

THE SCOPE



MEDICAL EDITION

ISSUE 08

FIRST QUARTER 2022

INSIDE THIS ISSUE

The Liability Issues of
'Medispa' Treatment

MLMIC Underwriting:
Prepared for Today;
Creating Solutions for
Tomorrow

Talk Studio:
Telephone Triage
by Nurses

NY



MLMIC
The Scope
Medical Edition

Issue 8
First Quarter 2022

EDITORIAL STAFF

Publisher

John W. Lombardo
MD, FACS

Editor

John Scott

Staff

William Fellner

Thomas Gray, Esq.

Kathleen Harth

Pastor Jorge

Shelly Kriete

Matthew Lamb, Esq.

Mirsade Markovic, Esq.

Patricia Mozzillo

Elizabeth Ollinick, Esq.

Robert Pedrazzi

Daniela Stallone

INSIDE

2 The Liability Issues of
'Medispa' Treatment

8 MLMIC Underwriting:
Prepared for Today;
Creating Solutions for
Tomorrow

9 AM Best Affirms Credit
Rating of MLMIC
Insurance Company

13 Talk Studio:
Telephone Triage
by Nurses





EXECUTIVE MESSAGE

You Care for Them. We Care for You.

I have always thought this should be MLMIC's motto — "You Care for Them. We Care for You." Why? Because I can't remember a time when it was more difficult to be a physician or other provider practicing in New York. The stresses on all of you are enormous, and many, and I'm so grateful you have decided to carry on. You have my gratitude and my admiration, as well as that of the entire MLMIC Family.

For those of you who have been, or are unfortunately being, sued, you need to know that MLMIC takes that fight as personally as you do. A plaintiffs' attorney once said to me, after I was sued and we beat him at trial, that "it wasn't personal." How wrong he was! MLMIC knows many of our policyholders personally, and we know each of the local climates in which plaintiffs' attorneys bring these lawsuits better than any other company — we also live here, and have lived here, for over 45 years. For MLMIC, these are "home games," not "away games." I strongly believe that this helps in our defense, as we are personally invested in seeing each of you survive, and succeed, in this difficult atmosphere.

For those of you who have not been sued, and that is about half of you, we offer a great many ways to help keep it that way — including, but not limited to, risk management education, instructional office surveys, and a 24/7 risk management hotline to answer your questions. The list is voluminous and can be explored at [MLMIC.com](https://www.mlmic.com). There may be ways we can help you that we haven't even thought of yet! If so, please feel free to call or email me at any time.

So, how else can MLMIC care for you? We now offer a wide variety of products and services to make your professional life a bit easier, including cutting-edge discounts of up to 30% on many of our policies. All you need to do to see if you are eligible is email or call our Account Specialist Lori Hertz, at lhertz@mlmic.com or (516) 508-4150. It won't take long, and it's a call worth making.

Again, and most important, thank you for all that you do. Our profession is noble, and I am proud to be among you. Please always remember, as they say in the military, "We've got your six."

You Care for Them. We Care for You.

Thank you.

John W. Lombardo, MD, FACS

Chief Medical Officer, MLMIC Insurance Company

jlombardo@mlmic.com



The Liability Issues of 'Medispa' Treatment

Physicians seeking to expand their medical practices to include aesthetic services often do so through the establishment of, or contractual affiliation with, a medical spa, or 'medispa.'

While medspa services may present an exciting opportunity to expand service offerings, caution is necessary. Physicians and professional practices face claims for liability arising out of the injuries that can occur from cosmetic treatments gone wrong, even when no physician is directly involved in the treatment. In addition, improperly structured arrangements between a nonmedical entity providing management services to the medspa and a professional corporation providing the medical services may subject physicians to regulatory action.

Before establishing or entering a contractual relationship to provide medical services to a medspa, physicians should consider the professional and financial risks they may face. Liability could be imposed for regulatory violations, false advertising, fraudulent misrepresentation, negligence, and malpractice. In addition, the actions of the spa may bear on the physician's medical license and reputation.

Liability could be imposed for regulatory violations, false advertising, fraudulent misrepresentation, negligence, and malpractice.

It is important to remember that many services provided by a medspa, such as Botox and chemical peels, constitute the practice of medicine, which is highly regulated in New York. Under the New York State Corporate Practice of Medicine doctrine, only a physician can own a medical practice, and a physician must make clinically related decisions such as the hiring of clinical staff. As a result, plaintiffs claiming injury from a medspa service will likely name the professional practice as a defendant, even if the service at issue was not medical in nature, and even if a physician shareholder was not directly involved in the treatment.

A consulting or supervising physician should be aware that they may bear the burden of liability for any medical malpractice or negligence claims related to the administration of the treatment. While physicians in medspas often delegate procedures to nonphysicians, such as nurses, physician assistants, aestheticians, cosmetologists, and unlicensed technicians, the fact that the physician is not involved in the treatment may be an insufficient basis for dismissal from a legal action.

In addition to malpractice, a cause of action for failure to supervise and inadequate training may stand against a medical director.

In addition to malpractice, a cause of action for failure to supervise and inadequate training may stand against a medical director. Even consulting physicians with more tenuous relationships to a medspa may have difficulty obtaining early dismissal, particularly if they are held out to the public as providing medical supervision to the medspa. Such consulting and supervising physicians should be wary of marketing materials that mischaracterize the relationship between the physician and the medspa. Contracting physicians having little control over the medspa's marketing practices may want to discuss with healthcare counsel the suitability of including in their contracts a "use of name" provision backed by a solid indemnification obligation on the part of the medspa.

Supervision, Communication, and Training

It is imperative that the physician owners of medspas establish and communicate objective standards of care and conduct to be followed for all treatments, both medical and nonmedical. Such standards should be consistent with prevailing standards even if the treatments are not medical in nature (e.g., laser hair removal).

Providers and Practices Should:

- Establish mechanisms to monitor the ongoing performance of delivering treatment, including compliance with pertinent policies and procedures such as record keeping, consultation, and communication.
- Ensure that the medspa has written protocols governing safety procedures for the use of equipment and products used by the medspa, and maintain documentation of staff training.
- Establish protocols for the physician review of records on a specified and reasonable periodic basis, and require staff to check in regularly with supervisors to discuss any potential risk issues or complications.
- Consider documenting record reviews and significant communications.
- Establish written policies and procedures covering treatment errors.
- Document, investigate, and implement corrective action plans for any reported incidents.
- Train staff to take seriously, address, report, and document all patient or client complaints related to treatment.
- Consider establishing follow-up protocols for any patients or clients who express concerns during treatment.
- Ensure that all staff, licensed and unlicensed, remain mindful that even the nonmedical services affect the integrity of a physical body and a person's physical appearance even though treatments performed in a medspa are marketed as "pampering." In addition to causing medical issues, such as burns, scars, and infections, errors in the provision of aesthetic services can also cause significant emotional distress.

Who is Providing the Services?

Significant integration between the professional practice and the nonprofessional entity raises the risk of liability to the professional practice. Physicians and professional practices wishing to avoid the liabilities of medspas should consider using separate websites and other marketing materials and avoid using documents bearing the name of the medspa. Documents such as informed consents and billing statements should list only the name of the providing entity; either the professional practice or the medspa. Providers should review public-facing materials such as websites and social media sites to determine how the relationship between the entities appears to the public. Would it be reasonable for a person looking for medspa services online to believe that the provider or the professional corporation provides medical supervision of the medspa? If the answer is yes, providers should understand that this appearance leaves them open to liability for the actions of the medspa if a patient or client relies on this appearance when choosing the services of the medspa.

Providers should review public-facing materials such as websites and social media sites to determine how the relationship between the entities appears to the public.

If the public-facing information inaccurately represents the amount of supervision and control the physician or the professional practice provides to the medspa, physicians should ensure that the information is corrected. Otherwise, defending a claim of fraudulent misrepresentation could prove challenging. Providers should also consider the wisdom of sharing office space or equipment with the medspa, renting space in the same building, and sharing staff. A defense of non-association will barely pass the red-face test, let alone support a motion to dismiss, if the provider has the same address as the medspa, and the ostensibly separate entities share staff, equipment, marketing materials, documents, electronic medical records systems, and administrative and operational documents.

continued on page 6 ›



INTRODUCING

Mercado May-Skinner

ATTORNEYS & COUNSELORS-AT-LAW

EMPLOYEES OF MLMIC INSURANCE COMPANY

After nearly 35 years of superb service to MLMIC Policyholders, the law firm of Fager Amsler Keller & Schoppmann, LLP (FAKS) was dissolved, making way for the new in-house law firm of Mercado May-Skinner (M&M). M&M will build on the standard of legal excellence MLMIC Policyholders have come to expect and will continue to provide risk management advice, medical malpractice defense, legal analysis, and related legal services. Nancy May-Skinner, Esq., and Al Anthony Mercado, Esq., will co-manage M&M and previously managed the respective Upstate and Downstate regions for FAKS. Contact M&M in Syracuse at (315) 428-1380, Colonie at (518) 786-2880, or Long Island at (516) 794-7340 or (877) 426-9555.

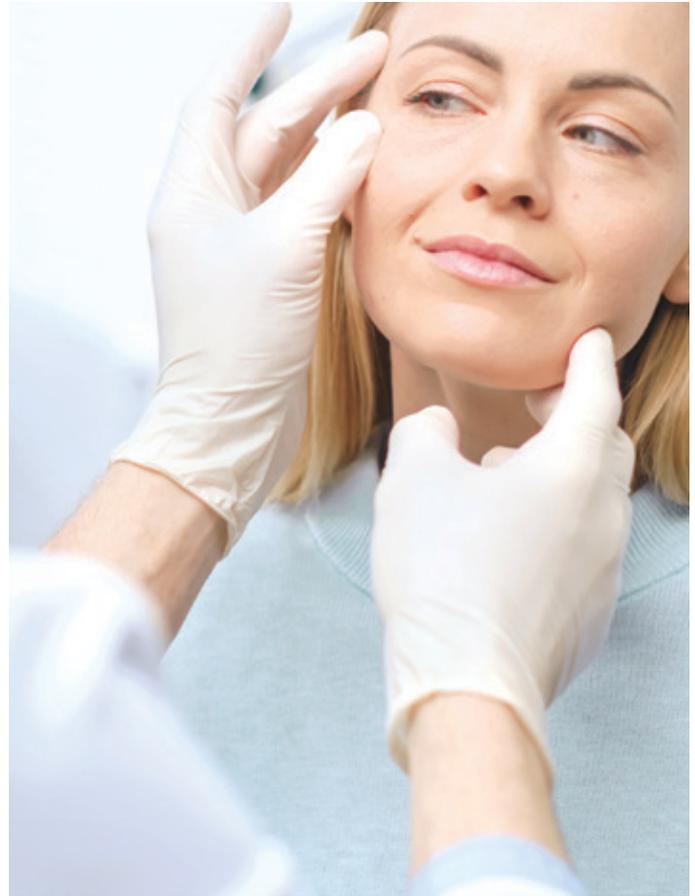
Considerations of Professional Standards

While providing medical director services to a medispa may be an exciting way to expand the scope of practice, there should be no appearance that a physician is “selling” their license or providing supervision to a medispa in name only. Physicians should not lend their names to a medispa if they have no intention of providing sufficient supervision of services. In addition, physicians who contract to provide medical director or consulting services to a medispa should have sufficient training in the treatments provided by the spa. While physicians may practice outside their specialty areas, they should consider the risk of providing supervision or consultation services to a medispa if the services performed, including the equipment and products used to administer treatment, are outside their training. The consulting or supervising physician has a professional responsibility to ensure that he or she is competent to provide counsel and supervision of the treatments being provided. In addition to the risk of litigation, failure in this area could compromise a physician’s license, professional standing, and reputation.

Physicians should not lend their names to a medispa if they have no intention of providing sufficient supervision of services.

Regulatory Uncertainty

The practice of medicine is highly regulated, and the law has not kept up with the rapid emergence of medispas. Due to ambiguities in the law, physicians involved with medispas contend with regulatory compliance and enforcement uncertainty. It is critical that providers stay abreast of legal developments. Medispa owners must determine which of the services they offer would constitute “medical treatment,” who can perform those services, and under what conditions. If supervision is required, providers must determine the appropriate oversight. For example, at present, anyone can provide laser hair removal treatment. The law requires no license, training, or supervision to provide such treatment.



Providers should be aware, however, that bills are presently pending in both houses of the New York State legislature that, if passed, would require the adoption of rules and standards for the licensure and practice of laser hair removal technicians and the facilities where they practice. Among other requirements, the practice of laser hair removal would require some level of supervision by a licensed professional, and the facility would need to maintain a minimum of \$1 million in liability insurance.

In addition to staying abreast of legal developments, prudent providers will retain experienced healthcare counsel to properly structure medispa businesses and ensure that financial arrangements, such as medical director and consulting physician agreements, are not viewed as illegal inducements for referrals.

In sum, as the following cases illustrate, providers entering the world of the medispa should be aware that the venture is not without risk and should proceed with caution.

Don't forget!

MLMIC Policyholders get **CME for FREE.**

**NEW
CME
COURSES**
coming
soon!

MLMIC Insurance Company's CME+ offers policyholders access to an ever-growing library of New York-focused risk management CME programs — *at no additional cost!*



Choose from a wide variety of courses, including:

- The Physician-Patient Relationship: A Closer Look
- Current Issues in Risk Management: Part 1 & Part 2
- High-Exposure Liability: A Case Study Analysis — Part 1 & Part 2
- High Exposure Liability: An Interview with a Plaintiff's Attorney — Parts 1 & 2

Gain valuable continuing medical education in leading topics through MLMIC-exclusive courses available for completion anytime, online, with MLMIC CME+.

Learn more or **get started today.**



MLMIC Underwriting:

Prepared for Today;
Creating Solutions for Tomorrow



In this section, *The Scope* will highlight the various departments of MLMIC Insurance Company and their roles in supporting the healthcare practitioners of New York.

Just as the business of healthcare has evolved in response to changing times, forcing practices to adapt accordingly in order to remain viable under an ever-shifting business environment, the management and staff of MLMIC's Underwriting Department are continuously monitoring the healthcare arena to ensure that our products not only continue to meet the needs of our policyholders and their administrators, but evolve along with them as well. By offering optimal solutions for risk transfer in the most cost-effective way possible, MLMIC's foresight keeps our Insureds better situated to address their future needs on an ongoing basis. Working closely in a collaborative effort with senior members of our Operations Department, and in conjunction with ancillary support from our Actuarial, Compliance Research & Development, Information Technology, and Marketing Teams, MLMIC Underwriting's approach in this regard holds true to our department's tagline of "Prepared for Today; Creating Solutions for Tomorrow."

In recognition of an increasingly complex operating environment, MLMIC Underwriting maintains a full appreciation of the needs of our clients and a sense of duty to ensure that we quickly identify current trends that we then translate into the solutions our clients require. Our well-received Preferred Savings Program is testament to our efforts in this regard and offers welcome premium relief in recognition of eligible policyholders' "better-than-average" claims experience. Physician members of requisite organizations in our Preferred Savings Program may apply for this discount at [MLMIC.com](https://www.mlmic.com) by clicking on their respective group's or organization's name on our homepage.

In pursuing our mission to proactively assess and create solutions in response to the changing face of healthcare delivery channels that confront many of today's healthcare employers and their employees, MLMIC created our SILO product as an innovative insurance program that was tailored specifically for large groups, facilities, and hospitals. The SILO program offers customized, comprehensive protection for employed physicians, with services such as dedicated multidisciplinary teams assigned to provide individualized analytics, superior risk mitigation, and expert claims services. Through flexible coverage options, SILO offers solutions to the challenges of increasing loss trends, the management of multiparty actions, and the financial uncertainty of unresolved claims. The concept of the SILO program was built upon a foundation of strong collaboration and the desire to jointly achieve early resolution of incidents, claims, and lawsuits. By applying a dedicated team approach, in conjunction with the aforementioned components, SILO was created in response to our observation of changing market conditions and built on the goal of helping to guide employers through the management of all related factors.

To learn more about how SILO can help protect your organization, [click here](#) or [contact MLMIC](#) or your professional liability broker.



Robert Pedrazzi is an Assistant Vice President of Underwriting with MLMIC Insurance Company.

rpedrazzi@MLMIC.com

AM Best Affirms Credit Rating of MLMIC Insurance Company

MLMIC Insurance Company is pleased to announce that **AM Best has affirmed MLMIC's A+ credit rating.**

FROM THE PRESS RELEASE:

"The ratings reflect MLMIC's balance sheet strength, which AM Best assesses as strongest, as well as its adequate operating performance, limited business profile and appropriate enterprise risk management.

The company underwrites risks only within New York State, which is one of the nation's most challenging markets for medical professional liability. However, management has been able to operate successfully through underwriting cycles while maintaining MLMIC's leading market position within New York. In addition, risk management capabilities have proven appropriate for the risk profile of the company."





Case Study #1

Negligent Treatment by Aesthetician Results in Burn

A 61-year-old married female was treated in the MLMIC-insured's dermatology office by a licensed aesthetician who was trained in chemical peels. The patient had been treated by the aesthetician for 11 years for a variety of procedures, including chemical peels of her hands.

On the date in question, the patient came to the office for a facial and subsequently requested laser treatments for the age spots on her hands. Since this was a procedure that had to be scheduled in advance, the patient requested a chemical peel instead. The aesthetician looked for a bottle of Jessner's Peel and, when she was unable to find it, she went to the nurse's closet and retrieved a bottle of trichloroacetic acid. The aesthetician poured this acid into a container and then applied it with a gauze pad. The patient complained of tingling and was advised to wash her hands. The aesthetician noted a frosted appearance on the patient's hands and realized she had used the wrong solution. She applied ice and other soothing gels and creams to both hands. There was no physician in the office to see the patient at that time.

The aesthetician noted a frosted appearance of the patient's hands and realized she had used the wrong solution.

The following day, the aesthetician went to the patient's home and the patient advised her that she had seen another dermatologist, who confirmed that she had been burned by the acid peel. The aesthetician did not inform the MLMIC-insured dermatologist of this incident; however, the patient and her husband came to the office the following week and informed him of what had transpired. This dermatologist treated the patient and referred her to the burn unit of a local medical center. The patient remained under the care of another dermatologist for the next 6 months.

The patient subsequently filed a lawsuit alleging negligent treatment that resulted in skin, muscle, bone, connective tissue, and nerve necrosis, as well as blistering, chronic wound opening and drainage, pain, numbness, neuropathy, cellulitis, and inflammation. These injuries were confirmed during an independent medical exam conducted by a cosmetic dermatologist, who noted permanent scarring, discoloration, and disfigurement.

MLMIC's consultant dermatologist felt that despite the aesthetician being trained, she did not read the label and, thus, the patient was treated with the wrong solution. In addition, the aesthetician had no supervision, and our insured dermatologist was not in the practice of reviewing her notes.

As this matter could not be defended, and because the aesthetician had no insurance, our insured dermatologist agreed that the matter should be settled, and the case was eventually settled for \$450,000.



Case Study #2

Medical Office with Related Spa May Not Be as It Appears

A 45-year-old single female had searched for a laser hair removal facility and found the website for the MLMIC-insured dermatologist's office, which featured the services of the spa. The patient made an appointment and originally arrived at our insured's office, but was directed to another floor, where laser hair removal was performed. The client questioned whether she needed to see a physician prior to the laser hair removal and was told she did not.

The employee of the spa had received a certificate from the Aesthetics Science Institute as well as training by the spa and the laser manufacturer. Prior to the procedure, the employee explained the risks and benefits, including the possibility of hyperpigmentation and burns. She then performed laser hair removal on the patient's chin.

The patient returned one month later and was informed that there was a new, improved machine, which was used at this time. This treatment took approximately 15 minutes. The patient complained of the intensity during the procedure, but was told this was normal. The patient noted tingling after the treatment and used an ice pack on the skin for the rest of the day. The next morning, she noted blistering and went to the emergency room, where she was diagnosed with a burn and prescribed a cream. She continued to experience discomfort and made an appointment with a burn center, where

she underwent multiple skin debridements and was diagnosed with a second-degree burn. She was provided with home nursing care to assist with dressing changes.

The patient subsequently brought an action against the MLMIC-insured dermatologist, her professional corporation, and the non-MLMIC-insured spa, alleging negligent laser hair removal that resulted in facial burns.

The spa was not overseen by the dermatologist or her professional entity, and its employees performed nonmedical services. The professional entity provided management services to the spa by contract, for which the spa paid a monthly fee for payroll, use of electronic medical records, and administrative services. Each entity maintained its own office space, staff, and phone numbers, and had separate billing and tax ID numbers. They shared some staff and their website and were in the same building. Our insured and her professional entity did not provide care to this patient and maintained no records on her behalf.

Counsel for the dermatologist and her professional entity took the position that they were not involved in this matter, as they never rendered treatment to this patient. They examined the financial contract and informed consent documents that were provided to the patient and noted that the professional entity was listed at the top of the page along with the address and website of the spa. In addition, the papers indicated that the entities were a partnership.

Stay Connected

Get the latest updates and industry news from New York's #1 medical professional liability insurer. No one knows New York better than MLMIC.

LinkedIn

Follow us for important industry updates and risk management resources.

www.linkedin.com/company/mlmic

Twitter @MLMIC

Get headlines and alerts that impact patient care in New York.

www.twitter.com/mlmic

MLMIC Healthcare Weekly

Stay current with MLMIC Healthcare Weekly's monthly newsletter. Sign up at:

www.mlmic.com/healthcare-weekly



The defense counsel argued that the spa and the dermatology group were actually separate legal entities. The medical supervision referenced in the spa's advertisements referred to the non-party owner of the spa and did not indicate that the medical group ever provided supervision. The laser equipment used during the procedure at issue was not owned or operated by the dermatology group. Therefore, they did not maintain or supervise the use of the equipment, either. As such, the plaintiff's theory would have to resort to vicarious liability to establish culpability for the medical group.

The patient claimed total damages of \$350,000. MLMIC's defense counsel continued to pursue a Stipulation of Discontinuance on behalf of our insureds, and were ultimately successful in extricating them from this case.



Kathleen Harth is an Assistant Vice President of Claims with MLMIC Insurance Company.

kharth@MLMIC.com



Elizabeth Ollinick is an attorney with MLMIC Insurance Company.

eollinick@MLMIC.com

MLMIC INSIDER

MLMIC's source for medical professional liability news.



Strategies to Reduce Physician EHR Burden

The growing emphasis on electronic health records (EHRs) places a greater documentation burden on physicians, contributing to stress and burnout. MLMIC examines strategies to improve EHR workflow.

[Read more](#)

Maintaining Professional Patient Relationships

The physician-patient relationship plays a central role in medical care. Here are several recommendations for building trust and addressing challenges both online and in person.

[Read more](#)

TALK STUDIO

MLMIC's video series on important and trending issues in professional liability, healthcare law, and risk management.



Telephone Triage by Nurses

Nancy May-Skinner and Brian Felton discuss nursing triage via telephone.

A new episode of MLMIC's "Talk Studio" features a conversation on telephone triage by nurses.

 [Click here](#) to view the episode.



P.O. Box 1287
Latham, New York 12110

New York City | Long Island | Colonie | Syracuse | Buffalo

(800) ASK-MLMIC