

# Legal Wrinkles In Med Spas

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**M**edical spas are catching on to public demand. Increasingly, more people are asking for a full array of medical aesthetics services in a spa-like atmosphere. But combining medical and nonmedical activities—including related organizational and financial arrangements—raises thorny legal issues for physicians.

If you ignore those issues, you could put yourself at risk for disciplinary action and monetary penalties. Furthermore, you could magnify your liability exposure if something goes wrong in the medical spa.

In a typical med spa setup, the medical side offers medical procedures, such as laser hair removal, BOTOX® injections and intense pulsed light treatments. The day spa offers nonmedical treatments, such as facials and massages.

The medical spa and day spa share space and overhead, and nonmedical personnel own and operate the day spa. Customers of the day spa frequently become patients of the medical spa, and the physician and day spa owner enter into financial arrangements relating to the medical spa activities.

Medicare and private insurance generally do not cover medical spa procedures. While this narrows the regulatory landscape somewhat, important regulatory issues exist under state law. Legal issues can arise in the following areas:

**REFERRAL FEE PROHIBITIONS.** Most physicians, no doubt, are aware that it's illegal to pay for patient referrals. In California, for example, the prohibition is broad and includes "any rebate, refund, commission . . . or other consideration . . . as compensation or inducement for referring patients, clients or customers." (Business & Professions ["B&P"] Code §650.) Moreover, this prohibition applies, whether the procedure is covered by insurance or is reimbursable under any governmental program.

This issue is relevant to medical spa financial arrangements. If the day spa is a source of patients for the medical spa, the day spa owner's sharing in any revenues or profits from medical spa procedures could be construed as a payment for patient referrals. Excess payments to the day spa owner also could be considered fee splitting and might constitute the corporate practice of medicine, which is prohibited under California law. In California, physicians could be fined up to \$50,000 for a single violation of B&P Code §650.

Clearly, your financial relationship with the day spa owner must be structured and reviewed by your attorney to ensure that it doesn't violate anti-kickback, fee splitting or the corporate practice of medi-

cine prohibitions in your state.

The day spa owner, of course, may be compensated for providing management services or leasing space to the medical spa. However, the amount of compensation must be reasonable in view of the services provided, and the arrangement should be thoroughly documented in writing.

**SUPERVISION.** Do not take supervision requirements lightly. They can be more involved than many people believe. Moreover, failing to adhere to supervision requirements could result in malpractice liability. Injuries, or even death, can occur in a medical spa. For example, a 22-year-old college student from North Carolina State suffered a seizure after applying a numbing cream of 10 percent lidocaine before her laser appointment. She fell into a coma and died from an overdose of lidocaine in January 2005. Whenever a serious injury occurs in a medical spa, the question will arise about whether the physician provided adequate supervision.

Nonetheless, supervision requirements can be confusing. In California, for example, the requirements for supervising physician assistants are different from those that apply to registered nurses, and registered nurses may perform medical procedures only under duly adopted written protocols. Other health care personnel in California, such as licensed vocational nurses and medical assistants, are not authorized to perform medical spa procedures at all, even under a physician's supervision.

If, as the physician, you allow procedures to be performed without proper supervision or by personnel who are not permitted by your state's law to perform such procedures, you could be violating several laws. In California, such conduct could be considered aiding or abetting the unlicensed practice of medicine. This could constitute "unprofessional conduct," resulting in a disciplinary proceeding by the California Medical Board. Be sure to find out whether your state's laws include similar prohibitions.

Often, the supervision requirements can be met through "general supervision," which doesn't require the physician's presence. But the supervision requirements are real, and your exposure to liability will increase if you're not fulfilling the applicable supervision responsibilities.

**ADVERTISING.** You could face charges of unprofessional conduct if your advertising and public communications don't meet state law requirements. In our casual observation of medical spa advertising and public communications in California, physicians frequently ignore the legal restrictions about

fictitious name use. The permissible fictitious names for a medical practice are limited, and no fictitious name may be used unless it's first approved by the California Medical Board.

In our experience and observation, medical spa practices are commonly advertised under the name of the day spa business, which is counter to California's statutory requirements. Once again, find out whether your state's laws include similar prohibitions.

**CLINIC OR MEDICAL OFFICE.** Performing laser treatments and other procedures in a medical spa constitutes the practice of medicine. Therefore, the question arises as to whether the medical spa setting would be considered a "clinic" under state law. This is a significant question because it may be illegal to operate a clinic without a license. The term "clinic" is defined broadly under California law, and we believe that an establishment providing medical spa treatments and procedures would be construed as a clinic under the law.

However, operating a clinic may be exempt from licensure under state law in certain circumstances. For example, California provides an exception for a practice conducted in a medical office that's leased by the physician. You must determine whether a medical spa could qualify for exemption from clinic licensure under your state's law, and what steps you should take to be sure you're covered by the exemption. Your arrangements should be properly documented to ensure that you qualify for the exemption.

All of these legal issues are important. Yet, we routinely see physicians failing to adhere to the requirements discussed in this article. We don't believe these are simply technical violations. Rather, ignoring these requirements is indicative of an apparently common pattern in which medical spa physicians have not taken responsibility for professional matters that clearly fall within the scope of their license.

Failing to comply with these requirements could expose you to disciplinary action and monetary penalties. It also could magnify your exposure to liability if something goes wrong in the medical spa. So take your responsibilities seriously and seek legal counsel.

This article is not intended to constitute legal advice. You should consult with an attorney about these matters. ■

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