

MEMORANDUM

March 4, 2021

COSAC Proposals to Amend Comments Relating to Rule 1.8(e)(4) of the New York Rules of Professional Conduct

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is engaged in a comprehensive review of the New York Rules of Professional Conduct. In this memorandum, COSAC is proposing amendments to the Comments to Rule 1.8 of the New York Rules of Professional Conduct. The proposed amendments offer guidance regarding the amendments to the black letter text of Rule 1.8(e) that were approved by the Administrative Board of the Courts effective June 24, 2020, when the Administrative Board added a new Rule 1.8(e)(4). That new provision, commonly called the “humanitarian exception,” allows non-profit legal services organizations, public interest organizations, law school clinics, and law school pro bono programs, as well as lawyers representing indigents on a no-fee basis, to provide financial assistance to indigent litigation clients, subject to certain restrictions.

The Association’s House of Delegates has authority to approve the proposed amendments to the Comments without judicial approval. (Only black letter changes to the Rules of Professional Conduct require judicial approval, and COSAC is not proposing any black letter changes to Rule 1.8 at this time.)

We first explain the background that led COSAC to propose these amendments. Then we set out each proposed amendment in redline style, underscoring new language ([in blue](#)). (COSAC is not proposing to delete any language in the existing Comments to Rule 1.8.)

Background

Rule 1.8, which is entitled “Current Clients: Specific Conflict of Interest Rules,” consists of eleven paragraphs. Paragraph (e) restricts the right of lawyers to advance or guarantee financial assistance to a litigation client.

In March 2018, the New York City Bar Professional Responsibility Committee issued a report recommending a ‘humanitarian exception’ to Rule 1.8(e). Specifically, the City Bar recommended amendments to Rule 1.8(e) and related Comments that would allow attorneys handling pro bono matters to provide financial assistance to indigent clients beyond advances of court costs and the expenses of litigation, which Rule 1.8(e) already allows.

COSAC’s prior proposals for a humanitarian exception

In January 2020, building on the City Bar’s March 2018 report, COSAC recommended that New York adopt a humanitarian exception and various new and amended Comments reflecting the new exception. The House of Delegates voted overwhelmingly to approve the proposed humanitarian

exception and related amendments and additions to the Comments to Rule 1.8. In particular, the House of Delegates approved COSAC's proposals to amend Comments [9B] and [10] to Rule 1.8 in minor ways, to provide, in pertinent part, as follows (with new language underscored and deleted language stricken through):

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. ... However, ~~like the former New York rule,~~ subparagraphs (e)(1)-(3) ~~limits~~ 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. ...

The House of Delegates also approved COSAC's proposal to add two new Comments to explain COSAC's proposed Rule 1.8(e)(4), but the House approved those new Comments contingent on the Administrative Board's approval of the version of Rule 1.8(e)(4) proposed by COSAC. As it turned out, the version of Rule 1.8(e)(4) adopted by the Administrative Board differed significantly from the version of Rule 1.8(e)(4) proposed by COSAC, adding new restrictions not mentioned in COSAC's version, so COSAC went back to the drawing board to revise prior proposed Comments and to develop new Comments to guide interpretation of the humanitarian exception as actually adopted. This memorandum proposes the new Comments.

On April 12, 2020, in view of the devastating COVID-19 pandemic, NYSBA President Hank Greenberg urgently asked the Administrative Board to approve the humanitarian exception embodied in proposed new Rule 1.8(e)(4).

Administrative Board approval of a humanitarian exception

The Administrative Board acted quickly. Effective June 24, 2020, the Administrative Board amended Rule 1.8(e). As amended, Rule 1.8(e) provides as follows (underscoring additions and striking through deletions to show the 2020 amendments):

(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, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship. Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered useable for providing financial assistance to indigent clients, and financial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.

In August 2020, at the ABA's Annual Meeting, the ABA House of Delegates approved its own version of the humanitarian exception by amending ABA Model Rule 1.8(e) and adding several new Comments to help interpret the new exception. The ABA version is similar but not identical to the New York version of Rule 1.8(e)(4) as approved by the Administrative Board.

COSAC's Proposed New Comments to Rule 1.8(e)

In light of the amendments to the text of Rule 1.8(e)(4) as adopted by the Administrative Board on June 24, 2020, COSAC proposes the following new paragraphs [10A] through [10E] to the Comments to Rule 1.8 (underscoring them to indicate that they are entirely new):

[10A] Subparagraph (e)(4) allows lawyers providing legal services "without fee," not-for-profit legal services and public interest organizations, and law school clinical and pro bono programs, 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 to cover food, rent, clothing, personal incidentals, and medicine. If financial assistance may have adverse consequences for the client, including, e.g., for receipt of government benefits, receipt of social services, or tax liability, the lawyer should consult with the client about these consequences. See Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

Subparagraph (e)(4) does not permit lawyers, organizations, or programs to provide financial assistance beyond court costs and expenses of litigation to clients who are not indigent.

[10B] The term “without fee” means traditional pro bono arrangements for representation of indigent clients in which a lawyer provides services without fee or expectation of fee, even if a statutory attorney fee is ultimately awarded in a case originally accepted as pro bono. See Rule 6.1 Comment [4]. However, a lawyer providing legal services under a contingent fee agreement or other arrangement where the fee is payable from the indigent client’s recovery would not be providing legal services “without fee” for purposes of subparagraph (e)(4), even if the lawyer does not eventually receive a fee.

[10C] Subparagraph (e)(4) is narrowly drawn to avoid potential conflicts of interest and to avoid incentivizing abuses. Thus, subparagraph (e)(4) prohibits loans or any other forms of support that cause the indigent client (or the indigent client’s relatives or others affiliated with the client) to be financially beholden to the lawyer, organization or program providing financial assistance. Similarly, subparagraph (e)(4) does not permit a lawyer, organization or program to promise or assure financial assistance (i) to a prospective indigent client as a means of inducing the indigent client to retain the lawyer, organization, or program, or (ii) as a means of inducing the indigent client to continue an existing lawyer-client relationship. However, the prohibitions in subparagraph (e)(4) on loans, promises, and assurances do not apply to the costs and expenses of litigation that subparagraphs (e)(1)-(3) of this Rule permit a lawyer, program, or organization to advance or pay.

[10D] Legal service or public interest organizations that raise funds for the provision of legal services are prohibited from using those funds to provide the financial assistance permitted by subparagraph (e)(4). Thus, these organizations need to account separately for (i) funds they raise to provide legal services and (ii) funds they raise to provide financial assistance permitted by subparagraph (e)(4). Subparagraph (e)(4) pertains only to direct financial assistance by the organizations or lawyers themselves and does not affect the ability of an organization or program, and the lawyers or others it employs, engages, or supervises, to help an indigent client find other sources of financial assistance. The restriction in subparagraph (e)(4) on using funds raised to provide legal services does not apply to financial assistance for court costs and expenses of litigation referred to in subparagraphs (e)(1)-(3) of the Rule.

[10E] Any financial assistance provided under subparagraph (e)(4) is voluntary and not part of a lawyer’s duty when representing an indigent client. Thus, nothing in subparagraph (e)(4) prevents a lawyer from declining to provide such financial assistance. Nor does subparagraph (e)(4) prevent a law firm, organization, or program from having a policy that centralizes decisions on whether and how to provide financial assistance to indigent clients, or a policy that bars or discourages lawyers (or others the law firm, organization, or program employs, engages, or supervises) from providing such assistance, in order, for example, to assure fairness among clients or to avoid subjecting individual lawyers to financial requests that may impair their relationships with pro bono clients.

As adopted by the Administrative Board, the black letter text of Rule 1.8(e)(4) covers four distinct topics. In this memorandum, COSAC proposes Comments covering all four topics, plus two additional topics. Of course, the introductory language to Rule 1.8(e) specifies that the humanitarian exception in subparagraph (e)(4) – like the exceptions in the other three numbered subparagraphs of Rule 1.8(e) – applies only to lawyers “representing a client in connection with contemplated or pending litigation.” The topics covered in COSAC’s proposed Comments relating to Rule 1.8(e)(4) are as follows:

- *Restrictions on who may financially assist clients.* Rule 1.8(e)(4) as adopted says: “A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients.” COSAC’s proposed Comments [10A] and [10B] to Rule 1.8 address this topic.
- *Restrictions on promises of financial assistance to clients.* Even when a lawyer or organization is permitted to financially assist an indigent litigation client, Rule 1.8(e)(4) says that a lawyer “may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship.” COSAC’s proposed Comment [10C] addresses this topic.
- *Prohibition on loans.* A new restriction added by the Administrative Board says: “[F]inancial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.” COSAC’s proposed Comment [10C] addresses this topic.
- *Prohibition on using legal services funds for financial assistance.* Another new restriction added by the Administrative Board says: “Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered useable for providing financial assistance to indigent clients” COSAC’s proposed Comment [10D] addresses this topic.
- In addition, COSAC’s proposed Comment [10D] makes clear that lawyers and legal service providers may help indigent clients find other sources of financial assistance.
- Finally, COSAC’s proposed Comment [10E] makes clear that providing financial assistance to clients is voluntary, not mandatory, and that law firms, organizations, and programs that are willing to provide financial assistance to clients may establish a policy that centralizes decisions on whether and how to provide the permitted financial assistance.

As COSAC said in its January 15, 2020 report to the House of Delegates recommending that New York adopt a humanitarian exception to Rule 1.8(e), and as COSAC’s proposed Comment [10D] now suggests, lawyers and legal service providers may also ethically discuss, and may actively explore with their clients, “other sources of financial assistance” that may reduce or eliminate the client’s need for financial assistance from lawyers under Rule 1.8(e)(4). Nothing in COSAC’s proposed Comments is meant to detract from those efforts.