Doctors and advertising

A review of the Medical Council’s
Statement on advertising

February 2014
Introduction
The Medical Council believes that clear and accurate information about the services provided by doctors benefits all parties in the healthcare system. Advertising has a role to play in keeping patients informed, but it also has the potential to mislead. Misleading advertising coupled with a lack of consumer knowledge can lead to patients being exploited, medical services being used inappropriately or unnecessarily, and patient harm.

In 2007 the Medical Council of New Zealand developed a Statement on advertising to set standards intended to protect the public from advertising that is false, misleading or deceptive. The purpose of this consultation paper is to seek your feedback on the statement, to help inform a review of its content.

Executive summary
This paper reviews some of the national and international literature and proposes that the Council make a number of amendments to the existing statement on advertising. A copy of the statement with the proposed amendments tracked is attached as Appendix 1. The suggested amendments include proposals to:

- Expand paragraph 11, which deals with claims about effectiveness, to outline how scientific information should be presented.
- Expand paragraph 16, which deals with the use of titles, to address the issue of doctors working in a sub-specialty or who have a “special interest”. In particular, this would allow for the use of such titles only where these have been conferred by the doctor’s College.
- Delete paragraph 19, which forbids the use of discount coupons and gift certificates, and replace it with a new paragraph that describes when the use of discount coupons and gift certificates is inappropriate.

We welcome your feedback on the statement, and on these suggested changes.

The Council also seeks your views on a number of other issues that are not currently addressed in the statement, including whether:

- Doctors should endorse, or use their status to promote, non-medical products and services – such as skincare products and gluten-free bread.
- Advertising of surgical or invasive procedures should include a clear statement about the risks involved.
- It would be helpful to patients to require that any titles used by a doctor in advertising be written in full, rather than abbreviated.
Specific matters identified by the Council
There are two specific areas of the current statement the Council has focused on as part of this review, the use of titles and the use of discount coupons and gift certificates. The Council is proposing to change the way that the statement addresses both of these areas. The issues involved, and how Council intends to tackle these, are laid out below.

Use of titles
Titles can be useful in terms of providing patients with information about a doctor’s expertise and experience. However, some titles are effectively meaningless and their use can mislead patients into believing that a doctor is more qualified or experienced than a colleague with the same background and training. In regulating the use of titles, the Council is aiming to ensure that these provide patients with the clearest and most accurate possible guidance about a doctor’s expertise.

Problems with the current standard
The Council currently regulates the use of titles by doctors through both Good Medical Practice and the Statement on advertising. Standards in both of these documents state that specialist titles should not be used except where they directly relate to the doctor’s vocational scope of practice.

This standard has proved problematic in a number of fields, but most prominently in relation to appearance medicine. Appearance medicine has been accepted as a “special interest” of general practice, with training and recertification provided under the auspices of the Royal New Zealand College of General Practitioners (RNZCGP). However, the RNZCGP is concerned that it is inappropriate for vocationally registered GPs who work full-time in appearance medicine to call themselves “general practitioners” – because many of these doctors have not worked in core general practice for many years and have no intention of returning to that field. The College is concerned that use of the title “general practitioner” in this context may be misleading to patients. This creates a problem for GPs who work in appearance medicine, who do not appear to have any title that they can use to describe their practice.

While appearance medicine is the field that has attracted most attention in relation to the use of titles, Council’s current standard does appear to place restrictions on other doctors that may cause patient confusion. For example, under the Council’s current standard a doctor could not use a term such as “paediatric psychiatrist”, even if he or she was a vocationally registered psychiatrist with training in paediatric psychiatry and who had worked exclusively with children for many years. Such a doctor would be expected to use only the title “psychiatrist”, and this may lead adult patients to believe that they can see the doctor for their own care.

Standards in use in other jurisdictions
A number of other regulators provide guidance around the type of titles that a practitioner can use. These include a requirement in the Chiropractic Board standards, paragraphs 6.4.2 and 6.4.3 of the Australian Medical Board’s guidelines on advertising, paragraphs 14-16 of a by-law published by the College of Physicians and Surgeons of Newfoundland and Labrador and standards published in Alberta and Nova Scotia. How these authorities regulate the use of specialist titles and other qualifications is discussed in detail in the literature review section of this paper.

The Australian and Canadian guidelines appear to provide a reasonable alternative to the Council’s position, and might help to address some of the concerns that have been raised. In particular, it is suggested that the Council incorporate something like paragraph 6.4.3 of the Australian guidelines into the Statement of advertising. This paragraph states:
Advertising qualifications or memberships may be useful in providing the public with information about experience and expertise but may be misleading or deceptive if patients or clients can interpret the advertisements readily to imply that the practitioner is more skilled or has greater experience than is the case.

Patients or clients are best protected when practitioners advertise only those qualifications that are:

- approved for the purposes of registration or endorsement of registration, or
- conferred by approved higher education providers (within the meaning of the *Higher Education Support Act 2003* [Cwlth]), or
- conferred by an education provider that has been accredited by a government accreditation authority such as a government department.

A list of accreditation authorities and approved qualifications for each health profession is available at the website of the relevant national board.

Practitioners who are considering the use of titles, words or letters to identify and distinguish themselves in advertising, other than those professional titles protected under the National Law for their profession, are encouraged to ask themselves the following questions:

- Why do I wish to use this title, qualification, membership, words or letters in advertising material?
- Am I well qualified in the areas of practice that I offer and promote with these words?
- Is the basis for my use of title, qualification, membership, or other words or letters relevant to my area of health practice?
  - current?
  - verifiable?
  - credible?
- If I display or promote my qualifications in advertising materials, is it easy to understand?
- Is there any risk of people misunderstanding or misinterpreting the words, letters or titles that I use?

The various Canadian guidelines go further than the Australian guidelines, and paragraph 16c of the College of Physicians and Surgeons of Newfoundland and Labrador goes into considerable detail about how the term “plastic” should be used, and who can describe themselves as a “plastic surgeon”. It is not suggested that it is necessary for the Council to go into such fine detail in its standards.

The College of Physicians and Surgeons of Alberta standards outline a process in which a doctor may apply to the Registrar for authorisation to use a title that reflects a “special interest”. It is suggested that introducing a similar process in New Zealand would be difficult to do without ending up with something unnecessarily unwieldy and expensive.

One other Canadian standard is intriguing, and the Council is seeking your views on whether it would be useful to introduce a similar standard here in New Zealand. A standard published by the College of Physicians and Surgeons of Nova Scotia states that doctors should not abbreviate titles in any advertising or promotional material. For example, this would mean that a surgeon should use the title “Fellow of the Australasian College of Surgeons” in any promotional material, rather than the abbreviated “FRACS”.
There are quite a number of acronyms used in medicine, and many have the potential to confuse patients – rather than inform them. It is possible that introducing a similar standard here might help to address this problem.

Because abbreviations are commonly used in New Zealand, such standard might need to be eased in slowly – perhaps by introducing the concept as a “suggestion”, rather than as a standard.

**Possible wording in the Statement on advertising**

After considering the issues, and the standards introduced by other regulators, the Council is proposing to introduce a new section in its *Statement on advertising* which states:

Advertising qualifications or memberships may be useful in providing the public with information about experience and expertise, but may be misleading or deceptive if patients can interpret the advertisements readily to imply that you are more skilled or have greater experience than is the case.

Patients are best protected when you advertise only those qualifications that have been:

- approved for the purposes of registration and relate to your vocational scope of practice
- conferred or approved by your College, or another training organisation that has been accredited by the Council, or another New Zealand responsible authority.

**Implications of this suggestion**

This standard would allow vocationally registered doctors who work in a sub-specialty, and whose training and recertification is conducted through their College, to use some other title so long as this is conferred upon them by the College.

There are two potential outcome of this recommendation for the Council that we will need to consider carefully before resolving to include such a standard. Firstly, it does place a burden on the Colleges, in that they may need to consider what titles their members can use – and what criteria a member needs to meet in order to use these titles. Secondly, this requirement would also provide some degree of Council recognition of non-vocational titles, and patients may therefore have a legitimate expectation that if the Council believes that a doctor can call him or herself a “cosmetic physician” or “paediatric psychiatrist” then that should be reflected on the Medical Register. Including such titles on the Register is not current Council policy, and would require some significant cost and changes to Council processes to implement.

**Question 1**
How do you think the use of titles should be regulated? Do you think the wording proposed above would be helpful?

**Question 2**
If titles conferred or approved by a College are to be recognised, should these also be published on the Medical Register?
**Discount coupons and gift certificates**

When the Council first published the *Statement on advertising* it regarded discount coupons and gift certificates as rather blunt and inappropriate advertising tools. In recent years, the sophistication of these tools has developed significantly. Gone are the days when a coupon was a small four-sided shape that you snipped out of a newspaper. Modern discount coupons are promoted online and by email and can contain much more information than a 5cm x 7cm rectangle ever could.

In light of these changes, the Council is reconsidering its position on the use of discount coupons and gift certificates. This is because it is now possible for many of the Council’s concerns about the use of discount coupons and gift certificates to be addressed, and a blanket ban might therefore be inappropriate.

What is it about discount coupons that the Council found troubling in the first place? The concerns were twofold:

1. A discount coupon or gift certificate can undermine an informed consent process. In a good informed consent process: the patient and the doctor establish effective communication; share information, including about different treatment options and the risks and benefits of those options; and the patient then provides his or her informed consent and agrees to undergo treatment. There is a real danger that in purchasing a discount coupon or gift certificate the patient is effectively agreeing to undergo treatment before being fully informed about the risks, benefits and alternatives.

2. Most are time-sensitive and this can serve to hurry a patient into a treatment decision without providing them with reasonable time to reflect and consider.

Examples of modern online discount coupons have been provided to the Council, and some of these appear to largely address its concerns. Such coupons are generally for an assessment rather than for a procedure (although they can include a pre-payment towards a procedure), and make clear that any treatment is dependent on the outcome of that assessment and the provision of the patient’s informed consent. They also make clear that any treatment will not be provided if the patient does not appear to be a suitable candidate, or if they do not consent to treatment, and that in such circumstances the patient will be provided with a refund.

In light of this, the Council is proposing to delete paragraph 19 of its current statement (which bans the use of gift certificates and discount coupons altogether) and to replace it with a new paragraph, which states:

> If you advertise by means of discount coupons or gift certificates, you must ensure that these do not undermine your relationship with the patient and the informed consent process. In particular, you must ensure that your coupon or certificate is clear that:
> - purchase of the certificate or coupon does not equate to granting informed consent
> - prior to treatment the patient will have an opportunity to discuss treatment with you, to ask questions and to provide their informed consent
• the patient will be provided with a period of reflection of at least seven days between purchase of the certificate or coupon and the provision of treatment
• the patient has the right to opt out of treatment at any time
• you will not provide the requested treatment if your assessment indicates that the patient is not a suitable candidate
• the patient will be entitled to a refund should they decline to provide consent, or should you decide that they are not a suitable candidate for treatment or that an alternate treatment is a better option for that patient.

Question 4
Do you agree that Council should permit the use of gift certificates and discount coupons when they meet the requirements listed above?

As an alternative to the third dot point, which requires a “period of reflection” following purchase the Council is also considering another option, which would require a period of reflection following an initial consultation instead. This would align the statement with paragraph 20 of the *Statement on cosmetic procedures*, which states that:

There must be a period of reflection of at least seven days between an initial consultation and the performance of a category 1 cosmetic procedure.

While such a requirement would ensure consistency in the Council’s approach, it does need to be noted that this would put an additional burden on both the practitioner and the patient. When developing the *Statement on cosmetic procedures* that Council resolved that a period of reflection following an initial consultation was only required for “category 1” procedures – those that involve cutting into the structures beneath the skin (such as breast augmentation and liposuction). Including the same requirement in the *Statement on advertising* would mean that patient purchasing a discount coupon for non-invasive and relatively safe procedures would also need to attend two separate appointments before the doctor could perform the procedure. Many patients, particularly those in rural areas, may find this inconvenient.

Question 5
Do you agree that there should be a period of reflection between the purchase of a coupon and treatment? Do you think it may be better to require this period of reflection to take place after an initial consultation? If so, should this be in all cases or just in the case of some procedures (such as surgical procedures)?
Literature review
A literature review was conducted in 2007, and this was intended to inform the development of Council’s standards. A further review has been conducted recently, and this has identified several additional matters that Council considered in amending the Statement on advertising. These matters are discussed below.

Summary of the 2007 literature review
When the Council developed its original Statement on advertising a targeted review of the national and international literature was undertaken. This review revealed that there is a very wide variation in the standards published by other regulators.

A number of jurisdictions did not have standards on advertising at all. At the time of the review the only Australian authority that was actively developing standards in this area was the Medical Board of Victoria, and they had yet to formerly publish any guidance. Meanwhile, in the UK, the GMC had recently withdrawn standards it had developed in the 1990s. In some of these jurisdictions it appears that regulators did not need to act because standards had been set through legislation. In the UK the Medicines (Advertising) Regulations 1994 provided some very strict limits around the way that medicines, medical devices and medical products could be advertised.

In other jurisdictions, in particular in Canada, standards had been set by regulators and in some cases these were very restrictive. The standards published by the College of Physicians and Surgeons of Newfoundland and Labrador forbade any form of advertising except for the use of a small sign at the entrance to a clinic. These standards also proscribed the size of the signage, the height of lettering and the words that were permitted to be used.

Review of current standards
New Zealand law and advertising standards
Unlike other jurisdictions, New Zealand has very few pieces of law that deal specifically with medical advertising. Section 58 of the Medicines Act 1981 is the only specific piece of law that deals with advertising by doctors. This section prohibits advertisements that:

- “Claim, indicate or suggest that a medicine, medical device or treatment will prevent, alleviate, or cure a range of diseases, or prevent, reduce, or terminate a range of physiological conditions.” However, the Act also states that “it shall be a good defence in a prosecution [for a breach of section 58] if the defendant proves that the matter claimed, indicated or suggested in the advertisement is true.”
- Claim, indicate or suggest a medicine, medical device, or method of treatment:
  - Is a panacea or infallible; or
  - Is or has been used or recommended by a practitioner, nurse, pharmacist, or person engaged in study or research in relation to any of those professions or the work they perform; or
  - Has beneficially affected the health of a particular person or class of persons, whether named or unnamed, and whether real or fictitious, referred to in the advertisement; or
  - Invites correspondence or the sending of hair, blood, urine, or other bodily specimens or photographs for the purposes of diagnosis or treatment concerning any disease or physiological condition.

The Advertising Standards Authority has also published a Therapeutic Services Advertising Code, which covers all advertisements of therapeutic services, including medical services. It is includes the following principles:
Advertisements should comply with the laws of New Zealand and the appropriate industry code of ethics.

Advertisements should observe a high standard of social responsibility particularly as consumers rely on therapeutic services for their health and well-being.

Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive consumers, abuse the trust of or exploit the lack of knowledge of consumers, exploit the superstitious or without justifiable reason play on fear.

Any scientific information in an advertisement should be presented in an accurate manner. Scientific terminology should be appropriate, clearly communicated and able to be readily understood by the audience to whom it is directed.

Advertisements should not claim or imply endorsement by any government agency, professional body or independent agency unless there is prior consent, the endorsement is verifiable and the agency or the body is named.

Some of the Rights outlined in the Code of Health and Disability Services Consumers Rights 1996 might also be extrapolated to address some of the issues related to medical advertising. In particular, Right 2 (which provides patients with the right to freedom from coercion and exploitation), Right 5 (the right to effective communication) and Right 6 (the right to be fully informed).

There are also a number of pieces of general law that apply to all forms of advertising. These include the Fair Trading Act 1986 (in particular, the clauses intended to prevent advertising which is false, misleading or deceptive) and the Consumers Guarantees Act 1993.

All of these pieces of law are referenced in the current statement, and have not been subject to significant amendment since. The one area which might usefully be expanded on is how the requirements of the Consumers Guarantees Act 1993 apply in the case of medical advertising.

Section 9 of the Consumer Guarantees Act requires that goods correspond with the description provided to the consumer. There is no similar clause that relates to the provision of services, but there is an expectation (in section 29) that such services:

"...are of such a nature and quality that it can reasonably be expected to achieve any particular result,— that the consumer makes known to the supplier, before or at the time of the making of the contract for the supply of the service, as the particular purpose for which the service is required or the result that the consumer desires to achieve, as the case may be, except where the circumstances show that—

(c) the consumer does not rely on the supplier’s skill or judgment; or

(d) it is unreasonable for the consumer to rely on the supplier’s skill or judgment."

Where a good or service does not meet the requirements of the Act, then the consumer is entitled to a remedy.

How the Consumer Guarantees Act applies to the provision of medical services can be complicated. Performing a surgical procedure is not like building a deck. It can sometimes be difficult for the patient to envisage what the outcome might look like, and a poor result in their eyes might not be the result of a failure on the doctor’s part. While this emphasises the importance of providing the patient with clear information prior to treatment, it is also likely to make making obtaining a remedy under the Act difficult. Nonetheless, patients are entitled to a remedy should a medical treatment
not be provided with reasonable care and skill – and there has been some suggestion that the statement be expanded to make this explicit.

**The NZMA**

The Council’s current *Statement on advertising* quotes from the NZMA Code of Ethics on the subject of endorsements. The Code also includes an additional paragraph on the subject of advertising. This paragraph states that:

> Doctors should accept that their professional reputation must be based upon their ability, technical skills and integrity. Doctors should advertise professional services or make professional announcements only in circumstances where the primary purpose of any notification is factual presentation of information reasonably needed by any person wishing to make an informed decision about the appropriateness and availability of services that may meet his or her medical needs. Any such announcement or advertisement must be demonstrably true in all respects and contain no testimonial material or endorsement of clinical skills. Qualifications not recognised by appropriate New Zealand statutory bodies should not be quoted.

**Other New Zealand regulators**

The Chiropractic Board published an advertising guideline in August 2011. Of interest here are clauses that forbid the use of titles or descriptions of expertise unless a practitioner holds “the required skills, knowledge, training or qualifications necessary to practise in that field”. How the Medical Council might regulate the use of titles by doctors is discussed separately above.

The Chiropractic Board’s statement also includes a discussion on the use of inducements. This states that such inducements should only be offered when:

- the terms and conditions of that offer are clearly and understandably set out; and
- the best interests of health consumers are considered when making such an offer; and
- any offer does not contravene the Code of Health and Disability Services Consumers’ Rights; and
- in offering goods or services, the chiropractor ensures that the product or service is appropriate for that individual and not based on other considerations.

How the Medical Council might regulate the use of discount coupons and gift certificates by doctors is discussed separately in a section above.

The Dental Council published a *Code of practice for advertising* in November 2013. This emphasises the harm that can be caused by poor treatment choices, poor treatment outcomes or a lack of truly informed consent. It forbids dental practitioners from advertising in a manner that could be considered as attempting to profit from, or take advantage of, limited consumer understanding.

While the other Boards do not seem to have published specific standards on advertising, several have incorporated standards into a more general document, such as a Code of Ethics.

The Dieticians Board Code of Ethics includes a clause which states that “dieticians do not allow their professional standing to be used in direct endorsement of commercial products, which is of particular concern for dieticians working for nutritional companies, industry and in private practice with commercial interests.” A page on the Board’s website includes a very interesting discussion of how this clause should be interpreted in different contexts.

The Optometrists and Dispensing Opticians Board also includes some guidance in its Code of Ethics for Optometrists. These include requirements that optometrists shall:
• Ensure that any arrangement to reward effort or performance does not have the potential to bias a practitioner’s clinical judgment toward decisions that may not be in the patient’s best interests.
• When promoting their practice or profession, ensure any claims made are valid, truthful and reflect their status as a trusted registered health practitioner.

The United Kingdom

The General Medical Council (GMC) does not publish a specific standards document on the subject of advertising. However, a paragraph has been included on this subject in its 2013 edition of Good Medical Practice. This paragraph states:

When advertising your services, you must make sure the information you publish is factual and can be checked, and does not exploit patients’ vulnerability or lack of medical knowledge.

It is also noted that the legislative environment in the UK has changed in recent years. The Medicines (Advertising) Regulations have been replaced with a new piece of law, the Human Medicines Act 2012. Part 14 of this Act deals with advertising of medicines, medical products and medical devices in a very comprehensive manner. In particular, this Act:

• Outlines general principles which state that advertising must not be misleading, and in addition must encourage “… the rational use of [the medical product, device or medicine] by presenting it objectively and without exaggerating its properties.”
• Forbids advertising that is “likely to lead to the use of a medicinal product for the purpose of inducing an abortion.”
• Forbids the advertising of prescription medicines except where this relates to an approved vaccination campaign.
• Forbids advertising that implies that a medical consultation or surgery is unnecessary.
• Forbids advertising that offers to provide a diagnosis or suggest a treatment by post or by means of an electronic communications network.
• Forbids advertising that might lead a person to make an erroneous self-diagnosis.
• Forbids advertising which suggests that the outcome of treatment is guaranteed, or better than or equivalent to another identifiable treatment or product, or not accompanied by an adverse reaction.
• Forbids advertising that portrays changes in the human body because of disease or injury that is likely to cause alarm.
• Forbids advertising that suggests that a healthy person’s health could be enhanced.
• Forbids advertising that suggests that the health of a person could be adversely affected by not taking a medicinal product (except for approved vaccination campaigns).
• Forbids advertising which suggests that a medicinal product is safe or efficient because it is natural.
• Forbids endorsements by doctors, scientists or celebrities.
• Forbids advertising that is directed at children.
• Puts strict limits on how medical sales representatives can promote and advertise medicinal products to health practitioners, and on inducements and hospitality.
• Requires that advertisements include specified information (including, for example, the name, actives ingredients and correct usage of any medical products advertised).
• Puts additional limits around the advertising of homeopathic or traditional health products. In particular, homeopathic medicinal products must not mention any specific therapeutic indications.
The UK’s Medicines and Healthcare Products Regulatory Agency (MHRA) has published a comprehensive “Blue Book” that outlines the requirements of the Human Medicines Act and other relevant pieces of UK legislation.

**Ireland**

The Medical Council of Ireland addresses advertising in a chapter of its edition of *Good Medical Practice*. This chapter begins with a statement that the provision of information about health services that is factually accurate, evidence based and not-misleading is “generally in the public interest”. Specific clauses from this chapter which may be of interest include:

- 54.3, which states that “Patients should be informed of the likely costs of treatment before the consultation and treatment”
- 56.6, which states that “to ensure that members of the public can identify doctors registered in Ireland, you must include your Medical Council registration number in any information you publish about your practice.”

As in the UK, there is a separate piece of law in Ireland that deals with the advertising of “human medicinal products”. This legislation does not appear to be as comprehensive as UK, although it does forbid the advertising of prescription medicines and puts limits around the advertising of other forms of medicines, medical devices and medical products – including a requirement that all medicinal claims must be substantiated.

**Australia**

The legislative environment in Australia has changed since the Council’s initial literature review, and these changes relate to both the role of regulators as well as to the content of advertising. The State Medical Boards have been replaced and now standards are published through a single Medical Board of Australia, and the law which established this new body also includes clauses that govern how “regulated health services” may be advertised.

In association with the boards of other regulatory authorities, the Medical Board of Australia published comprehensive *Guidelines for advertising of regulated health services* in July 2010. Some of the content of these guidelines is very similar to Council’s statement. The guidelines also provide clear advice on the requirements outlined in the Health Practitioner Regulation National Law Act 2009. That Act provides for limits on advertising that are considerably broader than those imposed under New Zealand law. In particular, the Act includes provisions which limit the use of gifts, discounts or other inducements and forbids advertising which “creates an unreasonable expectation of beneficial treatment” or “directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services”.

Clauses in the *Guidelines* that may be of interest include:

- Paragraph 3.5, which states that advertising is no substitute for informed consent and that “The main purpose of advertising of health services is to present information that is reasonably needed by consumers to make an informed initial decision about the availability and suitability of the services offered. Any initial decision by a consumer in response to an advertised service does not substitute for informed consent and does not remove the obligation on a practitioner to obtain informed consent before proceeding to provide the service.”
- Paragraphs 4 and 5, which provides examples of “acceptable” and “unacceptable” advertising.
- Paragraph 6.2, which requires the use of a visible warning about risk whenever a surgical or invasive procedure is advertised.
• Paragraphs 6.4.2 and 6.4.3, which discuss the use of specialist titles and other qualifications. It is noted that Council has resolved to include advice to doctors on the use of titles, and it might consider incorporating the development of that advice into the Statement on advertising. This suggestion is discussed further above.

• Paragraph 6.6, which states that “Discounts, gifts or other inducements must not be used in advertising of medicines that have potential for abuse or misuse due to the greater potential for harm. In relation to other medicines and therapeutic goods, the boards strongly discourage the use of prizes, bonuses, bulk purchases or other endorsements that may encourage the unnecessary consumption of medicines or other therapeutic goods.”

• Paragraph 6.7, which states that “The boards encourage caution when using scientific information in advertising of regulated health services. When a practitioner chooses to use scientific information in advertising, it should:
  - be presented in a manner that is accurate, balanced and not misleading
  - use terminology that is understood readily by the audience to whom it is directed
  - identify clearly the relevant researchers, sponsors and the academic publication in which the results appear
  - be from a reputable and verifiable source.

Question 6
Paragraph 6.2 of the Australian Guidelines requires advertising for surgical and invasive procedures to include a visible warning about risk. Would including such a clause in the New Zealand standard assist in ensuring that patients are fully informed about their treatment options and help to protect patient safety?

Question 7
The Council has dealt with several complaints in recent years about the way innovative treatments have been promoted. In particular, concerns have been expressed about the way scientific information has been presented in promotional material, and the quality of that information. Would it be useful to insert a clause into the statement such as that outlined in paragraph 6.7 of the Australian Guidelines?

Canada
At the time Council developed its statement the standards that were in place in some parts of Canada were particularly restrictive. In recent years those standards have undergone significant review, and most are now more permissive and in-line with those published in both New Zealand and Australia.

Canadian regulatory authorities are permitted to create by-laws. The scope of these by-laws is regulated by central government, but it is notable that many of the Canadian Boards have passed by-laws that put limits on advertising by doctors.
The by-laws introduced by the College of Physicians and Surgeons of Newfoundland and Labrador (CPSNL) in November 2012 include an expectation that doctors should not become involved in advertising for products and services except where they are the provider of those products or services.

Concerns have been raised with the Council about doctors endorsing non-medical products, for example skin care treatments and gluten-free bread. In considering such complaints Council members have expressed concern that these doctors may be inappropriately using their status as medical practitioners and that such advertising may cause patients to incorrectly believe that they will obtain a health benefit from using the products being promoted.

The requirements of paragraph 18 of the Council’s current statement already provide some guidance around endorsements. This paragraph notes that the Medicines Act prevents doctors from endorsing medicines, medical devices or medical treatments, and “agrees with” the view expressed by the Medical Association that doctors should only endorse other products when this is based on independent scientific evidence, and the evidence is clearly outlined.

**Question 8**

How do you feel about doctors advertising non-medical products such as skin care treatments and gluten-free bread? Do the current requirements of the Statement on advertising address this issue appropriately, or are specific standards needed? If so, what should those standards require?

Another requirement of note in the CPSNL by-law is that which requires doctors to “keep copies of all advertising ... for a minimum period of two (2) years from the date of its last publication...”. Including such a clause in the New Zealand standards may be useful for enforcement purposes, however the Council currently believes that the administrative cost this would place on doctors would exceed any likely benefit.

The CPSNL by-law also includes a requirement that advertising must not be “undignified, in bad taste or otherwise offensive...” (clause 13g). This is another area where the Council has had some concerns about advertising in the past. However, it is suggested that offensive advertising does not need to be addressed through a Statement on advertising, because any form of offensive behaviour can already be dealt with through existing mechanisms. In particular, section 100(1)(b) of the Health Practitioners Competence Assurance Act 2003 allows the Health Practitioners Disciplinary Tribunal to make disciplinary findings when a doctor “has been guilty of professional misconduct because of any act or omission that, in the judgement of the Tribunal, has brought or was likely to bring discredit to the profession...”. That is, it is suggested that the focus of a standard on this subject shouldn’t be on whether the advertising is offensive, but whether the behaviour exhibited in the advertising is offense.

Paragraphs 14-16 of the CPSNL by-law deal with the issue of the use of titles. Suggestions for how these standards might help inform the Council’s position on this topic are discussed earlier in this paper.

The College of Physicians and Surgeons of British Columbia (CPSBC) also introduced a new standard in November 2012. This standard includes the relevant by-laws passed by the Board and which address the subject of advertising.
The CPSBC standard forbids discounting and the use of inducements, and also provides a rationale for this. In particular, it outlines that discounting and inducements should not be used where they may:

- result in the doctor’s self-interest undermining the patient’s well-being
- create unnecessary patient risk and in some situations, patient harm
- minimise the risks inherent in medical interventions
- cloud the context in which patient’s consent is sought or given
- limit by contract physician access to essential patient information
- violate of the patient’s right to privacy
- limit patient redress as a result of inappropriate waivers.

The use of discount coupons and gift certificates is discussed in more detail in a separate section above.

The College of Physicians and Surgeons of Alberta (CPSA) published a standard of practice in 2010 entitled Advertising by regulated members. Again this forbids discounting (with an exemption for when this is done “for compassionate reasons”), but is otherwise largely consistent with Council’s own standards.

The CPSA standard also addresses the use of titles. This specifically limits the use of the term “surgeon” and also requires that doctors only use other titles where these relate to their authorised specialisation (ie, vocational scope of practice). Of interest here is an additional provision which allows doctors to use a title that relates to a “special interest” only if: they apply to the Registrar for authorisation; provide evidence by way of documentation about training, experience and interest; and the Registrar approves the application.

Like the other major Canadian Boards, the College of Physicians and Surgeons of Nova Scotia (CPSNS) has recently reviewed the standards which it publishes that relate to advertising. However, these standards have not been changed as a result of the latest review, and are essentially unchanged from the version published in 2005.

The CPSNS standards are interesting in the approach that they have taken. There are different standards depending on the purpose of the advertising. For example, doctors who are “commencing practice” are permitted to provide specified information to patients intended to inform them about their practice, while doctors who are going to be absent from their practice for an extended period of time are required to provide specified information to patients – including the arrangements made for practice coverage.

While the approach taken is interesting, much of the content is less to do with advertising and more to do with the broader issues of communication and informed consent. The section of the CPSNS standard that deals with Promotion of products and services by physicians is relatively short and largely deals with conflicts of interest. It is also noted that the CPSNS standard acknowledges the Council’s current statement as a reference, and some of the language is similar.

A separate statement by the CPSNS deals with the Qualifications required to perform certain cosmetic procedures in Nova Scotia. This statement includes provisions on the use of titles which largely resemble those published by the CPSNL. They also require that when titles are used in advertising these must not be abbreviated. For example, a Fellow of the Royal College of Surgeons of Canada, Otolaryngology – Head and Neck Surgery must use that full title in all advertising.
The CPNS statement also states that:

Advertising or other public communications by physicians must not confuse bona fide professional qualifications such as RCPSC fellowship or equivalent specialist qualification recognized by the College of Physicians and Surgeons of Nova Scotia with organizational affiliations. (Examples include the Canadian Academy of Cosmetic Surgery, the American Academy of Cosmetic Surgery and the American Academy of Aesthetic Medicine.)
Appendix 1 – Statement on advertising

Introduction
1. The Medical Council believes that clear and accurate information about the services provided by doctors benefits all parties in the healthcare system. The Council also believes that constraints to a doctor’s freedom of expression should be minimal and reasonable.
2. However, advertising can have adverse consequences for patients when it is false, misleading or deceptive, leads to the provision of inappropriate or unnecessary health services, or creates unrealistic expectations.
3. The purpose of this statement is to protect the public from advertising that is false, misleading or deceptive, and to provide guidance to doctors about the advertising of health-related products and services. This will support the appropriate use of health resources and ensure that patients are able to make informed decisions about their health care.
4. A number of standards exist which already provide some guidance on the subject of advertising. These standards include legislation which deals with advertising in general and standards for health-related advertising set by the Advertising Standards Authority. This document provides an overview of those standards, and also outlines additional expectations Council has of doctors who advertise. The statement may be used by the Advertising Standards Authority, the Health Practitioners Disciplinary Tribunal, the Council, and the Health and Disability Commissioner as a standard by which a doctor’s conduct is measured.

Definition
5. For the purposes of this statement, advertising includes, but is not limited to, any public communication using television, radio, motion picture, newspaper, billboard, list, display, the internet or directory, and includes business cards, announcement cards, office signs, letterhead, telephone directory listings, professional lists, professional directory listings and similar professional notices, and which is intended to promote health services, health-related products, a doctor or a clinic or group with which a doctor is associated.
6. Importantly this definition excludes material issued to patients during consultations where such material is designed to provide the patient with clinical or technical information about health conditions or procedures and where the patient is afforded sufficient opportunity to discuss and ask questions about the material. Also, this definition is not intended to apply to material issued by a person or organisation for the purpose of public health information or as part of a public health programme.

Responsibility for content
7. You are expected to take reasonable steps to control the content of any advertisement of your health-related services and products, regardless of authorship.
8. If you are in sole practice or a partnership you cannot delegate responsibility for ensuring compliance with this statement to an administrator, manager, director or any other person. If you hold responsibility for management or governance within a corporate organisation you may reasonably be held responsible for the content of any advertising published by that organisation.

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1 False, misleading or deceptive advertising can also give rise to a breach of the Fair Trading Act 1986 which carries penalties in the order of $60,000 in respect of an individual and $200,000 in respect of a body corporate.
2 As required by Right 6 of the Code of Health and Disability Services Consumers’ Rights.
9. You also have some responsibility in situations in which you make yourself available, or provide information to, media reports, magazine articles, “reality” shows or advertorials. In such circumstances, you are responsible for the comments you make and the information you provide.

10. The Council may view failure to take reasonable steps to control content under these circumstances as constituting unprofessional conduct.

**Council’s expectations**

11. Advertisements must contain truthful and balanced representations and claims must be valid, evidence based and be substantiated. When you choose to make a claim or include scientific information in advertising, it should:
   - be presented in a manner that is valid, evidence based and substantiated
   - be in plain English
   - identify clearly the relevant researchers, sponsors and the academic publication in which the results appear
   - be from a reputable and verifiable source.

   Although you should always discuss different treatment options with patients\(^3\), you should not make direct comparisons between the quality of your services and the quality of services your colleagues provide.

12. Advertisements must not encourage, or be likely to encourage, inappropriate or excessive use of health resources. You must not put pressure on people to use a service, for example, by arousing ill-founded fear for their future health.

13. Advertisements must not unduly glamorise products and services or foster unrealistic expectations.

14. You should use any images in your advertising with caution. Images, particularly “before and after” photos, have a significant potential to mislead or deceive, to convey to a member of the public inappropriately high expectations of a successful outcome and to encourage the unnecessary use of services. If you choose to use “before and after” photos you must ensure that they:
   - Are there solely for the purpose of providing accurate and useful information to patients.
   - Show a realistic portrayal of the outcome that can reasonably and typically be expected.
   - Only depict patients who have undergone the advertised procedure while under your (or your services’) care.
   - Have not been altered in any way.
   - Use the same lighting, contrast, background, framing, camera angle, exposure and other photographic techniques in both the “before” and “after” images.
   - Ensure consistency in posture, clothing and make up.
   - Are only used when the patient has given his or her fully informed consent.

15. Advertisements must not prey on the vulnerability of particular audiences, and you should be careful how your advertising represents vulnerable groups.

16. You must not falsely overstate your qualifications. Patients can find medical titles confusing and to reduce confusion you should not use titles such as “specialist” that refer to an area of expertise, unless you are registered with the Council in an appropriate vocational scope. Advertising qualifications or memberships may be useful in providing the public with information about experience and expertise, but may be misleading or deceptive if patients can interpret the advertisements readily to imply that you are more skilled or have greater experience than is the case.

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\(^3\) As required by Right 6(1)(b) of the Code of Health and Disability Services Consumers’ Rights.
You should advertise only those qualifications that have been:

- approved for the purposes of registration and relate to your vocational scope of practice
- conferred or approved by your College, or another training organisation that has been accredited by the Council, or another New Zealand responsible authority.

17. You must not advertise your services by visiting, emailing or telephoning prospective patients, either in person or through an agent.

18. Doctors are not permitted to endorse medicines, medical products or medical treatments under s.58(1) of the Medicines Act. The New Zealand Medical Association (NZMA) Code of Ethics also states that doctors should not allow their standing as medical practitioners to be used inappropriately in the endorsement of commercial products. When doctors are acting as agents for, or have a financial or other interest in, commercial organisations or products, their interest should be declared. If endorsing a product, doctors should use only the proper chemical name for drugs, vaccines and specific ingredients, rather than the trade or commercial name. Any endorsement should be based on specific independent scientific evidence, and that evidence should be clearly outlined. The Council agrees with this view.

19. It is not appropriate to offer, manufacture, promote or distribute discount coupons or gift certificates for medical treatments.

If you advertise by means of discount coupons or gift certificates, you must ensure that these do not undermine your relationship with the patient and the informed consent process. In particular, you must ensure that your coupon or certificate is clear that:

- purchase of the certificate or coupon does not equate to granting informed consent
- prior to treatment the patient will have an opportunity to discuss treatment with you, to ask questions and to provide their informed consent
- the patient will be provided with a period of reflection of at least seven days between purchase of the certificate or coupon and the provision of treatment
- the patient has the right to opt out of treatment at any time
- you will not provide the requested treatment if your assessment indicates that the patient is not a suitable candidate
- the patient will be entitled to a refund should they decline to provide consent, or should you decide that they are not a suitable candidate for treatment or that an alternate treatment is a better option for that patient.

20. It is not appropriate to offer medical treatments as prizes or gifts where this is done to promote a commercial service or for financial gain.

Complaints about advertising

21. If you have a concern about advertising you should contact the Council. Where advertising appears to breach a code or law the Council may refer complaints to another agency, such as the Advertising Standards Complaints Board or the Commerce Commission.

22. At the conclusion of an investigation by another agency the Council may initiate a conduct review which could result in additional sanctions.

Related statements

- The NZMA Code of Ethics
- The Code of Health and Disability Services

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4 It is permitted to contact former patients if this is for the purpose of re-enrolling them into a PHO.
Consumers’ Rights
- the Fair Trading Act 1986
- The Consumer Guarantees Act 1993
- The Medicines Act 1981
- The Therapeutic Services Advertising Code
- The Therapeutic Products Advertising Code

All advertising of health-related goods and services must comply with the above standards. Some of the requirements of the Medicines Act 1981 and the Therapeutic Services Advertising Code are outlined below.\(^5\)

**Requirements of the Medicines Act 1981**

Part 4 of the Medicines Act 1981 sets out legal requirements specific to medical advertisements. Section 58 specifically prohibits the publication of medical advertisements that:

- Claim, indicate or suggest that a medicine, medical device or treatment will prevent, alleviate, or cure a range of diseases, or prevent, reduce, or terminate a range of physiological conditions.\(^6\) However, the Act also states that “it shall be a good defence in a prosecution [for a breach of section 58] if the defendant proves that the matter claimed, indicated or suggested in the advertisement is true.”
- Claim, indicate or suggest a medicine, medical device, or method of treatment:
  - Is a panacea or infallible; or
  - Is or has been used or recommended by a practitioner, nurse, pharmacist, or person engaged in study or research in relation to any of those professions or the work they perform; or
  - Has beneficially affected the health of a particular person or class of persons, whether named or unnamed, and whether real or fictitious, referred to in the advertisement; or
  - Invites correspondence or the sending of hair, blood, urine, or other bodily specimens or photographs for the purposes of diagnosis or treatment concerning any disease or physiological condition.

**Requirements of the Therapeutic Services Advertising Code**

The Therapeutic Services Advertising Code covers all advertisements of therapeutic services, including medical services. It includes the following principles:

- Advertisements should comply with the laws of New Zealand and the appropriate industry code of ethics.
- Advertisements should observe a high standard of social responsibility particularly as consumers rely on therapeutic services for their health and well-being.
- Advertisements should not by implication, omission, ambiguity or exaggerated claim mislead or deceive or be likely to mislead or deceive consumers, abuse the trust of or exploit the lack of knowledge of consumers, exploit the superstitious or without justifiable reason play on fear.
- Any scientific information in an advertisement should be presented in an accurate manner. Scientific terminology should be appropriate, clearly communicated and able to be readily understood by the audience to whom it is directed.
- Advertisements should not claim or imply endorsement by any government agency, professional body or independent agency unless there is prior consent, the endorsement is verifiable and the

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\(^5\) Legislation, regulations and standards may be updated from time to time, and doctors.you should refer to the most recent edition.

\(^6\) Refer to Schedules 1 and 2 of the Medicines Act 1981 for the list of conditions. A copy of the Act can be found at http://legislation.govt.nz
agency or the body is named.