

RRC2 – Rule 4-210 [1.8.5]
E-mails, etc. – Revised (November 9, 2015)
Drafting Team: Rothschild (Lead), Kornberg, Peters

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October 29, 2015 McCurdy Email to Drafting Team, cc Difuntorum, Mohr, Marlaud & Lee:

The State Bar Office of Chief Trial Counsel (OCTC) memo providing comments on Rule 4-210 was received and is attached. Kevin incorporated these comments in the Report & Recommendation document that will be posted with the November agenda materials for this rule.

Attached:

RRC2 -[4-210][1.8.5] - 10-27-15 OCTC Memo to RRC2.pdf

October 27, 2015 OCTC Memo to Commission:

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E. Rule 4-210: Payment of Personal or Business Expenses Incurred by or for a Client

1. Any revision to rule 4-210 permitting a member to loan a client money during his or her representation of the client, should provide that rules 3-300, 3-310 and 4-300 apply to the transaction.
2. OCTC does not oppose permitting a member to pay costs for a pro bono client.

November 6, 2015 Rothschild Email to Drafting Team, cc Difuntorum, Mohr, Marlaud & Lee:

Attached is a law review article published earlier this year in the Georgetown Journal of Legal Ethics by Professor Phil Schrag. It argues that ABA rule 1.8 (e) (our 1.8.5) is in need of substantial revision as an access to justice issue. I think our proposed rule addresses his concerns, but it is probably worth taking a look at.

Attached:

RRC2 - [4-210][1.8.5] - Shrag - Need To Fix MR 1.8(e) - GJLE (2015).pdf

November 8, 2015 Rothschild Email to Drafting Team, cc Difuntorum, Mohr, Marlaud & Lee:

Attached is a letter Professor Schrag sent to the ABA ethics committee explaining very succinctly the need for changes in 1.8 (e).

Attached:

RRC2 - 4-210 [1.8.5 - 04-25-15 Shrag Letter to ABA re MR1.8(e).pdf

April 25, 2015 Shrag Letter to ABA Committee on Ethics & Professional Responsibility re MR 1.8(e):

By this letter, I am requesting the Committee to recommend to the House of Delegates an amendment to Model Rule 1.8(e). As presently written, the rule prevents lawyers from engaging in what many would consider a humanitarian act: providing an indigent litigation client with subsistence support (for food, housing or medicine). The rule has been adopted without

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amendment in 40 states, with minor amendments or glosses in 10 states, and with a major change only in the District of Columbia.

The rule as written might have some utility with respect to contingent fee cases, preventing plaintiffs' lawyers in such cases from loaning large amounts of money to clients and thereby obtaining improper leverage of the clients' decisions on whether or not to accept a settlement offer.

But the rule does not apply only to such cases. It bars outright gifts as well as loans, applies to indigent defendants as well as indigent plaintiffs, and even applies to gifts by pro bono lawyers who are not charging any fee. It therefor causes needless suffering by indigent clients of lawyers who have sufficient funds and want to help their clients to survive. In many cases, the client will be able to survive if the litigation succeeds – e.g., if the client is able, as a result, to obtain employment or public benefits. But the client may become homeless, suffer physical or mental illness, or die if the lawyer is unable to help temporarily.

My recent article, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct Rule 1.8(e)*, 28 *Georgetown J. of Legal Ethics* 39 (2015) explains in detail the need for an amendment and suggests several ways, short of outright repeal, that the rule could be improved. The article is attached to this email and is also online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589172. Among the nine possibilities for amendment that the conclusion of the article considers, the first four are the most attractive.