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THE CALIFORNIA BOARD OF DENTAL EXAMINERS has requested an opinion on the following question:

Is the operation of a dental referral service as described herein prohibited by sections 650, 651, 1680(j) or 1701(g) of the Business and Professions Code?

CONCLUSION

The operation of a dental referral service as described herein is prohibited by section 650 of the Business and Professions Code but not by its sections 651, 1680(j) or 1701(g).

ANALYSIS

We are asked whether the operation of a dental referral service violates those sections of the California Business and Professions Code which prohibit the payment of commissions or other consideration for the referral of patients (§ 650), the dissemination of false or misleading representation (advertising) (§ 651), the employing or use of solicitors (§ 1680, subd. (j)), and the practice of dentistry under a false or fictitious name (§ 1701, subd. (g)).[1] In connection therewith we are advised as follows: The classic referral service is an enterprise which will advertise the availability of dental services in appropriate media, giving a referenced telephone number which prospective patients can call to obtain the names of one or more dentists in their locality. The service may operate under a fictitious or trade name (e.g., "XYZ Dental Referral Service, Inc."), and may either be owned and operated by the participating dentists themselves, or under the auspices of a local dental society, or by a commercial entity that may be totally independent of dental professionals. To avail themselves of a dental referral service, the participating dentists pay a fee which may be fixed without regard to the number of patients referred (e.g., as with a flat fee assessed initially and/or monthly), or which may vary depending on the number of patients referred or the percentage of business generated.

As thus described we see a new phenomenon in the practice of dentistry, the operation of a dental referral service. While the particular operation of each service may vary, they all have in common the existence of a contractual relationship between the referral service and individual dental offices or dentists by which the referral service, in exchange for the payment of money, agrees to implement and engage in extensive advertising in the name of the referral service. Through this advertising, the consuming public is invited and encouraged to contact the referral service for the identity of a dentist who may satisfy a prospective patient's dental needs. Obviously, prospective patients will only be referred to dentists who have contracted with the referral service. Although the identity of the contracting dentists is not disclosed in the advertisements placed by the service, they are nonetheless able to obtain new patients who may call the service in response to its advertisements.

We conclude that while the operation of a dental referral service as described does not violate the provisions of sections 651, 1680(j) and 1701(g) it does violate the proscription on the payment of "any consideration" for patient referrals found in section 650.

1. Section 650 (Payment for Referrals)

[1] Section references are to the Business and Professions Code unless otherwise indicated.

Section 650 makes it unlawful for any healing arts licensee to offer, deliver, receive or accept "*any rebate*, refund, *commission*, preference, patronage dividend, discount, *or other consideration*, *whether in the form of money or otherwise*, *as compensation or inducement for referring patients* . . ., to any person, irrespective of any membership, proprietary interest or coownership in or with any person to whom such patients . . . are referred." The section was enacted (1) to ensure that referrals would not be induced by considerations other than the best interest of the patient (63 Ops.Cal.Atty.Gen. 89, 92 (1980)) and (2) to prevent patients being charged more for treatment because of an additional hidden fee imposed to recoup payment for securing the referral (53 Ops.Cal.Atty.Gen. 117, 118 (1970); 16 Ops.Cal.Atty.Gen. 18, 20-21 (1950)).

Since the prohibitions contained in section 650 extend to offer and delivery as well as to receipt or acceptance, only one of the two parties to a referral fee transaction need be a licensee in the healing arts for it to be illegal. (53 Ops.Cal.Atty.Gen., *supra*, at p. 118; cf. § 125 (conspiring with an unlicensed person to violate any section of the code).) Does it apply then to the dentist who participates in the referral service plan described herein to which he pays a fee, whether fixed or variable, for its referral of patients to him? We believe it does.

As originally enacted section 650 proscribed "the offer, delivery, acceptance or receipt . . . of any *unearned* rebate . . . commission, or other *unearned consideration*." (Stats. 1949, ch. 899, *supra*.) Accordingly, when called upon to apply or interpret the section, opinions of this office and of the courts concluded that only those arrangements were illegal wherein the consideration paid for the referral was not commensurate with the services rendered or expenses incurred by the receiver, but that no violation occurred where the fee paid reasonably approximated their true value. (See 53 Ops.Cal.Atty.Gen., *supra*, at p. 119; 55 Ops.Cal.Atty.Gen. 107, 108 (1972); 16 Ops.Cal.Atty.Gen., *supra*, at p. 23, 24; *Blank* v. *Palo Alto-Stanford Hospital Center* (1965) 234 Cal.App.2d 377, 390.) Nevertheless even those opinions declared illegal both (a) the payment of consideration based upon *net* income generated by referrals since that in effect would constitute a partnership or joint venture dividing profits based upon the amount of referral (55 Ops.Cal.Atty.Gen., *supra*, at p. 108; 16 Ops.Cal.Atty.Gen., *supra*, at p. 24; cf. *Blank* v. *Palo Alto-Stanford Hospital Center*, *supra*, at p. 390) as well as (b) the payment of consideration solely for the referral itself, i.e., where no other valuable service was rendered to justify the consideration paid (53 Ops.Cal.Atty.Gen., *supra*, at p. 119).

In 1971, however, the qualifier "unearned" was deleted from section 650. (Stats. 1971, ch. 1568, p. 3148, § 1.) We must assume that in making that change the Legislature intended to broaden the scope of coverage of the section by making unlawful the offer or delivery of *any* refund, "commission or other consideration for referring a

patient," whether it is "earned" or not. (64 Ops.Cal.Atty.Gen. 192, 201-202 (1981); cf. *Emmolo* v. *Southern Pacific Co.* (1949) 91 Cal.App.2d 87, 92.)

The referral plan about which inquiry is made fits squarely within the section's broad prohibition. The verb "refer" is defined as "to send or direct for treatment, aid, information, decision" (Webster's Third New Internat. Dict., (1971 ed.) at p. 1907, def. (2a)) and a "referral" as "the process of directing . . . a patient . . . to an appropriate specialist or agency for definitive treatment" (*id.*, at p. 1908, def. (1b)). The phrase "referral of patients" used in section 650 may thus be thought of as the process whereby a third party independent entity who initially has contact with a person in need of health care first *selects* a professional to render the same and then in turn places the prospective patient in contact with that professional for the receipt of treatment. In other words it is the selection of a dentist to provide professional services for a patient by someone other than the patient or dentist (or their employees or agents on their behalf) that constitutes the "referring of patients" under section 650. In our situation, the individual dentists who participate in the referral service plan pay a fee to just such a third party independent entity to secure new patients by being selected by it to render professional services to persons who have contacted it, and not the dentist, initially. As we have seen section 650 was designed to ensure that that selection and subsequent reference would not be tainted by the receipt of a fee and that the patient would not pay more for the ultimate services he receives because of it. (63 Ops.Cal.Atty.Gen., *supra*, at p. 92; 53 Ops.Cal.Atty.Gen. *supra*, at p. 118; 16 Ops.Cal.Atty.Gen., *supra*, at pp. 20-21.) Inasmuch as in the process described herein consideration *is paid* to obtain the advantage of being selected by the referral service to be the treating professional, a violation of section 650 occurs. We therefore conclude that the operation of a dental referral service described herein runs afoul of section 650's prohibition on payment for referrals, and is therefore prohibited by that section.

2. Section 651 (False Advertising)

Section 651 makes it unlawful for a healing arts licensee, such as a dentist, to:

> "[D]isseminate or cause to be disseminated, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim, for the purpose of or likely to induce, directly or indirectly, the rendering of professional services or furnishing of products in connection with the professional practice or business for which he is licensed." (§ 651, subd. (a).)

The section describes activity that it deems to be the making of false, fraudulent, misleading or deceptive statements or claims (*id.*, subd. (b)),[2] and it limits the types of information which may be included in any professional's advertising to (a) his name, address, telephone number(s), office hours, language proficiency, certification, education, publications, teaching experience, hospital or clinical affiliation(s); (b) to information regarding his fee schedule (and amenability to being paid in installments); and (c) to information regarding his providing services under a specified private or public insurance plan or health care plan.

We find nothing in section 651 to prohibit a dentist's utilization of the services of a dental referral service, or to prohibit the service itself. If anything, the section appears to tacitly accept such an endeavor speaking as it does of a dentist's disseminating statements "in *any* form of public communication . . . to induce . . . the rendering of professional services." (*Id.*, subd. (a).) The section proscribes only the dissemination of information which is false or fraudulent or is otherwise misleading or deceptive, and it specifically permits the type of information we are told a referral service is wont to provide, i.e., the professional's name, address, telephone number(s), office hours, charges and fees. As such, we cannot say that the cooperative advertising venture would be *inherently* deceptive. As long as the information about the professionals contained both in the advertisements of the service itself *and* in the subsequent statements it makes to prospective patients remains within the parameters defined by section 651, a dentist's utilization of the medium of the referral service would not violate that section.[3] Of course where the referral service transcends those bounds the participating dentist would be held accountable for at least indirectly disseminating improper statements in that "form of communication." (§ 651, subd. (a).)

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[2] A false, fraudulent, misleading or deceptive statement is defined to include one which, (1) contains a misrepresentation of fact, (2) is likely to mislead because of failure to disclose material facts, (3) is likely to create false or unjustified expectations of favorable results, (4) relates to fees but does not disclose all variables and other material factors, or (5) will cause an ordinarily prudent person to misunderstand or be deceived. (§ 651, subd. (b).) Section 651, subdivision (c) also demands that price advertisements be exact and that any use of words of comparison in describing services or costs of services be based on verifiable substantiating data.

[3] Section 651 does not require that information concerning all the items mentioned therein be presented in an advertisement (*id.*, subd. (h) "*may* include only the following" cf. 19 ("may" is permissive)) as long as the failure to disclose a material fact would not be misleading or deceptive (§ 651, subd. (b)(1)). We therefore reject the suggestion that the failure to include the *names* of the participating dentists taints the advertising. Where the Legislature has intended to proscribe anonymous advertising by professionals it has specifically done so. (See, e.g., § 2272 (formerly § 2380.5) (medicine).)

3. Section 1680(j) (Solicitation)

Section 1680, subdivision (j) declares "the employing or making use of solicitors" to be unprofessional conduct for a dentist, and it would thus constitute ground for disciplinary action against him under section 1670. Does the dentist who participates in a referral service of the type described herein violate its proscription? We believe not.

In *Aetna Bldg. Maintenance Co.* v. *West* (1952) 39 Cal.2d 198 our Supreme Court adopted a definition of the term "solicit" that requires direct personal contact and importuning, pleading and entreaty. Said the Court:

> "'Solicit' is defined as: 'To ask for *with* earnestness, to make petition to, to endeavor to obtain, to awake or excite to action, to appeal to, or to invite.' (Black's Law Dictionary, 3d ed., p. 1639.) 'It implies *personal petition and importunity addressed to a particular individual to do some particular thing*, . . .' (*Golden & Coe* v. *Justice's Court*, 23 Cal.App. 778, 798 [140 P. 49].) It means: 'To appeal to (for something); to apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading, to entreat, implore, or importune; to make petition to; to plead for; to try to obtain.' (*People* v. *Phillips*, 70 Cal.App.2d 449, 453 [160 P.2d 872].)" (39 Cal.3d at pp. 203-204.)

Given this frame of reference, we do not consider the activities of the dental referral service as described herein to fall within its rubric. The referral service does not require any particular importunity, entreaty, imploration, or supplication for its operation. Nor are its efforts directed at any particular individual. To the contrary, its efforts are directed to the public *in general* in *general* advertising terms which indicate dental services *are available* if needed. It is the individual patient in need of a dentist who initiates the first personal contact with the service and who is then referred by it to a dentist. The fact that a dental referral service may advertise or otherwise inform the public of *the availability* of dental services does not constitute solicitation. (Cf. *Barron* v. *Board of Dental Examiners* (1930) 109 Cal.App. 382, 384-385 (mere advertising does not constitute the employment of persons as cappers or steerers under former 13 of the Dental Act) (Stats. 1915, ch. 426, p. 706, § 13); *Aetna Building Maintenance* v. *West*, *supra*, 39 Cal.2d at p. 204 (informing customers of one's former employer of change of employment is not solicitation; neither is the willingness to discuss business on the invitation of another solicitation on the part of the invitee).) In short we find nothing in the nature or operation of a dental referral service which would lead to the conclusion that it is engaged in activities which constitute "solicitation." Accordingly we conclude that a dentist's use of the service would not constitute "the employing or making use of solicitors" within the meaning of section 1680, subdivision (j).

4. Section 1701 (g) (Practice of Dentistry Under A False or Fictitious Name)

Section 1701, subdivision (g) declares it unlawful for any person to practice, to advertise or to indicate in any other manner, that he is practicing or will practice dentistry under any false or fictitious name or any name other than the one by which he is licensed.[4] Section 1625 provides that a person is deemed to practice dentistry who does any one or more of the following:

> "(a) By card, circular, pamphlet, newspaper or in *any other way advertises himself or represents himself to be a dentist*.
>
> "(b) *Performs*, or offers to perform, *an operation or diagnosis of any kind*, or treats diseases or lesions of the human teeth, alveolar process, gums, jaws, or associated structures, or corrects malposed positions thereof.
>
> "(c) *In any way indicates that he will perform by himself or his agents* or servants any operation upon the human teeth, alveolar process, gums, jaws, or associated structures, or in any way indicates that he will construct, alter, repair, or sell any bridge, crown, denture or other prosthetic appliance or orthodontic appliance.
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> "(d) Makes, or offers to make, an examination of, with the intent to perform or cause to be performed any operation on the human teeth, alveolar process, gums, jaws, or associated structures.
>
> "(e) Manages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed." (Emphases added.)

Under this definition it is clear that *the referral service* is not advertising that *it* is practicing dentistry. It does not represent itself to be a dentist, it does not offer to perform dental examinations, diagnoses or procedures, and it does not manage a dental office. But the question remains as to whether *the dentist* who utilizes the service as a

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[4] The section reads as follows:

> "Any person is . . . guilty [of a misdemeanor for a first offense, a felony for the second] who . . . (g) [u]nder any false, assumed or fictitious name, either as an individual, firm, corporation or otherwise, or any name other than the name under which he is licensed, practices, advertises or in any other manner indicates that he is practicing or will practice dentistry, except such name as is specified in a valid permit issued pursuant to Section 1701.5."

vehicle to obtain patients thus practices dentistry or advertises *his* practice of dentistry under a name other than the one by which he is licensed and thus violates section 1701, subdivision (g).

At the time section 1701 was enacted in 1937 (Stats. 1937, ch. 415, p. 1377) the manners in which a dentist might presently "indicate" that he was practicing dentistry could not have been fully known. The anathema on professional advertising was not to be removed until a much later time (cf. *Va. Pharmacy Bd.* v. *Va. Consumer Council* (1976) 425 U.S. 748, 771-772; *Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350, 383; *Ohralik* v. *Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456; *Friedman* v. *Rogers* (1979) 440 U.S. §§ 1, 9, 10-11, fn. 9) and the notion of a dental referral service was yet unborn. Nonetheless we must apply subdivision (g) in a manner that is consistent with the purposes for which it was enacted (cf. *California Teachers Assn.* v. *San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698) and therefore decide whether the operation of a dental referral service at present is antithetical to those ends.

In *Berry* v. *Alderson* (1922) 59 Cal.App. 729 the court interpreted the legislative purpose behind the passage of a cognate section contained in the 1913 Medical Practice Act (Stats. 1913, ch. 354, p. 734, § 14, subd. (8)) as follows:

> "Our view is that the legislature intended that a person to whom the privilege had been granted of practicing medicine and representing himself to the world as qualified and worthy of the confidence of the sick, should, when offering his services by advertisement or announcement, do so under his own name. This simple requirement, so easily complied with, was not aimed particularly at the person who was willing to incur the odium of actual fraud, but was *designed to offer a much wider protection to the public by assuring to it a reasonable certainty of knowing in every case precisely with whom it was dealing*, the importance of the relation of physician and patient, and the very serious consequences which might follow improper, unskillful or negligent treatment, rendering such openness and candor particularly desirable. That the provision of the law in question is neither vague nor indefinite is obvious. Every person with intelligence enough to have been granted a license to practice medicine must be presumed to know his own name. When such a person is informed in so many words that in any announcement or advertisement of his practice he may not use a name other than his own, i.e., if he uses any name at all it must be his own name, there can be no doubt that he understands precisely what is required. It would, indeed, be difficult to put it in plainer language." (59 Cal.App. at pp. 732-733.)

(See also *Friedman* v. *Rogers*, *supra*, 440 U.S. at pp. 12-13, 15-16 (Texas prohibition on optometrist's use of fictitious trade names, valid).) We can safely presume a similar legislative intent behind the enactment of subdivision (g) -i.e., assuring the public a reasonable certainty of knowing precisely with which dentist they were dealing. (Cf. § 1701.5, an association, partnership, corporation or group of three or more dentists may practice under any name that would otherwise be in violation of section 1701 "if, and only if," it holds a permit to do so issued by the Board of Dental Examiners.)

Applying it to our situation, there can be no question that at the time the initial contact is made with the public in the referral service's advertising itself, there is *no certitude at all* on the part of the public in knowing with which particular dentist they *will be* dealing. But that is not expected. Members of the public who respond to such an advertisement and who deal with a referral service do not expect to know the particular name of a dentist *at that time*. Rather it is only when subsequent inquiry is made in response to the advertisement that it is expected that the identity of a particular dentist(s) will be furnished. In other words there would be no uncertainty in the mind of a member of the public concerning the identity of a dentist with whom he *is* dealing, because a person dealing with a dental referral service would not consider himself to be dealing with *a dentist* at all.

Because of the two step process involved in the placing of prospective patients in contact with a treating professional by a referral service and because persons dealing with such a service do not expect otherwise, we cannot say that a dentist's utilization of that medium contravenes the purpose for which subdivision (g) was enacted. Simply put the evils of advertising under another name are not present when it is understood by all concerned that the entity involved is not itself engaged in the practice of dentistry but serves merely as a vehicle by which a dentist may be secured. Furthermore, although the service may be advertising the possible availability of dental services, it does not do so on behalf of any particular dentist, but rather on behalf of all in the "pool" (cf. *Complete Serv. Bur.* v. *San Diego Med. Soc.* (1954) 43 Cal.2d 201, 215-216) and given the general nature and anonymity with which the advertising is cast we cannot say that the professional activities of any particular dentist are being advertised, indicated, offered, or otherwise presented to the public thereby. We therefore conclude that section 1701, subdivision (g) does not prohibit a dentist from utilizing the services of a dental referral service or prohibit the latter's operation.

The dental referral service described herein is a hybrid creature: some aspects of its operation involve professional advertising, while others involve professional referrals, and *both* of them must be considered in the overall determination of its legality. The latter in our view sounds its knell for we conclude that inasmuch as the dental referral

service described herein involves the payment of consideration by the participating dentists for its referrals of patients to them, it runs afoul of the prohibitions set forth in section 650.

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