Fundamentals of the Physician-Medical Spa Relationship

Associating yourself with a medical spa is perfectly legitimate—as long as you do it correctly By Carolyn V. Metnick, JD, LLM, and Julie A. Veldman, JD

Medical spas are on medical boards’ radars nationwide. Medical spas bring in significant sums, primarily in private pay cash, and create contention and competition among licensed health care providers and unlicensed medical spa staff. In recent years, these relaxing oases have been popping up everywhere while drawing the scrutiny of state regulators. The Illinois Department of Financial and Professional Regulation has medical spas on its radar. Proper entity formation and ownership, as well as appropriate medical director participation can help insulate medical spas and physicians and other health care providers who work in them from liability.

Understanding the Corporate Practice of Medicine Doctrine

Like most states, Illinois prohibits the corporate practice of medicine. The corporate practice of medicine doctrine generally prohibits unlicensed individuals and entities owned by laypersons from providing medical services. The rationale for this prohibition is largely based on public policy considerations. Namely, if an unlicensed person or entity owned by an unlicensed person were to employ a licensed physician to provide medicine, then the unlicensed person or entity could interfere with the physician’s exercise of independent medical judgment. The fear is that by controlling physicians and their compensation, the employer could undermine the physician-patient relationship.

While unlicensed individuals obviously cannot provide medical services, the corporate practice of medicine prohibition is not this simple. Many states, including Illinois, have carved out exceptions to the prohibition.

One improper trend that runs afoul of the corporate practice of medicine prohibition is the control of a licensed professional who is providing the medical spa services by a business entity or layperson. For example, medical spas owned and operated by unlicensed individuals are employing and contracting physicians to provide medical director services and to supervise other individuals providing services. This structure poses significant risks in Illinois and would in many other states.

Formation and Organization of a Legally Accepted Medical Practice

Physicians in Illinois who are not employed by a hospital or other licensed institution are generally limited to practicing medicine in a business form of a professional corporation, a medical corporation or a limited liability company. The Illinois Professional Corporation Act and the Illinois Medical Corporation Act adopt rules from the Illinois Business Corporation Act, which governs business corporations, with some important differences. In a medical corporation or professional corporation that provides medical services, only licensed physicians may be shareholders, directors and officers. In Illinois, physicians may also practice medicine through a limited liability company as long as the managers are permitted to practice medicine under the Illinois Medical Practice Act and each member is licensed under the Act or is a registered Illinois professional corporation, medical corporation or appropriately structured and licensed limited liability company. The bottom line is this: general business corporations formed under the Illinois Business Corporation Act should not provide medical services, including those medical spa services designated as such by the IDFPR.

Medical practices (and medical spa practices) must be organized appropriately in terms of corporate structure. Additionally, they must obtain a certificate of registration from the IDFPR. In Illinois, medical corporations, professional corporations and limited liability companies providing medical services must be registered with the IDFPR. Physician practices often overlook this administrative filing requirement that involves an initial registration and annual renewal, each with fees. The filing results in the issuance of a certificate of registration by the IDFPR.

Physicians who affiliate with medical spas as a medical director, employee, contractor or otherwise should be aware of these corporate requirements and make a reasonable effort to confirm that the practice or business they are doing business with is appropriately organized. Basic information on corporate structure and IDFPR registration can be found on the Illinois Secretary of State website and the IDFPR website, respectively. Illinois limited liability companies, medical corporations and professional corporations must file articles with the Secretary of State upon formation. Additionally, all Illinois entities or foreign entity such as those from other states doing business in Illinois, are required to file annual reports. Basic information from the articles and annual reports is available online. Additionally, the public can see whether an
entity has an active registration with the IDFPR through a search on the IDFPR website.

**Practice of Medicine/Unlicensed Practice**

Unlicensed practice is a hotly debated political issue, especially in the medical spa world. Licensed providers are forcing the hand of state regulators to protect their turf from invasion by unlicensed individuals who perform the licensed provider’s professional services for less. State legislatures typically define the “practice of medicine” and make it a felony for any non-physician to engage in the professional services reserved for physicians. A state’s case law and medical board interpretation of the statutory definition of the “practice of medicine” drastically affect the state’s understanding of unlicensed practice by non-physicians. Unlike most states, however, Illinois does not provide a statutory definition—or therefore case law or board interpretation of—the “practice of medicine.” Illinois’ nebulous regulation of unlicensed practice makes case-by-case consideration of scope of practice parameters very important.

**Supervision/Delegation and Unlicensed Medical Spa Staff**

Closely tied to unlicensed practice is the issue of physician delegation and supervision of unlicensed individuals. The provision of medical services by those who are not appropriately supervised by physicians is common in the industry. Frequently, individuals who are licensed to provide cosmetology and esthetician services do not understand where the line is drawn between their scope of practice and the practice of medicine. The Illinois Barber, Cosmetology, Esthetics and Nail Technology Act specifically states that cosmetologists and estheticians are prohibited from using any technique, product, or practice intended to affect the living layers of the skin. Illinois licensed electrologists are licensed only to provide permanent hair removal, utilizing only solid probe electrode type epilation. Services involving laser technology (for example, laser hair removal) may only be performed if delegated by a licensed physician pursuant to the requirements for physician delegation to unlicensed persons.

The IDFPR has offered additional clarity through a Warning Report that provides that Botox, chemical peels, collagen injections, colonics, liposuction and microdermabrasion (except for that which is superficial or light and intended only to remove dead skin cells, oil and other debris from the skin) constitute “medical procedures” (for example, the practice of medicine) and are not within the scope of practice of a cosmetologist or an esthetician. Therefore, only licensed physicians or others appropriately supervised by a licensed physician may provide these services.

While physicians may delegate the performance to a person functioning as their assistant, physicians must examine the patient and determine the appropriate course of treatment before these procedures are performed. Moreover, individuals who are performing acts delegated by a physician may not hold themselves out as a cosmetologist or esthetician because these acts are not part of the practice of cosmetology or esthetics. Other medical spa services subject to delegation limitations include: laser hair removal, tattoo removal, varicose vein treatments, laser skin tightening, and any treatments that affect tissues below the surface of the skin, or which inject into (for example, Botox) or remove from (for example, liposuction) the body.

Accordingly, when an esthetician, cosmetologist or electrologist provides any medical spa procedures that are outside the scope of their licensure, the individual is considered an “unlicensed person” and rules relating to physician delegation to unlicensed persons apply. Proper physician delegation to unlicensed persons must be in line with certain requirements. First, the unlicensed delegatee must practice in the delegating physician’s office or practice setting. Accordingly, and as confirmed by the IDFPR, a physician may not delegate to an unlicensed person unless the unlicensed person is practicing at an office or practice owned and operated by the physician. A non-physician owned medical spa may not, therefore, allow an unlicensed person to provide any medical services pursuant to physician delegation. This requirement does not, however, mean that the physician owner or medical director is required to maintain the medical spa (or the location where delegated procedures are performed) as his or her principal practice setting.

Second, the physician delegation to unlicensed persons must occur in relation to an established physician-patient relationship. Third, the physician must ensure that each unlicensed delegatee is appropriately trained and experienced. Liability is with the delegating medical director if the delegatee’s competency is not established and a patient is harmed as a result. Last, the physician, or other licensed health care provider designated by the physician who is acting within his or her scope of practice, must provide direct on-site supervision when the unlicensed delegatee is providing delegated medical procedures.

**Laws Surrounding the Issues of Fraud and Abuse**

Since most medical spa procedures are not covered by Medicare or Medicaid, the federal Anti-Kickback Statute and Stark Law are generally not applicable. However, many states, including Illinois, have adopted their own versions of the Stark Law and Anti-Kickback Statute. The federal Stark Law applies to referrals made by a physician for designated health services to an entity in which the physician or (an immediate family member) has a financial interest that is not in the best interest of the patient. Stark Law applies if the physician owner or medical director is required to maintain the medical spa as his or her principal practice setting. The federal Anti-Kickback Statute prohibits any knowing or willful kickback or remuneration to influence the furnishing of items or services covered by Medicare, Medicaid, or any other federal health care program. The anti-kickback statute applies if the physician owner or medical director is required to maintain the medical spa as his or her principal practice setting.

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The Illinois version of the Stark Law, known as the Health Care Worker Self-Referral Act, applies to a broader range of health care professionals (not just physicians) for the referral of a patient for any services to an entity outside the health care worker’s office or group practice in which the worker is an investor. Such a referral is prohibited unless the worker directly provides the services in the entity and personally performs them. Other statutory requirements must also be met. Unlike the federal law, the Illinois law only applies to investments and not to compensation arrangements. Additionally, it is not limited to Medicare or Medicaid and therefore applies to patients who are paying out-of-pocket or through private insurance. If you are a physician with an ownership interest in a medical spa or other entity to which you refer patients, self-referral laws such as the Illinois Health Care Worker Self-Referral Act should be considered.

Illinois’ version of the Anti-Kickback Statute is known as the Insurance Claims Fraud Prevention Act and prohibits the payment or offer to pay, directly or indirectly, in cash or in kind, for patient referrals or for any payment under an insurance program. This Act is broader than the federal Anti-Kickback Statute because it applies to payments made by any insurance program, not just federal ones such as Medicare or Medicaid. Any financial arrangements between a physician and a medical spa owner should be carefully analyzed to ensure that there is no illegal remuneration for the referral of patients.

Fee Splitting Prohibitions Specific to Illinois
Illinois, along with a few other states such as California and Florida, takes one of the strictest positions against physician fee splitting. Specifically, Illinois law prohibits a physician from dividing with anyone other than physicians with whom the physician practices any fee, commission, rebate or form of compensation for professional services not actually and personally rendered, with certain exceptions. The fee-splitting prohibition applies to a broad range of arrangements where a non-physician is paid under a formula based on physician revenues and collections.

It is important to note that many other licensed professionals have similar fee-splitting prohibitions. Fee-splitting violations may result in disciplinary action, including loss of licensure, and fines up to $10,000 per violation. Financial arrangements between licensed professionals and unlicensed professionals should be analyzed to ensure against prohibited fee-splitting.

The Importance of Using the Appropriate Corporate Model
Physicians should consider the significant legal issues that can occur when affiliating with a medical spa. The financial success and longevity of a medical spa and protection of a professional license rely on employing the appropriate corporate model, ensuring proper medical director involvement, and determining proper delegation and supervision methods for the various health care providers and medical staff members within the practice. Associating with a medical spa is not something that should be done lightly.

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Working With the Bar

THE CHICAGO Medical Society and the American Bar Association have established a formal relationship to address medical-legal issues affecting CMS members and their practices. This legal section is sponsored by the Health Law Section of the American Bar Association.

For CMS members this means that you get monthly articles from legal experts that specialize in health law. The articles will focus on subjects of current interest to the medical profession as well as cover new laws and regulations as they are implemented. The authors will vary every month in order for you to get the best information possible from the attorney that most specializes in the subject matter.

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