

OTLA Submission to the College of Physicians and Surgeons of Ontario

Draft Advertising Policy

August 3, 2020

The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA's members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

OTLA appreciates the opportunity to make submissions to the College of Physicians and Surgeons of Ontario (the "CPSO") on its draft Advertising Policy ("Policy"). The CPSO is to be commended for carefully considering the privacy interests of patients, while also ensuring future medical services consumers are protected from misleading or exaggerated advertising. In particular, OTLA supports the CPSO's focus on patient anonymity, informed consent, and a recognition of a patient's vulnerability when in a patient-physician relationship.

In order to ensure consistency and efficacy, OTLA submits two additional points for consideration:

1. General Advertising Content (Paragraph 2 of the Policy) should be subject to the same specific and enumerated privacy protections listed for "before and after" photos or videos, as set out in Paragraph 6 of the Policy, and
2. Physicians should be required to note in all advertising content that previous outcomes or results are not guaranteed or indicative of future results or outcomes.

Specific Privacy Protections and Consent Protocol for all advertising content

The specific privacy protections and detailed consent discussion content outlined in Paragraph 6 of the Policy provides a robust policy to protect patients who are providing "before and after" photos/videos for advertising purposes. OTLA submits that the extensive and detailed advice of Paragraph 6 of the draft Policy should be expanded to include all forms of patient information used in advertising, and not just "before and after" photos/videos.

Although physicians are required to follow the *Personal Health Information Protection Act, 2004*,¹ a clear and thoughtful articulation of the privacy considerations and consent discussion as outlined in Paragraph 6 of the Policy would be an effective tool to ensure Physicians adhere to these requirements. Expanding the Policy to ensure Paragraph 6 covers all patient information would increase patient privacy protections, and ensure patient autonomy over their own health information.

Advertising content may take many forms, such as surveys or aggregate statistics (e.g. 80% of patients experience a good clinical result). It is imperative that patients understand that their

¹ <https://www.ontario.ca/laws/statute/04p03>

clinical information may be used to sway other consumers. Given the private nature of health care services, and the confidential nature of the patient-physician relationship, patients should be fully informed if their case or outcome will be used by a physician to promote the provision of a particular medical service. This may be accomplished by broadening and amending the wording of Paragraph 6 of the Policy to include all forms of patient obtained information, or by adding similarly principled provisions to Paragraph 2.

Previous Outcomes/results are not indicative of future results/outcomes

OTLA recommends that both the Policy and Advice to the Profession be amended to require physicians to state that previous clinical outcomes or results are not guaranteed when advertising a particular treatment, tool, or service. Prospective patients and consumers should be cautioned that outcomes vary, given the multitude of clinical factors that may dictate a particular outcome. It is imperative that patients be informed that there is no guarantee of outcome with any medical service before they decide to obtain a medical service on the basis of advertising.

Conclusion

OTLA appreciates the opportunity to submit considerations to the CPSO in developing its Advertising Policy. By ensuring thorough and fulsome consent discussions occur whenever patient information is used for advertising, and by ensuring that future consumers of medical services are made aware that results or outcomes may vary, it is OTLA's hope that the CPSO's commendable efforts in creating an Advertising Policy that focuses on patient anonymity, informed consent, and protection, can be further strengthened.

OTLA would be pleased to discuss these submissions if there be any questions, or if OTLA can be of any further assistance.