

State law may dictate plastic surgeons' ability to use Groupon

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ASPS members have inquired about 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 services 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 Statute. Provisions in the Society's Code of Ethics could be implicated as well.

To date, Groupon has been used by ASPS members to offer deals on Botox® and Restylane® injections, SmartLipo™ laser liposuction, Endermolift™ noninvasive "facelifts," endermological lipomassage, 3-D breast analysis and modeling, laser hair removal, cellulite treatments, microdermabrasion, glycolic peels and consultations. To the Society's knowledge, offers to perform invasive procedures such as breast augmentations or facelifts have not been offered as a part of Groupon or any comparable program.

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 members. Groupon offers the discounted product or service to its members in a specific geographic area via its website, e-mail and through social networking sites. Those who choose to purchase the 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 voucher for the treatment would be sold for \$70, and Groupon would then pay the physician approximately \$35 for each voucher sold. Groupon is, in effect, making referrals to the physician 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 agreed-upon number of purchasers is reached. That number is determined by the service provider and designed to make the discounted offer worthwhile in terms of potential future business.

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 is compiled with excerpts from "existing reviews, other blogs, websites, magazines or newspapers," and the ultimate goal is to create the characteristically "engaging, entertaining and nonintrusive" write-ups that Groupon claims will entice many subscribers 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, proprietary interest, or co-ownership in or 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, paid, 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 health care 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 agreement 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 provides that a physician "may not directly or indirectly divide, share or split any professional fee or other form of compensation for professional

services with anyone in exchange for a referral or otherwise..." Further, Section 22.2(f) states that "a licensee under this Act may not divide, share or split a professional service fee with, or otherwise directly or indirectly pay a percentage of the licensee's professional service fees, revenues or profits to anyone for: (i) the marketing or management of the licensee's practice, ... (iv) negotiating fees, charges or terms of service or payment on behalf of the licensee, or (v) including the licensee in a program whereby patients or beneficiaries are provided an incentive to use the services of the licensee."

The Groupon arrangement would appear to be in direct conflict with the Illinois prohibitions because the professional fee paid by the patient would be split evenly with Groupon.

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 practice of medicine as including:

1. Diagnosing or treating physical or mental ailments or conditions including, but not limited to, deformities, diseases, disorders or injuries of human beings; and

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 more generally applicable Article 130, Section 6509), a physician who has "directly or indirectly requested, received or participated in the division, transference, 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 or gratuity, in connection with the furnishing of professional care or service," may be found to have engaged in professional misconduct and subject to licensure revocation, suspension, annulment or other penalties. Section 6521 of Article 131 defines the practice of medicine as "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition." Certain of the services currently offered on Groupon may well be viewed by New York regulators as included in this definition and subject participating physicians licensed to practice medicine in New York to disciplinary action by the Board of Regents under Article 130, Section 6511.

The Rules of the New York Board of Regents in Section 29.1(b)(3)-(4), prohibiting professional misconduct provide in relevant part, that a physician may be disciplined for:

3. 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;

4. Permitting any person to share in the fees for professional services, other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice the same profession, or a legally authorized trainee practicing under the supervision of a licensed practitioner.

Because of the nature of the Groupon arrangement, which is both dependent upon referrals and requires the splitting of the professional fee, providing services within the definition of the practice of medicine could be viewed as professional misconduct under New York law in violation of the anti-kickback and fee-splitting prohibitions of the Rules of the Board of Regents as well as Section 6531 of Article 131 discussed above.

Federal Anti-Kickback Statute

The Federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, generally prohibits the payment or receipt of kickbacks, or remuneration (including any kickback, bribe or rebate), in return for or to induce the referral of Medicare or Medicaid business. In pertinent part, the Federal Anti-Kickback Statute prohibits the knowing and willful solicitation or receipt of any remuneration "in return for purchasing, leasing, ordering or arranging for or recommending 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 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. 1001.952(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 assessment as to whether the Groupon program violates federal or state laws addressing fee splitting, kickbacks and referral fees. Groupon has acknowledged that there may be issues with particular states and their 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 the amount paid to Groupon is an advertising fee for promoting the service provider rather than a referral fee or fee splitting arrangement. Groupon has pointed to no authority supporting that position. It is

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important to stress that Groupon is taking a "buyer beware" position and assumes no responsibility for determining whether the program raises legal implications for the service providers. Groupon informs all participants from restaurants to physicians that they are responsible for determining whether their participation is in compliance with applicable laws and regulations. We have been advised that the form of agreement Groupon enters into with service providers states that fact. This disclaimer would also apply to promotional materials distributed by Groupon promoting the provider of services.

Code of Ethics considerations

The Society's Code of Ethics, in Section 2, I(F)(2), characterizes an improper financial dealing as the payment of referral fees or the acceptance of rebates in exchange for the referral of patients. The Groupon program,

as noted in the discussion of state laws, may well implicate these sections of the Code. The Code does not prohibit participating in a referral service provided the member's paid participation is disclosed and the participation is permitted by state law. It is unclear as to whether the Groupon voucher sold to the prospective patient adequately discloses a physician's paid participation in the program. However, even if it does, the state laws discussed above – as well as the laws of other states in which members reside – may not permit participation.

The Groupon program may also implicate the same concerns raised by participation in contests, raffles or similar promotions in which the prize is a procedure, i.e., the concern that a plastic surgeon will perform a procedure on a patient who is not suitable and will not perform the necessary evaluation and risk assessment. Thus far, the cosmetic services that have been identified as being offered through Groupon have not included invasive procedures; it would be important for plastic surgeons who decide to

participate in the Groupon program to determine whether its terms and conditions permit the surgeon to decline to perform the procedure if he or she determines the purchaser is not a suitable candidate.

Further, even though the Society's Code distinguishes between procedures requiring an incision, which are subject to Section I(K), the state law definitions of professional services addressed above do not make that distinction.

To the extent the advertising and promotion of a member by Groupon implicates sections of the Society's Code of Ethics addressing false, deceptive or misleading statements or claims, it is important to remember that the member is responsible for those statements or claims. The Preamble to the Code clearly makes this point.

Members be aware

It is critical for ASPS members to be aware of the potential issues associated with participating in Groupon or similar programs. It is also critical for members to determine

whether participation in the program is consistent with their particular state regulatory requirements. The position taken by the Society at present is one of education rather than enforcement. As new information comes to the attention of ASPS, the Society will provide that information to its members.

Members should also be mindful of the value – or lack thereof – of participating in such programs. An article titled "At What Price Beauty? Check Today's Deal" in the April 14 style section of *The New York Times* addresses the question of whether participation in these discounting programs is in fact beneficial: "But at what point does a business risk devaluing itself in the name of finding a few new customers?" Dr. Steven Pearlman, a facial plastic surgeon who listed discounted prices for chemical peels, laser services, Botox and Juvederm on Gilt City last year, said he would not work with a deal site again for a very long time. 'I don't want to undercut patients who have been seeing me for years and paying full price, the majority of whom do,' Dr. Pearlman said. 'I don't want to cheapen the brand.'^{PSN}

Legal and ethical considerations aside, ASPS members should also evaluate the value of participating in the Groupon program and what providing such discounts may or may not bring to their practices. ^{PSN}

PSF offers clinical fellowship in 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: Applications 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 research@plasticsurgery.org. ^{PSN}

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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 mosque 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.

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