

THE HOSPITALITY LAW
CONFERENCE
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THE STRESSFUL SIDE OF SPAS
Spa Claims, Operational Considerations,
Compliance

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DAVID M. SAMUELS

David M. Samuels is a senior litigation partner at Michelman & Robinson's Los Angeles office and a member of the Firm's Commercial and Business Litigation Department and the Firm's Executive Committee. Since joining M&R in 2000, Mr. Samuels has earned a reputation as a renowned litigator and mediator in civil and administrative law, and has been named as one of California's "Super Lawyers."

Mr. Samuels is an accomplished veteran of innumerable jury and bench trials, arbitrations, mediations and administrative hearings. His practice is devoted to representing hotels and resorts with respect to a wide variety of general and premises liability matters, contract disputes, and special investigations.

Additionally, Mr. Samuels is often called upon to defend high exposure/catastrophic injury cases involving commercial premises liability and products liability. His legal practice also involves representing licensees of state agencies in administrative hearings, and he has served as a Court Appointed Mediator for the Los Angeles Superior Court.

Mr. Samuels has been providing defense services to the Hospitality Industry for more than ten years and a representative listing of his clients includes: The Westin Mission Hills Resort & Villas; The Westin Pasadena; The Westin South Coast Plaza; The Westin LAX; The Westin Maui; The Sheraton San Diego Hotel and Marina; The Sheraton LAX; The W San Francisco; The W Silicon Valley; The W Los Angeles; The W San Diego; Paradise Point Resort; The Portofino Hotel & Yacht Club; The Historic Mission Inn; The Carneros Inn; The Century Plaza Hotel; The La Jolla Beach & Tennis Club; Nob Hill Properties; The Huntington Hotel; The La Playa Hotel; The Beverly Hills Hotel; and The St. Regis - Monarch Beach.

Education

Menlo College, Associate of Arts, 1984

Univ. of California - Davis, Bachelor of Arts, 1987

Pepperdine University School of Law, Juris Doctor, 1991

Practice Areas

Hospitality Litigation

Administrative Litigation

Professional & Products Liability

Affiliations

Global Alliance of Hospitality Attorneys

Academy of Hospitality Industry Attorneys

California Hotel & Lodging Association

American Hotel & Lodging Association

Los Angeles County Bar Association

DANA A. KRAVETZ

Dana A. Kravetz is the Firm Managing Partner of the national law firm Michelman & Robinson, LLP and chairs the Firm's Labor and Employment Law Department as well as its Strategic Planning Committee. Previously, Mr. Kravetz served as the Firm's Administrative Partner from 2005-2009.

Mr. Kravetz specializes in both employment counseling and litigation. He has successfully represented management in various employment litigation matters including discrimination, sexual harassment, wrongful termination, wage and hour, FEHA, EEOC, and DLSE claims and other employment related claims.

He regularly prepares employment handbooks, advising management on state and federal employment acts (such as EEOC, FEHA, ADA, ADEA, WARN, etc.), hiring, firing and wage and hour compliance in the areas of employment law for management and litigation.

Mr. Kravetz has earned the distinguished honor of working with some of the nation's top athletic organizations. He has handled contract negotiation, player arbitration, merchandise licensing and media relations with numerous sports organizations including Major League Soccer, the World Cup Organizing Committee, the NFL's Oakland Raiders and the America's Cup Organizing Committee. He has been named to both California's "Super Lawyers" and "Rising Stars" magazine lists.

In addition to his legal expertise, Mr. Kravetz has significant managerial experience. He sets the vision and direction of the Firm by working with the Executive Management Team and the Executive Committee, of which he has been a member since 2005, to establish long term goals, strategies, plans and policies. He also oversees business performance and strategic growth initiatives and is responsible for the overall financial management of the firm.

Education

Southwestern University School of Law, Juris Doctor, 1995

University of California, San Diego, Bachelor of Arts, Communication, 1992

Practice Areas

Labor & Employment Law

Business Litigation and Transaction

Affiliations

California's "Rising Stars" 1995-2009

Judge Pro Tem 2006-2007

Professionals in Human Resources Association (PIHRA), Peer Coach

National Sports Marketing Network

Los Angeles County Bar Association

Member, Young Presidents' Organization (YPO), Bel Air Chapter

Vistage

Spa-Related General Liability Claims and Issues

I. GENERAL LOSS CONTROL ISSUES

A. WHAT TYPES OF SERVICES OFFERED

1. Cosmetologist

The American Heritage Dictionary defines cosmetology as "the study or art in cosmetics and their use". They define cosmetics as "serving to beautify the body and improve the appearance of a physical feature". Cosmetology is a broad term that is used to encompass a wide range of beauty mediums, including hair, skin, nails, and makeup.

2. Esthetician

Esthetics involves beautifying the skin through a variety of ways, including facials, skin analyzing, makeup artistry, micro-dermabrasion, facial treatments and skin care regimes. This field also includes spa elements for the rest of the body, including body wraps and polishes, aromatherapy, foot reflexology, waxing, eyebrow shaping and eyelash tinting. Estheticians prescribe skin care regimens, perform facials, waxing, body wraps, laser treatments, anti-aging treatments, and facial massages.

3. Manicurist or Nail Technician

Nail technicians shape, file, color and paint nails, as well as perform full manicures and pedicures. Nail technicians also provide hand, calf and foot massages.

4. Barber

Barbers are expected to have a detailed understanding of the different types of hair as it pertains to ethnicity, curliness, thickness, and manageability. Barbers cut, trim, color and style men's hair and facial hair. They also perform shaving services, hairstyling, and scalp treatments.

5. Electrologist

Electrology, electrolysis or laser hair removal is medically recognized as a permanent hair removal method for the face and body. Electrolysis is a very popular service to get rid of unwanted body hair, but it requires the skill to apply laser hair removal methods with the utmost care and accuracy.

6. Massage Therapists

Massage therapy is a means to: Treat painful ailments; Decompress tired and overworked muscles; Reduce stress; Rehabilitate sports injuries; and Promote general health. Massage therapists manipulate clients' soft tissues, which improves circulation and acts as a cleanser for muscles. There are over 80 different types of massage (aka “modalities”) and the most common include: Swedish massage, deep tissue massage, reflexology, acupuncture, sports massage and neuromuscular massage. Most massage therapy training programs are designed to provide an understanding of different massage techniques and professional ethics. Training standards and requirements for massage therapy schools vary by state and location. Most states have their own set of laws regulating massage therapy practices.

Most state boards require practicing massage therapists to complete formal education programs and pass the national certification examination and, generally, a state exam. Some states require continuing education for practicing therapists.

- B. Employee Screening/Hiring/Training
 - 1. Background, reference and educational checks
 - 2. Training Processes

- C. Client Intake Forms
 - 1. Release Forms
 - 2. Medical History
 - 3. HIPPA Issues

- D. Client Interview
 - 1. Purposes

- E. Client Exit Questionnaires
 - 1. Can be a critical piece of evidence

II. INAPPROPRIATE TOUCHING AND DRAPING

A. Touching:

1. Always a “He Said vs. She Said”
2. Almost always a male spa tech
3. Client’s Willingness to call police at the time
4. Client calls the police after the fact

B. Draping:

1. “They Peeked...”

III. ALLERGIC REACTIONS & BURNS

A. Usually Manifest Quickly

1. True Product Allergy is Rare
 - a. Secure the product used for future testing
2. Ask questions about past reaction history
3. Chronology of signs, symptoms and statements

B. Retinol

C. Hot Stones

1. Stone Rotation
2. Training

IV. EQUIPMENT FAILURES

- A. Frequent Inspections
- B. Protocols for Staff to Report Equipment Problems
- C. Protocols for Removing Faulty Equipment
- D. Risks of Leaving a Faulty Piece of Equipment in Service
- E. Securing a Faulty Piece of Equipment as Evidence

V. PREMISES LIABILITY

- A. Traditional Issues re: Inspection and Maintenance
- B. Special Issues Created by the Spa Environment
- C. ADA Issues

VI. DOCUMENTATION

- A. Screening and Training
- B. Client Intake Sheets and Release Forms
- C. Client Exit Questionnaires
- D. Equipment Inspections
- E. Premises Inspections

Spa-Related Operational Issues

I. CORPORATE PRACTICE OF MEDICINE

- A. The law on the corporate practice of medicine is state specific.
- B. Ownership
 - 1. Laypersons or lay entities may not own any part of a medical practice.
 - 2. Physicians must either own the practice, or must be employed or contracted by a physician-owned practice or a medical corporation.
- C. Physician Responsibility
 - 1. A physician may consult with unlicensed persons in making the "business" or "management" decisions described above, but the physician must retain the ultimate responsibility for, or approval of, those decisions.
 - a. Ownership is an indicator of control of a patient's medical records, including determining the contents thereof, and should be retained by a California-licensed physician.
 - b. Selection, hiring/firing (as it relates to clinical competency or proficiency) of physicians, allied health staff and medical assistants.

- c. Setting the parameters under which the physician will enter into contractual relationships with third-party payers.
- d. Decisions regarding coding and billing procedures for patient care services.
- e. Approving of the selection of medical equipment and medical supplies for the medical practice.

2. Prohibited Conduct

- a. Non-physicians operating in a business for which physician ownership and operation are required: any business advertising, offering, and/or providing patient evaluation, diagnosis, care and/or treatment. These are services which can only be *offered or provided* by physicians.
- b. Physician(s) operating a medical practice as a limited liability company, a limited liability partnership, or a general corporation.
- c. Management Service Organizations arranging for, advertising, or providing medical services rather than

only providing administrative staff and services for a physician's medical practice (non-physician exercising controls over a physician's medical practice, even where physicians own and operate the business).

- d. A physician acting as "medical director" when the physician does not own the practice. For example, a business offering spa treatments that include medical procedures such as Botox injections, laser hair removal, and medical microdermabrasion, that contracts with or hires a physician as its "medical director."

D. Physician Delegation

1. Lasers and other prescriptive devices and prescriptive drugs must only be utilized by licensed registered nurses, nurse practitioners, or physician assistants.
2. No unlicensed staff, including medical assistants, may use these devices or drugs, regardless of the level of training or supervision. Likewise, delegation to improperly licensed personnel, such as estheticians, is prohibited.

3. Registered Nurses

- a. Standardized procedures for nurses allow nurses to perform procedures while the physician is not on-site; however, they do not absolve physicians of their supervision responsibilities.
- b. “Supervision” is defined as the act of supervising, which is to oversee, to direct, to have charge, to inspect, to provide guidance and evaluation.
- c. An appropriate prior examination is required where prescriptive drugs and devices will be used, and this examination may not be delegated to registered nurses.

4. Nurse Practitioners

- a. Nurse practitioners are granted much more autonomy than registered nurses.
- b. They are advanced practice nurses who are master’s-level educated
- c. The major exception to the rules governing their supervision in cosmetic procedures is that they may be delegated the task of providing the appropriate

prior examination and ordering the drug or prescriptive device for the patient, if acting under standardized procedures.

5. Physician Assistants

- a. PAs may only be delegated tasks that are part of the physician's customary practice.
- b. Physicians may only supervise four PAs at any given time, and must be in the facility with the PA or be immediately available by electronic communication if the PA is working under a delegation of services agreement.

E. Advertising

1. What type of advertising is prohibited?
 - a. The law governing physician advertising is specific, and requires the physician ads not be misleading.
 - b. The use of models, without stating that they are models.
 - c. The use of touched-up or refined photos.
 - d. Claiming superiority of the facility or procedures with no objective scientific evidence.

II. INDEPENDENT CONTRACTOR V. EMPLOYEE

A. Employee

1. Rebuttable presumption that worker is employee
2. The most important factor is the right of the principal to control the manner and means of accomplishing a desired result.
3. If the principal has that right of control, an employer-employee relationship exists, even if the right is not exercised.
4. Strong evidence of control is the principal's right to discharge at will, without cause.

B. Independent Contactor

1. Does control over the work exist?
2. Factors to consider:
 - a. Distinct Occupation: whether the one performing the services is engaged in a separately established occupation or business.
 - b. Industry Custom: the kind of occupation, with reference to whether, in the locality, the work is

usually done under the direction of a principal without supervision.

- c. Skill: the skill required in performing the services and accomplishing the desired result.
- d. Tools and Place of Work: whether the principal or the person providing the services supplies the instrumentalities, tools, and the place of work for the person doing the work.
- e. Length of Service: the length of time for which the services are performed to determine whether the performance is an isolated event or continuous in nature.
- f. Method of Payment: the method of payment, whether by the time, a piece rate, or by the job.
- g. Regular Business: whether the work is part of the regular business of the principal.
- h. Intent of the Parties: whether the parties believe they are creating the relationship of employer and employee.
- i. Principal's Actual Exercise of Control: the extent of

actual control exercised by the principal over the manner and means of performing the services.

- j. Benefit to Principal: whether the principal is engaged in a business enterprise or whether the services being performed are for the benefit or convenience of the principal as an individual.

3. Penalties

- a. The penalties for failure to properly classify can be severe, and include penalties related to federal and state income tax withholding, unemployment insurance contributions, workers' compensation penalties, liability for minimum wages and overtime.

III. OVERTIME

A. California

- 1. The general overtime provisions are that a nonexempt employee shall not be employed more than eight hours in any workday or more than 40 hours in any workweek unless he or she receives one and one-half times his or her regular rate of pay for all hours worked over eight hours in any workday and over 40 hours in the workweek.

2. Eight hours of labor constitutes a day's work, and employment beyond eight hours in any workday or more than six days in any workweek is permissible provided the employee is compensated for the overtime at not less than:
 - a. One and one-half times the employee's regular rate of pay for all hours worked in excess of eight hours up to and including 12 hours in any workday, and for the first eight hours worked on the seventh consecutive day of work in a workweek; and
 - b. Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight on the seventh consecutive day of work in a workweek.

B. Federal Law

1. An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work.
2. Employees covered by the Fair Labor Standards Act (FLSA) must receive overtime pay for hours worked in excess of 40 in a workweek of at least one and one-half times their regular rates of pay.

IV. MEAL BREAKS

A. California

1. An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than thirty minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.
2. A second meal period of not less than thirty minutes is required if an employee works more than ten hours per day, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and employee only if the first meal period was not waived. Labor Code Section 512.
3. Unless the employee is relieved of all duty during his or her thirty minute meal period, the meal period shall be considered an "on duty" meal period that is counted as hours worked which must be compensated at the employee's regular rate of pay.
4. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being

relieved of all duty and when by written agreement between the employer and employee an on-the-job paid meal period is agreed to.

5. If an employer fails to provide an employee a meal period in accordance with an applicable IWC Order, the employer must pay one additional hour of pay at the employee's regular rate of pay for each workday that the meal period is not provided.

B. Federal Law

1. The Fair Labor Standards Act (FLSA) does not require breaks or meal periods be given to workers.
2. Bona fide meal periods (typically lasting at least 30 minutes), serve a different purpose than coffee or snack breaks and, thus, are not work time and are not compensable.
3. If you work in a state which does not require breaks or meal periods, these benefits are a matter of agreement between the employer and the employee.

V. REST BREAKS

A. California

1. The Industrial Welfare Commission Wage Orders require that employers must authorize and permit nonexempt employees to take a rest period that must, insofar as practicable, be taken in the middle of each work period.
2. The rest period is based on the total hours worked daily and must be at the minimum rate of a net ten consecutive minutes for each four hour work period, or major fraction thereof.
3. The rest period is defined as a "net" ten minutes, which means that the rest period begins when the employee reaches an area away from the work area that is appropriate for rest.
4. A rest period is not required for employees whose total daily work time is less than three and one-half hours.
5. The rest period is counted as time worked and therefore, the employer must pay for such periods.
6. Since employees are paid for their rest periods, they can be required to remain on the employer's premises during such periods.

7. If an employer fails to provide an employee a rest period in accordance with an applicable IWC Order, the employer shall pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that the rest period is not provided.

B. Federal Law

1. Federal law does not mandate coffee breaks.
2. When employers do offer short breaks (usually lasting about 5 to 20 minutes), federal law considers the breaks as compensable work hours that would be included in the sum of hours worked during the work week and considered in determining if overtime was worked.
3. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished.