Order

Michigan Supreme Court
Lansing, Michigan

January 10, 2024

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

ADM File No. 2020-31

Amendment of Rule 1.8
of the Michigan Rules of
Professional Conduct

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 1.8 of the Michigan Rules of Professional Conduct is adopted, effective May 1, 2024.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 1.8 Conflict of Interest: Prohibited Transactions.

(a)-(d) [Unchanged.]

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except as provided in this subrule.~~that~~

(1) A~~a~~ lawyer may advance court costs and expenses of litigation, the repayment of which shall ultimately be the responsibility of the client.~~; and~~

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

(3) A lawyer who represents an indigent client pro bono, pro bono through a nonprofit legal services or public interest organization, or pro bono through a law school clinical or pro bono program, may pay for or provide the following types of assistance to the client to facilitate the client's access to the justice system in the matter:

(i) transportation;

(ii) lodging if it is less costly than providing transportation for multiple days;

(iii) meals; or

(iv) clothing.

Assistance may be provided under this subrule even if the indigent client's representation is eligible for a fee under a fee-shifting statute.

(4) Any assistance provided under subrule (3) must be delivered at no fee to the indigent client, and the lawyer may not:

(i) promise, assure, or imply the availability of such assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) publicize or advertise a willingness to provide such assistance to prospective clients.

(f)-(j) [Unchanged.]

Comment:

[Unchanged except for the following proposed additional language]

Humanitarian Exception.

Paragraph (e)(3) serves as a humanitarian exception. The lawyer can assist the client with needs that frustrate the client's access to the justice system in the specific matter for which the representation was undertaken, while still preserving the nature of the attorney-client relationship. For purposes of this rule, indigent is defined as people who are unable, without substantial financial hardship to themselves and their dependents, to obtain competent, qualified legal representation on their own.

Staff Comment (ADM File No. 2020-31): The amendment of MRPC 1.8(e) allows attorneys to provide certain assistance to indigent clients they are serving on a pro bono basis.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

CAVANAGH, J. (*concurring*). I concur with the Court's adoption of this amendment to Rule 1.8 of the Michigan Rules of Professional Conduct (MRPC). This modest change

will further the critical goal of providing greater access to justice to Michiganders who lack the means to incur incidental costs associated with navigating our legal system.

By way of background, the adopted rule stems from a State Bar of Michigan (SBM) proposal to amend MRPC 1.8(e) to allow modest financial living assistance to indigent clients to aid them in fully accessing justice. SBM highlighted the lopsidedness of the current rule, which prohibits lawyers from providing gifts to pro bono, indigent clients but permits lawyers to, for example, provide financial assistance, advance litigation costs, and offer social hospitality to litigation or transactional clients in some circumstances. The originally proposed rule paralleled amendments adopted by the American Bar Association (ABA) House of Delegates to the Model Rules of Professional Conduct. It broadly allowed modest gifts of food, rent, transportation, medicine, and other basic living expenses to indigent clients provided that the lawyer rendered services pro bono. Concerned by the breadth of this proposal, which was also opposed by Legal Services Association of Michigan (LSAM), the Court requested that SBM consider and resubmit a more nuanced, limited proposal. One concern was that the sweeping language would create unreasonable expectations from indigent clients and place associated undue pressure on attorneys.

SBM submitted a revised proposal providing that a lawyer representing an indigent client "may provide assistance to the client that facilitates the client's access to the justice system." The proposal was not limited to pro bono representation. SBM also proposed a comment that specified examples of needs that frustrate access to the justice system, including transportation to and from court proceedings, meals during long court sessions, and appropriate clothing for court. LSAM supported the revised proposal. The Court built upon SBM's two proposals and commentary from LSAM and published a further revised proposal for comment. We received robust feedback during the comment period from SBM, LSAM, the Michigan State Planning Body (SPB), and others who unanimously supported the addition of a humanitarian exception to the general rule barring financial assistance to clients. In response to the comments received, the Court further refined the rule to accommodate and balance stakeholder desires with ethical concerns.

The final product is a narrow, but meaningful, change that allows lawyers representing indigent clients on a pro bono basis to provide only specific types of financial assistance to "facilitate the client's access to the justice system in the matter." MPRC 1.8(e). That is, the limiting principle is that the assistance must be tied to the matter for which the attorney is retained such that the client's participation is enhanced. The types of permitted financial assistance are further limited within the rule to transportation, lodging (if it is less costly than providing transportation for multiple days), meals, and clothing. *Id*. The proposed restriction tying assistance to "court proceedings" was removed in response to feedback that representation is broader than simply going to and from the courthouse. For example, indigent clients may need transportation to attorney offices and other locations for meetings, depositions, mediations, and more as part of holistic, effective representation. Lack of transportation in particular can be a barrier to the indigent client's

full participation in the justice system. The restriction on the use of legal services organization funds was also removed from the published-for-comment rule in response to feedback from LSAM and SPB that their members would be hamstrung by the restriction. Without the participation of legal aid organizations, the rule would have little utility for the vast majority of indigent clients.[1]

Moreover, the exception prohibits attorneys with a financial interest in the litigation from using it. Instead, it allows for limited humanitarian assistance in pro bono cases only. As my dissenting colleague notes, pro bono attorneys can recover attorney fees when attorney-fee shifting provisions are applicable, see *Woodman v Dep't of Corrections*, 511 Mich 427 (2023). However, the circumstances in which attorney-fee shifting applies are limited. Nonprofit groups are clearly not permitted to distribute profits to private shareholders or individuals from attorney-fee recoupment.[2] Moreover, because the scope of assistance is restricted to facilitating the client's access to justice in the matter, concerns about nonprofit impact litigation groups competing over potential clients with perks are unlikely to materialize. Allowing the rule to be utilized even in fee-shifting scenarios also parallels the ABA's recent amendment of Model Rule of Professional Conduct 1.8(e).

This rule change is also consistent with the Michigan Justice for All Commission's goal of providing "100% access to justice." See Administrative Order No. 2021-1, 507 Mich lxxxv (2021). The Commission's duties include working to improve the civil legal justice system by identifying and assessing gaps, barriers, and strategies to improve access, especially for low- and moderate-income Michigan residents. *Id*. The rule of professional conduct adopted today goes toward removing barriers to access for low-income individuals, especially for the overwhelming majority who are necessarily pulled into the legal system because of critical concerns burdening their families, including child custody and support, debt collection, eviction, access to public benefits, and more.[3]

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[1] Civil legal aid in Michigan handled 8,400 divorce, separation, or annulment cases, 25,000 housing cases, and 5,300 public-benefits cases in 2019–2020 alone. Justice For All Commission, *Michigan's Legal Aid Organizations: Social Economic Impact and Social Return on Funding Investment 2019–2020* <https://www.courts.michigan.gov/4a9445/siteassets/court-administration/resources/mi_sroi_final-opt.pdf> (accessed December 13, 2023) [https://perma.cc/H3RP-KZTB].

[2] See 26 USC 501(c)(3); 26 CFR 1.501(a)-1(c) (2017) ("The words *private shareholder or individual* in section 501 refer to persons having a personal and private interest in the activities of the organization.").

[3] My dissenting colleague notes that the phrase "facilitating . . . access to justice" is undefined and vague. However, the commonly understood phrase "access to justice" does not require an express definition to meaningfully guide the Commission's work. Indeed,

I disagree with my dissenting colleague that this very limited rule will "incentiviz[e] dependency and personal attachment within the attorney-client relationship[.]" The rule is limited to specific types of assistance, provided that the assistance facilitates access to justice in the matter for which the attorney is retained. I do not see how providing transportation to an attorney's office or food during long meetings will create general dependency. Nor do I see how providing lodging in cases where it is less expensive than providing transportation over multiple days is problematic. This exception will by its terms apply in rare cases—such as if the client's presence is required at a multiday trial far from their home—the rule does not permit attorneys to subsidize client housing generally. In sum, the modest nature of the permitted expenditures makes the rule amendment unlikely to create conflicts of interest or invite abuse.

As with all administrative matters that the Court handles, we welcome feedback to ensure that the rule is working as intended. If further changes to the amended rule are desired, I hope that SBM, legal aid organizations, and others follow up with their comments to enable potential adjustments based on lived experience with the rule. For now, I support the adoption of this incremental change to MRPC 1.8 to allow limited financial assistance to clients in pro bono matters that is directly related to facilitating access to justice in the matter.

ZAHRA, J. (*dissenting*).

Attorneys are not social service providers, and when representing clients, their job is not to provide for the material and financial well-being of needy clients. The job of an attorney is to uphold the law and represent clients as an officer of the court. This longstanding and traditional understanding of the role of counsel is being turned on its head by this Court. Through adoption of this amendment, this Court embarks on a form of experiment by altering attorneys' professional behavior. Specifically, the broad rules adopted by the Court allow attorneys in a "pro bono" capacity to pay for an array of clients' life expenses, from travel and food to housing and clothing. No caps on aggregate costs, duration, or occurrences of expenditures are included. This deregulation of attorney ethics is novel to this state and in our nation, as similar changes have only recently been undertaken in a limited number of jurisdictions. Consequently, the Court has little to no quality information as to how this amendment of basic attorney ethical responsibilities can affect the practice of law in the long term. This reality is exacerbated by this Court's recent approval of the collection of a profit through "pro bono" attorney fees, which would extend even to nonprofits, which legally can earn income from individual transactions.[4] Instead

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there is no indication that the lack of a definition has prevented the Commission from doing its work since its creation in 2021.

[4] *Woodman v Dep't of Corrections*, 511 Mich 427, 454 (2023) (concluding that trial courts have no discretion to consider whether attorneys holding themselves out to the public and

of drafting new rules that rescind decades, if not centuries, of legal practice, I would retain the language of Michigan Rule of Professional Conduct 1.8 that this state and its legal profession have long relied upon. This Court should at least pause until it has a more complete understanding of the long-term effects of these rules in the few jurisdictions that have adopted them.

Legal aid and financial assistance for the indigent are admirable goals, and I strongly support attorneys and other individuals who financially contribute to our state's legal aid system, as well as numerous other funds established by state and nonprofit entities for those in need.[5] But the potential costs of replacing existing attorney ethics rules are high, and

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clients as working "pro bono" can collect full attorney fees from a fee-shifting provision, with no limitations on how those funds are used).

By definition, nonprofit organizations can earn operational income and profits so long as the ultimate corporate purpose is not for profit. See, e.g., MCL 450.2301(5) ("A corporation whose lawful activities include the charging of fees or prices for its services or products may receive the income and may make a profit as a result of its receipt."); 26 USC 501(c)(3) (exempting from taxation the income of nonprofits); Corewell Health, *Consolidated Financial Statements* (Sep 30, 2023), <https://assets.contentstack.io/v3/assets/blt7b132cfc09cf5e18/bltdfc7aff559296935/consolidated-financial-statements-sh.pdf> (accessed January 8, 2024) [https://perma.cc/9JMW-XKZ4] (major healthcare network in Michigan listing an operational profit prior to direct government funding of $72.9 million in 2022 and $11 million in 2023 up to September).

[5] See, e.g., Michigan Legal Help, *Make a Donation* <https://michiganlegalhelp.org/make-donation> (accessed November 15, 2023) [https://perma.cc/4W8M-8XD8]; The Salvation Army, Great Lakes Division <https://centralusa.salvationarmy.org/greatlakes/> (accessed November 2, 2023) [https://perma.cc/6YTY-473N]; Catholic Charities of Southeast Michigan <https://www.ccsem.org/> (accessed November 15, 2023) [https://perma.cc/7ZVW-7NM4]; Crossroads of Michigan <https://www.crossroadsofmichigan.org/> (accessed November 15, 2023) [https://perma.cc/WHN7-2KSZ]; State of Michigan, Health & Human Services, *Family Independence Program* <https://www.michigan.gov/mdhhs/assistance-programs/cash/fip> (accessed November 15, 2023) [https://perma.cc/72EU-8REN]; State of Michigan, Health & Human Services, *Food Assistance* <https://www.michigan.gov/mdhhs/assistance-programs/food> (accessed November 15, 2023) [https://perma.cc/ME3Y-LFMY]; Benefits.gov, *Housing Choice Voucher Program (Section 8)* <https://www.benefits.gov/benefit/710> (accessed November 15, 2023) [https://perma.cc/U42W-8VVC]; see also MI Bridges, *Welcome to MI Bridges* <https://newmibridges.michigan.gov/s/isd-landing-page?language=en_US> (accessed November 15, 2023) (providing an accessible portal of social services and resources available for those in need).

such changes are not the most efficient or worthwhile method of mitigating the deleterious effects of poverty. Because the amendments enacted by the Court risk undermining the arm's-length representation that stands at the center of legal ethics, and in so doing incentivizing dependency and personal attachment within the attorney-client relationship, I dissent.

Rules prohibiting attorneys from getting financially involved in their clients' well-being have existed from time immemorial. The rule at issue was included in the state's first rules of professional conduct adopted over 30 years ago,[6] but the principle underlying it has existed for centuries. Prohibitions on financial investment in or support of litigants derive from common-law principles of champerty and maintenance. Common-law maintenance disallowed "maintaining, supporting, or promoting the litigation of another."[7] Champerty was a form of maintenance and prohibited a "bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought

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[6] See State Bar of Michigan, *Role of Nonlawyers in Law Practice: Guidelines for Utilization of Legal Assistant Services*, available at <https://www.michbar.org/opinions/ethics/utilization#:~:text=Effective%20October%201%2C%201988%2C%20the,Conduct%2C%20superseding%20the%20prior%20Code> (accessed November 15, 2023) [https://perma.cc/7AUR-JBWW] (explaining that the first Rules of Professional Conduct replaced the Code of Professional Responsibility that existed before that).

Prior to the modern rules, the Michigan Code of Professional Responsibility, which was based on the 1969 model code promulgated by the American Bar Association, included the same prohibition under Disciplinary Rule (DR) 5-103(B). Compare Model Code of Professional Responsibility 5-103(B) ("While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that . . . [a] lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."), with State Bar of Michigan, Ethics Opinion CI-572 (1980) ("DR 5-103(B) clearly states that during representation of a client, in connection with contemplated or pending litigation, no advances for 'financial assistance' are permissible except for the litigation related expenses enumerated in the Rule and then only to the extent the client remains ultimately responsible for payment. Litigation expanses [sic] are generally understood to refer to court costs, fees of witness, and expenses incurred by the client because of the wrongful act that resulted in the litigation.").

[7] *Black's Law Dictionary* (4th ed) (defining "maintenance").

to be recovered."[8] "The doctrines of champerty and maintenance were developed at common law to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation."[9] When third parties paid for or got involved in the material benefits of a litigant for the purpose of litigation, the law recognized inherent perverse incentives and conflicts in the natural and objective progression of litigation.

Various states took action to reform the ancient common law of maintenance, with many retaining its core application.[10] Michigan focused its concerns about the financial intermixing of law and personal benefits on the legal profession. In this state, limitations on financial maintenance of legal processes applied only in the cases of attorneys representing their clients.[11] And Michigan's professional code has long prohibited financial benefits to or support of clients, outside prepayment of litigation-related expenses.[12] Given that attorneys are the central actors in indigent litigation and are the ones most at risk of taking a personal interest in the outcome of litigation, Michigan's focus on the practice of maintenance by attorneys was understandable.

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[8] *Black's Law Dictionary* (5th ed).

[9] 14 Am Jur 2d, Champerty and Maintenance, § 1; see also *Fetters v Wittmer Oil & Gas Props*, 258 Mich 310, 315 (1932) ("At the common law, champerty was regarded as an offense of a high grade, as *malum in se*, and all contracts tainted with it were held to be void.").

[10] For instance, Illinois still prohibits maintenance for the general public in certain circumstances. See 720 ILCS 5/32-12 ("If a person officiously intermeddles in an action that in no way belongs to or concerns that person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend the action, with a view to promote litigation, he or she is guilty of maintenance and upon conviction shall be fined and punished as in cases of common barratry. It is not maintenance for a person to maintain the action of his or her relative or servant, or a poor person out of charity."); see also *Rancman v Interim Settlement Funding Corp*, 99 Ohio St 3d 121, 123 (2003) (explaining that "[t]he ancient practices of champerty and maintenance have been vilified in Ohio since the early years of our statehood" and holding that a third-party promise to front money for litigation in the interest of a favorable result created perverse incentives unacceptable under the common law).

[11] *Smith v Childs*, 198 Mich App 94, 98 (1993) ("[T]he defense of champerty does not exist in Michigan except as specified by statute with regard to attorneys."); see also MCL 600.919(2) (prohibiting the collection of fees when done through solicitation from a member of the bar).

[12] See footnote 6.

The concerns underlying centuries of common law and the current rules of ethics remain strong. Attorneys, as officers of the court, have significant and deeply entrenched influences in the initiation and progression of lawsuits. Perhaps unlike other service providers for hire, attorneys are not "merely advocates" who pursue without limitation the interests and wishes of their clients.[13] Instead, through private representation, they uphold the rule of law and the "integrity of the legal process," for both their clients and society at large.[14] They advise clients on when to bring claims, how to bring them, and when to settle. While clients retain ultimate control over whether claims are settled and defining the lawful objectives of the attorney,[15] attorneys retain preeminent control over litigation strategy and procedure.[16] No matter how much it may help their client's cause, attorneys must make reasonable arguments understanding the established law,[17] cannot give advice

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[13] *Grievance Administrator v Fieger*, 476 Mich 231, 243 (2006).

[14] *Id*. at 252; see also *In re Snyder*, 472 US 634, 644-645 (1985) ("As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice."); *People ex rel Karlin v Culkin*, 248 NY 465, 470-471 (1928) (Cardozo, J.) ("The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."); *Penson v Ohio*, 488 US 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.") (quotation marks and citation omitted).

[15] MRPC 1.2(a).

[16] *Id*.; see also MRPC 1.2, comment ("At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.").

[17] MRPC 3.1, comment ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also has a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed."); MRPC 3.3 (explaining that attorneys cannot make false statements of law or fact on a client's behalf and must disclose fraud by the client if "reasonably necessary to remedy" any misleading statement); MRPC 3.3, comment (stating that while attorneys may

to clients which is used to violate the law,[18] and must advise clients to take actions in the client's best interests accepting the bounds of recognized law.[19]

When an attorney becomes financially involved in the client's personal and material well-being during litigation, there are concerns on both sides of the relationship. The attorney is now moving beyond the role of disinterested and objective advisor and into the position of a de facto commercial relationship (e.g., I pay you now, you pay me somehow, in some way, later), a social-support provider, or somewhere in the murky middle.[20] An attorney's personal investments in the client only increases the cost of providing services and places the attorney in a position of oversight and care over the client. The more an attorney or a firm has provided financially for a client, the more the attorney has "put in," and the greater incentive there is to shape advice for gain whether reputational or financial, notwithstanding the client's wishes or best interests. This is only exacerbated by this Court's recent conclusion that attorneys working "pro bono" can recoup a profit through attorney fees, and trial courts have no discretion to consider the attorney's "pro bono" status

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"present the client's case with persuasive force," performance of that responsibility "is qualified . . . by the advocate's duty of candor to the tribunal" as an "officer[] of the court").

[18] MRPC 3.3(b) (requiring remedial action by an attorney if they learn of criminal or fraudulent conduct during a proceeding); MRPC 1.2(c) (prohibiting the rendering of advice that "assist[s]" the commission of a crime or fraud); MRPC 1.16(a)(1) (requiring withdrawal from representation where representation will result in violations of law); MRPC 1.6(c)(4) (allowing attorneys to release confidential information "to prevent [a] crime"); *Clark v United States*, 289 US 1, 15 (1933) (noting the crime or fraud exception to the attorney-client privilege and explaining that "[a] client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law" and that "[h]e must let the truth be told").

[19] MRPC 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and shall render candid advice."); see also footnotes 17 and 18.

[20] See MRPC 1.2(a) ("A lawyer shall seek the lawful objectives of a client through reasonably available means permitted by law and these rules."); MRPC 1.2, comment ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."); MRPC 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); MRPC 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests . . . .").

when awarding fees.[21] In fact, the adopted rule expressly recognizes that attorneys can recoup a profit at the same time they provide direct financial aid through "pro bono" services.[22] In all, the more that lawyers are invested in the lifestyle and material state of their clients, the more the risk of a personal and nonprofessional attachment to those clients.

Specifically, when an attorney is tasked with providing basic food and shelter needs, clear-eyed objectivity on the needs and status of the case, including the client's prospects for success, may be undermined by personal attachment. This is the reverse side of monetary interests. When an attorney is involved not only in arguing the client's best case but also providing the client basic sustenance, charitable instincts and attachment in the form of deep personal empathy risk taking an outsized role. That is why so many ethics rules have been skeptical of personal interests affecting attorney representation, whether it be through representation implicating former clients, familial relations, sexual activity, or the attorney's "personal interests."[23] Furthermore, the client may choose to select an attorney, whether to pursue certain legal approaches to life problems, and whether to involve themselves or continue in a legal proceeding at all, on the basis of whether and to what extent the attorney provides them compensation for personal costs. Needless to say, selecting an attorney and a legal strategy on the basis of who provides the most extensive benefits, instead of who offers the best legal advice and the need for and/or value of legal proceedings in the first place, is not a superior, efficient, or desired system of justice.

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[21] *Woodman*, 511 Mich at 454 (concluding that trial courts have no discretion to consider whether attorneys holding themselves out to the public and client as working "pro bono" can collect full attorney fees through fee-shifting provisions, with no limitations on how those funds are used).

This extends to nonprofit corporations as well, who by definition can earn an income on individual transactions. See footnote 4.

[22] See adopted amendment 1.8(e)(3) ("Assistance may be provided under this subrule even if the indigent client's representation is eligible for a fee under a fee-shifting statute.").

[23] MRPC 1.7(b); MRPC 1.7, comment ("Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. . . . The critical questions [in determining whether representation is precluded under this rule] are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."); MRPC 1.8(c), (d), and (i); MRPC 1.8, comment (describing principles behind prohibition on certain media rights contracts and noting that ethics rules can apply to sexual relationships, considering the prohibitions on "representation that lacks competence or diligence" or is "shadowed by a conflict of interest"); MRPC 1.9(a).

Attorneys operate as private entities within an open system of consumer choice, but they are very different from insurance providers offering to bundle discount travel and hotels.

Almost certainly after this new amendment is adopted, the choice of what legal representation to select, even between traditional for-profit attorneys and "pro bono" institutions, will be colored by the array of personal financial benefits clients can receive. Nonprofit impact-litigation groups almost certainly will use Michigan's new rule to improve client recruitment and retainment, whether or not hiring those attorneys is the best choice for the individual client. And this result can be achieved passively or unknowingly on the part of the attorneys as the community and client pool builds greater information on the assistance lawyers can offer. The idea that limitations on advertisements directly to prospective clients will stop or keep restrained the public understanding of the direct financial benefits clients can receive through representation approaches wishful thinking. Nothing in the amended rules would prevent nonlawyers, clients, or even disinterested lawyers who do not provide the "pro bono" services from publicly discussing the financial assistance offered by other lawyers. Known policies of publicly facing firms are highly unlikely to remain a trade secret.[24] Just by the mere demands of prospective clients, smaller firms or other attorneys with low capitalization may experience greater difficulty affording entry into the pro bono "market," specifically for clients of interest to more well-financed firms.[25]

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[24] Notably, the new amendment seemingly prohibits advertisements only to the extent they seek to attract "prospective clients." The surrounding provisions are clearly directed toward limiting direct statements or promises to prospective clients, and the amendment appears to state that advertisements on the provision of aid cannot be made "to prospective clients." Neither the language nor comments of the rule appear to bar law firms, impact-litigation groups, or other attorneys from describing and reiterating to others the financial and life assistance provided to clients, whether for reputational benefits, fundraising, or other reasons. Further, while the new amendment may prevent advertisements or inducements directly targeted at prospective clients, attorneys certainly would not be in the position to lie or misrepresent facts to prospective clients who ask directly about financial assistance. See MRPC 4.1, 7.1, and 8.4(b) (stating the numerous rules prohibiting misleading or false statements). There remain serious questions as to how any limitation on "imply[ing] the availability of assistance" to prospective clients would be enforceable and effected in practice.

The vague and broadly worded requirement that funds be used to "facilitate . . . access to the justice system" poses even less of an obstacle to personal benefit expenditures, as discussed more fully below.

[25] To the extent an attorney declines to provide financial assistance when it is known that financial assistance is permissible and provided by other "pro bono" attorneys, that decision may provoke bitterness or distrust from the client, thereby undermining the

The potential consequences of this rule change are disconcerting, to say the least. What if, in providing personal benefits to the client, the client and attorney get into a dispute? What if lunch money or hotel money is used for purposes which the attorney does not approve? What happens when the attorney and client get into a disagreement as to how much money is provided and for what services? There are no set limitations or rules for how, when, and how much money should be spent, so long as they fit within the categories described (e.g., housing during a trial). A seemingly charitable arrangement can quickly turn into a contentious one. Placing attorneys in positions traditionally occupied by social service providers, churches, and other charities downplays the enormous difficulties such service providers address on a daily basis in performing their specialized work. Balancing the immeasurable moral choice between humanitarian interest in a fellow human being and combating abuse, neglect, and perverse incentives would try the resolve and independence of any person, let alone someone who operates within a duty-bound, licensed profession. An attorney who has to deal with financial squabbles with a client, in effect personal issues totally unrelated to the attorney's representation or the case, risks undermining the quality of services provided by that attorney. That is why our ethics rules are so exacting for *any* commercial transactions with clients.[26]

On the other side of the relationship, clients who are given basic and fundamental benefits, going to the heart of basic standards of life, may be left more reliant, both materially and mentally, upon their attorneys. The professional rules are designed to facilitate clients' exercise of their free and uninhibited choices on major decisions involving the law, notwithstanding their personal life and finances. The rules require upfront and consistent communication to allow clients to "participate intelligently in decisions concerning the objectives of the representation . . . ."[27] And the ethics rules are replete with provisions requiring attorneys to obtain the knowledgeable consent of the client before attorneys take actions that may affect the direction of legal representation. For instance, clients in their independent judgment must determine the "purposes of litigation," whether to accept a settlement, and whether to accept a plea deal.[28] The rules governing conflicts of interest are not designed for attorneys; the rules are designed to protect clients by ensuring they are given the best, clearest, and most accurate advice possible. That is why major conflicts are permitted only by the consent of the client, after

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attorney-client relationship. Such a decision may also lead the client to decline or terminate representation. That very issue was initially noted by the Legal Services Association of Michigan, which is discussed in more detail below.

[26] MRPC 1.8(a), (j).

[27] MRPC 1.4, comment.

[28] MRPC 1.2(a); MRPC 1.2, comment.

being properly informed of the choice.[29] When a client has received the roof over his head, the food in his stomach, and the clothes on his back from his attorney, there is a real concern that the client will feel a sense of debt to and dependence upon the attorney. That may very well impact clients' decisions on major matters, e.g., whether to settle or proceed to trial, if and when an attorney's advice runs against what the client may otherwise choose. To the extent this Court or others believe those populations should be relieved of financial stress, that may be best accomplished through measures designed to alleviate poverty in society; if this Court believes that there should be greater or more extensive litigation, that is best accomplished through changing the substantive law.

There is a reason why the instant prohibition is included within a rule on specific transactions that raise conflicts of interest. The same rule also establishes significant restrictions on business arrangements with clients (no matter how financially favorable those transactions are to the client),[30] receipt of gifts through legal instruments,[31] obtaining media rights,[32] and obtaining any proprietary interest in the subject matter of litigation.[33] Sexual relations with clients are mentioned in the comments section and are governed by general rules of conflicts of interest.[34] All these circumstances involve similar risks of moving attorneys away from being disinterested legal advisors and moving clients away from being careful guardians of their own interests and desires.[35]

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[29] MRPC 1.7(a), (b); MRPC 1.8(a); MRPC 1.9(a); see also MRPC, Terminology (" 'Consult' or 'consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.").

[30] MRPC 1.8(a).

[31] MRPC 1.8(c).

[32] MRPC 1.8(d).

[33] MRPC 1.8(j).

[34] MRPC 1.8, comment.

[35] That is the case even though the rules currently permit covering litigation costs for indigent parties. MRPC 1.8(e)(2). Those costs are administrative, are basic to the operation of litigation, are controlled entirely by the attorney, and in large part go unnoticed by the client. They are part and parcel of day-to-day operations of the litigation, which are decisively in the ethical realm of the attorney. That is a world of difference from basic elements of sustenance, such as food, shelter, and clothing. It should be of little surprise that advancing the direct costs of litigation has long been permitted under ethics rules, while supporting nonlegal life expenses is entirely novel. MRPC 1.8(e)(2); see also footnote 6.

Ultimately, the arrangement undermines the arm's-length professional relationship that has defined attorney-client associations. And this is not a new concern. Law and ethics have long recognized that financial interests undermine "the lawyer's undivided loyalty to the client . . . in an effort to protect the lawyer's personal financial investment in the outcome."[36] Such relationships also threaten to "interfere with settlement efforts," with clients either materially benefiting from continued litigation or being personally attached to the attorney's decision.[37] While those issues could theoretically arise in the context of business transactions, they have long been understood to be especially acute in the pursuit of lawsuits and judgments, and among those who may become financially dependent on the continued pursue of legal actions.[38]

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[36] State Bar of Michigan, Ethics Opinion RI-14 (1989); see also, e.g., Illinois Rules of Professional Conduct 1.8, comment 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."); 14 Am Jur 2d, Champerty and Maintenance, § 1 (explaining that illicit financial involvement in lawsuits threatened to "give nonparties impermissible interests in suits, impede settlement of underlying cases, and promote speculation in lawsuits").

[37] Ethics Opinion RI-14.

[38] See footnotes 6-10, 36-37, and 39. While ethical rules tightly regulate attorney agreements of a commercial nature with the client, attorney fees, provision of gifts, and conflicts of interest, if there was any indication or evidence demonstrating that business clients were at risk of dependency or inherent conflicts of interest as are clients involved in litigation, I would certainly consider amendment of the ethical rules to prohibit facially problematic transactions. See *ante* at 3 (noting the purported unfairness in allowing attorneys to make limited social and hospitality spending with certain business clients); MRPC 1.8(a), 1.8(c), 1.7, 1.7 comment (prohibiting conflicts that interfere with an attorney's ability to provide and for the client to consider "appropriate course[s] of action"), 1.5(a) (requiring reasonable fees), and 1.2 (describing the client's unfettered responsibility in determining the "objectives" of representation). Unlike the centuries of common practice in the field of litigation, no such evidence has been presented in the context of standard business contacts. That is likely due in no small part to the fact that attorney services are an inherent and necessary part of doing business, as opposed to the more selective and strategic choice to pursue litigation, and the fact that business transactions do not result in settlements or judgments, which are obtainable only through legal proceedings and can produce attorney-fee awards and contingency fees. In business contexts, clients primarily pay hourly attorney fees, and are accustomed to doing so; attorneys in business contexts generally are not compensated by devising claims,

Financial involvement in a client's personal well-being, whether for a short or extended period of time, has never been permitted. Every neighboring state has a blanket rule to guard against such involvement.[39] And this amendment to substantially loosen limits on attorney financial involvement in clients' personal lives has been advanced only in the very recent past. Very few jurisdictions have adopted comparable amendments (Alaska, Colorado, Connecticut, Massachusetts, Missouri, New York, New Jersey), and they have done so only very recently.[40] After this amendment, Michigan remains an

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continuing lawsuits, and obtaining monetary payment from the opposing party. Notably, the new amendment still focuses the rule on litigation clients. There are pronounced reasons for doing so.

[39] See Ohio Rules of Professional Conduct 1.8(e); Indiana Rules of Professional Conduct 1.8(e); Illinois Rules of Professional Conduct 1.8(e); Wisconsin Supreme Court Rule 20:1.8(e).

[40] See Alaska Rules of Professional Conduct 1.8(e)(3); Colorado Rules of Professional Conduct 1.8(e)(3); Connecticut Rules of Professional Conduct 1.8(e)(3); Massachusetts Rules of Professional Conduct 1.8(e)(3); Missouri Supreme Court Rule 004, Rules of Professional Conduct 4-1.8(e)(3); New Jersey Rules of Professional Conduct 1.8(e)(3); New York Rules of Professional Conduct 1.8(e)(3). All named jurisdictions have adopted this amendment only after 2020, with New Jersey being the exception, having adopted its amendment in 2015. New Jersey Rules of Professional Conduct 1.8(e) (historical notes). Several jurisdictions, located primarily in the lower south, have rules with longer vintage that permit direct financial assistance. However, those rules are expressly tailored to extraordinary and highly unusual circumstances, and ultimately, financial liability is retained by the client. Alabama Rules of Professional Conduct 1.8(e), comment (permitting "the lawyer either to advance a loan to the client or to guarantee the repayment of a loan by a third party to the client," recognizing the serious and inherent conflicts of interests, and stating that it is permissible only in the "narrowest and most compelling of circumstances"); Louisiana Rules of Professional Conduct 1.8(e)(4) and (5) (allowing certain financial assistance to the client in "necessitous circumstances" but setting forth several restrictions on such assistance and providing detailed financial terms and interest rates for the personal loans permitted by the rule); see also Ciolino, Louisiana Legal Ethics, *Rule 1.8. Conflict of Interest: Current Clients—Specific Rules* <https://lalegalethics.org/louisiana-rules-of-professional-conduct/article-1-client-lawyer-relationship/rule-1-8-conflict-of-interest-current-clients-specific-rules/> (accessed November 17, 2023) [https://perma.cc/BWK2-48GL] (describing the current Rule 1.8 as allowing financial assistance "only under tightly-regulated circumstances" and explaining that the legal community in the state had a past practice of advancing loans to clients despite the fact that it arguably violated the previous version of Rule 1.8, which "flatly prohibited lawyers from advancing living expenses to clients"); Mississippi Rules of Professional Conduct 1.8(e)(2) (permitting attorney advances, explaining that such loans can be issued

outlier, not only among our Midwest sister states but in the country at large. In essence, this is a novel amendment of foundational ethical principles, taken on without substantial experience or long-term understanding of its impact on the practice of law. Such actions should be taken with caution and restraint, yet today's amendment is a far cry from broad-based and consensus decision-making.

It should not be a surprise that the Legal Services Association of Michigan, which represents legal aid programs throughout the state, initially filed a paper opposing the first proposal underlying this amendment in May 2021. The initial proposal was substantially similar, although different in some respects, to the amendment adopted today. Legal Services noted in 2021, rationally, that allowing nonprofit attorneys to pay personal expenses for clients would put untoward pressure on (often strained) attorneys to provide financial assistance, even if they do not wish to. Whether for moral, personal, or legal reasons, attorneys working for a nonprofit would feel pressured to provide the assistance, lest as a result the client declines representation; develops bitter feelings or animus, which could threaten the effectiveness of the attorney-client relationship; or falls into concerning economic circumstances with which any person would naturally sympathize. In addition, the proposal would undermine the proper boundaries attorneys as legal professionals have with their clients.[41] After the instant rule was published for public comment, however, Legal Services changed its position and apparently is now in complete agreement that the rule should be changed, using the broadest language possible. Legal Services provided no explanation for this change in direction. The concurring statement provides a somewhat convoluted history of this amendment which may imply to some readers that the initial proposal was amended, in an homage to pragmatism, as a result of the proposal's initial "breadth," that opposing positions and concerns were acknowledged in a final compromise, and that Legal Services' change in position was not especially marked.[42] To dispel any potential confusion, the rule adopted today is almost identical to the initial proposal, about

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only under "dire and necessitous circumstances," capping total amount of potential loans, and requiring immediate reporting of any personal loan to the state bar for review); Texas Disciplinary Rules of Professional Conduct 1.08(d) (allowing attorneys to issue loans in similar circumstances). By contrast, the instant amendment condones direct financial support, at the expense of the attorney or firm, so long as it supports "access to justice."

[41] Legal Services of course supports other social safety nets, and in fact, has a policy to refer potential clients to those established resources.

[42] See *ante* at 3 (noting the "broadly allowed" payments authorized in the initial proposal, Legal Services' opposition to the "breadth" of the initial proposal, the Court's interest in adopting a "more nuanced, limited proposal," the several alterations to the proposal, and the eventual adoption of the final amendment, which was drafted to "accommodate and balance stakeholder desires with ethical concerns").

which Legal Services expressed serious reservations prior to this Court's request for public comments.[43]

Legal Services' initial position is exactly what the analysis should be here. The Court should not outsource social services programs to attorneys, who may not be able to afford that investment, may become increasingly dependent on the outcome of the litigation, or may become personally attached to the client and the client's lifestyle to the extent it negatively affects proper judgment. Clients themselves may seek out and demand attorney services, not considering the best representation or the need for representation for any given issue, but to the extent direct financial support is provided for the client's personal life. Once the client's personal finances and the existence of litigation or

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[43] This is the initial State Bar proposal in full, which Legal Services fiercely opposed:

> (3) a lawyer representing an indigent client may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses provided that the lawyer represents the indigent client pro bono, pro bono through a nonprofit legal services or public interest organization, or pro bono through a law school clinical or pro bono program. The legal services must be delivered at no fee to the indigent client and 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 financial gifts to prospective clients.
>
> Financial assistance provided under (3) may be provided even if the indigent client's representation is eligible for a fee under a fee-shifting statute.

Other than removing the requirement that "gifts" be "modest" and the permission to spend the gifts on "medicine," there is little to no material difference between this proposal and the proposal eventually adopted by this Court. Further, as discussed further below, Legal Services in its subsequent letter to this Court argued for the *removal* of certain limitations on client expenses, such as restrictions on expenditures to costs directly associated with court proceedings and limits on the use of public funds raised for the provision of legal services. This made the rule substantially more in line with the initial proposal offered by the State Bar. Legal Services offered no explanation for this 180-degree turn.

representation are intermixed, the client may struggle to make objective decisions based on what is in their best interests, notwithstanding the position of their attorney or the material aid provided. To the extent there is a need for greater food, clothing, or housing for individuals with low income, that should be provided by general funds or charities that are not attached or dependent on a specific lawsuit or a specific legal representation.

A final note on the language adopted, as compared to the language proposed in the public comment period. Initially, the proposal included many notable basic backstops and protections. The proposal tied the financial assistance to needs directly and proximately associated with litigation or the costs of representation: travel *to or from court proceedings*, meals *during court proceedings*, and clothing *for court proceedings*.[44] Further, the proposal limited the amount of funds that could be drawn from already stressed and financially burdened legal aid providers. This would have addressed the serious issues raised by Michigan's legal aid providers prior to public comments, and it would have ensured that public funding intended to provide legal services would not be taken up instead by personal and life expenses, which are covered by a panoply of social service programs not conditioned on an attorney-client relationship. While large firms, nonprofits, or impact-litigation organizations could perhaps better afford reimbursement of a client's life expenditures, it is abundantly reasonable to not place similar pressures and demands on the state's legal aid system and other funds raised specifically to provide legal representation.[45] The argument presented in the concurrence that there would be greater

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[44] Legal Services, in its new position, argued that such limitations would be difficult to understand and apply. "[T]ransportation to and from court proceedings," "meals during long court proceedings," and "clothing for court appearances" are not ambiguous terms, with the possible exception of the term "long" in reference to court proceedings. And such express limitations are no less uncertain than many basic ethics rules, such as those requiring "reasonable diligence," a "reasonable fee," and withdrawal for personal conflicts, to name three prominent examples. MRPC 1.3, 1.5, and 1.7. Further, such limitations are certainly less amorphous and uncertain than the freewheeling standard actually adopted, which permits payment for meals, transportation, and clothing so long as they "facilitate . . . access to the justice system . . . ."

[45] While much of the concern is utilizing limited resources expressly directed for legal representation, such limits also provide important guardrails on how charitable funds are used. Funds were appropriated from the public fisc and through donations for a specific purpose: providing legal representation to the poor. Expanding those purposes to personal welfare and financial assistance can present a materially different charitable project, which implicates significant differences in values on means and ends as compared to basic legal representation. Many individuals who may support legal representation may have a different view if they knew such funds would be used to provide financial assistance for other life expenditures, without predefined conditions or systems of oversight. The

"utility" in allowing funds specifically raised for legal representation to be diverted to personal life expenses, due in large part to the number of indigent individuals in society, amounts to a policy argument about the need for greater social services.[46] In addition, the individual workers in such legal aid institutions would of course have the ability to decline similar assistance out of their incomes pursuant to the express and rule-bound policy of their organizing institutions, if for no other reason than that their salaries are paid solely for providing legal representation. New York's version of the amendment contained a similar safeguard to the initial proposal here.[47] Finally, the initial proposal stated what should be a basic and fundamental principle of any personal financial aid: it cannot be given if it makes the client "financially beholden to the provider of the assistance." The New York version also contains this foundational limitation.[48]

Notwithstanding these concerns, the version adopted by this Court today removes all of these limits contained in the initial proposal. The permitted expenses are no longer limited or tied to direct costs of legal representation or court appearances. In fact, no qualification on the source or basis for the expenses is provided at all. So long as the expenses fall within the categories of need, for instance, of transportation, meals, or clothing, the expenses are permitted. Housing is especially problematic because it is permitted so long as it "less costly" than "providing transportation for multiple days." No definition of "cost" is provided, and it could include housing or facilities already paid for or expensed notwithstanding the litigation, such as the properties owned by an attorney or a public-facing charity. Given that there is no limitation to the use of the expenditures for court proceedings, it is possible that housing of indigent clients could continue for a notable period of time, so long as it "facilitate[s] . . . access to the justice system." Added all together, these categories of expenses can be personally and financially significant for attorneys, especially when they are multiplied by several clients whom an attorney may

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amendment could very well create divergence from the original intent of the donors who supplied the funds.

[46] *Ante* at 3-4; see also footnote 5 (listing the panoply of social services and private charity funds that have been established over decades to serve low-income individuals). Of course, such an argument would be appropriate when petitioning the Legislature or developing fundraising campaigns for charities, but not for materially altering well-established ethical rules for attorneys.

[47] See New York Rules of Professional Conduct 1.8(e)(4) ("Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered useable for providing financial assistance to indigent clients[.]").

[48] *Id*.

represent. From an indigent client's perspective, the value of such services can be even more compelling.

The adopted rule also removes the basic protection given to the legal aid system and other funds raised for legal services, as opposed to personal expenditures for low-income individuals. And most strikingly, the adopted version removes the express limitation on such aid creating dependency. There is no reasonable justification for eliminating express and clear limitations on financial assistance creating unacceptable conflicts of interest, and no such explanation is included in the adopted comments. It imposes no additional burden on the readability, coherence, or public accessibility of the ethics rules to state what should be a fundamental principle: assistance cannot cause the client to become "financially beholden to the provider of the assistance." If the rule actually permitted only sporadic and very small payments, as statements included in the concurrence may imply, the rule could have included caps on aggregate expenditures, duration, or occurrences.[49] It could have also expressly clarified that the expenditures cannot create financial dependency. The rule includes no such language, while also eliminating traditional ethical restrictions on attorney involvement in clients' personal lives.

Now, so long as the expenditures are given to facilitate the "access to the justice system," "pro bono" expenses under the rule are permitted. Of course, the rule provides no definition of the phrase "facilitate . . . access to the justice system." And the phrase on its face is vague, generalized, and potentially applicable to a wide array of life expenditures. If an attorney believes paying for the client's transportation to work would alleviate financial stress and facilitate continued litigation, would that be permissible under the rules? Given the language chosen by this Court, that is quite possible. The definition offered by the concurrence for "facilitat[ing] . . . access to the justice system"—"[enhancing the] client's participation" in the representation—offers little comfort that the language will be construed narrowly.[50] In attempting to alleviate immediate and direct burdens from litigation, this Court may instead condone massive expansions of attorney involvement in the personal and financial lives of clients. The term "attorney" may receive a new meaning for many indigent clients.

In all, I would not undertake a material deregulation of Michigan's legal ethics rules, made in conflict with decades if not centuries of practice, undertaken by a distinct minority of jurisdictions, and completed without full understanding of the amendment's long-term effects. For the foregoing reasons, I dissent.

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[49] See *ante* at 5 (providing the example of an attorney paying for transportation and a meal for a client during a "long meeting[]" as the example of permitted expenditures).

[50] *Ante* at 3.

VIVIANO, J., joins the statement of ZAHRA, J.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 10, 2024

Clerk