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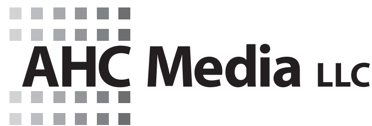

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— *Legal Review & Commentary*
— *Patient Safety Alert*

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New health services bring new risks to consider

By **Leila Narvid**, JD
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Evolving notions of health and wellness have introduced a plethora of new services to patients, many of which have less to do with medical necessity than with cosmetic appearance. Today, patients can receive a spa service, a nutrition consultation, and a full-body MRI scan all in a day's work.

However, the regulations that govern health care practices have yet to promulgate provisions that specifically relate to the operation of clinics that offer "spa-medicine" services and elective, nontherapeutic procedures. This article looks at the unique problems encountered by these types of clinics and legal pitfalls for health care risk managers to avoid.

EXECUTIVE SUMMARY

Health care organizations are launching more nontraditional services such as medi-spas and eye surgery clinics, but the financial benefits may come with potential liability. Risk managers should consider the dangers of such offerings and plan accordingly.

- Several states have "corporate practice of medi-cine" statutes that will dictate risks and limitations.
- Statutory penalties for corporate practice of medicine violations can be severe.
- Medical professionals can lose their licenses and employers can be prosecuted for participating in illegal activity related to these services.

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Patients are presented with a variety of options: "medi-spas" that provide cosmetic services in luxurious surroundings, in conjunction with medical care from plastic surgeons or dermatologists; vision therapy clinics that only perform LASIK eye surgery; and centers that perform full-body CT or MRI scans. These clinics are staffed by licensed physicians and nonlicensed employees, such as cosmeticians, plastic surgery counselors, and holistic medicine practitioners. Often, a nonphysician is the first point of contact for a patient. For example, plastic surgery counselors guide patients through the decision-making process and show them before-and-after photographs to "sell" them on the procedure, and optometrists perform initial consultations and refer patients to LASIK specialists.

The patient may not even see the physician until the day of the procedure. The relationships between physicians and nonlicensed persons can create what seems like a sensible opportunity for incentive pay programs wherein, in exchange for referrals, the nonlicensed person receives a commission from the physician. This can be a tremendous liability risk for the physicians and the participating health care organizations. Risk managers must be aware of this potential for significant civil and criminal violations.

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Editorial Questions

For questions or comments, call **Greg Freeman**, (770) 998-8455.

Beware 'corporate practice of medicine'

Though the arrangements can be problematic in all states, the risk is higher in California, Colorado, Illinois, New York, and Texas, which have statutes that limit the ability of physicians to be employed by nonphysician entities or to split fees with non-physicians. These are known as "corporate practice of medicine states." **(See p. 111 for more on the corporate practice of medicine doctrine.)**

Health care providers involved in such arrangements can face tremendous liability, but does this mean that physicians should not award bonuses or commissions to any nonlicensed staff members? Not necessarily. The key rule, however, is that incentive programs should not be linked to referrals or business-generated. For example, practice managers should not be paid based upon a percentage of total profits. Health care risk managers should recommend performance-based incentive programs, in which eligibility is based on monthly evaluations using criteria such as quality of work and patient care. Bonus programs that are based on a percentage of net income are illegal.

To the extent that nonlicensed staff members cause patients to be referred to the clinic for physician services, the fees paid to the physician for performing these services should remain constant. For example, the physician should not receive less compensation for Botox injections he or she performs because someone other than the physician was responsible for getting the patient in the door.

Must not influence doctor's judgment

What types of conduct are construed as exerting influence or control over a physician's professional

judgment? In corporate practice of medicine states, the following types of decisions should be made by physicians only and would constitute the unlicensed practice of medicine if performed by a nonphysician:

- determining what diagnostic tests are necessary for a particular condition;
- determining what kinds of procedures should be performed;
- determining the need for referrals to another physician/specialist;
- determining how many patients a physician must see in a given period of time.

Physicians are just one of many categories of health care providers, and a host of other non-physician providers are developing subprofessions that involve limited licensure and fill an important need in a specialty. With new forms of health care entities developing at tremendous pace, questions regarding the applicability of the corporate practice of medicine doctrine to these new entities continue to arise.

Health care risk managers should closely scrutinize their entities' contractual agreements, to assure that they are not assisting in the corporate practice of medicine.

(Leila Narvid, JD, is an associate in the general civil litigation practice group at Sideman & Bancroft in San Francisco. She can be reached at lnarvid@sid.) ■

Avoid the corporate practice of medicine

By **Leila Narvid**, JD
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Risk managers must assure that the fast changing face of health care does not draw their organizations into the "corporate practice of medicine," which brings significant liability risk.

The corporate practice of medicine doctrine has three primary tenets:

1. A nonlicensed individual or entity cannot employ a physician or any other health care professional to practice medicine.
2. Entities that provide health care services cannot be owned or controlled by nonlicensed persons or corporations.
3. Licensed health care professionals may not divide or share a professional fee with a nonlicensed person or entity.

These tenets all exemplify the principle that medical decision making should be entirely free of layperson and corporate control, and that physicians should be free to exercise professional judgment and remain fully accountable for their actions. Put another way, if a lay entity has a financial interest in a physician's "bottom line" or "profit," then the entity has a direct interest in and ability to control the medical side of the business, such as how many hours the physician will work, what type of procedures will be performed, and what type of medical technology should be used.

For example, in California, actual "medical" control need not be established to show a statutory violation. (See California Business & Profes-sions Code §§650, 2052, and 2400.) Rather, the law recognizes that many business decisions have direct and indirect medical implications and prohibits arrangements that provide for the potential of inappropriate lay control. Similarly, in Maryland, a physician is subject to discipline if the physician "pays or agrees to pay any sum to any person for bringing or referring a patient or accepts or agrees to accept any sum from any person for bringing or referring a patient." [Health Occupations Article, Maryland Code §14-404(a)(15).]

Penalties may be severe

Statutory penalties for corporate practice of medicine can be severe. Medical professionals can lose their licenses, and employers can be prosecuted for furthering the illegal activity. Professional organizations, such as the American Academy of Ophthalmology, have taken the initiative to promulgate ethical guidelines that address fee-splitting and corporate practice of medicine.

The American Academy of Ophthalmology issued voluntary guidelines that urge eye surgeons not to accept referrals from optometrists in exchange for a cut of the professional fee, even if the optometrist will be responsible for handling the patient's postoperative care.

(Editor's note: For the guidelines, go to www.aao.org/aao/member/ethics/employment_referral.cfm.) ■

Potential liability severe for allowing identity theft

Risk managers should be highly motivated to protect patient information that could lead to identity theft, says **Leila Narvid**, JD, an attorney with Sideman & Bancroft in San Francisco. The potential liability is huge.

Laws and liability will vary according to your state, but California, for instance, has enacted a security breach notification law that imposes responsibilities on the part of health care entities beyond those established by the Health Insurance Portability and Accountability Act (HIPAA). Narvid explains that the California Security Breach Information Act, codified as California Civil Code Sec. 1798.82 et seq., requires that businesses and organizations that conduct business in the state or own information about California residents must inform their consumers when an unauthorized person obtains access to personal information, such as Social Security numbers, driver's license numbers, and financial information. The law's disclosure requirements are triggered when "unencrypted personal information was or is reasonably believed to be acquired by an unauthorized person."

In California, a health care organization failing to promptly notify the patient victim whose personal information has been accessed by an unauthorized person is liable for statutory damages and equitable relief, Narvid says. "In addition, the health care organization may be vulnerable to a common-law action for negligence per se, meaning the health care organization could be found to be intrinsically negligent," she adds.

Narvid notes that the HIPAA rule for security breaches is more abstract. The security rule is, in practice, an outline for security planning and implementation, rather than a precisely defined set of rules (unlike the California Security Breach Information Act). The general requirement of the security rule is that health care organizations that "collect, maintain, use or transmit protected health information in electronic form" must construct "reasonable and appropriate administrative, physical and technical safeguards" that ensure the confidentiality of health care information. Such measures must provide protection against "any reasonably anticipated threats or hazards."

"The risk is great and warrants a thorough effort to protect confidential patient information," she says.

[Editor's note: For more advice on liability from identity theft, contact Leila Narvid, JD, Sideman & Bancroft, One Embarcadero Center, Eighth Floor, San Francisco, CA 94111. Telephone: (415) 392-1960. E-mail: lnarvid@sideman.com.] ■

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