

Behavioral Practice Ownership 101



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INTRODUCTION

This will not come as a surprise, but behavioral health providers have never been in higher demand. Prior to the Covid-19 pandemic, it was becoming more common for employers to offer behavioral health benefits and for insurance payers to expand reimbursable procedure codes for such services. However, when the pandemic led to isolation for billions of individuals worldwide, an unprecedented spike in behavior health needs followed. As most industry professionals know, undiagnosed and/or untreated mental health conditions have a number of adverse effects, including an immense financial burden on the healthcare system as a whole, given the relation of mental well-being and overall systemic health. An August 2020 Milliman report showed just how significant that financial burden is, stating that 10% of the 21 million patients in the sample accounted for 70% of overall healthcare costs.¹ Of the 10% that drove the majority of the costs, 57% suffered from some sort of behavioral health condition. This reinforced the fact that an individual's mental health is directly correlated to overall physical well-being. If we want to ease pressure on the healthcare system (think: a reduction in emergency department wait-times and overnight stays), one of the most impactful actions we can take is increasing accessibility to behavioral health providers.

At Marti Law Group, we are passionate about the importance of mental health and pride ourselves on successfully assisting clinicians in getting their doors open to treat patients. We've realized that, for many providers, the task of opening or buying a practice can be rather daunting, thus we have put together this comprehensive checklist to assist you in the process. While this is not an exhaustive list, it is intended to be starting point to help you plot your course to running a legally-sound behavioral health practice.

¹Davenport, Gray, Melek. (2020). *How do individuals with behavioral health conditions contribute to physical and total healthcare spending?* <https://www.milliman.com/-/media/milliman/pdfs/articles/milliman-high-cost-patient-study-2020.ashx>.

DISCLAIMER

Please note that throughout this e-book, we use the terms “providers” and “clinicians” interchangeably to indicate licensed behavioral health professionals. Similarly, “mental health” and “behavioral health” are used interchangeably. In addition, the information provided herein is not and shall not be construed as legal advice and is merely intended for the purpose of providing general information, thus no attorney-client relationship is created. An attorney-client relationship is only formed when you hire Marti Law Group LLC and sign an engagement letter. It is always advisable to consult a local behavioral health attorney who is intimately familiar with the nuances of your state and the details of your situation.



Your Practice's Legal Name

Generally, you can perform a search on your state's Secretary of State website to determine availability of your desired practice name. If your desired business name is not available, you may try registering a "DBA" (see below for more on the DBA process). You should consult an intellectual property attorney to ensure there are no other legal implications if the desired business name is in use by another entity, especially if you wish to trademark the name.

Business Address

Your business address will be the official address that gets put on record with the state. Even if you plan to offer only telehealth services, the state will likely require some business address to be on file. Later, we discuss the role of a Registered Agent, which may alleviate this requirement for virtual practices. Please note that many states will not allow for a P.O. Box to be used as the business address for your practice, and will require a physical business address instead. However, some states will allow a P.O. Box for the mailing address.

Town Approvals

For brick-and-mortar practices, you must get approval by the proper administrative bodies in your town to operate your business. When operating out of a professional building where your intended use is permitted, you should not have a problem. However, if you are entering a retail plaza, or perhaps a converted residential property, you may need to get approval from the town planning and zoning committee or building department. While we are not fans of operating out of your

home, if this is your chosen path, you will have to ensure that your residence is zoned to allow for commercial use. If not, you will have to apply for a variance, which can be a tricky administrative process which involves making a case before the zoning board as to why your commercial use should be permitted.² Each town will have certain steps you must follow to obtain necessary approvals. It is important that you have an understanding of your town's approval requirements before starting the process. This process can be completed in tandem with the rest of the list, but you want to ensure you won't hit any snags along the way.

Tip: Finding a helpful person "on the inside" is extremely valuable. Oftentimes you can find someone at the town clerk's office who will help guide you. You can also consult with a local attorney who is familiar with the requirements of your municipality.

NAICS Codes

Some states will request a North American Industry Classification System (NAICS) code be provided when registering your practice with the state. The US Census Bureau offers a robust catalog of codes associated with an organization's primary business category. The code generally associated with behavioral health practices is **621330**, however please note that this excludes physicians. Physicians may fall into a number of other categories. In these instances, you must search the Census site to find the applicable number. Check your state's Secretary of State website, as many states provide online assistance in determining the correct NAICS code for your industry.³

Secretary of State Registration

There is no shortage of literature on the value of forming a limited liability company (LLC) or corporation as the legal entity for your practice. However, prior to forming

² In our humble opinion, it is a bad idea to operate out of your home for many reasons, but most notably is your safety and liability. This concern does not just apply to behavioral health practices, but for all businesses. The safety concern is obvious, as disgruntled clients visiting your home is a major risk. Additionally, there are strict measures which must be in place to ensure your residence is separated from your business. Ensuring two points of entry/exit and separate ADA-compliant bathrooms are just the start of the list. A lack of proper separation between your home and business opens you up to potential claims (think: a slip and fall in your driveway) and penalties by various town administrative bodies for lack of compliance.

³ Most states require a NAICS code mostly for the purpose of demographics; however, it is also utilized for tax purposes in identifying industries. An incorrect NAICS code could result in a state agency comparing your deductions to an unrelated industry.

a legal entity, it is important to identify whether you reside in a state that follows the Corporate Practice of Medicine Doctrine (CPOM). This is a legal doctrine which allows only appropriately-licensed clinicians to own a behavioral health practice and precludes unlicensed individuals (or “laypersons”) and corporate entities from having an ownership interest. In many instances a CPOM state will nonetheless maintain an exception allowing ownership by a corporate entity as long as the owners of that entity are licensed providers. These states may require you to form a professional corporation (PC) or professional limited liability company (PLLC)⁴ as opposed to a traditional non-professional entity. Presuming you can operate under a corporate structure, your business name must include certain words indicating such. For example, as an LLC, the legal business name should end with words like “Limited Liability Company”, “Limited Company”, “L.L.C.”, or “LLC”. Many states allow you to register your business online or to mail forms to your state’s Secretary of State office.⁵ Below is a list of the information that you may need when registering your business with the Secretary of State (your state may have additional requirements):

- Business email address
- Business physical address
- NAICS code and sub code (if applicable⁶)
- Registered Agent (name and physical address)
 - A Registered Agent (or Business Agent) is a person or company in your state that can receive official legal documents on behalf of your business. Oftentimes, a business will designate a third party (such as an attorney) to act as its Registered Agent.
 - Keep in mind, the person or company you designate as your Registered Agent must accept appointment in order to be valid.
- Principal/Member name(s) and address(es)

⁴ Some states, such as New York, require additional forms to be completed. You should reference the Secretary of State website or consult a local attorney.

⁵ Certain states require publication requirements when forming a business entity (such as advertising the intended business formation in a newspaper). New York, Arizona and Nebraska are a few states that still require publication requirements, which can be a timely process that should be considered.

⁶ States that will ask you for your NAICS code include: Alaska, Arkansas, Connecticut, Mississippi, Georgia, Louisiana, New Hampshire and New Mexico (note that this list may change periodically).

A note on Management Services Organizations (MSOs): You may have heard of MSOs and been confused as to what they are and why they exist. While certainly a rabbit hole beyond the scope of this e-book, it may be helpful to give a brief background. These complex legal structures are often utilized in CPOM states to allow for unlicensed individuals or entities to be involved in the management, and effectively, the ownership of a practice. The emergence of MSOs in the behavioral health space has led to significant outside investment from private equity companies and venture capitalists. For more on the function of an MSO, head to the Blog section of the Marti Law Group website.

Filing Fees

Unsurprisingly, your state will likely require you to pay both an initial filing fee, as well as annual renewal fees to remain in “good standing”. Be sure to check online at the Secretary of State website to make sure you account for these fees when budgeting for your practice. Initial filing fees vary by state, generally ranging from \$50.00 to \$500.00.

Doing Business As (DBA)

A “Doing Business As” or DBA certificate allows a business to operate under a name that is not their legal name (some states will refer to this as a “Certificate of Assumed Name,” “Certificate of Trade Name,” or “Fictitious Name”). For example, your legal name may be “Jones Behavioral Health, PLLC”, but you would like to operate under “Jones Behavioral Health”. “Jones Behavioral Health” would appear on your logo, website, and other marketing materials, but all official state documents will use your legal name. There is an additional filing fee required for DBA certificates, which varies by state or town, though they typically are under \$100.00. If you choose to operate your practice as a sole proprietorship, your state will most likely require you to file a DBA certificate with your respective town.

Federal Employer Identification Number (EIN)

An EIN - also known as your “FEIN” or “Federal Tax ID” – is an identification number assigned to your business by the Internal Revenue Service. EIN registration is free and can be done immediately online, after you have registered your business with the state. As a tip, you will want to be sure to print the screen showing your new EIN upon completion, as it will not be emailed or mailed to you. We suggest that you contact your CPA in regards to the tax treatment of your practice (e.g. - disregarded entity, partnership, corporation, S Corp).

Sales & Use Tax (if applicable)

In certain states, behavioral health services are taxable, and thus, you will need to register with the respective Department of Revenue (the department name will vary from state to state) to receive a tax registration number. Taxes are determined by state and local government agencies. It is a good idea to contact an attorney or your accountant to determine whether this is required for your practice.



ESSENTIAL CONTRACTS

Owner's Agreement

The Owner's Agreement is an incredibly important, yet often overlooked, step in the process. Depending upon your entity type, this may be called an "Operating Agreement" for an LLC, a "Shareholders Agreement" and/or "Bylaws" for a corporation, or a "Partners Agreement" if no legal entity has been formed. Many businesses operate without an Owner's Agreement, particularly if there is only one owner. The thought process is, "Why must I have an agreement with myself?" Well, the issue here is that businesses that lack an Owner's Agreement leave it to the state to determine how certain matters will be handled, which may not be in your best interest or aligned with your wishes. These agreements usually outline capital contributions (putting money in) and draws (taking money out), voting rights and handling of death or disability, amongst myriad other matters. Depending upon your state, an Owner's Agreement may not be required to form your legal entity, but it is highly recommended to have this document in place to safeguard your business and minimize liability. Some states - including California, New York, Missouri, Maine and Delaware - do require an Owner's Agreement when forming an entity. An Owner's Agreement may also be required when opening a business bank account or obtaining financing, applying for state licenses/permits and signing commercial leases.

Employment or Contractor Agreements

If your practice will hire employees⁷ or independent contractors to perform specific tasks, it is imperative to have them sign an Employee Agreement or

⁷If you intend to hire employees in the near future, you will need to ensure you have registered your entity for the proper unemployment and withholding taxes. Many states will include this with the registration of the state sales and use tax.

Independent Contractor Agreement. These agreements are essential to ensuring you have properly outlined the scope of work and rights of both you and the employee/contractor (for example, how and when each party can terminate the employment/contractor relationship). They also serve the purpose of protecting your business interests by including language around non-competition and non-solicitation of clients and staff. Of note, there has been a major shift on enforceability of non-competition agreements as of late. You will want to speak with an attorney in your state to get the latest on whether a non-compete is enforceable.

Room Rental Agreement

Oftentimes providers find themselves with some extra space in the practice and wish to sub-lease a room or area to another licensed professional. This is a great way to minimize your rent expense while potentially complementing your services (perhaps you focus on adults and they focus on children). There are two concerns here. First, you want to ensure your landlord approves of the arrangement. Clinicians often allow another professional to set up shop in a back office, only to find out that their lease does not permit for such an arrangement – so double check what your lease says about subleasing! In addition, implementing a Room Rental Agreement is vital to ensuring a smooth working relationship. This document should outline any requirements you have for operating within your space, including hours of operation, maintaining a professional work environment and anything else that is important to you.

HIPAA Business Associate Agreement

The Office of Inspector General (OIG) and Office of Civil Rights (OCR) have implemented a major movement to crack down on non-compliance with HIPAA and other privacy requirements. Given the increased rate of data breaches and cyber-hacking, the treatment of Protected Health Information (PHE) has become a major concern for governmental bodies. As such, it is of utmost importance that you implement a HIPAA Business Associate Agreement

(BAA) with any parties external to your practice who may have access to PHE. In the aforementioned room rental arrangement, you will absolutely need to implement a BAA if patients are being referred back and forth amongst you and the renter. The same goes for vendors who may access your patient database or other types of contractors. A BAA must outline how PHE is to be handled, as well as strict protocols in the event of a data breach.



OPEN FOR BUSINESS

The time has finally come to open your doors (or phone lines) and begin treating patients! First of all, take a moment to celebrate. It has taken a lot of time and energy to get to this point. Now that you are operational, let's make sure you don't run into any issues when treating patients.

Intake and Assessment Process

As you know, you need to obtain quite a bit of information from your patients prior to the initial visit. Fortunately, platforms such as Doxy.me and Kareo (amongst others) have streamlined the process for providers. Much of the paperwork can be handled prior to the initial meeting with a patient. The specific requirement for patient intake may vary slightly state to state, but at a minimum you want to ensure you provide or collect the following:

- **Medical history** – Obtain a list of medications, hospitalizations and personal and family history of health conditions.
- **Privacy policy** – Provide patients with a clear understanding of how PHE is handled in your practice.
- **Initial assessment** – Establish the patient's candidacy for treatment, whether or not they must be referred to a more suitable provider, or require emergency action.
- **Emergency contact** – Whom you may contact in the event of a patient emergency.

This is certainly not an exhaustive list of all the data that needs to be collected or how the initial exam (also known as the “Good Faith Exam” or “GFE”) must be handled. Additionally, the Centers for Medicare & Medicaid Services (CMS) recently enacted the No Surprises Act, requiring all uninsured or self-pay patients to receive a Good Faith Estimate prior to treatment. It is critical that you have a robust intake process which includes a constantly-evolving list of processes and procedures when seeing a new patient.

Appointment Scheduling, Communication and Telehealth

As noted above, a number of Electronic Medical Record (EMR) or Electronic Health Record (EHR) platforms have emerged that act as a one-stop-shop for your practice management needs. These software platforms continue to evolve, offering features such as online scheduling, secure messaging and video teletherapy. Be sure to shop around and speak to colleagues to gain an understanding of which system may be right for you.

A note on teletherapy – It is important to keep tabs on how your state handles the ongoing treatment of teletherapy. As Covid-19 becomes somewhat normalized in minds of state legislators, some have aimed to reduce teletherapy allowance and insurance reimbursement. Keep frequent watch on any changes proposed so you are prepared to pivot to in-person treatment if needed.

Marketing Opportunities

Behavioral health practices have broad discretion in which marketing tactics they wish to employ. Everything from billboards to social media to direct mail can be effective, however don't underestimate the power of simple networking. Though certainly the most time-consuming method of marketing, networking with area businesses, professionals and associations almost always has the highest return on investment. There are countless opportunities to build your brand in your community, including local chambers of commerce and meet-up groups, so print

some business cards and get out there! Just be careful not to make any statements around guaranteed outcomes, as that can land you in hot water with medical boards concerned with statements that may be construed as false claims.

Board of Health Visits

So, you are open for business and thriving. Things are going great and then it happens. The Board of Health (or some administrative body) shows up unannounced and wants to inspect the premises. NOW. First, don't panic. This is completely standard and to be expected. The local and state governments have a requirement to make rounds and ensure that businesses of all types are acting in compliance with the law. They may want to see how you handle intake, patient confidentiality and compliance with the Americans with Disabilities Act (ADA), amongst other things. You should absolutely ask to see identification before allowing a visitor into your space and do not hesitate to call the respective board to ensure they are who they say they are. Might that annoy the individual? Likely yes. But remember that your duty is to your patients and to safeguard their PHE at all costs. An inspector should appreciate your protective measures over your patients' information.



CONCLUSION

As noted above, this is not an exhaustive list, however it is intended to give you much of what you need to get your behavioral health practice functioning within the confines of the law. At Marti Law Group, we pride ourselves on remaining hyper-focused on behavioral health law. In addition, we go a step further to ensure that your practice is not just legally-compliant, but well positioned for success (a rare skill set for lawyers!). Founded by an entrepreneur who built, scaled and sold a 45-office dental organization, our unique value proposition lies in our ability to “think differently” than most attorneys who consider only the legal elements of a running a practice. Rather, our experience as business operators allows us to help clients work through practical considerations. We work on a Value Based Pricing model, offering flat fee services with no surprises. If you are ready to get your behavioral health practice up and running, call us today for a free 15-minute consultation at **(860) 552-7770** or email **info@martilawgroup.com**.

