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Advertising, medicine a dangerous mix

By Lisette Hilton



Denver - Cosmetic surgeons can learn from surgeons performing laser-assisted in situ keratomileusis (LASIK), who have found out the hard way that making claims in advertising, such as "Throw away your glasses" can come back to haunt them in court. Cosmetic surgeons can find themselves in similar situations when they mix professional credibility with slick advertising.

Physicians who do any type of elective procedure should know that the "Throw your glasses away" claim, while it might be true for some, is not universal and can be thought of by juries as misleading. Even a disclaimer run at the bottom of the advertisement might not be enough to stop a jury from awarding a patient a sizable financial reward based solely on the physician's potentially misleading advertising, according to C. Gregory Tiemeier, an attorney with Denver-based Tiemeier & Hensen, who specializes in medical malpractice defense, commercial litigation and risk management.

Things do go wrong

LASIK, Tiemeier said, is a good procedure. "It is highly predictable, the risks are very small, and significant complications are extraordinarily rare. The problem is that, because of the high level of safety, physicians tend to think that nothing will go wrong. It becomes worse when they involve a marketing company or marketing department that thinks of LASIK as a procedure or commodity as opposed to a surgical operation."

The fact is, LASIK, like liposuction and other cosmetic surgeries, is surgery, and should be identified as surgery in advertisements, Tiemeier said. "Often people come to the physician with a vague understanding that LASIK is surgery and that they can have a problem. The difficulty that this creates affects physicians who do marketing and advertising, and also those who do not."

Undoing inaccurate perceptions

A cardiac surgeon generally does not advertise coronary bypass surgery. Patients about to have the surgery usually have a relatively open mind about what the physician will tell them about risks, benefits, and alternatives. The same cannot be said for Botox injections, chemical peels, or LASIK surgery, Tiemeier said. Even if the cosmetic surgeon has not run Botox advertisements, patients who come to see him might already be influenced and have expectations based on the ads of others. Consequently, the physician and staff's first job is to find out where the patient is in terms of education, and if he or she has misunderstandings about the Botox injections. "It is essentially a debriefing process," Tiemeier said.

Do not promise what you cannot deliver

A significant issue in cosmetic surgery is that many patients are searching for some sort of life change. These are typically the types of patients, Tiemeier said, who already have unusually high expectations. An ad with a headline promising to change a person's life or improve the quality of life is asking more than the procedure

was designed to do.

This can be an especially litigious area when cosmetic surgeons lure patients who have a history of depression or anxiety, according to Tiemeier. "Those types of people tend to be the ones who are more likely to respond to an ad that appeals to improve their lives - a type of appeal that I see not only in LASIK but also in cosmetic surgery advertising. Then, if for whatever reason they have a less than perfect result, and sometimes even if they have an excellent result, they might sue because they still cannot get a date, or they are still not happy," Tiemeier said.

A grey area that many LASIK surgeons are getting into is making guarantees in their advertising, according to Tiemeier, who thinks the practice is a mistake. Advertisers are calling these, "lifetime commitments," in which patients can come back for free "touch-ups" if their vision deteriorates. The promise is full of holes, he said. Whose lifetime is it? What exactly does it cover? What if the practice closes or the surgeon retires?

Cosmetic surgeons who advertise should market a surgical or non-surgical procedure for what it is. In the case of LASIK, it is surgery that will correct refractive error.

Tiemeier said that problem with that approach is that advertising executives know ads need "sizzle" and "puffery" in order to create sales. "That is where the problems come in - where you merge the fields of medicine and advertising. In one, you have a legal obligation to patients to present a fair and balanced approach so that patients can make decisions that will affect their physical health and possibly their lives," Tiemeier said. "People die from liposuction, and if the patient does not understand that, then the physician can be held liable. Marketing does not have any restrictions like that. With marketing, as long as you are not telling a blatant lie, you can get away with it."

Puffery is a well-recognized concept in which companies promote their products and services in ways that escalate the importance of the products or services in people's minds. The approach is a dangerous one in medical marketing. "There have been lawsuits that have relied solely on the marketing. Not that the doctor did anything wrong; not that the doctor was negligent, but the patient had a bad result and suffered damages, and the advertising that brought them in was misleading, so they filed a consumer-protection-act claim," Tiemeier said. "In Colorado, a successful consumer-protection-act claim cannot only get you your verdict, but the judge can award treble, meaning three times your actual proven damages, and can give you all your attorney's fees. It can be a fairly significant claim and you never have to prove that the doctor was negligent - just that the advertising was misleading."

What disclosure?

Some physicians take comfort in the eight-point lettering at the bottom of the ad that discloses the truth about the surgery or procedure. But even that might not sway a jury, according to Tiemeier, especially if you run 60-point type at the top, where the claim is.


Physicians reviewing ads that agencies have put together should ask themselves what they would do if they sat on a jury and a patient was suing the doctor for being misled.

Practicing safe advertising

Some of the "safe" things that you can include in advertising and marketing materials are your experience, background, data from performing procedures in your practice, and factual descriptions of what surgical and non-surgical procedures can do. Ads should be straightforward and not over promise.

The bottom line, Tiemeier said, is that cosmetic surgeons not just turn over the advertising and marketing to a marketing department or advertising agency. Rather, physicians should oversee the messages to make sure pass the straightforward test.



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