

## 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

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(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 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 Current Massachusetts Rule 1.8  
and Related Comments**

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

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(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**

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[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.

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[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

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(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;

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

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### COMMENT

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### Financial Assistance

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