CPSO Advertising Policy Review

Joint Statement from the OMA Section on Plastic Surgery
and OMA Section on Otolaryngology - Head & Neck Surgery

The OMA Section on Plastic Surgery is grateful for the opportunity to provide its opinions and suggestions with respect to advertising within the profession, the regulations contained in Part II of Regulation 114/94 under the Medicine Act, 1991, and the policies applied by the CPSO in the enforcement of those regulations. We recognize that the manner in which society communicates, shares information, and exchanges opinions has changed dramatically since those regulations and policies were implemented nearly 30 years ago. The advent of the internet, the widespread use of electronic communication, and social media have all, to a large extent, resulted in a better educated and much more sophisticated consumer, including consumers of medical procedures. The presence of online physician rating websites, for example, has become an integral source of information for patients considering or already receiving healthcare. The OMA Section on Plastic Surgery appreciates and supports the efforts the College is making to recognize and respond to these changes.

Plastic surgeons are particularly impacted by the rules that govern advertising by physicians. That is because plastic surgery is, largely, a visual specialty. The use of before and after pictures, for example, has been the subject of much discussion within the profession. We understand the concern that the use of photos might mislead patients to expect an outcome they do not achieve. And yet we know that before and after photos and videos are used extensively by prospective patients in making preliminary decisions about whether a procedure is right for them. When used responsibly they are a valuable tool that is an important part of the patient's research and education. They are not intended to replace a patient's direct consultation with the physician. We believe Ontario physicians have a duty to inform and educate our patients, applying these tools among others, so that information is readily accessible to them. We believe that policies that prevent dissemination of information interferes with patient autonomy and decision making, and is contrary to a patient-centered care model.

It is with these thoughts in mind that we offer our opinion and suggestions regarding the draft Advertising Policy proposed by the College.

Definitions:

With respect to the definition of Advertising, we suggest the following:

- The definition states that Advertising is "…any communication made in print, through electronic media, or via the internet….". We suggest the term 'social media' be added to this list. We also suggest the definition specifically refer to the statement contained at Section 6(1) of Regulation 114/94 that "…A member may communicate any factual, accurate, and verifiable information that a reasonable person would consider material in the choice of a physician, a) in or through a medium that is equally accessible to all interested members."

- The definition further states that the communication "…has as its primary purpose the promotion of the physician, a service they provide, or a clinic, facility or group with which they are associated." Much of the content that is communicated to the public is not for promotional purposes but rather for educational purposes. We suggest the definition specifically exempt communications that are intended to educate the public, while not replacing the requirement for direct patient/physician consultation.

With respect to the definition of Before and After Photo or Video, we suggest it be amended to read "…images of a patient taken before, during, and after a medical service…."

Advertising Content:

1. We agree with the general requirements contained in Sections 2 and 3 of the draft Policy that advertising must be "dignified", "in good taste", "respectful", "balanced in tone", and not "sensationalized, exaggerated, or provocative". However, we are concerned that the assessment of many of the issues described in these sections is largely subjective. The opinion of one individual may differ significantly from that of another. For this reason we suggest that issues concerning such assessments not be unilaterally arbitrated by the College. We suggest the College consider creating a committee to review issues that arise with respect to the advertising policy. Members of the committee would consist of physicians from those specialties that are most significantly impacted by the advertising policies, such as plastic surgeons, otolaryngologist/head-neck surgeons, dermatologists, and ophthalmologists. The committee should also include one or more member of the general public. We suggest the physician members be nominated by their respective OMA Sections, and that members from the general public be nominated by the College.

   Furthermore, as part of the complaint information gathering process, we would suggest that the aforementioned committee of involved specialists review specific information regarding any complaint against a member by clarifying whether the complainant has been (1) treated by the practitioner, (2) is related to or employed by the complainant or (3) is a medical practitioner.

2. The issue concerning advertising that contains testimonials, referred to at Section 3(f) of the draft Policy, is a major concern. As stated above, the existence of online physician rating websites has become an integral source of information for patients who are looking to select a physician. Patients making healthcare decisions expect to have access to the reviews and/or comments of others. It has become an important part of the larger information gathering process. A physician posting a positive review from a happy patient on his or her website, or on social media, does not unduly mislead the reviewer. The public has equal access to all review sites available on the internet. To apply the language of Section 6(1) of Regulation 114/94, a review or comment posted by a physician that contains "factual, accurate, and verifiable information" is "information that a reasonable person would consider in the choice of a physician".

However, there should be physician accountability to ensure the posted statements have been made by patients who have actually been treated by the physician. We suggest that, prior to posting any testimonial comment, physicians should be required to obtain the patient's consent that the comment may be shared on-line, and this consent should be documented and made readily available to the College, if requested.

The public currently has unlimited access to many websites that contain physician reviews that permit the posting of unedited and uncontrolled reviews by the public. Physicians should have the ability to post true patient comments and testimonials.

3. The provision at Section 3(g) of the draft Policy that prohibits advertising that refers to a specific drug, appliance, or equipment is also of concern to us. We believe the use of the trade names of medications / drugs and medical devices should be **required** by physicians. This will ensure patients are aware of the products and devices being used by the physician. When we prescribe a medication for a patient we do not use generic names or general terms. Patients need specific information to ensure that the treatment is a) what they are seeking and b) appropriate for their needs. If physician advertisements state "We now offer laser treatment", a patient seeking tattoo removal may take time out of their day/work and go to that office only to find out that the generic 'laser' being discussed does not actually treat the condition they were presenting with. Patients are educated and sophisticated. With the information available on the internet in 2020, they know what they want. It is our experience that patients do not call a physician's office and ask "Do you have lasers?" they ask "Do you offer Picoway® for tattoo removal?" It is our belief that a physician offering this service, and mentioning a drug or equipment brand-name for education and patient awareness, does not negatively impact patient safety. Statements made about any drug or equipment should be held to the same standards of being factual, accurate, and verifiable, and if it meets this criteria, and the other advertising criteria, it is our position that it should be permitted. Statements speaking to the applications of a specific technology are highly informative for patients. We agree that statements comparing specific technologies or claiming one device or drug to be better than another should not be included in physician advertising, but non-physician providers have the same devices in many cases and they are unregulated in the claims that they can make. It is imperative that we as physicians be able to educate our patients with accurate information on what these devices and drugs can and, importantly, cannot achieve.

We offer the example of a potential patient who has "tattoo regret" and wishes to remove the tattoo. The potential patient searches various medical websites such as WebMD, RealSelf, etc. to educate himself or herself about the treatment options. The potential patient reads about various laser modalities such as Ruby, Nd:YAG, Alexandrite, PicoWay® or PicoSure®. The potential patient decides to seek out a physician that offers this service using the PicoSure® laser. However, this potential patient would be unable to find a suitable provider because the regulations/policies prevent practitioners from using

tradenames on their websites. The potential patient is burdened with the extra step of contacting or visiting multiple physician offices listing *generic* laser tattoo removal on their websites until she found a provider with a PicoSure® device.

The public now expects particular brand name platforms such as Thermage®, Sciton Diva®, CoolSculpting®, Vaser®, SmartLipo® when seeking an appropriate physician. In our view this proposed policy unnecessarily blocks the right to "everyday agency"- the right to make consumer choices.

Finally, if a physician is using a product with a trade name, and if that product is being used as prescribed and approved by Health Canada, it should be a requirement of the College that the physician acknowledge the use of the specific product to ensure that patients are not misled. A full disclosure of all products and devices that have been used to create the outcomes shown in their before / after images, should be a requirement of the advertising policy.

Before and After Photos or Videos

4 The provision at section 4(e) of the draft Policy, that the photos or videos have used consistent lighting, photographic techniques and settings is problematic. We believe it is unreasonable to expect physicians and/or their staff to have specialized knowledge about photographic techniques and settings. It also could be applied to exclude the use of patient-submitted real-life photos, which many patients find helpful to show how their results look in clothing or day-to-day life, not simply in the sterile environment of a clinic photography studio.

We believe the goal of the draft Policy should be to discourage the use of photographic techniques that can be used to manipulate the appearance of results (for example, photographing the pre treatment chin and the post treatment chin from different angles so as to "manipulate" the appearance of the result). We believe this section of the draft Policy should be amended to ensure that efforts are taken to maintain a standardization of images, and that photographic techniques are not used to manipulate the appearance of the result.

Regarding photos, we believe the College should recognize the validity of using images other than "before and after" images in advertisements. For example, images or graphics used to portray a concept of beauty, images portraying conditions that require treatment, and images portraying unsatisfactory results should be allowable, provided that it is made clear that this is not an actual patient who has undergone treatment by the advertising physician.

5. Payment for content is a complex issue in 2020. The use of search engine optimization on the internet is an integral tool in the operation of the practice of many physicians. If

physicians are not permitted to pay to display their websites, they will be overwhelmed by non-local providers. Not only does this interfere with the business of the physician, it also unduly restricts patients by making it harder for them to find physicians who are close to them and offering the services that they are seeking. If the first several pages of results of a patients' Google search are all paid content from out-of-province or out-of-country providers, there is no way to either regulate or ensure the accuracy of information that patients in Ontario are receiving. Patients who are seeking information through a search engine do not want to have to go through hundreds or even thousands of search results just to find accurate information from a nearby physician offering the service they desire. The same is true for paid content on Facebook, Google, Instagram and other platforms.

We believe the medical profession has an obligation to make people aware of medical services and advances that can improve their health and well being. Ads are simply one method of giving them information about physicians close to them who are offering the services they seek. Once they become aware of those physicians, they are free to research and contact all of them to discuss their needs. "Pushing out" does not extinguish the free will of patients, it enhances it. This is now common practice and the public is very familiar with it. We believe prohibiting physicians from accessing paid online services is an unnecessary and unreasonable limitation on both free speech and the right to earn a living. It is what is said that should be regulated, not the right to say it.

6. We suggest the requirement at Section 6(a) that physicians wait until after treatment is provided to discuss and obtain consent is counterintuitive. Patients have a right to be kept informed during their healthcare. Physicians should be encouraged to keep patients informed and this includes informing patients about the recording of images and videos contemporaneously, and patients should be informed about the intended use of these images and videos. Are the images and videos being recorded solely for the purpose of the medical record, or for additional uses such as educational activities, advertising, etc.? Patient's should be given an opportunity to refuse if they are not an essential part of the medical record. Patients should have the right to determine whether they want their images shared at any time during the treatment process, either before treatment or after. As long as patients are not coerced into providing consent, and they recognize that it can be withdrawn at any time, the timing of the photo consent should be able to occur at any time. Furthermore, intra-operative photos can be an important part of the education process for patients, and this would not be possible to reasonably and respectfully obtain if consent could only be obtained afterwards. Additionally, many patients receive recurrent episodic care from their physician, so obtaining consent after the treatment has been completed is not possible. Nor would it be possible for the patient who seeks future treatment from the physician where this not known at the time the consent is obtained.

   The requirement at Section 6(e) that Physicians take "reasonable steps" to mitigate the potential effect of a power imbalance between the physician and the patient when discussing consent to use of photos is also very problematic. Is it not sufficient to ensure that the patient is aware that consent can be withdrawn at any time? If it is not, what

constitutes "reasonable steps" to mitigate such an imbalance? We see that determination as an issue that is subject to opinion. We suggest that if this were an issue, it is one that should be referred to the committee suggested under in Section 1 under Advertising Content above.

Subsection 6(f) prohibits the offering of incentives to obtain consent for the use of before and after photos or videos. We suggest the Policy define what will constitute "incentives".

Association with Products or Services Other than their own Medical Services

7. We believe the restriction described in Section 7 requires further clarity. Many physicians deliver speeches to business, are guest faculty of professional educational institutions or teach at the university with which they are affiliated. These entities often use the physician's name and image to inform the audience about the speaker, his / her credentials, and the topics of discussion. This is common practice by corporations, educational institutions and meetings of professional associations. We believe Section 7 of the draft Policy could be interpreted as not permitting such activities, which are intended to be educational. We suggest this provision be amended to be clear that it is not intended to interfere with educational activities such as those referred to above.

8. We have no issue.

9. We have no issue.

10. In regard to Subsection 3(h), an exception to offering incentives such as promotions or discounts should be made in the case of a client who has given the practitioner permission to communicate promotions or discounts or other material to them by written or electronic means. This can be regarded as an extension of the office setting rather than promoting to the public.

10. 'Section 10 of the draft Policy provides that physicians **must not** proactively target and contact, or attempt to contact, any person known to need medical services to solicit them to use their medical services. In our view a physician has an ethical duty to provide care to those in need. In some instances, a physician becomes aware of a healthcare need of a patient prior to the establishment of the physician-patient relationship or referral to the physician. If the physician is in a position to provide the appropriate care, they should be able to offer this to a patient even if they have not been directly asked. For example, a physician reads an article in the news about a person who has a medical problem and requires care. If the physician is in a position to offer the required care we believe they have a duty to make the person aware of this. Alternatively, a person may solicit care on social media by making a post. We believe it would not be in the patient's best interest to allow policy to prohibit a physician from making healthcare more accessible to the patient. This provision could be interpreted to contrary to the provisions of Section 15 of the College Professional Obligations and Human

Rights-Ensuring Access to Care that provides that "physicians **must not** impede access to care for existing patients, or those seeking to become patients."

11. We have no issue.

ADVICE TO THE PROFESSION: ADVERTISING

With respect to the advice offered in this document we offer the following thoughts, comments and questions.

- How are posts by hospitals or organizations, or newspaper articles on new technology and tools to fight cancer any different that the advertisements or posts made by physicians? There are numerous examples of 'testimonials' juxtaposed to physician names or photos across the websites of major hospital systems across Ontario in which patient's stories are told [redacted] or comparative statements are made regarding the quality of treatment or outcomes at a specific centre [redacted]. The mandate of the College is to regulate physicians, and those regulation standards should not vary based on practice location or physician subspecialty.

- What are rules around testimonials on third party sites?
  - Why can a physician not post a comment that is available on one of these sites which is publicly available if they cite the site or source?
  - We need to clarify that it is permissible for physicians to discuss with patients posting on these sites, provided that this is done willingly by the patient and under no coercion and with no incentive.

- Comments on Social Media Posts
  - There should be an allowance for removal of inappropriate, malicious, or incendiary posts on any media curated by the physician. For example, if a physician were to post a before/after photo of a patient and another user posted a comment containing racist, sexist, or frankly any other content deemed inappropriate, the physician should not be forced to allow this post to remain in place. We cannot rely on these social media sites to monitor for these posts, knowing that it may take hours, days, or weeks for them to respond to any complaint through their platform. Physicians should have the ability to remove posts on their personally/professionally managed accounts. If patients feel the need to post this content, there are many other third-party sites that individuals can post comments on that are not curated by the physician
  - However, if inappropriate, malicious, or incendiary comments are posted on these third-party sites that are unproven, libelous, or malicious, physicians should have

the right to request that this content be removed from that site without violating the CPSO policy.

- Incentive to Seek a Medical Treatment
  - Patients should be able to be made aware of physician pricing. If physicians decide to alter their pricing, this should also be a communicable fact to patients. This is a business decision and has nothing to do with the accuracy or authenticity of the advertisement. At the end of the day, patients are spending their own money, so if they can find an identical product for less cost elsewhere, what purpose does it serve to prevent a patient from learning about that?
  - Incentives simply help the consumer buy the things they already want. Price is an important signal for the consumer already interested in a cosmetic service. Price is irrelevant to a consumer who has no interest in a cosmetic product or service. We suggest the idea that "the public" needs to be protected from *incentives* lest they impulsively and foolishly spend their money on something they did not want or need is paternalistic and should be avoided.
  - More specific regulations and rules should be made on the offering of treatments as prizes or raffles
  - Offering additional treatments to a patient undertaking a service should not be prohibited. If a patient is undergoing a facial surgery and a clinic provides them with a complimentary facial treatment to enhance or maintain their result, this should be allowed.

- How Should I Refer to Myself in Advertising?
  - This will not work for social media. Physicians will often be mentioned in a post with an @ or # and it is not feasible to include the physician's entire designation in a social media post

- We suggest plastic surgeons be permitted to present themselves as 'Facial Plastic Surgeons' and not just ENT physicians, as many plastic surgeons may only practice facial surgery, and this puts them at a disadvantage to not be able to use this terminology.