

The Philadelphia Bar Association  
Professional Guidance Committee  
Opinion 2015-6  
(December 2015)

The inquirer states that he represents a client in a matter in which the inquirer expects to start litigation against a government entity in a Pennsylvania court. The client will be seeking equitable, non-monetary relief. An attorney fee shifting statute might result in the payment of some fee in the event of success, but the client does not have any ability to pay a fee. The client is going to assign any award of attorney's fees to the inquirer.

The inquirer proposes to solicit compensation for his or her work on a crowdfunding platform, an internet site that enables users to post information about a project and solicit financial contributions from persons who believe the project to be a worthy cause. The inquirer would publicize the anticipated litigation on such a website and solicit contributions to serve as his or her fee. The inquirer anticipates that certain members of the public might be interested in supporting what they would view as a worthy public cause. No contributors would be given a financial stake in the outcome of the litigation. They would merely make a contribution, and would receive nothing more than the satisfaction that they offered financial support to a legal cause in which they believe.

While the complete fee agreement that the inquirer would have with the client is not specified, the inquirer states that it would state, "any contributed funds received from the crowdfunding appeal would be payments to counsel, not the party [client] and that these fees would remain counsel's property even in the event of a recovery of attorneys' fees under the fee shifting statute."

The Committee first points out that there is, of course, an alternative. It is possible to raise funds on a crowdfunding site to support litigation, either by paying lawyers' fees or expenses or both, but to hold the funds raised in some sort of trust arrangement and pay them out only as earned or incurred. The Committee has visited crowdfunding sites and noted that several do contain solicitations of support for a legal cause to pay legal fees, but in those cases, it appears that the contribution is to an entity that would hold the amounts contributed in trust to pay fees as earned in accordance with a separate fee agreement between the lawyer and the client that would specify how and when the lawyer would be paid.

This inquiry poses several different issues:

1. May the lawyer accept a fee from a source other than his or her client? This is permissible. Comment 13 to Pennsylvania Rule of Professional Conduct (the "Rules") 1.7 provides:

A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

In addition, Rule 1.8f provides:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

There is no reason to think that by raising funds from a crowdsourcing site, the lawyer's duty of loyalty and independent judgment to this client would be compromised. The lawyer should of course give consideration to this issue and make sure that he or she does not imply in describing the matter on the crowdsourcing site that donors will be granted any right to direct or otherwise control the litigation. The inquirer indicates that he is aware of this requirement and will obtain the consent of the client for payment by others of his fees.

2. May the lawyer publicize the case on the crowdsourcing site without breaching his duty of confidentiality?

Rule 1.6 states that "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation . . ."

In order to seek funds on a crowdsourcing site, the lawyer will of course have to reveal certain information about the matter sufficient to interest the public in making contributions. That will require obtaining the informed consent of the client. The inquirer indicates he is aware of this requirement and provided the inquirer obtains the informed consent of the client by satisfying the requirement of having "communicated

adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct” (see Rule 1.0e), the Committee believes that is possible. Care should be taken, of course, to keep information revealed about the client and the matter to the minimum necessary to achieve the purpose.

3. Is the anticipated fee arrangement permissible?

Rule 1.5 provides in part that:

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. The factors to be considered in determining the propriety of the fee include the following:

- (1) whether the fee is fixed or contingent;
  - (2) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - (3) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - (4) the fee customarily charged in the locality for similar legal services;
  - (5) the amount involved and the results obtained;
  - (6) the time limitations imposed by the client or by the circumstances;
  - (7) the nature and length of the professional relationship with the client;  
and
  - (8) the experience, reputation, and ability of the lawyer or lawyers performing the services.
- (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.

As noted at the outset of this opinion, it seems the inquirer imagines that he or she will be paid as a fee whatever sum is raised by crowdfunding, regardless of its amount. We suspect that the inquirer anticipates that the amount raised will total far less than he would expect to be paid if the matter takes as long as he or she now anticipates, he or she spends the total number of hours now anticipated and if those hours were compensated at average rates of pay in the area. However, it may not turn out that way. It cannot be known how much may be raised; and the course of the

representation is by no means certain. The litigation could end quickly, either favorably or not; before the litigation's end the inquirer may seek to withdraw or the client may wish to discharge him; or the inquirer may or may not succeed in seeking the payment of fees and expenses under an applicable fee shifting statute. Thus, just to give one example, if the matter ends quickly with relatively few hours of work expended, the retention of the entire amount raised on the crowdfunding site may produce an effective hourly rate that is extremely high. Without knowing how much was raised, it would therefore be difficult to determine whether or not the fee would be clearly excessive. Add the fact that the inquirer has asked the client to assign any award of attorney's fees to the inquirer, the possibility of a clearly excessive fee is truly an issue.

The scope of the inquirer's obligation in return for the payment of the fee also is not clear to the Committee. Does the inquirer anticipate that if the client agrees to allow the lawyer to retain the total raised on the crowdfunding site that the inquirer is promising that he will handle the matter from its inception to its conclusion in return for whatever the crowd fund raised fee turns out to be? That is, in return for the fee, does the lawyer promise to remain in the case through its termination, regardless of what the fee is, or may he withdraw in the event certain contingencies arise but still keep his fee?

The Committee believes that the lawyer must consider these various issues and resolve them with the client, and that without consideration and resolution of such matters, the Agreement is insufficiently clear and could possibly result in an excessive fee. For example, suppose the inquirer raises \$20,000 under this arrangement and that the entire fund immediately is paid to him or her, and, then, the lawyer manages to get a result in the case by devoting only ten hours of work. That situation could produce a fee at the rate of \$2,000 per hour. On the other end of the spectrum, suppose the funding site raises \$20,000, and then the inquirer finds out the matter will go on for years and require thousands of hours of work, much more than anticipated, and more than the inquirer can possibly handle without a fee. Could he then keep the whole fee and withdraw? Those are only two examples of what could be many possible scenarios. If the lawyer is to avoid taking an excessive fee and satisfy the requirement of Rule 1.5b, the inquirer must consider these issues. The inquirer and the client should consider these possibilities and describe their understanding about the fee and scope of representation carefully. In addition, the inquirer should consider the various factors spelled out above in determining whether the fee is reasonable under all the circumstances of the representation.

The Committee also believes that the inquirer should recognize that where the lawyer treats all amounts raised on the crowdsourcing site as earned immediately upon receipt, he has established a *de facto* non-refundable retainer, even though the actual amount is unknown. While there is no *per se* prohibition on non-refundable retainers in

Pennsylvania (see Pennsylvania Bar Association Formal Opinion 95-100)<sup>1</sup> great care should be taken in accepting such retainers. As explained in PBA Opinion 95-100, such a fee arrangement can be clearly excessive if it interferes with a client's ability to meaningfully discharge the lawyer with or without cause. That is, if there is a non-refundable retainer paid in the amount of say, \$100,000, and it is truly non-refundable, it may place a meaningful limitation on the client's ability to discharge the lawyer if he is in any way dissatisfied with the lawyer's performance or simply chooses to change counsel without cause at any point. Similarly, unless the arrangement also includes a promise to represent the client through to the conclusion of the matter, assuming the client wishes the lawyer to, it also could be a clearly excessive arrangement. For those reasons, the Committee believes that if the arrangement proposed is simply an arrangement whereby the fee consists of whatever is raised with no other undertakings, it is improper. The arrangement should include the following attributes in order to satisfy the requirements of the Rules.

First, the fee arrangement should include terms which describe the lawyer's obligations including the lawyer's obligation to remain in the case, assuming the client wishes him to do so, until its conclusion or until some other point at which retention of the total fees paid would not constitute an excessive fee. For example, the fee arrangement with the client could state that the inquirer is obligated to remain in the representation until the time expended reaches a total figure such that the total fee paid is reasonable in light of that time expended.

Second, the arrangement should require that the amount raised be placed in a trust account established under Rule 1.15 until those amounts are earned in accordance with the terms of the final fee agreement. Until such time that it is determined that the fee is actually earned, the monies raised constitute Rule 1.15 funds and should be held separate from the lawyer's own property.

Finally, the inquirer also should consider the duties owed to non-clients. The Rules refer in several places to the obligation of lawyers to be truthful in all respects to third parties. Rule 4.1 states that "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person. Rule 7.1 requires that lawyers not make false or misleading communications about the lawyer or the lawyer's services, noting that a communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.<sup>2</sup>

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<sup>1</sup> There has been strong criticism in adjoining states of non-refundable retainers. See *In Re Cooperman*, 83 N.Y. 2d, 245 (1994) and *Cohen v. Radio*, 275 N.J. Super 241 (1994).

<sup>2</sup> While the information that may be posted about the matter on the crowdfunding site may not be advertising in the technical sense since the lawyer is not advertising for new clients, the ethical proscriptions contained in Rule 7.2 regarding advertising by lawyers are worthy of consideration. At their heart, those proscriptions are all grounded in the same basic requirements of truthfulness and the duty not to mislead that are embodied in Rules 4.1 and 7.1.

The Committee does not know the nature of the representation, why it may attract financing from the public, or what might be said about it in the crowdsource website. Certainly it is possible to describe the matter and the fact that the funds are sought in connection with a fee to make the matter feasible in a manner that is entirely truthful and not in any way misleading and advances the cause of the client without revealing too much confidential information. There is nothing inherent in such a plan to suggest that the inquirer in any way is violating any Rule by doing so. However, it is important to make sure that those who contribute to the crowdfunding not feel that they have been misled in any way. As suggested, the fee arrangement raises the possibility that a person who contributes funds might react negatively if they were to learn that the entire fee raised to pay for the litigation turned out to be a lucrative fee for the inquirer without producing the result described. This consideration further amplifies the Committee's recommendations made above regarding the inquirer's fee arrangement with the client.

In the course of considering this inquiry, the Committee has reviewed many crowdsourcing sites and reviewed various statements made thereby by lawyers seeking to raise funds to pay expenses or fees incurred in connection with litigation. While the Committee certainly does not view those efforts as inherently problematic in any way, it is important to the profession and to the public that such efforts be conducted in such a manner as to avoid any impropriety. Crowdfunding sites can be a beneficial source of funds allowing the public to assist in the assertion of valid legal claims that might otherwise go without recourse. Thus, great care should be taken to make sure that the initial development of such sites not affect the ability of subsequent persons to use such a source.

**CAVEAT:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.