



## Advertising Medical Services

### **PURPOSE OF RISK MANAGEMENT RECOMMENDATIONS**

*OMIC regularly analyzes its claims experience to determine loss prevention measures that our insured ophthalmologists can take to reduce the likelihood of professional liability lawsuits. OMIC policyholders are not required to implement these risk management recommendations. Rather, physicians should use their professional judgment in determining the applicability of a given recommendation to their particular patients and practice situation. These loss prevention documents may refer to clinical care guidelines such as the American Academy of Ophthalmology's Preferred Practice Patterns, peer-reviewed articles, or to federal or state laws and regulations. However, our risk management recommendations do not constitute the standard of care nor do they provide legal advice. If legal advice is desired or needed, an attorney should be consulted. Information contained here is not intended to be a modification of the terms and conditions of the OMIC professional and limited office premises liability insurance policy. Please refer to the OMIC policy for these terms and conditions.*

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Many ophthalmologists advertise their medical services to the public. Following the recommendations included in this document will help ophthalmologists reduce their liability exposure, comply with underwriting requirements, and avoid uninsured risk.

### **WHAT LAWS AND GUIDELINES GOVERN PHYSICIAN ADVERTISING?**

Physician advertising is regulated by state law, as well as by the Food and Drug Administration (FDA) and the Federal Trade Commission (FTC) under provisions of the Food, Drug, and Cosmetic Act and the Federal Trade Commission Act (FTCA). The American Academy of Ophthalmology (AAO) and the American Society of Cataract and Refractive Surgery (ASCRS) have issued guidelines to advise their members on relevant ethical and professional standards.

Advertising "includes any oral or written communication to the public made by or on behalf of an ophthalmologist that is intended to directly or indirectly request or encourage the use of the ophthalmologist's professional medical services...for reimbursement" (ASCRS Guidelines). These guidelines apply to print, radio, and television advertisements, as well as informational brochures, seminars, videos, and the internet.

The FTCA prohibits deceptive or unfair practices related to commerce, and "prohibits the dissemination of any false advertisement to induce the purchase of any food, drug,

or device.” The FTCA and the professional guidelines state unequivocally that advertising for medical and surgical services must be truthful and accurate. It cannot be deceptive or misleading because of 1) a failure to disclose material facts, or 2) an inability to substantiate claims—for efficacy, safety, permanence, predictability, success, or lack of pain—made explicitly or implicitly by the advertisement. It must balance the promotion of the benefits with a disclosure of the risks, and be consistent with material included in the informed consent discussion and documents.

### **LIABILITY RISKS ASSOCIATED WITH FALSE OR MISLEADING ADVERTISING**

Allegations related to physician advertising are surfacing with increasing regularity in medical malpractice claims. The first is lack of informed consent. Aggressive advertising can run the risk of overstating the possible benefits of a procedure, and potentially mislead patients into agreeing to undergo the surgery without fully understanding or appreciating the consequences and alternatives. Unfortunately, stories of physician advertisements being introduced in court to destroy the validity of a consent form are all too often true.

In a sense, the advertisements become a ghost-like appendage to the boiler-plate forms. If the advertisement overstates the benefits, misrepresents any facts, or conflicts with other consent documentation, it can potentially make a jury believe the physician may have over-stepped the line of ethical propriety by creating unrealistic patient expectations. Legally, such a scenario might allow a jury to conclude the patient was not given a full and fair disclosure of the information needed to make a truly informed decision.

### **FRAUD: A POTENTIALLY UNINSURED RISK**

In addition to allegations of lack of informed consent, plaintiffs are also using state consumer protection laws to claim that the physician defrauded the patient. State law may allow the plaintiff to ask for punitive damages, which might double or triple the amount of money awarded to the patient by the jury. Physicians should be particularly concerned about such allegations since most professional liability insurance policies do not pay for such damages.

### **OMIC UNDERWRITING REQUIREMENTS AND COVERAGE LIMITS**

OMIC underwriting requirements state that advertisements must not be misleading, and must not make statements that guarantee results or cause unrealistic expectations. In addition, insureds are required to abide by FDA- and FTC-mandated guidelines and state law. Failure to abide by these requirements could result in uninsured risk, denial of a claim, or termination of coverage. As explained on page 13 of the OMIC policy, while OMIC would defend physicians against allegations of medical malpractice that include misleading advertising, the policy does not provide for indemnity payments for such allegations:

#### **B. Conditional Defense - No Payment of Damages or Supplementary Payments**

**OMIC** will defend an **Insured** because of a **Claim** otherwise covered by this policy that arises out of, but is not solely limited to, any of the following; however, under no circumstances will **OMIC** pay any **damages** or supplementary payments except **Claim expenses** resulting from either settlement or judgment attributed to any of the following:

1. **Intentional Acts.** An act, error, or omission intended or expected to cause **injury** or **property damage** committed by the **insured** or at the direction of the **Insured**, including any of the following: intentional infliction of emotional distress; assault or battery, except that a technical battery based upon lack of informed consent is not excluded; false, misleading, or deceptive advertising and marketing; or any other dishonest, fraudulent, malicious, or knowingly wrongful acts, errors, or omissions.

### **Review of advertisements**

In the past, OMIC requested that insureds submit copies of all proposed advertisements for underwriting review and approval prior to implementation. In an effort to streamline the underwriting process, minimize paperwork for our insureds, and eliminate delays, existing insureds will no longer be asked to submit advertisements with their renewal applications or as they develop new advertisements throughout the year. Instead, insureds are asked to evaluate their own advertisements for compliance with these requirements. Applicants are required, however, to submit advertisements.

The enclosed "Review of Advertisement" form should prove helpful in identifying problems. Additional copies of the form are available in the "Risk Management Recommendations" section of our web site at [www.omic.com](http://www.omic.com) Staff will continue to be available to review advertisements at the insured's request.

**OMIC policyholders who have additional questions or concerns about practice changes are invited to call OMIC's Risk Management Hotline for confidential assistance at (800) 562-6642, extension 641.**