



87. Advertising and publicity (*)

Taken from a position paper published in 2000

Introduction

A bill has recently been passed that regulates the subject of advertising by professionals. The bill permits specific professionals¹⁰², among them, physicians, to advertise themselves more widely, in comparison with the limited way permitted until now.

The bill was passed against a background of basic rights that were granted legislative validity following the enactment of the Basic Law: Freedom of Occupation¹⁰³ and the Basic Law: Human Dignity and Liberty¹⁰⁴, which marked the opening of a new era, in which the right of the individual to advertise himself was recognized in principle. As a result, the Knesset reached the conclusion that it was no longer appropriate to sweepingly prohibit self-publicity of physicians.

Nevertheless, one should remember that the physician-patient relationship is a special one, which differs from any other relationship existing between a service provider and a customer.

The patient lies a priori in a situation of dependency and lack of information that does not permit him to evaluate by himself the nature and quality of the treatment that he requires, and, consequently, he is almost totally dependent on the physician treating him. Furthermore, the fear exists that granting the option of uncontrolled advertising will lead to rampant competition between physicians and medical institutions that will in turn lead to a cheapening of the medical profession, and will, in the final analysis, also cause harm to patients.

In the light of this a new law has been enacted, that attempts to confront the aforesaid fears.

We should note that the new law replaces sections 11-14 of the Physicians Order.¹⁰⁵

(*) In 2008 the Knesset approved the Physicians Regulations (forbidden publicity), 5768-2008

102 Midwives, lawyers, psychologists, optometrists, veterinarians and dentists

103 Basic Law: Freedom of Occupation, 5752-1992.

104 Basic Law: Human Dignity and Liberty, 5752-1992.

105 The Physicians Order [new version], 5736-1976.



The new law

The following is the wording of the law that was passed:

Limitations in advertising

"11.

- a) A licensed physician shall not, directly or indirectly, advertise his occupation in a way that may be misleading or that may constitute harm to the dignity of the profession or that contravenes the regulations enacted pursuant to sub section (c).
- b) The Minister of Health, in consultation with the Israeli Medical Association and with the approval of the Knesset Constitution, Law, and Justice Committee, shall be entitled to designate types, forms, and ways of advertising:
 - 1. That may be misleading.
 - 2. That may constitute harm to the dignity of the profession.
- c) The Minister of Health, in consultation with the Israeli Medical Association and with the approval of the Knesset Constitution, Law, and Justice Committee, shall be entitled to designate the types, forms and ways of advertising that may harm the public, and are therefore prohibited.
- d) No person may create advertising for the occupation of medicine or for the occupation of a licensed physician, that, were it created by a licensed physician, would have been prohibited in accordance with the provisions of sub section (a).
- e) A licensed physician, whose occupation is advertised by someone else, must make every effort to prevent the said person from acting contrary to the provisions of sub section (d); a person infringing this provision shall be liable to half the fine as set forth in section 61(a)(1) of the Penal Code, 5737-1977.
- f) If a person infringed the provision of sub section (d) regarding a specific licensed physician, it is presumed that the said physician violated his obligation pursuant to sub section (e), unless the physician proved that he made every effort to fulfill his obligation."

Interpretation of the law

Prohibited advertising

The law uses many general terms: misleading, harm to the dignity of the profession, harm to the public, whose purpose is to permit flexibility in enforcement of the prohibitions regarding prohibited advertising. Over the course of time it will be possible to see what interpretation is given to these terms.



Misleading and harm to the dignity of the profession

Section 11(a) and (b) of the law states:

Limitations in advertising

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- b) The Minister of Health, in consultation with the Israeli Medical Association and with the approval of the Knesset Constitution, Law, and Justice Committee, shall be entitled to designate types, forms, and ways of advertising:
 1. That may be misleading.
 2. That may constitute harm to the dignity of the profession."

The right of the physician to advertise himself is balanced in two interests that the legislator saw fit to emphasize:

- a) Prohibition of misleading.
- b) Prohibition of harm to the dignity of the profession.

Prohibition of misleading

At this stage it is impossible, as set forth above, to individually define what action falls into the category of "misleading". However, it is clear that the intention of the term "misleading" refers, in general, to the supply of incorrect information or the supply of partial information that creates an incorrect impression. This may be demonstrated by the following examples:

- Indication of the rate of success of a specific treatment/ practitioner in the advertisement – the reader of the advertisement will in general lack the means to estimate the real success of the practitioner. (Did he treat serious or light cases, which cases did he choose not to treat, the number of treatments on which the data presented are based, etc.)
- Advertising that focuses solely on praising the skill, know-how, and professional qualifications of the physician.
- Advertising presented on behalf of the physician as an image advertisement, that may apparently be regarded as the public as an objective article.
- Apparently innocent advertisements, that are related to a business interest of the physician presenting them.
- Advertisements that indicate an academic degree or specialty that are not recognized in Israel.



Prohibition of harm to the dignity of the profession

Further to what was said regarding prohibited advertising, the term "the dignity of the profession" is also a general term that, over the course of time, we will see how it is interpreted. Nonetheless, it may be generally determined that we are speaking of information that may harm the medical profession overall, and specifically, some physician or another. We shall give a few examples below:

- Advertising in which the tariffs are given for the proposed medical treatments – the fear exists that publication of the tariffs will lead to cheapening of the medical profession and to a price war in which emphasis will be placed both by the physicians and the patients on the price of the treatment and not on its quality.
- Advertising that expresses contempt, slander, and negation of the qualifications of other physicians.
- The form of the advertising, the color, size, and location of the advertisement are liable to harm the dignity of the profession.
- The advertising medium – because of harm to the dignity of the profession, advertising in the form of flyers distributed to the public, telemarketing, billboards, and offers to give medical treatment by means of correspondence, are prohibited.

Prohibition of harm to the public

Section 11(c) of the law states as follows:

- "c) The Minister of Health, in consultation with the Israeli Medical Association and with the approval of the Knesset Constitution, Law, and Justice Committee, shall be entitled to designate the types, forms and ways of advertising that may harm the public, and are therefore prohibited.

The term "harm to the public", like the terms presented above, is a general term that will be interpreted over the course of time. However a number of examples may be given that demonstrate the harm to the public:

- Advertising that encourages the consumption of unnecessary medical treatment.
- Advertising in which use is made of the name or picture of patients who recommend the treatment.
- Advertising that praises a specific medical treatment without indicating its risks and disadvantages.

Other provisions of the law

Section 11(d) of the law states:

- "d) No person may create advertising for the occupation of medicine or for the occupation of a licensed physician, that, were it created by a licensed physician, would have been prohibited in accordance with the provisions of sub section (a).



This section states that the advertising restrictions which apply to physicians, also apply to persons who are not physicians (and to companies) when advertising the occupation of a physician or of the practice of medicine.

It seems that the aim of this section is to prevent the bypassing of restrictions regarding advertising by another entity that is not a physician.

Section 11(e) of the law states:

"e) A licensed physician, whose occupation is advertised by someone else, must make every effort to prevent the said person from acting contrary to the provisions of sub section (d); a person infringing this provision shall be liable to half the fine as set forth in section 61(a)(1) of the Penal Code, 5737-1977."

This section states that in addition to the restrictions applying to advertising itself, the physician is obligated to prevent someone else, who is responsible for advertising the physician, from advertising contrary to the limitations set forth in the law.

It should be noted that a person infringing the provisions of this section is liable to criminal sanctions in the form of a fine.

Section 11(f) of the law states:

"f) If a person infringed the provision of sub section (d) regarding a specific licensed physician, it is presumed that the said physician violated his obligation pursuant to sub section (e), unless the physician proved that he made every effort to fulfill his obligation."

It should be noted that the law states that in the event that a third person advertises on behalf the physician contrary to the restrictions existing in the law, it is presumed that the physician for whom the advertising was made infringed his obligation as set forth in sub section (e), viz: the physician did not prevent the advertiser from acting contrary to the restrictions on advertising. The meaning of this presumption is that the physician is the one who must prove that he made every effort to prevent the advertisers from acting contrary to the restrictions as set forth in the law.

Conclusions

The legal situation in the wake of the new law is that self advertising by physicians is permitted, subject to the restrictions that the advertising will not be misleading, does not harm the dignity of the profession, and does not harm the public.

Over the course of time each of these terms will be given its own interpretation. However, an attempt may be made to define each of these terms.