Does your concierge medicine advertising create legal jeopardy and liability?

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Advertising and marketing are two areas that concierge medicine practices frequently neglect when assessing liability risk. But legal jeopardy can arise from advertising and marketing claims on your website or in your brochures, patient handouts, and other marketing materials–whether you have an **integrative medicine clinic**, **functional medicine practice**, **anti-aging medicine group**, **concierge** or **retail medicine practice**, or even a **conventional medical or surgical practice**.

The large medical malpractice verdict against **MDVIP** is a case in point.

The Malpractice Verdict Against MDVIP

That **MDVIP**, one of the nation's leading concierge medical management companies, could be held liable for the negligence of one of its physician clients, came as shocking news.

MDVIP has experienced skyrocketing success in promoting concierge medicine in the U.S. MDVIP has focused on preventative medicine and wellness, and profited by providing quick access to physicians and "exceptional care," in exchange for an annual membership fee.

For this promise, MDVIP got socked with an $8.5 million malpractice liability verdict in Florida. The verdict resulted from the negligence of a physician contracted with MDVIP, who had been sued for misdiagnosing a patient, resulting in amputation of the patient's leg.

To be sure, MDVIP did not actually provide the care nor did it supervise the physician's care. So why should MDVIP be held liable?

Potential MSO Liability for Managing and Marketing Patient Care

In one sense, MDVIP is acting like any **medical services organization** (**MSO**) in managing and marketing patient care–albeit in the specialized arena of concierge medicine.

An MSO (or any organization that manages and markets physician or other clinical services) can face several legal risks, particularly in states that have a strong **corporate practice of medicine** law, and in all states due to **fee-splitting and anti-kickback** concerns. See, for example:

- Corporate Practice of Medicine & Anti-Kickback / Fee-Splitting Rules: Deep Down the Regulatory Rabbit Hole

- Fee-Splitting 101 for Medical Doctors, Chiropractors, Acupuncturists, and Others
- Is it Fee-Splitting for Medical Doctors to Share Revenues with Non-Medical Business Owners
- Are You Handling Licensing, Corporate Practice of Medicine, Fee-Splitting, Standard of Care, Informed Consent, HIPAA (privacy & security), Scope of Practice, Liability, Advertising, Contract, & FDA Issues in Your Telemedicine Venture

Let's be clear that liability for negligence can come in two basic forms: direct and vicarious.

Direct Liability vs. Vicarious Liability for Medical Negligence

For example, when a physician is negligent by misdiagnosing the patient (as happened in the MDVIP case), the physician is **directly liable** for his or her conduct. This is direct liability.

A person can be directly liable in several ways, including:

- a negligent act or omission
- negligent failure to supervise, if the person has legal authority of supervision (for example, MD over RN)
- other, related negligent failures — for example, negligent credentialing if the person has undertaken legal responsibility to vet the provider (for example, hospital's failure to vet physician when giving hospital privileges)

A person can also be **vicariously liable** for someone else's conduct. Vicarious liability can arise in various ways; perhaps the most surprising is that there is an "apparent agency" (in other words, A is negligent but B is held liable because the arrangement makes it *appear* as though A was B's agent).

In one sense, we can look at the MDVIP verdict as a version of **vicarious liability**, in which liability is transferred up the chain to another party who was not "directly" negligent (by act or omission). Because MDVIP did nothing, as far as we can tell, that resulted in the leg amputation. All MDVIP did was contract with the physician. MDVIP had nothing to do with the clinical care itself–nor could it, as MDVIP is not a professional medical corporation.

Whether or not MDVIP is involved, vicarious liability is a concern in any medical practice–conventional, functional, anti-aging, integrative, concierge, or otherwise; and broadly speaking, vicarious liability can affect other healthcare professionals as well as those managing and marketing the practice.

Of course, management companies are not often the targets of medical malpractice lawsuits; nor, for example, is a physician typically liable for referring to a chiropractor (or the reverse). But here are some of the ways vicarious liability can arise:

- all providers could be held vicariously liable for negligence of their colleagues–particularly if they share clinical approaches and consult among one another within an integrative clinical care setting
- those who are organizing, arranging, or marketing the services could be seen as vicariously liable for the negligence of the clinicians, because they could be seen as **agents** for the practitioners
- the organizers, arrangers, marketers, could be seen to be making implied promises about the **quality of care** or **level of competence of the practitioners** (this is a variation on negligent credentialing)

The bottom line is that MDVIP was held responsible for promising "exceptional care," and a misdiagnosis that results in leg amputation is obviously *not* "exceptional care."

New Awareness of Potential Liability Risks When Promoting Concierge Medicine

Awareness of potential liability risks can lead to better risk management–and hopefully, lower risk (and improved patient care as a downstream result).

In Concierge Medicine Firm Found Liable for Doctor's Negligence, Kaiser Health News reports:

Industry experts say the ruling is significant because it shows concierge companies can be held liable for the care provided by their contracted doctors. The companies typically argue they do not actually provide care but merely act as brokers between doctors and patients….

[O]ne of the plaintiff's attorneys, said the verdict will push MDVIP and similar companies to scrutinize doctors more carefully before they affiliate with them because they may be liable for the doctors' actions.

Such companies will also be more cautious about advertising that they offer better care.

Unfortunately for such companies, by taking more care to vet physicians, they will run into the risk of liability for negligent credentialing, if their vetting efforts fail to prevent a doctor's negligence.

While MDVIP lookalike companies will be more cautious in vetting clinicians as well as in their marketing, negligent credentialing and other liability theories are not the only source of risk. Plaintiffs' lawyers no doubt now will look to many different legal theories to get the MDVIPs and MSOs of the world on the hook, including:

- direct liability / negligent credentialing
- vicarious liability / apparent agency
- federal advertising law (FTC prohibition on false, misleading, and deceptive advertising)
- consumer protection laws, including state advertising law and statutes such as, in California, Business & Professions Code Section 17200 (prohibiting unfair competition)

Risk Management for Concierge Medical Practices

Concierge medicine practices will still have to monitor other legal and liability issues, such as being careful not to violate federal law if the physician remains **Medicare par** or **non-par** (but not opted out). See, for example:

- How Medicare.gov helps with legal review of concierge medicine services
- Concierge v. Direct Primary Care: Legal Issues
- Packaging Medical Services – Is it a Legal Concierge Arrangement, or An Illegal Kickback?
- Concierge Medicine (Legal Issues)

These legal and regulatory issues ***can*** be tackled, but this requires an overall vision of the various potential rocks in shallow waters–the different sources of liability that should be reckoned with and, ideally, mitigated.

Conclusion

Some say medicine is dead; but the reality is that it is morphing into different forms.

Today, "concierge" practice, retail medicine, boutique medicine, hybrid models, direct primary care, cash-only practices, VIP care, executive physicals, personalized medicine; tomorrow, mobile medical apps, wellness care through your integrative care clinical team or via your latest wearable health tech tracking technology; after that, nanotechnology and your personal wearable or cloud robot.

The forms of delivery of wellness and health care keep changing–as do the business models and legal strategies for delivering these new forms of care. We still have these relatively archaic pillars of jurisprudence that have been handed down from time

immemorial (unless anyone remembers Hammurabi). Companies and counsel who represent them, must stay adept and deploy risk management strategies as the market keeps changing.