

ADVISORY ETHICS OPINION 89-04

SYNOPSIS:

An attorney may continue to represent plaintiffs when the attorney's paralegal also works in a Court Diversion program which once processed a brother of the defendant, and the brother's behavior has some relevance to the current suit. 3 V.S.A. §163 precludes the paralegal from sharing information gathered in the diversion process with the attorney without the relative's consent; screening the paralegal from further involvement in the case would remove any question of impropriety, but the Code does not strictly apply to the paralegal's conduct here.

FACTS:

Plaintiffs brought suit against a husband and wife and their minor son for injuries to plaintiffs in an automobile accident. The liability of the parents is premised upon their negligent failure to supervise their son with regard to his ownership and possession of the automobile. The plaintiffs contend that the conduct of the parents was imprudent, particularly in light of the fact that the seller of the automobile told one of the parents that she did not think a teenager should have that kind of a car, and the mother replied that she had several sons who had been through various episodes so that she knew her young son in this case would be no different from them.

Thus, the conduct of the other children of the parents becomes relevant to the litigation. The attorney's paralegal assistant is also employed by the County Court Diversion program. One of the parents' other sons went through this program, and was assured that all information which he disclosed during the course of the program would be kept confidential. This young man was arraigned as an adult in Vermont District Court. Plaintiffs, and their mother, each had knowledge of the charges brought against the young man in question and his participation in the Diversion Program. The paralegal assistant disclosed absolutely nothing regarding the young man in question or any disclosures made by him or on his behalf during the diversion program to the attorney/employer.

Plaintiffs and their mother were otherwise aware of the fact that the young man in question broke into and entered a local gas station and was charged before the District Court with this crime. They were also aware of his participation in the diversion program. Plaintiffs and their mother had knowledge of these facts prior to the motor vehicle accident which gave rise to the complaint.

DISCUSSION:

This request raises potential issues under DR 5-105 (conflict of interest), DR 4-101 (confidences and secrets), and DR 9-101(B) (public employee). The facts, however, are clear that the only conduct potentially at issue is the paralegal's.

In Opinion 78-2, this Committee found that DR 5-105 does not extend to paralegals. We are not aware of any authority which would now change that finding.

DR 4-101 addresses only confidences and secrets learned in the attorney-client relationship. Here, the paralegal cannot be said to have had a lawyer-client relationship with defendant's brother in the Court Diversion program. Therefore, DR 4-101 is inapplicable.

At the same time, we note that 3 V.S.A §163(c)(5) provides:

All information gathered in the course of the diversion process shall be held strictly confidential and shall not be released without the participant's prior consent (except that research and reports that do not require or establish the identity of individual participants are allowed).

We understand that the attorney and the paralegal are complying with this non-Code confidentiality requirement.

Finally, if the paralegal were an attorney, DR 9-101(B) (which generally precludes private employment in matters handled for the government) would apply. Yet, for the same reasons stated in Opinion 78-2, DR 9-101(B) does not apply to paralegals. While some extension of the Code to paralegals may be necessary,¹ we are not prepared to extend the Code's proscriptions to the paralegal's situation at issue here. The defendant's brother's behavior and involvement with the court diversion program

¹ See Opinions 85-8 and 79-28.

both have limited relevance to the case and are common knowledge in the community. The paralegal has not violated any confidences; indeed, it appears that the paralegal was not even involved in the brother's processing through the program.

Nevertheless, the attorney should be sensitive to the public perception of the paralegal's employment in this case. As EC 9-2 provides,

[W]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

Thus, while it is not required (and should be carefully considered if it will harm the plaintiffs), the attorney may want to screen the paralegal from any participation in this case.²

² See Opinion 87-7. (example of an acceptable screening arrangement).