

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 624 - 12/16/91 (17-91)

Topic: Advertising and publicity; newspaper articles, sending to non-lawyers.

Digest: A lawyer's targeted direct mail advertisement that includes copies of newspaper articles about the lawyer properly may be mailed to potential clients provided the advertisement comports with DR 2-101, and includes an appropriate disclaimer where the articles are likely to create unjustified expectations or contain claims that cannot be verified.

Code: DR 2-101, 2-101(A), 2-101(B), 2-101(F), 2-101(J); EC 2-10.

QUESTION

May a lawyer mail copies of newspaper articles written about the lawyer directly to accident victims, together with a letter apprising them of the availability of legal services?

OPINION

The United States Supreme Court, in *Shapiro v. Kentucky Bar Association*, held that a state may not place a blanket prohibition on the sending of targeted direct mailings by lawyers. 486 U.S. 466 (1988); see *von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163, 175, 470 N.E.2d 838, 844, 481 N.Y.S.2d 40, 46 (1984) ("the victims and their families had evident need for legal counsel and the mail solicitation of them arguably performed an informational function which the State could not proscribe"); *In re Koffler*, 51 N.Y.2d 140, 144, 412 N.E.2d 927, 930, 432 N.Y.S.2d 872, 874 (1980) ("neither statute nor code provision can constitutionally prohibit advertising of attorneys' services by direct mail to potential

clients"). See also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985) (a state may not prevent targeted lawyer advertising in

newspapers) (plurality opinion); *In re R.M.J.*, 455 U.S. 191, 206 (1982) (blanket mailings by attorneys to the general population may not be banned absolutely); *In re Primus*, 436 U.S. 412, 415-16 (1978) (lawyer's not-for-profit solicitation by mail may not be prohibited); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) ("advertising by attorneys may not be subject to blanket suppression").

Thus, as this Committee stated in N.Y. State 507 (1979), it is not improper *per se* for a lawyer to mail a letter directly to potential clients apprising them of the availability of legal services. Moreover, we believe that the mailing of newspaper articles written about the lawyer is not improper *per se*.

Regardless of the propriety of a particular mode of advertising, however, the contents of any lawyer advertising must comport with DR 2-101 of the Code of Professional Responsibility. N.Y. State 508 (1979). DR 2-101(A) prohibits advertising that is "false, deceptive, misleading or cast[s] reflection on the legal profession as a whole." Additionally, DR 2-101(B) prohibits advertising that contains "puffery, self-laudation, claims regarding the quality of the lawyers' legal services, or claims that cannot be measured or verified." See N.Y. State 505 (1979) (paying local newspaper to publish article about new office would be deceptive); N.Y. State 487 (1978) (overview of the effects of *Bates*).

This Committee does not opine on the accuracy, completeness or the verification of statements contained in particular advertisements. A lawyer engaged in advertising his or her services must take care that no statement violates any provision of DR 2-101.¹

We regard the use of newspaper articles in advertising as an endorsement of the contents of the articles. Accordingly, this Committee's guidelines on the use of client testimonials in radio and television advertising (see N.Y. State 614 [1990]) also are applicable to the use of newspaper articles in the circumstances contemplated:

Thus, we hold improper those client endorsements describing prior results that are potentially misleading in the various ways described herein, *e.g.*, statements of "overblown assurances of client satisfaction," statements that create unjustified expectation or "false hopes" or statements that fail to contain sufficient information, thus rendering the statement false, deceptive or misleading. Additionally, some disclaimer should be joined with client endorsements describing prior results to the effect that the

¹ Because the Committee's jurisdiction is limited to giving guidance on ethical issues raised under the Code of Professional Responsibility, we can express no opinion as to whether advertising that is neither false or misleading, although prohibited by DR 2-101, nevertheless may be protected by the Constitution.

endorsement does not guarantee or predict a similar outcome with respect to any future matter on which the lawyer may be retained.

Concerned with the potentially misleading nature of advertisements that include statements on the outcome of a particular case, the Committee concluded that "to avoid unjustified expectations or false hopes by the consumer, a disclaimer should be inserted in the advertisement that facts and prior results in an earlier case do not guarantee or predict a similar outcome with respect to any further matters on which the lawyer may be retained." *Id.*

The same considerations apply to the conduct here proposed. The lawyer should look to the totality of the advertising materials -- including appropriate disclaimers contained in the letter to accident victims -- to determine if the advertisement as a whole comports with existing disciplinary rules. Thus, for example, if the newspaper article is likely to create an unjustified expectation about the results the lawyer can achieve in other matters, or if the article contains a claim that is impossible to verify then the lawyer could not properly mail the article to potential clients without a disclaimer. Furthermore, if an article contained a statement that the lawyer knows to be false, the lawyer must include a correction. In short, a lawyer who proposes to distribute newspaper articles in this manner is responsible for assuring that the advertising, including the contents of the articles, is not false, deceptive or misleading.

It should be noted that it would be improper to use the newspaper articles in the proposed manner if the lawyer had engaged in improper conduct to cause the articles to be written. As this Committee stated in N.Y. State 505, a lawyer properly may attempt to convince a newspaper to publish an article about himself or herself. However, DR 2-101(J) expressly prohibits a lawyer from compensating or giving anything of value to representatives of the press in anticipation of or in return for professional publicity, because to do so would deceive the public into thinking that the newspaper had made an independent judgment that the subject of the article was newsworthy. *See* N.Y. State 505 (1979).

We caution that this type of targeted mailing to potential clients, particularly accident victims who may be overwhelmed by a particular legal problem prior to receiving the mailing, is fraught with the potential for overreaching and undue influence. *See* Rhode Island 88-29 (1989); Philadelphia 88-25 (1988); Arizona 87-12 (1987); Florida 87-7 (1987). Thus, a lawyer engaged in this activity should avoid "undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel." EC 2-10.

We also point out the responsibility of the lawyer to file a copy of the mailing with the Departmental Disciplinary Committee pursuant to DR 2-101(F).

CONCLUSION

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