

**May 31, 2018**

**Off To Jail For 38th Doctor Convicted In Lab Scheme**

Hey, who's gonna get caught?

Ralph K. Messo, M.D., of Colts Neck, NJ, is the latest physician (number 38) to be headed off to jail for participation in the largest, in terms of defendants, kickback case yet to be prosecuted. When we include the nonphysicians also heading off to the graybar hotel, the number of convicted defendants jumps to 53. But who's counting . . .

Dr. Messo, who was given a 24 month sentence plus another 24 months of supervised release and a fine, pleaded guilty to one count of accepting bribes of approximately \$3,000 a month in exchange for referrals to the now defunct Biodiagnostic Laboratory Services LLC ("BLS"), of Parsippany, New Jersey.

BLS was a massive scam. The company itself pleaded out in 2016 and was required to forfeit all of its assets.

Dr. Messo wasn't the only one to head off to jail last week in connection with BLS. Five former BLS salesmen were also sentenced to federal prison terms of up to 41 months and were required to forfeit up to more than \$1 million each.

Over the course of the larger prosecution, the scam's organizers admitted to paying millions in bribes. Medicare and private insurers paid more than \$100 million to BLS for claims submitted in the course of the crime.

The form of the bribes in the BLS scheme provides an interesting lesson.

Although some were in good old cash, many were disguised in a way to make them appear to be benign, even to comply with safe harbors under the federal Anti-Kickback Statute.

Consider, as the avatar of alleged safe harbor protection, Dr. Bernard Greenspan, another participant in the scheme who was convicted last year.

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 harbors.*

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?

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.

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.

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 2017 issue of the E-Alert.)

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 Nicholls pleaded guilty and, *while they await sentencing*, are cooperating in the prosecution of their co-conspirators.

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.



### **Wisdom. Applied. 114: Who's Your Competition?**

Is your head in the sand when it comes to ascertaining who your real competition is?

## **All Things Personal**

On a recent trip, I rode in a lot of Ubers.

Uber, and companies like it, are said to be examples of the "sharing economy." The reality is that there is no actual sharing, it's charging, and, it's not as if the cars that are used are "shared" in terms of truly being underutilized assets: they are being driven by their owners or lessees, exactly in the same manner as taxis.

Some observers have called this form of virtue signaling "sharewashing."

Earlier this month, I read about a physician, Rita Luthra, M.D., who was convicted of violating HIPAA for another form of "sharing," this time of the protected health information in her patient files. She shared the PHI with a pharmaceutical sales rep.

I'm not sure if part of her defense was based on the virtue of sharing, but, if it were, virtue signaling didn't work with the jury. She'll soon to be sentenced and faces up to a year in prison and a fine of up to \$50,000.

Most HIPAA violations aren't intentional and they're certainly not this stupid. More often, the problems stem from the negligent protection of PHI. Auditing your practice on a regular basis for compliance with the HIPAA Privacy and Security Rules is not only a good idea, it's, for all intents and purposes, mandatory.

As to Dr. Luthra, my bet is that she'll also lose her license, her medical license that is.

On the bright side, when she gets out of prison, she'll still have her driver's license and be able to work for Uber. At least that's a more legally acceptable form of "sharing," real or imaginary.



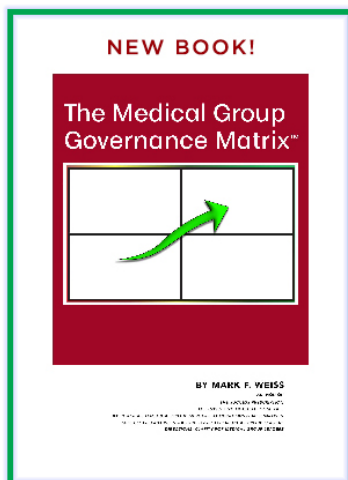
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## Published Articles

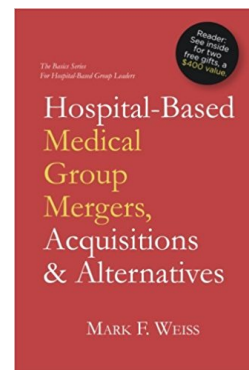
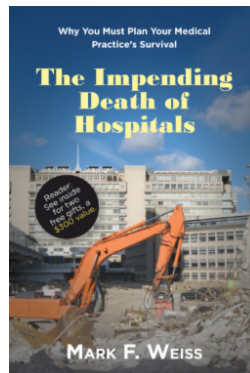
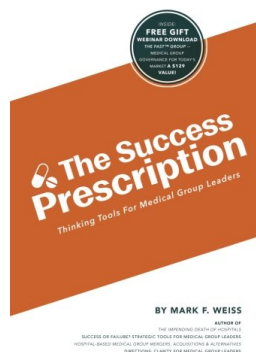
- [Explosive Growth in ASC Codes Fuels Opportunity](#), published on [RadiologyBusiness.com](#), April/May 2018.
- [Anesthesia Services RFPs: Reality, Unicorns And Cognitive Bias](#), Spring 2018, [Communique](#)
- [How \(Others'\) Stupid Compliance Mistakes Can Save Your Life](#), Winter 2018, [Communique](#).

## 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.](#)

**Learning opportunity:** Mark will be presenting the key concepts of the Matrix as a part of his presentation at the Advanced Institute for Anesthesia Practice Management, April 28 – 30, 2018 at The Cosmopolitan of Las Vegas. <http://aiapmconference.com>



## 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.
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.