

THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART IV. ADMISSION TO PRACTICE LAW [204 PA. CODE CH. 71]

Order Amending Rule 322 of the Pennsylvania Bar Admission Rules; No. 879 Supreme Court Rules Doc.

Order

Per Curiam

And Now, this 17th day of August, 2021, upon the recommendation of the Board of Law Examiners, the proposal having been published for public comment in the *Pennsylvania Bulletin* at 49 Pa.B. 5700 (October 5, 2019) and at 51 Pa.B. 780 (February 13, 2021):

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Rule 322 of the Bar Admission Rules is amended in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and the amendments shall be effective immediately.

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART IV. ADMISSION TO PRACTICE LAW

CHAPTER 71. PENNSYLVANIA BAR ADMISSION RULES

Subchapter C. RESTRICTED PRACTICE OF LAW CERTIFIED LEGAL INTERNS

Rule 322. Authorized [activities of certified legal interns] Activities of Certified Legal Interns.

(a) *General [rule] Rule.* Subject to the restrictions of this subdivision, a certified legal intern may with the approval of a supervising attorney:

(1) Appear before any **court or other** government unit [**(other than the Supreme, Superior or Commonwealth Courts)**] in any civil or criminal matter on behalf of any indigent, if the person on whose behalf the legal intern is appearing consents to such appearance. [**The supervising attorney must be personally present throughout the proceedings where the legal intern is appearing on behalf of the defendant in a criminal matter where the defendant has the right to counsel under any provision of law.**]

(2) Appear in any civil or criminal matter on behalf of the Commonwealth, if the Attorney General (or the prosecuting attorney in the case of a criminal matter) or his or her authorized representative consents to such appearance.

The approval of the supervising attorney and the consent of the party represented required by this subdivision shall be in writing and filed of record in the matter and shall be brought to the attention of the judge or magisterial district judge or the presiding officer of the other government unit. Appearances pursuant to this rule include provision of oral argument.

(b) *Preparation of [papers] Papers.* A certified legal intern may engage in other activities, [**under the general supervision of a member of the bar of this Commonwealth, but outside the personal presence of the attorney,**] including the following:

(1) Preparation of pleadings and other documents to be filed in any matter in which the legal intern is eligible to appear and in any appeals therefrom in the Supreme, Superior or Commonwealth Courts.

(2) Except when the assignment of counsel is required under any provision of law, **provision of** assistance to indigent inmates of correctional institutions or other persons who request such assistance in preparing applications for and supporting documents for post-conviction relief. If there is an attorney of record in the matter, all such assistance shall be supervised by the attorney of record.

Each pleading or other document shall contain the name of the legal intern who has participated in drafting it. If the legal intern participated in drafting only a portion of it, that fact may be stated. All pleadings or other documents shall be signed by the supervising attorney.

(c) *Supervising [attorney] Attorney.* The attorney under whose supervision a certified legal intern performs any of the services permitted by this rule shall [:]

(1) Be approved in writing as a supervising attorney for the purposes of this rule by the dean of the law school in which the legal intern is or was enrolled.

(2) Assume personal professional responsibility for the guidance of the legal intern in any work undertaken and for supervising the quality of the work of the legal intern.

(3) Assist the legal intern in his or her preparation to the extent the supervising attorney considers necessary.

(4) Assure that the certified legal intern is fully prepared and appropriately supervised.

(5) Ensure that a licensed attorney employed by his or her office is personally present during any appearance the certified legal intern makes before any tribunal.

Official Note: Based on former Supreme Court Rule 11 A, D and E and makes no change in substance.

[Pa.B. Doc. No. 21-1374. Filed for public inspection August 27, 2021, 9:00 a.m.]

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT [204 PA. CODE CH. 81]

Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Conflict of Interest: Current Clients: Specific Rules

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania ("Board") is considering recommending to the Supreme Court of Pennsylvania

that the Court amend Pennsylvania Rule of Professional Conduct 1.8(e) and related commentary, as set forth in Annex A.

EXPLANATORY REPORT

Rule 1.8(e) prohibits a lawyer from providing financial assistance to a client in connection with pending or contemplated litigation. There are two exceptions: advancing court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and paying court costs and expenses of litigation on behalf of a client when a lawyer represents an indigent client. Comment (10) explains that allowing lawyers to subsidize lawsuits and administrative proceedings, including making or guaranteeing loans to their clients for living expenses, could encourage clients to pursue lawsuits that might not otherwise be brought and give lawyers too great a financial stake in the litigation. However, the advancement of court costs and litigation expenses is permissible because such costs and expenses are comparable to contingent fees and in the situation of representing indigent clients, helps ensure access to the courts.

The Board's proposal would add another exception to Rule 1.8(e) to allow a lawyer representing an indigent client pro bono to provide modest gifts to the client for food, rent, transportation, medicine, and other basic living expenses. Under the proposed new exception, a lawyer would not be permitted to (1) promise, assure or imply the availability of financial assistance before the client retains the lawyer or do so as a means to induce the client to continue the client-lawyer relationship; (2) seek or accept reimbursement from the client or a relative or affiliate of the client; and (3) publicize or advertise a willingness to provide gifts to prospective clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings. The proposed exception represents narrow circumstances and none of the concerns raised by the current prohibition is present.

The proposal to add a narrow exception to RPC 1.8(e) reflects the recognition that the COVID-19 pandemic has financially impacted historically marginalized communities and has heightened concerns that vulnerable Pennsylvanians have restricted access to justice. The proposal is in keeping with the legal profession's ongoing efforts to afford access to justice to those in need. With the appropriate limitations in place to mitigate the risk of abuse, lawyers should have the discretion whether to make modest gifts to indigent clients they represent on a pro bono basis without fear of potential discipline.

In making this proposal, the Board notes that in August 2020, the American Bar Association ("ABA") adopted an amendment to Model Rule of Professional Conduct 1.8(e) to permit lawyers to make modest gifts to pro bono clients for necessities.¹ The proposed changes would substantially conform Pennsylvania's RPC 1.8(e) to correspond to the ABA Model Rule.

Interested persons are invited to submit written comments, suggestions or objections by mail, email or facsimile to the Executive Office, The Disciplinary Board of the Supreme Court of Pennsylvania, 601 Commonwealth

¹ Eleven jurisdictions have an exception to the prohibition on financial assistance to clients. See, ABA Report 107.

Avenue, Suite 5600, PO Box 62625, Harrisburg, PA 17106-2625, facsimile number (717-231-3381), email address Dboard.comments@pacourts.us on or before September 27, 2021.

*By The Disciplinary Board of the
Supreme Court of Pennsylvania*

JESSE G. HEREDA,
Executive Director

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart A. PROFESSIONAL RESPONSIBILITY

CHAPTER 81. RULES OF PROFESSIONAL CONDUCT

Subchapter A. RULES OF PROFESSIONAL CONDUCT

§ 81.4. Rules of Professional Conduct.

The following are the Rules of Professional Conduct:

CLIENT-LAWYER RELATIONSHIP

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.

* * * * *

(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 may be contingent on the outcome of the matter; [and]

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client[.]; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization, or a lawyer representing an indigent client pro bono through a law school clinical or pro bono program, may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Comment:

* * * * *

Financial Assistance

(10) Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

(11) Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization, or a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. 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. See Rule 1.4.

(12) The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstance where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

(13) Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

Person Paying for a Lawyer’s Services

[(11)] (14) Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third

person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer’s professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[(12)] (15) Sometimes, it will be sufficient for the lawyer to obtain the client’s informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in the fee arrangement or by the lawyer’s responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph.

Aggregate Settlements

[(13)] (16) Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients’ informed consent. In addition, Rule 1.2(a) protects each client’s right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[(14)] (17) Agreements prospectively limiting a lawyer’s liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This

paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[(15)] (18) Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[(16)] (19) Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[(17)] (20) The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client

confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[(18)] (21) Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[(19)] (22) When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[(20)] (23) Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

[Pa.B. Doc. No. 21-1375. Filed for public inspection August 27, 2021, 9:00 a.m.]

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CH. 83]

Proposed Amendments to the Pennsylvania Rules of Disciplinary Enforcement Relating to the Disciplinary Board's Power to Authorize Electronic Means to Conduct Proceedings and Public Access Through Livestream Technology

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania ("Board") is considering recommending to the Supreme Court of Pennsylvania that the Court amend Pennsylvania Rules of Disciplinary Enforcement 205 and 402, as set forth in Annex A.

EXPLANATORY REPORT

Consistent with state courts and agencies in the Commonwealth, during the COVID-19 outbreak the Board has continued its essential operations by conducting hearings, arguments, reprimands and other proceedings remotely through the use of advanced video communication technology. Livestream technology provides public access to public proceedings. Recognizing both that the future is uncertain and that the use of remote proceedings and livestream technology has benefitted the disciplinary system by providing flexibility and greater public access, the Board proposes amendments to Rules 205(c) and 402(j).

Pa.R.D.E. 205(c) enumerates the Board’s powers and duties. The Board’s proposal adds the additional power to authorize electronic means to conduct proceedings within the rules and decisional law of the Court and the Board. While current Rule 402(j) gives the Board, as well as hearing committees, special masters and the Supreme Court, the ability to authorize electronic and photographic means during a proceeding to present evidence, perpetuate the record, or for other judicial administration purposes, the Board determined that it is necessary to solidify its power to authorize electronic means by specifically setting forth that power in Rule 205.

Pa.R.D.E. 402 governs access to disciplinary information and confidentiality. The Board’s proposal amends subdivision (j) to address public access to public proceedings. New subparagraph (j)(2) provides that public access to a public proceeding before a hearing committee, special master or the Board shall consist of or be supplemented by livestream technology. Based on the experience gained over the past 16 months, the Board views the public’s ability to observe livestreamed public proceedings on YouTube as a great benefit. The livestream allows much greater access to disciplinary and reinstatement proceedings, as it affords members of the public the convenience of viewing a proceeding from any location, rather than having to attend a proceeding in-person at one of the district offices in the Commonwealth. The proposed revisions further provide that the livestream access ceases upon the conclusion of the proceeding and the official record of the proceeding is the record generated by the court reporter, if such is applicable.

The use of livestream technology does not prohibit the public from attending proceedings in-person. Proposed subparagraph (j)(3) permits public access to a public proceeding through a request process, which will ensure adherence to any health and safety policies in place at the time of the request. The tandem approach of livestream technology and public access upon request accomplishes reasonable means of access to disciplinary proceedings.

Interested persons are invited to submit written comments, suggestions or objections by mail, email or facsimile to the Executive Office, The Disciplinary Board of the Supreme Court of Pennsylvania, 601 Commonwealth Avenue, Suite 5600, PO Box 62625, Harrisburg, PA 17106-2625, facsimile number (717-231-3381), email address Dboard.comments@pacourts.us on or before September 27, 2021.

By The Disciplinary Board of the Supreme Court of Pennsylvania

JESSE G. HEREDA, Executive Director

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart B. DISCIPLINARY ENFORCEMENT

CHAPTER 83. PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT

Subchapter B. MISCONDUCT

Rule 205. The Disciplinary Board of the Supreme Court of Pennsylvania.

* * * * *

(c) The Board shall have the power and duty:

* * * * *

(16) To decide, through the Board Chair, the Vice-Chair, or a designated lawyer-member of the Board, an interlocutory appeal to the Board when such appeal is permitted by the Enforcement Rules, the Board Rules, or other law.

(17) To authorize the use of electronic means to conduct proceedings before a hearing committee, special master or the Board, in accordance with Board Rules, Enforcement Rules and the decisional law of the Court and the Board.

[(17)] (18) To exercise the powers and perform the duties vested in and imposed upon the Board by law.

(d) The Board shall, to the extent it deems feasible, consult with officers of local bar associations in the counties affected concerning any appointment which it is authorized to make under these rules.

Subchapter D. MISCELLANEOUS PROVISIONS

Rule 402. Access to Disciplinary Information and Confidentiality.

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[(j)] (j)(1) This rule does not permit broadcasting, televising, recording or taking photographs during a proceeding under these rules, except that a hearing committee, a special master, the Board or the Supreme Court when conducting a proceeding may authorize the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration.

(2) Public access to a public proceeding before a hearing committee, special master or the Board shall consist of or be supplemented by livestream technology, which access shall cease upon the conclusion of the proceeding. The official record of the proceeding shall be the record generated by the court reporter, as applicable.

(3) A request for in-person access to a public proceeding other than by the parties, their attorneys and reasonably necessary staff shall be made to the Board at least 30 days in advance of the scheduled proceeding.

(k) If a formal proceeding results in the imposition of private discipline or dismissal of all the charges, the proceeding shall cease to be open to the public when the decision to impose private discipline or dismiss the charges becomes final, unless the respondent-attorney requests that the record of the proceeding remain open to the public.

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[Pa.B. Doc. No. 21-1376. Filed for public inspection August 27, 2021, 9:00 a.m.]