Judiciary Law § 479: Prohibition Against Attorney Solicitation of Clients Through Third-Party Mailings Held Constitutional

Kevin F. Cavaliere

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that such phraseology serves only to facilitate an insurer's efforts
to recover all of its payments in one action against the tortfeasor,
thereby fostering the legislative purpose of avoiding duplicative
lawsuits.\textsuperscript{116}

Thus, it is suggested that the insurer's action is not a new
statutorily created action and should therefore be subject to the 3-
year personal injury statute of limitations which accrues on the
date of injury. Since section 673(2) does not toll the personal in-
jury statute of limitations,\textsuperscript{117} the insurer is afforded 1 year within
which to commence his suit. Surely, having already paid benefits
within 2 years of the injury, the insurer has sufficient notice to en-
able it to commence a suit in the third year.\textsuperscript{118} It is submitted that
such a result is preferable to the \textit{Safeco} holding which subjects a
defendant to potential tort liability extending 5 years from the
date of the injury. Hence, it is hoped that the Court of Appeals
will review section 673(2) of the Insurance Law at the earliest op-
portunity and construe that provision narrowly in the interests of
equity and legislative purpose.

\textit{Edward G. Bailey}

\textbf{JUDICIARY LAW}

\textit{Judiciary Law § 479: Prohibition against attorney solicitation of clients through third-party mailings held constitutional}

Section 479 of the Judiciary Law prohibits an attorney from
engaging in direct or indirect solicitation of legal business.\textsuperscript{119} While

\textsuperscript{116} See notes 112 & 115 and accompanying text \textit{supra}.

\textsuperscript{117} See note 103 \textit{supra}; cf. \textit{O'Brien v. King}, 258 App. Div. 504, 505, 17 N.Y.S.2d 44, 45 (1st Dep't 1940) (stockholder not entitled to bring suit on behalf of corporation until after a
demand made upon the corporate directors has been refused); \textit{Chaplin v. Selznick}, 186 Misc. 66, 69, 58 N.Y.S.2d 453, 455-56 (Sup. Ct. N.Y. County 1945) (time during which stockholder
demand is made and refused does not operate to toll the statute of limitations).

\textsuperscript{118} In \textit{Aetna Cas. & Sur. Div. v. Sandy Hill Corp.}, 54 App. Div. 2d 222, 388 N.Y.S.2d 162 (3d Dep't 1976), a worker's compensation case cited by the \textit{Safeco} court, Justice Swee-
ney stated that "it is significant that the plaintiff delayed some eight months before bring-
ing the action and had it acted diligently there was ample time to commence the action
within the statutory period." \textit{Id.} at 224, 388 N.Y.S.2d at 164. The \textit{Aetna} court dismissed the
complaint as barred by the statute of limitations. \textit{Id.}

\textsuperscript{119} Section 479 of the Judiciary Law provides:

\begin{quote}
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
\end{quote}
this section has been held unconstitutional as applied to direct mail solicitation of prospective clients, it has been unclear whether solicitation of clients through materials sent to third parties is also constitutionally protected. Recently, in \textit{In re ...}

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). Proscription of attorney solicitation of clients has its roots in ancient law and English common law. Note, \textit{Attorney Solicitation of Clients: Proposed Solutions}, 7 Hofstra L. Rev. 755, 757 (1979). Another historical ground for such proscription was the prevalent medieval fear of the inherent evilness of lawsuits. \textit{See id.} Several reasons also have been given for the retention of the rules regulating legal advertising and solicitation. H. DRINKER, \textit{LEGAL ETHICS} 212 (1953). Considerations allegedly contributing to this retention include the overcommercialization of the profession, the probability that advertising attorneys will use unscrupulous methods to “make good their extravagant inducements,” “the tendency of advertising and solicitation to [cause unnecessary] litigation,” and the negative effect upon the uneducated of “alluring assurances” by the advertisers. \textit{See id.; Note, supra, at 757.}

One exception to New York’s nonsolicitation rule has been carved in class action cases, where “solicitation is an appropriate integral and statutorily recognized part of the proceeding.” Vallone v. Delpark Equities, Inc., 95 Misc. 2d 161, 165, 407 N.Y.S.2d 121, 125 (Sup. Ct. N.Y. County 1978); \textit{see CPLR} 904 (1976). Additionally, an attorney may obtain cases through the good will efforts of friends and neighbors, \textit{In re Kreisel}, 21 App. Div. 2d 431, 433, 250 N.Y.S.2d 1001, 1003 (1st Dep’t 1964) (per curiam), absent an arrangement to solicit such business. \textit{In re Schneider}, 22 App. Div. 2d 231, 233, 254 N.Y.S.2d 836, 838 (1st Dep’t 1964) (per curiam); \textit{see In re Lebowitz}, 67 App. Div. 2d 240, 241, 414 N.Y.S.2d 735, 736 (2d Dep’t 1979) (per curiam); \textit{In re Entes}, 39 App. Div. 2d 182, 182-83, 333 N.Y.S.2d 292, 292 (1st Dep’t 1972) (per curiam).

In \textit{In re Koffler}, 51 N.Y.2d 140, 144, 412 N.E.2d 927, 930, 432 N.Y.S.2d 872, 874 (1980), \textit{cert. denied}, 450 U.S. 1026 (1981). In \textit{Koffler}, lawyers mailed letters to individual real estate owners and to a number of real estate brokers, suggesting that the addressees employ their services in connection with the disposition of real property. 51 N.Y.2d at 143, 412 N.E.2d at 929, 432 N.Y.S.2d at 873-74. In determining that solicitation by direct mail addressed to potential clients cannot be proscribed, the Court of Appeals refused to make a substantive distinction between advertising and solicitation. \textit{Id.} at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875. The Court stated that any semantic difference between the two terms does not justify “ignor[ing] the strong societal and individual interest in the free dissemination of truthful price information as a means of assuring informed and reliable decision making.” \textit{Id.} at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875. Recognizing that there is nothing inherently wrong with a lawyer’s desire to earn fees, the Court suggested that the legal profession should be permitted to advertise in the manner allowed for other businesses and professions. \textit{See id.} at 146-47, 412 N.E.2d at 931, 432 N.Y.S.2d at 876; \textit{cf. Bates v. State Bar of Ariz.}, 433 U.S. 350, 368-72 (1977) (advertisement of attorney’s fees does not undermine true professionalism). \textit{But see Ohralk v. Ohio State Bar Ass’n}, 436 U.S. 447, 460 (1978) (in-person solicitation may be regulated pursuant to a state’s “special responsibility” to maintain professional standards).

Greene, the Court of Appeals held that section 479 constitutionally proscribes an attorney’s solicitation of clients by direct mail addressed to real estate brokers.

In Greene, a disciplinary proceeding was instituted against an attorney who had mailed approximately one thousand fliers to various real estate brokers in the hope that they would refer prospective clients to him. A referee found the attorney in violation of section 479 of the Judiciary Law, but imposed no sanction. The attorney, relying upon the recent Court of Appeals decision in In re Koffler, which found the prohibition against direct mailing to prospective clients to be unconstitutional, requested exoneration. The Appellate Division, Second Department, denied this request, holding that solicitation of clients through third-party mailings is prohibited by section 479 of the Judiciary Law and is not constitutionally protected.

On appeal, the Court of Appeals affirmed, construing the language of section 479 as proscribing third-party mailings and finding such proscription constitutionally permissible. Writing for the majority, Judge Meyer maintained that the restriction

123 Id. at 120-21, 429 N.E.2d at 391, 444 N.Y.S.2d at 884.
124 Id. at 121, 429 N.E.2d at 391, 444 N.Y.S.2d at 884. The fliers read in pertinent part that “ALAN L. GREENE offers your client full legal representation on any and all property transactions for just $335.... By recommending the services of ALAN L. GREENE, you, the realtor, will save your client time and money—one of the main reasons they [sic] called on you!” Id. at 121, 429 N.E.2d at 391, 444 N.Y.S.2d at 884. In addition to finding that Greene violated Section 479 of the Judiciary Law, the referee determined that the lawyer violated section DR2-103(A) of the New York State Bar Association Code of Professional Responsibility. Id. at 122, 429 N.E.2d at 392, 444 N.Y.S.2d at 885. Inquiry into the scope of this provision, however, is unnecessary because the Code cannot limit or expand the effect of a legislative statute. Id. at 125, 429 N.E.2d at 393, 444 N.Y.S.2d at 886; see People v. La Carruba, 46 N.Y.2d 658, 663, 389 N.E.2d 799, 802, 416 N.Y.S.2d 203, 206 (1979).
125 54 N.Y.2d at 122, 429 N.E.2d at 392, 444 N.Y.S.2d at 885.
127 51 N.Y.2d at 143, 412 N.E.2d at 929, 432 N.Y.S.2d at 873.
128 50 N.Y.2d at 122, 429 N.E.2d at 392, 444 N.Y.S.2d at 885.
130 54 N.Y.2d at 129, 429 N.E.2d at 396, 444 N.Y.S.2d at 889.
131 Id. at 125, 429 N.E.2d at 393, 444 N.Y.S.2d at 886.
132 Id. at 121, 429 N.E.2d at 391, 444 N.Y.S.2d at 884.
133 Judge Meyer was joined in the majority opinion by Judges Gabrielli, Jasen, Jones, and Wachtler. Judge Fuchsberg dissented in an opinion in which Chief Judge Cooke concurred.
against the mailings to brokers was a control of the manner, and not the content, of lawyer advertising.\textsuperscript{136} Thus, the court concluded, as a reasonable regulation of the manner of speech, it is constitutionally permissible.\textsuperscript{137} Furthermore, Judge Meyer emphasized that even if the statute were deemed to be a control of speech content,\textsuperscript{138} there was a “substantial governmental interest” in averting attorney-client conflicts of interest and an absence of any “less restrictive alternative” which could be used to prevent such conflicts.\textsuperscript{139} Finally, third-party mailings, in the Court’s view, involve the element of in-person solicitation for pecuniary gain which the Supreme Court already has determined cannot survive constitutional scrutiny.\textsuperscript{140}

\textsuperscript{136} 54 N.Y.2d at 126-27, 429 N.E.2d at 394, 444 N.Y.S.2d at 887.
\textsuperscript{137} Id. at 127, 429 N.E.2d at 394, 444 N.Y.S.2d at 887. A governmental regulation of the time, place, or manner of speech is constitutionally permissible as long as the restriction is reasonable. \textit{E.g.}, Grayned v. City of Rockford, 408 U.S. 104, 115-17 (1972); Cox v. New Hampshire, 312 U.S. 569, 576 (1941); People v. Remeny, 40 N.Y.2d 527, 529-30, 355 N.E.2d 375, 377, 387 N.Y.S.2d 415, 416-17 (1976); see Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 535 (1980); People v. Mobil Oil Corp., 48 N.Y.2d 192, 206, 397 N.E.2d 724, 729, 422 N.Y.S.2d 33, 38 (1979). Different criteria, however, are used to determine the validity of a law which totally prohibits the content of speech. \textit{See Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977); note infra.}

\textsuperscript{138} 54 N.Y.2d at 127, 429 N.E.2d at 394, 444 N.Y.S.2d at 887. A four-part analysis should be employed in cases where the government has imposed a restriction on the content of commercial speech. \textit{Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 566 (1980). First, for commercial speech to be protected by the first amendment, it “must concern lawful activity and not be misleading.” Id. Second, the governmental interest in regulating the speech must be “substantial.” Id. If these two requirements are met, then it must be found that the “regulation directly advances the governmental interest asserted.” Id. Lastly, there should not be any less restrictive alternatives to the adopted regulation. \textit{See id.}

\textsuperscript{139} 54 N.Y.2d at 127, 429 N.E.2d at 395, 444 N.Y.S.2d at 888. Judge Meyer illustrated the conflict of interest problems which could arise if mailings to realtors were permitted. \textit{Id. at 129, 429 N.E.2d at 396, 444 N.Y.S.2d at 889. The Court noted, for example, that an attorney might view marketability of title in a different light because he knows that the referring broker will not receive a commission unless title closes. \textit{Id. Judge Meyer also stated that there is a probability that the lawyer will not negotiate the realtor's commission “to the lowest possible level.” Id. Finally, the Court observed that the attorney might fail to scrutinize carefully the broker's conduct in bringing about the sale. \textit{Id.}}

\textsuperscript{140} \textit{Id. at 128, 429 N.E.2d at 395, 444 N.Y.S.2d at 888; see \textit{In re Koffler, 51 N.Y.2d 140, 145 n.2, 412 N.E.2d 927, 930 n.2, 432 N.Y.S.2d 872, 874 n.2, cert. denied, 450 U.S. 1026 (1981). The in-person solicitation issue was decided by the Supreme Court in \textit{Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). In Ohralik, an attorney, after learning of an automobile accident, approached two injured girls offering to represent them. \textit{Id. at 449-51. The girls agreed to a contingent fee arrangement. \textit{Id. at 450-51. The Court decided that such in-person solicitation for pecuniary gain will result in disciplinary action against the attorney if important governmental interests need to be protected. \textit{See id. at 449. These interests include the obligations to maintain professional standards, \textit{id. at 460, to protect}}}}
Dissenting, Judge Fuchsberg maintained that a mailing would prove less difficult to police than the in-person solicitation which has gained limited acceptance in the Supreme Court.\(^1\) Moreover, the dissent asserted, permitting a Greene-type mailing would be an additional step toward the improvement of referral practices which have become inadequate.\(^2\) Finally, Judge Fuchsberg, apparently assuming a content restriction, concluded that the restrictions on the advertising of legal services were unreasonable\(^3\) and, thus, denied the constitutional protection that the Supreme Court has accorded commercial speech.\(^4\)

It is submitted that the Greene Court erred in denying constitutional protection to third-party mailings by attorneys. By limiting first amendment protection of such commercial speech,\(^5\) the consumers engaged in commercial transactions, \(id.\), and to prevent “fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct’,” \(id.\) at 462.

The Ohralik decision has been criticized on the ground that the Court failed to consider any “less restrictive” means of regulating in-person solicitation. Reich, Preventing Deception in Commercial Speech, 54 N.Y.U. L. Rev. 775, 789 (1979). For a brief discussion of the extensive in-person solicitation which occurs in the personal injury field, and the part that contingent fee arrangements play in causing such solicitation, see F. Mackinnon, Contingent Fees for Legal Services 202-03 (1964). Since Ohralik was decided, most courts considering the in-person solicitation issue have concluded that such conduct can be prohibited. Murdock & Linenberger, Legal Advertising and Solicitation, 16 LAND & WATER L. Rev. 627, 644 & n.111 (1981).

\(^1\) 54 N.Y.2d at 131, 429 N.E.2d at 397, 444 N.Y.S.2d at 890 (Fuchsberg, J., dissenting); see note 140 supra.

\(^2\) 54 N.Y.2d at 132-33, 429 N.E.2d at 398, 444 N.Y.S.2d at 891 (Fuchsberg, J., dissenting).

\(^3\) Id. at 136, 429 N.E.2d at 400, 444 N.Y.S.2d at 893 (Fuchsberg, J., dissenting). Judge Fuchsberg observed that the use of third-party mailings is a “more targeted” and “more cost-efficient” method of conveying a “fair and truthful message . . . to the attention of those to whom it would be most useful.” \(id.\) at 132, 429 N.E.2d at 398, 444 N.Y.S.2d at 891 (Fuchsberg, J., dissenting).

\(^4\) Id. at 130, 429 N.E.2d at 396, 444 N.Y.S.2d at 889. (Fuchsberg, J., dissenting). The dissent contended that the Supreme Court, in Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978), did not intend an absolute ban on in-person solicitation. 54 N.Y.2d at 131, 429 N.E.2d at 397, 444 N.Y.S.2d at 890 (Fuchsberg, J., dissenting). Judge Fuchsberg opined that the words in Ohralik were “self-limiting” insofar as they prohibit attorney solicitation of clients “in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.” \(id.\) at 131, 429 N.E.2d at 397, 444 N.Y.S.2d at 890 (Fuchsberg, J., dissenting) (quoting Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 449 (1978)) (emphasis added); see note 140 supra.

\(^5\) The constitutional protection afforded to commercial speech developed slowly. In Breard v. Alexandria, 341 U.S. 622, 642-43 (1951), and Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), the Court denied first amendment protection in situations where the speech involved could be characterized as “commercial.” At other times, the Court emphasized that the particular speech being protected was not “‘purely commercial advertising.’” New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (quoting Valentine v. Chrestensen, 316 U.S. 52, 54 (1942), the Court denied first amendment protection in situations where the speech involved could be characterized as “commercial.” At other times, the Court emphasized that the particular speech being protected was not “‘purely commercial advertising.’” New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (quoting Valentine v. Chrestensen, 316 U.S.
Court has sacrificed the public's right to make informed and reliable decisions as to the selection of counsel. Indeed, it appears that the Court has attempted to slow the recent trend toward lib-

52, 54 (1945)); see Thomas v. Collins, 323 U.S. 516, 533 (1945). Significantly, the Supreme Court, in Bigelow v. Virginia, 421 U.S. 809, 826 (1975), recognized that first amendment scrutiny should be given to certain speech, whether it is labelled “commercial,” “commercial advertising,” or “solicitation.” In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the Supreme Court finally concluded that commercial speech is protected by the first amendment, but that it could also be regulated. Id. at 770; see notes 137-138 supra. One judge has suggested that the courts should not inquire into the level of protection to be accorded commercial speech since one kind of speech need not be preferred over another. Fuchsberg, Commercial Speech: Where It’s At, 46 BROOKLYN L. REV. 389, 391 (1980) (citing People v. Remeny, 40 N.Y.2d 527, 531, 355 N.E.2d 375, 378, 387 N.Y.S.2d 415, 417-18 (1976) (Fuchsberg, J., concurring)). Justice Rehnquist, however, has contended that “the Court unlocked a Pandora’s Box when it ‘elevated’ commercial speech to the level of traditional political speech by according it First Amendment protection.” Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting).

The constitutional protection accorded commercial speech was extended to the lawyer advertising area in Bates v. State Bar of Ariz., 433 U.S. 350 (1977), wherein it was held that an attorney’s truthful newspaper advertisement of the “availability and terms of routine legal services” could not be prohibited. Id. at 384. The protection was further extended to organizations which encouraged individuals to obtain legal assistance in the assertion of their political or nonpolitical rights. E.g., UMW, District 12 v. Illinois State Bar Ass’n, 389 U.S. 217, 222-23 (1967); Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 8 (1964); NAACP v. Button, 371 U.S. 415, 437 (1963); see United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585-86 (1971). See generally L. DEITCH & D. WENSTRA, PREPAID LEGAL SERVICES (1976). Additionally, direct mail solicitation by an attorney, who is not seeking pecuniary gain, on behalf of a nonprofit organization that “engages in litigation as a vehicle for effective political expression and association” is constitutionally protected commercial speech. In re Primus, 436 U.S. 412, 431-32 (1978).

146 The commercial speech protection of the first amendment extends not only to the speaker, but also to the recipient of the communication. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976); Kleindienst v. Mandel, 408 U.S. 734, 734-63 (1972). The “free flow of commercial information” is essential to the public’s ability to make informed economic decisions. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976); cf. Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) (“consumer’s concern for the free flow of commercial speech . . . may be . . . keener than his concern for urgent political dialogue”). Indeed, one commentator has contended that the Supreme Court, in permitting certain lawyer advertising, has focused more on the need of individuals to receive information than on the right of attorneys to disseminate it. See Note, Advertising, Solicitation and the Profession’s Duty to Make Legal Counsel Available, 81 YALE L.J. 1181, 1186 (1972). Thus, unnecessary restrictions on a lawyer’s ability to advertise or solicit clients ultimately may leave the consumer unable to find the right lawyer at the right price. See Dement, PREPAID LEGAL SERVICES: A Review of Theory and Practice, 30 BAYLOR L. REV. 625, 631-32 (1978). Furthermore, limitations on the opportunity of lawyers to solicit business discourage competition among them, thereby destroying the potential for higher quality work at lower prices. L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 85 (1980); Brosnahan & Andrews, Regulation of Lawyer Advertising: In the Public Interest?, 46 BROOKLYN L. REV. 423, 436 (1980); see Bates v. State Bar of Ariz., 433 U.S. 350, 377 (1977).
eralizing the right of attorneys to engage in advertising as a method of obtaining new clients.\textsuperscript{147}

While it is recognized that there are legitimate and important state interests to be protected by regulating solicitation of clients by attorneys,\textsuperscript{148} it is submitted that an absolute ban on third-party mailings is an undesirable solution to the mere potential abuse of commercial speech.\textsuperscript{149} Instead, an appropriate solution to the solicitation problem would be to require attorneys to file a copy of each advertisement with an overseeing committee.\textsuperscript{150} In addition, extensive guidelines, regulating the type of information permissible in such mailings, could be promulgated by the committee.\textsuperscript{151} In this way, the legitimate concerns raised by the Court would be allayed.\textsuperscript{152} Until the Supreme Court clarifies the extent to which attorneys may advertise for new clients, however, there will continue to be confusion regarding the latitude attorneys have in such pursuits.\textsuperscript{153}

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\textsuperscript{147} See note 145 supra.


\textsuperscript{149} But see Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 466 (1978) (actual harm need not be proved in personal solicitation cases).


\textsuperscript{151} It is suggested that the appropriate committee might require an attorney to include some kind of warning or disclaimer in his or her solicitation letters. See Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977). Additionally, the committee could mandate that the face of the envelope be stamped with the words "[a]dvertising content." See Bishop v. Committee on Professional Ethics & Conduct, 521 F. Supp. 1219, 1231-32 (S.D. Iowa 1981). Such regulations, it is submitted, are clearly less restrictive than a total prohibition of third-party mailings.

\textsuperscript{152} See notes 139 & 140 and accompanying text supra.

\textsuperscript{153} For a discussion of the major Supreme Court cases concerning legal advertising and solicitation, see note 145 supra. It has been argued that most of these decisions have been ineffective in creating clear guidelines which would aid the states in structuring regulations in the advertising and solicitation area. See In re Primus, 436 U.S. 412, 440-46 (1978) (Rehnquist, J., dissenting). A number of questions indicative of the lack of workable guidelines have arisen. See L. Andrews, supra note 146, at 62. One such issue is whether a letter mailed to a limited number of potential clients should be considered advertising or solicitation. Another unsettled issue is whether personal solicitation for pecuniary gain is permissible if it is "noncoercive." Also controversial is whether and when freedom of association should be considered. Id.

The difficulties engendered by the Supreme Court's failure to enunciate specific standards are evidenced by conflicting state court decisions on the permissibility of mailing solicitation materials directly to prospective clients. Compare In re Koffler, 51 N.Y.2d 140, 144, 412 N.E.2d 927, 930, 432 N.Y.S.2d 872, 874 (1980), cert. denied, 450 U.S. 1026 (1981) and Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933, 933-34 (Ky. 1978) (per curiam) with
Although failure to ensure that defendant is aware of risks inherent in joint representation is error, withdrawal of guilty plea is permitted only if defendant demonstrates significant possibility of conflict of interest.

Because of the potential for conflicts of interest, a criminal defendant’s sixth amendment right to effective assistance of counsel may be violated when his attorney also represents a codefendant.

The sixth amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense.” U.S. Const. amend. VI. This provision has been held to guarantee to criminal defendants the right to effective assistance of counsel. See, e.g., Glasser v. United States, 315 U.S. 60, 76 (1942). In McMann v. Richardson, 397 U.S. 759, 770-71 (1970), the Supreme Court enunciated a standard for measuring whether effective assistance of counsel has been afforded a defendant. The McMann Court stated that a court should not examine retrospectively the correctness of counsel’s advice, but should consider “whether that advice was within the range of competence demanded of attorneys in criminal cases.” Id. at 771. One commentator has suggested that a standard of “reasonable competence” coupled with proof of “lack of prejudice” would improve counsel’s performance in criminal cases. See Note, Criminal Law — Competence, Prejudice, and the Right to “Effective” Assistance of Counsel, 60 N.C.L. Rev. 185, 192 (1981). See generally Alpert, Effective Assistance of Counsel: The Exchange Theory, 17 Crim. L. Bull. 381, 384-88 (1981); Schwarzer, Dealing With Incompetent Counsel—The Trial Judge’s Role, 93 Harv. L. Rev. 633, 633-41 (1980).


Nearly 40 years ago, the Court of Appeals held that denial of a defendant’s fundamental right to effective assistance of counsel in the preparation of his case is cause for reversal. People v. McLaughlin, 291 N.Y. 480, 483, 53 N.E.2d 356, 357 (1944). In People v. Blake, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974), the Court described the protections afforded to criminal defendants in the area of representation:

An accused or defendant may have the right to a lawyer generally to advise him, represent him, or act as an attorney in his behalf. An accused or defendant may have the right to have access to his lawyer or that his lawyer be allowed access to him. Lastly, an accused or defendant may be entitled specially to have a lawyer to