

DENTAL LEGAL UPDATE

Internet “Coupons”: Dental Practice Time Bombs

by Jeanine Lehman, Attorney

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Texas Deceptive Trade Practices Act Violations:

- Triple Damages
- Civil monetary penalties of not more than \$20,000 per violation (except if victim is 65 or older, goes to not more than \$250,000 per violation)

Swarming into the email inboxes of Texans are deals of the day, promising deep discounts for everything from restaurant meals to dental services. To become involved in these deals, the dental practice hires an Internet company as its marketing agent to sell dental services. There are a few large companies providing these services and lots of new ones popping up. Dental deals range from teeth whitening to packages of initial exam, x-rays and hygiene. The hope is to increase foot traffic to the practice and expand the patient base. The discounts are deep – with some deals providing 50% - 90% discounts from the regular price. The Internet company keeps a portion of the fees, reportedly in the 30 – 50% range of the already discounted price and sends the remainder to the dental practice. Typically, the potential patient has to sign up quickly, usually the same day, pay the marketing agent, and use the prepaid “coupon” or voucher within a specified period before expiration.

Dental practices considering this type of deep discount marketing need to thoroughly investigate Texas, federal, and other state law that applies to these deals. If your dental practice has already done these deals, exploration of obligations and liability exposure needs to be undertaken.

Texas Stored Value Card Law

In 2005, to address abusive gift card practices, Texas passed laws on stored value cards. Stored value cards include gift

certificates. The Internet prepaid coupons are considered gift certificates and therefore, fall within the purview of the Texas law. There are required disclosures of expiration date or policy, fees, other material restrictions, and contract terms applicable to the prepaid coupon, which must be clearly and conspicuously disclosed at the time the prepaid coupon is sold. In addition, the expiration date or a periodic fee that reduces the unredeemed value must be legibly printed on the coupon. Failure to make such disclosure results in the prepaid coupon being valid until redeemed or replaced.

Texas Unclaimed Property Law

In 2005, Texas amended its Property Code to make stored value cards, including gift certificates, and therefore, Internet prepaid “coupons”, subject to the unclaimed property law, if the prepaid “coupons” have an expiration date. If the prepaid coupon is unredeemed on the expiration date, the coupon is deemed to be abandoned property. The merchant, who sold the prepaid coupon, must then follow the reporting rules of a holder of unclaimed property. In the example, the dental practice needs to pay the sales price on unredeemed prepaid coupons to the Texas Comptroller of Public Accounts. The amount paid includes the dental practice's cut of the prepaid coupon deal, as well as the commission retained by the Internet company for selling the coupon.

At least 11 class action lawsuits have been filed in federal courts from coast-to-coast involving Internet "prepaid" coupons.



Website Favorites

Capital Area Dental Society:

www.capitalareadental.org

Texas State Board of Dental Examiners:

www.tsbde.state.tx.us

Texas Comptroller of Public Accounts:

www.window.state.tx.us

Internet "Coupons" (cont.) --

Federal Law & Litigation

In 2009, to address abusive credit card practices, the federal Credit Card Accountability Responsibility and Disclosure Act (CARD) was passed and became part of the Electronic Funds Transfer Act. Generally, that Act provides that electronic gift certificates cannot expire in less than 5 years from issuance. Since the Internet "prepaid" coupons are electronic gift certificates, they are subject to this law. Generally, the Internet "prepaid" coupons have a much shorter expiration date than 5 years.

At least 11 class action lawsuits have been filed in federal courts from coast-to-coast involving Internet "prepaid" coupons. These lawsuits have generally alleged that the expiration dates on the coupons are a violation of federal and state laws. Further, it is alleged that purchasers have been misled, because they were not informed that the expiration dates are illegal; and that this was a deceptive trade practice in violation of state law. In several cases, the defendants include not just the Internet company, but also include merchants by name, and unnamed "Does" (John Does). So far, the author has not located instances where dental practices have been specifically named as defendants, but it is possible that dental practices could be included in the category of "Does".

Internet Deal Contracts

The Internet company acts as a marketing agent for the merchant. There is a contract between the Internet company and the merchant, for example, the dental practice. There is also a contract between the Internet company and the purchasers of the Internet prepaid coupons. Since the Internet company is the agent of the merchant, the merchant (dental practice) needs to be aware of the terms of the contract

with the purchasers of the Internet coupons, as well of the representations made and practices used by the Internet company, because the merchant may have liability for its agent. Contracts with the merchant, typically, have the merchant indemnify the Internet company for its losses and require the merchant to be responsible for compliance with laws including:

- Deceptive Trade Practices
- Unclaimed Property Liability for Unredeemed Vouchers
- Expiration of Gift Certificates
- Sales Tax Collection & Remittance

There are a myriad of questions on operation of the deals and contract terms. Here are some:

- Choice of Law – Does Texas law or some other law apply?
- Does Choice of Law Clause impact Texas regulatory law on Prepaid Coupons?
- Expiration Date on Prepaid Coupon?
- Scheduling of Deal?
- Volume of Prepaid Coupons issued
 - Minimum
 - Maximum
- Can Multiple Coupons be Combined in One Purchase?
- Capacity to Meet Demand (Lack of Capacity = Deceptive Trade Practice)
- Limit # of Coupons per Purchaser
- Limit sale only to persons who are not currently Patients – How will your current Patients feel if they are excluded?
- Additional discount charged to Practice for tie-ins, such as Purchaser marking Merchant as "liked" on Social Network website
- Cash Flow – When does Practice get paid? Is there a Holdback?
- Who owns funds until Practice fulfills its obligations? (Unclaimed Property Issues)
- Partial Redemptions Allowed? How handled?
- Refunds – How handled? Is Internet Company's commission also refunded? Who is responsible?
- Indemnification Clause – Impact on

- Practice given the proliferation of class action lawsuits.
- Limitation of Liability (for Internet Company)
 - Lockup: Practice agreeing to not offer similar vouchers or discounts for some period of time.
 - Can the Practice decline a Patient? How handled?
 - Is the Prepaid Coupon/Voucher transferrable?

Deceptive Trade Practices

Texas has a deceptive trade practices act. The penalties for violation of the law can be very steep, including triple damages in suits brought by consumers and civil monetary penalties in suits by the Texas Attorney General's Office of not more than \$20,000 per violation, but if the "victim" is 65 years old or older, of not more than \$250,000 per violation. If each Internet coupon is a separate violation, the financial risk for violating the deceptive trade practices act grows exponentially in a class action lawsuit or an A.G.'s lawsuit.

In the class action lawsuits that have been filed in other states, allegations of violations of those states' deceptive trade practices and advertising laws have occurred. Therefore, when lawsuits arise in Texas, it is reasonable to assume that allegations will be made under the Texas deceptive trade practices act.

Fee Splitting?

The question arises -- is sharing a percentage of the sales price of the Internet prepaid coupon by the dental practice fee splitting?

Insurance Contracts & Law

If the dental practice's contracts with insurance companies disallow discounting, the practice's participation in an Internet prepaid coupon deal could violate its insurance contracts. Texas also has a law on illegal pricing practices in Chapter 552 of the Texas Insurance Code. Under that law, a person commits a criminal offense, if the person is not acting under a exception to the law and (i) the person knowingly or intentionally charges two different prices for providing the same product or service and (ii) the higher price charged is based on the fact that an insurer will pay all or part of the price of the product or service. [Aside from the Internet prepaid coupon scenario -- There are exceptions under the law for policies that can be adopted by the dental practice to care for its indigent and uninsured patients.]

Dental Board Rules

Texas Dental Board rule 108.60 addresses false,

misleading, or deceptive referral schemes and prohibits a dentist from paying for referrals. Subsection (b) of that rule allows advertising/marketing, provided that the remuneration is set in advance, is consistent with fair market value of the services, and is not based on the volume or value of referrals. Since a commission is paid on a per referral basis under many of the Internet prepaid coupon deals, the deals could be problematic under this rule. Texas Dental Board rule 108.70(c)(7) includes discussion of the dentist remaining responsible for the content of advertising or marketing services, and confirming that such comply with all legal requirements.

HIPAA & Business Associates

If Protected Health Information is shared by the dental practice with the Internet company, HIPAA comes into play. Then, the requirements of HIPAA need to be satisfied, including but not limited to having a Business Associate Agreement. An example of the disclosure of PHI is an email from the dental practice to the Internet company that "Joan Garcia used her teeth whitening voucher".

Medicaid, Stark & Anti-kickback Laws

With payment occurring for referrals under these Internet prepaid coupon deals, careful analysis by the dental practice in collaboration with the practice's health law attorney needs to be undertaken to determine if Medicaid, Stark and state and federal anti-kickback laws are violated

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- ✓ **Your Dental Office Lease: Watch the Terms**
- ✓ **Ownership Options for Your Dental Practice**
- ✓ **Financing Your Dental Practice: Tips & Terms**
- ✓ **Buying a Dental Practice: Deal Points**

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Internet "Coupons" (cont.) --

by participation of the dental practice in these deals. There are significant consequences from violation of these laws.

Financial Statements

The unredeemed prepaid "coupons" are a liability to be disclosed on the dental practice's financial statements, including those provided to banks and dental practice purchasers.

Dental Practice Branding

Jan Triplett, Ph.D., CEO, Business Success Center in Austin, Texas consults with clients concerning appropriate pricing and long term benefits from focusing on platinum clientele. Jan has evaluated the impact of Internet prepaid "coupon" experiences on Texas businesses and has these words to the wise: "Buy coupons and use them but don't use coupons to 'buy' new clients."

Triplett also advises "if you do offer a discount coupon, be prepared for a rush at the end of the life of the coupon. That can mean a lot of work at little or no pay. You will also expose staff and yourself to irate coupon buyers who want the discount now and forever and existing customers who want the same discount even though they don't have a coupon. Be prepared to hear or read about such complaints on yelp.com, twitter, etc."

For service providers, Triplett says "if you must coupon, do it wisely." She recommends "giving people a 'taste' of working with you - not your most expensive procedure. The payoff is too small and the risk is too great otherwise. And, unless you want to be tagged as a discount provider, the damage can be long term to your reputation and your pricing. Just because your competitors are offering

coupons, doesn't mean you should."

Conclusion

Given the legal and business risks involved with these prepaid Internet coupons, Texas dentists may be best served by choosing other marketing options for their practices.

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Jeanine Lehman is an Austin, TX attorney who practices health law.

Future Issues

The next issue of the Dental Legal Update is planned to be a Texas Legislative Update.

If you have a topic that you would like to see covered in a future Dental Legal Update, please give me a call. Your topic suggestions are appreciated.

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To receive the Dental Legal Update by email, call (512) 918-3435.

Speaking Requests

For **Jeanine Lehman** and **Jan Triplett** to speak to professional and business groups on Internet prepaid "coupons", please contact Jeanine Lehman at (512) 918-3435 or Jan Triplett at (512) 933-1983.

About Our Firm ...

Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Austin with a state-wide health law practice, including representation of Texas dentists. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as contracts and incorporations, office/facility leases, building purchases/condos, and build-to-suits, practice sales/purchases/buy-ins, employment agreements, financing, and consultation concerning the day-to-day legal concerns of running a health care practice. The firm is owned by Texas Attorney **Jeanine Lehman**. Jeanine has over 25 years experience as a Texas attorney. She has had one book and over 70 articles published. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family. Contact us at (512) 918-3435, jeanine@jeanine.com or PO Box 202211, Austin, TX 78720, and visit our website at www.jeanine.com