A Note to Physicians: Protect Your Practices from Fraud by Management Service Organizations (MSOs)

The practice of medicine has become increasingly regulated over the past few years. Unlike the days when you performed your own billing and managed your own offices, evolving regulations have become so burdensome that many doctors like yourselves have difficulty both treating patients and managing a practice. You did not go through the rigors of medical school and residency to manage insurance documents and patient records; thus, nowadays physicians contract away administrative, billing, and records management work to specialized management service organizations (MSOs). MSOs are the non-medical companies operated by non-medically licensed businesspeople that contract with medical practices to perform administrative and management functions, leaving you to focus exclusively on patient care.

Although this contractual arrangement lightens your burden, it presents a new set of problems centered on one concept: Who maintains control over your practice and its patient information, billing practices, and finances? MSO contracting is set up in a formalistic and rigid manner purportedly to aid your practice in complying with billing and recordkeeping rules. However, just because it is a rigid system does not mean it is an honest one. Once you engage an MSO, it has access to your practice’s most valuable information. And while you focus exclusively on providing patient care, a potentially corner-cutting MSO manager could decide to achieve economies by abusing this access and performing illegal activities in your name. For example, if the MSO has full authority to send your invoices, access your practice’s bank accounts, and manage the electronic medical...
most restrictive states, there are exceptions to the rule. For example, in New York, doctors may practice medicine through partnerships, professional corporations, professional limited liability companies, and registered limited liability partnerships comprised exclusively of physicians.6

Unfortunately, the stringency of the CPMD tends to generate an opposite effect and creates a system that is ripe for corrupt exploitation. MSOs emerged in an attempt to resolve the dichotomy between violating the CPMD and providing administrative services to physicians and medical practices. Contracting with MSOs aligns with the CPMD by permitting you the doctor to control patient care while the MSO handles the business function. But what actually occurs is that by controlling the business function, MSO managers gain access to pertinent patient and financial information, which can be misused for financial benefit.

THE PROBLEM: MANAGEMENT SERVICE ORGANIZATIONS PRONE TO FRAUD

Admittedly, MSOs perform much-needed services for medical practices like yours such as billing, collection, banking, management of patient records, personnel management (non-clinical), and marketing. Granting MSOs this access enables you to focus on patient care and clinical staff while leaving administrative control to the MSOs.

However, there is a line between what you must control and what the MSO may control. When MSOs are granted administrative responsibilities, they are uniquely situated to control your records, invoices, and finances, likely without much interference from you. This could entice a less-than-honest MSO manager to commit fraud under your name and financially benefit. Keep in mind that you can be held accountable for any misconduct by an MSO. Therefore, it is important for you to maintain oversight into MSO operations to reduce the risk that bills, bank accounts, and patient information will be misused for the MSO’s economic benefit.

THE LAW: CORPORATE PRACTICE OF MEDICINE

Health care laws seek to maintain the integrity of the health care industry by requiring that patient care be left to the charge of physicians. One of the ways this is done is through the Corporate Practice of Medicine Doctrine (CPMD), codified in most states,2 which prohibits medical practices from being controlled by people who are not licensed medical professionals, like MSO managers. The doctrine is rooted in the policy that patient care should not be affected by the unscrupulous profiteers of the business world. The American Medical Association (AMA), in its 1934 Principles of Medical Ethics,3 lambasted corporate involvement in medicine, claiming that corporations and laypeople motivated by revenue will harm patients by exploiting physician services for pecuniary gain.4

The CPMD appears in various state laws5 that address issues regarding the ownership of health care practices by unlicensed professionals. The most rigid rules are in New York and California, while many states like Florida and Alabama have no such limitations. Regardless, even in the

records (EMR) system, then you and your practice are vulnerable to fraudulent billing, theft of your funds, and violations of patient privacy — all acts committed using your name for the MSO’s financial gain.

Thus, aside from treating patients, you must ensure that you maintain control over your administrative and patient information and check that your MSO remains honest. This is key to preventing an MSO from potentially corrupting your practice and your reputation.

This article will describe how the law has tried to prevent MSOs from controlling medical practices and explain, by presenting a hypothetical and a real-life example of MSO fraud, how an MSO could, regardless of the law, usurp your practice for corrupt activity. The article will conclude with compliance recommendations to aid you in reducing the risk of MSO fraud.
Case Example: Fraud by MSO

Hypothetical
Take a scenario where a physician owns and operates a medical practice and engages an MSO to handle all administrative components related to its management, leaving the doctor free to focus on patient care. For a fixed monthly fee, the contract includes billing services, depositing funds, paying the salaries of the staff, managing the practice’s books and records, and handling overhead costs such as lease payments and furniture rentals. The doctor generally sees that bills are being submitted to insurance (or Medicare/Medicaid), payments are coming in, and patient information is up to date on the EMR. In all respects, it seems that the MSO is fulfilling its duties, but unknown to the physician, the MSO is billing for services that were never performed, double billing for those that were performed, and embezzling funds that were meant for the practice, and outsourcing EMR management overseas to cut costs:

- Through access to the practice’s bank accounts, the MSO transfers income received for medical services (both legitimate and fraudulent) from the practice’s account to a personal account but informs the physician the transfers are to cover overhead and staff salaries. The doctor is none the wiser.
- To cover its tracks, before the money reaches the personal account, the MSO employs a layering strategy in which it opens several bank accounts across which it transfers the money, knowing full well that the amount of money paid by the insurance companies for each patient is a relatively small amount compared to the cost and effort to trace the movement of funds.
- When tax season arrives, the practice is hit with tax liability for this income that it never saw while the MSO enjoys the benefit of this money.
- With access to and control over the practice’s finances, the MSO borrows money under the guise of covering the practice’s costs. In reality, the MSO managers keep the money, but because the loan is in the name of the practice, the physician is liable for it.
- Because the MSO manages the patient records, outsourcing EMR management to an offshore data entry company — a HIPAA violation — lowers costs, which further increases net income. Throughout this process, the physician may be unaware that while the practice is being saddled with tax liability, its name and the physician’s are criminally being used to pad the MSO’s pockets. Unfortunately, although everything the MSO did is illegal, the actual contractual relationship between the MSO and practice comports with the CPMD so long as fees are not shared and the practice controls medical decisions.

Actual Case Example
Such cases like the above example are not rare. In June 2015, the New York Office of the Attorney General (OAG) entered into an Assurance of Discontinuance with a dental MSO after investigating it and a dental clinic for illegal activity. Some of the activities that triggered the OAG investigation include:

- customer complaints to the OAG about billing practices and unnecessary medical services;
- control by the MSO over the dental clinic’s finances and bank accounts, and
- taking by the MSO a percentage of each dental office’s monthly gross profit.

Ultimately, the OAG ordered a $450,000 civil penalty against the MSO, ordered it to change practices, and instituted an independent monitor to oversee implementation of the changes.

Lesson
The key takeaway from these examples is that the risk of wrongdoing by an MSO rests on you as much as it does the MSO. Corruption of the system through fraud can expose you to civil and criminal liability if you rely blindly on the MSO’s assurances.
and grant it unchecked control. You should remember you are responsible for anything done by an MSO, especially because it is your name associated with the actions. Thus, it is important for you to ensure you have oversight into and control over the MSO’s operations. This can be done by implementing effective compliance programs that require you to be aware of and to comply with the pertinent health care laws.

**How to Address the Problem**

With the strict regulatory environment within which health care providers practice, the need to engage an MSO to manage the non-clinical aspects of practice becomes essential. However, as demonstrated above, retaining such a third party carries compliance risks. MSOs that have too much control could engage in a litany of corrupt behavior, all of which pose immense liability and financial risks to you, the medical provider. Creating a compliance program can help screen MSOs, identify risks of wrongdoing, and create controls to help prevent fraud. The effectiveness of these types of compliance programs is based on the belief that you can apply internal controls to monitor adherence to applicable statutes, regulations, and program procedures.

The elements of a good compliance program can include:

- implementing written policies, procedures, and standards of conduct;
- conducting periodic internal monitoring and auditing by independent disinterested people, which includes an accounting of the financial and banking records with the invoices and patient records;
- maintaining signature authority over all bank accounts, or at least not permitting e-signatures in your name;
- designating a compliance officer either in-house or through an outside firm;
- conducting effective training and education;
- developing effective lines of communication between employees and employers, maybe permitting anonymous reporting;
- enforcing standards through well-publicized disciplinary guidelines; and
- responding promptly to detected or suspected offenses and developing corrective action.

Implementing a comprehensive compliance program is a sound business investment that can save you money and liability exposure in the long run by tempering the fraud risks. Although creating such a program does not guarantee the elimination of fraud, a properly created plan can reduce the risk of unlawful conduct.

**Conclusion**

The health care industry functions through the allocation of responsibility. The considerations surrounding who can share fees, bill for services, collaborate on health care decisions, and manage an office are subject to legal requirements, the stringency of which make the industry ripe for fraud. It is up to you, the provider, to ensure that your practice is not being usurped by commercial profiteers who circumvent the law for economic efficiencies, lest you fall victim to the corrupt acts of your MSO. Effective and comprehensive compliance procedures that manage risk are therefore essential to structuring a profitable and legally compliant MSO-medical provider relationship.

**Endnotes:**

1. The case examples and hypotheticals presented in this article are based on reported cases including US v. Gabinskaya, 829 F.3d 127 (2d. Cir. 2016); US ex rel. Brandler v. MSO Washington Inc., No. 3:06-cv-05437-RJB, (W.D. Wash 2011); and People v. Tabakman, 2009 NY Slip op 33389(U) (Nov. 23, 2009) as well as the creative imagination of the authors. No current or ongoing investigations are implicated in the facts of this article.
2. See note 5, Infra.
3. “It is unprofessional for a physician to dispose of his professional attainments or services to any lay body, organization… or however organized, under terms or conditions which permit a direct profit from the fees, salary or compensation received to accrue to the law body or individual employing him.” Medical Ethics and New Methods of Practice, 103 JAMA 263, 263 (1934) (quoting the change to the medical ethics principles for the “protection of the public”).
4. **Id.**
6. **Id.**
7. The fixed fee is a monthly dollar amount, not a percentage of the medical practice’s revenue. Sharing a percentage of physician fees is fee-sharing and illegal under the CPMD and federal law.
8. An Assurance of Discontinuance is a settlement agreement in which the party providing the assurance ceases to violate the law and to modify its practices according to the provisions of the Assurance.
9. In the matter of Aspen Dental Management, Inc., Assurance of Discontinuance, Assurance No.: 15-103 (NY Att. Gen. June 15, 2015). In this case, the MSO did in fact violate the CPMD because it shared fees with the dental practice, and the practice did not have access to its own bank accounts.
10. **Id.**
11. **Id.**