

# Physician Advertising of Medical Services: Avoiding 5 Legal Traps

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When medical doctors advertise their professional medical services (including online advertising) they can easily run afoul of legal and regulatory traps.

Watch out for these **7 legal traps in physician advertising**, and understand possible ways to navigate important legal restrictions.

## 1. Physician Advertising must be Truthful & Non-Misleading

The key here is that anything a medical doctor posts in print or online that could be considered “advertising” must be “truthful” and “non-misleading.” No deception, period.

The First Amendment protects commercial speech. However, states can regulate deceptive advertising.

## 2. Watch out for advertising that the law specifically considers “deceptive.”

While every state has its own laws, in California the relevant statute is Business & Professions Code, Section 651. Section 651 prohibits not only physicians, but any person licensed under Division 2 (for example, also **acupuncturists, dentists, nurses, chiropractors, psychologists, social workers**, and others) from:

false, fraudulent, misleading, or deceptive statement, claim, or image for the purpose of or likely to induce, directly or indirectly, the rendering of professional services or furnishing of products in connection with the professional practice or business for which he or she is licensed.

false, fraudulent, misleading or deceptive advertising. Under 651(j), the California Attorney General can commence legal proceedings to enjoin physician advertisements that violate the law.

Section 651(b) contains a long list of **statements, claims, or images** that could be considered false, fraudulent, misleading, or deceptive, such as one that:

- (1) Contains a **misrepresentation of fact**.
- (2) Is likely to mislead or deceive because of a **failure to disclose material facts**.
- (3) (A) **Is intended or is likely to create false or unjustified expectations of favorable results**, including the use of any photograph or other image that does not accurately depict the results of the procedure being advertised or that has been altered in any manner from the image of the actual subject depicted in the photograph or image.

- (B) Use of any photograph or other image of a model without clearly stating in a prominent location in easily readable type the fact that the photograph or image is of a model...
- (C) Use of any photograph or other image of an actual patient that depicts or purports to depict the results of any procedure, or presents before and after views of a patient, without specifying in a prominent location in easily readable type size what procedures were performed on that patient is a violation of subdivision (a). Any before and after views (i) shall be comparable in presentation so that the results are not distorted by favorable poses, lighting, or other features of presentation, and (ii) shall contain a statement that the same before and after results may not occur for all patients.
- (4) **Relates to fees**, other than a standard consultation fee or a range of fees for specific types of services, **without fully and specifically disclosing all variables** and other material factors.
- (5) Contains **other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived**.
- (6) Makes a claim either of **professional superiority** or of performing services in a superior manner, unless that claim is relevant to the service being performed and can be substantiated with objective scientific evidence.
- (7) Makes a **scientific claim that cannot be substantiated by reliable, peer reviewed, published scientific studies**.
- (8) Includes any **statement, endorsement, or testimonial that is likely to mislead or deceive because of a failure to disclose material facts**.

Section 651 also contains rules about:

- advertising prices
- disclosing compensation given for publicity
- using letterhead

Violation can be a misdemeanor.

Section 651 goes on to list the items that **can** legitimated be advertised, such as the name of the school where physician graduated.

The California Code of Regulations (16 CCR 1363) supplements the above prohibitions by stating that physician advertising must not promote excessive or unnecessary medical services.

### **3. Get a Fictitious Name Permit if practicing under a name different than the physician's own name.**

In California, Business & Professions Code Section 2272 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.

See our earlier post, The Strange World of the California Medical Board Fictitious Name Permit.

There are some exceptions, such as medical doctors in a group practice where the professional medical corporation has a fictitious name permit.

In some states, there might be a simple DBA or other regulatory requirement by the local medical board.

### **4. Follow the rules for "board certification" claims.**

States can have different rules. This can have particular implications for physicians practicing integrative medicine, functional medicine, or anti-aging medicine.

In California, Business & Professions Code §651(h)(5) limits advertising statements as to board certification or eligibility.

Physicians may include statements that they are certified or eligible for certification by a private or public board or parent association (including multidisciplinary boards or associations) only if that board or association is among those listed or with credentials in the statute.

There are additional rules in the California Code of Regulations (governing advertising a non-ABMS specialty board certification if approved by the Medical Board of California).

The Medical Board of California advises consumers in, [Can I find out if my doctor is board certified:](#)

Physicians can identify their practice specialty on their Medical Board profile and that information is available through the Breeze Online License Lookup. You can also obtain this information by contacting the physician's office directly, reviewing the physician's and/or medical group's website, or by contacting the local medical society if the physician is a member. Most physicians have a practice specialty, which is the area of medicine they have received additional training in, but not all physicians have medical specialty certification. Medical specialty certification is a voluntary process granted by a member board of the American Board of Medical Specialties (ABMS), a private organization, or other equivalent board. Board certification is not required by the Medical Board for a physician to practice.

Please use the links below to access the ABMS website and other boards recognized by the Medical Board of California and learn more about board certification and whether your doctor is board certified.

American Board of Medical Specialties  
American Board of Facial Plastic and Reconstructive Surgery  
American Board of Pain Medicine  
American Board of Sleep Medicine  
American Board of Spine Surgery

On the same page, the medical board addresses advertising about "specialization."

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## **5. Watch out for violations involving physician "discounts"**

"Discounts" on medical services are often considered kickbacks and can violate not only federal law but also state law (such as in California, Business & Professions Code Section 650).

Section 650(a) states:

the offer, delivery, receipt, or acceptance by any person licensed under this division or the Chiropractic Initiative Act of any rebate, refund, commission, preference, patronage dividend, **discount**, or other consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership, proprietary interest, or coownership in or with any person to whom these patients, clients, or customers are referred is unlawful.

States vary on whether discounts can be given for cash payment by the insured patient.

In California, Business & Professions Code 657 states:

Notwithstanding any provision in any health care service plan contract or insurance contract to the contrary, health care providers are hereby expressly authorized to grant discounts for health or medical care provided to any patient the health care provider has reasonable cause to believe is not eligible for, or is not entitled to, insurance reimbursement, coverage under the Medi-Cal program, or coverage by a health care service plan for the health or medical care provided. Any discounted fee granted pursuant to this section shall not be deemed to be the health care provider's usual, customary, or reasonable fee for any other purposes, including, but not limited to, any health care service plan contract or insurance contract.

Back to Section 651, for a moment: it says that price advertising may not include "statements or advertisements of bait, **discount**, premiums, gifts, or any statements of a similar nature."

### **MSO Arrangements**

Because of these varied rules governing physician advertising, in our **management services organization (MSO) agreements**, we typically insert a provision that any physician advertising done by the MSO must be in conformity with state law.

This is to set the boundaries straight right in the MSO agreement, and also provide protective language to create an arguable defense for the physician with respect to compliance around advertising law.