

BUSINESS LAW

The logo for the California Lawyers Association, featuring a stylized white bracket on the left side of the text.

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Put Me In Your Business Contract! An overview of
contract terms that protect business relationships and the outcome of disputes

Vandad Khosravirad, Vito Costanzo, and Kathleen Gallagher | August 29, 2024 10:00 a.m.

Vandad Khosravirad

Vandad Khosravirad has substantial trial and arbitration experience gained at top national law firms before joining the Law Offices of Steven Goldsobel in 2018. He successfully represents individuals and companies in a wide variety of industries, including the tech, telecom, healthcare, and financial services industries in state and federal courts throughout the country, as well as in private arbitration.

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Kathleen Gallagher

Kat specializes in health care litigation at DSR Health Law, a Sacramento firm that focuses exclusively on the legal needs of health plans and health insurers. She represents clients in contracted and non-contracted disputes regarding questions of medical necessity, receipt of proper and valid authorizations to trigger payment, compliance with provider dispute resolution processes, and others. Kat also assists in defense of peer review and administrative matters, as well as in providing regulatory advice to public entity health plans.

Kat has over 17 years of experience as a general litigator and transactional attorney serving businesses and individuals in various areas of law. Her experience includes areas such as breach of contract, business torts, personal injury, employment law, workers' compensation subrogation, unlawful detainer, estate planning, and intellectual property.



Vito Costanzo

Vito is an attorney in the Litigation Section of the Los Angeles office of Holland & Knight. He has experience in the litigation of trade secrets issues, breach of contract claims and trust and estate litigation. Mr. Costanzo also has extensive experience representing colleges and universities in litigation and internal investigations. Mr. Costanzo was formerly employed as a trial attorney by the Los Angeles County District Attorneys' office. He has conducted numerous jury and non-jury trials, appeals and arbitrations, and has practiced before federal and state courts in California as well as federal courts in various states.



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**You can delegate the task but not
the responsibility.**

What is a Management Services Organization?

A Management Services Organization (MSO) is a business organization that provides **non-clinical** administrative support to medical providers and risk bearing organizations, such as independent physician associations. MSOs help streamline operations, reduce administrative burden, improve efficiency, and meet payor guidelines and milestones. Typical MSO services include:

- Accounting, collections, and revenue cycle management
- Coding, billing, and managing relations with commercial and government payors
- Human resources
- IT support, including EMR management
- Auditing support
- Contracting, credentialing, and legal services.

The typical MSO arrangement is often structured in one of two ways:

1. Managing the IPA, which receives capitation payments based on the number of lives cared for
2. Managing the provider / practice group

Basic Structure of a Management Services Agreement

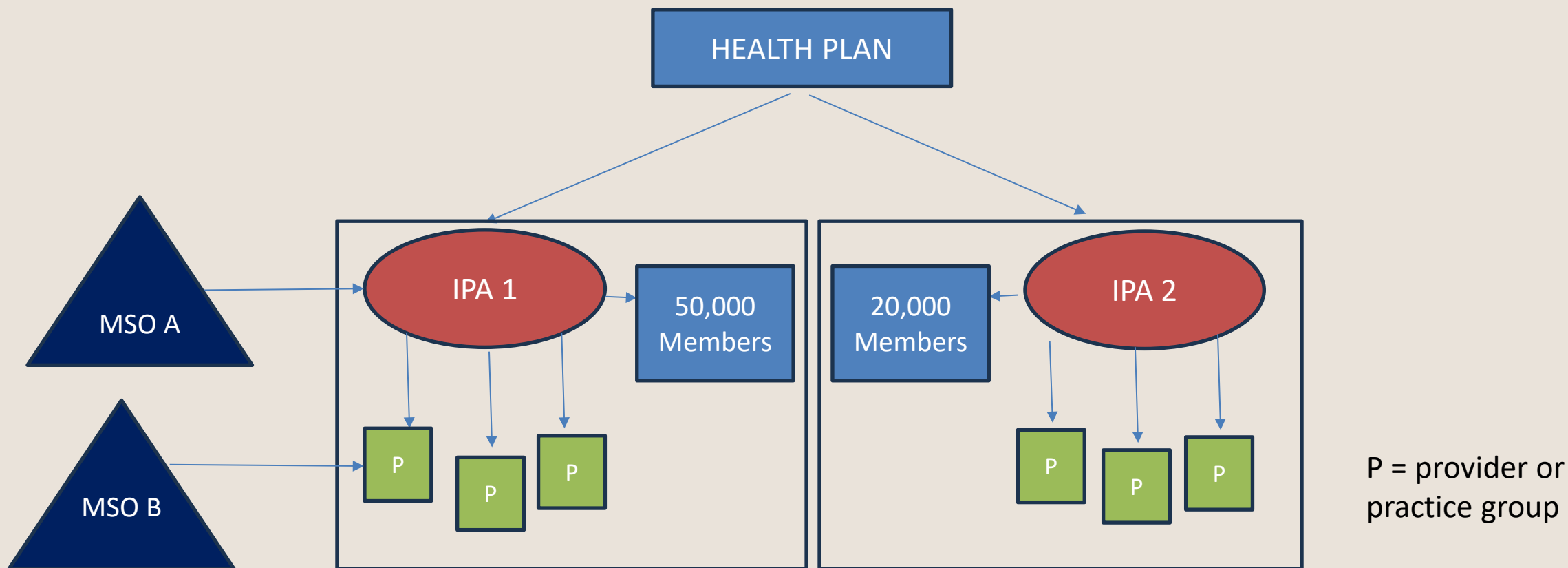
A Management Services Agreement (MSA) is a contract between an MSO and a medical practice or other healthcare business that governs the business relationship between the parties. The MSA should detail the services to be provided by the MSO, as well as the services that are specifically excluded (e.g., clinical services). It is important that the parties distinguish between the clinical functions of the practice and the non-clinical functions of the MSO to protect against the unlicensed practice of medicine and corporate practice of medicine by the MSO and physicians in violation of Calf. B&P Code §§ 2052 and 2400 *et. seq.*

People ex rel Allstate Insurance v. Discovery Radiology Physicians, P.C. (2023) 94 Cal.App.5th 521

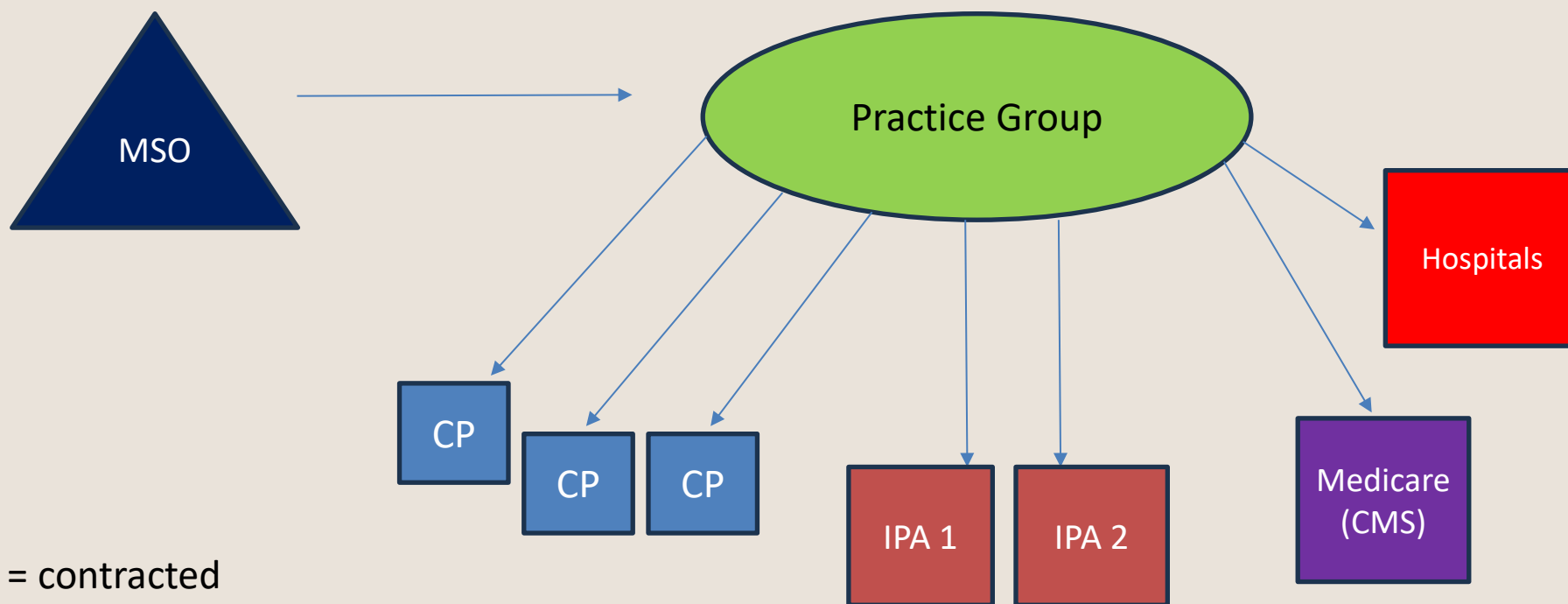
Other basic terms include:

- Term and termination provisions
- Indemnification (First Party v. Third Party)
- Confidentiality and trade secret terms
- A fee schedule for management services (commercially reasonable and consistent with fair market value)
- The parties should also execute a HIPAA-compliant Business Association Agreement, since the parties will be exchanging personal health information

Typical Risk Bearing Organization Flow Chart



The Practice Group's Perspective



CP = contracted
physician

Benefits of Management Services Organizations

- Provide actionable data analytics to enable physicians to identify at-risk patients so that they can engage and intervene to improve a patient's health status.
- Develop support services that include additional care coordination staff, patient scheduling and outreach, provider education, compliance expertise and staffing to handle audits and reporting requirements, and legal and contracting support.
- Develop and implement protocols to submit payor-compliant reimbursement claims to private and government payors, which are always changing, to ensure prompt payment and minimize audits.
- Assist with the processing of appeals for denied or underpaid claims.
- Advise on negotiating agreements with private payors.

Audits

- One of the most significant events to the business of a medical practice or IPA is an audit.
- IPAs are licensed entities and go through rigorous auditing by the health plans with whom they contract and the California Department of Managed Health Care (DMHC) or California Department of Health Care Services (DHCS).
- Providers are audited by health plans and the various auditing contractors hired by Centers for Medicare and Medicaid Services (CMS).
- Audits can be routine, or targeted because of billing irregularities or fraud, waste, and abuse investigations.
- Failed audits can have significant consequences, such as Corrective Action Plans (CAP), pre-payment reviews, recoupment, and termination of in-network agreements with payors, to name a few.

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“Example is the best precept.”

- Aesop

Businesses that Function Like an MSO

The MSO model can be analogized to other business models where a third-party entity takes care of much of the administrative functions, leaving the business owner able to focus on the key aspects of the business.

Other Third-Party Management Organizations can include:

- Website sales platforms like Amazon, Shopify, or eBay
- Small Business Office Administrative or Technical Support
- Accounting Payroll or Collections

Basic contract terms that can be found in MSO contracts can be found in the contracts that govern these business relationships, too.

Standard Contract Terms – Term and Termination

- To best protect the contracting parties, contracts should express the length of time that the contract is in effect.
- The length of a contract term can be expressed in many ways depending on the needs and desires of the parties.
 - Contracts can be written with 1-year terms that automatically renew every year unless otherwise agreed to by the parties.
 - Contracts can be written with 2-year terms that automatically terminate unless renewed by the parties.
- Termination clauses generally require notice in writing by one party to the other.

Standard Contract Terms – Term and Termination

California courts have established a three-step analysis to determine the duration of a contract. *Zee Medical Distr. Ass'n, Inc. v. Zee Medical, Inc.*, 80 Cal. App. 4th 1, 10 (2000), citing *Consolidated Theatres, Inc. v. Theatrical Stage Emp. Union, Local 16*, 69 Cal. 2d 713, 727-28 (1968).

STEPS:

1. Seek an express term of duration. If none can be found, then:
2. Determine whether a term of duration can be implied from the nature and circumstances of the contract.
3. If no express or implied duration can be found in the contract, then the contract can be generally construed as terminable at will.

Standard Contract Terms – Indemnification

- Indemnification is an obligation to cover or make good a loss or damage that another has incurred. There are two types: First Party Indemnification and Third-Party Indemnification.
- First Party Indemnification is an agreement by A to indemnify B for losses or damages directly incurred by B as a result of certain triggering acts.
- Third-Party Indemnification is an agreement by A to indemnify B for losses or damages that B causes to a third party arising from triggering acts.

Standard Contract Terms – Indemnification

- In the context of an MSO, indemnity agreements appear when the MSO agrees to indemnify the Provider for any losses or damages directly incurred by the MSO or any third party arising from the MSO's conduct. The reverse can also happen where the Provider indemnifies the MSO for damages that arise from the Provider's own conduct.
- Similar indemnity agreement relationships can be found in other business relationships. The goal is to have each entity take responsibility for its own acts in as complete a way as possible.

Standard Contract Terms – Trade Secret

- California Civil Code section 3426.1(d) defines “Trade Secret” as:
 - “information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
 - (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
 - (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”
- The Uniform Trade Secrets Act found at California Civil Code section 3426, *et seq.* prohibits misappropriation of trade secrets and codifies the procedures for pursuing an action for misappropriation.

Standard Contract Terms – Trade Secret

- Contracts can include their own definition of “trade secret.”
- In MSO and other contracts in general should expressly include language that each party agrees to keep trade secrets confidential.
- The statutory definition of trade secret can be better defined in the contract to include specific areas like:
 - (a) business methods;
 - (b) billing records and processes;
 - (c) forms and checklists;
 - (d) information regarding business relationships;
 - (e) marketing campaigns; and
 - (f) information regarding suppliers and vendors.

Standard Contract Terms – Confidentiality

“Confidential Information”
defined in a comprehensive way.

including all notes, studies, records, financial information, business plans and strategies, joint venture plans, forms, business or management methods, marketing data, fee schedules, treatment protocols or guidelines, terms of contracts and arrangements of the Providing Party or other trade secrets, whether oral or written, and whether or not such Confidential Information is disclosed or otherwise made available to one party by the other party pursuant to this Agreement. Confidential Information shall also include this Agreement’s terms and provisions, and any transactions consummated or documents executed by the parties related to this Agreement. Confidential Information does not include any Protected Health Information as defined in Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) or any information that (i) is or becomes generally available to and known by the public (other than as a result of an unpermitted disclosure directly or indirectly by the Receiving Party or its affiliates, advisors or Representatives); (ii) is or becomes available to the Receiving Party on a nonconfidential basis from a source other than the Providing Party or its affiliates, advisors or Representatives, provided that such source is not and was not bound by a confidentiality agreement with, or other obligation of secrecy to, the Providing Party of which the Receiving Party has knowledge at the time of such disclosure; or (iii) has already been developed, or is hereafter independently acquired or developed, by the Receiving Party without violating any confidentiality agreement with or other obligation of secrecy to the Providing Party.

Standard Contract Terms – Confidentiality

6.1. Reciprocal Confidentiality Covenant. Neither party (as the “Receiving Party”) will disclose any Confidential Information of the other party (as the “Providing Party”) to other persons without the Providing Party’s written authorization. The Receiving Party will not, directly or indirectly, use such Confidential Information in a manner detrimental to the Providing Party, and the Receiving Party will keep such Confidential Information confidential and will ensure that its affiliates, advisors and Representatives (as defined in section 6.2) who have access to such Confidential Information comply with these nondisclosure obligations. The obligations set forth in this section 6 shall survive the expiration or termination of this Agreement for any reason.

Standard Contract Terms – Confidentiality

6.2. Permitted Disclosure to Representatives. The Receiving Party may disclose Confidential Information to those of its managers, directors, officers, employees and agents (“Representatives”) who need access to Confidential Information for the purposes of this Agreement, it being understood and agreed to by the Receiving Party that such Representatives shall be informed of the confidential nature of the Confidential Information, shall agree to be bound by this section 6, and shall be directed by the Receiving Party not to disclose to any other person any Confidential Information.

6.3. Disclosure Required by Law. If the Receiving Party is required by law or legal process to disclose any Confidential Information of the Providing Party, the Receiving Party shall immediately notify the Providing Party, and upon request of the Providing Party, shall cooperate with the Providing Party in contesting such disclosure at the expense of the Providing Party.

Standard Contract Terms – Privacy

- Health care contracts must include protection of privacy rights under HIPAA, 45 C.F.R. Parts 160 and 164, as well as California Civil Code sections 56 to 56.37.
- These contract terms and obligations can be triggered when one party receives a subpoena to produce business records that may infringe on the privacy rights of non-parties like health care patients.
- HIPAA requirements found in 45 C.F.R. section 164.512(e) *et seq.* require that the patient receive notice of a subpoena and an opportunity to object to disclosure of their health care information.

Standard Contract Terms – ADR / Forum Selection

- ADR and Forum Selection clauses allow the parties to choose how to resolve their disputes, including electing for binding arbitration instead of court action.
- There are pros and cons to specific forums and ADR or exhaustive remedy procedures.
- Health care contracts generally incorporate procedures found in ancillary documents like manuals, so it is important to identify all of the procedural documents that are incorporated into the contract.
- It is important to follow the process stated in the contract or there could be issues in the event of a dispute for each side. Business custom and practice may override the express language of the contract.

Standard Contract Terms – ADR / Forum Selection

SAMPLE CONTRACT TERM:

Any dispute, controversy, or claim arising out of or relating to this Agreement or the breach, termination, or validity thereof (“Dispute”) arising between the Parties shall be communicated in writing by one party to the other as soon as reasonably possible after the Dispute arises. All Parties involved in the Dispute shall first attempt in good faith to resolve it informally, which all such communications shall be deemed settlement discussions not admissible in formal proceedings. If the Dispute cannot be settled informally within 6 months, then it shall be submitted to binding arbitration before a competent arbitrator within the State of California.

Standard Contract Terms – Other

From the DHCS 2024 Boilerplate Contract, Exhibit G (page 573 of 614)

22.4 No Third-Party Beneficiaries. Nothing in this Agreement is intended to or shall confer, upon any third person any rights or remedies whatsoever.

22.5 Interpretation. The terms and conditions in this Agreement shall be interpreted as broadly as necessary to implement and comply with HIPAA and other applicable laws.

22.6 No Waiver of Obligations. No change, waiver, or discharge of any liability or obligation hereunder on any one or more occasions shall be deemed a waiver of performance of any continuing or other obligation, or shall prohibit enforcement of any obligation, on any other occasion.

Litigation Concerns

Pre-filing considerations

Mediation/settlement discussions

Arbitration v. court

Pros and cons

Enforcing/vacating arbitration awards

Venue Choice

Litigation, cont'd.

Contract Termination Claims

Was termination notice proper?

Calculating damages following termination

Default/cause for termination

Enforcing contract terms – enforcement of percentage fee arrangements

Litigation, Cont'd.

Protecting Your Technology

Definition of Trade Secrets
economic value
not generally known
valuable to others
secret

Requirement to identify the trade secrets



“ “ **Litigation: A machine which you go
into as a pig and come out a sausage.
Ambrose Pierce**

Litigation, Cont'd.

Enforcing confidentiality provisions

What is confidential?

Proprietary business information

HIPAA information

Remedies for disclosure

Litigation, cont'd.

Enforcing Restrictive Covenants

Examples of restrictive covenants

Employment context

Enforcement mechanisms

Litigation, Cont'd.

Indemnity claims

Scope of duty to indemnify

How to enforce

Limitations on enforcement