

# CHICAGO LAWYER

APRIL 2017

## MED-MAL MATTERS

Imagine while sorting through your mail, you discover a glossy, 30-page magazine, titled *Health Life*. The front cover promises information about "Classes, Service and Events for Your Whole Family" and identifies "St. Elsewhere Health®" as the publisher. On the inside front cover, you notice a large picture of a happy family and below it, in large, bold print: "The Doctors Your Family Needs, Close to Where You Live, Work and Play." In smaller print, it says: "At St. Elsewhere Health Medical Group, our doctors can do more for you."

As you flip through the pages, you see articles, snippets and factoids regarding general health issues, events and services offered by St. Elsewhere. On Page 3, for instance, St. Elsewhere urges you to learn about the St. Elsewhere Health Heart and Vascular Institute, which provides the "highest level" of cardiovascular care and offers TAVR, a specific kind of valve repair surgery.

On at least nine pages, you are urged to "Find a physician, make an appointment or register for a class!" by going to [stelsewherehealth.org](http://stelsewherehealth.org) or calling 855.ELSEWHERE. In a short Viewpoints article, St. Elsewhere Health's pediatric medical director discusses lead screening in kids.

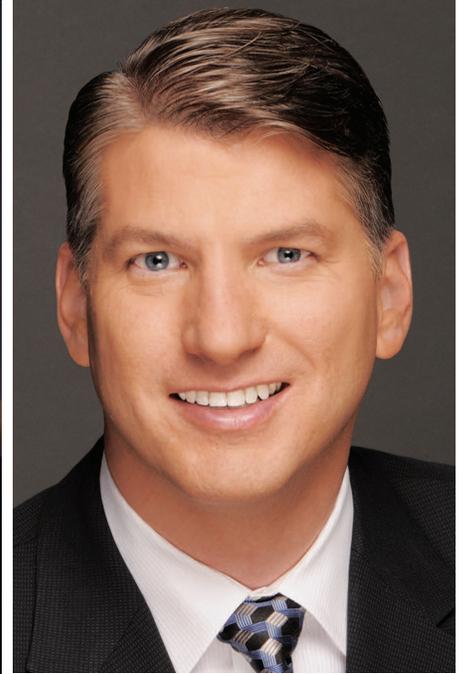
In small, light print on the third page, St. Elsewhere explains that it is an integrated health system encompassing nine hospitals with a physician provider network of more than 3,000 physicians. Before you toss the magazine into the recycling bin, an impression is created in your brain, consciously or unconsciously, that these St. Elsewhere hospitals and their doctors look pretty good.

Fast forward a few weeks or months. You wake up feeling short of breath and you have a pain from your chest into your arm. Your spouse is concerned and wants to take you to a hospital so you reply: "OK, let's go to that St. Elsewhere hospital near us." When you get to the emergency room, your pain is worse, you're sweating and very, very scared. But when you look at the forms you've been given, you're surprised to read that St. Elsewhere wants you to agree in writing that all of the physicians who will manage your care are not employees of St. Elsewhere and that St. Elsewhere has no control or authority over them.

If you understand the potential import of that language, you may feel angry and a bit betrayed. After all, one of the reasons you came to an St. Elsewhere facility was its advertising. But getting up and leaving is simply not an option; you know you might be having a heart attack and every minute could make a difference.

This isn't just a thought exercise: Other than the name "St. Elsewhere," all the above text came directly from a local health system's advertisements.

This is exactly the situation encountered by thousands of Illinois patients every day. Hospitals and health systems compete for business with extensive radio, television, print and internet advertising, communicating or implying that they



## BAIT AND SWITCH

When hospitals use car-salesman tactics

By THOMAS A. DEMETRIO and KENNETH T. LUMB

stand behind the services they provide in order to entice patients inside. Once inside, however, the advertising is disclaimed in consent forms and the hospitals tell patients that the medical services they touted are actually provided by independent contractors.

In *Gilbert v. Sycamore Municipal Hospital*, the Illinois Supreme Court held that a hospital may be held liable for the negligence of independent contractor physicians under the doctrine of apparent agency. In so holding, the court noted that hospitals commonly hold themselves out to the public in expensive advertising campaigns as offering and rendering quality health services.

The only purpose for these campaigns, the court stated, is to persuade potential patients to obtain services at a specific hospital. According to the *Gilbert* court, "unless the patient is somehow put on notice of the independent status of the professionals with whom he might be expected to come into contact, it would be natural for him to assume that these people are employees of the hospital."

But can a hospital disclaim its advertising after it has already had its desired effect? Under the Federal Trade Commission Act, advertising must be truthful and nondeceptive. 15 U.S.C. Sections 41-58. An ad is deceptive if it is likely to mislead consumers acting reasonably under the circum-

stances. Indeed, federal regulations specifically prohibit "bait" advertising, defined as: "... an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell." (16 CFR 238.0).

Extensive and sophisticated advertising campaigns that extol the hospital's high quality care but never reveal the truth behind the status of the people who will provide that care arguably fits the definition of "bait." When the patient walks into the emergency room, with no realistic option to leave and seek care elsewhere, the "switch" occurs when the hospital demands a signature on a consent form that disclaims the message of its advertising.

A car salesman is prohibited by federal law from employing that tactic. If a hospital induces a patient to receive hundreds of thousands of dollars of medical care at its facility through its advertising, shouldn't it be held to the same standard? [CL](#)

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