

“... I Lost Ten Pounds in 5 Weeks ...”: The Legal Position Of Testimonials and Sponsorships Within Medical Advertising in the UAE

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Conditions to be applied in advertising:

Advertising shall not be ambiguous or obscure or void of any clear indications.

- It shall not include any false or misleading claims or resort to exaggerations, intimidation, or claim to be unique while contempting competitors, and it shall not resort to fraud and deception.
- The advertisement shall not include images that are falsified or imitated or images of which they don't have the rights to use.
- The advertisement shall be real and unexaggerated, not leading to confusion or ambiguity with other products or activities.
- The advertising identity shall be clearly determined, and it shall appear as unique and separate from other editorial or media material, and there shall be limits separating the advertisement from any other material in addition to time lapses in case of radio or television broadcasting.

These days, the use of testimonials (praise received from customers that have used the product or service) and brand ambassadors (by way of the use of influencers) is becoming more common than before. Not only do advertisers understand that consumers currently have a higher level of trust in 'word of mouth' advertising but social media outlets now make it easier than ever to create and circulate such content. It's credible. It's effective. But it is also clear that, when creating and distributing testimonial advertising, advertisers must comply, at the very least, with Article 5.

When creating testimonial content generally, the terms of sub article 7 are important to keep in mind. This sub article notes that advertising material must appear as '*separate and unique*' from editorial material. This is not going to be problematic where the testimonials are contained within the advertising material itself as perhaps a boxed segment in a paid print commercial, as it is clear that it is part of the commercial itself. However, where the paid content takes the form of a 140 character Tweet within numerous other editorial or opinion tweets, then it becomes significantly more difficult to keep it clear and unique. Our view is that Tweets that are paid advertising content should be noted as such; however we note that the industry is not yet doing that as standard practice in the region at this stage.

In addition to the usual regulations for advertising, when the product is a medical service or device, then the advertiser must be more cautious. Extra regulations apply under the Health Advertisements Regulations (Ministerial Resolution 430 of 2007) (the "Regulations"). When it comes to testimonials, Article 4 (25) of the Regulations specifically states that, in any medical advertising that is produced for use within the UAE "*the evidences and certificates must be authenticated and true, not misleading, explaining the typical cases only and not obtained through illegal means*". In the UAE, as with many jurisdictions around the world, the use of false testimonials is prohibited by law. This is not singular to the UAE legal landscape and indeed some countries have much stricter regulations about the use of testimonials in relation to healthcare products or services.

The USA, always proactive when it comes to regulating consumer matters, has been watching the

activities of testimonials in advertising in the medical field for some time. The Federal Trade Commission in the USA (FTC) has issued guidelines and regularly initiates court action. A 2016 case involved the very successful prosecution of a company that was using fake news websites with phony celebrity endorsements (including false endorsements from Oprah Winfrey) alongside unsupported claims about the product's efficiency in order to promote a weight-loss product. In this matter the FTC was successful in the case and was able to claim the assets of the company as well as some assets of the shareholders.

There is no doubt that if an advertiser undertook similar practices in the UAE, they could be prosecuted by both the National Media Council and pursuant to the Resolution. Looking at the elements of Article 4 (25) in particular ("*must be authenticated and true, not misleading, explaining the typical cases only and not obtained through illegal means*"), it is clear that an advertising campaign that uses false endorsements from a celebrity and claims amazing results for everyone 'even whilst you sleep' (as was the case in the above matter) could easily be prosecuted in this country as well, under Article 4 (25).

It is important to note that this does not prevent healthcare advertisers from including endorsements if they are genuine consumer reviews – these are not prohibited – and have been properly approved as advertising material under the appropriate regime in the UAE. In addition this will not, in our opinion, stop the circulation of unpaid and unsought reviews about healthcare products and services. People will always want to 'like' and 'share' information as they choose. The fact that these may comprise positive unpaid reviews of a healthcare product or service does not mean that they should be treated as testimonials.

Figures released in the UAE indicate that a significant percentage of the penalties imposed for breaching the Resolution are arising, surprisingly, within social media and indeed a vast number arise in Twitter. Because of this, we recommend that healthcare advertisers exercise caution when engaging with anyone that will endorse their brand, including the now ubiquitous social media influencers.

When it comes to social media influencers, we recommend that advertisers take an active role in guiding them in relation to content. Many companies are developing influencer guidelines to assist with this and we recommend that these be added to a services contract that is provided to the influencer in order to ensure that the influencer understands what can and cannot be said, what will require approval from the advertiser and what needs prior approval from the regulator. Most importantly though, this will assist companies in enforceability within the jurisdiction if anything does go wrong.

The International Consumer Protection Enforcement Network (ICPEN) has this year consolidated regulations from over 60 countries into helpful documents for stakeholders wishing to undertake endorsement-style advertising. Their tips include:

- Endorsements must be truthful and not misleading;
- Material connections between an endorser and marketer of a product or service that would affect how people evaluate the endorsement must be disclosed clearly and conspicuously;
- Allow influencers to be open about other commercial relationships that might be relevant to the content;
- Disclose clearly and prominently whether content has been paid for; and
- Allow influencers to give genuine views on markets, businesses, goods or services.

Al Tamimi & Company's Technology, Media & Telecommunications team regularly advises companies on their advertising and marketing practices in the region. For further information please contact Fiona Robertson (f.robertson@tamimi.com).