

Utah Ethics Opinions

1979.

58. USB EAOO Opinion No. 58

Utah State Bar

Ethics Advisory Opinion No. 58

Approved April 12, 1979

Summary: A lawyer may not contact medical doctors with the intent of obtaining clients in a class action suit when the prospective clients are patients of the contacted doctors.

Facts: The Ethics Committee has been presented with a situation wherein an attorney is representing two clients in an action intended to be a class action suit, involving a defective medical device. The attorney asked the Committee if he may send a form letter to all doctors dealing in the specialty concerned in Utah, to seek information concerning the defective product and requesting that the doctors inform their patients that the product was defective and was in fact the cause of a number of specific medical problems. A corollary question, not included in the original request, is if the lawyer does send out such letters can he accept as clients persons who have been informed by the recipient doctors of the possible claim.

Opinion: Canon 2, DR 2-103 deals with the problem of a lawyer who informs lay persons that they are in need of legal services. The provisions are as follows:

"(A) 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 lay person who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual or reasonable or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him, or his firm, as a private practitioner, . . ."

Further advice and caveat is provided in DR 2-104(A)(5) having particular reference to class action suits. This rule

provides as follows:

"(A) A lawyer who has given in-person unsolicited advice to a lay person that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(5) If success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contracted for the purpose of obtaining their joinder."

American Bar Association Informal Opinion No. 1280 (1973) considered a somewhat similar problem. A layman had approached an attorney concerning instituting an action in federal court. The client proposed that other persons be contacted who were in a similar situation to solicit their joining in the action. The client sent letters to all members of the potential class requesting financial contribution towards payment of costs and execution of power of attorney which would authorize the client to retain his attorney on their behalf. The opinion states that, "although DR 2-104 is directed to the case in which the advice to the layman that he seek legal counsel comes first from a lawyer, and, therefore, does not speak precisely to your situation, we are of the opinion that the policy of paragraph (5) is applicable. Thus, while you may not solicit strangers to employ you, you are not prohibited from accepting employment from them." The opinion further pointed out that "it was the act of solicitation, by the lawyer, and not the acceptance of employment, which constituted unprofessional conduct." The important factor in arriving at the decision in that opinion was that the communication to the potential clients was not initiated by the attorney.

In the situation presented herein, it appears that there is no prohibition against the lawyer writing the members of the medical profession as proposed. The interdiction lies in his accepting any clients which result from that contact: The fact that the communication is initially with the doctors rather than the potential clients themselves seems to have little bearing. The intent of the communication is to garner additional clients for the class action suit. Acceptance of employment is permissible only if the contact or communication is made by one other than the lawyer himself.

Rule Cited:

Canon 2