

Committee Opinion
February 19, 1988

LEGAL ETHICS OPINION 1041

ATTORNEY/CLIENT – ENTERING
BUSINESS TRANSACTION WHEN
DIFFERING INTERESTS EXIST.

Your letter presents the following fact situation for the Committee's consideration: Attorney and a nonlawyer friend agree to form a partnership for the purpose of purchasing a parcel of vacation property for their private use. The attorney agrees to draft the partnership agreement. The friend, relying upon the attorney's expertise, assumes that he is in the position of a client. At execution, the friend has reservations regarding certain provisions of the agreement, but signs it after the attorney represents that "they will be able to work things out later." At no time did the friend seek or was advised to seek independent legal advice. Recently, a dispute has arisen between the two parties and it appears that the friend may be prejudiced because of the operation of one of the provisions of the agreement that he had reservations about at the execution.

Your inquiry is whether the attorney had an obligation to advise the friend to seek independent legal advice.

Your inquiry is controlled by Canon 5 of the Virginia Code of Professional Responsibility. Specifically, Disciplinary Rule (DR) 5-104(A) [DR:5-104], provides that:

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full and adequate disclosure under the circumstances and provided that the transaction was not unconscionable, unfair or inequitable when made.

In order for this provision to be applicable, the role of the friend must be construed as that of a client. The existence of an attorney-client relationship is a fact-based determination and can be evidenced by many different factors. In this case, based on the limited number of facts that you have presented, the Committee will not assume that an attorney-client relationship existed.

The Committee opines that if the facts support a finding that an attorney-client relationship existed, then the attorney should have made full and adequate disclosure of the fact that he and the client may have differing interests in the partnership agreement and that the client should seek independent legal advice prior to signing the agreement.

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Legal Ethics Committee Notes. – Under Rule 1.8(a), a lawyer may not enter into a "business transaction" with a client unless the client is given an opportunity to seek independent advice, and there has been full disclosure and consent in writing.