Marketing on the Internet: Warranty Liability

So, you have established a website with slick graphics, descriptive text, and color photographs. You are getting hits from all over the county; one out-of-state hit turns into an actual patient at your surgicenter. Even though you maintained the highest standard of care throughout the procedure, the patient is unhappy with the result. You get served with an out-of-state lawsuit, not for medical negligence, but for breach of warranty. How could this happen?

The global nature of the Internet is partly to blame. To be sued out-of-state, courts require that the out-of-state party have “sufficient minimum contacts” so that exercising jurisdiction “does not offend traditional notions of fair play and substantial justice.” All states have such so-called “long-arm statutes.” A California court recently ruled that “[t]here is no reason why the requisite minimum contacts cannot be electronic.”1 However, jurisdiction is not automatic. Whether the contacts are “sufficient” will vary from case to case and will depend on whether the website is “active” (encouraging browsers to sign on for services, post messages, or order products) or “passive” (noninteractive). The mere existence of a passive website represents insufficient “minimum contacts” without purposely availing oneself of the privilege of conducting business out-of-state.2

The other potential liability is the extent of promise that your website makes. Medical malpractice usually takes place in the operating room. However, misleading advertising suits may be filed where the advertising was received; thus the specter of claims for breach of warranty arises. Most states have adopted the Uniform Commercial Code, which specifies liability for express and implied warranties. Most states do not recognize any implied warranties for surgical results.3 However, express warranties are recognized.4-11

Although a physician may exclude all warranties by using a disclaimer, it is poor practice to tantalize patients with favorable results in one portion of your website, yet disclaim them elsewhere. It is better practice to make no promises whatsoever.12

As an added level of security, have a disclaimer in a conspicuous location and and use a notable typeface (see www.phudson.com [Dr. Patrick Hudson], for example), or keep the text informational (see www.cosx.com [Cosmetic Surgery Center]), or do both (see www.surgery.com [The Body Electric] or www.acss.com [America’s Cosmetic Surgery Specialists]). Additionally, place a clause in the surgical contract that selects your locale as the forum in which any claims must be brought, as well as the source of the law to be applied to your case. That way, any suit that does arise, regardless of the legal theory used, won’t force you to travel out-of-state to defend yourself.

Because managed care and tort reform have dramatically limited recoveries against physicians, plaintiffs and their attorneys are thinking more creatively. Internet advertising is rapidly becoming common practice, so don’t make any promises on your website, include a disclaimer, and add “local forum” selection and “choice of law” clauses. Finally, check with your malpractice carrier and ask whether it has developed any website risk management advertising guidelines. Keep one step ahead. It’s great to get browser hits, but taking a legal hit is another matter altogether.

References

5. Crawford v Duncan, 31 Cal App 647 (1923) (physician orally promised no scar would be left by a radium treatment on her back).

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Assign the Most Senior Individual to Accompany the Inspector on the Inspection Tour

Do not leave the inspector alone to chat with the staff, offer any comments, or bring up any other issues. Be completely honest at all times. At my facility we offer our patients a variety of skin care procedures that are provided by a licensed cosmetologist whose work area is licensed by the California Board of Barbering and Cosmetology. Recently, an inspector from this board paid us an unexpected visit. He asked a series of questions, inspected the cosmetologist’s work area, and 10 minutes later was on his way to the next facility.

I have found that these four responses ease the difficulties encountered during announced and unannounced site visits. Invariably, I experience a temporary increase in blood pressure, which precipitates a flurry of new policies and procedures and, ultimately, enhanced patient care.

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6. Bailey v Harmon, 222 P2d 393 (1924 CO) (plastic surgeon promised to make his patient “a model of harmonious perfection”).

7. Camoso v Claiborn, 196 A2d 129 (1963 CT) (rhinoplasty; plastic surgeon promised only "hairline scars of a minor nature").

8. Sullivan v O'Connor, 296 NE2d 183 (1973 MA) (rhinoplasty; plastic surgeon promised to "enhance her beauty and improve her appearance").


10. Paciocco v Acker, 467 NYS2d 548 (1983 NY) (blepharoplasty; plastic surgeon promised that "the incisions would not go beyond the corner of her eyes and that the resultant scars, if any, would fall within the natural crease of the skin").

11. Frank v Malinaq, 249 NYS 514 (1931 NY) (rhinoplasty; plastic surgeon expressly agreed no external scarring would result).

12. Perin v Hayne, 210 NW2d 809 (1973 IA) (vocal chord paralysis following anterior approach cervical fusion surgery; neurosurgeon's "assurances were qualified and expressed only in terms of experience of most other patients").

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