

## ETHICS OPINION 050317

### FACTS:

Deputy County Attorneys file Affidavits pursuant to Section 46-11-201, MCA. That statute states, in pertinent part:

- 1) The prosecutor may apply directly to the district court for permission to file an information against a named defendant....
- 2) An application must be by affidavit supported by evidence that the judge...may require. If it appears that there is probable cause to believe that an offense has been committed by the defendant, the judge...shall grant leave to file the information, otherwise the application is denied.

Also, pursuant to 46-11-401(3), a complaint must be “signed by a sworn peace officer, under oath by a person having knowledge of the facts, or by the prosecutor.”

Question Presented: By signing and attesting to an Information, an Affidavit and Motion for Leave to File an Amended Information and an Affidavit in Support of a Complaint, does a Deputy County Attorney act as a witness on a case, in violation of Rule 3.7 (Lawyer as Witness) of the Rules of Professional Conduct?

**SHORT ANSWER:** No.

### DISCUSSION:

Two Rules of Professional Conduct, Rule 3.7, titled “Lawyer as Witness” and Rule 3.8, titled “Special Responsibilities of a Prosecutor”, blend with the statutory requirement of a reviewing judge to protect Deputy County Attorney’s from running afoul of the Rules.

Rule 3.7 provides, in pertinent part:

**RULE 3.7: LAWYER AS WITNESS**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

And Rule 3.8 provides, in pertinent part:

**RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause...

The prohibition against a lawyer serving as advocate and testifying as a witness in the same matter is essentially aimed at eliminating confusion about the lawyer's role. As an advocate, the lawyer's task is to present the client's case and to test the evidence and arguments put forth by the opposing side. A witness, however, provides sworn testimony concerning facts about which he or she has personal knowledge or expertise. When a lawyer takes on both roles, jurors are likely to be confused about whether a statement by an advocate witness should be taken as proof or as an analysis of the proof (see Comment 2, below). Rule 3.7 is designed to preserve the distinction between advocacy and evidence and to protect the integrity of the advocate's role as an independent and objective proponent of rational argument. This is discussed in the Comment:

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

In context, the Rule 3.7 prohibition addresses, in part, the heightened risk of prejudice to a defendant in criminal matters when a prosecutor testifies. Prosecutor testimony before a jury is not the issue of this opinion, but it is the context behind the Rule's prohibition. It is also the context that keeps the Deputy County Attorneys clear of the Rule 3.7 prohibition--their affirmations are not testimony to jurors. Their affirmations are to judges, who understand the particular wording and form of the affirmation supplied by the prosecutors to them (offered in the footnotes below).

Also supporting Rule 3.7's inapplicability is the critical phrase within the Rule: "in which the lawyer is likely to be a necessary witness". The purpose of the Rule is to disqualify a lawyer who will "likely" be a "necessary" witness. A plain reading of the Rule indicates that testimony that is cumulative or is obtainable from another source will not disqualify the lawyer.

Further restricting the scope of the prosecutor's attestations within Rule 3.7 as "analysis of the proof" is found in the Comment of Rule 3.8:

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence....Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4 [Maintaining the Integrity of the Profession].

The applicable law is Section 46-11-201, MCA. This statute requires that an application to file an information must be by affidavit supported by evidence as may be required by the reviewing judge. If probable cause appears from the application to warrant a finding that a crime has been committed by the person accused, the judge shall grant leave to file the information. The affidavit required for the filing of felony cases by information is an affidavit by a prosecutor to the Court that the facts and circumstances arising from the investigation have been reviewed, the prosecutor believes that the facts and circumstances are correct to the best of his/her knowledge, and that the facts would support a reasonable likelihood of conviction. This doesn't make the prosecutor a witness, but does hold the prosecutor's feet to the professional fire. It is to insure that only cases which the prosecutor reasonably believes, based on training and experience, are based on facts which, when presented to a jury, would support a reasonable person believing beyond a reasonable doubt that the accused person is guilty.

The requestor has provided several documents for review along with the question. In substantially redacted form these are included in the footnotes. The Complaint<sup>1</sup> meets the requirements of section 46-11-401, MCA and the Rules of Professional Conduct. The Information<sup>2</sup> also meets the statutory and Rule requirements. The Affidavit might be adjusted as follows to better reflect this "one step removed" clarification:

Comes Now, "Prosecutor", and being first duly sworn, deposes and says:

1. That I am a prosecutor for "location of jurisdiction" and as such I am responsible for reviewing allegations and prosecuting criminal offenses in "name of Court"; and
2. That I have reviewed the report of "Name of Investigating Officer and title and department", whose work and reports I know and have found to be truthful and reliable in the past; and
3. The affiant believes that the information provided by Investigating Officer demonstrates probable cause to believe that the Defendant has committed the

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<sup>1</sup> "The undersigned Deputy County Attorney of \_\_\_\_\_ County, Montana, states: before the filing of this Complaint, the above-named Defendant, in \_\_\_\_\_ County, Montana, on or about \_\_\_\_\_ committed the offenses of:

COUNT 1 offense

The alleged facts constituting the offense are: \_\_\_\_\_

Signed under oath by the Deputy County Attorney."

<sup>2</sup> "The undersigned County Attorney of \_\_\_\_\_, Montana, states: before the filing of this Information, the above-named Defendant, in \_\_\_\_\_ County, Montana, on or about \_\_\_\_\_ committed the offenses of:

COUNT 1 offense

The alleged facts constituting the offense are: \_\_\_\_\_.

Signed by the Deputy County Attorney on behalf of the County Attorney." Then, the following affirmation:

"The undersigned, being first duly sworn on his oath, deposes and says: That he is the duly elected, qualified and acting County Attorney of \_\_\_\_\_ County, Montana, that he has read the foregoing Information, knows the contents thereof and the matters, facts, and things therein stated are true of his knowledge, except those things stated on Amended Information and belief, and that as to those he believes it to be true."

Signed by the Deputy on behalf of the County Attorney.

offense of \_\_\_\_\_. The information relied upon by the prosecuting jurisdiction to support probable cause for this offense is as follows:

[insert statement of facts/circumstances supporting charge]

4. Wherefore, the undersigned reasonably believes the above described charges are true and correct based upon the report of "the investigating officer", and reasonably believes probable cause exists that Defendant has a sufficient likelihood of conviction if brought to trial.

5. Accordingly, the affiant moves the Court for leave to file the requested information.

With this format, the issues of the requestor would be sufficiently satisfied to dispel the notion that by signing the affidavit, the prosecutor becomes a witness to the case. Unlike the case of *Kalina v. Fletcher*, 522 US 118 (1997), the prosecutor is not making a finding, but only supporting the request for a finding by the Court. Only the Court has the power to make determinations about whether there appears on the face of the complaint and the supporting documents sufficient facts and circumstances to support a reasonable belief that charges should be filed. It is not "likely" that the Deputy County Attorney becomes a "necessary" witness, as the facts averred generally depend upon the necessary witnesses referenced in the affidavit. The testimony is obtainable not from the County Attorney, but from another source. And the prosecutor, under Rule 3.8 "knows" (a term defined in the Rules) that the charge is supported by probable cause.

#### **CONCLUSION:**

Deputy and County Attorneys are not violating Rule 3.7 when they file an Information, Affidavit and Motion for Leave to File an Amended Information, and an Affidavit in Support of a Complaint because the Court confirms the attestations made within them, not the Attorneys. In addition, the attestations are offered within the parameters of Rule 3.7 and Rule 3.8--not by an individual "likely" be a "necessary" witness, but by a prosecutor charged to transmit and comment on evidence given by others to the Court.