

NEW YORK STATE BAR ASSOCIATION

**Committee on Professional Ethics**

Opinion 659 (63-93)

Topic: Advertising

Digest: Attorney may include advertising material in an information package that a car dealer will give to purchasers of automobiles.

Code: DR 2-101; 2-101(A), (B); 2-103 (A), (B), (C), (D).

**QUESTION**

May an attorney ethically include advertising material in an information package that a car dealer will give to purchasers of automobiles?

**OPINION**

DR 2-101(A) and (B) of the Lawyer's Code of Professional Responsibility (the "Code") permits an attorney to advertise "so long as the advertising is not false, deceptive or misleading, and does not contain puffery, self-laudation, or claims regarding the quality of the lawyer's legal services or claims that cannot be measured or verified." N.Y. State 566 (1984).<sup>1</sup> See also *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984); N.Y. State 614 (1990); N.Y. State 563 (1984); N.Y. State 539 (1982). Because the Committee does not pass upon the accuracy or completeness, or verify

---

<sup>1</sup> Whether advertising that is neither false nor misleading may, even though prohibited by the Code, nevertheless be protected by the Constitution, is an issue of law beyond our Committee's jurisdiction to consider or resolve. See *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984).

statements contained in particular advertisements, an attorney who engages in advertising his or her services should ensure that no statement violates any provision of DR 2-101 of the Code. N.Y. State 624 (1991). An advertisement, announcement, newsletter or letter may be sent or mailed to anyone subject to any filing or retention requirements that may be imposed by the appropriate department of the New York Supreme Court, Appellate Division, and an attorney may accept representation arising from such activity. The recipient need not be a current client. *See von Wiegen v. Committee on Professional Standards*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984); *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 214 N.E.2d 927, 432 N.Y.S.2d 872 (1980); N.Y. State 563 (1984); N.Y. State 539 (1982).

DR 2-103(A) of the Code states that a lawyer shall not solicit employment "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.

The Committee lacks jurisdiction to pass on questions of law and therefore cannot express an opinion as to whether any particular manner of advertisement constitutes improper solicitation under Section 479 of this state's Judiciary Law, as interpreted by the courts. "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." N.Y. State 508 (1979). *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

The Committee, however, does not perceive any substantive difference between sending an advertisement through the mail and having it handed to a recipient as part of an information package. It is presumed that the delivery of the information package will not be made by the attorney (and thus would not involve in person solicitation of prospective client by the attorney), and that the car dealer or his employee will deliver the information package but not discuss the advertisement with the purchaser.

Because the attorney will not pay a fee to the car dealer, the attorney will not violate DR 2-103(B) and (C) of the Code, which "prohibit a lawyer from compensating, giving anything of value to, or requesting that, any third party recommend or promote the use of the lawyer's services except as permitted by DR 2-101 or under the specific arrangements set forth in DR 2-103(C) and (D)." N.Y. State 566 (1984)(advertisement improper if payment made to a real estate

brokerage firm to endorse or recommend attorney's services). See N.Y. State 565 (1984)(improper for attorney to employ and compensate public relations and marketing firm to solicit attorney's employment by client). If any form of consideration as paid to a third party to disseminate a lawyer's advertisement, it must be clear from the circumstances that the third party is neither endorsing nor recommending the use of the lawyer's services. See N.Y. State 566 (1984)(misleading if "purported recommendation is in actuality a paid-for, albeit undisclosed advertisement.")

### **CONCLUSION**

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