



Office of the Child's Representative

1300 Broadway, Ste. 320
Denver, Colorado 80203
Phone: (303) 860-1517
Fax: (303) 860-1735
www.coloradochildrep.org

Chris Henderson
Executive Director

July 22, 2022

OCR Comments Regarding Proposed Changes to C.R.C.P. 1.8(e)

On behalf of the Colorado Office of the Child's Representative (OCR), I am writing to express the OCR's support for the proposed revisions to C.R.C.P. 1.8 and to request a minor modification that would clarify that the attorneys OCR contracts with and employs to represent the interests of children in Colorado proceedings are also covered by the new exception regarding gift giving to clients.

The OCR is statutorily charged with providing attorney services for children and youth in a variety of proceedings, including but not limited to dependency, delinquency, and truancy proceedings. We fulfill this statutory mandate through employing 12 FTE attorneys at our Colorado Springs office and contracting with over 250 other attorneys throughout Colorado. Our attorneys are appointed as Counsel for Youth, Guardians *ad litem* (GALs), and Child's Legal Representatives (CLRs). CJD 04-06 makes clear that when our attorneys are appointed as GAL or CLR, they do not have a traditional client per se but that the best interests of that child or youth is the "client" of that attorney under the Colorado Rules of Professional Conduct.

The OCR believes the policy and purpose supporting the revisions to C.R.C.P. 1.8 apply to its attorneys. The children and youth our attorneys represent are among the most marginalized populations in Colorado. Regardless of whether a court has made an indigency finding as part of its appointment determination, the children and youth our attorneys represent do not pay for their attorney services. Moreover, they do not have financial or other resources to provide for their basic needs and are often involved in court cases because of their caretakers' inability to provide for those needs. While a huge part of our attorneys' job is to advocate for appropriate services and support, OCR attorneys do find themselves providing modest gifts to help address basic needs of children and youth.

The OCR believes that the proposed revisions to C.R.C.P. 1.8(e) provide not only permission but also helpful guidance regarding gift-giving that would benefit its attorneys. However, the draft's current references to "payment of a fee" leads OCR to question whether the revisions will apply to its attorneys, as the OCR does compensate attorneys for their representation. Additionally, the reference to client throughout the proposed revision also leads OCR to question whether the new rule will apply to attorneys appointed to represent the best interests of a child or youth.

To clarify that attorneys contracted with or employed by the OCR are covered by the revisions, the OCR requests the following amendment (highlighted in yellow).

3) a lawyer representing an indigent client without payment of a fee, a lawyer representing an indigent client without payment of a fee through a nonprofit legal services or public interest organization, ~~and~~ a lawyer representing an indigent client without payment of a fee through a law school clinical or pro bono program, and a lawyer representing an indigent client or the interests of a child and youth through employment or contracts with a state agency may provide modest gifts to the client for food, rent, transportation, medicine or other basic living expenses. .

. .

The OCR requests this language also be added to the corresponding comment, Paragraph 11.

We understand that this revision may have implications for other state agencies and their contract attorneys. I have reached out to the Office of Alternate Defense Counsel and the Office of Respondent Parent Counsel, who also contract with attorneys to represent indigent clients, and they have expressed that they are in support of OCR's proposed changes and have asked me to include that information in this comment.

Thank you for your consideration of this request.

Sincerely,

Sheri Danz/s/
Deputy Director

The Community Firm, Inc.

Anna C. Fullerton, Esq.

Staff Attorney

410 Acoma Street #311

Denver, CO 80204

Direct: (720) 724-8799

anna.fullerton@cedlaw.org

July 22, 2022

RE: Proposed Changes to C.R.P.C. 1.8(e)

To Whom it May Concern:

I am writing on behalf of myself, the other attorneys in my firm, and, most importantly, our clients to express support for the proposed amendment to Rule 1.8 of the Colorado Rules of Professional Conduct.

Rule 1.8(e) is undoubtedly an important safeguard in the attorney-client relationship. Indeed, the reason lawyers are prohibited from providing financial assistance to clients in connection with pending or contemplated litigation is to prevent a lawyer from having too great an interest or stake in the representation. *See* C.R.P.C. 1.8, Comment 16 (relating paragraph (i) with paragraph (e) in that both rules are “designed to avoid giving the lawyer too great an interest in the representation”). These concerns, however, do not arise in the legal-aid context where clients do not pay for the attorneys’ time or services and, as is the case with eviction defense, there is no significant monetary reward recoverable by the attorneys. This is further supported by the fact that there is already an exception to Rule 1.8(e) which allows lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid. *Id.*, Comment 10.

Not only are the ethical concerns minimized in the legal-aid context, but the proposed changes will have a significant, positive impact on the day-to-day lives of our clients and on our ability to serve them. For the past two years, legal aid attorneys have been able to stabilize housing for thousands of tenants in partnership with entities distributing rental assistance funds provided by the federal government, state, and other donors. However, public funds are winding down. Our clients will no longer be able to access these funds to avoid evictions in non-payment cases. The proposed changes to the Rule would ensure legal-aid organizations have the flexibility to pay rent and other related costs through overhead expenses or the organizations’ own funds.

Finally, it is worth highlighting the significant body of literature has called for the amendment¹ or abolishment of Rule 1.8 in the legal-aid context because the rule punishes indigent clients and does not actually solve or prevent conflicts of interest.² As Louis Rulli, who is a Practice Professor of Law and the Director of Civil Practice Clinic and Legislative Clinic at the University of Pennsylvania Carey Law School, writes, “The assumptions that underlie this prohibition simply do not apply when providing free legal assistance to impoverished communities.” For example, “in landlord-tenant evictions . . . there is no sizeable monetary recovery that would give substance to ethical concerns.”³

For these reasons, and the significant difference this change could make in our clients’ lives, we urge the Court to adopt the proposed amendment to C.R.C.P. 1.8.

Sincerely,

Anna C. Fullerton, #53490
(720) 724-8799
anna.fullerton@cedlaw.org

¹ *See e.g.*, Philip G. Schrag, The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e), 28 Geo. J. Legal Ethics 39, 66 (2015) (arguing that the rule should only apply to contingent fee cases, bar only loans not gifts, exempt the rule gifts in which no fees are being charged to indigent clients, and a few other limiting provisions on loans, advertising and the arrangement of assistance).

² *See e.g.*, Jack Sahl, The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment, 34 ST. MARY’S L.J. 795, 870 (2003).

³ Louis S. Rulli, Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients, 17 U. Pa. J.L. & Soc. Change 347, 369 (2014) (Describing issues related to financial assistance for indigent clients).