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Dentistry and the Law: Problems with Referral Incentives Explained

Dan Schulte JD
Kerr Russell, dschulte@kerr-russell.com

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By Dan Schulte, JD
MDA Legal Counsel

Problems with Referral Incentives Explained

Question: I would like to add a referral incentive program to attract new patients. Is it problematic to give a Starbucks, Apple, or other gift card to patients who refer a new patient to me? What if I organized a raffle of a TV, giving a ticket to patients who refer a new patient?

Answer: In most businesses these referral incentives would be perfectly legal and ethical ways of attracting new business. Dentistry, however, is not one of those businesses. Instead, dentists are subject to ethical rules, federal and state law, and possibly contractual limitations making these incentives problematic.

First is the MDA's ethical rule 4.E., which applies to MDA members. It states: "Dentists shall not accept or tender rebates or split fees." Notice that the rule is not limited to dentists rebating or splitting fees with other dentists. Rebating or splitting a fee with anyone (including a patient or any other non-dentist referral source) violates the rule.

A rebate is defined as a return of an amount paid. It appears that giving any small gift to a referral source could be considered a rebate. A gift made after seeing the patient referred could be considered a return of the amount the referral source paid for services.

A raffle ticket given to the existing patient who made the referral is less problematic. Unless you consider the *chance* to win to have value, only the patient who received the winning raffle ticket has actually received anything of value in return for the referral, which could then be considered a rebate. These are close calls, and if a complaint was made the issues would be decided by the MDA Peer Review/Ethics system, and the MDA member involved would have to follow its decision.

Second is state law (applicable to all Michigan dentists) on this subject. I am going to assume that these incentives are not being used to attract Medicaid or Medicare patients. If they are, you should know there are federal laws that may make these incentives illegal as well.

MCL 333.16221 states that it is an unethical business practice for any health care professional to "divide fees" for the referral of patients. The rebate interpretation discussed above applies here as well. Giving a gift to either a new patient or an existing patient who has referred a new patient following their payment of your fees for services could be deemed a division of those fees (and a return of a portion of the fees to the patient).

What about the raffle tickets given to the referring patients? The only raffle ticket to worry about is the one that wins the raffle. Only the referring patient with this raffle ticket has received anything of value. Would the payment of the TV be deemed a division of the fees from the new patients? There is no precedent or other clear answer to this question. Upon a complaint, the Board of Dentistry would ultimately make the call on whether any of these incentives violate MCL 333.166221.

Finally, you should carefully check your agreements with insurers and dental plans prior to implementing any of these incentive plans. Often, these contracts will require you to charge the fee schedule amount to all patients and to charge and make reasonable attempts to collect co-payments and deductibles.

Delta Dental's Uniform Requirements of participation contain these provisions. Will giving a new patient or an existing patient who has made a referral with such insurance or enrolled in such a dental plan a small gift or a raffle ticket be deemed by the insurer or dental plan to be a backdoor way of reducing the fee you are contractually required to charge? Is there a prohibition in your insurer or dental plan contract prohibiting the payment of referral fees? Insurers and dental plans often include these provisions as well so that patients choosing dentists within the network do so based only on quality of care. You must review and understand your contracts and, when in doubt, seek clarification. ●

Send legal questions for publication to MDA Journal Managing Editor Dave Foe at dfoe@michigandental.org. All queries remain confidential.