

A MARTI LAW GROUP EBOOK:

# NAVIGATING THE LEGALITIES OF MEDSPA OWNERSHIP

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## INTRODUCTION

# Are you ready to own a medspa?

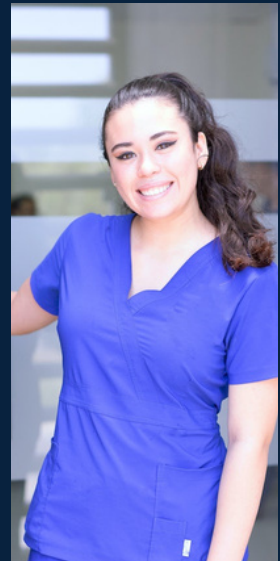
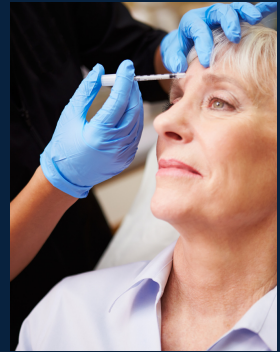
The medical aesthetics industry is booming. New practices, providers, technology, and patients flock to the industry to contribute to its rapid growth. And it doesn't seem to be slowing down! Currently, the US makes up \$6 billion of a \$15 billion global industry. By 2030, it's projected to be \$40B. It's no wonder there's been so much recent interest in medical spas from private equity groups.

Of course, we have a feeling you already know how exciting it is to be a part of the medical aesthetics field. Numbers like those might have encouraged your interest in owning a practice in the first place.

What's not-so-exciting, however, is navigating some of the complicated laws regarding medspa ownership. Who can own one? How are practices regulated? What is an MSO and do you need one? A lack of clarity around these questions can get in the way of opening your practice—or establishing an entity that meets compliance requirements and sets up your business for long-term success.

In this ebook, we're here to walk you through the legalities of owning a medical spa so that you can build, grow, or potentially sell your practice. Inspired by our clients' most frequently asked questions, we work to untangle the rules that vary by state and impact your approach to medspa ownership.

We hope you walk away with a better understanding of ownership considerations. (And we apologize in advance for the number of times we have to write "it depends" in these articles.) We'd love to continue the conversation and help you with your specific questions. Reach out to us at [info@martilawgroup.com](mailto:info@martilawgroup.com) if you'd like to dig into a challenging legal issue as you establish or sell your practice. We're excited to hear from you!



## CHAPTER ONE

# Making sense of regulation in medical aesthetics

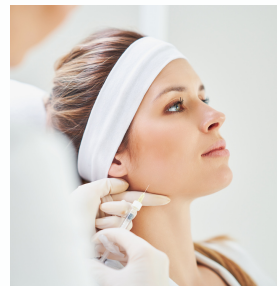
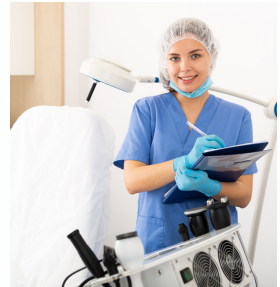
Why is regulation so confusing in medical aesthetics? There are a few reasons. In part, state statutes vary throughout the country, offering different definitions of medical spas and medical procedures. Despite the fact that medical spas emerged more than thirty years ago, it seems that regulatory bodies have been slow to adapt and interpret exactly what a medical spa is and who can own one. What's worse is that there are a number of sources, generally believed to be reliable, publishing inconsistent or downright wrong content around what is or is not legally compliant.

How can we make sense of these? Let's break it down into a few key points.

## State statutes differ in the way they define and regulate a medical aesthetics practice.

Each state has drastically different regulations on how to define a medical spa and who can own one. While some states have clearly articulated that a medspa is, in fact, the practice of medicine and must be regulated as such, others have taken a more passive approach, failing to even define medspas in their statutes.

As the industry grows, regulators in various states are working to more clearly define medical spas, which aesthetic procedures are defined as "medical," and enforce compliance. Of course, the laws still vary from state-to-state, making the question of "who can own a medical spa?" (our next section) become dependent on where you live.



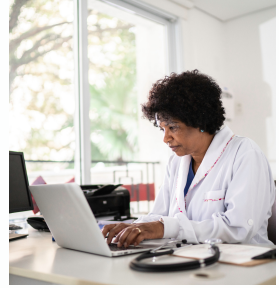
CHAPTER ONE: MAKING SENSE OF REGULATION

**Who regulates medical aesthetic practices?**

As you can see in the list below, there are a number of regulatory bodies when it comes to medical spas, and sometimes they aren't consistent in their own definitions, rules, or information. That's why it's crucial to work with a legal team who truly understands the industry and is proactive about staying up to date with changing regulations.

- Boards of Health
- Divisions of Professional Licensing
- State Medical Boards
- State Nursing Boards
- State Cosmetology Boards
- Food and Drug Administration (FDA)
- Occupational Safety and Health Association (OSHA)
- Office of the Inspector General (OIG)
- State Attorney General Offices

In the following sections, we'll discuss how variations in state law, such as the Corporate Practice of Medicine, can impact ownership, supervision requirements and more.



## CHAPTER TWO

# Who can own a medical spa?

By far the most frequently asked question we receive from clients is, “Can I own a medical spa?” We can sum up our response to all of them with just two simple words: *it depends*.

In this section, we provide three considerations you’ll need to make in determining if you’re able to own a medical spa.

## State Law and the Corporate Practice of Medicine

Yes, this again. But here, we’ll dig a little deeper into how state laws impact ownership, not just regulation. We’ll do that by explaining the [Corporate Practice of Medicine \(CPOM\)](#) theory. CPOM is a legal doctrine that allows only properly-licensed healthcare providers to own a medical practice. The underlying idea is that healthcare providers should remain free from corporate or investor influence when making medical decisions for their patients.

You guessed it! States vary in both their subscription to and enforcement of this theory. States typically fall into three buckets regarding CPOM:

- CPOM is in effect and strictly enforced
- CPOM is in effect, but enforcement is relaxed
- No CPOM

## Licensure Type

The next consideration when determining who can own a med spa is your level of licensure. While your state may allow an aesthetician to shoot lasers or a registered nurse (RN) to inject under physician supervision, this does not mean that these professionals can automatically own a medspa.

A growing number of states have been joining the [independent practice movement](#), wherein licensed nurse practitioners (NPs) can practice medicine independent of physician oversight after meeting certain criteria. Currently, 28 states have approved some level of independent practice for NPs and a handful of others have proposed legislation working its way through the approval process. For those states that have passed such laws, an NP is generally able to own a medspa.

In other states, such as California, other licensed professionals, including dentists, RNs, optometrists, and chiropractors, may be able to take a minority ownership stake in the medspa, as long as a physician maintains at least 51% control.

## CHAPTER TWO: WHO CAN OWN A MEDICAL SPA?

### Physician Arrangements and Medical Directors

Regardless of your level of licensure or lack thereof, it is of the utmost importance that you have a Medical Director in place to properly supervise the clinical team. The credentials of the Medical Director again vary by state, but generally the individual will have to be a physician, NP (in an independent practice state), or in some instances, a physician's assistant (PA).

The Medical Director should have a written agreement with the clinical practice that articulates the duties owed to the practice, how good faith exams are conducted, frequency of in-person compliance checks and compensation. For individuals with the proper license level to act as their own Medical Director, they may certainly do so, but it is still important for the team to know who is on call should the director be away or otherwise unavailable.

We'll talk more about the role of the Medical Director in the next section.



## CHAPTER THREE

# Understanding the Role of Medical Director

Rapidly becoming one of the most hotly-contested issues in aesthetics law is the role of the Medical Director. Who can serve as a Medical Director and what are the requirements of the person in this critical position? Let's dive in.

## Who can act as a Medical Director?

You have heard us say this before (and please don't be upset) but, *it depends*. Though the answer to who can act as Medical Director of a medspa tracks closely with the question of who can own one, there are some significant variances.

Generally, a medical director candidate will fall into one of three buckets:



**Physicians:** First, due to Corporate Practice of Medicine (CPOM) restrictions, some states allow only a physician to act as the Medical Director. In strict CPOM states, such as California, despite allowing certain licensed individuals to own a minority share of a medical practice, the role of Medical Director may only be filled by a physician.



**Nurse Practitioners:** Next, in independent practice states that allow nurse practitioners (NPs) to own a medical practice, the NP may also act as Medical Director after meeting certain criteria.



**Physician's Assistants:** The third and final bucket of directorship are those states that, in addition to physicians and NPs, allow a physician's assistant (PA) to fill the role, as long as there is collaborative agreement in place with a doctor.



## CHAPTER THREE: UNDERSTANDING THE ROLE OF MEDICAL DIRECTOR

### What are the requirements and expectations of the Medical Director?

Once again, state statutes and medical board opinions vary widely in the list of duties required of the person filling this role. Generally, the Medical Director is tasked not only with oversight of the clinical team, but also for writing and disseminating clinical policies and procedures, hiring and training clinical staff and ensuring compliance with everything from continuing education to OSHA and HIPAA requirements.

The duties list can lead down a rabbit hole rather quickly, as the regulations vary as to how initial consultations must be handled, how often the Medical Director needs to be on-site and what provider headcount limitations may exist.

For a nuanced role with many variations, it's not one to be taken lightly. The liability for the negligent acts of the clinical team members will likely rise to the Medical Director themselves. For folks considering the role of Medical Director, it is wise to not only obtain your own medical malpractice insurance, but layer on an administrative liability policy, which aims to limit exposure stemming from the administrative duties that are a key element of the position.



CHAPTER FOUR

# MSOs, fee-splitting, & management fees

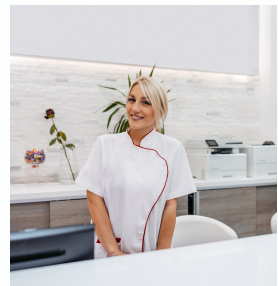
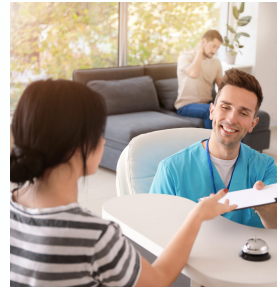
**What is an MSO?**

MSO stands for Management Services Organization. To understand the MSO model in medical spas, you need to think about the medical spa as two businesses instead of one.

One business is the medical clinic that treats patients. It handles all patient matters, treatment planning, and medical equipment. The other business is a management company, which handles everything non-medical: staffing, payroll, scheduling, accounting, marketing, and more.

MSOs emerged as a workaround to CPOM. While an unlicensed (or under-licensed) individual may not be able to own an actual clinical entity (think: the medical facility that is injecting or shooting lasers), they can own the management company that supports the operation (and receives a hefty fee in exchange.) A Management Services Agreement (MSA) is essential in order to define the relationship, operational arrangements, and the flow of funds. The MSA must be carefully crafted to ensure there are no issues around CPOM or fee-splitting prohibitions.

MSOs are an attractive model to private equity groups. Centralization of business services offers opportunities for companies to scale and find efficiencies. Their buying power grows as they add more practices. But before deciding if this model is right for you, it's important to understand the implications—whether you're a physician, PA, RN, or investor.



## CHAPTER FOUR: MSOS, FEE-SPLITTING, & MANAGEMENT FEES

### Fee Splitting Prohibitions

“Fee-splitting” is a term that sends – or should send – shivers down healthcare providers’ spines. Prohibition on fee-splitting stems from the idea that the paying of referral fees by healthcare providers to unlicensed third-parties (and vice versa) impairs the provider’s ability to make objective medical decisions.

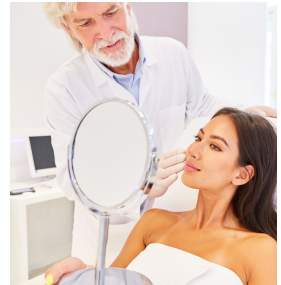
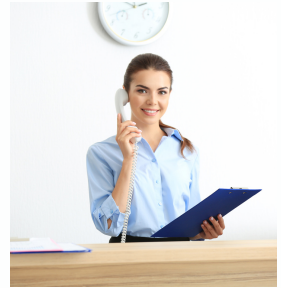
On the surface, this certainly makes sense. Providers should be practicing independent of outside influence. If a financial arrangement exists that incentivizes third-parties to refer to certain providers, it could result in abuse of the healthcare system. However, a major drawback of the prohibition is realized when attempting to structure MSO arrangements, particularly as it pertains to the setting of management fees.

Getting the management fee right could mean the difference between a successful MSO arrangement and one that is non-compliant and subject to legal scrutiny.

### Management Fee Calculation

A management fee is an MSO’s financial arrangement; the fee the clinic pays to the management company. Though we leave the actual accounting of management fees to the CPAs and financial experts, it is important to get familiar with your state’s legal protocols on management fee calculations and what is - or is not - allowed.

Generally, there are three methods to calculate management fees depending upon the jurisdiction. We share those methods on the next page.



CHAPTER FOUR: MSOS, FEE-SPLITTING,  
& MANAGEMENT FEES

# Management Fee Calculation Methods



### Flat Fee

In many states, MSOs have no choice but to implement a flat management fee, as the use of a percentage of revenue is precluded by the aforementioned fee-splitting regulations.

For new practices that lack historical data, this can be a total shot in the dark. The key is to allow flexibility in the MSA to take a look back after some period of time (say, quarterly or annually) and make adjustments as necessary.



### Percentage-Based

In some states, although the fee-splitting prohibition is alive and well, the regulations may allow for a fee predicated upon a percentage of revenue, as long as it is not based upon the specific referral of patients. In other words, if the fee is truly based upon management services provided and there is no underlying referral relationship agenda, a percentage may be allowable.

MSOs must proceed with extreme caution when attempting to implement a management fee based upon a percentage of revenue and consult an attorney familiar with that respective state's regulations.



### Cost Plus

This method determines a flat fee and layers on a premium. In this instance, the flat fee is again based upon historical expense data (if it exists, otherwise pro forma analysis) and then adds on a mark-up.

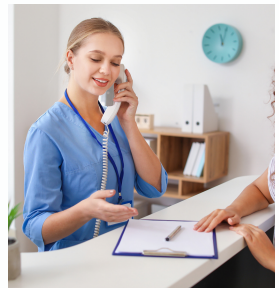
While the medical practice may not love the "plus" component going to the MSO, the idea is that the management company should more than make up for that premium by the value they deliver.

CHAPTER FOUR: MSOS, FEE-SPLITTING, & MANAGEMENT FEES

The Fair Market Value Requirement

As a final rule of thumb, federal and state regulations require that the management fee be one of "fair market value." What is fair market value (FMV) you may ask? As we lawyers like to say, *it depends!*

The underlying theme is that the management fee should not be gouging the practice. This is again a subjective area, but historical expense data would tell a practice whether or not a fee meets the FMV standard.



## CHAPTER FIVE

# Structuring your legal entity

If you've made it this far in navigating the varied, complicated legal complexities of owning a medspa, congratulations! It's time to put some serious consideration into your legal entity. Where should you start?

In the world of healthcare law, it is commonplace to see medical practice entities formed as Professional Corporations (PCs) or Professional Limited Liability Companies (PLLCs). These structures are commonly used by licensed professionals (think: doctors, dentists, NPs and PAs) to organize their legal entities.

While most practitioners understand that they should set up one of these professional structures to operate their practice, there is often a lack of clarity as to the why. Here, we discuss five considerations for utilizing a "P" structure when forming your legal entity.

*Note that for purposes of this ebook we use PLLC as our example. However there are a number of legal and tax considerations when deciding between a PC, PLLC, or another entity type, as with general corporations and LLCs. You can read more on common business structure types [on our blog](#).*

## Purpose and Evolution

The emergence of the PC/PLLC (and in some states, a professional association, or "PA") came about as an effort to provide certain benefits and legal protections to professionals practicing in fields that required a license. Given the heightened duty of care owed to patients or clients in these fields of practice, a licensed professional inherently realizes greater liability exposure, hence the need for malpractice insurance. Unsurprisingly, when forming a new entity to start a medical practice, it is important to familiarize yourself with the applicable laws of your state.

## Professional Status

Frequently, healthcare licensing boards will require providers to form a professional legal entity to provide services to the public. These structures tend to demonstrate compliance with regulatory requirements and establish a professional status. Anecdotally, such a structure also speaks to the idea that the licensed professional is reputable amongst colleagues and referral partners.

## CHAPTER FIVE: STRUCTURING YOUR LEGAL ENTITY

### Limited Liability

As the name implies, the whole idea behind the LLC is to limit one's personal liability from claims that arise out of the actions of a business. The same applies here. The increased likelihood for malpractice suits calls for heightened protection.

It is important to note that, generally, a PLLC does not gain special treatment merely on account of being formed. However, maintaining a PLLC may be required to obtain certain insurance policies, which may come with greater protections than that of a more traditional general business liability policy.

### Tax Considerations

We are not CPAs, and thus, will never give tax advice (that's why we stay friends with many of them). However, PC and PLLC structures can provide certain tax advantages that you should explore with your accounting team and financial advisors.

While tax regulations vary by state, these structures often allow professionals to take advantage of specific deductions and/or benefits available to providers. The ever-popular "S-corp" designation can also apply to professional entities, giving the best of both worlds.

### M&A Transactions

An asset purchase is one of the more common M&A transaction types. When such a transaction is consummated, the buyer is generally using a new PC or PLLC to purchase the assets of the selling practice. This is important because a newly-formed legal entity will help avoid any skeletons in the closet of the selling entity (or as we like to say, it helps prevent our client from "buying a lawsuit").

You know what we're going to say next. Requirements for forming and operating a PC or PLLC vary by state. Further compounding the confusion of what entity type to implement are Corporate Practice of Medicine (CPOM) concerns.

# Will you be the next owner to start or sell a practice?



## CONCLUSION

# Let's get started.

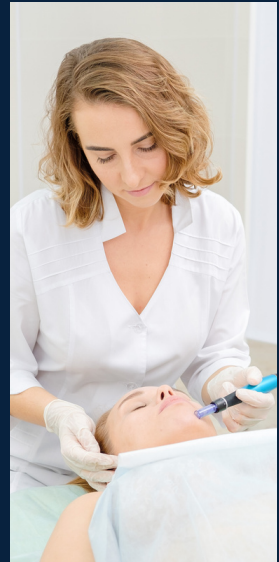
We set out in this ebook to shed some light on the gray areas of owning a medical aesthetics practice. However, to do this topic justice, we could publish 50 different state-specific ebooks that dig into the nuances, only to have to update them the following year when the law, once again, evolves.

Despite the complexities of this industry, we love being a part of it! It's exciting to work with providers and entrepreneurs in this growing, complicated, ever-changing field. Will you be the next owner to start or sell a practice?

If that's your vision, we must reiterate the importance of working with the right legal team that understands the nuances of healthcare law to ensure that your professional entity is properly-structured and legally compliant.

If you are a practitioner that is concerned about your structure type or you are looking to form a new entity for purposes of starting or buying a medspa practice, please reach out to us at (860) 552-7770 or email [info@martilawgroup.com](mailto:info@martilawgroup.com).

Learn more about how we specialize in serving medical aesthetics at [www.martilawgroup.com](http://www.martilawgroup.com).





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