St. John's Law Review

Volume 54, Spring 1980, Number 3 Article 12

Jud. Law § 479: State Constitutionally May Prohibit Attorneys from Soliciting by Mail

Joseph Trovato

fited is the attorney, who is guaranteed a minimum payment from the award, leaving the client liable for the difference.[247] In order to remedy this apparently unintended anomaly, it is suggested that the regulations be amended to permit recovery against the carrier on a scale that more closely reflects typical retainer agreements.[248]

Richard L. O'Toole

JUDICIARY LAW

Jud. Law § 479: State constitutionally may prohibit attorneys from soliciting by mail

In order to increase public awareness of the availability and cost of legal assistance, the Supreme Court has held that a state may not prevent an attorney from advertising the nature and fees of his services.[249] Although the Court acknowledged the need for

---

tion—the award of fees may not exceed the recovery of first-party benefits, with interest. [1978] 11 N.Y.C.R.R. § 65.16(c)(7). Similar hourly limitations apply to awards made by master arbitrators. [1978] 11 N.Y.C.R.R. § 65.17(k). It should be noted that the $2850 award affirmed by the *Fresh Meadows* Court, calculated at $150 per hour, on an underlying claim of $70, 49 N.Y.2d at 96, 400 N.E.2d at 304, 424 N.Y.S.2d at 362, would be impermissible under the current regulations.

[247] Notwithstanding the monetary restrictions contained in the regulations, the claimant remains contractually liable to his attorney for fees in excess of those awarded. It should be noted that the regulations initially promulgated included a provision prohibiting the attorney from charging his client an amount in excess of the fees permitted by the regulations. [1978] 11 N.Y.C.R.R. § 65.16 (c)(7)(ix). This provision was ordered rescinded in Rachlin v. Lewis, 96 Misc. 2d 701, 705, 409 N.Y.S.2d 594, 597 (Sup. Ct. N.Y. County 1978). The court held that the regulations were inconsistent with § 675(1), since the statute only authorized limitations on fees recovered from the *carrier*. *Id.* at 706, 409 N.Y.S.2d at 597. In addition, the court concluded that it would be impermissible to interfere with any private contactual arrangements a lawyer has made with his client. *Id.* (citing N.Y. Jud. Law § 474 (McKinney 1968)).

[248] An increase in the permissible award of fees would enhance a claimant's ability to retain competent counsel, since the successful attorney would be assured of adequate remuneration. It is submitted that a more realistic restriction might authorize an increased award, calculated at an hourly rate for small claims and a contingency for larger claims, since this would simulate typical private fee arrangements. *See generally* 1 S. SPEISER, ATTORNEY'S FEES ch. 1 (1973). A regulation of this nature would alleviate the difficulties of computing the award by permitting the arbitrator or the court to award fees similar to those the claimant would have paid his attorney, absent the statutory provision allowing recovery from the carrier.

[249] Bates v. State Bar, 433 U.S. 350, 374-77, 384 (1977). The *Bates* holding was limited to the narrow question whether it was constitutionally permissible for a state to bar an attorney from truthfully advertising the availability and cost of his services in a newspaper. In finding that a state could not bar such conduct, the *Bates* Court reaffirmed its decision in

reasonable state regulation of the manner, time and place of legal advertising,[250] the scope of permissible attorney conduct in the area of advertising has remained unclear. Recently, in *In re Koffler*,[251] the Appellate Division, Second Department, attempted to clarify one aspect of this sensitive issue,[252] holding that under section 479 of the Judiciary Law[253] and the Code of Professional Responsibility (the Code),[254] an attorney may not solicit business by

---

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) that a total ban on professional advertising constitutes an abridgment of the first amendment right to freedom of speech. Bates v. State Bar, 433 U.S. 350, 384 (1977). Prior to the *Virginia State Bd.* decision, commercial advertising had been considered outside the penumbra of first amendment guarantees. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[250] Bates v. State Bar, 433 U.S. 350, 383-84 (1977). Notwithstanding the Court's recognition of society's "strong interest in the free flow of commercial information," it nevertheless has found that commercial speech is distinguishable from other types of speech. Consequently, it has been "afforded . . . a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values [and is subject to] modes of regulation which might be impermissible in the realm of noncommercial expression." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). *See generally* Erickson, *The Consumers Right to Know: An Analysis of* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. *and the Effect of the First Amendment Right to Receive Information on Lawyers' Advertising*, 12 NEW ENGLAND L. REV. 991, 1005-11 (1977). For example, a state validly may prohibit false or deceptive advertising. Bates v. State Bar, 433 U.S. 350, 383 (1977). Additionally, because of the public's ignorance in the area of legal services, the *Bates* Court suggested that advertising dealing with quality often may have a tendency to mislead, and therefore, also might be restricted. *Id.* at 383-84. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT § 9.1(b) (1980); ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) (1980).

[251] 70 App. Div. 2d 252, 420 N.Y.S.2d 560 (2d Dep't 1979).

[252] The longstanding prohibition on solicitation and advertising by attorneys had been based upon a desire not only to maintain the dignity of the profession, but also to avoid misrepresentation, political corruption and the stimulation of unnecessary litigation. Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L. J. 1181, 1184 (1972). At the same time, however, it had been argued that since solicitation may serve to reduce fees and assist the public in obtaining legal services, it is not without benefit. Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 681-84 (1958). It should be noted that studies conducted subsequent to the *Bates* decision have refuted the Bar's concern that advertising would result in a reduction in the quality of legal services. McChesney and Muris, *The Effect of Advertising on the Quality of Legal Services*, 65 A.B.A.J. 1503, 1505 (1979).

[253] Section 479 of the Judiciary Law provides:

> It shall be unlawful for any person or 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 so to solicit or procure such business, retainers or agreements.

N.Y. JUD. LAW § 479 (McKinney 1968).

[254] Disciplinary Rule 2-103(A) of the Code of Professional Responsibility states that

mail.[255]

In *Koffler,* the defendants sent letters to approximately 7,500 homeowners stating that they understood that the owner was selling his home[256] and that they were willing to represent him in the transaction at a specified price.[257] A similar letter was sent to real estate brokers and offered reduced fees to broker-referred clients.[258] The Joint Bar Association Grievance Committee subsequently instituted proceedings against the defendants alleging that they had directly solicited clients in violation of the Code and sec-

---

> [a] lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A)(as amended Oct. 1978); *see id.* EC 2-3.

[255] 70 App. Div. 2d at 254, 420 N.Y.S.2d at 575.

[256] *Id.* at 257, 420 N.Y.S.2d at 564. How the defendants had obtained the information that the homeowner was going to sell his home was not established at the hearing.

[257] *Id.* at 254, 420 N.Y.S.2d at 562. One of the defendants previously had placed an advertisement announcing his legal fees for real estate closings in Newsday, a daily newspaper with a large suburban circulation. The letters offered to reduce the advertised price of $235 to $195. *Id.* at 255, 420 N.Y.S.2d at 562. The letter stated:

> We understand that you are selling your home and we would like to take this opportunity to inform you that because we are now allowed to advertise our services YOU no longer need to pay $400 to $600 for legal representation when you close title.
>
> IN FACT, BECAUSE WE ARE ABLE TO CONTACT YOU BY DIRECT MAIL, WE ARE WILLING TO TRANSACT AND REPRESENT YOU AT THE SALE OF YOUR PROPERTY FOR $195.
>
> Feel free to contact us if you have any questions. If you wish, you may make an appointment with us prior to selling your house. This will enable us to draw your contracts quickly when you and a purchaser come to terms.
>
> Enclosed you will find our business card. We look forward to representing you.

Id. at 254-55, 420 N.Y.S.2d at 562.

[258] *Id.* at 255, 420 N.Y.S.2d at 562. The letters mailed to the real estate agents stated in pertinent part:

> We think you will agree that the fee of $235 is very competitive, NEVERTHELESS, WE ARE NOW HAPPY TO ADVISE THAT OUR FEE TO ALL BROKER-REFERRED CLIENTS WILL BE $195, REGARDLESS OF THE PURCHASE PRICE OF THE PROPERTY.
>
> . . . .
>
> Enclosed are two of our business cards. Our principal office is at [ooo] Main Street, Islip, New York, however, we also have facilities at [oo] Randall Road, Shoreham. We can be contacted in Islip at [555-1000] during normal business hours or in Shoreham at [555-2000] after 9 P.M. and on weekends.
>
> We look forward to assisting you by assisting your clients.

Id.

tion 479 of the Judiciary Law.[259] The defendants answered contending that the statute and rule as applied to solicitation by mail were unconstitutional.[260] A referee found that the attorneys had violated the Code and the Judiciary Law "not because they communicated with prospective clients by mail, but because the content of that communication . . . constituted solicitation rather than advertising."[261]

On appeal, the Appellate Division, Second Department, confirmed the referee's finding, holding that the letters were a form of solicitation that constitutionally could be prohibited.[262] Justice Shapiro, writing for a unanimous court,[263] rejected the defendants' contention that their mailings were a form of permissible advertising.[264] The court reasoned that the letters to the homeowners did not merely alert the public to the availability of the defendants' services.[265] Rather, directed to a small group of individuals, they constituted solicitation of business from a "captive audience . . . believed to be interested in a particular transaction."[266] Moreover, Justice Shapiro observed that the letters were isolated from the "marketplace of competitive advertising" and therefore were not the type of public notice contemplated by the Supreme Court

---

[259] 70 App. Div. 2d at 256, 420 N.Y.S.2d at 563. *See* notes 253 & 254 *supra.*

[260] 70 App. Div. 2d at 256, 420 N.Y.S.2d at 563. The defendants also interposed an affirmative defense of good faith reliance on the Supreme Court's decision in Bates v. State Bar, 433 U.S. 350 (1977), which sanctioned attorney advertising. *See* note 249 *supra.*

[261] 70 App. Div. 2d at 257, 420 N.Y.S.2d at 563. *See* note 272 *infra.* The court had referred the proceedings to the Hon. John F. Scileppi, a retired judge of the Court of Appeals. 70 App. Div. 2d at 256, 420 N.Y.S.2d at 563.

[262] 70 App. Div. 2d at 274, 420 N.Y.S.2d at 575.

[263] Presiding Justice Mollen and Justices Hopkins, Rabin and Gulotta concurred in Justice Shapiro's opinion.

[264] 70 App. Div. 2d at 256, 420 N.Y.S.2d at 563. Though admitting that advertising "is a method, in a broad sense" of solicitation, *id.* at 271, 420 N.Y.S.2d at 573, Justice Shapiro explained that each is separate and distinct from the other. To "advertise" was considered to be "[t]he act or practice of bringing . . . one's business, into public notice. . . ." To "solicit" was defined as "[t]o importune, entreat, implore, ask, attempt, try to obtain." *Id.* at 271-72, 420 N.Y.S.2d at 573 (quoting State v. Cusick, 248 Iowa 1168, 1172, 84 N.W.2d 554, 556 (1957)). *See* Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 465 n.25 (1978). *But see* note 283 and accompanying text *infra.*

[265] 70 App. Div. 2d at 272, 420 N.Y.S.2d at 573. *See also* Bates v. State Bar, 433 U.S. 350, 384 (1977).

[266] 70 App. Div. 2d at 272, 420 N.Y.S.2d at 573. The defendants' statement in the letter that they understood that the recipient was selling his home apparently was the determinative factor in the court's decision that the letters constituted solicitation rather than advertising. *Id. See* note 272 *infra.*

when it upheld the attorney's right to advertise his services.[267] The second department also characterized the letter to the real estate brokers as impermissible solicitation since it was designed to establish a referral service.[268] Consequently, the court concluded that by soliciting through the mail, the defendants had engaged in unethical conduct proscribed by the Judiciary Law and the Code.[269] Emphasizing the "important governmental interest" in regulating its licensed professionals,[270] the *Koffler* court also found that the statutory ban on solicitation by mail was constitutional.[271]

While the *Koffler* court's prohibition of the defendants' mail

---

[267] 70 App. Div. 2d at 272, 420 N.Y.S.2d at 573.

[268] *Id.* at 272, 420 N.Y.S.2d at 573. The court noted that the solicitation of the real estate brokers implicated possible conflicts of interest. *Id.* at 274 n.5, 420 N.Y.S.2d at 575 n.5.

[269] *Id.* at 272-75, 420 N.Y.S.2d at 573-75. Noting that the defendants' good faith reliance on the Supreme Court's sanction of advertising in Bates v. State Bar, 433 U.S. 350 (1977), *see* note 260 *supra*, should preclude disciplinary action, the court nevertheless put the Bar on notice that future misconduct would not be dealt with leniently. 70 App. Div. 2d at 275, 420 N.Y.S.2d at 575. Solicitation in the past has been punished with disbarment. *See In re* Millstein, 25 App. Div. 2d 129, 133, 267 N.Y.S.2d 732, 735 (1st Dep't 1966); *In re* Levine, 254 App. Div. 165, 166, 4 N.Y.S.2d 230, 231 (1st Dep't 1938); *In re* Rosenthal, 250 App. Div. 421, 427, 294 N.Y.S. 165, 171 (2d Dep't 1937).

[270] 70 App. Div. 2d at 272-75, 420 N.Y.S.2d at 573-75. According to the *Koffler* court, the considerations relevant to the regulation of attorney solicitation are: "(1) whether there are ample alternative channels for communication of the information . . . (2) whether the solicitation involves vexatious conduct or invasion of privacy . . . and (3) whether the solicitation unduly . . . erodes true professionalism contrary to the 'State's interest in maintaining high standards among licensed professionals' . . . ." *Id.* at 273-74, 420 N.Y.S.2d at 574-75 (citations omitted). The court reasoned that mail solicitation is as much an invasion of the privacy of the recipient as is in-person solicitation. *Id.* at 273 n.4, 420 N.Y.S.2d at 574 n.4, *see* Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 462 (1978); *In re* Primus, 436 U.S. 412, 426 (1978). Moreover, the court opined that the legalization of solicitation would result in a loss of respect for the legal profession. 70 App. Div. 2d at 274 n.4, 420 N.Y.S.2d at 574 n.4. Since an attorney may publicize his services through less intrusive and more restrained advertising, the court concluded that the state's compelling interest in regulating the legal profession and protecting the public from vexatious conduct justified precluding the solicitation of clients by mail for pecuniary gain. *Id.* at 271, 420 N.Y.S.2d at 572.

[271] In its analysis, the court relied heavily on the Supreme Court's decision in Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *Ohralick* involved in-person solicitation by an attorney. *See* note 275 *infra*. In holding that a state legitimately may prohibit such conduct, the Court stated that "[t]he entitlement of in-person solicitation of clients to the protection of the first amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State's countervailing interest in prohibition." 436 U.S. at 455. Thus, a state may utilize prophylactic measures to prevent solicitation involving "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct,' " *id.* at 462, such as the invasion of privacy, conflict of interest and commercialization of the legal profession. *See In re* Primus, 436 U.S. 412, 434-36 (1978).

campaign appears justifiable,[272] it is submitted that the reasoning employed to reach that result is both ambiguous and problematic. In *Bates v. State Bar of Arizona*,[273] the Supreme Court sanctioned "truthful [newspaper advertising] concerning the availability and terms of routine legal services."[274] Subsequently, the Court held that a state may proscribe solicitation by attorneys that is in fact "misleading, overbearing, or involves other features of deception or improper influence" and may prohibit in-person solicitation for remuneration "under circumstances likely to result in these evils."[275] As to the broad range of activity that lies between objective newspaper advertisements and in-person solicitation, the Court has furnished little guidance. The *Koffler* court opted for a test that requires a categorization of the challenged activity as either

---

[272] The *Koffler* letters differed from the advertisement in *Bates* in that instead of merely advising the public of the availability and fees of legal services, the letters were targeted towards prospective clients who apparently were interested in the transaction and "urge[d] that such persons retain the [defendants] to represent them." 70 App. Div. 2d at 272, 420 N.Y.S.2d at 573; *see* notes 249 & 250 *supra*. Such language of entreaty directed to individuals interested in selling their homes may result in overreaching, which the states are authorized to proscribe. *See In re* Primus, 436 U.S. 412, 426 (1978). Since the large volume of mail sent by the defendants apparently made it improbable that they actually knew that the recipients were interested in selling their homes, *see* 70 App. Div. 2d at 274 n.5, 420 N.Y.S.2d at 575 n.5, it would seem that the defendants' letters might constitute the type of fraudulent or deceptive advertising that may be restrained. *See* Bates v. State Bar, 433 U.S. 350, 383 (1977). *But see* ABA MODEL RULES OF PROFESSIONAL CONDUCT 9.3(b)(2).

[273] 433 U.S. 350 (1977). *See* notes 249 & 250 *supra*.

[274] 433 U.S. at 384.

[275] *In re* Primus, 436 U.S. 412, 438-39 (1978). In Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978), the defendant was suspended from the Bar for personally soliciting a contingency arrangement with two accident victims. The defendant claimed that his in-person solicitation was "indistinguishable . . . from the advertisement in *Bates*" and was protected by the first and fourteenth amendments of the Constitution. *Id.* at 454. Rejecting this contention, the Court stated that "in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim . . . [is] to encourage speedy and . . . uninformed decisionmaking; there is no opportunity for intervention or counter-education . . . ." *Id.* at 457.

In *In re* Primus, 436 U.S. 412 (1978), an attorney for the American Civil Liberties Union (ACLU) allegedly advised a citizen of her legal rights without being requested to do so and later sent a letter informing her that free legal assistance was available. Noting that the attorney had not sought representation for pecuniary gain, the Court held that for the ACLU, litigation was a form of political expression entitled to full constitutional protection. *Id.* at 428; *see* note 250 *supra*. The Court also observed that sending a letter, in contrast with in-person solicitation, "involved no appreciable invasion of privacy, nor did it afford any significant opportunity for overreaching or coercion." *Id.* at 435. In concluding that the attorney could not be disciplined for this form of solicitation, the *Primus* Court emphasized that only one letter had been sent and that it contained information relevant to the litigation that the attorney previously had discussed with the recipient. *Id.* at 435 n.284.

"solicitation" or "advertising."[276] In view of the difficulties that inevitably will arise in both invoking and attempting to comply with such a test, it is suggested that the better approach would have been to determine whether the communication would more likely than not result in the "substantive evils" that a state legitimately may seek to avoid or would debase the standards of the legal profession.[277]

Notwithstanding the perplexities of the *Koffler* decision, it appears that not all mailings are prohibited.[278] The second department's attack on the *Koffler* letters apparently was not motivated by a disapprobation of an attorney's use of the mails to publicize his services, but rather by the court's criticism of the contents of the communications and to whom they were directed.[279] Thus, it would seem that in the future, an objective notice in the form of a letter, pamphlet or circular mailed to the general public might pass muster.[280] It is submitted that such activity would accord with the

---

[276] *See* 70 App. Div. 2d at 271-75, 420 N.Y.S.2d at 572-75; Bonomi, *Professional Responsibility*, N.Y.L.J., Jan. 31, 1980, at 1, col. 1.

[277] *See* notes 270-71 *supra*. It is submitted that such an approach would make it easier for the reasonable attorney to determine what forms of advertising or solicitation he may properly utilize. A similar rationale was employed in Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978), where two lawyers were charged with having solicited clients in violation of DR 2-103(A) of the Code of Professional Responsibility. The charge was based on a letter mailed to two real estate agencies on firm stationary which contained a statement of the service they rendered, their fees, and the estimated time in which routine services could be performed. The Supreme Court of Kentucky held that the letters did not constitute impermissible solicitation, *id.* at 934, since "the letters contained no words generally associated with solicitation" and did not present any "of the evils . . . which exist in the case of 'in-person solicitation.' " *Id.* Moreover, the court found that the letters would not "encourage a person to make a speedy and possibly uninformed decision," *id.*, nor would they increase the likelihood of overreaching or deception to any greater extent than would other forms of permissible advertising. *See id.* Finally, the court concluded that the Bar Association could ensure that letter advertisements complied with ethical standards by "requir[ing] the attorney to mail a copy . . . to the [Bar] Association simultaneously with the mailing . . . to . . . the public." *Id.*

The significant distinction in the *Koffler* and *Stuart* letters must be noted. In contrast to the *Stuart* letters, it is suggested that the letters in *Koffler* involved a substantial potential for fraud or deception. *See* note 272 *supra*.

[278] 70 App. Div. 2d at 274, 420 N.Y.S.2d at 575. The court stated that it did not "reach the question of whether all mailing is proscribed." *Id.*

[279] *See id.* at 272, 420 N.Y.S.2d at 573; Bonomi, *supra* note 276 at 28, col. 3.

[280] As noted by Justice Powell in his dissenting opinion in *Bates:*

> The Court speaks specifically only of newspaper advertising, but it is clear that today's decision cannot be confined on a principled basis to price advertisements in newspapers. *No distinction can be drawn between newspapers* and a rather broad spectrum of other means—for example, magazines, signs in buses and subways, posters, handbills, *and mail circulations.*

spirit of the *Bates* Court's effort to encourage the free flow of information concerning the availability of legal services.[281]

Koffler suggests that an advertising attorney must avoid any semblance of solicitation.[282] Since advertising itself is a form of solicitation,[283] it is submitted that the second department's attempt to distinguish the terms offers little clarification of the permissible bounds of legal advertising. It is hoped, therefore, that the bar associations and judiciary will promulgate criteria delineating the proper contents and modes of advertising in order to assist the profession in conforming its conduct to acceptable limits.[284]

Joseph Trovato

Bates v. State Bar, 433 U.S. 350, 402 n.12 (1977) (Powell, J., dissenting) (emphasis added); *see* note 277 *supra*.

[281] Bates v. State Bar, 433 U.S. 350, 384 (1977); *see* note 249 *supra*.

[282] As noted by one commentator, an attorney wishing to use letters to advertise must combine careful wording with a large distribution to the public at large to avoid the stigma of solicitation. *See* Bonomi, *supra* note 276 at 1, col. 1.

[283] BLACK'S LAW DICTIONARY 50 (5th ed. 1979). "Advertise" is defined as "[a]ny oral, written, or graphic statement made by the seller in any manner in connection with the *solicitation* of business . . . ." (emphasis added). *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 474 (1978) (Marshall, J., concurring); 70 App. Div. 2d at 271, 420 N.Y.S.2d at 573. *But see* State v. Cusick, 248 Iowa 1168, 1172, 84 N.W.2d 554, 556 (1957); note 264 *supra*.

[284] The Court in *Bates* called upon the Bar to play a "special role . . . in assuring that advertising by attorneys flows both freely and cleanly," Bates v. State Bar, 433 U.S. 350, 384 (1977).

Although the rules of the first and second departments attempt to prescribe the acceptable form and content of attorney advertising, it is submitted that they fail to establish sufficiently concrete guidelines. These provisions, which became effective in March, 1978, provide that the purpose of attorney advertising is to increase "public . . . awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel." [1980] 22 N.Y.C.R.R. §§ 603.22(d), 691.22(d). For examples of acceptable advertisements, articles and brochures, see LAWYER ADVERTISING KIT, ABA SEC. OF ECON. OF LAW PRAC. (1978).

The A.B.A. Commission on the Evaluation of Professional Standards recently issued its Model Rules of Professional Conduct for evaluation by the Bar. The proposed rules, which eventually would replace the ABA Code of Professional Responsibility, specify the extent to which advertising by the legal profession is permissible. Like DR 2-101(A) of the code, proposed rule 9.1 prohibits an attorney from making false, fraudulent, or misleading statements to a client. ABA MODEL RULES OF PROFESSIONAL CONDUCT § 9.1 (1980); *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(A) (1980). As to advertising, proposed rule 9.2 states:

> (a) A lawyer may advertise services through public communications media such as a professional announcement, telephone directory, legal directory, newspaper or other periodical, radio, television, or general direct mailing. . . .

ABA MODEL RULES OF PROFESSIONAL CONDUCT § 9.2 (1980); *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) (1980). Biographical information including the attorney's legal education and background, the range of fees for services, and any "other information that might invite the attention of those seeking legal assistance," may be included in the adver-

WORKER'S COMPENSATION LAW

Carrier's release from future liability effected by employee's third party recovery held not a benefit for consideration in apportioning litigation expenses

Section 29(1) of the Worker's Compensation Law (WCL) provides that an employee injured in the course of his employment through the fault of one other than his employer or fellow employee may pursue a third party action for damages without compromising his statutory entitlement to compensation.[285] In order to ensure the continued viability of the compensation system, however, the compensation carrier is afforded a lien upon the proceeds of any recovery to the extent of the benefits previously paid to the employee.[286] Where the carrier seeks to satisfy such lien out of the proceeds of a judgment or settlement procured through the efforts

---

tisement. *See id.* It is submitted that the vagueness of these rules detract from their value as purported standards to be followed by the advertising attorney.

It should be noted that proposed rule 9.3 permits solicitation on a limited basis. It provides, in part, that "a lawyer may initiate contact with a prospective client . . . [b]y a letter concerning a specific event or transaction if the letter is followed up only upon positive response by the addressee . . . ." ABA MODEL RULES OF PROFESSIONAL CONDUCT § 9.3 (1980). This provision apparently would sanction the type of letter sent by the defendants in *Koffler*.

[285] N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1979-1980). Originally, an employee had to choose between bringing his action against the third party or receiving payments from the compensation carrier. Ch. 816, § 29, [1913] N.Y. Laws 2293. The employee's election to receive compensation benefits constituted an automatic assignment of the tort cause of action of the carrier. *Id.*; Curtin v. City of New York, 287 N.Y. 338, 340, 39 N.E.2d 903, 904 (1942). The practical consequence of this election was that injured employees, financially unable to await the uncertain outcome of litigation, would "choose" to receive the compensation payments. *See* Gegan, *The Compensation Carrier's Right to Restitution for Medical Expenses Through a Lien on the Employee's Tort Recovery*, 52 ST. JOHN'S L. REV. 395, 401 (1978); 7 FORDHAM L. REV. 282, 282 (1938). The abolition of this forced election allowed the employee to collect his benefits without surrendering his right to bring a third party suit. Ch. 684, § 29, [1937] N.Y. Laws 1556 (McKinney). *See also* Gegan, *supra*, at 401.

[286] *See* N.Y. WORK. COMP. LAW § 29(1) (McKinney Supp. 1979-1980). The compensation carrier's lien was an outgrowth of the 1937 amendment to section 29(1) of the WCL designed to prevent a double recovery by the employee and to provide the carrier with an opportunity to recoup payments already made to the employee. *See* Granger v. Urda, 44 N.Y.2d 91, 97, 375 N.E.2d 380, 382, 404 N.Y.S.2d 319, 321 (1978); Becker v. Huss Co., 43 N.Y.2d 527, 538, 373 N.E.2d 1205, 1207, 402 N.Y.S.2d 980, 982-83 (1978); Curtin v. City of New York, 287 N.Y. 338, 342-43, 39 N.E.2d 903, 905 (1942); Gegan, *supra* note 284, at 401-02. The lien attaches to any recovery, whether by judgment or settlement, arising from the injury which originally generated the compensation payments. *See* Ryan v. General Elec. Co., 26 N.Y.2d 6, 9, 256 N.E.2d 188, 189, 307 N.Y.S.2d 880, 881 (1970); Petterson v. Daystrom Corp., 17 N.Y.2d 32, 39, 215 N.E.2d 329, 332, 268 N.Y.S.2d 1, 3 (1966).