Peddling products to patients

The doctor–patient relationship is one based on trust, and has been described as fiduciary in nature.[1] This requires doctors to keep patient confidences, and to take steps to avoid any conflict of interest in caring for patients. The doctor–patient relationship in itself gives rise to a presumption of undue influence. As noted by the High Court of Australia, this means that "any substantial benefit received by the doctor from a patient (other than proper remuneration) is presumed to be the result of undue influence with the doctor bearing the onus of rebutting the presumption".[2]

In a High Court decision in 2005, Baragwanath J stated that "the essence of breach of fiduciary duty is the fiduciary's taking wrongful advantage of the trust reposed by the beneficiary" and that if there is no such abuse, there is no fiduciary liability.[3] Interestingly, the Health Practitioners Disciplinary Tribunal has recently suggested (in a case where a psychiatric nurse bought a house from a patient, albeit at a "very fair market price", with a solicitor acting for the patient) that the health professional "may have inadvertently breached his broader fiduciary obligations by entering into any form of financial transaction with his patient". A breach of fiduciary duty may occur "even in circumstances where [health professionals] gain no financial advantage".[4] Although the nurse was found not guilty of a disciplinary offence, the Tribunal's concerns about a health professional's potential conflict of interest are well justified, and are echoed in a recent HDC case, discussed below.

Codes of ethics and law usually focus on specific exploitation, rather than potential conflict. Thus the NZMA Code of Ethics exhorts doctors to "avoid exploiting the patient in any manner". The Code of Consumers' Rights prohibits any form of exploitation. Right 2 states that "every consumer has the right to be free from discrimination, coercion, harassment, and sexual, financial or other exploitation" and defines "exploitation" to include "any abuse of a position of trust, breach of fiduciary duty, or exercise of undue influence".

Case study

The recent HDC case shows the problems that can arise when a GP's commercial interests infiltrate the practice of medicine.[5] It involved a GP in a provincial city, Dr A, who had set up a separate "business" providing complementary products and services. In this case the business provided health and nutrition products. Mr and Mrs B, in their late 40s, were patients of Dr A for two to three years. They each had several medical conditions and saw Dr A for treatment of asthma, migraine, hypertension, heart conditions, dysuria and low iron. Mr and Mrs B complained to HDC that Dr A did not treat their conditions appropriately and instead tried to sell them Nutriway products that could be purchased through his company.

Mrs B stated that when she saw Dr A in relation to her asthma, he attempted to promote an air-purifying unit, not available in retail stores but able to be purchased via his company. Mrs B was also concerned about being overweight and having high blood pressure. Dr A told her that diets were ineffective, and he was unwilling to prescribe medication for weight loss. Instead, Dr A suggested Mrs B consider a "lifestyle programme" called "Energy for Life" involving the daily consumption of 15 different fruits and vegetables. He provided written material and a CD about the

programme, indicating that if Mrs B were interested she should write her details on the business card when she returned the CD.

The lifestyle programme cost $400 for 12 weeks, and was available through another of Dr A's sideline businesses. While Dr A assured HDC that the programme was unrelated to his involvement in Nutriway, he did confirm that "Energy for Life" was a separate business of his. When Mr B consulted Dr A about his low iron levels and lack of energy, Dr A suggested that diet might be a factor, and again promoted the "Energy for Life" programme. Mr B was also provided with a leaflet on "Changing Habits". The leaflet was based on the same research as "Energy for Life", but was free of charge.

Complaint
Mr and Mrs B declined the offers of Nutriway products and the lifestyle programmes. They changed GP and complained to HDC about Dr A's treatment of their medical conditions and his attempts to sell them complementary products. They considered that Dr A should not practise medicine and sell Nutriway products simultaneously.

In his response to notice of HDC's investigation, Dr A contended that whenever he discussed Nutriway products with patients he advised them unreservedly that they are sold through a separate entity. This contention was not supported by Dr A's records, which contained no details of such discussions. In Dr A's view he had never advised Mr and Mrs B to purchase products or services through his business rather than other available alternatives.

Medical Council guidance
Guidance on issues relating to the interface between medicine and commerce can be found in several Medical Council publications. The recommendations accompanying the NZMA Code of Ethics state that the commercial interests of a doctor must not interfere with the free exercise of clinical judgement in determining the best ways of meeting the needs of individual patients. This point is reiterated in *Good Medical Practice* and in the Council's statement on "Responsibilities in any relationships between doctors and health related commercial organisations". *Good Medical Practice* advises doctors: "If you have a commercial or financial interest in an organisation you plan to refer a patient to, you must tell the patient about your interest."

HDC decision
My decision noted that in the context of a doctor–patient relationship, there is an inherent power imbalance, and the doctor's recommendation of products or programmes in which the doctor has a financial interest is likely to be perceived by the patient as coercive. The doctor runs the risk of blurring the boundaries between medical practice and other commercial interests. I did not accept Dr A's submission that the situation was no different from the everyday occurrence of doctors providing to patients, at a profit, items such as dressings, retail drugs, vaccines, etc. Such items are a necessary part of supplies that a medical centre requires to deliver appropriate care. I was not convinced that the unavailability of Nutriway products or the "Energy for Life" programme would compromise a GP or medical centre's ability to provide quality care.

Patients are entitled to a reasonable level of information about treatment options (Right 6(1)), and Mr and Mrs B should have been directed to other outlets for Nutriway products in their city. As noted by my expert advisor, Dr Steve Searle, even assuming that Dr A's financial interests had been disclosed, Dr A had failed to offer Mr and Mrs B alternative ways to obtain the same or similar products, or to offer them the option of seeking a second medical opinion. Such advice should have been given and documented. "It is important for doctors directly selling treatments to patients to offer them an alternative way of obtaining the same and similar products in order to help preserve some of the independence in the doctor's decision to offer the treatment in the first place."

I concluded that Dr A had exceeded the boundaries of proper practice and breached Right 4(2) of the Code. Given the potential conflict of interest, Dr A should have offered Mr and Mrs B alternative avenues for purchasing the recommended products, and documented disclosure of the conflict and of the provision of advice about options.

Cautionary note

Doctors obviously have to earn a living and receive fair recompense for their skills and services. There is no suggestion that it is unethical to make a profit from the practice of medicine, but a doctor does need to be clear, open and honest about situations where there is a financial interest in the recommended product. Such an interest must be declared. The patient's best interests are the paramount consideration, rather than the doctor's financial interests. To demonstrate this, the patient should always be told about other treatment options and advised of alternative sources of the product or service. The disclosure of the conflict of interest and of the giving of advice about options must be carefully documented.

In this case, other aspects of Dr A's care were adequate. Giving lifestyle and dietary advice is clearly appropriate for patients who are overweight and have blood pressure problems. However, his financial interest in some of the treatment options recommended, and the way this was managed, undermined Mr and Mrs B's confidence in Dr A's overall care, and was deserving of censure. Even if the disclosure process had been better handled, there is some force to Mr and Mrs B's statement that Dr A should be either a doctor or an Amway salesman, but not both. Situations where doctors seek to pedal products to patients are undesirable, and can expect to be carefully scrutinised by regulatory bodies and courts.

Ron Paterson
Health and Disability Commissioner
NZ Doctor, 26 July 2006

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[1] *Duncan v MPDC* [1986] 1 NZLR 513.
[2] *Breen v Williams* (1996) 186 CLR 71.
[3] *A v Nelson Marlborough DHB* (HC Blenheim, 2005) para 40.
[4] *Re Johnson* (HPDT 46/Nur06/31P, 19 June 2006).
[5] The full decision (Opinion 04HDC06861, 15 February 2006) may be viewed at www.hdc.org.nz.