

Gratitude or Grift: The Perils of Physician Gifts to Patients and Referral Sources (Part 2 of 2)



By Mark A. Ison, J.D.

***Note:** If you missed Part 1 of this article in the March 2023 Sentinel, please click [here](#) to read it.*

Ethical Obligations

Codes of professional ethics typically address (and prohibit) the payment or receipt of kickbacks, but also may address the separate and sensitive issue of whether a provider may accept a gift *from* a patient. As most providers know, accepting a gift from a patient is about much more than merely saying “thank you” or avoiding giving offense, as such a gift

can complicate the provider-patient relationship. In particular, the American Medical Association *Code of Ethics* (which has been adopted as binding on physicians in many states, including Tennessee) provides:

Patients offer gifts to a physician for many reasons. Some gifts are offered as an expression of gratitude or a reflection of the patient's cultural tradition. Accepting gifts offered for these reasons can enhance the patient-physician relationship. Other gifts may signal psychological needs that require the physician's attention. Some patients may offer gifts or cash to secure or influence care or to secure preferential treatment. Such gifts can undermine physicians' obligation to provide services fairly to all patients; accepting them is likely to damage the patient-physician relationship. The interaction of these factors is complex and physicians should consider them sensitively before accepting or declining a gift.

AMA Code of Ethics, Op. 1.2.8.

In particular, and as the *AMA Code of Ethics* notes, providers to whom a patient offers a gift should:

- consider the gift's value relative to the patient's or provider's means and should decline gifts that are disproportionately or inappropriately large, or when the provider would be uncomfortable to have colleagues know they accepted the gift;
- not allow the gift or offer of a gift to influence the patient's medical care; and
- decline a gift if acceptance would present an emotional or financial hardship to the patient's family.

Alternatively, a provider could suggest that the patient make a charitable contribution instead of a gift to the provider. If a patient makes such a contribution, the recipient charity should be a *bona fide* tax exempt organization that is independent of, and not controlled by, the provider. Whether the provider may suggest a gift to a particular organization, and whether the patient may give a gift to an organization in which the provider participates through management (e.g., as a board member) or services (e.g., as a volunteer or staff member), would depend on the specific circumstances and whether the gift to the organization could reasonably be viewed as benefitting the provider in some way.

For example, a suggestion by a provider that a patient make a gift to the American Heart Association, even if the provider serves on the local board or provides volunteer services for the organization, would probably pose little to no risk of violating ethical standards (or applicable laws governing healthcare fraud, waste and abuse). On the other hand, a gift to a private foundation controlled by the provider or benefitting the provider or the provider's patients in some targeted way, or to an organization that materially compensates the provider for the provision of services, would likely give rise to the same concerns as a gift made directly to the provider.

Takeaways and Specific Circumstances

Often, when considering whether a proposed course of conduct would violate healthcare fraud and abuse laws, it is helpful to consider how one would explain the conduct to a cynical government regulator. Such an exercise can highlight the differences between ordinary business activities, such as marketing and showing gratitude for business relationships, and problematic behavior intended to induce or reward referrals.

While no general recitation of “good” and “bad” characteristics is a substitute for expert legal advice in a given case, and no gift of any value is truly free from all compliance risk, some gifting scenarios are common enough that they can be distilled into general rules of thumb for providers to keep in mind when considering giving a gift to, or receiving a gift from, a patient or referral source. Those rules include the following:

- Develop an internal policy regarding giving and receiving gifts, ideally in consultation with an attorney. The policy should address
 - limits on the value of permissible gifts;
 - a central authority for deciding when gifts are appropriate;
 - a means of keeping timely, accurate, and complete records of gifts given and received and their value;
 - guidelines for when gifts must be considered the property of a practice as opposed to a particular provider; and
 - procedures for reporting and addressing violations of the gift policy, and training requirements for staff.
- Gifts given or received in proportion to referrals or other business generated between the giver and recipient are inherently suspect. A gift, or the value of a gift, should not be dependent upon a particular volume or value of referrals or business generated.
- Cash gifts are generally prohibited, as are cash equivalents. Avoid giving gift cards where possible, as they are typically considered cash equivalents. If a gift card is redeemable for a single item or small group of items (as opposed to a Visa gift card or big-box store gift card), there is some guidance providing that the gift card would not be considered a cash equivalent, but the line is not always clear.
- For purposes of applying the dollar limits set out in the Stark Law and CMPL, and the AKS standard of “nominal value,” the value of a gift is its fair market value at the time given, not a subjective value determined by the giver or recipient.
- For purposes of applying the dollar limits set out in the Stark Law and CMPL and the AKS standard of “nominal value,” the overall cost of a gift for the benefit of a group of people who share alike in the enjoyment of the gift (e.g., a meal for a group of people) is generally allocated among the participants on a per capita basis.
- Give customary gifts of nominal value wherever possible, staying within the applicable limits of the Stark Law’s “de minimis” exception and the CMPL’s dollar limits for gifts to patients.
- Compliance with the AKS, Stark Law, or CMPL doesn’t necessarily equal

- compliance with the others (or applicable state law, codes of ethics, etc.).
- Bona fide charitable contributions to tax-exempt organizations independent of the parties to a referral relationship are generally acceptable. However, beware of situations where:
 - a charitable contribution is solicited as a condition of referrals;
 - a contribution is made in a manner that takes into account the volume or value of referrals or other business generated for the contributor;
 - a contribution will inure to the benefit of targeted individuals such as patients or referral sources;
 - a contribution involves a private foundation or organization controlled by a party to a referral relationship;
 - or a contribution is otherwise intended to reward or induce referrals.
 - Raffles and sweepstakes for patients may pass muster under the CMPL and AKS where the prizes are reasonable, the chance of winning nominal, and the group of participants sufficiently large (ideally including the general public). In such cases, the value of the prize could reasonably be divided per capita among participants for purposes of the CMPL dollar limits but note that there is no firm guidance on these activities. Similar events involving only existing patients are risky, and providers should avoid raffles and similar contests involving referral sources. Also, be aware of state sweepstakes, lottery, or similar laws.
 - Any gift tied to the purchase of a service (e.g., a new patient gift) is suspect.
 - Be reasonable and be ordinary. Valuable or extraordinary gifts carry more risk, no matter the context and mindset in which they are given.
 - Do not give or accept any gift if it would be embarrassing to have the gift become known to colleagues or reported in the media.
 - An alternative show of appreciation (e.g., a handwritten note) can be as meaningful or more meaningful than a gift (particularly a gift fitting within restrictive federal guidelines) without the risk of violating the law.
 - Reasonable meals that stay carefully within federal guidelines generally pose a low compliance risk and, of course, offer the opportunity for face-to-face interaction with the recipient.

Ultimately, as much as a physician or other healthcare provider may appreciate his or her patients and referral sources, any expression of appreciation beyond words of thanks raises at least the potential for legal exposure. Providers considering giving or receiving gifts should do so carefully and intentionally, keeping applicable law, published guidance, and internal policies in mind and considering whether to consult with an experienced health care attorney to minimize the chances that gratitude is mistaken for a gift.

If you have questions regarding gifts, SVMIC recommends contacting your corporate attorney or our Medical Practice Services Department at ContactSVMIC@svmic.com or 800.342.2239.

The contents of The Sentinel are intended for educational/informational purposes only and do not constitute legal advice. Policyholders are urged to consult with their personal attorney for legal advice, as specific legal requirements may vary from state to state and/or change over time.