

The Consumer Protection Act: implications for medical practice

Van den Berg E
Healthcare Navigator

Correspondence to: Esmé Prins-Van den Berg, e-mail: esme@healthcarenavigator.co.za

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The Consumer Protection Act (CPA) 68 of 2008, and the Regulations in terms thereof, became effective on 31 March 2011, and 1 April 2011, respectively. Potentially, the CPA has far-reaching implications for medical practice. Under the CPA, patients could be regarded as consumers, and medical practitioners as suppliers or service providers, depending on the context. Medical practitioners could also be regarded as consumers. However, when they practise in partnerships or incorporated companies, i.e. as juristic persons, and their turnover equals or exceeds R2 million, the CPA would not apply.

This article briefly reviews some of the provisions of the CPA that could impact on medical practice.

Does the CPA affect the marketing activities of a medical practice?

The CPA regulates marketing activities related to goods and services. In terms of the CPA, it is impermissible for producers, importers, retailers, and service providers, to market goods and services in a manner that is misleading, fraudulent, or deceptive, in respect of the nature thereof, conditions of supply, price, or any other material aspect.

Protection is also afforded to consumers against discriminatory marketing.

This entails that it will be impermissible for a supplier to unfairly:

- Exclude any person, or category of persons, from accessing any goods or services;
- Supply a different quality of, or charge different prices for, any goods or services to any person or category of persons;

on the basis of any of the grounds of unfair discrimination contemplated in the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 2000, such as race, age, gender, language, disability, or sexual orientation.

Differential treatment, which constitutes unfair discrimination, may also not occur, for example, when:

- Deciding whether to enter into an agreement, e.g. to accept a person as a patient;
- Determining any aspect of the cost of an agreement to the consumer;
- Providing any services to the consumer;
- Determining whether or not to terminate an agreement, e.g. refusing to treat a patient;
- Determining whether or not to report a person's personal information, e.g. to a medical scheme.

Therefore, decisions as to which persons to accept as patients, and the level of fees to be charged, should not be based on discriminatory grounds.

Consumers are also entitled to restrict unwanted direct marketing. For example, they may require that the persons responsible for marketing communication desist from any further communication. Such a request must be acknowledged in writing by the supplier, or registered as a pre-emptive block by the consumer, i.e. a recording on a national registry that is to be established for this purpose. This block will state that direct marketing material from certain suppliers may not be sent to them. Once it is up and running, direct marketers will have to check the registry for any such registered blocks. Any direct marketing that is conducted against a consumer's wishes would constitute a transgression of the CPA.

What should practice documentation look like?

In terms of Section 22, notices or documents which are provided or displayed to consumers in terms of the CPA, or any other law, must be in:

- The form prescribed in the relevant legislation, e.g. the consent forms prescribed under the Children's Act;
- Or in plain language, if no form has been prescribed.

"Plain language" means that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills, and minimal experience as a consumer of the relevant goods or services, could be

expected to understand the content of that document without undue effort. The form, style, vocabulary, sentence structure, illustrations and headings used in the document, would be used to determine whether a document was written in plain language. "Plain language" might mean "official language", depending on whether the persons for whom the document was intended, could understand the language in which the document was written.

The "plain language" requirements should be noted in view of the obligation imposed on the courts and the National Consumer Tribunal to interpret any contract, standard form, or document, prepared by a supplier, to the benefit of the consumer. Therefore, it is advisable that all documents provided to patients should be written in plain language.

Are there any special requirements pertaining to invoices?

Suppliers of goods and services, e.g. medical practitioners, must provide written records (invoices) of each transaction, to the consumer, to whom the goods or services are supplied.

The minimum information that must be included on such invoices is:

- Supplier's full name, or registered business name, and value added tax (VAT) registration number.
- The address of the premises at which, or from which, the goods or services were supplied.
- Date on which the transaction occurred.
- Name or description of the goods or services.
- Unit price of the goods or services.
- Quantity of the goods or services.
- Total price of the transaction with, and without, the applicable taxes.

However, practitioners' accounts must also comply with the requirements of Regulation 5 of the Medical Schemes Act 131 of 1998. Therefore, it is advisable that invoices should incorporate the requirements of both the CPA, and the Medical Schemes Act. Although consumers may select not to receive invoices in terms of the CPA, section 59(1) of the Medical Schemes Act, requires invoices to be issued to medical scheme beneficiaries.

What does the CPA require in respect of quality of services?

Consumers have the right to demand quality service under the CPA.

This entails:

- Services must be performed timeously;
- Consumers must be given timely notice of a delay in the performance of the services;
- Services must be performed in a manner and quality that could generally be expected.

The circumstances of the supply, and any specific conditions agreed between the supplier and the consumer, before or during the performance of the services, would be considered in this context. It is an implied condition of every transaction involving the supply of goods or services, that the supplier is able to deliver the goods or perform the services, e.g. consultation, on the agreed date, and at the agreed time, or otherwise, within a reasonable time. These provisions should be noted, for example, especially when patients have to wait for prolonged times in practitioners' waiting rooms for their appointments. Communication with patients to advise them of a delay in the provision of services is essential.

If the services are performed at a location, on a date, or at a time, other than that agreed with the consumer, the consumer may:

- Accept performance;
- Reject performance;
- Cancel the agreement without penalty.

If the services are rejected, any services already performed would become unsolicited, and no payment could be collected for such services. Unsolicited services also include services that were not requested by a consumer.

Failure to meet expected quality standards could result in consumers electing to have a refund of a reasonable proportion of the price that they paid for the services, taking into account the extent of the failure.

What does prohibited "misleading conduct" entail?

Goods and services may not be supplied in a manner that is misleading, fraudulent, or deceptive, in respect of the conditions of supply, price, or any other material aspect. Doctors should neither verbally, nor through their conduct, directly or indirectly express or imply, false, misleading, or deceptive representations concerning any material fact of the service to be rendered, or the goods to be supplied. For example, this would include a misrepresentation about a person's status, e.g. that a practitioner has certain qualifications when it is not true. It would also include a failure to correct any misunderstanding on the part of the patient, e.g. regarding the performance characteristics of medicine or the benefits of a procedure, for example. It would also include suggesting that a specific price advantage exists, or that a charge is for a specific purpose. Failure to disclose a material fact would also constitute a transgression of this section. The use of exaggeration, innuendo and ambiguity, in respect of a material fact, must be avoided too. Therefore, when recommending treatment, doctors should take specific care to ensure that all material facts are disclosed.

Does the price of the service have to be disclosed?

The CPA is explicit in terms of disclosure of price in respect of goods, e.g. medicines. Retailers must display goods for sale, together with their prices, to consumers. However, this is not required in areas to which patients would not normally have access, e.g. a dispensary. Any price discrepancies in respect of displayed prices will be interpreted to the benefit of consumers, unless there is an obvious error, e.g. if more than one price is displayed, then the lowest price will be applicable.

However, according to the CPA, there is not an explicit obligation to display the price of services. Nevertheless, the requirements of Section 50 should be considered in this context. It provides that a written agreement with a consumer must contain a detailed breakdown of the consumer's financial obligations. Compliance with this requirement in medical practice will be challenging, as generally, doctors will only be able to comply with such an obligation, once the patients' conditions have been assessed.

Where serious risks exist, what are the obligations of suppliers?

When a patient is exposed to a serious risk or a risk of an unusual nature, when receiving treatment or undergoing a procedure, the obligations, imposed by the CPA, should be observed.

A supplier of any activity or facility that is subject to any risk:

- Of an unusual nature;
- Of which a consumer could not reasonably be expected to be aware or to contemplate, in the circumstances;
- Or that could result in serious injury or death;

must draw the fact, nature and potential effect of that risk to the attention of the consumer.

This should be done as follows:

- It must be written in plain language.
- The nature and effect of the risk must be pointed out to a consumer in a conspicuous manner before the consumer enters into the agreement, engages in the activity, enters the facility or pays for the goods or services.
- The consumer must be given an adequate opportunity to receive and understand the risk in the circumstances. The consumer must assent in writing, or act in a manner that demonstrates acknowledgment and acceptance of that risk. In such circumstances, it is advisable to obtain the written consent of the patient, although this is not specifically required in terms of the CPA.

Could medical practitioners be held liable for harm caused to patients by medicine?

In terms of the CPA, consumers have a general right to expect that goods are:

- Reasonably suitable for the purposes for which they are generally intended;
- In good working order;
- Free from defects;
- Usable and durable for a reasonable period of time.

In terms of Section 61, the entire supply chain could incur joint and several liability, irrespective of whether or not they were negligent and harm resulted, either wholly or partly, as a consequence of:

- Supplying any unsafe goods.
- A product failure, defect, or hazard, in any goods.
- Inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from, or associated with, the use of the goods.

The supply chain consists of the producer, importer, distributor, or retailer of any goods, and sometimes even a supplier of services, who, in conjunction with the supply of services, gives the consumer access to certain goods. There is a view that a supplier of a service would only incur liability under this section if he/she gave "physical access" to the goods that caused the harm. However, until this position has been clarified by the courts, the possibility exists that a court could hold a prescribing doctor liable for harm suffered by a patient, for example, as a result of failure of a medicine that was prescribed by that doctor.

Liability in terms of Section 61 extends to death, injury, illness, loss, damage to property, and economic loss, and may be apportioned by the courts. This Section provides for certain defences to be raised by specific members of the supply chain, e.g. if the failure, defect, or hazard was attributable to compliance with a public regulation, if it did not exist at the time the goods were supplied. Section 61 has retrospective application since 24 April 2010.

Under the CPA, could doctors be held liable for transgressions committed by their staff?

In terms of the CPA, the employer or principal is jointly and severally liable, together with an employee or agent, for anything executed or omitted in the course of his or her employment or activities on behalf of the principal, (excluding criminal activities). This means that, doctors could be held liable for any act or omission in terms of the CPA by any of its employees, e.g. nursing staff and receptionists, or agents, e.g. contracted nurses.

What are the requirements for contracts?

The Minister of Trade and Industry may prescribe which categories of consumer agreements must be in writing, which has not yet been done. The CPA requires that in instances where a consumer agreement is not put in writing, the supplier must keep a record of the transaction entered into over the telephone, or in any other recordable form, that may be prescribed.

Generally, doctor-patient contracts are verbal agreements. However, doctors often enter into written agreements with their patients. Written consumer agreements apply, irrespective of whether the consumers have signed them. Section 50 requires the supplier to provide the consumer with a free copy of, or free electronic access to, the terms and conditions of such an agreement.

Furthermore, these agreements must:

- Be written in “plain language” as defined in Section 22;
- Contain an itemised breakdown of the consumer’s financial obligations in terms of the agreement.

A person must also have legal capacity to enter into an agreement with another person.

The CPA provides that an agreement to supply any goods or services to a consumer will be:

- Void if the consumer has been declared mentally unfit by a court, and the supplier knew, or could reasonably determine such fact;
- Voidable at the discretion of the consumer if he/she was an unemancipated minor, i.e. the patient was under the age of 18 and unmarried, or has not been declared an adult by the courts, or if no consent was obtained from the responsible adult, and the agreement was not ratified as specified.

However, this does not apply if a supplier was induced to believe that the consumer had unfettered legal capacity to contract, or there was an attempt to obscure that fact. It should be noted that a person may be legally able to consent to treatment, e.g. a child of 12 years, under certain circumstances. However, such a child does not have legal capacity to enter into other contracts, and agree to pay the doctor for his or her services, for example.

The CPA also regulates the terms and conditions that may be included in contracts. For example, it prohibits the supply of goods, or provision of services, at a price, or on terms, that are “unfair”, “unreasonable” or “unjust”. Terms that would be regarded as “unfair”, “unreasonable” or “unjust” include those that are excessively one-sided in favour of a person other than the consumer, or are so adverse to the consumer that they are inequitable.

Section 49 requires that certain terms be pointed out to consumers before they enter into agreements, or pay for the agreed services, whichever occurs first.

These terms include those that:

- Limit the risk or liability of the supplier;

- Impose an obligation on a consumer to indemnify the supplier;
- Constitute an acknowledgement of any fact by a consumer.

These terms must be written in plain language, and their nature and effect must be pointed out to a consumer in a conspicuous manner. The consumer must also be given an adequate opportunity to receive and understand these terms.

Section 51 specifies a list of prohibited terms, which may not appear in contracts, such as those that:

- Deprive a consumer of a right in terms of the CPA;
- Exempt a supplier from liability for any loss as a result of his or her or its gross negligence.

Regulation 44 contains a list of terms that are presumed to be unfair if they appear in a contract related to the business of a for-profit supplier and an individual consumer. A term that excludes, or limits, the liability of the supplier for the death or personal injury of the consumer, caused by an act or omission of that supplier, would be presumed to be unfair. If doctors require patients to indemnify them against harm suffered as a result of medical treatment or an operation, for example, such indemnification would be considered to be unjust.

Section 14 of the CPA regulates the term, renewal, and cancellation of fixed-term agreements, i.e. agreements of a specific duration. This Section does not apply to transactions between juristic persons, regardless of their annual turnover or asset value. Therefore, for example, a fixed-term agreement between an incorporated company of doctors and a medical scheme, would fall outside the ambit of the CPA. Generally, a fixed-term agreement may not exceed 24 months from the date of signature of the agreement, with certain exceptions.

Conclusion

Contraventions of the CPA may result in a number of penalties, such as fines or imprisonment. In certain instances, consumers may even be entitled to damages. Furthermore, the National Consumer Tribunal may impose administrative fines up to 10% of the supplier’s annual turnover during the preceding financial year, or R1 million, whichever is the greater.

Due to the potential significant implications of the CPA on medical practice, practitioners are encouraged to review and align their businesses, if indicated, in accordance with these provisions.

Bibliography

1. Consumer Protection, 2008 (Act 68 of 2008).
2. The Consumer Protection Act, 2008 (Act No 68 of 2008) Regulations. Government Notice R293. *Government Gazette* No. 341803 of 1 April 2011.