

THE RISING USE OF TELEMARKETING IN MEDICAL FRAUD AND ATTORNEY SOLICITATIONS

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I. INTRODUCTION

The date was June 27, 1977. The next morning, most newspapers would carry the article but only on an inside page and the article would only be several paragraphs in length. The United States Supreme Court in concluding its term had issued a decision in a case titled *Bates v. State Bar of Arizona*. In that case the nation's highest court held the time honored practice of state and local bar associations prohibiting attorneys from advertising and soliciting for services violated the First Amendment of the United States Constitution protecting freedom of speech. Perhaps no one could tell at that time, the far reaching impact of that decision a quarter century ago. One need only look now at the back of any telephone book, local television advertising or the back of passing public transportation buses to realize the implications of that decision have been far reaching.

Lawyer advertising is now a billion dollar a year plus business and is ever growing. Regardless of experience, qualifications or expertise, any lawyer with the financial resources to buy an ad can promote himself or herself as the area's leading personal injury specialist. Sadly, much in the same manner as many "new and improved" detergents and food products fail to live up to their advertising promises, so goes as well the self-promotion of personal injury litigation practice.

Many commentators have noted what was once the respected profession of law has now become little more than the providing of another retail consumer service. Much in the same manner as the retailer has taken to ever increasing levels of promotions to market their products, so too are lawyers beginning to turn to even more aggressive manners of marketing their services and insuring they are the first attorney to solicit the injured or grieving party who may be "in need" of legal representation.

Likewise, in the same manner as Madison Avenue, retailers have convinced us we "need" products we did not even know existed before, lawyers are ever increasingly utilizing marketing efforts to convince people who are involved in accidents of their need to retain legal representation and present an injury claim where, in truth, no such legitimate claim exists. In the past several weeks alone, a law firm in Dayton, Ohio has been running television ads telling persons they may have a claim if they recently purchased a certain defective product and urging them to call the law firm for more information.

I am mindful of a case I was involved in only several years out of law school when I was still practicing in Florida. In preparation for jury trial, I was taking the brief deposition of the plaintiff's wife relative to her consortium claim. I asked her when she first learned her husband intended to file suit against my client over the relatively minor automobile accident he was involved in. Her response surprised, but also delighted me. According to the wife, she and her husband were watching the evening news when a television ad came on for a notorious Orlando law firm. Following the spiel about how the law firm could secure financial compensation for you if you had been injured as the result of an auto accident, the husband turned to his wife and advised her he was going to call the law firm. To which the wife replied "Why would you do that, there is nothing wrong with you!"

Whether we like it or not, there is no end in sight to the use of marketing efforts by attorneys. The "good ole days" are both old and probably gone forever. What we may be able to do, however, is stop early on what appears to be a new but potentially growing area of marketing for lawyers in the area of telemarketing either directly for their legal services or attorneys attempting to telemarket their services through others such as medical practitioners, chiropractors and even auto body shops. The time to stop these practices is now.

II. STATE REGULATIONS

The admission to practice law is done on a state-by-state basis. For this reason there is no federal law which either permits or prohibits lawyer advertising and marketing efforts. Although the Bates decision was decided by the United States Supreme Court applying the U.S. Constitution, the actual regulation of the manner in which an attorney may or may not advertise is still left strictly to state regulation.

Most states have taken reasonable steps to limit attorney advertising. Certain states shortly after the Bates decision attempted to so stringently limit lawyer advertising as to effectively prohibit the practice and this has uniformly been struck down by courts as unconstitutional. The courts have shown a willingness, however, to reasonably regulate lawyer advertising to prohibit unscrupulous lawyers from soliciting clients either too quickly or too aggressively for legal representation.

Ohio, Indiana, Kentucky, Michigan and Illinois have all adopted state laws regulating attorney advertising and solicitation. Complete copies of each of the state statutes are appended to this article, however, in brief summary, each of the state regulations provide as follows:

Ohio, DR 2-101 Publicity

(A) A lawyer shall not, on his or her own behalf or that of a partner, associate, or other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication, including direct mail solicitation that:

- (1) Contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement;
- (2) Seeks employment in connection with matters in which the lawyers or law firm does not intend to actively participate . . .
- (3) Contains any testimonial of past or present clients pertaining to the lawyer's capability;
- (4) Contains any claim that is not verifiable;
- (5) Contains characterizations of rates or fees chargeable by the lawyer or law firm . . .

(B) Subject to the limitations contained in these rules:

(1) A lawyer or law firm may advertise services through newspapers, periodicals, trade journals, "shoppers," and similar print media, outdoor advertising, radio and television, and written communication.

Kentucky, Rule 7.30 Direct contact with prospective clients.

(1) A lawyer shall not in-person or by live telephone contact or solicit professional employment from a prospective client with whom the lawyer has no family or direct prior professional relationship.

Indiana , Rule 7.1 Publicity and Advertising

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may advertise so long as said advertising is done in a dignified manner.

Michigan, Rule 7.2 Advertising

(a) Subject to the provisions of these rules, a lawyer may advertise.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

Illinois, Rule 7.3 Direct Contact With Prospective Clients

. . . A lawyer shall not, directly or through a representative, solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain. The term "solicit" means contact with a person other than a lawyer in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient.

Additionally, many states have adopted laws addressing specifically the use of telemarketing. At the present time in the State of Ohio there is a piece of legislation pending which initially intended to limit the use of telemarketing by chiropractors. H.B. 506 as passed by the Senate would permit the Ohio Chiropractic Board to penalize chiropractors who are "guilty of false, fraudulent, deceptive, or misleading advertising or other solicitations for patients or knowingly having professional connection with any person that advertises or solicits for patients in such a manner".

Interestingly, but not surprisingly, one of the nation's leading chiropractic telemarketers has retained two influential lobbyists in the State of Ohio in an effort to so limit this legislation, the ultimate result would be to place no limits on telemarketing in personal injury cases. H.B. 506 also states, "Section 5. The authority this act grants to the State Chiropractic Board to adopt rules under Chapter 4734. of the Revised Code shall not be construed to allow the Board to prohibit or restrict commercial speech by time, place, or medium of solicitation on behalf of chiropractors."

Virtually all states prohibit attorneys from direct telephone solicitation of non-clients. Especially in a profession given to trying to ever expand the limits of the law, this does not stop many attorneys, however, from indirectly using telemarketing efforts to solicit potential clients.

Recent investigations in Ohio and many other states have disclosed ties between chiropractic telemarketers and plaintiff's attorneys. Although the plaintiff's attorney cannot telephone solicit potential clients involved in automobile accidents, the attorney can review traffic accident reports at the police station, purchase copies of those reports or copy information from them and then turn the names and telephone numbers over to telemarketers who ostensibly call the allegedly injured party to arrange a chiropractic evaluation. Once the solicited person arrives at the chiropractor's office, however, they are advised of the need to be represented by counsel and conveniently provided either with the address and telephone number of the attorney or oftentimes the attorney or a representative from his or her firm, just as coincidentally, is in the chiropractor's office and is available to meet with and sign up the individual as a client of the law firm at the same time as the initial chiropractic treatment.

Recently our firm was involved in a case in Toledo, Ohio where blatantly the chiropractor strongly suggested to the solicited party they would not receive any medical treatment until agreeing to be represented by the attorney. The following is an exchange from the examination under oath taken of the claimant:

Q: Now, I'm not intending in any way to ask you any questions that involve your communications with your counsel, but I do want to ask you at what point did you seek an attorney as a result of this accident?

[Claimant's Attorney:] We object to that question. Go ahead.

A: I think it was the chiropractor had asked me if I had seeked (sic) a lawyer and I says no, and he says, well, sometimes it's a good idea if you do. And he says, it was up to me, what I wanted to do. And I says, well, you know, I'd like to just get it settled, I really don't want to have to go through all of that. And I let it go. And then he gave me a card of the lawyer's and says, you know, here's a lawyer, if you need one, you know, it's up to you. You could use your lawyer, you know...

Arrangements between lawyers and chiropractors are not the only method by which attorneys are utilizing third parties to telemarket on their behalf. Recently several states have begun investigations of ties between auto body shops and lawyers. Again the information is being supplied by or on behalf of the attorneys to telemarketers who either on the day of or following the accident

call the non-at-fault driver with an offer to provide a free estimate or discount on the repair of their vehicle. If the person accepts when they arrive at the body shop, the same scenario results of either a referral being made to the attorney or the attorney conveniently being at the body shop and available to talk to the "customer" at that time.

Practices such as these clearly violate the spirit if not the actual ethics rules and guidelines for attorneys. Although local and state bar associations are investigating these practices, it is widely estimated many of these types of solicitation efforts occur without ever being referred to any investigative authority. Until someone comes forward and exposes the practice taking place, it is difficult, if not impossible, for any type of local or state regulatory authority to even be aware the practice is occurring.

III. THE FINANCIAL CONSEQUENCES

The use of telemarketing in personal injury litigation is big business. Recent studies have shown personal injury litigation in the United States is a multi-billion dollar business and with this amount of money at stake, attorneys and medical practitioners will aggressively attempt to expand the boundaries of the law in an attempt to be the first ones to provide services and sign up as clients involved in potential personal injury claims.

It is not surprising then at least some evidence has come forward linking organized crime to telemarketing efforts in personal injury litigation. The *Wall Street Journal* recently published a series of article regarding an attorney in New York State named Robert Barsody. Mr. Barsody is suspected of having ties to chiropractors throughout the U.S. involved in the widespread use of telemarketing. Mr. Barsody, who is trained as an attorney, is noted for putting on seminars "training" chiropractors and other medical providers concerning the use of telemarketing of personal injury claimants.

Although tying Mr. Barsody, and others like him, to telemarketing by attorneys is more difficult, needless to say, a logical correlation can be drawn that more personal injury claimants equal more personal injury claims for plaintiff attorneys to handle and more potential lawsuits to be filed.

Insurance fraud studies conducted over a number of years have shown as many as four of ten insurance claims involved some aspect of insurance fraud. This can range from inflating damage claims to direct falsification of actions and staged accidents. The field of personal injury litigation is without a doubt the number one target of those attempting to commit insurance fraud. A quick way to realize the magnitude of this problem within your own company is to simply look at the amount of indemnity dollars paid out by your company on a monthly or annual basis. Assuming the national statistics are correct then forty percent of this figure in some way relates to insurance fraud. The use of telemarketing by attorneys, chiropractors and body shops will do nothing to lessen this figure and will, in fact, increase this number substantially as this practice continues.

IV. HOW TO HANDLE THE PROBLEM

Ultimately the question becomes how do you successfully combat the use of telemarketing to generate questionable, if not actually fraudulent, personal injury claims? The first line of defense needs to be to identify telephone solicitation as close to the source as possible. As with most things, this means, a prompt and thorough initial investigation of the claim is required. Keep in mind telephone solicitation will generally occur within 24 to 72 hours of the time of the loss. If you are properly adjusting or handling the investigation of the claim, whether the claim is a first or third-party action, you will be in contact with the solicited party within the same time period and should remain in close contact with the potential party during this initial period keeping the lines of communication open.

Beyond this you at all times need to be aware of the potential of the claim involving telemarketing and adopt within your company broader procedures to be prepared to address the problems of telemarketing and identify which attorneys, chiropractors, medical practitioners and auto body shops are, or may be, engaged in these practices. To help you achieve this goal the remainder of this presentation will center upon practical uses you can consider implementing within your companies to identify and address the growing problem of telemarketing. The following are some, and certainly not all, factors to consider and steps to take to investigate whether telemarketing is involved in claims:

1. Recorded Statements:

Whether it is a first or third-party claim, it is imperative to take a recorded statement of the claimant as soon as possible. Although you are probably not doing it currently, one of the things to include in the recorded statement should always be to ask the claimant whether or not anyone or any business entity has solicited them at all either in person or via telephone since the occurrence of the accident. If so, have the individual identify for you as specifically as possible the type of provider they were contacted by, the name, address and telephone number of the provider and whether they have agreed to accept any type of treatment for solicitation from the provider.

In like manner in the recorded statement you should also tell the potential claimant if they are contacted at any time in the future by any provider soliciting their business please make a note of who the provider is, what representations were made to them and if they receive any telephone solicitation on a telephone recorder to please save a copy of the tape if at all possible.

2. Prompt Follow Up Call:

As was stated previously, most telephone solicitation will occur within 24 to 72 hours of the loss. You may wish to make initial telephone contact on the day of or the morning following the occurrence, however, where prudent it would be also wise to follow up 3 to 4 days after the loss to simply inquire how the potential claimant is doing and ask again whether any form of solicitation has occurred. If you

learn solicitation has occurred in the interim, since your first conversation, then request permission to take another recorded statement to address the manner in which the solicitation was made and by whom.

3. Follow Up Letters:

Most companies use some form of written correspondence initially after the occurrence of the loss both to their own insured and to potential claimants. If your company does so consider adding language such as the following to your letters:

Regrettably when incidents such as this occur others may take advantage of the opportunity to solicit you for various services including medical treatment, auto body repair and legal services. It is the position of our company all persons have the right to make proper and informed decisions concerning their rights at any time. If, however, you are solicited for services we would urge you to be cautious relative to such solicitations which may or may not be permissible under various state rules and regulations. Please notify our company if you receive any type of solicitation as it is our goal to make certain all parties involved in losses receive accurate and correct information.

4. Develop a Claims Matrix:

Many telemarketing attorneys and medical providers intentionally try to keep a low profile and otherwise are not high level advertisers or self-promoters. Particularly one chiropractic clinic which utilizes telemarketing almost exclusively running no local television or print advertisements whatsoever, specializes in cases where the total amount of the medical special damages are under twenty-five hundred dollars (\$2,500). By doing so this particular chiropractic practice secures millions of dollars of profits from the insurance industry for what would appear on the surface to be simply "routine" soft tissue injury claims. The only way to truly discover whether a pattern exists is for each claims office to keep records which are neither complicated or involved. What these records should include, however, are records concerning what may appear to be a pattern of claims emanating from one particular medical practice, chiropractic firm and/or law firm. Often times what may appear to be simple routine claims when cross-referenced show a distinct pattern in the same lawyer or law firm representing claimants who are all treated by the same medical care facility with a pattern of medical special damages being in approximately the same amount and for the same number of treatments. If you see a pattern such as this emerging then there may be credible evidence telemarketing is the genesis from where these claims are emanating.

One of the best ways to develop such a matrix is to have one claims professional within the claims office designated as a coordinator for compiling this

documentation. Even a brief cursory review of attorney represented soft tissue injury claim files can disclose valuable information as to whether a pattern may be appearing concerning these claims.

5. Consult Your State Regulatory Agencies:

Most states have departments of insurance, chiropractic boards and medical boards which are charged with the responsibility of tracking not only insurance fraud, but professional and ethical standards for medical providers. In like manner, most state bar associations or state supreme courts have jurisdiction, including disciplinary regulation, of attorneys admitted into practice within this state. At least on an annual basis, it is prudent to check with these state regulatory agencies to determine whether any complaints have been made or public investigations are underway relative to improper use of telemarketing solicitation by chiropractors, medical providers, auto body shops and attorneys operating within the area your claims office handles.

You will find frequently state agencies may have valuable information and documentation which they have compiled relative to telemarketing efforts and of which you may not be aware until you contact the agency or regulatory body to request their assistance.

In like manner, if you have compiled sufficient documentation to demonstrate a pattern of improper telemarketing is existing, it is important you notify these agencies so proper, civil and criminal investigations, where applicable, may be undertaken.

6. Save and Compile Written Documentation:

One of the hardest aspects of piecing together the investigation of improper telemarketing by chiropractors, medical providers, auto body shops and even attorneys is the information and documentation to support the allegation is spread over claim files throughout multiple offices handled by multiple adjusters. Accordingly, if you do secure information and documentation which leads you to believe telemarketing is occurring, it is important to make certain your company designates a central person or location where these records may be compiled. Information such as recorded statements documenting calls from chiropractors, attorneys or the like, written letters of solicitation and even direct mail advertisements from various chiropractors, medical providers and law firms should be secured and kept on file.

When I began our firm in 1989, we began immediately compiling file records concerning various chiropractors and law firms which routinely solicit. Over the years we have developed a wealth of information and documentation for purposes of using cross-examination and, on occasion, to help support civil and criminal legal proceedings.

These are but a few of the many steps and recommendations which you and your companies can undertake to thoroughly and completely investigate insurance fraud which may be occurring as the result of improper telemarketing efforts. One of the things which these individuals count on is the fact your company will not conduct thorough investigations and the claims professionals will be more interested in simply closing small soft tissue injury files than looking below the surface to see whether a pattern in practice is emerging which would disclose improper telemarketing activities. Although one file may appear to be easier to simply close and move onto the next, over a period of years the cost to your company and ultimately to your insured is staggering if you do not take proper investigative steps to limit or eliminate claims which are arising due to telemarketing efforts.

V. CONCLUSION

The age of telemarketing simply being a disturbing call during your dinner hour is over. Telemarketers, at the onset of this new century, are sophisticated and often times are interconnected, weaving a web which begins with monitoring police scanners, securing police accident reports, placing calls on the day of or the day following accidents and attempting to steer individuals toward medical treatment and legal representation all for financial gain. The ultimate goal, however, is simple and that is to secure money from your company or another insurance carrier willing to compensate these providers who unfortunately often times do not have the best interest of the injured party at heart.

Whether these actions will continue or not into the future really is not a problem to be addressed by your state legislature or the courts. The solution to the problem rests with you being committed to the highest quality and most thorough claims investigation process possible. You will not need to look far to find these types of claims, for they are occurring across the United States on a daily basis. The only question becomes how diligent you will be in investigating these matters and bringing these unscrupulous practices to light of day.