New York State Bar Association

Committee on Professional Ethics

Opinion 676 - 10/31/95 (27-95)

Topic: Advertising; Solicitation; Class Action.

Digest: Attorney may advertise for, or solicit by mail, additional participants in class action litigation.

Code: DR 2-101; DR 2-104(F); DR 2-103(A); DR 7-101(A)(3); EC 2-10

QUESTION

May an attorney ethically publish newspaper or magazine advertisements, or send letters to current or former employees of a particular corporation, stating that the attorney represents clients who intend to bring an employment discrimination class action against the corporation based on certain claims and inviting others who are similarly situated to participate in such a class action or furnish information?

OPINION

Before commencing the proposed advertising or mailing campaign, the attorney should carefully consider whether that course of action will be beneficial to, or could prejudice, his or her clients. DR 7-101(A)(3). If the attorney determines that the action will not damage his or her clients, we see no ethical bar to the proposed course of conduct so long as the attorney complies with the ethical guidelines noted below.

As our Committee noted in N.Y. State 487 (1978), DR 2-101(A) of the Lawyer's Code of Professional Responsibility permits advertising and other publicity by lawyers provided it is not false, deceptive or misleading and does not cast adverse reflection on the legal profession as a whole. *See* EC 2-10; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985); N.Y. State 659 (1994); N.Y. State 614 (1990); N.Y. State 563 (1984); N.Y. State 539 (1982). Further, a letter or advertisement may be sent or mailed to anyone (including persons who are targeted recipients because they are likely to have similar claims against the corporation) subject to the filing and retention requirements of DR 2-101(F) and any such requirements of the appropriate department of the New York State Appellate Division, and the attorney may accept representation arising from such solicitation; the recipient need not be a current client. *See In re von*

Wiegen, supra; In re Koffler, 51 N.Y.2d 140, 214 N.E.2d 927, 432 N.Y.S.2d 872 (1980) *cert. denied*, 450 U.S. 1026 (1981); N.Y. State 563; N.Y. State 539.

Nonetheless, care must be taken in the advertisements and mailings not to create unjustified expectations or false hopes in those potential members of the class who read the communication. To do so would violate DR 2-101(A), which proscribes advertising that is false or misleading, and DR 2-101(B), which proscribes advertising that contains self-laudation, claims regarding the quality of the lawyer's legal services or claims that cannot be measured or verified. The attorney has the responsibility for assuring that none of the statements in the advertisements or letters is false, deceptive or misleading.

We note, too, that DR 2-104(F) permits a lawyer to accept employment from those contacted for the purpose of obtaining their joinder in class action litigation if success in asserting a client's rights in such litigation is dependent upon the joinder of others, subject to compliance with DR 2-103(A). DR 2-103(A), in turn, essentially incorporates into the Disciplinary Rules the limitations on solicitation imposed by state law, as it prohibits a lawyer from seeking professional employment from a person who has not sought advice about employment of the lawyer if the lawyer's conduct would violate any statute or existing court rule in the judicial department in which the lawyer practices. Section 479 of the New York Judiciary Law in turn makes it unlawful for any person to solicit legal business. Nevertheless, we note that decisions of the Supreme Court may have limited the scope of section 479's prohibitions in providing that such conduct is protected at least to some extent by the Constitution. *See Florida Bar v. Went for It, Inc.,* 115 S. Ct. 2371 (1995); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) *cert. denied*, 490 U.S. 1107 (1989); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Arizona, supra; see also In re von Wiegen, supra; In re Koffler, supra*. It is beyond the jurisdiction of our Committee to opine on issues of law, including whether the proposed conduct would be improper solicitation under section 479 as interpreted by the courts, or whether such a prohibition is constitutionally enforceable.

CONCLUSION

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