Botox® at the Mall? A Look at Medical Spas Under California Law
Carol Lucas, Esq.

Medical Spas seem to be popping up all over these days. More and more Southern Californians, both men and women, view a Botox® injection or laser hair reduction as a cosmetic treatment rather than as a medical procedure. Likewise, people are willing to obtain these services in the same settings they use for pedicures—in day spas or even in mall stores. Frequently, the operators of these medical spas are no more aware of the legal requirements that apply to their businesses than are their customers, as both the providers and consumers of the services see these services as esthetic in nature. But because California law defines many of the services that medical spas provide as the practice of medicine, there are numerous traps for the unwary spa operator.

Medical spas were developed to offer certain esthetic skin care procedures developed by dermatologists and plastic surgeons in a setting thought to be more pleasing to “clients” than a physician-office setting. These procedures include dermal filler injections or collagen replacement therapy, photo facial rejuvenation, laser hair reduction, microdermabrasion and chemical peels. They sometimes offer weight reduction services as well, and frequently endeavor to enhance the client’s experience by offering other day spa services, such as manicures, waxing, massages and facials.

Many of these services, however, are defined as medical services by California law, and may only be provided by a physician or other licensed person, such as a registered nurse or nurse practitioner under the supervision of a physician. California’s Medical Practice Act requires a medical license to diagnose mental and physical conditions, to use drugs in or upon human beings, to sever and penetrate the tissue of human beings and to use other methods in the treatment of diseases, injuries, deformities or other physical or mental conditions.

Under this definition, it is clear that the selection of injectable pharmaceuticals, such as Botox®, determination of the dosage, and performance of the injections is the practice of medicine. Laser hair removal and intense pulse light devices also implicate the practice of medicine because these procedures penetrate the tissues of a human being. Microdermabrasion is classified as either cosmetic or medical, depending on whether the procedure penetrates only the outermost layer of skin (cosmetic) or involves the penetration of the deeper levels of the epidermis (medical). If weight management services involve the use of prescription drugs, such as Phentermine or Adipex-P®, those services also constitute the practice of medicine.

To the extent that any of these services are provided by nurse practitioners, they are required to be supervised by a physician. Though the physician is not required to be in the room while the procedure is performed, the physician should be on the spa premises, otherwise, the nurse and the medical spa risk being charged with the unlicensed practice of medicine. Any physician involved with the medical spa, whether as medical director or investor, risks licensure action for aiding and abetting the unlicensed practice of medicine.

Additional complications arise because of California laws relating to the relationship between physicians and general business entities, and fee-splitting by physicians. California is one of the few states that still recognizes and enforces the prohibition against the so-called “corporate practice bar.” The California statute that codifies the corporate practice bar precludes “lay” individuals, organizations and corporations from providing medical services.

Nonphysicians cannot employ a licensed physician to provide medical services or enter into any contractual arrangement that allows interference with, or exercise of any control over, the medical decisions of a physician. For this reason, medical spas that are not professional corporations cannot directly employ the physician needed to supervise the medical services provided. They must instead enter into a medical director, consulting or professional services agreement, being careful that such agreements do not trespass on the physician’s professional judgment.

If the medical spa is organized as a professional corporation, California law requires that at least fifty-one percent (51%) of the shareholder interest in a professional medical corporation be owned by licensed physicians. The remaining forty-nine percent (49%) may be owned by certain other licensed clinicians, including registered nurses. Unlicensed persons and organizations cannot own any interest in a professional medical corporation or other medical entity.

These provisions make medical spa joint ventures between physicians and unlicensed persons complicated to structure. An additional wrinkle is California’s prohibition on physician fee
splitting. Because it is illegal for a California physician to split fees as incentive for referring patients, contracts must be carefully drafted so that there is no inference that the physician is paying or receiving compensation for referrals, but only for actual professional services rendered.

Laws relating to the employment of physicians and fee-splitting vary from state to state. A medical spa chain or franchise opportunity structured to comply with another state’s law may still run afoul of California requirements. And because medicine is a highly regulated industry, medical spa operators must be careful not to cross the line between cosmetology and the practice of medicine. The advice of healthcare counsel should always be obtained to make sure that the regulatory minefield is negotiated safely.

*Carol K. Lucas is a Shareholder in the Los Angeles office, and heads the firm’s Health Care Practice. She can be reached at (213) 891.5611 or by email at clucas@buchalter.com.*