

HOW (OTHERS') STUPID COMPLIANCE MISTAKES CAN SAVE YOUR LIFE

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Some inner desire stronger than my willpower beckoned me to stare at them through the glass. I was nine years old. It was both titillating and embarrassing.

There were 10 photographs in gritty black and white, arrayed in order behind glass on the post office wall: The FBI's 10 Most Wanted fugitives. Murderers, bank robbers and forgers. And not a physician among them.

My pediatrician Dr. Glazer's office was across the street, but no one, I imagined, who wore such a heavily starched white lab coat could ever commit a crime.

How things have changed.

I'm no longer naïve. I know that, today, even the bureaucrats who run the Department of Health and Human Services have an Office of Inspector General's 10 Most Wanted list.

Let's keep you off of it.

One easy and schadenfreude-filled way to do that is to learn by example, specifically by example of what I call "stupid compliance mistakes." After all, it's more fun to read about someone else's stupid mistakes than it is to make one yourself. And it might just save your life, financially, professionally and personally.

But first, let's set the stage with some background on the primary regulatory scheme that tripped up these fools, the federal Anti-Kickback Statute (AKS).

THE FEDERAL ANTI-KICKBACK STATUTE (AND OTHER CRIMINAL TRAPS)

Hey, sometimes life's unfair.

Paying for a referral, or getting something back for making one, is not only a good business practice for plumbers,



poultry farmers and Hollywood producers, it's a *best practice*.

But for anesthesiologists and CRNAs, hospitals and ambulatory surgery centers (ASCs), and, in fact, anyone or any entity in connection with referrals of federal healthcare program patients, it's a crime, a violation of the federal AKS.

In everyday terms, the AKS prohibits the knowing and willful remuneration—that is, the offer, solicitation, receipt or transfer of anything of value—for referrals of Medicare, Medicaid, Tricare and about a dozen other sorts of federal healthcare program patients.

Violation can lead to fines of up to \$25,000 for each kickback, in addition to even greater civil penalties, plus prison time of up to five years for each kickback. So, for example, paying a kickback in connection with 10 Medicare claims can land you in prison for 50 years.

In addition, violations of the AKS can trigger other federal and state crimes. Most, perhaps all, states have some companion statute prohibiting kickbacks

or "fee-splitting." Others have laws criminalizing "commercial bribery." The transactions and communications underlying kickback violations—for example, the exchange of emails or even electronic banking transfers of the ill-gotten gains—constitute wire fraud. And that's just the start.

With penalties so high and with compliance so simple, it's a wonder that the AKS is ever violated. But just as life's sometimes unfair, the world is filled with wonder.

FIRST STUPID COMPLIANCE MISTAKE: FREE DRUGS OR PERSONNEL

I'd have to borrow 10 or 20 readers' hands and toes to help count the number of times that anesthesiologists and CRNAs have told me that the administrator of some ASC or its most influential surgeon had told them that their anesthesia group must pay for anesthesia drugs or for "some help" to move "your patients" into and out of the operating room.

Those ASC "requests" are darkly funny, because the ASC is already reimbursed for those expenses. They're an inherent element of the CPT code-based system used by both federal healthcare programs and commercial payers to pay ASCs.

You'd think that both facilities and anesthesia personnel would understand that.

Yet, in August 2016, the United States, Attorney for the Middle District of Georgia, in concert with the Georgia Attorney

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General, announced a civil settlement with a series of anesthesia businesses, collectively known as Sweet Dreams Nurse Anesthesia (Sweet Dreams). The prosecutors alleged that Sweet Dreams engaged in a scheme of providing free anesthesia drugs to ASCs in exchange for the ASCs granting Sweet Dreams exclusive contracts.

Sweet Dreams paid \$1,034,416 to the U.S. government, plus \$12,078.79 to the State of Georgia, to resolve the allegations.

In fact, the allegations were broader than just free drugs: the U.S. Attorney also alleged that an affiliate of Sweet Dreams agreed to fund the construction of an ASC in exchange for Sweet Dreams's selection as the exclusive anesthesia provider at that and other facilities. How did they miss the danger in that stupid idea?

In fairness to Sweet Dreams, which fully cooperated with the government investigation, the claims covered by the settlement were allegations only. There was no determination of, and Sweet Dreams did not admit, liability.

Yet, Sweet Dreams is out the \$1,046,494.79 paid in settlement plus what one might guess is a huge amount of attorneys' fees.

First Stupid Compliance Mistake Avoidance Tip: Don't provide free drugs or free personnel to ASCs or other facilities. The provision of *anything* (whether tangible or intangible) of *value* in order to induce referrals of federal healthcare program patients is the same as giving cash for that same purpose. And it's a crime.

SECOND STUPID COMPLIANCE MISTAKE: CASH

Let's segue to a stupid compliance mistake involving money itself.

And let's flip the receiving end around. Let's look at a situation in which two physician partners, one a board certi-

fied anesthesiologist, received cash for their referrals.

In May 2015, Drs. John Couch and Xiulu Ruan, both pain management specialists, were arrested based on allegations that they received \$115,000 in kickbacks from Insys Therapeutics, Inc., in connection with its fentanyl drug, Subsys.

At their trial, a former Insys employee testified that the company would pay the doctors "speaking fees" based on the number of prescriptions they wrote. They apparently wrote *a lot* of prescriptions: Another former Insys employee who plead guilty to conspiring with Drs. Couch and Ruan in the scheme testified that she was under constant pressure to schedule the doctors for speaking engagements and that if she couldn't, or if events were cancelled, she could have her pay docked.

The allegations against Couch and Ruan expanded from there. They were also charged with duping both the federal government and private insurance companies by misleading them as to diagnoses. The prosecutors alleged that their kickback-fueled scheme generated profits of \$40,000,000 for their practice and controlled pharmacy.



The wheels of justice turned all the way to trial. Drs. Couch and Ruan were found guilty. In May 2017, they were sentenced to prison for 20 and 21 years, respectively.

In case you want to ask for their advice on AKS compliance, you won't find either of the Mobile, Alabama, physicians currently residing in the state: Dr. Couch passes (or "does") time at the Federal Correctional Institute in Forrest City, Arkansas, while Dr. Ruan enjoys the view from behind bars at the Federal Correctional Institute in Oakdale, Louisiana.

In addition to their lengthy prison sentences, the duo was ordered to make restitution of \$6,282,023.00 to Medicare, \$3,649,092.97 to Blue Cross/Blue Shield of Alabama, \$2,285,170.70 to Tricare, and \$1,695,929.00 to United Heath Group.

Second Stupid Compliance Mistake Avoidance Tip: The AKS runs both ways: Accepting kickbacks is just as much a crime as paying them. So, too, is offering them or soliciting them. Disguised kickbacks, such as payment for phony speakers' fees, invariably come to light, whether from whistleblowers, co-conspirators seeking to reduce their punishment or a random audit. Don't be foolish: Just because the entity on the other side of the deal is huge and has access to in-house and outside legal counsel doesn't mean the deal is legal.

THIRD STUPID COMPLIANCE MISTAKE: EASY MONEY

I scream, you scream, we all scream for . . . pain cream.

In October 2017, the first guilty plea came in connection with what the government alleges was a \$100 million compounded pain and scar cream scam on Tricare.

A dozen people were charged in the scheme, said to involve the payment of



kickbacks by the owners of a marketing/compounding pharmacy business, CCMGRX, LLC, to Tricare beneficiaries, prescribing physicians and marketers.

I've seen a number of pain cream schemes in my own practice. In the typical scheme, the physician, often an anesthesiologist, is offered very significant payments from the organizers for prescribing, over the phone, a particular compounded pain cream to "patients" the physician has never seen, never will see and with whom he or she will never speak again.

The government alleged a similar situation in the CCMGRX case. It alleged that a physician defendant was paid to prescribe compounded drugs to Tricare beneficiaries, writing thousands of prescriptions for patients he never met in person and for whom he conducted only a cursory consultation via telephone.

Another physician defendant was alleged to have served as the "Chief Medical Officer" for the marketing company. It's claimed that he designed a so-called "study" in which Tricare beneficiaries were paid kickbacks disguised as participation grants. According to the government, the true purpose of the "study" was to compile a list of Tricare beneficiaries who had filled prescriptions so that the

defendants could calculate the amount of the kickbacks.

Perhaps because the OIG wasn't directly involved, the FBI and the Defense Criminal Investigative Service investigated the case, and the kickback allegations were charged under the AKS-related crime of federal healthcare fraud.

The physicians and other defendants each face up to 10 years in federal prison and a \$250,000 fine on each count for which they are charged. In addition, the government is seeking restitution of all illegally gained profits. It's a safe bet to assume that the first defendant to flip, the one who plead guilty in October, will be testifying against the remaining defendants.

Third Stupid Compliance Mistake Avoidance Tip: With millions at play, it's not hard to see how physicians with legitimate medical practice interests can become attracted to fast and easy money. *But fast and easy money can quickly become long, hard time.* The organizers of these schemes often approach physicians claiming that their legal counsel has vetted the deal: If that's true, the lawyers are criminal lawyers, as in lawyers who are criminals. Run your own compliance analysis, or just run, before you're on the run.

SOME PARTING TAKEAWAYS

You're in charge of your own future.

Yes, I know that as more business moves from the hospital to the outpatient setting, many anesthesia providers are finding it harder to compete for business, and that many controlling the flow of anesthesia referrals are brazen about wanting something back.

And, yes, I know that many who control facilities, both hospitals and ambulatory facilities, don't think (*why* they don't think is another question) about the compliance issues inherent in the business relationships they propose or accept.

However, the real world impact of hospitals and ASCs (and pharmacies and

clinical labs, etc.) gone wild is investigations (which cost money, lots of money, to deal with), whistleblower lawsuits (which cost money, lots of money, to deal with), and criminal prosecutions (which cost money, lots of money, to deal with plus, as Drs. Couch and Ruan have learned the hard way, decades behind bars).

If you can't trust a hospital that claims that the arrangement has been vetted by its attorneys and is compliant (you can't), you certainly can't trust an outpatient facility, or your co-owners of the outpatient facility, to tell you that a stupid compliance mistake isn't really a stupid compliance mistake.

Immediate Actionable Steps:

1. Be careful.
2. Perform a compliance assessment of any proposed dealings with those who refer to you, or to whom you refer.
3. "Red team" (i.e., perform a simulated government investigation of) your current arrangements. It's better to find your own weaknesses than to permit a whistleblower, the OIG or an FBI agent to find them for you. 

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