

PROPOSED AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT (MRPC) RULE 1.8. TO CREATE A NARROW HUMANITARIAN EXCEPTION

Issue

Should the Representative Assembly request that the Michigan Supreme Court amend Michigan Rules of Professional Conduct (MRPC) Rule 1.8 and related commentary to add a narrow humanitarian exception to the general prohibition on providing financial assistance to an indigent client?

RESOLVED, that the State Bar of Michigan supports amendment of the MRPC to add a narrow humanitarian exception to the general prohibition on providing financial assistance to an indigent client.

FURTHER RESOLVED, that the State Bar of Michigan proposes an amendment to Chapter 1 of the MRPC by amending MRPC 1.8(e) as follows:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which shall ultimately be the responsibility of the client; ~~and~~

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses provided that the lawyer represents the indigent client pro bono, pro bono through a nonprofit legal services or public interest organization, or pro bono through a law school clinical or pro bono program. The legal services must be delivered at no fee to the indigent client and the lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such financial gifts to prospective clients.

Financial assistance provided under (3) may be provided even if the indigent client's representation is eligible for a fee under a fee-shifting statute.

FURTHER RESOLVED, that the State Bar of Michigan proposes an amendment to the related commentary of MRPC 1.8 as follows:

A lawyer representing an indigent client, pro bono through a nonprofit legal services or public interest organization, or pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) are limited to modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client (including, but not limited to: eligibility for government benefits or social services or tax liability) the lawyer should consult with the client before providing the modest gift. The exception in paragraph (e)(3) is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings. Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee shifting statute. Paragraph (e)(3) does not permit lawyers to provide assistance in contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

Synopsis

On August 3, 2020, the American Bar Association (ABA) House of Delegates adopted an amendment to the Model Rules of Professional Conduct to provide a humanitarian exception to the prohibition on a lawyer providing financial assistance to a client. The Diversity & Inclusion Advisory Committee proposes that a parallel amendment be added to the MRPC 1.8. Conflict of Interest: Prohibited Transactions.

The ABA House of Delegates also adopted commentary to the rule amendment, and the Diversity & Inclusion Advisory Committee also recommends that Michigan adopt parallel commentary for MRPC 1.8 that would be added as a second paragraph to the MRPC Commentary to Rule 1.8.

Background

The amendments adopted by the ABA House of Delegates were sponsored by the Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Legal Aid and Indigent Defendants, who offered the following explanation to support the amendment especially in times of acute national economic distress:

[The] narrow exception to Model Rule 1.8(e) ... will increase access to justice for our most vulnerable citizens. [The current rule] forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit* financial assistance for

living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono without fee to the client, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.

The proposed rule addresses a gap in the current rule. Currently, lawyers

- may provide financial assistance to any transactional client;
- may invest in a transactional client, subject to Rule 1.8(a);
- may offer social hospitality to any litigation or transactional client as part of business development; and
- may advance the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent.

The only clients to whom a lawyer may not give money or things of value are those litigation clients who need help with the basic necessities of life. Discretion to give indigent clients such aid is often referred to as “a humanitarian exception” to Rule 1.8(e).^[footnote omitted]

Supporting a humanitarian exception to Rule 1.8(e), one pro bono lawyer wrote: “There are plenty of situations in which a small amount of money can make a huge difference for a client, whether for food, transportation, or clothes.”^[footnote omitted] Another wrote: “I hate that helping a client . . . is against the rules.”^[footnote omitted] And another: “Legal aid attorneys grapple with enough heartache and burdens that they should not also have to worry about whether a minor gift—an expression of care and support for a client in need—could violate the rule.”^[footnote omitted]

The amendment . . . is client-centric, focused on the most vulnerable populations, and protects the ability of indigent persons to gain access to justice where they might otherwise be foreclosed as a practical matter because of their poverty.

Additional ABA supporters include the Diversity and Inclusion Center and its constituent Goal III entities (the Coalition on Racial and Ethnic Justice; Commission on Disability Rights; Commission on Hispanic Legal Rights and Responsibilities; Commission on Racial and Ethnic Diversity in the Profession; Commission on Sexual Orientation and Gender Identity; Council for Diversity in the Educational Pipeline; and Commission on Women in the Profession; and the Standing Committee on Pro Bono and Public Service), the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Law Students Division, the Commission on Domestic and Sexual Violence, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel. In addition, the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty pro bono lawyers and law school clinicians nationwide, the Legal Aid Society of New York (an organization of more than 1200 lawyers), and APBCo support it.

Eleven jurisdictions currently have a form of humanitarian exception in their rules of professional conduct. Outreach to the bar counsel of these jurisdictions did not reveal any disciplinary problems associated with the narrow exception proposed.

Opposition

None known.

Prior Action by Representative Assembly

None pertaining to the proposed amendment.

Fiscal and Staffing Impact on State Bar of Michigan

No fiscal or staffing impact.

State Bar of Michigan Position

By vote of the Representative Assembly on September 17, 2020

Should the State Bar of Michigan support an amendment to MRPC Rule 1.8 and related commentary to add a narrow humanitarian exception to the general prohibition on providing financial assistance to an indigent client?

- (a) Yes
- or
- (b) No

LAW STUDENT, RECENT GRADUATE AND LAW INTERN PRACTICE COURT RULE

ISSUE

Should the Representative Assembly request that the Michigan Supreme Court amend Michigan Court Rule (MCR) 8.120 to permit law students and recent graduates to practice under the supervision of Michigan Indigent Defense Commission (MIDC) attorneys in private practice similar to how they are permitted to practice in Legal Aid Clinics and Legal Defender Offices?

RESOLVED, that the State Bar of Michigan supports amendment of the Michigan Court Rules to expand the scope of MCR 8.120 to include the ability for law students and recent graduates to practice under the supervision of MIDC attorneys in private practice.

FURTHER RESOLVED, that the State Bar of Michigan proposes the amendment to Chapter 8 of the Michigan Court Rules by amending MCR 8.120, as follows:

Rule 8.120 Law Students and Recent Graduates; Participation in Legal Aid Clinics, Defender Offices, MIDC Compliant Attorneys With 5 Years-Experience, and Legal Training Programs.

(A) [No Change]

(B) MIDC Compliant Attorneys. Law students and recent law graduates, under supervision of a member of the State Bar of Michigan, may staff the private practice of an attorney in the same manner as Legal Aid Clinics and Defender Offices. To qualify as a supervising attorney, the attorney shall:

(1) have a minimum of five (5) years of experience in practice,

(2) be fully compliant with the MIDC, and

(3) carry malpractice insurance.

~~(B)~~ [No Change]

~~(C)~~ [No Change]

~~(D)~~ [No Change]

(1) [No Change]

(2) [No Change in (a)-(b)(i)-(ii)]

The supervising attorney shall assume all personal professional responsibility for the student's or graduate's work; and should consider purchasing professional liability insurance to cover the practice of such student or graduate. Attorneys who supervise law students or recent graduates in private practice shall obtain malpractice insurance as set forth in Section (B).

(3) [No Change]

(4) [No Change]

SYNOPSIS

The proposed addition to the Michigan Court Rules improves the access of indigent criminal defendants to representation by expanding the scope of attorneys under whom law students and recent graduates can gain valuable practical legal experience. The proposed amendment has two purposes: to enhance the profession by providing practical experience that is not taught in law school; and to expand access to legal services for indigent persons.

BACKGROUND

The proposed rule is based upon US. Const., Amend. VI, which provides in relevant part, that “[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.”

The proposed rule is also based upon Const. 1963, Art 1, Sec. 20, which provides, in pertinent part, that “[i]n every criminal prosecution, the accused shall have the right ... to have the assistance of counsel for his or her defense [and] to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.”

OPPOSITION

None known.

PRIOR ACTION BY REPRESENTATIVE ASSEMBLY

None known.

FISCAL AND STAFFING IMPACT ON STATE BAR OF MICHIGAN

None known.

STATE BAR OF MICHIGAN POSITION

By vote of the Representative Assembly on September 17, 2020

Should the Representative Assembly request that the Michigan Supreme Court amend MCR 8.120 to permit law students and recent graduates to practice under the supervision of MIDC attorneys in private practice similar to how they are permitted to practice in Legal Aid Clinics and Legal Defender Offices?

(a) Yes

or

(b) No