

Can the MSO Legally Brand the name of a Medical Clinic?

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If you have a medical management company (MSO), you might be wondering, can your MSO brand itself with the same name as the medical clinic, and even license the name to the physician that owns and operates the medical clinic.

Background: The MSO Model

We address the MSO in prior posts, including:

- Rock Your Practice with an MSO—MSO Compliance vs. using Independent Contactor Practitioners
- Kickbacks, Fee-Splitting, Corporate Practice of Medicine, Stark, MSOs: Guiding Healthcare Ventures through the Maze
- Corporate Practice of Medicine on Steroids: How Your MSO and Professional Medical Corporation Could Work Together Without Courting Legal Disaster
- Corporate Practice of Medicine & Anti-Kickback / Fee-Splitting Rules: Deep Down the Regulatory Rabbit Hole
- Is it fee-splitting for medical doctors to share revenues with non-medical business owners?

The MSO model is a stalwart for creating a healthcare venture that involves licensed medical doctors, where the entrepreneur is a non-physician.

Branding and Licensing the Clinic Name

The branding path is complicated by the fact that California law treats physicians, and the practice of medicine, differently than other professions. Among other things:

California prohibits the unlicensed and corporate practice of medicine. This means that management companies must take particular care to avoid enforcement scrutiny.

On its webpage, [Corporate Practice of Medicine](#), the [Medical Board of California](#) explains that the rule is “intended to prevent unlicensed persons [and companies] from interfering with or influencing the physician’s professional judgment.” However, the Board then lists a broad range of activities that constitute corporate practice of medicine. These include:

Management service organizations arranging for, advertising, or providing medical services rather than only providing

administrative staff and services for a physician's medical practice (non-physician exercising controls over a physician's medical practice, even where physicians own and operate the business).

So at the start, caution is required as the medical board could see a corporate practice of medicine violation if there appears to be excessive entanglement by the MSO or management company in the affairs of the medical practice or physician.

The Strange Case of the Fictitious Name Permit

This is our version of a legal Alice in Wonderland, or maybe a Benjamin Button.

California law requires that a physician apply for a fictitious name permit ("FNP") if the physician intends to practice under a name other than his or her own. On its webpage, [Fictitious Name Permit](#), the medical board indicates that an FNP application takes approximately 4-6 weeks to process, and that the Board "closely monitors fictitious names to ensure that similar names are not issued."

Numerous management company clients have asked us about naming, branding, and licensing the trade name, and we have not always gotten clear answers from the California Medical Board. The rules themselves are byzantine and convoluted, and as we understand it, the Board has not always followed them, or has been selective in its enforcement actions.

In addition to the above:

- The California Secretary of State ("SOS") has rules regarding naming of business entities (see SOS, Business Entity: Name Regulations & Additional Statutory Requirements and Restrictions).

If a proposed entity name is "the same as or deceptively similar to an existing name," SOS may reject incorporation. "Substantially similar names" may be available if the existing entity consents in writing to the second entity using the name. A proposed name can be "substantially the same" if, among other things, "it implies an affiliation with" the existing entity.

The Business Entity document above contains details of these rules.

Legal Issues; Legal Risks – From MSOs to Medical Spas

Remember that because of the prohibition against the corporate practice of medicine, the business structure for a medical spa typically involves two entities: the management company, and the physician's professional medical corporation.

The Professional Medical Corporation's name typically is either the name of the physician (for example: George T. Smith, MD, Inc., PC) or the fictitious name for which the physician has obtained a fictitious name permit from the California Medical Board.

If your brand name—let's call it the MSO brand name which you want to license to the physician as "Your Clinic Brand Name"—has substantial value or potential value, then this presents a number of possible legal pitfalls.

License the Name?

Again, this is a murky area complicated by less-than-clear statutes and regulations and changing enforcement priorities.

In our experience, at the present writing, there could be risks to licensing the MSO's name to your designated physician.

And, like many similar decisions, this is also common in the healthcare industry.

The legal risks include:

1. The Medical Board of California could potentially see a corporate practice of medicine violation in the management company licensing the corporate name to a physician. Presumably, enforcement scrutiny would only be triggered if the Board found other violations or issues with the whole arrangement. However, “no one has a crystal ball” is the way it goes.
2. The physician would receive a fictitious name permit from the Medical Board of California for use of the name, “Your Clinic Brand Name.”

Even were the Management Agreement to provide that the license of the name (from the management company to the physician or his professional corporation) would terminate at the discretion of the management company, the physician still would have the fictitious name permit in hand. These two areas of laws do not intersect. Presumably, the management company could send a cease-and-desist letter, demanding that the physician stop using the licensed name. It is unclear what weight the fictitious name permit would have, or what leverage it could give the physician, as a potential defense (or at least, as one way to create legal turmoil).

3. Suppose the management company found a second physician, who would open a different location (say, Your Clinic Brand Name in Different City). The physician might apply for a fictitious name permit from the Medical Board of California, and find the Board denying the permit, based on the fact that the first physician was already granted a permit with the name, “Your Clinic Brand Name.”

Note that the Board indicates on its Fictitious Name Permit website that it could grant the first physician a fictitious name permit for a second “practice address.” This is different, though.

The Board notes that an FNP is not transferable to another physician if a medical practice is purchased. Thus, were your current physician to wish to sell to another physician, the FNP could not simply transfer from the seller to the buyer. Instead, the owner of a fictitious name permit must submit an Application for Cancellation of a Fictitious Name Permit and the new owner must submit a Fictitious Name Permit Application. Both must be accepted by the Board.

All this is rather cumbersome, and there is no guarantee that the Board would approve of these steps. In fact, the process would be outside the control of the management company.

Could all the steps be required contractually, and would this solve the problem?

Theoretically, the Management Agreement could provide, for example, that:

- The management company licenses the name to the physician.
- Presumably, the physician will apply for a fictitious name permit.
- If the Management Agreement terminates, the physician loses the rights granted by the license, and all those rights revert to the management company.

The physician must cancel the fictitious name permit and dissolve or change the name of the professional medical corporation if the professional medical corporation uses “Your Clinic Brand Name.”

However, each of these raises corporate practice of medicine concerns.

For example, in one conversation with the Medical Board of California, the Board representative advised us that licensing a corporate name to a physician would raise corporate practice of medicine and possibly franchise issues. Typically, the representative said, the situations the Board encounters involve a physician group licensing the name of the medical practice, to individual physicians but that is another matter.

Similarly, regarding the second bullet, the management company probably cannot insist on the physician applying for an FNP,

since this could tread on corporate practice of medicine sensitivities.

As to the third bullet, the management company cannot insist on a physician canceling an FNP, or dissolving his or her professional corporation; nor can the management company be seen to control the physician's advertising.

4. Even if the FNP were not an obstacle, the California Secretary of State might not approve and file the Articles of Incorporation for another "Your Clinic Brand Name" if one already exists, as this might be considered deceptive to the public.

The Secretary of State rules are additional to and separate from whatever the Medical Board of California decides.

5. An additional concern is the set of advertising restrictions contained in Section 651 of the Business & Professions Code, which among other things, make it unlawful to disseminate "any form of public communication containing a false, fraudulent, misleading, or deceptive statement, claim, or image for the purpose of or likely to induce, directly or indirectly, the rendering of professional services or furnishing of products in connection with the professional practice or business for which he or she is licensed."

This section can be broadly used if the Board sees confusion around naming and which entity is responsible for what.

6. Last, if the management company branches beyond California, it could face similar issues in other states. We do not know how these states would regarding licensing a trade name to a physician or professional medical corporation.

Our Bottom Line on Licensing the MSO Name to the Physician

The practice of branding the physician's medical clinic or medical practice within the medi-spa with the same name as the MSO is, as we've indicated, common in the industry yet legally risky.

We prefer that the MSO and medical practice have different names and, depending on who we represent, we want the branding value to stay with the client.

Typically, we represent the MSO and in such case, the MSO wants to drive the branding. Notwithstanding the corporate practice of medicine, the MSO wants to drive the value, and sees the physician as ancillary to the value drive.

From a corporate practice of medicine standpoint, the name of the physician (or the name of the physician and his or her professional medical corporation) must be "on the door" of the medical spa and included in the advertising. Patients must know that they are going to be seeing a licensed medical doctor (or someone properly supervised by the MD) for medical services.

The management company can "co-brand"—i.e., can also have its name on the door and in the marketing materials.