

## **Partnering with Online Pharmacies**

A “partner pharmacy” is a turnkey online pharmacy solution that “partners” with veterinary practices to deliver pharmacy services to the practice’s animal patients in exchange for a fee. We were asked whether such arrangements are legal in light of New York’s corporate practice of medicine and fee-splitting rules.

### **Describing the “Partner Pharmacy” Arrangement**

There are many ways to structure a partner pharmacy arrangement, which is essentially a type of pharmacy service outsourcing, and we did not perceive that any one structure predominates the market. We selected one particular model, described below, to facilitate a practical review of the legal issues, however, it should be noted that our analysis applies only to this particular model.

In the model we reviewed, veterinary practices are permitted to sign up either as a “partner practice” or as a “referral clinic.”

In a referral clinic arrangement, veterinarians simply refer clients to the website for purchase of prescription drugs, and the site generates an approval request to the veterinarian whenever a client purchases from the site. There is no monetary arrangement.

In the “partner practice” arrangement, the veterinary practice enters into an agreement with, or “subscribes” to, the partner pharmacy website. The veterinarian then sets up an online “store” on the website; setup includes deciding what products to offer in the store and the selling price for each of the products. Setup also includes some customizing of the look and feel of the store so that it matches or at least aligns with the veterinarian’s own website, and links are established from the veterinarian’s own website to the store for smooth transition.

Once the store is setup and open, veterinary clients can then shop online at the store for prescription drugs, compounded drugs, dietary products, and other products. The veterinarian is charged the wholesale cost of the product at the point of purchase, and the partner pharmacy charges a volume-variable fulfillment fee for each order. The veterinarian keeps what is left over after the product cost and fulfillment fees have been paid. Veterinary clients generally pay for shipping, which is available in standard and expedited modes.

The veterinarian receives a notice of any orders placed through his or her online store and has the option of approving or denying the purchase. Veterinarians can also create prescriptions for patients from the partner pharmacy’s “online tool.” The client then receives an e-mail with a direct-link to purchase the product exactly as prescribed.

The partner pharmacy we reviewed is located centrally in the continental United States and ships products from there. An online disclosure form states that the business operator holds a pharmacy license for many states, including the State of New York.

Below, we look at some legal and compliance aspects of the “partner practice” arrangement.

### **AVMA Guidance**

The American Veterinary Medical Association (AVMA) published a Q&A which includes the following regarding online pharmacies:

Q: I’d like to set up an online pharmacy for my clients to use. Is this legal, and what do I need to disclose to my clients?

A: Some clinics choose to enter into agreements with businesses that appear to function as online pharmacies, but dispense medications only to that practice's clients. These arrangements can be very convenient for both the practice and the pet owner, yet veterinarians should be sure they follow state rules, including any requirements for disclosures to clients regarding business relationships and potential conflicts of interest. Please keep in mind that, even if you provide this online pharmacy service for your clients, your clients still have the option of filling a prescription at any pharmacy.

This is a tepid endorsement of online pharmacies, but typical of the approach that we see in guidance. Essentially, the message about partner pharmacies boils down to: "mostly good, potentially bad, be careful." This is true with respect to New York guidance as well.

## **Referral Fees**

In New York, it is considered professional misconduct to directly or indirectly offer, give, solicit, or receive any fee or other consideration to or from a third party for the referral of a patient or in connection with the performance of professional services. (New York Education Law Section 6530(18) and 8 NYCRR 29.1(b)(3).) Veterinarians are disciplined from time to time for engaging in referral fee arrangements. For example, in *Cooke v. New York State Educ. Dept.*, 162 A.D.2d 901 (3d Dept. 1990), a veterinarian lost his license for accepting fees from a pharmaceutical dealer to conduct site visits to farms after which he would write prescriptions for drugs sold by the same company.

In addition, the AVMA has adopted a policy known as the "Principles of Veterinary Medical Ethics" or "PVME." One principle of this policy requires that veterinarians "be free to choose whom to serve, with whom to associate, and the environment in which to provide veterinary medical care." Annotations to this principle include the statement that veterinarians "are entitled to charge fees for their professional services" including "a fee for the services the veterinarian provides in conjunction with the use of third-party providers such as laboratories, pharmacies, and consulting veterinarians" but cautions 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 the monetary arrangement we reviewed, there are no fees paid to the veterinarian. The residual amounts paid over to the veterinarian after the sale of a drug are similar to the pricing and margin model for a veterinarian dispensing drugs from his or her own office site, and so should not be of concern.

It is possible, however, that a regulatory authority could view the provisioning of an "online store" to subscribers for "free" is, in effect, giving "consideration" in exchange for the referral of a patient. Such an arrangement is of concern to physicians, for example, because of prevailing regulatory opinions governing medical practitioners. While online veterinary pharmacy stores are fairly common and we are not aware of any occasions in New York in which a veterinarian was disciplined for such an arrangement, a regulator could reasonably conclude that providing a free software arrangement to a veterinarian is an improper giving of consideration in exchange for a referral from the veterinarian, especially if the free software permits the veterinarian to engage in business transactions that result in profit to the veterinarian.

However, until pronouncements are forthcoming from New York regulators, veterinarians are left with no clear guidance on whether such arrangements could violate the referral fee prohibitions.

## **Fee Splitting**

In New York, it is considered professional misconduct to permit any person to share in the fees for professional services other than another licensed professional who is a partner, employee, or associate of the practice or a professional subcontractor or professional consultant. (N.Y. Education Law Sec. 6530(19).) This prohibition specifically includes any arrangement where the amount received in payment for furnishing services is a percentage of, or otherwise dependent upon, the income or receipts of a professional licensee.

In the described partner pharmacy arrangement, the veterinarian is responsible for setting the prices for products sold through the store. The product cost and the fulfillment fee are presented as flat fees that do not appear to vary with the price of the offered product. The fact that the fulfillment fee is volume-sensitive and decreases in relation to the volume of products sold is a common business practice and should not change the analysis under the fee-splitting provision.

We note, however, that it is impossible to verify without a deeper investigation into whether the product cost and fulfillment fee are in fact fixed prices, or whether they are calculated as a percentage of the listed product price. If the fulfillment fee and/or the product cost goes up in direct relation to the retail product price, a New York veterinarian using this arrangement would be at risk of an accusation of fee-splitting.

We also note, in passing, that the AVMA definition of “fee-splitting” is “payment by a receiving veterinarian of part of their fee to the referring veterinarian who has not rendered professional services.” AVMA affirmatively states that “under this definition, the use of consultants, laboratory services, and online pharmacies does not constitute fee-splitting.” New York’s fee-splitting language is considerably stronger, however, and the AVMA interpretation is neither determinative nor likely to be persuasive.

## **Electronic Prescribing**

The website of the partner pharmacy we reviewed suggests that a mechanism is available for the veterinarian to enter a prescription for a patient, and that the online tool “integrates with many of the practice management software used by practices today.”

Electronic prescribing is permissible in New York (and in fact will soon be mandated for practitioners other than veterinarians) but certain restrictions apply. In order to prescribe controlled substances electronically, the veterinarian must:

- use software that meets all federal security requirements for Electronic Prescribing of Controlled Substances (“EPCS”);
- complete an “identity proofing” process, as defined in federal requirements;
- obtain a two-factor authentication, as defined in federal requirements; and
- register the DEA-certified EPCS software with the Bureau of Narcotic Enforcement (“BNE”).

Additional requirements apply as well. Prescribing controlled substances on non-compliant electronic systems will violate both federal and state law. Prescribing non-controlled drugs (such as aspirin, say) or dietary products on a non-compliant electronic system, while not violating federal law, still contravenes New York State requirements. [\*\*\*Add when available\*\*\* For more detail information about electronic prescribing, please see <<“Electronic Prescribing in New York”>>[link to article on electronic prescribing].”

It is unclear whether the electronic prescribing tool of the pharmacy we reviewed would comply with applicable requirements. Although the pharmacy’s website describes many certifications among its credentials, DEA certification is not one of them. They do, however, advertise an independent internet pharmacy verification certification which “ensures that [they] follow all laws and regulations of the Boards of Pharmacy, the Drug Enforcement Agency (DEA), and the Food and Drug Administration (FDA).” This is an area where veterinarians should exercise the most caution; using a non-compliant prescribing tool could cause problems with both state and federal regulators and could provoke aggressive agencies such as the DEA into action. We suggest practitioners fully investigate and verify the compliance of online prescribing tools with applicable requirements.

## **Conclusion**

As the AVMA guidance suggests, online partner pharmacy arrangements raise important compliance issues that could significantly impact a veterinarian’s practice and livelihood. Veterinarians partnering with online pharmacies are encouraged to review the specific arrangement with legal and financial professionals to ensure compliance risks are appropriately identified and managed.