

Plastic Surgery Economics

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APPOINTMENTS

New Editor-in-Chief For Head and Neck Surgery Journal

Michael S. Benninger, MD, is the new editor-in-chief for *Otolaryngology – Head and Neck Surgery*. The publication is the official journal of the American Academy of Otolaryngology – Head and Neck Surgery Foundation Inc. and the American Academy of Otolaryngic Allergy.

Dr. Benninger is chairman of the department of otolaryngology, head and neck surgery, at the Henry Ford hospital in Detroit. He has served as editor-in-chief of *The Online Interactive Journal of Otolaryngology*, the first completely online medical journal.

Along with a new editor, the monthly peer-reviewed journal will move its editorial office from San Antonio to the headquarters of the American Academy of Otolaryngology – Head and Neck Surgery Foundation Inc. in Alexandria, Virginia. The new managing editor is Louanne M. Wheeler. ■

Source: American Academy of Otolaryngology

PRACTICE SENSE

When Marketing Becomes Misrepresentation

Misleading advertising can lead to a malpractice suit.

by David J. Goldberg, MD, JD

Dr. Jones has become increasingly concerned about the diminishing revenues of his plastic surgery practice. In only five years, he has developed a large reconstructive practice, but the cosmetic side has lagged behind. He has considered bringing various laser techniques into his practice, but he has always been wary of physicians performing procedures with which they are not comfortable.

Recently, he attended an evening workshop about laser hair removal and was impressed that the FDA had cleared lasers for permanent hair reduction. Furthermore, the technique appeared safe, effective and easy to perform. Although multiple sessions are usually required, all the slides presented at the meeting showed uniformly good results. He learns



from his colleagues that all ethnic skin types can now be treated and that he can even delegate the procedure to a nurse.

Dr. Jones recognizes the advantages of laser hair removal and decides to make the

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INDUSTRY WATCH

Post Peel Product

Dermatologic Cosmetic Laboratories (DCL), a non-prescription skin and hair care product developer introduces Post Peel Quick Recovery™, one of the first after-care formulations specifically developed to address the post-procedure effects of chemical and laser peels, microdermabrasion, laser hair removal and retinoic acid therapy. Post Peel is scientifically formulated to alleviate post peel skin trauma and accelerate the healing process.

"While the market has continued to develop and refine peels and other rejuvenative therapies, very little has been done for post-operative therapies. Post Peel Quick Recovery has been expressly created to address this after-care market demand," said Truitt Bell, president of DCL. "This product is loaded

with profound healing and soothing agents."

Scientist Joel Rubin, who has led research and development at DCL for 11 years, said when he and his colleagues set out to develop this product, they combined the most beneficial raw materials.

DCL scientists developed this formulation with willowherb extract to reduce irritation, hyaluronic acid and vitamin E to moisturize, vitamins A and C to aid repair, vitamin K to reduce the appearance of bruising, panthenol for healing, aloe, allantoin, and bisabolol to soothe the skin.

Since 1981, DCL has provided physicians worldwide with high performance, non-prescription skin and hair care formulations for direct dispensing. ■

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leap. He rents an older, outdated hair removal laser, and then considers doing some marketing – something he's never done before. He ponders the substance of his ad. He wants to focus on the advantages of laser hair removal. He wants to stress "no more tweezing, no more waxing, no more shaving and no more depilatories." He wants to make the point that other methods are only temporary and may be painful.

With this in mind, Dr. Jones begins to run ads in his local paper, with the guidance of their ad department. The display ads emphasize all the points from his laser workshop. The ads run for several weeks. The response, however, is nowhere near the rental payments on his laser. Feeling frustrated, Dr. Jones contacts a local ad agency for advice. The firm suggests that he high-

"The ad representative assures him that stretching the truth is commonplace in advertising. It is considered hyperbole and is nothing to worry about."

light the following statement: "Permanent hair removal in all ethnic skin types after one treatment." Dr. Jones is concerned about the wording. After all, this claim is not exactly in line with what he can deliver. His workshop did say he could treat all ethnic skin types. But a series of treatments is generally required. The ad representative assures him that stretching the truth is commonplace in advertising. It is considered hyperbole and is nothing to worry about.

The ad runs and the response is remarkable. Dr. Jones' first client is Mr. Doe, a middle-aged African American with excessively thick hair on his neck. In response to the ad and in reliance of its claims, Mr. Doe spends \$1,000 for one laser hair removal treatment performed by Dr. Jones' staff. Unfortunately, all the hair returns three months after the single laser session. And, to complicate matters, the treatment from Dr. Jones' rented laser creates permanent loss of pigmentation. Dr. Jones assures Mr. Doe that this response is not unusual and suggests that more laser treatments will bring better results.

Mr. Doe feels that Dr. Jones' ad mis-

represented the efficacy of laser hair removal and underplayed its risks. He demands a refund. Dr. Jones, frustrated with his economic difficulties, refuses to refund the \$1,000. Mr. Doe seeks legal advice and sues Dr. Jones for misrepresentation, fraud and negligence.

Misrepresentation is a specialized area of the law where a plaintiff seeks damages for economic loss suffered because of his reliance on a false statement. Dr. Jones knew the facts of his ad were misleading, which he articulated to the ad agency. But the agency's bad advice will not shield Dr. Jones from liability. The purpose of the ad was to induce reliance by patients who would seek laser hair removal from Dr. Jones. Mr. Doe justifiably relied on the ad. Had Mr. Doe known the ad to be false or exaggerated, he would be unable to bring a cause of action against Dr. Jones. But a lay person has every reason to believe in the accuracy of a physician's ad. Mr. Doe suffered a loss of \$1,000 and he is likely to win his lawsuit.

To make matters even worse, Dr. Jones' lack of knowledge and experience about laser hair removal techniques posed some serious consequences. First, he did not understand that all laser hair removal devices are not the same. He was unaware that many models cannot treat darker skin types without serious risks. Dr. Jones had a legal duty to know that ethnic skin types are more difficult to treat. He breached his duty by allowing his staff to inappropriately treat Mr. Doe. This breach led to the permanent loss of pigmentation.

A physician's breach of his duty leading to damages epitomizes a malpractice case. Dr. Jones did not initially mean to misstate the facts in his ad. He also did not purposely bring damage to Mr. Doe. Nevertheless, he was seduced by a common trend in the cosmetic laser arena. While these procedures are portrayed by the lay press and the occasional unethical salesman as simple procedures that require only a weekend course for most physicians, the fact remains that lasers are incredibly powerful devices. And making mistakes like Dr. Jones did is a common occurrence among inexperienced and undereducated physicians. Dr. Jones did not understand that even laser hair removal devices could cause significant unintended results. A more experienced, well-trained skin laser surgeon who owns his lasers, performs laser procedures every day and understands the nuances of laser technology, is much less likely to cause complications. There is no substitute for good training.

Dr. Jones' defense against this lawsuit becomes an issue relating to the standard of care as defined by his community. The standard of care, however, is not a simple question. It is not necessarily written down in any textbook, nor is it articulated by any judge. The standard of care is defined by

"If the jury accepts the suggestion that the laser surgeon mismanaged the case and that his negligence led to damage of the patient, then the physician will be liable."

some as whatever an expert witness says it is and what a jury will believe. In a case against any medical specialist, the specialist must have the knowledge and skill ordinarily possessed by a specialist in that field, and must have used this care and skill in the same field under similar circumstances and in approximately the same locality. A failure to fulfill such duty is negligence. If the jury accepts the suggestion that the laser surgeon mismanaged the case and that his negligence led to damage of the patient, then the physician will be liable. Conversely, if the jury believes an expert for the defendant, Dr. Jones, then the standard of care has been met. In this view, the standard of care is a non-standard concept, decided case-by-case and based on the testimony of the physician.

It is important to note that where there are two or more recognized methods of diagnosing or treating the same condition, a physician does not fall below the standard of care by using any of the acceptable methods even if one method turns out to be less effective than another. In addition, in many jurisdictions, an unfavorable result due to an "error in judgment" by a physician is not necessarily a violation of the standard of care if the physician acted appropriately prior to exercising his professional judgment.

Evidence of the standard of care in a specific malpractice case includes laws, regulations, and guidelines for practice, which represent a consensus among professionals regarding diagnosis or treatment and medical literature including peer-reviewed articles and authoritative texts.

While the standard of care may vary from state to state, it is typically defined as a

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PRACTICE SENSE

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national standard by the profession at large. The view of an expert is crucial for litigation purposes, based on the following criteria:

- 1) The witness's personal practice, and/or
- 2) The practice of others that he has observed in his experience, and/or
- 3) Medical literature in recognized publications, and/or
- 4) Statutes and/or legislative rules, and/or
- 5) Courses where the subject is taught in a well-defined manner.

The standard of care is the way in which the majority of physicians in a similar medical community would practice. If, in fact, the

"The standard of care is the way in which the majority of physicians in a similar medical community would practice."

expert himself does not practice like the majority of other physicians, then the expert will have a difficult time explaining why the

"Thus, in most situations the standard of care is neither clearly definable nor consistently defined."

majority of the medical community does not practice according to his ways.

It would seem then that in a perfect world, the standard of care in every case would be a clearly definable standard, agreed on by all physicians and patients. But in the typical situation the standard of care is an ever-changing concept due to the differences and inconsistencies among the medical profession, the legal system and the public.

At one extreme, the medical profession is dominant in determining the stan-

dard of care in the practice of medicine. In such a situation, recommendations, guidelines, and policies regarding varying treatment modalities for different clinical situations published by nationally recognized boards, societies and commissions establish the appropriate standard of care. Even in some of these cases, however, factual disputes may arise because more than one such organization will publish conflicting standards concerning the same medical condition. Adding to the confusion, local societies may publish their own rules applying to a particular claim of malpractice.

Thus, in most situations the standard of care is neither clearly definable nor consistently defined. It is a legal fiction to suggest that a generally accepted standard of care exists for any area of practice. At best there are parameters within which experts will testify. Unfortunately, due to the increased reliance on technology by the medical profession and unrealistic expectations by the public, physicians may sometimes run the risk of being held to an unrealistic and unattainable standard of care. But ultimately, the standard of care is established by the physicians.

That being the case, Dr. Jones' argument, that he is performing within the standard of care based on the knowledge he garnered from an evening laser course, is a fallacious one. Dr. Jones cannot state that the laser

"Laser technology is changing as fast as computers."

company sponsoring the course should share his liability. His use of an older rental hair removal laser for the treatment of unwanted hair in ethnic skin may very well represent a breach of the standard of care.

Laser technology is changing as fast as computers. But the lay public is often led to believe that all lasers are the same. In addition, they are not educated enough to understand that laser hair removal devices from four years ago are not as safe and effective as those available today. Nor are the devices from four years ago safe for darker ethnic skin types. A simplistic approach evaluates the wavelength of a particular laser hair removal system. Is the system a ruby, alexandrite, diode or Nd:YAG laser? Is the system an intense pulsed light source? In reality, the emitted wavelength is just the beginning of the analysis. The success of laser hair re-

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removal and the safety of treating darker skin types are directly related to the delivered energy (fluence) from the machine, the pulse duration and the cooling efficacy of that hair removal device. Thus, a technique that ap-

“Caveat emptor is the guideline that every patient should follow regarding the procedure of laser surgery.”

pears as simple as laser hair removal is really not so simple.

Caveat emptor is the guideline that every patient should follow regarding the procedure of laser surgery. Consumers should verify that their laser surgeon is experienced and has kept up on current technology. A dermatologist who takes a weekend course on facelifts does not have the experience to perform this proce-

dures on patients. The best plastic surgeon is only as good as his skill and training. Laser surgery has become increasingly complex. Presenting such treatments to patients as a simple procedure is sine qua non for a simple-minded surgeon. It leads to malpractice lawsuits. It is also unethical. ■

About The Author

David J. Goldberg, MD, is a Board-Certified Dermatologist and the Director of Skin Laser & Surgery Specialists of New York and New Jersey, LLC, the pioneers of FDA research on laser hair removal and skin rejuvenation. He was the first recipient of the prestigious Leon Goldman MD award, named for the founding father of laser surgery and medicine. Dr. Goldberg is past Chairman of the Ethics Committee of the American Society for Laser Medicine & Surgery and the current Chairman of the American Society of Dermatologic Surgery.

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