

Malpractice and the Ripple Effects

Bradford E. Adatto & Michael S. Byrd

Dallas, Texas & Chicago, Illinois
(214) 291-3200
byrdadatto.com
Blog: byrdadatto.com/banter



This presentation is for educational purposes only. This presentation does not constitute legal advice nor does it establish an attorney-client relationship. Please consult with an attorney on your legal issues.

ByrdAdatto Biography

- Michael S. Byrd and Bradford E. Adatto are partners at ByrdAdatto, PLLC, a national business and healthcare boutique law firm with offices in Dallas and Chicago. The firm represents physicians, nurses, medical practices and medical spas in the spectrum of issues that arise on the business side of medicine. ByrdAdatto helps specifically setting up medical practices, medical spas, MSOs, other ancillary entities, structuring partnership transitions, employment agreements, other contracts, and federal and state regulatory compliance. Both Michael and Brad lecture throughout the country at universities and medical schools, medical conferences, and other professional and trade associations.



Malpractice Lawsuits

- | | |
|-----------------------------------|--|
| 1. Surgery: 85% | 6. Plastic surgery/esthetic medicine: 73% |
| 2. OB/Gyn and women's health: 85% | 7. Radiology: 70% |
| 3. Otolaryngology: 78% | 8. Emergency medicine: 65% |
| 4. Urology: 77% | 9. Gastroenterology: 62% |
| 5. Orthopedics: 76% | 10. Anesthesiology: 61% |

*Medscape's Malpractice Report 2017



Malpractice

Elements:

- (1) A professional duty owed to the patient;
- (2) Breach of such duty;
- (3) Injury caused by the breach; and
- (4) Resulting damages

Who's Watching:

- Hospital Staff, Medical Board, Nursing Board, and State Agencies
- Undercover investigations
- Complaints
 - Patient
 - Former or current employee
 - Competitor
 - Ex-Spouse



Lawsuits

- Fresno doctor and three nurses in trouble for Botox injections and laser hair removal
 - Charged with unauthorized practice of medicine and aiding and abetting the unlicensed practice of medicine
 - Charges were eventually dismissed
- ABC15 UNDERCOVER: Impostor nurse injecting patients at Scottsdale medspa
- CBS Boston - Med Spa Patients Badly Hurt By Hair Removal, Botox Treatments
- **Illegal Cosmetic Surgery Leads to Patient's Death**
 - March 28, 2017, a Dallas woman was convicted of murder for the death of a patient due to her practicing medicine without a license.
 - Injected industrial-grade silicon into the buttocks of a patient in order to enhance that patient's buttocks.
- **Spa worker accused of practicing medicine without license**
 - April 17, 2017 Houston cosmetologist has been charged with practicing medicine without a license by district attorney
 - Gave buttock injections that led to serious infections and complications



What does an angry patient do?

- Post Negative Review
- File Complaint with Nursing Board
- File Malpractice Claim



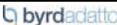
Reduction of Exposure

1. Patient Communication!
2. Have positive reviews.
 - Incorporate strategies to ask happy patients to make a review.
3. Patient Rebate Strategy
4. Work with your partners on their website and community presence
5. Respond to investigations timely and efficiently



Pandora’s Box

- Investigators Powers
 - Interview witnesses
 - Demand medical, court, police records, personnel information, and business records
 - Conduct site visits,
 - Consider standards of care



Compliance – Three Legged Stool

1. Ownership
2. Diagnoses
3. Delegation & Supervision



Ownership

- Corporate Practice of Medicine
 - State Law Concept
 - Only medical practices can provide medical services
 - Only physicians may own medical practice
 - Non-physicians may not employ physicians
- What type of entity may own a Medical Practice?
 - Physician* owned Entity
 - License By State
 - ***Exception To Ownerships Rule**
 - *State Driven*

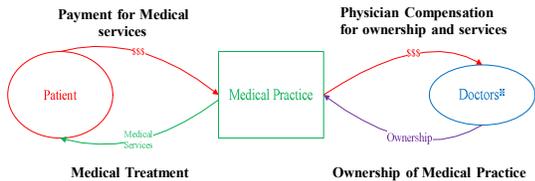


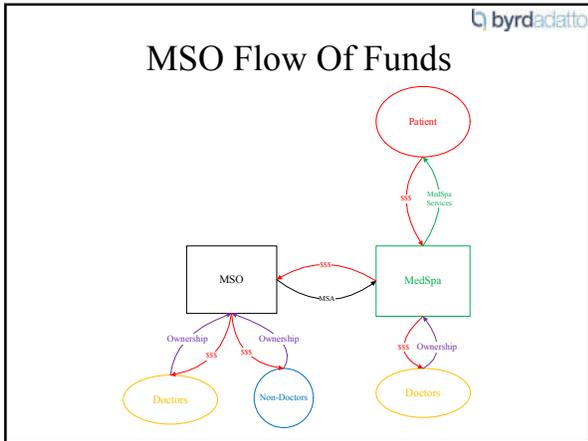
Medical Services

- Anything that affects living tissue
 - All injectables
 - Most lasers (IPL, hot/cold, radiofrequency)
 - Micro-needling
 - Dermaplaning/Dermablading
 - Medical grade chemical peels and microdermabrasion
 - IV Treatments



CPOM





byrdclatto

Medical Ownership

Three simple steps to be compliant with Ownership Requirements

1. Form Management Service Organization (MSO)
 - MSO (management company)
2. Draft Management Service Agreement (MSA)
 - Legal Contract to provide management services to Medical Entity
3. Execute MSA between Medical Entity and MSO

byrdclatto

MSOs Operations

<p>Non-Clinical Operations</p> <ul style="list-style-type: none"> • HR • Finance • Marketing • Space • Equipment • Branding • Payroll 	<p>Non-Clinical Operations</p> <ul style="list-style-type: none"> • Insurance • Scheduling • Record-keeping • Intellectual Property • Software
---	--



Key to MSOs

- Clinical Operations
 - Control Being Asserted Over Medical Practice by MSO
 - No Absentee Physician
 - Medical decisions remain with physician hiring health professionals (RNs, PAs) and any person affecting clinical care
 - Equipment and supply choices requiring physician oversight.



Who Can Diagnose?

- Doctors –
 - Doctors can do a face to face consultation for all initial diagnoses & medical treatments
- NPs and PAs*
 - can face consultation for all initial diagnoses & medical treatments
- Subject to written protocols, SOPs AND physician general supervision
 - *The Good Faith Exam*



Do you have Skills?

- Within the scope of your professional services.
- Know your limitations.
- Understand your state’s nurse practice act and applicable standards of care related to *your* practice area.



Is an NP always a NP?

- Scope of practice based upon **advanced educational preparation**, continued experience, and the accepted scope of the particular specialty area
- When operating outside their specialty, some Boards have indicated that those activities are limited to the scope of practice of a registered nurse
- Engaging in areas outside their scope of practice,
 - Functioning as RNs
 - No prescriptive authority
 - No authority to oversee other providers
- Major Problem
 - No accredited national program for aesthetic nursing



State Law

- Several factors.
- Two most applicable are that the practitioner must either:
 1. have a preexisting relationship with a patient;
 - or**
 2. provide telemedicine services that allows the practitioner access to, and the practitioner uses, relevant clinical information in accordance with the **same standard of care** applied to in-person relationships.
- Medical records must be submitted to the treating physician within a certain timeframe



Delegation & Supervision

- | | |
|---|---|
| <p>Delegation</p> <ul style="list-style-type: none"> • Once “physician-patient” relationship established, may delegate to licensed practitioners and <i>staff</i>, provided... <ul style="list-style-type: none"> – Practitioner is trained, qualified and experienced – Doctor is trained, qualified and experienced – Proper supervision is in place – Proper protocols are in place – Supervision doesn’t necessarily mean on-site | <p>Supervision</p> <ul style="list-style-type: none"> • Supervision doesn’t necessarily mean on-site • Depends on the treatment • Practitioner must be “Trained and Qualified” • Should be written protocols |
|---|---|



Complicated Laser Laws

- Each State has unique laws that can be in multiple statutes:
 1. laser radiation and intense-pulsed light devices (“IPL”); and
 2. lasers or pulsed light devices for hair removal (“LHR”).
- This can limit who can own the laser, fire the laser and supervise the laser technician



So who can do what?

- PAs and NPs can do initial consults
- PAs, NPs and RNs can inject
- RN limitations
 - No new patients (exam/diagnosis)
 - Generally need direct supervision



Insurance

- | | |
|---|--|
| Professional Liability Insurance | Types of Insurance |
| • Who pays? <ul style="list-style-type: none"> – Usually employer – but do not assume so. | • Amounts (\$\$\$) |
| • Claims Made Policies <ul style="list-style-type: none"> – Coverage <ul style="list-style-type: none"> • Claims Made During Policy • Extended Reporting Endorsement (“Tail”) | • Services <ul style="list-style-type: none"> – Surgical – Non-Surgical – Aesthetic |
| • Occurrence Policies <ul style="list-style-type: none"> – Coverage <ul style="list-style-type: none"> • Protects From Incidents Occurring While Policy is In Force • Covers Incidents Forever • No Tail Coverage Required | • State <ul style="list-style-type: none"> – HIPAA – Privacy – Cyber Security |
