

Opinion on Ethics and Professionalism

Advertising by Orthopaedic Surgeons

An AAOS Opinion on Ethics and Professionalism is an official AAOS statement dealing with an ethical issue, which offers aspirational advice on how an orthopaedic surgeon can best deal with a particular situation or circumstance. Developed through a consensus process by the AAOS Ethics Committee, an Opinion on Ethics and Professionalism is not a product of a systematic review. An AAOS Opinion on Ethics and Professionalism is adopted by a two-thirds vote of the AAOS Board of Directors present and voting.

Issue raised

What parameters exist to guide orthopaedic surgeons regarding advertising?

Legal analysis

Federal and state antitrust laws prohibit medical associations like the Academy from impeding physicians who use truthful advertising. The reason for this prohibition is to preserve and promote a free and open market by enabling physicians to disseminate information about their services to patients. Policy makers at the federal and state level believe that truthful advertising may assist patients in making better informed judgments and choices.

Although truthful advertising has substantial legal protections, physician advertising that is not truthful is not protected by federal or state antitrust laws nor is it protected from state regulation by the First Amendment. In fact, physician advertising that is false, deceptive, or misleading within the meaning of Section 5 of the Federal Trade Commission (FTC) Act is illegal. [15 U.S.C. Sect. 45]. The FTC has the authority to sue physicians who disseminate false or deceptive advertising. In addition, the FTC may enjoin them from further dissemination of misleading advertisements, and under some circumstances, may levy fines. Furthermore, physicians who violate an FTC order which prohibits the dissemination of false or deceptive advertising are subject to substantial fines.

In addition, many state consumer protection laws and medical practice acts prohibit false or deceptive physician advertising. These laws generally empower state attorneys general to sue physicians who engage in false advertising for fines or to enjoin further illegal activity. State medical licensure boards often have the authority to discipline physicians who engage in false advertising. In addition, patients who have been injured by false or misleading physician advertising may be able to sue the physician involved for damages under consumer protection statutes or common law fraud claims.

Ethical analysis

Orthopaedic surgeons, like all physicians, have an ethical obligation to present themselves and the services they provide to patients in a clear and accurate manner. This principle of ethical conduct is buttressed by its enforcement in law.

A successful physician-patient relationship is based on trust. The patient trusts that the physician has the appropriate training and skills, will listen to the patient's complaints and symptoms, and will advise the patient accurately and objectively about the alternative courses of treatment. It is essential to this relationship that the patient has confidence that the physician is honest and is not manipulating the information presented for any purpose. Because the patient is often in a relatively uninformed position, patients usually assume that the physician is telling them all they need to know and that what they are told is accurate. Consequently, patients are especially at risk for untruthful, misleading or deceptive advertising.

For this reason, false and deceptive advertising by physicians destroys the trust relationship between the physician and patient which is essential to quality medical care. A physician's misrepresentation may harm patients by making them less likely to seek out treatments they need or vulnerable to accepting treatments that are not essential.

The FTC has developed four general rules to determine whether physician advertisements are truthful and not false, deceptive or misleading. The four rules are:

1. Advertisements should be accurate and not contain explicit false claims or misrepresentations of material fact. Generally, a false claim or a misrepresentation of fact would be material if it would be likely to affect the behavior or actions of an ordinary and prudent person regarding a physician or physician service.
2. Advertisements should not contain material implied false claims or implied misrepresentations of material fact. An advertisement that does not contain direct false claims or misrepresentations should not by implication create false or unjustified expectations about the physician or physician services being publicized. An implied false claim or misrepresentation would be material if it would be likely to affect the behavior of an ordinary and prudent person towards a physician or physician service.
3. There should be no omissions of material fact from advertisements. In advertisements, disclosures of information are necessary where omission would make the advertisement as a whole misleading to an ordinary and prudent person or an average member of the audience to whom it is directed.
4. Physicians should be able to substantiate material claims and personal representations made in an advertisement.

The ultimate question of whether an advertisement is truthful can be determined by addressing whether all four of these rules of truthful advertising have been followed in the development and dissemination of the advertisement.

Specific issues

Advertising by Employers or Third Parties

With the increase in employed physicians and practice partnerships with other healthcare entities, advertising for physicians and their services is increasingly organized and paid for by entities other than the physician themselves. Industry publications describe how hospitals can leverage physicians as “brand advocates.” While marketers may see patients more as ‘customers’ or ‘consumers,’ the orthopaedic surgeon has a professional and ethical duty to care for patients that transcends transactional terminology.

Though the physician may not directly control this advertising by proxy, they still maintain an obligation to “make a reasonable effort to ensure that statements made by an academic institution, hospital or private entity on his or her behalf are not false nor misleading.” Thus, the orthopaedic surgeon should be cognizant of how their services are being advertised or ‘branded’ by their employer or affiliates and apply the considerations below to such marketing as well.

New Media and Public Content

Traditional advertising has focused on paid advertising content in print, radio, mailings, billboard, and television. Increasingly, physicians and healthcare entities are utilizing newer media (e.g. social media sites, blogs, online videos, practice websites, etc.) to advertise and brand their services and expertise. The orthopaedic surgeon should apply high standards for professional, truthful communication to all these forms of public communication and advertising, traditional or non-traditional.

Endorsements and Pictures

Endorsements and pictures are sometimes used to represent the benefits of specific orthopaedic services, such as the degree of relief, recovery, or other benefits that may be attained if the services are used. The primary concern raised by endorsements and pictures is whether they communicate benefits of orthopaedic services that are representative of the benefits ordinarily attained by the average patient. If they communicate a degree of relief or recovery that is exceptional or otherwise not representative of the average patient, they may mislead patients into having unjustified medical expectations about the orthopaedic services advertised. Images should not be materially altered or enhanced to misrepresent the magnitude of benefits or to mislead patients.

Claims: “Painless,” “Painfree,” or “Ouchless”

The degree of comfort, ease, or pain involved in the provision of an orthopaedic service is difficult to measure by objective standards. How these factors are experienced by an individual is subjective and varies from patient to patient. Therefore, claims or representations about the degree of comfort, care or lack of pain involved in an orthopaedic service and where they are provided (e.g. ER) may be difficult to substantiate and may be misleading if not used with care.

Statements that an orthopaedic procedure does not cause pain or is painless raise concerns if the services advertised are invasive. It is highly unlikely that an invasive orthopaedic procedure will not cause some degree of pain.

Claims: “Safe” or “Effective”

General representations about the safety or effectiveness of specific orthopaedic services should not be misleading. Such representations may cause a layperson to lack appreciation for the nature of any risks or adverse effects associated with the orthopaedic procedure, even if the likelihood that adverse effects may occur is low. More specific representations can also cause concerns. For example, a statement that an orthopaedic surgeon has cured or successfully treated a large number of cases involving a particular serious ailment is deceptive if it implies a certainty of result and creates unjustified and misleading expectations in prospective patients.

Representations about the safety or effectiveness of orthopaedic services should be substantiated with sound scientific support, such as peer reviewed publications in medical literature or other authoritative sources of scientific information. Such claims should not contradict or be inconsistent with conclusions reached by authoritative federal agencies, such as the National Institutes of Health, the Centers for Medicare and Medicaid Services, the Food and Drug Administration or others, unless such a contradiction or inconsistency can be substantiated with sound scientific evidence.

Simply using a phrase such as “safe” is likely to deceive prospective patients by implying an absolute or binary (“safe” versus “unsafe”) standard, when in fact the “safety” of an orthopaedic procedure is necessarily a qualified concept. The failure to qualify the claim is particularly objectionable since a variety of phrases could easily be employed to communicate the safety/risk relationship (e.g. “relatively safe,” “safe for most patients,” or “among the safer types of orthopaedic surgery”).

Claims: “Cure”

Use of the term “cure” with reference to a problem is often deceptive. To “cure” a condition means to alter the circumstances so that the condition no longer exists and will not recur. In order not to be misleading, the term “cure” should almost always be further explained and qualified to give the patient an accurate understanding of his/her prospects for improvement.

Claims: Physician Qualifications

Orthopaedic surgeon qualifications include education, training, and other indicators of status or achievement within the profession. The lay public does not have a good understanding about what various qualifications represent. Most patients will assume that physician qualifications in an advertisement indicate training, knowledge, expertise, and competence with respect to the services being advertised. That assumption is likely because patients will conclude that qualifications are listed in an advertisement to substantiate the orthopaedic surgeon’s ability to perform the services being advertised. It is possible for patients to be misled if the qualifications listed imply a level of education or training which the orthopaedic surgeon did not receive; if they imply a degree of scrutiny of the orthopaedic surgeon’s knowledge, training and competence that did not in fact occur; if they imply a qualification which the orthopaedic surgeon does not have; if the qualifications are inaccurately listed; or if the qualifications do not indicate education, training, knowledge, expertise, or competence with respect to the services being advertised. For example, a brief, observership with a prominent surgeon should not be misrepresented as the equivalent to operative training received via a formal fellowship.

Claims: “World Famous,” “Top Surgeon,” “Pioneer”

Only a small fraction of all orthopaedic surgeons can justifiably claim to be “world-famous.” These may include some orthopaedic surgeons who are editors of major journals, who have authored widely used texts, or who have made major, original contributions to medical techniques. However, it is the very elusiveness of measures of “fame” which makes invoking them in trying to lure patients misleading. Merely traveling extensively, presenting addresses at professional meetings or treating patients from abroad does not mean that an orthopaedic surgeon is “world-famous.” To so indicate is to use the inherent imprecision of the concept of fame to mislead patients. There can be little question that such claims are employed in order to give patients the impression that the orthopaedic surgeon meets some objective, high level of competence, skill or recognition - which probably does not exist with respect to the advertiser. Use of superlative language in advertising (e.g. “Top orthopaedic surgeon,” “Exceptional,” “Top doctor,” “Best doctor”) raises the same issue and is on the rise as competition intensifies among some healthcare institutions and providers. If such claims are made, they should be properly substantiated or qualified.

Saying that one has “pioneered advances in orthopaedic surgery” is also deceptive. Such a phrase connotes a major breakthrough, not a minor alteration or refinement of conventional procedures. Simply being one of many “investigators” for a type of orthopaedic prosthesis, using one piece of equipment, or using a slightly refined surgical procedure does not justify use of the term “pioneer.” Since all orthopaedic surgery requires some degree of innovation, an orthopaedic surgeon cannot meaningfully claim to be an originator or developer of a technique or product simply because he or she has modified what existed before in some minor way.

Claims: Fees and Costs

Orthopaedic surgeons may advertise truthful information about fees and costs. However, statements about fee information can be misleading if they do not fairly inform the public about the costs likely to be incurred when patronizing the advertised physician. For example, the description of any service for which a fee or a range of fees is advertised must not be deceptive or misleading, and the statement should also indicate whether there may be additional fees for related services that are commonly required when the advertised service is obtained.

Claims: “Minimally Invasive”

Since patients are obviously interested in having surgical procedures that do as little harm as possible to their bodies, there has been great public interest in “minimally invasive” surgical approaches. Unfortunately, the term is often abused, misunderstood and misapplied, and physicians have inappropriately used the term in advertisement and marketing programs as well.

Patients may mistakenly assume that “minimally invasive” equates with minimal tissue damage, faster recovery, lower risk, and better clinical results. In some clinical studies those facts do not bear out, and numerous reports elucidate the complications of so-called minimally invasive procedures. Thus, the concept that minimally invasive procedures are safer, less damaging, demonstrate clinically superior results or are better for the patient must not be inferred, stated or implied in physician advertising.

Claims: “Bloodless”

There is no such thing as bloodless surgery. Statements that surgical procedures are “bloodless” convey a false impression to the patient. Qualifying terms such as “relatively little blood lost” or “little blood lost in most patients” are preferable.

It is rare, even in arthroscopy, that a surgical procedure will result in no loss of blood. There may be relatively little blood lost at the time of the procedure but almost all surgical cases will result in some blood loss either at the time of surgery or during the post-operative period.

Some institutions have established “bloodless surgery centers” developed for patients with religious objection to transfusions. Physicians at these centers should make every effort to explain that the term “bloodless center” does not imply that no blood is lost but rather that a transfusion may not be required.

References:

AAOS Standards of Professionalism on Advertising by Orthopaedic Surgeons, adopted April 18, 2007. The entire document is relevant.

Applicable provision of the *Principles of Medical Ethics and Professionalism in Orthopaedic Surgery*

“IX. The orthopaedic surgeon should not publicize himself or herself through any medium or form of public communication in an untruthful, misleading, or deceptive manner.”

Applicable provisions of the *Code of Medical Ethics and Professionalism for Orthopaedic Surgeons*

“I. F. When obtaining informed consent for treatment, the orthopaedic surgeon is obligated to present to the patient or to the person responsible for the patient, in understandable terms, pertinent medical facts and recommendations consistent with good medical practice. Such information should include alternative modes of treatment, the objectives, risks and possible complications of such treatment, and the complications and consequences of no treatment.”

“II. A. The orthopaedic surgeon should maintain a reputation for truth and honesty. In all professional conduct, the orthopaedic surgeon is expected to provide competent and compassionate patient care, exercise appropriate respect for other health care professionals, and maintain the patient's best interests as paramount.”

“VI. A. The orthopaedic surgeon should not publicize himself or herself through any medium or form of public communication in an untruthful, misleading, or deceptive manner. Competition between and among surgeons and other health care practitioners is ethical and acceptable.”

Other references

American Medical Association Council on Ethical and Judicial Affairs: *Code of Medical Ethics*. Chicago, IL, 2014-1015 edition.

Opinion 5.01 ("Advertising and Managed Care Organizations") [Issued prior to April 1977. Updated June 1996.]

Opinion 5.02 ("Advertising and Publicity") [Issued prior to April 1977. Updated June 1996.]

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