

# OBCE ADVERTISING REVIEW POLICIES

Updated November 7, 2011

(Sources: OBCE Guide to Practice and Policy Questions, Oregon Revised Statutes, Administrative Rules and legal advice)

Chiropractic physicians or any other person under the jurisdiction of the OBCE must be able to support statements, whatever the statements are, with credible evidence. This is necessary to be in compliance with:

OAR 811-015-0045 (1): “A Chiropractic physician shall not use or participate in the use of improper advertising which: (a) States any fact which would result in the communication being untruthful, misleading or deceptive. (b) Contains statistical or other assertions of predicted rates of success of treatment...” (also provisions 2 through 4)

ORS 684.100 Grounds for discipline. Section (1)(i): “The use of any advertising making untruthful, improper, misleading or deceptive statements.

(j) The advertising of techniques or modalities to infer or imply superiority of treatment or diagnosis by the use thereof that cannot be conclusively proven to the satisfaction of the board.

(L) Advertising either in the name of the person or under the name of another person, clinic or concern, actual or pretended, in any newspaper, pamphlet, circular or other written or printed paper or document, professing superiority to or a greater skill than that possessed by other chiropractic physicians that cannot be conclusively proven to the satisfaction of the board.

(o) The advertising or holding oneself out to treat diseases or other abnormal conditions of the human body by any secret formula, method, treatment or procedure.

The OBCE may not impinge upon legitimate commercial free speech rights. However, advertising statements must be supported by credible evidence. The OBCE recommends that this evidence be available for review upon request.

Doctors are responsible to review their own advertising in light of the laws, rules and policies cited in this review. The Board will make a final determination of the credibility of evidence supporting advertising statements on a case by case basis when presented with a complaint concerning advertising.

To assist in understanding what the OBCE considers to be violations of the advertising rule, final orders regarding advertising violations will be provided upon request.

The OBCE does not offer to review or pre-approve advertising by chiropractic physicians. Instead the Board is issuing this advisory.

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At their May 17, 2007 meeting the Oregon Board of Chiropractic Examiners adopted five additional policy statements regarding advertising by chiropractic physicians. These policies are an update to the existing OBCE policy advisory on advertising issues.

- 1) Any advertising claims that spinal decompression/traction devices or any other medical device are a “medical breakthrough” must be supported by credible evidence.

- 2) Claims of superiority for medical devices such as “Non-surgical spinal decompression is the most promising disc pain treatment today” must meet the standard articulated in ORS 684.100 Section (1) (j): “The advertising of techniques or modalities to infer or imply superiority of treatment or diagnosis by the use thereof that cannot be conclusively proven to the satisfaction of the board.
  - 3) Statements contrasting spinal decompression favorably with drugs or surgery without mentioning other kinds of chiropractic treatment are misleading to the public.
  - 4) Use of the term “FDA approved” in reference to the FDA 510 (k) clearance process is misbranding and misleading advertising. The FDA’s regulations make clear that *“Submission of a premarket notification in accordance with this subpart, and a subsequent determination by the Commissioner that the device intended for introduction into commercial distribution is substantially equivalent to a device in commercial distribution before May 28, 1976, or is substantially equivalent to a device introduced into commercial distribution after May 28, 1976, that has subsequently been reclassified into class I or II, does not in any way denote official approval of the device. Any representation that creates an impression of official approval of a device because of complying with the premarket notification regulations is misleading and constitutes misbranding.”*
  - 5) When a statement is literally false, the (OBCE) presumes that it will cause injury to a competitor. (Cf. Energy Four, Inc. v. Dornier Medical Sys., Inc., 765 F. Supp. 724, 734 (N.D. Ga. 1991))
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## **OBCE Administrative Rules Chapter 811**

### **Advertising**

811-015-0045 (1) A Chiropractic physician shall not use or participate in the use of improper advertising. Improper advertising is any advertising which:

(a) States any fact which would result in the communication being untruthful, misleading or deceptive;

(b) Contains statistical or other assertions of predicted rates of success of treatment; or

(c) Claims a specialty, degree or diplomate not possessed or that does not exist;

(2) A chiropractor shall not practice under a name that is misleading as to the identity of the chiropractor or chiropractors practicing under such name or under a firm name which is misleading.

(3) A Chiropractic physician shall adhere to the Doctors' Title Act, ORS 676.110(2).

(4) A Chiropractic physician may use a professional card and/or letterhead identifying the Chiropractic physician's name, profession, address, telephone number, name of the chiropractic office and educational degrees. It may also include names of licensed associates.

## **Oregon Revised Statutes 684**

**ORS 684.100 Grounds for discipline of licensee or refusal to license; restoration; suspension; competency examinations; confidential information.** (1) The State Board of Chiropractic Examiners may refuse to grant a license to any applicant or may discipline a person upon any of the following grounds:

(a) Fraud or misrepresentation.

(b) The practice of chiropractic under a false or assumed name.

(c) The impersonation of another practitioner of like or different name

- ... (i)The use of any advertising making untruthful, improper, misleading or deceptive statements.
- (j)The advertising of techniques or modalities to infer or imply superiority of treatment or diagnosis by the use thereof that cannot be conclusively proven to the satisfaction of the board.
- ... (L)Advertising either in the name of the person or under the name of another person, clinic, or concern, actual or pretended, in any newspaper, pamphlet, circular or other written or printed paper or document, professing superiority to or a greater skill than that possessed by other chiropractic physicians that cannot be conclusively proven to the satisfaction of the board.
- ... (o)The advertising or holding oneself out to treat diseases or other abnormal conditions of the human body by any secret formula, method, treatment or procedure.

## **Oregon Revised Statute 676 Doctor’s Title Act**

**[The Oregon Doctor’s Title Act was amended in 2009 and clarifying amendments were passed by the Legislature in 2011 (HB 2395).]**

**ORS 676.110 Use of title “doctor.”** (1) An individual practicing a health care profession may not use the title "doctor" in connection with the profession, unless the individual:

- (a) Has earned a doctoral degree in the individual's field of practice; and
- (b)(A) Is licensed by a health professional regulatory board as defined in ORS 676.160 to practice the particular health care profession in which the individual's doctoral degree was earned; or
- (B) Is working under a board-approved residency contract and is practicing under the license of a supervisor who is licensed by a health professional regulatory board as defined in ORS 676.160 to practice the particular health care profession in which the individual's doctoral degree was earned.

(2) If an individual uses the title "doctor" in connection with a health care profession at any time, the individual must designate the health care profession in which the individual's doctoral degree was earned on all written or printed matter, advertising, billboards, signs or professional notices used in connection with the health care profession regardless of whether the individual's name or the title "doctor" appears on the written or printed matter, advertising, billboard, sign or professional notice. The designation must be in letters or print at least one-fourth the size of the largest letters used on the written or printed matter, advertising, billboard, sign or professional notice, and in material, color, type or illumination to give display and legibility of at least one-fourth that of the largest letters used on the written or printed matter, advertising, billboard, sign or professional notice.

(3) Subsection (1) of this section does not prohibit:

- (a) A chiropractic physician licensed under ORS chapter 684 from using the title "chiropractic physician";
- (b) A naturopathic physician licensed under ORS chapter 685 from using the title "naturopathic physician";
- (c) A person licensed to practice optometry under ORS chapter 683 from using the title "doctor of optometry" or "optometric physician"; or
- (d) A podiatric physician licensed under ORS 677.805 to 677.840 from using the title "podiatric physician."

**676.120 Use of deceased licensee’s name.** Notwithstanding ORS 676.110, upon the death of any person duly licensed by a health professional regulatory board as defined in ORS 676.160, the executors of the estate or the heirs, assigns, associates or partners may retain the use of the decedent’s name, where it appears other than as a part of an assumed name, for no more than one year after the death of such person or until the estate is settled, whichever is sooner. [Amended by 1953 c.137 §2; 1983 c.769 §2; 1991 c.314 §5; 2009 c.142 §2]

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## OBCE GUIDE TO POLICY & PRACTICE QUESTIONS (excerpt)

### **MULTI-DISCIPLINE CLINICS, ADVERTISING REQUIREMENTS:**

**(See Doctors' Title Act)** If any person (including a group or combination of individual persons) uses certain terms listed in the statute in any printed or written matter, or in any advertising, signs, or professional notices, then the particular health care profession under which the person is licensed also must be identified in print at least one-fourth as large as the title or name of the professional “person” or entity. The designation of the person’s health care profession also must be displayed in such a way as to be at least one-fourth as “legible” as the title or name. The concept is to provide consumers with sufficient information to identify under which license a health care professional in Oregon is practicing.

To further explain, the following examples are given:

If a multidiscipline clinic has a sign out front that says XYZ Rehab Clinic, then each profession involved in the clinic must be identified, such as:

XYZ Rehab Clinic  
Medical Doctor, Chiropractor etc. (in one-fourth size print)

If a person’s name is used, then one must be identified as a chiropractor, i.e. John Doe, Chiropractor, or John Doe, Chiropractic Physician.

The provisions of the “Doctor’s Title Act”, ORS 676.100 - 676.130 apply in the case of multidisciplinary organizations such as rehabilitation facilities in which various health-care professionals practice.

The Doctors' Title Act is essentially a consumer protection statute. If any person (including a group or combination of individual persons) uses certain terms listed in the statute in any printed or written matter, or in any advertising, signs, or professional notices, then the particular health care profession under which the person is licensed also must be identified in print at least one-fourth as large as the title or name of the professional “person” or business entity. The designation of the person’s health care profession also must be displayed in such a name. The concept is to provide consumers with sufficient information to identify under which license a health care professional in Oregon is practicing.

The purpose and effect of the statute do not differ if the “person” is an individual physician or a multidisciplinary organization. A plain reading of the statutory terms demands that each health care professional working in a multidisciplinary clinic, institute, or group must identify his or her profession according to the “one-fourth” rule. (11/3/92)

FEDERAL TRADE COMMISSION  
16 CFR Part 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising

\* \* \* \*

This document includes only the text of the Revised Endorsement and Testimonial Guides. To learn more, read the Federal Register Notice at [www.ftc.gov/opa/2009/10/endortest.shtm](http://www.ftc.gov/opa/2009/10/endortest.shtm).

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§ 255.0 Purpose and definitions

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of Section 5 of the FIC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute.

The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising. Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an endorsement means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group, or institution.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term product includes any product, service, company or industry.

(e) For purposes of this part, an expert is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

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**Example 1:** A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the standards set by this part because it would distort the endorser's opinion [See § 255 1(b) ]

**Example 2:** A TV commercial depicts two women in a supermarket buying a laundry detergent. The women are not identified outside the context of the advertisement. One comments to the other how clean her brand makes her family's clothes, and the other then comments that she will try it because she has not been fully satisfied with her own brand. This obvious fictional dramatization of a real life situation would not be an endorsement.

**Example 3:** In an advertisement for a pain remedy, an announcer who is not familiar to consumers except as a spokesman for the advertising drug company praises the drug's ability to deliver fast and lasting pain relief. He purports to speak, not on the basis of his own opinions, but rather in the place of and on behalf of the drug company. The announcer's statements would not be considered an endorsement.

**Example 4:** A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Even though the message is not expressly declared to be the personal opinion of the driver, it may nevertheless constitute an endorsement of the tires. Many consumers will recognize this individual as being primarily a racing driver and not merely a spokesperson or announcer for the advertiser. Accordingly, they may well believe the driver would not speak for an automotive product unless he actually believed in what he was saying and had personal knowledge sufficient to form that belief. Hence, they would think that the advertising message reflects the driver's personal views. This attribution of the underlying views to the driver brings the advertisement within the definition of an endorsement for purposes of this part.

**Example 5:** A television advertisement for a particular brand of golf balls shows a prominent and well-recognized professional golfer practicing numerous drives off the tee. This would be an endorsement by the golfer even though she makes no verbal statement in the advertisement.

**Example 6:** An infomercial for a home fitness system is hosted by a well-known entertainer. During the infomercial, the entertainer demonstrates the machine and states that it is the most effective and easy-to-use home exercise machine that she has ever tried. Even if she is reading from a script, this statement would be an endorsement, because consumers are likely to believe it reflects the entertainer's views.

**Example 7:** A television advertisement for a housewares store features a well-known female comedian and a well-known male baseball player engaging in light-hearted banter about products each one intends to purchase for the other. The comedian says that she will buy him a Brand X, portable, high-definition television so he can finally see the strike zone. He says that he will get her a Brand Y juicer so she can make juice with all the fruit.

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and vegetables thrown at her during her performances. The comedian and baseball player are not likely to be deemed endorsers because consumers will likely realize that the individuals are not expressing their own views.

**Example 8:** A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

#### § 255.1 General considerations.

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser. [See §§ 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements.]

(b) The endorsement message need not be phrased in the exact words of the endorser, unless the advertisement affirmatively so represents. However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information on the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product. [See § 255.1(b) regarding the "good reason to believe" requirement.]

(d) Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers [see § 255.5]. Endorsers also may be liable for statements made in the course of their endorsements.

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**Example 1:** A building contractor states in an advertisement that he uses the advertiser's exterior house paint because of its remarkable quick drying properties and durability. This endorsement must comply with the pertinent requirements of Section 255.3 (Expert Endorsements). Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to specify the paint and to subscribe to the views presented previously.

**Example 2:** A television advertisement portrays a woman seated at a desk on which rest five unmarked computer keyboards. An announcer says, "We asked X, an administrative assistant for over ten years, to try these five unmarked keyboards and tell us which one she liked best." The advertisement portrays X typing on each keyboard and then picking the advertiser's brand. The announcer asks her why, and X gives her reasons. This endorsement would probably not represent that X actually uses the advertiser's keyboard at work. In addition, the endorsement also may be required to meet the standards of Section 255.3 (expert endorsements).

**Example 3:** An ad for an acne treatment features a dermatologist who claims that the product is "clinically proven" to work. Before giving the endorsement, she received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. The dermatologist is subject to liability for the false statements she made in the advertisement. The advertiser is also liable for misrepresentations made through the endorsement. [See Section 255.3 regarding the product evaluation that an expert endorser must conduct.]

**Example 4:** A well-known celebrity appears in an infomercial for an oven roasting bag that purportedly cooks every chicken perfectly in thirty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the bag. In each attempt, the chicken is undercooked after thirty minutes and requires sixty minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the oven roasting bag and places the bag in one oven. He then takes a chicken roasting bag from a second oven, removes from the bag what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just thirty minutes, this is the product you need. A significant percentage of consumers are likely to believe the celebrity's statements represent his own views even though he is reading from a script. The celebrity is subject to liability for his statement about the product. The advertiser is also liable for misrepresentations made through the endorsement.

**Example 5:** A skin care products advertiser participates in a blog advertising service. The service matches up advertisers with bloggers who will promote the advertiser's products on their personal blogs. The advertiser requests that a blogger try a new body lotion and write a review of the product on her blog. Although the advertiser does not make any specific claims about the lotion's ability to cure skin conditions and the blogger does not ask the advertiser whether there is substantiation for the claim, in her review the blogger writes that the lotion cures eczema and recommends the product to her blog readers who suffer from this condition. The advertiser is subject to liability for misleading or unsubstantiated

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representations made through the blogger's endorsement. The blogger also is subject to liability for misleading or unsubstantiated representations made in the course of her endorsement. The blogger is also liable if she fails to disclose clearly and conspicuously that she is being paid for her services [See § 255.5]

In order to limit its potential liability, the advertiser should ensure that the advertising service provides guidance and training to its bloggers concerning the need to ensure that statements they make are truthful and substantiated. The advertiser should also monitor bloggers who are being paid to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered.

#### § 255.2 Consumer endorsements.

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support such claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation.<sup>1</sup>

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<sup>1</sup> The Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either "Results not typical" or the stronger "These testimonials are based on the experiences of a few people and you are not likely to have similar results." Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser's experience to what consumers may generally expect to achieve are unlikely to be effective.

Nonetheless, the Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.