



PROFESSIONAL RESPONSIBILITY

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.¹ 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*, C6-02-2117 (Minn. 07/22/04).

CHIROPRACTOR SOLICITATION

Pietsch, a St. Paul chiropractor whose practice focused upon treating no-fault patients, was charged by the Chiropractic Board with improperly using the Xiong Translation & Transportation Company (Xiong) to personally solicit accident victims in the Hmong community. Pietsch admitted paying Xiong \$71,000 in 1999 and \$95,000 in 2000 to obtain daily accident reports from local police departments, identify Hmong accident victims, and then telephone or visit the victims to solicit them as patients at Pietsch's clinic.²

The Chiropractic Board suspended Pietsch's license for three years and assessed a \$30,000 civil penalty. In doing so, it determined that Pietsch's use of runners or cappers to solicit patients constituted unprofessional conduct. Specifically the Board found:

Obtaining patients by employing runners to follow upon daily police accident reports preys on people when they are most vulnerable. These patients are not given an opportunity to carefully consider and choose among health care options. They are, in fact, pressured into choosing the runner's employer for their health care.

The Board also found that Pietsch's targeting of the Hmong/Southeast Asian communities was even more egregious because of the potential language and cultural barriers experienced by these victims.

Pietsch appealed the Board's suspension to the Court of Appeals. In affirming the

Board's determination, the Court of Appeals panel found that there was substantial evidence supporting the conclusion that Pietsch's use of runners to solicit patients was unethical, deceptive, and harmful to the public as well as the chiropractic profession. *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 662 N.W.2d 917, 924 (Minn. App. 2003).³

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.

LAWYER SOLICITATION

Since the *Pietsch* decision, lawyers have inquired about the applicability of the Court's decision to the in-person solicitation prohibitions governing lawyers and those associated with lawyers. The short answer to these inquiries is that nothing has changed. In-person as well as telephonic solicitation by lawyers and their agents is not only unethical, but also illegal if the lawyer pays the runner to solicit clients.

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 solicitation⁴ by a lawyer unless a prior professional relationship exists with the prospective client or the client is a family member.⁵ Assisting or inducing a nonlawyer (*i.e.*, runner or capper) to violate the solicitation prohibition runs afoul of Rule 8.4(a).⁷ Rule 7.2(c) makes it unethical to give anything of value to a person for recommending the lawyer.⁶ 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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PROFESSIONAL RESPONSIBILITY

constitutionally protected. Rather it determined the Board had failed to provide sufficient evidence that chiropractor solicitation was unprofessional conduct *per se* or that it was harmful to the public for the reasons advanced by the Board.

The Pietsch chiropractic discipline proceeding is consistent with a larger effort by government agencies on both the state and federal level to curb or thwart healthcare fraud. One factor cited by the Chiropractic Board in its discipline of Pietsch is that payments to runners "can encourage patients to exaggerate or invent injuries." Similar concerns undoubtedly caused the 2002 Legislature to enact Minn. Stat. §609.612, making it a felony to employ a runner to procure patients for the purpose of fraudulently obtaining benefits under a contract of motor vehicle insurance.

Within the past year, federal investigations focusing upon use of runners and cappers resulted in the indictments of local chiropractors for healthcare fraud. Key to the investigations was the testimony of runners who sought leniency in their own prosecution in exchange for testimony against chiropractors about incidents of healthcare fraud. Unfortunately, the allegations made by these runners were not limited solely to the chiropractic profession. Although no lawyer was implicated in healthcare fraud, allegations of in-person solicitation and lawyer payments to runners surfaced in the federal investigation. Runners from more than one ethnic community claimed to have been paid fees for soliciting legal clients or fees for nonexistent interpretation services to conceal that they were in fact being compensated for soliciting clients.

Although lawyer discipline for in-person solicitation and nonlawyer referral payments is infrequent, complaints of this nature are on the rise. Most of these complaints, like the complaint in Pietsch, stem from alleged abuses within the various ethnic communities in the Twin Cities. One ongoing lawyer discipline investigation involves allegations of payments for interpreter services as pretext for runner solicitation fees. Other alleged abuses include a runner soliciting legal representation at the home of an accident victim within 24 hours of the accident. In nearly all of the ethics complaints alleging runner solicitation, the determinative issue is whether the lawyer directed, assisted, promoted, induced or ratified the improper solicitation by the runner. Other ethics complaints have similarly turned upon the lawyer's supervision, or lack thereof, of nonlawyer employees or agents.

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.⁹ 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 nonlawyer associates should not be allowed the autonomy to supplant 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 nonlawyers so entrusted. See e.g., *In re Krueger*, A04-303 (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 releases, 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 Random House Dictionary of the English Language* 1683 (2d ed. 1987). A "capper" is "a lure, decoy, or steerer especially in some illicit or questionable activity." *Webster's Third New International Dictionary* 333 (10th ed. 1993). Pietsch, *slip op.* at p. 9, n. 1.
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 could 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 Xionsgs 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 essence 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(e).
9. Family members and former clients are excluded from the in-person and telephonic solicitation law. See Rule 7.3.