

ADVISORY ETHICS OPINION 97-09

SYNOPSIS:

Law Firm A may employ a paralegal who formerly was employed by Law Firm B, despite the fact that the two firms are engaged in litigation against each other in a matter in which the paralegal participated for Law Firm B. However, Law Firm A must now screen the paralegal from involvement in the pending litigation and any matter in which the interests of Law Firm B's client is adverse to any client of Law Firm A. Further, Law Firm A must ensure that no information relating to the representation of the client of Law Firm B is revealed by the paralegal to any person in Law Firm A.

FACTS:

The Committee has been asked whether, under the Vermont Code of Professional Responsibility, a law firm hiring a paralegal formerly employed by another firm must withdraw from representation of a client under the following circumstances.

A paralegal has worked for some time with Law Firm B which was then handling and continues to handle litigation against a client of Law Firm A. Law Firm A intends to hire the paralegal and desires to continue to represent Law Firm A's client. The facts indicate that the paralegal has participated in the litigation and has obtained substantial information relating to the representation of the former firm's client. Law Firm A is prepared to screen the paralegal from working on the pending litigation with Law Firm B's clients and will direct the paralegal not to reveal any information relating to Law Firm B's client gained during the previous employment.

DISCUSSION:

This Committee's earlier Opinions 78-2, 89-4 were predicated on the fact that the paralegal could not be said to have a lawyer-client relationship with the employee's clients and that, therefore, Disciplinary Rule DR 4-101 was inapplicable. The Committee adopts the reasoning and conclusions of ABA Opinion 88-1526.

Disciplinary Rule 4-101 (A) of the Code protects "confidences" and "secrets" of a client from disclosure to third parties. Model Rule 1.6, presently under review by a Committee of the Vermont Supreme Court, in addition to protecting "confidences" and "secrets" from disclosure, extends to all information which pertains to the attorney-client relationship, even though it was not learned during the relationship and even though disclosure would not embarrass or be detrimental to the interests of the client. The ABA in its Informal Opinion 88-1526, issued under the ABA Model Rules of Professional Conduct, discusses a series of cases which have addressed the issues presented when paralegals change employment from one law firm to another while both firms are representing clients with conflicting interests. This informal opinion discusses court decisions and the opinions of other ethics committees.

As stated in the ABA Informal Opinion, it is important that paralegals have as much mobility of opportunity as possible consistent with the protection of clients' interests. The opinion states "To so limit employment opportunities that some non-lawyers trained to work with law firms might be required to leave the careers for which they are trained would disserve clients as well as the legal profession. Accordingly, any restrictions on the non-lawyers' employment should be held to the minimum necessary to protect confidentiality of client information.

DR 4-101 of the Code of Professional Responsibility imposes general supervision obligations on lawyers with respect to non-lawyer employees, including the obligation to make reasonable efforts to ensure that there are methods in effect to assure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer.

DR 4-101 states:

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or a court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee

Ethical Consideration 4-2 further “obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved.”

Ethical Consideration 4-5 requires that “A lawyer should be diligent in his efforts to prevent the misuse of [information acquired in representation of a client] by his employees and associates.”

CONCLUSION:

The Committee opines that the same policy considerations are applicable under the Vermont’s Code of Professional Responsibility as are applicable under the ABA Model Rules. Consequently, Law Firm A must screen the paralegal from participating in any way in the litigation with Law Firm B’s client. Both firms should carefully advise the paralegal not to disclose any information about Law Firm B’s client to anyone in Law Firm A or any other person.

Similarly, the paralegal should be advised that these admonitions apply to all matters where the interests of the clients of each firm are in conflict and not solely to matters in the current litigation.

The Model Rules require that the paralegal should be cautioned (1) not to disclose any information relating to the representation of the client of the former employer, and (2) that the paralegal should not work on any matter on which he or she worked for the prior employer respecting which the paralegal has information relating to the representation of the client of the former employer. The paralegal must be isolated from participating in the matter litigation and from revealing any information relating to the new employer.

In any instance where such screening would be ineffective, the firm must necessarily withdraw from representing its client unless the client of the former employing firm should consent to the continued representation after being apprised of all of the relevant factors.

* * * * *

An article entitled “Developments in the Law: Conflicts of Interest in the Legal Profession” appears in 94 Harvard Law Review 1244, 136-70 (1981), which sets forth the elements required for effective screening.