

December 22, 2019

Hi Drew,

You had some questions. I'm available to discuss by telephone if you wish. The basic question though is whether the standard is legally defensible. The standard is set out at section 10.2 of the bylaws, which states:

"10.2 Advertising, promotion and other marketing activities must be in good taste, accurate and not capable of misleading the public, and observe the dignity and ethics of the profession. Any conduct, either directly or indirectly, or through any medium or agent that:

- (a) misinterprets facts;
- (b) compares either directly, indirectly or by innuendo, the member's services or ability with any other practitioner, or promises or offers more effective service or better results, than those available elsewhere;
- (c) deprecates another member as to service, ability or fees;
- (d) creates an unjustified expectation about the results the member can achieve;
- (e) is made under any false or misleading guise, or takes advantage either physical, emotional or financial of any patient or uses coercion, duress or harassment;
- (f) is undignified, in bad taste or otherwise offensive so as to be incompatible with the best interest of the public or members under the Act, or tend to harm the standing of the profession generally;
- (g) discloses the names of clients or includes testimonials;
- (h) makes statements which are not statements of fact or makes statements that cannot be proven to be accurate by the member;
- (i) makes references in any advertising or promotional activity to equipment, products or materials used in the practice of dentistry;
- (j) makes reference to an area of practice, without disclosing that the member is not a specialist; and
- (k) expresses or implies a specialty which is not in accordance with recognized specialties named in Section 10.4 and 10.6;

is to be strictly avoided as such conduct is contrary to the interests of the public and the profession."

That standard is defensible. The larger question is how that standard is being applied. As we have discussed, my primary concern is whether objectively verifiable, factually accurate information is being suppressed. If it is not, then I think that you can legitimately defend your standard.

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December 23, 2019

Sean,

I can call you if you want but my concern is in the section below, specifically where it applied to "Discounts

15. Advertising, promotion, and other marketing activities must be professional and observe the dignity and ethics of the profession and therefore should not include: (i) Superlative or non-objectively verifiable statements of superiority, uniqueness, and comparison to other providers; (ii) Undignified statements; (iii) Deprecating statements about other members; (iv) Statements in bad taste that could harm the profession; (v) Suggestions of better results or unjustified expectations; (vi) Bias, guise, coercion, or harassment to take advantage of physical, emotional, financial duress or urgency; (vii) Incentive programs, coupons, giveaways, and discounts; (viii) Reference materials, techniques, equipment, and services; (ix) Specialities, implied or otherwise, that are not recognized by the College.

We have had some pushback (from one dentist specifically) on the inability to advertise discounts. His rationale is that if he states that he charges 15% less than the CDSS fee guide, that statement is objectively verifiable. At a decision of council in May it was decided to not allow any statements on discounts, but I just wanted to see if our position is defensible if challenged.

Thanks,

Drew

December 23, 2019

Hi Drew,

I think that there is a definite risk that a judge would find that the prohibition on an objectively verifiable statement, like this, is not defensible.

Basically, it would be up to you, as the regulator, to justify why such advertising has to be prohibited. Any prohibition is an infringement on freedom of speech. So, the onus is on the CDSS to show that there is sufficient justification for the rule.

There is case law where advertising bylaws prohibiting advertising of fixed fees was struck down as the association was unable to prove that such advertising leads to a reduction in the public esteem of the professionals.

So, the real questions are: 1) what is the reason behind the prohibition on advertising "discounts"; and 2) do you have the evidence necessary to back up such reason.

Sean