

June 30, 2023

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2020-31 – Proposed Amendment of Rule 1.8 of the Michigan Rules of Professional Conduct

Dear Clerk Royster:

At its June 9, 2023 meeting, the Board of Commissioners of the State Bar of Michigan (“SBM”) voted unanimously to support the addition of a humanitarian exception to Rule 1.8 of the Michigan Rule of Professional Conduct (“MRPC”), but to oppose the form of the exception published for comment in ADM File No. 2020-31. Instead, the Board urges the Court to adopt the amendment to Rule 1.8 proposed by the Bar in April 2022 (Enclosed).

The Board believes that SBM’s proposal preserves the fundamental nature of the attorney-client relationship, while permitting an attorney to assist a client with the expenses that all too often pose significant barriers to indigent individuals accessing our justice system. By contrast, the Board fears that the amendment proposed by ADM File No. 2020-31 would make the challenges faced by pro bono and public interest attorneys and their clients significantly worse than they are today under the existing rule.

ADM File No. 2020-31 enumerates only four types of permissible assistance. In doing so, the proposed amendment impliedly prohibits any other type of assistance that would facilitate a client’s access to the justice system (e.g., transportation to appointments other than court proceedings or meals served during such appointments). The Board believes that the limitations imposed by the proposed amendment to Rule 1.8 as published for comment would significantly undermine the purpose and intent of a humanitarian exception. SBM’s proposed amendment, by contrast, would allow flexibility in the exact nature of the assistance, while still providing illustrative examples in the proposed commentary and requiring that the assistance facilitate the client’s access to the justice system.

The Board also has serious concerns about the provision in ADM File No. 2020-31 that would appear to require a lawyer employed by a legal services or public interest organization to use their personal, out-of-pocket funds for humanitarian assistance to their client by prohibiting these attorneys from using their employer’s funds to do so, even if their employer was willing to pay for such assistance. This restriction is unfair to the client, the lawyer, and the organization. The Board believes it would also threaten to render the humanitarian exception largely a nullity. SBM’s alternative does not include such a restriction. The Board believes that, so long as the assistance facilitates the client’s access to the justice system, it should not matter whether the assistance is financed by the attorney personally or by a nonprofit organization that employs the attorney and finances the representation.

When SBM first proposed a humanitarian exception to Rule 1.8 in October 2020, the Court declined to publish the proposal and requested that the Bar consider “a more nuanced, limited proposal.” At

that time, the Court identified several specific concerns and invited the Bar to submit a revision to the Court for consideration. Our April 2022 alternative was the result. It was crafted by a workgroup from the Bar's Diversity & Inclusion Advisory Committee, Justice Initiatives Committee, and Professional Ethics Committee, and was overwhelmingly supported by the SBM Representative Assembly. The Board believes that SBM's alternative preserves the attorney-client relationship, addresses concerns about appropriately limiting the scope of permissible humanitarian assistance, and avoids the unintended consequences that would result from the adoption of ADM File No. 2020-31. The Bar is not alone in this conclusion. Both the Legal Services Association of Michigan and the Michigan State Planning Body—organizations composed of experienced lawyer-members who are most likely to be impacted by the adoption of a humanitarian exception—also support SBM's alternative.

The State Bar appreciates the Court's willingness to consider the Bar's request that Rule 1.8 be amended to provide a humanitarian exception and to advance this important discussion by publishing ADM File No. 2020-31 for comment. For the reasons stated here, the State Bar of Michigan requests that the Court not adopt the current proposal and, instead, adopt SBM's April 2022 alternative.

Thank you for the opportunity to comment on the proposed amendment.

Sincerely,

A handwritten signature in dark blue ink that reads "Peter Cunningham". The signature is written in a cursive, flowing style.

Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
James W. Heath, President

April 20, 2022

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: Proposed Amendment of Rule 1.8 of the Michigan Rules of Professional Conduct to Provide a Humanitarian Exception

Dear Clerk Royster:

The State Bar of Michigan (“SBM”) recommends amending Rule 1.8 of the Michigan Rules of Professional Conduct (“MRPC”) to provide a focused, humanitarian exception to the Rule’s general prohibition of an attorney providing financial assistance to a client in connection with pending or contemplated litigation. This revised proposal, fully set forth in Attachment A, would permit a lawyer representing an indigent client to provide financial assistance to the client that “facilitates the client’s access to the justice system.” As noted in our proposed commentary for the amended Rule, such a humanitarian exception would preserve the fundamental nature of the attorney-client relationship, while also permitting an attorney to assist a client with transportation, lodging, meals, and clothing—necessary expenses that often pose a significant barrier to indigent individuals accessing the justice system.

In October 2020, SBM proposed a similar amendment to Rule 1.8. At that time, the Court declined to publish the proposal for comment and requested that the Bar consider “a more nuanced, limited proposal.” The Court identified several specific concerns about the initial proposal and invited the Bar to submit a revision to the Court for consideration. The revised proposal presented in Attachment A is provided in response to the Court’s invitation and identified concerns. It is the product of a workgroup convened by the Bar and comprised of stakeholders from the Diversity & Inclusion Advisory Committee, Justice Initiatives Committee, and Professional Ethics Committee. Ultimately, each of these committees voted to support the revised proposal, which was approved overwhelmingly by the Representative Assembly at its April 9, 2022 meeting.

By permitting lawyers to assist their indigent clients in this manner, the proposed amendment and commentary will allow such clients to more effectively engage in legal proceedings and strengthen access to justice in Michigan, while also guarding against improper financial entanglements between lawyers and their clients.

We appreciate your consideration of this revised proposal. It is our hope that it will address the Court’s thoughtful concerns about the previous iteration and that the Court will publish the proposed amendment to the Michigan Rules of Professional Conduct, as revised, for comment and ultimate adoption.

Sincerely,



Peter Cunningham
Executive Director

cc: Sarah Roth, Administrative Counsel, Michigan Supreme Court
Nicholas M. Ohanesian, Representative Assembly Chair

Attachment A

Proposed Amendments to MPRC 1.8(e)

- (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 may provide assistance to the client that facilitates the client's access to the justice system.

Comment:

Humanitarian Exception.

Paragraph (e)(2) serves as a humanitarian exception. The lawyer can assist the client with needs that frustrate the client's access to the justice system, such as providing transportation to and from court sessions (including inexpensive lodging if that is less costly than transportation to and from for multiple days), meals needed during long court sessions, and clothing appropriate to appear in a court proceeding, while still preserving the nature of the attorney-client relationship. For purposes of this rule, indigent is defined as people who are unable, without substantial financial hardship to themselves and their dependents, to obtain competent, qualified legal representation on their own.