

ADVISORY ETHICS OPINION 85-09

SYNOPSIS:

A firm does not violate the Code of Professional Responsibility when it accepts as client a person referred by the spouse of a non-lawyer employee.

FACTS:

A law firm has asked our opinion as to whether provisions of the Code of Professional Responsibility are violated where the firm undertakes the representation of a client who was referred to the firm by the spouse of a non-lawyer firm employee. Briefly stated the facts are as follows: Prior to becoming a firm client A was a patient at a hospital and received treatment giving rise to the possibility of a medical malpractice action against the hospital. The hospital asks A's doctor who was uninvolved in the events giving rise to the medical malpractice claim, to inform A's spouse that medical malpractice may have occurred. The doctor so informs A's spouse. The spouse tells the doctor that she will seek the advice of a family attorney concerning possible legal action against the hospital. The doctor then recommends to the spouse that she seek the services of the requesting law firm. Although not revealed to A's spouse the doctor's own spouse is a non-lawyer employee at the requesting law firm. A subsequently seeks representation from the law firm. The firm asks whether it may undertake the representation consistent with its obligations under the Code of Professional Responsibility. We conclude that it may.

ANALYSIS:

The facts presented present no ethical dilemma under the Code. The potential areas of concern under the Code are the Canon 2 standards pertaining to solicitation. Under the facts presented there has been no solicitation by the firm. There is no suggestion that the doctor who recommended the firm was an agent of the firm at the time he recommended the firm to the patient's spouse. DR2-103(A) would be implicated if the firm itself had recommended its services to the patient or the patient's spouse or if the doctor was acting as an agent of the firm at the time the recommendation was made; however, under the facts presented neither of these circumstances is present.¹ DR1- 102(A)(2) prohibits the circumvention of the disciplinary rule through the actions of another and this has been construed to bar a lawyer's use of an agent to solicit cases (See Legal Background to the ABA Model Rules of Professional Conduct, tentative draft, January 1984, Rule 8.4(a) (citations omitted)); however, there is no suggestion in the facts presented that the doctor had an agency relationship with the firm or that the non-lawyer employee of the firm was engaged in a course of conduct designed to promote the firm or solicit clients.

Attorneys need not muzzle their employees or spouses of employees with respect to the work of the firm. An employee's conduct in soliciting clients for the firm would raise substantial ethical concerns if the employee was acting as an agent of or at the behest of the firm; however, absent such an agency relationship, there is no violation for a non-lawyer employee of the firm to recommend the firm's services to other persons.

To avoid any appearance of impropriety the firm should disclose to its client that the spouse of the doctor who recommended the firm is an employee of the firm.

¹ Proposed amendments to DR2-101 through DR2-105 and related ethical considerations are pending final action by the Supreme Court. It appears likely that they will be approved. These amendments make significant changes to the Code sections but the changes liberalize the standards pertaining to attorney communications to potential clients. See e.g. proposed amendment to EC 2-3. No violation of the proposed amended rules is presented here.