

VOLUNTARY ADMISSION BY NAPP

Promotional emails sent without recipient's permission

Napp voluntarily reported three incidents which related to a call process conducted by a contract tele/e-detail sales agency, on its behalf. The incidents related to BuTrans (buprenorphine patch) promotional emails sent to two practice managers and one health professional. Napp was uncertain as to whether the recipients had given their consent to receive such emails.

In accordance with Paragraph 5.6 of the Constitution and Procedure for the PMCPA, the Director treated the matter as a complaint.

Napp explained that the agency would schedule an appointment with a customer for a later web-based e-detail call by an agency sales representative. This offered health professionals unable to see a representative, the opportunity to learn more about a medicine via a real-time, web-based interface or by telephone. The call scheduling process involved a scripted call usually with a receptionist, an email to confirm the appointment and another to explain the format if there were any questions. The confirmation email had two sections; the first explained that a conversation had taken place to book the appointment and the second was addressed to the health professional to confirm the appointment details. The emails were only sent if an email address was supplied by the receptionist or similar who made the appointment.

The agency used health professional data provided by Napp to populate certain data fields within the call system including name, address, institution and telephone numbers. Napp noted that there was no email data field within the call system.

At the end of a scheduled web-based e-detail or telephone call, the health professional could agree to receive or specifically request that additional BuTrans promotional material be posted or emailed.

Napp approved a template letter/email to be used by its employees to send out any additional BuTrans information requested following a call. Confirmation emails from schedulers and follow-up additional information emails from Napp were only sent if an email address was supplied to the agency by a health professional.

Napp submitted that the three incidents which took place in May and June 2013, involving the same agency sales representative, involved uncertainty around the consent given for three health professionals to receive emails containing additional promotional information following a call. Napp immediately launched an investigation and services were suspended.

In the first incident Napp understood that the representative initially called a doctor in early May

2013 but was advised that he did not speak to representatives and was asked to call back to speak to the practice manager which the representative did a few days later. The relevant call notes recorded, *inter alia*, that the practice manager had requested additional BuTrans information. It was, however, not clear from the notes whether this had been specifically requested to be sent by email. (Napp noted that the representative's call notes for the three incidents lacked detail). Napp used its template email and sent two pieces of material to the practice manager, both attachments required the recipient to click on them to open them and the email explained that the attachments were promotional and advised the reader not to open them if they did not wish to see them. The practice manager subsequently contacted Napp and stated that she had not requested any information from the representative. Napp apologised for any unexpected communication. No further communication had taken place.

In the second incident Napp understood that the representative similarly called a doctor who did not speak to representatives and was again asked to call the practice manager. The representative called the practice manager. Once again, the representative's notes recording the call with the practice manager suggested that additional BuTrans information had been requested but it was not clear whether this was specifically requested to be sent by email. Napp emailed BuTrans documents to the practice manager who emailed straight back explaining that she had not had the conversation referred to in the email (an 'online conversation') and wondered if Napp had sent it to the right person.

Napp understood that the representative stated that he/she had gained express permission from the practice manager. Napp directed the project manager to send his/her team an email on the Code requirements and guidance on obtaining email consent and the customer was removed from further calling on the project.

Napp apologised to the practice manager for the delay in responding as well as for any error which might have occurred. No further communication had taken place.

In the third incident Napp understood that the representative initially called a doctor but was advised to call back the following week. A call back was made but the representative was redirected to the practice manager as the doctor was unavailable. The call notes suggested that the practice manager had thought the doctor's partners would be interested in the product information and requested that it be sent to another named doctor.

In this instance, the notes specifically referenced to the information being emailed. Napp emailed BuTrans information to the second named doctor as requested by the representative.

The second named doctor responded and explained that he had not had an online conversation and did not wish to receive any information. Napp apologised and its investigation into the matter had shown it likely that no consent was given by the doctor for the use of email in this way. Napp submitted, however, that the practice manager operated under implied authority to give such permission on behalf of colleagues. In this instance it was likely that the representative obtained the doctor's email address from the practice manager.

The detailed response from Napp is given below.

The Panel noted that Napp's investigation into the three incidents had been hampered by the representative's persistent poor record keeping.

The Panel noted that the Code stated that email communications must not be used for promotional purposes, except with the prior permission of the recipient. In the Panel's view this permission had to be obtained from the recipient of the material and could not be given by a third party on the recipient's behalf. In that regard the Panel noted that an email in late May from one of the agency's sales managers to his/her sales team clearly stated that email addresses of health professionals given by receptionists and support staff could not be used without direct permission from the recipient.

The Panel considered each incident separately.

1 Practice Manager

The Panel noted that on receipt of emailed, additional BuTrans information, the practice manager had emailed Napp to inform the company that she had not requested any information, that she did not want to receive any further information and that her email address should be removed from its circulation list. The practice manager referred to the representative by name but did not state whether she had given him her email address. The representative's call notes stated that 'the customer requested med info' but did not state how such information was to be sent. Napp did not know how the representative had obtained the practice manager's email address. The Panel noted that extreme dissatisfaction was generally required before an individual was moved to complain but considered that on the basis of the information before it, it was impossible to know whether the practice manager had given her email address, and her permission to use it for promotional purposes, to the representative. The Panel therefore ruled no breaches of the Code.

2 Practice Manager

The Panel noted that Napp had emailed the practice manager with additional BuTrans information and that in response the practice manager had stated that she had not had the conversation referred to in

the email and queried whether Napp had sent the information to the right person. The Panel noted that Napp's email template referred to a 'recent online conversation' and Napp's submission that the representative had telephoned the practice manager and that this might explain why she could not remember the conversation. The Panel noted Napp's submission that the representative's call logs showed that three calls had been made to the practice in question and although the call notes were not detailed, they stated that information had been requested. The call notes did not state how the information was to be sent but the Panel noted that Napp understood that the representative had stated that he had gained express permission from the practice manager given the previous incident and further instructions from Napp. The Panel further noted Napp's submission that email addresses were not stored in the call system and the original appointment had been made with a different health professional so it was difficult to rule out the possibility that the email address had been obtained during a telephone conversation. As above, the Panel considered that it was impossible to know whether the practice manager had spoken to the representative and given her email address, and her permission to use it for promotional purposes. The Panel therefore ruled no breaches of the Code.

3 Practice Manager and Doctor

The Panel noted that following receipt of an email about BuTrans, a doctor emailed Napp stating that he had not had an online conversation with the representative as stated in the email and did not wish to receive any information. In subsequent correspondence, the doctor queried how his contact details had been obtained as he had not shared them. The Panel noted Napp's submission that the practice manager had provided the representative with the doctor's email address and instructed him to send the additional BuTrans material. This was supported by the representative's brief call notes. The Panel noted, however, that in a further email to Napp, the doctor stated that the practice manager had no recollection of any conversation with the representative at issue and that he would not have revealed the doctor's email address in conversation with a representative. The Panel noted Napp's submission that as the doctor used a short form of his name in his email address the representative was unlikely to have been able to guess it and so he must have been given it by someone; it appeared clear, however that that someone was not the doctor. The Panel considered that the doctor had been emailed promotional material without his prior permission and that the representative had not maintained a high standard of ethical conduct. Breaches of the Code were ruled.

Napp Pharmaceuticals voluntarily reported three incidents which related to a call process conducted by a contract tele/e-detail sales agency, on its behalf. The incidents related to BuTrans (buprenorphine patch) promotional emails sent to two named practice managers and one named health professional. Napp was uncertain as to whether the recipients had given their consent to receive

such emails. Following an investigation, Napp was not certain that the incidents at issue breached the Code but submitted that combined, they should be reported to the Authority.

In accordance with Paragraph 5.6 of the Constitution and Procedure for the PMCPA, the Director treated the matter as a complaint.

VOLUNTARY ADMISSION

Napp explained that the call system involved an agency 'scheduler' scheduling an appointment with a customer for a later web-based e-detail call by an agency sales representative. This method of communication offered health professionals unable to commit to physically seeing a representative, the opportunity to learn more about a specific medicine via a real-time, web-based interface or by telephone. Napp understood that this method of communication was becoming more common within the industry and the agency provided similar services to other pharmaceutical companies.

The call scheduling process involved a scripted call usually with a receptionist, an email to confirm the appointment and another to explain the format if there were any questions. The confirmation email had two sections; the first section explained that a conversation had taken place to book the appointment and the second was addressed to the health professional to confirm the appointment details. The two emails were only sent if an email address was supplied by the likes of the receptionist who made the appointment.

The agency in question used health professional data provided by its clients and had in this instance used data from Napp to populate certain data fields within the call system including name, address, institution and telephone numbers. Napp noted that there was no provision of email data fields within the call system.

At the end of a scheduled web-based e-detail or telephone call, the health professional could agree to receive or specifically request additional BuTrans promotional material to be posted or emailed to them.

Napp had commissioned the agency to conduct promotional tele/e-detail BuTrans sales calls to health professionals in October 2012; a considerable amount of due diligence was undertaken during the negotiation of the contract, in respect of the call system and the agency's process surrounding it. Napp submitted that it had taken steps to fully understand the system and how health professionals would interact with it and agency employees, and had imposed extensive contractual obligations upon the agency in relation to the general performance of the project and quality of the services provided by it and its employees.

The agency was required to:

- use all reasonable skill and care in the performance of these services. This clause was particularly important to Napp within its contracts

and Napp sought to monitor and enforce it diligently

- accept extensive contractual obligations imposed on it by Napp in respect of recruitment and disciplinary matters in relation to staff working on the project
- provide a scheduling and sales representative team dedicated to Napp for the duration of the contract
- comply with all reasonable instructions from Napp which included compliance with appropriate elements of its standard operating procedures (SOPs) relevant to the detailing and promotion of medicines
- comply with all relevant laws, regulations and policies, including the Code, relevant to the detailing and promotion of medicines
- ensure that it 'used best endeavours under all circumstances' to respect and adhere to Napp's Leadership Attributes and Code of Business Ethics (both of which were appended to the contract)
- ensure and maintain evidence that its sales staff were ABPI qualified (the certificate of qualification for the relevant representative was provided)
- provide a project manager pursuant to the contract to undertake the general management of its employees as well as the specific management tasks imposed upon she/he by the contract.

Napp submitted that fees and incentives for agency staff were set at the appropriate levels to avoid them being an undue proportion of their basic salary and to avoid excessive call rate activity.

Before the project started, Napp reviewed and approved all of the associated materials and scripts that would be used by agency employees. Napp took additional steps to guide the agency where it believed particular Code areas required it and in this regard had focussed on the emailing of promotional materials to health professionals. In particular:

- data protection obligations were placed on the agency
- the agency was contractually required to focus on a target list of circa 13,000 health professionals provided to it by Napp from its validated database. Annual call rates were set within the contract at appropriate Code compliant levels to avoid excess call rate activity
- key performance indicators were included in the contract to enable Napp to monitor and measure the agency's performance in terms of call targeting, in-call activity and call quality
- the agency was required to provide Napp with a monthly record of all calls
- the contract with the agency required its employees to undergo training with Napp in respect of the project. Napp trained agency employees on its anti-corruption policy requirements as well as additional ABPI training including specific guidance on the use of health professionals' email addresses
- the agency was obliged to only use materials provided (and approved) by Napp, including anything requested by a health professional to be sent by post or email

- it was agreed with the agency that, as an additional control for Napp, any additional information requested by a health professional following a call would be sent by a Napp employee using a Napp email address. This particular step was included to limit email activity by agency staff to schedule confirmations and call information. This helped Napp ensure that only approved materials and information were sent to the right people. It was recognised that this was always subject to a certain level of reliance upon agency employees communicating accurate email addresses and consents to Napp. Napp submitted that the Code did not require formal written consent regarding email use and was guided by the expertise and pharmaceutical industry experience of the agency in respect of this project together with the other safeguards that it employed

In addition to the above, Napp submitted that it had approved a template letter/email which would always be used by its employees to send out any additional BuTrans information requested following a call. This template was set out below:

'Dear []

Further to your recent online conversation, [representative name], your NappCall representative has indicated to me that you have requested some supporting information about the BuTrans patches that were discussed. The items requested are marked below:

- BuTrans monograph (PDF attached to this email)
- FAQ booklet 'Your questions answered' (Enclosed)
- Patients in specific populations (PDF attached to this email)
- Patient booklet 'Your guide to BuTrans patches' (Enclosed)

Please note that if you have requested items that are attached as PDFs to this email, these items contain promotional information. If you do not wish to see this information please refrain from opening the PDF(s) attached.

Any items to be sent by post should reach you in the next few days.

If you have any further questions please do not hesitate to contact me.'

Napp stated that it had specifically structured this template email so that health professionals did not see the requested promotional information in the main body of the email. Napp recognised the potential for the agency's experience with industry practice in obtaining email permission to inadvertently expose health professionals to material that they might not remember asking for. Napp wanted to give health professionals a further opportunity to decide if they wanted to view promotional content or not. Napp reiterated the importance of adherence to the Code in an email sent in January 2013 to the agency and its respective

sales representatives which included a specific attachment where Clause 9.9 was definitively reiterated and emphasised. Napp noted that within the call system, there was no field for the inclusion of health professionals' email addresses (regardless of whether these were available from the likes of named data providers Napp or agency databases). The fields were limited to name, address, institution and telephone numbers. The stance taken by the agency was as follows: 'At the start of the project we agree use of email with our client and this is minimised to avoid email usage unless absolutely necessary within the constraints of the Code. This guidance is communicated to call representatives both verbally and in writing. In addition to this our customer data does not include email addresses and therefore emails could only be sent if an email address is provided to us'.

Consequently, confirmation emails from schedulers and follow-up additional information emails from Napp were only sent if an email address was supplied to the agency by a health professional.

Napp submitted that between November 2012 and June 2013, the agency recorded over 2,100 calls on health professionals on behalf of Napp. The three incidents leading to this voluntary admission took place in May and June 2013. Each incident involved calls to health professionals by the same agency sales representative following appointments booked by agency schedulers. The key aspect of all three incidents, and the purpose of Napp's voluntary admission, related to uncertainty around the consent given for three health professionals to receive emails containing additional promotional information following a call.

Napp apologised to each of the health professionals, including two practice managers and one GP, for any misunderstanding. No further correspondence had been received since the last communication in June 2013. Napp submitted that this was an isolated and contained episode and no further notifications had been received from any other health professionals called upon by the agency.

Upon becoming aware of the incident, Napp immediately launched an investigation and further services performed by the agency were initially suspended pending its outcome as additional information was obtained from the agency and the call servers based in another European country. The contract with the agency was terminated by Napp in July 2013 following the disclosure and interpretation of further information. In addition, the investigation led to the agency's dismissal of the representative involved in these incidents and disciplinary action pending against the relevant project manager responsible for the representative.

Napp detailed three incidents.

1 Practice Manager

Napp understood that the representative initially called a doctor in early May 2013 but was advised that he did not speak to representatives and was

asked to call back to speak to the practice manager. A call back was made when the representative spoke to the practice manager.

Napp understood that a brief discussion took place about Napp's product and the practice manager had requested additional BuTrans information. This was suggested in the sales manager's call notes. It was, however, not clear from the notes whether this had been specifically requested to be sent by email. The reference simply to 'med info' being requested was not ideal although this phrase was used on all of the representative's notes. Napp generally only made four pieces of additional information available and the representative had specified in instructions to Napp which material had been requested. Napp noted that during its investigation, it had found that the particular representative's call notes for the three incidents at issue lacked detail.

Napp used its template email and sent two of the possible four pieces of material to the practice manager. Both attachments required the recipient to click on them to open them and read them and the email explained that the attachments were promotional and advised the reader not to open them if they did not wish to see them.

The practice manager subsequently contacted Napp and stated that she had not requested any information from the representative. Napp apologised for any unexpected communication. No further communication had taken place between the parties since.

Despite Napp's investigation it was not possible to definitively conclude either way as to whether any consent was given by the practice manager for the use of her email in this way. The call notes were not ideal yet they stated that information was requested. Napp submitted that email addresses were not stored in the call system. Napp had looked into whether the representative had obtained the email address from the scheduler's notes yet the scheduler had made an appointment with someone else. Napp had also considered the possibility that the representative had guessed the email address, however in this instance the practice manager used a different email address from the name on her email signature and the name she went by on the surgery website. Notwithstanding the practice manager's denial, Napp concluded that it was difficult to rule out the possibility that an email address had been provided for this additional information to be sent.

Following this incident coming to Napp's attention, it called the project manager at the agency to communicate the issue. It was agreed that the project manager would speak to the representative in question to reinforce the Code requirements and Napp's direction about the use of email. This action was communicated back to Napp and, as per the practice manager's requirements, she was removed from further calling on the project.

As the telephone number to the practice manager was a local number, it had not been possible to itemise the particular call to investigate its duration

or any other circumstantial evidence which might be gleaned from it.

2 Practice Manager – 16 May 2013

Napp's investigation into this incident suggested that it followed a similar pattern to that above. Napp understood that the representative initially called a doctor in May 2013 and was advised that the doctor did not speak to representatives and was asked to call back to speak to the practice manager. A call back was made when the representative spoke with the practice manager.

Napp understood that a brief discussion took place about Napp's product and additional BuTrans information had been requested by the practice manager. Once again, this was suggested in the representative's call notes but it was not clear from the notes whether this was specifically requested to be sent by email.

Napp used its email template to send two of the possible four pieces of material to the practice manager, namely a BuTrans monograph, and a 'Patients in Specific Populations' booklet. The recipient had to click on both attachments in order to open and read them and the email explained that the attachments were promotional and advised the reader not to open them if they did not wish to see them.

On the same day, the practice manager emailed Napp explaining that she had not had the conversation referred to in the email (an 'online conversation') and wondered if Napp had sent it to the right person.

When this incident came to Napp's attention, it was communicated to the agency's project manager by telephone. It was agreed that the project manager would once again speak to the representative. Napp understood that the representative stated that he had gained express permission from the practice manager in light of the previous incident and the reiteration of direction from Napp. In addition, the project manager was to send further written communication to his team and an email was circulated in late May to highlight the relevant Code requirements and provide additional guidance on obtaining email consent.

This action was communicated back to Napp and the agency's head of commercial, and the customer was removed from further calling on the project.

Napp apologised to the practice manager for the delay in responding as well as for any error which might have occurred. No further communications had taken place between the parties.

Despite Napp's investigation, it had not been possible to definitively conclude either way as to whether specific consent had been given by the practice manager for the use of her email in this way. The call notes were not ideal yet had stated that information was requested. Once again, Napp noted that email addresses were not stored in the

call system. Napp had looked into whether the representative obtained the email address from the scheduler's notes yet the scheduler again had made an appointment with a different health professional with the representative being redirected to the practice manager. Napp had also considered whether the representative had guessed the email address. Although Napp could not rule this out, it considered it highly unlikely given that such a pattern was not seen across all three incidents.

Given the practice manager's particular response 'I did not have this conversation', Napp had investigated whether the call actually took place. Upon review of the representative's telephone logs, Napp confirmed that three telephone calls were made to the practice in question by the specific representative. The combined duration of these calls was sufficiently long for the recipient to consent to giving her email address out for further information. Napp noted that its email template referred to a 'recent online conversation' which in this situation had been replaced by a telephone call; this could explain why the practice manager could not remember the conversation.

Napp concluded that it was difficult to rule out the possibility that an email address had been provided for the additional information to be sent.

3 Practice Manager and Doctor

Napp submitted that this incident had similarities with the two above with regards to the uncertainty surrounding the use of email although in this case the email was sent directly to a doctor rather than to a practice manager. Napp understood that the representative initially called a doctor in late May 2013 but was advised to call back the following week. A call back was made but the representative was redirected to the practice manager as the doctor was unavailable.

Napp understood that a brief discussion took place about Napp's product and the call notes suggested that the practice manager had thought the doctor's partners would be interested in the product information and requested that it be sent to a second named doctor.

Again, the representative's call notes suggested that the practice manager had requested additional BuTrans information. In this instance, the notes specifically referenced to it being emailed.

Napp received an email request from the representative for the additional BuTrans information to be emailed to the second doctor.

Using the email template, Napp sent the second doctor an email which had PDF files attached containing a BuTrans monograph, and a 'Patients in Specific Populations' booklet. Both attachments required the recipient to click on them before being opened and read. The email explained that the attachments were promotional and advised the reader not to open them if they did not wish to see them.

The second doctor responded and explained that he had not had an online conversation and did not wish to receive any information. Following Napp's apology, the second doctor wished to understand where his contact details had been obtained from. Napp explained that it was in the process of investigating the matter and would provide him with further information once the work had been completed.

Once the initial investigation had been completed, Napp tried unsuccessfully on several occasions to telephone the second doctor following which contact was made and conversation carried out via email to explain the findings of Napp's initial investigation. Since then there had been no further correspondence between the parties.

Napp stated that its investigation had shown it likely that no consent was given by the second doctor for the use of email in this way. Napp submitted that had it known this, it categorically would not have sent him an email with promotional material attached. Napp submitted that it had not been given this crucial information by the representative. Napp further submitted, however, that the practice manager operated under implied authority to give such permission on behalf of colleagues. Napp submitted that the call notes were not ideal yet they did state that information had been requested and importantly that it would be of interest to the second doctor rather than the first doctor with whom the original call had been planned. Napp again noted that email addresses were not stored in the call system and that in this instance it was likely to be obtained from the practice manager despite the confusion about an online conversation taking place with the representative. Napp had looked in to whether the representative had obtained the email address from the scheduler's notes yet the scheduler had again made the appointment with a different health professional, the first doctor, and the representative was redirected to the practice manager who had asked him to email the second doctor. Although Napp could not rule out, the possibility that the representative had guessed the email address, it considered it highly unlikely because such a pattern was not seen across the three incidents and the doctor used a shorter version of his name in his email address.

Napp concluded that it was difficult to rule out the possibility that an email address had been provided by the practice manager for the additional information to be sent to the second doctor; the circumstantial evidence suggested that the practice manager had exercised implied authority to give permission on the second doctor's behalf regarding the use of his email in this way.

When this incident came to Napp's attention, it telephoned the agency's head of commercial and given the two previous incidents, the agency's head of operations contacted the representative to understand the situation.

In conclusion, Napp submitted that a conference call had taken place on 6 June between the agency,

Napp and the senior brand manager. As the agency and its employees had violated the high standards and stringent procedures to abide strictly by the Code, Code of Business Ethics and Leadership Attributes demanded by Napp, Napp requested that the agency launch its own internal investigation into the matter. It was agreed that a disciplinary process be instigated together with the immediate suspension of the representative in question. Napp understood that the disciplinary action ended in the representative's termination given that Napp would have, in any event, exercised its contractual right to request that the representative in question be removed from the particular project.

Napp had requested investigation reports from the agency in order to continue its investigation. At this time Napp formally suspended the contract with the agency with immediate effect, pending a final decision on termination of the contract.

The contract with the agency was terminated in July 2013.

When writing to Napp, the Authority asked it to respond in relation to Clauses 9.1, 9.9 and 15.2 of the Code.

RESPONSE

Napp submitted that since it made its voluntary admission, it had been able to interrogate and gather further information from the agency. In view of the evidence available to Napp at this time as set out above, Napp considered that the incidents in the self-report did not represent breaches of the Code. That said, Napp acknowledged the potential for uncertainty from conflicting information from the respective health professionals should that be available to the PMCPA.

As detailed above, Napp had, through contractual obligations and training, imposed upon the agency and its employees an extensive framework of Codes, policies and procedures to ensure that high standards would be maintained at all times. Therefore, Napp considered that high standards had been maintained. Napp submitted that it had in place appropriate core compliance modules in addition to which Napp and the agency imposed additional bespoke requirements on the agency employees in respect of this project. Therefore Napp submitted that there had been no breach of Clause 9.1.

Napp submitted that Clause 9.9 did not stipulate that written permission must be obtained. Consequently, the use of verbal permission did not constitute non-compliance with this clause. The issue that this clause presented, regarding verbal permission, was one of evidence that such permission was given. It was in that respect Napp believed there to be considerable circumstantial evidence to support no breach of this clause.

The circumstantial evidence indicated that in all three instances permission was obtained. In two of those instances the permission was obtained

directly from the recipients. In the third instance, Napp considered that permission was granted on behalf of the recipient in circumstances where it was reasonable to believe that it was pursuant to the protocols of the practice involved.

There was considerable circumstantial evidence to support the fact that verbal permission had been given by two recipients. The call notes stated that information was requested. As stated in Napp's original letter, email addresses were not stored in the call system which required them to be obtained from a recipient by the agency representatives before such contact could be made. Napp had investigated whether the representative obtained the email addresses from the scheduler's notes yet in each instance, the scheduler had made the original appointment with a different health professional before it was intercepted by the practice manager. Napp had also considered the possibility of the representative guessing the email addresses. There was no evidence of any such pattern existing across the three incidents and in the second incident the practice manager used a different email address from the name on her email signature and the name she went by on the surgery website.

There was also considerable circumstantial evidence in the third incident that permission had been obtained from the practice manager who had operated under implied authority to give such permission on behalf of colleagues. This was reasonable to believe given the evolution of the practice manager's role to help manage what was and what was not sent to or put in front of his/her colleagues. Napp further submitted that Clause 9.9 did not require such permission to be provided directly from the recipient. The call notes stated that information was requested and importantly that such information would be of interest to the second doctor (rather than the first doctor with whom the original call had been planned). Once again, Napp noted that email addresses were not stored in the system and in this instance it was likely to have been obtained from the practice manager (despite any confusion, possibly via the Napp template email, about an 'online conversation' which took place with the representative). Napp had investigated whether the representative had obtained the email address from the scheduler's notes yet the scheduler had again made an appointment with a different health professional the first doctor; the representative was redirected to the practice manager and had seemingly been asked to email a further health professional, the second doctor. Napp had also considered the possibility of the representative guessing the email address. Napp submitted that this was unlikely because such a pattern had not been seen across the three incidents and the doctor referred to a shortened form of his name in his email address.

Napp submitted that in all three instances the evidence supported the fact that verbal permission was obtained. In one instance the permission had been given on behalf of a colleague. Given the evidence available to Napp it refuted that any of the circumstances were in breach of Clause 9.9.

Napp addressed Clause 15.2 below under its two distinct sections. The first was whether the agency representative maintained high standards of ethical conduct in the discharge of his duties. The second was whether he had complied with all of the relevant requirements of the Code.

The extensive framework of Codes, policies and procedures (including its Code of Business Ethics) imposed upon the agency and its employees by Napp was set out above. The agency also imposed its own policies and procedures (including restrictions on access to health professionals' email addresses) as additional safeguards for its employees when interacting with health professionals. These were discussed above. Napp confirmed that the actions of the representative were not in breach of Napp's Code of Business Ethics in respect of his interactions with health professionals. Furthermore, given the evidence above, Napp submitted that the representative's actions whilst interacting with the health professionals, obtaining permission to email them and then arranging for the email to be sent, would or could not be objectively viewed as being unethical in any way. Napp explained that the representative had been dismissed by the agency. Napp also terminated the contract with the agency, however this was related to wider agency contractual and commercial performance matters.

In these incidents the relevant requirements of Clause 9.9 of the Code related to having the prior permission of the recipient to use email for promotional purposes. As explained above, Napp submitted that the representative had complied with this Code requirement in respect of all three incidents.

PANEL RULING

The Panel noted Napp's submission that during a seven month period the agency had recorded over 2,100 calls. However, the Panel disagreed with Napp's description of the three incidents at issue, which all involved the same representative, as 'an isolated and contained episode'. The Panel noted that Napp's investigation into the three incidents had been hampered by the representative's persistent poor record keeping.

The Panel noted that Clause 9.9 stated, *inter alia*, that email communications must not be used for promotional purposes, except with the prior permission of the recipient. In the Panel's view this permission had to be obtained from the recipient of the material and could not be given by a third party on the recipient's behalf. In that regard the Panel noted that an email dated 23 May from one of the agency's sales managers to his sales team clearly stated that email addresses of health professionals given by receptionists and support staff could not be used without direct permission from the recipient.

The Panel considered each incident separately.

1 Practice Manager

The Panel noted that on receipt of emailed, additional BuTrans information, the practice

manager had emailed Napp to inform the company that she had not requested any information, that she did not want to receive any further information and that her email address should be removed from its circulation list. The practice manager referred to the representative by name but did not state whether she had given him her email address. The representative's call notes stated that 'the customer requested med info' but did not state how such information was to be sent. Napp did not know how the representative had obtained the practice manager's email address. The Panel noted that extreme dissatisfaction was generally required before an individual was moved to complain but considered that on the basis of the information before it, it was impossible to know whether the practice manager had given her email address, and her permission to use it for promotional purposes, to the representative. The Panel therefore ruled no breach of Clauses 9.9 and 15.2. Consequently no breach of Clause 9.1 was ruled.

2 Practice Manager

The Panel noted that Napp had emailed the practice manager with additional BuTrans information and that in response the practice manager had stated that she had not had the conversation referred to in the email and queried whether Napp had sent the information to the right person. The Panel noted that Napp's email template referred to a 'recent online conversation' and Napp's submission that the representative had telephoned the practice manager and that this might explain why she could not remember the conversation. The Panel noted Napp's submission that the representative's call logs showed that three calls had been made to the practice in question and although the call notes were not detailed, they stated that information had been requested. The call notes did not state how the information was to be sent but the Panel noted that Napp understood that the representative had stated that he had gained express permission from the practice manager given the previous incident and further instructions from Napp. The Panel further noted Napp's submission that email addresses were not stored in the call system and the original appointment had been made with a different health professional so it was difficult to rule out the possibility that the email address for the practice manager had been obtained during a telephone conversation. As above, the Panel considered that it was impossible to know whether the practice manager had spoken to the representative and given her email address, and her permission to use it for promotional purposes. The Panel therefore ruled no breach of Clauses 9.9 and 15.2. Consequently no breach of Clause 9.1 was ruled.

3 Practice Manager and Doctor

The Panel noted that following receipt of an email about BuTrans, a doctor emailed Napp stating that he had not had an online conversation with the representative as stated in the email and did not wish to receive any information. In subsequent correspondence, the doctor queried how his contact details had been obtained as he had not shared

them. The Panel noted Napp's submission that the practice manager had provided the representative with the doctor's email address and instructed him to send the additional BuTrans material. This was supported by the representative's brief call notes. The Panel noted, however, that in a further email to Napp, the doctor stated that the practice manager had no recollection of any conversation with the representative at issue and that he would not have revealed the doctor's email address in conversation with a representative. The Panel noted Napp's submission that as the doctor used a short form of his name in his email address the representative was unlikely to have been able to guess it and so he must have been given it by someone; it appeared clear, however that that someone was not the doctor. The Panel noted that Clause 9.9 required prior permission from the recipient before emails could be used for promotional purposes; such permission could not be granted by a third party. The Panel considered that the doctor had been emailed promotional

material without his prior permission. A breach of Clause 9.9 was ruled. The Panel considered that the representative had not maintained a high standard of ethical conduct. A breach of Clause 15.2 was ruled. High standards had not been maintained and a breach of Clause 9.1 was ruled.

During the consideration of this case the Panel was concerned that the representative's call notes were of a very poor quality and it queried whether more could have been done by Napp and the agency to guide the representative on best practice for completing call notes. The Panel requested that its general concerns were drawn to Napp's attention.

Complaint received

19 July 2013

Case completed

12 September 2013