



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1277 (11/26/2024)

Topic: Crowdfunding on behalf of indigent clients

Digest: A non-profit criminal defense organization may set up and administer GoFundMe pages for the benefit of indigent current clients, provided that the financial assistance is rendered as gifts, not loans, and the financial assistance does not promise financial assistance prior to retention or as an inducement to continue the lawyer-client relationship.

Rules: 1.6(a), 1.8(e)(4), & 1.9(c)

FACTS:

1. The inquirer works for a non-profit indigent criminal defense organization. The organization's clients include incarcerated individuals who will have no financial resources when released. The inquirer has submitted this inquiry on behalf of the non-profit organization.

QUESTION:

2. May a non-profit legal defense organization set up and administer GoFundMe pages intended to help the organization's indigent clients raise funds from the public to cover their living expenses upon release from incarceration?

OPINION:

How GoFundMe operates

3. GoFundMe is a for-profit crowdfunding platform that seeks donations to enable individuals or groups to raise funds either for registered 501(c)(3) charities or for private causes. Donations sent to a GoFundMe page may be transferred either to the person setting up the page or to a beneficiary. GoFundMe charges no fee to set up a GoFundMe page, but GoFundMe automatically deducts a standard transaction fee (2.9% + \$0.30) from each donation.

4. As a threshold matter, this Committee does not opine on issues of law and expresses no opinion on the legality or implications of the proposed GoFundMe activity under the Internal Revenue Code or other applicable law.

Rule 1.8(e): Financial assistance to indigent clients

5. Until 2020, Rule 1.8(e) of the New York Rules of Professional Conduct (the "Rules") (and the Code of Professional Responsibility before that) generally prohibited lawyers from advancing or guaranteeing financial assistance (such as living expenses or medical expenses) to a client in connection with contemplated or pending litigation unless certain exceptions applied. On June 24, 2020, however, the Appellate Divisions approved new Rule 1.8(e)(4), which allows lawyers to provide financial assistance to indigent clients under specific conditions.

6. Rule 1.8(e), which states the general rule, provides that a lawyer “shall not advance or guarantee financial assistance to a client” unless one of four exceptions applies. Regarding the instant inquiry, which is from a non-profit criminal defense organization, we believe that the exception stated in Rule 1.8(e)(4) applies. Rule 1.8(e)(4) states:

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

(4) a lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship. Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered useable for providing financial assistance to indigent clients, and financial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.

7. Rule 1.8(e)(4) – often called the “humanitarian exception” – thus expressly applies to a “not-for-profit legal services or public interest organization” that is serving indigent clients and is “providing legal services without fee.” Financial assistance to clients under the humanitarian exception must not come from “[f]unds raised for any legal services” and must be in the form of gifts, not “loans.” Thus, so long as the funds raised on the GoFundMe page are disbursed as outright gifts to indigent clients, the inquirer may administer the proposed GoFundMe page as described in the inquiry. *See generally, Simon’s New York Rules of Professional Conduct Annotated* § 1.8:76 (Thomson Reuters, 24th ed. 2024) (phrase-by-phrase analysis of the “humanitarian exception” to the general rule against financial assistance to litigation clients).

8. Comment [10A] to Rule 1.8, which the New York State Bar Association added to the Comments in 2020 to explain the “humanitarian exception,” elaborates on Rule 1.8(e)(4) as follows:

Subparagraph (e)(4) allows lawyers providing legal services “without fee,” not-for-profit legal services and public interest organizations, and law school clinical and pro bono programs, to provide financial assistance (beyond court costs and expenses of litigation) to indigent clients in connection with contemplated or pending litigation. Examples of financial assistance permitted under subparagraph (e)(4) include payments to cover food, rent, clothing, personal incidentals, and medicine. If financial assistance may have adverse consequences for the client, including, *e.g.*, for receipt of government benefits, receipt of social services, or tax liability, the lawyer should consult with the client about these consequences. *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”). Subparagraph (e)(4) does not permit lawyers, organizations, or programs to provide financial assistance beyond court costs and expenses of litigation to clients who are not indigent.

Duty of confidentiality to current and former clients

9. The lawyers in the inquiring criminal defense organization should also be mindful to comply with the Rules governing confidentiality when administering the GoFundMe page. Rule 1.6(a) prohibits a lawyer from knowingly revealing “confidential information” or using it to the

disadvantage of the client or for the advantage of the lawyer, unless the client gives informed consent. Rule 1.6 defines the term “confidential information” 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.

10. Thus, unless a client gives informed consent (or some other exception to the duty of confidentiality applies, which we doubt is the case here), the lawyers in the organization must take care to ensure that no information is included on the GoFundMe that is likely to be “embarrassing” or “detrimental” to the client, or that could waive the attorney-client privilege, or that the client has requested be kept confidential.

11. Moreover, if the inquiring organization’s indigent clients become former clients upon release from incarceration (or at some other point), we caution that Rule 1.9(c) imposes a duty of confidentiality on lawyers toward former clients similar to that imposed by Rule 1.6 toward current clients.

Prohibition against promising financial assistance

12. Finally, under the express language of Rule 1.8(e)(4), the inquiring organization “may not promise or assure financial assistance [via the GoFundMe page] prior to retention” by an indigent client and may not promise such financial assistance “as an inducement to continue the lawyer-client relationship” after the organization is retained. These twin prohibitions seem unlikely to come into play here, given that the inquiring organization does not charge any fees for providing legal services, but these prohibitions are written into subparagraph (e)(4) so we mention them here as a precaution.

CONCLUSION:

13. A non-profit criminal defense organization may set up and administer GoFundMe pages for the benefit of indigent current clients, provided that the financial assistance is rendered as gifts, not loans, and the financial assistance does not promise financial assistance prior to retention or as an inducement to continue the lawyer-client relationship.

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