SPS members have inquired about whether the Society’s position on Groupon – an online coupon service that has already been engaged by a number of plastic surgeons to offer discounts on injectables and other minimally invasive cosmetic treatments. A key question is whether using this online marketing tool to promote a plastic surgery practice carries any legal and ethical implications.

Depending on the nature of the procedure being offered, physicians who offer discounts through Groupon – or comparable programs such as Living Social, Tippr and Facebook’s “Deals” (which is currently being tested in several cities) – could be in breach of state laws related to patient referrals and/or the Federal Anti-Kickback Statue. Provisions in the Society’s Code of Ethics could be implicated as well.

To date, Groupon has been used by SPS members to offer discounts on Botox® and Restylane® injections, SmartLipo™ laser lipo- suction, Endermolift™ noninvasive “facelifts,” endermological lipomassage, 3-D breast analysis, and no-needle, non-surgical, collateral treatments, microdermabrasion, glycolic peels and consultations. To the Society’s knowledge, offers to perform invasive procedures through this medium have not as yet been made.

"Groupon or any comparable program. The code contains exceptions for certain referral services, but such exceptions apply only to dentists, chiropractors and marriage and family therapists. There does not appear to be any exception under California law that would permit the Groupon arrangement. Without such an exception, there is the possibility a California member participating in Groupon could be subject to scrutiny.

**The Groupon model**

In a typical Groupon arrangement, a business (or plastic surgery practice) agrees to sell its product or service at a discount to Groupon. Groupon offers the discounted product or service to its members in a specific geographic area via its website, email and through social networking sites. Those who agree to purchase a product or service pay Groupon directly, and Groupon reimburses the business 50 percent of the monies it collects.

For example, in the context of laser hair removal – a service some members have offered through Groupon – if a physician typically charges $140 for a treatment, the Groupon price might be $70. If 100 people were to purchase the service, Groupon would pay the physician approximately $35 for each voucher sold. Groupon is, in effect, making a no-risk “bet” on the success of the offer through the online offer, and Groupon receives remuneration in an amount equal to half of the physician’s discounted professional fee.

The amount of remuneration that Groupon receives would vary based upon the value or volume of the referrals. Typically, the voucher is not effective until a specific agreement upon number of purchases is reached. That number is determined by the service provider and designed to make the discounted offer worthwhile in terms of potential revenue.

The Groupon voucher is written by Groupon, and the merchant is afforded the opportunity to “suggest” specific or unusual points to be included. It is not clear, however, how often these suggestions are actually incorporated into the final copy. Typically, the Groupon promotions feature pictures of “new, exciting, reviews, other blogs, websites, magazines or newspapers,” and the ultimate goal is to create the characteristic “engaging, entertaining, and eye- grabbers that make a memory and turn in-scrbers regardless of whether they actually purchase the Groupon or not.

**State law considerations**

**California state law.** Section 650(a) of the California Business and Professions Code generally prohibits physicians from offering 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, partnership or other agreement with any person to whom these patients, clients, or customers are referred... The Code contains exceptions for certain referral services, but such exceptions apply only to dentists, chiropractors and marriage and family therapists. There does not appear to be any exception under California law that would permit the Groupon arrangement. Without such an exception, there is the possibility a California member participating in Groupon could be subject to scrutiny.

**Florida state law.** Florida Statutes, Title XXXII Regulation of Professions and Occupations, Chapters 456 and 458 govern the licensure of the practice of medicine in Florida. Section 456.045 specifically prohibits kickbacks, defined as “a remuneration or payment, by or on behalf of a provider of health care services or items, to any person as an incentive or inducement to refer patients for past or future services or items, when the payment is not tax deductible as an ordinary and necessary expense.” Internal Revenue Service Publication 535 (2010) indicates that an unlawful kickback will not be considered a deductible ordinary and necessary business expense.

A healthcare provider found to have offered, past, solicited or received a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients can be sanctioned under Section 817.505 of the Florida Criminal Statutes and charged with “patient brokering.” A health care provider is defined in this Section as anyone licensed, registered or certified in the state. The specific acts of patient brokering prohibited include, in relevant part, to:

(a) Offer or pay any commission, bonus, rebate, kickback or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage to or from a health care provider or facility.

(b) Solicit or receive any commission, bonus, rebate, kickback or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for referring patients or patronage to or from a health care provider or health care facility.

Because the Groupon arrangement requires the division of the fee paid for the offered services, physicians participating could be seen as engaging in patient brokering in violation of both the Florida Criminal and Professional Regulations statutes for those services meeting the definition of the practice of medicine.

**Illinois state law.** Section 22.2(a) of the Illinois Medical Practice Act does not define professional services for purposes of Section 22.2(a) prohibiting payment of referral fees. However, the Act defines the professional fee as including:

1. Diagnosing or treating physical or mental ailments or conditions including, but not limited to, deformities, diseases, disorders, conditions or a physical disability.

2. Suggesting, recommending or prescribing any form of treatment for the palliation, relief or cure of any physical or mental ailment or condition of any person with the intention of receiving, either directly or indirectly, any fee, gift or compensation whatever. Under this definition, a Botox injection or microdermabrasion would most likely be considered a professional service and subject to Section 22.2(a) of the Illinois Medical Practice Act. However, a 3-D breast analysis may not be.

**New York state law.** Title VIII, Article 131 of New York Education Law governs licensed professionals in the practice of medicine. Under Article 131-a Section 6531 (and the applicable New York State Law, Article 130, Section 6509), a physician who has “directly or indirectly requested, received or participated in the division, transferrence, assignment, rebate, splitting or refunding of a fee for, or has directly requested, received or profited by means of a credit or other valuable consideration as a commission, discount, bonus, rebate, kickback, split or share of any professional fee, providing services within any form of treatment for the palliation, relief or cure of any physical or mental disability or condition of any person with the intention of receiving, either directly or indirectly, any fee, gift or compensation whatever. Under this definition, a Botox injection or microdermabrasion would most likely be considered a professional service and subject to Section 22.2(a) of the Illinois Medical Practice Act. However, a 3-D breast analysis may not be.

The Federal Anti-Kickback Statute also prohibits the offer or payment of any remuneration to any person to induce the person to “purchase, lease, order or arrange for or recommend purchasing, leasing, or ordering any good, facility, service or item for which payment may be made in whole or in part under a Federal health care program....”

The Federal Anti-Kickback Statute is a very broad statute. In addition to governing traditional health care relationships among health care providers and other referral sources, the statute also applies to arrangements among non-health care providers where any purpose of the arrangement is to induce referrals.

With respect to cosmetic procedures and other medical services not covered by Medicare, the Federal Anti-Kickback Statute should not be an issue. To the extent that such procedures may be payable by Medicare, the Groupon arrangement is unlikely to fit within the “referral services” safe harbor at 42 C.F.R. 1001.925(f), because the payment to Groupon will vary based upon the value or volume of referrals to the physician.

**Groupon’s legal position**

Groupon has advised through its counsel that it has not independently done a legal analysis and as a result to its knowledge the Groupon program violates federal or state laws addressing fee splitting, kickbacks and referral fees. Groupon has acknowledged that there may be issues from the perspective of the physician’s licensing authorities, but it is unaware of any specific ruling or action by a state medical board. Groupon suggests there may be an argument that because Groupon is an advertising fee for promoting the service provider rather than a referral fee or fee split arrangement. Groupon has pointed to no authority supporting that position. It is

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State law may dictate plastic surgeons’ ability to use Groupon by AMY WANDEL, MD, ASPS ETHICS COMMITTEE CHAIR & MIKE REED, JD

Continued on page 10
The ASSI®
Walden Breast Marker

The Walden Breast Marker, made of thin but durable wire, is a useful tool for preoperative breast marking whether for reduction or mastopexy. The 14 cm circumference mould pattern aids with creating a circular nipple-areola complex with less eccentricity and need for tailoring after inset, and is useful for marking both vertical and pattern of Wise reductions.

The vertical limbs set at 7 cm with shorter gradations are an ideal length, with 90 degree angles pointing laterally to aid in marking the takeoff of horizontal limbs in pattern of Wise reductions.

Designed by
Jennifer L. Walden, MD, NYC

Post-Bariatric Surgery Body Contouring

Plastic surgeons may now apply for The PSF Clinical Fellowship in Post-Bariatric Surgery Body Contouring, part of a greater effort to increase the number of advanced training programs targeting structured clinical experience in all practical aspects of post-bariatric surgery body contouring. Support for this fellowship is provided by Ethicon Endo-Surgery.

The fellowship will provide funding to a plastic surgery practice, division or department for the purpose of establishing – or expanding – a comprehensive clinical training program dedicated to specializing in the treatment and care of massive weight-loss patients.

Through the Clinical Fellowship in Post-Bariatric Surgery Body Contouring program, The PSF intends to foster plastic surgeons in their development of specialized knowledge, competence and insight in state-of-the-art and best practices, as related to the clinical treatment and management of massive weight-loss patients who undergo body contouring procedures.

The selected plastic surgery practice, division or department will recruit a qualified clinical fellow to participate in a directed and structured year-long experience designed to provide advanced competency in all aspects of managing patients interested in post-bariatric surgery body contouring options, and in the issues related to developing and running a post-bariatric body contouring practice.

Amount: $62,000 for one year.

Eligibility: Applicances must be submitted by a plastic surgery practice, division or department affiliated with an accredited United States or Canadian medical institution, with an approved or active post-bariatric surgery body contouring program and clinical fellowship program. The program director must be an ASPS Active Member or Candidate for Membership.

Applications must be submitted in .pdf format via e-mail no later than 11:59 p.m., EDT on Aug. 1. For more information, contact Research & Grants Associate Jennifer McCormick at (847) 228-3356 or e-mail: jennifer.mccormick@plasticsurgery.org.