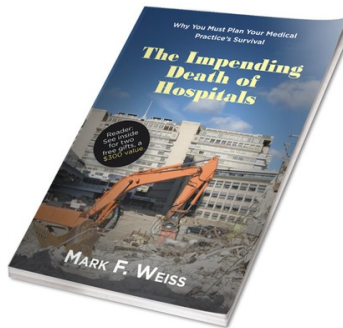
- [Popularity Contests and Disruptive Physicians: Avoiding the Death of Your Anesthesia Group](#), Fall 2021 Issue of [Communique](#).
- [You Have Enough Problems. Why Buy Compliance Risk?](#), Summer 2020 Issue of [MiraMed Focus](#)
- [Who Really Owns Your Anesthesia Group?](#), Summer 2020, [Communique](#)

## 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

**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.