

Physician Licensing and Medical Director Issues

By Padraic B. Deighan, M.B.A., J.D.

TThere are changes in the manner in which respective Boards of Medicine will be reviewing physician licensure issues, especially in regard to medical directors and physicians who own, operate, or supervise medical spas.

At a recent meeting of the Federation of Boards of Medicine in San Francisco, the attorneys who represent the 50 Boards of Medicine convened and discussed various issues relating to physician licensure and medical director arrangements. It was clear after this meeting that there will be many changes in the manner in which the states view and review physician licensure. The respective Boards of Medicine will be regulating medical spas by regulating the conduct of physician licensees.

ON THE RADAR SCREEN

For example, in February the State of Kansas sent a letter to all physicians indicating that all physicians who own, operate, or supervise a medical spa are "on their radar" screen. The clear implication of this is that the states are beginning to scrutinize physicians utilizing their licenses for monetary gain. Kansas intends to review these situations on a case-by-case basis. This is the first time that a state has openly admitted concern regarding the conduct of physicians in the medical spa field. There was some speculation

that the Kansas action was the result of products and services that were being made available to spas that clearly were "medical" in nature. Further speculation was that product claims were being made that did not receive Food & Drug Administration marketing clearance. The physicians who developed the product were in Kansas.

The respective Boards of Medicine will be regulating medical spas by regulating the conduct of physician licensees.

So it is now also clear that states will be regulating products utilized in medical spas.

OWNERS, OPERATORS AND SUPERVISORS OF MEDICAL SPAS

The initial focus of the Federation is physicians who are owning, operating, or supervising a medical spa. The concern is that physicians are allowing (and in some cases promoting) the practice of medicine by non-physician employees. The greater concern is the situations in which physicians are supervising the employees of a spa that he or she does not own. Physicians are being warned that if they choose to medically supervise the employees of others, they will be under scrutiny.

The Federation also discussed

increasing the enforcement of policies already in effect in all 50 states. They will be reviewing conduct to determine whether a situation constitutes the unauthorized practice of medicine by individuals who may be performing services in a legally unsupportable manner (i.e. without proper licensure or supervision). Ancillary to this is the concept of violations of the non-corporate practice of medicine that will also be increasing.

The significance of this meeting is that for the first time, the 50 states (through their attorneys) discussed these matters collectively. There was surprise among many attendees at the significance of existing violations and the prevalence of physicians supervising medical spas in a manner inconsistent with principles of law and medicine. The state representatives were genuinely aghast at the current status of many medical spas. There was surprise at the widespread violations of many medical spas including ones owned and operated by physicians. Previously, states really did not focus on such issues; but after the recent discussions, this will change. Many representatives were completely unaware of any issues regarding medical spas.

Now that the states are all aware of violations and are commonly united in enforcement, there should be a dramatic rise in enforcement. The letter sent by Kansas is the first of many that are certain to follow.

STATE BOARDS NOW WORKING TOGETHER

States are free to enact and enforce healthcare policies that they

develop. They are also free to regulate physician conduct. However, it is significant to note that the states are reviewing medical spa matters on a collective basis. It is rare that states work together on medical matters. There are likely to be some common ground and information sharing regarding these issues. This will certainly impact the type of regulation and the severity of penalties.

I have previously mentioned that many of the concepts discussed in this issue have been in existence for some time. The methods to enforce policies have also been in existence.

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However, states will now be utilizing these methods to enforce conduct that is inappropriate.

Accordingly, it is essential that physicians review their conduct in view of anticipated future regulation and enforcement. Having a business policy "regulated out" after implementation could be catastrophic to a business plan. It would be prudent to review conduct as it relates to existing regulations and realize that if anything, regulations (or at least enforcement) are likely to increase. There is too much at stake to assume that states will no longer be enforcing

concepts of law and medicine that have been in existence for many years. The eyes of the state

Boards of Medicine are wide open now.

WHERE SHOULD YOU BEGIN?

Physicians who are supervising medical spas which they do not own are the most likely to be scrutinized. Such relationships are possible, but great care is necessary in the

they are managing or are medically responsible for employees other than their own. A state will have a much easier time proving non-conforming conduct on a physician who is medically supervising the employees of a spa.

The spa owner is at risk, too; but the focus of this article is on the exposure of the physician. It would not be helpful for a physician to argue that he or she does not own the facility and, therefore, he or she should not be subject to scrutiny. A Board of Medicine does not have jurisdiction over a non-physician medical spa owner. However, a state would likely charge the spa owner with either the non-corporate practice of medicine regulations (which exist in 45 out of the 50 states) or the unauthorized practice of medicine violations. A physician risks losing his or her license or at least a suspension for violation of a state's policies.

When a new concept begins to gain prevalence in the medical

marketplace (such as medical spas), the sanction for violations is typically little more than a slap on the wrist for alleged violations. However, as the states begin to share information, this is likely to change. States are likely to have immediate strong penalties for violative conduct. The reason for this is the perceived widespread abuses that have existed

since the beginning of the medical spa wave in the United States and the collective experience and information sharing on the subject that is now a reality.

I have cautioned physicians in the past to really review their business plans and be certain to be as compliant as possible. However, after the recent meeting mentioned above, it is now imperative that physicians carefully review their behavior and business plans in advance. As the saying goes, "the devil is in the details" and no detail is too small to be considered. There is far too much at stake for lack of adequate planning. If you feel any doubt about what you are doing, seek competent counsel, fix what can be fixed, and abandon those plans that cannot be medically or legally supportable. ■■



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