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ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND ETHICS
RULE 1.8, RULE 42 OF THE
RULES OF THE SUPREME
COURT OF ARIZONA

Supreme Court No. R-23-0051

Joint Comment by the Directors of the
Maricopa County Indigent Defense
Agencies

The indigent representation offices of Maricopa County (IR) collectively handle most cases filed in Maricopa County in which there has been a finding of indigency. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate (OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly submit this comment in support of the proposal to amend Ethics Rule 1.8, Rule 42 of the Arizona Rules of the Supreme Court. We believe that the amendment should be adopted by the Arizona Supreme Court and have the following additional thoughts and suggestions to increase the clarity and efficacy of the proposed rule change.

I. Modest assistance to indigent clients is currently ethically permissible.

Lawyer gifts to clients have historically been part of the American legal culture and ethically permissible in some circumstances. *See e.g., In re Gilman's Administratrix*, 167 N.E. 437 (N.Y.1929) (Cardozo, C.J.) (dictum). Presently, in Arizona, the practice of providing some small assistance has been part of the culture and ethically acceptable under Ethics Opinion 91-14. Ariz. Ethics Op. 91-14 (1991). In that opinion, the attorney sought to help cover the medical expenses of the daughter of his personal injury client. *Id.* The opinion explained that although he

could not make a loan for medical care, a gift of money to his client to enable the daughter to receive the necessary medical care was permissible, so long as:

1. The transfer of money truly results from a charitable and nonpecuniary motivation;
2. The client had already retained the attorney before any direct or indirect communication between the attorney and the client concerning the transfer, or prospective transfer, of this gift of money takes place; and
3. There is no expectation of repayment at any future time.

Id. Pursuant to that opinion, giving small gifts is presently permissible, and already occurring to a small extent, in the course of indigent representation. As examples, an attorney for an indigent client may purchase a fast-food meal for a client while meeting to discuss the case, may give a client small amounts of money for a meal or for jail canteen, or may send a book to help them pass the time while incarcerated. Although it has been permissible under the Ethics Opinion 91-14, the opinion was advisory, and non-binding. We welcome and support the addition of the explicit permission in clear, binding authority to Rule 42 of the Arizona Rules of the Supreme Court.

II. The term “modest” requires additional clarification.

Gifts should continue to be limited to necessities and they should be “modest.” Modest is the proposed word in the petition to describe what qualifies as

an acceptable gift. A definition of modest or additional guidance would be helpful and prevent possible confusion. This would alleviate any residual concerns that a departure from true “modest” assistance could result in leverage or incentive to not report and/or fire an attorney.

Comment 12 to the Model Rules explains that (e)(3), the Model Rules clause which allows modest gifts, should be construed narrowly. The comment adds “Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse.” The petitioner has added this language in the Rule Change Petition. We support the inclusion of this comment by petitioner.

Other states adopting the model rules’ changes regarding gifts also adopted some form of clarification on the term “modest.” Many states that adopted the change, adopted the clarification from the Model Rules Comment as well. For example, Colorado, Delaware, and Massachusetts adopted the verbatim wording from the ABA Model Rules Comment in their comment to their new Rules 1.8: “Modest gifts are allowed in specific circumstances where they are unlikely to create conflicts of interest or invite abuse.” Colorado Rules of Professional Conduct, Rule 1.8, Comment 12; Delaware Rules of Professional Conduct, Rule 1.8, Comment 12; Massachusetts Rules of the Supreme Judicial Court RULE 3:07 Rules of Professional Conduct 1.8, Comment 12.

One state adopted the change regarding gifts and adopted a modified version of the comment to allow for clarification of the term “modest” that would limit abuse. The Alaska Supreme Court gave additional guidance on what would be “modest.” In comment 10 to their new rule 1.8, the Court defined “modest” as gifts that “must not be so substantial that they would create a conflict between the lawyer’s interests and the client’s interests in regard to the handling or settling of the case.” Alaska Rules of Professional Conduct, Rule 1.8.

The presence of the comment in the Model Rules as well as clarifying comments in many states that have adopted the proposed language emphasize the need for clarifying language. We recommend the Committee adopt the Model Rule 1.8 Comment 12 language: “Modest gifts are allowed in specific circumstances where they are unlikely to create conflicts of interest or invite abuse.” We also recommend further clarification, similar to that of Alaska, to explain that modest means “must not be so substantial that they would create a conflict between the lawyer’s interests and the client’s interests in regard to the handling or settling of the case.”

III. Rent assistance is a departure from the current practices in Arizona.

Contribution for rent assistance is a departure from the more acceptable practice of modest assistance to indigent clients. Rent is certainly a necessity; however, there is some concern surrounding the interpretation of modest rent

assistance. Keeping indigent clients housed is important but rent can be very high, and more open to creating a conflict. Additionally, rent assistance has the potential for being treated differently by private counsel and public defenders. Where public defenders may work with organizations focused on housing-related resources, referring a client to such a resource along with efforts to increase housing initiatives, are more appropriate than the challenge of providing direct rental assistance to clients.

IV. Additional clarification is needed for the term “medicine.”

Finally, we believe “medicine” should receive further analysis, and if included should provide additional guidance. An attorney may be well-intentioned in providing an ill indigent client with an over-the-counter medication that the client may not have the funds to purchase, but they may not know the full spectrum of allergies, other medications, potential harmful reactions, conflicting medical limitations and implications. For example, a client may suffer from a heart condition where taking even an over-the-counter medication can result in an adverse reaction.

Additionally, if this amendment is intended to be limited to modest gifts, that would likely mean limited to copays, and other small amounts, rather than an entire medical bill. This note should be added to the comments for clarification that modest also applies to medicine and medical costs. The potential amounts of the medical bill gifts allow for broad interpretation which make them susceptible to

misinterpretation and abuse, similar to our concerns with large rent gifts. We recommend that the committee add to the comments that gifts of medicine should be limited to modest gifts, such as copays.

Finally, the work of the indigent representation offices is authorized under Arizona Revised Statute section 11-584. County, State and Federal funding is allocated to IR so that they may carry out their statutory duties. It is important to note that IR does not receive an allotment for monetary assistance to their clients. Therefore, the Maricopa County Indigent Representation Offices do not, and cannot, provide monetary assistance, regardless of how modest, from the offices' funding.

Conclusion

The rule change petition will provide clear, binding authority for attorneys practicing indigent representation. With a few suggestions to clarify areas that can lead to confusion, we the directors of the defense agencies of Maricopa County support the proposed amendment to Ethics Rule 1.8, Rule 42 of the Arizona Rules of the Supreme Court.

Respectfully submitted this 29th day of April, 2024.

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