NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207

Committee on Professional Ethics

Opinion #508 - 3/29/79 (80-78)

Topic: Advertising; solicitation; legal seminar; promotion by mail to non-lawyers.

Digest: In the absence of judicial holding to the contrary, law firm may organize and promote by mail legal seminar designed for non-lawyers.

Code: EC 1-5, 2-2;
DR 1-102(A), 2-101, 2-103, 2-104(C), 7-102(A)(8)

QUESTION

May a law firm organize and promote by mail a legal seminar expressly designed for non-lawyers?

OPINION

In 1978, the New York version of the Code of Professional Responsibility was substantially revised in the light of the standards announced by the Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). See, N.Y. State 487 (1978). Prior to these revisions, the Code contained provisions, now repealed, which directly prohibited solicitation and advertising. The Code now prohibits only solicitation "in violation of any statute or court rule." DR 2-103.

A review of the opinions principally applicable to the question here posed reveals that the ethical strictures against law firms organizing legal seminars for lay persons were based on the theory that such activities amounted to advertising and solicitation, both then subject to the pre-Bates broad brush prohibitions established by former DR 2-101 and DR 2-103. See, e.g., N.Y. State 442 (1976) and N.Y. State 283 (1972); see also, ABA Inf. 1021 (1968) and ABA Inf. 840 (1965). Consistent with that view, the question of sponsorship, or the auspices under which the seminar originated, became central to any determination of its propriety.

Thus, in N.Y. State 283, our Committee, by way of elaboration on the then current language of the Code, laid down certain guidelines for lawyer participation in legal seminars addressed to the general public. Among these guidelines was the requirement that the seminar "be sponsored by a bar association, school or other responsible public or private organization." We also quoted at length from ABA Inf. 1021, observing:

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"[W]hat is appropriate for a lawyer to do in participating in these programs and what is appropriate for a lawyer to permit to be said about him ... will turn on the question as to whether or not the overall thrust of the program is designed as a program to advertise a particular lawyer or a group of lawyers. If it is, then the same kind of information about his law firm, about his past accomplishments, etc. would be improper, whereas if it is not, then it is proper to tell persons who may desire to attend these programs any information that is relevant so far as their making up their mind as to whether the program would be worthwhile. This could include the name of his law firm, his experience, etc."

Four years later, in N.Y. State 442, our Committee examined the propriety of a lawyer-operated "school" on the Bankruptcy Act for lay persons. In finding the "school" improper, we reaffirmed the guidelines set out in N.Y. State 283, and said:

"The question of sponsorship is one of the central considerations. While attorneys may properly receive compensation for participation in educational programs ... the opening of a school by lawyers acting independently of any responsible sponsoring organization in these circumstances goes beyond permissible limits. It smacks of an effort to avoid the present strictures against advertising."

Then came Bates. Among the many changes triggered by that opinion were certain amendments to the Ethical Considerations and Disciplinary Rules relating to participation by lawyers in legal seminars and other programs of public education.

Specifically, EC 2-2 was amended to delete the requirement that lawyer participation in educational programs be "under proper auspices" and should not be undertaken for reasons of personal publicity or professional employment.1/ DR 2-104(C) which previously required that participation in educational activities be restricted to those "conducted or sponsored by a qualified ... organization" similarly was amended to remove that restriction.

Hence, with advertising now permitted and the requirements of the Code relating to sponsorship now repealed, much of the rationale for the traditional prohibition on lawyers organizing and promoting legal seminars, or other programs of public education for lay persons, has been removed.

With respect to the promotion of legal seminars by direct mail, as previously noted in N.Y. State 507 (1979), the recent amendments

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to the Code place no limitation on the media which a lawyer may employ in advertising his services or seeking to publicize himself. Absent considerations attending "in-person" solicitation, or a judicial determination to the contrary, the ethical propriety of such communications in this State should be determined by their content. In other words, in the absence of a judicial determination to the contrary, advertising does not become solicitation simply by virtue of being sent through the mails.

Whether the organization and promotion of legal seminars for non-lawyers by direct mail constitutes improper solicitation under Section 479 of this State's Judiciary Law is a matter upon which we cannot pass. Similarly, whether or to what extent Section 479 can survive the constitutional touchstone of Bates and its progeny is also a matter of law that we cannot address.[2] Cf., Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) with Friedman v. Rogers, ___ U.S. ___, 47 U.S. Law Week 4151 (decided 2/21/79).

Conduct which is unlawful will generally be deemed inconsistent with the ethics of our profession. See, e.g., EC 1-5, DR 1-102(A) and DR 7-102(A)(8). Hence, what we here say about the propriety of lawyers organizing and promoting legal seminars for lay persons can be undone to the extent of a judicial determination that any aspect of the proposed conduct constitutes unlawful solicitation.

Having noted the limit of this Committee's jurisdiction and the integral relationship between matters of law and ethics, we nonetheless hasten to observe that direct mail has long been recognized as an appropriate and relatively inexpensive advertising medium. What is of particular importance in the context of the question posed is that, when sent to sophisticated businessmen and executives accustomed to receiving such communications, a direct mail promotion piece is not qualitatively or functionally different from either broadcast or print advertising.

For the reasons stated, and subject to the qualifications hereinabove set forth, the question posed is answered in the affirmative.

FOOTNOTES

1. EC 2-2, prior to its amendment, read:

"The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations

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programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity." (Emphasis supplied)

That provision, as amended April 29, 1978, now reads:

"The legal profession should help the public to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise."

2. To date, the highest courts of at least three states have addressed this issue and appear to be divided. Cf., Kentucky State Bar Association v. Stuart, 568 S.W.2d 933 (Ky., 1978) (holding that lawyers' activities in promoting the use of their services by direct mail is constitutionally protected); Allison v. Louisana State Bar Association, 362 So.2d 489 (La., 1978) (holding that lawyers were guilty of solicitation and unethical conduct in writing letters to employers seeking to obtain contracts under which employers would collect money from wages of employees which would then be sent to lawyers who, in exchange, promised to perform specified legal services for employees); and Adler Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175 (Pa., 1978) (holding improper lawyers' conduct in mailing to former clients letters containing stipulation of substitution with request that they be retained in place of present counsel).