Introducing Trust Rewards

TMLT is introducing a new financial reward program for policyholders — TMLT Trust Rewards Program. Under the program, TMLT will establish and fund a Trust Rewards account for each enrolled physician. The funds from the account will be paid to the physician upon a qualifying event — retirement, disability, or death.

Policyholders must enroll in Trust Rewards to create their account. An enrollment form is available on page 4. Policyholders can also complete an enrollment form at www.tmlt.org/trustrewards.

Eligibility

The Trust Rewards Program is designed to reward policyholders who have demonstrated loyalty to the Trust and a commitment to practicing quality medicine.

All full-time and part-time physician policyholders who are insured on December 31 of the previous year and who enroll in the program are eligible. New policyholders who sign up when their coverage goes into effect are also eligible. Physicians who are not eligible are those insured on a scheduled physician policy, physicians rated on a “per patient” or “per encounter” basis, and entities.

Funding

The TMLT Board of Trustees will determine funding for Trust Rewards annually, based on the financial performance of the Trust. If an amount is allocated, a policyholder’s share will be based on that policyholder’s earned premium for the past 3 calendar years as it compares to the overall earned premium for all policyholders.
**Pay-out and forfeitures**

Participating physicians are eligible for pay-out upon their retirement on or after age 50 and 3 years of coverage with TMLT; upon death; or upon a qualifying disability. In all other cases — including non-renewal of coverage by TMLT — the funds will be forfeited. Requests for pay-out must be in writing. Pay-out will be in the form of a lump sum. Periodic payments or annuities are not permitted. All contributions are tax-deferred until distributed. All taxes are the responsibility of the recipient and will not be withheld by TMLT at the time of the distribution.

**Ownership**

The TMLT Trust Rewards Program is a benefit established for individual insured TMLT physicians and is maintained in the physician’s name. If a physician changes groups or starts a solo practice, there is no impact on the program, as long as the physician maintains medical professional liability coverage with TMLT. Some physicians may prefer that the proceeds from the Trust Rewards Program be paid to a practice group or entity instead of to the individual physician. This is permitted if the physician assigns the balance of the account to the group. However, the group would only receive the funds if the physician retires, passes away, or becomes disabled while employed by or associated with the group.

**Additional information**

The terms and conditions of the TMLT Trust Rewards Program are governed by the Plan Document adopted by the Board of Trustees of Texas Medical Liability Trust. If any information, comments or statements in this article, or in any other document or communication — including press releases, letters and electronic information conflicts with the Plan Document — the Plan Document shall supersede such information, comments, or statements.

Any funds made available for the benefit of the Trust Rewards Accounts shall be unrestricted surplus of TMLT until and unless distributed to the participant and, as such, remain available to TMLT for the satisfaction of policyholder obligations and general creditors. No participant shall have any individual claim to any funds made available for the benefit of the Trust Rewards Accounts until and unless such funds are distributed to the participant.

For more information on Trust Rewards, please visit www.tmlt.org/trustrewards or contact TMLT Customer Service at 800-580-8658 ext. 5050.

**TMLT to acquire Florida-based Physicians Insurance Company**

TMLT is proud to announce that, effective December 27, 2011, it has entered into definitive agreements to acquire Physicians Insurance Company (PIC), a Florida-based medical malpractice insurance company. TMLT also entered into agreements to purchase several related entities, including Managed Insurance...
These affiliated companies own and/or control various insurance-related businesses and e-commerce platforms including OnLine-PL and E-Professional Insurance.

“PIC has an entrepreneurial spirit and we will be proud to bring them into the TMLT family,” says TMLT President and Chief Executive Officer Charles R. Ott, Jr. “Our acquisition of PIC will diversify our product base, enable us to expand to new markets, and bring a more technology-based approach to the way we do business.”

While the parties executed a formal purchase agreement effective December 27, 2011, it is anticipated that the PIC acquisition will officially close in early 2012, pending requisite approvals from applicable state insurance regulatory bodies. TMLT closed the purchase of the holding company, which owns MIS, NIQA, ISD and Innovations, effective as of the end of 2011.

PIC is a leading technology and insurance service firm based in Deerfield Beach, Florida. PIC has provided medical professional liability insurance to Florida physicians since 2003. In addition to its core physician business, PIC, through its subsidiaries, provides diversified insurance products and services to the medical and non-medical professional liability marketplace in all 50 states.

**TMLT adds cyber liability coverage to all policies**

Physicians and medical groups are increasingly at risk for privacy-related claims that occur as a result of lost laptops, theft of hardware or data, improper disposal of medical records, hacking or virus attacks, and rogue employees. Our new cyber liability coverage offers protection for network security and privacy-related exposures faced by medical professionals, including:

- Network security and privacy insurance — coverage for both electronic and physical information, virus attacks, hackers, identity theft, and defense costs for regulatory proceedings.
- Regulatory fines and penalties insurance — coverage for administrative fines and penalties a policyholder may be required to pay as the result of an investigation conducted by a federal, state, or local government agency resulting from a privacy breach (such as HIPAA, HITECH, and state or federal notification requirements).
- Patient notification and credit monitoring cost insurance — includes all necessary legal, IT forensic, public relations, advertising, call center, and postage expenses incurred by the policyholder to notify third parties about the breach of information. This coverage will also pay for credit monitoring for all affected parties.
- Data recovery costs insurance — includes all reasonable and necessary costs to recover and/or replace data that is compromised, damaged, lost, erased, or corrupted.

TMLT’s cyber liability coverage offers annual aggregate limits of $50,000 per insured physician/entity. Increased limits are available for purchase. Please contact your underwriter at 800-580-8658.

**Medefense coverage enhanced**

All TMLT policies covering individual physicians include our Medefense Endorsement, which provides reimbursement for legal expenses associated with defined disciplinary proceedings and tax audit expenses. The endorsement covers the following:

- a review action by the Texas Medical Board (TMB);
- a hospital action regarding clinical privileges;
- a professional review action;
- actions by the Texas Department of State Health Services or the U.S. Department of Health and Human Services;
- alleged violations of EMTALA, HIPAA, and the Stark Law; and
- non-compliance with Medicare/Medicaid regulations.

In 2011, the Medefense endorsement was enhanced to include coverage for payment of civil fines and penalties associated with disciplinary proceedings.

Medefense limits were also increased up to $50,000 per insured event with an annual aggregate limit of $100,000 per policy period.

Medefense benefits are subject to a $1,000 deductible, with a 10% coinsurance provision (the physician will pay 10% of the legal expenses after application of the deductible). The 10% coinsurance clause and the deductible will be waived if you select an attorney from a panel provided by TMLT.

The coverage for tax audits will be limited to a $5,000 maximum reimbursement.

To take advantage of Medefense coverage, policyholders should:

- Notify TMLT as soon as you receive the initial letter from the TMB or other disciplinary authority. The policy states that a policyholder has 60 days in which to report an event or letter in order to receive reimbursement for covered expenses.
- Consider retaining an attorney to help draft a narrative and to respond to the disciplinary authority. Upon request, TMLT can provide policyholders with a list of attorneys who have experience handling disciplinary proceedings.
As of the date indicated below, I, the undersigned policyholder of Texas Medical Liability Trust (TMLT), hereby:

(Please indicate your selection by checking one of the boxes below)

☐ Request to participate in the TMLT Trust Rewards Program.
☐ Decline to participate in the TMLT Trust Rewards Program.

If I have requested to participate in the TMLT Trust Rewards Program, I acknowledge and agree that my request may be accepted or rejected in TMLT’s sole discretion in accordance with the eligibility criteria for participation in the program in effect on or after the date hereof. In addition, I acknowledge and agree that my participation in the program will be governed by certain policies and guidelines adopted by TMLT’s Board of Trustees from time to time, including, without limitation, the TMLT Trust Rewards Program Plan Document. I hereby acknowledge that I have read the TMLT Trust Rewards Program Plan Document and agree to its terms and conditions and I understand that the TMLT Trust Rewards Program Plan may be amended or terminated in the sole and absolute discretion of TMLT’s Board of Trustees.

First Name ____________________________ MI _____ Last Name _______________________________________

Date of Birth (mm/dd/year) ______/______/______ Policy Number(s) _______________________________________

E-mail Address _________________________________ Telephone Number _____________________________

Signature ___________________________________________ Date _________________________

Mail
TMLT
PO. Box 160140
Austin, TX  78716-0140

Customer Service: (512) 425-5050
(800) 580-8658 ext. 5050

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Email
trustrewards@tmlt.org

For Company Use Only

Accepted by _______________________________ Date ___________________________
The rules and regulations of physician advertising

**Course author**
Robin Desrocher is a senior risk management representative with Texas Medical Liability Trust.

**Disclosure**
Robin Desrocher has no commercial affiliations/interests to disclose related to this activity.

**Target audience**
This one-hour activity is intended for physicians of all specialties who are interested in practical ways to reduce the potential for malpractice liability.

**CME credit statement**
Under AMA guidelines, physicians are required to complete and pass a test following a CME activity in order to earn CME credit. A passing score of 70% or better earns the physician 1 CME credit. Physicians will be allowed two attempts to pass the test.

TMLT is accredited by the Accreditation Council for Continuing Medical Education (ACCME) to provide continuing medical education for physicians. TMLT designates this enduring material for a maximum of 1 AMA PRA Category 1 Credit™. Physicians should only claim credit commensurate with the extent of their participation in the activity.

**Pricing**
Effective January 2012, new pricing will take effect for the Reporter CME courses.
Policyholder: to remain free
Non-policyholders: $75

*Reporter* CME content will continue to be available at no cost. This fee will be assessed when CME credit is applied for.

**Ethics statement**
This course has been designated by TMLT for 1 credit in medical ethics and/or professional responsibility.

**Instructions**
You have two options to obtain CME credit from this activity.

**Option 1 – online**
Complete Reporter CME test and evaluation forms online. After reading the article, go to www.tmlt.org/reporterCME. Click on “Earn CME” under “The rules and regulations of physician advertising.”

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**Objectives**
At the conclusion of the educational activity the reader will be able to:

- Understand the Texas Medical Board (TMB) rules for physician advertising.
- Describe the TMB rules regarding the use of the term “board certified” in advertising.
- Identify what the TMB requires for record-keeping and responsibilities related to advertising content.
- Discuss tactics to avoid TMB actions related to advertising.
The 36-year-old man with a history of excessive sweating on his hands came to a thoracic surgeon for treatment of his hyperhidrosis. The patient had seen an ad in a magazine in which the thoracic surgeon indicated several treatment options for persons with hyperhidrosis. The patient told the physician that the condition had been a life-long problem, which affected him socially and professionally. The patient said he had tried numerous medical therapies with no success, and he came to the physician to help him. The patient then went to see his cousin, a family physician, who told the patient he made a mistake in having the surgery.

Physician action

The physician told the patient what a sympathectomy was and professionally. The patient said he had tried numerous medical therapies with no success, and he came to the physician to help him. The patient then went to see his cousin, a family physician, who told the patient he made a mistake in having the surgery.

The patient consulted a dermatologist who told him the sympathectomy was irreversible, and he would be combating this condition for the rest of his life. The patient was referred to a neurologist for a second opinion, and the neurologist was unable to help him. The patient then went to see his cousin, a family physician, who told the patient he made a mistake in having the surgery.

The plaintiff’s attorney threatened, but did not make advertisements — whether through magazines, office brochures, or web sites — can place a physician at risk. Avoid implied guarantees or any language that inadvertently causes a physician to be held to a higher standard of care than required by law.

Legal implications

The plaintiff’s expert was also critical of the physician’s failure to obtain informed consent. One of the physician’s own articles about sympathectomies states compensatory sweating occurs. The expert felt this was a significant complication of the surgery and one that required full discussion with the patient.

Informed consent is defined by two legal doctrines — fiduciary relationship and self-determination. Fiduciary relationship requires a physician to inform and advise the patient in an understandable manner of the risks and treatment. Self-determination is the patient’s right to agree to or refuse treatment to the extent the law allows. A physician may be liable for damages proximately caused by the failure to obtain informed consent or if the patient does not receive adequate information, which is necessary to make a truly informed decision.

Further complicating this case was an alteration of the patient’s medical chart by the physician. Some time after the surgery occurred, the physician made a late entry on the page referencing the risks and complications involved with the bilateral thoracic sympathectomy.

The plaintiff’s attorney threatened, but did not make advertisements — whether through magazines, office brochures, or web sites — can place a physician at risk. Avoid implied guarantees or any language that inadvertently causes a physician to be held to a higher standard of care than required by law.

Disposition

Although the patient most likely did suffer from compensatory hyperhidrosis, a known complication of this type of procedure, this may have been a difficult argument for the defense.

In this particular case, it was principally the alteration of records that weighed against the physician. The record was changed expressly to add an indication in the chart that the patient was warned preoperatively about the very surgical complication.
he developed. It could be persuasively argued that, since the physician admitted altering the medical records, there is a strong possibility that he did not advise the patient of the complications or inform him of other nonsurgical treatments available. This case was settled before trial.

**Introduction**

With the help of medical liability reform, more physicians are practicing in Texas. This means competition among physicians has also grown. As the health care market becomes more consumer-oriented and consumer-empowered, physicians and other health care professionals must find ways to market their services more effectively. Their goal is to make their practice stand out from the rest. From the increasing volume of television, print, and Internet-based advertising, it appears that physicians may be relying more heavily on advertising to attract patients.

This article will review the Texas Medical Board (TMB) advertising rules and will offer guidelines on how to avoid TMB actions related to advertising.

**TMB rules**

The Medical Practice Act prohibits certain types of advertising and states that a physician commits a prohibited practice if the physician:

- uses an advertising statement that is false, misleading, or deceptive; or
- advertises professional superiority of the performance of professional service in a superior manner if that advertising is not readily subject to verification. 1

The TMB rule Section 164.3. Misleading or Deceptive Advertising, states:

“No physician shall disseminate or cause the dissemination of any advertisement that is in any way false, deceptive, or misleading. Any advertisement shall be deemed by the board to be false, deceptive, or misleading if it:

1. contains material false claims or misrepresentations of material facts which cannot be substantiated;
2. contains material implied false claims or implied misrepresentations of material fact;
3. omits material facts;
4. makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;
5. advertises or assures a permanent cure for an incurable disease;
6. compares a health care professional’s services with another health care professional’s services unless the comparison can be factually substantiated;
7. advertises professional superiority or the performance of professional service in a superior manner if the advertising is not subject to verification;
8. contains a testimonial that includes false, deceptive, or misleading statements, or fails to include disclaimers or warnings as to the credentials of the person making the testimonial;
9. includes photographs or other representations of models or actors without explicitly identifying them as models and not actual patients;
10. causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;
11. represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;
12. represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;
13. states that a service is free when it is not, or contains untruthful or deceptive claims regarding costs and fees. If other costs are frequently incurred when the advertised service is obtained then this should be disclosed. Offers of free service must indeed be free. To state that a service is free but a third party is billed is deceptive and subject to disciplinary action;
14. makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient;
15. advertises or represents in the use of a professional name, a title or professional identification that is expressly or commonly reserved to or used by another profession or professional;
16. claims that a physician has a unique or exclusive skill without substantiation of such claim;
17. involves uninvited solicitation such as “drumming” patients or conduct considered an offense under Texas Occupations Code §102.001(a) relating to the solicitation of patients; or
18. fails to disclose the fact of giving compensation or anything of value to representatives of the press, radio, television or other communicative medium in anticipation of or in return for any advertisement, article, or infomercial, unless the nature, format or medium of such advertisement makes the fact of compensation apparent.” 2

The Texas Medical Board can find a physician to be in violation of the advertising rule if one of the 18 standards listed in Chapter 164 is breached.

**Scope of practice**

“In today’s health care environment, patients are bombarded with...
advertises and claims about different health care services that are provided by different health care professionals — by physicians and non-physicians. To learn more about patients’ beliefs and expectations, the Scope of Practice Partnership — a cooperative effort of the American Medical Association (AMA), and other leading national specialty medical societies and state medical associations — commissioned a recent survey that found patients are undeniably confused about who provides their medical care.

To combat this confusion, the AMA believes all patients deserve to know the training, education, licensure and qualifications of their health care professionals. The AMA “Truth in Advertising” campaign is focused on providing that clarity for patients.”

**Board certification**

“The American Board of Medical Specialties (ABMS) is a highly respected, 78-year-old not-for-profit organization consisting of 24 Member Boards that certify physicians in over 150 medical specialties and subspecialties. ABMS and Member Boards were created as a public service that would enable patients to determine whether their physicians were appropriately trained and knowledgeable in their specialties.” More than 750,000 physicians hold certificates from ABMS Member Boards and approximately 300,000 participate in the Maintenance of Certification program.

“Today, although there are approximately 200 other certifying medical boards, many are self-designated and do not require the high standards, training, testing and continuous learning that are the hallmarks of ABMS Member Board Certification.”

In December 2010, the ABMS conducted a survey focusing on patients’ knowledge of physician qualifications and factors that patients consider important when choosing a physician. Survey respondents identified the following factors as important when choosing a physician:

1. “Bedside manner or communication skills (95 percent)
2. Board Certification (91 percent)
3. Recommendation from a friend or family member (83 percent)
4. Location of the office (80 percent)
5. Hospital affiliation (76 percent)
6. The school or hospital where the doctor trained (62 percent)”

On February 25, 2011, the ABMS launched CertificationMatters.org, a new website designed to make it easier for the public to find out if their doctor is Board Certified by one of the ABMS’ 24 Member Boards. If a physician lists “board certification” on business cards, websites, print advertising, or any other type of advertising, this new site can be used to verify this information.

The TMB regulates how a physician may communicate information to prospective or current patients about board certification and strictly enforces these provisions.

**TMB board certification rule**

The TMB has also established rules regarding the use of the term “board certified” in advertising. These include:

“(a) A physician is authorized to use the term “board certified” in any advertising for his or her practice only if the specialty board that conferred the certification and the certifying organization is a member board of the American Board of Medical Specialties (ABMS), the American Osteopathic Association Bureau of Osteopathic Specialists (BOS), or is the American Board of Oral and Maxillofacial Surgery.

(b) Physicians who are certified by a board that does not meet the criteria of subsection (a) of this section, shall be authorized to use the term “board certified” only if the medical board determines that the physician-based certifying organization that conferred the certification has certification requirements that are substantially equivalent to the requirements of the ABMS or the BOS existing at the time of application to the medical board. Physicians, or physician-based certifying organizations on behalf of their members, must submit an application to a committee of the medical board, and demonstrate that:

1. the organization requires all physicians who are seeking certification to successfully pass a written or an oral examination or both, which tests the applicant’s knowledge and skills in the specialty or subspecialty area of medicine. All or part of the examination may be delegated to a testing organization. All examinations require a psychometric evaluation for validation;
2. the organization has written proof of a determination by the Internal Revenue Service that the certifying board is tax exempt under the Internal Revenue Code pursuant to Section 501(c);
3. the organization has a permanent headquarters and staff;
4. the organization has at least 100 duly licensed members, fellows, diplomates, or certificate holders from at least one-third of the states;
5. the organization requires all physicians who are seeking certification to have successfully completed postgraduate training that is accredited by the Accreditation Council for Graduate Medical Education (ACGME) or the American Osteopathic Association and that provides substantial and identifiable supervised training of comprehensive scope in the specialty or subspecialty certified, and the organization utilizes appropriate peer review;
6. the organization provides an online resource for the consumer to verify the board certification of its members; and
(7) the organization has the ability to provide a full explanation of its certification process and membership upon request by the Texas Medical Board.

(c) A physician may not authorize the use of or use the term (board certified) if the claimed board certification has expired and has not been renewed at the time the advertising in question was ordered.

(d) The terms (board eligible), (board qualified), or any similar words or phrase calculated to convey the same meaning may not be used in physician advertising.

(e) A physician’s authorization of or use of the term (board certified), or any similar words or phrase calculated to convey the same meaning in any advertising for his or her practice shall constitute misleading or deceptive advertising unless the specialty board which conferred the certification and the certifying organization meet the requirements in subsection (a) or (b) of this section.

(f) A physician may advertise a field of interest if the physician is certified by, or a member, fellow, or diplomate of an organization that meets the requirements of subsection (a) or (b) of this section.

(g) A board certified physician who advertises board certification may advertise a field of interest that is different from the certified specialty only if the physician identifies the specialty for which the physician is board certified in an equal size of type or emphasis.

(h) A physician who is not board certified by, or a member, fellow, or diplomate of an organization that meets either the requirements of subsection (a) or (b) of this section may not advertise a field of interest, except that the physician may advertise that his or her practice is ‘limited to’ a certain practice area.

(i) A physician who holds a certification that was granted prior to September 1, 2010, and whose certifying board was approved by the medical board for advertising purposes prior to September 1, 2010, is considered to meet the requirements of subsection (b) of this section.

(j) Application for board certification approval for the purpose of advertising.

(1) Applicants for approval of board certification under subsection (b) of this section shall complete a written application and payment of an application fee as set out in §175.1 of this title (relating to Application Fees).

(2) Applicants whose applications have been filed with the board in excess of one year will be considered expired. Any fee previously submitted with that application shall be forfeited. Any further request for board certification recognition will require submission of a new application and inclusion of the current application fee. An extension to an application may be granted under certain circumstances, including:

(A) Delay by board staff in processing an application;

(B) A committee of the board requires an applicant to meet specific additional requirements for approval and the application will expire prior to deadline established by the Committee;

(C) Applicant requires a reasonable, limited additional period of time to obtain documentation after completing all other requirements and demonstrating diligence in attempting to provide the required documentation.

(3) If the executive director determines that an application meets all qualifications, the application shall be presented to a committee of the board for review and approval.

(4) If the Executive Director determines that the applicant does not clearly meet all requirements, the executive director shall notify the applicant and the applicant may appeal that decision to a committee of the board.

(5) Disapproval Determination.

(A) If a committee of the board or the full board determines that an applicant’s certifying board does not meet the board’s requirements for approval, the applicant shall be notified of the disapproval determination.

(B) If an applicant’s certifying board is disapproved, the applicant may request a rehearing of the application before a committee of the board. The request must be made within 20 days receipt of notice of the disapproval determination. It is at the discretion of the committee whether to grant a rehearing. The request for rehearing must be based on information not previously presented or considered.

(6) A certifying board approved by the board under this subsection must be reviewed every five years from the date of initial approval and the board must obtain information of any substantive changes in the certifying board’s requirements for diplomates since the certifying board was last reviewed by the board. In addition, a renewal fee as set out in §175.2 of this title (relating to Registration and Renewal Fees) must be paid by an applicant to have the certifying board reviewed.”

Additional advertising rules

The TMB also spells out rules for record-keeping and responsibilities related to advertising content. (Section 164.5)

(a) “Any and all advertisements are presumed to have been approved by the licensee named therein.

(b) Each licensee who is a principal partner, or officer of a
firm or entity identified in any advertisement, is jointly
and severally responsible for the form and content of
any advertisement. This provision shall also include any
employees acting as an agent of such firm or entity.

(c) If photographs or other representations of actual patients
are used in advertising, there must not be communica-
tion of facts, data, or information which may identify the
patient without first obtaining patient consent.

(d) A recording of every advertisement communicated by
electronic media, and a copy of every advertisement
communicated by print media and a copy of any other
form of advertisement shall be retained by the licensee
for a period of two years from the last date of broadcast
or publication and be made available for review upon
request by the board or its designee.

(e) At the time any type of advertisement is placed, the
licensee must possess and rely upon information which,
when produced, would substantiate the truthfulness of
any assertion, omission or representation of material fact
set forth in the advertisement or public communication.

(f) It is hereby declared that the sections, clauses, sentences
and parts of these rules are severable, are not matters
of mutual essential inducement, and any of them shall
be excised if these rules would otherwise be uncon-
stitutional or ineffective. If any one or more sections,
clauses, sentences or parts shall for any reasons be
questioned in any court, and shall be adjudged unconsti-
tutional or invalid, such judgment shall not affect, impair
or invalidate the remaining provisions thereof, but shall
be confined in its operation to the specific provision
or provisions so held unconstitutional or invalid, and
the inapplicability or invalidity of any section, clause,
sentence or part in any one or more instances shall not be
taken to affect or prejudice in any way its applicability
or validity in any other instance.”

Rules for web sites

Physicians who maintain a practice web site and who bill for
services provided over the Internet, are required to disclose of the
following information on the website:

(a) Disclosure. A licensee that maintains a website in
relation to the license’s professional practice must
clearly disclose:
   (1) ownership of the website;
   (2) specific services provided;
   (3) office address and contact information;
   (4) licensure and qualifications of physician(s) and
       associated health care providers;
   (5) fees for online consultation and services and how
       payment is to be made;
   (6) financial interest in any information, products, or
       services;
   (7) appropriate uses and limitations of the site, includ-
       ing providing health advice and emergency health
       situations;
   (8) uses and response times for e-mails, electronic
       messages, and other communications transmitted
       via the site;
   (9) to whom patient health information may be
       disclosed and for what purpose;
   (10) rights of patients with respect to patient health
       information; and
   (11) information collected and any passive tracking
       mechanisms utilized.

(b) Accountability. Licensees must provide patients with a
clear mechanism to:
   (1) access, supplement, and amend patient-provided
       personal health information;
   (2) provide feedback regarding the site and the quality
       of information and services; and
   (3) register complaints, including information regard-
       ing filing a complaint with the Texas Medical
       Board as provided for in Chapter 178 of this title
       (relating to Complaints).

(c) Advertising/Promotion of Goods or Products. Advertis-
ing or promotion of goods or products that a licensee
sells outside the normal course of business from which
the physician receives direct remuneration or incentives
is prohibited.

(d) This section applies only to licensees who bill for
services provided via the Internet. (Rule 164.6)

TMA policy

The Texas Medical Association Board of Counselors Ethics
Opinion on Advertising also provides guidance for physicians.

“Advertising by physicians can benefit patients by providing
information which helps patients make choices about their health
care needs. Advertising should not contain false or misleading
statements, and should not otherwise operate to deceive. Aggres-
sive, high-pressure advertising and publicity may create unjusti-
fied expectations.

Testimonials are anecdotal reports and may not be representative
of every patient’s experience or even most patient’s experiences.
Any inducements or payments given to persons giving testimoni-
als should be clearly disclosed in the advertisement. Advertising
containing testimonials regarding a physician’s skill or the quality
of the physician’s professional services is unethical.

Texas law makes advertising professional superiority or the
performance of professional service in a superior manner if the
advertising is not readily subject to verification grounds for
disciplinary action against the physician(s) responsible. Any
communication, advertising, or publicity distributed on behalf
of a physician, group, partnership, or professional association should include the name of at least one physician responsible for its content.”

**TMB disciplinary actions**

The TMB can and does discipline physicians for violating advertising rules. According to Leigh Hopper, TMB public information officer, violations of advertising rules are mostly found in the course of investigating a physician for another board violation or board complaint.

Here are some examples of TMB orders relating to advertising violations:

- “In 2009, the Board and Dr. M entered into a one-year Agreed Order under which his advertisements will be monitored by the board’s compliance division; requiring that within one year Dr. M obtain eight hours of CME in ethics; and that he pay an administrative penalty of $5000. The action was based on Dr. M’s false, misleading or deceptive advertising of his LASIK surgery procedures.”

- “In 2010, the Board and Dr. D entered an Agreed Order requiring Dr. D to present within 90 days a revised patient consent form containing information about bioidentical hormone therapy to the Texas Medical Board Executive Director for review; disclose to patients, in writing, the business relationship between the wellness center, which employs Dr. D, a financially-related pharmacy and a financially-related nutritional supplement formulation. In addition, Dr. D must pay an administrative penalty of $2000. The Board’s action was based on the finding that Dr. D violated advertising rules using the terms ‘natural’ and ‘bio-identical’ interchangeably when the terms are not medically equivalent.”

- “In 2010, the Board and Dr. G entered into a mediated Agreed Order requiring Dr. G to: complete 10 hours of CME in ethics and risk management within one year; pass the Texas Jurisprudence Examination within three attempts; complete 30 hours of CME in ethics, medical record-keeping and Board rules; within one year complete 30 hours of CME in ethics, medical record-keeping and Board rules; within one year and pay an administrative penalty of $1000. The action was based on Dr. G using misleading and deceptive advertising and failure to supervise adequately the activities of those acting under her supervision.”

- “In 2010, the Board and Dr. A entered into an Agreed Order requiring Dr. A to: immediately cease the use of any and all existing advertisements used in any medium, including but not limited to television, radio, print, and Internet and revise all such advertising to conform to the Medical Practice Act and Board rules; within one year complete 30 hours of CME divided equally between ethics, medical record-keeping and plastic surgery procedures of the face; and pay an administrative penalty of $2000. The action was based on the Board’s finding that Dr. A used false and misleading advertising (proclaiming his services were some of the "best in the world"), failed to practice medicine in an acceptable manner, failed to disclose reasonably foreseeable side effects, failed to obtain informed consent and failed to ensure proper documentation.”

- “In 2011, the Board and Dr. N entered into an Agreed Order requiring Dr. N to pay an administrative penalty of $1000. This action was based on Dr. N’s violation of Board rules that prohibit misleading advertising.”

**Conclusion**

The rules and regulations in health care are always evolving. It is essential for physicians to know and understand the rules and keep current with any changes. Physicians are encouraged to conduct a regular and comprehensive review of their web sites and all advertising for potential violations.

**Sources**


**TrendsMD**

*Connecting physicians*

Connect with physicians and other professionals on TMLT’s new blog, TrendsMD.

Visit the site and add it to your bookmarks. Please feel free to comment on articles that interest you.

http://www.trendsmd.com
CME test questions

Instructions: Using black ink, read each question, select the answer, and then clearly mark your selection. Under newly revised AMA guidelines, physicians are now required to complete and pass a test following a CME activity, in order to earn CME credit. A passing score of 70% or better earns the physician 1 CME credit. Physicians will be allowed two attempts to pass the test.

Please fax the completed test and evaluation forms to the Risk Management Department, attention Stephanie Downing 512-425-5996. You can also mail the test and evaluation forms to the TMLT Risk Management Department, attention Stephanie Downing, P.O. Box 160140, Austin, Texas 78716-0140. A certificate of completion will be mailed to the address you provide on the CME evaluation form.

Effective January 2012, new pricing will take effect for Reporter CME courses.
Policyholder: to remain free Non-policyholder: $75

Reporter CME content will continue to be available at no cost. This fee is assessed when CME credit is applied for.

This form can also be completed online at www.tmlt.org/reportercme

1. The American Board of Medical Specialties 2010 patient survey found the number one factor that is important to patients when choosing a physician is:
   ○ a. board certification
   ○ b. recommendation from a friend or family member
   ○ c. bedside manner or communication skills
   ○ d. number of physicians at the office

2. The organization responsible for regulating and enforcing how physicians may communicate information about board certification is:
   ○ a. the American Medical Association
   ○ b. the Texas Medical Board
   ○ c. the American Board of Medical Specialties
   ○ d. none of the above

3. The terms "board eligible," "board qualified," or any similar words or phrases may not be used in physician advertising.
   ○ a. true
   ○ b. false

4. A physician may not authorize the use of or use the term "board certified" if the claimed board certification has expired and has not been renewed at the time the advertising was ordered.
   ○ a. true
   ○ b. false

5. A recording of every advertisement communicated by electronic media, a copy of every advertisement communicated by print media, and a copy of any other form of advertisement shall be retained by the licensee for a certain number of years from the last date of broadcast or publication and be made available for review upon request by the board or its designee. This time period is:
   ○ a. five years
   ○ b. one year
   ○ c. ten years
   ○ d. two years

Statement of completion

I attest to having spent ____________ hours in this CME activity.

Physician signature ________________________________ Date ________________

Volume 1 2012
CME evaluation form
Please complete the following regarding the article, "The rules & regulations of physician advertising."
Please fax the completed evaluation with the CME test questions.

1. The objectives for this CME were met. ○ Yes ○ No
2. The material will be useful in my practice. ○ Yes ○ No
3. Did you perceive any evidence of bias for or against any commercial products? If yes, please explain.
   ○ Yes ○ No
4. How long did it take you to complete this learning activity?
   ○ .5 hr ○ .75 hr ○ 1 hr ○ 1.25 hrs ○ 1.5 hrs
5. On a scale of 1 to 5, with 5 being the highest, how do you rank the effectiveness of this activity as it pertains to your practice?
   ○ 1 ○ 2 ○ 3 ○ 4 ○ 5
6. What will you do differently in your medical practice after reading this article?

7. Suggestions for course improvement are:

8. Suggestions for future topics include:

Contact information
Name

Address

Phone

TMLT policyholder? ○ Yes ○ No (If no, please provide payment information)

Pay by check made payable to TMLT. Please complete the above contact information and mail to:
TMLT, Attn: Stephanie Downing, PO Box 160140, Austin, TX 78716
Pay by credit card. Please complete the contact information above and credit card detail below.
We accept Visa, MasterCard and American Express

Name of Cardholder

Credit Card #

Expiration Date CVV#
(3 digits located on the back of Visa or MasterCard and 4 digits located on the front of American Express)

Email address (to have your certificate emailed). Please print legibly. We cannot email your certificate if we cannot read your email address. To ensure your certificate is received in your email inbox, please add TMLT to your address book or safe sender list. Otherwise, your certificate may be flagged by your e-mail provider as unsolicited mail or "spam."

Volume 1 2012
**Presentation**
A 70-year-old woman was referred to a vascular surgeon for evaluation and treatment of extensive varicose veins. The patient reported progressive pain and swelling in her legs. Her medical history included breast cancer, GERD, osteoarthritis, cataracts, cervical spine surgery, shoulder surgery, gallbladder surgery, and restless legs syndrome.

**Physician action**
The vascular surgeon examined the patient and found varicose veins in the right and left greater saphenous veins. A venous duplex study showed superficial venous incompetence in both legs. Over the next several years, the patient underwent multiple sclerotherapy procedures without complication. According to the medical records, she was not always compliant with instructions for follow-up care.

Sclerotherapy was again performed on both legs on June 27. On July 17, the patient came to a wound care physician with a 0.4 cm x 0.3 cm x 0.1 cm lesion on her left anterior leg. She reported that the wound developed after sclerotherapy. The wound care physician noted erythema, eschar, and moderate serosanguinous drainage. He debrided the wound and ordered antibiotics. The patient underwent several wound debridements with the wound care physician and did not return to the vascular surgeon.

**Allegations**
A lawsuit was filed against the vascular surgeon, alleging that he improperly performed sclerotherapy and failed to return the patient’s phone calls when she called to report complications. By failing to return the patient’s calls, the vascular surgeon failed to diagnose and treat complications, causing the patient’s wound infection.

**Legal implications**
The plaintiffs were able to locate expert testimony to support their allegations. This expert stated that the defendant breached the standard of care by failing to follow his own written policy to call the patient and check on her status after the procedure; failing to return the patient’s phone calls; and failure to treat the patient’s wound infection. He also alleged the surgeon was negligent for failure to instruct his staff on how to appropriately respond to patient phone calls.

Physicians who reviewed this case for the defense were supportive of the medical care provided by the vascular surgeon. The main issue in this case was whether or not there was appropriate and reasonable communication with the patient after the procedure.

The patient claimed that she called the surgeon’s office on June 30 and July 7 reporting that her leg was red. These phone calls were not documented in the medical record. The defendant testified that he does not return patient phone calls, but leaves that to his nurse. If a patient has concerns, the patient is asked to return to the office so the surgeon can examine them.

The nurse testified that she returned the patient’s calls on her personal cell phone and that she had a lengthy conversation with the patient. The nurse’s cell phone records did not document such a call.

**Risk management considerations**
It is particularly important to document patient phone calls that involve complications following a procedure. Note the patient’s complaint or complication and the medical instructions that were given. It can also be helpful to ask the patient to repeat the instructions back to you. If there are multiple providers in the practice, documenting patient phone calls can assist subsequent providers in delivering continuing care.

When training staff, have protocols in place to properly document patient phone calls. It is important to note the date and time of the call and initial this documentation. With electronic medical records, there are templates available for entering the reason for the call and signing the entry. Without proper phone call documentation on the part of staff, poor outcomes can become the responsibility of the physician if allegations of vicarious liability occur.

Documenting patient phone calls in the medical record can be considered connecting the dotted lines between the visits. It is more than a matter of internal communication; it is an issue of maintaining an adequate medical record.

**Disposition**
This case was settled on behalf of the vascular surgeon.
Failure to timely review test results

by Louise Walling and Laura Hale Brockway, ELS

**Presentation**

On September 6, a 33-year-old woman came to her ob-gyn for a well-woman exam and to discuss birth control. The patient’s medical history included tonsillectomy, hyperhidrosis, and an episode of Guillain-Barre syndrome, from which she had fully recovered.

**Physician action**

Following an examination and after obtaining consent, the ob-gyn prescribed an ethinyl estradiol and norelgestromin transdermal contraceptive patch.

The patient called the ob-gyn’s office on September 25 with complaints of hair loss and nausea. The ob-gyn suggested that she stop using the patch and called in a prescription for ethinyl estradiol and norgestimate, an oral contraceptive that the patient indicated she had taken before without any adverse effects.

On September 29, the patient came to the emergency department (ED) of a local hospital complaining of left arm and left leg pain. The patient was found to have tenderness and edema of the left leg. The emergency medicine physician ordered a Doppler study and the results were negative. The patient was diagnosed with muscle strain, given a prescription for cyclobenzaprine, and discharged.

The patient called the ob-gyn on October 2 with complaints of severe left leg pain. She told the ob-gyn that she had taken off the contraceptive patch during the recent ED visit. The ob-gyn scheduled an appointment for the patient on October 4. During that office visit, the patient’s complaints included migraines, hair loss, and malaise. She also complained of pain in the lower left leg. The ob-gyn ordered a chest x-ray and a D-dimer test. She instructed the patient to stop taking hormones and to return to the office the week of October 11. The ob-gyn also told the patient to return sooner if she had any problems.

The results of the patient’s D-dimer test were elevated at 1.6 mg (normal 0.0-0.4 mg). These results were communicated electronically to the ob-gyn’s office the weekend of October 5. The ob-gyn later told the defense attorney that the office was not open on Saturday and the lab would typically call the office emergency number to report abnormal results so someone could respond. On Monday, October 8, the clinic was busy due to reports of a hurricane possibly hitting the area that week. Patients were rescheduling appointments and requesting that their medical records be sent to physicians outside the area. The electronic in-box was not checked that day.

On October 10, the patient began experiencing worsening leg discomfort, severe chest pain, and syncope. She was taken to the emergency department where a CT pulmonary angiography found bilateral pulmonary emboli with a significant clot and possible pulmonary infarct in the left lower lobe.

The patient was started on alteplase treatment, but was transferred to another hospital due to the hurricane. On October 11, the patient underwent thrombolysis of the pulmonary emboli with alteplase infusion.

The patient’s husband called the ob-gyn to tell her about the patient’s hospital admission. It was at that time that the ob-gyn reviewed the D-dimer lab results and chest x-ray that she ordered. She discussed these results with the patient’s husband.

While in the hospital, the patient was kept on subcutaneous enoxaparin and warfarin was added. She was discharged on October 14. Her INR was 1.2. She was instructed to continue warfarin and advised of the need for her INR to stay at 2.5. The patient followed up with an internal medicine physician, who checked her INR levels and monitored her anticoagulation therapy through September.

**Allegations**

A lawsuit was filed against the ob-gyn. The allegations included failure to timely review the results of the D-dimer test, report them to the patient, and refer the patient for treatment.

**Legal implications**

The plaintiff’s expert criticized the ob-gyn for failing to follow up on the abnormal D-dimer test results and for not instituting treatment or referring the patient for treatment. The defendant ob-gyn noted in the medical record that she would rule out possible DVT and call the patient with the results. A pulmonologist who reviewed the case for the plaintiff stated that the likely source of the blood clot in the lung was a DVT in the patient’s left leg. If the thrombosis had been promptly treated, in all reasonable probability, the patient would never have experienced the pulmonary embolism.

The primary weakness in the defense of this case was the failure to timely follow up on the D-dimer results. The hematologist who reviewed this case for the defense testified that when this type of test is ordered, the physician has the responsibility for reviewing the results within 24 to 48 hours of receipt.

The defendant ob-gyn stated that the practice had no formal procedure in place related to the receipt of electronic lab reports. After this incident, the clinic instituted policies and procedures for following up on test results, but they were not yet in written form.

**Risk management considerations**

The importance of timely follow up on test results and referrals cannot be overstated. A consistent tracking protocol is crucial
test results ... continued from page 15

for every practice. Some patients may conclude that silence on the part of the physician’s office is good news. But the responsibility to communicate test results and actions for follow up is on the ordering physician.

It is recommended that the physician date, initial, and document any follow-up instructions given to the patient. If multiple attempts are made to contact the patient, each attempt should be documented.

A written policy and procedure for tracking helps ensure that staff follows through with all ordered diagnostic tests, laboratory tests, and consultations. It shows an effort to provide continuity of care and helps guard against the issues related to failing to follow through.

Disposition

Due to the lack of timely follow up, this case was settled on behalf of the ob-gyn.

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