

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

David J. Euchner, SB#021768

33 N. Stone Ave., 21st Floor, Tucson, AZ 85701

(520) 724-6800

david.euchner@pima.gov

Seth M. Apfel, SB#032225

Apfel Law Group, P.L.L.C.

PO Box 8808

Phoenix, AZ 85066

(602) 499-8468

seth@apfellowgroup.com

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:) No. R-24-0018
)
Petition to Amend Ariz. R. Sup. Ct. 42,) **Comment of Arizona Attorneys for**
ER 1.8.) **Criminal Justice regarding Petition to**
) **Amend Arizona Rule of Supreme**
) **Court 42, ER 1.8**
)
)
_____)

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment on the petition to amend Ethical Rule 1.8.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the

accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Petitioner, the Ethics Advisory Committee, makes a strong case for allowing attorneys to make gifts to clients under some circumstances. The proposal to allow gifts to clients is designed to help those clients who are not paying any fees or costs up front to secure representation. In criminal and juvenile cases, where contingency fees are prohibited and impractical, this will almost exclusively benefit those who have appointed counsel. A person who can afford to retain counsel rarely needs financial assistance from the lawyer; if those circumstances existed, the lawyer could discount the fee or accept the case *pro bono*. However, it is common for clients' family members to pay retainer fees while the client is indigent.

The proposal seeks to limit the gifts that may be provided in two ways: first, by use of the adjective "modest," and second, by categorically limiting the gifts to "basic living expenses." As an association of criminal defense lawyers, AACJ takes no position on the proposal as it relates to civil cases, but in criminal cases AACJ believes each requires further limitation.

First, “modest” is vague. Among its definitions are: “free from ostentation or showy extravagance”¹; “limited or moderate in amount, extent, etc.”²; and “limited in size, amount, or scope.”³ Read together, these definitions connote “medium.” Does that mean an attorney can provide a furnished two-bedroom apartment for a year for the client and client’s family? The proposal includes a new Comment 9 that reads: “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.” This suggests that the proposal contemplates allowing “modest gifts” worth thousands of dollars.

Second, by including “rent” and “medications” in the list of basic living expenses potentially covered by proposed ER 1.8(e)(3), clients may develop expectations of other needs to be met. “The *ejusdem generis* rule applies ‘where general words follow the enumeration of particular classes of things.’” *Bilke v. State*, 206 Ariz. 462, ¶13 (2003) (quoting Black’s Law Dictionary 517 (6th ed. 1990)). By using the enumerated list to define the term “basic living expenses,” one could easily imagine that the list would include day care, utilities, and maybe even a used car if

¹ <https://www.dictionary.com/browse/modest> (last visited April 29, 2024).

² *Id.*

³ <https://www.merriam-webster.com/dictionary/modest> (last visited April 29, 2024).

the client does not have available public transportation. May an attorney provide the client with “gifts” equivalent to the cost of living above the poverty line?⁴

When the gift becomes substantial, there is an increased risk that the client will feel such gratitude to the lawyer (“indebted” in spirit if not legally) and then will defer to the lawyer’s judgment on decisions that properly belong with the client. No amount of comments explaining the rule will change that. This is a risk that is not worth taking.

In criminal cases, there are further ramifications. If a client receives a substantial gift from the lawyer and then accepts a plea agreement, the client can challenge the voluntariness of the plea by alleging the inducement of the monetary gift. This is not hypothetical; a Pima County contract attorney put \$200.00 on the jail account of a client before his plea agreement and another \$200.00 after the plea agreement. The client later filed a petition for post-conviction relief, alleging his plea was involuntary because of the payments. At the conclusion of the evidentiary hearing, the court found the lawyer’s testimony credible that the money was a gift and not an inducement. *See State v. Wells*, Pima County Superior Court Cause Nos. CR-20201385-001 & CR-20201718-001 (minute entry dated December 11, 2023).

⁴ According to the U.S. Department of Health and Human Services, in 2021, the poverty line was \$12,880 for one person and \$4,540 for each additional person in the household. <https://aspe.hhs.gov/2021-poverty-guidelines> (last visited April 29, 2024).

Had the judge found otherwise, however, the lawyer likely would have faced serious discipline.

Like everyone else, indigent clients are all different. Many appreciate their lawyers, and many do not. Many clients call their public defenders a “public pretender,” and private counsel with a contract do not necessarily fare better with such clients. Every so often, a client tells a lawyer, “I hear you guys get a bonus every time one of us takes a prison-only plea.” If the word gets around the county jail that some clients (such as Mr. Wells described above) are receiving a monetary “gift” from their lawyers, then it is likely that others will hold out on accepting any plea offer until they get paid off from a share of the appointed attorney’s “bonus.” It is true that all defendants have a right to a jury trial, but the decision whether to accept a plea bargain or go to trial should not be influenced by a few hundred dollars.

Some public defense agencies employ social workers to assist clients with obtaining housing, transportation, cell phones, enrolling in AHCCCS and other benefits, etc. Not all attorneys have the luxury of in-house services; but that does not mean that a sizable gift is the next best thing.

//

//

For these reasons, AACJ asks this Court to modify the proposal to use the term “nominal” instead of “modest” to describe the value of gifts, and to remove “rent” and “medical expenses” from the enumerated list. This will more accurately reflect that the gift is just that.

DATED (electronically filed): May 1, 2024.

By: /s/ David J. Euchner
David J. Euchner & Seth M. Apfel

Copy delivered to:

Hon. Christopher Staring
Chair, Ethics Advisory Committee
eac@courts.az.gov