



Compliance Planning & Cosmetic Medicine: A Tool for Minimizing Risk

Dr. Smith was looking for ways to boost revenues to make up for the steady erosion of insurance reimbursement in his medical practice. He had received an offer from a consultant that would offer to transform his practice into a “medi-spa,” offering aesthetic medical services, such as Botox, along with spa services, such as facials. He agreed to pay the consultant a fee plus a share of revenues from the non-medical spa services in order to develop the new practice and market it to a new clientele, interested in both cosmetic medical treatment and spa services.

The first year was promising, with an influx of new patients and a surge in practice revenues. With the new practice, though, came new challenges, including an increasing number of disgruntled patients and, ultimately, contact with the state medical board.

Dr. Smith contacted us after a series of complaints from patients triggered a licensing investigation. We urged him to focus on making sure that his practice was in compliance with all regulations and standards as the best defense to licensing action, i.e. cleaning up any problems so that there was nothing left for the regulators to do. The compliance audit revealed a number of issues that sometimes seem to be endemic to aesthetic medicine. Working with Dr. Smith, we were able to correct practice management problems, address documentation gaps, and develop a compliance plan for the future.

Cosmetic medicine is has been described as the “Wild West” of American medicine. Operating largely without the external constraints imposed on much of the physician community by Medicare and Medicaid programs, health insurance companies, or peer review, doctors can find great rewards in the marketplace of patients willing to pay for physical self-improvement. But along with those rewards come risks, such as questionable guidance from marketers and consultants who, at best, ignore and, at worst, circumvent, the law.

Scope of Practice. Careful compliance planning should begin with a review of staff functions and supervision. While state laws vary, each state has precise laws as to who can do what (“scope of practice”) for both medical and non-medical (*i.e.* spa) activities, such as facials and massage. State law

defines, for example, which allied health personnel (*i.e.* physician assistants, nurses, and medical assistants) can use lasers for hair removal or which personnel can perform chemical peels. The level of supervision required for different personnel also varies. To make matters worse, the rules are constantly changing. California physicians, for example, were generally limited to supervising two physician assistants (P.A.’s); as of January 2008, they can supervise up to four. However, the delegated responsibilities and the protocols according to which the P.A. operates must be carefully documented. Similarly, the highly publicized 2007 death of Donda West, mother of rapper Kanye West, following plastic surgery (performed without requiring a prior medical examination) has led to introduction of proposed state legislation to tighten supervision requirements in cosmetic practices.

Financial Arrangements. It is also essential to examine organizational structure and financial arrangements to ensure that physicians are avoiding issues such as the prohibition on the corporate practice of medicine. While non-physician consultants may be compensated for providing administrative or marketing services, these agreements need to be documented carefully and to establish a reasonable basis for compensation to avoid issues such as illegal fee-splitting. With respect to billing practices, it is ensure that third party payors are not being billed for cosmetic procedures or services performed by non-medical personnel (*e.g.* aestheticians) and that marketers are not paying referral fees.

Marketing/Patient Privacy. Each state has different laws, but in general there are detailed regulations about how medical practices advertise, whether on the Internet or in print. It is routine to find that marketers for cosmetic practices are not attuned to the advertising limits imposed by law. In addition, HIPAA and state medical privacy laws impose limits on use of patient information for marketing purposes without meeting strict consent requirements. Given the widespread use of patient photography (*e.g.* before and after photos) in marketing, it is essential to document consent not only for the procedure, but also for use of patient medical information in compliance with the law. Care must be taken to ensure proper handling of private patient information, as well as to ensure that patients experience the level of care being taken.

Patient Relations. The transformation of patient expectations in the age of the Internet is a broad issue looming over the entire healthcare industry and transforming the nature of doctor-patient relations. Compliance planning needs to address emerging challenges related to aesthetic medicine patients, who

almost by definition are more consumer-oriented. Such patients are more likely to “shop” online for the right provider, to seek out information from websites or blogs with posts from past patients, and to report after their procedures on any dissatisfaction.

Physicians who provide cosmetic medical services need to adapt to the challenges. For example, at the same time that physicians are subjected to the above noted restrictive patient privacy restrictions, patients freely trade and share information on Internet community websites. The potential for negative publicity from a disgruntled patient is a serious issue. It is more critical than ever to review management of patient expectations and patient relationships to minimize the risks of litigation and complaints.

Documentation Management. Insufficient and/or sloppy documentation practices are, in general, one of the points of greatest vulnerability in cosmetic medical practice. In licensing investigations, for example, it is far more difficult to defend poor recordkeeping than clinical care decisions. It is critical to review patient forms, such as informed consents and privacy notices, to ensure compliance with legal requirements. In the current litigious and heavily regulated climate, the objective of every practice should be to model “best practices” from which other practices can learn. Simple acts like calling patients after procedures and having the caller document that the patient reports that he or she is “doing fine” in the chart can offer immeasurable protection. It is valuable to regularly review documentation practices to identify areas of improvement not only to cover the minimum legally required information, but also to identifiable areas where additional documentation is advisable.

Medication/Anesthesia Issues. Many cosmetic practices are unaware of the extensive requirements concerning controlled substances that are prescribed, administered, or dispensed to patients. In addition to federal DEA regulations, state laws establish detailed requirements for inventories of controlled substances, dispensation logs, records that must be maintained, and reports that must be submitted. Noncompliance places cosmetic practices at risk of losing DEA certification, civil monetary penalties, or, in the worst cases, criminal sanctions. Even worse, noncompliance can be reported to the state licensing board for “follow on” disciplinary action.

Practice Management Issues. Finally, perhaps the most important step in compliance planning is reviewing the clinical medical procedures and practices themselves. Compliance review can ensure that practices are consistent with standard of care, from patient intake through discharge, that informed consent issues are being addressed, and that the practice is a model of “best practices.” Although it is

often possible to defend the wide range of practices across the profession, it is far better to identify and implement current best practices throughout the profession whenever possible.

Through effective compliance planning, when Dr. Smith's practice was reviewed, the investigation was closed promptly. More important, he had developed compliance tools to avoid issues in the future. If you are a physician working in aesthetic medicine, from plastic surgery to cosmetic dermatology, we encourage you to act proactively and review the state of your compliance. There are great business opportunities available in aesthetic medicine, allowing physician to build practices that deliver services patients want. Thoughtful attention to compliance issues in aesthetic practice in advance is the safest road to avoiding the headaches and expenses of government action or patient lawsuits.

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