

VBA OPINION 2009-8

SYNOPSIS

An attorney licensed to practice in Vermont with active status is engaged in the practice of law and governed by the Vermont Rules of Professional Conduct (the “VRPC”) when accompanying disabled beneficiaries of his organization to court for matters where by commission or omission of an attorney’s duties the beneficiary’s rights may be affected, even though the attorney does not hold himself out as an attorney; such attorney must disclose his status and behave accordingly.

FACTS

Attorney A has an active license to practice law in Vermont and inactive licenses in two other states. However, Attorney A does not hold himself out as a practicing attorney.

Currently, Attorney A works as a counselor for an organization which assists people with disabilities to help them identify and achieve independent living goals. Periodically, those being assisted get into trouble with the law and are called into civil, family and criminal courts. They frequently ask for a person working in Attorney A’s position to accompany them and help them understand the system. Apparently, this is a common practice among similar organizations and the “counseling” in court often amounts to nothing more than what has been characterized as “hand holding.” Attorney A has made it clear to management that he is not the organization’s attorney and will not function as an assisted beneficiary’s attorney.

Attorney A has been asked by his employer to accompany assisted beneficiaries to court. He has not done so when the beneficiary is actually represented by counsel out of concern that, should he disagree with the advice or actions of retained or assigned counsel, that he would have a legal or moral duty to raise those objections. He is also concerned that going to court with an unrepresented assisted beneficiary may place him in the same situation, and has raised several

questions regarding the relationship created by this arrangement and his responsibilities under the Rules of Professional Responsibility if he were to appear in court and be called on to give or withhold advice or representation in court.

ANALYSIS

Because we find that Attorney A is bound to comply with the VRPC when appearing in court with an assisted beneficiary, we do not reach the questions on how he should comport himself if he were not. Even if the assisted beneficiary could be kept ignorant of Attorney A's admission to the bar, the court would have at least constructive notice and expect him to comport himself as such. To withhold that information from the assisted beneficiary, moreover, would create a host of other issues.

In short, there is no exception that applies in court. It is clear that attorneys are subject to compliance with ethical rules and subject to discipline whether they are in an attorney-client relationship or not.

Application of specific rules to attorneys obviously varies based on whether there is an attorney-client relationship or in which capacity an attorney may be acting. For example, VRPC 5.7 provides special rules for attorneys involved in "law related services." But, none of those possible exceptions would apply to an attorney accompanying or counseling a person in court or about to go to court where significant legal rights are at stake. The Preamble and Scope sections of the VRPC remind us in section 1 that "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice" and in section 2 that an attorney's regulated roles include representation, advice, advocacy, negotiation, and evaluation. In Opinion 97-11, this Committee stated that even a suspended attorney remains subject to compliance with the (then applicable) Code of Professional Conduct and subject to the jurisdiction of the Vermont Professional Conduct Board. This applies to Attorney A as a person with an active license to practice.

If Attorney A were to provide legal services to assisted beneficiaries as part of his employment, as many attorneys do, it would be regulated. We can see no mechanism to exempt him from application of this regulation by trying to keep his true identity a secret or by disclaiming it in the circumstances presented. The dangers to the public of attempting to do so, in any event would far outweigh any perceived benefit. To attempt to withhold his status on a court would plainly not exhibit required candor. Undertaking to give what he considered informal advice which may turn out to be incorrect could also subject Attorney A and perhaps his employer to liability for failure to exercise due care if nothing else. Accordingly, Attorney A must decline services to assisted beneficiaries or do so in his capacity as licensed attorney in the circumstances presented.