

Physician Marketing on Groupon: How Healthcare Providers Can Ethically Leverage This Technology and Why States Should Allow Them to Do So

*Miriam Neems**

I. INTRODUCTION

Technological innovations disrupt the paradigm under which the medical profession operates,¹ and healthcare providers are shifting the practice of medicine to accommodate digital processes.² An important element of this transition is the development and implementation of digital marketing plans in the medical field.³ Healthcare providers increasingly look to leverage online technology to brand and market their services in order to be competitive and match the way in which society consumes, shares, and responds to

*Juris Doctor Candidate, Loyola University Chicago School of Law, Class of 2015.

1. See generally Bertalan Meskó, *Rx Disruption: Technology Trends in Medicine and Health Care*, 48 THE FUTURIST (2014) (discussing the impact that technology has on the healthcare sector).

2. See CHUN-JU HSIAO & ESTHER HING, USE AND CHARACTERISTICS OF ELECTRONIC HEALTH RECORD SYSTEMS AMONG OFFICE-BASED PHYSICIAN PRACTICES: UNITED STATES, 2001-2013 (2014), available at <http://www.cdc.gov/nchs/data/databriefs/db143.pdf> (finding that 78% of office-based physicians used an electronic health record (EHR) system in 2013); Brian Eastwood, *Healthcare Finally Warming to Cloud Technology*, CIO.COM (Nov. 18, 2013), http://www.cio.com/article/743379/Healthcare_Finally_Warming_to_Cloud_Technology (noting that healthcare providers are beginning to utilize cloud computing in the storage of personal health information); SHERYL COUGHLIN, ET AL., DELOITTE CTR. FOR HEALTH SOLUTIONS, PHYSICIAN ADOPTION OF HEALTH INFORMATION TECHNOLOGY (2013), available at [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Health%20Care%20Provider/us_dchs_2013PhysicianSurveyHIT_051313%20\(2\).pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Health%20Care%20Provider/us_dchs_2013PhysicianSurveyHIT_051313%20(2).pdf) (finding that a growing number of physicians – approximately 4 in 10 – use mobile health technology for clinical purposes).

3. See generally Marketo, *How to Leverage Digital Marketing in the Healthcare Industry*, http://www.marketo.com/_assets/uploads/How-to-Leverage-Digital-Marketing-in-the-Healthcare-Industry.pdf (last visited Mar. 29, 2014) (explaining the importance of digital marketing in healthcare).

information.⁴ In the process of doing so, a number of medical professionals seek the services of daily deal advertising platforms, made popular by Groupon.⁵ These platforms offer daily deal advertising across a number of industries,⁶ but the expansion into health care poses unique legal and ethical challenges.⁷ Healthcare providers frequently question whether such marketing arrangements violate fee splitting⁸ prohibitions under the American Medical Association (AMA) Code of Medical Ethics and state statutes.⁹ Their questions, however, remain largely unanswered.¹⁰

This article argues that the AMA and state licensing boards should pro-

4. Anna M. Grizzle & Lori S. Richardson Pelliccioni, *A Marketing Compliance Primer for Healthcare Providers*, AM. HEALTH LAWYERS ASS'N, http://www.healthlawyers.org/Events/Programs/Materials/Documents/PHY13/A_grizzle_pelliccioni.pdf (last visited Mar. 28, 2014); see also Thomas Daschle & Bill Frist, *Technology and the Changing Business of Health Care*, HEALTHAFFAIRS BLOG (Aug. 14, 2013), <http://healthaffairs.org/blog/2013/08/14/technology-and-the-changing-business-of-health-care/> (describing how consumers expect information technology to shape their interactions with healthcare providers).

e

5. See Suzanne D. Nolan, Mercedes Varasteh Dordeski & Frank Haron Weiner, *Health Care Marketing: A Tricky Operation*, 25 HEALTH LAW. 34, 36 (2012).

6. See *id.* (explaining that consumers commonly purchase daily deal promotions for discounts at restaurants, health clubs, clothing retailers and spas).

7. *Id.*

8. Fee splitting occurs when a physician makes or accepts payment solely for the referral of a patient. AM. MED. ASS'N COUNCIL ON ETHICAL AND JUD. AFFS., CODE OF MEDICAL ETHICS (2013), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion602.page>.

9. See Bob LaMendola, *Are Groupon Discounts for Medical Treatments Illegal?*, SUNSENTINAL, (Sep. 25, 2011), http://articles.sun-sentinel.com/2011-09-25/news/fl-hk-groupon-medical-20110925_1_websites-discounts-medical-professionals.

10. *Id.* (commenting on the lack of clarity provided to healthcare providers on the issue). Only three states have taken a position on the legality of daily deal advertisements in the medical field. See THE STATE MED. BD. OF OHIO, GRAND ROUNDS: PHYSICIAN PARTICIPATION IN "DEAL OF THE DAY" OFFERS 13 (2012), available at <http://www.med.ohio.gov/pdf/Newsletters/Spring2012.pdf>; Referral Fees and Fee Splitting, N.C. MED. BD., REFERRAL FEES AND FEE SPLITTING, http://www.ncmedboard.org/position_statements/detail/referral_fees_and_fee_splitting (last updated Jan. 2013); THE ILL. DEPT. OF FIN. AND PROF'L REG., VOUCHER ADVERTISING AND FEE-SPLITTING (2013), available at <http://www.idfpr.com/News/newsrsls/VoucherAdvertisingStatement04102013.pdf>.

vide healthcare providers with guidance and adopt a framework that makes it ethically and legally permissible for healthcare providers to advertise medical services on daily deal platforms, as done by the Illinois Department of Professional Regulation (IDPR). Section II details how daily deal platforms work and explores the benefits realized from these marketing arrangements.¹¹ Section III discusses the legal and ethical implications that healthcare providers encounter under the AMA Code of Ethics and state statutes when they market on daily deal websites.¹² Lastly, Section IV explains why the IDPR takes a sensible approach to the issue by allowing healthcare providers to legally market their services on daily deal platforms and why the AMA and other state licensing boards should adopt this framework.¹³

II. HOW DAILY DEAL ADVERTISING WORKS AND ITS BENEFITS

Groupon and similar daily deal platforms¹⁴ are online platforms where a business offers a subscriber the opportunity to purchase advertised goods and services at deep discounts.¹⁵ A subscriber provides Groupon with an

11. See *infra* Section II.

12. See *infra* Section III.

13. See *infra* Section IV.

14. Although Groupon claimed nearly 60% of the United States market for daily deal platforms in 2013, there are several other notable competitors sharing the market, including Living Social, Google Offers, Amazon Local, and BuyWithMe. See *Groupon Owns Nearly 60% of the U.S. Daily-Deals Market in 2013, Industry to See Slowed Growth*, DMCONFIDENTIAL (Sept. 3, 2013), <http://www.dmconfidential.com/report-groupon-owns-nearly-60-of-the-daily-deals-market-in-2013/>.

15. See *Social Networking Advertising-Marketing and the Medical Practice – Coupons and Daily Deals*, AM. HEALTH LAWYERS ASS'N (Aug. 6, 2013, 4:19 PM), www.healthlawyers.org/hlresources/Health%20Law%20Wiki/Social%20Networking%20Advertising-Marketing%20and%20the%20Medical%20Practice%20-%20Coupons%20and%20Daily%20Deals.aspx; see also Ryan Spoon, *10 Fun Groupon Statistics, from Geography to Sushi to NBA*, BUS. INSIDER (Mar. 20, 2011), <http://www.businessinsider.com/10-fun-groupon-statistics-from-geography-to-sushi-to-nba-2011-3> (noting that the average Groupon offers consumers a 56% discount on the advertised good or service).

email address and zip code to sign up.¹⁶ Once a subscriber, the consumer begins receiving advertisements to purchase various online coupons from merchants.¹⁷ The coupons are often limited in quantity or the amount of time that they are made available to the subscriber.¹⁸ If a subscriber decides to purchase an online coupon, the subscriber pays Groupon the value of the online coupon, and Groupon keeps fifty percent of the payment.¹⁹ Groupon then remits the remaining fifty percent of the payment to the merchant.²⁰

The public immediately took to Groupon's offerings.²¹ Generating \$2.6 billion in revenue in 2013, Groupon experiences impressive success in the daily deal industry.²² The tremendous popularity of daily deal advertising platforms draws physicians to consider their applicability and value in medical advertising.²³ Physicians seek to leverage Groupon and similar platforms as a tool to build and grow their practice.²⁴ With over 200 million subscribers in forty-eight countries, Groupon prides itself on its broad reach

16. *Social Networking Advertising-Marketing and the Medical Practice – Coupons and Daily Deals*, *supra* note 15.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Christopher Steiner, *Meet the Fastest Growing Company Ever*, FORBES (Aug. 12, 2010), <http://www.forbes.com/forbes/2010/0830/entrepreneurs-groupon-facebook-twitter-next-web-phenom.html>.

22. Alex Wilhelm, *Groupon Skyrockets After Hours on Q4 Beat With Revenue of \$768.4M, EPS of \$0.04*, TECHCRUNCH (Feb. 20, 2014), <http://techcrunch.com/2014/02/20/groupon-skyrockets-after-hours-on-q4-beat-with-revenue-of-768-4m-eps-of-0-04/>.

23. Claudia Ahiabor, *There's a Coupon for That: How Coupons for Medical Services on Daily Deal Websites Violate the Federal Anti-Kickback Statute*, 7 HEALTH L. AND POLICY BRIEF 67, 67, available at <http://digitalcommons.wcl.american.edu/hlp/vol7/iss1/6>.

24. See Nolan et al., *supra* note 5; see generally Benjamin Edelman, et al., *To Groupon or Not to Groupon: The Profitability of Deep Discounts*, HARVARD BUSINESS SCHOOL (Feb. 3, 2014), http://www.hbs.edu/faculty/Publication%20Files/11-063_42425cdb-81ee-4d66-9420-4ebdb809358f.pdf (discussing how Groupon can benefit businesses by offering advertising).

and ability to generate business.²⁵ Physicians that decide to utilize Groupon's marketing services may be motivated by the opportunity to attract new business with the use of coupons, which will potentially lead to repeat business.²⁶ By virtue of such marketing tactics, physicians also seek to enjoy heightened exposure of their practice in the local community.²⁷ Groupon's success within the mobile market may be another compelling reason that physicians would integrate its services into their marketing plan.²⁸ The host of benefits offered to healthcare providers by Groupon causes these providers to reevaluate their traditional reluctance to engage in online marketing and employ more innovative solutions.²⁹ It is estimated that marketing arrangements between daily deal platforms and healthcare providers amount to five to ten percent of the online coupon industry.³⁰

Healthcare consumers recognize the substantial benefit of using daily deal advertisements.³¹ Medical costs exceeded the inflation rate by threefold

25. See GrouponWORKS, <http://works.groupon.sg/en/> (last visited Feb. 28, 2014).

26. See *Groupon Q3 2013 Public Fact Summary*, GrouponWORKS.COM, <http://files.shareholder.com/downloads/AMDA-E2NTR/2832382440x0x710981/E9EEB68D-05DB-4C99-9BF4-0D04B326C698/2013> (last visited Feb. 28, 2014) (stating that, based on internal data, "82% of merchants agree that their Groupon deal brought in new customers" and that "93% of recent Groupon customers plan to purchase from Groupon again in the next 50 days").

27. See *Id.* (stating that, based on internal data, "81% of merchants felt the Groupon deal increased awareness of their business within the community" and that "81% of customers have referred someone to the business").

28. See Tara Clarke, *Groupon (Nasdaq: GRPN) Earnings Update: Record-Breaking Quarter, and Promising Future on these Two Numbers*, MONEY MORNING (Feb. 20, 2014), <http://moneymorning.com/2014/02/20/groupon-nasdaq-grpn-earnings-preview-two-numbers-watch/> (stating that nearly 70 million people have downloaded Groupon's mobile application and that 50% of Groupon's transactions take place on a mobile device).

29. See, e.g., Ankita Rao, *Doctors And Dentists Lure Patients With Money – Saving Deals Online*, KAISER HEALTH NEWS (Jan. 8, 2013), <http://www.kaiserhealthnews.org/Stories/2013/January/09/groupon-living-social-health-care-deals.aspx> (describing how AMG Medical Group used Groupon to bring in more than 1,000 new patients over the course of a year).

30. *Id.*

31. See *id.*

over the past few decades, and online vouchers for medical services provide consumers with an alternative way to meet the rising costs of health care.³² In addition, such arrangements may effectively combat the inaccessibility of health care in underserved populations.³³ Millions of Americans are currently uninsured or have gaps in their coverage, and these individuals can turn to Groupon as a way to access affordable health care.³⁴ While Groupon is more commonly known to advertise elective procedures such as Botox, liposuction, or Lasik eye surgery, at times physicians utilize daily deal websites to offer general medical care, such as full checkups and eye exams.³⁵

III. ETHICAL AND LEGAL IMPLICATIONS OF DAILY DEAL WEBSITES

The use of daily deal platforms to connect healthcare providers and consumers generates controversy in the field of medicine over the extent to which such conduct is legal and ethical.³⁶ While other concerns exist,³⁷ this article specifically addresses the issues of fee splitting violations under the AMA Code of Medical Ethics and state statutes and the increased risk of

32. DEVON M. HERRICK, NAT'L CTR. FOR POL'Y ANALYSIS, *THE MARKET FOR MEDICAL CARE SHOULD WORK LIKE COSMETIC SURGERY* (2013), *available at* <http://www.ncpa.org/pdfs/st349.pdf> (noting that the price of medical care has increased by 2,700 percent since 1950 whereas inflation has increased by only 800 percent).

33. See Catherine Hoffman & Julia Paradise, *Health Insurance and Access to Health Care in the United States*, 1136 ANNALS N.Y. ACAD. SCI. 149, 152-53 (2008), (explaining that “[m]ore than 90% of the uninsured cite cost as the main barrier to getting care (as do more than half the insured)” and that “uninsured adults are significantly more likely to delay or forgo care and to have unmet needs than their insured counterparts”); see also Associated Press, *Uninsured turn to Groupon for Health Care*, CBSNEWS (Dec. 30, 2011 3:28 PM), <http://www.cbsnews.com/news/uninsured-turn-to-groupon-for-health-care/>.

34. Associated Press, *supra* note 33; see also Ankita Rao, *supra* note 29 (describing how the majority of patients brought into AMG's medical practice through Groupon were low-income, uninsured or on high deductible plans).

35. Associated Press, *supra* note 33.

36. Bob LaMendola, *supra* note 9.

37. Additional issues are posed in the analysis of a daily deal marketing agreement if a government-funded program covers any amount of the services that the patient receives. In this circumstance, all federal and state anti-kickback statutes should be carefully considered. See, e.g., 42 U.S.C. § 1320a-7b.

patients receiving unnecessary and inappropriate medical services.

A. Prohibitions on Fee-Splitting

Since 1847, the AMA Code of Medical Ethics provides the authoritative ethics guide for practicing physicians.³⁸ The Code establishes that it is unethical for a physician to engage in the practice of fee splitting.³⁹ The Code defines fee splitting as a physician paying or receiving payment for the referral of a patient,⁴⁰ and almost all state licensing entities have enacted similar statutes prohibiting fee splitting by healthcare providers.⁴¹

As described in Section II, in the typical scenario where a patient purchases an online voucher for medical services on a daily deal platform, the patient pays the daily deal company the full amount of the discount coupon and the daily deal company then charges the physician fifty percent of that amount by retaining fifty percent of the patient's payment and remitting the remaining balance to the healthcare provider.⁴² In this scenario, ethical violations arise when the dollars retained by the daily deal company represent part of the healthcare provider's fee for providing the patient with medical

38. *History of AMA Ethics*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/about-ama/our-history/history-ama-ethics.page> (last visited Feb. 27, 2014) (providing a general history of the Code of Medical Ethics). While not laws, the AMA Council of Ethical and Judicial Affairs' (CEJA) ethical guidelines are "standards of conduct which define the essentials of honorable behavior for the physician." Frank A. Riddick, *The Code of Medical Ethics of the American Medical Association*, 5 OCHSNER J. 6, 6-10 (2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3399321/>. Members voluntarily agree to abide by the applicable code as a condition of membership and may be subject to AMA sanctions for failure to comply with its guidelines. *Id.*

39. AM. MED. ASS'N COUNCIL ON ETHICAL AND JUD. AFFS, *supra* note 8.

40. *Id.*

41. See, e.g., COLO. REV. STAT. § 12-36-125(1) (2014); HAW. REV. STAT. § 431:10C-308.7(b) (2013); IDAHO CODE ANN. § 54-1814(8) (1994); NEB. REV. STAT. § 38-179 (2013); WIS. STAT. § 448.08(1) (2008); N.C. GEN. STAT. § 90-401 (1994); N.M. STAT. ANN. § 61-6-15(16) (2013); OHIO REV. CODE § 4731.22(B)(4),(17) (2013); TENN. CODE ANN. § 63-6-225(a) (1995); N.Y. EDUC. LAW § 6509-a; FLA. STAT. ANN. § 458.331(1)(i) (2013); 225 ILL COMP. STAT. 60/22.2(a) (2010).

42. Nolan et al., *supra* note 5.

services.⁴³ With this assumption in place, the healthcare provider's conduct may be interpreted as fee splitting.⁴⁴

As it stands today, there is little uniformity and clarity surrounding the issue of whether a medical professional's decision to participate in daily deal advertising violates fee-splitting prohibitions.⁴⁵ The AMA and most state licensing boards have not addressed the issue of fee splitting within the context of medical promotions on daily deal platforms.⁴⁶ Only three state medical licensing boards have taken a position on the legality of these promotions: Illinois, Ohio, and North Carolina.⁴⁷ In these three instances, the states concluded that daily deal advertising as it applies to medical practice is not a *per se* violation of state fee splitting statutes and, under certain circumstances, is permissible.⁴⁸ Without a change in or comment on the majority of existing state policies, however, healthcare providers proceed with caution in arranging daily deal promotions because such arrangements can be considered violations of the ethical and legal rules governing healthcare providers.⁴⁹ It is imperative that the AMA and state licensing boards weigh in on the specific issue of daily deal medical promotions to provide guidance and certainty to those healthcare providers seeking to leverage this

43. *Id.*

44. *Id.*

45. See, e.g., THE STATE MED. BD. OF OHIO, *supra* note 10; N.C. MED. BD., *supra* note 10; ILL. DEPT. OF FIN. AND PROF'L REG, *supra* note 10; but see, e.g., Francis J. Serbaroli, *Internet Discounts on Health Care Services: Strictly Illegal*, 247 N.Y.L.J. (2012), available at <http://www.gtlaw.com/News-Events/Publications/Published-Articles/155511/Internet-Discounts-on-Health-Care-Services-Strictly-Illegal> (discussing the strict illegality of daily deal advertisements).

46. Wailin Wong, *Illinois agency OKs daily deal for medical services*, CHICAGO TRIBUNE BUSINESS (Apr. 16, 2013), http://articles.chicagotribune.com/2013-04-16/business/ct-biz-0416-tech-notebook-20130416_1_daily-deals-lightbank-paul-taaffe (stating that the AMA has not undertaken a legal review of daily deals).

47. THE STATE MED. BD. OF OHIO, *supra* note 10; N.C. MED. BD., *supra* note 10; ILL. DEPT. OF FIN. AND PROF'L REG, *supra* note 10.

48. THE STATE MED. BD. OF OHIO, *supra* note 10; N.C. MED. BD., *supra* note 10; ILL. DEPT. OF FIN. AND PROF'L REG, *supra* note 10.

49. See Francis J. Serbaroli, *supra* note 45.

technology.⁵⁰

B. Increased Risk of Unnecessary or Inappropriate Treatment

Another expressed concern over medical marketing on daily deal platforms where the patient prepays for medical services is the increased risk that the healthcare provider will provide medically unnecessary services or services that the patient is not a suitable candidate to receive.⁵¹ Upon paying for the medical service on the daily deal platform, a patient forms expectations about the eventual receipt of medical services, regardless of whether that patient is suitable for or needs the medical services.⁵² Although the Office of Inspector General (OIG) has not directly addressed the issue of daily deal healthcare marketing, it has expressed concern that healthcare providers in a pre-paid online marketing arrangement will feel unduly pressured to provide the medical services even if unnecessary or inappropriate.⁵³

50. The need for clarity for healthcare providers is what prompted the IDPR to address the issue. The IDPR stated that it issued a policy statement in response to an influx of questions and concerns from healthcare providers on whether daily deal advertisement would subject them to legal scrutiny. *See* Wailin Wong, *supra* note 46; *see also* Michael J. Sacopolos, *The Price is Right: Are group discounts really fee splitting in disguise?*, PLASTIC SURGERY PRACTICE (Sep. 26, 2013), <http://www.plasticsurgerypractice.com/2013/09/the-price-is-right-are-group-discounts-really-fee-splitting-in-disguise/> (explaining that the varying models of daily deal advertising and lack of direction on how to use these arrangements without engaging in fee splitting prompted North Carolina to issue a statement on the issue).

51. Claudia Ahiabor, *supra* note 23 at 72 (Mar. 27, 2012) (citing OFFICE OF INSP. GEN., DEP'T HEALTH & HUMAN SERVS., NO. 12-02 at 8 (2012)), *available at* <https://oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-02.pdf>).

52. *Id.*

53. Nolan, et al, *supra* note 5 (citing OFFICE OF INSP. GEN., DEP'T HEALTH & HUMAN SERVS., NO. 12-02, 8 (2012)), *available at* <https://oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-02.pdf>). The Office of Inspector General's concerns follow that "if a beneficiary bought a pre-paid coupon for Service X, when that beneficiary walks into the offering provider's office requesting Service X – already having paid for Service X – the offering provider might feel pressured to render Service X, even though it is not medically necessary." *Id.*

IV. THE IDPR FRAMEWORK AND WHY IT IS SENSIBLE

A blanket ban on daily deal marketing in the field of medicine due to fee splitting prohibitions is not justifiable on textual or policy grounds. Rather, it is sound policy to permit healthcare providers to leverage a daily deal marketing solution so long as the fundamental concerns at play with fee splitting arrangements are appropriately mitigated. The IDPR's opinion provides a sensible model for how to ethically realize the benefits of daily deal advertising while also ensuring built-in safeguards against fraudulent or abusive tactics.

A. The Requirements Under the Illinois Department of Professional Regulation

The IDPR concludes that daily deal marketing in medicine is permissible so long as four conditions are met.⁵⁴ First, the negotiated fee between the daily deal advertising company and the healthcare provider must be reasonable compensation for the cost of advertising.⁵⁵ Second, all advertisements must disclose a comparison in price between the actual service and the discounted service.⁵⁶ Third, all advertisements must disclose that decisions about health care are made on an individual basis, should not be made in haste, and that all patients may not be eligible for the advertised service.⁵⁷ Fourth, all advertisements must provide a mechanism whereby the patient is entitled to a full refund in the event that the patient is not a candidate for the medical service.⁵⁸

B. The IDPR Framework Does Not Violate the Letter of the Law

As a threshold matter, fee splitting precludes a physician from making or

54. THE ILL. DEPT. OF FIN. AND PROF'L REG., *supra* note 10.

55. *Id.* While the IDPR states that the advertising fee must be reasonable, it does not define what constitutes a reasonable fee. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

accepting a payment solely for a referral.⁵⁹ The IDPR, however, recognizes that the portion of a consumer's payment that Groupon retains represents the cost of advertising and not a referral fee.⁶⁰ Groupon is merely an advertising channel.⁶¹ It does not make any recommendations, but merely provides a platform where healthcare providers can promote their services.⁶² Therefore, a blanket ban on daily deal medical marketing cannot be justified on the face of the fee-splitting statutes, as Groupon's advertising fees do not fall within the purview of the statute.⁶³

C. The IDPR Framework Does Not Violate the Spirit of the Law

Daily deal advertisements for medical services do not threaten the policy reasons that drove fee splitting statutes into existence in the first place. Careful examination of such statutes reveals that their fundamental concern is the best interests of patients and to ensure that a referral for health care is based on competencies and talent, rather than any financial considerations.⁶⁴ To this effect, the Code emphasizes that patients rely on the physician's advice regarding referrals and that fee splitting constitutes a failure to deal honestly with patients.⁶⁵ The fundamental principle, however, that referrals should be based on skill, rather than financial incentive, does not hold true because Groupon is not a referring entity.⁶⁶ Moreover, the risk that a refer-

59. AM. MED. ASS'N COUNCIL ON ETHICAL AND JUD. AFFS, *supra* note 8.

60. THE ILL. DEPT. OF FIN. AND PROF'L REG., *supra* note 10 (providing that daily deal marketing is permissible when the daily deal company retains payments for reasonable compensation for the cost of advertising).

61. Similar ethical and legal implications of daily deal advertising platforms arise in the legal context. Krista Umanos, *Ethics, Groupon's Deal-of-the-Day, and the "McLawyer"*, 81 U. CIN. L. REV. 1169, 1184-85 (2013), available at <http://scholarship.law.uc.edu/uclr/vol81/iss3/12/>. Please refer to this article for an interesting discussion on how Groupon functions as a mere advertising platform and not as a referral agency.

62. *Id.*

63. *See id.*

64. Francis J. Serbaroli, *supra* note 45.

65. AM. MED. ASS'N COUNCIL ON ETHICAL AND JUD. AFFS., *supra* note 8.

66. *See* Krista Umanos, *supra* note 61.

ring physician will breach a patient's trust does not exist, as Groupon is not a physician.⁶⁷ Fee-splitting statutes are designed to combat white coat marketing,⁶⁸ and the policy justifications for its prohibition subside when the patient is not being directed to a physician from another physician.⁶⁹ Because Groupon discloses to the public that it is in the business of marketing goods and services for a fee,⁷⁰ and does not exclusively market healthcare goods and services,⁷¹ there is a low risk that patients will construe Groupon as a referring entity and make a healthcare decision based on misplaced trust.

D. The IDPR Framework Guards Against the Increased Risk of Unnecessary or Inappropriate Treatment

The IDPR's framework for regulating medical marketing on daily deal platforms sufficiently guards against the risk that physicians will provide unnecessary or inappropriate treatment. A disclosure on the discount voucher that the patient is not necessarily a suitable candidate for the medical service mitigates the risk that patients will form inappropriate expecta-

67. See Nolan et al., *supra* note 5 (noting that the OIG, in advisory opinion 12-02, found a low risk of fraud in an advertising agreement between a website that hosted online coupons for healthcare services and healthcare providers where the coupon website was not a healthcare provider).

68. "White coat marketing" occurs where the marketer is a healthcare professional. Claudia Ahiabor, *supra* note 23 at 71.

69. *Id.* (explaining that daily deal websites do not fit into the white coat marketing scheme that is subject to higher scrutiny); see also Anna M. Grizzle & Lori S. Richardson Pelliccioni, *supra* note 4 at 6 (listing advisory opinions issued by the OIG that raises the issue of white coat marketing).

70. See *Groupon FAQs*, GROUPONWORKS, <https://www.grouponworks.com/merchant-resources/FAQs> (last visited Mar. 30, 2014) (disclosing that Groupon charges businesses a marketing fee for advertising and promoting their offers).

71. Claudia Ahiabor, *supra* note 23 at 72 (noting that the distribution of non-health related coupons further shows that a daily deal website is not a healthcare provider or affiliated solely with the healthcare industry).

tions about receiving the service.⁷² An additional disclosure on the discount voucher that the healthcare provider's decision to deliver the particular service is made on a case-by-case basis and depends on the individual patient helps ensure that the provider makes decisions based on the best interests of the individual patient.⁷³ Further, the requirement that a full refund be made available to the patient if the patient is not eligible for the medical service mitigates the risk that healthcare providers will feel undue pressure to deliver the service regardless of need or suitability.⁷⁴

V. CONCLUSION

Healthcare providers who turn to Groupon and similar daily deal platforms to promote their medical services need guidance on how to leverage this technology without running afoul the law.⁷⁵ The AMA and state licensing boards should provide healthcare providers with such guidance and issue a policy statement that adopts the framework set forth by the IDPR.

This framework properly recognizes that daily deal advertisements can be structured so as to comply with fee splitting statutes and guard against any increased risk of unnecessary or inappropriate treatment.⁷⁶ Also, this framework empowers healthcare providers to broaden their patient base, increase access to health care, and evolve with society.⁷⁷

72. See *id.* (discussing the concern that patients develop improper expectations about the receipt of medical services when they purchase medical discount vouchers).

73. See Francis J. Serbaroli, *supra* note 45 (explaining that fee splitting statutes are designed to ensure that health care decision making is based on the best interests of the patient).

74. See Nolan, et al, *supra* note 5 (noting that the OIG is concerned with the undue pressure placed on healthcare providers to provide medical services when payment is fixed in full prior to consultation with the provider).

75. See, e.g., Wailin Wong, *supra* note 46 (recognizing the level of uncertainty that existed in Illinois regarding the use of daily deal platforms for medical advertising prior to the issuance of a statement by the IDPR).

76. See *infra* Section IV.

77. See *infra* Section II.