COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

January 28, 2022, 9:00 a.m.
Via Webex
Webex link:
https://judicial.webex.com/judicial/j.php?MTID=mc053f605b770133175884bd88d7d3c33

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1. Call to Order [Judge Lipinsky].
2. Approval of minutes for September 24, 2021 meeting [attachment 1].
3. Status report on the proposed revision to Rule 3.8(d) and comment [3] [Judge Lipinsky].
4. Report from the Rule 1.4 subcommittee [Dave Stark and Jessica Yates].
5. Report on proposed amendment to Rule 1.8(e) [Jon Asher] [attachment 2].
6. Report on the PALS II committee [Judge Arkin] [attachment 3].
7. New business.
8. Adjournment.

Judge Lino Lipinsky, Chair
Colorado Court of Appeals
lino.lipinsky@judicial.state.co.us

Attachment 1

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On September 24, 2021
Sixty- First Meeting of the Full Committee
Virtual meeting in Response to Covid-19 Restrictions

The sixty-first meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, September 24, 2021, by Chair Judge Lino Lipinsky de Orlov. The meeting was conducted virtually in response to Covid-19 restrictions.

Present at the meeting, in addition to Judge Lino Lipinsky de Orlov and liaison Justices Maria Berkenkotter and Monica Márquez, were Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., Judge Adam Espinosa, Margaret B. Funk, Marcy Glenn, A. Tyrone Glover, Erika Holmes, April Jones, Judge William R. Lucero, Marianne Luu-Chen, Julia Martinez, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Troy Rackham, Henry Richard Reeve, Alexander R. Rothrock, Robert W. Steinmetz, Marcus L. Squarrell, David W. Stark, Jamie S. Sudler, III, Eli Wald**,** Jennifer J. Wallace, Lisa M. Wayne, Judge John R. Webb, Frederick R. Yarger, Jessica E. Yates, and E. Tuck Young. Special guests in attendance were Judge Michael Berger (at the beginning of the meeting); Dan Rubinstein, District Attorney, 21st judicial district; and Lucienne Ohanian, Deputy Public Defender, Appellate Division.

1. Introductory Remarks.

   The Chair introduced and welcomed four new members to the Committee and thanked them for their willingness to serve. The new members are Erika Holmes, Matthew Kirsch, Troy Rackham, and Robert Steinmetz.

   The Chair next offered a tribute to Member Glenn for her many years of service to the Committee as its first and only chair. The Chair thanked member Glenn for the thoughtful, graceful, and practical way that she conducted the Committee's business, allowing all voices and points of view to be heard and considered. The Chair then introduced Member Wayne who, on behalf of the full Committee, presented a gift to Member Glenn in appreciation for her many years of service to the Committee. Since the meeting was conducted remotely, Member Wayne had the honor of opening the gift and showing Member Glenn and the Committee the beautifully designed Tiffany bowl. The bowl was inscribed as follows: "To our dear friend Marcy with great appreciation for your inspiring dedication and leadership. The Members of the Standing Committee." Member Glenn addressed the Committee and expressed her deep appreciation for the Committee's going above and beyond in recognizing her service as Chair of the

Committee. Member Glenn stated that it has been a gift to her to have served as Chair of the Committee for so many years and to have worked tirelessly with Committee members, many of whom she considers as family. While acknowledging that the business of the Committee often generated differing points of view, she praised the members for their thoughtful and respectful approach to reconciling differences and trying to reach consensus. Member Glenn stated that she will treasure the Tiffany bowl for years to come and will feel joy each time she reads the thoughtful inscription. The Chair concluded the recognition of Member Glenn by thanking Member Wayne for all efforts in selecting and acquiring the gift for Member Glenn.

2. Approval of Minutes of June 25, 2021 Meeting.

   The Chair had provided the submitted minutes of the sixtieth meeting of the Committee held on June 25, 2021 to the members prior to the meeting. A motion to approve the minutes was made and seconded. The minutes were approved by a vote of the Committee.

3. Old Business

   a. Approval of amendments to Rule 1.5(b) "Scope of Representation" and comment [2]

      The Chair noted that the Colorado Supreme Court had approved the amendments to Rule 1.5(b) on Scope of Representation as well as comment [2] to the Rule. Justice Márquez thanked the Committee for its work on the amendments. She noted that the proposed amendments were published and that no public comments were received. The Court determined that, in the absence of any public comments, a hearing was unnecessary and it adopted the amendments as proposed by the Committee. The Chair joined Justice Márquez in thanking the Committee members who worked on the amendments.

   b. Proposed Revision to Rule 3.8(d) and comment [3] and subcommittee report.

      Member Yates presented the Subcommittee's report, which is attachment 3 to the meeting materials, and led the discussion regarding potential changes to Rule 3.8(d) and comment [3]. The Subcommittee is also proposing a change to Rule 3.8(f).

      The Subcommittee's report lists the individual members of the Subcommittee, the objectives of the Subcommittee, and the work the Subcommittee completed. The Subcommittee was comprised of a diverse group of state and federal prosecutors, as well as State Public Defenders, private criminal defense counsel, and members of this Committee. The Subcommittee's objective was to set forth a clearer standard regarding a prosecutor's duties to timely disclose evidence or information under Rule 3.8(d) that could either negate guilt; affect a defendant's strategic decisions, including plea decisions; affect the defendant's sentence; and to diligently seek information when it is in the possession of other law enforcement agencies. The Subcommittee

sought to add rule and comment language that would abrogate parts of *In re Attorney C,* 47 P.3d 1167 (Colo. 2002), which held that Rule 3.8(d) was not violated unless a prosecutor intended to not timely disclose material information, and that information is not material unless the outcome of the overall proceeding would have been different if the information had been more timely disclosed.

The Subcommittee reviewed professional conduct rules similar to Rule 3.8(d) from other states and the *In re Attorney C* decision of the Supreme Court. The Subcommittee was concerned about the retrospective view of materiality espoused in that case, especially when other Rules of Professional Conduct require lawyers to act and apply rules prospectively or contemporaneously. There was also concern with language in that case indicating that no regulatory violation of Rule 3.8(d) would occur unless there was proof that the prosecutor intended not to disclose exculpatory evidence. It was the view of the Subcommittee that the decision of *In re Attorney C* presented almost a complete bar to regulatory enforcement of Rule 3.8(d).

The Subcommittee report notes that initial meetings featured experienced criminal defense attorneys sharing their experiences in obtaining exculpatory evidence on a timely basis. Defense attorneys felt the current Rule failed to adequately address timely disclosure, especially in the context of the plea bargaining phase of a criminal case. They were also concerned that there was no express obligation to ensure that participating agencies provided prosecutors with information in the case that may need to be disclosed. Prosecutors participating in the Subcommittee discussions noted the logistical challenges they face in ensuring that their files are complete and include information from other agencies. They noted prosecutors are often unaware of information that a defense attorney may deem relevant to case strategy, and that prosecutor's offices do not have the logistical capability to seek out potential impeachment evidence from all available public agencies.

The Subcommittee's proposed revision to Rule 3.8(d) and comment [3] are found in attachments A and B to its report.

Member Yates introduced Dan Rubinstein, District Attorney for Mesa County, and Lucienne Ohanian, of the Colorado Public Defender's Office to offer remarks on their experiences and the need for revisions to Rule 3.8(d), comment [3] to Rule 3.8(d), and a slight modification to Rule 3.8(f).

Dan Rubenstein thanked the Committee for the opportunity to share his thoughts and to work on the Subcommittee proposing revisions to the language of the Rule and the comment. He discussed the issues that prosecutors face when dealing with the amount of digital evidence available today and budgetary issues on review and dissemination of that information. He addressed the importance of the timing issue, noting that it was imperative for prosecutors to disclose information to defense counsel in sufficient time for defense counsel to weigh such information in light of critical decisions to be made throughout the case, and commented that the guidance from *In*

re Attorney C was not helpful. He stated that he was in communication with the other elected district attorneys throughout the state and sought their input on the proposed revisions. He indicated that the proposed revisions to the Rule and the comment would provide good guidance to prosecutors and provide defense counsel with good expectations relating to disclosures. He requested that the Committee adopt the proposed language to Rule 3.8(d) and comment [3].

Lucienne Ohanian thanked the Committee for the opportunity to share her thoughts on the proposed revisions to the Rule and the comment. She stated that adoption of the proposed revisions to Rule 3.8(d) provided Colorado the opportunity to be a leader in in adding specificity, clarity, and transparency to the Rules of Professional Conduct relating to disclosure of exculpatory evidence. She stressed that the proposed revisions to the Rule and the comment reflected a consensus approach between the prosecution and defense members of the Subcommittee. She reiterated the concerns relating to the materiality and retrospective standards set by *In re Attorney C*, noting that it is almost impossible to know if undisclosed evidence would have impacted pretrial or trial proceedings. She recommended that the Committee adopt the proposed revisions to Rule 3.8(d) and comment [3].

At the conclusion of the remarks by Mr. Rubenstein and Ms. Ohanian, member Yates requested that the Committee adopt the Subcommittee's proposed revisions to Rule 3.8(d), comment [3] to Rule 3.8(d) and the proposed revision to Rule 3.8(f). She noted the significant input from both the prosecution and defense bars into the concepts set forth in the proposed amendments, stressed that the requested revisions represented a consensus proposal, and welcomed comments from the Committee that may add clarity to the consensus opinions expressed. The matter was then opened for discussion by the Committee.

A member questioned why the proposed new rule includes the language "a prosecutor may not condition plea negotiations on postponing disclosures of information known to the prosecutor that negates the guilt of the accused" when that language was not part of the existing rule. Ms. Ohanian explained that, in some cases, a prosecutor will approach defense counsel with a plea bargain, noting that they have some exculpatory information that they do not want to present at that stage of the proceeding. In these cases, the prosecutor will then offer the defendant a plea if they agree to waive the prosecutor's requirement to disclose exculpatory information under Rule 3.8(d). Ms. Ohanian explained that such situations put the defendant and defense counsel in a very difficult position because, while the proposed plea agreement may seem reasonable, making that decision in the absence of the exculpatory information is difficult. A Member thanked the Subcommittee for its significant work but discussed her concern about the use of the word "timely" as it relates to disclosures. She felt "timely" was too subjective and that a more objective standard would be more appropriate. Member Yates responded, indicating that the "reasonably should know" language in the proposed rule is a defined term that provides the objective standard

for action for a reasonably prudent attorney. Other members suggested that the words "reasonably" or "promptly" could be substituted for "timely." Subcommittee member Rubinstein noted that the language in comment [3] requiring prosecutors to evaluate timeliness of disclosure in light of case specific factors should also alleviate concerns regarding the use of "timely." Several other members commented on the "reasonably should know" language utilized in the proposed rule. Subcommittee member Rubenstein noted that he believed the "reasonably should know" language was protective but also noted that it is almost impossible to set up an objective standard that would apply to all situations. A member inquired whether the Subcommittee had considered the recent CBA Ethics Opinion 142 dealing with an attorney's duty to inquire with respect to his or her client in connection with the issue under discussion. Member Yates responded by again noting that "reasonably should know" is a defined term under the Rules. She noted that the Subcommittee did not specifically look at Rule 1.2(d) and did not, given the timing of the issuance of opinion 142, consider that opinion. Another member questioned whether the Subcommittee had considered use of the word "promptly" in lieu of the word "timely." In response, member Yates noted that they had not considered the use of the word "promptly" and utilized "timely" because it is used in the current version of the Rule. Subcommittee members Rubinstein and Ohanian also noted the use of "timely" in the current rule and said that the language in the comment provides some clarity on what that means insofar as such disclosures must occur before important events in the case. A member raised the question relating to the proposed comment and whether it made a distinction between guilt and credibility of an accused. Subcommittee members Rubinstein and Ohanian responded by reviewing the language of the comment that stresses prosecutors have to evaluate the timeliness of disclosures at the time they possess the information in light of case specific factors, one of which could pertain only to credibility or negating the guilt of the accused. There was a brief discussion of the difficulty of drawing a bright line, but the Subcommittee concluded that the language proposed in the comment represented a consensus view of the prosecution and defense bars. A member inquired as to whether the defense filing a specific Rule 16 motion at the beginning of a criminal case could potentially impact later action by attorney regulatory counsel. Member Yates responded by referring to the language of proposed comment [3], which says that whether a prosecutor reasonably should know of the existence of information that must be disclosed will depend on the facts and circumstances in any given case. A member inquired as to the proper name and location for the proposed comment, questioning whether it should be referred to as comment [3] or comment [3A]. The member requested that his remarks be reflected in the minutes and possibly in the future letter of transmittal to the Supreme Court. Member Yates indicated she had no strong feelings one way or the other on the issue, while another member: suggested that it be kept as comment [3].

Member Glover moved that the proposed revision to Rule 3.8(d) be adopted. The motion was seconded by Judge Webb. All of the members present at the meeting,

with the exception of Member Wayne, voted to approve the proposed revision to Rule 3.8(d).

Member Yates moved to approve the proposed revision to Comment [3]. Member Cohen seconded the motion. All of the members present at the meeting, with the exception of Member Wayne, voted to approve the proposed revision to Comment [3].

Member Yates then proceeded to review the proposed revision to Rule 3.8(f). She described the proposed addition of the language "or other law" as being noncontroversial and necessary in light of SB 271, which was passed in 2021. There were no comments or questions on the proposed amendment. Judge Espinoza moved to adopt the proposed revision to Rule 3.8(f). The motion was seconded by member Sudler. The motion passed unanimously.

c. Proposal regarding Rule 1.4

Members Stark and Yates reviewed materials being considered by the Malpractice Insurance Subcommittee of the Supreme Court Advisory Committee regarding mandatory insurance disclosures, and suggested that the issues presented by that Committee's work were also ripe for consideration by the Standing Committee on the Rules of Professional Conduct.

The materials presented by Members Stark and Yates are set forth in Attachment 4 to the meeting materials.

Members Stark led the discussion of the proposal and congratulated member Yates for her work on the Malpractice Insurance Subcommittee. Member Stark reported that, at its meeting on September 17, 2021, the Malpractice Insurance Subcommittee made a recommendation regarding mandatory disclosure of professional liability insurance details to prospective and actual clients. Although that subcommittee had considered recommending mandatory insurance coverage, it declined to make that recommendation but instead chose to recommend that attorneys make certain mandatory disclosures. The Subcommittee considered positions adopted by other states both on mandatory insurance and mandatory disclosure requirements. The disclosures contemplated would include information relating to basic insurance coverage on a per claim and aggregate basis, potential deductibles, events that may erode coverage, such as defense costs, and other matters. The Malpractice Insurance Subcommittee is considering that such disclosures should be provided in writing to a client and whether said writing would constitute informed consent without having to be signed by the client. Government attorneys, in-house counsel, and legal services organization attorneys would be exempt from the disclosures.

Comments raised by members of the Committee touched on the number of issues. First, some questioned whether the Standing Committee need to be actively involved at this point and whether the issue should just continue to be advanced by the Malpractice Insurance Submitting Subcommittee of the Supreme Court Advisory Committee on Attorney Regulation. Some members were critical about the number and scope of contemplated disclosures, indicating there could be traps for lawyers. Many members expressed a preference that lawyers should carry malpractice insurance, but disagreed that it should be a mandatory requirement and had questions about potential disclosures. Some members were comfortable with the concept that an attorney simply disclose whether they carry malpractice insurance at the time they renew their annual attorney registration without getting into the details of that coverage. Such a disclosure would create a public record of whether the registered attorney carries malpractice insurance. There was, however, support among certain members for mandatory disclosures regarding professional liability coverage. Members Stark proposed that a subcommittee of the Standing Committee be formed to address mandatory insurance disclosure requirements from a Rules of Professional Conduct point of view. There was discussion for and against the formation of the subcommittee, but a vote on the issue resulted in formation of a subcommittee.

d. Report from Rule 1.5(e) Subcommittee.

Member Rothrock presented the report of the Rule 1.5(e) Subcommittee, which is contained in Attachment 5 of the meeting materials. Rothrock pointed out that Rule 1.5(e), which is unique to Colorado, prohibits lawyers from paying or receiving referral fees. Rule 7.2(b), which has its origin in the Model Rules, merely prohibits lawyers from paying referral fees or other compensation for recommending the lawyer's services and does not regulate a lawyer's receipt of referral fees. Member Rothrock and the Subcommittee see inherent conflicts between the rules and recommend that Rule 1.5(e) should yield to Rule 7.2(b).

Member Rothrock reported that the Subcommittee had determined there were several options to deal with this conflict between the rules. At a minimum, the Subcommittee recommended that the full Committee revise Rule 1.5(e) to make it expressly subject to Rule 7.2(b). Another option was to eliminate Rule 1.5(e). Such action would leave Rule 7.2(b) to regulate the payment of referral fees and other Rules of Professional Conduct to regulate the receipt of referral fees. Although Colorado does not have an ethics opinion or reported case addressing a lawyer's receipt of compensation for referring current clients to third parties, the Subcommittee noted that many other states do. These other states analyze the lawyer's obligations under Rule 1.7(a)(2)'s conflict of interest analysis and Rule 1.8(a)'s prohibitions against a lawyer entering into a business transaction with a client. Member Rothrock indicated that if the language of Rule 1.5(e) was eliminated he would encourage the CBA Ethics Committee to issue a formal opinion addressing the propriety of a lawyer receiving

compensation for the referral of current clients to a third party. He noted that such action by the ethics committee would most probably analyze the policy issues in the context of the conflict of interest under Rule 1.7(a)(2) and the prohibition against business transactions in Rule 1.8(a).

The Subcommittee's recommendation was to revise the language of Rule 1.5(e) to read as follows: "A lawyer shall not accept compensation for referring the client to a third party for products and services related to the lawyer's representation of the client." Member Rothrock noted that there was some discussion in the Subcommittee about the proper placement of the proposed language in the Rules and recommended that the language be recognized as Rule 1.8(k) with the current Rule 1.8(k) becoming Rule 1.8 (l).

In the discussion following member Rothrock's presentation, a member inquired as to the origin of this request for revision. Member Rothrock responded by reminding the Committee that he had brought this conflict to the attention of the Committee in the letter that resulted in the formation of the Subcommittee to review the issue. He noted that this issue was not being proposed or advocated by any section of the bar. Another member noted that the issue under discussion involved much more than a simple clarification of two rules that appear to be in conflict and involved a fundamental policy issue. The member noted that our Supreme Court, while allowing division of fees, expressly prohibits "naked" referral fees. The member suggested that Rule 1.5(e) needs to remain in the Rules as currently stated or, alternatively, language could be added to Rule 1.5(e) to provide "except as otherwise prohibited by these rules." A member raised the question regarding the Committee's policy of trying to follow the Model Rules where appropriate. Member Rothrock responded by indicating that the Subcommittee's proposed revisions are trying to eliminate the conflict between Rule 1.5(e) and Rule 7.2(b). He again noted that Rule 1.5(e) is a Colorado-specific Rule and is not part of the Model Rules.

After brief further discussion, member moved that the matter be referred back to the Subcommittee for additional consideration on whether the proposed revised language for Rule 1.5(e) should be included in Rule 7.2 and Rule 1.8. The motion was seconded and passed by the Committee.

4. New business. No new business was presented for the Committee's consideration.

5. Adjournment. The chair adjourned the meeting at 11:45 AM. The next meeting for the Committee was scheduled for January 28, 2022.

Respectfully submitted,
Thomas E. Downey, Jr., Secretary

Attachment 2

Colorado Legal Services
1905 Sherman Street, Suite 400
Denver, CO 80203-1811
Telephone: 303.837.1321 / Fax: 303.830.7860
www.ColoradoLegalServices.org

January 3, 2022

The Honorable Lino S. Lipinsky de Orlov
Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203
Sent via email to lino.lipinsky@judicial.state.co.us

Re: Adoption of a Revised Rule 1.8(e)

Dear Judge Lipinsky de Orlov:

Thank you for allowing me to present to you, and to the Standing Committee on the Rules of Professional Conduct, my request for, and arguments in support of, adoption of a revised Colorado Rule 1.8(e). The ABA revised Rule on which the proposed revision to the current Colorado Rule is based recognizes that representation of indigent clients often involves responding to challenges that more financially secure clients, most often, do not face.

For a single individual, representation through Colorado Legal Services (CLS) is generally limited to persons with gross income below $1,342 per month, with an additional $473 per month income allowed for each dependent. CLS clients face daunting obstacles in securing adequate housing, medical care, transportation, child care, and other basic needs. These challenges have been magnified by the COVID-19 pandemic, which often led to illness among clients and their families, loss of employment and decreased income, increased housing costs, decreased transportation options, limited medical care, disappearing child care, and other financial and physical and mental health challenges.

CLS staff attorneys and pro bono attorneys who work with indigent clients to help them obtain protection from domestic violence, eviction, loss of income, difficulty in obtaining necessary medical care, and other severe legal circumstances often confront obstacles which many of us would consider minor annoyances – clients who lack bus fare to get to court for their hearing or to get to the CLS office for an appointment or to get home again from the appointment or hearing, clients who cannot afford diapers for their babies, or other modest needs. I believe that the only ethical and moral response to these situations is also the humane response, and that our staff and pro bono attorneys should be able to act, on occasion to alleviate these hardships, ensuring that clients are able to obtain a successful resolution to their legal issue that also allows them a small measure of security and dignity.

Many attorneys, including those at CLS, over the years have found themselves in situations where their indigent clients were in desperate need, and have provided "modest gifts" to these clients. This is especially true during the COVID-19 pandemic with its devastating impact on low-income Coloradans. CLS staff have provided assistance to clients in a number of situations, including help with the purchase of diapers for one client with an infant child. On another occasion, CLS staff collected modest funds to assist a client who was being evicted from her current home but had received a gift from a church to help pay a security deposit and first month's rent on a new apartment, but still needed modest additional funds to pay the security deposit and first month's rent. In another unfortunate situation, CLS staff provided bus fare for a client who had enough money to get to the CLS Denver office, but then had no money to pay for the bus ride home. These modest donations of financial assistance to clients in desperate financial need should not put CLS attorneys and pro bono attorneys in a questionable ethical position.

The ABA revised Rule and the proposed Colorado Rule recognize and accept that these situations arise in cases where attorneys represent clients with no payment of a fee or through a nonprofit legal services or public interest organization, law school clinic, or other pro bono program. The revisions to the Rule apply in these situations only and limit the assistance to be provided to indigent clients to "modest gifts" for food, rent, transportation, medicine, and other basic living expenses. The proposed Rule prohibits using these "modest gifts" as an inducement to continue the client-lawyer relationship, seeking reimbursement for the gifts, or publicizing the availability of such gifts to prospective clients. The ABA and the proposed Colorado Rule have carefully delineated the circumstances under which these "modest gifts" are allowable. The proposed Rule is a realistic and carefully crafted response that respects the well-established ethical principles of the attorney-client relationship, while providing guidance for the infrequent and unique circumstances that arise in representation of indigent, struggling clients and their families.

I urge the Committee to consider revised Colorado Rule 1.8(e) in light of its limited application to the representation of indigent clients, with the adequate guard rails outlined in the proposed revisions to the Colorado Rule, and allow CLS, along with all other Colorado providers of representation to indigent clients, to extend to those clients the modest humanitarian financial assistance as outlined in the proposed Rule.

Respectfully,

Jonathan D. Asher
Executive Director

Enclosures
ABA revised Model Rule 1.8(e)
Colorado proposed revisions to the ABA Model Rule 1.8(e)
Massachusetts revised Rule 1.8(e)
Michigan revised Rule 1.8(e)
New York City Bar Association revised Rule 1.8(e)

107 REVISED

ADOPTED

RESOLUTION

RESOLVED, That the American Bar Association amends Rule 1.8(e) and related commentary of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Model Rule 1.8: Current Clients: Specific Rules

***

(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 may be contingent on the outcome of the matter; ~~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 pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts 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.~~ 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 assistance to~~ gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Comment

Financial Assistance

107 REVISED

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts ~~if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle.~~ Gifts permitted under paragraph (e)(3) include modest contributions ~~as are reasonably necessary~~ for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are ~~A gift is~~ 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 ~~financial assistance~~ to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts ~~may be provided~~ pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other 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.

[No other changes proposed in the commentary to this Rule except renumbering succeeding paragraphs.]

Deletions struck through; additions underline

~~ADOPTED~~

RESOLUTION

RESOLVED, That the ~~American Bar Association~~ Colorado Supreme Court amend~~s~~ Rule 1.8(e) and related commentary of the ~~ABA Model~~ Colorado Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Model Rule 1.8: Current Clients: Specific Rules

***

(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 may be contingent on the outcome of the matter; ~~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 ~~pro bono~~ without payment of a fee, a lawyer representing an indigent client ~~pro bono~~ without payment of a fee through a nonprofit legal services or public interest organization and a lawyer representing an indigent client ~~pro bono~~ without payment of a fee through a law school clinical or pro bono publico program may provide modest gifts 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.~~ The ~~legal services must be delivered at no fee to the indigent client and the~~ lawyer~~:~~ may not:

(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~~ or

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

Gifts of ~~F~~financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Comment

Financial Assistance

107 REVISED

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client ~~pro bono~~ without payment of a fee through a nonprofit legal services or public interest organization and a lawyer representing an indigent client ~~pro bono~~ without payment of a fee through a law school clinical or pro bono program may give the client modest gifts ~~if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle.~~ Gifts permitted under paragraph (e)(3) include modest contributions ~~as are reasonably necessary~~ for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client~~,~~ (including, ~~e.g.~~ but not limited to, eligibility for receipt of government benefits, social services, or tax liability)~~,~~ the lawyer should consult with the client ~~about these~~ before providing the modest gift. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are ~~A gift is~~ allowed in specific circumstances where ~~it is~~ they are 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 ~~financial assistance to~~ clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts ~~may be provided~~ pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other 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.

[No other changes proposed in the commentary to this Rule except renumbering succeeding paragraphs.]

Deletions struck through; additions underline

PROPOSED REVISIONS TO RULE 1.8 AND RELATED COMMENTS

The Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct is publishing for comment a proposed revision to Rule 1.8(e) of the Massachusetts Rules of Professional Conduct and related comments.

Background. At its annual meeting on August 3-4, 2020, the American Bar Association adopted Resolution 107 approving a limited exception to Rule 1.8(e) of its Model Rules of Professional Conduct. The new exception to the prohibition on a lawyer providing financial assistance to a client in connection with pending or contemplated litigation would permit modest gifts to a pro bono client for food, rent, transportation, medicine and other basic living expenses subject to certain conditions.

Proposed Revisions. The Committee's proposed revisions to Rule 1.8(e) and related comments substantially follow the changes adopted by the ABA, but with some stylistic simplifications of the language used by the ABA in paragraph (3) of Rule 1.8(e) and in Comment 11. The proposed amendments are stated below, followed by redlines (i) showing the changes from the current Massachusetts Rule 1.8(e) and related comments and (ii) showing the changes from the ABA Model Rule 1.8(e) and related comments.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

***

(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 may be contingent on the outcome of the matter;

(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 *pro bono publico* may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses, provided that the lawyer may not:

(i) 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) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or

(iii) publicize or advertise a willingness to provide such gifts to prospective clients.

Gifts of financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

COMMENT

[No changes to Comments 1 through 9]

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee may give the client modest gifts for basic living expenses, such as contributions for food, rent, transportation, medicine and similar basic necessities of life. This rule applies to a lawyer in private practice representing an indigent client pro bono. The rule also applies to a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization or through a law school clinical or pro bono program. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception 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 to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] 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. However, paragraph (e)(3) does not permit lawyers to provide assistance in other 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.

[No other changes to the Comments to this Rule except renumbering succeeding paragraphs.]

Massachusetts

Proposal Marked for changes from Current Massachusetts Rule 1.8 and Related Comments

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

***

(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 may be contingent on the outcome of the matter; ~~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 *pro bono publico* may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses, provided that the lawyer may not:

(i) 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) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or

(iii) publicize or advertise a willingness to provide such gifts to prospective clients.

Gifts of financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

COMMENT

[No changes to Comments 1 through 9]

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer ~~advancing~~lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee may give the client modest gifts for basic living expenses, such as contributions for food, rent, transportation, medicine and similar basic necessities of life. This rule applies to a lawyer in private practice representing an indigent client pro bono. The rule also applies to a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization or through a law school clinical or pro bono program. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception 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 to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] 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. However, paragraph (e)(3) does not permit lawyers to provide assistance in other 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.

[No other changes to the Comments to this Rule except renumbering succeeding paragraphs.]

Proposal Marked for changes from ABA Model Rule 1.8 and Related Comments

~~Model~~ Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

***

(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 may be contingent on the outcome of the matter;

(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 *pro bono*~~, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program~~ *publico* may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses~~. The~~, provided that the lawyer~~:~~

~~(i)~~ may not :

(i) 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~~ or

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

~~Financial~~Gifts of financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

COMMENT

[No changes to Comments 1 through 9]

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses,

including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, may give the client modest gifts for basic living expenses, such as contributions for food, rent, transportation, medicine and similar basic necessities of life. This rule applies to a lawyer in private practice representing an indigent client pro bono. The rule also applies to a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization, and a lawyer representing an indigent client pro bono or through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception 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 to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] 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. However, paragraph (e)(3) does not permit lawyers to provide assistance in other 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.

[No other changes to the Comments to this Rule except renumbering succeeding paragraphs.]

MICHIGAN

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.

FUTHER 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

The remainder of this report will explain each of COSAC's recommendations.

Rule 1.8
Current Clients: Specific Conflict of Interest Rules

In March 2018 the Professional Responsibility Committee of the New York City Bar Association issued a detailed report (the "City Bar Report," attached as Appendix A) recommending a "humanitarian exception" to Rule 1.8(e), as well as a new Comment to Rule 1.8 to explain the exception. The Report was later approved by the City Bar President and represents the position of the City Bar. The new exception to Rule 1.8(e) proposed in the City Bar Report would permit lawyers representing indigent clients on a pro bono basis, lawyers working in legal services or public interest offices, lawyers working in law school clinics, and the legal services offices, public interest offices, and law school clinical programs themselves, to provide financial assistance to indigent litigation clients.

COSAC has carefully considered the City Bar Report and strongly supports the proposal to add a humanitarian exception to Rule 1.8(e). COSAC therefore recommends the City Bar proposal to the House of Delegates with a few relatively minor edits and additions. COSAC has discussed these edits and additions with the City Bar and understands that the City Bar supports COSAC's proposal to amend Rule 1.8(e) as set forth below.

As amended, Rule 1.8(e) would provide as follows:

> (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:
>
> (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> (2) A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; ~~and~~
>
> (3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred;~~.~~ and
>
> (4) A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, a law school clinical program, a law school pro bono program, or a lawyer employed by or volunteering for such an organization or program, may provide financial assistance to indigent clients, provided that:
>
> (i) the lawyer, organization or program does not promise or assure financial assistance allowed under subparagraph (e)(4) to a prospective client before

retention, or as an inducement to continue the lawyer-client relationship after retention, and

(ii) the lawyer, organization or program does not publicize or advertise a willingness to provide such financial assistance to clients.

The Comment to Rule 1.8 would be amended as follows:

COMMENT

Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, ~~like the former New York rule,~~ subparagraphs (e)(1)-(3) limit~~s~~ permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses under subparagraphs (e)(1)-(3) do not include living or medical expenses other than those listed above.

[10] Except in representations covered by subparagraph (e)(4), ~~L~~lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

[10A] Subparagraph (e)(4) allows certain lawyers and organizations 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 or loans to cover food, rent, and medicine – but loans must comply with Rule 1.8(a) (governing business transactions with clients). Subparagraph (e)(4) permits lawyers providing legal services without fee, not-for-profit legal services or public interest organizations, and law school clinical or pro bono programs (as well as lawyers employed by or volunteering for such organizations or programs) to provide financial

assistance to indigent clients. The organizations or programs (and lawyers employed by or volunteering for such organizations or programs) may provide such financial assistance even if the organization or program is eligible to seek or is seeking fees under a fee-shifting statute, a sanctions rule, or some other fee-shifting provision. However, subparagraph (e)(4) does not apply to any other legal services provided "without fee." Thus, subparagraph (e)(4) does not permit lawyers or other organizations to provide financial assistance beyond court costs and expenses of litigation in matters in which they 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 or organization ultimately does not receive a fee.

[10B] Subparagraph (e)(4) is narrowly drawn to allow charitable financial assistance to clients in circumstances in which such financial assistance is unlikely to cause conflicts of interest or to incentivize abuses. To avoid incentivizing abuses, such as "bidding wars" between qualifying organizations or pro bono lawyers to attract or keep clients, subparagraph (e)(4) does not permit a lawyer or organization to promise or assure financial assistance to a prospective client as a means of inducing the client to retain the lawyer or to continue an existing lawyer-client relationship. Nor does subparagraph (e)(4) permit a lawyer or organization to publicize or advertise a willingness to provide financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation. However, the restrictions on promises, assurances, advertising, and publicity in subparagraphs (e)(4)(i) and (ii) apply only to financial assistance allowed under subparagraph (e)(4) and not to costs and expenses of litigation that are permitted under subparagraphs (e)(1)-(3).

COSAC Discussion of Rule 1.8(e)

Currently, Rule 1.8(e) allows payment of "court costs and expenses of litigation" for indigent clients represented in connection with contemplated or pending litigation on a pro bono basis but bars other financial assistance to indigent clients as well as other clients. As described in the City Bar Report, the proposed "humanitarian exception" would give certain attorneys and organizations discretion to provide financial assistance to indigent clients represented on a pro bono basis as long as the attorney or organization (i) does not promise financial assistance allowed under Rule 1.8(e)(4) in order to induce a client to commence or continue an attorney-client relationship, and (ii) does not advertise or publicize a willingness to provide such financial assistance.

Some form of humanitarian exception similar to proposed subparagraph (e)(4), with varying terms and limitations, has been adopted by ten other states and the District of Columbia.

COSAC supports the proposed humanitarian exception. COSAC believes that the concerns about attracting clients and fomenting litigation through loans or payments (and the attendant conflicts and professionalism issues that such assistance could raise) would generally not exist for outright payments or loans to (or on behalf of) indigent, non-fee paying litigants for necessities of life such as food, rent, and medicine. (Rule 1.8 already permits lawyers to advance the costs of medical examinations to create evidence or comply with discovery requests, but the rule does not permit lawyers to advance other expenses for medicines or medical treatment.)

Any likelihood of abuse is reduced by the City Bar proposal to prohibit advertising or promises of humanitarian assistance designed to induce a client to retain the lawyer or to continue an existing attorney-client relationship. In addition, COSAC believes that payments of such expenses may sometimes be necessary to enable potentially meritorious litigation to proceed (much as litigation funding already does for many non-indigent clients).

According to the City Bar Report, the public interest bar is said generally to support a humanitarian exception. This claim is based on an ABA nationwide survey of legal aid and public defender organizations and on the City Bar Professional Responsibility Committee's own inquiries of some law school clinics and legal services organizations in New York and New Jersey. The Report notes the prospect that lawyers representing indigent clients with desperate needs could be placed in a difficult position regarding whether to provide financial assistance to their clients (perhaps out of their own pockets), but also notes that law firms and legal services organizations could adopt (and in some cases have adopted) policies that would make decisions on financial assistance less personal, or would assign the decisions on financial assistance to attorneys or administrators who are not involved in the matter in question.

Though not mentioned in the City Bar Report, lawyers and legal service providers may also ethically discuss and actively explore with their clients other available charitable resources that may reduce or eliminate the client's need for financial assistance under subparagraph (e)(4). Nothing in COSAC's recommendation is meant to detract from those efforts. In any case, whether or not the Courts adopt a humanitarian exception, COSAC encourages lawyers to educate themselves and their clients about other charitable organizations that may assist litigants who are struggling financially, and COSAC encourages lawyers to support such organizations and to urge others to support them.

Public comments on Rule 1.8(e) and COSAC's response

New York State Bar Association Committee on Professional Ethics.

The NYSBA ethics committee supports the proposed amendments to Rule 1.8(e) and related Comments but urges COSAC to do three things: (a) define or clarify the meaning of "indigent" in Rule 1.8(e); (b) explain COSAC's view that contingent fee personal injury cases do not qualify for the humanitarian exception; and (c) make clear that a "loan" to a client must comply with Rule 1.8(a) (governing business transactions with clients). Specifically, the ethics committee said:

> With the following observations, we agree with COSAC's proposal, which originates with the New York City Bar's Committee on Professional Responsibility.
>
> The N.Y. Rules of Professional Conduct (the "Rules") do not explicitly define "indigent." So noting in our Opinion 786 (2005), which interpreted the identical predecessor of Rule 1.8(e), we said that the New York courts "have defined the term as 'destitute of property or means of comfortable subsistence; needy; poor; in want; necessities' (citing Healy v. Healy, 99 N.Y.S.2D 874, 877 (Sup Ct. Kings County 1950)." Since then, Comment [3] to Rule 6.1 was added to define "poor person" in the context of pro bono representations. In our Opinion 1044 (2015), at ¶ 8, we opined that a person qualifying as a "poor person" under that Comment would be "indigent" under Rule 1.8(e). We assume that COSAC's proposal uses the term "indigent" in this same ordinary and common sense, but we believe

> that COSAC should expressly so state in a Comment; the matter should not be left to our assumptions.
>
> Also needful of clarity is proposed paragraph (c)(4), which extends to any lawyer providing services without fee to indigent clients, with the explanation in proposed Comment 10A that this does not exclude "an organization or program" that is eligible to seek fees under a fee-shifting statute, common in, among other things, civil rights laws. This is not what the proposed revision of paragraph (c)(4) actually says, so a discordance exists between the proposed Rule and the proposed Comment. Equally unclear is whether a so-called "non-public" interest matter is confined to personal injury contingency cases, and why such cases are invariably of a "non-public" character. Wise public policy may be that such matters are not apt for the "humanitarian exception" but the bar deserves greater guidance than the COSAC proposal puts forth.
>
> That COSAC contemplates that the financial aid may take the form of a loan implicates Rule 1.8(a), to which our Committee has consistently required adherence in loan transactions between a lawyer and client. See, e.g., N.Y. State 1145 ¶ 9 (2018); N.Y. State 1104 ¶ 4 (2016); N.Y. State 1055 ¶ 13 (2015). Although mention is made of other parts of Rule 1.8 in its commentary on the proposed change, COSAC does not say whether the proposal would require compliance with the strict standards of Rule 1.8(a). While we are loath to burden a humanitarian measure with undue complexity, we believe that any business transaction with a client – that is, a transaction other than an act of charity – compels application of Rule 1.8(a). At a minimum, if COSAC disagrees, then we think clarification and explanation is needed.

COSAC has deliberated regarding each of the ethics committee's suggestions and will address each one.

With respect to the term "indigent," COSAC does not believe it is a necessary to clarify the meaning of "indigent." That term has been in Rule 1.8(e) or its predecessor, DR 5-103(B)(2), for at least twenty-five years and has not created problems. Also, as the ethics committee noted, ethics opinions have addressed the meaning of the term "indigent" and have provided substantial guidance that is not readily captured in a short Comment.

With respect to making clear that a "loan" to a client must comply with Rule 1.8(a), COSAC agrees and has added appropriate language to proposed Comment [10A].

With respect to whether personal injury cases serve the public interest, COSAC believes that sometimes they do and sometimes they do not. COSAC has excluded them for the same reason that the New York City Bar excluded them: abuses of the financial assistance exception are least likely to occur when financial assistance to clients is provided by lawyers providing legal services without fee, by not-for-profit legal services or public interest organizations, by law school clinics or law school pro bono programs, or by lawyers working for or with such organizations or programs. Lawyers in the for-profit sector have different incentives and motivations. COSAC understands that a number of jurisdictions allow lawyers to provide financial assistance to a wider variety of needy individual clients (including contingent fee clients) beyond the costs and expenses of litigation, and COSAC recognizes that extending the humanitarian exception to contingent fee lawyers might be an

appropriate step at a later time, but adopting the proposed humanitarian exception would be a big step for New York, and COSAC thinks it best to see how the humanitarian exception works in pro bono and public interest cases before expanding it to the private sector.

New York City Bar

The New York City Bar originated the proposed humanitarian exception and generally supports COSAC's changes to its proposals, but requested the following modifications:

> Proposed Comment 10A to proposed Rule 1.8(e)(4) seems to describe the universe of lawyers who may provide financial assistance to indigent clients more narrowly than does the proposed Rule itself. The proposed Rule provides that such assistance may be provided by, among others, "[a] lawyer providing legal services without a fee...." The third sentence of comment 10A lists the other categories of attorneys who are covered by the rule, but excludes this category (except to the extent that it overlaps with lawyers volunteering for public interest organizations or law school clinical or pro bono programs, which is a separately listed category under the Rule). We suggest clarifying language so that the comment does not create confusion about the ability of a lawyer or law firm providing pro bono services to an indigent client to provide such assistance.

COSAC agrees with the City Bar's suggestion and has made the requested modification to COSAC's earlier proposal.

Rule 3.4
Fairness to Opposing Party and Counsel

COSAC proposes to add a new paragraph (f) to Rule 3.4. The new paragraph would provide as follows:

> Rule 3.4. A lawyer shall not ...
>
> (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
>
> (1) the person is a relative or an employee or other agent of a client; and
>
> (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COSAC also proposes to amend Comment [4] to Rule 3.4 to explain the new provision. As amended, Comment [4] would provide as follows:

> [4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer's client. See Rule 4.3. However, subject to Rule 4.3, a lawyer may inform any person of the right not to

Attachment 3

SUPREME COURT, STATE OF COLORADO

IN RE: ADVISORY COMMITTEE'S RECOMMENDATION CONCERNING PARAPROFESSIONALS AND LEGAL SERVICES

ORDER OF THE COURT

On February 27, 2020, this Court ordered that a new subcommittee of the Supreme Court Advisory Committee be created to explore the possible creation of a regulatory regime for licensing qualified paraprofessionals to engage in the practice of law in defined contexts, including authorized scopes of work in certain types of domestic relations matters. Pursuant to that Order, the Advisory Committee's Paraprofessionals and Legal Services (PALS) Subcommittee has proposed a new program that would authorize Licensed Legal Paraprofessionals (LLPs) to offer and provide limited representation to parties in certain domestic relations matters. On May 21, 2021, the Advisory Committee approved the proposal and its recommendations, and subsequently transmitted the report and recommendations to this Court.

Upon consideration of the Advisory Committee's report and recommendations to this Court, **IT IS HEREBY ORDERED** that the Advisory Committee shall create a subcommittee or subcommittees, as the Committee deems appropriate and necessary, to develop more detailed requirements for licensure of and practice by LLPs, to create a plan to launch and operationalize the LLP program, and to draft appropriate Supreme Court rules to govern such a program. The subcommittee(s) shall submit a complete proposal covering these areas to the Advisory Committee for its review and any recommendation to the Supreme Court.

BY THE COURT, EN BANC, this 3rd day of June, 2021.

Brian D. Boatright

Brian D. Boatright
Chief Justice Colorado Supreme Court

cc: Jessica E. Yates, Attorney Regulation Counsel via email

Licensed Legal Paraprofessionals: Program Plans and Updates[1]

Licensed Legal Paraprofessionals

Colorado currently does not license paralegals or other legal paraprofessionals, but that could change in the near future. After approving a preliminary report recommending that Licensed Legal Paraprofessionals (LLPs) be allowed to provide limited legal services in certain types of domestic relations cases, the Colorado Supreme Court has requested that its **Advisory Committee** develop an implementation plan. Given that some 75% of litigants in domestic relations cases have no legal representation ("pro se"), LLPs could help fill the gap in representation, and would be allowed to assist clients directly in lower-asset marital dissolution, parentage, and allocation of parental responsibility (APR) cases. Other jurisdictions, including Utah, Arizona and Washington, already have similar programs to license paralegals or legal paraprofessionals with enhanced skills in limited legal practice areas.

The Advisory Committee is forming working groups, which will include family law lawyers, ethics lawyers, judges, family court facilitators and other court personnel, paralegals, community college and law school representatives. The working groups will develop, for the Supreme Court's consideration:

- Detailed educational, experiential and examination requirements for licensure of Licensed Legal Paraprofessionals;
- Court rules to set forth ethical and procedural requirements governing Licensed Legal Paraprofessionals ;
- A plan to make necessary changes to Colorado Judicial electronic filing systems to ensure Licensed Legal Paraprofessionals can file documents in cases and take other permitted actions for their clients; and
- A plan for outreach and education to stakeholders about the limited scope of a Licensed Legal Paraprofessional's practice.

The most recent report of the Paraprofessionals and Legal Services ("PALS") Subcommittee of the Advisory Committee, which contains recommendations about Licensed Legal Paraprofessionals' qualifications and scopes of practice, can be viewed **here**.

[1] From https://www.coloradosupremecourt.us/AboutUs/PALS.asp

The Colorado Supreme Court's February 2020 order requesting creation of the PALS Subcommittee can be viewed **here**. The Court's June 2021 order requesting development of an implementation plan can be viewed **here**.

Questions about the LLP initiative? While the final decisions around licensing paraprofessionals have not been made, please review the **PALS report**, which may be able to answer your questions. Please **email** with any additional questions. Updated information will be posted on this website when it becomes available.

Individual Working Group Rosters as of October 26, 2021

Licensure and Qualifications

- Co-chairs: Hon. Angie Arkin (Ret.), Hon. Jennifer Torrington
- Tanya Bartholomew
- Hon. Catherine Cheroutes
- Richard Corbetta
- Jennifer Feingold
- Karey James
- Hon. Frances Johnson
- Laura Landon
- Dawn McKnight
- Colleen McManamon
- Rebekah Pfahler
- Gina Weitzenkorn
- Jessica Yates

Rules

- Chair: Hon. Adam Espinosa
- Nancy Cohen
- Cindy Covell
- Dave Johnson
- Hon. Michal Lord-Blegen
- Katharine Lum
- David Stark
- Hon. Dan Taubman (Ret.)
- Jessica Yates

Outreach and Communications

- Co-chairs: Maha Kamal and Amy Goscha
- Hon. Angela Arkin (Ret.)
- Celeste Carpenter
- Kaylene Guymon

- Brittany Kauffman
- Wes Hassler
- Hon. Bryon Large
- Laurie Mactavish
- Toni-Anne Nuñez
- Hon. Marianne Marshall Tims
- Stefanie Trujillo
- Penny Wagner
- Danae Woody

Judicial Systems Coordination

- Chair: Jessica Yates
- Dawn Handeland
- Heather Lang
- Jacqueline Marro

Paraprofessionals And Legal Services (PALS) Subcommittee

Preliminary Report (May 2021) Outlining Proposed Components of Program for Licensed Legal Paraprofessionals

The Colorado Supreme Court created the Paraprofessionals and Legal Services Subcommittee (PALS) of its Advisory Committee to study whether licensed paralegals specializing in domestic relations matters could provide limited legal services to the 75% of family law litigants who now appear in court without lawyers.[1] Several other states have implemented or are considering similar proposals.[2] The Court has asked the PALS Subcommittee to develop a proposal for consideration by the Advisory Committee and the Colorado Supreme Court.[3]

- The subcommittee is comprised of current and former trial and appellate judges, family law lawyers, an experienced family law paralegal/mediator, a

[1] According to the Colorado Judicial Branch's "Cases and Parties without Attorney Representation in Civil Cases FY2018," the number of domestic relations cases across all judicial districts totaled 34,364. Of that number, 23,810 cases had no attorney, and the case level pro se rate was set at 67%. The number of parties totaled 69,021, of which 51,646 parties were without attorneys. The party level pro se rate was at 75%. The updated numbers for 2020 show that this challenge for unrepresented litigants is continuing.

[2] Utah and Washington State are the primary models for this program, offering different options and opportunities for licensure. Other states considering or moving forward with similar proposals include Arizona, Illinois, Minnesota, and California. In mid-2020, the State of Washington decided to "sunset" its LLLT program, but there are still LLLTs practicing in Washington State.

[3] The Supreme Court entered an order creating this second PALS Subcommittee on February 27, 2020. The Court did so after considering the recommendations of the first PALS subcommittee in 2019 for a pilot program for nonlawyer advocates in landlord-tenant cases. The Supreme Court agreed that assistance the unrepresented litigants would be helpful, but it decided to prioritize such assistance in domestic relations cases.

family court facilitator, Attorney Regulation Counsel, and the Chair of the Supreme Court Advisory Committee. [4]

- The subcommittee's purpose is to substantially decrease the number of self-represented litigants in domestic relations cases as part of an effort to address what is commonly referred to by the bar as "the justice gap." According to a 2017 study by the Legal Services Corporation, in 2016, low income Americans received inadequate or no legal help for 86 percent of their civil legal problems.[5] These individuals are unable to obtain representation from Colorado Legal Services or similar programs that provide free legal assistance to low-income individuals. Pro bono representation has been unable to meet the legal needs of self-represented litigants, especially in family law cases, where pro bono lawyers are often reluctant to represent clients outside of their usual practice areas.
- Most of these folks would not qualify for Colorado Legal Services, but still cannot afford a lawyer at regular market rates.[6] We hope to give them another choice. They should not have to choose between a lawyer and no lawyer. They should be able to choose between representing themselves and getting help from a licensed legal paraprofessional.

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[4] Colorado Supreme Court Justice Melissa Hart (Liaison Justice), Judge Daniel Taubman (COA, Retired), Judge Angela Arkin (18th JD, Retired; Co-Chair), Judge Adam Espinosa (Denver County Court), Maha Kamal, Esq. (Co-Chair), Rebekah Pfahler, Esq., Colleen McManamon, (Paralegal/ Mediator), Heather Lang (Family Court Facilitator), Jessica Yates, Esq., and David Stark, Esq.

[5] Legal Serv. Corp., The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans 6 (2017).

[6] Colorado Legal Services does not represent all indigent family law litigants. It only represents indigent family litigants in certain categories of cases.

- We have been and are continuing to solicit input from family law practitioners, judicial officers, family court facilitators (FCFs), self-represented litigant coordinators (Sherlocks), experienced and new paralegals, community college and legal educators, and the public to develop this proposal. Feedback is welcome on all aspects of the proposed program components set forth in this preliminary report.

Proposed Program Components:

1. **Title**: These professionals will be titled "Licensed Legal Paraprofessionals (LLPs).
2. **Licensure**: LLPs would be licensed by the Colorado Supreme Court to engage in the limited practice of domestic relations law.
3. **Independence**: LLPs could engage in this limited practice either with a law firm or with their own legal paraprofessional firm (see the ethics rules, below).
4. **Scope**: The scope of practice of LLPs would be limited to uncomplicated domestic relations matters.
5. **A. Task limits of an unsupervised LLP[7]:**

[7] An "unsupervised" LLP is an LLP acting independently of attorney supervision. We are not suggesting any change to the current role of a paralegal under attorney supervision.

Task	Description of LLP Role
Client Interview	*Interview client to determine needs & goals of client & whether LLP services are appropriate or if matter should be referred to a lawyer. Determine appropriate motion or petition to file with the court: dissolution of marriage or civil union, legal separation, allocation of parental responsibility (APR), invalidity of marriage, parentage (in context of dissolution or APR) petition, and/or protection orders, modification of APR, child support and/or maintenance, & motions for contempt citations under C.R.C.P. 107.*[8]
Determine jurisdiction and venue, complete petition, summons, and case information sheet or post-decree motion or complaint for temporary protection order (TPO) & supplementing documents	*Assist client in gathering information & completing state approved forms. May need to add additional simple state forms.*
File documents with the court	*File forms in person or electronically on behalf of the client.*
Case management order	*Assist client in understanding and complying with case management order.*
Obtain service of process	*Arrange for service of documents (may complete and file a motion for publication or substituted service if needed).*
Complete sworn financial statement (SFS), disclosures & pattern discovery	*Assist client with gathering disclosure information, completing SFS & Certificate of Compliance with Mandatory Disclosures,.*[9]
Direct client to parenting class & other resources as necessary	*Provide client with co-parenting education class info & file certificate of completion with court; help clients process what they learned in class.*
Review of documents of other party (OP)	*Review documents of OP and explain documents to client. Refer to lawyer for complex issues.*[10]

[8] Cases involving alleged contemnors charged with punitive contempt, trusts, common law marriage, marital agreements, and contested jurisdiction must be referred to a lawyer.

[9] All non-pattern discovery, including drafting or review of questions or responses, must be referred to a lawyer Depositions also must be handled by a lawyer. However, LLPs can issue and respond to pattern discovery, and assist in non-pattern discovery authorized by the Court, or under a lawyer's supervision. A lawyer's representation of the LLP's client may be on an unbundled basis. The PALS subcommittee urges the Civil Rules Committee to consider studying an amendment to C.R.C.P. 16.2 that would require leave of court to issue discovery.

Task	Description of LLP Role
Speak with OP or opposing counsel (OC)	*Communicate with OP or OC regarding case status, potential agreements, and relevant forms. Refer to a lawyer for complex issues.*
Accompany client to initial status conference (ISC)	*Accompany client to ISC, provide emotional support, answer factual questions to LLP by judge, court facilitator, or opposing counsel, take notes, help client understand proceeding.*[11]
Assist client in reaching agreements; prepare documents	*Assist client with forming parenting plan, separation agreement, stipulation for modification, support worksheets, uncontested proposed orders, non-appearance affidavit, etc.*
Assist with the selection of a mediator & scheduling	*Work with OP or OC to identify and schedule mediation.*
Accompany client to mediation	*Inform, counsel, assist, and advocate for a client in mediation.*[12]
Pretrial work, including pretrial conferences	*Draft or review joint trial or trial management certificate, proposed parenting plan, C.R.C.P. 16.2 pretrial submissions, exhibit lists, witness lists.*
Accompany client to temporary orders hearing	*Stand or sit with client, provide emotional support, answer factual questions as needed that are addressed to client by Court or OC, take notes, help client understand proceeding and orders.*[13]
Accompany client to permanent orders hearing	*Stand or sit with client, provide emotional support, answer factual questions as needed that are addressed to client by Court or OC, take notes, help client understand proceeding and orders.*

[10] In Utah, only lawyers can prepare documents that are not court-approved forms. Drafting documents without court-approved forms is outside the scope of an LLP's authority.

[11] Only lawyers can advocate for clients in court.

[12] An LLP can negotiate on a client's behalf at mediation, but not in court. LLPs are allowed to review settlement agreements or MOUs drafted by an attorney or mediator, and explain them to their client before the client enters into the agreement.

[13] Only lawyers can represent clients in court.

B. Financial Limits:

For an LLP to represent a party in a domestic relations matter, the parties must have **no more than $200,000 combined net marital assets**.[14]

1. If the case has net marital assets in excess of $200,000, the LLP could not handle the case without a licensed lawyer, absent good cause shown.
2. "Good cause shown" would be a finding by the district court, with specific factors to be considered (factors would be generally related to the simplicity and uncontested nature of the case, and whether the financial limits were only nominally exceeded).

   The district court may also consider the extent to which the party seeking to employ an LLP does not have direct access to the equity in a marital asset, such as equity in a home or in a pension, even though that party has an ownership interest in such assets.

6. Qualifications, Education and Training:

a. **General Degree Requirement**. A Colorado LLP applicant must have one of the following degrees:

   i. A degree in law from an accredited law school;

   ii. An associate's degree in paralegal studies from an accredited school;

[14] Net marital assets are cash assets, net marital equity in a marital residence (whether the home is separate or marital); and/or net marital retirement assets in a defined contribution plan (401(k), IRA, 457, etc.).

iii. A bachelor's degree in paralegal studies from an accredited school; or

iv. A bachelor's degree in any subject from an accredited school, plus a paralegal certificate, or 15 hours of paralegal studies from an accredited school.

b. **Training and Experience**. In addition to those degree requirements, an applicant is required to:

i. Complete 1,500 hours of substantive law-related experience within the three years prior to the application, including 500 hours of substantive law-related experience in Colorado family law;[15]

ii. Complete required classes[16]:

1. ETHICS CLASS – All applicants, including those with a law degree, will be required to take this class.

2. FAMILY LAW CLASS – Required for all applicants applying to become licensed LLPs (law degree exempt); and

iii. Pass Licensing Examinations:

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[15] The subcommittee strongly recommends that new LLPs be engaged with individual mentors and a mentoring group, to support and enhance their practice in this new profession. The subcommittee recommends that a mentoring relationship, whether required or simply encouraged, continue through at least the LLP's first full year of practice. The implementation phase of this proposal, if approved by the Court, could include discussions with community colleges about mentorship programs, as well as exploring whether the Colorado Attorney Mentoring Program could provide a platform for LLP mentoring.

[16] We anticipate all classes will be offered through continuing education at a community college(s) (and we hope to offer all classes online).

1. the Colorado LLP Professional Ethics Examination.

2. the Colorado LLP Family Law Examination.

c. **Transition Period (for waiver of educational requirements only):**

i. The Colorado Supreme Court may grant waiver of minimum educational requirements **for three years from the date the Court begins to accept LLP applications for licensure**. Applicants must show, within two years from the waiver request, that they:

1. have filed the application for a limited time waiver and paid prescribed fees.
2. are at least 21 years old.
3. have completed three years of full-time substantive law-related experience within the five years preceding the application, including 500 hours of substantive law-related experience in Colorado family law.

d. **Character and Fitness.** All applicants must undergo a character and fitness review and bear the burden of proving that the applicant is of good moral character and has a proven record of ethical and professional behavior.

e. **"Safety Valve" rule similar to C.R.C.P. 206**: a similar rule would need to be drafted to allow individual petitions to the Colorado

Supreme Court by aspiring LLPs, for waiver of individual eligibility requirements, while still ensuring their basic competence by requiring them to pass the licensure examinations.[17]

7. **Annual Registration**: LLPs would pay an annual registration fee.
8. **CLE**. The LLPs must meet CLE requirements of 30 hours in each three-year compliance period (including five credit hours devoted to professional responsibility as provided in Rule 205.2 C.R.C.P.).
9. **Malpractice insurance.** Malpractice insurance is another area being researched, and it is possible some kind of malpractice coverage will be required.[18]
10. **Ethics Rules.** The Colorado Rules of Professional Conduct for lawyers would be generally applicable to LLPs as recommended here, with modifications depending on the scope of activities ultimately approved by the Colorado Supreme Court for LLPs. Those Rules will be titled The Colorado Rules of Professional Conduct for LLPs:
    a. We recommend two general principles: (1) ethics rules for LLPs should specify that they parallel the Colorado Rules of Professional Conduct for lawyers and that case law and ethics opinions interpreting those

[17] Unlike the standardization of law school education, there currently are not standardized educational programs for preparing individuals for licensure as LLPs, and there may be individuals who are very well-qualified due to their professional experience. By waiving educational eligibility requirements in such cases, these individuals would be encouraged to apply for licensure, but they still would be required to pass a competence exam and ethical exam.

[18] Currently, there is no requirement that attorneys in Colorado have malpractice insurance coverage. The subcommittee recommends that LLPs be required to have malpractice insurance if attorneys are required to have malpractice insurance.

rules would provide guidance for LLPs; and (2) a link to the Colorado Rules of Professional Conduct for LLPs be provided to the client at the outset of the representation. This second principle could facilitate a discussion about the difference between representation by an LLP and a lawyer.

b. The One Series – We recommend:

   i. changes that reflect the limited scope of the LLP's authority to practice law.

   ii. the requirement of a written agreement at the outset of representation and a prohibition on contingency fees.

   iii. that LLPs may not represent organizations.

   iv. that LLPs be precluded from filing guardianship and conservatorship actions.

   v. that LLPs only be allowed to purchase the practice of another LLP.

   vi. using Colorado's Rule 1.18 with the modification that any disqualification will apply to any other lawyer or LLP in the firm, unless the affected clients give informed consent or the lawyer or LLP is screened as provided by Colorado Rule 1.18 (d).

c. The 2 series – We recommend that Colorado adopt rules that allow LLPs to provide information to third parties and to serve as mediators.

LLPs would have limited opportunities to function in those categories, but they should be authorized to do so.

d. We recommend adapting the 3 Series and the 4 Series to LLPs.

e. The 5 Series -- The Rule 5 series of the Colorado ethics rules covers a variety of issues relating to eligibility to practice law in Colorado: supervisory responsibilities, ownership and fee-sharing restrictions, responsibilities around professional independence, and right to practice. We recommend:

   i. LLPs should have no direct supervisory authority over any lawyer. Similarly, LLPs should support the efforts of lawyers with managerial authority to ensure firm-wide compliance with the rules of professional conduct.

   ii. LLPs, as nonlawyers, should have the authority to own minority interests in law firms as well as establish their own LLP firms.

   iii. Prohibiting the temporary practice by out-of-state LLPs in Colorado.

   iv. Colo. RPC 5.7 concerning law-related services be adopted for Colorado LLPs. Examples of "law-related services," include the provision of "financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting." LLPs will have a limited

scope of practice, and it is anticipated that they likely will not be involved in providing law-related services. However, to the extent they are, LLPs should be held to the same ethical standards as lawyers in providing such services.

f. The 6 Series – We recommend that LLPs provide pro bono legal services.

g. The 7 Series –We recommend that:

   i. LLPs have an affirmative obligation to state that they have only a limited license and only for family law, and to avoid implying that the LLP has a broader license.

   ii. An LLP in private practice and not part of a law firm must use the words "Licensed Legal Paraprofessional" in the firm name.

h. The 8 Series – We recommend similar requirements for LLPs as there are for lawyers regarding misconduct and disciplinary action.

11. **Program Evaluation.** The subcommittee recommends that an evaluation plan be adopted as part of a broader implementation plan, so that relevant data could be collected and tracked starting at the time the initial LLPs are licensed and commence their work. Key measures could include: the number (or percentage) of litigants receiving LLP services in domestic relations matters; the satisfaction of judges presiding over such matters about the performance of LLPs and the efficiency of the matters with LLPs; surveys of LLP clients; and surveys of attorneys working with LLPs.