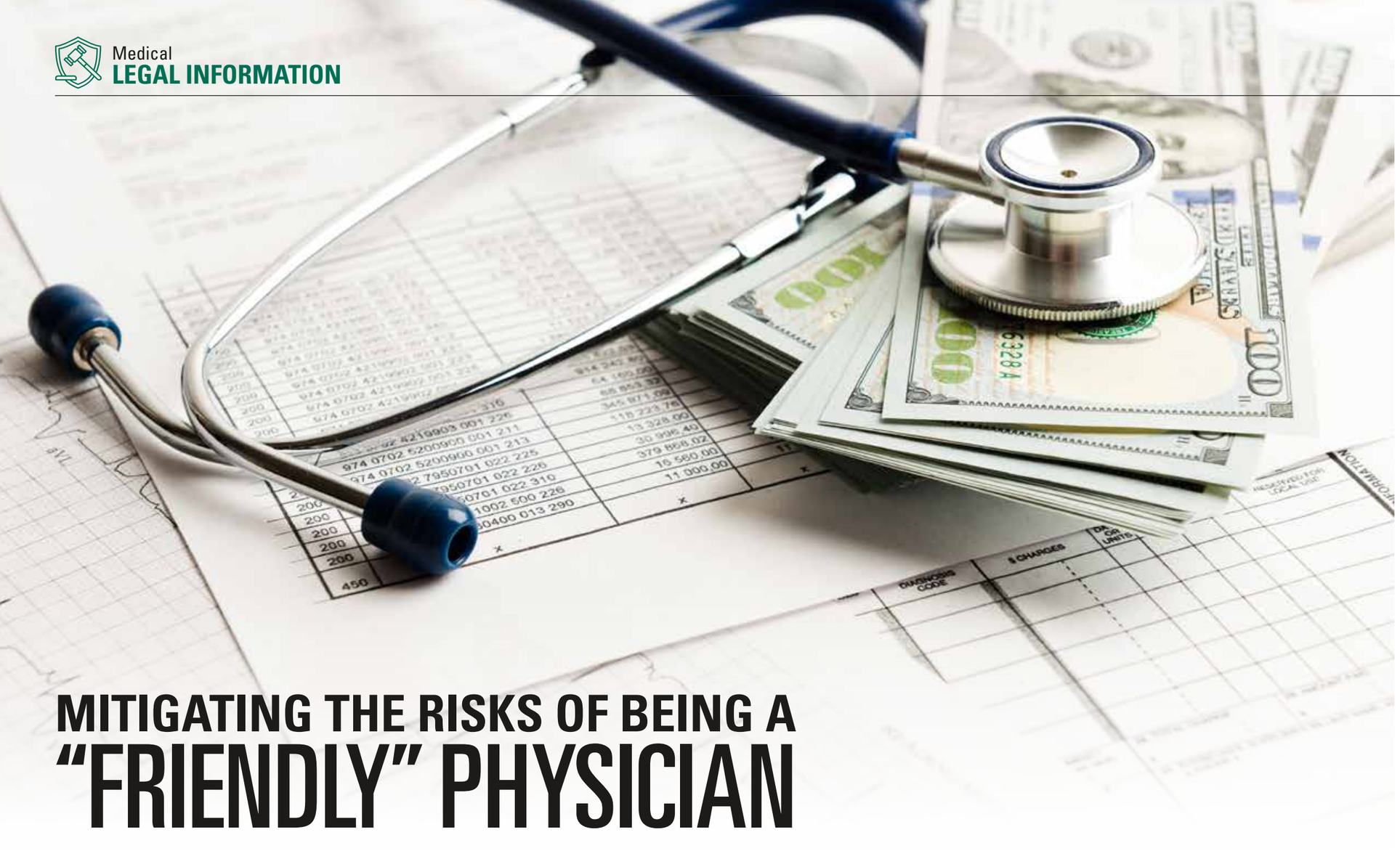

MITIGATING THE RISKS OF BEING A "FRIENDLY" PHYSICIAN

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How could a physician have any risk in being "friendly"? In this context, "friendly physician" refers to a particular type of arrangement where a physician-owned practice is managed by a management services organization, often referred to as an "MSO." The term originates from the fact that the "friendly physician" is deemed to be friendly to the objectives of the MSO.

Basic Structure Involving a Friendly Physician

In North Carolina, a medical practice, with few exceptions, must be owned by those who are licensed to practice medicine in North Carolina. Certain businesses such as med spas and urgent-care centers often have the need to practice medicine but are managed by entities that are not owned by physicians, and therefore cannot provide medical services. So, for example, if a med spa wants to provide certain injections that would constitute the practice of medicine, it must do so through a person who is licensed to provide the injection. Further, the licensee cannot be employed by the med spa to provide the injection; he or she must be employed by a practice that is licensed to provide the injection.

This conundrum is often addressed by the "friendly physician model" whereby a physician establishes a medical practice that is then managed by an MSO, which has expertise in financial, marketing, and other non-clinical aspects of running a medical practice. The basic tenet is to leave to the medical providers the practice of medicine and allow everything else to be managed by the MSO.

The risk is that MSOs overstep their boundaries and the relationship is viewed as only a "relationship on paper," where the MSO actually usurps many of the obligations and responsibilities of the physician-owner. Our experience is that when these relationships run awry, the licensing board is much more interested in its licensee (in this case the physician) than it is the MSO. Physicians who may be willing to serve as a friendly physician need to understand certain obligations that may be endemic to being a friendly physician.

Read Everything

When I first started practicing law, I had a mentor who had sage advice on which I have relied over the 30-plus years I have practiced: "read everything." In this context, it is important for the physician to read all of the documents involved in the relationship, which would include the organizational documents for the physician practice as well as the documents that memorialize the relationship with the MSO (primarily a management services agreement, often referred to as an "MSA"). Given the nature of the relationship and the stakes, it is often advisable for a physician to employ counsel. (Analogous to your barber or hairdresser telling you that you need a haircut, so it is that an article penned by a lawyer suggests that you obtain legal advice).

All Decisions Cannot Be Turned Over to the MSO

While the MSO provides certain valuable services to the medical practice (marketing, receivables management, and human resource assistance), certain obligations cannot be turned over carte blanche to the MSO. For example, licensing boards will typically want licensees and not laypersons to counsel other licensees about failures to meet practice norms. Thus, an employee of the MSO should not counsel a physician on how the physician should practice medicine. If the practice relies on advanced practice providers' "APPs," then the collaborating and supervising physicians should also have a line of communication to the physician-owner and if not, to a person licensed to handle communications from licensees. It is important that there is no lay control over clinical decision-making. The issue of who is in control could become murky if there is a non-licensee in the chain of command regarding clinical issues. The physician-owner should either take an active role in counseling providers or hire another licensee to assist in that endeavor.

Keep the Fees Flat

Further, our medical board has specific rules about fee-splitting and would prohibit a fee based on a percentage of revenues or profits in this context. Fees to the MSO should be flat and not based upon the volume or value of referrals. Fees may be renegotiated periodically, but again, should not be based on the volume or value of referrals but should be based on the value of the managerial services provided by the MSO.

Take Care of Charts

Physicians have a special relationship with patients and the information that is generated by a patient visit. All physicians have (or at least should have) a working knowledge of the requirements of the Health Insurance Portability and Accountability Act and regulations adopted thereunder (HIPAA). If the MSO has access to the charts for billing or other purposes, the practice should have a HIPAA-compliant business associate agreement with the MSO. Additionally, the ownership of charts should be maintained by the physician's practice.

Follow the Agreements

We have seen more than once situations in which the agreements establishing the friendly physician model were compliant, but the parties did not follow the agreements. It is basic. The physician should periodically review the agreements he or she signed to make sure the parties are adhering to their terms.

Act Like an Owner

In short, the friendly physician should act as if he or she owns the medical practice, because he or she does. This would include periodically reviewing financial reports as well as handling any complaints regarding providers (or delegating the handling of such complaints to someone who holds an appropriate license). Ultimately, the licensing board would look to the physician-owner to see if he or she "acted like an owner" in handling these issues.