STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

ORDER ESTABLISHING PUBLIC COMMENT PERIOD ON PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

The Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility filed a joint petition proposing amendments to Rules 1.8 and 3.8 of the Minnesota Rules of Professional Conduct. The petition states that the proposed amendments would conform Minnesota's rules to the American Bar Association's Model Rules. The petition with the proposed amendments was filed on the public access site for the Minnesota Appellate Courts, under case number ADM10-8042. *See* Joint Petition of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility for Amendments to the Minnesota Rules of Professional Conduct, No. ADM10-8042 (filed Jan. 22, 2025). A copy of the petition is also attached to this order.

The court will consider the proposed amendments to the Minnesota Rules of Professional Conduct after providing a period for public comment and reviewing any comments received on the proposed amendments.

IT IS HEREBY ORDERED that any person or organization wishing to provide written comments in support of or in opposition to the amendments proposed to the Minnesota Rules of Professional Conduct must file those comments with the Clerk of the Appellate Courts consistent with the filing requirements of Minn. R. Civ. App. P. 125.01(a). All comments must be filed in case number ADM10-8005, and so as to be received by the Clerk's office no later than June 23, 2025.

Dated: April 23, 2025

BY THE COURT:

Natalie E. Hudson
Chief Justice

ADM10-8042

STATE OF MINNESOTA

IN SUPREME COURT

FILED

January 22, 2025

OFFICE OF APPELLATE COURTS

Joint Petition of the Lawyers Professional Responsibility Board and the Office of Lawyers Professional Responsibility for amendments to the Minnesota Rules of Professional Conduct

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The Lawyers Professional Responsibility Board ("the Board") and the Director of the Office of Lawyers Professional Responsibility ("the Director") respectfully petition the Minnesota Supreme Court to amend the Minnesota Rules of Professional Conduct. The Court should amend Rule 1.8 (Addendum A), concerning financial assistance from lawyer to client, and Rule 3.8 (Addendum B), concerning the special responsibilities of a prosecutor. Almost all of these amendments would substantially conform Minnesota's rules to the American Bar Association's Model Rules in these areas.

The Board and the Director make this petition after the Board received requests from lawyers who are familiar with the rules at issue, their application in practice, and the salutary effects of amending them. The Board studied these requests for one year, debated and considered the pros and cons of all options, and solicited and received feedback from other potentially interested groups, including the Director. The Board and the Director make these recommendations because they believe adopting them will make the

practice of law in Minnesota more empathetic, more transparent, and more just.

I. The Court should amend Rule 1.8 to allow lawyers in pro bono and nonprofit organizations to provide modest gifts to clients.

As it currently stands, Rule 1.8 does not allow a lawyer to "provide financial assistance to a client in connecting with pending or contemplated litigation" except under extremely limited circumstances. The ABA Model Rules contain an exception to that rule that Minnesota currently does not have: the Model Rule allows lawyers representing an indigent client *pro bono*, including via a nonprofit legal-service organization or other agency, to provide clients with "modest gifts" for "food, rent, transportation, medicine, and other basic living expenses." "Gifts" authorized under the Model Rule include, for example, bus fare to attend court, child-care costs during attorney-client meetings or court appearances, food and modest living expenses, and other basic necessities of life.

The Board has heard from at least one agency – Hennepin County Adult Representation Services – that the lack of the Model Rule exception in Minnesota's Rule 1.8 have prevented lawyers from helping indigent clients in these basic, humanitarian ways. (Addendum C). This situation, to the Board and the Director, is untenable. Rule 1.8's anti-gifting rule is designed to prevent lawyers from essentially bribing clients in exchange for hiring the

lawyer. It also prevents unscrupulous lawyers from exploiting clients by plying them with gifts, potentially causing the client to hire a lawyer she might not otherwise have hired or taken legal action that might not be in her best interest. The rule also prevents lawyers from having a financial interest in the representation.

None of this applies to lawyers representing indigent clients *pro bono*. There is no financial or other incentive for those lawyers to give clients modest gifts to help those clients meet basic life needs. The Board and the Director do not see any other potential downside to allowing lawyers in situations like this to help their indigent clients via modest gifts.

The ABA Model Rule contains one provision that the Board and the Director do not recommend: the Model Rule provides that a lawyer "may not publicize or advertise a willingness to provide such gifts to prospective clients." The Board and the Director have serious concerns about the First Amendment implications of that kind of restriction on speech. *See generally Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). It could be that courts would consider the Model Rule's restriction to be constitutionally reasonable; it could be that courts would decide the opposite. Litigation over what the provision would not be in the public interest. The Board and the Director also believe that the advertising restriction is not necessary to prevent misuse of the rule.

II. The Court should amend Rule 3.8 to clarify prosecutors' ethical obligations regarding exculpatory evidence.

The Great Northern Innocence Project requested that the Board recommend that the Court amend Rule 3.8, concerning the special responsibilities of a prosecutor, to adopt the ABA Model Rules and clarify prosecutors' ethical obligations surrounding disclosure of exculpatory evidence. (Addendum D). The GNIP was specifically concerned with scenarios where there is "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense." Under the Model Rule, in such cases the prosecutor must promptly disclose the evidence to the appropriate court. If the conviction was obtained in that prosecutor's jurisdiction, the prosecutor must also disclose the evidence to the defendant unless a court authorizes a delay and must undertake or cause further investigation into the validity of the conviction.

The GNIP also thought our rules should address scenarios where there is "clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit." Under the Model Rule, in such cases the prosecutor must "seek to remedy the conviction." The GNIP noted that 24 states had adopted some form of the former rule while 19 states had adopted some form of the latter rule. Finally, the GNIP advised that, in its experience, "prosecutors in Minnesota

lack clarity concerning their ethical obligations when they become aware of exculpatory evidence concerning a prior conviction."

The Board thought the GNIP's suggestions had merit and set forth to investigate what if any recommendations might be in order. To do this, the Board formed a working group of members with particular interest or experience in these issues. The group included, among others, a criminal defense attorney, a city attorney, non-lawyer public members, and, for the final part of the group's work, an elected county attorney.

The working group solicited feedback on potential amendments from numerous stakeholders, including the Minnesota County Attorney's Association, the State Public Defender, the Office of Lawyers Professional Responsibility, the Minnesota State Bar Association, the GNIP itself, and others. The group heard back from most of these organization and conducted meetings and listening sessions with interested participants.

The group learned that the GNIP's concern about prosecutors' lack of clarity on their ethical obligations concerning exculpatory evidence had merit. The working group reported its understanding that county attorney's offices' practices with regard to such information varied, meaning that criminal defendants in different parts of the state received different information at different times. The working group also reported its belief that the proposed amendments were consistent with prosecutors' roles as ministers of justice

whose duties are to see justice done, not simply convictions entered. Finally, the working group determined that, in part to help standardize prosecutors' views of their day-to-day obligation to disclose evidence, an amendment to a rule not specifically cited by the GNIP – Rule 3.8(d) – was warranted and wise.

The Board discussed and debated the working group's recommendations at two public meetings and heard views on all sides of the issues. Ultimately, the Board agreed to recommend that the Court adopt the ABA Model Rules, with slight modifications, and amend Rule 3.8(d). The Directors joins in those recommendations.

The proposed rules 3.8(g) and (h) both relate to prosecutors' obligations upon learning of "new, credible, and material evidence" that a person convicted of a crime did not, in fact, commit that crime. Under proposed Rule 3.8(g), a prosecutor is obligated to disclose that evidence to the defendant and, in some circumstances, must take steps to cause further investigation of the matter. Under proposed rule 3.8(h), if the prosecutor learns of "clear and convincing"[1] evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of a crime the defendant did not commit, then the prosecutor's obligation is somewhat more specific: the prosecutor must seek to remedy the conviction.

[1] "Clear and convincing" evidence of a fact is evidence that makes the fact "highly probable." *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978).

The recommendations differ from the Model Rules in a couple of instances. Model Rule 3.8(g)(2)(ii) requires that, if a prosecutor learns of new, credible, and material evidence of innocence, then "the prosecutor shall…undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit." The Board and the Director think requiring the prosecutor to personally undertake an investigation (which is what the Model Rule could be read to require) was not reflective of the separate roles of the participants in the criminal-court system. Accordingly, the Board and the Director recommend that the rule require the prosecutor to "make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit."

The Board also sought to make more specific the prosecutor's affirmative obligations to cause an investigation of or remedy a potentially wrongful conviction. The Model Rules state that a prosecutor must seek to do these things regarding potentially wrongful convictions "in the prosecutor's jurisdiction." The Board was concerned about the ambiguity of that phrase. Prosecutors, like all lawyers, sometimes change jobs. The Model Rules are unclear as to whether a prosecutor's obligations would apply only to potentially wrongful convictions in the prosecutor's current jurisdiction or also to such convictions in a prosecutor's former jurisdiction.

The Board and the Director determined that a prosecutor's investigation and/or remedy obligations should be limited to knowledge of potentially wrongful convictions "in the prosecutor's current jurisdiction." The Board and the Director do so because a prosecutor's ability to cause an investigation of or to remedy a potentially wrongful conviction entered in a jurisdiction in which the prosecutor does not current work would be so practically difficult as to make it nearly impossible to comply. A prosecutor's disclosure obligations under proposed Rule 3.8(g)(1), however, would apply to new, credible, and material evidence of potentially wrongful convictions in any jurisdiction, because there are minimal if any practical barriers to such disclosure and because the Board and the Director agree with the ABA that prosecutors should have a specific ethical obligation to at least notify potentially wrongfully convicted people of such evidence.

Finally, the Board and the Director recommend that the Court amend Rule 3.8(d) to address prosecutors' day-to-day obligation to disclose to the defense information that the law requires to be disclosed. The current rule requires prosecutors to disclose "evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." The Board and the Director recommend that the Court expand that rule to require disclosure of all evidence or information "the prosecutor is required to disclose under applicable law and procedural rules which, a

prosecutor knows or reasonably should know, tends to negate the guilt of the accused or mitigates the offense." Caselaw already requires prosecutors to disclose to the defense evidence such as that described in the amendment. Making such requirements an express ethical obligation will provide transparency and clarity to members of the bar and the bench as to prosecutors' constitutional obligations in this area.

CONCLUSION

The Board and the Director thank the Minnesota Supreme Court for its attention to these important issues.

Dated: January 22, 2025

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

/s/ *Benjamin J. Butler*

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OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

/s/ *Susan M. Humiston*

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INDEX TO ADDENDUM

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

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

* * *

(4) 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; and

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

Comment

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Financial Assistance

[10] Lawyers may not subsidize lawsuits brought on behalf of their clients, such as by making 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. A lawyer may guarantee a loan to enable the client to withstand delay in litigation under the circumstances stated in Rule 1.8(e)(3).

[11] Paragraph (e)(4) 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 and 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)(4) 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)(4) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(4) 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.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(4), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(4) 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, or acceptance of compensation from another is impliedly authorized by the nature of the representation. 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), 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. Under Rule 1.7(b), the informed consent must be confirmed in writing.

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. The rule stated in this paragraph is a corollary of both these rules and provides that, before any settlement offer 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 is accepted. See also Rule 1.0(f) (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 such agreements 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, such as provisions requiring client notification or maintenance of adequate liability insurance. 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 unlikley 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 from having a sexual relationship with a person who oversees the representation and gives instructions to the lawyer on behalf of the organization.

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.

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that a prosecutor is required to disclose under applicable law and procedural rules which, a prosecutor knows or reasonably should know, tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) The information sought is not protected from disclosure by any applicable privilege;

(2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution;

(f) Exercise reasonable care to prevent employees or other persons assisting or associated with the prosecutor in a criminal case and over whom the prosecutor has direct control from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

(g) When a prosecutor knows of new, credible, and material evidence creating a reasonable belief that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority; and,

(2) if the conviction was obtained in the prosecutor's current jurisdiction,

i. promptly disclose that evidence to the defense unless the court authorizes delay, and

ii. make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's current jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

To: Ben Butler, Chair, LPRB
From: Jeanette Boerner, Hennepin County Adult Representation Services
Re: Minn. R. Prof. Conduct 1.8(e)

As you know, I am the Director of Hennepin County Adult Representation Services. We are an independent county organization that provides advocacy to clients experiencing poverty in civil matters where they are entitled to an attorney. We connect our clients to resources to support them in achieving self-sufficiency and serve as advocates to protect their rights both in and outside of court.

My department received a federal grant (our project is called HELP- Health Equity Legal Project) to support pregnant parents with the goal of avoiding child protection engagement. We provide legal and social service support and have a parent mentor with lived experience assigned to each client. It's exciting and I am hopeful it will change the trajectory for BIPOC families who are grossly overrepresented in the child-protection and housing justice system.

I struggle with the ethical rules on gifts and want to make sure we are walking a clear line on this. We have restrictions with the grant but are permitted to provide a host of services to clients that involve paying for basic needs such as respite childcare, transportation, phone service, temporary housing, etc. We will not distribute this money directly to the clients either using a contracted vendor or paying the business directly. But to me, this could be interpreted as a gift even though it is our agency not the attorney giving the money. Providing temporary economic resources is key to the success of our program.

Minnesota Rule of Professional Conduct 1.8(e) provides 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, the repayment of which may be contingent on the outcome of the matter;
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

I respectfully request that the Board consider recommending that the Minnesota Supreme Court replace our rule with the ABA Model Rule version of Rule 1.8(e). That rule provides:

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;

(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 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.

I submit that the ABA Model rule is much more compassionate and realistic than Minnesota's rule. Adopting it would allow our agency and similar agencies to dramatically improve the lives of indigent Minnesotans. Thank you for your consideration.

Benjamin Butler, Chair
Lawyers Professional Responsibility Board
445 Minnesota Street, Suite 2400
St. Paul, MN 55101

April 21, 2023

Dear Mr. Butler,

On behalf of the Great North Innocence Project ("GN-IP"), I write to encourage the Lawyers Professional Responsibility Board to recommend that the Minnesota Supreme Court amend Rule 3.8 of the Rules of Professional Conduct (Special Responsibilities of a Prosecutor) so as to add Rule 3.8 (g) and (h) of the American Bar Association's Model Rules of Professional Conduct (the "Model Rules").

These provisions of the Model Rules address the responsibilities of a prosecutor when new evidence emerges that calls into question the validity of an existing conviction. Specifically, Model Rule 3.8(g) addresses scenarios where there is "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense." In such cases, the prosecutor must promptly disclose the evidence to the appropriate court or authority. If the conviction was obtained in that prosecutor's jurisdiction, the prosecutor must go further and disclose the evidence to the defendant "unless a court authorizes delay" and undertake or cause further investigation into the validity of the conviction. Model Rule 3.8(h) addresses scenarios where the new evidence is stronger in nature, where there is "clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit." In such cases, that prosecutor must "seek to remedy the conviction."

Minnesota has adopted most of the Model Rules, including most of the remainder of Model Rule 3.8. Model Rules 3.8(g) and (h) represent a sensible extension of the existing rules and the underlying principle that the prosecutor occupies a unique role in our system of justice. Comment 1 to Minnesota Rule 3.8 notes as the basis for imposing special ethical obligations upon prosecutors that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." That principle motivates the obligation that prosecutors affirmatively disclose exculpatory evidence before trial. The same principle should lead an ethical prosecutor to take appropriate actions when new evidence comes light after trial that calls the integrity of the conviction into question.

Under the current regime, prosecutors in Minnesota lack clarity concerning their ethical obligations when they become aware of exculpatory evidence concerning a prior conviction. Model Rules 3.8(g) and (h) would provide that clarity. In so doing, these rules would not impose any undue burden on prosecutors. The rules do not require prosecutors to affirmatively seek out new evidence related to existing convictions. Instead, the rules merely address scenarios in which prosecutors become aware of such evidence. Once they do, it is not too much to ask that prosecutors disclose and take appropriate actions in light of such evidence. As of November 2022, 24 states have adopted

some form of Model Rule 3.8(g), and 19 state have adopted some form of Model Rule 3.8(h). We hope that Minnesota will soon add its name to this list.

Thank you for your consideration. Please do not hesitate to reach out if you have any questions or if GN-IP can be of any assistance in this process.

Sincerely,

Sara Jones
Executive Director