

Daily Journal

www.dailyjournal.com

FRIDAY, OCTOBER 12, 2018

PROFESSIONAL RESPONSIBILITY

Lawyer payments for clients under the new rules

By Whitney Carlson

Although the United States is one of the most financially well-off countries, in terms of the affordability of, and accessibility to, its civil justice system, it ranks comparably with low-income nations in the developing world. *See* World Justice Project, “Rule of Law Index” (2017-2108). In an effort to confront this access to justice problem head on — and as concerns California specifically — where the state once took a more restrictive view of the payment of client expenses under the auspices of an attorney-client relationship, beginning Nov. 1, California lawyers will be expressly permitted to pay certain costs on behalf of their indigent clients.

Rule 1.8.5 of the new California Rules of Professional Conduct replaces current Rule 4-210 governing the “Payment of Personal or Business Expenses Incurred by or for a Client.” Subsection (b)(4) of new Rule 1.8.5 provides that a lawyer may pay the “costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests, of an indigent person in a matter in which the lawyer represents the client.”

This and other changes to the rules bring California into greater alignment with the 50 other jurisdictions that have adopted some iteration of the American Bar Association’s Model Rules of Professional Conduct — including Rule 1.8.5(b)(4)’s Model Rules counterpart, Rule 1.8(e). Rule 1.8(e) states that a lawyer is generally prohibited from providing financial assistance to a client in connection with pend-

ing or contemplated litigation, but may nonetheless pay “court costs and expenses of litigation” on behalf of indigent clients.

New Rule 1.8.5(b)(4) departs from the Model Rules, however, in that “costs” are “not limited to those costs that are taxable or recoverable under any applicable statute or rule of court” but may also include “any reasonable expenses of litigation, including court costs, and reasonable expenses in preparing for litigation or providing other legal services to the client.”

This then begs the question: What is “reasonable”?

In the early stages of the new rule’s implementation, California practitioners should be cognizant of how other jurisdictions have interpreted their Model Rules counterparts, and should likewise be mindful of how Rule 1.8.5(b)(4) impacts and relates to California’s other Rules of Professional Conduct — most notably those pertaining to conflicts of interest.

What is “Reasonable”?

Under the soon-to-be-implemented rules, and “when used in reference to a lawyer[,]” the terms “reasonable” and “reasonably” mean that “the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” New Rule 1.0.1(h). In reality, what is reasonable to one attorney might be completely unreasonable to the next. A review of the permissible practices in other states that have adopted some version of Rule 1.8(e) thus provides useful guidance regarding what may ultimately be deemed compliant in this state.

What is most readily apparent is that, in order to be allowable, indigent client payments should directly concern the representation, and should be distinguishable from other forms of humanitarian relief. No matter how well intentioned, payments of the latter nature are frequently viewed as the making of substantial client gifts, and have the perception of both encouraging clients to pursue frivolous lawsuits, and of giving attorneys too great a financial interest in the outcome of their clients’ litigation. Historically, these concerns are understood through the concepts of champerty and maintenance. Such concerns, and the ensuing conflicts of interests generated therefrom, are not entirely unfounded. *See The Florida Bar v. Patrick*, 67 So.3d 1009 (Fla. 2011) (attorney who advised client to reject \$2,500 settlement offer and to pursue litigation where client could achieve a maximum \$48 small claims damages award, but could also recover attorney fees, violated ethical duties by placing his own interests ahead of his client’s, and by impermissibly obtaining a financial interest in outcome of the litigation).

Payments toward “the cost of maintaining nominal basic local telephone service or providing bus passes to enable the indigent client to have means of contact with the lawyer during litigation” will likely be permitted under new Rule 1.8.5. *See* Advisory Opinion 11-02 (Utah St. Bar Nov. 8, 2011) (Utah’s Rule 1.8(e) permits lawyers representing indigent clients to pay court costs, expenses of litigation, and “minor expenses reasonably con-

nected to the litigation.”). Presumably so, too, would an attorney’s provision of used clothing — or potentially even the purchase of a new suit for the client to wear to court — be permitted. *See The Florida Bar v. Taylor*, 648 So.2d 1190 (Fla. 1994). Similarly, payments toward the “expense of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the cost of obtaining and presenting evidence” should also be considered acceptable. *See* Georgia Rule of Professional Conduct 1.8(e), cmt.4. Indeed, nominal monthly payments toward the medical insurance premiums of a personal injury client seeking treatment for injuries and unable to work may even be deemed a “reasonable” expense of prosecuting or defending a claim in California. *See In re G.M.*, 797 So.2d 931 (Miss. 2001). (In contrast to California’s new Rule 1.8.5(b)(4), however, Mississippi’s version of Rule 1.8(e) permits its attorneys to “advance” certain costs and expenses on behalf of their clients facing “dire and necessitous circumstances” — not pay them outright.)

By contrast, payments of a more generalized nature, including the provision of basic living expenses, should be more cautiously approached. *See* Georgia Rule 1.8(e) (expressly prohibiting the payment of living expenses on behalf of clients who are “unable to pay court costs and expenses of litigation”). Attorneys in other jurisdictions have been disciplined for providing monetary relief to their clients when it was not directly

Payments for clients under California’s new rules of ethical conduct

related to the representation. *See Cleveland Bar Ass’n v. Mineff*, 652 N.E.2d 968 (Ohio 1995) (attorney who represented personal injury client was reprimanded for making over \$5,300 in monetary payments to client where the client claimed that he could only afford to eat one meal a day and was facing eviction); *Mississippi Bar v. Shaw*, 919 So.2d 51 (Miss. 2005) (attorney who made over 555 advances of funds to 67 indigent clients within the first 60 days of the representation for the payment of utilities, food, rent, travel and medical expenses — without pre-approval from the state’s Ethics Committee — was suspended for 90 days). But *see In re Maxwell*, 783 So.2d 1244, 1249 (La. 2001) (providing living expenses to clients is a well-established statewide practice).

Finally, it is important to note that California Rule 1.8.5(b)(4) approves the payment of reasonable costs and expenses on behalf of *indigent* clients only. New York, by contrast, permits such payments to be made on behalf of both an attorney’s in-

digent and pro bono clientele. New York’s Rule 1.8(e)(2) (in effect in its current form since 2009) has not generated much attention by way of ethics opinions published by the State Bar Committee on Professional Ethics. Indeed, a single opinion from 2010 addressed whether it was permissible for a lawyer to pay the litigation expenses of its pro bono client where the client was an organization that provided legal services to the indigent, but the organization itself was not indigent. Ethics Opinion 840 (N.Y. State Bar Assn. March 26, 2010). The Committee opined that such a practice was permissible, and advised that, so long as the representation was undertaken on a pro bono basis, it was irrelevant whether or not the pro bono client was also indigent.

Although an earlier draft of California’s new rule accounted for payments on behalf of both indigent and pro bono clients, the reference to “pro bono” was ultimately removed — and California attorneys should be mindful of this distinction going forward. *See* Rule 1.8.5 Commission Notes.

Recommendations for California Practitioners

With the implementation of Rule 1.8.5(b)(4), California is now making a full-court press in its efforts to ensure that those with limited financial resources are not denied their day in court. Indeed, taking a cue from the Golden State, the New York State Bar recently proposed changes to its rules to broaden the scope of the state’s permissible indigent and pro bono client expenses beyond those strictly related to court costs. *See* Report by The Professional Responsibility Committee, Proposed Amendment to Rule 1.8(E), NY Rules of Professional Conduct (Mar. 16, 2018).

As the scope of what indigent client costs and expenses are or are not “reasonable” is initially defined in California, practitioners should be mindful of these types of on-goings in other jurisdictions. Additionally, California lawyers should endeavor to specifically address what costs and expenses will be paid on behalf of their indigent clients at the outset of the engagement, so as to avoid unnecessary confusion

down the road. And, although Ethics Opinions are not binding, when in doubt, attorneys should also not hesitate to seek guidance from the State Bar’s Ethics Committee as appropriate.

Whitney Carlson is a litigation associate in Murphy Pearson Bradley & Feeney’s San Francisco office. Her practice focuses on commercial litigation, business litigation, intellectual property, and personal injury matters. She has experience with trade secret, product liability, and breach of contract cases.



CARLSON

Earn one hour of MCLE credit by reading the article and answering the questions that follow. Mail your answers with a check for \$36 to the address on the answer form. You will receive the correct answers with explanations and an MCLE certificate within six weeks. Price subject to change without notice. CERTIFICATION: This self-study activity has been approved by the State Bar of California toward Minimum Continuing Legal Education Credit in the amount of one hour of general credit.

1. According to the World Justice Project, the U.S. ranks comparably with high-income nations when it comes to access to justice.

True False

2. Under California's new rules of conduct, attorneys can pay the expenses of litigation for any client.

True False

3. Fifty jurisdictions in the U.S. have adopted some iteration of the ABA Model Rules.

True False

4. Under the ABA Model Rules, payments a lawyer can make on behalf of a client are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court.

True False

5. Under California's new rules of conduct, the payments a lawyer can make on behalf of a client are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court.

True False

6. Under California's new rules of conduct, "reasonable" and "reasonably" are de

True False

7. Payments made on behalf of clients should directly concern litigation to be allowable.

True False

8. The concepts of champerty and maintenance refer to gifts

that encourage clients to settle lawsuits.

True False

9. An attorney who advises a client to reject a relatively large settlement to pursue litigation where only a small claims award plus attorney fees are available violates his ethical duties by placing his own interests ahead of his client's.

True False

Paying nominal costs to enable a client to contact his lawyer likely would be a permitted payment.

True False

11. An attorney's purchase of a new suit to wear to court, however, likely would not be a permitted payment on behalf of a client.

True False

12. The cost of obtaining and presenting evidence would likely be considered an acceptable payment.

True False

13. In Mississippi attorneys cannot make payments outright on behalf of clients.

True False

14. In Georgia attorneys are permitted to pay living expenses on behalf of attorneys who are unable to pay the costs of litigation.

True False

15. In Louisiana paying living expenses on behalf of clients is a

well-established practice.

True False

16. California's new rules of conduct permit lawyers to make payments on behalf of pro bono clientele.

True False

17. In New York, an attorney may represent a pro bono client who is not indigent.

True False

18. New York allows for payments beyond those strictly related to court costs.

True False

19. State Bar Ethics Opinions are binding.

True False

20. California's new rules of conduct take effect January 1, 2019.

True False

HOW TO RECEIVE ONE HOUR OF MCLE CREDIT

Answer the test questions, choosing the best answer. For timely processing, print or type your name/address/bar number below. Mail this page and a \$36 check made payable to Daily Journal to:

Daily Journal MCLE Center
P.O. Box 54026 • Los Angeles, CA 90054-0026

Name (required)

Date (required)

Law Firm, Company, Organization

Practice Area

State Bar Number (required)

Lawyer payments for clients under the new rules (October 12, 2018)

Title and Date of Test Publication (required)

Address

Phone

email

Please check here if this is a new address