8. Amend Oregon RPC 1.2(d) expand representation in instances where conduct is legal in Oregon, but in conflict with other jurisdictions
(Board of Governors Resolution No. 2)

Whereas, the Legal Ethics Committee and the Board of Governors formulated the following amendment to the Oregon Rules of Professional Conduct 1.2(d);

Whereas, the House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, that the amendment of Oregon Rules of Professional Conduct 1.2(d) as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

**RULE 1.2 SCOPE OF REPRESENTATION**

* * *

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any
proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon marijuana-related laws in a proposed course of conduct that the lawyer reasonably believes is permitted under Oregon law. In the event Oregon law conflicts with federal law or tribal law the law of another jurisdiction, the lawyer may also advise the client regarding related federal and tribal law and policy such conflict and the potential legal consequences.

Background

RPC 1.2(c) prevents a lawyer from consulting clients to engage in or assist a client in conduct that the lawyer knows is illegal or fraudulent. It reads:

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

In 2014, the LEC recommended an exception to the RPCs be adopted to allow attorneys to advise clients regarding the then pending legalization of marijuana within Oregon. The exception adopted by the HOD, RPC 1.4(d), states:

(d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

On June 13, 2022, the OSB Cannabis and Psychedelics Executive Committee requested the LEC review RPC 1.2(d) considering the changes to the law in relation to psilocybin. Specifically, the Oregon Psilocybin Services Act (OPSA) allows the Oregon Health Authority to establish a framework for the manufacture and administration of psilocybin. Psilocybin, like marijuana, is still a Schedule I substance in the federal Controlled Substances Act.

The LEC reviewed the request from the Cannabis and Psychedelics Executive Committee and noted that a broader exception may be necessary to prevent the LEC from revisiting the issue each time there is a conflict between federal and state law. Additionally, there is a new concern about conflicting state laws between states. Recent events have created long-arm statutes that criminalize advising and assisting clients with reproductive rights and gender-affirming care that is legal within Oregon, but illegal in other jurisdictions. These amendments to 1.2(d) provide confidence to attorneys that advising clients about proposed conduct that is legal in Oregon will not be considered unethical behavior.

The LEC recommends that RPC 1.2(d) also adjust the language to include conduct the “lawyer reasonably believes is permitted under Oregon law.” The LEC decided to adopt a “reasonably believes” standard in order to allow the attorney to counsel the client based on the reasonable interpretation of the law at the juncture that the client is requesting advice. The option of “expressly permitted” was raised, but the concern was that a potential change in the judicial interpretation of a law could cause a violation of the Rule. A “reasonably believes” standard allows lawyers to provide legal advice based on the reasonable
interpretation of the law at the present time without fear that a future judicial decision may subject them to a future ethical violation of the RPCs.

The LEC also recommends changing “shall” to “may.” The LEC noted that the marijuana industry has matured, and business providers may seek advice from attorneys specializing in certain areas of the law not linked to criminal law or the Controlled Substances Act. Additionally, attorneys may not be adequately competent to discuss the conflict between the laws of other jurisdictions or the potential legal consequences.

The LEC recommended the following amendments to create a broader exception to provide attorneys with the ability to provide clients with competent legal assistance in the climate of conflicting laws.

Financial Impact

None stated.

Presenter:
Ankur Doshi, OSB General Counsel

9. Amend Oregon RPC 1.8(e) to allow attorneys representing indigent clients pro bono to gift modest living expenses to them
   (BOG Resolution No. 3)

Whereas, the Legal Ethics Committee and the Board of Governors formulated the following amendment to the Oregon Rules of Professional Conduct 1.8(e);

Whereas, the House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, that the amendment of Oregon Rules of Professional Conduct 1.8(e) as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

   (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.

       (3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a court appointment, or 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.

Background

This amendment is a modification to the 2022 House of Delegates Resolution #2 to Amend RPC 1.8. In 2022, the Oregon State Bar Board of Governors recommended the submission of ABA Model Rule 1.8(e)(3) to the House of Delegates for approval. The House of Delegates raised a number of questions about the proposal and submitted the proposal back to the Legal Ethics Committee. The Legal Ethics Committee submitted this modified language, which has been recommended by the Board of Governors for passage.

Currently, Oregon RPC 1.8(e)(1) and (2) strictly limit financial assistance to clients in connection with a pending or contemplated litigation with two exceptions. First, the lawyer may advance court costs and litigation expenses, the repayment of which may be contingent on the outcome of the matter. Second, for indigent clients, the lawyer may pay the court costs and expenses of litigation. Under the current RPC 1.8(e), attorneys may not give money or things of value to clients in litigation who need help with the basic necessities of life.

The ABA adopted a third subsection to ABA Model Rule 1.8(e) that provided an additional exception to providing financial assistance. ABA Model Rule 1.8(e)(3) reads:

(e) 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, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and 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.

The ABA noted that this new rule was a narrow exception to ABA Model Rule 1.8(e) that provided increased access to justice to many vulnerable clients. The ABA further noted it was a humanitarian rule, allowing attorneys to help indigent clients with basic needs without running afoul of their ethical obligations.
In many instances, the provision of modest gifts can allow an indigent client to continue with their proceedings by providing food security or shelter security, or even simply having access to the courthouse by providing fare for transportation.

At the 2022 House of Delegates meeting, several questions were raised by the proposal, which the Legal Ethics Committee has examined. The LEC modified the language of the amendment to capture some of those concerns.

First, the LEC removed additional references to “pro-bono.” The removal of the additional language was specifically to avoid confusion as to the definition of pro-bono. During debate at the 2022 House of Delegates, there was confusion as to whether pro-bono meant that the client was not charged for services, or if the attorney did not receive payment for services. The latter interpretation led to concerns that the rule may not apply to legal aid programs which provide attorneys with a salary, but do not charge their clients. The LEC noted that Washington had the same concern and removed additional references to pro-bono to clarify that non-profit legal service and public interest organizations are covered under this Rule.

Second, the LEC added “through a court appointment” to address concerns about the application of this rule in indigent defense. There was substantial concern raised at the 2022 House of Delegates meeting about the application of this Rule to indigent defense providers. The LEC opted to use the word court appointment to cover consortia that may only provide indigent defense as part of their practice and other areas of indigent defense, such as juvenile proceedings.

The LEC reviewed additional questions raised by the 2020 House of Delegates. They researched the issues as noted below:

1. The 2022 HOD raised questions about the liability of an attorney for providing gifts that may be used for substance abuse, and whether such liability would be covered by PLF coverage.

   The LEC noted that the PLF responded that it is unlikely that an attorney would be found liable in a claim for relief related to a gift under 1.8(e)(3). PLF coverage always depends on the facts and circumstances of any given claim. However, it does not appear that this rule would generate a malpractice issue. The PLF also noted that education could be provided about possible risks and best practices. Additionally, this change to RPC 1.8(e)(3) does not obligate attorneys to provide financial assistance or other gifts to clients, and attorneys who had concerns about potential liability could choose not to give such assistance to clients.

   The LEC opted to keep the current language based on this response.

2. The 2022 HOD also raised questions about whether the lack of a definition of modest would be a concern, and proposed language to provide limits to the value and the type of gifts (cash versus non-cash) that could be provided.

   The LEC debated this issue and noted several concerns about adopting such language. The primary concern focused on the purpose of this rule, and that was to allow attorneys to provide a humanitarian response to many of the clients they provided services to without charge. The original amendment was proposed by the ABA Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Legal Aid and Indigent
Defendants to increase access to justice by allowing attorneys to provide some aid to their most vulnerable clients.

The original proposal noted that the ABA declined to define modest, or to create specific amounts. Part of the reason to decline to create a cap or define “modest” was to account for different costs of living within different jurisdictions. The LEC also noted that restrictions on the type of gift or the value of the gift, or reporting requirements would deter attorneys from utilizing the exception and render the exception ineffective. The ABA also noted that, in pro bono cases where this limited exception would apply, the potential for harm to the client by receipt of a gift, was remote.

The LEC opted to keep the current language based on this review.

The LEC reviewed this matter and discussed the importance of this amendment. It found that the proposed amendment is narrow enough to avoid many of the concerns related to attorneys providing financial assistance to clients in litigation. The narrowness of the rule avoids any potential for champerty and maintenance to occur under this exception. A review of past disciplinary matters under 1.8(e) was conducted as well, and it was noted that the limited violations that occurred were in the context of attorneys providing assistance to fee-paying clients, and not in a pro-bono context.

Financial Impact

None stated.

Presenter:
Ankur Doshi, OSB General Counsel

10. Amend Oregon RPC 8.4(a)(7)
(BOG Resolution No. 4)

Whereas, the Legal Ethics Committee and the Board of Governors formulated the following amendment to the Oregon Rules of Professional Conduct 8.4(a)(7);

Whereas, the House of Delegates must approve any changes in the rules of professional conduct before they are presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, that the amendment of Oregon Rules of Professional Conduct 8.4(a)(7) as set forth below is approved and shall be submitted to the Oregon Supreme Court for adoption:

RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

* * *

(7) in the course of representing a client in the practice of law, knowingly intimidate or harass a person because of that person’s race, color, national origin, ethnicity, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.
(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.

**Background**

Oregon RPC 8.4(a)(7) was passed in 2015 prior to the ABA adopting a similar rule within the Model Rules of Professional Conduct. The ABA’s analogue to RPC 8.4(a)(7), Model Rule of Professional Conduct (ABA MR) 8.4(g), was passed in 2016. In February 2022, the Board of Governors requested the Legal Ethics Committee (LEC) review RPC 8.4(a)(7) and recommend whether the rule should be amended to more closely conform to ABA MR 8.4(g).

ABA MR 8.4(g) reads as follows:

It is professional misconduct for a lawyer to:

* * *

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The LEC formed a subcommittee that met over 2022 to review Oregon RPC 8.4(a)(7) and ABA MR 8.4(g). Upon the presentation of the findings of the subcommittee to the LEC, the LEC recommended two changes to RPC 8.4(a)(7).

First, the LEC recommended changing the phrase “in the course of representing a client” to “in the practice of law.” This phrase was felt to be broader and encompasses actions taken by lawyers in their role practicing law, which may not necessarily occur while representing a client. At the same time, it strikes a reasonable balance between the free speech rights of the attorney under the Oregon Constitution and the professional responsibilities of the attorney as an officer of the court. Conduct that would be considered inappropriate behavior while practicing law would be subject to discipline under this new provision. Oregon RPC 8.4(c) still contains an exception specifically for attorneys providing legitimate advocacy.

The LEC also noted that “ethnicity” was omitted from Oregon RPC 8.4(a)(7). The LEC recommended the addition of “ethnicity.”

**Financial Impact**

None stated.

**Presenter:**

Ankur Doshi, OSB General Counsel