



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 907 (2/2/12)

Topic: Protecting anonymity of client

Digest: An attorney may agree to make an anonymous donation on behalf of a client, and must protect the confidentiality of the identity of a client when asked by the client to do so, provided the request does not involve the lawyer in prohibited conduct.

Rules: 1.4, 1.6(a)(3), 1.6(b)(6), 1.15(a), (b), (c), 4.1, 8.4(a),(b), (c)

QUESTION

1. May an attorney may make a charitable donation on behalf of a client and maintain the client's anonymity at the client's request, and may the attorney use the attorney's escrow account to make the donation?

FACTS

2. The inquirer is an attorney whose client seeks to make an anonymous donation to a charity. The client would like to place the money in an escrow account under the attorney's control, and then have the attorney forward the payment of the donation to the recipient. The client has instructed the attorney not to reveal the client's identity so that the client may remain anonymous.

OPINION

3. Rule 1.6 bars lawyers from revealing confidential information without client consent unless otherwise authorized by the Rule. "Confidential Information" is defined in Rule 1.6(a)(3) as follows:

"Confidential information" consists of *information gained during or relating to the representation of a client, whatever its source*, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) *information that the client has requested be kept confidential*. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. (Emphasis added.)

4. The attorney has a duty under Rule 1.6(a) (3)(c) to follow the client's direction because the client's identity in making an anonymous donation is "information that the client has requested be kept confidential." The attorney *must* therefore maintain the confidentiality of the information unless authorized or required to disclose it.

5. That protecting the identity of a client who has not consented to disclosure is an attorney's duty has previously arisen before for this Committee, under the Code of Professional Responsibility in effect prior to April 1, 2009. In N.Y. State 645(1993), this Committee addressed the conflict between legally mandated disclosure obligations and the attorney's duty to protect a client's identity. Specifically, N.Y. State 645 "discusses the obligations of a lawyer who contemplates accepting a position that might involve the disclosure of certain information about the lawyer's clients — the name of the client and, implicitly, the fact of the representation...." The Committee applied DR 4-101(B) requiring an attorney to protect "confidences" and "secrets."

6. The request for anonymity and the duty to protect information the client request to be kept confidential, does not alone allow the attorney to make the donation if it were unlawful to do so. The attorney must be careful not to mislead as to the identity of the donor, for example by identifying the donor as the lawyer's trust account. Rule 4.1 bars attorneys from knowingly making a false statement of fact or law to a third person. Rule 8.4(b) prohibits engaging in "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer." Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit, or misrepresentation." The inquirer has not presented us with any specific reason to believe that unauthorized disclosure of the client's identity could be legally mandated here, but it is not difficult to imagine that the donor's identity may be required to ensure that the donation is lawful (e.g., is not from an improper foreign source, does not evade disclosure or donation limits, etc.). Rule 1.6(b)(6) permits lawyers to make disclosures when required to do so by law.¹

7. Because circumstances may arise that require the attorney to make a disclosure of the client's identity, the attorney should make sure that the client understands that the attorney may not be able to keep his identity secret and that the client still wants to go ahead with the donation knowing the risk. *See* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

¹ *See also, e.g.*, Association of the Bar of the City of New York, Reforming New York State's Financial Disclosure Requirements For Attorney-Legislators: Report On Legislation By The Committee On State Affairs, The Committee On Government Ethics And The Committee On Professional Responsibility, dated January 2010, available at <http://www.nycbar.org/pdf/report/uploads/20071850-ReformingNYSFinancialDisclosureRequirements.pdf>. In pertinent part, the report stated that "[w]hile "information" may include the identity of a client, courts have found that revealing client identities does not breach ethical obligations because attorneys may be obligated or permitted by law to provide this information." *Id.*, citing *U.S. v. Legal Services for New York City*, 100 F. Supp 2d 42, 47 (D.D.C. 2000). "Indeed," the report continues, "Rule 1.6(b)(6) permits a lawyer to reveal information when required to comply with a law and courts have noted that such a legal obligation would override any claimed ethical duty of secrecy to a client." *Id.*, citing *U.S. v. Hunton & Williams*, 952 F. Supp. 843, 856 (D.D.C. 1997).

8. Whether the attorney may use his escrow account in connection with the proposed anonymous donation invokes Rules 1.15(a) and (b). Rule 1.15 provides for a trust account holding “funds belonging to another person incident to the lawyer’s practice of law...”. In view of the use of the word client in this question we assume that the making of the donation is incident to the practice of law. (If that were not the case, it may be necessary for the attorney to set up a separate account to receive the funds and make the donation. See Comment [5] to Rule 1.15.) In general, the attorney must receive the client’s funds into an attorney trust or escrow account and not commingle the funds with the attorney’s own funds or the funds of any other client. Rule 1.15(c) requires the attorney to provide the client a receipt and to maintain appropriate books and records. As discussed above, to avoid misleading the recipient, the lawyer must make sure that the recipient knows that the donation is anonymous, and not actually from the lawyer.

CONCLUSION

9. A lawyer has a duty to maintain the confidentiality of a client’s identity at the request of the client, and provided the lawyer does not knowingly make any false statement and segregates the client funds in a properly documented attorney escrow account, the lawyer may use the lawyer’s escrow account for the purpose of making an anonymous charitable donation on behalf of the client, provided the lawyer has satisfied himself that the contemplated donation is not illegal or otherwise prohibited by law.

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