

Disclosure of Client Information to a Third-Party Supplier

A large national supplier (“Supplier”) of veterinary products is offering increased rebates to the clients of veterinarians who participate in its pet reach program (“Program”). The Program is billed as a free marketing program that will help veterinarians grow their practice. The Program, as a condition of participation, requires the veterinarians to disclose their client contact information directly to the Supplier’s designated marketing vendors. The Supplier would not have access to any client information that is disclosed to the marketing vendors.

The veterinarians are not required to pay any fees to participate in the Program, which apparently is funded entirely by the Supplier. Similarly, the Supplier and its marketing vendors would not make any monetary payments to the participating veterinarians, and all Supplier rebates would be issued directly to the veterinarians’ clients.

The Supplier, through its marketing vendors, would facilitate the transmission of highly targeted client communications, which are designed to offer enhanced rebates on certain of the Supplier’s products, promote the benefits of particular products offered by the Supplier, send refill reminders to current product users, and build relationships with new pet owners. These communications would include the name of the recipients’ veterinarian and, at least implicitly, would suggest that the veterinarian recommends the use of the Supplier’s products. It is possible that a veterinarian could be induced to make such a recommendation by the Supplier’s offer of free marketing services.

Specifically, with respect to marketing service, the Program: (1) provides participating veterinarians with a competitive advantage in the market, as the clients of the participating veterinarians would have access to greater rebates than the clients of non-participating veterinarians; (2) promotes the participating veterinarians by including their names in communications to clients; and (3) provides participating veterinarians with marketing analytics.

I. May veterinarians disclose their clients’ contact information to the Supplier or its vendors if such disclosure would result in increased rebates for its clients?

No, or at least not without prior consent. “Revealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law” (1) constitutes unprofessional conduct, which is punishable as misconduct in accordance with the penalties provided for in Education Law § 6511 (set forth below). Therefore, absent consent, a veterinarian cannot disclose client contact information to the Supplier or its vendors. This is so even if the vendors agree not to further disclose the information to the Supplier. For this reason alone, veterinarians should not participate in the Program as currently constituted.

II. Who would bear the liability for any wrongful disclosure of client information?

The rules regarding confidentiality of client information are applicable to the licensed veterinarian, but not the Supplier. Thus, it would be the veterinarian, not the Supplier, who would face penalties for disclosing client information to the Supplier’s marketing vendors.

III. What may be done to prevent a competing veterinarian from obtaining a perceived unfair competitive advantage by making unauthorized disclosure of client information to the Supplier’s marketing vendors?

A veterinarian who is in violation of the non-disclosure rules may be reported to the office of professions for engaging in unprofessional conduct. Such unprofessional conduct is punishable as misconduct in accordance with the penalties provided for in Education Law § 6511. Such penalties can include the following:

(1) NY Educ. § 6530(23).

- (1) Censure and reprimand;
- (2) Suspension of the veterinarian;
 - Wholly, for a fixed period of time;
 - Partially, until the veterinarian successfully completes a course of retraining in the area to which the suspension applies; or
 - Wholly, until the veterinarian successfully completes a course of therapy or treatment prescribed by the regents.
- (3) Revocation of license;
- (4) Annulment of license or registration;
- (5) Limitation on registration or issuance of any further license;
- (6) A fine not to exceed Ten Thousand Dollars (\$10,000), upon each specification of charges of which the veterinarian is determined to be guilty;
- (7) A requirement that a veterinarian pursue a course of education or training; and
- (8) A requirement that a veterinarian perform up to one hundred (100) hours of public service, in a manner and at a time and place as directed by the Veterinary Medicine Board. (2)

IV. Can a veterinarian accept free marketing services from the Supplier in exchange for the veterinarian's recommendation of the Supplier's products?

No. Based on the information provided, it does not appear that the veterinarian would receive any direct monetary payment from the Supplier. Rather, the facts presented suggest, it is the veterinarian's client who would receive the direct benefit of an increased rebate for the Supplier's products.

However, the veterinarian could be viewed as receiving compensation in the form of free marketing services from the Supplier in exchange for the recommendation of the Supplier's products. Indeed, the entire Program appears to be premised on the concept that the veterinarians would, at least implicitly, recommend the Supplier's products by having their names on the Supplier's promotional materials. This would likely constitute unprofessional conduct as defined by the New York Board of Regents.

The definition of unprofessional conduct includes:

- (1) Exercising undue influence on the patient or client, including the promotion of the sale of services, goods, appliances or drugs in such manner as to exploit the patient or client for the financial gain of the practitioner or of a third party; and
- (2) 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. (3)

Receipt of free marketing services from the Supplier could cause a veterinarian's conduct to fall within the above enumerated unprofessional conduct standards, which are punishable as misconduct, in accordance with the penalties provided for in Education Law § 6511 (set forth above). For this reason alone, it appears veterinarians would be at risk of committing unprofessional conduct by participating in the Program.

Additionally, the American Veterinary Medical Association ("AVMA") offers helpful insight explaining that "a veterinarian may not accept payment of any kind, in any form, from any source, such as a pharmaceutical company or pharmacist, manufacturer of medical appliances and devices, for prescribing or referring a patient to said source. In each case, the payment violates the requirement to deal honestly with clients and colleagues. The client relies upon the advice of the veterinarian on matters of referral and prescribing. All referrals and prescriptions must be based on the skill and quality of the veterinarian to whom the patient has been referred or the quality of the drug or product prescribed. (4)

(2) NY Educ. § 6511.

(3) Rules of the New York Board of Regents, Part 29.1(2) and (3).

(4) Principles of Veterinary Medical Ethics of the AVMA, <https://www.avma.org/KB/Policies/Pages/Principles-of-Veterinary-Medical-Ethics-of-the-AVMA.aspx>.

The Program appears to also violate this AVMA prohibition, as the free marketing services could be considered to be in exchange for the recommendation of the Supplier's products.

V. Does the Supplier's program implicate the advertising rules?

Yes. Advertising, as defined by the Principles of Veterinary Medical Ethics of the AVMA, is "communication that is designed to inform the public about the availability, nature, or price of products or services or to influence clients to use certain products or services." (5) Generally, New York law permits veterinarians to advertise provided it is in the "public interest." (6)

Although the law and related guidance does not define the meaning of "public interest" in this context, one could reasonably conclude that "advertising" that is facilitated through the improper disclosure of client information is not in the "public interest." Further, to the extent that the "advertising" involves the recommendation of a product in exchange for free marketing services, one could reasonably conclude that such "advertising" is not in the "public interest."

(5) *Id.*

(6) *Rules of the New York Board of Regents, Part 29.1(12).*