

Medical Spa Ownership

ARE YOU PROTECTED FROM CORPORATE PRACTICE OF MEDICINE AND FEE-SPLITTING PROHIBITIONS?

By Mai Pham, Trends Editor

Aesthetic medicine is not just for cosmetic surgeons, dermatologists, or laser surgeons these days. Just attend a local laser seminar and you will meet any number of physicians from specialties wholly unrelated to cosmetics, dermatology, or laser surgery – gastroenterologists, radiologists, family physicians. Spa and salon entrepreneurs, looking to expand their service offerings to include medical treatments such as laser hair removal, skin tightening, and dermal fillers are also trying to get into the medical spa business.

Whether you're a physician, entrepreneur or both, if you plan to offer aesthetic medical procedures such as laser hair removal, Botox® injections, or mesotherapy, you must abide by the same regulatory guidelines which govern other healthcare entities. This article will discuss the main regulatory issues of

concern for medical spa owners: corporate practice of medicine, fee-splitting prohibitions, and self-referral conflicts.

CORPORATE PRACTICE OF MEDICINE PROHIBITIONS

The "corporate practice of medicine" is simple: it is illegal for a corporation or business to employ physicians in such a way that they may influence a physician's professional judgment. The idea is that a lay entity will make decisions based on corporate profit, which, in turn, can dictate the way in which a physician practices medicine.

Most states have corporate practice of medicine prohibitions which regulate lay ownership of healthcare businesses. Beth Kase, a

healthcare attorney with the firm Saphier and Heller Law Corp. in Century City, CA, says that "The issue arises when the lay owner treats these medical procedures as an ancillary service which is offered by a day spa." If the lay person has control over the medical spa services, this could result in an "unlicensed practice of medicine violation which could implicate the

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physician and non-physician owner. The physician could then be charged with unprofessional conduct for aiding and abetting the unlicensed practice of medicine. No physician wants to have problems with the medical board."

If you don't know about these prohibitions, you can easily find yourself in violation. In many states, medical grade laser hair removal devices can be sold to spa or salon owners even though laser hair removal is considered the practice of medicine. Once the spa or salon owners buy the machine, they will "hire" a physician in order to comply with laws governing medical practice. These types of arrangements are fairly common, even in heavily regulated states. The spa/salon may continue to operate without regulatory oversight and without any problems until something happens. Perhaps a patient complains to the medical board, a disgruntled employee files a complaint, or a competitor complains to the state agency. Failure to take the necessary precautions to protect your business and comply with corporate practice of medicine laws is most

certain to compromise your long-term business viability.

Another issue to be concerned with when dealing with corporate practice of medicine issues is contract enforceability. Kase says, "If the contract is illegal because of the unauthorized practice of medicine by a lay entity, this illegality could void the contract. When an issue arises in which one of the parties wants to enforce the contract, the contract may not be enforceable."

REFERRAL PROHIBITIONS

Federal Laws

Healthcare self-referral laws and fee-splitting prohibitions exist at the state and federal level. Federal self-referral laws, such as the "Stark Laws," prohibit a physician from referring Medicare and Medicaid patients to other medical services (e.g. physical therapy, imaging, diagnostic, lab, etc.) in which the physician has ownership interest. The purpose of this law is to prevent physicians from making unnecessary referrals to ancillary services where they would directly profit from the referral. The Federal Anti-Kickback Statute outlaws direct remuneration for patient referrals covered by federal health benefit programs. Since most medical spa procedures are not covered by Medicare or Medicaid, the federal laws may not be applicable to medical spas; however, an understanding of the federal statutes is important in understanding the various state laws which address these issues.

A statement by the Texas Attorney General best characterizes the issue:

Arrangements by which a corporation formed by non-physicians employs physicians to render medical services to the corporation's clients consistently have been held to constitute both the unlawful practice of medicine by the corporation and the violation by the employee-physician of the prohibitions in ...the Medical Practice Act...on a physician's "permitting or allowing another to use his license or certificate to practice medicine in this state," and ... "aiding or abetting, directly or indirectly, the practice of medicine by any person, partnership, association, or corporation not duly licensed to practice medicine." (Texas Attorney General Opinion No. JM-1042, April 24, 1989)

State Laws

Self-Referral Laws

Many states have self-referral laws similar to the Stark law which prohibit physician ownership in an entity where they are directing referrals. If you are a physician with undisclosed ownership or a profit-sharing stake in a medical spa to which you are referring patients, self-referral prohibitions can be an issue.

Fee Splitting Prohibitions

If you are a medical spa receiving





free, unincentivized referrals from hotels and satisfied customers, you do not have to worry about fee-splitting prohibitions and illegal remuneration. However, if you are a medical spa owned by lay entity, and the lay entity wants a 50% cut of the profits from the procedures performed, you may have some corporate restructuring about which to worry.

According to Michael Saphier, a partner at Saphier and Heller Law Corp., "The financial arrangements between the physician and the day spa owner could cause additional problems, including illegal remuneration for the referral of patients by the day spa owner and illegal fee-splitting, as well as a corporate practice of medicine violation."

Typical spa procedures such as facials and massages do not fall within the regulatory scope of healthcare fee-splitting regulations. However, in states such as California, any

procedure which requires administration by a licensed health professional is considered medical. This means that Botox® injections, laser hair removal, and services performed using a Class II medical device are subject to fee-splitting prohibitions. California prohibits remuneration for referral of medical services. While the federal Anti-Kickback Statute only applies to federally funded health programs, the language in California's Business and

Professions Code extends to cover all types of medical services and different types of remuneration including but not limited to rebates, refunds, commissions, and other types of inducements.

If you and a physician are in a partnership whereby profits are distributed evenly among spa and medical services, you could be in violation of anti-kickback and fee-splitting prohibitions. Lay persons and entities are not entitled to compensation or other kickbacks for medical service referrals, even if

the referrals pertain to aesthetic medical procedures which are paid for by cash.

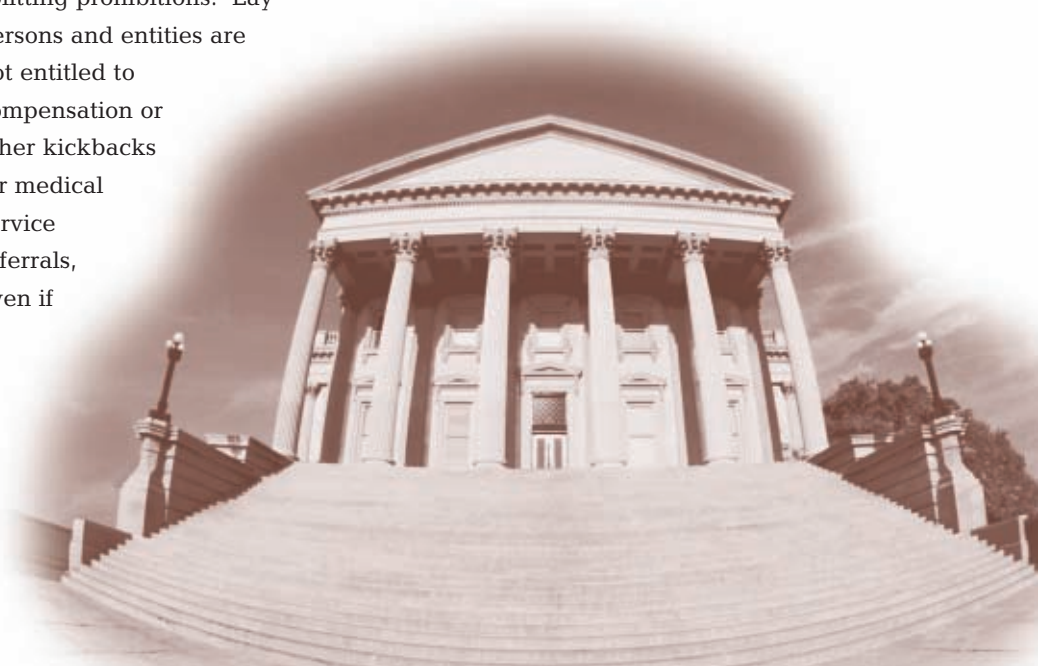
HOW TO PROTECT YOURSELF

To protect yourself from corporate practice of medicine violations, the lay entity and physician entity should consider having a written agreement which distinguishes the activities of the lay entity from the medical entity. Kase recommends the following: "Spell out the management company responsibility and professional entity responsibility. The written agreement should require that the physician take responsibility for medical decision making."


To protect yourself from self-referral prohibitions, make sure the

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appropriate disclosures are being made to your patients about your financial interest in the entity which is receiving the referral. The patient has the right to know that you might be making money from the referral.



To protect yourself from fee-splitting prohibitions, be careful about monetary distributions, and try not to fashion financial agreements which disburse profits on a per-case or percentage basis. Make sure that payments to the lay entity related to medical services are clearly worded and are based on fair market value, monthly salary, or flat fee arrangement which is not directly connected with the volume of cases performed or the volume of referrals received.

If you are concerned about any of the issues raised in this article, consult with your healthcare attorney as soon as possible. Addressing potential problems before they arise will be much less costly than waiting until something happens. 

Disclaimer: This article is presented for informational purposes only and is not intended to constitute legal advice.



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SHOULD YOU BE WORRIED?

Here are some typical scenarios which may apply to you:

- A nurse or spa owner wants to open a laser clinic and approaches a physician to ask that physician to be his/her medical director. In exchange for being medical director, the physician will receive a percentage of all aesthetic medical fees collected.

Potential problem: Violating Corporate Practice of Medicine and Fee-splitting prohibitions

- The spouse of a physician with an existing medical practice decides to open a medical spa with a lay business partner. The physician regularly refers patients to this medical spa, and the physician's spouse receives a 40% profit distribution from revenues collected at the spa.

Potential problem: Violating Self-Referral laws

- A spa regularly refers patients to a doctor's clinic for laser hair removal. The doctor charges the patient \$200 per treatment and gives the spa a \$25 referral fee.

Potential problem: Violating Fee-Splitting Prohibitions

- A non-professional lay corporation calls itself a "Medical Spa," advertises medical procedures, runs all aspects of the medical spa business without physician oversight, purchases medical equipment, and hires and trains medical personnel.

Potential problem: Violating Corporate Practice of Medicine