Legal Wrinkles Need Attention, Too

One of the byproducts of our appearance-oriented culture is the growing popularity of medical spas. New medical spas are opening continually, and physicians in various specialties are entering the field, yet many relevant legal issues draw little attention.

This article explores a number—but certainly not all—of the regulatory issues applicable to the medical spa that is operated along with a nonmedical day spa in a common setting. The medical spa offers medical procedures, such as laser hair removal, Botox injections and intense pulse light treatments. The day spa offers nonmedical treatments, such as facials and massages. Some of the issues addressed in this article also apply to traditional medical offices that add medical spa procedures as an adjunct to the practice.

The absence of Medicare and private insurance, which generally do not cover medical spa procedures, narrows the regulatory landscape somewhat, but important regulatory issues under California law remain, including issues arising out of the following:

- The nonmedical spa as a source of patients for the medical spa;
- The physician's "supervision" without being physically present;
- Advertising and public communications concerning the medical spa; and
- The medical spa as a "clinic" or "medical office."

The starting point for considering these and related questions is to recognize that the performance of medical spa procedures constitutes the practice of medicine. This has been confirmed by the Medical Board of California and, indeed, is the very reason that nonmedical spa owners have turned to physicians to expand their spas into medical spas. It follows that the numerous regulatory provisions applicable to physicians under California's Business and Professions Code (B&P Code) are applicable to medical spas.

Adhere to Referral Fee Prohibitions

Most physicians no doubt are aware that it is illegal to pay for patient referrals. The prohibition (B&P Code §650) is very broad, and includes "any rebate, refund, commission, … or other consideration … as compensation or inducement for referring patients, clients, or customers …" Moreover, it is applicable whether or not insurance or any government program covers the procedure.

The issue is pertinent to medical spa financial arrangements because, if the day spa is a source of patients for the medical spa, the nonphysician day spa owner's sharing in revenues or profits from medical spa procedures could be construed as a payment for patient referrals. Excess payments to the nonphysician spa owner also could be considered fee splitting and could constitute the corporate practice of medicine, which is prohibited under California law.

In 2000, the maximum fine for a single violation of B&P Code §650 was increased from $10,000 to $50,000. Clearly, the physician's financial relationship with the nonphysician day spa owner must be structured and reviewed by an attorney to ensure that it does not violate antikickback, fee-splitting and corporate practice of medicine prohibitions.

The nonphysician day spa owner, of course, may be compensated for providing management services 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.

Referral fee prohibitions also should be considered in connection with promotional offers intended to generate business for the medical spa.

Supervise Procedures

Supervision requirements should not be taken lightly, not only because they are more involved than many people believe, but also because the failure to adhere to applicable supervision requirements could result in liability. And liability is certainly more than an academic concern, as illustrated by the death of a 22-year-old college student medical spa patient in North Carolina following the application of lidocaine prior to laser hair removal, as reported by *Cosmetic Surgery Times* in its April 2005 issue.

In the case of physician assistants, supervision must meet the requirements of regulations promulgated by the Physician Assistant Committee of the Medical Board. In the case of registered

KEY LEGAL AND REGULATORY ISSUES are being glossed over as the medical spa trend takes hold. Careful physicians can avoid liability by managing referral arrangements, supervision issues and advertising practices.

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nurses, supervision must meet the requirements of regulations promulgated by the Board of Registered Nursing. Other personnel, such as estheticians, licensed vocational nurses and medical assistants, are not authorized to perform medical spa procedures, even under the supervision of a physician.

If a physician permits procedures to be performed without proper supervision or by personnel who are not permitted by California law to perform such procedures, that physician could be found to have engaged in "unprofessional conduct" under B&P Code §2234 for "assisting in or abetting the violation of" the Medical Practice Act and under B&P Code §2264 for "the aiding or abetting of any unlicensed person … to engage in the practice of medicine …"

Run Appropriate Advertising

Charges of unprofessional conduct (not to mention corporate practice of medicine) also could arise if advertising and public communications do not meet applicable legal requirements. In our casual observation of medical spa advertising and public communications, the restrictive provisions of the B&P Code are commonly ignored.

B&P Code §2272 states "any advertising of the practice of medicine in which the licensee fails to use his or her own name or approved fictitious name constitutes unprofessional conduct." B&P Code §2285 provides that "the use of … any name other than his or her own by a licensee … in any public communication, advertisement, sign, or announcement of his or her practice without a fictitious-name permit … constitutes unprofessional practice."

Under these B&P Code provisions, if the medical spa wants to advertise and provide services under a name that is different from the physician's name, it should obtain a fictitious-name permit from the Medical Board and follow fictitious-name permit requirements and regulations.

In our experience, medical spa practices are routinely advertised and promoted by and in the name of the day spa business, in contravention of the above-quoted statutory requirements, presumably without the physician's objection.

Operate as a Clinic or Medical Office

Since the performance of laser treatments and other procedures in a medical spa constitutes the practice of medicine, the question arises as to whether this means the medical spa setting is a "clinic" under California law. This is a significant question because it is illegal to operate a clinic without a license, unless the clinic is exempt from licensure under the law.

The term "clinic" is defined broadly under California law, and we believe it likely that a place or establishment providing medical spa treatments and procedures would be construed as a clinic under the law. Therefore, in order to operate lawfully, the medical spa must be organized and operated as a medical office as provided in the clinic licensing laws, with appropriate documentation, and all medical spa procedures must be performed in the medical office.

Be Careful

Failure to adhere to the requirements discussed in this article apparently is commonplace. We do not believe that these are simply technical violations with which physicians need not be overly concerned. Rather, we view them as indicative of an apparently widespread pattern in which physicians have not taken responsibility for professional matters that clearly fall within the scope of their licenses. Noncompliance with these requirements not only exposes the physician to disciplinary action and monetary penalties, but it also magnifies the physician's exposure to liability if and when something goes wrong in the medical spa.

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

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