

WSR 22-08-084
RULES OF COURT
STATE SUPREME COURT
[March 31, 2022]

IN THE MATTER OF THE) ORDER
SUGGESTED AMENDMENT TO RPC) NO. 25700-A-1424
1.8—CONFLICT OF INTEREST:)
CURRENT CLIENTS: SPECIFIC)
RULES)

The Washington State Bar Association Committee on Professional Ethics, having recommended the suggested amendment to RPC 1.8—Conflict of Interest: Current Clients: Specific Rules, and the Court having approved the suggested amendment for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendment as shown below is to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2023.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2023. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 31st day of March, 2022.

For the Court

Gonzalez, C.J.

CHIEF JUSTICE

GR 9 COVER SHEET

Suggested Amendments to
RULES OF PROFESSIONAL CONDUCT (RPC)
Rule 1.8(e) and Comments

A. Proponent: Washington State Bar Association, Board of Governors, Committee on Professional Ethics

B. Spokepersons:

Brian Tollefson, President, Washington State Bar Association, 1325 4th Avenue, Suite 600, Seattle, WA 98101-2539

Terra Nevitt, Executive Director, Washington State Bar Association, 1325 4th Avenue, Suite 600, Seattle, WA 98101-2539

Jeanne Marie Clavere, Professional Responsibility Counsel, Washington State Bar Association, 1325 4th Avenue, Suite 600, Seattle, WA 98101-2539

C. Purpose: Based on changes to the Model Rules of Professional Conduct, the amendment would permit lawyers to pay court costs and expenses of litigation on behalf of indigent clients, and to provide modest gifts for living expenses to indigent clients in limited circumstances.

Background

On April 30, 2020, Chief Justice Debra Stephens asked for review of potential regulatory modifications to improve access to justice during the Covid-19 pandemic, including whether to amend 1.8(e) to permit attorneys to provide financial assistance to clients in limited circumstances. See Memo to WSBA President from WSBA Chief Disciplinary Counsel and Chief Regulatory Counsel (May 8, 2020) (attached hereto as Exhibit A) and Supplemental Memo to WSBA President from WSBA Chief Disciplinary Counsel (August 5, 2020) (attached hereto as Exhibit B).

The WSBA Office of Disciplinary Counsel, in a memo dated May 8, 2020 (Exhibit A), provided information regarding the complicated history of attempted modifications of this Rule. Furthermore, the Chief Disciplinary Counsel's August 5, 2020 memo to the WSBA President summarized updates regarding the developments in New York and at the American Bar Association which had changed the analytic landscape around the issue. See *Exhibit B*. Pursuant to a request by the WSBA Board of Governors then President Rajeev Majumdar on August 6, 2020, the Committee on Professional Ethics (CPE) formed a subcommittee and studied the changes to ABA Model Rule 1.8(e) and commentary as well as the history of Washington RPC 1.8(e), the Washington revised Comment [10] and additional Washington Comment [21]. The CPE then consulted with key WSBA and public stakeholders including the Northwest Justice Project, Pro Bono Council of the Washington Alliance for Public Justice, and WSBA Chief Disciplinary Counsel.

Recommendation

The CPE concurred with the reasoning of the ABA Standing Committees on Ethics and Professional Responsibility and Legal Aid and Indigent Defendants as described in their August 2020 report. (<https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/107-annual-2020.pdf>, last accessed December 7, 2021). The CPE concluded that a financial assistance exception in RPC 1.8(e) could serve to increase access to justice for the public and serve the public interest.

The CPE recommended to the WSBA Board of Governors appropriate changes to Washington RPC 1.8(e) and comments, (redlined and clean versions attached hereto as Exhibits C and D). These recommended changes differ from the new ABA Model Rule in the following key respects:

- The word "pro bono" as a modifier is removed from recommended Subsection (3) for lawyers representing clients through a non-profit legal service, public interest organization, law school clinical, or pro bono program to clarify that attorneys employed as staff in such programs are included in the rule together with private attorneys who are volunteering with such programs.
- Model Rule 1.8 (e)(2) only allows for an attorney's payment of litigation and court expenses in the case of an indigent client and pro bono representation. The CPE recommends that such payment be allowed in other non-profit contexts as well, for instance by staff attorneys of legal aid organizations, law school clinics, and others.
- Washington Comment [21] and Comment [10] [Washington Revision] are amended and combined into a new Comment [10] [Washington Revision] to clarify that the prohibition in Rule 1.8(e) is intended to prevent attorneys from influencing clients to pursue litigation primarily for the private financial gain or to advance

other interests of the attorney. The CPE does not believe the public interest is served by discouraging litigants who lack resources from pursuing otherwise meritorious lawsuits.

- Washington Comment [21] and Comment [10] [Washington Revision] are also amended and combined into a new Comment [10] [Washington Revision] to preserve the original interpretation of RPC 1.8 that, other than in indigent client context, the client remains ultimately liable.
- The proposed Washington revised Comment [11] mirrors, with slight modifications, ABA Model Comment [11]. Proposed Washington Comment [12] and [13] have the same language as Model Rules of Professional Conduct RPC 1.8 Comments [12] and [13].

The CPE concluded that creating a clear, permissible financial assistance exception in RPC 1.8(e) will serve the public and their lawyers who want to ethically provide financial assistance to their clients within the parameters of RPC 1.8(e).

At their board meeting dated January 13, 2022, the WSBA Board of Governors approved the request by the Committee on Professional Ethics to submit these amendments to the Washington Supreme Court for consideration.

D. Hearing: A hearing is not requested.

E. Expedited Consideration: Expedited consideration is not requested.

F. Supporting Material:

- Exhibit A: Memo to WSBA President from WSBA Chief Disciplinary Counsel and Chief Regulatory Counsel dated May 8, 2020.
- Exhibit B: Supplemental Memo to WSBA President from WSBA Chief Disciplinary Counsel dated August 5, 2020.
- Exhibit C: Proposed redline changes to RPC 1.8(e) and Comments
- Exhibit D: Proposed clean changes to RPC 1.8(e) and Comments

SUGGESTED AMENDMENTS TO

RULES OF PROFESSIONAL CONDUCT 1.8

RPC 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

...

(e) A lawyer shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to a client, except that:

(1) a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client through a nonprofit legal services or public interest organization, and a lawyer representing an indigent client through a law school clinical or pro bono program may pay court costs and expenses of litigation on behalf of the client. The lawyer may also provide modest gifts to the indigent 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 for these gifts 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.

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Financial Assistance

[10] **[Washington revision]** Except as otherwise provided in the Rules, 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. See Washington Comment [21]. Paragraph (e) of Washington's Rule differs in part from the Model Rule. Paragraphs (e) (1) and (2) are based on former Washington RPC 1.8(e). The minor structural modifications to the general prohibition on providing financial assistance to a client do not represent a change in Washington law, and paragraph (e) is intended to preserve prior interpretations of the Rule and prior Washington practice.

[11] **[Washington revision]** For purposes of 1.8(e), the term "indigent" has its ordinary meaning and in addition includes definitions of eligibility used by nonprofit legal services providers, court-annexed pro bono programs, law school clinics and similar programs that operate to protect and expand public access to our courts and to legal representation. A lawyer representing an indigent client without fee, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client 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 gifts 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.

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Reviser's note: The typographical error in the above section occurred in the copy filed by the agency and appears in the Register pursuant to the requirements of RCW 34.08.040.