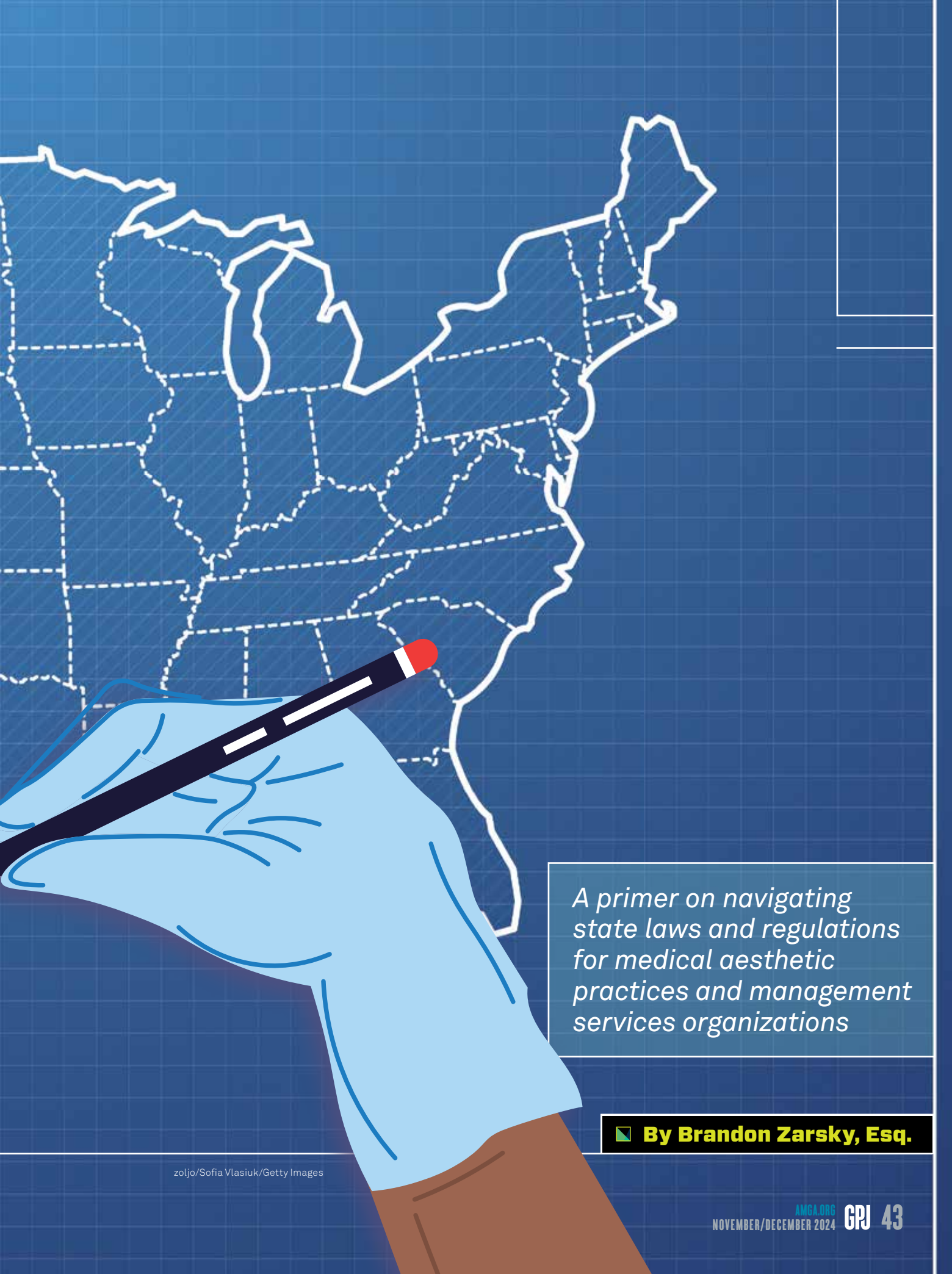
Aesthetics, Above Board



A primer on navigating state laws and regulations for medical aesthetic practices and management services organizations

By Brandon Zarsky, Esq.

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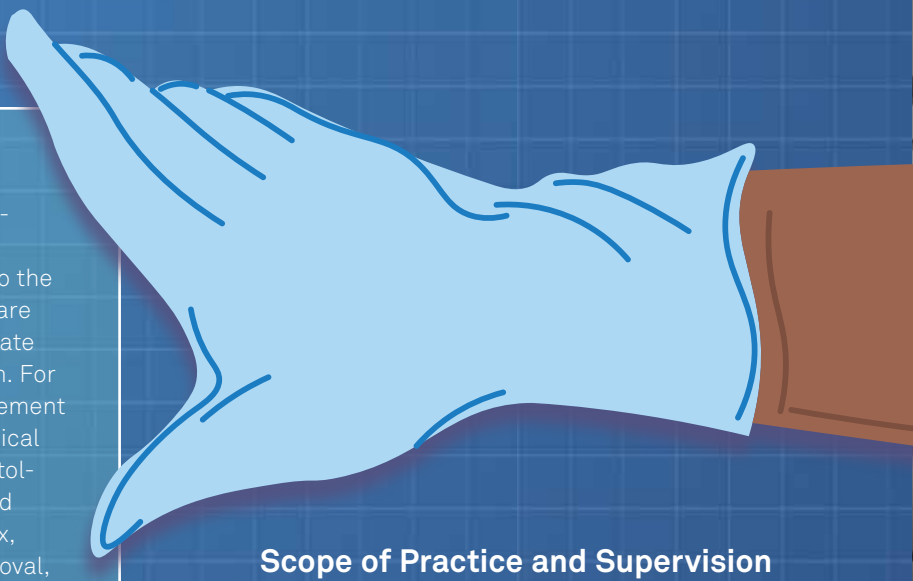

As the medical aesthetic sector continues to boom across the country, more providers and other industry stakeholders are considering entering the space. However, as the industry continues to grow, so do the number of investigations by government healthcare regulators, especially state attorneys general, state medical boards, and state departments of health. For example, New Jersey recently brought an enforcement action against a cosmetologist for providing medical services that were outside the scope of a cosmetology license, and an esthetician was recently fined over $20,000 for providing services such as Botox, platelet-rich plasma (PRP) injections, tattoo removal, and hair removal procedures, all of which are considered the practice of medicine in most jurisdictions.

Whether you are opening a new aesthetic medical practice or forming a management services organization (MSO) for the first time, expanding your existing aesthetic business into a new jurisdiction, or adding a new service line or provider, there are a variety of state-specific regulations that will impose limitations and requirements on the structure of your business, the services you offer, and who can perform those services. These laws and regulations may also create certain requirements or limitations on the relationship between a medical aesthetic practice and an MSO, or the provision of services via telehealth.

Here, we provide a jurisdiction-agnostic primer on the most common types of state laws and regulations that impact medical aesthetic practices and MSOs. We also provide recommendations for how to minimize risk and avoid common pitfalls while expanding your medical aesthetics business.

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Scope of Practice and Supervision

The first set of state law limitations applicable to medical aesthetic providers are the state's scope of practice and supervision requirements. Unlike some of the types of regulations we will discuss, each state has specific scope of practice and supervision requirements. For that reason, it is extremely important to confirm your business complies with any applicable scope of practice or supervision requirements when adding a new service type or employing a new provider type to provide a service. Note that this analysis should be performed even if other types of providers are already providing those services at your business, as scope of practice and supervisions requirements can vary greatly among provider types.

A licensed healthcare professional's scope of practice is the set of activities that the professional is permitted to perform within their profession. These vary greatly from state to state and from provider type to provider type. For example, in certain states, the use of lasers for various medical aesthetic procedures may be considered surgery and strictly limited to physicians. In other states, mid-level providers such as nurse practitioners, physician assistants, or registered nurses may be able to provide the same service under proper supervision.

Supervision requirements also vary greatly from state to state, so in addition to confirming your providers are delivering services within their scope of practice, it is paramount to confirm they are being supervised by the proper type of provider. You should also confirm that there are no state-specific limitations on the type of supervision that must be provided (for example, is direct supervision required, or is remote supervision via electronic means permitted?) and verify the number of providers that may be supervised by any one physician or provider at a time.

Finally, if remote supervision is permitted, it is also important to confirm whether there are any other limitations on supervision, such as the distance the supervising provider may be away from the site where the services are being provided.

State Prohibitions on the Corporate Practice of Medicine & Management Services Organizations

The corporate practice of medicine (CPOM) doctrine prohibits unlicensed persons from practicing medicine and/or employing physicians and other licensed healthcare professionals to provide medical services. This doctrine stems from the inherent conflict between a licensee's duty to provide appropriate care and treatment to a patient, and a business entity's (i.e., the licensee's employer's) superseding interest in reducing costs while maximizing profitability.

To combat this potential conflict, many states have enacted legislation, or have binding caselaw precedent, that prevents or restricts unlicensed individuals from obtaining ownership interests in medical practices. These prohibitions aim to ensure that profit interests do not interfere in the exercise of a licensee's clinical judgment. In states with strong CPOM prohibitions, medical practice entities may only be owned by licensed physicians. In some states with less restrictive CPOM prohibitions, other types of professional healthcare providers (such as chiropractors, nurse practitioners, or physician assistants) can own all of or a minority interest in a medical practice entity. In other, even less restrictive states, an unlicensed individual may be permitted to own a medical practice, provided that they do not control the practice of medicine by their employed clinical providers.

Understanding your jurisdiction's CPOM limitations is especially important when utilizing an MSO model. While these models may be utilized to allow non-licensees to participate in a medical revenue stream, jurisdictions with more restrictive CPOM limitations often have specific limitations on the services an MSO may provide or the level of control an MSO may exert over the clinical entity it manages.

In less restrictive jurisdictions, it may be possible for non-clinicians to directly own a practice entity provided the practice of medicine is properly supervised within their entity. In some states, this requires a written medical director agreement with a physician who supervises the practice of medicine within the practice.

In addition to allowing non-clinicians to benefit from the success of a medical practice in a non-ownership role, MSOs can also be utilized in a number of other ways that can be incredibly beneficial. Some examples include utilizing an MSO to incentivize key employees who may not otherwise be able to own equity in a medical practice directly, such as nurse injectors or physician assistants. If utilized properly, an MSO can also be used to shield assets from liabilities that may otherwise be subject to professional malpractice liability.

Telehealth & Telemedicine Considerations

New and/or expanding aesthetic practices planning to utilize telehealth should also be aware of their jurisdiction's specific telehealth and telemedicine laws as well as any patient choice laws, insurance laws, or professional board regulations that may impact the provision of telemedicine services. All jurisdictions contain additional telehealth-specific limitations on provider scope of practice in the context of telehealth, and often apply different requirements to different provider types. For example, physicians may be able to provide certain services via telehealth, while mid-level providers may be more limited. Certain jurisdictions may also require an in-person physical assessment, rather than a telehealth assessment, prior to providing cosmetic medical services to patients.

Closing Thoughts

Overall, individuals looking to open their own practice and existing practices planning to expand their scope of practice have to consider a plethora of state regulations to ensure compliance including, but not limited to, appropriate scope of practice, corporate practice of medicine considerations, as well as when it may be appropriate to hire or create a management services organization. Taking the time to engage in this diligence prior to starting a new business venture or before expanding practice scope has the potential to insulate an organization from substantial risk and liability as they evaluate future opportunities. GPJ

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