August 3, 2020

Dear College of Physicians and Surgeons of Ontario,

Thank you for the opportunity to comment on the draft Advertising Policy. I hope that the following comments are helpful for the College in moving forward with a policy that protects the public interest.

Recommendation #1: exempt outreach attempts in FN9 and FN10 of the policy.

Many physicians specifically target marginalized populations in outreach initiatives. The following examples demonstrate cases where a physician may breach items 9 and 10 of the draft policy simply by participating in an outreach initiative:

- Public health physicians host an annual STI testing drive at a local college/university. Students are randomly approached by public health staff in the student centre and encouraged to leave an anonymous urine sample if they have any suspicions about their current STI status. Several thousand students participate province-wide, and several dozen positives are identified and treated.
- A nurse practitioner and a physician work on a downtown outreach team that identifies people who are experiencing homeless and appear to be in need of medical treatment. The physician proactively approaches people who are living rough on the street and attempts to engage them in accessing food and medical care. In several cases, the physician visually identified abscesses, and in one case, a fungating tumor, and provided immediate medical care.
- The nurse practitioner, who is paid by a grant from the local Community Health Centre, participates in a co-ordinated effort to approach individuals experiencing homelessness at a food bank, ask them if they have a family physician, and, if not, refer them to the sole physician at the CHC who is currently accepting patients.
- A social worker who works at a homeless shelter participates in a co-ordinated effort where people with severe mental illness who lack the insight to recognize their medical needs are identified and connected with the specific physician that volunteers weekly at the shelter for primary care. As a result of this effort, several patients receive primary care and the Emergency Department ceases to be their main source of medical treatment.
- A registered nurse who works for the City of Toronto's housing-first strategy proactively identifies severely mentally ill clients at a homeless shelter who he suspects may be eligible for ODSP. As a member of this co-ordinated housing-first effort, he refers these patients for examination by a specific psychiatrist who runs a monthly assessment clinic at the shelter. Because of these assessments, several eligible patients have received positive ODSP assessments and now have access to funding for housing.

As written, all of these initiatives violate items 9 and 10 of the draft policy as the physicians either participate in a co-ordinated outreach effort or, themselves, proactively target people known to need medical services.

My suspicion is that the College, in its interest in protecting the public, is targeting kickback schemes and aggressive referral programs, and may not wish to include public interest initiatives in the scope of the policy. However, as written, most prudent physicians would steer clear of these initiatives in order to avoid violating a professional duty.

The recommendation is that the College add an exception to FN9 and FN10 for cases where the purpose of the referral process or the organized/co-ordinated effort is either (a) to help marginalized populations access care or (b) for the purpose of public health initiatives.

Recommendation #2: clarify the extent to which the College places a positive duty on physicians to "permit" themselves to be associated with an advertisement.

In the last five years, the College has created a line of cases where it has imposed a positive duty on physicians to monitor for possible uses of their name or likeness in advertisements.

In *Cyriac, Yau v. Bernstein (ONSC 2015)*, the CPSO Discipline Committee held that "although physicians may have no knowledge of their names being used, they nevertheless do bear the ultimate responsibility when this use is connected with a third party. They need to show the College that they have taken reasonable steps to discontinue and/or prevent advertising that contravenes the Advertising Regulation."

In *Wong v. HPARB (ONSC 2016)*, the Divisional Court upheld the HPARB holding that there is a "positive duty on a physician to make inquiries as to the activities of a clinic or other organization before permitting his or her name to be associated". In that case, the ICRC had stated that even though Dr. Wong "did not know about the advertising", they held that "he had *permitted* himself to be associated with the advertising by allowing his name to be portrayed on the Clinic's website" (emphasis added).

Finally, in *CJH v. JS (HPARB 2017)*, the ICRC found that Dr. CJH had breached the advertising policy, despite having no role in its sale, marketing, nor distribution, because he had been interviewed on Youtube while "packing jars labelled 'Zenbev' into boxes".

The draft policy's use of the word "permit" (and the advice document's further clarification) is ambiguous in relation to the CPSO's recent decisions. Does the College impose a positive duty on physicians to monitor for inadvertent usage of their names in advertisements? If so, to what extent does that positive duty flow? Does the College expect physicians to routinely "Google" themselves in order to demonstrate "reasonable steps?" Should physicians, for example, avoid being filmed in Youtube videos where product labels are present?

As written, the draft policy and advice document under-reach what the College has held in several cases as necessary to protect the public. The recommendation is that the College more clearly delineate its expectations, in reference to its holdings in recent cases, so that physicians are able to meet them consistently.

Recommendation #3: consider removing the following language from the policy document: "2b. is dignified; 2c. is in good taste."

Rocket v. Royal College of Dental Surgeons of Ontario (SCC 1990) clearly empowers the College to regulate physician advertising. The Supreme Court held that while granting such a power violates a citizen's s. 2(b) *Charter* right to freedom of expression, such infringement was justified by the importance of "promoting professionalism" and "to protect the public from irresponsible and misleading advertising." It granted to the Colleges the heavy burden of weighing a citizen physician's right to free expression against the importance of protecting the profession and the public. In noting that "few [professionals] would be inclined to set themselves against their governing bodies", the Court was under no illusion that this balancing act was not without substantial impact to its members. Accordingly, the College has an important responsibility for any language that it uses to exercise this power to be as clear and defined as possible.

Indeed, most prudent physicians are inclined to steer clear of possible infringements of College policy and are likely to over-police their own actions. Accordingly, any vague language in a policy is likely to result in an overly broad reach.

Importantly, policy item #3 clearly explains advertising that the College deems as unprofessional. Any reasonable physician should be able to read that list, assess their advertisement, and decide for themselves whether it breaches College policy or not. Conversely, reasonable physicians may disagree on what is "dignified" or in "good taste."

The advice document also has an important opportunity in clarifying the meaning of "good taste." As ICRC decisions not arising to certain penalty levels are not available for public review, it is challenging for a reasonable physician to know what the ICRC has found "less tasteful" in the past.

Furthermore, *SKB v. SS (HPARB 2013)* has held that the College believes contests to be *per se* violations of the "dignified" and "good taste" requirement. If so, why not include that under policy item #3 as opposed to leaving that out of the policy altogether?

What type of content is website-acceptable but billboard-unacceptable? If all advertising is commercial by nature, what makes some advertising "overly" commercial?

We recommend the College remove the terms "good taste" and "dignified" to avoid an overly broad application of the policy. Instead, we recommend the College to use policy item #3 as a listing of the characteristics that define what "bad taste" and "undignified" advertisements contain. In doing so, it will more clearly delineate what is acceptable, and unacceptable, for advertisements, which will result in better adherence to the desired outcome.

Recommendation #4: clarify the language of policy #7 "physicians **must not** permit their name or likeness to be used in or associated with advertising: a. for any commercial product or service other than their own medical services."

One of the most inspiring attributes of Ontario's physicians is their widespread interests both inside, and outside, of medicine. The broad drafting of item #7 rejects *all* physician advertising, except for their own medical services, thus precluding physicians from promoting their hobbies. Because the draft policy has defined advertising as "*any communication* … that has as its primary purpose the promotion of the physician, [or] *a service they provide*…" (emphasis added) virtually all references containing a physician's name and service fall within the policy's regulatory scope. This is a similar style of policy that the Supreme Court cautioned against in *Rocket v. Royal College of Dental Surgeons of Ontario (SCC 1990)* as overbroad and not minimally impairing.

The following examples (slightly edited from real life) are times where physicians have permitted their name or likeness to be used in or associated with a communication promoting themselves or a non-medical service they provide. In each case, the physician is *not* acting in their official capacity as a health care professional but may include their "Dr." title or "MD" degree.

- A Youtube banner from a bodybuilding physician who posts videos around his tips to healthy eating. As the physician makes money from Youtube views, this is a commercial service. The banner's sole and primary purpose is the promotion of the physician, but not in his capacity as a health care professional – only as a bodybuilder.
- An About section from a website that sells books that an Ontario physician has written. The physician earns royalties from the sale of the book and the website is a communication whose primary purpose is to promote himself.
- A Facebook page for a physician who sells prints of natural photography. The Facebook page is a communication that has as its primary purpose the promotion of the physician's service.
- The website by a physician who is a singer-songwriter. Her website is a communication that promotes her music.
- The banner from a gym studio website where the physician promotes her fitness services.
- An advertisement comprised of the book cover for a mystery novel written by a physician. The book is a commercial service and the image is a communication for the primary purpose of promoting the service provided. The book cover contains the physician's name.

My suspicion is that the College does not intend to restrict physicians from promoting their Youtube channels on healthy eating, their artistic pursuits, and their businesses that are unrelated in any way to the practice of medicine. Indeed, even if the College does intend to restrict physicians from promoting their external activities, there is a genuine question of law whether such a restriction would be upheld under *Charter* s. 1 in the post-*Vavilov* world of Canadian administrative law. These examples are specifically selected to demonstrate that the policy clause is written in a way that is far broader than the intended purpose of protecting the public from misleading advertising. Most prudent

Ontario physicians will avoid any interaction with the College by interpreting the wording of the policy to its widest extent. Accordingly, the College owes it to the public and to its physicians to carefully define its expectations.

One possibility would be for the College to limit the scope of this provision to scenarios where the physician uses their title, designation, or membership in the profession in the advertisement.

Recommendation #5: clarify College expectations with third-party websites such as ratemd.com.

Many physicians (not this one) frequently ask patients to post opinions of their service on ratemd.com. I certainly agree with the College that this should be considered advertising and comes well within the College's purview of regulating to prevent the public from being misled. One question that remains is whether the College is open to providing guidance on the extent to which physicians can respond to negative feedback. For example, racist, sexist, or ageist comments occasionally appear on ratemd.com. The physician could petition the website to have such comments removed. Would that be a violation of the testimonial policy?

Furthermore, it is not inconceivable that a particularly malicious physician could run a smear campaign against a competitor. Indeed, the trio of College cases *SKB v. SS*, *SKB v. LMB*, and *SKB v. TZ* suggests that physicians are not above using the College's complaint process to affect competitors. Ratemd.com and Google Reviews currently offers physicians the ability to respond to negative comments. What is the College's position on physicians reasonably responding to smear campaigns and negative comments? Is that a per se violation of the Advertising policy?

As social media and third-party review websites become increasingly important in a patient's choice of physician, I believe it to be crucial for the College to clarify its expectations on physician management of these reviews.

I thank the College for their hard work in reviewing these comments and appreciate their time and careful consideration of the above recommendations.

Sincerely,
Anonymous Ontario Physician