

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ORDER AMENDING RULE 1.8 OF §
THE DELAWARE LAWYERS' §
RULES OF PROFESSIONAL §
CONDUCT §

Before **SEITZ**, Chief Justice; **VALIHURA**, **TRAYNOR**, **LEGROW**, and **GRIFFITHS**, Justices, constituting the Court *en Banc*.

ORDER

This 18th day of December 2023, it appears to the Court that:

WHEREAS, in 2020 the American Bar Association (“ABA”) Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Legal Aid and Indigent Defense proposed amending Rule 1.8 of the ABA Model Rules of Professional Conduct (the “Model Rules”) to permit a lawyer representing an indigent client pro bono to provide modest financial assistance to the client for basic living expenses;

WHEREAS, at the 2020 ABA Annual Meeting, the ABA House of Delegates adopted the proposed amendment to Model Rule 1.8, adding subsection (e)(3) and three clarifying comments;

WHEREAS, before the ABA amended Model Rule 1.8 in 2020, the professional conduct rules of various states provided for humanitarian exceptions to professional conduct rules limiting lawyers’ provision of financial assistance to clients;

WHEREAS, following the amendment of Model Rule 1.8, various other states have amended their respective professional conduct rules consistently with the amendment of Model Rule 1.8;

WHEREAS, the Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct has considered whether Rule 1.8 of the Delaware Lawyers' Rules of Professional Conduct should be amended consistently with the amendment of the Model Rules and has recommended that the Court amend the Delaware rule;

WHEREAS, the Court has determined that the proposed amendment will promote access to justice for Delaware's most vulnerable populations; will not promote deleterious litigation; will not increase lawyers' financial stake in litigation or otherwise compromise lawyers' exercise of independent judgment; and will not contribute to competition among lawyers for clients;

NOW, THEREFORE, IT IS ORDERED that:

(1) Rule 1.8(e) of the Delaware Lawyers' Rules of Professional Conduct shall be amended to add the underlined text and to delete the strikethrough text 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 litigations, 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. 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 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.

(2) The commentary to Rule 1.8 shall be amended to add new Comments 11, 12, and 13 as provided below, and the subsequent existing comments shall be renumbered accordingly:

[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. 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 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.

(3) The amendments are effective immediately.

(4) The Clerk of this Court is directed to transmit a certified copy of this order to the clerk for each trial court in each county.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Chief Justice