

Ontario Medical Association Submission

CPSO Policy Consultation Draft Advertising Policy

August 2020



The OMA welcomes the opportunity to provide comments about the CPSO's draft Advertising Policy. We appreciate the CPSO is open to feedback and recommendations about its policies through its public consultation process. The OMA supports the CPSO's direction to develop briefer, more concise policies that clearly state the College's expectations. The accompanying Advice to the Profession documents are useful tools to help in policy translation and implementation. Below is the OMA's preliminary feedback regarding the draft Advertising Policy. We would appreciate the opportunity to have further discussions about the contents as the policy development process progresses, and to help identify/develop tools and resources to assist with the change management process to enable policy implementation.

Definitions:

Advertising

In part, the draft CPSO policy defines Advertising as, "any communication made in print, through electronic media or via the internet" (line 11). Given the wide array of communication methods available to physicians today, it would be helpful to provide specific examples of methods that are considered advertising within the policy itself. While this list is included in the Advice to the Profession document ('Advisory document'), it would be useful to have this information available up-front in the definition or as a footnote, especially with respect to some of the more informal or "non-traditional" forms of communication that one may not assume to be covered, such as blogs and social media posts (e.g., Facebook, Twitter, Instagram). The list could be identified as non-exhaustive as we recognize communication technology evolves rapidly. As well, it would be helpful to indicate that "any communication" refers to communication, paid or unpaid.

The draft policy indicates that Advertising is 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 (line 12-14). It would may be helpful to explain what is meant by promotion, for example, communication that is meant to encourage the public to choose a particular physician, clinic, etc., or to help inform the public about the services, products or treatments they offer. While this information is available in the Advisory document, it would be helpful to have this information in the policy or as a footnote to help avoid confusion about other instances where communication would not be considered advertising, such as materials the physician would use to inform patients about procedures in a clinical setting during an appointment, select fundraising activities, educational activities such as presentations at industry conferences, university lectures, guest speaker opportunities, etc., where the primary purpose of the communication is not to attract patients to the physician, clinic, service, etc.

Incentives

The term incentive or incentives is used several times throughout the policy and in the Advisory document. While there is information in the Advisory document about what constitutes an incentive, it would be helpful to have this information readily available and up-front in the policy as a definition.

Advertising Content:

This part of the CPSO draft policy describes the manner in which advertising content must and must not be presented, but it does not describe the advertising content itself. It would be helpful to add a statement beginning at line 31, similar to what is in Section 6. (1) of Regulation 114/94: General, for example, “A member may communicate any information that a reasonable person would consider material in the choice of a physician, a service they provide, or a clinic, facility or group with which they are associated. Information must be ... (readily comprehensible, verifiable, accurate, etc.)”.

This section of the draft policy describes advertising content using language such as “dignified” and “in good taste” (line 33-34). The OMA recognizes that these terms were taken directly from regulation and that the CPSO has little flexibility in avoiding the use of this language. As well, it is evident the CPSO has tried to clarify what is meant by “in good taste” in the Advisory document. However, additional clarification of this term and others, such as dignified, respectful, etc. is requested, as they lack necessary clarity in a document outlining expectations for the profession. The OMA would be pleased to work with the CPSO to offer additional suggestions as the policy is further developed.

Testimonials

The Advertising Content section of the policy indicates that physicians must not advertise in a manner that contains a testimonial (line 50). The OMA acknowledges that Regulation 114/94: General contains this restriction and, as a result, the CPSO has little flexibility to permit testimonials. However, this regulation is out of date and out of step with current communication technology available to members of the public. Prospective patients have access to many sources of information to help them select a physician, including websites that permit the posting of unedited and uncontrolled reviews about physicians. We ask the CPSO to request the government to update its regulation to permit physicians to use verifiable, unpaid, testimonials from their own patients in their advertising, following the completion of treatment. Patients could be asked to sign a form to verify their testimonial (e.g., patient confirms the service they received, verifies that what they have said is true, confirms no compensation was offered or received in exchange for the testimonial, etc.) and to authorize consent for the physician to use the testimonial in advertising.

Reference to a Specific Drug, Appliance or Equipment

3(g) of this section of the policy indicates that physician advertising must not contain any reference to a specific drug, appliance or equipment, unless the drug, appliance, or equipment is known by its commercial name in a generic sense (lines 51-52). Additional clarification regarding this expectation is requested. Many patients are well-educated about the medical services they seek, and they will often choose a physician based on the availability of a specific brand name drug, appliance, or equipment. Using certain brand names in advertising would be for the purpose of informing and/or educating the public rather than to endorse a product. For example, a patient seeking tattoo removal will often look for Picoway® laser treatment, rather than generic laser treatment. Other brand name platforms patients may seek include Thermage®, Sciton Diva®, CoolSculpting®, Vaser®, and SmartLipo®. We recommend that advertising using brand names such as these be permitted.

Incentives to the Public

3(h) of this section of the policy (line 53) prevents physicians from offering incentives to the public to seek a medical service. However, it does permit physicians to discuss potential payment options and discounts with prospective patients in their office setting. We ask that this be extended to include existing and former patients who have given physicians permission to contact them to receive communications by paper-based or electronic means about promotions, discounts, or other materials. In these instances, patients have asked to be kept informed about various incentives available to them by the physician.

Before and After Photos or Videos

The policy outlines the conditions for which Before and After photos and videos of patients can be used in advertising, including to provide accurate and educational information, and to portray an outcome that can reasonably and typically be expected (lines 57-58). To achieve these goals, it would be helpful for the CPSO to permit the use of photos and videos of patients during the process as well. This will help to provide prospective patients with a more comprehensive and accurate depiction of the process to achieve a particular result and help to manage patient expectations. For example, a 'during' photo may show a patient result following surgery where the incision, stitches, swelling, etc. are evident, while an 'after photo' would show the patient result after healing has taken place, the stitches have dissolved, the swelling has dissipated, etc. As well, many patients are interested to see intra-operative photos or videos that show what their medical procedure looks like, how it is done, etc., to gain a better understanding of the process from start to finish. The same patient consent provisions would apply to 'during' photos as apply to before and after photos and videos.

Patient Consent

At lines 84-85, the draft policy requires that physicians must, “consider how the power imbalance inherent in the physician-patient relationship could cause patients to feel pressured to consent to the use of photos or videos and to take reasonable steps to mitigate this potential effect;”. The OMA agrees with the intent of this expectation, but clarification is requested to explain how this requirement could be put into practice. We recommend that the Advisory document provide examples of what reasonable steps might be considered appropriate.

Association with Products or Services

Beginning on line 88, the policy indicates that 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, or (b) for facilities where medical services are not provided by the physician. With respect to (b), many physicians deliver speeches at conferences or to businesses, teach at universities, hold guest faculty positions at professional educational institutions, etc. These organizations may use a physician’s name and/or image to advertise or inform the audience about the speaker, his/her credentials, the topics of discussion, etc. These activities are generally for educational purposes, and the advertising is designed to draw the public to an organization’s event, rather than to draw patients to the physician’s practice. We recommend that this type of advertising be permitted and clarified in the policy or the Advisory document.

Other Considerations Regarding the Draft Policy

As part of the OMA’s consultation process, several other considerations and concerns were raised. While not captured in the OMA’s response to the draft policy, we have captured this additional feedback in Appendix 1.

The OMA appreciates the opportunity to provide the CPSO with feedback concerning its draft Advertising Policy. The OMA would like to continue to work with the CPSO to find practical, constructive solutions that support physician practice while enabling the CPSO to fulfil its mandate to protect the public interest.

Thank you.

Appendix 1

As part of the OMA's consultation process, several other considerations and concerns were raised. Please see below:

Before and After Photos or Videos:

- It is an unreasonable expectation for physicians and staff to have specialized knowledge in relation to consistent lighting, photographic techniques, and settings.
- Enable the use of patient-submitted real-life photos, which many patients find helpful to show how their results could look in clothing or day-to-day life.
- Enable the use of other images in advertisements, such as images or graphics used to portray a concept of beauty, images portraying conditions that require treatment, and images portraying unsatisfactory results, provided that it is made clear that the image is not an actual patient who has undergone treatment by the advertising physician.
- Enable physicians to use paid advertising with before and after photos or videos to “push out” content to the public who would otherwise not seek out that information.
- Enable physicians to obtain consent for the use of before and after photos or videos in their advertising at any time during the treatment process, rather than after the treatment is completed.

Directing and Targeting Prospective Patients

- Enable physicians to proactively contact persons known to need medical services to solicit them to use their medical services.

General Comments

- Regarding complaints against a member that pertain to the Advertising Policy, consideration should be given as to whether the complainant: (1) is a patient treated by the practitioner, (2) is related to or employed by the complainant, or, (3) is a medical practitioner.
- Recommend that a committee be formed to review issues that arise from the Advertising policy. Committee membership 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, nominated by the Sections, and a member of the general public.