

LEGAL ISSUES IN MARKETING A DENTAL
PRACTICE: REFERRAL GIFTS AND GROUPON
DISCOUNTS

Message from the ADA Legal Division
October 7, 2011

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To: ADA Constituent Executive Directors

From: ADA Legal Division

Subject: Legal Issues in Marketing a Dental Practice: Referral Gifts and Groupon Discounts¹

QUESTION PRESENTED

Whether a dentist's adoption of any of the following practices creates potential legal concerns:

- (a) Offering and awarding gifts² to existing patients in exchange for new patient referrals ("referral gifts")?
- (b) Offering and awarding Groupon³ discounts to new or existing patients?
- (c) Advertising Groupon or other discounts in connection with dental services?

EXECUTIVE SUMMARY

Depending on (a) the state in which the dentist practices and (b) whether the dentist provides services payable under a federal health care program such as Medicare or Medicaid, a dentist may be prohibited under state and/or federal law from (i) offering and/or awarding referral gifts or (ii) offering and/or awarding Groupon discounts. Many states have regulations that prohibit or restrict the award of gifts as a means of soliciting patients, or prohibit fee splitting between a dentist and a third party. (A dentist utilizing Groupon to offer discounts to new patients will split a portion of the revenue generated from the Groupon promotion with Groupon.) In addition, the federal anti-kickback statute generally prohibits a dentist from offering or paying remuneration to induce a person to refer a patient that may be eligible for services under a federal health care program, including Medicare or Medicaid.

¹ This memo is not intended to provide or offer legal or other advice and should not be relied upon for that purpose. To get appropriate legal advice, one should consult directly with a properly qualified attorney.

² For purposes of this memo, "gifts" include cash, gift cards, or other tangible items of value. It does not include discounts for services, for which different rules may apply.

³ The analysis provided herein would be applicable to any company that provides similar services under a similar fee structure (e.g., LivingSocial).

A violation of the state regulations could result in the dentist's facing censure and reprimand, fines, suspension, and even license revocation, while a dentist violating federal law could be charged with a felony and subject to fines, imprisonment, and exclusion from federal health care programs.

The advertising of discounts may also raise concerns. Many states have dental advertising regulations that restrict the method of advertising discounts in connection with dental services. Some restrictions involve the form of the advertisement, while others involve the manner in which the discount and other fees are applied to a patient.

In addition, the terms of the dentist's contracts with third party payors may give rise to issues with the offer and award of referral gifts or Groupon discounts to patients. These contracts sometimes contain provisions requiring that fees submitted to the insurer reflect any rebates or reductions in the fees (or co-pays) charged to the patient, or that the dentist grant the insurer the best price that the dentist charges for a particular service (a "most favored nations" clause). In the first instance, giving a rebate to a patient after the service has been billed to the insurer may violate the contract; in the second, providing a discounted price to Groupon customers may breach the most favored nation provision (or perhaps require the dentist to offer the same discount to the insurer's patients, and perhaps even to rebate an equivalent per patient discount to the insurer).

Finally, the offer and award of referral gifts or Groupon discounts to patients may violate certain ADA ethical rules, including the rule prohibiting dentists from giving rebates and splitting fees.

ANALYSIS

1. Referral Gifts

A dentist may be prohibited under state and/or federal law from offering or awarding referral gifts to existing patients.

a. State Law

Many states have regulations that directly or indirectly prohibit or restrict the award of gifts as a means of soliciting dental patients. Some of these laws, such as those in Illinois and Texas, have a broad prohibition against such gifts. The Illinois Dental Practice Act (the "Illinois Act") makes it unlawful for any dentist to "advertise or offer gifts as an inducement to secure dental patronage",⁴ and the rules of the Texas State Board of Dental Examiners (the "Texas Board Rules") make it illegal for a dentist to "offer, give, dispense, distribute or make available to any third party...any cash, gift, premium, chance, reward, ticket, item or thing of

⁴ 225 ILCS 25/45.

value for securing or soliciting patients”.⁵ Under these regulations, even nominal gifts made to existing patients may be prohibited.⁶

Other state regulations have a more narrow prohibition against referral gifts. For example, while the New Jersey Board of Dentistry regulations include a general prohibition on offering or paying remuneration to third parties in exchange for a referral, that provision is tempered by the statement that “[n]othing contained in this section shall prohibit a dentist from providing a gift to a patient, or from providing a credit for dental services to a patient, provided the gift or credit does not exceed \$25.00 in value”.⁷ Hence, referral gifts to existing patients having of value of \$25.00 or less may be allowed under the New Jersey regulations.

In addition, some state regulations may be read to bar referral gifts to existing patients even though the regulations do not specifically mention “gifts” or “consideration”. Under the Arizona Dental Practice Act, “unprofessional conduct” is defined to include the “giving or receiving . . . of rebates, either directly or indirectly”.⁸ While a referral gift such as movie tickets or a gift card may not typically be thought of as a rebate, a broad interpretation of the statute might treat such a gift as a means of helping to offset the patient’s fees. Similarly, some statutes prohibit “fee splitting” for the referral of patients.⁹ If a referral gift to an existing patient is interpreted as a method of dividing fees received from a new patient between the dentist and the existing patient, such gift would be prohibited under the fee-splitting laws.

⁵ Rule §108.60.

⁶ See also, §29.1.b.3 and §29.1.b.12(e) of the New York Rules of the Board of Regents (unprofessional conduct includes “directly or indirectly offering, giving, soliciting, or receiving or agreeing to receive, any fee or other consideration to or from a third party for the referral of a patient or client or in connection with the performance of professional services” and “offer[ing] bonuses or inducements in any form other than a discount or reduction in an established fee or price for a professional service or product”); Section 650(a) of the California Business and Professions Code (“the offer, delivery, receipt, or acceptance by any person licensed under this division . . . of any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership, proprietary interest, or coownership in or with any person to whom these patients, clients, or customers are referred is unlawful”).

⁷ Chapter 13:30-8.13(d).

⁸ Chapter 32-1201.21(k).

⁹ See Section 23(5) of the Illinois Act (prohibiting the “[d]ivision of fees or agreeing to split or divide the fees received for dental services with any person for bringing or referring a patient”); Section 776.A(9) of the Louisiana Dental Practice Act (prohibiting the “[d]ivision of fees or other remuneration or consideration with any person not licensed to practice dentistry in Louisiana, or an agreement to divide and share fees received for dental services with any non-dentists in return for referral of patients to the licensed dentists, whether or not the patient or legal representative is aware of the arrangement”); Section 333.16221(d)(ii) of the Michigan Public Health Code (prohibiting “[d]ividing fees for referral of patients”).

Accordingly, a dentist should carefully consider and seek guidance as to the application of state laws before offering and awarding referral gifts to patients. A violation by a dentist of the state dental board statute and regulations could result in the dentist's facing censure and reprimand, fines, suspension, and even license revocation. Note that compliance with state law would not absolve a dentist of exposure under federal law (and vice versa).

b. Federal Law

The federal anti-kickback statute ("AKS") prohibits any person from:

"... knowingly and willfully offer[ing] and pay[ing] any remuneration (including any kickback, bribe or rebate)...to any person to induce such person...to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program".¹⁰

The AKS can apply if even one purpose of the transaction is to generate referral(s) for such item or service. Prior to the enactment of the Patient Protection and Affordable Care Act in 2010 (the "Affordable Care Act"), some courts held that the AKS only applied if the defendant *knew* that the AKS prohibited offering or paying remuneration to induce referrals, and did so with the specific intent to disobey the law. However, the Affordable Care Act amended the AKS to make clear that the AKS does not require the government to prove actual knowledge of a "known legal duty" that was being breached, but only that the dentist intended to perform the act that violated the law.¹¹ In addition, the statute refers to payments that "may be" made under a federal health care program, so it is possible that a dentist who accepts Medicare or Medicaid patients may be found to have violated the AKS even if the payment for services at issue is not in fact made by a Medicare or Medicaid patient or out of Medicare or Medicaid funds.

Accordingly, a dentist who provides services payable by a federal health care program including Medicare or Medicaid should carefully consider the application of the AKS before offering and awarding referral gifts to patients.¹² A violation by the dentist of the AKS could result in the dentist being charged with a felony and subject to fines and imprisonment, in

¹⁰ 42 U.S.C. §1320a-7b(b).

¹¹ 42 U.S.C. §1320a-7b.

¹² There may also be an issue under the Civil Monetary Penalties Law (the "CMP") if the patient receiving the referral gift is a Medicare or state health care patient. Section 1128A(a)(5) of the CMP provides for the imposition of civil monetary penalties against any person who "gives something of value to a Medicare or state health care program beneficiary, including Medicaid, that the benefactor knows or should know is likely to influence the beneficiary's selection of a particular provider, practitioner, or supplier of any item or service for which payment may be made, in whole or in part, by Medicare or a state health care program, including Medicaid". However, "nominal" gifts of between \$10 and \$50 annually are generally allowed under the CMP.

addition to being excluded from federal health care programs, such as Medicare and Medicaid.

2. Groupon

Offering and awarding Groupon discounts by a dentist to new or existing patients may be prohibited under state or federal law.

a. State Law

As noted above, many states have regulations that prohibit fee splitting between a dentist and a third party. For example, the Michigan Public Health Code prohibits “[d]ividing fees for referral of patients”.¹³ When a dentist utilizes Groupon to offer discounts to new patients, the dentist generally splits the revenue generated from the promotion with Groupon (in fact, the fees are paid directly to Groupon, with Groupon then paying the dentist a percentage of the fees collected). This arrangement could be seen to violate state regulations prohibiting fee-splitting.

In addition, Groupon-type arrangements may also violate the other rules and regulations that prohibit dentists from providing referral gifts to existing patients. For example, as noted in Paragraph 1.a. above, under the Texas Board Rules a dentist may not offer or give cash to a third party for securing or soliciting patients. While the Texas Board Rules do have a “safe harbor” for remuneration for advertising, marketing or other services if the remuneration “is set in advance, is consistent with the fair market value of the services, and is not based on the volume or value of any patient referrals”, the Groupon arrangement most likely would not meet the safe harbor requirements because Groupon’s fees are not set in advance and are based on the volume or value of patient referrals. Accordingly, if Groupon is viewed under the rules as having secured or solicited patients for the dentist in exchange for cash, the Groupon arrangement may constitute a violation of such rules.¹⁴

A dentist may argue of course that Groupon is simply advertising or promoting the dentist’s services, and is thus not referring or soliciting patients on behalf of the dentist. However, a dentist considering participation in Groupon may wish to wait until further guidance is provided by the states regarding this type of arrangement. In fact, the Oregon Board of Dentistry recently released a “Newsflash” announcing it “had preliminarily determined that [voucher systems for potential patients] may violate Oregon’s unprofessional conduct rule which prohibits offering rebates, split fees, or commissions for services rendered to a patient to any person other than a partner, employee or employer”. The Board further advised that “until [such arrangements] can be fully reviewed by the Board, licensees proceed with caution and if they feel necessary seek legal counsel on this matter or contact the Board...”

¹³ Section 333.16221(d)(ii). See footnote 9 above for additional state regulations prohibiting fee splitting.

¹⁴ See footnote 6 above for additional examples of state regulations prohibiting the payment of remuneration to third parties in exchange for patient referrals.

Accordingly, a dentist should carefully consider and seek appropriate guidance as to the application of state law before offering and awarding Groupon discounts to new or existing patients. A violation by a dentist of the state dental statutes and regulations might risk the possibility of censure and reprimand, fines, suspension, and even license revocation.

b. Federal Law

As described in Paragraph 1.b. above, the AKS prohibits any person from knowingly and willfully offering or paying cash to any person to induce the person to refer a patient for services for which payment may be made under a federal health care program. While the AKS does provide a safe harbor for payments by physicians to referral services such as professional societies or other consumer-oriented groups, the Groupon-type arrangement may not fit within the safe harbor, which requires that any payment from a participant to a referral service not be based on the volume or value of any referrals and must be based on the cost of operating the referral service.¹⁵ On the other hand, the AKS should not be applicable if the Groupon discount is being offered solely for services that would not be covered by a federal health care program.

As under state law, a dentist may claim that Groupon is not referring patients on behalf of the dentist, but is instead simply advertising or promoting the dentist's services. Once again, however, the more prudent approach may be simply to wait to participate in Groupon until clear guidance is provided, by the federal government or the courts.

Accordingly, a dentist who provides services payable under a federal health care program should carefully consider the application of the AKS before offering Groupon discounts for covered services to new or existing patients. A violation of the AKS can be a felony and can subject an offender to fines, imprisonment, and exclusion from federal health care programs, such as Medicare and Medicaid.

3. Discount Advertising Regulations

Many states have regulations restricting the advertising of discounts in connection with dental services. Florida, for example, imposes the following disclosure requirements with respect to advertising of dental service discounts:

- (1) An appropriate disclosure regarding advertised fees is necessary to protect the public since there is no uniform code available which would enable a fair and rational selection based upon advertised fees.
- (2) Any advertisement containing fee information shall contain a disclaimer that the fee is a minimum fee only.
- (3) Any advertised fee for a dental service shall state a specified period during which the fee is in effect or that service shall remain available at or below the advertised fee for at least 90 days following the final advertisement for that service.

¹⁵ 42 C.F.R. §1001.952(f).

(4) Any dental service for which a fee is advertised shall be accompanied either by a description of that service using the exact wording for that service contained in the American Dental Association's "Code on Dental Procedures and Nomenclature"... or by the specific ADA Code number or numbers which accurately and fully describes the advertised dental service.¹⁶

In addition, Florida requires that the following statement be included in advertisements for discounted services in capital letters and clearly distinguishable from the rest of the text in the advertisement:

THE PATIENT AND ANY OTHER PERSON RESPONSIBLE FOR PAYMENT HAS A RIGHT TO REFUSE TO PAY, CANCEL PAYMENT, OR BE REIMBURSED FOR PAYMENT FOR ANY OTHER SERVICE, EXAMINATION, OR TREATMENT THAT IS PERFORMED AS A RESULT OF AND WITHIN 72 HOURS OF RESPONDING TO THE ADVERTISEMENT FOR THE FREE, DISCOUNTED FEE, OR REDUCED FEE SERVICE, EXAMINATION, OR TREATMENT.

Similarly, in Indiana, advertisements of discount offers by dentists must disclose "the non-discounted or full price and the final discounted price", as well as the period during which the discount will be available.¹⁷ Accordingly, a Groupon or other discount ad that does not contain the requisite language for satisfying applicable state dental advertising regulations may be in violation of the law.

In addition to restrictions on the form of the advertisement under state law, there may also be restrictions on the manner in which the discount and other fees are charged to a patient. The Illinois Act, for example, provides that "[d]entists may advertise or offer free examinations or free dental services; it shall be unlawful, however, for any dentist to charge a fee to any new patient for any dental service provided at the time that such free examination or free dental services are provided."¹⁸ And New Jersey law states that "[s]ervices advertised as complimentary, free of charge or for a discounted fee shall be offered equally to all patients identified as eligible in the advertisement (for example "new patients"), regardless of the patient's third-party coverage."¹⁹

Accordingly, a dentist should carefully consider the application of, and seek appropriate guidance as to, the state dental advertising regulations before advertising for Groupon or

¹⁶ Fla. Admin. Code Ann. R. 64B5-4.003.

¹⁷ 828 Ind. Admin. Code 1-1-18(d). See also Cal. Code Regs. Tit. 16 Section 1051 (advertising of discounted dental services must disclose the dollar amount of the non-discounted fee, the dollar amount of the discount fee (or the percentage of the discount), the length of time the discount is available, the specific groups who qualify for the discount, and any other applicable terms and conditions).

¹⁸ 225 ILCS 25/45.

¹⁹ N.J.A.C. 13:30-6.2.

other dental discounts. As in the case of the previously discussed statutes or regulations, a violation of the state dental statutes and regulations could result in censure and reprimand, fines, suspension, and even license revocation.

4. Insurance Contracts

The provision of referral gifts or discounts may also be problematic under the terms of the dentist's contracts with third party payors. These contracts may require that fees submitted to the insurer reflect any rebates or reductions in the fees (or co-pays) charged to the patient. In such case, if a rebate is given to a patient after the service has been billed to the insurer, the insurer may contend that the rebate effectively reduced the fees for the service and thus that the dentist's a claim is in violation of his or her contract (or even fraudulent). The rebate may also be viewed as violating Section 5.B. of the ADA Ethics Code, which provides that "[d]entists shall not represent the fees being charged for providing care in a false or misleading manner".

Further, if the insurance contract contains a "most favored nation" clause, that clause may be violated by referral gifts and Groupon discounts. A "most favored nation" clause generally provides that the dentist must grant the insurer the best price that the dentist charges for a particular service. The insurer could invoke such a clause to compel a dentist who has given a rebate or Groupon discount for a particular service to charge the reduced price for that service to all patients covered by the insurer, and even to rebate to the insurer amounts previously charged by the dentist in excess of the Groupon rate.

Accordingly, a dentist who has entered into a contract with a third party payor should carefully review the terms and conditions in the contract to determine whether offering and awarding referral gifts or Groupon discounts to patients would impact such third party payor contract.

5. Ethical Implications: ADA Ethics Code

Finally, the provision of referral gifts and Groupon discounts may also raise ethical issues. For example, under Section 4.E. of the ADA Principles of Ethics and Code of Professional Conduct (the "ADA Ethics Code"), a dentist may not "accept or tender 'rebates' or 'split fees.'" For the reasons described above, the referral gifts and Groupon fee arrangement may violate this provision. Moreover, a rebate paid to a patient after a claim for the service has been submitted to an insurer may violate Section 5.B. of the ADA Ethics Code, which provides that "[d]entists shall not represent the fees being charged for providing care in a false or misleading manner". Although compliance with the ADA Ethics Code is not mandatory for all dentists, members of the ADA voluntarily agree to abide by the ADA Ethics Code as a condition of their membership. At the time of writing this memo, it is understood that the ADA Council on Ethics, Bylaws and Judicial Affairs is investigating this issue.

CONCLUSION

There are numerous legal issues for a dentist to consider before offering and awarding referral gifts or Groupon discounts to patients. Hence, a dentist is advised to consult with an attorney familiar with such issues in the state in which the dentist is located prior to proceeding.

Due to Groupon's popularity, it may be that state and federal agencies will soon provide general guidance as to whether the Groupon arrangement violates state and federal laws (indeed, as previously noted, the Oregon Dental Board has recently provided preliminary guidance). If such guidance provides that the Groupon arrangement may under certain circumstances violate state and federal laws, enforcement of such laws may not be far behind.

If general guidance from state agencies is not yet available, the dentist may have the option of seeking an opinion letter from the applicable state dental board as to whether the dentist's marketing plan would run afoul of the state's dental regulations. Doing so, however, would provide no guidance with respect to the federal statute. While a dentist may seek an advisory opinion under the AKS, the process may be costly and time-consuming, and may involve certain risks, particularly if an opinion is sought for past behavior (for which criminal penalties may apply). Legal advice should be sought prior to seeking an advisory opinion either under state law or under the AKS.