

EMERGENCY FINANCIAL ASSISTANCE TO INDIGENT CLIENTS NOW PERMITTED IN PRO BONO REPRESENTATIONS

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THE SUPREME COURT OF MISSOURI ENTERED AN ORDER ON NOV. 23, 2021, EFFECTIVE THAT SAME DAY, CHANGING THE OVERALL PROHIBITION ON FINANCIAL ASSISTANCE TO CLIENTS PURSUANT TO MISSOURI RULE OF PROFESSIONAL CONDUCT 4-1.8(E).

The order provided a limited exception permitting a lawyer to offer emergency financial assistance to an indigent client who is being represented pro bono as provided in the new Rule 4-1.8(e)(3).² In addition to amending the blackletter rule, the order added three new comments providing guidance regarding this change and renumbered the remaining comments.

Parameters of new emergency financial assistance exception

To better understand the parameters of this new exception, below is the text of Rule 4-1.8(e), which now states in relevant part:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: ...

(3) a lawyer representing an indigent client pro bono may provide emergency financial assistance to the client, whether monetary or in-kind, for food, housing, transportation, medicine, and other basic necessities. The lawyer:

(i) may not promise, assure, or imply the availability

of such emergency financial assistance 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 emergency financial assistance to prospective clients.

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



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There are a few points to consider regarding this new provision of Rule 4-1.8(e). First, it is important that representation must be pro bono before a lawyer may provide emergency financial assistance. Second, lawyers should know that this assistance is permissive, “may provide,” and not required. Third, Comment [11] to Rule 4-1.8(e) provides guidance as to who may provide such assistance, including “[a] lawyer representing an indigent client pro bono or through nonprofit legal services, public interest organizations, law school clinical programs, or other pro bono programs.” Fourth, “emergency financial assistance” can be monetary or in-kind, and it is only appropriate in limited circumstances. Comment [11] to Rule 4-1.8(e) provides that “[s]uch assistance is limited to food, housing, transportation, medicine, and other basic necessities of life.” Finally, the lawyer has a duty to communicate and consult with the client if the emergency financial assistance may have consequences for the client, including issues regarding tax liability, receipt of social services, or government benefits.³

Further, Rule 4-1.8(e)(3)(i) – (iii) places limits on a lawyer who is willing to provide emergency financial assistance to

an indigent pro bono client. The lawyer is prohibited from promising, assuring, or implying such assistance is available if the lawyer is retained or as an inducement to continue a representation.⁴ The lawyer may not seek or accept reimbursement from the client, anyone affiliated with the client, or a relative of the client.⁵ Also, the lawyer is prohibited from publicizing or advertising a willingness to provide emergency financial assistance to prospective clients.⁶

Additionally, Comment [12] to Rule 4-1.8 notes that this emergency financial assistance is a narrow exception and only appropriate “in specific circumstances where it is unlikely to create conflicts of interest or invite abuse.” Guidance is provided that “[e]mergency financial assistance is reasonable if the financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle.”⁷

Finally, Rule 4-1.8(e)(3) expressly permits emergency financial assistance “even if the representation is eligible for fees under a fee-shifting statute.” However, Comment [13] to Rule 4-1.8 clarifies that a lawyer is not permitted “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.”

Existing prohibition on financial assistance to clients otherwise unchanged


Rule 4-1.8(e) continues to require that:

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, including medical evaluation of a client, 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.

Comment [10] to Rule 4-1.8(e) remains unchanged, and it provides guidance that lawyers are still prohibited from making or guaranteeing loans to clients for living expenses and may not subsidize lawsuits or administrative proceedings for clients “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.” However, Comment [10] goes on to note that the same “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.” Finally, Comment [10] explains that the exception to pay court costs and litigation expenses for indigent clients, regardless of whether such funds are repaid, is appropriate for the same reason of ensuring access to the courts.

If you have questions about the Rules of Professional Conduct regarding emergency financial assistance to indigent clients being represented pro bono, or any other ethics issue, you are encouraged to contact the Office of Legal Ethics Counsel at Mo-Legal-Ethics.org to seek an informal advisory opinion about your prospective conduct under the Rules of Professional Conduct. 

Endnotes

1 Melinda J. Bentley is legal ethics counsel for the Advisory Committee of the Supreme Court of Missouri.

2 Order dated Nov. 23, 2021, effective Nov. 23, 2021, In re: Repeal of subdivision (e) and paragraphs [11] through [20] of the Comment of subdivision 4-1.8, entitled “Conflict of Interest: Prohibited Transactions,” of Rule 4, entitled “Rules of Professional Conduct,” and in lieu thereof adoption of a new subdivision (e) and new paragraphs [11] through [23] of the Comment of subdivision 4-1.8, entitled “Conflict of Interest: Prohibited Transactions,” at <https://www.courts.mo.gov/page.jsp?id=182255>.

3 Rule 4-1.8, Comment [11].


4 Rule 4-1.8(e)(3)(i).

5 Rule 4-1.8(e)(3)(ii).

6 Rule 4-1.8(e)(3)(iii).

7 Rule 4-1.8, Comment [12].

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