

Hi Drew,

I should note that there is no clear case law to answer any of the questions below, only my analysis drawn from the decisions already sent to you. However, my thoughts are:

1. We would assume that the answer to this question would be different if the discount was 10-50% instead of a fixed amount (such as 15%). A range makes it no longer objectively verifiable we would assume?

-I agree that a range makes it no longer objectively verifiable and could also be misleading;

2. Would free treatment and giveaways be compliant even if their purpose is to be a loss leader and the goal may be to pick up the revenue lost on over treating other procedures.

-I would say that advertising of free treatment would be compliant, even if it was a "loss leader". If there is "over treating" on other procedures after the free treatment, then the over treatment may be professional misconduct and subject to its own charge (see the case of *Abouabdallah* from the CDSS in 2012). In terms of giveaways, I am not sure if you are referring to a giveaway of dental procedures or of prizes. If you are talking about prizes, I think that a court may agree that, although it is objective and verifiable, it is in such bad taste that it demeans the profession (possibly depending on what is being given away);

3. Also can we keep the standard as is and then back down once a challenge is made and pushes the college to the next level?

4. Can we not maintain the standard as is until a challenge is made and then at the advice of our legal counsel concede. Or does that look bad on the college and the council for being deceptive with the standard.

-This answer is for questions 3 and 4. Yes, you can keep the standard as is and then back down once a challenge is made and pushes the College to the next level. In this case, there is the potential that a court will award legal costs against the CDSS. In terms of whether it looks bad on the College/council, I am not sure which audience you are concerned about. For a judge, it would likely not look that bad unless the judge knew that council/CDSS was aware that the standard was likely offside. My communications with the CDSS are obviously subject to solicitor-client privilege so my comments about this issue should be protected. There is then the question of whether it looks bad to the general public and/or to members of the profession that the CDSS has passed unconstitutional bylaws. I am not sure how the general public or members of the profession would feel about this issue.

I am happy to discuss.

