

ETHICS OPINION 2011-01

Rules: 7.1, 7.2, 7.3
Subject: Attorney advertising and communication with potential clients
Summary: “Claim Calculator” involves improper prediction of success, prohibited fee for referral, and does not contain required elements of advertising communication

Law Firm is considering participation in a service called “Claim Calculator.” Claim Calculator is an Internet based service that allows individuals to enter certain information (e.g., amount of medical expenses, estimated future expenses, type of injury, etc.) about a legal claim and then receive an estimated settlement value of the claim via email. Claim Calculator would also forward the individual’s claim and contact information to Law Firm. Law Firm would then contact the individual, indicate that Law Firm handles those types of claims and indicate a willingness to assist the individual in pursuing the claim. Law Firm’s proposed communication to individuals would be:

Thanks for using the Claim Calculator - your results are listed at the bottom of this email. You have a very good claim and I can answer any questions you may have about the process. Our law firm has successfully handled these types of personal injury cases and will be able to point you in the right direction.

Your claim is also potentially worth more than the claim value you see with the Calculator. If you would like to know more, please reply to this email with answers to these questions to help determine your claim value:

1. *When did the accident happen?*
2. *Was it a rear-end accident (if not, what happened)?*
3. *Were you transported by ambulance?*
4. *Were x-rays or MRI taken? Did they show anything?*
5. *List your injuries (start from the top of your head and work your way down).*
6. *Do you believe there is any “permanent” condition? If so, what is it specifically that could make a big difference in the value of your claim?*

Separate from your claim value, there are a few more important questions that could determine how much money you will recover for your case:

1. *Do you know what the insurance policy limits are for the person that hit you? This is very important for your case.*
2. *Do you have UIM (under-insured) coverage on your own policy?*
3. *If there’s not enough insurance to compensate you, have you explored all the possible sources of recovery? You’d be surprised how many people are not aware they’re entitled to recover money from a certain person, company, or government entity. It never hurts to find out.*

If you reply to this email with your answers to these questions, I can make sure you're covering all your bases. Please do not negotiate with or provide information to the other insurance company until you speak to me.

Again, there's absolutely no charge for this service. Our firm is located here in [Law Firm City] and I look forward to speaking with you.

Law Firm has asked if this protocol complies with Rules 7.1, 7.2, and 7.3 of the South Dakota Rules of Professional Conduct. It is the opinion of the Committee that it does not.

Claim Calculator's "estimate" of the claim value constitutes a prediction of likely success and dangerously unjustified expectation about results Law Firm can achieve in violation of Rule 7.1. Obviously any representation for personal injury or other claim for damages must and will involve a discussion between the lawyer and client about the potential value of the claim through settlement or trial as well as the risks to obtaining such a recovery. However, the "estimate" provided by Claim Calculator, followed by Law Firm's representation that the claim "is also potentially worth more," creates a dangerous probability of misunderstanding by a potential client. It is effectively a prediction of the minimum value of the claim. As such, it is not permissible under Rule 7.1(c)(1).

Both the Claim Calculator estimate and Law Firm's follow up communication fail to provide sufficient statements that any recovery is uncertain and that there are costs and risks involved in any litigation. As such, they may be materially misleading. Similarly, the closing statement that "there's absolutely no charge for this service" runs the risk of being misleading as to Law Firm's actual fee structure. Both of these present potential violations of Rule 7.1(c) as well. Overall, it is questionable if the entire communication is "predominantly informational" as required by Rule 7.1(b).

Law Firm will pay Claim Calculator a monthly fee for referral of individuals who submit their claim and contact information. This constitutes an improper payment for referrals in violation of Rule 7.2(d). Claim Calculator does not itself "recommend" Law Firm to inquiring individuals, but Law Firm is given the individual's contact and claim information for the purpose of initiating that contact. The net effect is identical to paying Claim Calculator to directly tell individuals to "call Law Firm." That is a distinction without a difference for purposes of Rule 7.2(d). It is also substantively indistinguishable from practices previously rejected by the Committee in Opinions 90-3 and 98-10.

Law Firm's proposed email communication with potential clients does not comport with Rule 7.3. There is no disclaimer of "Advertising Material" at the beginning and end of the communication nor is there any indication that the emails will be provided to the State Bar as required. Law Firm has indicated its opinion that Rule 7.3 does not apply because the contact is not for "soliciting professional employment" but only "to give the prospective client an opportunity to discuss their case with an attorney who is experienced in handling these types of cases." It is patently obvious, however, that Law Firm is providing that opportunity with the hope that individuals retain Law Firm's services; as such, it constitutes solicitation for purposes of Rule 7.3. Law Firm acknowledges this by noting its "underlying motive...is to eventually enter into an attorney-client relationship." The strictures of Rule 7.3 cannot be avoided by gamesmanship as to the purpose of communication to a potential client. Where, as here, communication is initiated by a lawyer with the ultimate purpose of

obtaining pecuniary gain through employment, Rule 7.3 must be complied with. As noted in paragraph 12 of the Preamble to the South Dakota Rules of Professional Responsibility, the autonomy of the Bar as a self-policing entity is purchased at the cost of professional self-discipline; the Rules of Professional Responsibility are guideposts to lead responsible professional behavior, not barriers to be cleverly evaded.

Finally, it is important to note that Committee discussion raised concerns that other Rules could be implicated by this arrangement. Those issues were not discussed because Law Firm inquired specifically about Rules 7.1, 7.2, and 7.3 which provided a definite conclusion. In considering other types of advertising arrangements, counsel should be aware that the discussion above is not intended to be exhaustive of all possible ethical issues. The rules discussed above preclude participation in Claim Calculator and similar arrangements by themselves, however.

Neil Fulton, Chair
Ethics Committee
State Bar of South Dakota