Pre-Publication Draft

Four Out of Five Doctors Need to Know: Legalities of Physician Advertising

By Daniel F Shay, Esq.

Alice G. Gosfield and Associates, P.C.
2309 Delancey Place
Philadelphia, PA 19103
215-735-2384
215-735-4778
dshay@gosfield.com
www.gosfield.com

"Accepted for publication in the Health Law Handbook, 2007 Edition.
Alice G. Gosfield, Editor, (c) West, A Thomson Company.
A complete copy of the Health Law Handbook is available from West by calling
1-800-382-9252 or online at www.west.thomson.com."

Four Out of Five Doctors Need to Know: Legalities of Physician Advertising

By Daniel F. Shay, Esq.

"When you lose part of who you are, you can't do the things you enjoy doing, the things that make you a whole person, that's when you turn to Scripps."[1]

11.1 Introduction

The quote above typifies much of modern healthcare industry advertising. Spoken by a former Scripps Hospital patient, the television advertisement utilizes several common techniques, such as appealing to emotions, citing the hospital's experience and/or ranking, and use of customer testimonies. The advertisement is part of a trend in healthcare: the increasing commercialization of medicine. Turn on your radio or television and you will hear and see advertisements for hospitals, lasik or cosmetic surgery, health plans, and pharmaceuticals. Open the newspaper, and you will find the same. Include e-mail spam for a range of pharmaceuticals, and it is easy to see that healthcare marketing is becoming almost unavoidable.

In any marketing, the advertising party is undertaking some kind of legal risk in communicating with the customer, whether making a simple statement about oneself or making a comparative statement about a competitor. While it is expected to see advertising of this sort from the more commercial ends of the healthcare industry – such as HMOs, hospital systems, and "elective surgery" providers like lasik and cosmetic surgeons – eventually, this trend will force physician practices to compete the same way. In the coming years, it should therefore be no surprise when physician groups begin to market themselves more aggressively.

For purposes of this chapter, "marketing" means any communication to a potential customer (a patient or other consumer), designed to secure additional business. This includes communications from healthcare providers themselves as well as third parties using information collected about and from the provider, all communications designed to alter the consumer's perception of the healthcare product in question. "Marketing" includes radio, print, and television advertisements, as well as public relations publications (such as newsletters, profiles in magazines, or brochures). As interest in physician marketing increases, it will be important to understand the legal ramifications of marketing activities, both in a general sense, and as specifically applied to physicians. This chapter will explore ways in which healthcare providers advertise, with specific consideration for how such advertising methods pertain to physicians, and what legal barriers may arise on the marketing landscape.

11.2 Marketing Techniques

To effectively advise physicians regarding potential pitfalls in marketing, it is important to understand different types of marketing that physicians may use as well as what others might say about them, even if the physicians themselves are not the ones doing the advertising. For example, a brochure about a physician practice group that includes patient testimonials offers different legal risks from a television advertisement comparing one HMO to another. Marketing

[1] http://www.filmspot.tv/tvspots.html.

may be directed at any type of customer; physicians and HMOs may advertise to patients, pharmaceutical companies may advertise to physicians as purchasers and prescribers, or other service providers may advertise to physicians and hospitals. While there are numerous marketing techniques, this chapter will only focus on issues in (1) print ads, radio and television spots; (2) employing brand names, trademarks, tag lines and the like; and (3) problems in third party ratings.

11.2.1 Print, Radio, and Television Advertisements

Mass media, in the form of print, radio, and television, offer avenues by which healthcare providers communicate directly with potential customers and patients. The goal of any successful advertisement is to create a positive disposition towards the provider in the potential customer's mind, or to impart valuable information that ultimately leads the customer to select the provider's services. This chapter examines four specific types of advertisements: (1) the "feel-good" advertisement; (2) the customer testimonial; (3) the "We're the Best" advertisement; and (4) the comparative advertisement.

The "feel-good" advertisement is designed to create nothing more than a positive association between the provider and the consumer, without actually providing substantive information or making clear statements about a competitor. "Feel-good" advertisements build goodwill, operating on an almost subliminal level. Essentially, this form of advertisement attempts to get the consumer to think "Company = good". One example of the "feel-good" advertisement was a television advertisement run by U.S. Healthcare. Set to the tune of "My Sunny Funny Face", the advertisement shows a collage of individuals engaging in mundane behavior. A woman eats an ice cream cone with a laughing child. An elderly couple laughs while gardening. A small child laughs while on a swingset. A woman looks over her shoulder while rowing a boat, smiling. A well-dressed young man walks along and stumbles, just as a woman sings "Though you're no Valentino, for worlds I'd not replace your sunny funny face." The advertisement ends with the announcer saying "Over one and a half million Americans have turned to us for a healthier way of life. U.S. Healthcare – the health plan for living."[2] No substantive or comparative statements about the company were made, and the viewer was told nothing about the services offered. The sole purpose of the advertisement was to equate positive feelings with the U.S. Healthcare brand name.

A similar example recently appeared in the June 19, 2006 issue of Modern Healthcare, directed at hospitals. There, Sodexho's advertisement consisted solely of a picture of a small sleeping child, with the phrase "Patients are the heart of everything we do," and a service mark designation.[3] The advertisement tells you nothing about the company – not even what the company's business is. If you have never heard of the company before, you will walk away knowing nothing more.

---

[2] This advertisement can be viewed at www.watchreels.com.

[3] Modern Healthcare, June 19, 2006, p. 38.

Similar to the "feel-good" advertisement, the customer testimonial seeks to create "positive vibes" towards the company, but rather than relying simply on positive images and associations, the testimonial provides the consumer with a "true story" from a customer. Customer testimonials may be provided by an actual customer, or by an actor. In some cases, the stories told by the "customer" are real, in others they are complete fabrications, and in still others they are true stories of real customers told by actors rather than the customers themselves.

For example, when a visitor logs in, M.D. Anderson Cancer Center's website home page displays pictures of smiling cancer survivors. The specific type of cancer they faced is displayed below their name, and is then struck through with a red line. "Missy Mitchell – ~~Lymphoma~~", "Hugo Robledo – ~~kidney cancer~~", and "Cheryl Lam – ~~Germ Cell Tumor~~" are all real-life examples of cancer survivors.[4] Similarly, Cancer Treatment Centers of America's home page allows the viewer not only to select various survivors of specific types of cancer (including lung, breast, pancreatic, and ovarian cancer), and read the patient's specific story, but also to watch a video about the patient, where each survivor discusses his or her history and how they selected Cancer Treatment Centers of America, and then brief blurbs about the type of treatment the patient received (nutritional treatment, working with multiple physicians, etc.).[5] The image of happy, healthy former patients helps to reinforce the notion both that the services provided are quality services, and that patients can feel well cared for on a personal and emotional level by the physicians.

A "we're the best" advertisement generally touts the healthcare provider's standing in the community, rating by an independent entity, or general performance and positive attributes. The obvious goals are to convince the consumer to select the provider because of their high quality performance. Advertisements of this kind may start with a phrase that explicitly states the provider's quality. For example, Lutheran Medical Center in Brooklyn, New York has advertised that it is the only hospital in Brooklyn to earn a ranking among the top five percent of hospitals in the country from HealthGrades.[6] Alternatively, a provider may merely imply its own quality. A statement such as, "We perform over 200 operations in this specialty a year...", indicates that the provider is highly experienced based on the number of cases it treats a year. Even a mere statement of longevity, like, "Since 1967, Provider Medical Group has been serving your community...", suggests that the provider has long-term experience in its specific field. A statement like this has the added effect of a "feel-good" advertisement, in that it implies a strong connection with the community and a trustworthy reputation. However, unlike a pure "feel-good" advertisement, the "We're the best" advertisement makes substantive or factual statements about the provider itself, without comparing the provider to any other entity.

---

[4] See, http://www.mdanderson.org/. Each time the page loads, a new survivor is pictured. Clicking on the picture will take the visitor to a new link which includes more in-depth testimonials from patients.

[5] See, http://www.cancercenter.com/. Visitors must click on the image of the patient to view the background story and video.

[6] See, http://www.lutheranmedicalcenter.com, and http://www.lutheranmedicalcenter.com/news/releases/Health%20Grades12_1.pdf.

One type of advertisement which has traditionally been used predominantly by health plans and pharmaceutical companies, but could be used by some providers is the comparative advertisement. Here, the provider seeks to distinguish itself from the competition, by touting its own positive features (which naturally outstrip the competition's), while simultaneously pointing out the competition's shortcomings. For example, a comparative advertisement might show four different hospitals, listing their rankings in a state survey on cardiac disease treatment. The advertisement might show a bar graph with the provider's bar being the tallest, and its competition's bars lower by a notable margin.

Another more recent example of comparative advertising directed at physicians is a print advertisement for Effexor XR, a depression medication. The advertisement's version of comparative advertising lists the results for recurrence prevention for depression symptoms at 6 months, 1 year, and 2 years, arranged in columns, and compares Effexor with several other competing drugs (such as Zoloft, Paxil, and Lexapro). In each column, any drug which prevented recurrence received a check mark. All drugs received check marks in the 6 month column, but only four of the six drugs listed received checks in the 1 year column, and only Effexor received a check in the 2 year column (although Zoloft and Paxil both indicated that studies for each had been conducted differently from the Effexor study).[7]

Whether using bar graphs or check marks, an advertisement like this provides the custmer with concrete information to quickly compare two or more entities, and come to the inevitable conclusion that the company advertising itself is superior in the compared area. In this case, the implication is that Effexor is the best anti-depression medication of those compared, primarily because it can reduce recurrences of depression symptoms after two years – a feat unmatched by its competitors.

In many cases, advertisements do not segregate purely by category and, instead, blend aspects of the various methods described. For example, a comparative advertisement for a hospital may include aspects of "feel-good" advertising, such as images designed to inspire confidence and good will, including smiling patients, doctors who appear competent or even tout their skills, or patients enjoying their lives post-treatment. Likewise, the advertisement may include customer testimonials, while flashing text on the television screen stating a ranking as the #1 center for a given disease in the region, thereby combining the testimonial and "we're the best" approach.

There are advantages and disadvantages to all of these approaches, as well as with the medium through which the provider chooses to communicate. All three media (television, radio, and print) permit the provider to communicate directly with the consumer. In addition, the provider may target specific audiences either through the use of demographic data, such as who watches certain television shows or listens to a given radio show at certain times, or through print media targeted at a specific audience (IE: Popular Mechanics, Redbook, or The Atlantic Monthly). However, a print advertisement can only fit so much information on a page, and may limit the provider's ability to utilize different advertisement styles in a single ad. Radio provides

[7] See, Medical Economics, Vol. 83, no. 23, December 1, 2006.

a vocal element absent in print, but lacks the visual content of print or television. Television, while allowing the provider the widest variety of techniques combining both visual and audio content, may be cost prohibitive.

As a side issue, some providers may prefer one advertising method over another because it feels less demeaning. For medical practitioners, it may feel unseemly to engage in comparative advertising or "feel-good" advertising. Advertising in the healthcare industry has traditionally been dominated by larger entities, such as hospitals, health plans, and pharmaceutical companies. Physicians have been slower to fully pursue these options.

11.2.2 Branding

Branding may be a more appealing alternative to traditional advertising for physician practices. A well-chosen brand name provides fast recognition of the origin of goods or services. An established brand name may on its own convey a wealth of information to the customer. A distinctive brand name will also be easy for a customer to remember. This alone may help a provider distinguish itself, instantly setting it apart from the competition.

For best effect, the brand name must be distinctive enough so customers can easily recall it and differentiate it from other brands in the same industry. A common problem for healthcare providers, and physician groups specifically, is generic naming. Often, physician groups simply name themselves according to a geographic region and specialty. For example, it is extremely hard to distinguish between "Cardiac Associates of Topeka", "Topeka Cardiovascular Associates", and "Topeka Cardiology Associates." By contrast, "Jayhawk Cardiovascular" may be more easily remembered, unless others have used similar names or brands.[8] While it may seem counterintuitive to a physician group, often the more arbitrary or fanciful a name, the more likely it is to be remembered and the easier it is to distinguish from competitors. It is for this reason that some healthcare organizations use made up words which are intended to evoke positive associations like Kaleida Health System in Buffalo, NY and Benefis Healthcare in Great Falls, MT. These decisions are made, more and more often, when managers create new entities.

Similarly, a logo, slogan, or tag line can serve the same function as a brand name. An instantly recognizable shape or image may function well as a logo. Even something as simple as a typefaced brand name may work effectively. For example, while the name "Jayhawk Cardiovascular" may be distinguishable, imagine the same name written in distinctive typeface, with the image of a hawk, wings outspread, taking the place of the "w" in "Jayhawk". Another example can be seen in the abovementioned U.S. Health Care television advertisement, with the tagline "The health plan for living." Combined with an effective, easily remembered slogan, a physician practice using these tools may be more able to develop a solid reputation than other generically named practices.

---

[8] The concept of legal distinctiveness as applied to trademark law comes into play here, too. Whereas "Cardiovascular Associates of Topeka" is merely descriptive, "Jayhawk Cardiovascular" is distinctive in a legal sense. However, if the provider is not the first to use "Jayhawk Cardiovascular" in commerce, the provider will be unable to obtain a trademark in any area where "Jayhawk Cardiovascular" was already in use, and the value of the trademark itself will necessarily be diminished by its inability to distinguish the brand in that geographic area.

Tag lines can also serve to show common association with a larger brand. For example, at the time of this writing, the University of Pennsylvania Health System is running a radio advertising campaign which uses the tag line "We are medicine" and variants thereof. The advertisements will discuss a specific clinic, such as the Abramson Cancer Center or Booth, Bartelozzi, and Balderston Orthopedics, typically beginning with "We are [the name of the specific practice]", and concluding with "We are medicine." Using this technique, practices may both capitalize on their own specific goodwill, and on the goodwill of the parent company, and can contribute their own goodwill to the parent company.

The benefits of branding a practice are obvious: if the practice provides high quality services and satisfies customers, its good reputation will follow more easily than a practice with a generic name. Likewise, a customer who can easily distinguish among practices due to effective branding will be less likely to call a competitor by accident. In addition, once a brand is established, the simple appearance of the brand may be enough to act as advertising. A billboard with nothing more than a white Nike "Swoosh" on a black field and the words "Just do it" in white text underneath is instantly recognizable because of the strength of the brand.

However, there may be disadvantages. The brand name may run afoul of a competitor's brand, if there is insufficient due diligence before adoption. In addition, effective branding can be expensive and time consuming, and the returns on investment slower than desired. In addition to the cost of filing for appropriate legal protections (such as federal and state trademark registration or fictitious names), the practice may have to engage in advertising in addition to simply adopting a brand name, or rely on word of mouth and customer memories to build goodwill.

11.2.3 External Ratings

In the "we're the best" approach, healthcare providers use external ratings systems to distinguish themselves. Many private and state healthcare report cards create the actual rankings. A healthcare provider which submits itself for private rating (as opposed to mandatory public rating) or accreditation may choose to advertise this fact to customers as an indication of the quality of its services. For example, Cleveland Clinic's Heart & Vascular Institute advertises that it is "America's #1 Heart Center 12 Years in a row!", citing its own ranking by U.S. News & World Report.[9] Johns Hopkins Hospital also prominently displays its seal as the Best Hospital in America, 2006, according to U.S. News & World Report.[10] Lutheran Hospital in Brooklyn, New York also prominently advertises its own rankings by Health Grades as a recipient of "Excellence Awards" in gastrointestinal care, general surgery, pulmonary care, and stroke care.[11] With this style of marketing, the healthcare provider is capitalizing on the strength of the accrediting or rating entity's reputation, and using it to strengthen the provider's own reputation.

---

[9] http://www.clevelandclinic.org/heartcenter/.

[10] http://www.hopkinsmedicine.org.

[11] See note 6, *supra.*

In some cases, the provider may choose to advertise standings based on state-mandated report cards. For example, Indiana produces report cards on nursing homes, Maryland publishes HMO and POS plan report cards, and Pennsylvania reports on hospital and associated physician performance.[12] In each case, provider data is collected, abstracted, and turned into bar graphs or general statements about whether the provider met, exceeded, or fell below expectations.[13] In all cases, the information is a matter of public record, independently collected by state officials. In this sense, the state report cards represent trustworthy sources of impartial information about providers. Because the report cards are tied to hard data, they also appear far more reliable to the consumer than, for example, a self-made statement touting the provider's high quality.

In addition to state-mandated report cards, there are numerous private report card and similar accrediting entities. Private report cards are often "opt-in" affairs, which permit the provider to submit itself to whatever scrutiny the private entity uses, often in the hopes of gaining accreditation or a high rating by the private entity.

For example, the National Committee for Quality Assurance (NCQA) offers two separate ratings systems on health plans: the Health Plan Employer Data and Information Set (HEDIS®) and the Quality Compass® program. HEDIS® uses voluntarily submitted information from health plans to track effectiveness of care, satisfaction with experience of care, cost of care, and other measures. Quality Compass® provides specific information on over 300 commercial HMO and point-of-service products. It derives its information from HEDIS® data and compiles it for comparison by customers.

Physicians also are ranked by multiple entities. NCQA offers its own rankings of individual physicians in its Diabetes Physician Recognition Program (DPRP)[14], the Heart/Stroke Physician Recognition Program (HSRP)[15], and the Physician Practice Connections program (PPC).[16] Each rewards physicians meeting the program's performance criteria with recognition. In the case of DPRP and HSRP physicians, criteria are outcome and process based; the physician must bring a given percentage of his or her patients within the required outcomes range before being rewarded.[17] In the PPC program, physicians must demonstrate that their practices meet the program's required elements of business and practice structure (for example, use of electronic records and patient histories), as well as how the physician interacts with patients.[18] For all

---

[12] See generally, http://www.phc4.org, http://www.hospitalguide.mhcc.state.md.us/index.asp; http://www.state.in.us/isdh/regsvcs/ltc/repcard/rptcrd1.htm.

[13] For more information on provider report cards, see Shay, "Provider Data", Health Law Handbook, 2005, pp.285-325.

[14] See generally, http://www.ncqa.org/DPRP.

[15] See generally, http://www.ncqa.org/HSRP.

[16] See generally, http://www.ncqa.org/PPC.

[17] See, http://www.ncqa.org/dprp/DPRPbrochfinal.pdf, and http://www.ncqa.org/hsrp/HSRPBrochure.pdf.

[18] See, http://www.ncqa.org/PPC/PPC%20Brochure.pdf, and http://www.ncqa.org/ppc/FAQ06.pdf.

programs, one can search NCQA's website to find physicians who have been recognized by NCQA.[19]

Similarly, Health Grades offers report cards on physicians, hospitals, and nursing homes.[20] Physician reports include board certifications, disciplinary action, education and training, with comparisons to national data. Most of the physician data used by Health Grades on is a matter of public record. Likewise, for hospitals, Health Grades collects information from the Centers for Medicare and Medicaid Services (CMS) and from discharge data reported in sixteen states.[21]

The Leapfrog Group is an independent organization comprised of employers, which provides data to allow consumers to search and compare hospitals in the consumer's geographic region. However, while Health Grades data is collected from CMS and discharge data – all information that hospitals are required to submit – the Leapfrog Group's data is submitted voluntarily. Hospitals choose to report on whether they have implemented various steps that Leapfrog has identified as important to quality delivery of healthcare services.[22]

The Pacific Business Group on Health (PGBH) provides rankings of California medical groups, measuring responses from each group's patients between the ages of 18 and 64.[23] Reports measure overall patient satisfaction, as well as specific areas such as: communication with patients, coordinating patient care, helpful office staff, and timely care and service.[24] Medical groups are grouped for ratings based on geographic location. Users visiting the report card website select a county, which then displays several medical groups within the county. In the event that a medical group has too few patients responding or too few patients overall, no data is displayed.

Even CMS has begun to solicit data from physicians with the intention of developing a quality measures system specifically for physicians.[25] The program was launched in January, 2006, and uses 16 separate evidence-based measures to track physician performance.[26] Physicians receive periodic reports of their performance as part of their voluntary participation

---

[19] http://recognition.ncqa.org/

[20] See, http://www.healthgrades.com.

[21] http://www.healthgrades.com/consumer/index.cfm?fuseaction=mod&modtype=FAQS&modact=FAQS&action=getOne&faq_id=7.

[22] See generally, http://www.leapfroggroup.org/.

[23] http://opa.ca.gov/report_card/medicalgroupabout.aspx.

[24] http://opa.ca.gov/report_card/medicalgrouprating.aspx.

[25] See generally, http://www.cms.hhs.gov/PVRP/.

[26] Id.

with the program.[27] Information is collected through the use of the administrative claims system.[28] CMS plans to expand the quality measures to include 86 additional measures for 2007, although the list may continue to change before and during 2007.[29]

As marketing tools, third-party reporting entities such as these may be used in several ways, some of which will depend on the nature of the reporting entity itself. If the entity is a government-sponsored report card, its ratings are a matter of public record, and the provider likely may simply choose to tout its high scores. If the reporting entity offers accreditation based on voluntary submission of data or conforming with accreditation standards, the provider may simply advertise that it has been accredited by the reporting entity. For example, advertising NCQA accreditation or a #1 ranking by U.S. News & World Report generally serves to indicate the quality of your services. In this sense, the provider is capitalizing on the strength of the accrediting/reporting entity's brand, rather than its own, and possibly seeks to enhance its own reputation through association with the accrediting agency.

Advertising ratings by third parties pose a range of issues based on the specific third party. Generally speaking, providers may freely advertise their ranking by a state or other government-run report card system, because the information is a matter of public record. However, advertising one's status under a private entity's ratings system may require the provider to obtain prior consent by the ranking entity, follow various guidelines, or even pay fees for the privilege of using the entity's name.

For example, Health Grades charges hospitals a licensing fee to advertise that they have been given a specific ranking under Health Grades. Hospitals who fail to pay the fee and simply advertise the fact may find themselves embroiled in a lawsuit.[30] Other ranking entities require the provider to display the entity's logo, seal, or name, or to describe the ratings system in a specific way. For example, NCQA places specific requirements on health plans that seek to advertise NCQA accreditation status. Plans are required to submit all marketing materials for prior approval before publication.[31] Plans are also not permitted to refer to NCQA accreditation as "rank" or "ranking", and are encouraged to instead use "rate" or "rating".[32] An advertisement's description of NCQA must be one of five specific statements.[33] HEDIS

---

[27] Id.

[28] See, Medlearn Matters, MM5036, March 24, 2006.

[29] http://www.cms.hhs.gov/PVRP/Downloads/qualmeasures.pdf.

[30] See Health Grades, Inc. v. Decatur Memorial Hospital, 2006 WL 1704454 (C.A. 10 2006). The hospital advertised the mere fact that it had been ranked highly by Health Grades, Inc. Health Grades then sued for, *inter alia*, trademark infringement.

[31] See NCQA Advertising Guidelines for Accreditation/Certification, p.2. http://www.ncqa.org/marketing/accred-certadguidelines.pdf.

[32] Id., at p.3.

[33] Id., at p.4. Examples of the descriptive statements include: "NCQA is an independent, not-for-profit organization dedicated to measuring the quality of America's health care," "NCQA's mission is to improve the quality of health

references must always be displayed with the ® symbol at the first and last use of the term "HEDIS", and include a footnote at the bottom of the first page where the trademark is mentioned: "HEDIS is a registered trademark of the National Committee for Quality Assurance."[34] Such stringent requirements may prove burdensome for a provider who simply wishes to tout their own quality. However, the value of the a given seal of approval or "#1" ranking may be worth the effort.

11.3 Legal Issues in Marketing

Each marketing method raises different legal concerns for the provider. Rather than examine every possible legal difficulty that a provider may face in its marketing efforts, this chapter will focus on three main areas of marketing pitfalls: (1) trademark issues, such as hurdles in obtaining a trademark, loss of a trademark through abandonment or "naked licensing", and trademark infringement; (2) general advertising issues relating to tort law, such as how providers and healthcare entities may be subjected to different standards of care or have agency imputed to them based on advertising; and (3) professional licensing issues, such as how physicians are permitted to advertise themselves in accordance with state law.

11.3.1 Trademark Concerns

The underlying goal of a trademark is to allow the consumer to distinguish the origin of goods or services. A trademark may be anything that allows the consumer to do this. Trademarks have been granted to sounds (the Intel jingle), logos (the Nike swoosh), and even to colors (brown for UPS, pink for Sweet and Low). Trademarks are also delineated by category. Thus, the color pink may be trademarked for Sweet and Low sweetener, and for Owens Corning insulation, because the two marks exist in different categories.

Federal trademarks are available to any mark used in commerce which does not fall into a prohibited mark category.[35] Prohibited marks include flags of states or countries, generic marks, and immoral, deceptive, or scandalous marks. A trademark will not be issued if the applicant's mark is already registered in the same category, or would be likely to cause confusion with another existing mark (although not necessarily in the same category or the same mark). The trademark must also be distinctive.[36]

---

care," and "NCQA is governed by a Board of Directors that includes employers, consumer and labor representatives, health plans, quality experts, regulators and representatives from organized medicine."

[34] Id., at pp. 6-7.

[35] 15 U.S.C.A. § 1052.

[36] The general spectrum of distinctiveness is: generic marks (IE: Medical Services, Inc. for a company offering medical services); descriptive marks (Geographically descriptive, such as Delaware Valley Pain Associates for a pain management practice, or personal names such as Leonard McCoy, M.D. for Dr. McCoy's medical practice); suggestive marks (marks which are more than descriptive, but are not arbitrary. For example, Greyhound for bus services, Coppertone for suntan oil); arbitrary marks (random words not otherwise associated with the product, such as Apple for computers); and fanciful marks (made-up words such as Kodak, Xerox, or Kleenex). McCarthy on Trademarks & Unfair Competition, 4th Ed., § 11:1.

Although only suggestive, arbitrary, or fanciful marks are granted registration immediately, descriptive marks can eventually acquire distinctiveness enough to be registered. This is known as "secondary meaning," *prima facie* evidence of which is five years of use in commerce.[37] During this time, a mark may be placed on what is known as the supplemental register, rather than the principal register. Placement on the supplemental register, unlike the principal register, does not confer any rights beyond those available at common law. For example, a mark on the supplemental register will not be automatically considered distinctive in a court hearing or in a Patent and Trademark Office (PTO) challenge to the distinctiveness of the mark. However, registrants on the supplemental register may bring suit in federal court for infringement, and the PTO may use the registrant's status on the supplemental register as grounds for denying someone else registering the same or a similar mark.[38] In addition, registration on the supplemental register does not preclude later registration on the principal register; once a mark has acquired distinctiveness following five years of continuous use in commerce, it may be placed on the principal register.[39]

Registration on the secondary register and acquiring distinctiveness may be an existing healthcare provider or physician group's best means for obtaining a trademark. In many cases, the business name of a physician group may not initially be protectible because it is merely descriptive. For example, when it first attempted to register for a federal trademark, the National Comprehensive Cancer Network® (NCCN®) was refused registration on the principal register. The PTO's rationale was that the mark was merely descriptive as applied to healthcare services, specifically a network of hospitals and cancer centers. In response, the NCCN® chose to register on the secondary register. Following five years of continuous use in commerce, the NCCN® brand acquired distinctiveness and was placed on the principal register and granted all the rights afforded to such registrants.

The advantages for federal registration, especially on the principal register, include the ability to bring suit in federal court for infringement with registration as *prima facie* evidence of validity of the mark, and the chance to recover up to triple damages as well as attorney fees.[40] Registration on the principal register also acts as constructive nationwide notice of the registration of the mark, which can serve to preempt any other local attempts at registration.[41]

---

[37] 15 U.S.C.A. § 1052(f).

[38] McCarthy, § 19:37.

[39] 15 U.S.C.A. §§ 1095, and 1065(3), respectively.

[40] 15 U.S.C.A. §§ 1121, 1057(b), and 1117 respectively.

[41] 15 U.S.C.A. § 1072. Because the federal trademark system exists side-by-side with state trademark systems, it is possible for an individual to register only a state trademark while another individual registers a federal trademark. Federal registration grants nationwide registration of the mark, however if the mark is already in use in a small local area, the federal system may create a "carve-out" for that mark, freezing it in place within the geographic region it was used at the time the federal registrant was placed on the principal register.

Once a federal mark has been obtained, it must be protected. Failure to protect the mark may result in its cancellation. If the mark is not used in commerce consistently, it may be considered abandoned. Without such use, the mark has no value and it will be cancelled. As a general rule, a failure to use the mark in commerce for three years will be considered *prima facie* evidence of abandonment. Mere token usage of the mark is also insufficient to satisfy the three year requirement.[42] Avoiding abandonment through non-use is relatively easy. Simply using the name as part of an active business would satisfy the use requirements.

Abandonment may also occur if the mark becomes generic. When the mark ceases to distinguish the goods or services effectively, or simply becomes the common name for a type of good or service, it will be considered generic.[43] Shredded wheat, trampoline, and escalator are all examples of once distinctive marks that, over time, became the generic term for the item in question. Marks such as Kleenex and Xerox have been viewed as in danger of being found generic for years. Within the healthcare industry, a mark such as Toughlove® could be endangered by virtue non-licensed individuals using the mark to describe the general type of services, rather than a licensed provider's services.

However, since most healthcare providers provide services more than goods, the risk of their marks being considered generic over time is relatively low. While it is easy to see how shredded wheat would have at one time been distinctive, but ultimately lost that distinction as more and more people used the name to describe their own identical goods, it is difficult to conceive of how a mark associated with various medical services could become truly generic to the point where the term was simply used to describe the services. What is more likely is that marks will be found to be generic during the registration process, and will simply be denied registration, rather than cancelled for becoming generic. However, the risk still exists, and thus healthcare providers should be made to understand the risk.

A more serious means of a mark being cancelled may come from "naked licensing." "Naked licensing" occurs when a mark owner fails to engage in quality control of the use of the mark, and either permits licensees to use the mark without attention to the quality of the licensee's services, or fails to enforce against infringing users. In general, mark holders have a duty (as well as a right) to exercise quality control of their products and services. Because the goal of a trademark is to allow the consumer to distinguish the origin of goods or services as well as the general characteristics of those goods or services based on the presence of the trademark, a mark holder must take steps to ensure common quality of the goods associated with the work across all licensees and prevent unlicensed users from using the mark in commerce. When the mark holder fails to do this, it may result in the loss of the trademark.[44]

---

[42] 15 U.S.C.A. § 1127.

[43] Id.

[44] McCarthy, § 18:48.

This issue will be less of a concern for physician practices operating out of one or only a few locations. However, if a provider expands its services, especially by licensing the use of its name, logo, or other distinguishing marks, the provider will need to remain vigilant in how its licensees are performing and representing the brand.[45] Towards this end, it may be helpful for the provider to maintain a handbook of standards for licensees, or to clearly spell out requirements for licensees in the license agreement, and then to strictly enforce these requirements. By spelling out the requirements clearly, the provider will have an easier time terminating the license agreement if a licensee breaches and endangers the mark.

In addition, providers are at risk where unlicensed competitors are using identical or similar marks. Even a single unlicensed use poses a threat. If the provider fails to curtail the unlicensed use, the use may become protected under a *laches* defense, which could bar the provider from enjoining the future use of the mark by the specific defendant, or at least result in the provider being unable to obtain damages.

Providers may also consider obtaining a state trademark. As discussed above the federal trademark system does not preempt state trademarks; and the two exist simultaneously. While federal registration provides the broadest protection and widest scope of rights, state marks also allow for some level of protection. A provider with a state trademark will often have no greater rights to sue others by virtue of registration than are granted by common law. However, state registration may offer defensive rights. For example, the provider with a state trademark may prevent an individual performing a nation-wide search from eventually registering an identical or substantially similar mark. Similarly, if another provider registers a federal mark, having a state mark may protect a provider from being enjoined from using their state mark. Instead, the court will limit the state mark holder to using the state mark in a given geographic region, while permitting the federal mark holder to use their mark elsewhere.[46] Thus, while ideally a provider will register federally, there are benefits to registering a state trademark prior to federal registration.

Even providers who do not register a trademark in either system need to understand the trademark risks involved in marketing. Trademark infringement remains a concern for any provider who engages in marketing, and typically breaks down along two lines: likelihood of confusion claims, and dilution claims. In likelihood of confusion claims, the trademark holder is alleging that the infringing user's use is identical to or too close to the registered mark, and is thus likely to confuse consumers as to the origin of the goods or services.[47] In a dilution claim,

---

[45] Trademark holders may license their marks as part of a franchise, allowing otherwise separate entities to assume the guise and goodwill of the trademark holder to provide the trademark holder's services in a given geographic area. This practice is more common with hospitals and health systems who acquire smaller physician practices and operate them as satellites of the central entity.

[46] McCarthy, § 21:1, 22:2.

[47] 15 U.S.C.A. § 1125(a).

the trademark holder claims to have a "famous" mark, which – even though there may be no likelihood of confusion – has been infringed and is statutorily protected.[48]

For example, in McDonald's Corp. v. Druck & Gerner, DDS, P.C., a dental practice was sued for marketing itself as "McDental."[49] The McDonald's Corporation claimed that there was a likelihood of confusion based on its "family of marks." The District Court for the Northern District of New York outlined the test for likelihood of confusion, and ultimately found that McDonald's did indeed have a "family of marks".[50] Because McDonald's used its brand name in so many different areas of commerce, it was at least possible that consumers might think McDonald's had expanded its line of business to include dental services. Thus, the court found that "McDental" had infringed upon McDonald's trademark.

Had McDonald's wanted to, it could have also argued dilution under 15 U.S.C.A. § 1125(c). When claiming dilution, the owner of a "famous" trademark is generally limited to injunctive relief, unless there is evidence of willful infringement. A court will, however, look to several factors in determining whether a mark is "famous." These include the inherent distinctiveness of the original mark, how long it has been used for, the duration and extent of advertising or publicity of the original mark, the geographic area where the original was used, "channels of trade" for which the goods or services of the famous mark are used, the degree of recognition of the mark in the trading areas, the nature and extent of use of the same or similar marks by third parties, and whether the famous mark is on the principal register.

Despite this strict analysis, even within the healthcare industry, dilution cases can still succeed. For example, in Kinetic Concepts, Inc. v. Bluesky Medical Group, Inc.,[51] a manufacturer of wound suction devices sued a medical group for alleged dilution of its "V.A.C." and "Vacuum Assisted Closure" trademarks. The medical group challenged the legitimacy of bringing suit for trademark dilution, and claimed that the manufacturer could not show (a) that its mark was famous, and (b) that the infringer actually diluted the mark. In addressing the medical group's motion for summary judgment, the court pointed out that a "famous mark" under a dilution analysis need only be famous within its relevant market. Because the manufacturer had provided evidence to support its claim to fame, the court refused to grant the defendant's motion on this count. With respect to actual dilution, the court stated that there was insufficient evidence to support the notion that there was any "blurring" (which can only occur between non-related goods, as in the "McDental" case), but that there was a genuine issue of fact regarding allegations of "tarnishment", due to the use of the manufacturer's mark by the medical group. Based on this, the court refused to grant summary judgment on the dilution claims.

---

[48] 15 U.S.C.A. § 1125(c).

[49] McDonald's Corp. v. Druck & Gerner, DDS, P.C., 814 F.Supp. 1127 (NDNY, 1993).

[50] The test for likelihood of confusion examines several factors. These are: the strength of the infringed mark, the degree of similarity between the original and infringing mark, the proximity of the products in the marketplace, "bridging the gap" (IE: whether the original mark holder may expand into the defendant's line of business), evidence of actual confusion, and the good faith of the defendant in adopting the mark. McDonald's, at 1133.

[51] 2005 WL 3068223 (W.D.Tx. 2005).

By using as distinctive a mark as possible, the provider should be able to avoid this problem. The provider's attorney carefully check any material that could be registered as a trademark (including sounds, colors, slogans, logos, and names) against both the federal PTO database and any state database where the provider currently operates or into which the provider will expand its business. Providers should avoid accidental or intentional capitalization on the recognition of an existing mark, as in the "McDental" and the Kinetic Concepts cases – doing so may lead to a lawsuit with the proverbial 800lb gorilla. Even if a provider is not considering registering a mark, it is safer for them to submit copies of marketing materials for legal review prior to publication or use in commerce.

11.3.2 Tort Liability From Advertising

Advertising campaigns can also give rise to tort liability. Holding oneself out as a provider of quality services may implicate standards of care or degrees of control over independent contractors. For example, in Glover v. St. Mary's Hospital of Huntington,[52] a hospital was unsuccessful in its motion for summary judgment on a claim of medical malpractice by an independent contractor working at the hospital. In successfully bringing the hospital in as a defendant, the plaintiffs provided substantial advertising evidence, including an advertising campaign involving doctors, nurses, and technicians from specific departments of the hospital, discussing a wide range of illnesses, including prevention and treatment. This campaign was run both in television commercials, and in newspapers, both of which prominently displayed the hospital's affiliation with the advertisement. The West Virginia Supreme Court of Appeals stated

> "Modern hospitals have spent billions of dollars on marketing to nurture the image that they are full-care modern health facilities. Billboards, television commercials and newspaper advertisements tell the public to look to its local hospital for every manner of care, from the critical surgery and life-support required by a major accident to the minor tissue repairs resulting from a friendly game of softball. These efforts have helped bring the hospitals vastly increased revenue, a new role in daily health care and, ironically, a heightened exposure to lawsuits."[53]

Based partially on the plaintiff's reliance on the hospital's marketing campaign, the court remanded the case for a full determination of whether the hospital had held the independent contractor physician out as its agent.

In addition, when facing a malpractice lawsuit individual physicians and physician practices may find themselves subject to a higher standard of care due to advertising. As a general matter, any physician who holds himself out as a specialist will be held to a higher standard of care than a general practitioner.[54] For example, in one case a physician who posted a

---

[52] 551 S.E.2d 31, (W.Va. 2001).

[53] Glover, at 35.

[54] 2nd Restatement of Torts § 299A.

sign outside his office reading "Internal Medicine", and used letterhead reading "Dr. Price, M.D., P.A., Internal Medicine and Cardiology," was held to the standard of an internal medicine specialist, rather than a general practitioner.[55] In another case, a defendant who advertised in the Yellow Pages as "Family Practice Obstetrics & Pediatrics" was held to a higher standard than that of a general practitioner.[56]

When even use of letterhead, an office sign, or a Yellow Pages listing can subject a physician to a higher standard of care – that of a specialist – in a medical malpractice case, clearly an aggressive "we're the best" advertising campaign could subject that same physician to the higher standard of care. When a physician practice advertises itself as "number one in the region", touts the collective experience of its doctors (e.g., "Our doctors have a combined 75 years of experience"), or advertises the fact that it was responsible for designing a specific medical device or method of practice (e.g., "We designed the first knee replacement designed specifically for a woman."[57]), that practice must be made to understand the legal significance of such claims. By contrast, a "feel-good" advertisement approach may place the practice at less risk, assuming the practice does not otherwise hold itself out as a specialty practice.

Although there is relatively little caselaw relating to imposing tort liability based on a physician's advertising, it is possible that aggressive marketing techniques and grandiose claims of superiority or quality services might lead a jury to impose higher damages in a malpractice action. For example, a practice that merely advertises itself as "The Center for Spinal Surgery" in the Yellow Pages and includes nothing more than the name of the practice and its phone number may not feel the same degree of jury wrath as a practice that has engaged in a long television and radio campaign, touting its own achievements and qualifications, using patient testimonials, and making specific claims as to the number of successful surgeries it performs in a given year. In such circumstances, the actual malpractice may be seen as more egregious. Depending on the nature of the malpractice, the practice that engaged in aggressive advertising may be seen to have deviated further from their claims of quality than a practice with a generic Yellow Pages advertisement, and thus might find itself facing higher damages.

11.3.3 False Advertising & Commercial Disparagement

False advertising and commercial disparagement are two separate doctrines which, while similar, involve two different types of claims. In a false advertising claim, the lawsuit is generally brought alleging that an entity has advertised using false information or has inaccurately characterized itself. By contrast, commercial disparagement may also involve the use of false information, but specifically relates to the disparagement of a competitor. While

---

[55] Stewart v. Price, 718 So.2d. 205, (Fla.App. 1998).

[56] Gambrell v. Ravin, 764 P.2d 362, (Colo.App. 1988).

[57] This claim has been made in radio advertisements for Booth, Bartolozzi, & Balderston Orthopedics in Philadelphia.

false advertising may also include instances of commercial disparagement, commercial disparagement itself is more specific in terms of the alleged wrongdoing.

False advertising is controlled by the Lanham Act, which states that anyone who on or in connection with goods or services, uses any word, term, name, etc. in commerce of false or misleading description of fact or representation of fact which misrepresents in commercial advertising the nature, qualities, or geographic origin of their own or someone else's goods or services is liable civilly to anyone damaged by the alleged false advertisement.[58] Note that false advertising is not mutually exclusive with common law or state law claims for defamation.

For example, in Ford v. Nylcare Health Plans of the Gulf Coast, Inc., a physician sued an HMO for claiming that its management techniques improved health care quality, and that it let consumers and physicians make their own choices with respect to treatment.[59] The physician claimed that, because the HMO used capitated payments, the statements regarding freedom of choice in treatment were false, and that he had been damaged by increased patient volume which had reduced his income. In response, the court found that the physician had failed to produce evidence of a reduction in income resulting from the HMO's policies and – more importantly – from its allegedly deceptive advertising. Because there was no causal connection between the HMO's advertising and the physician's reduced income, the court found in favor of the HMO.

In U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, both parties brought claims against each other for false advertising under the Lanham Act.[60] In the case, both parties ran competing advertisements against each other. The advertisements ranged in type from "we're the best" style advertisements to alleged misrepresentations in comparative advertising. For example, one advertisement simply stated "Better than [U.S. Healthcare]. So good, it's Blue Cross and Blue Shield." The court determined that this was "innocuous puffing." By comparison, an advertisement that stated U.S. Healthcare permitted beneficiaries to select their doctor, but provided financial incentives for the doctor to accept too many patients and refuse to refer those patients, was found to be far more damaging.

These two cases demonstrate that providers must be aware of the potential impact of their advertising, especially in the case of comparative advertising. Making exaggerated claims about one's self may be seen as "innocuous puffing", but may still be actionable. Thus, providers must be careful about claims made in advertisements regarding competitors.

In addition to federal false advertising claims, state common law may include various unfair competition and defamation or commercial disparagement laws. These may appear in

---

[58] 15 U.S.C.A. § 1125(a). Note, however, that this language has been interpreted only to apply to competitors or persons whose commercial interests have been injured, and not to consumers. Ford v. Nylcare Health Plans of the Gulf Coast, Inc., 301 F.3d 329, 338 (C.A.5 2002).

[59] Ford v. Nylcare Health Plans of the Gulf Coast, Inc., 301 F.3d 329, (C.A.5 2002).

[60] U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (C.A.3 1990).

common law, or may be codified in state statutes. For example, Pennsylvania has laws regarding unfair competition, as well as established caselaw regarding defamation.[61] In general, defamation claims require four elements: a false statement concerning another which tends to harm the other person, unprivileged publication to a third party, negligence or intentional conduct on the part of the publisher, and special harm or a statement which is actionable without special harm.[62]

For example, in Neurotron, Inc. v. Medical Service Association of Pennsylvania, Inc., a Maryland corporation brought suit against a Pennsylvania insurer for alleged commercial disparagement.[63] Specifically, the insurer had sent out a notice to its participating physicians, which stated that a specific test that Neurotron's product performed was not a covered service. Despite the fact that the product was not mentioned by name, Neurotron claimed that the implication was clear, and that the insurer must have acted based on economic reasons. Because the test was stated to have "no clinical value", Neurotron argued that it had been commercially disparaged. The Court of Appeals for the Third Circuit dismissed the case on summary judgment on the grounds that there was insufficient evidence to support the notion that the insurer's statement was known to be false or was made recklessly.

By contrast, in Sutter Health v. UNITE HERE, a California health system sued a union over a disparaging postcard.[64] In the case, the union, which provided laundry services to and was engaged in unsuccessful negotiations with the hospital, circulated a postcard making false and disparaging statements. The postcard stated that the hospital's sheets may have had feces and blood in them, and urged mothers to protect their newborns if they visited the hospital. The union attempted to have the case removed to federal court, but the court for the Eastern District of California remanded the case to state court because of lack of a federal question. Ultimately, the union lost the lawsuit in state court, and the hospital was awarded $17.3 million, not including punitive damages.[65]

Similar to the Neurotron case, in TMJ Implants, Inc. v. Aetna, Inc., a manufacturer of a device for the correction of temperomandibular joint syndrome sued an insurer for making disparaging statements about the company's product.[66] As in the Neurotron case, the insurer circulated a notice to its member physicians. However, in the instant case, rather than simply implying a connection with the company, the notice specifically stated that the company's device

---

[61] 73 P.S. § 201, *et seq.*

[62] Restatement 2nd of Torts, § 558.

[63] Neurotron, Inc. v. Medical Service Association of Pennsylvania, Inc. 254 F.3d 444 (C.A.3 2001).

[64] Sutter Health v. UNITE HERE, 2005 WL 1925910 (E.D.C.A. 2005).

[65] Rauber, Chris, "Sutter Wins $17.3M Defamation Suit", San Francisco Business Times, July 24, 2006. http://www.bizjounals.com/sanfrancisco/stories/2006/07/24/daily9.html.

[66] TMJ Implants, Inc. v. AETNA, Inc., 405 F.Supp.2d. 1242 (D.Co. 2005).

was considered "experimental." The case was ultimately dismissed in favor of the insurer, including attorney's fees for the insurer.

While only one of those cases was a success, the implication of all three is clear: providers must watch what they say in a marketing campaign. Comparative advertisements remain risky propositions; and providers must ensure that they do not make false or misleading statements about their competitors. While the truth is an ultimate defense against alleged disparagement arising from a comparative advertisement, it may be better for the provider to stick to established facts, rather than embellish or try to draw conclusions for the viewer. Instead of explaining the advertisement, it may be more effective and safer to simply say "Provider X was ranked #1 this year in cardiology, while Provider Y was only ranked #13," or to point out that one provider has been accredited by a given accrediting entity, while the other has not been similarly accredited.

As a separate issue, the use of transparency information will require attention to detail and close scrutiny of the planned advertisements. A provider may be have been "Rated the #1 provider in the tri-county area by [ranking entity]!" or "Recipient of the [Entity] Seal of Approval" However, claiming as much in public advertising may expose the provider to liability for issues such as trademark infringement or alleged violations of license agreements.

For example, in Health Grades, Inc., v. Decatur Memorial Hospital, a hospital that published its ranking status by Health Grades was sued on several counts.[67] After learning through talks with Health Grades that it had been ranked #1 in the state for orthopedic services, Decatur declined to pay the $25,000 license fee. Instead, it simply published the fact that it had been ranked #1 in the state for orthopedic services by Health Grades on its website. In addition, after being rated a "five star" program in the region, a doctor sent an e-mail with an announcement of the rating, including a link back to Health Grades' "click to proceed" user agreement on its website. In response to both instances, Health Grades brought suit alleging copyright infringement, trademark infringement, and breach of the click-to-proceed license agreement. Although initially dismissed on procedural grounds for lack of proper jurisdiction, the Court of Appeals for the Tenth Circuit reversed the dismissal and required further information. The case remains pending, as of this writing.

Although still pending, the case illustrates one of the risks of advertising using third party reports. If the provider does so without a license, it may find itself in the midst of a lawsuit which, even if it wins, may prove costly to fight. Faced with the practical reality of spending the money to win a lawsuit or spending the money on a license agreement, it will likely be less expensive to pay for the license. As a separate but related issue, providers should always adhere to the terms of license agreements or guidelines regarding use of trademarks, names, or ranking information from the reporting entity. Many such entities place specific requirements on the display of trademarks and report card results or similar statistics.

11.3.4 State Licensure Issues

[67] Health Grades, Inc. v. Decatur Memorial Hospital, 2006 WL 1704454 (C.A. 10 2006).

In addition, providers cannot ignore requirements of professional licensure regulations relating to advertising in those states in which they practice. These requirements may range from a general "corporate practice of medicine" prohibition and prohibitions on unethical or unprofessional conduct, to more specific concerns, such as requirements for how practices must be named, registration requirements, and prohibitions on certain types of advertising and commercial activities. While this chapter does not explore every possible quirk of state licensure requirements for health care practitioners, consider the following caselaw examples of how state licensure regulations have been applied.

Physicians may be required to practice under the name in which they were originally licensed. In Wen Lin v. Medical Board of California,[68] two physicians advertised their practice and practiced under legally assumed names which differed from the names under which they were licensed. Cheng-Wen Lin, M.D. and Tein Lin, M.D., for non-fraudulent reasons, legally called themselves Charles Cheng-Wen Lin, M.D. or Charles C. Lin, M.D., and Cecilia Tein Lin, M.D. or Cecilia T. Lin, M.D., and advertised their medical practice using these names. The California Medical Board brought suit, claiming that the state law[69] required that physicians use their "own" names in any advertising of the practice of medicine. Although the physicians argued that California law permitted them to change their names through non-fraudulent use, the court held that the Medical Practice Act, did not permit them to practice medicine under their legally changed names, and instead required that they use their licensed names or apply to the Board of Medicine to have their licensed names formally changed to match the names they were using. Moreover, the court held that, even though their conduct was not intentionally fraudulent, they were still liable for their actions.

The case also briefly touched on the issue of using fictitious names.[70] Under California law, physicians practicing under fictitious names are required to obtain a permit before using the fictitious name.[71] Failure to do so is also considered unprofessional conduct.[72] Such laws necessarily intersect with marketing activities. A practice that seeks to begin branding itself with a catchy name will have to make sure it is in compliance with state licensure laws in California, or with whatever laws may exist regarding advertising and fictitious names in the practice's state.

In Bureau of Professional and Occupational Affairs v. State Board of Physical Therapy,[73] the Pennsylvania Supreme Court addressed the intersection of the state's Physical Therapy Act

---

[68] Wen Lin v. Medical Board of California, 52 Cal.App.4th 39 (Ca.Ct.App.2d.Dist. 1997).

[69] California Business and Professional Code § 2272, which states "Any advertising of the practice of medicine in which the licensee fails to use his or her own name or approved fictitious name constitutes unprofessional conduct."

[70] See, Lin at 42.

[71] California Business and Professional Code § 2415.

[72] California Business and Professional Code § 2285.

[73] 728 A.2d 340, (Pa. 1999).

and the Chiropractic Practice Act. A group of chiropractors had advertised in newspapers that they provided "physical therapy" services. This ran afoul of a provision in the Physical Therapy Act, which prohibited individuals from holding themselves out to be able to practice physical therapy unless they were licensed as physical therapists.[74] In addition, it was also prohibited for any person or business to use the phrases "physical therapy," "physical therapist", "physiotherapy", or "physiotherapist" (or similar words) that would suggest physical therapy services are offered unless the services were provided by a licensed physical therapist.[75] The chiropractors countered that the Physical Therapy Act itself permitted medical practices and chiropractors to practice chiropractic.[76] In addition, they claimed that because they were licensed to perform adjunctive procedures[77], they should be permitted to advertise the fact. The court ultimately held that, while the chiropractors could advertise that they performed adjunctive procedures, they could not advertise or hold themselves out as providing physical therapy, and that although similar in nature, adjunctive therapy was not the same as physical therapy.

This case illustrates how marketing activities, especially commercial advertising, may require not only scrutiny of the specific providers' area of licensure, but also those of related professions. Although many state laws defer to the authority of physicians to practice medicine, and generally include within the practice of medicine a large portion of those services offered by other health care practitioners, there may be areas of conflict between professions. It is therefore imperative to scrutinize the practice's proposed advertisement and ensure that it does not run afoul of related professional laws or regulations.

Even identifying oneself as a doctor using the "M.D." designation in advertising may land an unlicensed physician in hot water. For example, in State Board of Healing Arts v. Thomas,[78] the Kansas Board of Healing Arts brought suit against a licensed dentist, seeking to enjoin him from attaching the M.D. designation to his name because he had not been licensed to practice medicine. Although the dentist had obtained a Doctor of Medicine degree from a Caribbean university, he had not completed any post-graduate training, nor had he completed any part of the Federation Licensing Examination or the United States Medical Licensing Examination and had not been licensed by the State Board of Healing Arts to practice medicine in Kansas. Despite this, he attached to his name both the D.D.S. and M.D. designations on applications for renewals of hospital privileges, certificates of liability insurance, history and physical evaluation records, progress notes, an informed consent form, a health insurance claim form, and on his business card and his practice group's website biography. Moreover, his website biography did not note that he was not a licensed physician.

---

[74] 63 P.S. § 1304(a).

[75] 63 P.S. § 1304(b.1).

[76] Id.

[77] Adjunctive procedures are chiropractic procedures substantially similar to physical therapy, which include many of the same modalities.

[78] 97 P.3d 512 (Kan. App. 2004).

The Kansas Appellate Court deemed first that the State Board of Healing Arts had sufficient jurisdiction to use its enforcement powers against unlicensed persons, because of its goal of protecting the public from incompetent, dishonorable, or unprofessional conduct in the practice of the healing arts. Second, in ruling on the matter of the injunction, the court found that the dentist was prohibited from holding himself out to the public as a licensed physician when he lacked the authority or skill to practice medicine, and also noted that Kansas law prohibited unlicensed practice of medicine. In this case, the court found the dentist had done both, and held that the dentist was deemed to have engaged in the healing arts merely by use of the M.D. designation.[79] Thus, the court held the injunction was appropriate.

Similarly, in Harvey v. Lupinacci,[80] the Appellate Division of the New Jersey Superior Court addressed a case in which a physician had previously held a license to practice in New Jersey, but the license had been revoked. The physician identified himself on a printed form with the phrase "From the desk of: A. Louis Lupinacci, M.D., N.D., C.N.C., Nutritional Counseling", on a sign outside his office as "A. Louis Lupinacci, M.D., N.D., C.N.C., Nutritional Counseling", and signed a letter as "A. Louis Lupinacci, M.D." all within the course of counseling a patient through "natural health" and nutrition, such as selling patients antioxidants to assist with hypothyroidism and to assist with feelings of sadness. The court affirmed the lower court's findings that the defendant had engaged in the unlicensed practice of medicine by using the M.D. designation, while holding himself out as able to diagnose (as evidenced by requesting blood results and a urine sample and declaring the patient's urine to be "good"), and able to treat the patient's mental and physical condition by providing vitamins as a remedy. In addition, the court found that the defendant had engaged in consumer fraud because he had sold the patient his own services and vitamins while creating a false impression that he was a medical doctor licensed to make the patient's condition "better".[81]

The implication of these two cases is significant: even mere self-identification as a physician when not (in the provider's mind) actually providing clinical services requiring the skill of a physician may be deemed "practicing medicine" without a license. This specific scenario would apply particularly to individuals who hold medical degrees but have not received a license from the state in which they advertise themselves as an "M.D.", or to physicians with multi-state practices who are not duly licensed in all states where they list themselves as an "M.D." and provide healthcare services.

11.4 Conclusion

[79] The dentist also raised defenses relating to the constitutionality of Kansas' prohibition on his identifying himself with the M.D. designation, and that the law violated his equal protection rights. He lost on both counts.

[80] 2005 WL 2588271 (N.J.Super.A.D. 2005).

[81] The sale violated N.J.S.A. 56:8-2, which prohibited the use of deception, fraud, false pretenses, false promises, misrepresentation, or knowingly concealing material facts with the intent that another rely on the fraud in connection with a sale of merchandise.

As the healthcare market for providers becomes more competitive, providers will turn increasingly to marketing and advertising activities to capture business. Their marketing efforts will be primarily business-minded, and may not take into account the legalities of how they market themselves. A nutritionist who holds a medical degree and advertises himself with the M.D. designation, but who does not hold a valid license in the state where he advertises may not realize he is violating the state's medical licensure laws. A group practice that decides to advertise under what they believe to be a creative name may not realize that it has infringed the trademark of another healthcare provider. Physicians who receive positive rankings from a physician report card entity may find themselves in a lawsuit with the reporting entity when they advertise the fact without the entity's permission or if they do so not in accordance with the entity's display policies. On all of these matters, healthcare attorneys will need to counsel providers on the pitfalls that await them as they enter the marketing arena.

Providers may also be awakened to new methods of advertising, and legal mechanisms for promoting themselves. For example, a physician group may be counseled on how to best protect the goodwill they have built over the years via application for a trademark. Likewise, a practice may learn how to fight off competitors who are using illegitimate means of advertising, or may learn that what they thought was improper advertising is actually permissible and thereby adopt the same advertising methods to "fight fire with fire." Whatever the end result, healthcare providers must be made aware of the legalities surrounding advertising. They must understand the boundaries for acceptable advertising practices, the risks they face when employing marketing techniques, and the legal advantages and disadvantages of their approach to promoting themselves.