

You have presented a hypothetical situation in which Attorney A and Attorney B are partners in a law firm. Attorney B has been a friend of X for a number of years and has been acquainted with X's family for some time through various social occasions. Attorney A, Attorney B and their law firm have never provided any legal advice or services to X or her family.

Recently, X's sister became involved in a domestic relations altercation with her husband, resulting in X's sister taking out assault warrants against her husband. Attorney A, unaware of Attorney B's friendship with X, accepted a retainer from the husband (Client) and agreed to represent Client. On the hearing date for Client's criminal case, the Commonwealth's Attorney objected to A's representation of Client, and moved to disqualify A on grounds of a conflict of interest as a result of the foregoing relationships. Attorney A also realized, at that time, that he too was acquainted with X's family, through prior social or public settings.

Although believing that no conflict of interest exists, Attorney A asked Client if he could refund the fees and withdraw as counsel. Client refuses to accept the refund and insists that A continue to represent him. X's family maintains that, because of B's friendship with X, as well as their acquaintance with both attorneys, A and B, the entire law office of Attorneys A and B are disqualified from representing Client in any matters adverse to X's sister. X also claims that X has confided in B about family matters, including X's sister's relationship with Client. Finally, X asserts that there may be an "appearance of a conflict" because X works for a company in which B's father has an interest. B does not deny that she has been a close friend of X for a few years and has discussed matters concerning X's family over that period of time, including Client's marriage to X's sister. However, B does not consider any of her conversations with X or X's family to be privileged or confidential. Notwithstanding full disclosure of the foregoing to Client, Client still insists that A represent him.

You have asked the committee to render an advisory opinion addressing the following issues:

1. Does A have a conflict of interest in representing Client in any matters (i.e., defense of Client on assault charges, divorce and custody proceedings, etc.) adverse to X's sister?
2. Regardless of whether a conflict exists, may A withdraw from representing Client over Client's objection?

The controlling disciplinary rules are DR:4-101 which requires an attorney to protect client confidences and secrets; DR:5-101(A) which prohibits an attorney from accepting employment if the exercise of his professional judgment may be affected by the attorney's own financial, business, property or personal interests except with consent of the client; DR:5-105(D) which prohibits an attorney from representing a client adverse to a former client in substantially related matters unless the former client consents; DR:5-105(E) which imputes a conflict of interest of an attorney to all other attorneys in the same law firm and DR:2-108(B)(1) which permits an attorney to withdraw from a representation if there is no material prejudice to the client.

While some of the disciplinary rules in the Code of Professional Responsibility apply regardless of whether an attorney acts in a professional or personal capacity, the ethical duties imposed under Canons 4 and 5 presuppose the existence of an attorney-client relationship. An agreement to employ an attorney may be expressed or implied, but there must be some indication that the advice and assistance of an attorney was sought and received in order to create an attorney-client relationship. *Nicholson v. Shockey*, 192 Va. 270, 277, 64 S.E.2d 813, 817 (1951). The committee has previously opined that the attorney-client relationship is a contractual one which is entered into after a consultation with a lawyer and mutual agreement as to its existence and scope. LE Op. 1193. On occasion, the committee has recognized that there may be particular circumstances where a person may have an expectation of confidentiality in their consultations with a lawyer even though the attorney does not undertake to represent that person. *See*, LE Op. 1453, LE Op. 1456 and LE Op. 1638.

Under the facts you present, there is no indication that X or X's family sought or received legal advice from either B or A. Nor does it appear that any of X's discussions with B occurred in B's professional capacity as a lawyer, to which an expectation of confidentiality might attach, as opposed to conversations between friends. Therefore, the committee is of the opinion that neither B's relationship with X, nor the social contacts X's family had with A or B creates a conflict of interest under DR:5-101(D). In addition, any information A or B may have obtained about X's sister's marital problems with Client was acquired under circumstances, in the committee's view, outside the scope of DR:4-101. Therefore, the committee believes that it would not be improper for A to continue representing Client in any matters adverse to X's sister.

As to the second issue, if A can withdraw from the representation of Client without material prejudice to Client, it would not be improper for A to terminate the attorney-client relationship. DR:2-108(B)(1). If, however, the matter is pending in court, A would need to obtain leave of court before A could withdraw from the representation.

Committee Opinion
June 24, 1997