Surgical infomercials: The ethical price of stardom

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This operative video, cloaked in the guise of a medical documentary, is in reality an infomercial; it is advertising. Medical infomercials are advertisements planned to appear as something they are not—legitimate, objective medical knowledge. Further, this is direct-to-consumer advertising. The AMA addresses direct-to-consumer advertising done by the pharmaceutical companies with acknowledgement of the dangers it poses.1

Advertising is defined as a “call for public attention by arousing a desire to buy or to patronize.”2 Thus understood and used, the practice involves a self-consciously self-serving effort to gain market share and thus increase revenues by arranging the style, content, and presentation of information offered to consumers. The facts presented do not have to be wrong for advertising to be of ethical concern. This video is patently biased in that it presents selected information patients will use to choose who will do their surgery and where to have surgery. Illusory medical advertising, personal as well as institutional, by its very nature reduces medical care to a commercial commodity,3 and, worse, transforms physicians to peddlers in the marketplace. Medical professionalism suffers more greatly as the transformation progresses in ever-more sophisticated forms of electronic communication.

Although not entirely flawless, patients benefit from the time-honored referral process. Having the initial medical evaluation and the discussion about decision for therapy performed by a physician who will not benefit economically from providing the therapy adds a layer of objectivity. Referral means that at least two physicians have input before an operation is recommended, an automatic, if unequal, preceding second opinion. Also, the need to refer provides, over time, a screening mechanism for quality. Referring physicians have their reputations tarnished by recommending poor-quality consultants.

Commercial advertising, until recently shunned by reputable members of the medical profession as beneath their dignity, should be seen for what it really is: an end-run around these venerable methods of establishing legitimacy and attracting referrals. Advertising is a creature of the marketplace that is governed not by the professional, fiduciary obligation to protect patients, but by the adage caveat emptor: patients are transformed into customers who are on their own. Notwithstanding, the indefinite adjectives upon which advertising thrives, words like “best,” “leading,” “most,” and “outstanding,” defy quantification and even definition. The more such adjectives appear, the more deceptive the advertising.
The AMA Council on Judicial and Ethical Affairs changed its position under duress and now acknowledges doctors’ rights to advertise. It did not willingly do so, but a Federal Trade Commission’s ruling, upheld by the United States Supreme Court, forced the Association to renounce its ban on medical advertising in 1981.4 The lawsuit began in 1975, the AMA changed its policy in 1981, and the lawsuit was settled in 1985. The AMA continues to insist, however, that “the key issue is whether advertising or publicity, regardless of format or context, is true and not materially misleading.”56

Their prohibition turns on the word materially; one of the great unanswerable questions: exactly how much is too much? The infomercial under consideration mildly encroaches on standards for advertising set down in the 1996 AMA Code of Ethics statement (section 5.02):

Because physicians have an ethical obligation to share medical advances, it is unlikely that a physician will have a truly exclusive or unique skill or remedy. Claims that imply such a skill or remedy therefore can be deceptive . . . Similarly, a statement that a physician 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.4

The American College of Surgeons also avoids prohibitions, probably as protection from legalities:

An advertisement may include information about specialty training, board certification, type of practice, office hours, languages spoken, and other such information that might assist the patient in contacting the surgeon. Advertising must be truthful, both in terms of what is said and in what is not said.6

The careful language of the AMA and the College suggests that advertising can be introduced into the professional practice of medicine with no major ethical concerns; however, advertising in medicine is one area in which law and ethics should not be equated. This is because advertising and medicine are an inherently bad fit, ethically. The primary goal of advertising is the advancement of individual self-interest with limited or no consideration of consequences inflicted upon either competitors or clientele. The ethos of caveat emptor, of the marketplace, is at perfect odds with the fiduciary responsibility, which distinguishes the medical profession from virtually every other form of human endeavor in which money is exchanged for service.4 Pellegrino has compared physician advertising to “Faustian moral compacts with business,”7 and encouraged physicians to avoid participation.

The Medical Practioners Board of Victoria (Australia) conducted a wide-ranging survey on medical advertising of surgical procedures with mixed responses.8 Opinions of potential patients, medical institutions, and surgical organizations were included. The patients generally viewed the public as vulnerable and needing protection but they themselves needed access to the information. There was a belief that medical practitioners were not, and should not be, any different from lawyers and other professionals who promote their services, but the information must be correct. The Australian College of Surgeons agreed that guidelines for surgeon advertising were necessary, whereas the Cosmetic Physicians Society of Australia disagreed and stated that the assertion of harm from advertising surgical services was unproven.

As the video is described, option A is not acceptable ethically, because the video is misleading. It invites the belief that the surgeons who star in it are the best choice for therapy, that their institution is the most advanced, that referral is unnecessary, and that viewers can be assured of an equivalent excellent outcome.

State medical boards have the support of laws broadly prohibiting false or misleading physician advertising, but the actual rules are concrete and do not insure rational enforcement. Violations from the Texas Medical Board include when “board-certified” is used without designating the specialty of if the certification has expired, offers of free service that require third party payments, and door-to-door solicitations. Option B, thus, is lame and falls prey to differences in focus between ethics with law, as does option D. There are few legal safeguards for truth in advertising in general, only what cannot be advertised.

Many of the county medical societies publish newsletters which are funded by physician’s ads. Ads would need to be overtly unprofessional to have them step into a fray. Option E is also lame.

While it is true that prohibiting medical advertising is prohibited by federal law, acceptable medical promotion should be defined by the profession to ensure that advertising comes under the ethical concept of fiduciary responsibility. Advertising should be seen as the initiation of the informed consent process and should be balanced. The remaining and most correct answer is option C: professional organizations should regulate their members who cross the line to self-promotion, which appears to be inevitable when physicians confuse professional responsibility with the allure of “stardom.” Many of the subspecialty organizations, such as the Society for Vascular Surgery, the American Association for Thoracic Surgery, and the Society for Thoracic Surgeons, have rules against unethical advertising and some have disciplined their scofflaws. Professional organizations should make it clear that the ethics of advertising should be held to the demanding ethical standards of the informed consent process, not to the legal standards of anti-trust laws which protects businesses, not patients.

REFERENCES