

**STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 7
October 15, 1987**

QUESTION - May a lawyer mail solicitation letters regarding the following:

- (1) To inform persons whose homes are about to be foreclosed of the option of curing arrearages over five years under a Chapter 13 bankruptcy plan;
- (2) To inform persons against whom Internal Revenue Service tax liens have been filed of the option of avoiding garnishment or foreclosure or both, and paying the debt owed to the Internal Revenue Service over a period of five years under a Chapter 13 bankruptcy plan;
- (3) To inform persons similarly situated to litigants in pending litigation of their potential rights regarding the legality of Internal Revenue Service assessment made in the aftermath of certain tax court decision?

ANSWER - Nevada Supreme Court Rule 197 (1987) prohibits a lawyer from mailing solicitation letters to specific persons known to require legal services because of pending foreclosure, existing liens or involvement in previous litigation in which a judgment was entered against the person is presently the subject of post-judgment proceedings where no family or previous professional relationship exists between the lawyer and the person.

Absent a supervening determination from either the Supreme Court of the United States or the Nevada Supreme Court, the prohibition of certain types of solicitation contained in SCR 197 may constitutionally apply in circumstances like those described above.

AUTHORITIES RELIED ON

Nevada Rule of Professional Conduct (Supreme Court Rule) 197 (1987).

DISCUSSION

The committee was asked to consider this question in light of Nevada Supreme Court Rule 198 (1987) ("SCR"), entitled "Communication of Fields of Practice." However, it is the committee's opinion that this question is more properly evaluated in light of SCR 197, entitled "Direct Contact with Prospective Clients."

The Committee reaches this conclusion based on the method to be used to select persons who are to receive one or more of the solicitation letters. The attorney requesting this opinion has provided the committee with blank forms of the three letters that he proposes to send to each of the three categories of persons specified in the question stated above. Persons in the first category would receive a letter based on the fact that a notice of foreclosure sale affecting their property was published in a legal newspaper. Persons in the second category would receive a different letter based on the fact that the Internal Revenue Service published a notice of the filing of a tax lien affecting that person's property in the same legal newspaper. Persons in the third category would be selected to receive another letter based on information developed from the review of tax court records regarding cases recently disposed of. Based on the method to be used to select persons who are to receive the solicitation letters, it is the committee's opinion that this question properly involves direct contact with prospective clients rather than communication of a lawyer's fields of practice.

SCR 197 addresses the solicitation of professional employment from a prospective client. The rule reads:

A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need

legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

The attorney requesting this opinion has asked the committee to consider this question in light of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Leoni v. State Bar of California*, 704 P.2d 183 (Cal. Sup. Ct. 1985) appeal dismissed, U.S. , 106 S.Ct. 1170 (1986); *In Re Von Wiegen*, 470 N.E.2d 838 (N.Y. App. Ct. 1984) cert. Denied, 472 U.S. 1007 (1985) and *Grievance Committee v. Trantolo*, 470 A.2d 235 (Conn. Sup. Ct. 1984).

Implicit in the requested consideration of case authorities cited in the previous paragraph is the suggestion that the solicitation standards in SCR 197 are constitutionally infirm. The committee does not accept the suggested conclusion. *Zauderer* is an advertising case which does not reach the direct mail solicitation issue involved in this opinion. *Leoni* deals with a targeted direct mail program using letters and pamphlets which the court treats like misleading advertising. *Von Wiegen* involves, in part, the direct mail solicitation of certain accident victims and their families under a professional responsibility rule that that court characterizes as a complete ban on this type of solicitation. *Trantolo* involves, in part, the direct mail solicitation of realtors under a professional responsibility rule that the court concludes is a blanket prohibition of mailed solicitations to third parties. As stated earlier, this opinion does not involve public advertising nor does it arise under a rule of professional responsibility that can be characterized as a blanket prohibition of mailed solicitations to third parties.

The committee recognizes that the cases discussed in the two preceding paragraphs are not the only authorities that appear to question the constitutionality of a rule like SCR 197. *Adams v Attorney Registration & Disciplinary Com'n.*, 617 F. Supp. 449 (D.C. Ill. 1985) aff'd, 801 F.2d 968 (7th Cir. 1986) involves, in part a bankruptcy lawyer who wants to send direct mail materials offering his professional bankruptcy services to people whose names appear on state court lists of debtors against whom a judgment has been entered. The applicable Rule of Professional Responsibility reads in relevant part:

(b) A lawyer may initiate contact with a prospective client in the following circumstances:

.....

(2) By written communication distributed generally to persons not known in a specific matter to require such legal services as the lawyer offers to provide but who in general might find such services to be useful and providing that such letters and circulars and the envelopes containing them are plainly labeled advertising material;

Illinois Supreme Court Disciplinary Rule 2-103.

The district court enjoined the enforcement of the disciplinary rule in the circumstance of this type of targeted direct mail solicitation.

The district court contrasted *Zauderer v. Office of Disciplinary Counsel*, *supra*, with *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) and *In Re R.M.J.*, 455 U.S. 191 (1982) and concluded that the protection afforded lawyer "print" advertising precludes the disciplinary rule's overly broad prohibition against these targeted mailings. The court pointed out that targeted mail solicitation is properly subject to regulation to prevent misleading communication. However, the court could not see a justification for the conclusion that targeted mail solicitation should be completely banned because it may promote invasions of privacy, overreaching and undue influence which justifies the total prohibition of in-person solicitation. *Adams v. Attorney Registration & Disciplinary Com'n.*, *supra*, 617 F. Supp. At 451-455. The court of appeals in affirming this reasoning points out that targeted mailings subject an individual to less harassment, overreaching and duress than personal contact does stating: "It is easier to throw out unwanted mail than an uninvited guest." *Adams v. Attorney Registration & Disciplinary Com'n.*, 801 F.2d 968, 973 (7th Cir. 1986).

In *Spencer v. Honorable Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Pa. 1984) aff'd, 760 F.2d 261 (3rd Cir. 1985), the district court addresses another concern raised as a justification against direct mail solicitation. In that case the Rules of Professional Responsibility provide:

A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer.

Pennsylvania Disciplinary Rule 2-103(A). The Rules also provide:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice....

Pennsylvania Disciplinary Rule 2-104(A). The attorney in this case wanted to claim that he was an experienced pilot and computer programmer in direct mail solicitation letters individually addressed to aircraft owners, aircraft pilots, computer users, computer operators, and others.

The district court agreed with the state that the claims the attorney wanted to make were inherently misleading but disagreed with the state that an absolute prohibition of direct mail solicitation was justified or permissible. In support of its position, the state argued that the prohibition of direct mail solicitation prevented undue influence, intimidation and overreaching where the lawyer's letter reached a vulnerable recipient. The court rejected this contention stating:

Even if the state could identify specific situations in which mail recipients were particularly susceptible or vulnerable to the persuasive influence contained in a lawyer's letter, an absolute prohibition of direct mails would not be justified. Rather, direct mails could be banned only in those identified circumstances.

Spencer v. Honorable Justices of the Supreme Court of Pennsylvania, 579 F. Supp. At 890. Similar considerations concerning direct mail solicitation as those analyzed in *Adams* and *Spencer* are noted and approved of in the circumstances where a bankruptcy law clinic mailed its pamphlet to persons facing foreclosure on their homes. In *Re Damon*, 40 B.R. 367 (Bkr. S.D.N.Y. 1984). However other courts have reached a different conclusion regarding the propriety of targeted direct mail solicitation.

SCR 197 is taken from Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct (Adopted August 2, 1983). The comment accompanying Rule 7.3 discusses the dangers of false and misleading representations and the possibility of undue influence, intimidation and over-reaching that may be present in direct solicitation whether the solicitation is in-person or by mail and goes on to state:

These dangers attend direct solicitation whether in-person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition. One proposed safeguard is to require that the designation 'Advertising' be stamped on any envelop containing a solicitation letter. This would do nothing to assure the accuracy and reliability of the contents. Another suggestion is that solicitation letters be filed with a state regulatory agency. This would be ineffective as a practical matter. State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading. In any event, such review would be after the fact, potentially too late to avert the undesirable consequences of disseminating false and misleading material.

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mails not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

American Bar Association's Model Rules of Professional Conduct (1983), p. 30.

These concerns were considered and approved of very recently by the Supreme Court of Kentucky when it endorsed Model Rule 7.3 as the appropriate rule concerning solicitation by lawyers in that state. The court stated:

This Court is not unmindful of the serious potential for abuse inherent in direct Solicitation by lawyers of potential clients known to need specific legal services. Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have a seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of possibility of undue influence, overreaching and intimidation.

As provided in the Model Rules which are now under consideration by this Court and members of the Kentucky Bar Association, as well as current rules, advertising makes it possible for a potential client to be informed about the need for legal services and about the qualifications of available lawyers without subjecting them to direct personal pressure. The use of general advertising as distinguished from direct private contact tends to assure that information is presented without intimidation.

We do not believe submission of a blank form letter to the Advertising Commission provides a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation.

Such dangers result from direct solicitation whether in person or by mail. General mailings not addressed to a specific situation do not have the same danger for abuse as direct target mailing.

Shapero v. Kentucky Bar Ass'n., 726 S.W. 2d 299, 301 (Ky. 1987). Absent, a supervening decision by the Supreme Court of the United States or the Supreme Court of the State of Nevada, the committee adopts the rationale of the Supreme Court of Kentucky and determines that SCR 197 may be applied to the issue addressed in this opinion.

The first concern in applying SCR 197 to the proposed solicitation letters is whether the letters and method for selecting their recipients are solicitation within the meaning of SCR 197. Based on the text of the sample letters received by the committee, it is apparent that they

are written communication from the lawyer that would be directed to a specific recipient. We must assume for purposes of this opinion that the specific recipient of the letter enjoys no family or prior professional relationship with the lawyer. The content of the sample letters makes it apparent that a significant motive for transmitting the letter is the lawyer's pecuniary gain because the letter outlines the recipient's legal situation in very general terms, discusses possible legal avenues that may be pursued (i.e., filing a Chapter 13 petition in the United States Bankruptcy Court), states the lawyer's fee for filing the petition and closes with an offer of the lawyer's professional services. The only other concern is whether the letter is excluded from SCR 197 because of the last sentence contained in that rule.

The last sentence of SCR 197 reads in part:

The term 'solicit'... does not include letters addressed...to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Contrasting this language with the text of the sample letters, it is apparent that the lawyer knows that the recipient is in need of legal services. It is entirely possible that the potential client receiving one of these letters may feel overwhelmed by the situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment and a natural protective self-interest. Shapero v. Kentucky Bar Ass'n., supra, 726 S.W.2d at 301. See also State v. Moses, 642 P.2d 1004, 1007 (Kan. 1982) (lawyer's direct mail solicitation for real estate listings grounds for discipline) and In Re Frank, 440

N.E.2d 676, 677 (Ind. 1982) (lawyer's direct mail solicitation of persons charged with crime grounds for discipline). Consequently, the proposed direct mail solicitation of specific persons known to presently require legal services because of pending foreclosure, existing liens or involvement in previous litigation would be improper under SCR 197 absent the lawyer having a family or prior professional relationship with the person

This opinion is issued by the Standing Committee on Ethics of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.