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Professional Ethics Committee

Informal Opinion 24-1

Crowdfunding and the Rules of Professional Conduct; Rule 3.7, Lawyer Not Likely to Be a Necessary Witness

An attorney who has represented an indigent mother in a child protection matter asks whether the representation violated Rule 3.7 of the Rules of Professional Conduct (Lawyer as Witness) where the attorney initiated and administered a crowdfunding[1] campaign for the benefit of her client. On the facts presented, we see no violation of Rule 3.7, and we take this opportunity to address ethical issues a lawyer must consider when undertaking a crowdfunding campaign for the benefit of a client.

The Facts Presented

The attorney's former client is an indigent single mother of several children. The attorney was appointed by the Office of the Public Defender to represent the mother in the litigation over the children's return after the Department of Children and Families ("DCF") had removed them from their home. After beginning the representation, and with the client's consent, the attorney undertook a crowdfunding campaign that raised approximately $1,100 for the benefit of the client. Donors contributed via Venmo, PayPal, and Zelle. Neither the attorney nor her law firm donated any funds to the crowdfunding campaign. The attorney distributed all of the donated funds to the client in several installments, and the attorney believes that the client has spent all of the funds on rent, food, and fuel.

After DCF's counsel became aware of the campaign, counsel demanded that the attorney cease her representation of the client, asserting that the attorney could not properly continue the representation because she could be a witness in the DCF matter. To avoid causing issues for the client, the attorney unhappily withdrew from the representation even though she disagreed with DCF counsel's implicit assertion that she was subject to disqualification as a potential witness. The client, however, wishes that the lawyer resume the representation. The attorney now asks

[1] Crowdfunding is considered the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the internet. See, https://www.dictionary.com.

the committee to opine on whether Rule 3.7 required her withdrawal from the representation. As discussed below, on the facts presented, we see no violation of Rule 3.7.

Crowdfunding and the Rules of Professional Conduct

Before addressing the Rule 3.7 issue, we first address some of the ethical issues a lawyer should consider whenever the lawyer becomes involved in crowdfunding on a client's behalf.[2] Specifically, the lawyer must consider questions of client confidentiality (Rule 1.6); the obligation to be truthful in statements to others (Rule 4.1); attorney obligations with respect to the receipt, safekeeping, and disbursement of any collected funds (Rule 1.15(b) and (e)); and the prohibition on financial assistance to a client (Rule 1.8(e)).

Prior to commencing a crowdfunding campaign on behalf of a client, a lawyer, pursuant to Rule 1.6(a), must obtain the client's informed consent to the disclosure of any information relating to the representation of the client. Even where the attorney does not plan to refer to the client by name in the crowdfunding campaign, informed consent is still required if there is a reasonable likelihood that the publicly shared information, including the lawyer's identity, could permit identification of the client.

Rule 4.1 prohibits a lawyer from making any "false statements of material fact or law" and failing "to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Accordingly, the attorney must not make any false statement in connection with the crowdfunding campaign, including with respect to the lawyer's relationship to the client. The lawyer's duty under Rule 4.1 remains in effect throughout the entire duration of the crowdfunding campaign, not just at the time of the initial posting.[3]

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[2] As this request does not involve crowdfunding to help pay a client's legal fees we do not address ethical issues raised by that practice. *But see*, District of Columbia Bar Ass'n Ethics Op. 375 (Nov. 2018); Philadelphia Bar Ass'n Ethics Opinion 2015-6 (Dec. 2015); and New Hampshire Bar Association Ethics Opinion 2021-22/02, addressing those questions.

[3] While there is nothing in the facts presented to the committee that raises any concern about the lawyer's client engaging in fraudulent or criminal activity, we note that Rule 1.2 (d) prohibits a lawyer from assisting a client in such conduct. Accordingly, if a lawyer who has sponsored a crowdfunding campaign discovers that the funds raised were used for criminal or fraudulent activity, the lawyer would be required to withdraw from the representation, *see* Rule 1.16(a), and, pursuant to Rule 1.6(c)(2), may disclose otherwise confidential information in order to prevent, mitigate, or rectify the consequences of the criminal or fraudulent conduct.

The facts presented here are that the lawyer raised funds for the benefit of the client, received the funds raised through the crowdfunding campaign, and then distributed those funds "in several installments" to the client. Presumably, it was the donors' intent that their donated funds would go to the client. Hence, all funds the lawyer received through the crowdfunding campaign were the client's funds, and the lawyer's receipt of those funds triggered the obligations under Rule 1.15. Under subsection (e) of that Rule, the lawyer must "promptly notify" the client of the lawyer's receipt of the funds, and, most important, must "promptly deliver" the funds to the client. And if the lawyer anticipates holding the funds for any length of time prior to delivery to the client, Rule 1.15(b) dictates that the funds must be deposited into the lawyer's IOLTA account, and that they not be commingled with the lawyer's own funds or with funds belonging to the lawyer's firm.

Subject to certain exceptions, Rule 1.8(e) generally prohibits lawyers from providing "financial assistance to a client in connection with pending or contemplated litigation…" Where, as here, the lawyer is merely facilitating donations made by third parties, Rule 1.8(e) is not implicated. In that situation, a lawyer is not, herself, providing the client with "financial assistance" as the committee interprets that term. And in light of the general prohibition on "financial assistance to a client," a lawyer may contribute to a crowdfunding campaign for the benefit of a client *only if* the contribution is permissible under the exception of Rule 1.8(e)(3), which permits, in very narrow circumstances, "modest gifts to [an indigent] client to pay for food, shelter, transportation, medicine or other basic living expenses."

Last, when representing a client and establishing and receiving funds from a crowdfunding campaign, the lawyer should be mindful of this advice from the commentary to Rule 1.8(e)(3): "If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about such consequences. See Rule 1.4."

Rule 3.7

Finally, we turn to the question of whether the attorney's crowdfunding campaign for the benefit of her client disqualifies the attorney from continuing or resuming her representation. Rule 3.7(a) prohibits a lawyer from "act[ing] as an advocate <u>at trial</u> in which the lawyer is likely to be a <u>necessary</u> witness…" (emphasis added). The Rule does not bar a lawyer from participation in any other portion of the action before the trial takes place, nor from advising a client more generally. The facts we have been given do not specify the procedural posture of the case, nor when or if a trial will take place. But on a plain reading of Rule 3.7(a), the attorney certainly would not violate the Rule by continuing her representation up to the point of trial, regardless of whether or not she would be a necessary witness.

Moreover, we see nothing in the facts presented that indicates that the attorney will be a necessary witness at trial so as to require her disqualification

from representing the client either during trial or in the pre-trial stages of the proceedings. Accordingly, it is the committee's opinion that the lawyer was not required to withdraw from the representation.

Ultimately, determination of the fact-specific issue of disqualification is one for the trial court to make, if and when the opposing side moves for disqualification pursuant to Rule 3.7. And even if the lawyer were to be deemed a necessary witness at trial, the lawyer will not be subject to disqualification if the court determines that the exception of Rule 3.7(a)(3) applies, namely, that "disqualification of the lawyer would work a substantial hardship on the client." The committee notes that the commentary to Rule 3.7 provides that in balancing the various interests at stake – the interests of the client, the tribunal and the opposing party – "due regard must be given to the effect of disqualification on the lawyer's client." Where, as in the facts presented here, the client is not in a financial position to hire counsel of her choice, disqualification of her preferred counsel may well "work a substantial hardship."

In making a pre-trial determination of whether there is a risk of disqualification at trial pursuant to Rule 3.7, and the attendant disadvantage for the client, these are some of the issues the lawyer should consider:

1. *Whether the subject of the lawyer's contemplated testimony would encompass information protected from disclosure by attorney client privilege or pursuant to the lawyer's duty of confidentiality under Rule 1.6(a).* If the information that would be disclosed in the lawyer's testimony is within the scope of such protections, the lawyer is unlikely to be a proper witness at trial.

2. *Whether the subject of the lawyer's contemplated testimony will actually be disputed at trial.* Under Rule 3.7(a)(1), the prohibition on serving as advocate and witness in the same proceeding will not come into play where "the testimony relates to an uncontested issue."

3. *Whether the subject of the lawyer's contemplated testimony can be established by other evidence without the lawyer's testimony.* If it can be established by other evidence, then the lawyer is not "likely to be a necessary witness" and Rule 3.7 will not be implicated.[4]

[4] We do not address the two other exceptions to the general prohibition of Rule 3.7. *See* Rule 3.7(a)(3) (exception to prohibition of Rule where attorney's potential testimony "relates to the nature and value of legal services rendered in the case"); and 3.7(b) ("a lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness . . .").

4. *Whether the lawyer has first-hand knowledge of the matter(s) for which her testimony is contemplated.* If the lawyer has no first-hand knowledge of disputed matters, the lawyer's testimony is unlikely even to be admissible, much less "likely to be . . . necessary."

5. *Whether the lawyer's contemplated testimony is likely to be substantially in conflict with the client's testimony.* As indicated in the commentary to Rule 3.7, under that scenario, "the representation involves a conflict of interest that requires compliance with Rule 1.7," even if the general prohibition of the Rule is not applicable.

Conclusion

In summary, given the pre-trial posture of the DCF proceeding, and no indication in the facts presented that the attorney "is likely to be a necessary witness" within the meaning of Rule 3.7(a), the fact that the attorney undertook a crowdfunding campaign for the client does not dictate disqualification of the attorney. As a general matter, lawyers contemplating a crowdfunding campaign on behalf of a client should keep in mind their duty of confidentiality (Rule 1.6); their obligation to be truthful (Rule 4.1); the prohibition on financial assistance to a client (Rule 1.8(e)); and their obligations with respect to client funds (Rule 1.15).

THE COMMITTEE ON PROFESSIONAL ETHICS

Stuart C. Johnson

BY Stuart Johnson, Chair