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‘Ambulance chasing’ in the digital age

Information is available immediately, but how soon is too soon to use it?

May 12, 2012, was the kind of Saturday we dream of all winter. It was warm and sunny, hinting at summer’s impending arrival. Soon-to-be graduates were getting ready to launch themselves into the real world. Mark Burgett’s daughter, Western Michigan University senior Alexandra Burgett, was among them.

But a call from a police officer in Kalamazoo interrupted that day, and changed his family forever.

Alexandra had been in a head-on car crash. She was admitted to Bronson Methodist Hospital. Burgett, along with his wife and youngest daughter, left immediately to be by Alexendra’s side.

The youngest Burgett daughter returned Tuesday, May 15, to the family’s home in Plymouth. She thought she would just be picking up some clothing, a few sundries, maybe the mail. What she didn’t know would be waiting for her at the house was a stack of mail, addressed to her sister, from various personal-injury law firms in the metro Detroit area.

“I found it very offensive,” Mark Burgett said. “It was intrusive.”

And then, it crossed over from offensive to unspeakably painful. Alexandra never regained consciousness. The swelling in her brain couldn’t be controlled. Her injuries were just too severe. She died May 19.

And the mail, solicitations from attorneys, kept coming.

It gives lawyers a bad name, said Norman Tucker, attorney with Sommers Schwartz PC in Southfield.

Earlier this year, two local television news stations ran reports about people who had been in car crashes, who started getting phone calls within hours, from so-called accident services organizations — cappers, or runners, as they’re known. They represent health care providers, such as chiropractors and pain clinics.

But even among health care providers who don’t engage runners to solicit business, it also is alleged — by one of the television news stories, and in at least one lawsuit filed in federal court

in April — that some health care providers have cozy beneficial relationships with personal-injury lawyers. And that's just part of the greater problem in no-fault personal-injury cases.

The beneficial relationship

State Farm is suing a group of health care providers in the Eastern District of Michigan. The insurance company claims that the providers fraudulently billed for services provided under no-fault.

In *State Farm Mutual Automobile Insurance Co. v. Physiomatrix Inc., et al.*, filed April 3, State Farm alleges a quid pro quo relationship between the health care providers and two personal-injury firms.

In that relationship, the complaint alleges, the providers maximize their collection of no-fault benefits and inflate the value of the claims to curry favor with the personal-injury lawyers with whom they have a cross-referral system.

Southfield-based attorney Michael Morse was one of those attorneys. State Farm claims that, of the 61 patients for whom the defendants submitted bills to State Farm, 59 percent of them — or 36 patients — were represented by Morse.

Morse said he has a high-volume practice, representing thousands of clients every year, and 36 patients might represent a substantial percentage of that physician's practice, but it's a very small number in his total number of cases. He does sometimes refer his clients who inquire to any number of doctors he knows, including the defendants.

But there is no quid pro quo relationship, he said.

"There is nothing at all unethical or illegal about a doctor who, if asked, refers a patient to any lawyer, or if a patient asks if I know, for example, a doctor who can treat an ankle injury, I can say, 'Yes, I know a doctor,'" Morse said. "What I can't do is ask someone else to solicit for me."

Tucker said he doesn't know yet whether State Farm's allegations, or any of the other rumors, are true. But he's quite certain that all of it adds up to ruin the reputations of trial lawyers. The phone calls by the health care providers who also provide information about law firms, the cozy referring relationships, and the mass mailings to injured people are making the plaintiffs' bar look bad, he said.

Personal-injury attorney Steven Gursten agrees. He said he'd like to see all of it stop — the law firm mailings and the non-lawyer solicitation.

"Cappers and runners are against the law, so these law firms can get non-lawyers to do it. Everyone knows who they are, and no one wants to name names," he said. "It's been building over the past couple of years and it's exploding now. It's become an industry. And it's all legal."

He said that only a very small number of lawyers are working directly with the doctors.

“The lawyer keeps telling these people you have to treat. You have to see this doctor, and this doc only,” Gursten said. “Then they don’t care what happens to the people on their third-party cases. They make all the money on the first-party side, with the chiropractor bills. As a result, you all of a sudden don’t care if *Kreiner* [*v. Fischer*] comes back.”

Mark Bernstein of The Sam Bernstein Law Firm said it’s the “underbelly of *Kreiner*, on full public display.”

In *Kreiner*, the Michigan Supreme Court decision struck a blow to the plaintiffs’ bar by interpreting the definition of “serious impairment of body function.” In order for plaintiffs to sue for non-economic damages, they had to prove an impairment that affects the “ability to lead their normal lives.”

Kreiner was overturned in 2010 with *McCormick v. Carrier*. But popular opinion among no-fault lawyers is that the Court will return to the *Kreiner* standard.

Bernstein said that, because for so long *Kreiner* made it so much more difficult to pursue third-party benefits, and because there is no fee schedule for unlimited no-fault first-party benefits, “the temptation is just too great” for some lawyers who wind up getting involved in quid pro quo relationships with the health care providers.

Gursten said that the only people who benefit are the doctors and the lawyers. But the no-fault system is in jeopardy of becoming unsustainable.

Data (gold) mining

Law firms and health care organizations can get crash information from online data services like TRACView, which have made accident data in bulk available to the public. Law firms routinely use the information to send solicitation mail.

Non-lawyers aren’t prohibited from making phone calls, or even paying in-person visits, to people involved in crashes.

“What I don’t understand is that the police officer who responded to the scene told us, at least twice, that he wouldn’t file the police report right away because once he did, he said that we’d start getting phone calls and mail,” Burgett said.

The officer said he filed the report May 21, but the first mail to arrive at the house, a large packet of materials from The Sam Bernstein Law Firm, was postmarked May 14, the first available date to get materials in the mail after the crash Saturday afternoon.

“It was not our focus at all, wondering whether or not we needed a lawyer,” Burgett said. “We were hoping, praying she was going to get better. Then after she passed, we’re all just trying to heal. Then we get that crap in the mail. … It hurts to get mail with her name on it. And it makes me angry.”

Last year, the Michigan Supreme Court considered amendments to the rules governing lawyer advertising. In December, it rejected a proposal that would have barred attorneys from soliciting prospective clients by direct mail, until at least 30 days after a police report is filed. Though the Court rejected that proposal, it is still considering an amendment to require family lawyers to wait 14 days, or until there is proof of service.

Burgett said that if he had to receive the solicitation mail at all, a little time to grieve would be nice.

“Having to wait a month before sending this stuff would be better,” Burgett said.

Burgett’s brother-in-law, Robert Edick, is the deputy grievance administrator for the Attorney Grievance Commission.

He held the stack of mail sent to his niece’s family.

“The first one was from the Bernstein firm, then on the 15th there was one from Matz & Pietsch, and another one from them on the 23rd, then two from Nathan French, then a follow-up dated on the 23rd from Bernstein, then another on the 23rd from Benner & Foran,” he said. “It seems odd that they started arriving so soon.”

So, what’s the fix?

The commission stays neutral on most issues considered by the Court, Edick said, and only occasionally will weigh in if the Court requests. When the Court considered the proposed rule, the AGC supported it.

“The only rationale I’ve ever been aware of for not requiring a waiting period has been from the plaintiffs’ bar. The notion is that insurance companies and defense attorneys will rush in and bamboozle people into a settlement,” Edick said. “I can’t believe that in the Western Hemisphere, there would still be someone who doesn’t understand that you can get an attorney for free, on a contingency fee basis.”

If there is going to be change, it’s probably going to have to be a legislative fix, Gursten said.

The Legislature took a first, but very small step, when it passed Senate Bill 298, which makes it illegal to work as or employ someone who appears at accident scenes in order to direct victims to particular doctors or attorneys. Gov. Rick Snyder signed the bill into law in March.

But the law should go further, Gursten said.

“We could have legislation that prohibits an injured person from being contacted by anyone for a certain period of time,” he said. “But it would have to be the law that no one could contact them, not the lawyers, not the health care providers. No one.”

Edick suggested that if the concern is that insurance companies will take advantage of people by rushing them into a settlement, perhaps the solution is to give a 30-day period to rescind a settlement.

“It’s all because of the information available online,” Bernstein said. “Maybe the answer is to make it more difficult to obtain police reports, which are the mother’s milk of this enterprise. Michigan is unique in that you can obtain accident reports en masse.”

In the meantime

Gursten said that you have to look at where your business is coming from.

He said that the vast majority of his business comes from lawyer-to-lawyer referrals, but he does get a small number of cases from other sources. He learned that a couple of physicians had sent him business they attracted by using a runner. He no longer does business with them.

Morse said that when he first started noticing that a growing number of his clients were reporting to him that they’d been contacted by phone by the doctors’ representatives, he started ramping up his own screening processes to be sure that none of the doctors with whom he has relationships are engaging in that activity.

There were a couple. And he no longer refers anyone to them, and doesn’t take any of their referrals.

He also regularly employs an attorney ethics expert to conduct educational workshops at the firm.

“It just requires a lot of due diligence to make sure you’re not violating any ethics rules,” Morse said.

But Edick said that maybe any lawyer who is using an online database to contact potential clients might want to rethink that.

“If any attorney believes this is a business model or strategy,” he said, “they might want to hear from people who are offended.”

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