

The Bottom Line: The Business of Medicine – Medical Spas

There has been an explosion of cosmetic medicine over the past few years, and many physicians are being approached to "increase their bottom line" by entering into this lucrative field. Recently, our office received a letter from a business promoting the many programs they offered to physicians that contained the following message:

"... Lastly, we are very excited to announce our Medical Director program. This opportunity allows Doctors and Physicians to earn up to \$400 per month per spa in their area. We have several DaySpas that anxiously await a Medical Director and we would anticipate a large number of client referrals to your practice.'.....'We would be happy to discuss how they can benefit your practice and grow your bottom line.'"

This business is offering the opportunity for physicians, for a fee, to rent their license to a business so that the business may engage in the practice of medicine --- a profession for which it has no license or qualifications.

Is what this business proposes legal? Can physicians simply sign-on, lend their names on paper to a salon or spa, collect "up to" \$400 a month, and escape any liability or responsibility for the patients treated by the business? NO!

In 2006, Senator Liz Figueroa authored legislation (SB 1423, Chap 873) that directed the medical and nursing boards to work together to study the issue of safety in the use of lasers in cosmetic procedures. Over the past year, the boards have been holding public forums on the subject. What we have learned is that the current law is being violated with impunity by many in the cosmetic medical field.

The current environment gives rise to violations of the laws governing the business of medical practices, including violations of the corporate practice prohibitions, as well as fee-splitting and payment for referrals. The illegal business models give rise to the use of unlicensed or inappropriately licensed personnel, paper-only supervision ("rent-a-license") of allied health professionals, consumer confusion over the medical nature of the procedures, and confusion over who is responsible for the patient. Patients are not fully informed of the risks and often do not know the medical nature of the treatments or who is responsible for their care.

The use of prescriptive medical devices and injections for cosmetic reasons is the practice of medicine:

There is a tendency for the public, and some in the profession, to view laser treatments, Botox and cosmetic filler injections as cosmetic rather than medical treatments. The use of prescriptive drugs and devices, however, is the practice of medicine, and the same laws and regulations apply to these types of treatments as those driven by medical necessity. There are no separate laws governing these procedures, and physicians will be held to the same standard as they are for their routine medical practices. This means that the standards for informed consent, delegation to allied health professionals, physician-patient confidentiality and boundaries, maintaining medical records, as well as responsibility and liability apply to physicians, even those denominated "medical director."

Physician responsibility when delegating procedures to allied health professionals:

In the practice of medicine, physicians routinely delegate functions to allied health professionals. Physicians, however, may only delegate to appropriately licensed staff that they know to be capable of performing the task. Lasers and other prescriptive devices and prescriptive drugs must only be utilized by licensed registered nurses, nurse practitioners, or physician assistants. No unlicensed staff, including medical assistants, may use these devices or drugs, regardless of the level of training or supervision. Likewise, delegation to improperly licensed personnel, such as estheticians, is prohibited.

Supervision of those to whom procedures are being delegated:

While current law allows the delegation of laser treatments and injections to the above mentioned licensees, the law requires supervision by the physician. In the current environment, many have operated under the opinion that since the nursing regulations are broadly written, nurses may perform anything anywhere with essentially no supervision as long as there are "standardized procedures" or "delegation of services" documents on file.

Nurses:

Standardized procedures for nurses allow nurses to perform procedures while the physician is not on-site; however, they do not absolve physicians of their supervision responsibilities. Nor does the law allow nurses to set up a practice in a salon, hire a physician supervisor, or perform medical procedures independently.

The law does not contain a legal definition of supervision, and therefore, absent a legal definition, the plain English definition applies. "Supervision" is defined as the act of supervising, which is to oversee, to direct, to have charge, to inspect, to provide guidance and evaluation. The law and regulations support this definition.

As an example, the regulations for "standardized procedures guidelines" require physicians to be responsible for ensuring the experience, training, and education requirements for performance of the delegated function – and this must be documented. The regulations require that a method of initial and continuing evaluation of the nurses' competence be established. Further, it is the responsibility of the physician to examine the patient before delegating a task to a registered nurse.

When functioning under "standardized procedures," physicians need not be present in the facility when the procedures are being performed. The facility, however, must be a medical setting. Regulations require that the location be an "organized healthcare system," which is not a salon, spa, or other facility not under the control of the physician.

An appropriate prior examination is required where prescriptive drugs and devices will be used, and this examination may not be delegated to registered nurses. After performing the examination, the supervising physician may delegate a procedure that utilizes a prescriptive device to a nurse working under standardized procedures.

The guidelines further require the standardized procedures to describe the circumstances under "which the registered nurse is to immediately communicate with a patient's physician concerning the patient's condition." While there is no actual mileage limit relating to supervision, this requirement certainly means that the physician must be immediately reachable and able to provide guidance in the event of an emergency or the need for a higher level of care that must be provided by the physician. Physicians must be within a geographical distance that enables them to effectively provide supervision and support when needed or upon request.

For more specific information on registered nurse and nurse practitioner regulations, the Board of Registered Nursing website is: www.rn.ca.gov.

Nurse Practitioners:

Nurse practitioners are granted much more autonomy than registered nurses. They are advanced practice nurses who are master's-level educated, and, for that reason, may perform certain functions with a different level of supervision than registered nurses. The major exception to the rules governing their supervision in cosmetic procedures is that they may be delegated the task of providing the appropriate prior examination and ordering the drug or prescriptive device for the patient, if acting under standardized procedures.

Physician Assistants:

The supervision of physician assistants (PAs) is similar to that of nurses; however, the regulations governing PAs are much more specific. First, PAs may only be delegated tasks that are part of the physician's customary practice. In other words, obstetricians may supervise PAs treating obstetrical patients; pediatricians may supervise PAs providing care to pediatric patients, and so forth. Therefore, if cosmetic medicine is not a part of the physician's customary practice, the physician may not supervise a PA providing cosmetic procedures. In addition, physicians may only supervise four PAs at any given time, and must be in the facility with the PA or be immediately available by electronic communication if the PA is working under a delegation of services agreement.

PAs may be delegated the "appropriate prior examination" of the patient, but there are methods enumerated in the law and regulations on how physicians must provide their supervision and evaluation. For more specific information, all of the rules and regulations are available at the Physician Assistant Committee website: www.pac.ca.gov.

Supervision of all allied health professionals:

“Supervise” is a verb, and it requires those calling themselves supervisors to guide, direct, oversee, and evaluate performance. Physicians must really supervise, not simply lend their license to allied health professionals on paper without providing any supervision. A “supervising” physician who does not give direction, oversee or inspect, is not performing the task of supervising and is in violation of the law.

Qualifications of Physician Supervisors:

Physicians may only delegate to those that they know to be capable of performing the task. If they are to supervise the procedure, the physician too should be capable of performing it. One cannot provide guidance, direction, evaluation and oversight unless one is knowledgeable and competent in the procedure being delegated.

The law does not require board certification to perform cosmetic procedures. That said, however, one should not think that the absence of this requirement allows anyone of any specialty to supervise cosmetic procedures, unless the physician has sufficient knowledge and training in the procedures being performed.

Business arrangements; issues of ownership and control:

California law prohibits the corporate practice of medicine. Laypersons or lay entities may not own any part of a medical practice. (Business & Professions Code Section 2400) Physicians must either own the practice, or must be employed or contracted by a physician-owned practice or a medical corporation. (The majority of stock in a medical corporation must be owned by California licensed physicians, with no more than 49% owned by other licensed health care professionals, such as nurses, physician assistants, nurse practitioners, etc. No stock in a medical corporation may be owned by a lay-person. (Corporation Code Section 13401.5(a))

In an attempt to circumvent this legal prohibition, some creative business and management schemes have emerged that violate the law. Businesses that provide management services, franchises or other models that result in any unlicensed person or entity influencing or making medical decisions are in violation of the law.

As an example, businesses that control medical records, the hiring and firing of healthcare staff, decisions over coding and billing, and the approving or selection of medical equipment or drugs, violate the law. Management Service Organizations (MSOs) 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) are also engaging in illegal conduct. Also, many current business arrangements violate the prohibition against fee-splitting or giving any consideration for patient referrals. The current practice of lay-owned businesses hiring medical directors is also prohibited. A physician who acts as medical director of a lay-owned business is aiding and abetting the unlicensed practice of medicine. (See Precedential Decision No. MBC – 2007-01-Q, in the matter of the Accusation against Joseph F. Basile.)

Physicians who become employees or contractors of lay-owned spas and violate other business provisions of the laws may be disciplined for unprofessional conduct.

Physician Responsibility for back-up systems and emergency plans:

Physicians who perform or delegate treatments are responsible for their patients' care. As supervisors, they are responsible to ensure that back-up systems and emergency plans are in place.

Under current law, the patients are the physician's responsibility, and the physician is responsible for treating mishaps, complications or any other emergency that might arise from the treatments the physician has delegated. While nurses are responsible for their patients within their scope-of-practice, under the Medical Practice Act, physicians have the ultimate responsibility for the care of their patients.

Physician responsibility for patient informed consent and education:

All medical procedures must be preceded by informed consent, which should include the possible risks associated with the treatment. While there is no specific code section that enumerates the contents of an informed consent, the well-established doctrine of informed consent in case law requires that patients must be, at a minimum, informed of:

- 1) the nature of the treatment,
- 2) the risks, complications, and expected benefits, including its likelihood of success, and
- 3) Any alternative to the recommended treatment, including the alternative of no treatment, and its risks and benefits.

Providing sufficient information to constitute informed consent is the responsibility of the physician.

Physician responsibility for advertising and marketing:

California law requires advertising to include the physician's name or the name for which they have a fictitious name permit. (Business & Professions Code Section 2272) While nurses may be performing the treatment, the name of the supervising physician, or his or her registered fictitious name, must be in the advertisement.

The law governing physician advertising is specific, and requires the physician ads not be misleading. California law is very specific in prohibiting many of the advertising practices currently being used to promote cosmetic treatments. The use of models, without stating that they are models, the use of touched-up or refined photos, and claiming superiority of the facility or procedures with no objective scientific evidence is prohibited. Also, the use of discount or "bait and switch" promotions is prohibited. The use of "for as low as" in advertising procedures, is strictly prohibited. The laws relating to physician advertising, Business & Professions Code Section 651, may be viewed on the Medical Board's website: www.mbc.ca.gov.

The Bottom Line:

Cosmetic procedures are the practice of medicine, and physicians are responsible for their patients, regardless of who performs the treatments. There is no legal scheme that allows physicians to collect a fee for signing their name to an agreement to lend their license to an entity to practice medicine. Legally, the "clients" of the spa or salon are patients --- the *physician's* patients, and that arrangement comes with all of the responsibility *and liability* that goes with any other doctor-patient relationship. Becoming involved in an improper business arrangement, may, in the short term, raise a physician's economic bottom line. In the long run, however, the risks are great. In reality, the

bottom line is that physicians who become embroiled in these illegal arrangements may lose their license, or their livelihoods.

It is impossible to cover all of the relevant legal issues in this short article, and the content is not a substitute for professional legal advice. Physicians may want to consult with their attorneys or malpractice carriers for additional legal advice.