

the Reporter



Advertiser beware

The do's and don'ts of physician advertising

There was a time, not so long ago, when advertising by physicians — beyond listing their name, specialty and contact information — was considered not only unethical but also illegal. The American Medical Association's ban on advertising, which had been formulated in the 19th century, was intended to preserve ethical and professional standards against the "encroachment of distasteful commercialism."¹

This ban persisted until 1979 when the Federal Trade Commission found that the AMA's ban unreasonably restricted the advertising of its members and denied consumers the opportunity to learn more about physicians' services. The FTC issued an order prohibiting the AMA from any effort to prevent advertising. The AMA appealed the order; and, in 1982 the Supreme Court granted physicians the right to advertise.¹

Two decades later and we have witnessed a dramatic change in the way physicians advertise their services. According to the FTC, 95 percent of all physicians now engage in some form of paid advertising.² And, "advertising" per se, is no longer just a placement in the yellow pages. The Texas State Board of Medical Examiners — the entity that regulates physician advertising in Texas — has adopted a broad definition of physician advertising to include "signs, nameplates, professional cards, announcements, letterheads, listings in telephone directories and other directories, brochures, radio and television appearances, and information disseminated on the internet or web."³ Anything done to inform or promote the services of a physician can be considered advertising and falls under the jurisdiction of the TSBME.

This article will review the TSBME advertising rules, specifically those related to deceptive advertising and the use of the term "board certified," as well as offer guidelines on how to avoid litigation related to advertising.

Misleading or deceptive advertising

"Truthful advertising not only serves to better educate patients toward a more informed decision and choice regarding their medical care, but also enhances competitiveness among providers. The key word here, however, is 'truthful.' Truth in advertising, however, must be verifiable since false, misleading or deceptive advertising is not only unethical but also illegal and subject to sanctions by both the

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Federal Trade Commission and the Texas State Board of Medical Examiners, as well as lawsuits by patients.”⁴

The TSBME rules state: “No physician shall disseminate or cause the dissemination of any advertisement that is in any way false, deceptive, or misleading. Any advertisement shall be deemed by the board to be false, deceptive, or misleading, if it:

1. contains material false claims or misrepresentations of material facts which cannot be substantiated;
2. contains material implied false claims or implied misrepresentations of material facts;
3. omits material facts;
4. makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;
5. advertises or assures a permanent cure for an incurable disease;
6. compares a health care professional’s services with another health care professional’s services unless the comparison can be factually substantiated;
7. advertises professional superiority or the performance of professional service in a superior manner if the advertising is not subject to verification;
8. contains a testimonial that includes false, deceptive, or misleading statements, or fails to include disclaimers or warnings as to the credentials of the person making the testimonial;
9. includes photographs or other representations of models or actors without explicitly identifying them as models and not actual patients;
10. causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;
11. represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;
12. represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;
13. states that a service is free when it is not, or contains untruthful or deceptive claims regarding costs and fees. If other costs are frequently incurred when the advertised service is obtained then this should be disclosed. Offers of free service must indeed be free. To state that a service is free but a third party is billed is deceptive and subject to disciplinary action;
14. makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient;
15. advertises or represents in the use of a professional name, a title or professional identification that is expressly or commonly reserved to or used by another profession or professional;
16. claims that a physician has a unique or exclusive skill without substantiation of such claim;
17. involves uninvited solicitation such as door to door solicitation of a given population or other such tactics for “drumming” patients; or
18. fails to disclose the fact of giving compensation or anything of value to representatives of the press, radio, television or other communicative medium in anticipation of or in return for any advertisement, article, or infomercial, unless the nature, format or medium of such advertisement makes the fact of compensation apparent.”⁴

Board certification

The TSBME has also established rules regarding the use of the term “board certified” in advertising. These include: “(a) A physician is authorized to use the term ‘board certified,’ or any similar words or phrase calculated to convey the same meaning in any advertising for his or her practice if the specialty board which conferred the certification and the certifying organization meet the requirements in paragraphs (1)-(2) of this subsection:

- (1) The certifying organization is a member board of the American Board of Medical Specialties, or the Bureau of Osteopathic Specialists, or is the American Board of Oral and Maxillofacial Surgery; or
- (2) The certifying organization requires that its applicants be certified by a separate certifying organization that is a member board of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists, or appropriate Royal College of Physicians and Surgeons, and the certifying organization meets the criteria set forth in subsection (b) of this section.

(b) Each certifying organization that is not a member board of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists must meet each of the requirements set forth in paragraphs (1)-(5) of this subsection:

- (1) the certifying organization requires all physicians who are seeking certification to successfully pass a written or an oral examination or both, which tests the applicant’s knowledge and skills in the specialty or subspecialty area of medicine. All or part of the examination may be delegated to a testing organization. All examinations require a psychometric evaluation for validation;
- (2) the certifying organization has written proof of a determination by the Internal Revenue Service that the certifying board is tax exempt under the Internal Revenue Code pursuant to Section 501(c);
- (3) the certifying board has a permanent headquarters and staff;
- (4) the certifying board has at least 100 duly licensed certificants from at least one-third of the states; and
- (5) the certifying organization requires all physicians who are seeking certification to have satisfactorily completed identifiable and substantial training in the specialty or subspecialty area of medicine in which the physician is seeking certification, and the certifying organization utilizes appropriate peer review. This identifiable training shall be deemed acceptable unless determined by the Board of Medical Examiners to be inadequate in scope, content, and duration in that specialty or subspecialty area of medicine in order to protect the public health and safety.

(c) A physician may not authorize the use of or use the term ‘board certified’ or any similar words or phrase calculated to convey the same meaning if the claimed board certification has expired and has not been renewed at the time the advertising in question was published or broadcast.

(d) The terms ‘board eligible,’ ‘board qualified,’ or any similar words or phrase calculated to convey the same meaning shall not be used in physician advertising.

(e) A physician's authorization of or use of the term 'board certified', or any similar words or phrase calculated to convey the same meaning in any advertising for his or her practice shall constitute misleading or deceptive advertising unless the specialty board which conferred the certification and the certifying organization meet the requirements in subsections (a) and (b) of this section.

(f) A physician who is board certified by an organization that does not meet the requirements set out in subsections (a) and (b) of this section, or otherwise has a special interest in a particular field of medicine, may include in advertisements the physician's field of interest. For each area of interest advertised the physician must clearly state in the advertising "Not certified by an organization recognized by the Texas State Board of Medical Examiners." This statement must be separate and apart from other statements and shall be displayed conspicuously with no abbreviations, changes, or additions in the quoted language so as to be easily seen or understood by an ordinary consumer."⁴

Risk management considerations

According to the TSBME, the most common advertising violation is stating that the physician is board certified when he or she is not board certified as defined in Rule 164. The typical resolution for these violations is a fine and requiring the physician to change the ad.

Advertising can become an issue in malpractice litigation. Recent examples include a patient who underwent sympathectomy for hyperhidrosis and experienced severe compensatory sweating. The patient claimed that it was the surgeon's advertisement in a magazine that triggered his interest in the procedure and brought him to the surgeon. Another case involved a hospital web site's claim that all its physicians were board certified. The discovery that one prominent physician was not board certified triggered a number of lawsuits.

According to Jane Holeman, vice president of risk management at TMLT, certain types of advertising have the potential to create unjustified and misleading expectations in prospective patients. "In many cases, it is difficult enough to defend against the known risks of procedures, much less the subjective promises made in advertising or on the physician's web site," says Holeman. "A plaintiff's attorney will not hesitate to make this an issue in a case, especially if the advertising minimizes risk and promises results that are currently unachievable."

"Physicians must also be aware that the TSBME rules apply to their web sites. This is a problem area for a lot of physicians. The text and graphics on a physician's web site are just as likely to create unrealistic patient expectations as a full-page ad in the yellow pages," says Holeman.

Physicians can consider the following guidelines to help reduce liability related to advertising.

- Become familiar with the TSBME's rules for physician advertising. "It is the responsibility of each physician to carefully scrutinize his advertisements [and web site] and adhere to the highest ethical standards of truth in advertising."³
- Avoid making any guarantees or using any language that may inadvertently cause you to be held to a higher standard of care.
- Avoid subjective terms such as beautiful, slim, young, completely cured.

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How to say it

Sample ad and
web text

To illustrate how the TSBME rules and ethical guidelines can be applied, we have created advertising/web copy for two fictional practices.

Anywhere Pediatrics

Questionable — "My daughter has never been healthier since seeing the physicians at Anywhere Pediatrics." This testimonial quote most likely does not reflect the overall experience of your patients, and its use should be avoided.

Better — If you use patient testimonials, use them to describe objective, verifiable services, such as extended office hours or walk-in services. "I really appreciate the convenience of the walk-in sick clinic hours." or "There is always plenty of free parking at Anywhere Pediatrics."

Questionable — "All our pediatricians are board certified." This statement is questionable because it is non-specific. The reader may believe that all the physicians are board certified in pediatrics, when in fact two may be board certified by the American Board of Pediatrics and one may be board certified by the American Board of Family Practice

Better — "All our physicians are board certified by the American Board of Pediatrics."

Questionable — "We offer the best pediatric care in Anywhere, Texas." If you are the only physicians in town treating children, it may be permissible to say this. But keep in mind that the family physician across the street and the walk-in clinic at the hospital may also treat children.

Better — "Thank you for trusting Anywhere Pediatrics to take care of your child's needs. You have chosen professionals with special interests in the health and well being of your child."

Anywhere Plastic Surgery

Questionable — "Trust our surgeons to make you look younger and more beautiful. Cosmetic surgery delivers coveted results. The idea of having the body you have always dreamed of is exhilarating." Avoid making promises that cannot be fulfilled. Unrealistic patient expectations can lead to dissatisfied patients and increase exposure to lawsuits.

Better — "A facelift may make you look younger, but it cannot give you a totally different look, nor can it restore the health and vitality of your youth. Before you decide to have surgery, think carefully about your expectations and concerns and discuss them thoroughly with your surgeon."

Questionable — "There has never been a better or safer time to consider cosmetic surgery. Complications from these procedures are rare and cannot cause permanent damage." It is difficult to defend claims in which promotional materials minimize the potential complications from a procedure.

Better — "Dramatic as the end results can be, this is not a simple procedure. Complications can occur, and the estimated recovery time is a week to 10 days."

• “Testimonials of patients as to the physician’s skill or the quality of the physician’s professional services tend to be deceptive when they do not reflect the results that patients with conditions comparable to the testimoniant’s condition generally receive.”⁵

• Claims regarding the experience, competence and the quality of physicians should only be made if they can be supported by facts. Generalized statements of patient satisfaction should only be made if they are representative of all patients.

• “It is unlikely that a physician will have a truly exclusive or unique skill or remedy. Claims that imply such a skill or remedy therefore can be deceptive. Statements that a physician has an exclusive or unique skill or remedy in a particular geographic area, if true, however, are permissible.”⁵

• Uninvited solicitation, solicitation of a certain population or other tactics for “drumming” patients — is prohibited by the Medical Practice Act of Texas.⁴

• Advertising must be clearly and conspicuously identified as advertising. This includes articles that appear in “special advertising sections” of magazines or newspapers.

• The promotional use of before and after photos that use different lighting, poses or other photographic techniques to misrepresent results can be difficult to defend.

• “It is within the realm of possibility that advertising can be both legal yet unethical. Because of some patients’ positions of vulnerability they may be unduly influenced by advertising that is perhaps legal but unethical since it may direct them to use the advertised services to their detriment rather than betterment. Under these circum-

stances it is a physician’s duty to adhere to a higher standard in advertising so that no undue influence is placed on any patient.”³

Sources

1. Kwoka J. The federal trade commission and the professions: a quarter century of accomplishment and some new challenges. Presentation at the FTC 90th anniversary symposium. Washington DC. September 2004. Available at www.ftc.gov/ftc/history/041001kwoka.pdf. Accessed on Dec. 1, 2004.

2. Carabello L. Federal Trade Commission and U.S. Department of Justice joint hearings on health care and competition law and policy. Washington DC. June 2003. Available at www.ftc.gov/ogc/healthcarehearings/docs/030612carabello.pdf. Accessed on Dec. 1, 2004.

3. Texas State Board of Medical Examiners. Statement of ethical advertising. Texas Medical Board Bulletin. Fall/Winter 1994. Available at www.tsbme.state.tx.us/guidelines/sea.htm. Accessed on Dec. 1, 2004.

4. Texas State Board of Medical Examiners. Physician advertising Chapter 164.1-164.5. Available at www.tsbme.state.tx.us/rules/rules/164.htm. Accessed on Dec. 1, 2004. TSBME rules have been established under the authority of the Medical Practice Act, Tex. Occ. Code Ann. section 153.001 and the Health Professions Council, Tex. Occ. Code Ann. section 101.201.

5. American Medical Association. E-5.02 Advertising and publicity. Code of medical ethics. Available at www.ama-assn.org. Accessed on Dec. 1, 2004.

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In case you missed it . . .

HIPAA compliance deadline approaches

April 20, 2005 is the compliance deadline for the HIPAA Security Rule, the third piece of HIPAA legislation to be implemented by health care practices. Now is the time to review each of the security requirements, determine and document your compliance level, and formulate a plan to accomplish compliance. The HIPAA advisory web site offers the following overview of tasks to be completed before the deadline.

1. Formally appoint an Information Security Official to lead your project.
2. Create a team to complete the tasks.
3. Perform a HIPAA gap analysis to look at the standards and document your current compliance level.
4. Create an inventory of all systems that maintain electronic PHI within the office.
5. Perform an evaluation of each system to determine HIPAA compliance.
6. Begin risk analysis to identify all reasonable risks and vulnerabilities to the

confidentiality, integrity, and availability of electronic PHI.

7. After vulnerabilities have been identified, determine what actions need to be taken to reduce or remove the risk.
8. Create an action plan to implement the recommended safeguards.
9. Create policies to guide the practice for each of the HIPAA standards (there are 54 standards).
10. Implement the safeguards.

Remember to document and retain all of your remediation activities for at least six years. For more information visit the HIPAA advisory website at www.hipaadvisory.com.

TMLT announces spring seminar dates

TMLT’s spring risk management seminar “Worst case scenario: surviving and thriving in a medical practice” will be offered in seven Texas cities in April. This seminar is intend-

ed for nurses, office managers, front office staff, and medical records personnel. Dates and cities include:

- Tuesday, April 5 — San Antonio;
- Thursday, April 7 — Lubbock;
- Tuesday, April 12 — Austin;
- Thursday, April 14 — Rancho Viejo;
- Tuesday, April 19 — Houston;
- Wednesday, April 20 — Houston;
- Tuesday, April 26 — Tyler; and
- Thursday, April 28 — Fort Worth.

The seminar will address medical records, the treatment of minors, staffing issues and office processes.

Registration begins at 1 p.m., and the seminar time is 1:30-4:30 p.m. Registration fee is \$50 for TMLT policyholders and \$75 for all others.

Registration materials will be mailed soon. For more information, please contact Natalie Gilmore, 800-580-8658, ext. 5911 or natalie-gilmore@tmlt.org.