ADVISORY E-ALERT

THE MARK F. WEISS LAW FIRM
A PROFESSIONAL CORPORAT

December 31, 2018

False Claims And Faulty Brains: Letting The Fox Into The False Claims Act Henhouse

You're concerned about compliance, so much so that you hire an internal auditor. Kudos for you.

Until, of course, the auditor turns around and files a whistleblower action, that is a False Claims Act lawsuit, against you.

As I've written many times before, a medical group's or facility's greatest risk by class of potential whistleblowers is an insider.

I'm in no way denigrating the need to **not** violate the law. I'm simply telling you that the risk of a violation being discovered, actually, even more so, the risk of a violation being *claimed*, by someone *within* your organization is far greater than the risk of an attack coming from the outside.

Take, for example, the recently unsealed FCA lawsuit brought against Florida's Lee Memorial Health System, filed on behalf of the United States by relator Angela D'Anna. [For the intensely curious, the case is styled *United States of American and Angela D'Anna, ex rel., Plaintiffs, v. Lee Memorial Health System, Defendant*. It's filed in the United States District Court, M.D. Florida, Ft. Myers Division, as Case No. 2:14-cv-437-FtM-38CM.]

In 2014, D'Anna filed her complaint, amended in 2017, alleging violations of the FCA and of the Stark Law. She claims that Lee Memorial paid physicians illegal referral fees and financial incentives under compensation arrangements that exceeded fair market value and were "commercially unreasonable in the absence of referrals." She alleges that Lee paid the excessive compensation to certain physicians and then "knowingly submit[ted] false claims to government payers [Medicare and Medicaid] related to referrals from such specialists in violation of the FCA."

Among the specifics claimed to have occurred are a "pay to play" scheme in which the total of financial incentives to physicians increased based on the volume of referrals, and that payments to physicians pursuant to a plan that recognized *personally performed* wRVUs still paid even though the services were performed by physician extenders, neurosurgeons, cardiologists and pulmonologists. The amended complaint seeks treble damages and other civil penalties from Lee Memorial.

Of course, Lee Memorial denies the allegations and is defending against the FCA claims. Interestingly, the government declined to intervene in the case. However, Ms. D'Anna, as is her right as the relator, is continuing to prosecute the case. If successful, either by way of a settlement or judgment, she'll be entitled to a significant share of the proceeds payable to the government.

Although there's a large enough dose of allegations in the amended complaint to satisfy compliance-related prurient interest, I suggest you focus on the more practical picture:

Ms. D'Anna is Lee Memorial's *former head internal auditor*. She claims that Lee Memorial ignored internal audit reports as well as audit reports presented by their outside auditors that indicated the hospital system was paying the physicians in excess of fair market value. And how did she get those reports and how did she know enough to allege a violation: access to the information was an integral part of her job.

Of course, do all that you can ahead of time to make sure that your arrangements with facilities, physicians and other providers comply with applicable federal and state law. In particular, pay very close attention to the federal Anti-Kickback Statute, Stark, and their state counterparts.

And be *very* careful about who you hire.

Although it's a gray area, consider the enforceability of contractual restrictions such as notice provisions prior to the filing of a whistleblower action. The law is unclear but similar provisions that restrict allegations of securities law violations have been successfully challenged by the SEC.

Be vary careful about engaging outside entities not protected by attorney-client privilege to generate audit reports.

But once generated, just as in complaints and other challenges from internal sources as to the legality of questioned practices, *completely investigate* whether or not the practices are, indeed, legal and supportable.

And be very, very careful about not retaliating against any potential whistleblower, because not only does it spur many who might never otherwise file a claim to "drop the dime" on you, it also compounds a violation into wrongful termination.

For more guidance on deal structure, compliance matters, and whistleblower concerns, contact me.

Wisdom. Applied. 121: Community Hospitals Must Change or Die

The Impending Death of Hospitals is hitting community hospitals particularly hard. That, of course, is a peal of the bell that tolls for thee, if your medical group is dependent on the survival of the local hospital.

2019 New Year's Un-Resolutions

We all make New Year's resolutions. "I'll do this or that!" Then January 5th rolls around and, well, you get the idea.

In keeping with our E-Alert New Year's Tradition, here's the hack. Flip things around: What will you not do, or stop doing, next year?

Here are some suggestions for 2019:

1. Stop yearning for a return to the golden past; it wasn't golden and it's not coming back.

2. Stop putting all of your eggs in the basket called a hospital. Hospitals, as we know them, are an endangered species in a world in which diagnosis, treatment and care is quickly moving to outpatient facilities and into patients' homes.

3. Stop believing the hospital CEO, ASC administrator, deal partner, or other promoter who says the deal "has been vetted by my lawyer and it's perfectly legal." If the deal involves you performing services without fair market value compensation, has you receiving a fee per adjudicated script, has you giving a discount, allows someone else to resell your services, or (and this should be obvious) has you paying them a fee per patient, consider how you'll look in an orange jumpsuit.

4. Stop aiming simply for so-called "best practices," which, if you think about it, is all about doing what other people do, which then leads to mediocrity.

5. Stop reacting to others' proposals. Become proactive and lead with your own strategy, not simply tactics.

6. Stop settling for less. Don't believe those who tell you that you have to lower your expectations. Set them as high as the stars. If you don't, you'll regret it sooner or later.

Oh, and one regular resolution: Resolve to have a very happy, healthy, and successful New Year!

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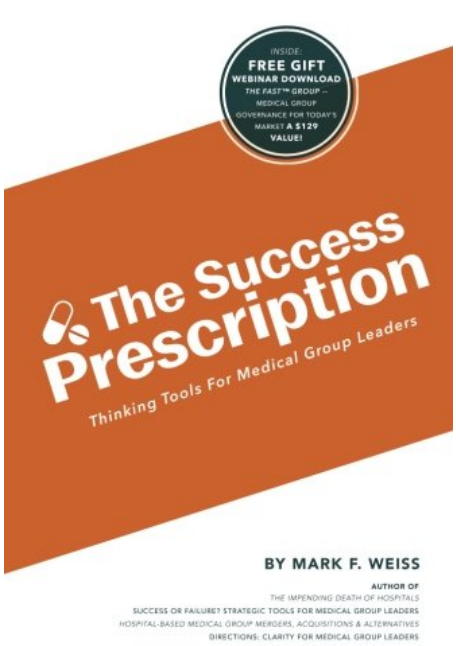
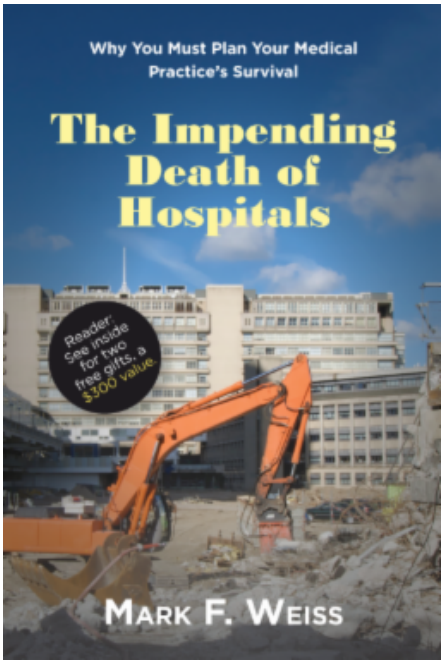
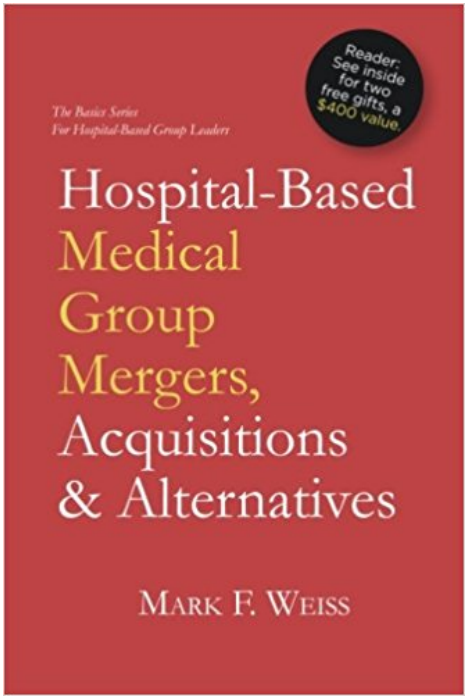
A Self-Diagnostic for High-Performing Anesthesia Group Leaders, Fall 2018 Communique

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. Ge 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.