

# The Impact of Dr Kwong's Case on Publicity Codes Governing Professionals

*A successful human rights-based challenge to advertising prohibitions contained in the medical practitioners' code will have immediate ramifications across a number of professions, writes [Woody Chang](#)*

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The landmark Court of Appeal decision in *Dr Kwong Kwok Hay v Medical Council of Hong Kong* [2008] 1 HKC 338 represented the first time the legality of the doctors' publicity code was scrutinised in the context of human rights. Dr Kwong's case will have a significant impact on not just the doctors' publicity code, but also the publicity codes of many other professions.

## Background to the Case

Practice promotion by doctors is heavily regulated under the Professional Code and Conduct issued by the Medical Council of Hong Kong. The provisions relating to practice promotion (the 'publicity code') start with a general prohibition against all practice promotion, which includes any means by which a doctor or his practice is publicized except for communication with other healthcare professionals. They go on to set out several permitted means by which a doctor's basic practice information may be disseminated, for example, via signboards, stationery, announcements of commencement of practice in newspapers, telephone directories, practice websites, notices displayed at the exterior of clinics and doctors' directories. There are detailed restrictions with regard to what and how basic information can be disseminated via each of these means. Practice promotion is said to be interpreted by the Medical Council in its 'broadest sense'. Advertising was prohibited before the very recent amendments to the code in April 2008.

In October 2005, a group of 78 doctors filed a joint written submission requesting the Medical Council to relax the code. Among these doctors was Dr Kwok-hay Kwong of Hong Kong Sanatorium & Hospital. The Ethics Committee of the Medical Council had in fact proposed to relax the code by allowing doctors to publish advertisements in certain print media. The Medical Council, however, decided to conduct a survey on doctors in October 2005 and the results suggested that the majority of respondents were not in favour of the proposed relaxation.

In 2006, Dr Kwong challenged some of the restrictions in the publicity code by way of judicial review on the ground that the restrictions had infringed the freedom of expression guaranteed under Articles 27 and 39 of the Basic Law and Article 16 of the Hong Kong Bill of Rights Ordinance (Cap 383).

In the Court of First Instance, reported at [2006] 4 HKC 157, Reyes J held that all the restrictions under challenge were not constitutionally justified. The Medical Council appealed against the decision. In the Court of Appeal, from which judgment was handed down in January 2008, the Medical Council's appeal was unanimously dismissed by a coram of Ma CJHC, Tang VP and Stock JA, although the reasons given by Stock JA were slightly different from those of the other judges.

## Effect of the Judgment

Some newspapers reported that, as a result of the Court of Appeal's Judgment, "doctors are free to advertise". Those reports could be misleading if they were taken to mean that doctors can advertise in whatever way they wish. In reality, the legal challenge in Dr Kwong's case focused on very narrow issues, leaving other parts of the publicity code free from the Court's scrutiny. The direct effect of the judgment on the doctors' publicity code can be briefly summarised as follows.

- A doctor can now provide certain basic practice information, including qualifications, consultation hours, languages spoken and services and procedures available, to the public by way of newspapers, magazines or other print media if such information is already allowed to be provided to the public through other permitted means (e.g. doctors' directories or websites).
- With regard to the number of medical services of which a doctor can inform the public, where previously there was a maximum of five, the doctor can now mention any number of services, provided of course that the information is true and not misleading.
- If a doctor gives public lectures or participates in radio or television programmes for the purpose of public health education, the doctor may need to make reference to his or her experience, skills and reputation or practice. The incidental promotion of the doctor's practice is not objectionable. The publicity code currently requires doctors to ensure that no reference is made to their experience, skills and reputation. The relevant provision of the code will need to be amended in view of this case.

- Under the code, if a medical organisation advertises its services in an improper manner, any doctor who has a professional or financial relationship with such an organisation may be held responsible for the improper advertisements, even if the doctor does not have knowledge of or control or influence over the nature or content of the advertising. The Court considered that the imposition of such strict liability was unjustifiable.

The judgment certainly does not have the effect of allowing doctors to engage in practice promotion in whatever ways they might desire.

## General Principles and Other Observations

The Court laid down the following general principles in determining whether any possible infringement of the rights protected under the Basic Law or the Bill of Rights – and, by association, the ICCPR can be justified.

- While the Court will give due deference to the views of the decision maker which imposes the restrictions as a starting point, it is the Court that has the ultimate responsibility to determine whether constitutionally guaranteed rights have been infringed, grappling as it does with questions of proportionality.
- The decision maker must provide cogent reasons to justify any interference with a constitutionally guaranteed right for the Court to scrutinize.
- The burden is on the decision maker to justify the restriction; it is not for the person affected by the restriction to prove that it is not justifiable or proportionate.

On the proportionality test, the Court will require the decision maker to justify that (a) the restriction is rationally connected with one or more of the identified legitimate objects, and (b) the means used to impair the constitutionally guaranteed right must be no more than is necessary to accomplish such legitimate object.

Advertising for personal gain is often cited in argument against relaxation of publicity codes. On this point, the following remarks made by Ma CJHC are enlightening:

“The freedom of expression includes the right to advertise and this is so even where the intention is for personal gain ... it is important to recognize the following facets of advertising which I believe to be relevant considerations in the present case: (1) The public interest as far as advertising is concerned lies in the provision of relevant material to enable informed choices to be made ... (2) The provision of relevant material to enable informed choices to be made includes information about latest medical developments, services or treatments. *Stambuk* provides a good example of this ...”

In *Stambuk v Germany* (2002) 37 EHRR 845, a doctor took part in an interview with a newspaper which printed a story, illustrated by a photograph of the doctor in his consulting room, explaining a new laser technique used by him to correct his patients' sight problems. In the article, the doctor emphasised that he had treated more than 400 patients and had a success rate of 100%. The doctor was found by his professional body to have contravened the domestic disciplinary rules concerning self-promotion and was fined 2,000 German marks. The European Court of Human Rights found that this was a

disproportionate interference with the right to freedom of expression, contrary to Article 10 of the European Convention on Human Rights.

In Dr Kwong's case, Tang VP highlighted that the Court in that case was not concerned with the dissemination of information which was in itself harmful. He endorsed the reasoning of Ma CJHC and cited the following statement from a US Supreme Court judgment to conclude his speech:

“... people will perceive their own best interests if only they are well enough informed ... the best means to that end is to open the channels of communication rather than to close them ...”

It can be seen from Dr Kwong's case that if disclosure of certain information about doctors will serve the public interest, the Court will indeed encourage disclosure to a wider audience. It was one of Dr Kwong's arguments that, given that certain information is already allowed to be conveyed to the public by other means under the Code, there is no reason or logic why the same information cannot be made available to the public by a wider means of circulation. If it is accepted that such information benefits the public by enabling informed choices to be made, then surely making the same information more accessible to more members of the public must be acceptable? In response to the above argument, Ma CJHC said, “For my part, I agree with these submissions, as did Reyes J in the court below.”

Can the same argument apply in the context of radio or television broadcast where probably even more people can receive the information which the Court has accepted will benefit the public? Is

the same argument equally applicable in the context of other professions' publicity codes where advertising is strictly prohibited at the moment? It seems the answer will very much depend on what justifications are going to be provided by the relevant professional authorities which may seek to maintain such a prohibition. It is anticipated that many professional authorities will review their publicity codes in view of Dr Kwong's case.

### The Medical Council's Responses

The Medical Council has amended its publicity code, with effect from 2 April 2008, by adding a provision which allows doctors to publish their basic practice information (which is already permitted to be published by other means under the code) in newspapers, magazines, journals and periodicals, subject to certain conditions. One of the conditions is that a doctor must be able to secure a written undertaking from the publisher that his or her service information will not be published in a manner which may reasonably be regarded as suggesting his endorsement of other medical or health related products or services, such as publication in close proximity to advertisements for those products or services.

It is possible that the publishers of print media are willing to give such an undertaking in some cases. However, the imposition of such a condition suggests that whether or not a doctor can enjoy his or her freedom of expression to advertise, in this context, basic factual and non-misleading practice information is to be determined by a publisher's commercial decision.

It appears that the Medical Council is currently conducting a more comprehensive review of the code. It is

submitted that further amendments are necessary in view of the decision in Dr Kwong's case and that the amendments should cover other parts of the publicity code rather than just the few areas specifically touched upon in this case.

### Solicitors and Certified Public Accountants

The publicity code governing solicitors is mainly contained in the Solicitors' Practice Promotion Code. The solicitors' publicity code is very relaxed. It provides that, subject to the Solicitors' Practice Promotion Code, a solicitor may engage in practice promotion in any way he or she thinks fit. There are the usual general guiding principles that practice promotion shall be decent, legal, honest and truthful, followed by some general guidelines as to what a solicitor should not do, such as giving misleading information, claiming to be an expert in any field, and making adverse remarks concerning other solicitors.

Likewise, the Code of Ethics for Professional Accountants issued by the Hong Kong Institute of Certified Public Accountants focuses on general principles rather than detailed restrictions and prohibitions. Its publicity code is also rather relaxed.

Advertising by both solicitors and certified public accountants is permitted, subject to compliance with certain general principles. It would appear that the dissemination of truthful, accurate, verifiable and objective information about solicitors and certified public accountants would not usually be a cause for concern. One point to note is that, at the moment, certified public accountants are not allowed to disclose their fees in the advertising and promotional material. Such information is allowed to be published in an inner page

on an accountant's website, but not on the homepage. The code explains that the rationale is to require the user to positively act to gain access to such information. By contrast, for both solicitors and doctors, advertising about fees is no longer prohibited.

All considered, it seems that Dr Kwong's case may not have a significant impact on the publicity codes of solicitors and certified public accountants.

### Code of Conduct of the Bar

The restrictions on advertising and publicity contained in the Bar Code are very stringent. For example, a barrister may not do, or cause or allow to be done on his or her behalf, anything with the primary motive of personal advertisement or anything likely to lead to the reasonable inference that it was so motivated (see paragraph 101 of the Bar Code). It can be said that any form of advertising is completely banned.

A preliminary point to consider is whether the human rights arguments apply to barristers' disciplinary proceedings. In *Hong Kong Bar Association v Anthony Chua* (1994) 4 HKPLR 637, the Barristers Disciplinary Tribunal considered at that time that the Hong Kong Bill of Rights Ordinance had no binding effect on the Bar Association. Although this issue has not been specifically dealt with by a higher court, it is submitted that the legal climate has changed sufficiently to bring human rights concepts into application. See comments by Ma CJHC in *The Law Society of Hong Kong v A Solicitor* [2004] HKCU 1361 (CACV 280/2003, 25 November 2004); see also *A Solicitor v The Law Society of Hong Kong* [2004] HKCU 199 (CACV 302/2002, 18 February 2004) and *Dr Ip Kay Lo v Medical Council of Hong Kong* [2003] 3 HKC 579, [2003] 3 HKLRD 851.

Dr Kwong's case will no doubt be carefully considered by the Bar Council, because if the legality of the restrictions is challenged it is incumbent upon the Council to give cogent reasons to justify that the restrictions under challenge are no more than what is necessary to achieve an identified legitimate object. It is to be noted that the English Bar Code has been relaxed for 20 years and barristers may now advertise by way of their photographs, state the rates and methods of charging and describe the nature and extent of their services.

### Other Healthcare Professionals

The publicity code contained in the Code of Professional Discipline issued by the Dental Council in April 2007 (after the handing down of Reyes J's judgment in Dr Kwong's case) mirrors the restrictions contained in the medical doctors' professional code. However, it can be said that the dentists' publicity code is even more restrictive than the doctors' code. Advertising is prohibited. If a dentist publishes an article in a newspaper or magazine, or gives talks or appearances on radio or television, the only information about the dentist that can be disseminated is his or her full name and photograph. The dentist must not disclose his or her qualifications, experience or other personal professional particulars, including the fact that he or she is in clinical practice. The Dental Council will generally hold a dentist who gives interviews to the media responsible for any publicity which may ensue. If a dentist chooses to give an interview to the media, he or she must secure in writing the right to obtain an advance copy of the draft version of the article and to make amendments thereto before actual publication or broadcast, except in the case of an instantaneous broadcast. In view of Dr Kwong's case, the Dental Council should consider reviewing its publicity code to keep pace with the changed law.

The publicity codes of other healthcare professions, including occupational therapists, physiotherapists, radiographers, registered Chinese medicine practitioners and listed Chinese medicine practitioners are at least as stringent as the medical doctors' and the dentists' codes.

Practice promotion is heavily regulated. Advertising is prohibited. In some cases, the professionals are not even allowed to disclose their names and identifiable photographs when they give interviews to radio, television or the press. Dr Kwong's case will likely have a significant impact on these codes and therefore reviews should be considered.

It may be argued that in the cases of occupational therapists, physiotherapists and radiographers, a referral by another practitioner is generally required, and therefore there is a lesser need for these professionals to advertise their services. However, one should not forget that the public is entitled to be provided with relevant information about therapists in order to facilitate informed patient choice. Factual and non-misleading information about these professionals, such as therapists' qualifications, experience and fees, may be important for a patient's discussion with his or her doctor when choosing an appropriate therapist.

By contrast, optometrists have a very relaxed publicity code. In the case of

medical laboratory technologists, they are allowed to advertise basic practice information. Dr Kwong's case is unlikely to have much impact on these codes.

## Conclusion

Relaxation of the publicity codes appears to be the general trend in Hong Kong and many other jurisdictions. There will inevitably be further legal challenges by professionals against the legality of restrictions under the relevant publicity codes on the basis of human rights. As far as the medical and healthcare professions are concerned, Dr Kwong's case is just the beginning of a probable avalanche, unless the publicity codes are carefully and comprehensively reviewed and revised by the relevant authorities with a view to genuinely incorporating human rights considerations.

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*Declaration of interest: Johnson Stokes & Master (now JSM) was the solicitors firm which acted for Dr Kwong in the judicial review and appeal the subject of this article.*

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