

July 15, 2020

Via email

Dr. Nancy Whitmore  
Registrar & CEO  
College of Physicians and Surgeons of Ontario  
80 College Street  
Toronto, ON M5G 2E2

Dear Dr. Whitmore:

**Re: CPSO Consultation on Advertising**

The Canadian Medical Protective Association (CMPA) appreciates the opportunity to participate in the consultation being conducted by the College regarding its new draft *Policy and Advice to the Profession on Advertising*.

As you know, the CMPA delivers efficient, high-quality physician-to-physician advice and assistance in medical-legal matters, including the provision of appropriate compensation to patients injured by negligent medical care. Our evidence-based products and services enhance the safety of medical care, reducing unnecessary harm and costs. As Canada's largest physician organization and with the support of our over 100,000 physician members, the CMPA collaborates, advocates and effects positive change on important healthcare and medical-legal issues.

Given the ambiguity of some of the advertising requirements contained in the *General Regulation* under the *Medicine Act*, it is helpful that the College wishes to provide clarity regarding these requirements, as well as the additional expectations of the College. However, there are some aspects of the draft *Policy and Advice* document that we think would benefit from further clarity to avoid any unintentional confusion on the part of physicians.

*Advertising Specific Drug, Appliance or Equipment*

The CMPA recommends that the draft *Policy and Advice* document be revised to make clear in what circumstances the exception on the prohibition of advertising a particular drug, appliance or equipment is applicable.

Section 6(1)(c) of the *General Regulation* prohibits any advertising that contains reference to a specific drug, appliance or equipment. The draft *Policy* would create an exception where "the drug, appliance or equipment is known by its commercial name in a generic sense." However, the *Advice* document states that physicians will continue to be prohibited from endorsing specific drugs and "whether a brand name is being used to describe the generic product or the brand name product will depend on the exact wording of the advertisement."

The draft *Advice* document explains that the purpose for the prohibition in the *General Regulation* is to prevent physicians from endorsing specific drugs and that the exception in the *Policy* is narrow. However, physicians may not understand from the explanation provided in the *Advice* document what is permitted activity under this proposed exception. Physicians may misinterpret the proposed exception as allowing for the exact kind of product endorsement that the *General Regulation* prohibits.

It would be preferable that the draft *Policy and Advice* document provide additional guidance for physicians to clarify this distinction and so that physicians do not mistakenly run afoul of the *Policy* or the *General Regulation*. In particular, the proposed wording might clarify when use of a product name in a generic sense will be permitted, as well as those uses that would be expressly prohibited.

### *Before and After Photos and Videos*

The CMPA recommends that the draft *Policy* specify how physicians should document the consent and discussion with the patient regarding the use of “before and after photos and videos”.

The draft *Policy* would create strict rules governing the use of “before and after photos or videos.” Amongst other things, the draft *Policy* would require that a physician obtain express consent to the use of the photo or video and engage in a dialogue with the patient about this use. The draft *Policy* is silent on whether and how the consent and discussion should be documented.

The CMPA generally advises that when obtaining express consent, physicians include a note about the consent discussion in the patient's medical record. The CMPA further encourages physicians to ask patients to sign a written consent form whenever they are using photos or videos for promotional purposes. A copy of this consent form should also be retained in the medical record.

Documenting the consent discussion and retaining any written consent form in the record provides good evidence that the patient consented to the use of his/her personal health information for this secondary purpose.

### *Directing and Targeting Prospective Patients*

It would be helpful if the *Advice* document clarified what types of systems would be considered as steering or recommending patients to a member for professional services.

Section 7 of the *General Regulation* prohibits physicians from participating “directly or indirectly in a system in which another person steers or recommends people to a member for professional services”. Although the draft *Advice* document provides an obvious example of when the prohibition in section 7 would apply (*i.e.* physicians offering services through group discount companies), it does not address other, less obvious situations for which physicians may be found in breach of this section.

For example, it would be useful for physicians to know whether they are permitted to rely upon search engine optimization (SEO) when using a website to advertise their services. As the College may be aware, SEO involves building a website in a certain way in the hopes that the website will be displayed as a top result on the search engine results page.

Given the number of physician operated websites and new forms of online media, it would be helpful to provide clarification as to whether, for example, SEO might be considered to violate section 7 of the *General Regulation*. It would also be useful for physicians to be aware of other types of situations that would be considered as directing patients to a particular physician for medical services.

### *Use of Practice Description Terms*

It would be preferable if the *Advice* document listed *all* the restricted practice description terms that physicians are permitted to use as these appear in section 9 of the *General Regulation*.

As currently written, the draft *Advice* document omits certain practice descriptions such as “otolaryngologist-head and neck surgeon” and “ophthalmologist”. Furthermore, those practice descriptions that are listed do not specify that “any variation, or abbreviation, or equivalent of [the listed term] in another language” are also regulated terms.

It is important that the *Advice* document list all the relevant descriptions so that physicians clearly understand what terms, titles or designations they are permitted to use in respect of their practice of the profession.

We hope these comments will be helpful to the College in finalizing the draft *Policy and Advice* document.