

Risk Management

*A Spa Therapist's Primer
for Avoiding Disaster*

By Steve Capellini





If you work in a spa, plan to work in a spa, or plan to open a spa of your own one day, this article is for you. To state the subject bluntly, you are at risk, and you need protection. The spa industry has recently turned a corner, surpassing \$10 billion in annual sales, and people are starting to seize on opportunities to take some of that profit away through lawsuits, some of which have merit and others of which may be based solely on greed. Whichever the case, you as a therapist must think in terms of protecting yourself in addition to helping your clients. This is unfortunate, but to deny the reality would be to put yourself, and your spa, unnecessarily at risk.

The practice of protecting a business from potential disasters is known as risk management. This article will treat just one aspect of this practice—the kind that deals with problems created by humans, such as lawsuits. Managing the risks that stem from nature, such as hurricanes, floods, and fires, will not be covered here, but are equally important. You can contact any of the resources listed at the end of this article for information on this topic as well.

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Case One. A Disgraced Therapist

Consider the following scenario: I was in Boston setting up the classroom for a spa workshop when my cell phone rang. On the line was a lawyer from Los Angeles. He was searching for someone to act as an expert witness in a trial. His client, a prominent Hollywood day spa, was being sued and faced the possibility of going out of business. The following description of the events that led up to the lawsuit are taken from depositions this lawyer later sent me.

A female client arrived at the spa and was ushered into a treatment room to receive a full-body massage from a male therapist. The therapist had a sterling reputation. He had come from a Ritz Carlton spa where he was well respected, and his references all checked out positive. He was trained in the day spa's protocols and was liked by the clients there as well. He was a grandfather, a family man, a pillar of society. Until that day.

The massage proceeded uneventfully until the client started to feel uncomfortable. She could not pinpoint the cause of the discomfort, until she opened her eyes and looked down at the therapist. His head was between her legs, and he was performing a sexual act on her. How long had it been happening? She could not be sure, and you will learn why in a moment.

She complained, and the therapist stopped what he was doing, apologizing profusely. Shocked, the client allowed him to quickly finish the massage, but then when she was ushered from the treatment room, she went immediately to the front desk and complained. The therapist was escorted from the premises. He lost his job. He lost his license to practice massage. Worse, he lost the respect of his employers, coworkers, and perhaps his family and friends as well.

Why hadn't the client felt what the therapist was doing and reacted more swiftly? Why didn't she immediately insist he stop the massage? Perhaps it was because she felt helpless. And because she could not sense what was happening to her like most people could. For you see, this client was paraplegic.

Lessons from Case One

Regardless of the eventual outcome of the lawsuit, the spa was put through tremendous expense, and its reputation suffered because of the behavior exhibited by this one therapist behind closed doors. The therapist, obviously, was in the wrong and deserved his punishment. But what could the spa have done differently to perhaps avoid this situation or at least to more effectively protect itself once it happened?

Lesson. Spas need to protect themselves because they will be sued, and will suffer, regardless of who is at fault in situations such as these. Therapists may have liability coverage through their professional



The Spa Industry Takes a Stand

Risk management was a hot issue at the 2006 International Spa Association (ISPA) conference in Las Vegas. ISPA teamed up with the Resort Hotel Association to inaugurate a comprehensive risk management program for spas. I attended more than one session given by lawyers and insurance executives, in addition to the visionaries and healers regularly heard from at this conference.

ISPA Chairman Jim Root says, "We found it was important to put an emphasis on risk management, as it is imperative to have a policy in place to protect the rights of the spa, its staff, and guests. As spa owners, operators, as well as product and service providers, it is our responsibility to ensure a safe and nurturing environment for the entire spa community."

To help achieve these goals, ISPA and the Resort Hotel Association recently introduced a spa guest's code of conduct to be made available at all member spas. It clearly outlines what guests should expect during their spa visit, and it also describes the responsibilities each guest has. When taken seriously, these rights and responsibilities can help ensure a safe environment for guests, therapists, and spa owners alike.

ISPA Code of Conduct: Your Rights and Responsibilities as a Spa Guest

As a spa guest, it is your responsibility to:

- Adhere to the spa's published policies and procedures.
- Communicate your preferences, expectations, and concerns.
- Communicate complete and accurate health information and reasons for your visit.
- Engage in efforts to preserve the environment.
- Treat staff and other guests with courtesy and respect.
- Use products, equipment, and therapies as directed.

As a spa guest, you have the right to:

- A clean, safe, and comfortable environment.
- Ask questions about your spa experience.
- Be treated with consideration, dignity, and respect.
- Confidential treatment of your disclosed health information.
- Information regarding staff training, licensing, and certification.
- Stop a treatment at any time, for any reason.
- Trained staff who respectfully conduct treatments according to protocols and the spa's policies and procedures.

The code of conduct is officially endorsed and prepared in partnership by International SPA Association and Resort Hotel Association.

associations, but plaintiffs almost always target the business itself because they feel the business must have much deeper pockets than its employees.

Lesson. Paradoxically, clients sometimes feel let down and abused by the spa even more than by the therapist who actually commits the infringement. Clients put their faith and trust in a business when they pass through its doors. It can anger, frustrate, and depress them to find this trust has been broken.

Lesson. Therapists who work in spas need to take full responsibility for their actions. The therapist in question admitted to the impropriety, but claimed the client had nonverbally enticed him to act in such a manner. This is not an excuse. There can be no excuses.

Lesson. Spa owners need to do more to ensure their therapists are fully aware of all ethical, legal, and safety standards, and, perhaps more importantly, they need to be able to prove they have done everything possible, short of entering the treatment room with them or installing surveillance cameras, to ensure their employees will behave appropriately.

Case Two. A Disgraced Spa

Not surprisingly, lawsuits such as these are becoming more common. In another recent case, I was retained by a lawyer whose client was suing a spa in South Florida. This case received a lot of media attention and was featured on the local news on several occasions, and I ended up testifying in the trial.

The client was a woman in her forties who had received a spa treatment as a gift for Mother's Day. It was her first visit to a spa and her first massage or spa service. She received the spa's Turkish Hammam treatment, which is administered in a steamy chamber and included exfoliation and massage.

Once again, she looked up during the massage to find the "therapist" engaging in a sexual act. She halted the treatment immediately and rushed out to complain to management. They called the police who then interviewed the "therapist." The transcript of this interview is quite interesting. I put the word "therapist" in quotations, because as it turns out the individual involved was not trained as a therapist or licensed as a therapist at all. He was a Brazilian man who had recently arrived in the United States and whose only prior work experience here was in a car wash and at a telemarketing business. His English was poor.

In his statement to the police, he admitted the wrongdoing, but blamed it on conditions inside the steam chamber where he "slipped and fell because of all the steam and moisture,

and my face landed in the compromising position." He admitted to engaging in similar behavior with other female clients. Before the trial began, the "therapist" fled the country and could not be found.

The owner of this popular and successful spa hired a powerful lawyer. Believe it or not, the spa was found not liable for any damages. The defense rested on the shaky grounds that a Hammam treatment is not covered by the laws of massage therapy or cosmetology because it is a distinctly different service. The jury was not convinced otherwise, even though Hammam services clearly include both exfoliation and massage maneuvers.

The general public in South Florida tuned into the evening news to discover that some spas are neither safe, reputable, nor accountable for their hiring and training practices. →



Lessons from Case Two

Some of the lessons learned in this case are sad, but they are also necessary. You need to understand when it comes to risk management, an entirely new set of rules applies to your practice as a therapist and to your business if you become a spa owner. These are the rules as practiced on prime-time courtroom dramas. Though sometimes less than savory, the techniques used and the outcomes achieved are nonetheless upheld by the law of the land. You need to have a healthy respect for these rules in order to have a realistic chance at survival in the increasingly litigious environment of the spa industry.

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Lesson. Keep your guard up. Spas sometimes foster an atmosphere that can be conducive to the very transgressions they attempt to avoid. Although many spas offer high-quality therapeutic work, others provide a workplace that is lax when compared to clinics, sports centers, and most private practices. Especially at some resort spas and day spas in vacation areas, a relaxed, permissive attitude can infuse the workplace, leading to misconduct. Some spa guests incite this attitude themselves through permissive behavior of their own. Therapists need to be aware of this and overcome the challenges of such environments.

Lesson. Learn more about the law. As a therapist or as a potential spa owner, you need to understand the realities of the judicial system. The fact this looks like an open-and-shut case and the spa owner obviously had sloppy hiring practices, if not outright low moral standards, did not matter as much in the end as how things appeared to the jury. The general public are not experts when it comes to massage law, and there is a good chance juries will be swayed by emotions more than facts.

Lesson. The “truth” is a relative term. Depending on the skill and training of the lawyers on either side of any given case, the “truth” can be made to look very different than what you might think. In this case, for instance, the written interview with the “therapist” (which amounted to a confession of wrongdoing) could not be used in court because the policeman who took it was not

available for the trial, and therefore the information was “hearsay.” So, even though I knew and the lawyers knew and the spa knew and the judge knew the man was guilty and the spa was negligent, the jury was not allowed to see clear proof of this themselves.

Lesson. Sometimes friends can turn into enemies. An authority from the Florida Department of Regulation was allegedly paid by the spa to say that Hammam services are not covered under their jurisdiction and therefore no license was required by the man administering them. This authority was either ill informed or had been, in a sense, “paid off” by the plaintiff to provide this “official” point of view.

A World of Risk

Even though the previous two examples may be shocking, they represent just one of the types of risk faced by operational spas. Though the risks are many, they can be categorized into several broad categories. According to L. Brooks Baldwin, a lawyer specializing in spa issues (see Expert Profile, page 39), there are three main types of risk spas face: employment issues, sexual harassment issues, and tort liability issues. Each of these need to be taken into account when formulating a spa’s risk management program.



Profile of an Expert

An experienced litigation attorney, L. Brooks Baldwin is more recently known for carving a niche for herself as a writer in the spa industry. Her dual expertise makes her especially qualified to address massage therapists and day spa owners about risk management.

When asked for advice concerning therapists and what they need to know about seeking legal representation, Baldwin has very specific advice. "First of all, it is essential to determine the type of problem requiring legal assistance. For example, let's say a therapist is experiencing employment issues, either as an employee or an employer—perhaps the matter deals with employment agreements, discrimination, wrongful termination, etc. It would be advisable then for the therapist to seek out an attorney who specializes in employment law."

The most direct method of identifying attorneys who specialize in your particular area of concern is to contact your state's bar association, explain the issue, and request guidance in locating qualified attorneys. The bar association can then suggest the best means of winnowing down options in order to identify appropriate attorneys to address your needs; however, the bar will not make referrals to specific lawyers. Another option is to contact trusted colleagues within the massage industry (or related businesses) who have utilized legal services in the past and seek a referral. Upon contacting the attorney, be sure to identify your colleague as your referral source. To do so will generally have a positive effect in initiating and establishing the attorney-client relationship.

Baldwin is a proponent of early intervention when it comes to potential legal problems. Too often, those unaccustomed to working with attorneys, of which massage therapists are many, avoid engaging legal representation until the situation has deteriorated into a much greater problem. What could have been a far less troublesome matter to resolve instead has the potential of exploding into a grossly expensive and time- and energy-consuming affair. Too often, spas and their staff try to make problems go away on their own, not realizing that in doing so they may be exposing themselves to even greater liability in the long run. Baldwin provides an example in which a client claimed to have suffered an injury during a hot stone massage. The client complained to spa management, after which she received a cash payment to cover her medical expenses and alleged injury. Unfortunately, the same client then sued the spa, seeking supplemental compensation to the original amount.

Baldwin suggests a proactive approach when it comes to avoiding potential liability. "It's far better to have an established relationship with an attorney prior to problematic situations arising, than to be choosing one in a panic," she says. My advice, even if you don't foresee any problems arising, is to interview and hire a dependable attorney, whose specialty includes small business practices, to conduct a review of your business. Such a review should include business practices (employee manuals, contracts, job descriptions, service menus, treatment protocols,

etc.), in addition to a site visit, during which the attorney can assess potentially dangerous or risky situations that may expose your business or practice to costly liability. The attorney should also review your client disclaimer/waiver form (or create one for you if you don't already have one).

The cost of hiring an attorney to conduct this business practice review will be minimal when compared to that of hiring an unfamiliar attorney in the midst of a crisis—a crisis that could quite possibly, have been averted by the review in the first place.

Attorneys' fees vary, but most are typically billed on an hourly basis. Hourly rates vary greatly depending on the attorney's level of experience and the location of the attorney's practice (fees will be substantially higher in major metropolitan areas). In some cases, an attorney may consider a contingent fee arrangement (typically one-third to the attorney and two-thirds to the client), though contingent fee agreements are unusual unless the client intends to sue another party for damages. Most hourly fee agreements require the client to provide a retainer (a sizeable deposit from which hourly fees will be withdrawn) before an attorney-client relationship is established. In general, money spent on legal fees is tax deductible as a business expense (consult your tax specialist for specifics). Depending on your business needs, and the options available in your state, Baldwin also suggests investigating prepaid legal services, which can be quite cost effective.

Baldwin's take on the future of risk management for massage therapists? "It will soon become a business necessity for spas, therapists, and product and equipment vendors to incorporate risk management practices into their business dealings."

She explains that with the rapid growth and resulting "mainstreaming" of the spa and wellness industries comes a predictable outcome—increased liability concerns caused by catering to the masses and to increasingly spa-savvy clientele. "When you're dealing with serving the masses, many businesses fall prey to focusing on quantity, rather than quality—that's the chink in the armor."

Baldwin points to the International Spa Association's (ISPA) recent announcement of its plans to establish a risk management educational program for spas and a code of conduct for spa guests (see *The Spa Industry Takes a Stand*), as evidence of the swiftly growing trend. She is hopeful the legal community will also sit up and take notice of the trend. "Currently there are very few attorneys who have a strong understanding of the hybrid nature of the legal issues relating to spas. However, as the spa industry continues to grow, attorneys will begin to emerge who possess this specialized knowledge—it's simply a matter of supply and demand."

And what about Baldwin? "Oh, I've got some plans up my sleeve," she says, alluding to her strategy to create a spa risk management consulting practice. "I'm excited about merging my once distinct backgrounds in law and in spas, in an effort to address the unique needs of the spa and wellness industries." →



owner's lawyer counseled against it, citing high costs and the difficulty of proving the allegations.

Sexual Harassment Issues

The two cases studied in this article both belong to the "he said, she said" category. Even though both male therapists in these cases admitted to improper behavior, they each made an excuse to rationalize away some portion of their guilt. In Case One, the therapist claimed the client made nonverbal advances to him in the treatment room. She denied this. In Case Two, the therapist claimed to have slipped and the transgression was inadvertent. The onus was on the spa in each case to prove they had adequately trained their therapists for any such eventuality. Of course, there are other types of sexual harassment cases, including cases when clients make inappropriate advances toward therapists and when one employee accuses another of harassment.

Tort Liabilities Issues

These issues are not limited to spas alone, naturally, but the very nature of the spa environment exacerbates the potential problems. This is primarily due to the use of heat (sauna, steam, hydrotherapy), water, and complicated equipment. Included in this category are slips; falls; burns caused by hot rocks, baths, or showers; product liability; allergic reactions; faulty

equipment; improper use of equipment; and more.

Employment Issues

These include wrongful firing, breach of contract, partnership problems, discrimination, overwork, immigration, licensing, and more. Employment lawsuits can flow in either direction. Some are instigated by disgruntled employees who feel the spa is mistreating them. Others are filed by employers who feel they have been wronged by therapists or other employees. For instance, in one Nebraska spa a therapist left and took her employer's operations manual with her to a competitor. This was cause for legal action, but the spa

Steps to Manage Risk

What can be learned from the two cases cited here and the list of other possible risk management problems? Lawsuits are going to become more frequent in the spa world, not less. Faced with this reality, what should your next steps be? According to the experts, there are five steps you can take to help manage this risk more effectively. The steps are acceptance, planning, implementation, monitoring, and reaction.

Step One. Acceptance

First of all, if you work in the spa industry, you need to acknowledge the importance of learning how to manage your risk. Just as in a classic twelve-step program, admitting you have this need to protect yourself is the first step in achieving protection. Hiding your head in the sand is no longer an option. As Anthony Hirsch, president of Hirsch Claims and Risk Services, said in his address at the International Spa Association (ISPA) conference last November, "It is not a matter of if your spa is going to be sued, it is a matter of when." Hirsch said he spends most of each year on the road, traveling from property to property, assisting spas and resorts in sorting out the best responses to an ever-growing onslaught of lawsuits and similar problems.

Once you have accepted the fact that risk management is a part of doing business, just like marketing, training, hiring, and firing, then you are on your way toward making your business and your career more bulletproof when it comes to this growing new threat.

Step Two. Planning

The next step takes a little more time. You now need to formulate a plan that will protect you and your business from possible losses. At this stage, you should research potential allies such as lawyers (see Expert Profile, page 39) and risk management specialists. Make a short list of three or four candidates who may be able to help you and contact them regarding their fees and availability. If you are already actively engaged in the spa industry, then it may be helpful to contact the ISPA regarding further education about risk management.

With guidance from these experts, create necessary documents, including waivers, employee guidelines, training materials, an emergency action plan, and a responsibility checklist.

Step Three. Implementation

Put the risk management plan into effect through hands-on training of therapists, management, and other staff. This training should be documented and preferably certified and filed by a third-party provider who will be able to back up the viability of the spa's risk management practices in a court of law. When an incident occurs, it will not be sufficient to claim spa employees were told about correct procedures—it has to be documented. Experts warn that even though a spa's employee manual may contain plenty of information pertinent to liability issues, an opposing lawyer in a courtroom could discount it easily, claiming there is no paper trail proving employees read, understood, and practiced its contents.

Step Four. Monitoring

After the risk management plan has been implemented, it is important to keep it up to date, periodically reassessing its effectiveness, training new hires, and retraining personnel on current trends. While the

plan is in effect, every incident, no matter how trivial, must be reported and logged into the system so the spa's appropriate responses can be tracked. The documents used for risk assessment must be periodically reviewed and updated as well.

Step Five. Reaction

When an incident does occur, the spa must go straight into battle mode. The emergency plan, which should already be in place, needs to be followed to the letter. In order to ensure uniformity, a point person is assigned during each incident to deal with authorities, attorneys, insurance agents, and possible media contacts. This is often a spa owner, manager, or director, but at larger spas the human resources director or public relations manager can take over the role. If all of the previous steps have been followed correctly, then this plan should make dealing with specific problems much easier and help the spa avoid huge potential losses and perhaps even the closing of the business.

Be Prepared

During my career, I have acted as a spa director, manager, and treatment department supervisor. And in those roles, I have had to reprimand therapists, fire therapists, and whisk therapists off the spa floor in the middle of the afternoon who were then arrested by large, uniformed law enforcement officials. I have fielded complaints from spa therapists who threatened to sue the spa for discrimination. I've dealt with irate customers who initiated legal action against spas for injuries, harassment, and just plain incompetence.

All of these experiences have taught me one main lesson, the same lesson that spa owners, spa therapists, and therapists who are expanding their practices into the spa arena should be keen to learn. The lesson is this: right or wrong, people are increasingly willing to rely on complaints and even lawsuits to resolve the issues they feel strongly about, and there is very little you can do to stop these people from initiating such actions. All you can do is get ready soon, as soon as possible, and to the best of your ability, for what spa industry experts call an inevitability.

In short, be prepared. **M&B**

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