IN-PERSON SOLICITATION:
NOT FOR LAWYERS

BY KENNETH L. JORGENSEN

A recent Minnesota Supreme Court decision involving solicitation of patients by chiropractors has generated confusion about the continuing viability of the legal ethics prohibitions against in-person solicitation. In July the Court determined that chiropractor David Pietsch’s use of “runners” or “cappers” to solicit auto accident victims for chiropractic services did not constitute “unprofessional conduct” as defined by the statutes governing the delivery of chiropractic services in Minnesota. Pietsch v. Minnesota Bd. of Chiropractic Exam’rs, 662 N.W.2d 917, 924 (Minn. App. 2003).

On review, the Supreme Court analyzed two issues in reversing the decision and remanding the matter back to the Chiropractic Board: (1) was Pietsch’s solicitation of accident victims unprofessional conduct per se? and (2) did the record support the Board’s conclusion that in-person solicitation of accident victims negatively affected the professional-patient/client relationship and was unethical, deceptive, and harmful to the public?

As to the first issue the Court noted that the statute defining unprofessional conduct does not specifically make the use of runners or cappers to obtain business unprofessional conduct per se. This deficiency could have been overcome by evidence of an industry standard clearly recognizing the use of runners to obtain business as unprofessional. However, the record contained no evidence of an industry standard.

The Court also found the record devoid of any support for the Board’s conclusion that Pietsch’s solicitation was deceptive and harmful to the public. Specifically it noted the absence of any evidence that the Xiongs had deceived or pressured accident victims into using Pietsch’s services. Nor was there evidence that any of the accident victims even objected to the solicitations. The paucity of evidence to support the unprofessional conduct conclusions resulted in the Court’s reversal and remand of Pietsch’s professional discipline case for further proceedings.

A quick comparison of the legal regulations governing solicitation reflects the significant distinctions between the chiropractic and legal professions. As noted in Pietsch, professional conduct standards for chiropractors do not specifically address solicitation of patients. In contrast, Rule 7.3, Minnesota Rules of Professional Conduct, expressly prohibits in-person or telephonic solicitation by a lawyer unless a prior professional relationship exists with the prospective client or the client is a family member. Assisting or inducing a nonlawyer (i.e., runner or capper) to violate the solicitation prohibition runs afoul of Rule 8.4(a). Rule 7.2(c) makes it unethical to give anything of value to a person for recommending the lawyer.

Applying the Court’s Pietsch analysis to lawyer conduct, Rules 7.2(c), 7.3 and 8.4(a) define in-person and telephonic solicitation, as well as paying for the solicitation of clients, as unprofessional conduct per se. These rules may also constitute evidence of the industry standard the Court found lacking for the chiropractic profession in Pietsch.

Beyond legal ethics standards, Minnesota law also criminalizes lawyer payment of a fee or commission to runners and cappers. See Minn. Stat. §§481.03 and 481.05 (providing that payments by lawyers to anyone other than another lawyer for securing or soliciting clients is a misdemeanor punishable by a fine and 90 days in jail). State law does not include an analogous provision applicable to chiropractors’ use of runners or cappers. If such a provision had existed, it is entirely likely that the Pietsch result would have been different. This is especially true since the Court did not find that chiropractor solicitation was

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As the healthcare fraud prosecutions have shown, changes in the criminal laws have provided significant incentive for runners and cappers to bite the hands that feed them. Lawyers wishing to avoid disciplinary exposure to solicitation violations need only keep a few simple precepts in mind.

Written solicitation letters targeted to prospective clients are permissible, in-person or telephonic contact is not. Accepting referrals from nonlawyers is allowable whereas compensating nonlawyers for those referrals is not. Payments for interpreter or other client-related services must be bona fide. Invoices reflecting the time expended by the interpreter in rendering the services should be documented in client files. Undocumented cash payments for interpreter or other client-related services will likely garner increased scrutiny in any disciplinary investigation.

Retainer agreements signed by clients who have never consulted or even talked with a firm’s lawyer invite disciplinary inquiry. Lawyers who entrust investigators and other nonlawyers with retainer forms and the authority to sign up clients must appreciate the peril of this practice if the client later contends he or she was improperly solicited.

Other measures include precautions that may appear obvious to most lawyers. Investigators, interpreters, or other nonlawyers should not be allowed the autonomy to submit or circumvent the lawyer’s involvement at crucial stages of the representation. Such stages include, but are not limited to retention of the lawyer’s services, advising the client about settlement offers, and distributing settlement proceeds. Language or cultural barriers between the lawyer and the client do not justify wholesale entrustment of the representation to a nonlawyer agent, assistant, or employee.

Lawyers who do so risk professional discipline as they can be held accountable for the errant or dishonest acts committed by the lawyer without consent. See, e.g., In re Knueer, AC4-303 (Minn. 07/12/04) in which a 30-day suspension resulted from inter alia the lawyer’s failure to supervise a nonlawyer investigator who settled the injury claim of a deceased client, secured a forged endorsement on the settlement check and released, and caused the lawyer to distribute settlement proceeds to the deceased client’s wife.

The Pietsch decision makes it likely that for now in-person solicitation of chiropractic patients will continue. Lawyers who work closely with the chiropractic community need to appreciate the significant distinctions between chiropractic and lawyer regulations when it comes to soliciting clients.

NOTES
1. See e.g., “Accident-file Gatherers Win One Round, Minneapolis Star Tribune, 08/08/04: “To many attorneys, the [Pietsch] ruling gives a green light to the hiring of runners, provided they are not involved in any fraudulent medical care scheme.”
2. A “runner” is “a person whose business it is to solicit patronage or trade.” The Black's Law Dictionary (9th ed. 1999). A “runner” is “a person whose business it is to solicit patronage or trade.” The Random House Dictionary of the English Language 1683 (2d ed. 1987). A “runner” is “a lure, decoy, or steerer especially in some illicit or questionable activity.” Webster’s Third New International Dictionary 923 (10th ed. 1993).
3. Pietsch was also charged with other misconduct that was not resolved by the Board’s summary disposition on the solicitation charges. These charges apparently remain pending before the Chiropractic Board and include instructing interns how to falsify bills and reports to defraud insurers and instructing interns that they should care for non-English-speaking patients without communicating with the patients about their medical problems.
4. The Court of Appeals reversed a Chiropractic Board finding that Pietsch had engaged in improper fee splitting with the Xions by virtue of his payments totaling $71,000 in 1999 and $95,000 in 2000.
5. Lawyers can solicit clients in writing provided they include the word “ADVERTISEMENT” clearly and conspicuously at the beginning of any written solicitation letter to a prospective client. See Rule 7.2(f).
6. See e.g., In re Charges of Unprofessional Conduct Against 97-29, 581 N.W.2d 347 (Minn. 1998) (where the lawyer was admonished for his unsuccessful attempt to solicit an injury client by telephone).
7. Rule 8.4(a) provides in relevant part that it is unprofessional conduct to assist or induce another to violate the Rules of Professional Conduct or to violate the Rules through the acts of another.
8. Lawyers can in some pay referral fees to other lawyers by entering into a disproportionate fee-splitting agreement in which the referring lawyer agrees to be jointly responsible for the representation and the client consents to the amount that will be paid to the referring lawyer. See Rule 1.5(c).
9. Family members and former clients are excluded from the in-person and telephonic solicitation law. See Rule 7.3.