

***Memorandum***

**Robertson Stromberg LLP**

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To: Bernie White, Marion Lafrenier and Drew Krainyk

From: Sean M. Sinclair

Date: December 27, 2019

File No: 6130.141

**Subject:** **Advertising**

This memorandum is best read in conjunction with our memorandums of March 20, 2019 and December 20, 2017.

Drew Krainyk had asked that I provide some case law where courts had considered prohibitions on advertising. In this memorandum, I will provide you a list of cases with a very brief outline of the facts of each of them. There are no cases which directly address the issue of a discount off a fee guideline provided by the professional regulator.

**I. Important Decisions**

There are five main decisions which are important to this analysis:

1. **Yazdanfar v. College of Physicians and Surgeons, 2013 ONSC 6420**

The prohibited advertising in this case was on testimonials from patients. The concerns of the College were twofold: 1) the information was potentially misleading; 2) the statements were non-verifiable.

The Court found that the prohibition on testimonials was justified. In particular, the Court agreed that the information in the testimonials was not verifiable. Thus, the restriction was a permissible infringement on the member’s freedom of expression.

1. **Bratt v. British Columbia Veterinary Medical Association, 1999 CarswellBC 2380**

The Association in this case had a prohibition on advertising fixed fees for veterinary services. The justification for such prohibition was outlined by the Association former president as follows:

[32] The former president of the BCVMA, Dr. J. Andrew Forsyth, deposes that fixed-fee advertising may mislead consumers by not accurately or completely describing the services offered for the fixed fee; by creating pressure on veterinarians to reduce their fixed fees, leading to increased costs for other non-advertised services or reducing the quality of service to recoup losses; by suggesting that the cost to consumers of veterinarians who advertise fixed fees may be lower than those who do not, when overall cost may not vary greatly; and by causing consumers to focus on and evaluate veterinary services on the basis of price rather than competence, quality of service and the relationship with the veterinarian.

[33]        He says that the esteem in which veterinarians are held may be eroded because consumers may take the view that fixed fees equate with reduced quality of service: “you get what you pay for”. On the other hand, consumers may think that a veterinarian who does not advertise fixed fees is somehow cheating the consumer. Consumers may also conclude that veterinarians are more concerned with fees than with providing professional service. If more veterinarians advertise fixed fees, consumers may conclude that veterinarians over-all are less competent, professional and worthy of trust.

[34]        Dr. Forsyth deposes that veterinarians’ views of their profession may be similarly eroded by a focus on fees.

[35]        Dr. Forsyth’s concerns about comparative statement advertising are similar to his concerns about fixed fee advertising. He says that consumers may be misled because they are unable to properly evaluate comparative statements about fees, services and products. A proliferation of comparative statement advertising may evoke images of commercialism, comparable to used-car dealers. This would affect the view of the profession held by both consumers and veterinarians.

The prohibition on fixed fee advertising was ultimately struck down by the Court. The Court found that there was a lack of evidence to demonstrate that fixed-fee advertising leads to the decline of the professional standards and esteem of veterinarians. The Court commented on such information being objective and verifiable.

By contrast, the Court indicated that the Association’s prohibition on advertising comparative statements were permissible and would not be struck down because “[c]omparative statements are by their nature non-objective, non-verifiable and self-laudatory…”.

1. **Assie v Institute of Chartered Accountants of Saskatchewan, 2001 SKQB 396**

The Institute, in this case, had a bylaw prohibiting quotation of fees, unsolicited, to consumers. The member had breached that bylaw by quoting fees for certain services in mailouts.

The bylaw in this case was struck down, as it was violated the freedom of expression of the member. The Court indicated:

[39] … This view, in my view, is inconsistent with the decisions in *Grier* and *Bratt* discussed above, both of which clearly approved, as in the public interest, the publication of price quotes for professional services so long as these are not otherwise in violation of legitimate rules designed to restrain misleading professional advertising.

[40] I do not believe that prohibitions or limitations to marketing by chartered accountants can be justified *solely* on the basis that they prevent competition among or between chartered accountants for clients. Competition becomes "unseemly" or unprofessional when it is misleading, contravenes good taste, makes unfavourable reflections on the competence or integrity of another member, or includes subjective claims of superiority that cannot be substantiated. All of these evils are amply covered by Bylaw 217.1 Marketing of chartered accountancy or related services that is directed generally to a professional or geographic group, or which quotes in advance a price for services that can reasonably be determined in advance, and does not denigrate or unfavourably compare services which are or may be provided by another member, is not objectionable solely because of the advance price quotation or because some or all persons receiving the material may have engaged another chartered accountant. Both of Bylaws 214 and 301.2 are clearly intended to go beyond the restrictions in Bylaw 217.1 and, in doing so, are broader than is required to protect the legitimate objectives of maintaining professional standards and to avoid misleading potential clients.

1. **Grier v. Alberta (1987) AJ No 650 (ABCA)**

Some of the analysis of *Grier* is a bit dated as a result of developments in case law since 1987. However, the basic facts are that the member, in contravention of a bylaw, advertised his fees for services. The Court ultimately found that the prohibition of all price quotation is an unnecessarily blunt instrument “for regulation of potentially misleading advertising”

1. **Rocket v College of Dental Surgeons, [1990] 2 SCR 232**

The restrictions in this case were significant. The College basically only allowed advertisements of a member’s name, address and telephone number.

The bylaws were struck down, as the Court commented that important information for consumers was being suppressed such as office hours, languages spoken by the dentist, etc. The Court commented such information was objective.

**II. Less Important Decisions**

There are two older decisions which have limited precedential value. I question whether either is rightly decided, partly in light of development in the law since they came out. Neither decision has been adopted by other courts since they were rendered.

1. **Nicholson v Pharmaceutical Society (New Brunswick) (1994), 150 N.B.R. (2d) 161**

The Society had a bylaw that prohibited offering or distributing a gift, rebate, bonus or other inducement with respect to a prescription. The member distributed coupons in newspapers and was prosecuted.

The Court struck down the bylaw, as the Society had not demonstrated, with evidence, any pressing objective for the bylaw. The Court noted that non-prescription drugs could be advertised with discounts attached and there was no real justification for the prohibition on discounts of prescription drugs.

It should be noted that this decision was not followed in a later case of *Stenzler v College of Pharmacists* (addressed below). I have questions as to whether this case was rightly decided.

1. **Stenzler v College of Pharmacists, 1998 CarswellOnt 501 (Ont. Div. Ct.)**

The Court found that a bylaw prohibiting gifts, rebate bonuses or other inducements related to a prescription was not “expressive” activity. Thus, Section 2(b) of the Charter was not engaged.

I question whether *Stenzler* is good law on this issue. It has not been quoted with approval by other courts. In *Assie, supra*, the Court came to the opposite conclusion and found that commercial speech is a form of expression.

**III. More Recent, Irrelevant Decisions**

There are two more recent decisions which deal with advertising. However, the facts on each are so extreme or different that I do not believe that they have any bearing on the analysis. They are: 1) *Zuk v. Alberta Dental Association*, 2018 ABCA 270 (a dentist was advertising his grievances with the Dental Association in newspapers) and 2) *C.J.H. v. J.S.*, 2017 CanLII 78875 (College of Physicians and Surgeons prohibited members being spokespersons for certain products/medications).

**IV. Conclusion**

The bulk of the case law seems to indicate that it will be difficult to justify restrictions on advertising objective, verifiable statements. Thus, if a Charter challenge was initiated, the onus would fall on the College to justify why such rule is necessary and that it is not overbroad.

I am happy to provide any other information that you require.