



Ohio Board of Professional Conduct

OPINION 2022-05

Issued June 10, 2022

Lawyer Notarization of Affidavit of Client

SYLLABUS: A lawyer may notarize an affidavit of a client that will be filed in a pending matter and represent the client at a subsequent hearing or trial in the matter. If questions arise as to the execution of the affidavit or the identity of the affiant, then the court must hold a hearing to determine if a lawyer must be disqualified under Prof.Cond.R. 3.7.

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Ohio Board of Professional Conduct

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QUESTION PRESENTED:

May a lawyer notarize an affidavit of a client that will be filed in a pending matter and subsequently represent the client at a hearing or trial in the matter?

APPLICABLE RULES: Prof.Cond.R. 3.7

OPINION:

The requesting lawyer practices landlord-tenant law and handles the eviction of tenants on behalf of landlords. The lawyer wishes to notarize affidavits, signed by his landlord clients, that will be filed in pending cases. The affidavits are likely to include information such as whether a written or oral lease agreement exists, whether the tenant is behind in rent or has violated another term of the lease, and whether the tenant still resides in the property. The landlord will have personal knowledge of the facts contained in each affidavit while the lawyer representing the landlord is unlikely to have personal knowledge of the facts set forth in the affidavit.

Prof.Cond.R. 3.7(a), commonly known as the “advocate-witness” rule, prohibits a lawyer from serving as “an advocate at a trial in which the lawyer is *likely* to be a

necessary witness,” unless one of the exceptions stated in the rule applies. (Emphasis added.) Ohio appellate courts have extensively addressed the advocate-witness rule in establishing parameters as to the disqualification of counsel for a party.

Disqualification of a party’s chosen lawyer is a “drastic measure [that] courts should hesitate to impose except when absolutely necessary.” *City of Akron v. Carter*, 190 Ohio App. 3d 420, 2010-Ohio-5462, ¶19 (9th Dist.) quoting *Puritas Metal Prod. Inc. v. Cole*, 2008-Ohio-4653, 2008 Ohio App. LEXIS 3900, ¶25 (9th Dist.) and *Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St. 3d 1, 1998-Ohio-439. Disqualification is absolutely necessary only if “real harm is likely to result from failing to [disqualify].” *Carter* at ¶9 quoting *Puritas* at ¶28. A lawyer is a necessary witness after a trial court “determine[s] that the proposed testimony is material and relevant to the issues being litigated and that the evidence is unobtainable elsewhere.” *Carter* at ¶20 citing *Puritas* at ¶39. “A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other evidence * * * .” *Carter*, citing *Puritas* ¶34. It is not enough that a lawyer be a “potential” witness in order to disqualify the lawyer. See *State v. Johnson*, 197 Ohio App. 3d 631, 2011-Ohio-6907, ¶20 (6th Dist.). Further, “[a] party’s mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony.” *Cater* ¶20, quoting *Puritas* ¶34.

It is important for trial courts to follow the proper procedures in determining whether disqualification is necessary. *Reo v. Univ. Hosp. Sys.*, 2019-Ohio-1411, 131 N.E.3d 986, ¶17 (11th Dist.) citing *Fordeley v. Fordeley*, 2015-Ohio-2610, 2015 Ohio App. LEXIS 2642 (11th Dist.) The case law establishes that a trial court is required to hold a hearing, either oral or non-oral, to consider whether a lawyer should be disqualified under Prof.Cond.R. 3.7. *Reo* at ¶34 citing *Brown v. Spectrum Networks, Inc.*, 180 Ohio App.3d 99, 2008-Ohio-6687, ¶11 (1st. Dist.). The trial court must make factual and/or legal determinations relevant to the required Prof.Cond.R. 3.7 analysis for granting disqualification. See *King v. Pattison*, 2013-Ohio-4665, 2013 Ohio App. LEXIS 4880, ¶23 (5th Dist.).

The Board concludes that the act of notarizing a document on behalf of a client does not immediately transform the notarizing lawyer into a necessary witness or even make it likely the lawyer will be called as a witness. Lawyers regularly notarize

documents on behalf of clients in many areas of law, such as landlord-tenant law, domestic law, or probate law. “An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer.” Prof.Cond.R. 3.3, cmt. [3]. The fact that a lawyer – having no personal knowledge of the matters asserted therein – notarized a document is typically not material or relevant to the underlying litigation.

Further, the information contained in the affidavit is obtainable elsewhere, for example, from the landlord or property manager. In notarizing an affidavit, a lawyer is not taking responsibility for or verifying the facts contained therein any more so than does a notary unknown to the client. The lawyer is simply confirming the client appeared before him or her and signed or acknowledged the document in his or her presence. When, at the time the lawyer notarizes the affidavit, there is no question as to the identity of the affiant and the lawyer follows proper notarization procedures, the likelihood of the lawyer being called as a necessary witness is remote. There is no harm likely to result from a lawyer representing a client in a hearing or trial under these circumstances.

The application of Prof.Cond.R. 3.7 does not support an automatic or blanket prohibition of a lawyer representing a client when the lawyer has notarized an affidavit in a matter. If specific questions arise, such as whether the affidavit was properly executed or the identity of the affiant, then a trial court may determine it is necessary to have a hearing to establish whether the lawyer is a necessary witness. *See* Tex. Adv. Op 439-1987. The determination as to whether counsel may continue to represent the client is a fact-based determination and should be made on a case-by-case basis after a hearing.