



Committee on Professional Ethics

Opinion #565 - 10/1/84 (28-84)

Topic: Solicitation of potential clients, third party solicitation; in-person solicitation; dividing fees with non-lawyers.

Digest: Improper for attorney to employ and compensate another to solicit attorney's employment by client. In-person solicitation, particularly by third party, improper. Attorney may not divide legal fees with non-lawyer.

Code: EC 1-5, 3-8;
DR 2-100(A), 2-101, 2-103,
3-102.

QUESTION

May an attorney employ a public relations and marketing firm to solicit potential clients for whom the attorney will provide prepaid legal services and pay such firm as compensation either a salary, commission or percentage of the annual fee charged to such clients by the attorney for legal services where the public relations firm will handle all advertising, inquiries, and initial correspondence on behalf of the attorney as well as the presentation and marketing of the prepaid legal services and such public relations firm will seek out corporations, non-profit organizations and various groups?

OPINION

DR 2-101 in general permits advertising and other publicity by lawyers, provided it is not false, deceptive or misleading, and does not adversely reflect on the legal profession as a whole and provided it does not contain puffery, self-laudation, claims regarding the quality of the lawyer's legal services or claims that cannot be measured or verified.

DR 2-103(A) provides that a lawyer shall not solicit employment for himself "in violation of any statute or court rule." Section 479 of the Judiciary Law provides:

"It shall be unlawful for any person, his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business to solicit or procure

such business, retainers or agreements."

This Committee lacks jurisdiction to pass on questions of law. If an arrangement such as the one described in this inquiry is in violation of Judiciary Law § 479 or some other applicable statute or rule, it of course follows that the arrangement would constitute unethical conduct. DR 2-100(A); EC 1-5; N.Y. State 507 (1979); N.Y. State 508 (1979).

Apart from questions of law, the proposed plan violates several provisions of the Code. The lawyer plans to request the marketing firm to promote the use of the lawyer's services as a private practitioner, and to compensate such firm to obtain employment by a client in contravention of DR 2-103(B) and (C). Accord N.Y. State 467 (1977); N.Y. County 656 (1980); see N.Y. State 524 (1980) (ethical proscriptions of DR 2-103(B) and (C) still substantially intact); ABA Inf. 1421 (1978). DR 2-103(B) states, with exceptions not here applicable, "A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client. . . ." DR 2-103(C) provides, with exceptions not here applicable, "a lawyer shall not request a person or organization to recommend or promote the use of the lawyer's services . . . as a private practitioner"

With respect to those aspects of the solicitation that involve the presentation and marketing of legal services by the marketing firm, the ethical considerations weighing against "in-person" solicitation of course pertain. The potential for false, deceptive or misleading statements, for pecuniary interest, puffery and over-commercialization of the legal profession are present. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Matter of Koffler, 51 N.Y.2d 140, 432 N.Y.S.2d 872 (1980), cert. denied, 450 U.S. 1026 (1981); Matter of Greene, 54 N.Y.2d 118, 444 N.Y.S.2d 883 (1981), cert. denied 455 U.S. 191 (1982); Matter of Alessi, 60 N.Y.2d 229 (1983). The effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and uninformed decision-making. Ohralik, supra. In contrast to direct mail solicitation, effective oversight of in-person solicitation is not practicable. Cf. Koffler, supra. It is not visible or otherwise open to public scrutiny. Ohralik, supra. Where the solicitation is directed at businessmen and executives, as in the case of soliciting corporations, the dangers are lessened, but the drawbacks are not entirely removed. Other groups to which the solicitation is to be directed may be less sophisticated, and vulnerable.

These problems are enhanced by the fact the solicitation here proposed is to be carried out by a third-party the marketing firm of nonlawyers, who have neither the training nor tradition in the peculiar ethical and legal limitations on the lawyer's "marketing" of his services. This is one of the reasons that the Code has particular prohibitions against the lawyer's use of third parties to solicit professional employment.

Finally, any compensation in the form of a commission or percentage based upon the volume of business developed would be clearly improper. Such form of compensation would tend to give the marketing firm a pecuniary interest in the success of the solicitation, and may lead to the use of hard-sell tactics or other improprieties. DR 3-102(A) provides in pertinent part, "A lawyer . . . shall not share legal fees with a non-lawyer" The effect of the proposed method of compensation is a division of fees, whether or not it is denominated as such. N.Y. State 438 (1976); N.Y. State 371 (1975). Compensation by commission or percentage would also constitute "a reward for having made a recommendation resulting in employment by a client," which is prohibited by DR 2-103(B).

For the reasons stated, the question posed is answered in the negative.
