

TO: THE REGISTRAR

P O BOX 205

Pretoria

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553 Madiba Street, Arcadia, Pretoria, 0001

Please send the completed form to: LegalMed@hpcsa.co.za

COMPLAINT FORM

Please only complete up to section 4 of the form

1. DETAILS OF COMPLAINANT

Full names of complainant	SA Optometric Association NPC – represented by H M Rosen
Postal Address	PO Box 2925 Halfway House, 1682
Physical Address	561 Nupen Crescent Halfway House Extension 12
Cell phone number	084 482 4517
Landline number	011 805 4517
Fax number	
E-mail address	harry@saoa.co.za
Has the complainant previously filed a complaint with the HPCSA?	
If so, please provide the reference number	No

2. DETAILS OF PRACTITIONER

Name of Practitioner	Preferred Provider Negotiator (PPN)
Physical/Postal Address	1401/2 Oasim North Havelock Street, Port Elizabeth, 6001
Practice Number	N/A
Telephone number	041 506 5900

Cell Number	
E-mail address	harry@saoa.co.za
3. DETAILS OF COMPLAINT	
<p>SA Optometric Association</p> <p>The South African Optometric Association NPC (SAOA) is a professional association, registered as a non-profit company, formed primarily to accommodate the interests of optometrists and dispensing opticians in South Africa, taking cognisance of the eye care needs of the South African public.</p> <p>Preferred Provider Negotiator</p> <p>PPN, by their own admission is the largest optometric Provider Network in South Arica with some 2000 members, all practicing optometrists. PPN enters into separate contracts with various medical schemes where PPN agrees to manage the procurement and administration of the optometric benefits of these schemes.</p> <p>PPN also provides buying group services such as negotiated rebates with laboratories for spectacle lenses, professional indemnity insurance, design and shop-fitting services as well as loyalty programmes to its members.</p> <p>PPN, by their own admission is the largest optometric Provider Network in South Arica with some 2000 members, all practicing optometrists.</p> <p>It is noted that despite the requirement of having to be registered with the CMS to provide managed care services, PPN is not registered as a Managed Care Organisation.</p> <p>HPCSA Position: The Designated Service Provider (DSP)</p> <p>On 24 March 2013, the Health Professions Council of South Africa published a media release entitled 'Concerns over the exploitation of Health Care Practitioners '. These concerns relate specifically to pressures applied on practitioners to participate in various forms of contracts with medical schemes. Practitioners who feel unduly pressurised or feel their ethics could be compromised were invited to engage with either the HPCSA or in cases where there were perceived transgressions by the medical schemes concerned, the Council for Medical Schemes.</p> <p>The above mentioned release has relevance for the purpose of this complaint.</p>	

PPN Manual

PPN published an updated Manual effective as of 1 January 2019 ("the Manual"). The Manual provides information to health care practitioners regarding PPN's operational requirements for 2019;

The Manual was distributed on or about 24 December 2018 to, inter alia, health care practitioners including the members of SAOA

It is to be noted that the Manual permitting PPN to pay a higher consultation fee to health care practitioners who utilise Authenticate-IT, PPN's online laboratory ordering system ("Authenticate IT"), as opposed to health care practitioners who elect to not utilise the aforementioned system who will receive less than half of the consultation fee to which a health care practitioner would otherwise be entitled if he/she uses PPN's Authenticate-IT .

The Manual – Authenticate-IT

In terms of the Manual, Authenticate-IT is an online system "that network providers can voluntarily elect to subscribe to when ordering their lenses through accredited PPN laboratories". Further, the Manual provides that Authenticate-IT has been in place since 2018 and has been "designed with expert legal opinion to ensure that the methodology applied to Authenticate-IT is complicit [sic] with all relevant laws".

The Manual provides that a "comprehensive consultation" includes a "consultation", the use of "Authenticate-IT" and "biometric fingerprinting". It is to be noted that although Authenticate-IT has been in place since 2018, the payments received for utilising Authenticate-IT have been drastically revised. In this regard, PPN undertakes, on page 5 of the Manual, to pay health care providers R325 for utilising Authenticate-IT, a consultation fee of R300 and a further R5 for biometrics, thus totalling R630.

"Re-examinations", "consultations and tonometry/visual fields" and "consultations only" are listed on page 4 of the Manual in a column entitled "Other Consultation Adjustments" and costs from R250 to R275. Further in terms of the Manual, the fee for the use of Authenticate-IT may be claimed for the consultations listed under "Other Consultation Adjustments" in the event that "there has been a new script or new lenses ordered".

Health care providers who do not use Authenticate-IT will receive an all-inclusive payment of R300, which rate is lower than the rate health care providers were receiving in 2018. We have been instructed that although Authenticate-IT has been in place since 2018, the payments received for utilising Authenticate-IT have been drastically revised. In this regard, PPN undertakes, on page 5 of the Manual, to pay health care providers R325 for utilising Authenticate-IT, a consultation fee of R300 and a further R5 for biometrics, thus totalling R630.

However, health care providers who do not use Authenticate-IT will receive an all-inclusive payment of R300, which rate is lower than the rate health care providers were receiving in 2018.

Authenticate-IT and Rule 7(1) of the Ethical Rules

The Ethical Rules are published by the HPCSA, the regulatory authority tasked with enforcing the provisions of the Health Professions Act No. 56 of 1974 ("the HPA").

Rule 7(1) of the Ethical Rules provides that "practitioners shall not accept commission or any material consideration, (monetary or otherwise) from another practitioner or institution in return for the purchase, sale or supply of any from a person or goods, substances or materials used by him or her in the conduct of his or her professional practice".

In so far as how Rule 7(1) of the Ethical Rules interacts with the incentive Authenticate-IT offers to health care practitioners the health care practitioner may be considered as accepting money from PPN for the use of Authenticate-IT;

- The abovementioned use of Authenticate-IT results in the sale and supply of medical devices offered by the laboratories who also utilise Authenticate-IT;
- The abovementioned medical devices are, then, used by the health care practitioners in the conduct of his or her professional practice, in so far as they are prescribed to patients.

Therefore, as health care practitioners accept fees from PPN when utilising Authenticate-IT and then supplying medical devices from specified laboratories, health

care practitioners are induced contravene Rule 7(1) through the use of Authenticate-IT.

Authenticate-IT and the Rule 7(3) of the Ethical Rules

Rule 7(3) of the Ethical Rules provide that "a practitioner shall not offer or accept any payment, benefit or material consideration (monetary or otherwise) which is calculated to induce him or her to act or not to act in a particular way not scientifically, professionally or medically indicated or to under service, over service or over charge patients".

Based on a reading of the abovementioned Rule, practitioners are prohibited from accepting a payment intended to induce him/her to act in a way that is not scientifically, professionally or medically appropriate; or under or over-service or over-charge patients.

The Ethical Rules do not define the terms "consideration", "induce" and "indicate". The rules of statutory interpretation provide that, in the absence of a statutory definition of a word in a statute, such a word must be interpreted in context according to its ordinary grammatical meaning (see *Cool Ideas 1186 CC v Hubbard and another 2014 (8) BCLR 869 (CC)*). In this regard, the Oxford Concise English Dictionary Luxury Edition 12th ed. (2011) provides the following definitions -

"consideration" as "a payment or reward" or "anything given or promised by one party in exchange for the promise or undertaking of another";

"induce" as "to succeed in persuading or leading someone to do something"; and

"indicate" as "suggest a desirable or necessary course of action".

Furthermore, the words "shall not" indicates that Rule 7(3) is a peremptory provision, which imposes a strict prohibition on the conduct described within Rule 7(3), and thus requires stringent adherence to the statutory provision. The word "shall" is imperative or affirmative in law. (see *Bezuidenhout v AA Mutual Insurance Association Ltd 1978 (1) SA 703 (A)* at page 709).

Taking into account the definitions set out above in paragraphs in this complaint and the principles of statutory interpretation which are set out above, **Rule 7(3) imposes a strict prohibition on a medical practitioner from accepting any payment, benefit or reward with the purpose of persuading or leading such a medical practitioner to**

act in a manner that is not scientifically, professionally or medically advised in the treatment of patients, or failing to provide adequate health care services, providing excessive health care services, or charging patients excessive fees for such healthcare services.

PPN pays health care practitioners a higher fee in order to persuade such health providers to utilise Authenticate-IT. The aforementioned provision of the Manual can thus be construed as PPN inducing health care practitioners to conduct their respective health care practices in a particular way. This has been our position.

However, based on the provisions In terms of Rule 7(3) in order for the abovementioned inducement to contravene the aforementioned Rule, the inducement must relate to the manner in which a health care practitioner treats and charges his or her patient.

In respect of patient treatments and charges in terms of the Authenticate-IT, only certain laboratories have signed-up to utilise Authenticate-IT and health care practitioners may only prescribe lenses and spectacles supplied by the aforementioned laboratories.

Thus, the health care practitioners, implicitly, prefer the medical devices provided by the laboratories registered on Authenticate-IT regardless of whether or not the patient may be better treated using a medical device not supplied by the aforementioned laboratories; and as discussed above, medical schemes/patients are charged almost double the standard consultation fee where optometrists participate in Authenticate-IT.

Therefore, in so far as Authenticate-IT induces health care practitioners to treat patients in a particular way, in respect of the medical devices prescribed, the use of Authenticate-IT by health care practitioners is in contravention of the Ethical Rules.

Rule 13(2)(a) of the Ethical Rules provides that a healthcare practitioner may only divulge confidential information concerning a patient with the express consent of the patient. The aforementioned Rule is relevant for our purposes in so far as a health care practitioner is obliged to enter into a patient's confidential details when submitting an online order using Authenticate-IT.

Authenticate-IT and Rule 23(2) of the Ethical Rules

Rule 23(2) of the Ethical Rules states that "a practitioner shall not engage in or advocate the preferential use or prescription of any medicine or medical device which, save for the valuable consideration he or she may derive from such preferential use or prescription, would not be clinically appropriate or the most cost-effective option" (emphasis added).

Rule 23(2), arguably, mirrors the provisions of Rules 7(1) and (3). Arguably, however, Rule 23(2) of the Ethical Rules does not necessarily prohibit an incentive derived by a health care practitioner but rather prohibits health care practitioners from encouraging the use of medical devices that would not be the most appropriate or cost-effective in the circumstances.

The abovementioned Rule is relevant for the purposes of this complaint as the use of Authenticate-IT results in health care practitioners preferring the use of the lenses and spectacles offered by the laboratories accredited by PPN.

Thus, unless in each instance there is no alternative brand of lenses or spectacles available from a laboratory not accredited by PPN, which would be more appropriate and cost effective for a patient, health care practitioners, by ordering from a laboratories stipulated by PPN, are acting in contravention of Rule 23(2) of the Ethical Rules.

Authenticate-IT and the UBP Policy

In support of the view expressed above , Clause 4.8 of the UBP Policy states that financial incentives should only be used to promote quality and cost-effective care and should not be used to encourage the withholding of medically necessary care.

The UBP Policy further states that health care practitioners should not be influenced in their judgments of appropriate therapeutic alternatives or deny their patients access to appropriate services due to financial incentives. Health care practitioners should receive incentive payments which are based on performance according to criteria that are founded in best practice and the ethical behaviour of individuals. Health care practitioners may not use incentives to encourage either "over" or "under" servicing of patients.

The restriction on the selection of medical devices that the health care practitioner must adhere to when utilising Authenticate-IT may result in patients being under-serviced or over-serviced. As, in the event that there are medical devices available at laboratories that are not registered with Authenticate-IT, which would perform the health service required at either a lower price or more effectively, the health care practitioner is unable to prescribe the aforementioned device based on the manner in which Authenticate-IT operates.

Based on the above, in our view, Authenticate-IT is contrary to provisions of the UBP Policy.

Authenticate-IT and the Guidelines for Perverse Incentives

The HPA and Ethical Rules do not define the terms "incentive" or "perverse incentives". However, the Guidelines for Perverse Incentives define the term "improper financial gain or other valuable consideration", at clause 2.9, as "money, or any other form of compensation, payment, reward or benefit which is not legally due or which is given on the understanding, whether express, implied or tacit, that the recipient will engage or refrain from engaging in certain behaviour in a manner which is either:

- Illegal; and/or
- Contrary to ethical or professional rules; and/or
- Which, in the opinion of a the HPCSA, may adversely affect the interests of a patient or group of patients,

In order to procure some direct or indirect advantage, benefit, reward or payment for the person offering or giving the said money, compensation, payment, reward or benefit, and "perverse incentive" has the same meaning".

in terms of the Guidelines for Perverse Incentives the HPCSA seeks to identify incentive schemes and forms of inducement that it finds unacceptable.

In terms of the definition of the term "improper financial gain or other valuable consideration", as stated above, we have not been advised whether or not SAOA has received a formal opinion from the HPCSA regarding the legal standing of Authenticate-

IT. In our opinion, procuring the aforementioned opinion may be prudent.

Clause 3.4 of the Guidelines for Perverse Incentives states that "[h]ealth care practitioners shall not engage in or advocate the preferential use of any health establishment or medical device or health related service or prescribe any orthodox medicine, complementary medicine, veterinary medicine or scheduled substance, if any financial gain or other valuable consideration is derived from such preferential usage or prescription or the advocacy of preferential usage by the health care professional".

Clause 3.4 is applicable in this instance.

As stated above, Authenticate-IT stipulates from which laboratories a health care practitioner may prescribe medical devices.

PPN has argued that the intention behind the incentive provided by Authenticate-IT is to prevent fraud and promote cost-effective health care services. However, the unintended and unlawful consequence of the uses of Authenticate-IT is that, inter alia, in so far as health care practitioners are restricted only to utilising medical devices distributed by the associated laboratories, the restriction may result, in certain instances and for the reasons given above at paragraph 13.4, in the under-servicing or over-servicing of patients.

On the bases of what is set out above the incentive provided by Authenticate-IT is a perverse incentive as contemplated by the Perverse Incentives Guidelines.

Incentive Schemes: The Medicines Act versus The Ethical Rules

As discussed above, Rules 7(1) and 7(3) of the Ethical Rules, respectively, prohibit health care practitioners from accepting monetary consideration in return for the purchase, sale or supply of any goods used in his or her professional practice or accepting any payment to induce him or her to act or not to act in a particular way which is contrary to the best interests of patients.

Section 18A(1) of the Medicines Act provides, in respect of incentive schemes, inter alia, that "[n]o person shall supply any medicine, medical device or IVD according to a bonus

system, rebate system or any other incentive scheme". Various terms used in section 18A are not defined in the Medicines Act. In our view, the aforementioned omissions may be deliberate on the part of the legislature in order to broaden the scope and ambit of the application of the terms - which, in turn, is designed to quash as many possible types of incentives pertaining to the supply of medicines as possible.

Thus, both the Ethical Rules and the Medicines Act seek to prevent the same mischief, being the supply of, inter alia, medical devices in terms of an incentive scheme.

However, in terms of an undated Government Notice published in terms of the MSA entitled "Exemption of Schedule Zero Medicines from the Provisions of Section 18A and 22G of the Medicines and Related Substances Act No. 101 of 1965, as amended" signed by the Minister of Health on 13 December 2018 ("the Exemption Notice"), medical devices have been exempt from the provisions of section 18A of the Medicines Act. Accordingly, currently any person may supply medical devices through an incentive scheme.

Notwithstanding the Exemption Notice, the provisions referred to above at paragraphs 15.1 to 12.1 of the Ethical Rules are still in operation.

Taking into account the above, a conflict, arguably, exists between the Medicines Act and the Ethical Rules. In this regard, incentive schemes which were unlawful in terms of the Medicines Act and also unethical in terms of the Ethical Rules are now, by virtue of the Exemption Notice, lawful. **However, incentive schemes potentially remain unethical in terms of the Ethical Rules.**

We state above, that Authenticate-IT is contrary to the relevant provisions of the delegated legislation.

List of documents relevant to complaint attached to this form	PPN Manual
What outcome do you propose for this complaint?	Withdrawal of the manual as presented.
Date	10 January 2019
Place	Midrand
Signature of complainant	H ROSEN
4. DECLARATION/CONSENT BY PATIENT	
By signing below I confirm that I am aware that the complainant was authorised by myself to lodge a complaint on my behalf(<i>where complainant is not a patient</i>) and I further give consent to the practitioner to disclose confidential information to the HPCSA in the course of addressing my complaint against him/her should it be necessary	
Signature of patient for disclosure of confidential information	
5. OFFICE USE ONLY	
Reference number	