

Advertising of Health Products and Services

Advertising of health products and services must be done in a responsible and ethical way, and the effect of any advertisement needs to be carefully considered. This factsheet provides an overview of the standards and laws that cover advertising, and key points about advertising that doctors need to be mindful of.

In this factsheet:

- What is advertising?
- Standards and laws
- Key points to be aware of

What is advertising?

Advertising has been defined broadly by MCNZ as:

“Any communication that is oral, in print, through electronic media or on the internet by or on behalf of a doctor to the public, to provide information about the doctor, the doctor’s services, or the clinic or group where the doctor practices or with which the doctor is associated”

The advertising of all therapeutic products (medicines and medical devices), natural health products, and dietary supplements is also regulated.

Excluded from the definition is explanatory material given to a patient during a consult about a health condition or a proposed procedure, treatment or medication, and material distributed for the purpose of public health or as part of a public health programme.

It is important to be mindful that while some advertisements can be obvious, such as a written communication on a clinic’s website, others may be less so, for example an oral endorsement of a therapeutic product made in a conversation with a patient could be considered to be an advertisement.

Advertising of Health Products and Services

Standards and laws

The responsibility for ensuring compliance with relevant standards and laws lies with the doctor who is advertising. This is so even when a third party is engaged to draft an advertisement on a doctor's behalf. It is a responsibility that cannot be delegated.

Relevant standards include:

- "Advertising" by MCNZ;
- The Advertising Codes of Practice issued by the Advertising Standards Authority (ASA), in particular the "Therapeutic and Health Advertising Code"; and
- Any relevant industry codes of practice, such as the Medicines New Zealand Code of Practice, the Medical Technology Association of New Zealand Code of Practice or the New Zealand Self Medication Industry Association Code of Practice.

There are also statutes that play a role in regulating advertising, including the Fair Trading Act 1986, the Medicines Act 1981, the Medicines Regulations 1984 and the Misuse of Drugs Regulations 1977.

Tip: MedSafe has published a document called **Guideline on the Regulation of Therapeutic Products in New Zealand – Part 7: Advertising of therapeutic products**, to assist with the interpretation of this legislation.

The laws and standards around advertising are complex and extensive. It is useful then to have an understanding of the principles that underly the governance of advertising.

ASA's Therapeutic and Health Advertising Code sets out two key principles:

- **Principle 1:** Social responsibility
Therapeutic and health advertisements shall observe a high standard of social responsibility particularly as consumers often rely on such products, devices and services for their health and wellbeing; and
- **Principle 2:** Truthful representation
Advertisements shall be truthful, balanced and not misleading. Advertisements shall not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge or without justifiable reason, play on fear. This includes by implications, omission, ambiguity, exaggerated or unrealistic claim or hyperbole.

Advertising of Health Products and Services

Key points to be aware of

Advertising can be beneficial or harmful. It can be utilised in a beneficial way to provide information about a doctor's skills, expertise and services, and enable patients to make informed decisions about their care or treatment. However, should the advertisement contain false, misleading or deceptive information, it could have a harmful effect. For example, it might foster unrealistic expectations, cause a patient to seek treatment that is not clinically indicated, or create unfounded fear about a person's health (all of which is prohibited).

Claims made or information provided in an advertisement must be truthful and balanced and products or services must not be glamourised. Care must also be taken not to allow advertising to reinforce stereotypes of a particular person or group of people.

The MCNZ statement provides that truthful and balanced content means content that is:

- valid, evidence-based and substantiated;
- clear and easy to understand;
- from a reputable and verifiable source; and
- identifies clearly the relevant researchers, any funding received, and the publication that the results/information are sourced from.

This ties in with section 12A of the Fair Trading Act which makes it unlawful for anyone "in trade" to make an unsubstantiated representation, that is a representation made without reasonable grounds.[1]

Because of how this section is phrased, anyone who makes an unsubstantiated claim may breach the provision even when that person did not manufacture or supply the product or service, or develop the promotional material. For example, if a GP clinic publishes an advertisement for a medical device on its website, the clinic (and possibly also the manufacturer or supplier of that medical device) is making claims about the device by advertising it.

Under the Fair Trading Act the clinic has a responsibility to substantiate the claims in the advertisement, even though the advertisement may not be its own. The level of substantiation required to support the claim will vary depending on what is being advertised. The Commerce Commission has provided the example of a claim that asserts a particular product can cure disease, saying it would expect this to be supported by a high level of substantiation in the form of credible and reliable scientific evidence.

Comparatively, a general claim about the performance or effectiveness of a familiar product such as "calcium is good for healthy bones and teeth" would require a lower level of substantiation.

Under the Fair Trading Act, false or misleading advertisements, or unsubstantiated representations, may result in a fine of up to \$200,000 for an individual, and \$600,000 for a body corporate. Doctors can also face disciplinary action for conduct that does not comply with the relevant standards.

Advertising of Health Products and Services

It is essential then that doctors ensure that the information provided by them, or by someone on their behalf, complies with all standards.

Doctors should also be conscious of the inherent power and knowledge imbalance in a doctor-patient relationship. This imbalance means that patients tend to trust what their doctor says to them (especially when the patient is particularly vulnerable). Advertisements therefore need to be managed in a responsible and ethical way, and the trust a patient places in his or her doctor must not be exploited. As a related point, doctors must not pressure people to use their services or advertise services by approaching prospective patients directly.

Helpfully, some key 'advertising scenarios' have been considered by MCNZ:

- **Testimonials:**

"Testimonial" is defined by MCNZ as "a recommendation or positive statement that a person makes about another person..." (Examples of testimonial statements are provided in the MCNZ factsheet). Because of the unrealistic expectations testimonials can create, they are not permitted to be used or quoted to advertise a doctor's services to consumers.

- **Endorsing medical products or methods of treatment:**

Doctors must not use their position as a doctor to endorse medical products or methods of treatment in an advertisement to consumers, and any interest (financial or otherwise) or role in relation to a medical product or method of treatment needs to be declared (without endorsement). The reasoning is that the endorsement of a medical professional tends to give 'undue authority' or support for the particular product or service. Doctors must also be conscious of any conflict that might arise between their interest in a product or treatment, and the care they provide to a patient. If that conflict compromises the patient's care, MCNZ requires the patient to be informed and provided with access to alternative sources of care.

The testimonial and endorsement restrictions apply where an advertisement is made to **consumers**. Section 60 of the Medicines Act exempts advertisements that are circulated solely or principally to healthcare professionals. See the ASA "Therapeutic and Health Advertising Code" for further information.

Advertising of Health Products and Services

- **The advertising of titles, qualifications and memberships:**

Done improperly, this might cause a patient to think a doctor is more skilled and qualified than they actually are, which can be confusing or misleading. MCNZ has placed restrictions on what qualifications may be advertised (being those that appear on MCNZ's register or conferred or awarded by a doctor's college or other properly accredited training organisation), and provided guidance on how to use acronyms to avoid misinterpretation.

- **Discussing treatment options with patients and making comparisons:**

When discussing treatment options, doctors need to avoid making direct comparisons between the quality of their own and their colleagues' services or suggest they have superiority over them. (Outside of this, comparative advertising is permitted provided that the advertisement compares "like with like" and is "factual, fair and able to be substantiated, referenced to the source and reflective of the body of available evidence" – refer ASA "*Therapeutic and Health Advertising Code*").

- **Using images:** care needs to be taken when using images in advertising – what impression or expectation does the image create? Will it encourage the unnecessary use of services?

MCNZ highlights the example of "before and after" images, warning of the impression such advertising might give or expectation it might create. The MCNZ factsheet provides detailed guidance for using "before and after" images.

- **Offering inducements:** inducements include discount coupons, gift certificates, online deals and vouchers. These should not be offered to a patient if it would undermine the doctor's relationship with the patient as well as the informed consent process. There is certain information that must be made clear to a patient when offering inducements, which are set out in MCNZ's factsheet. Furthermore, medical care or treatment may not be offered as a prize or gift, in order to increase a practice's profile or for financial gain.

The ASA "*Therapeutic and Health Advertising Code*" also provides information relating to the above scenarios, and doctors should review that Code alongside MCNZ's factsheet (and the relevant legislation).

The ASA Code addresses other important points for advertisements that the MCNZ factsheet does not, for example that advertisements must contain such information as the name and address of the advertiser and other information prescribed by various legislation, and must not claim, state or imply that the advertised product or service is safe or cannot cause harm or is a "sure cure" (amongst other things).

Advertising of Health Products and Services

The ASA Code also provides examples not covered by the MCNZ factsheet, for example weight loss or weight management advertisements that include a medicine or medical device. The Code reflects the wider social and health issues that stem from obesity, as well as the individual vulnerabilities of those who find weight loss (or maintaining weight loss) difficult to achieve. In particular, the Code highlights the potential for patients to be misled, or for unrealistic expectations to be fostered, by promises of “quick” or “easy” weight loss. Such statements should therefore be avoided, and advertisements should include an acknowledgment of nutrition and exercise as important elements in individual weight management (amongst other things).

The Medicines Act provides further restrictions and requirements, for example that medical advertisements must not contain any statement that contradicts the information required by regulations to be marked on or attached to a medical product or its container or package, or fail to include statements that are required by regulation to be in an advertisement. (As noted above, the **MedSafe Guideline on the Regulation of Therapeutic Products in New Zealand – Part 7: Advertising of therapeutic products** is a useful starting point to understand the further legislative restrictions and requirements.

It also provides helpful information about advertisements for medicines, medical devices and related products).

The Association of New Zealand Advertisers (ANZA) administers a service called the Therapeutic Advertising Pre-vetting Service (TAPS). TAPS “pre-vets” advertisements for medicines, medical devices and related products for compliance with the relevant codes and regulations (for a fee). It is a helpful mechanism when navigating the requirements and regulations around advertising. However, while the TAPS system is considered to be robust and reliable, it does not guarantee compliance. Nor does it remove the liability of the advertiser for the content of its advertisements. Ultimately that responsibility lies with the doctor who is advertising.

The laws and regulations around the advertising of health products and services can be tricky to navigate, especially given the range of sources from which they stem. This factsheet provides an overview only of some of the restrictions and requirements. For more detailed guidance, doctors should seek professional advice.

NZMII are here to help!

Contact Us

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