

Influencer marketing by healthcare providers - Ethics and the law

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Abstract

In some professional settings, social media platforms are accepted as gold-standard marketing mechanisms. Many businesses have a vast social-media presence, backed-up by marketing agency support and digital analytics that measure the impact of marketing strategies. Many healthcare professionals have embraced this trend, especially in the fields of aesthetic medicine, plastic and reconstructive surgery and aesthetic dentistry where 'influencer marketing' has gained traction to promote one's practice.

There is very little academic literature about the use of influencer marketing in the healthcare context internationally and no South African publications on this topic. However, anecdotal experience suggests that influencer marketing is widely used by health practitioners, with little to no guidance on its ethical acceptability or legal permissibility.

Addressing this gap, and providing practical guidance, is urgent and the purpose of this article, which presents a detailed ethical-legal analysis of influencer marketing use by healthcare professionals. The analysis draws on international ethical standards, South African legislation, ethical guidelines for health professionals and principles of advertising regulation.

The article concludes that whilst influencer marketing may be legally permissible - with certain conditions and caveats - it is ethically questionable, and as such may be best avoided in the healthcare setting, or should be utilised with extreme caution. Recommendations for the use of influencer marketing within the confines of the law and ethical best practice are provided.

Keywords

Ethics, ethics professional, ethics clinical, legislation, social media

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Introduction

In some professional settings, social media platforms are accepted as gold-standard marketing mechanisms^{1, 2}.

Many businesses have a vast social-media presence, backed-up by marketing agency support and digital analytics that measure the impact of marketing strategies. Many healthcare professionals (HCPs), including some in South Africa (SA) have embraced this trend, especially in the fields of aesthetic medicine, plastic and reconstructive surgery and aesthetic dentistry where “influencer marketing” has gained traction to promote one’s practice.

There is very little academic literature about the use of influencer marketing in the healthcare context internationally and we could find no SA publications on this topic. However, our anecdotal experience is that influencer marketing is widely used by HCPs, with little to no guidance on its ethical acceptability or legal permissibility. Addressing this gap, and providing practical guidance, is urgent and the purpose of this article. Through a detailed ethico-legal analysis, we conclude that influencer marketing is legally permissible - with certain conditions and caveats - but ethically questionable, and as such may be best avoided in the healthcare setting, or should be utilised with extreme caution.

Influencer marketing 101

An influencer is broadly defined as a person able to influence potential buyers of a product or service by promoting or recommending it on social media platforms like WhatsApp, Twitter, SnapChat, Tiktok, YouTube and others. A recent case in the United Kingdom³ suggested that anyone with > 30,000 followers on social media is considered an influencer, though this would differ by jurisdiction.

Brand owners and service providers pay influencers for marketing, either directly in the form of cash, or indirectly through discounts or free services (freebies). Interestingly, a recent German study found that the public are not as “influenced” by the communications of influencers as we may have believed. More research is required to establish whether influencer marketing plays a major role in customer choice of HCP or procedure⁴. Social media endorsement is closely linked to the wider milieu of celebrity endorsement of brands, which is significant business. Unlike an influencer, a brand ambassador is normally in a formalised contractual relationship with the service provider or brand owner⁵.

What makes healthcare different?

Unlike many other industries, healthcare hinges on the relationship of trust between HCP and patient⁶, with the general premise that any action that could be considered coercive - such as offering an incentive or promoting a certain product or professional over others - may impact on the autonomous decision-making of the patient⁷. This could result in an erosion of public trust, the upshot of which is that the public may be increasingly unwilling to approach HCPs for care. Protecting the ‘fiduciary relationship’ is the cornerstone of much medical legislation, its attendant

regulations and ethical guidelines⁸. There are few other professions that protect the relationship between parties so vociferously, perhaps the closest being law. Hence there is an additional burden on HCPs to be especially judicious in all their dealings with the public. In SA, HCPs registered with the Health Professions Council of South Africa (HPCSA) are obliged to practice according to the legal mandates of the Health Professions Act No 56 of 1974 as amended⁹, National Health Act No 61 of 2003¹⁰, the Medicines and Related Substances Act 101 of 1965 as amended¹¹ and other pertinent health legislation. HPCSA registration also calls on HCPs to follow the HPCSA Ethical Rules - a series of booklets addressing a wide gamut of topics. Moreover, as with all other business areas, health professionals are expected to comply with legislation like the Protection of Personal Information Act No 4 of 2013¹², the Promotion of Access to Information Act No 2 of 2000¹³ and the Consumer Protection Act no 68 of 2008¹⁴.

The rise and rise of the influencer

Although there is no published literature on influencer marketing in healthcare in SA, the fact that it is so widely used is perhaps unsurprising. The very nature of the influencer is that they are expected to document their every move, making their daily lives a sellable product¹⁵. This means that many influencers post about their experiences in seeking medical care, often without any pre-engagement with the HCP in question and without compensation from the HCP. This poses its own set of ethical, legal and reputational challenges for HCPs, as it requires regular monitoring of ones online reputation and a robust system for managing posts that name or implicate the HCP on social media. Discussing these is beyond the scope of this article.

We are aware of many instances where HCPs have been approached by influencers, who offer to post about their medical treatment in exchange for a discount or freebie. Anecdotally, HCPs - especially in aesthetic medical practices - have expressed concern that influencers feel entitled to freebies, and suggest that influencers may be rude or inconsiderate if their offer to post is turned down.

What are the ethical implications?

Ethical healthcare practice in South Africa is governed by the HPCSA, which has published several guidelines based on international ethical principles. These guidelines address aspects like privacy, confidentiality, informed consent, disclosure, the fiduciary relationship, ethical research and management of children⁹. The HPCSA’s 17 booklets detailing Ethical Guidelines for Good Practice have a quasi-legal standing, as they are mandated in the Health Professions Act⁹, and the HPCSA has sweeping judicial powers to discipline any practitioner in breach by bringing a charge of misconduct. We have undertaken a thorough evaluation of these guidelines and synthesised their recommendations regarding advertising, marketing, canvassing, touting and other relevant aspects. We conclude that the guidelines offer no definitive recommendation on whether the use of

influencer marketing is ethical, however appreciating the nuance of the guidelines suggests that it would not be viewed favourably by the HPCSA.

Booklet 11 of the guidelines states that:

“A practitioner shall be allowed to advertise his or her services or permit, sanction or acquiesce to such advertisement: Provided that the advertisement is not unprofessional, untruthful, deceptive or misleading...”

Advertising of any “...health related product or **health related service**” is widely defined as¹⁷:

“... any written, pictorial, visual or other descriptive matter or verbal statement or reference in respect thereof:
· Appearing in any newspaper, magazine, pamphlet or other publication; or
· Distributed to members of the public; or
· Brought to the notice of members of the public in any manner whatsoever,

That is intended to promote the sale of that ... health related product or to attract patients to any particular health establishment or health related service.”

So far so good. We have established that health practitioners are permitted to advertise their services within reason, and that advertising involves publishing one's services in such a manner as to promote their sale. However, the line between acceptable and unacceptable advertising is extremely fine., with Booklet 11¹⁷ stating that:

“Health care practitioners shall not advertise or endorse or encourage the use of any health establishment ... health related product or health related service in a manner that unfairly promotes the practice of a particular health care practitioner or a health care facility for the purpose of financial gain or other valuable consideration.”

Moreover, the Social Media guidelines¹⁸ state that:

“When using social media, even if via personal or anonymous blogs, health care practitioners must comply with the HPCSA rules on advertising practice, (including not engaging in active or passive touting and canvassing or allowing others to do so on their behalf)” (Section 9.2)

The Social Media guidelines¹⁸ specifically warn practitioners against utilising social media for canvassing and touting, and the limits of social media as an advertising platform for health professionals.

· Canvassing is: “... the promotion of one's professional goods and services by drawing attention to one's personal qualities, superior knowledge, quality of service, professional guarantees, or best practice.

An example of canvassing is a health care practitioner declaring on social media or posting patient reviews that state he or she is ‘the best health care practitioner in the country’” (Section 9.5).

· “Touting involves drawing attention to one's professional goods or services by offering guarantees or benefits that fall outside one's scope of practice. An example is advertising free WiFi services to patients while waiting for their consultations.” (Section 9.4)

Amalgamating these, we can make some important ethical inferences.

- Influencer marketing that crosses the line of canvassing or touting is ethically problematic, but it is not clear whether influencer marketing that avoids these aspects is acceptable, because it might still be perceived as unfairly promoting the practice or professional who has sanctioned it.
- The statement that “A practitioner shall not ... allow canvassing or touting to be done for patients on his or her behalf” (Section 3.2) suggests that any post by an influencer that claims the HCP is superior to others may be ethically problematic, but no remedy is suggested. This is challenging as HCPs would, by these standards, be implicated in canvassing and touting that they had nothing to do with. We argue that it seems unreasonable to imagine that an HCP may be seen to have brought the profession into disrepute if an influencer posts a review of their treatment online without the HCP having any prior knowledge¹⁹. However it would take a case being brought against an HCP to clarify this.

This analysis suggests that when it is solicited, influencer marketing may be ethically acceptable provided it does not constitute unfair advertising, canvassing or touting. However we need to consider the ethical implications of actively engaging influencers to provide advertising though the lens of coercion and perverse incentives too.

Coercive use of services

A central tenet of the HCP-patient relationship is that HCPs must not act towards patients in a way that coerces that patient into utilising their services, or undergoing a procedure without consideration of the alternatives. This is enshrined in patient-centred care and realised through the process of information giving and informed consent²⁰. Engaging an influencer to undergo a treatment at ones practice, and providing this treatment at a discount, may be coercive in that the patient will feel they have no choice - because the discount will make this treatment substantially cheaper than anywhere else.

Let's consider what could happen when influencer marketing goes wrong. The tragic death of Bodybuilder and influencer Odalis Santos Mina²¹ - who suffered a cardiac arrest during a non-surgical aesthetic procedure she was promoting online (*Box 1*) - raises some of the main contentions. These are that Mina was coerced into undergoing the treatment, and that her autonomy was violated. Moreover, the reputational fallout suffered by the clinic who sanctioned Mina and performed the procedure has been devastating - and we don't believe it is worth the risk.

Perhaps, because they are larger than life, we sometimes forget that ‘influencers are people too’. In the healthcare context, they are our patients, and we are expected to treat them according to the same standards as we do anyone else. The Patients' Rights Charter²² states that patients should be free to choose an HCP where possible, and they are entitled to confidentiality and informed consent. One of the main tenets of informed consent is voluntariness - that a person is in no way coerced or induced to undergo medical treatment or

examination²⁰. Any action that proposes to compromise the voluntariness of a treatment decision may thus be unethical, and possibly illegal.

Of course, it can be argued that the influencer is simply exercising their autonomy by accepting an incentive to undergo a treatment and post about it, and that influencers are entitled to earn a living as everyone else is. This argument will likely stand until a procedure goes wrong, and an influencer starts seeking damages from the HCP. Here, if the HCP has sanctioned the influencer to market services, they are particularly vulnerable because it could easily be painted as coercion, even if this was not the case. We must also remember that the court of public opinion is a formidable foe²³, and influencers play in this arena daily. If a procedure involving an influencer, solicited by an HCP, goes wrong, the HCP could suffer major reputational damage in the court of public opinion long before the facts are ascertained in a court of law or arbitration. Undoing this damage can be a near-impossible task, and it could put an end to a promising medical career.

Box 1 - Fitness influencer dies in procedure she was promoting

On July 7th, 2021, Mena presented at a Mexican aesthetic clinic to undergo an FDA-approved anti-sweating procedure known as miraDry®. As an influencer, Mena had previously been paid by the clinic to promote miraDry® - so it made sense that she would choose the clinic for her treatment. However, whilst undergoing local anaesthesia prior to the procedure, Mena suffered a cardiac arrest and staff at the clinic were unable to revive her. Although the cause of death is under investigation, the clinic claims that Mena was taking a steroid-based medication known as Clenbuterol, which interacted with the local anaesthetic causing the cardiac arrest. The clinic claims that Mena did not inform them that she was on any medication or supplements. However, Mena's family have laid a charge of negligence against the clinic, claiming that the anaesthesia was administered by non-professionals and that Mena was anesthetized by an employee who had never trained as an anaesthetist. The facts have yet to be established, and the case is now under formal investigation.

Is it legal?

There is no case law to clarify the way in which an SA court might interpret legislation in a case involving influencer marketing in healthcare. We argue that it would be most distressing to be the 'test case' in this scenario - for instance the HCP who is sued by an influencer because their discounted anti-wrinkle injections resulted in a droopy eyelid the week before a star-studded public appearance. The influencer post related to this scenario is unlikely to be a glowing

review of the HCP.

Presently, SA does not have laws specific to influencer marketing. However, we can likely turn to the Consumer Protection Act (CPA) 68 of 2008²⁴ and the Advertising Regulatory Board (ARB) Regulations and Code of Advertising Practice²⁵ to understand how influencer marketing would be dealt with legally. These sources should be read in conjunction with specific industry or profession related laws, regulations and guidelines - some self-regulatory and others legally binding.

Declaration of advertising as a legal obligation

Influencer marketing in SA gained legal traction following an ARB case involving Volvo in 2019 (Box 2)²⁶. This complaint elucidated certain legal provisions of the ARB Code that many may be unaware of. This includes the fact that service providers across the span of industry - and influencers alike - may be held accountable for non-disclosure of the nature of their relationship.

Box 2 - Volvo, Amanda du Preez, Kandy Kane

The complainant (Ms Amanda du Preez) objected to an Instagram post by a certain Kandy Kane (@kandykanemakeup) who has around 23000 followers on Instagram, and around 14000 subscribers to her YouTube channel. The complaint was essentially that Kandy Kane had said nice things in her post about the Volvo she was driving, but she hadn't really explained her relationship with the company. Certainly, the post had not been identified as advertising. In their response, Volvo said that the relationship between themselves and Kandy Kane was "not one of financial investment" but rather a "trade exchange". "The ARB agreed that Volvo and Kandy Kane were in contravention of its rules, and required that the post be amended to reflect the nature of the relationship."

It is a legal requirement that solicited influencer marketing posts clearly indicate that they are advertisements. Clause 3.2 of Appendix K to the ARB Code²⁵ (which is related to Declaration of Advertising and designed to ensure transparency) stipulates that: "... advertisers are required to disclose if content is part of a Social Media Advertising campaign as opposed to purely Organic Social Media." Framed within the proceeding discussion, a Social Media Advertising Campaign would constitute influencer marketing solicited by an HCP, whereas Organic Social Media would refer to unsolicited posts. Clause 3.2 continues by stating that:

... where Paid Advertising may reasonably appear to the consumer to be the unsolicited opinion of the influencer or platform, then the material must be clearly identified as Paid Advertising through the use of supported Social Media identifiers.

Supported Social Media identifiers include... "#AD" ... "#Advertisement" ..."#Sponsored".

The Consumer Protection Act (CPA) confers similar legal obligations and defines “advertisement” as:

... any direct or indirect visual or oral communication transmitted by any medium, by means of which a person seeks to bring the attention of the public to the existence of any goods or services or promote the supply of any goods or services.

This means that sponsored content, like influencer marketing, is considered advertising, and the CPA applies. Section 29 of the CPA states that a producer, retailer or service provider must not market goods or services in a way that is misleading, fraudulent or deceptive. Section 41 of the CPA stipulates that the supplier must not fail to correct an apparent misapprehension on the part of the consumer. So, when a social media influencer fails to disclose that posted content has been sponsored, they are in blatant violation of the CPA as is, arguably, the service provider or brand owner²⁴.

Furthermore, the CPA requires that advertising must take place in a fair and reasonable manner and that goods or services must not be marketed in a way that is false or misleading. Could an argument be made that a paid-for advertisement which is not clearly labelled as one is misleading? Probably. After all, a consumer is far more likely to be induced to purchase a product that has been given a rave review by a person they admire. Therefore, as with the ARB, in terms of the CPA ensure that all posts contain an indication that they are advertisements.

Declaration of a relationship of exchange as a legal obligation

Both the CPA²⁴ and the ARB²⁵ impose a legal requirement to declare any kind of “Trade Exchange” (*Box 2*) or other mutually beneficial relationship in advertising. Appendix K, Clause 4 of the ARB code provides as follows:

To ensure full transparency publishers and influencers are required to disclose if they were provided (permanently or on loan) with goods or services in return for media coverage (whether this is expressly stated or not). ... influencers are expected to disclose their relationship whether it is money or goods that have been exchanged.

According to the CPA, any form of compensation or inducement, whether in monetary terms or some other form will likely trigger the need to disclose the relationship with the advertiser or service provider. This recommendation applies to all types of influencer-brand relationships, regardless of whether the influencer receives money or free products and perks.

Advertising regulations and medical legislation

Both influencers and HCPs additionally need to be aware of wider advertising regulations specific to healthcare. Section 18 of the Medicines and Related Substances Act 1965 (as amended)¹¹ notes that Schedule 2-6 medicines may not be advertised to the public and the prices of these medicines may not be listed on social media. Moreover, trade names may not be mentioned on social media. Regulations relating to Medical Devices, published in the Government Gazette No. 40480 on the 09 December 2016²⁷, state that Class C and D Medical Devices may not be advertised to the public.

The penalties for contravening these regulations may be more serious than those imposed by the ARB and the CPA. In certain instances, there may even be criminal liability. Ignorance of the law will not suffice as a legal defence in this case by a service provider.

Core principles of medicine

Core principles of healthcare are compassion, integrity, respectfulness, trustworthiness, benevolence and discernment²⁸.

These apply equally when we use influencer marketing and HCPs need to ensure that such marketing is aligned with these core values. Is the influencer acting with integrity? Are they honest and authentic? Most importantly is it in the best interest of the patient? HCPs will be judged on how and why they use social media. It should be used with benevolence to educate, inform and positively impact healthcare. It should not be for self-aggrandisement, internet fame or financial reward. Moreover, HCPs needs to protect their integrity and professional image. A major risk associated with the use of influencer marketing is the posting of unprofessional content that reflects badly on the HCP. It follows that HCPs who don't practice wisdom and discretion in deciding what content to post online may also be incapable of exercising sound professional judgment in providing care²⁹.

Regarding discernment, a doctor has the competency to analyse scientific literature, backing social media posts with evidence and references where appropriate. However, an influencer might give inaccurate information and advice, lacking quality and reliability, thus misleading the public. While evidence-based medicine de-emphasizes anecdotal reports, social media tends to promote them³⁰. Doctors need to keep advice and information factual and based on scientific evidence when communicating on social media, and this is very difficult to manage when marketing is in the hands of an influencer.

The final verdict

The ethical and legal analysis above demonstrates that influencer marketing as utilised by HCPs is legally acceptable provided it does not fall foul of an extensive range of legislation and legally binding guidelines. However, it is unclear whether influencer marketing in healthcare is ethically acceptable, and for this reason practitioners are advised to utilise maximum caution when employing this strategy, or better yet, to avoid using influencer marketing altogether. For those who still insist, *Box 3* provides some guidelines, however this does not constitute legal advice.

The upshot is that both practitioners and the influencers they solicit for marketing bear legal responsibility for the content that is posted, however the HCP alone is obliged to act in an ethical manner, and the HCP alone will be subject to ethical censure if something goes wrong.

Box 3 - Guidelines for HCPs utilising influencer marketing

- Content solicited by the HCP must always be marked as an advertisement with a social media identifier
- The nature of the relationship between influencer and HCP must always be declared, as well as the exchange or compensation provided for the post
- The content of the post should not constitute canvassing or touting
- The content must not constitute illegal advertising or pricing of scheduled substances or devices
- Ideally the legal and ethical parameters of what acceptable influencer marketing is should be attested by both parties, preferably in a legally binding contract.'
- A professional medical marketing company can assist in ensuring appropriate posts. A good medical marketing company will consult with lawyers and be fully aware of the latest laws and ethical requirements in SA
- Ensure that informed consent is sought for all procedures involving influencers, with the necessary disclaimers that the influencer is undergoing the procedure as part of their business, and voluntarily in this context
- Ensure that influencers understand that by posting about their medical treatment, they are making information that would generally be considered confidential publicly available
- Keep advice and information factual and based on scientific evidence when communicating on social media

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Conflict of Interest

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