A LAWYER MAY DIRECTLY MAIL SOLICITATIONS OF A PROPOSED GROUP LEGAL SERVICES PLAN TO PROSPECTIVE COMMERCIAL ORGANIZATIONS, WHICH DO NOT HAVE A QUALIFIED PLAN, IF THE LETTER IS NOT FALSE, DECEPTIVE, FRAUDULENT OR MISLEADING AND THE LEGAL SERVICES PLAN IS IN COMPLIANCE WITH DR 2-103(D)(4).

STATEMENT OF FACTS

I. Attorney submitted, to the Cleveland Bar Association Professional Ethics Committee, a proposed letter with accompanying pamphlet which he intends to mail directly to the professional associations listed in the Cleveland Yellow Pages with the hope of enlisting these associations in a group legal services plan.

The lawyer developed this plan and will be the sole attorney handling all of the business. The association would pay the lawyer a set fee for each member who is to be covered by the plan. The lawyer would not represent the member in any legal action, or otherwise, against the association nor would he represent the association in any legal matter, or otherwise, against any of its members. This opinion will only address the propriety of mailing the proposed letter. The Professional Ethics Committee of the Cleveland Bar Association has declined to rule on the propriety of the content of the letter and the legality of the proposed Group Legal Services Plan.
QUESTIONS PRESENTED

1. Whether the Code of Professional Responsibility permits a lawyer to directly mail a proposed group legal services plan to professional commercial associations listed in the Cleveland Yellow Pages?

2. Whether the referral of the lawyer's work from the professional associations constitutes permissible conduct pursuant to DR 2-103(D) of the Ohio Code of Professional Responsibility.

CONCLUSIONS

1. A letter which is not deceitful, fraudulent, false or misleading and which informs prospective commercial clients of specific legal services with each accorded fee, constitutes permissible conduct under DR 2-103(A) of the Ohio Code of Professional Responsibility.

2. The referral of the lawyer's work from the business associations constitutes permissible conduct pursuant to DR 2-103(D)(4) of the Ohio Code of Professional Responsibility.
DISCUSSION

The Ohio Code of Professional Responsibility expressly prohibits specific types of solicitations on the part of an attorney, which are not otherwise permitted by the First and Fourteenth Amendments to the United States Constitution.

**DR 2-103(A):** A lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer, except as provided in DR 2-101.

**DR 2-101** provides in relevant part that:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of, any form of communication containing a false, fraudulent, misleading or deceptive statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-102 through DR 2-105, information in print media, in written or printed material distributed to consumers through the mail or otherwise; or over radio or television. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A).

The Supreme Court of the United States in *Bates v. State Bar of Arizona*, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S.Ct. 2691 (1977), held that a state may not entirely ban all advertising by lawyers because truthful advertising is commercial speech protected by the First and Fourteenth Amendments to the United States Constitution.

The next year, the Court held in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 56 L.Ed. 2d 444, 98 S.Ct. 1912 (1978), that in-person solicitation of a prospective client may
be prohibited because its limited First Amendment protection is outweighed by the state's interest in preventing the possibility of fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct which may occur in the context of that situation.

However, that same term the Court in In re Primus, 436 U.S. 417, 56 L. Ed. 2d 417, 98 S.Ct. 1893 (1978), softened its position from Ohralik on the factor that a written letter is less oppressive than in-person solicitation and the letter contained helpful information and is protected commercial speech by the first and fourteenth Amendments to the United States Constitution.

In In Re Primus, supra, the Court reasoned that the appellant's act of mailing a letter to a woman informing her to consult the ACLU for advice on an alleged unconstitutional sterilization was not for pecuniary gain but to communicate to her an offer of free assistance by an ACLU attorney.

The Court in Zauderer v. Office of the Disciplinary Council of the Supreme Court of Ohio, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed. 2d 652 (1985), addressed the issue of the differences between advertising and other forms of solicitation. The Court reasoned that prospective clients are less subject to harrassment, overreaching, and duress through advertising than they are through direct personal contact. In most cases printed advertising will lack the coercive force of the personal presence of a trained advocate.
Target mailings may, at times, be prohibited pursuant to Zauderer, if the content of the letter is misleading, fraudulent, unlawful or deceptive. The mailings must be presented in an honest and accurate manner.

The states are split as to whether a lawyer may directly mail a letter to targeted groups requesting that the groups retain or refer the lawyer's services. Several state supreme courts have rejected the idea that letters written to people with the specific purpose of soliciting the person for employment is constitutionally protected commercial speech. The Supreme Court of Louisiana in Allison v. Louisiana State Bar Association, 362 So. 2d 489 (1979), held that a letter written to employers for the specific purpose of forming contracts was prohibited solicitation. See Also, The Florida Supreme Court in The Florida Bar v. Schreiber, 407 So. 2d 595 (1982), Kansas v. Moses, 642 P.2d 1004 (1982). The Court in Schreiber, supra, held that because of harm to the public's best interest when an attorney solicits employment, in light of the pecuniary interests, the prohibition of direct mail solicitation relates to the state's obligation to uphold professional standards for the protection of its citizens.

In Shapero v. Kentucky Bar Association, 726 S.W.2d 299 (1987), cert. granted, 56 U.S.L.W. 3242 (March 27, 1987), the Kentucky Supreme Court relied upon Zauderer to declare unconstitutional a state rule which barred all targeted direct mail advertisements and replaced it with American Bar Association
Model Rule 7.3 (1983) which generally prohibits targeted solicitation of prospective clients known to need legal services by mail, in person or otherwise, where a significant motive for doing so is the lawyer's pecuniary gain. The new rule was applied retroactively to the attorney's proposed letter to potential clients against whom mortgage foreclosure suits had been filed. Hopefully the forthcoming decision of the United States Supreme Court will clear up much of the uncertainty on this issue.

The trend appears to permit direct mail solicitation to a targeted group because the fears of in-person solicitation are not present. In *Spencer v. Justices of the Pennsylvania Supreme Court*, 579 F. Supp. 880 (E.D. Pa. 1984), aff'd Sub Nom., *Spencer v. Supreme Court of Pennsylvania*, 760 F.2d 261 (3rd Cir. 1985), the court held that direct mail solicitation is constitutionally protected speech because it can provide the public with useful information regarding legal rights, remedies and services. Direct mail solicitation is different than in-person solicitation because the evils of pressure and intimidation, and an atmosphere demanding an immediate response are not present.

In 1986, the Supreme Judicial Court of Massachusetts, in *In Re Amendment to S.J.C. Rule 3:07*, 398 Mass. 73, 495 N.E.2d 282 (1986), amended its rules to permit targeted direct mail advertising.

The New York Court of Appeals addressed this issue three times. The first time, in *Koffler v. Joint Bar Association*, 412 N.E. 2d 927 (N.Y. 1980), the Court held that direct mail
solicitation of potential clients is constitutionally protected speech which may be regulated but not prohibited.

One year later, in *Greene v. Grievance Committee, etc.*, 444 NYS 2d 883 (1981), the New York Court of Appeals held that direct mail advertising addressed to real estate brokers was a direct and improper form of solicitation of brokers to refer clients to the attorney and thus indirect solicitation of clients by attorneys.

In 1984, in *In re. von Weigen*, 470 N.E. 2d 883 (NY 1984), the New York Court of Appeals held that a blanket prohibition of mail solicitation of accident victims violated an attorney's right of expression under the First and Fourteenth Amendments.

The United States Court of Appeals for the Seventh Appellate Circuit in *Adams v. Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois*, 801 F.2d 968 (7th Cir. 1986), relied on *Zauderer* and affirmed the Federal District Court's preliminary order enjoining the enforcement of a Disciplinary Rule that prohibits lawyers' direct mail advertising to persons known to require specific legal services. That Court reasoned that the concerns of overreaching, harassment, duress or over zealous self-recommendation are not present.

In accord with these decisions, the Professional Ethics Committee of the Cleveland Bar Association opines that the inquirer may send letters to the commercial associations listed in the Cleveland Yellow Pages requesting them to peruse his drafted group legal services plan.
The fear of in-person solicitation is not present in situations in which the recipient has no known legal problems and is more sophisticated than a lay person with known legal problems. The recipient will not be under pressure to retain the services of the attorney by a verbal barrage of information through the attorney's advocacy skills. Rather, the recipient will be able to merely throw the letter away. Also, the letter may be subject to more regulation than in-person solicitation because the author has published the letter and brochure, which, if false, misleading, fraudulent or deceptive may subject the author to disciplinary action.

Many groups with known legal problems are more susceptible to overreaching and pressure than others without known problems. A commercial group with no known legal needs is less likely to feel compelled to respond to such a letter than is a lay person who has just filed a bankruptcy petition or has been accused of criminal conduct.

A letter directed to these professional organizations is commercial speech protected by the First and Fourteenth Amendments to the United States Constitution and not violative of the Ohio Code of Professional Responsibility if its content is not fraudulent, false, deceptive or misleading.

It appears that the referral of the attorney by the association is permissible pursuant to DR 2-103(D). That rule sets forth the following:

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services
to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101(B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, assisting and providing legal services for, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

x x x x

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization; provided, however, that the organization shall be under no obligation to pay for the legal services furnished by the attorney selected by the beneficiary unless the terms of the legal services plan specifically provide therefor.

Every legal services plan shall provide that any member or beneficiary may assert a claim that representation by counsel furnished, selected or approved by the organization would be unethical, improper or inadequate under the circumstances of the matter involved; the plan shall provide for adjudication of such a claim and appropriate relief through substitution of counsel or through providing that the beneficiary may select counsel and the organization shall pay for the legal services rendered by such counsel to the extent that such services are covered under the plan and in an amount equal to the cost which would have been incurred by the plan if the plan had furnished designated counsel.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the Supreme Court of Ohio on or before January 1 of each year a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.
Assuming that the professional associations contacted by the lawyer comply with all provisions of DR2-103(D), the attorney may accept clients referred to him by such association. DR 2-103(D)(4)(b) states that:

"Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer."

It is the opinion of this committee that the word "organization" referred to in DR 2-103(D)(4)(b) refers to the entity forming the Group Legal Services Plan and not the Group Legal Services Plan itself. This matter then must be held to the standards and tests articulated in Zauderer, supra. Zauderer has already been fully discussed and as a result, the lawyer may mail a letter and Group Legal Services Plan to prospective commercial organizations if the letter is not misleading, fraudulent, false or deceptive and complies with DR2-103(D).

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1 DR 2-103(D)(4)(g) mandates that the organization that recommends, furnishes or pays for legal services to its members: file with the Supreme Court of Ohio on or before January 1 of each year a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.