

RUNNERS AND CAPPERS IN NEVADA

by

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As trial lawyers, we commit ourselves to holding people, companies, and industries accountable for the protection of our society. That pursuit demands that we act as vanguards of our own profession, protecting and maintaining our integrity as we call into question the integrity of others.

This article addresses one danger to our profession, which exists in the form of “runners” and “cappers,” individuals who solicit accident victims, frequently conspiring with attorneys, for representation, in exchange for money. In writing this article, we are reminded of the words of Neil Galatz, one of the NJA’s founding fathers, who cautioned years ago that industries which fail to adequately police themselves will, at some point, find themselves policed by others, potentially with a less desirable outcome.

During the past twenty years, we have personally become aware of the use of runners and cappers on multiple occasions. Classic examples include tow truck drivers seeking fees in exchange for cases and random third parties who have the uncanny ability to know exactly when and where accidents happen. Most recently, we have observed a new, more insidious, tactic in which a third party fraudulently represents himself or herself as a witness to an accident, thus providing additional incentive for the client to see his/her “preferred” attorney.

These activities in their various forms threaten to damage our profession in a number of ways, yet two are worth noting. First, this conduct reinforces the stereotype that trial lawyers are ambulance chasers, who are more concerned with money than protecting their clients. We spend hours in Voir Dire attempting to identify potential jurors who are affected by this stereotype, to avoid biases which hurt both our ability to advocate as well as our clients’ recoveries. Second, the activity funnels clients toward attorneys willing to compromise their morals and ethics in exchange for new clients. It stands to reason that attorneys willing to take these shortcuts are likely to take others, increasing the likelihood that clients will not receive adequate representation.

I. The Nevada Rules of Professional Conduct

While Nevada has not codified a definition of runners and cappers, California specifically defines a “runner” or “capper” as “any person, firm, association or corporation acting for consideration in any manner or in any capacity as an agent for an attorney at law or law firm, whether the attorney or any member of the law firm is admitted in California or any other jurisdiction, *in the solicitation or procurement of business for the attorney at law or law firm* as provided in this article.” Cal. Bus. and Prof. Code §6151 (emphasis added). The term “runner” or “capper” thus refers to any individual who refers or solicits potential clients with the expectation of return consideration.

With regard to attorney conduct, Nevada's Rules of Professional Conduct expressly address this behavior. Rule 7.2(n), which concerns advertising, states:

(n) A lawyer *shall not give anything of value to a person for recommending the lawyer's services*, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these Rules and may pay the usual charges of a lawyer referral service or other legal service organization.

Id. (Emphasis added.)

Rule 7.3 addresses "Communications with Prospective Clients," and describes the types of permissible and impermissible interactions with prospective clients that may occur. Relevant sections follow:

Rule 7.3. Communications With Prospective Clients.

(a) Direct contact with prospective clients. Except as permitted pursuant to paragraph (d) of this Rule, *a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.* The term "solicit" includes contact in person, by telephone, telegraph or facsimile, by letter or other writing, or by other communication directed to a specific recipient.

...

This provision limiting contact with an injured individual or the legal representative thereof applies as well to lawyers or law firms or any associate, agent, employee, or other representative of a lawyer or law firm who represent actual or potential defendants or entities that may defend and/or indemnify said defendants.

Id. (Emphasis added.)

While the above rule governs *attorney* conduct, it clearly anticipates the involvement of third parties who may be associated with the attorney, including "associates," "agents," "employees," or "other representatives." Thus, even though Rule 7.3 does not specifically govern the conduct of a runner or capper, it certainly seeks to hold attorneys accountable for their interactions with runners and cappers, as they fall into the broad categories of individuals cited. Similar to other rules or statutes referenced within this article, there exists the argument that attorneys associated with these third parties are engaged in conspiracies to circumvent the law.

II. Criminal Exposure

In addition to the Rules of Professional Conduct, NRS 7.045 criminalizes this behavior, holding all parties, including runners or cappers, accountable for their involvement. The statute,

which follows in its entirety, specifically references solicitations which occur at the scene of accidents.

NRS 7.045 Unlawful solicitation of legal business; penalty.

1. Except as otherwise provided in this section, it shall be unlawful for a person, in exchange for compensation, to solicit a tort victim to employ, hire or retain any attorney at law:

- (a) At the scene of a traffic crash that may result in a civil action; or
- (b) At a county or city jail or detention facility.

2. It is unlawful for a person to conspire with another person to commit an act which violates the provisions of subsection 1.

3. This section does not prohibit or restrict:

(a) A recommendation for the employment, hiring or retention of an attorney at law in a manner that complies with the Nevada Rules of Professional Conduct.

(b) The solicitation of motor vehicle repair or storage services by a tow car operator.

(c) Any activity engaged in by police, fire or emergency medical personnel acting in the normal course of duty.

(d) A communication by a tort victim with the tort victim's insurer concerning the investigation of a claim or settlement of a claim for property damage.

(e) Any inquiries or advertisements performed in the ordinary course of a person's business.

4. A tort victim may void any contract, agreement or obligation that is made, obtained, procured or incurred in violation of this section.

5. Any person who violates any of the provisions of this section is guilty of a misdemeanor.

6. As used in this section, "tort victim" means a person:

(a) Whose property has been damaged as a result of any accident or motor vehicle crash that may result in a civil action, criminal action or claim for tort damages by or against another person;

(b) Who has been injured or killed as a result of any accident or motor vehicle crash that may result in a civil action, criminal action or claim for tort damages by or against another person; or

(c) A parent, guardian, spouse, sibling or child of a person who has died as a result of any accident or motor vehicle crash that may result in a civil action, criminal action or claim for tort damages by or against another person.

In addition to classifying the behavior as a misdemeanor in Subsection 5, the reader will note that Subsection 4 allows a client to void any contracts flowing from this behavior, thus eliminating an attorney's right to fees and costs.

III. Insurance Fraud

As noted earlier, some of the tactics described above, expose parties to other types of liability. For example, the act of defrauding insurance companies by making false witness statements could result in liability pursuant to NRS 686A.2815, the statute defining “Insurance Fraud.” That statute defines the term as “knowingly and willfully:”

(c) Assisting, abetting, soliciting or conspiring with another person to present or cause to be presented any statement to an insurer, a reinsurer, a producer, a broker or any agent thereof, if the person who assists, abets, solicits or conspires knows that the statement conceals or omits facts, or contains false or misleading information concerning any fact material to an application for the issuance of a policy of insurance or a claim for payment or other benefits under such a policy.

...

(f) Accepting any proceeds or other benefits under a policy of insurance, if the person who accepts the proceeds or other benefits knows that the proceeds or other benefits are derived from any act or omission specified in this section.

(g) Employing a person to procure clients, patients or other persons who obtain services or benefits under a policy of insurance for the purpose of engaging in any act or omission specified in this section, except that such insurance fraud does not include contact or communication by an insurer or an agent or representative of the insurer with a client, patient or other person if the contact or communication is made for a lawful purpose, including, without limitation, communication by an insurer with a holder of a policy of insurance issued by the insurer or with a claimant concerning the settlement of any claims against the policy.

(h) Participating in, aiding, abetting, conspiring to commit, soliciting another person to commit, or permitting an employee or agent to commit any act or omission specified in this section.

NRS 686A.2815.

Insurance Fraud is a Category D Felony punishable by imprisonment in state prison for a minimum of not less than 1 year and maximum of not more than 4 years and a fine of not more than \$5,000. NRS 686A.291; NRS 193.130. This statute makes it clear that all parties involved who “knowingly and willfully” engage in this conduct are breaking the law.

IV. Deceptive Trade Practices

Finally, there is that possibility that this conduct may be characterized as a “Deceptive Trade Practice” under Nevada Law pursuant to NRS 598.0915. The following subsections of that statute apply:

NRS 598.0915 “Deceptive trade practice” defined. A person engages in a “deceptive trade practice” if, in the course of his or her business or occupation, he or she:

...
3. Knowingly makes a false representation as to affiliation, connection, association with or certification by another person.

...

15. Knowingly makes any other false representation in a transaction.

An attorney associated or engaged in these activities exposes himself or herself to the allegation that he or she is deceptively representing to a potential client that it is acceptable and legal to solicit business using these methods. Obviously, we know that is not the case. Neither Nevada Law nor the Rules of Professional Conduct sanctifies these activities.

Violations of Chapter 598 could subject parties to both civil and criminal penalties. NRS 598.0999.

V. Enforcement

Informal research confirms that members of our Association continue to observe the use of runners and cappers by attorneys in our community. While the activity does not appear to be prevalent amongst firms, we are led to believe that a select number are associated with the solicitation of literally hundreds of claims annually. It is reasonable for us to conclude that a small number of runners and cappers are impacting the marketplace, by steering these claims to attorneys willing to risk prosecution and damage to the profession in exchange for personal gain.

Firms like our own have continued to comply with the Nevada Rules of Professional Conduct, by reporting violations of the Rules pursuant to Rule 8.3 to the State Bar. The reality, however, is that neither the State Bar nor the authorities have the resources necessary to alone curb this behavior. This is not said to be critical of the State Bar or the District Attorney's office, as the behavior is such that it typically occurs in private.

Nonetheless, the authors suggest that increased complaints may shed light on the true nature and extent of this conduct, potentially convincing the authorities to allocate additional resources to the problem. This article serves to remind colleagues of our obligations, so that we are better equipped to police ourselves.

If you are aware of or observe any of this conduct, please contact the State Bar of Nevada at 702.382.2200 or contact your local District Attorney's office.