AHLA PG Briefing

Understanding the Legal Limitations on the Promotion of Physician Practices

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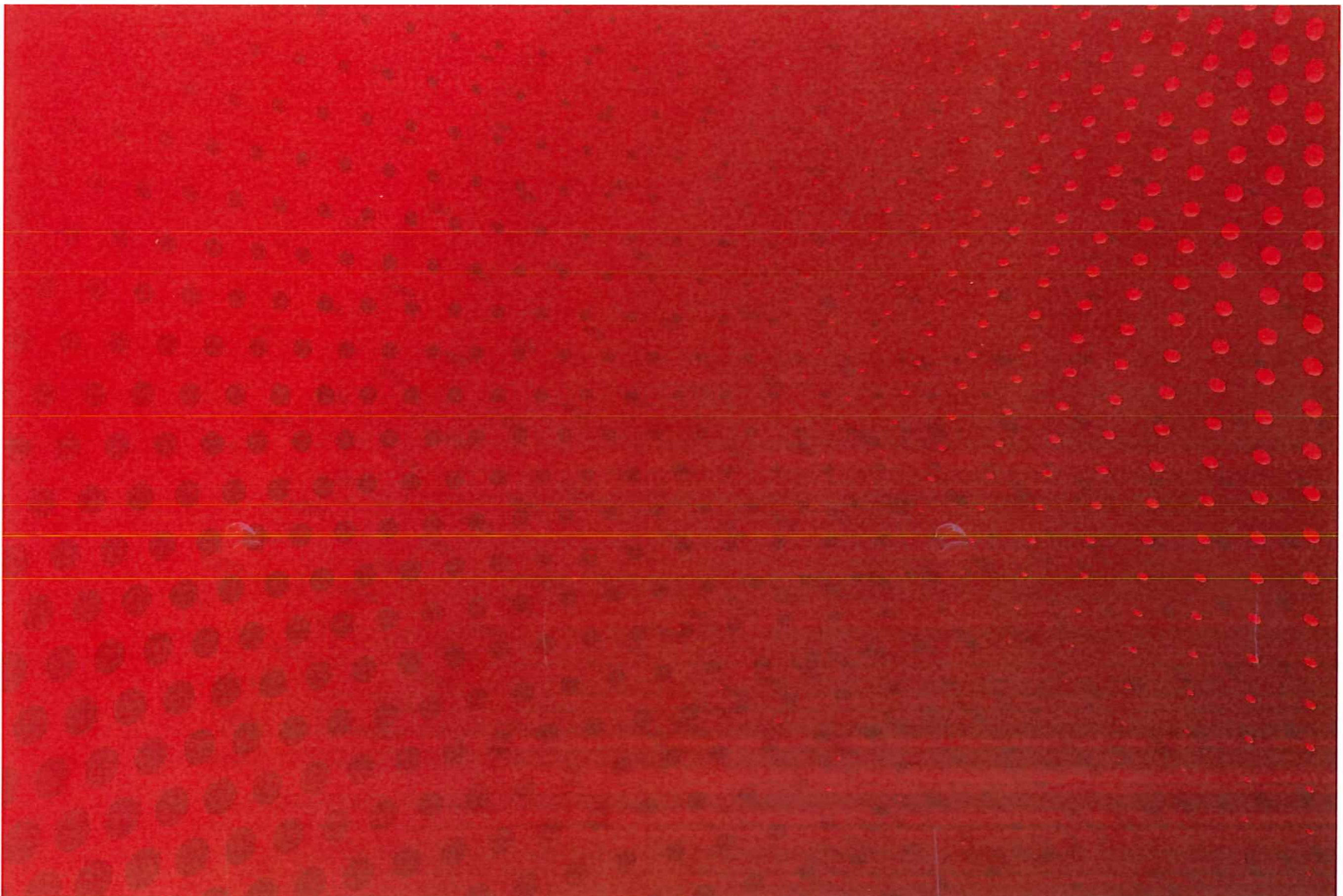

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–From a declaration of the American Bar Association.

Those of us working in the health care space know that what is permissible in other industries does not always pass muster in health care. The promotion of physicians and their practices is no exception. However, one should not be intimidated by the regulatory limitations. This article will address some of the more common mistakes made by physicians and their advisors when promoting physicians' services and tips to ensure promotional efforts do not run afoul of applicable laws and regulations.

Misleading or Deceptive Practices

While state laws regarding physician marketing and advertising practices may vary, most states that have not promulgated laws or regulations specific to physician marketing and advertising have, at a minimum, adopted laws and regulations that prohibit physicians from making false or misleading statements regarding the physician's services. This is particularly true when the false or misleading statement relates to the physician's training, expertise, or board certification; the cost of the services advertised; the use of patient testimonials, endorsements, and images; as well as promising specific results and claims of superiority.

If the physician is offering a specific promotion, for example, free eye examinations, it is important to ask the provider whether this service is indeed free, meaning no party is billed for the services, or if the services are being provided at no additional charge to the patient, in which case the services are billed to the patient's insurance and the patient is not charged a co-pay or deductible. It would be a misrepresentation to state the service is free simply because the service is being provided at no charge to the patient.[1] Further, this type of statement should be used with extreme caution as the physician may be in breach of his or her provider agreement for failure to collect a patient's co-payment or deductible, and may be in violation of state or federal law prohibiting the waiver of co-payments or the offering on an inducement to a patient to obtain services.[2]

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[1] *See, e.g.,* CA Bus. & Prof. Code § 651(b)(4) and (c) treating statements related to fees as deceptive unless the statements "fully and specifically" disclose all variables and material factors related to the fees and prohibiting use of phrases related to fees that are not exact, such as "as low as" or "and up."

[2] *See* Social Security Act § 1128A(a)(5) which prohibits a person from offering or transferring remuneration to any individual eligible for benefits under Medicare or Medicaid that such person knows or

Physicians appear to be using patient testimonials and patient endorsements with more frequency, particularly as they develop more informative and interactive websites and become more comfortable having a presence on social media. While use of patient testimonials and endorsements in advertising may be perfectly acceptable, there are federal and state restrictions on the use of endorsements and testimonials that should be taken into consideration. The Federal Trade Commission (FTC) is paying attention to medical and health related claims especially as they relate to weight loss products and services, refractive eye surgery, contact lenses, and mobile health apps. In 2009, the FTC updated its Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides) with a common theme of truthfulness in advertising.[3]

One of the FTC's updates to the Guides related to advertisements that feature a consumer of a product or service who may have experienced an outcome that is not necessarily consistent with what other consumers can expect. Following the 2009 changes, it was no longer sufficient to point out that others may have a different experience with statements like "results not typical" or "results may vary." Rather, the Guides instruct the advertiser to specifically state the expected results under the same circumstances shown in the advertisement or to maintain adequate proof to demonstrate that the results in the advertisement are indeed typical.[4] Another point the FTC makes clear in the Guides is that the FTC holds advertisers accountable for claims they make indirectly through another party's testimonial or endorsement as though the advertiser made the claim himself. In other words, an advertiser may not use a patient testimonial or endorsement to make a claim that would not be permissible if the physician made the claim himself. Thus, unless the patient's experience is the result all

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should know is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, under Medicare or Medicaid. "Remuneration" is defined as including the *waiver of coinsurance amounts*, except in certain narrowly defined circumstances. OIG Advisory Opinion *See also*, OIG Advisory Opinion No. 02-7, issued June 5, 2002 and OIG Advisory Opinion No. 99-7, issued June 30, 1999. For adjustment of remuneration that is nominal value, *see* OIG Policy Statement Regarding Gifts of Nominal Value to Medicare and Medicaid Beneficiaries, dated December 7, 2016.

[3] *See* https://www.ftc.gov/news-events/press-releases/2009/10/ftc-publishes-final-guides-governing-endorsements-testimonials.

[4] *See* https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

patients can generally expect, physicians should not rely on a patient's statement of his or her own experience, even if the statement is in the patient's owns words and made of his own volition.

It follows that if a patient was given a discount on her services or is an employee or family of the physician whose services she is endorsing, this relationship and/or compensation (in the form of a discount) is a "material connection" and should be disclosed. As a viewer of the advertisement, having knowledge of this connection would likely influence your perception of the patient's endorsement and whether it was freely given. The Guides include a number of examples that demonstrate what the FTC considers a material connection. Keep in mind, however, the FTC Guides are just that—guidance—and are not legally binding. One advising a physician cannot always rely on physicians divulging that the results experienced by the patient were not necessarily typical, that a statement made by the patient in a testimonial is not completely accurate, or that the patient is a long time employee and the professional services were provided at no cost. This may not be due to the physician intentionally withholding information, but simply because the physician may not know these facts are germane to obtaining guidance. The physician must be made aware of this important information and those advising the physician should ask these questions.

In addition to federal restrictions, there may also be state consumer protection and professional conduct laws applicable to a physician's use of patient testimonials to promote the physician's practice. For example, Colorado adopted a regulation that prohibits physicians' use of "unsubstantiated testimonials" and provides that "When using a subjective testimonials whose truthfulness cannot be substantiated, the advertisement should also include disclaimers or warnings as to the credentials of the person making the testimonial."[5] Unless the patient is a weight loss surgeon, what credentials and experience does the patient possess to evaluate the quality of her bariatric procedure? If the patient's comments relate solely to the surgeon's bedside

[5] 3 CCR 713-31.

manner and her overall satisfaction the testimonial may comply with this regulation; however, keep in mind that it could run afoul of other guidance.[6]

Similarly, California law prohibits public communications that contain false, misleading, or deceptive statements or claims and includes patient testimonials and endorsements that are "... likely to mislead or deceive because of a failure to disclose material facts ..." as an example of what the state considers a false or deceptive claim.[7] The California Business and Professions Code also delineates requirements related to patient "before" and "after" photographs that must be followed in order to avoid a violation of the prohibition against false, misleading, and deceptive statements. For example, "before" and "after" views must have comparable presentation (e.g., lighting and poses), specify the procedure performed and state that the same results may not occur for all patients.[8] With regard to endorsements, California specifically prohibits a physician from giving "... anything of value to a representative of the press, radio, television or other communication medium in anticipation of, or in return for, professional publicity, unless the exchange of value is made known in the publicity."[9]

Texas takes a somewhat different approach from California and Colorado, and prohibits physicians from using patient testimonials altogether.[10] There are questions as to whether this ban on physician use of testimonials is constitutional, however, demonstrating this fact will likely be both costly and time consuming. Interestingly, the Texas Administrative Code appears to contemplate a permissible use of testimonials in physician advertisements—under Title 22 of the Texas Administrative Code § 164.3(8) the Texas Medical Board considers an advertisement to be false, deceptive, or

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[6] For example, in 2010 the AMA issued opinion 5.02 regarding physician advertising in which the AMA took the position that patient testimonials that make statements 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. While this opinion has no legal authority, state medical boards could look to this opinion for guidance related to patient testimonials and what may be considered deceptive or misleading.

[7] CA Bus. & Prof. Code §651(b)(8).

[8] CA Bus. & Prof. Code § 651(b)(3)(C).

[9] CA Bus. & Prof. Code § 651(d).

[10] *See* Texas Occ. Code §101.201(b)(4).

misleading if it 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. Keep in mind that a physician cannot use a patient to make a statement that would not be permissible if it came directly from the physician. Thus, if advertising in a state that prohibits physicians from making guarantees or statements about curing a condition, it would not be permissible to, for example, include a patient interview in which she states that her weight loss surgeon cured her back pain or diabetes on the surgeon's website. It may, however, be acceptable to include a patient statement that more accurately depicts the circumstances such as, "due to my weight loss, I no longer experience back pain and I am no longer using insulin to control my diabetes."

Another physician advertising taboo that we see all too frequently is physician claims of superiority. Whether it's general claims of superiority such as "I am the leading weight loss surgeon in the Southwest" or specific claims of superiority such as "I have the best lumbar disc replacement outcomes in the area," a state's medical board may take the position that these representations, if not readily verifiable, are not just puffery but rather a misrepresentation and, thus, a violation of regulations governing physician conduct. This is particularly true if, for example, the spine surgeon lives in a small town in Texas and only one other surgeon in the area performs the same procedure. The Texas Medical Board requires that physician advertisements making comparisons of professional services be "factually substantiated" and that statements of superiority be "subject to verification."[11] Similarly, the Colorado Medical Board rules require that physicians, at the time the advertisement is placed, possess information that substantiates the truthfulness of "... claims that the services performed, personnel employed, and/or materials or office equipment used are professionally superior...or that convey the message that one licensee is better than another ..."[12] California, on the

[11] 22 TAC § 164.3(6)-(7).
[12] 3 CCR § 713-31.

other hand, requires that physicians making claims of superiority be able to substantiate the claims with "objective scientific evidence."[13]

Regardless of the state in which the physician is advertising, if the physician wishes to make statements of superiority, it would be prudent for such representations to at a minimum be supported by valid data on file demonstrating the basis for making the statement. If the physician wishes to make a specific claim of superiority regarding a procedure and is one of two or three physicians in the state performing the procedure the physician should recognize that by making this statement publicly the physician may be baiting a competitor to alert the state agency responsible for enforcement.

Like claims of superiority, physician advertisements that include representations related to board certification and areas of expertise are common areas for mistakes. Whether it relates to the state's recognition of the organization from which the physician earned this credential, language used to communicate the physician's certification, or advertising "board qualified" or "board eligible," many states have laws (and the applicable board has likely adopted guidance), governing how physicians communicate their board certification to the public. For example, it is not uncommon for state law to prohibit the use of the term "board certified" unless the physician is certified by a board that is a member of the American Board of Medical Specialties (ABMS) or by an organization that has certification requirements that are substantially equivalent to the requirements of the ABMS or is otherwise approved by the applicable state's medical board.[14] In addition, some states as well as the applicable board certification agency, may regulate and/or provide guidance about how physicians may communicate their certification—a physician who is board certified in Radiology may be prohibited from making this representation in an advertisement focusing on the physician's provision of allergy testing service, and some states' laws prohibit physician advertisement of a specific field of interest or specialty unless the physician is board certified in that field or

[13] CA Bus. & Prof. Code § 651(b)(6).

[14] *See, e.g.,* 22 TAC § 164.4; CA Bus. & Prof. Code § 651(h)(5)(C); and Florida Admin Code § 6488-11.001(2)(f).

has received special recognition as a specialist by an agency approved by the state's medical board.[15] Finally, if a physician is not certified, but is eligible to sit for the board exam, it is important to review state law and guidance issued by the applicable board as it is not uncommon for the state or the board to prohibit the use of terms like "board eligible."

Social Media Considerations

Many physicians who resisted the electronic age are now accepting that they need websites and possibly even Facebook and Instagram accounts in order to stay relevant. While we want to applaud these efforts, the use of such an immediate and public means of advertising or interacting with the public opens physicians to a variety of new missteps. Social media sites like Health Grades and Yelp provide a venue for patients to express their positive and negative opinions, and consumers are more vocal than ever. If physicians use Facebook to promote their practices and allow the public to comment on their Facebook pages, they are likely to receive a negative comment at some point. While these comments do need to be addressed, they should be handled carefully, with sensitivity and in a manner that does not discount the patient's perception of the event that led to the negative comment.

The most important factor to keep in mind is that negative comments can trigger emotions, which may result in poor decision making and an insensitive response. A recommended practice is to simply state that the practice strives for all patients to have a positive experience and encourages anyone who has had a negative experience to contact the practice directly to see what, if anything, can be done to ensure the patient is satisfied with services in the future. The physician must not confirm or deny that the individual posting is a patient, and should keep the response generic to avoid violating any federal or state privacy and confidentiality laws. Similarly, if a patient complains to the Better Business Bureau, and a representative contacts the physician, the response

[15] *See, e.g.*, Florida Admin Code 64B8 § 11.001(2)(f).

should not attempt to refute the patient's claims by providing details about the patient's treatment, but to explain that the practice is subject to a variety of privacy and confidentiality laws and thus does not provide information to refute or accept responsibility for the claim nor will it confirm whether or not the individual was even a patient of the practice. But it is still important to address the patient's negative experience. It is recommended that the physician request the Better Business Bureau to ask the person who filed the complaint to contact the practice so that it can address the patient's concerns and provide a contact number.

Documentation

Physicians need to retain a copy of advertisements whether electronic or print media and, if the advertisement is solely auditory (e.g., radio, podcast), keep a recording if possible and, at a minimum, retain a written record of the dialogue. In addition, physicians should retain information about ad placement (e.g., what periodical, what radio station, payment for the ad, date of publication, etc.). Physicians should also maintain screenshots or other documentation of website content and changes made to that content particularly if it touches on any of the areas highlighted in this article or under federal or state law as potentially amounting to false, misleading, or deceptive statements. Not only are physicians required by certain states' laws to retain this documentation, it will also be instrumental if any claims are ever made related to the physician's advertising practices. With regard to patient testimonials, photos, or other representations included in the advertisement or website, it is necessary for the physician to have obtained written patient consent. The consent should specifically address the scope of the use and include all elements required of a valid authorization under the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations[16] and any state specific requirements.

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[16] 45 C.F.R. Chapter 164.

Other Considerations

In addition to state law, it would be prudent to review rules or guidance issued by professional organizations related to the physician's specialty area and the service that is the subject of the advertisement for guidance as enforcement agencies may also look to this organization for guidance on what may or may not be appropriate. In 2011, the American College of Obstetricians and Gynecologists Committee on Ethics issued a Committee Opinion addressing ethical ways for a physician to market a practice. Some of the positions taken by the Committee include: (1) physicians are responsible for advertisements that are undertaken by hospitals on the physician's behalf; (2) all paid advertisements must be clearly identified as such and not disguise the advertisement as part of a news program; (3) physicians must be able to substantiate all claims made in advertisements; and (4) statements ranking the competence of physicians and quality of services usually are not supportable and if used, the advertisement must describe how the ranking was established.[17]

Physicians should also review payer guidelines to see what restrictions, if any, the payer places on marketing. This is particularly true of state Medicaid programs. For example, in Texas, the Health & Human Services Commission (HHSC) publishes marketing guidelines[18] that are applicable to providers who render services to beneficiaries of Medicaid programs and these guidelines are more specific than the Texas Medical Board's. HHSC prohibits the use of marketing materials to promote a practice if those materials are not intended for educational purposes and requires the materials be written at or below a 6th grade level. HHSC also prohibits the use of marketing materials to offer an inducement (e.g., a giveaway) or anything designed to

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[17] *Ethical Ways for Physicians to Market A Practice*, Committee Opinion No. 510. American College of Obstetricians and Gynecologists (November 2011) (reaffirmed in 2017).

[18] Available at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjU9NTg-cDeAhVkq4MKHcWrDv8QFjAAegQIABAC&url=http%3A%2F%2Fwww.tmhp.com%2FTMHP_File_Library%2FProvider%2520Marketing%2FProvider%2520Marketing%2520Guidelines_w_example.pdf&usg=AOvVaw1CTlfQhkQGHVTBQ25H-sB3.

influence the choice of provider and it prohibits any giveaways worth more than $10 individually.[19]

Conclusion

While the information and guidance contained in this article may appear to be common sense, physician marketing efforts are often fraught with a number of missteps that may result in violations. It is imperative that physicians who are launching promotional campaigns and those providing guidance or content for such efforts recognize the applicable federal and state law, professional organization mandates, payer rules, and guidance prior to releasing it for public consumption. This review of applicable authority is particularly true in the area of digital promotion where promoters may think that the legal standards are relaxed. Ultimately, physicians should take a cautious approach to all promotional activities in light of the potential ramifications.

[19] Section 1128A(a)(5) of the Social Security Act prohibited a provider from giving any "remuneration" that he knows or should know is likely to influence a Medicare or Medicaid beneficiary's choice of provider, a violation of which could lead to a civil monetary penalty of $10,000 for each act. The OIG later permitted "inexpensive gifts" or "nominal value" interpreting this to mean $10 or less per occurrence and $50 or less each year. 65 Fed. Reg. 24400, 24411 (Apr. 26, 2000). This amount was updated in 2016 to $15 per occurrence and no more than $75 each year. Note that Texas Medicaid has not updated its giveaway price limit to reflect the federal 2016 increase.