

Recommendations: line between providing information and advertising

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Facts

Decisions

Comment

The Supreme Court recently ruled in a case involving a request for an ophthalmologist to cease and desist from providing recommendations for opticians to his clients.

Facts

The claimant was an optician in a village in Burgenland. The defendant was an ophthalmologist in the same village. When patients asked the defendant to recommend an optician from which to buy glasses, the defendant did not recommend the claimant, but instead recommended another local optician. Further, when asked for recommendations by patients who the defendant believed to have limited funds, he would advise them to consult a "cheaper optician", which was generally understood by patients to be a referral to certain discount chain stores. Finally, a detective retained by the claimant was referred to the other optician on his request for a recommendation.

Decisions

The lower instance courts found that the defendant's recommendations were mostly objective and based on the product diversity offered by the other optician. However, the courts were unable to establish that this had always been the case. The defendant claimed that his motive was always patient welfare and that he believed that the other optician had a larger range of products and offered a better service. He did not receive an advantage in exchange for his recommendations. According to the defendant, when patients purchased glasses from the claimant and subsequently complained about the services offered therein, he would express surprise that they had been treated poorly.

The Higher Regional Court of Eisenstadt⁽¹⁾ dismissed the claim. The Vienna Appellate Court⁽²⁾ ordered the defendant to cease and desist from issuing recommendations for the other optician. According to the Physicians and the Public Regulation 2014, issued by the Chamber of Physicians, physicians must not advertise:

- pharmaceuticals;
- medical devices;
- other medicinal products; or
- manufacturers and distributors.

However, providing basic information on services or service providers is permitted if it relates to the physician's own service. The appellate court held that, in principle, physicians can mention possible suppliers, but will be considered to be providing undue advertising if their motives are not purely objective. Referring to a Supreme Court case in which it was held that the referral of patients to a specific optician was an undue advertisement,⁽³⁾ the appellate court granted the claim.

On the claimant's extraordinary appeal, the Supreme Court reversed the appellate court's judgment and restored the first-instance decision.⁽⁴⁾ According to the court, the relevant provisions within

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the regulation (as amended in 2015) were as follows:

"Sec 3: The advertising of pharmaceuticals, medical devices and other medicinal products as well as their manufacturers and distributors is prohibited. The objective and true information, not impairing the reputation of the medical profession, on pharmaceuticals, medical devices and other medicinal products as well as their manufacturers and distributors in execution of the medical profession is permitted.

Sec 4: Provided the content complies with this regulation physicians may, inter alia... provide information on commercial services or businesses in connection with their own services."

These provisions differ from those applied in Decision 4 Ob 34/14z. At that time, the regulation prohibited physicians from providing any information that impaired the reputation of the medical profession, including advertising pharmaceuticals, medical devices, other medicinal products or manufactures and distributors. No exception for providing mere information to patients was available. Based on this earlier version of the regulation, a broad concept of advertising had to be applied, one which prohibited any recommendation of a specific optician.

The updated regulation has narrowed the concept of advertising. As such, under the definition of 'undue advertising', providing information on businesses that supply medicinal products is permitted. Further, the regulation now allows physicians to offer opinions regarding other services on request. The purpose of prohibiting advertising is primarily to maintain patients' freedom of choice. In general, there is a level of trust between a physician and his or her patients which the physician must not take advantage of by recommending certain businesses above others. However, if a patient requests a recommendation, there is no reason that any advice therein should be considered professional misconduct, as it is a physician's duty to provide patients with requested information. Thus, the test for undue advertising is whether the physician offered unsolicited recommendations for certain businesses or did so for other inappropriate reasons (eg, financial gain).

Further, according to the German Federal Court, recommendations following a patient's request are permitted⁽⁵⁾ – in particular, recommendations regarding value for money. If a patient asks for a recommendation, he or she can decide whether to follow the physician's advice. It is thus unreasonable to prohibit physicians from offering recommendations or to require them to recommend alternative service providers where they consider alternatives inappropriate.

The prohibition against advertising set out in Section 3 of the regulation can thus be interpreted as allowing physicians to recommend a specific service provider to patients on request. Recommendations will be considered illegal only where they are based on inappropriate motives (eg, to gain a financial advantage).

Comment

In previous years, the professional standards for physicians were rather strict in respect of advertising (with regard to advertising both a physician's own practice and other service providers). These strict standards were enforced not only by the Chamber of Physicians, but also by competitors in competition law cases. The Chamber of Physicians has only recently relaxed the professional standards. The Supreme Court followed this approach, in line with the German Federal Court.

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Endnotes

(1) Judgment of December 7 2015, 18 Cg 1/15x.

(2) Judgment of April 14 2016, 1 R 24/16f.

(3) Judgment of July 17 2014, 4 Ob 34/14z.

(4) Judgment of August 30 2016, 4 Ob 133/16m.

(5) Judgment of January 13 2011, I ZR 111/08.

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