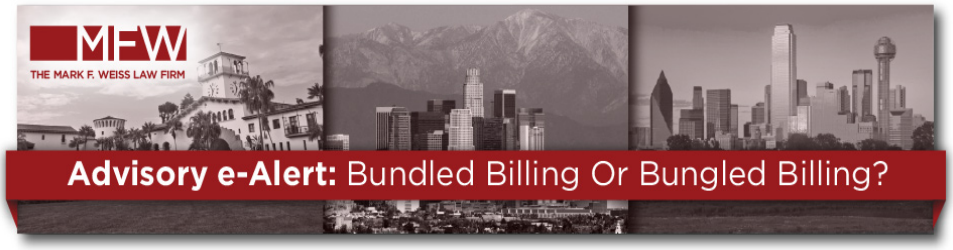

August 29, 2014

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Bundled Billing Or Bungled Billing?

Bundled billing. What could be wrong with it? A lot, depending on who is doing the bundling. And, in some cases, *why* they're doing it.

Let's look at the definition first: Bundling is the combination of multiple entities' fees into a single price.

Historically, this came out of the hospital world: In order to market for a certain service, for example, a certain surgical procedure, the hospital sought to have all, or at least some, of the physician providers involved in that procedure agree with the hospital on a fixed price for their services. Those prices were then added, together with the hospital's fixed price for its fee, into the bundle.

Metastatic Change

Although that hospital practice has continued, and although it poses compliance issues, the original notion of bundled billing, a competitive edge passed through to the customer, has metastasized into a tool to extract kickbacks. This type of metastasized bundling appears to be on the rise.

This manifests itself in demands (well, they are sometimes couched as "suggestions") that physicians and physician groups receiving referrals through another physician or physician group, or that provide services at a surgery center or similar facility, enter into a "bundled billing" arrangement with the referral source or facility. This bundling though, often serves to shift a portion of the downstream physician's fee into the hands of the bundler.

For example, a dermatologist performing MOHS surgery in her office demands that the pathologist providing services in the context of that procedure "bundle" his bill with hers, at a discount below his usual charges.

Or, for example, a plastic surgeon providing purely cosmetic procedures at his solely owned surgery center demands that the anesthesia providers "bundle" their fees, at a substantially reduced rate, with his and his facility's for purposes of providing all-inclusive pricing to patients.

Compliance Quagmire

The federal *Anti-Kickback Statute* (the "AKS") is designed to prohibit payments to physicians and other providers that are made in order to induce the referral of patients whose care is paid for by federally funded health care programs.

The AKS is a criminal statute and intent is required, but that intent can be inferred from the circumstances and many seemingly appropriate arrangements are, upon examination, viewed by the enforcers, the OIG, as highly suspect.

The states have *AKS-counterpart statutes*, some of which approach the issue from the same angle as the AKS but which may not make any distinction between the source of the patient's funding, and others of which approach the issue from the angle of *"fee-splitting"* the sharing of a physician's fee with certain third parties under certain circumstances.

A bundling arrangement that results in the transfer of the referral receiving physician's fee to the referral source may implicate the AKS and similar state statutes. Additionally, even

arrangements which involve no transfer of wealth from the receiving physician to the person or entity coordinating the bundling may trigger a state's *fee-splitting* prohibitions and its *corporate practice* of *medicine prohibitions.*

Depending on the nature of the services provided, it's possible that the arrangement violates the Stark law, the federal "self-referral" prohibition which applies to any physician who makes referrals to those with whom the physician has a direct or indirect ownership or investment interest, or a compensation arrangement. Stark is a "strict liability" statute that imposes civil, not criminal penalties, although the severity of the penalties makes it a distinction without much difference.

The states, too, have counterpart self-referral statutes that, depending again on the nature of the services involved, might be triggered.

And last, but by no means least,violations of Stark and of the AKS lead to federal False Claims Act liability (commonly spoken of as "whistleblower actions") in which violators stand liable to regurgitate reimbursement, plus treble damages, and up to $11,000 per claim.

Conclusion

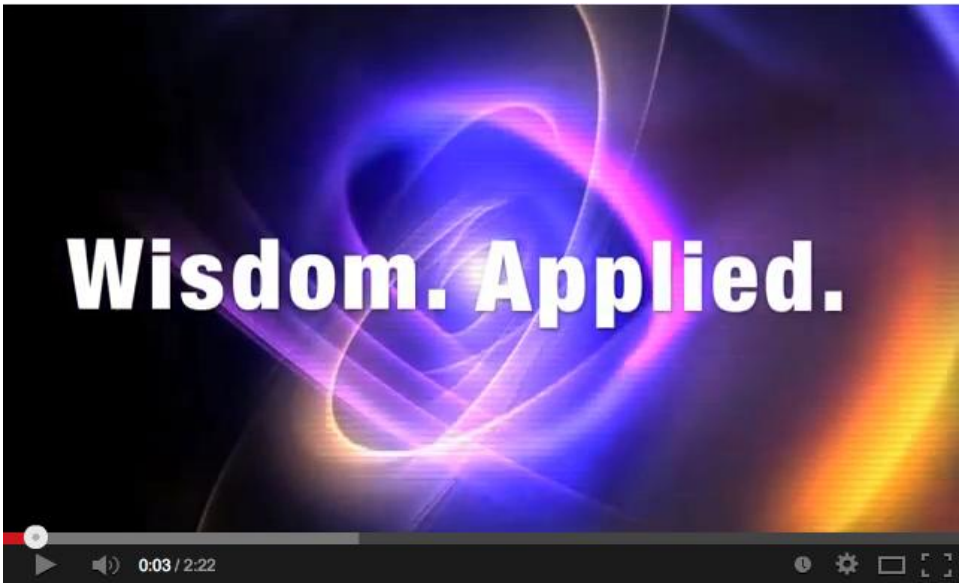
In terms of intent, all may be above board in connection with a bundling relationship. Or, it could be a poorly designed substitute for a kickback. No matter which, innocent or deceitful, bundling arrangements implicate a number of federal and state compliance laws.

Whether you're a prospective bundler or "bundlee," tread carefully before entering into one of these questionable relationships.

On the other hand, if you've already become involved in one without considering the risks, it's essential that you engage in a thorough evaluation immediately.

Wisdom. Applied. 68: The Problem With Compensation Surveys – Why Assume That You're Average?

Physician compensation surveys assume that you're average. It's up to you to break out of the paradigm.



All Things Personal

When I first began practice, I worked for a law firm that represented clients in the entertainment industry.

One thing that struck me from each morning's required reading, *Daily Variety*, was that although it carried many announcements of auditions for minor roles, stars didn't have to addition at all – in fact, the paper often reported how many scripts some star was reviewing: the buying/selling or supply/demand situation was completely flipped.

Make Any Difference was published in the Summer 2014 issue of Communique. Read or download here.

Mark was quoted in Michael Vlessides's article **Does Anesthesia Need Its Own NTSB?** Published in the August issue of Anesthesiology News. Read here.

Mark's article ***Anesthesia Group Acquisitions and Alternatives*** was published in the June issue of Anesthesiology News. Read or download here.

Mark's article ***OIG Opinion Adds Clarity to Illegality of Company Model*** was published in the February issue of Anesthesiology News. Read or download here.

It's hard to imagine a more common service commodity than actors in Los Angeles – they are everywhere: waiters, secretaries, office support staff, temps, and substitute teachers; in fact some even work as actors.

But some have differentiated themselves and are no longer in the same, well, solar system, they are "stars."

How different in this regard are most physician group members from actors? Most are stuck, at least in their minds, in the commodity world.

But if stars don't have to respond to the acting equivalent of RFPs, casting calls and auditions, why don't you create an experience monopoly practice and do the same?

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