

Advisory Opinion of the Code of Ethics

Subject: **Communications to the Public**

Issues Raised:

- (1) What modes of communication to the public are addressed in the Code of Ethics?
- (2) How is it determined whether communications are objectionable under the Code?
- (3) To what degree must adverse information (e.g., risk) be disclosed?

Applicable Rule: Rule 13. Communications to the Public

Background

Code of Ethics Rule 13 on communications to the public sets forth the requirements for advertising or promotional materials and nonpromotional communications directed at the public. The first provision of Rule 13 is that information provided by ophthalmologists be accurate, whether it is given to patients, the public, the media, or other colleagues. It is, of course, unethical to intentionally deceive. It is also unethical to decrease patients' autonomy by withholding information, by shading it so that it is inaccurate in any way, or by presenting material in a way that prevents patients from making a truly informed choice. This is especially true when the information that is provided leads a patient into making decisions that benefit the ophthalmologist. Deception intended to benefit the physician is unethical.

Inadvertent or otherwise excusable errors by ophthalmologists in their public statements are not ordinarily actionable under the Code of Ethics. However, the fundamental requirement of accuracy is one that transcends the other more particular provisions of Rule 13.

Inaccurate, false, or misleading advertising statements are unethical and compromise the integrity of the physician and the profession. Rule 13 governs communications to the public regardless of their nature, format, or medium and regardless of whether or not they are overtly commercial. It must be stressed that the rule does not ban or discourage any particular format or type of communication provided that the content is not objectionable under the rule.

The second provision of Rule 13 requires that, in their communications to the public, ophthalmologists avoid not only statements that are demonstrably "false" or "untrue" but also statements or ancillary communications (such as photos) that are "deceptive" or "misleading." For example, they must not "omit material information without which the communications would be deceptive." The potential for deception must be measured by the anticipated impression created by the communication upon those likely to receive it. "Material" means information that is likely to be of actual significance to the prospective patient in deciding whether or not to obtain a particular service from a provider of care.

This requirement must be interpreted in light of the properties of the medium used and the nature of the statement. Less extensive disclosure may be more acceptable in a 30-second radio spot than in a pamphlet distributed in physicians' offices. In most cases, a statement is not rendered deceptive simply because all information potentially relevant to the patient's decision is not included. It would not ordinarily be deceptive, for example, to advertise that an ophthalmologist has "specialized in pediatric eye care since 1984" without also disclosing that his fees are somewhat higher than the average fee for less experienced ophthalmologists. On the other hand, the ophthalmologist's statement would be deceptive if he omitted to state that, while he had specialized "since 1984," for 15 of those years he was practicing as a general ophthalmologist.

The third provision set forth in Rule 13 is that ophthalmologists' communications to the public must not "appeal to an individual's anxiety in an excessive or unfair way." It can be argued that such communications should not appeal to patients' anxieties at all. However, the rule establishes a reasonable standard. For example, it would not be an unreasonable "appeal to anxiety" for an ophthalmologist to run an ad saying "if you are over 65 and haven't been to an ophthalmologist in three years, maybe you should see Dr. T." This is a straightforward encouragement to the reader to consider rationally whether he or she needs a medical service. "Excessive" or "unfair" appeals to anxiety are those that are likely to encourage decisions based on fear, emotion, or misunderstanding rather than reason, taking into account the foreseeable perceptions and vulnerabilities of the target audience. For generations, patients have trusted physicians to act in patients' best interests. Patients are vulnerable when they are worried, and especially when they have limited ability to evaluate the appropriateness of their care. Patients need the physician, but they may have a difficult time evaluating what the physician advises.

The fourth provision is that ophthalmologists' communications to the public should not "create unjustified expectations of results." Once again, a rule of reason is intended. Ophthalmologists are not precluded from expressing professionally justifiable opinions about the therapeutic efficacy or worth of particular procedures. Indeed, it is in the interests of other physicians and the public to make known promising leads or successful results of therapy. Moreover, it is often helpful to patients and therefore ethical for ophthalmologists to describe the likely results of medical procedures. However, most medical procedures have ranges of efficacy that vary depending on the severity of the condition, the general physiological condition of the patient, the skills of the physician, and other factors. Therefore, unqualified or inflated general predictions of success should be avoided.

The fifth provision of Rule 13 expands on the foregoing point. If an ophthalmologist cites the benefits of particular ophthalmic procedures that also present significant associated risks, the ophthalmologist should simultaneously provide "realistic assessments" of the risks and availability of alternatives. The last clause of this provision does not invariably require an exploration of all the alternatives to the technique under discussion. It does require that the existence of alternatives be noted, and if those alternatives are discussed, that their benefits, risks, and other attributes be fairly presented as a reflection of consensus views in the ophthalmic community. The rule does not prescribe a particular format for such corrective additional information. However, disclosure should not be gratuitous or merely in fine print; it should be integrated into the primary message and should leave the recipient with a reasonably balanced impression of the actual facts and disclosure of the professional consensus view.

The sixth provision of Rule 13 is a specific one: an ophthalmologist must never misrepresent his "credentials, training, experience, or ability." Also, the ophthalmologist must not make

"material claims of superiority that cannot be substantiated." It does not necessarily constitute an inappropriate "claim of superiority" for an ophthalmologist merely to state that he/she practices "modern laser surgery," has "convenient office hours," or has performed "many successful cataract operations." However, it must be stressed that Rule 13 bars not only claims of superiority that are demonstrably false but also those that simply cannot be substantiated. Since there is no objective measure of "best," it probably would be deceptive for an ophthalmologist to claim to be "one of the nation's best eye surgeons" unless this accolade was granted by a verifiable, independent source that applies relevant and meaningful criteria that have been made public. Moreover, generalized statements of a physician's successes in treatment are not acceptable in most cases. In addition, it would constitute a subtle, but still objectionable, claim of superiority for an ophthalmologist to create the impression that he/she exclusively provides a particular therapy or service that is in fact widely available. Therefore, ophthalmologists should avoid communications that create a false impression about the uniqueness of their services. The goal must always be to enhance patients' understanding of their actual therapeutic choices.

Finally, Rule 13 requires that ophthalmologists clarify when they have paid in any way for public communications. Payment means anything of significant value, including provision of goods or services without the usual compensation. Normally, it would be apparent that a boxed ad in the Yellow Pages was paid for. For media such as print or broadcast interviews in which the economic basis for the communication is not obvious, any significant payment or economic inducement by the ophthalmologist to anyone associated with the communication must be disclosed or avoided. Similarly, if an ophthalmologist pays for listing as a preferred or otherwise qualified provider, that should be disclosed.

Nothing in this Advisory Opinion is intended to discourage ophthalmologists from maintaining constructive relationships with representatives of the media in order to better inform the public about ophthalmological services. However, ophthalmologists should avoid communications that are intended to deceive. Ophthalmologists are ultimately responsible for the content of all communications that originate with them, whether written or developed by a public relations or marketing firm, an office manager, or the media. Ophthalmologists put themselves at risk in granting interviews, and they need to be ever vigilant as to how that risk might compromise their ethical positions.

The conduct of the ophthalmologists in the following cases deviates in some respect from Rule 13, and each ophthalmologist has been the subject of a complaint for alleged unethical behavior. All ophthalmologists in the following case studies are Fellows of the American Academy of Ophthalmology.

First Inquiry:

Facts - Dr. G is an ophthalmologist who has a practice in cataract and intraocular implant surgery, and he intends to distribute a brochure about these procedures to prospective patients. The brochure was professionally produced for Dr. G, and it prominently features a testimonial from one of his former patients, Mrs. M, who is 82 years old. The brochure contains two photos of Mrs. M. One photo, in black and white, is captioned "Before My Surgery" and shows Mrs. M sitting alone staring aimlessly off into space. The second photograph, in color, is captioned "After My Surgery" and depicts Mrs. M golfing with friends on a beautiful sunny day. The text includes the following statements by Mrs. M: "Before I went to Dr. G, I was afraid I was going blind. But he used the newest method of surgery: no stitches, no patch, and no pain. I could see perfectly—instantly! He changed my life. I understand that this surgery can help most other people with cataracts, too."

Resolution - Dr. G's proposed brochure would violate Rule 13 in several respects. As a

preliminary matter, Dr. G is responsible for the content of the brochure regardless of whether he or a professional agency devises the content. His use of photos and a testimonial is inaccurate, deceptive, and misleading. The idealized portrayal of the patient's change in lifestyle from solitary musings to golfing is fanciful and does not reasonably represent predictable results for an 82-year-old woman. Readers of the brochure are likely to be misled into believing that such a transformation is typical and predictable. The black and white versus color photos and the change in activity also may appeal unduly to emotion and contribute to unjustified expectations of results. The text of the testimonial is also false and deceptive. Accurate and appropriate testimonials are permitted (if allowed by state law), but this one is clearly misleading. To raise the fear of blindness and to say that surgery "changed my life" is clearly an appeal to emotion. It is totally unjustifiable for a lay patient to advise other patients about the general efficacy of a surgical procedure, since he or she has no basis for warranting such results.

Second Inquiry:

Facts - Dr. B has been asked to be a guest on a television talk show to discuss a new surgical procedure for the correction of hyperopia, a method that she uses in her practice. Dr. B appears on the show and describes in a mixture of professional and lay terminology how she performs the procedure. She states that in her view it is "a terrific treatment that is safe and effective for correction of hyperopia in most cases." She does not mention risks or alternatives.

Resolution - Dr. B's television interview statement that hyperopia surgery is a "terrific treatment that is safe and effective for correction of hyperopia in most cases" is somewhat objectionable, though less egregious than Dr. G's claims. Dr. B's statement describes and assesses the safety and efficacy—key attributes—of an ophthalmic procedure without any apparent qualifications about the risks and alternatives. While ophthalmologists may not have control over the ultimate presentation to the public after print or electronic media have edited their presentations, they should obtain assurances that their presentation will not be edited so that it becomes deceptive. If no such assurances can be obtained, it is best in most cases to not grant the interview. If ophthalmologists choose to proceed, they should take reasonable steps to qualify their statements and to phrase them in a way that prevents dissemination of hyperbolic, unqualified views about safety and efficacy of medical procedures or devices. If an ophthalmologist's statements are reasonable in general terms, a particular instance of failure to qualify statements, perhaps resulting from editing, will not itself constitute unethical conduct under Rule 13. A course of conduct involving repeated failures would violate it, however.

Third Inquiry:

Facts - Dr. R has just moved into the area and has begun to practice at the local hospital. The hospital places an announcement of his new practice in the Yellow Pages. The announcement lists Dr. R's name, his hospital address and phone number, and identifies him as an ophthalmologist. It also includes the following phrases: "certified specialist in surgery for crossed eyes," "specializes in children's eye problems," and "a new addition to our staff: one of the leading pediatric eye surgeons in the United States."

Resolution - Dr. R's Yellow Pages ad is deceptive and contains material claims of superiority that cannot be substantiated. The claim that Dr. R "specializes in children's eye problems," if true, is simply informational and acceptable. However, currently no professionally recognized entity "certifies" ophthalmologists for "surgery for crossed eyes" or rates eye surgeons as "leading" ones. Therefore, these claims are patently not amenable to substantiation. The claims are material since they are intended to overwhelm the patient with Dr. R's claimed prestige, and they are also deceptive. Unlike claims that a particular

perfume smells "better than" any other (where it is clear that merely the manufacturer's arbitrary opinion is being expressed), here the implication is that "leading" refers to an external, objective standard of competence. Since no such standard of "leading" surgeons exists, the ad is deceptive. The fact that Dr. R's employer, the hospital, designed and paid for the ad does not discharge Dr. R from responsibility under the Code of Ethics. He must not permit or cooperate with any misleading communications to the public concerning his practice, and he must take steps to prevent them.

Fourth Inquiry:

Facts - Dr. W, the senior partner of a large refractive surgery practice in a major metropolitan area, places an advertisement in the newspaper that imitates the appearance of his practice Web site. Dr. W has thoroughly researched the competition in the area and knows the market well. The prominent bullet points of the advertisement state the following:

"Golden Eyecare is the most experienced eye care provider in the Tri-State area."

"Our LASIK eye doctors include experienced surgeons who have performed over 40,000 LASIK procedures."

"Visual freedom is available, and it only takes a few minutes to achieve it for a lifetime of enjoyment."

Resolution - The advertisement raises several concerns. First, the "most experienced eye care provider" statement implies that the Golden Eyecare practice is in a position of superiority over all the other ophthalmology practices in the Tri-State area. This claim may be difficult to substantiate adequately unless one has access to all the business statements and surgical volume databases of each practice in that entire area. Second, the statement about surgical volume is an express claim intended to imply a level of experience for the surgeons in the group. This statement may be misleading if as a group they have collectively performed 40,000 LASIK procedures but one relatively new surgeon has performed only a small number of the total. Quoting the larger number without qualification may be misleading, and it may unfairly place at a disadvantage a competitor who practices alone but who also has considerable experience and a high surgical volume. The third concern relates to the claim that "visual freedom...only takes a few minutes." This claim has the potential to create unrealistic patient expectations for the lifetime permanence of refractive results. The Federal Trade Commission (FTC) may consider this either an "express" or "implied" claim. As required by the FTC Act, advertisers must have proof for the meaning of any claim that consumers would reasonably take from an advertisement, not just what is explained to each person once they are inside the practice doors. The phrase "visual freedom...for a lifetime" implies freedom from corrective lenses for a lifetime, yet some refractive patients may eventually need glasses for reading or for occasional use, especially as they age. Even if this phrase originated with a laser manufacturer and others may be using it in their advertising, the individual advertiser may be held responsible for compliance with FTC requirements. From an ethical perspective, such claims may be regarded as deceptive or misleading.

Fifth Inquiry:

Facts - Dr. S is an experienced cataract surgeon who has decided to expand his refractive surgery practice through an advertising campaign designed to highlight his 25 years of ophthalmic surgical experience. An advertisement is placed in the local newspaper describing his LASIK practice and stating that he is the most experienced ophthalmic surgeon in town, having performed over 13,000 refractive surgeries. Dr. O is another

ophthalmologist in the same community who has a very busy refractive surgical practice; he is upset by the advertisement, which depicts Dr. S performing a LASIK surgery and includes several testimonials from happy patients. Dr. O believes that the advertisement in question contains false and misleading information by stating that Dr. S has performed over 13,000 refractive surgeries. When Dr. O calls Dr. S to ask that the advertisement be revised, Dr. S states that the ad copy is accurate—he has performed 13,000 refractive surgeries, although he acknowledges that close to 85 percent of these were cataract surgeries, which he considers to be a refractive procedure.

Resolution –Dr. S could argue that cataract surgery associated with the intraoperative use of limbal relaxing incisions; a toric, accommodative, or multifocal intraocular lens; or even with a monofocal lens to target emmetropia or create monovision (which essentially would include all cataract surgeries) could lead to the description of these procedures as “refractive surgeries.” However, the use of the phrase “refractive surgeries” in the context of a LASIK advertisement would reasonably lead the public to conclude that Dr. S has performed 13,000 keratorefractive surgeries, which is false. Since the advertisement is intended to promote Dr. S as an experienced refractive surgeon to patients with refractive errors, not with lenticular opacification, the advertisement has the potential to be deceptive and misleading to the lay public. Dr. S cannot objectively substantiate his implied claim of 13,000 refractive surgical procedures.

Applicable Rule:

Rule 13. Communications to the Public. Communications to the public must be accurate. They must not contain false, untrue, deceptive, or misleading information through statements, testimonials, photographs, graphics, or other means. They must not omit material information without which the communications would be deceptive. Communications must not appeal to an individual's anxiety in an excessive or unfair way; and they must not create unjustified expectations of results. If communications refer to benefits or other attributes of ophthalmic procedures that involve significant risks, realistic assessments of their safety and efficacy must also be included, as well as the availability of alternatives and, where necessary to avoid deception, descriptions and/or assessments of the benefits or other attributes of those alternatives. Communications must not misrepresent an ophthalmologist's credentials, training, experience, or ability and must not contain material claims of superiority that cannot be substantiated. If a communication results from payment by an ophthalmologist, this must be disclosed unless the nature, format, or medium makes it apparent."

Other References:

American Academy of Ophthalmology Advisory Opinion of the Code of Ethics, Advertising Claims Containing Certain Potentially Misleading Phrases.

Approved by:	Board of Directors, June 1984
Revised and Approved by:	Board of Directors, June 1992
Revised and Approved by:	Board of Trustees, October 1996
Revised and Approved by:	Board of Trustees, June 1999
Revised and Approved by:	Board of Trustees, September 2003
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