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Non-compliance with medical ethics in advertising: impacts on civil liability

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Abstract

This article reflects on medical obligation due to the violation of the ethical rules of advertising in medicine, especially when published on social media. Using the deductive method, the legal nature of a professional's obligation will be discussed, which, as a rule, is an obligation of means. However, the discussion arises when the content of the advertising message and how it is conveyed make it possible to transform this obligation into an obligation of result, thus changing the legal nature of the physician's essence. To enable the debate, based on a literature review, this article exposes the possibility of the professional being civilly responsible for ethical violations related to medical advertising and the impairment of informed consent, that is, if the physician induces results, that he is liable for not achieving the proposed outcome.

Keywords: Advertising. Social networking. Treatment outcome. Evaluation of results of therapeutic interventions.

Resumo

Descumprimento da ética médica em publicidade: impactos na responsabilidade civil

Este artigo se propõe a refletir sobre a obrigação médica em decorrência da violação das regras éticas de publicidade em medicina, em especial quando veiculada nas mídias sociais. Por meio do método dedutivo, será discutida a natureza jurídica da obrigação do profissional, que, via de regra, se dá como obrigação de meio. Entretanto, a discussão surge quando o conteúdo da mensagem publicitária e a forma como é veiculada possibilitam transformar essa obrigação em obrigação de resultado, alterando então a natureza jurídica de essência do médico. Para viabilizar o debate, com base em revisão bibliográfica, este artigo expõe a possibilidade de o profissional responder civilmente por violações éticas relativas à publicidade médica e ao comprometimento do consentimento informado, ou seja, se o médico induz resultado, que ele seja responsabilizado por não alcançar o desfecho proposto.

Palavras-chave: Publicidade. Rede social. Resultado do tratamento. Avaliação de resultado de intervenções terapêuticas.

Resumen

El incumplimiento de la ética médica en la publicidad: impactos en la responsabilidad civil

Este artículo se propone reflexionar sobre la obligación médica derivada de la violación de las normas éticas de la publicidad en medicina, especialmente cuando se difunde por las redes sociales. Con base en el método deductivo se discutirá la naturaleza jurídica de la obligación del profesional que, en general, se da como obligación de medios. Sin embargo, se plantea la discusión cuando el contenido del mensaje publicitario y la forma como se difunde permiten convertir esta obligación en una obligación de resultado, modificando así la naturaleza jurídica de la esencia del médico. Para facilitar el debate, y con base en una revisión bibliográfica, este artículo expone la posibilidad de que el profesional sea civilmente responsable de las violaciones éticas relacionadas con la publicidad médica y con el compromiso del consentimiento informado, es decir, si el médico induce un resultado, debe ser responsable de no lograr el resultado propuesto.

Palabras clave: Publicidad. Red social. Resultado del tratamiento. Evaluación de resultados de intervenciones terapéuticas.

The authors declare no conflict of interest.

Update

The combination of medical practice with social media and consumption results in a complex situation in which a wrong, defective, or flawed union may lead to an undesirable end. Such an outcome occurs in the possibility of physicians being responsible for the obligation of result, when in fact their obligation is of means. This scenario happens, in theory, when physicians broadcast an advertising message to make believe the achievement of a certain and determined result.

Initially, the difference between medical obligation and responsibility will be discussed to conceptualize and distinguish the obligations of means and of results in the medical act. A specific study of these civil law phenomena is required to understand the terms used in this study. Then, advertising will be addressed to differentiate it from other terms such as "propaganda," "marketing," and "promotion" and specify it in the conduct of the medical professional. Advertising will be analyzed and discussed based on the provisions of the Federal Council of Medicine (CFM) [1,2], a regulatory body of the physician's rights and duties, and on the Consumer Defense Code (CDC) [3], responsible for disciplining consumer relations, including the one between physician and patient.

In its Code of Medical Ethics (CEM), especially in item XX of the Fundamental Principles, CFM states that *the very personal nature of the physician's professional performance does not characterize a consumption relationship* [4], even though the Judiciary has applied the CDC to interactions between physicians and patients. The brief analysis proposed here will allow expanding this knowledge, providing technical aspects to the legal provisions that regulate medical advertising.

Finally, it was necessary to summarize the physician's obligation and civil liability due to undue advertising. This discussion will address how advertising may reflect on the burden of medical practitioners and, thus, characterize an obligation of result due to the content of the advertisement. This study will be eminently bibliographic and justified by the possibility of a physician answering for an obligation of result when broadcasting an advertising message that leads the consumer to believe in the achievement of the outcome.

Medical obligation or liability?

Although the terms "obligation" and "liability" are treated as synonyms by some jurists, they express different situations, and therefore one must conceptualize, identify, and differentiate them. The obligatory legal relationship is born from the will of the parties that integrate it or from legal determination, and it must be fulfilled spontaneously and in full. When the obligation is not voluntarily fulfilled, or if it is partially fulfilled, liability arises [5].

The physicians' obligation is characterized by what they will be bound to provide in their work. It can be of means or result, and this classification will differentiate what should have been obtained at the end of the medical procedure. On the subject, Rosenvald and Braga Netto [6] point out a certain arbitrariness in setting the obligations of means or results according to the specialty. This brings the need to differentiate these two possibilities of obligation and identify which one the physician – or the medical specialty – will fit into [7].

In the obligations of means, the debtor, who in this study will be the physician, undertakes to provide the necessary resources for the achievement of an end, without being responsible for the result – remembering that liability arises when the obligation is not wholly fulfilled. Here, physicians must employ all the efforts and care necessary to achieve the desired result; however, it is not obligated to them. That is, the physician is not obliged to cure the patient, but to treat him. The medical duty is to act zealously, cautiously, and diligently [8].

In the obligation of result, the debtor (the physician) must achieve a certain purpose to fulfill their obligation, that is, they must deliver exactly the object of the contractual relationship [5]. Nevertheless, Barros [8] highlights that medicine cannot be obligated to provide results, since physicians do not work with promises, as numerous external factors impede such an attitude. Promises can generate the attempt to standardize the body, which, however, given the subjectivity of the reaction, is not standardizable [9].

According to Maluf and Maluf [10], although CFM defends the obligation of means in medicine,

as extracted from the CEM, the Judiciary has applied the obligation of result to some medical specialties [11,12]. Most notably, this occurs for medical acts related to aesthetic-related specialties, such as dermatology, nutrology, and plastic surgery for beautifying purposes – although such specialties can also emphasize restorative and curative aspects [13]. On the subject, we suggest reading the article "Beauty medicalization: a bioethics reflection about medical responsibility," by Silva and Mendonça [14].

From this perspective, physicians may be held responsible for flagrant violations of ethical standards by the abusive use of advertising for commercial purposes, in disagreement with the sobriety required from the professional. Having exposed and understood the physician's obligation and responsibility towards the patient in case of non-compliance (even if partial), the professionals' conduct is discussed on social media, changing the nature of their obligation. In other words, as a rule, their obligation is of means, and their responsibility, subjective, but what will be discussed here is whether the professional who induces the guarantee of results with their advertising will be able to answer for unreached outcomes, even if they used all of the resources that medicine offers.

Medical advertising

Before any discussion, the clear understanding and definition of the differences between advertising, marketing, and propaganda is required. Although commonly used as synonyms, these acts are distinguished in their essence and goals, and therefore must be clearly differentiated. The CDC [3], which will be the greatest ally of this study, was concerned with advertising when establishing its rules and principles, leaving propaganda and marketing as supporting actors, and it is for this reason that this article will focus on advertising.

This type of disclosure aims at commercialization, thus, linked to a marketing object. That is, it adopts a commercial character to attract potential buyers, spectators, or users. Advertising intends, directly or indirectly, to promote the purchase of a product or use of a service by consumers [15]. The main purpose of advertising is to persuade and add value to a particular good or service [16].

Article 8 of the Brazilian Advertising Self-Regulation Code defines advertising as *activities aimed at stimulating the consumption of goods and services* [17]; therefore, its objective is identified in attracting consumers. Advertising is not characterized by providing information, but by presenting commercial content that encourages consumers (here, patients) to purchase goods and services (medical procedures). In other words, it induces the potential patients to consume a certain service.

Propaganda, in turn, is distinguished from advertising in terms of its purpose and objective. While advertising aims to "capture" people to adhere to or consume products or services, propaganda aims to "capture" people to adhere to an idea, be it political, social, economic, or even religious – propaganda is about ideological, non-commercial, adherence. That is, despite being a persuasion technique, propaganda holds no economic purpose, it only aims to spread ideas [18].

To differentiate advertising and marketing, one can observe that the first consists of one of several tools of the second, since marketing as a concept involves all commercial activities related to the circulation of goods and services, from their production to final consumption. Marketing is the set of activities performed to create and take the goods from the producer to the final consumer [18].

Advertising provided for by the Federal Council of Medicine

Having defined the three terms, they will now be applied to the physician-patient relationship. Products, goods, or services are understood to be any procedure presented by a physician via advertising. Consumers, in turn, are the potential patients, that is, it does not matter if the people joined the advertising and will undergo the procedure or if they were only reached by its content (without adhering, at least for now). According to the concepts presented, and the proposal of this study, it can be immediately identified that the conduct to be discussed here will be medical advertising, an act whose purpose is economic gain.

Health professionals, especially physicians, are free to market their work via advertising.

However, this freedom is not as wide as it may seem; in fact, it is carefully regulated by the CEM and by municipal resolutions, which define what can and cannot be done regarding medical advertising. The professional council actually restricts freedom of expression concerning the expression of medical content [19].

Communication and information techniques have grown, assuming a fundamental role in bringing consumers and suppliers closer together. As a result, advertising cannot have absolute freedom, with the aim of guaranteeing its legality under the prism of good faith, veracity, trust, and transparency, ensuring that the expectations of the consumer, a presumably vulnerable subject, are satisfied, notably due to the existing information asymmetry [20].

Before understanding the matter in the light of the CDC, which, in principle, limits advertising, curbing abuses and mistakes, a brief analysis of some CFM resolutions will be conducted. Although the terms "advertising," "propaganda," and "marketing" have already been differentiated and are recognized as distinct behaviors, some bibliographic and study sources consulted use the three terms, or at least two of them, as synonyms, so it was necessary to pay attention to what the information intended to communicate. The same occurs in the publications of CFM itself, the main parameter of this study. However, this does not mean these terms are synonymous, and therefore they had to be previously differentiated.

To understand the subject at hand, one must analyze CFM Resolution 1,974/2011 – updated by CFM Resolution 2,126/2015 [2] –, whose article 1 defines publicity, advertising, or propaganda as *communication to the audience, by any means of dissemination, of professional activity with initiative, participation, and/or consent by the physician* [1]. That is, any form of dissemination to publicize a professional activity that involves some conduct by the physician will be considered advertising.

As can be seen in the cited article [1], medical advertising is lawful and easily characterized. Nevertheless, for it to be implemented, article 2 of the same resolution [1] requires the inclusion of some data in the advertising message: name of the professional; their registration number with the Regional Council of Medicine (CRM); their specialty and/or area of expertise, if registered in the CRM; and the Specialist Qualification Record number, if any. In other words, the absence of any of this information can harm the physician in future investigations of responsibility, at least administratively [1].

It is also worth paying attention to the conduct prohibited in the paragraphs of article 3 of CFM Resolution 1,974/2011: *b) advertising equipment to grant it privileged capacity*; (...) *d) allowing your name to be included in deceptive advertising of any nature;* (...) *g) exposing your patient's figure as a way of publicizing technique, method, or treatment result, even with* [their] *express authorization* (...), [except in the event of scientific dissemination in which the exposure is strictly necessary, under the terms of article 10 of the aforementioned resolution]; and *k) guaranteeing, promising, or implying good treatment results* [1]. More incisively, article 3 restricts advertisements, and professionals must be aware of their conduct. If any physician eventually exercises any of the prohibited actions, they will certainly be held responsible in an administrative, and, perhaps, also judicial way, if the act has repercussions on the patient and the patient chooses to do so.

According to CFM's understanding and position, it is important to pay attention to the prohibition of publishing self-portraits (selfies), images, and/or audios that characterize sensationalism, self-promotion, or unfair competition on social media, as well as the need to protect confidentiality and the patient's image (even if the patient authorizes the disclosure). In this regard, advertisements that disseminate the "before and after" of procedures are also prohibited, as well as the publication by third parties of repeated praise for the techniques and results obtained. In cases of doubt or not knowing what information they can or cannot legally and ethically expose in their advertising message, the medical professional has the support of the Medical Affairs Disclosure Commission of the CRM.

Article 9 of CFM Resolution 1,974/2011 [1], in turn, emphasizes that physicians should avoid self-promotion and sensationalism due to the profession they practice, and exemplifies these behaviors in its paragraphs. Subparagraph f of paragraph 2 of this article will be specially analyzed in this study. This item defines sensationalism as the *abusive*, *misleading*,

or seductive use of visual representations and information that may induce promises of results [1]. Such behavior is all too common in the current context and often goes unnoticed. It is present in an unbridled way, mainly in social media; profiles of physicians presenting seductive outcomes that induce guarantees of results are easy to find in applications and social media websites.

The current influence of social media is notorious, moving society in such a way that they are possibly the most used means to capture clients-patients, partners, and consumers. This vast universe, apparently unlimited and "without an owner," enables a significant number of advertising messages, reaching an incalculable audience and allowing content to be broadcast irresponsibly, as if it were possible to cover up its dishonesty.

Annex I of CFM Resolution 1,974/2011 also specifies that *the physician's participation in the disclosure of medical matters, in any mass media, must be guided by the exclusive nature of clarification and education of society, not being up to the professional to act in order to stimulate sensationalism, self-promotion, or the promotion of other(s), always ensuring the dissemination of scientifically proven, valid, relevant, and public interest content* [21].

In general, when advertising or publicizing medical services, it is forbidden to use expressions such as "the best," "the most efficient," "the only capable," "guaranteed result," or others with a similar meaning. It is also forbidden to: suggest that the medical service or the professional is the only one capable of treating the health problem; ensure results for the patient or their families; abusively, deceptively, or seductively display images of bodily changes caused by alleged treatment; and even use celebrities to publicize their service and influence lay people [1].

Thus, one can see that CFM Resolution 1,974/2011 [1] regulates medical advertising and aims to prevent sensationalism, self-promotion, and commercialization of the medical act, to avoid abuse in advertising messages that may lead to ethical-disciplinary and judicial processes. Such a measure supports medicine and safeguards patient safety, favoring society as a whole.

However, the existence of the rule does not guarantee its observance. In fact, there are countless cases of physicians who simply ignore it and deliver content according to their own desire. These conducts lead to administrative and judicial repercussions. After all, if the physicians' intention to signal the result is demonstrated, it is reasonable for them to respond as an obligation of result and not of means. However, despite such reasoning, it is opportune to analyze the CDC [3] and identify what it says about the physician's obligation and responsibility as a result of advertising.

Physician's obligation due to improper advertising

The advertising message has marketing importance for the professional in order to reinforce their brand. Nevertheless, it must be conveyed very carefully, insofar as a misrepresented or abusive advertisement can generate unattainable expectations in potential patients, and, of course, attract them by the "promise" that the physician offers in its dissemination – this is about the principle of binding the advertising message.

Therefore, professionals often induce the guarantee of the result, that is, they seems to assure their possible patients that they will obtain exactly that outcome presented – often through surreal images or results obtained punctually – in the advertising message. Thus, if physicians behave this way (inducing a guarantee of the outcome), why should not they also be responsible for the result of their intervention? Thus, their obligation would become an obligation of result.

Physicians must be aware of the content conveyed in their advertising messages on social media, especially in their relationship with the patient. This is because, sometimes, an advertisement can give the patient distorted information (deceptive advertising), or generate unattainable expectations, and, as a rule, physicians are aware of this. In other words, professionals know that, when exposing a certain subject or procedure, they will attract a greater number of patients, even if this exposition is sensationalist and unattainable. If observed, this scenario will leave no doubt as to the deceptive or abusive nature of the published content, hence the potential liability of the physician.

Advertisements for medical services are not prohibited or illegal. The problem does not lie in the publications themselves but in their content, which will be exposed to a lay audience that does not have sufficient technical knowledge about medicine. Therefore, advertising must have clear and objective information that will be decisive for the patient to seek or not the professional presented (principle of transparency of the advertising grounds). It should also be considered that this choice is often based on the "guarantee" of such a result.

There is a duty of veracity of the information published, but, more than that, there is a duty of loyalty and respect, which proves to be a corollary of the principle of objective good faith, listed in article 422 of the Civil Code [22], so important to the full realization of every legal business. Advertising based on particular results and/or results that are not attainable by the community cannot be accepted. The advertising practice requires a relationship of trust between the provider and the consumer [23].

Patients, dazzled by what they see on digital media, look for the physician to perform the desired procedure, full of expectations for what was presented to them. The physician, in turn, aiming at profit (the purpose of all publicity), does not even pass on the necessary information to patients, because the professional knows that the truth can lead them to give up the procedure. This leads to a closer look at the physician-patient relationship, which must be based on truth and trust. Professionals must always be prepared and willing to expose the truth to the patient about the desired service, allowing them to exercise their autonomy [10].

Depending on how physicians present their service in advertising messages, they induce the guarantee of a certain result, even though they are aware that each human being is individualized, that each organism has its particularities, and that a single outcome could never be guaranteed to different types of people. From this perspective, false information or expectations precisely represent the violation of informed consent and of the principle of patient autonomy. Informed consent aims to give patients knowledge of all possible implications of the medical procedure to which they will be submitted. This mechanism will also have the power to exempt the physician from any civil liability in case of treatment failure [24,25]. It is not just a requirement for a consumption relationship, but also, and mainly, an ethical requirement, in which physicians, using the truth, must explain to their patients how they will proceed, the possible consequences of the procedure, how it will be done, what will be necessary to achieve a good result, and all information relevant to the case [4].

Informed consent is supported by the CDC [3], which guarantees the consumer the right to adequate and clear information about the services and risks arising from them. CEM [4] also gives patients authority over their own life, guaranteeing them the right to freely decide about their person or well-being, as well as exercising their authority to limit it [23]. In addition to safeguarding patient autonomy, the same legal provision [4] prohibits certain medical conducts, such as failing to explain to the patient about their illness and failing to obtain their consent to perform the procedure, except in cases of imminent risk of death [24,25].

This consent process is an expression of good faith and a way for physicians to protect themselves from possible results, not being only about passing on knowledge to patients – which is their right [26,27]. After all, when relevant information about the object and content of the service is withheld, any result other than the one offered must be indemnified [23]. Physicians must present in their advertisements all the risks of the practices used, in the same way that they present the benefits. And, of course, this conduct must be observed not only in the act of advertising, but also in the consultation in which the patient contracts the service, since the object of the obligatory legal relationship is already established there.

It is evident that informed consent will only be recognized when the information provided by physicians is clear and precise, so that, if they do not do so, they will be at risk of responding for omission of information considered indispensable. It will be based on what has been clarified that the patient will freely decide whether or not to undergo the suggested procedure.

The physicians' conduct in their professional practice, as long as there is no excess, will be considered legitimate, since ethics is assumed as a way of preserving dignity and self-determination. Thus, despite presenting formidable results in their

professional advertisement, bordering on fantasy, physicians can talk to patients and inform them about the specifics of the outcomes presented in the advertisements. This is because the duty to inform, provided in a complete and satisfactory way, will allow the patient to respond, translated into their informed consent. These clarifications will allow the patient to accept the risks of the procedure in a free and self-determined way.

However, most professionals do not proceed in the way indicated because they aim to profit "at any cost." The thirst for high and fast pay is exactly what leads many physicians to respond to lawsuits, since they promise – even if implicitly – an unattainable result, falling under deceptive and sometimes even abusive advertising.

Obligation of result

The obligation of result seems to be far from being framed as the best way to evaluate medical conduct. Nevertheless, it is noted at the same time that advertising rooted in deception or abuse must be severely punished, including administratively by CRM. The discussion gives rise to the junction of these two phenomena: the obligation and the advertising message of the physician.

Professionals are prohibited from using technology, such as social media, to advertise privileged conditions for treatments or procedures, in addition to methods or techniques not scientifically recognized. Physicians are also, of course, prevented from guaranteeing, promising, or implying good treatment results. That is, professionals must effectively avoid any form of self-promotion and sensationalism [28].

In the obligation of result, as seen above, the provision of the service has a defined purpose (object of the obligatory legal relationship or contractual relationship), so that the absence of the expected outcome implies default, forcing the physician to assume the responsibility for not having satisfied the promised obligation [28].

Note that to configure an obligation of result, one must define the purpose, that is, the promise of an outcome. For medical conduct to be framed in this way, it needs to be backed by a guarantee, which can take many forms. For this discussion, such a promise is implied. Obviously, and as seen, physicians have an economic interest in publishing their services, and, to achieve this objective, they try to convince the patient to hire what they offer. For this, professionals implicitly promise in the advertisement that, by hiring them, the patient will reach the result exposed in the message.

Thus, it is plausible to understand that this should characterize an obligation of result for the physician who, in an advertising message, will seduce the patient based on third-party results. Nothing else seems as reasonable as professionals answering for what they practice, especially when they violate the legal interests of others, who are the vulnerable part. After all, patients are lay people in medicine and the physician is an expert in the subject, so there is no way to demand technical knowledge from the patient, since all of it is held by the professional.

Therefore, what is proposed is to verify that ethical legislation can impact the scope of civil law, since typically an obligation of means will be transmuted into an obligation of result. Unlike what happens with the Judiciary in the context of certain aesthetic specialties, this modification will be caused by physicians themselves, which is why care must be taken when advertising.

Final considerations

In view of the linear construction of the proposed content, some essential points are concluded: the physicians' obligation is one of means, but it can become one of result; their liability will always be subjective, with the patient having to prove medical guilt; the content of an advertising message is essential to characterize the promise of an outcome, and, thus, give rise to the obligation of a result for the physician; and the physician-patient relationship is nothing more than a consumer relationship, since, when it is signed, there is a contract.

As seen, advertisement as understood here is the one fraught with an implicit promise as a method to convince the patient to adhere to the proposed medical service and to consolidate a legal business (consumer contract). The contract must be fully complied with, or it will give rise to liability and, consequently, if fault is proven, reparation.

The contract between physician and patient, when arising from misleading or abusive

advertising, will clearly be corrupted by the vice of consent, in which a patient expressed a desire to adhere to the contractual relationship but did so in a biased and flawed way, because, if they knew about the reality of the service or procedure offered, they could decline. In other words, a patient makes a mistake due to advertising deception/abuse. From ignorance or false perception of reality, patients manifest their will, contradicting what they would do if they knew exactly the conditions of the procedure.

In view of the above, it is understood that the crucial point to give rise to the topics discussed will be the content of the advertising message, to determine whether a guarantee was induced by the physician and, as a result, if there was an error in the patient's consent. Once the facts are verified, if there is a violation of the patient's legal interests and the physician's guilt is proven, it is believed that there will be a possible obligation of result to be fulfilled by the professional, even if this is not their obligation in essence.

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