O'Donnell, Shanna RC ID # 2021-004 a

Subject: RE: CBA Proposal to Amend Rule 1.8(e) of the Rules of Professional Conduct

From: Stovall, Marcy [mailto:MStovall@PULLCOM.COM]
Sent: Monday, February 1, 2021 1:13 PM
To: Del Ciampo, Joseph <Joseph.DelCiampo@jud.ct.gov>
Cc: Amy Lin Meyerson <amy@almesq.com>; Cecil Thomas <CThomas@ghla.org>; 'ccoul3417@gmail.com' <ccoul3417@gmail.com>; Bowler, Michael <Michael.Bowler@jud.ct.gov>; Petruzzelli, Lori <Lori.Petruzzelli@jud.ct.gov>; Chapman, Bill (bchapman@ctbar.org) <bchapman@ctbar.org>; Kim E. Rinehart <krinehart@wiggin.com>
Subject: CBA Proposal to Amend Rule 1.8(e) of the Rules of Professional Conduct

Dear Mr. DelCiampo,

Attached please find correspondence to Justice McDonald concerning a CBA proposal to amend of Rule 1.8(e) of the Connecticut Rules of Professional Conduct to permit, in limited circumstances, a humanitarian exception to the prohibition on providing financial assistance to a client in a litigation matter. The proposed amendment would amend Rule 1.8 in accordance with the ABA's recent amendment of Rule 1.8 of the Model Rules of Professional Conduct.

I respectfully request that the proposal be added to the Rules Committee's agenda for February 8, 2021.

Please do not hesitate to let me know if you have any questions or if I can provide any additional information.

Thank you.

Marcy Tench Stovall
Legislative Liaison, CBA Standing Committee on Professional Ethics

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Sent Via Email (Joseph.DelCiampo@jud.ct.gov)

February 1, 2021

Honorable Andrew J. McDonald
Connecticut Supreme Court
Chair, Superior Court Rules Committee
231 Capital Avenue
Hartford, CT 06106

Re: Proposal to Amend Rule 1.8(e) of the Connecticut Rules of Professional Conduct to permit, in limited circumstances, a humanitarian exception to the prohibition on providing financial assistance to a client

Dear Justice McDonald,

On behalf of the Connecticut Bar Association's Pro Bono Committee and Standing Committee on Professional Ethics, as authorized by the Executive Committee of the Connecticut Bar Association at its January 15, 2021 meeting, I write to propose an amendment of Rule 1.8(e) of the Connecticut Rules of Professional Conduct to permit, in limited circumstances, a humanitarian exception to the prohibition on providing financial assistance to a client in a litigation matter, and to request that the proposal be placed on the Rules Committee's agenda for February 8, 2021.

The proposed amendment would permit a lawyer representing a client pro bono to provide modest gifts to the client to pay for basic living expenses. The proposed exception would apply to a narrow group of lawyers and would be available only in circumstances where the client does not pay a fee for legal services.

Specifically, the proposal is to amend Rule 1.8(e), and the related Official Commentary, as follows (<u>additions underlined</u>; [deletions in brackets]):

Rule 1.8 Conflict of Interest: Prohibited Transactions

. . .

(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; 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, a law school clinical or pro bono program, or a state or local bar association program; and a lawyer representing an indigent client through a public defender's office may provide modest gifts to the client to pay for food, shelter, transportation, medicine, and other basic living expenses. A lawyer may not:

(i) promise, assure or imply the availability of such gifts prior to retention, or as an inducement to continue the client-lawyer relationship after retention, or as an inducement to take, or forgo taking, any action in the matter;

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

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

A lawyer may provide financial assistance permitted by this Rule even if the representation is eligible for fees under a fee-shifting statute.

Official Commentary

. . .

Financial Assistance. 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. 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.

Paragraph (e)(3) provides another exception. A lawyer representing an indigent client who does not pay a fee may give the client gifts in the form of modest contributions toward basic necessities of life such as food, shelter, transportation, clothing, and medicine. 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 such consequences. See Rule 1.4.

The paragraph (e)(3) exception is narrow. Modest contributions towards basic necessities are allowed only in circumstances where it is unlikely to create conflicts of interest or invite abuse.

Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) 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.

A copy of the proposed amendment of Rule 1.8(e) and related commentary is attached at Tab A, and a copy of Rule 1.8 in its entirety, showing the proposed amendment of subsection (e) and related commentary, is attached hereto at Tab B.

Explanation and Rationale for the Proposed Amendment

In its current form, Rule 1.8(e) forbids providing financial assistance to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed addition to Rule 1.8(e) would permit an exception for a limited form of financial assistance but only to indigent clients; only in the form of modest gifts, not loans; only when the lawyer is working pro bono without a fee charged to the client; and only where there is a need for help to pay for life's necessities. The amendment permits gifts in the form of modest contributions to the client for food, shelter, transportation, medicine, and other basic living expenses. Eleven other U.S. jurisdictions have a comparable exception in their Rules of Professional Conduct.

Such an exception to permit assistance to indigent clients is sometimes referred to as a "humanitarian exception" to the prohibition of Rule 1.8(e). The experiences of legal aid lawyers, public defenders, and other lawyers who represent clients who do not pay a fee is that the issue is one that comes up with some frequency in their interactions with their clients, and it would be helpful to have some provision in the Rules to allow for this type of limited and compassionate assistance to indigent clients.

In a 2015 article that included a comprehensive survey of Rule 1.8(e) and its harsh effects, the author notes that "[b]ecause of its indifference to the humanitarian or charitable impulses of lawyers and its harsh effects on indigent clients, Rule 1.8(e) stands out as an unethical ethics rule." Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 Geo. J. Legal Ethics 39, 71-72 (2015) (copy attached at Tab E). The author's conclusion in regard to financial assistance to clients is that:

> the problem, if there is one, seems to arise most often in the context of loans to clients in contingent fee cases in which the lawyer expects to be repaid out of the proceeds of a settlement to his plaintiff-client. But if that is the concern, the rule could be more

> narrowly written with that scenario in mind. In particular, the policy of protecting clients in contingent fee cases has no application to pro bono cases, to the defense of cases, or to cases not involving monetary relief.

Id. at 71-72 (2015) (urging the ABA and states to reconsider the prohibition: "At the very least, the ABA and the states should eliminate the ban on outright gifts by pro bono lawyers to meet the survival needs of their indigent clients, particularly those who are involuntary parties to legal proceedings.").

Based on such considerations, the ABA House of Delegates, at its August 2020 meeting, approved an amendment to the Model Rules of Professional Conduct to include the humanitarian exception in Rule 1.8(e).

In their joint August 2020 Report to the House of Delegates in support of the amendment of Rule 1.8(e), the ABA Standing Committee on Ethics and Professional Responsibility (SCEPR") and Standing Committee on Legal Aid and Indigent Defense ("SCLAI") ("Report") (copy attached at Tab D) provided this summary of the purpose of the amendment:

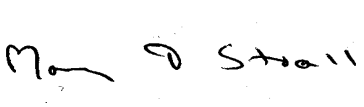
> The proposed rule closes a gap in the current rule. Currently, lawyers may provide financial assistance to transactional clients, may offer social hospitality to any litigation or transactional client and may advance or pay the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent. Clients to whom lawyers may not give money or things of value are litigation clients who need help with basic necessities of life. By allowing lawyers to give such gifts, the proposed rule is intended to increase access to justice and permit lawyers to follow their humanitarian instincts.
>
> . . . .
>
> The history, development, and commentary on the prohibition against financial assistance to litigation clients establishes two reasons for the prohibition, which are succinctly stated in Comment [10] to Rule 1.8. First, the prohibition prevents lawyers from having "too great a financial stake in the litigation." Second, allowing assistance would "encourage clients to pursue lawsuits that would not otherwise be brought."
>
> Because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer's advice. Further, by enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule's restrictions, the amendment ensures equal justice under law, a core ABA mission.

Report at 16, 19. The authors of the SCEPR/SCLAI Report note that the proposal had garnered widespread support from a variety of organizations, as well as from ABA committees and entities involved in access to justice initiatives, and that "No opposition has been identified." Report 14-15, 20. Inquiries to disciplinary authorities in the eleven jurisdictions with similar exceptions to the Rule 1.8(e) prohibition provided no indication that the humanitarian exception was subject to abuse or otherwise created disciplinary issues. Report at 13-14.

The amendment that the CBA now proposes is substantially similar to the ABA's amendment of Model Rule 1.8(e). The proposed amendment differs from the Model Rule in that it: (1) adds public defenders as a class of lawyers within the scope of the exception; (2) adds that a lawyer may not offer such financial assistance in order to induce a client to take, or forgo taking, any action in the matter; and (3) includes some modification of the language for the sake of clarity and to eliminate some redundancies in the Model Rule and its Commentary. A comparison document showing the differences between the CBA's proposed amendment and Model Rule 1.8(e) is attached at Tab C.

Amy Lin Meyerson, Cecil Thomas, and I plan to attend the Rules Committee's February 8 meeting to address any questions the Committee may have about the proposed amendment of Rule 1.8(e).

Respectfully submitted,



Marcy Tench Stovall
Legislative Liaison, CBA Standing Committee on Professional Ethics

Enclosures:

A. Proposed Amended RPC 1.8(e);

B. Proposed Amended RPC 1.8 Showing Variations from Current Connecticut RPC 1.8;

C. Proposed Amended RPC 1.8(e) Comparative to ABA Model Rule 1.8(e) (as revised August 2020);

D. August 2020 Report of ABA Standing Committee on Ethics and Professional Responsibility and Standing Committee on Legal Aid and Indigent Defense to the ABA House of Delegates; and

E. Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 Geo. J. Legal Ethics 39, 71-72 (2015).

cc: Bill Chapman, CBA Director of Government and Community Relations (via email)
Michael Bowler, Statewide Bar Counsel (via email)
Amy Lin Meyerson, CBA President (via email)
Kim Rinehart, Chair, Standing Committee on Professional Ethics (via email)
Cecil Thomas, Chair, CBA Pro Bono Committee (via email)
Craig Coulombe, Legislative Liaison, CBA Pro Bono Committee (via email)
Lori A. Petruzzelli, Counsel, Legal Services, Connecticut Judicial Branch

Exhibit A

Proposed Amended RPC 1.8(e)

Proposed Amendment of Connecticut Rule 1.8(e)

Showing changes from current Connecticut Rule 1.8(e) and related Commentary (<u>additions underlined</u>; [deletions in brackets]).

***

(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; <u>and</u>

<u>(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, a law school clinical or pro bono program, or a state or local bar association program; and a lawyer representing an indigent client through a public defender's office may provide modest gifts to the client to pay for food, shelter, transportation, medicine, and other basic living expenses. A lawyer may not:</u>

<u>(i) promise, assure or imply the availability of such gifts prior to retention, or as an inducement to continue the client-lawyer relationship after retention, or as an inducement to take, or forgo taking, any action in the matter;</u>

<u>(ii) seek or accept reimbursement from the client, a relative of the client, or anyone affiliated with the client; or</u>

<u>(iii) publicize or advertise a willingness to provide such gifts to prospective clients.</u>

<u>A lawyer may provide financial assistance permitted by this Rule even if the representation is eligible for fees under a fee-shifting statute.</u>

Comment

. . .

Financial Assistance. 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. 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.

Paragraph (e)(3) provides another exception. A lawyer representing an indigent client who does not pay a fee may give the client gifts in the form of modest contributions toward basic necessities of life such as food, shelter, transportation, clothing, and medicine. 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 such consequences. See Rule 1.4.

The paragraph (e)(3) exception is narrow. Modest contributions towards basic necessities are allowed only in circumstances where it is unlikely to create conflicts of interest or invite abuse.

Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) 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.

Tab B

Proposed Amended RPC 1.8 Showing Variations from Current Connecticut RPC 1.8

Proposed Amendment of Connecticut Rule 1.8 Conflict of Interest: Prohibited Transactions

Showing changes from current Connecticut Rule 1.8 and Commentary (<u>additions underlined</u>; [deletions in brackets]).

Rule 1.8. Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction, including investment services, with a client or former client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client or former client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client or former client and are fully disclosed and transmitted in writing to the client or former client in a manner that can be reasonably understood by the client or former client;

(2) The client or former client is advised in writing that the client or former client should consider the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction;

(3) The client or former client gives informed consent in writing signed by the client or former client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction;

(4) With regard to a business transaction, the lawyer advises the client or former client in writing either (A) that the lawyer will provide legal services to the client or former client concerning the transaction, or (B) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn for legal advice concerning the transaction; and

(5) With regard to the providing of investment services, the lawyer advises the client or former client in writing (A) whether such services are covered by legal liability insurance or other insurance, and either (B) that the lawyer will provide legal services to the client or former client concerning the transaction, or (C) that the lawyer will not provide legal services to the client or former client and that the lawyer is involved as a business person only and not as a lawyer representing the client or former client and that the lawyer is not one to whom the client or former client can turn to for legal services concerning the transaction. Investment services shall only apply where the lawyer has either a direct or indirect control over the invested funds and a direct or indirect interest in the underlying investment.

For purposes of subsection (a)(1) through (a)(5), the phrase “former client” shall mean a client for whom the two-year period starting from the conclusion of representation has not expired.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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

(1) A lawyer may pay court costs and expenses of litigation on behalf of a client, 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, a law school clinical or pro bono program, or a state or local bar association program; and a lawyer representing an indigent client through a public defender’s office may provide modest gifts to the client to pay for food, shelter, transportation, medicine and other basic living expenses. A lawyer may not:

(i) promise, assure or imply the availability of such gifts prior to retention, or as an inducement to continue the client-lawyer relationship after retention, or as an inducement to take, or forgo taking, any action in the matter;

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

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

A lawyer may provide financial assistance permitted by this Rule even if the representation is eligible for fees under a fee-shifting statute.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent; subject to revocation by the client, such informed consent shall be implied where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense;

(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) Information relating to representation of a client is protected as required by Rule 16.

(**g)** A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. Subject to revocation by the client and to the terms of the contract, such informed consent shall be implied and need not be in writing where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client.

(h) A lawyer shall not:

(1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) Settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) Contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing subsection (a) through (i) that applies to any one of them shall apply to all of them.

Official Commentary

Business Transactions between Client and Lawyer. Subsection (a) expressly applies to former clients as well as existing clients. A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of subsection (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in subsection (a) are unnecessary and impracticable.

Subsection (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Subsection (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Subsection (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(f) (definition of informed consent).

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here, the lawyer's role requires that the lawyer must comply, not only with the requirements of subsection (a), but also with the

requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

If the client is independently represented in the transaction, subsection (a)(2) of this Rule is inapplicable, and the subsection (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as subsection (a)(1) further requires.

Use of Information Related to Representation. Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Subsection (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Subsection (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subsection (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another

potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights. An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Subsection (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and subsections (a) and (i).

Financial Assistance. 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. 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.

Paragraph (e)(3) provides another exception. A lawyer representing an indigent client who does not pay a fee may give the client gifts in the form of modest contributions toward basic necessities of life such as food, shelter, transportation, clothing, and medicine. 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 such consequences. See Rule 1.4.

The paragraph (e)(3) exception is narrow. Modest contributions towards basic necessities are allowed only in circumstances where it is unlikely to create conflicts of interest or invite abuse.

Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) 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. Subsection (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

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. 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).

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), 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 subsection. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements. 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 and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain 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 or plea offer 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. Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they 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 subsection 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 subsection 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.

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. Subsection (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like subsection (e), the general rule, which has its basis in common-law champerty and maintenance, 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 subsection (e). In addition, subsection (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 subsection (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships. 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 interest and because the client's own emotional involvement renders it unlikely 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.

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).

Imputation of Prohibitions. Under subsection (k), a prohibition on conduct by an individual lawyer in subsections (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. The prohibition set forth in subsection (j) is personal and is not applied to associated lawyers.

Tab C
Proposed Amended RPC 1.8(e) Comparative to ABA Model Rule 1.8(e)

Proposed Amendment of Connecticut Rule 1.8(e)

Showing changes from Model Rule 1.8(e) and related Commentary

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(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;

(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, or a state or local bar association program; and a lawyer representing an indigent client through a public defender's office may provide modest gifts to the client to pay for food, rentshelter, transportation, medicine, and other basic living expenses. The A lawyer may not:

(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, or to take, or forgo taking, any action in the matter;

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

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

A lawyer may provide Ffinancial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Comment

. . .

Financial Assistance. 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. 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.

Paragraph (e)(3) provides another exception. A lawyer representing an indigent client who does not pay a ~~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 in the form of modest contributions towards~~. Gifts permitted under paragraph (e)(3) include modest contributions for~~ basic necessities of life such as food, ~~rent~~shelter, transportation, clothing, and 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.

The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. ~~Paragraph (e)(3) 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; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.~~

Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) 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.

Tab D

August 2020 Report of ABA Standing Committee on Ethics and Professional Responsibility and Standing Committee on Legal Aid and Indigent Defense to the ABA House of Delegates

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

RESOLVED, That the American Bar Association amends Rule 1.8(e) and related commentary of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Model Rule 1.8: Current Clients: Specific Rules

***

(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; 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.

Comment

Financial Assistance

[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. 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.

[11] Paragraph (e)(3) 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)(3) 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)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) 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; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute.

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However, paragraph (e)(3) 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.

[No other changes proposed in the commentary to this Rule except renumbering succeeding paragraphs.]

REVISED 107

REPORT

I. Introduction

The Standing Committee on Ethics and Professional Responsibility (SCEPR) and the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) propose adding a narrow exception to Model Rule 1.8(e) that is intended to increase access to justice for our most vulnerable citizens. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit a limited form of* financial assistance for living expenses *only* to indigent clients, *only* in the form of modest gifts not loans, *only* when the lawyer is working pro bono without fee to the client, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.

The proposed rule addresses a gap in the current rule. Currently, lawyers

- may provide financial assistance to any transactional client, subject to Rule 1.7;
- may invest in a transactional client, subject to Rule 1.8(a);
- may offer social hospitality to any litigation or transactional client as part of business development; and
- may advance the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent.

Clients to whom a lawyer may not give money or things of value are those litigation clients who need help with the basic necessities of life. Discretion to give indigent clients such aid is often referred to as "a humanitarian exception" to Rule 1.8(e).[1]

Supporting a humanitarian exception to Rule 1.8(e), one pro bono lawyer wrote: "There are plenty of situations in which a small amount of money can make a huge difference for a client, whether for food, transportation, or clothes."[2] Another wrote: "I

[1] *See, e.g.*, Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39, 40 (2015) (discussing the desirability of a humanitarian exception to Model Rule 1.8(e)); Model Rule 1.8(e) "is at odds with the legal profession's goal of facilitating access to justice. [It] bars lawyers from assisting their low-income litigation clients with living expenses, such as food, shelter and medicine, though such clients may suffer or even die while waiting for a favorable litigation result." The rule should be changed "[b]ecause of its indifference to the humanitarian or charitable impulses of lawyers and its harsh effect on indigent clients"); Cristina D. Lockwood, *Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients*, 48 U.S.F. L. REV. 457 (2014). *See also* Florida Bar v. Taylor, 648 So. 2d 1190, 1192 (Fla. 1994) (giving an indigent client a used coat and $200 is an "act of humanitarianism").

[2] Statement of Legal Services Corporation ("LSC") Program Executive Director in connection with a broad but anecdotal survey conducted by the National Legal Aid and Defender Association (NLADA) for the ABA Standing Committee on Legal Aid and Indigent Defense ("SCLAID"), on file with SCLAID (hereinafter, "SCLAID Survey"). *See also* Schrag, *supra* note 1 at 40.

hate that helping a client . . . is against the rules."[3] And another: "Legal aid attorneys grapple with enough heartache and burdens that they should not also have to worry about whether a minor gift—an expression of care and support for a client in need—could violate the rule."[4]

Model Rule 1.8 cmt. [10] gives two reasons for the prohibition against lawyers financially assisting litigation clients. First, it prevents lawyers from having "too great a financial stake in the litigation." Second, allowing assistance would "encourage clients to pursue lawsuits that would not otherwise be brought."

Regarding the first reason, because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer's advice. Further, the amounts will often be small compared to the sums lawyers may now advance for litigation costs, which are repayable from a client's recovery and therefore could affect the lawyer's judgment.

Regarding the second reason—that financial assistance will "encourage... lawsuits that might not otherwise be brought"—in the limited circumstances the amendment describes, that outcome, if it occurs, furthers ABA Policy. By enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule's restrictions, the amendment ensures equal justice under law, a core ABA mission.[5]

Additional support for this conclusion is found in legislation—for example, in civil rights and anti-discrimination statutes that empower courts to award counsel fees to the prevailing plaintiff. The policy behind this legislation is to facilitate access to courts, not discourage it.[6] Lawyers in turn advance the legislative purpose if they can financially help their indigent clients with living expenses while a case is pending.

Support is also found in two Supreme Court opinions recognizing the social value of court access. In another context, Justice Hugo Black wrote "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[7] Nor can there be equal justice when the ability to bring and prosecute a case—to get a trial at all—is lost because of extreme poverty.

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[3] SCLAID Survey, *supra* note 2, at 3.
[4] *Id.* at 1.
[5] *See* ABA MISSION STATEMENT, https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited May 4, 2020). Many ABA policies support equal justice. *See, e.g.*, ABA CONSTITUTION Art. 10, sec. 10.1 (creation of the Civil Rights and Social Justice Section and Criminal Justice Section); ABA CONSTITUTION Art. 15 (creation of the ABA Fund for Justice and Education); ABA BY-LAWS sec. 31.7 (creation of SCLAID).
[6] *See* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." H.R. REP. NO. 94-1558, p. 1 (1976)).
[7] Griffin v. Illinois, 351 U.S. 12, 19 (1956).

Nearly thirty years later, Justice Byron White rejected the argument that restrictions on lawyer advertising were justified by the goal of not "stirring up litigation." Justice White wrote:

> But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: 'we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action'. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride.[8]

The amendment SCEPR and SCLAID propose is client-centric, focused on the most vulnerable populations, and protects the ability of indigent persons to gain access to justice where they might otherwise be foreclosed as a practical matter because of their poverty.

II. Support for the Proposed Rule in the Nonprofit Community

SCEPR and SCLAID have received support from the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty lawyers in nonprofit organizations and legal services and legal aid offices, including the Legal Aid Society in NYC—an office of more than 1200 lawyers, and clinical faculty at law schools nationwide, and Southeast Louisiana Legal Services (SLLS).[9] Further, in a letter to the ABA Board of Governors, the Association of Pro Bono Counsel ("APBCo"), a membership organization of nearly 250 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at more than 100 of the country's largest law firms wrote:

> APBCo supports the effort to modify the Model Rules and permit pro bono lawyers to help their indigent clients meet basic human necessities, such as food, rent, transportation and medicine during the course of the representation. In the context of pro bono representation, none of these kinds of charitable gifts present any concerns raised by the Model Rule, which is designed to prevent lawyers from providing financial assistance to

[8] Zauderer v. Disciplinary Counsel, 471 U.S. 626, 643 (1985) (*citing* Bates v. State Bar of Arizona, 433 U.S. 350, 376 (1977)).

[9] *See* (i) SALT email of April 24, 2020, (ii) NLADA Memo of April 23, 2020, and (iii) emails dated April 10 and April 11, 2020 from Daniel L. Greenberg, Special Counsel for Pro Bono Initiatives at Schulte, Roth, & Zabel and former member of SCLAID, and Barbara S. Gillers, SCEPR Chair, to public interest lawyers and law school clinicians, and responses, and (iv) Letter of June 19, 2020, from Mark Surprenant, President, SLLS Board of Directors, to SCEPR Member Michael H. Rubin, on file with SCEPR. SALT is one of the largest associations of law professors in the United States.

> clients in order to subsidize lawsuits or administrative proceedings in a way that encourages clients to pursue lawsuits that might not otherwise be brought and gives lawyers a specific financial stake in the litigation. Neither pro bono lawyers nor their firms profit from public interest representation; the kinds of limited financial assistance contemplated by the proposed amendment will in no way violate the intended policy behind the Rule.[10]

III. Background

Model Rule of Professional Conduct 1.8(e) was adopted in 1983.[11] Its prohibition against financial assistance in connection with litigation is derived from the common law prohibitions against champerty and maintenance.[12] As originally defined, maintenance is "'improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.'"[13] Champerty is "a specialized form of maintenance in which the person assisting another's litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery."[14]

Payments or loans for litigation costs and expenses are allowed under the rule "because [they] are virtually indistinguishable from contingent fees and help ensure access to the courts."[15] Comment [10], which was added in 2001 on the recommendation of the Ethics 2000 Commission,[16] makes clear that "court costs and litigation expenses [include] the expenses of medical examination and the costs of obtaining and presenting evidence".[17] Litigation expenses also typically include payments for experts, translators, court reporters, medical examinations connected to the merits or remedies, mailing, and photocopying.[18] However, living expenses in connection with pending or contemplated

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[10] *See* Letter, April 14, 2020, APBCo to the ABA Board of Governors, on file with SCEPR.

[11] ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 at 193 (2013).

[12] *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. [16] (2019) (paragraph (e) "has its basis in common law champerty and maintenance"); Cristina D. Lockwood, *supra* note 1 at 466 ("the restrictions in Rule 1.8(e) were adopted to protect the poor by incorporating rules against champerty and maintenance"); Utah State Bar, Advisory Op. 11-02 (2011) (Rule 1.8(e) is "derived from the common law prohibition of champerty and maintenance") (cite omitted); Mich. State Bar Advisory Opinion RI-14 (1989) (Rule 1.8(e) "is the result of the common law rules against champerty and maintenance"). *See also* John Sahl, *Helping Clients With Living Expenses; "No Good Deed Goes Unpunished"*, 13 No. 2 PROF. LAW. 1 (Winter 2002) (common law doctrines of champerty and maintenance influenced the ABA Rules against financial assistance to clients).

[13] STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 30 (11th ed. 2018) (*quoting In re* Trepca Mines, Ltd., [1963] 3 All E.R. 351 (C.A.)).

[14] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.13 at 940 (1986) (cites omitted); GILLERS, *supra* note 13 at 630 ("'[c]hamperty [is] the unlawful maintenance of a suit, where a person without an interest in it agrees to finance the suit, in whole or in part, in consideration for receiving a portion of the proceeds of the litigation . . . .'" (quoting Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997)); *In re* Primus, 436 U.S. 412, 424 n. 15 (1978) (champerty is "maintaining a suit in return for a financial interest in the outcome"; maintenance is "helping another prosecute a lawsuit").

[15] MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. [10] (2019).

[16] *See* GARWIN, *supra* note 11 at 207.

[17] MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. [10] (2019).

[18] N.Y. City Bar, Formal Op. 2019-6 at 3 (2019).

litigation, e.g. for food, rent, and other basic necessities, were never permitted by the rule because of concerns rooted in traditional common law prohibitions on champerty and maintenance.

Modern American applications of the doctrines of champerty and maintenance are varied and in some jurisdictions are quite limited.[19] Moreover, courts and commentators have recognized that these doctrines "can be used abusively—to deny unpopular litigants access to the courts to vindicate constitutional rights. They can also make it harder for persons with even mundane claims to go to court . . . ."[20] Some bar committees have rejected the essential justification for the doctrines.[21] The SCLAID Survey demonstrated that the prohibition on living expenses is especially harsh on indigent clients for whom even small financial burdens can pose significant barriers to initiating, participating in, and completing litigation.[22] For all of these reasons, and those explained below, the prohibition on financial assistance should no longer apply in the limited circumstances and the types of representations covered by the proposed rule.

IV. Analysis

A. The Current Rule

Model Rule of Professional Conduct 1.8(e)(1) and (2) strictly limit financial assistance to clients in pending or contemplated litigation. Only court costs and litigation expenses are permitted. The Rule reads: "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."[23]

Comment [10] explains why Rule 1.8(e) permits financial assistance for litigation expenses and court costs only: "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*."[24] The Comment continues: "[L]ending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence" is permitted "because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

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[19] REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING 5-8 (Feb. 28, 2020) ("[t]he extent to which the United States has adopted and has continued to enforce prohibitions [based on champerty and maintenance] varies by jurisdiction") (cites omitted).
[20] GILLERS, *supra* note 13 at 631 (cites omitted).
[21] *See, e.g.*, Utah State Bar, Advisory Op. 11-02, *supra* note 12 at 4 (permitting "small charitable gifts" under Utah RPC 1.8(e), which is "more permissive" than M.R. 1.8(e); observing that "[t]he original goal of not stirring up litigation is no longer a justification for [the rule]") (cites omitted)).
[22] *See* Memo from SCLAID to the SCEPR dated June 14, 2016, on file with SCEPR [hereinafter, "SCLAID Memo"].
[23] MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2019).
[24] MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. [10] (2019) (emphasis added).

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."[25]

B. The Proposed Rule

The proposed rule adds a new exception,1.8(e)(3). The new exception permits lawyers representing indigent clients pro bono, whether individually or through the organizations or programs designated in the proposed rule to contribute to the living expenses of their indigent clients. As further explained below, the contributions must be modest gifts not loans, for basic living expenses. The assistance is permitted even if the representation is eligible for an award of attorney's fees under a fee-shifting statute, for example, the Civil Rights Attorney's Fees Award Act.[26] The lawyer may not promise the assistance in advance, seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client, or advertise its availability. The new provision reads:

> (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.

SCEPR and SCLAID propose new Comments [11], [12], and [13] to explain key elements of the new exception.

Comment [11]

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[25] *Id.*

[26] 42 U.S.C.A. § 1988 ("[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs [with exceptions]").

New Comment [11] offers guidance on covered expenses and permitted amounts. Below, this Report first sets out the text of new Comment [11] and then discusses its key elements. The text reads:

> [11] Paragraph (e)(3) 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)(3) 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

Living Expenses

Comment [11] gives examples of permitted assistance: "Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life." This would include modest contributions for meals, clothing, transportation, housing and similar basic necessities. Examples from SCLAID include small amounts for moving to avoid eviction, bus fare, meals, clothes to go to court, and groceries, including cleaning supplies and toilet paper.[27]

Amounts

The Rule permits contributions of modest amounts. This follows seven of the eleven jurisdictions that have already adopted a humanitarian exception.[28] The flexibility

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[27] *See* SCLAID Survey, *supra* note 2.

[28] *See* D.C. Rule of Prof'l Conduct 1.8(d) (a lawyer may "pay or otherwise provide . . . financial assistance which is *reasonably necessary* to permit the client to institute or maintain the litigation or administrative proceedings") (emphasis added); Minn. Rule of Prof'l Conduct 1.8(e)(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"; prohibits promises of assistance prior to retention and requires that client remain liable for repayment without regard to the outcome of the litigation) (emphasis added); Miss. Rule of Prof'l Conduct 1.8(2)(2) (permits a lawyer to advance (i) "*reasonable* and necessary" (a) "medical expenses associated with treatment for the injury giving rise to the litigation" and (b) "living expenses incurred"; client must be in "dire and necessitous circumstances"; other limitations and conditions apply) (emphasis added). Mont. Rule 1.8(e)(3) (a lawyer may guarantee a loan from certain financial institutions "for the sole purpose of providing basic living expenses;" the loan must be "*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;" client must remain liable for repayment without regard to the outcome; prohibits promises or advertisements before retention) (emphasis added); N.D. Rule of Prof'l Conduct 1.8(e)(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;" client must remain liable for repayment without regard to the outcome; no promise of assistance before retention) (emphasis added); Tex. Rule of Prof'l Conduct 1.08(d)(1) (a lawyer may "advance or guarantee . . . *reasonably necessary* medical and living expenses, the repayment of which may be contingent on the outcome of the matter") (emphasis added); Utah Rule of Prof'l Conduct 1.8(e)(2) (a lawyer representing

gives lawyers room to decide amounts based on the cost of living in their jurisdictions and other factors.

No Definition of "Indigent"

The new Rule and Comments do not add a definition of "indigent." None is needed. The word "indigent" has been in Rule 1.8(e) since 1983. It was also in the predecessor rule, DR 5-103(B). SCEPR is aware of no problems in applying this term. Further, the Model Rules already address obligations toward the indigent, the poor, and "persons of limited means."[29] Additionally, SCEPR opinions address lawyers' obligations toward the "indigent."[30] Webster's Dictionary defines "indigent" as "suffering from indigence" and "impoverished," and "indigence" as "a level of poverty in which real hardship and deprivation are suffered and comforts of life are wholly lacking." Synonyms include "needy, necessitous, and impoverished."[31] Finally, lawyers covered by the exception generally serve only the poor and the most economically disadvantaged.[32]

Comment [12]

Comment [12] contains safeguards against conflicts and abuse by prohibiting lawyers from (i) using assistance to lure clients, (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client, and (iii) advertising the availability of assistance. It provides:

> [12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse.

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an indigent client may "pay . . . minor expenses *reasonably connected* to the litigation") (emphasis added). Only *one* of the eleven jurisdictions incorporates a dollar amount: Mississippi. *See* Miss. Rule of Prof'l Conduct 1.8(e)(2) (Permitted expenses "shall be limited to $1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless [the Standing Committee on Ethics of the Mississippi Bar approves a greater amount.]").

[29] MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. [3] provides: "Persons eligible for legal service [that meet Rule 6.1] are those who qualify for participation in programs funded by the [LSC] and those whose incomes and financial resources are slightly above guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means.")

[30] *See*, *e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (discussing the ethical obligations of lawyers "who represent *indigent* persons") (emphasis added).

[31] *See* ROGET'S INTERNATIONAL THESAURUS § 836.8 (3rd ed.). *See also* THE COMPACT OXFORD ENGLISH DICTIONARY, NEW EDITION, SECOND EDITION (1994) ("indigent" means "destitute," "lacking in the necessaries of life," "in needy circumstances," "characterized by poverty," "poor," "needy").

[32] *See, e.g.*, Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* n.4 (Sept. 2009), https://mlac.org/wp-content/uploads/2015/08/Documenting-the-Justice-Gap.pdf ("LSC establishes maximum income levels for persons eligible for civil legal assistance . . . . the maximum level is equivalent to 125 percent of the federal poverty guidelines"). For poverty guidelines, see U.S. Department of Health & Human Services, *Poverty Guidelines 2020* (2020), https://aspe.hhs.gov/poverty-guidelines. *See also* ABA FINDLEGALHELP.ORG FREQUENTLY ASKED QUESTIONS, https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/ (last visited May 4, 2020) (clients of public defenders are "indigent").

Paragraph (e)(3) 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; and (iii) publicizing or advertising a willingness to provide gifts to prospective clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

New Comment [13]

New Comment [13] underscores that contributions may be made even if the representation is eligible for fees under a fee-shifting statute but not in connection with contingent-fee personal injury cases or other specified matters. It reads:

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) 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.

C. Proposed 1.8(e)(3) Does Not Present the Ethical Risks that 1.8(e)(1) and (2) Address

Policy Against "Encouraging Litigation"

As noted earlier, Model Rule 1.8(e) prohibits living expenses "*because [permitting them] would encourage clients to pursue lawsuits that might not otherwise be brought*. . . ."[33]

The proposed amendment could result in a poor client being able to bring and maintain a lawsuit that would not otherwise be brought or that would be settled quickly if brought because of the client's adverse financial circumstances. SCEPR and SCLAID deem this a worthy objective. It reflects the view that legal ethics rules should not impede a poor client's access to the courts, as the current rule does, where the conditions described in the proposed rule are present. Furthermore, as noted earlier, in public interest fee-shifting cases the proposed rule will reinforce the legislative goal of facilitating rather than impeding court access. It would frustrate that goal and achieve no benefit if the amendment allowed financial assistance to indigent clients only if a lawyer were willing to forego a court-ordered fee under a fee-shifting statute.

[33] MODEL RULES OF PROF'L CONDUCT R.1.8(e) cmt. [10] (2019) (emphasis added)

Comment [10] is *not* addressed to the problem of frivolous litigation, as some analysts seem to suggest.[34] Other rules do that. Model Rule 3.1 makes clear that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is basis in law and fact for doing so *that is not frivolous.* . . ." [35] Rule 11 of the Federal Rules of Civil Procedure requires lawyers to certify, *inter alia*, that court filings are not "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation . . .[and that] claims, defenses, and other legal contentions are warranted by existing law or by a *nonfrivolous* argument for extending, modifying, or reversing existing law or for establishing new law."[36] Many jurisdictions have similar court rules and other mechanisms to prevent frivolous litigation.[37]

Whatever the relationship between financial assistance and frivolous litigation in other contexts, however, it is not credible that a lawyer working *without fee* would assist a poor client with living expenses, which could not be recouped, so that the lawyer could file a frivolous lawsuit.

No Compromise of the Lawyer's Independent Judgment

Rule 1.8(e) forbids financial assistance for living expenses also to avoid conflicts between the interests of the lawyer and the interests of the client and to protect the lawyer's independence. Living expenses are not allowed "*because such assistance gives lawyers too great a financial stake in the litigation."*[38]

Rule 1.8(e)(1), however, allows the lawyer to advance the costs of litigation with repayment contingent on the outcome of the matter. There is no cap on the amount of these expenses, which can amount to tens of thousands of dollars. Lawyers also may invest thousands of hours on a contingency matter which will be compensated only if there is a recovery. The profession tolerates these outlays of time and money, trusting that lawyers will honor their obligations to exercise independent professional judgment in the advice they give clients and not be influenced by their own financial concerns.

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[34] *See* Lockwood, *supra* note 1 at 472-474 ("the assertion [in Cmt. [10] is that] unlike the financing of litigation expenses, financing living expenses is somehow distinguishable from contingency fee financing and leads to frivolous litigation"); N.Y. CITY BAR REPORT BY THE PROF'L RESPONSIBILITY COMM. PROPOSED AMENDMENT TO RULE 1.8(E), NY RULES OF PROFESSIONAL CONDUCT 8 (Mar. 2018), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/proposed-amendment-to-rule-18e-ny-rules-of-professional-conduct [hereinafter "CITY BAR RPT."] (NYRPC 1.8 cmt. [10], which is identical to Model Rule 1.8 cmt. [10], is aimed, in part, to curb frivolous litigation). Lawyers will "support" plaintiffs, it is suggested, in order to get retained to bring cases that turn out to be frivolous. As shown in the text by reference to Model Rule 1.8 cmt. [10] this is *not* the purpose of the prohibition in 1.8(e). It is not in the text. It is not in the Comment. Other Rules perform that function.

[35] MODEL RULES OF PROF'L CONDUCT R. 3.1 (2019) (emphasis added).

[36] FED. R. CIV. P. 11(b)(1) and (b)(2) (emphasis added).

[37] *See, e.g.*, N.Y. Rules of the Chief Administrator of the Courts Part 130, *Awards of Costs and Imposition of Financial Sanctions For Frivolous Conduct In Civil Litigation*, 22 NYCRR 130-1.1.

[38] MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. [10] (2019) (emphasis added).

The proposed rule presents no such risks simply because loans to assist indigent clients are prohibited. Unlike in the exception for advancing the costs of litigation, lawyers have no interest in repayment of the financial help.

No Competition for Clients

Some opponents of expanding a lawyer's discretion to provide financial assistance under Rule 1.8(e) expressed concern that lawyers will use this discretion to improperly compete for clients.[39] The proposed rule avoids this problem entirely because it prohibits advertising or publicizing the availability of gifts for living expenses to prospective clients. The provision is reinforced by SCLAID's belief that: "Poverty lawyers and lawyers who provide *pro bono* service to clients in poverty are simply not competing for the business of their clients."[40]

Other Impediments to Financial Assistance

There may be other laws or rules in American jurisdictions that will operate if financial assistance is allowed and provided. Model Rule of Professional Conduct 1.4 requires lawyers to consult with clients about the representation and the possible effect of those rules or laws when appropriate. A reference is made to that obligation in the proposed new Comments.

Financial assistance to transactional clients, social hospitality toward all clients as part of business development, and payment of litigation expenses that may or may not be recovered may all have collateral consequences under tax or other law. But in allowing each, the only question is whether the activity creates the kind of dangers that should concern the Model Rules of Professional Conduct. The limited exception in the proposed amendment does not create those dangers.

V. The Need for ABA Leadership

In all but eleven U.S. jurisdictions Rule 1.8(e) is identical or substantially similar to Model Rule 1.8(e).[41] Ethics Committees generally interpret the prohibition strictly.[42]

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[39] *See, e.g.*, Sahl, *supra* note 12 at 5 ("[s]ome practitioners fear a competitive disadvantage in the marketplace for legal services if the profession permits lawyers to advance living expenses because only more established or affluent lawyers will offer such assistance") (cite omitted); Schrag, *supra* note 1 at 54 (a "thread that runs through the history of Rule 1.8(e) is the concern that lawyers might compete with each other for business through the generosity of the gifts or loan terms that they might offer their clients").

[40] SCLAID Memo, *supra* note 22.

[41] *See* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 173 (9th ed. 2019) ("[m]ost jurisdictions do not allow an exception for assisting indigent clients").

[42] *See* N.Y. City Bar, Formal Op. 2019-6, *supra* note 18 at 2 ("routine medical care and living expenses do *not* qualify as expenses of litigation even if, in the absence of assistance, the client may be pressured to accept an unfavorable settlement") (emphasis in original) (cites omitted); Conn. Bar Ass'n, Informal Op. 2011-10 (2011) (water bills; $300 in advance rent to avoid eviction); Pa. Bar Ass'n, Informal Op. 94-12 (1994) (bond for preliminary injunction); Ariz. State Bar, Formal Op. 95-01 (1995) (transportation costs); Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct 95-6 (1995) (medical care); S.C. Bar Ethics Advisory Comm., Advisory Op. 89-12 (1989) (medical treatment). *But see* N.C. State Bar, Formal Op. 7 (occasional

Courts generally discipline lawyers for providing clients with non-litigation expenses.[43] Only a handful of courts and ethics committees have approved financial assistance in small amounts beyond litigation expenses, even where the text of the rule would forbid it.[44]

Of the jurisdictions that have adopted an exception to Rule 1.8(e)'s prohibition on providing assistance for living expenses, some go beyond the modest amendment SCEPR and SCLAID propose.[45] They permit, for example, advances and loans for basic needs and other living expenses. Reimbursement by the client is sometimes required. By contrast, the proposed rule permits gifts only. No loans. No advances. No reimbursements. New Jersey has a specific provision for pro bono legal services.[46]

The proposed rule draws on the rules of the eleven jurisdictions, expert commentary, and comments provided in response to earlier drafts. In addition, SCEPR and SCLAID notes that recently, the New York State Bar Association (NYSBA) House of Delegates unanimously approved a recommendation by the NYSBA Committee on Standards of Attorney Conduct (COSAC) and the City Bar Professional Responsibility Committee to adopt a humanitarian exception to NYRPC 1.8(e) that is similar in some

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cab or bus fare or other transportation cost may be permitted as a litigation cost "when reasonable in light of the distance to be traveled").

[43] *See* Schrag, *supra* note 1 at 59-61(discussing "unforgiving" application of Rule 1.8(e)); Lawyer Disciplinary Bd. v. Nessel, 769 S.E.2d 484, 493 (W. Va. 2015) (prohibition on living expenses is absolute; no exception for "altruistic intent"); Matter of Cellino, 798 N.Y.S.2d 600 (4th Dept. 2005) (suspension for, among other violations, loaning a client money for the client's son's nursing and care and rehabilitation); State *ex rel.* Oklahoma Bar Ass'n v. Smolen, 17 P.3d 456 (2000) (suspending a lawyer for, among other violations, loaning a client $1200 for living expenses); Maryland Attorney Grievance Comm'n v. Kandel, 563 A.2d 387 (Md. App. 1989) (discipline for advancing the cost of medical treatment and transportation to obtain the treatment).

[44] *See, e.g.*, Florida Bar v. Taylor, 648 So.2d 1190, 1192 (Fla. 1994) (used clothing for child and $200 for necessities approved as "act of humanitarianism"); Okla. Bar Ass'n, Op. 326 (2009) ("[n]ominal monetary gifts by a public defender to a death row inmate for prison system expenses"); Va. State Bar Legal Ethics Op. 1830 (2006) ("nominal amounts" to an incarcerated client to buy personal items or food at the jail commissary); Md. State Bar Ass'n Comm. on Ethics, Op. 2000-42 (2000) (a "de minimus gift" does not violate 1.8(e)); Ariz. State Bar, Formal Op. 91-14 (1991) (loan for client's daughter's medical care prohibited but a gift for that purpose is permitted if the lawyer has a "charitable motivation").

[45] In addition to the rules cited in footnote 28, see Ala. Rule of Prof'l Conduct 1.8(e) (lawyer may advance or guarantee emergency assistance; prohibits (i) making repayment contingent on the outcome and (ii) promises or assurance of assistance before retention); Cal. Rule of Prof'l Conduct 1.8.5 (permits a lawyer to pay a client's personal or business expenses to third person, "from funds collected or to be collected for the client as a result of the representation" with the consent of the client: and "to pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interest of an indigent person in a matter in which the lawyer represents the client"); La. Rule of Prof'l Conduct 1.8(e) (permits financial assistance in addition to court costs and litigation expenses to clients in "necessitous circumstances"; conditions and limitations apply).

[46] N.J. Rule of Prof'l Conduct 1.8(e) provides: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that . . . (e)(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to an indigent client whom the organization, program or attorney is representing without fee." N.J. Rules of Court, R. 1:21-11(a) defines "qualifying pro bono service" to include legal assistance through a legal services or public interest organization and legal assistance through a law school clinical or pro bono program.

respects to the one SCEPR and SCLAID propose for the Model Rules.[47]

The ABA has been a leader in access to justice for decades. It should lead here, too, by changing an out-of-date rule that interferes with access to justice by the most vulnerable population and encouraging all American jurisdictions to adopt the new rule.

VI. Support Based on Disciplinary Counsel Experience

SCEPR asked Disciplinary Counsel for the eleven jurisdictions with some form of humanitarian exception about their experience implementing the provision. Two jurisdictions, D.C. and Louisiana, responded. Both jurisdictions permit loans for living expenses and apply in contingency matters. Chief Disciplinary Counsel in Louisiana wrote that Louisiana's version of Rule 1.8(e), which has been in effect since 1976,

> permits lawyers to advance monies to clients in necessitous circumstances. The Louisiana rule is not limited to non-profits and does not prohibit a lawyer from obtaining reimbursement, although it does not permit a lawyer to obtain reimbursement of interest for funds the lawyer advances directly . . . The Louisiana Office of Disciplinary Counsel has received very few complaints against lawyers concerning Rule 1.8(e) and (f). The complaints that have been lodged primarily involve how the lawyer calculated disbursement of funds from monetary recoveries resulting from a suit or settlement. Because you have informed me that the proposed ABA Rule prohibits any reimbursement of any necessitous circumstances advances, I do not anticipate that such a rule would lead to any complaints (such as the ones we have received) to a state's disciplinary counsel. Based upon my experience as the Chief Disciplinary Counsel in Louisiana, it is my belief that the rule discussed would not lead to an increase in disciplinary enforcement action nor increase the potential for harm to the public or to the legal profession.[48]

Disciplinary Counsel for D.C. wrote:

> We have had few if any complaints about lawyers violating Rule 1.8(d) [the D.C. analogue to M.R. 1.8(e)]. I can't represent that no one has ever complained because I don't have a way of checking every one of the approximately 1000 complaints we receive each year. Certainly, we have

[47] NYSBA COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT MEMORANDUM 3-6 (Jan. 15, 2020), https://nysba.org/app/uploads/2020/03/12-14-cosac-AGENDA-ITEM-8.pdf. CITY BAR RPT., *supra* note 34. Shortly thereafter, on June 24, 2020, the Four Presiding Justices of the New York Appellate Divisions issued an order adding a humanitarian exception to New York Rule of Professional Conduct (NYRPC)1.8. The rule is similar to the rule proposed by SCEPR and SCLAID. See, Joint Order of the Departments of the New York State Supreme Court, Appellate Division, June 24, 2020 amending NYRPC 1.8(e).

[48] Letter from Chief Disciplinary Counsel in Louisiana, Charles B. Plattsmier to SCEPR Member Michael H. Rubin (Apr. 8, 2020) (on file with SCEPR).

> never brought a case based on a violation of that rule, and it has been mentioned in only three reported opinions, two of which are reciprocal matters from other states whose parallel rule is not as liberal as our Rule 1.8(d).[49]

VII. Support from the Pro Bono Community

Commenters have questioned whether the pro bono community supports adding a humanitarian exception to Rule 1.8(e). SCEPR's work in connection with the proposed rule shows that there is broad support for this in the pro bono and law school clinician communities.[50] SCLAID is a cosponsor. ABA supporters include the Diversity and Inclusion Center and its constituent Goal III entities—the Coalition on Racial and Ethnic Justice; Commission on Disability Rights; Commission on Hispanic Legal Rights and Responsibilities; Commission on Racial and Ethnic Diversity in the Profession; Commission on Sexual Orientation and Gender Identity; Council for Diversity in the Educational Pipeline; and Commission on Women in the Profession; the Standing Committee on Pro Bono and Public Service, the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Law Students Division, the Commission on Domestic and Sexual Violence, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel, the Criminal Justice Section, Commission on Interest on Lawyers' Trust Accounts, the Commission on Lawyer Assistance Programs, the Standing Committee on Lawyers' Professional Liability, and the Standing Committee on Professional Regulation. In addition, the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty pro bono lawyers and law school clinicians nationwide, the Legal Aid Society of New York (an organization of more than 1200 lawyers), Southeast Louisiana Legal Services, and APBCo support it.[51] On Easter weekend and in response to SCEPR's Survey—one lawyer wrote:

> Ethics rule 1.8, and its correlating rule under New York rules, has substantially hindered our ability to support clients: rather than supporting those in the most desperate of circumstances, we can only help clients with

[49] E-mail from Hamilton P. Fox, Disciplinary Counsel in D.C. to SCEPR Member Thomas H. Mason (Apr. 8, 2020) (on file with SCEPR) (citing the following reciprocal cases: *In re* Schurtz, 25 A.3d 905, 906-907 (D.C. 2011); *In re* Edelstein, 892 A.2d 1153, 1159 n.3 (D.C. 2006); *In re* Wallace, Board Docket No. 17-BD-001 at 10 n.6 (BPR HCR, Mar. 16, 2018)). *See also* Sahl, *supra* note 12 at 8 (DC's "permissive approach concerning lawyer advances for living expenses has existed for a 'long time and has not produced any official complaints.' Nor has the approach caused the bar any 'reason to be concerned.'") (citing the author's conversations with D.C. Bar Counsel); CITY BAR RPT., *supra* note 34 at 10 ("the committee informally consulted bar regulators and academic ethicists in the jurisdictions which currently have a version of a 'humanitarian exception,' in order to assess whether those rules have led to any notable abuses or problems. Without exception, no one reported problems with a humanitarian exception in pro bono cases.").

[50] *See* Section II of this Report.

[51] *Id.*

> no pending or contemplated litigation. We urge the rule be amended to allow our ability to respond to our client's financial needs during this crisis.[52]

Some lawyers outside the pro bono community have suggested that giving pro bono lawyers discretion to help their needy clients would create stress that might impair the client-lawyer relationship. SCEPR has seen no evidence from the pro bono community that this is true, and there are several approaches short of denying the discretion to the many pro bono lawyers who seek it. Lawyers and legal services organizations can adopt a policy against providing assistance with living expenses to any client. Alternatively, decisions can be made not by individual attorneys but by a central-decision maker according to rules and standards adopted by the organization.

VIII. Conclusion

For the foregoing reasons, the ABA should adopt the proposed amendments to Rule 1.8(e).

Respectfully submitted,

Barbara S. Gillers
Chair, Standing Committee on Ethics
and Professional Responsibility
August 2020

[52] E-mail from Michael Pope, Executive Director of Youth Represent, to Daniel L. Greenberg and Barbara S. Gillers (Apr. 10, 2020) (on file with SCEPR).

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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Barbara S. Gillers, Chair, Standing Committee on Ethics and Professional Responsibility

1. Summary of the Resolution(s). The proposed rule amends Model Rule 1.8(e) by adding a narrow exception that is intended to increase access to justice for the most vulnerable clients. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit* a limited form of financial assistance for living expenses *only* to indigent clients, *only* in the form of modest gifts not loans, *only* when the lawyer is working pro bono and without fee to the client or through a nonprofit legal services or public interest organization or a law school clinical or pro bono program, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses.

   The proposed rule closes a gap in the current rule. Currently, lawyers may provide financial assistance to transactional clients, may offer social hospitality to any litigation or transactional client and may advance or pay the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent. Clients to whom lawyers may not give money or things of value are litigation clients who need help with basic necessities of life. By allowing lawyers to give such gifts, the proposed rule is intended to increase access to justice and permit lawyers to follow their humanitarian instincts.

2. Approval by Submitting Entity. The Resolution was approved in May 2020 and repeatedly throughout this process by both the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Legal Aid and Indigent Defendants.

3. Has this or a similar resolution been submitted to the House or Board previously? The ABA Model Rules of Professional Conduct were adopted by the House of Delegates in 1983. Model Rule 1.8(e) was a part of that submission. It has not been amended since its adoption in 1983.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The ABA Model Rules of Professional Conduct, as adopted by the House of Delegates, are ABA policy. This would amend that policy. The SCEPR knows of no other ABA policy that would be affected by this change. As noted in the report, "By enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule's restrictions, the amendment ensures equal justice under law, a core ABA mission." ABA Goal IV is to "Advance the Rule of Law." To meet this goal, one of the ABA's objectives is to "[a]ssure meaningful access

to justice for all persons." SCEPR and SCLAID believe this resolution advances that objective.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. (If applicable) N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. Information about the amendment will be provided to the Chief Justice of every state. Developments in the states will be tracked and published on the Center's website.

8. Cost to the Association. (Both direct and indirect costs) None

9. Disclosure of Interest. (If applicable) N/A

10. Referrals.

Standing Committee on Legal Aid and Indigent Defendants
Center for Diversity and Inclusion
Business Law Section
Civil Rights & Social Justice Section
Criminal Justice Section
Health Law Section
Law Student Division
Litigation Section
Young Lawyers Division
Commission on Disability Rights
Commission on Immigration
Commission on Homelessness & Poverty
Center on Children & the Law
Commission on Domestic and Sexual Violence
Commission on Law & Aging
Standing Committee on Professionalism
Standing Committee on Pro Bono & Public Service
Standing Committee on Legal Assistance for Military Personnel
Standing Committee on Professional Regulation
Standing Committee on Lawyers' Professional Liability
Standing Committee on Public Protection in the Provision of Legal Services
Commission on Lawyers' Assistance Programs
Commission on Interest on Lawyers' Trust Accounts
Standing Committee on Delivery of Legal Services
Standing Committee on Disaster Response & Preparedness
Standing Committee on Group & Prepaid Legal Services

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Standing Committee on Lawyer Referral & Information Services

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.)

    Barbara S. Gillers, Chair of the Standing Committee on Ethics and Professional Responsibility, 917.679.5757, barbara.gillers@nyu.edu

12. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online*.

    Barbara S. Gillers, Chair of the Standing Committee on Ethics and Professional Responsibility, 917.679.5757, barbara.gillers@nyu.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution asks the House of Delegates to add a narrow exception to Model Rule 1.8(e) that is intended to increase access to justice for our most vulnerable citizens. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented without fee to the client in a pending or contemplated litigation or administrative proceeding. The proposed rule will permit modest gifts to indigent clients by lawyers representing those clients in litigation or administrative proceedings pro bono individually or through the organizations or programs designated in the proposed rule: a nonprofit legal services or public interest organization or a law school clinical or pro bono program.

The proposed rule would *permit a limited form of* financial assistance for living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono without fee to the client, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions for food, rent, transportation, medicine, and other basic living expenses. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.

A lawyer may not: (1) promise, assure or imply the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (2) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or (3) publicize or advertise a willingness to provide financial assistance to prospective clients.

2. Summary of the issue that the resolution addresses.

The proposed rule addresses a gap in the ABA Model Rule of Professional Conduct 1.8(e), which prohibits lawyers from helping indigent clients with basic and essential living expenses such as food, clothing, shelter and medicine while a litigation or administrative proceeding is pending.

The history, development, and commentary on the prohibition against financial assistance to litigation clients establishes two reasons for the prohibition, which are succinctly stated in Comment [10] to Rule 1.8. First, the prohibition prevents lawyers from having "too great a financial stake in the litigation." Second, allowing assistance would "encourage clients to pursue lawsuits that would not otherwise be brought."

Because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer's advice. Further, by enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule's restrictions, the amendment ensures equal justice under law, a core ABA mission. An exception for assistance permitted by the proposed rule is commonly referred to as a "humanitarian exception" to the prohibitions in Model Rule 1.8(e).

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The proposed rule to add a humanitarian exception to Rule 1.8(e) has received support from a wide variety of pro bono, legal services and legal aid lawyers and from law school clinicians. This group includes approximately sixty lawyers in nonprofit organizations and legal services and legal aid offices, the Legal Aid Society in NYC—an office of more than 1200 lawyers, and clinical faculty at law schools nationwide, and the Southeast Louisiana Services. SCEPR and SCLAID have also received support from the Society of American Law Teachers (SALT) and the National Legal Aid and Defender Association (NLADA). Further, in a letter to the ABA Board of Governors, the Association of Pro Bono Counsel ("APBCo"), a membership organization of nearly 250 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at more than 100 of the country's largest law firms wrote, "APBCo supports the effort to modify the Model Rules and permit pro bono lawyers to help their indigent clients meet basic human necessities, such as food, rent, transportation and medicine during the course of the representation. In the context of pro bono representation, none of these kinds of charitable gifts present any concerns raised by the Model Rule, which is designed to prevent lawyers from providing financial assistance to clients in order to subsidize lawsuits or administrative proceedings in a way that encourages clients to pursue lawsuits that might not otherwise be brought and gives lawyers a specific financial stake in the litigation. Neither pro bono lawyers nor their firms profit from public interest representation; the kinds of limited financial assistance contemplated by the proposed amendment will in no way violate the intended policy."

In addition, many ABA committees and entities involved in access to justice initiatives support the proposed rule. These include the cosponsor, the Standing Committee on Legal Aid and Indigent Defendants, the Diversity and Inclusion Center and its constituent Goal III entities, the Standing Committee on Pro Bono and Public Service, the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Commission on Domestic and Sexual Violence, the Law Students Division, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel, the Criminal Justice Section, the Standing Committee on Lawyers' Professional Liability, the Commission on Interest on Lawyers' Trust Accounts, the Commission on Lawyer Assistance Programs, and the Standing Committee on Professional Regulation.

While support for the proposed rule is deep and wide within the public interest community, the proposed rule *does not require* any lawyer to provide financial assistance for living expenses to indigent clients.

3. Please explain how the proposed policy position will address the issue.

The amendment to Model Rule 1.8(e) would eliminate the prohibition on providing indigent clients represented pro bono in litigation or administrative proceedings with modest financial assistance for basic necessities of life, e.g. food, clothing, shelter, and medicine.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

During our prefiling circulations of a draft resolution and report (on March 12 and 13, on April 20, and in May 2020) the following committees noted their support for permitting modest financial assistance for basic living expenses to indigent clients represented pro bono in litigation and administrative proceeding but also offered general comments and specific amendments: the Steering Committee of the ABA's Death Penalty Representation Project, the Committee on Business and Corporate Litigation of the Business Law Section, and the Standing Committees on (i) Professionalism, (ii) Interest on Lawyers' Trust Accounts, (iii) Lawyers' Professional Liability, (iv) Professional Regulation, and (v) Public Protection in the Provision of Legal Services. A new version was created, adopting many of the suggestions. SCEPR and SCLAID submitted the new version to the Standing Committee on Rules and Calendar on May 5, 2020.

Since approval by the Standing Committee on Rules and Calendar after May 5th, SCEPR and SCLAID have continued to work with the aforementioned Committees and Commissions, and other ABA entities to achieve consensus. During this process additional edits were made to the Resolution and Report. As a consequence, the Criminal Justice Section, the Commission on Lawyer Assistance Programs, the Commission on Interest on Lawyers' Trust Accounts, the Standing Committee on Lawyers' Professional Liability, and the Standing Committee on Professional Regulation now support the Resolution and Report. No opposition has been identified.

SCEPR and SCLAID will continue to work with all entities presenting concerns to ensure that all are heard and that every reasonable attempt at consensus is made.

Tab E

Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 Geo. J. Legal Ethics 39, 71-72 (2015)

The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)

PHILIP G. SCHRAG*

TABLE OF CONTENTS

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The ABA *Model Rules of Professional Conduct* proclaim that all lawyers should use their influence "to ensure equal access to our system of justice,"[1] and in many ways, the *Model Rules* themselves attempt to improve access to justice for individuals of limited financial means. For example, the *Model Rules* explicitly authorize lawyers to charge contingent fees, so that clients who are unable to pay an hourly or flat fee can obtain legal redress for injuries without investing whatever savings they may have.[2] The *Model Rules* also encourage lawyers to aspire to provide at least fifty hours a year of pro bono legal services,[3] and they discourage lawyers from avoiding court appointments to represent indigent or unpopular clients.[4] But Model Rule 1.8(e), which has become law in forty states, is at odds with the legal profession's goal of facilitating access to justice. This rule bars lawyers from assisting their low-income litigation clients with living expenses, such as food, shelter and medicine, though such clients may suffer or even die while waiting for a favorable litigation result. Because of its indifference to the humanitarian or charitable impulses of lawyers and its harsh effects on indigent clients, Rule 1.8(e) stands out as an unethical ethics rule.

This article examines Rule 1.8(e) and its persistence, academic criticism notwithstanding, in the law of most states. It also suggests that the rationale for its continued enforcement rests primarily on concern for clients in contingent fee cases, and that the rule could be amended, rather than repealed outright, to narrow its scope, preserving its possible benefit while reducing its collateral damage.

Part I, based on my personal experience as a clinic director, describes the impact of the rule on indigent clients. It also contrasts the lenient version of the rule adopted by the District of Columbia with the application of the rule in a typical state (Maryland) that has done nothing to soften its harsh consequences. Part II describes the origin and history of Model Rule 1.8(e), culminating in its

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1. MODEL RULES OF PROF'L CONDUCT pmbl. (2010) [hereinafter MODEL RULES].

2. *See* MODEL RULES R. 1.5(c). For a critique of contingent fees in a tort system that increasingly relies on "settlement mills," see Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1524–27 (2009).

3. MODEL RULES R. 6.1.

4. *See* MODEL RULES R. 6.2.

adoption, in its present form, by the House of Delegates of the American Bar Association (ABA) in 1983. Part III discusses the rationales that have been offered in support of the rule. Part IV surveys state law. It examines in particular the rule in the eight states that have adopted less harsh versions, and in two states in which opinions of the bar or the courts have softened its application. It also recounts the recent jurisprudence of the states that simply adopted the ABA's model language. Part V explores conceptual distinctions that arise from the varied jurisprudence in states that do not use the ABA's version of the rule. These distinctions inform Part VI, which describes and evaluates nine different ways, short of complete repeal, in which the rule might be improved.

I. THE HUMAN TOLL OF RULE 1.8(e)

A. INDIGENT CLIENTS IN MARYLAND TRIBUNALS: A CASE IN POINT

Since 1995, Georgetown University Law Center has operated an asylum law clinic, the Center for Applied Legal Studies, and I have had the honor of being its co-director.[5] The clinic's students represent clients who flee from persecution in other countries. Most asylum applicants file affirmatively with the U.S. Department of Homeland Security, and are interviewed by one of the Department's asylum officers.[6] If they are turned down after completing that non-adversarial interview, they are served with summonses to appear in deportation hearings before a federal immigration court (which is actually an agency of the Department of Justice), where they have a new opportunity to win asylum and start on the road to American citizenship. About 20% of asylum-seekers apply "defensively," either as they enter the United States and declare their desire for protection, or after they are apprehended by authorities.[7] When an immigration judge denies asylum, the applicant is ordered deported from the United States, subject to a paper appeal to the Board of Immigration Appeals. The immigration court hearings are adversarial hearings, with an attorney from the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE) cross-examining the applicant and usually arguing vigorously in favor of deportation.

A large proportion of asylum applicants have little or no wealth, are unable to afford lawyers, and are recent arrivals in the United States with poor English language skills and little understanding of American law or legal culture. Many,

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5. The clinic's goals and teaching methods are described in links from its home page, CENTER FOR APPLIED LEGAL STUDIES, http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/CALS/index.cfm (last visited Oct. 10, 2014). For background on the pedagogical choices that went into the creation of this clinic, see Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175 (1996).

6. For a detailed description of the process of asylum adjudication by the Department, and of non-merits factors that apparently affect asylum officers' decisions, see ANDREW I. SCHOENHOLTZ ET AL., LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY (2014).

7. For the statistical breakdown, see SCHOENHOLTZ ET AL., *supra* note 6, at 228 n.7.

even among those who apply affirmatively, have no professional assistance when they file their applications or appear for asylum office interviews.[8] Others are represented by counsel who are not competent or who spend very little time helping them to prepare their written or oral submissions.[9] They expect the asylum officers to believe their stories, even though without professional help they were unable to collect corroborating documentation from their home countries (such as arrest warrants, prison records, or affidavits from friends and relatives who could attest to their persecution and torture).[10] Winning asylum is an uphill struggle, especially if the applicant lacks legal assistance.[11]

Many of these applicants are indigent or, even if not totally impecunious, unable to afford to pay for representation for an immigration court hearing, as practitioners often charge about $15,000 for representation at such a hearing. But some are lucky enough to obtain free assistance from a non-governmental organization, a large law firm with a substantial pro bono practice, or a law school clinic such as the Center for Applied Legal Studies. Such representation is doubly advantageous; not only is it free, but the free services win asylum cases about twice as often as paid lawyers.[12]

Early in our representation of indigent asylum applicants, we discovered a serious problem. Asylum applicants are not allowed to work in the United States until either (a) their applications are granted or (b) 180 days have elapsed without a decision, through no fault of their own.[13] Applicants' "fault," suspending the running of this time period, includes requests for time to obtain counsel, requests for time to file additional documentation, requests to consolidate a case with that of a family member, and requests to have a court hearing in person instead of a

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8. From financial year (FY) 2002 through FY 2005, only 40% of asylum applicants had representation at their asylum office interviews. For the period FY 2006 to FY 2009, this percentage increased to just under 60%. SCHOENHOLTZ ET AL., *supra* note 6, at 25. But these percentages include not only representation by lawyers but also representation by non-lawyer accredited representatives, law students, law graduates not yet admitted to the bar, and other persons of "good moral character" selected by the applicant and allowed by the asylum officer to serve as the representative. *See, e.g.*, 8 C.F.R. 292.1 (2011); Philip G. Schrag et al., *Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum*, 52 WM. & MARY L. REV. 651, 782 (2010) (explaining that the asylum office codes all representatives as "attorneys" for purposes of the statistical analyses performed by its officials and used as well by the academic researchers).

9. New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 391 (2011) (Even in immigration court proceedings, "close to half of the representation in immigration courts was judged [by immigration judges] to fall below basic standards of adequacy in terms of overall performance (47%), preparation of cases (47%), knowledge of the law (44%), and knowledge of the facts (40%); between 13% and 15% of representation, in all of these categories, was characterized as 'grossly inadequate.'").

10. An application may be denied for lack of corroborating documentation that the asylum officer believes should have been available to the applicant. 8 U.S.C. § 1158(b)(1)(B)(ii) (2009).

11. For a book-length example of one applicant's struggle, see DAVID N. KENNEY & PHILIP G. SCHRAG, ASYLUM DENIED (2008).

12. JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION 45 (2009).

13. 8 C.F.R. § 208.7(a) (2011).

video-conferenced hearing offered by the immigration court.[14] The asylum office often turns down applicants within sixty to ninety days after application, so applicants are not allowed to work until the immigration court makes a favorable decision, unless the entire process takes longer than 180 days. The court promptly schedules a "master calendar hearing" at which the judge offers the applicant a hearing on the merits shortly thereafter; the period of time for preparation of the case may be as short as three or four weeks. Very often, that is too short a time for the applicant to find a lawyer; even if the applicant has a lawyer, it is too little time in which to interview the client (often several times, in the case of a victim of persecution who was tortured in his home country and reluctant to relive the experience), collect the evidence necessary to corroborate the story, prepare witnesses, and write a trial brief, so the applicant's representative must counsel the client to ask for a later date. But, asking for a later date is considered a delay that is the fault of the applicant, and it therefore stops the 180-day employment authorization clock. Furthermore, immigration courts are badly backlogged, so if an applicant for asylum does not take a date in the very near future, she is likely to be given a hearing date a year or more into the future, and she cannot be employed, even in a minimum-wage job, for this entire waiting period. Asylum applicants also have no right to public welfare, Medicaid, or other social services, as they have not yet received any lawful immigration status in the United States.

Forced unemployment does not preclude the receipt of pro bono legal services. But for many such applicants (particularly those who don't want to violate the law by working illegally, or who are too unskilled or disabled to be able to obtain employment even if they were so willing) it means a year or more in which they cannot earn money to pay for food, lodging, medical care, transportation, or other necessities.[15] Unless they happen to have family members or friends who will supply them with charity for a year or more, they quickly become destitute.[16]

An applicant who appeals after being denied asylum by an immigration judge may remain in the United States until the appeal is decided, but the appeal can take a year or more to be decided. An applicant who was not allowed to work before the immigration judge decided the case is not also allowed to work during

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14. Memorandum to Deputy Chief Immigration Judges et al. from Michael J. Creppy, Chief Immigration Judge (June 6, 2005) http://www.justice.gov/eoir/efoia/ocij/oppm05/05-07.pdf.

15. Not only does the period in which employment is forbidden stretch to more than a year for those who are denied asylum by an immigration judge but prevail after an appeal, but a remand to an immigration judge will usually result in still more delay, because the case is likely to be scheduled at the end of the queue of cases already scheduled for hearings.

16. The asylum application process may itself hasten destitution. One of our clinic's clients came from a fairly well-off African family and arrived in the United States with $8,000 worth of gold. But her first immigration lawyer charged her that entire amount—and the client failed to win asylum from the asylum office. She was virtually penniless by the time she learned that she could get free legal help, at the immigration court stage of the proceedings, from our clinic.

the lengthy appeal process, and as time goes by and any savings are depleted, the risk of destitution increases.

Impoverishment while awaiting a decision or appeal is familiar to us. One of our clients, for example, was living in the wreck of an automobile when he secured our services. Another became homeless during the course of our representation; we only learned that she was living on the street after her telephone was disconnected and we lost contact with her. A third was no longer able to afford prescribed anti-psychotic medication and without it had become suicidal. A fourth was living in a friend's apartment but could not afford bus fare to get to our office or anywhere else. A fifth could not communicate with his students because he had no money and no telephone.

In all of these cases, the students who were representing these individuals had only modest means themselves but had far more wealth than their impoverished clients. They wanted to provide the clients with some of their own funds to tide them over until their cases, scheduled a few months hence, could be heard. Some students wanted to pay their clients' rent for a few weeks or months. One wanted to purchase prescribed anti-psychotic medication for the client, fearing that otherwise, she would die. One wanted to purchase a fare card so that the client could use the bus. One wanted to buy the client a pre-paid cell phone.

B. MODEL RULE 1.8(e)

But the students could not give their clients some money for rent, food, or medicine, or even buy pre-paid mobile telephones for them, as such phones could be used for personal calls as well as those to the clients' legal representatives. Their generous impulses clashed head-on with a surprising prohibition in the legal ethics rules.

Model Rule of Professional Conduct 1.8(e), which has been adopted by most states, 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; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.[17]

Therefore, in a state that has adopted this rule, it would seem that a lawyer may advance court costs and "expenses of litigation" for any client, and even absorb those costs if the client does not prevail, and that a lawyer for an indigent client may simply pay those costs and expenses. But even for an indigent client, a

17. MODEL RULES R. 1.8(e).

lawyer may not provide "financial assistance" if that assistance is "in connection with" litigation. In other words, a lawyer may not extend charity even to an indigent client whom the lawyer is representing, or whom the lawyer plans to represent, in litigation.

In case there was any doubt about what kind of expenses are encompassed within the ban, the ABA's official comments explain that lawyers "may not subsidize lawsuits or administrative proceedings" for their clients, "including making or guaranteeing loans to their clients for living expenses."[18] The comments also explain the twin rationales for this rule. First, such assistance "would encourage clients to pursue lawsuits that might not otherwise be brought." Second, such assistance "gives lawyers too great a financial stake in the litigation."[19]

C. A LENIENT JURISDICTION: THE DISTRICT OF COLUMBIA

Fortunately for my students who wanted to help their clients out of their own pockets, there remained—for a time—a way to do so. Our office was located in the District of Columbia, although the litigation of their deportation litigation occurred in immigration courts in Baltimore, Maryland, and Arlington, Virginia.[20] The District had rejected the Model Rule in favor of a much more liberal version, which is still in effect:

> While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:
>
> (1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and
>
> (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.[21]

A comment to the D.C. rule explains the rationale for this departure from the model: "The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on

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18. MODEL RULES R. 1.8 cmt. 10. This explicit example apparently rules out a theory that a lawyer's gift or loan of living expenses to a litigation client is an independent act and not "in connection with" litigation. The phrase "in connection with litigation" was probably intended to limit the rule's applicability to matters that were in or seemed headed for litigation, making it acceptable for lawyers to make gifts or loans to clients being represented in transactional matters.

19. MODEL RULES R. 1.8 cmt. 10.

20. There is no immigration court in the District of Columbia. District residents who are placed into immigration court proceedings have their cases heard in Virginia.

21. D.C. RULES OF PROF'L CONDUCT R. 1.8(d) (2007). The District's Rule 1.8(d) is the counterpart to the American Bar Association's MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (1983).

unfavorable terms in order to receive the immediate proceeds of settlement."[22] In the case of an indigent in deportation proceedings, a "settlement" is not possible, but the potential consequences of homelessness, starvation, or medical inattention are even more serious than having to accept artificially low financial compensation. The client may die while waiting for a court hearing, or may be unable to remain in communication with counsel, causing a winning case to become a losing one, or causing the client to be unable to participate in the hearing at all, with the result that the client would be ordered deported in absentia.[23]

We had a basis for believing that we could rely on the D.C. rule because, until 2007, the D.C. rule on conflict among ethics rules only required compliance with another jurisdiction's rules if the D.C. attorney was handling a matter in a "court" in another jurisdiction,[24] and the rules of ethics distinguished between "courts" and "tribunals." "Tribunals" included administrative agencies.[25] The immigration court was and still is an administrative agency of the U.S. Department of Justice. However, in 2007, D.C. amended its conflict of ethics rule to require D.C. attorneys to obey the ethics rule of any "tribunal" in which they were handling litigation.[26] Clinic students could no longer provide even the most meager assistance, other than litigation expenses, to their indigent clients, unless the ethics rule of the state of the tribunal—Maryland or Virginia—permitted it.

D. A STRICT JURISDICTION: THE EVOLUTION OF MARYLAND'S HARD LINE

Maryland's rule was particularly severe.[27] Maryland had adopted the Model Rule, but in addition, Maryland's Court of Appeals had on several occasions construed and applied its Rule 1.8(e) literally, and the Maryland Bar had even more severely limited lawyers' generosity.[28]

Maryland's interpretation of Rule 1.8(e) apparently began with a 1975 disciplinary case against a lawyer named Cockrell who had settled a personal injury case for the benefit of his client, Mason. Cockrell deducted from the settlement not only his attorney's fee but also $600 for funds he had loaned to Mason

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22. D.C. RULES OF PROF'L CONDUCT R. 1.8(d), cmt. 9. The comment adds that the provision "does not permit lawyers to 'bid' for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed."

23. 8 U.S.C. § 1229a(b)(5) (2008).

24. *See* D.C. RULES OF PROF'L CONDUCT R. 8.5(b) (1991) (amended 2007).

25. D.C. RULES OF PROF'L CONDUCT terminology.

26. *Compare* D.C. RULE OF PROF'L CONDUCT R. 8.5(b) (2007), *with* the former rule, *supra* note 24.

27. Virginia, like Maryland, had adopted Model Rule 1.8(e) without modification, but no Virginia case or bar opinion had construed it. In 2006, recognizing that it was adopting a minority interpretation, the Virginia Bar took a more liberal approach than the Maryland Bar has consistently taken. *See* text accompanying notes 112–15 discussing Va. State Bar, Legal Ethics Op. 1830 (2006).

28. *See infra* notes 29–51 and accompanying text.

pending the conclusion of year-long settlement negotiations.[29] He gave Mason a check for the balance, but the check was returned to Mason marked "insufficient funds."[30] He was charged with misrepresentations and with having made kickbacks to the insurance adjuster, but neither of these charges were proved, and they were dismissed. A third charge, however, concerned the $600 advance that Cockrell admitted having made to Mason. The Court of Appeals found that this loan violated Disciplinary Rule 5-103(B), the forerunner of what is now Rule 1.8(e).[31] Although the only sustained charge was loaning Mason $600, the Court of Appeals suspended Cockrell from the practice of law for six months.[32]

A few years later, an attorney named Engerman was charged with violating the rule. Engerman had violated several disciplinary rules; among other things, he had paid non-lawyers to refer clients to him, and he had commingled his personal funds with client funds.[33] In addition, he had loaned $712 to a client whom he was representing in a personal injury case.[34] Both Engerman and the client testified that these funds were advanced for "food and other necessities" for the client's home, and Engerman testified that his motivation was that he felt sorry for his client.[35] Motivational explanations had been absent from the *Cockrell* case, and this might have been the basis for a distinction. Nevertheless, the Court of Appeals held that Engerman had clearly violated Rule 5-103(B), and he too was suspended.[36]

Six years later, the Court of Appeals suspended attorney Alan Edgar Harris for six months.[37] Like Cockrell and Engerman, Harris had committed numerous ethical violations. He had neglected a client's case, resulting in its dismissal; he had failed to maintain complete records in connection with nineteen cases that he handled for a family named Jacks; and, at a time when he was authorized to file a case for one of the members of the Jacks family, he had loaned the family nearly $9,000 so that it could purchase a house, a car, and a "video machine," which apparently increased the severity of his punishment.[38]

Two years later, the court considered a case in which, contrary to the three previous matters, an attorney was charged only with violating the rule against

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29. Bar Ass'n of Balt. City v. Cockrell, 334 A.2d 85, 86 (Md. 1975).

30. *Id*.

31. That rule differed from Rule 1.8(e) in that while lawyers could advance litigation expenses to clients, the client had to remain "ultimately liable" for the expense. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1980) [hereinafter MODEL CODE]. Rule 1.8(e) eliminated the requirement of ultimate client liability while retaining the limits on the type of expenses that could be advanced. *See* MODEL RULES R. 1.8(e).

32. *Cockrell*, 334 A.2d at 89.

33. Att'y Grievance Comm'n of Md. v. Engerman, 424 A.2d 362, 336–67 (Md. 1981).

34. *Id*.

35. *Id*.

36. Curiously, he was suspended for only thirty days, five months less than Cockrell, although he had committed several other violations.

37. Att'y Grievance Comm'n of Md. v. Harris, 528 A.2d 895, 904 (Md. 1987).

38. *Id*. at 901–04.

advancing funds, other than litigation expenses, to clients. Nelson Kandel represented plaintiff Vincent Prescimone in two suits for injuries resulting from accidents.[39] Prescimone had limited means, and his car broke down so often that he could not reliably get to his medical appointments.[40] Kandel loaned him $200 for automobile repairs, although Kandel "admitted" that Prescimone may have used the car for other purposes, as well as to see the doctor.[41] Later, while Prescimone was still indigent and his cases were still pending but after he no longer needed medical care, Kandel loaned him an additional $1,000 for car repairs.[42] Prescimone repaid the funds after he received a settlement from an insurance company.[43] The court held that although "Kandel was not motivated by self-interest or personal gain in making the advancements to his client," and Prescimone suffered no harm or loss, Kandel had to be disciplined because "advancement of funds for medical treatment, or for transportation to a medical office for treatment" is not an advance for "necessary expenses of litigation."[44] It publicly reprimanded him; a dissenting judge would have suspended him for thirty days.[45]

By the time of the next Maryland case, the ethics rule that had been violated by Cockrell, Engerman, Harris, and Kandel had been replaced by Rule 1.8(e), which allowed lawyers to make repayment of advanced litigation expenses contingent on the outcome and allowed lawyers to pay such expenses, without even the façade of a loan, for indigent clients. But that change did nothing to help Myles Eisenstein, who loaned money to his client, William Curtis Taylor, while representing him in a claim for funds from a job-related injury.[46] The court acknowledged that the loan may have been made "in part because of his [Eisenstein's] long-standing personal relationship" with Taylor (and that Eisenstein was still representing Taylor in related proceedings), but held it a violation of Rule 1.8(e) anyway.[47] For the first time, the court offered a rationale for its promulgation of the Rule: "advancing non-litigation related expenses smacks of 'purchasing an interest in the subject matter of the litigation.'" Eisenstein was suspended for two years, in part because he had also violated Rule 1.15, which pertains to maintaining client funds in a separate trust account.[48] Nor did the new rule save Jill Johnson Pennington from a reprimand after she made a personal

39. Att'y Grievance Comm'n of Md. v. Kandel, 563 A.2d 387, 387–88 (Md. 1989).
40. *Id*. at 388.
41. *Id*.
42. *See id*. at 389.
43. *Id*. at 389.
44. *Id*. at 389–90.
45. *Id.* at 390–91.
46. Att'y Grievance Comm'n of Md. v. Eisenstein, 635 A.2d 1327, 1333 (Md. 1994).
47. *Id*. at 1337.
48. *Id*. at 1337–38.

loan of $1,350 to a client while representing that client in a fair employment suit.[49]

None of those cases involved gifts, as opposed to loans. But in 2001, the Maryland State Bar issued an ethics opinion concluding that because the Rule "makes no distinctions between advances/loans and gifts . . . it is a violation of Rule 1.8(e) for an attorney to provide housing or other financial assistance to a client or potential client in connection with contemplated or pending litigation."[50] A concurring opinion by "several" committee members recommended "a comprehensive rewrite of the Rule" by the appropriate committee, because the bar should "not try to punish every good deed done by attorneys, the public believes we do few enough of them as is."[51] No rewrite occurred.

The combination of the District of Columbia's new conflicts rule and the Maryland Bar's emphatic conclusion that gifts to indigent clients would violate the ethics rules forced the clinic to conclude that students could not make charitable contributions to their Maryland clients, even if those clients were freezing, starving, or in desperate need of medical care. Virginia apparently had no court cases or, at that time, bar opinions interpreting its Rule 1.8(e), but it too had simply adopted the Model Rule, so we did not think that we could adopt a more lenient policy for cases in the Virginia immigration court. We could only ask our students to ponder why the ABA and the highest courts of most states desired impoverished clients to experience so much needless suffering.[52]

II. THE ORIGINS OF RULE 1.8(e)

A. BRITISH LAW

The Maryland Bar opinion stated that "the public policy against 'stirring up litigation'" is "furthered by Rule 1.8(e)" and that "if anything, a gift provides more financial assistance than a loan" so that the rule is "violated as much or more by a gift as compared to an advance."[53]

The concern that lawyers' gifts to indigent clients could stimulate more litigation than would otherwise be conducted accurately reflects the medieval

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49. Att'y Grievance Comm'n of Md. v. Pennington, 733 A.2d 1029, 1031, 1038 (Md. 1999).

50. Md. State Bar Ass'n Comm. on Ethics, Op. 01-10 (2001) (financial assistance to a client by gift).

51. *Id.* (concurring opinion).

52. It is impossible even to estimate how many impoverished clients across the country are adversely affected by Rule 1.8(e). One would have to poll, at the least, all legal aid lawyers, all law school clinics, and all private lawyers who represent poor clients on a pro bono basis, and ask them whether they would have been willing to contribute to the subsistence expenses of some of their indigent litigation clients if permitted to do so, and how many such clients they would have assisted in recent years. The number of pro bono lawyers, in particular, is very large, and they would be extremely hard to identify. But many of them might be relatively wealthy individuals in corporate law firms who could afford to be generous, and if Rule 1.8(e) allowed it, their firms might even create small accounts to provide assistance to indigent clients.

53. Md. State Bar Ass'n Comm. on Ethics, *supra* note 50.

origins of Rule 1.8(e). Professor James Moliterno has traced the origins of the rule to its roots in fifteenth century England, and specifically to the Star Chamber Act of 1487 and the Statute of Liveries of 1504, directed against "maintenance."[54] These statutes were not aimed at lawyers; they were aimed at wealthy feudal landowners who supported litigation by their "minions and supporters" to gain land and power, which diminished the influence of the crown.[55] These landowners retained lawyers to conduct the litigation, and in time, a new justification emerged for laws against maintenance or "barratry," the "habitual provision of maintenance."[56] This new rationale was simply the "fundamental distrust of legal procedure and of lawyers," resulting in the application to lawyers of the barratry and maintenance laws.[57]

B. PRE-RULE BAR ASSOCIATION OPINIONS

First, the Association of the Bar of the City of New York and then the ABA weighed in against loans and gifts by lawyers to clients, except for actual litigation expenses. But they did not rely on the barratry and maintenance rationale for their views, as the British restrictions had long been rejected by American courts.[58] The first salvo was a 1925 opinion of the New York City bar. The lawyer's client was a seaman from another country who was injured, allegedly negligently, by his employer.[59] The accident had caused him to lose his hand.[60] As a result, he could not work unless he obtained a prosthetic hand.[61] The lawyer wanted to pay for the prosthetic, because if the client continued to be unemployed, he would become a "public charge," would be deported, and would be unable to pursue his negligence claim.[62] The bar committee concluded that

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54. James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 228 (2003) (drawing on Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1934)).

55. *Id.* at 228.

56. *Id.*

57. *Id.* at 228–29.

58. Nineteenth and early twentieth century American courts rejected the British prohibitions on these offenses. Indeed, over the objections of the organized bar (which was dominated by defendants' lawyers), they accepted the development of the contingent fee system, through which lawyers enabled impecunious clients to bring lawsuits, with the attorneys fronting the time and expenses. At least one state supreme court explicitly endorsed loans by a lawyer to an indigent client for living and medical expenses, to "prevent his becoming a public charge." People *ex rel.* Chi. Bar Ass'n v. McCallum, 173 N.E. 827, 831 (Ill. 1930). When the first *ABA Canons of Ethics* were issued in 1908, they barred attorneys from purchasing interests in the lawsuits they were conducting, but they did not outlaw either contingent fees or loans or gifts to their clients. Moliterno, *supra* note 54, at 229–31.

59. Comm. on Prof'l Ethics of the Ass'n of the Bar of the City of New York, Op. 20 (1925), *reprinted in* OPINIONS OF THE COMM'S ON PROF'L ETHICS OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASS'N 10 (1956) [hereinafter NYC BAR OPINIONS].

60. *Id.* at 10.

61. *Id.*

62. *Id.*

while "charity is in accord with the best traditions of the profession," the lawyer could not pay for the prosthetic because this form of charity would give the lawyer "greater control of the action . . . than is consistent with the free agency of the client" and would create "an undue personal interest in the action on the part of the attorney."[63]

The 1925 opinion was followed by others to similar effect. In 1932, the City Bar refused to allow a personal injury lawyer to lend funds for food and board to destitute clients because such loans would be "in effect, a method of soliciting business for the attorney."[64] In 1953, a lawyer with another client who was an injured, unemployable and destitute seaman reported to the bar that the allegedly negligent steamship company was making periodic maintenance payments to his client but that it had told the client that it would cease making those payments while he was represented by a lawyer.[65] The lawyer wanted to lend the seaman some money so that he would not starve or be forced by his poverty to accept a low settlement offer.[66] The Bar refused to permit it, stating that "such loans might induce a client to employ one attorney rather than another" and "would impair the dignity of the profession."[67]

The ABA focused initially on personal injury cases in a 1954 opinion rendered at the request of a lawyer for a client that had been sued by several "badly injured" plaintiffs who were being supported by "certain attorneys."[68] The bar concluded that "payments, pending trial in personal injury cases, by an attorney to or for the benefit of his injured client, for any purpose other than to cover expenses of litigation, subject to reimbursement, are improper."[69]

C. FORMAL RULES OF ETHICS

In 1969, that opinion was codified in the ABA's Disciplinary Rule 5-103(b) of its *Model Code of Professional Responsibility*, which cited the opinion in a footnote but in fact went beyond the opinion by applying the prohibition to all cases, not merely personal injury cases:

> 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 medical examination, and costs of obtaining

63. *Id.* at 11.
64. NYC BAR OPINIONS, Op. 319 (1934), *supra* note 59, at 169.
65. NYC BAR OPINIONS, Op. 779 (1953), *supra* note 59, at 474.
66. *Id.*
67. *Id.*
68. ABA Formal Op. 288 (1954), in ABA Journal, Jan. 1955, at 33 n.53.
69. *Id.*

> and presenting evidence, provided the client remains ultimately liable for such expenses.[70]

The *Model Rules of Professional Conduct*, adopted in 1983, continued most of these restrictions.[71] Model Rule 1.8(e) relaxed them only to the extent of allowing lawyers to advance the expenses of litigation contingently (so the client would not be required to repay them if there was no recovery) and allowing lawyers to pay the litigation expenses of indigent clients without even a contingent repayment requirement. Loans or gifts to enable indigent clients to survive remained subject to a ban.[72] Neither the ABA's Ethics 2000 commission nor its Ethics 20/20 commission proposed any further change, and most states have adopted Rule 1.8(e) in the form proposed by the ABA.

III. RATIONALES FOR THE RESTRICTIONS

A. CONFLICTS OF INTEREST

Although the restrictions seem to be rooted historically in hostility to litigation and one can find echoes of that reasoning even in a few modern cases,[73] it has also been justified on the ground that lawyer assistance to clients for living expenses could result in conflicts of interest. This was the justification asserted by the Association of the Bar of the City of New York in its original 1925 opinion.[74] It was offered, as well, by the American Law Institute (ALI), which stated that "a loan gives the lawyer the conflicting role of a creditor and could induce the lawyer to conduct the litigation so as to protect the lawyer's interests rather than the client's."[75] In this instance, the reporters for the ALI's Restatement of the Law Governing Lawyers expressed a rare public disagreement with the members for whom they were serving as staff. The reporters believed that the lawyers should be allowed to advance living expenses to clients, at least if they did not promise to do so before being retained, "but that position was not accepted by the [ALI]."[76]

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70. MODEL CODE DR 5-103 (1969).

71. Hazard and Hodes assert that pursuant to the Proposed Final Draft of the Model Rules, "a lawyer would have been allowed to advance living expenses as well as litigation costs" but that "this proved too much of a liberalization." Therefore the ABA's "House of Delegates amended Rule 1.8" so that "advances for living expenses were once again prohibited altogether." GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING 1.8:802 (2d ed. Supp. 1998). But, the proposed liberalization does not appear in the Proposed Final Draft. *See* MODEL RULES OF PROF'L CONDUCT (Proposed Final Draft May 30, 1981), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.authcheckdam.pdf. Nor is either the proposal or its defeat by the House of Delegates reported in the official history of the adoption of the Model Rules. AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 (2006).

72. *See* MODEL RULES R. 1.8(e).

73. *See* Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 462 (Okla. 2000).

74. *See supra* note 59 and accompanying text.

75. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 36, cmt. c. (2000).

76. *Id.* at reporter's note to cmt. c.

The justification based on potential conflict between lawyer and client has some merit, but for several reasons it is not entirely convincing. First, it does not distinguish between loans and gifts. Even if there could be some sort of conflict because a lawyer becomes a creditor, the role of creditor is absent once the lawyer has made an unconditional gift to a client. Second, even as to loans, as Moliterno points out, when a lawyer makes such a loan, "the lawyer's interests have been aligned in a more-than-usual way with those of the client,"[77] because the lawyer's likelihood of being repaid becomes greater as the size of a plaintiff-client's damage recovery increases. Moliterno notes the possibility, however, that a risk-averse lawyer-creditor intent on repayment of a loan might advise a client to accept a settlement offer that a less risk-averse client might otherwise reject.[78] As a rationale for the policy, however, even this scenario is undercut by the third weakness of the conflicts theory: the bar readily accepts contingent fee agreements,[79] in which the lawyer's revenues also depend on the client's success, and in which usually much more money is at stake for the lawyer than the amounts that the lawyer is likely to have advanced for a client's subsistence. A risk-averse lawyer representing a plaintiff through a contingent fee agreement may also counsel accepting a settlement offer in order to be assured of earning a fee, yet the organized bar seems to have no difficulty with that possibility.[80] Finally, the solution to most conflicts of interest between lawyers and clients is disclosure and consent; even if there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interests, a client's informed consent can waive the conflict, unless the lawyer cannot reasonably believe that he can provide diligent representation to the client, or the representation is prohibited by law.[81]

The ABA acknowledged that there exists "an inescapable conflict of interest between the attorney and his client with regard to counsel fees,"[82] but it believed that

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77. Moliterno, *supra* note 54, at 243.

78. *Id.* at 244.

79. MODEL RULES R. 1.5(c).

80. Contingent fee agreements must be in writing and signed by the client, but presumably debts incurred by a client are also written and signed, and in any event could be required to be written and signed. Many other potential conflicts between lawyers and clients are common but not considered objectionable. For example, lawyers generally want to charge high hourly rates, and clients generally want to pay as little as possible. Hourly billing gives lawyers incentives to put more hours into a case than necessary. And, there are some cases that would benefit by having the lawyer work for a single client on that case during every waking hour for several years, but lawyers also want to serve other clients and to spend time with their families, relax, and engage in other personal pursuits. *See* LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 522 (3d ed. 2012).

81. *See* MODEL RULES R. 1.7(b).

82. This may refer to the conflict depicted in the Leo Cullum cartoon for The New Yorker Magazine showing a lawyer advising his prospective client, "My fees are quite high, and yet you say you have little money. I think I'm seeing a conflict of interest here." The cartoon is reproduced, with permission, in LERMAN & SCHRAG, *supra* note 80, at 522.

> "this conflict of interest need not and should not be extended to permit the lawyer to acquire an additional stake in the outcome of the suit which might lead him to consider his own recovery rather than that of this client and to accept a settlement which might take care of his own interest in the verdict but would not advance the interest of his client to the maximum degree."[83]

The suggestion appears to be that the lawyer would pressure the client to accept a quick settlement so that the lawyer could recover a loan made to the client. But it is hard to see how this justification would apply to an outright gift, or why it would not apply with much greater force to contingent fee agreements, or why a client would be more likely to be disadvantaged by his lawyer's interest in recovering a debt than by his adversary's forcing him to accept unfair settlement terms because the client is unable to feed himself or his family.

B. STIMULATION OF COMPETITION AMONG LAWYERS

A second thread that runs through the history of Rule 1.8(e) is the concern that lawyers might compete with each other for business through the generosity of the gifts or loan terms that they might offer their clients. This theme is suggested by the 1934 New York City opinion, which termed advances to clients a "method of soliciting business for the attorney,"[84] and even more explicitly by its 1953 opinion, which stated that "there is real danger that such loans might induce a client to employ one attorney rather than another."[85] It also suggested by the ABA's claim that the practice of offering subsistence benefits to clients, "if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him."[86] The bar's desire to prevent the legal profession from becoming a competitive one was reflected in prohibitions, before the 1970s, against lawyer advertising, and in minimum fees for particular types of legal services that were published by state bars. But this rationale seems quaint now that the Supreme Court has weighed in against both of those anti-competitive measures.[87] Advertisements by lawyers are ubiquitous on television, billboards, and buses, and minimum fee schedules are a thing of the past. In addition, lawyers representing personal injury clients can compete with each other by offering to charge lower percentages of the recovery as their fee. In essence, anti-competitive rationales may have seemed reasonable in the past but are no longer viable. Curiously, although advertising by lawyers and open competition

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83. ABA Formal Op. 288, *supra* note 68.

84. NYC BAR OPINIONS, Op. 319, *supra* note 59, at 169.

85. NYC BAR OPINIONS, Op. 779, *supra* note 59, at 474.

86. ABA Formal Op. 288, *supra* note 68.

87. Most restrictions on advertising by lawyers fell away after *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), held that they violated the First Amendment. Bar associations' minimum fee schedules were declared to be violations of the Sherman Antitrust Act in *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

among them are now commonplace, some judges still characterize "unregulated lending to clients" as a practice that would lead to "unseemly bidding wars."[88]

C. THE IMAGE OF THE PROFESSION

The 1953 opinion of the New York City bar also justified its restriction by claiming that the "making of such loans [to unemployable, impoverished clients] . . . would impair the dignity of the profession."[89] The Mississippi Supreme Court remains concerned that competition among lawyers that is reflected in supporting low-income clients while their cases are pending would cause "further denigration of our civil justice system."[90] This rationale seems even more archaic than the anti-competitive justification now that law is seen as just another business rather than a unique "profession"[91] and that only 3% of the public rates lawyers very highly for honesty and ethical standards.[92] As the concurring opinion to the most recent Maryland ethics pronouncement on its gifts-to-clients rule noted,[93] it is hard to see how the ban on such charity to destitute clients improves the dignity of the legal profession.[94]

IV. STATE VARIATIONS

One might have thought that well into the 21st century, these rationales for limits on lawyers' assistance to impoverished clients would have been re-examined and the rule amended or construed to allow more exceptions than appear on its face. A small number of states have in fact moderated the rule, but most states continue to prohibit lawyers from providing financial help to their clients, often citing one of the traditional rationales. A survey of state variations

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88. Att'y AAA v. Miss. Bar, 735 So. 2d 294, 298 (Miss. 1999).

89. NYC BAR OPINIONS, Op. 779, *supra* note 59, at 474.

90. *Id.* As a result of this concern, the court amended its rule to allow some support for indigent clients, but limited the amount to $1,500 and imposed other restrictions. *Id.* A variation of some judges' fears about the evils of competition is the expressed concern by certain judges that in the resulting competition, "the more financially secure attorneys will have an advantage." Matter of Rule 1.8(c), 53 Mont. St. Rep. 707 (Mt. 1996) (dissenting opinion).

91. *See generally* THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER (2010) 10–69 (arguing that the idea of law as a "profession" was a fiction perpetrated by the ABA to confer prestige on lawyers and to justify anti-competitive practices that kept prices artificially high).

92. Art Swift, *Honesty and Ethics Rating of Clergy Slides to New Low*, GALLUP (Dec. 16, 2013), http://www.gallup.com/poll/166298/honesty-ethics-rating-clergy-slides-new-low.aspx (follow link to methodology and full question results). Another 17% rated lawyers "high," but even the 20% combined "very high" and "high" results put lawyers far below auto mechanics, who scored 29%.

93. *See* text at *supra* note 50.

94. An additional justification, cited favorably but rarely by judges enforcing the rule, is that "the rules can also be said to protect lawyers from client requests for help." Rubenstein v. Statewide Grievance Comm., 2003 Conn. Super. Ct. LEXIS 1727 (Conn. Super. Ct. 2003) (quoting Law. Man. On Prof'l Conduct (ABA/BNA) 51:803 (1995)). This rationale seems to assume that lawyers can't take responsibility for turning down client requests that they don't want to honor and need the protection of the state in order to say no.

and recent case law is useful for the purpose of examining possible amendments to Rule 1.8 that the ABA or a majority of states might adopt. Those potential changes are explored more fully in Parts V and VI of this article.

A. JURISDICTIONS THAT HAVE SOFTENED RULE 1.8(e)

In addition to the District of Columbia,[95] eight states have adopted more lenient versions of Rule 1.8(e).

Texas allows lawyers to advance or guarantee "reasonably necessary medical and living expenses," and repayment can be forgiven if the client loses the case.[96]

Alabama allows a lawyer to "advance or guarantee emergency financial assistance" with two conditions: the client's obligation to repay may not be contingent on the outcome of the matter, and the lawyer must not make the promise to assist the client until after the client has retained the lawyer.[97] The first of the two conditions apparently means that in a contingent fee case, the client must continue to be obligated to the lawyer for the amount of the loan even if the client has no recovery.

California allows lawyers who have already been retained to lend money to their clients, provided that the client promises, in writing, to repay the loan.[98] In addition, even before the lawyer is retained, the lawyer may, with the client's consent, agree to pay personal expenses for the prospective client to third parties from funds that will be collected as a result of the representation.[99]

In Minnesota and North Dakota, a lawyer may not give or loan money to a client, but may guarantee such a loan if the loan is "reasonably needed" to prevent financial hardship that would pressure the client to settle a case.[100] The client must remain liable for repayment even if the client loses the case, and the lawyer may not offer the guarantee before being retained.[101] Montana has the same rule, except that there the loan must come from a regulated financial institution, the amount may not exceed "basic living expenses," and the rule

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95. *See* text accompanying *supra* note 21.

96. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(d)(1) (2013).

97. ALA. RULES OF PROF'L CONDUCT R. 1(8)(e)(3) (2008).

98. CAL. RULES OF PROF'L CONDUCT R. 4-210(A)(2) (2012).

99. CAL. RULES OF PROF'L CONDUCT R. 4-210(A)(1) (2012). A proposed revision of the California rules, drafted by the state bar, would add a requirement that the client consent to such terms in writing after having consulted an independent attorney or having been advised by the client's prospective lawyer to do so and having been given an opportunity to do so. CAL. RULES OF PROF'L CONDUCT R. 1.8.1 (proposed Sept. 22, 2010), http://ethics.calbar.ca.gov/Portals/9/documents/CRRPC/RRC%20Final%20Docs/ProposedRulesofProfessionalConduct011014.pdf. In addition, the proposed rule would allow lawyers to offer or make gifts to current clients. *Id.* at R. 1.8.5(a).

100. MINN. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2005); N.D. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2009).

101. *Id.*

explicitly prohibits advertising of the arrangement as well as offering it before the lawyer is retained.[102]

Mississippi and Louisiana have quite detailed regulations. Mississippi allows lawyer to advance to clients "reasonable and necessary" expenses in two categories: medical expenses associated with "treatment for the injury giving rise to the litigation" and "living expenses."[103] However, before any such loan can be made, the lawyer must engage in "due diligence and inquiry into the circumstances of the client" and must wait until sixty days have elapsed after the lawyer has been retained.[104] At that point, the loan can be made only "under dire and necessitous circumstances" and must be limited to "minimal living expenses of minor sums such as those necessary to prevent foreclosure or repossession or for necessary medical expenses."[105] A further limitation is that the lawyer must report a loan of $1,500 or less to the state bar's ethics committee, and must seek the committee's approval before lending more than $1,500. The $1,500 limit on loans not approved in advance includes any loans made by the client's previous counsel.[106] Louisiana imposes even more conditions. As in Mississippi, the assistance must not be a gift; it can be a loan or a loan guarantee, and the client must be in "necessitous circumstances."[107] The requirement that those circumstances be "dire" is absent, but the lawyer must determine that without assistance, the client's ability to initiate or to maintain the claim would be adversely affected. The lawyer may not advertise a willingness to help clients in this way or use the prospect of a loan or guarantee as an inducement to be retained.[108] The amount loaned may not exceed the "minimum" amount needed to meet the client's immediate family's "documented" obligations for food, shelter, utilities, and insurance, and the medical expenses unrelated to the litigation (because loans for medical expenses are permitted under a different clause of the section).[109] Loans from a lawyer's own funds may not bear interest; loans obtained from financial institutions may bear interest, but not in an amount greater than the actual bank charge or ten percentage points above the bank prime rate, whichever is less. The client must sign a written consent to the loan terms, and a copy of the ethics rule itself must be given to the client along with the lawyer's bill or with the settlement documents.[110]

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102. MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2004).

103. MISS. RULES OF PROF'L CONDUCT R. 1.8(e)(2) (2005).

104. *Id.*

105. *Id.*

106. *Id.*; *see also* Att'y AAA v. Miss. Bar, 735 So. 2d 294, 298 (Miss. 1999) (finding an advance of $1,414 for living and medical expenses not in violation of the rule because less than $1,500).

107. LA. RULES OF PROF'L CONDUCT R. 1.8(e)(4) (2005).

108. LA. RULES OF PROF'L CONDUCT R. 1.8(e)(4)(ii)–(iii).

109. LA. RULES OF PROF'L CONDUCT R. 1.8(e)(4)(iv); 1.8(e)(1).

110. LA. RULES OF PROF'L CONDUCT R. 1.8(e)(5)(v)–(vi).

B. JURISDICTIONS IN WHICH COURTS OR STATE BARS HAVE INTERPRETED RULE 1.8(e) PERMISSIVELY

In another two jurisdictions, state bars or courts have construed Rule 1.8(e) to permit at least some forms of financial assistance despite formal rules that appeared to prohibit it.[111] In Virginia, the issue arose when attorneys asked the state bar whether they could contribute small amounts to the commissary accounts of jailed clients so that the clients could purchase toothpaste or food. The bar's ethics committee concluded that they could do so, notwithstanding the fact that the state's version of Rule 1.8(e) used the Model Rule language that appeared to prohibit such conduct.[112] The committee opined that "neither the language nor the spirit of this prohibition create a per se ban on all financial assistance, regardless of the purpose or size of the assistance" and that "a total prohibition on all such giving paints with an unnecessarily broad brush."[113] It justified its decision by reference to the fact that the rule barred financial assistance "in connection with" litigation; according to the committee, "the provision of this commissary money appears to have nothing to do directly with the litigation that is the subject of the representation."[114] It acknowledged that this conclusion put it in the minority of jurisdictions.[115]

The Supreme Court of Florida has opened the door slightly to financial assistance to clients. In the years before 1991, a lawyer named Taylor represented Mary Barner, an indigent client, and her child, in a medical malpractice claim.[116] His firm's "medical group" advanced her $600 per month (probably in violation

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111. In addition to the cases identified in this section, Colorado allowed an attorney to provide assistance in *Mercantile Adjustment Bureau v. Flood*, 278 P.3d 348 (Colo. 2012). An attorney lost a fair debt collection practices case. With his client's consent, he mortgaged his home and personally paid the fee of an appellate attorney, with the understanding that he would be reimbursed if the appellate attorney won statutory fees that were paid by the defendant. A divided Colorado Supreme Court decided that this assistance did not violate the rule. This is not a particularly lenient application of the rule, however, because the appellate attorney's fees are easily characterized as a litigation expense of the type that the rule allows to be advanced.

112. Va. State Bar, Legal Ethics Op. 1830 (2006).

113. *Id.*

114. *Id.*

115. The committee's citation for other jurisdictions in the minority reveals only one that clearly support its suggestion that other jurisdictions' interpretations of the rule are consistent with its view. It cited a case from Mississippi, which uses language that differs significantly from the Model Rule and bar opinions from Connecticut, Pennsylvania and Maryland that deal with third-party litigation finance, not with loans or gifts from lawyers to their clients. It also cited a Maryland bar opinion from 2000, which concluded that the state's rule did not bar a small, outright gift of money to a personal injury client who was in financial difficulty as a result of an automobile accident. Md. State Bar, Comm. on Ethics, Op. 00-42 (2000). That opinion, however, seems to have been overruled the following year by Md. State Bar Ass'n Comm. on Ethics Op. 2001-10, *supra* note 50, which cited the earlier opinion in a footnote and claimed to distinguish it but did so only by characterizing the previous opinion as allowing a "de minimis exception," without citing distinguishing facts or explaining why the exception did not cause it to reach the opposite result. *Id.* at n.4. The cited case that most clearly aligned with the committee's view is *Fla. Bar v. Taylor*, 648 So. 2d 1190 (Fla. 1994), discussed in text at *infra* notes 121–23.

116. Fla. Bar v. Taylor, 648 So. 2d 1190, 1191 (Fla. 1994).

of the state's equivalent of Rule 1.8(e), though that appears not to have been adjudicated).[117] In 1991, Taylor moved to a different firm, which would not advance funds to clients.[118] However, while at the new firm, Taylor personally gave Ms. Barner some used clothing, and his partner gave her $200 from his personal funds.[119] The Florida bar learned of these gifts and initiated a disciplinary proceeding.[120] A referee concluded that Taylor had not violated any rule because Ms. Barner was not obliged to make any repayment; therefore, the referee reasoned, the gifts were not "in connection with" the litigation.[121] By a 4-3 vote, the Florida Supreme Court upheld the referee's decision because the funds were not given "in an effort to maintain employment" but represented "essentially an act of humanitarianism."[122] The dissent argued that that Taylor's relationship to Barnes was "only because of the lawsuit" and was therefore "in connection with" litigation in violation of the rule.[123]

C. JURISDICTIONS THAT HAVE INTERPRETED AND APPLIED THE RULE STRICTLY

In addition to Maryland,[124] several jurisdictions have recently interpreted and applied their rules strictly. In Oklahoma, in the late 1990s, a lawyer named Smolen represented a client named Miles in a worker's compensation suit. He loaned Miles $1,200, interest-free, for living expenses after Miles' home was destroyed in a fire.[125] But for the loan, Miles would have had to move to Indiana and would not have had sufficient resources to appear in court, and he would not have been able to continue medical treatment.[126] Miles' inability to appear in court without the loan could have enabled the court to characterize at least part of the loan as a litigation expense. But, the court suspended Smolen for sixty days.[127] It noted the origin of the rule in the British doctrines forbidding the "evils" of champerty and maintenance and asserted that if financial assistance were allowed, clients might choose lawyers on the basis of such offers.[128] Even if lawyers like Smolen did not advertise their willingness to make loans, clients might learn of their practices from existing or past clients of those lawyers.[129]

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117. *Id.*
118. *Id.*
119. *Id.*
120. The funds were characterized as "loans" but the court found that they were actually gifts, with no expectation of repayment.
121. Florida Bar v. Taylor, 648 So. 2d 1190, 1191 (Fla. 1994).
122. *Id.* at 1192.
123. *Id.*
124. *See supra* notes 29–51 and accompanying text.
125. Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 457 (Okla. 2000).
126. *Id.*
127. *Id.* at 463.
128. *Id.* at 462. Smolen had been disciplined eight years earlier for a similar offense.
129. *Id.*

A Connecticut lawyer named Rubenstein provided his clients with bus tokens for transportation to their medical appointments and advanced funds to them for medical treatment and prescribed drugs. He was publicly reprimanded, with the court quoting approvingly from the ABA/BNA Lawyers Manual on Professional Conduct, to the effect that "the rules can also be said to protect lawyers from client requests for help, and also from the competition from other lawyers who might be willing to provide monetary assistance."[130]

In Georgia, a lawyer named Morse loaned $1,400 to a longtime acquaintance who became his personal injury client. But for the loan, the client would not have been able to avoid foreclosure and possible jail time for violating probation.[131] The lawyer was publicly reprimanded.[132] A concurring judge wrote to remind the bar that financial assistance is only prohibited when it is offered "in connection with" litigation.[133] But the example he gave of assistance that is not so connected to litigation is so far-fetched as to be unlikely to justify much financial help by generous lawyers: he pointed out that a mother representing her own seventeen-year-old son in traffic court would still be allowed to provide room and board to the child.[134]

Ohio is also unforgiving. Pheils, representing Robinson, negotiated a settlement that awarded $20,000 to his client, but he advised Robinson not to sign it because it included terms to which Robinson had not yet agreed.[135] Robinson said he needed the money.[136] Pheils arranged for his wife to lend $4,000 to Robinson.[137] Later, while the case was on appeal, Pheils' wife made another loan, for $10,500, and this time, Robinson signed a promissory note that Pheils prepared, assigning part of his eventual recovery as security.[138] After Robinson won the case, Pheils' wife sued on the note, and Robinson paid her.[139] A hearing panel found that even if his motive had been solely to benefit Robinson, Pheils had violated Rule 1.8(e) because his wife, rather than a disinterested bank, had made the loan.[140] By preparing the agreement between Robinson and his wife, Pheils had "promoted maintenance and/or champerty."[141] He was suspended for six months.[142]

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130. Rubenstein v. Statewide Grievance Comm., No. CV020516965S, 2003 Conn. Super. LEXIS 1727, at *15 (Conn. Super. Ct., 2003).

131. *In re* Morse, 748 S.E.2d 921, 921 (Ga. 2013).

132. *Id.*

133. *Id.* at 922.

134. *Id.* at 922 n.3.

135. Toledo Bar Ass'n v. Pheils, 951 N.E.2d 758, 760 (Ohio 2011).

136. *Id.* at 761.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 762.

141. *See id.* at 763.

142. *See id.* at 765–66.

In Nebraska, a lawyer named Shefren guaranteed bank loans for living expenses for twenty personal injury clients who could not obtain loans without his guarantee. Although a referee found that he did not guarantee the loans in order to induce the clients to retain him, and that no client had suffered damages as a result of his practices, he was suspended for thirty days.[143] In another Nebraska case, a client named Hill had become unable to work as a result of a personal injury. Her lawyer, Kratina, paid her taxi fare for medical treatment, her health insurance premiums, and her rent, as well as several expenses to enable her to drive: a fine so that she could have her license reinstated, the fee for the license, and a fee to recover her impounded car.[144] The total loan was $11,000, which she reimbursed him for after the case was settled.[145] Stating that Rule 1.8(e) included no exception for humanitarian acts, the court suspended Kratina for sixty days.[146]

These cases are merely representative. Courts in other states have also interpreted and enforced Rule 1.8(e) literally in recent years.[147]

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143. *See generally* State *ex rel.* Counsel for Discipline of the Neb. Supreme Court v. Shefren, 690 N.W.2d 776 (Neb. 2005).

144. State *ex rel.* Counsel for Discipline of the Neb. Supreme Court v. Kratina, 746 N.W.2d 378, 379–80 (Neb. 2008).

145. *Id.* at 380.

146. *See generally* State *ex rel.* Counsel for Discipline of the Neb. Supreme Court v. Kratina, 746 N.W.2d 378 (Neb. 2008).

147. For example, in Alaska, S.H. was evicted during the course of a personal injury suit in which she represented the interests of her minor daughter, whose father had died in an accident. At first, she and her daughters resorted to living in their car, but eventually they could not live in that manner. She and the daughters moved to Wisconsin to live with her father. Markham, who was S.H.'s lawyer, loaned her several hundred dollars. He also allowed his associate to send her money so that she could return to Alaska to be deposed, and to live in an apartment while there, and he arranged for his accountant to advance her $1,000 for living expenses (which he guaranteed) and "small amounts of money" for "items such as cigarettes and cosmetics." After the case was settled, a special master allowed Markham to recover $3,050 for the airfare for her and her daughters to return to Alaska, treating those expenditures as costs of litigation. The master disallowed a recovery for his subsidy of S.H.'s living expenses. Markham appealed, but the state's Supreme Court affirmed. Although the state bar conceded in an amicus brief that Rule 1.8(e) should be "given a review," the court accepted the bar's position that in the absence of a rule-making review, Markham should not be able to recover the remaining funds that he had advanced. *See generally In re* K.A.H., 967 P.2d 91 (Alaska 1998). The Supreme Court of South Carolina also applied Rule 1.8(e) literally, albeit in bizarre circumstances. While representing a wife in negotiations with her husband's lawyer regarding the terms of a proposed separation agreement, Hoffmeyer began a sexual relationship with her. He discussed withdrawing as her attorney with her, but she asked him to remain as her lawyer so as not to prolong the negotiations. In those negotiations, she agreed to pay her husband $3,500 as his share of the marital home. Hoffmeyer paid this sum from his own personal funds, in part to reach a prompt settlement so that "there would be less of a problem spending time with Client." In addition, when the client shortly thereafter planned to travel to New Orleans for treatment of an eating disorder, Hoffmeyer gave her $100 for expenses. After the husband confronted Hoffmeyer and his wife about the relationship, Hoffmeyer withdrew as counsel and paid the fees of her new attorney. The client obtained a satisfactory result, including primary custody of her children. A hearing panel found that Hoffmeyer's conduct did not adversely affect his client and that he had not violated Rule 1.8(e) because the funds he paid were a gift, not a loan, and Hoffmeyer had no expectation of reimbursement. The court of appeals reversed that determination, holding that Rule 1.8(e) did not distinguish between gifts and loans. For his several violations, Hoffmeyer was suspended for nine months. *See generally In re* Hoffmeyer, 656 S.E.2d 376 (S.C. 2008). In addition, a federal district court in New Mexico held that a violation of Rule 1.8(e) was a basis for disqualification. It disqualified the McKinneys from

V. WHAT CAN WE LEARN FROM THE STATE VARIATIONS AND RECENT DECISIONS?

The first thing to notice about the state variations and the recent decisions is that the rule-writers and interpreting adjudicators are primarily concerned with a problem that could arise when personal injury lawyers lend money to plaintiff-clients and make arrangements to recover their loans from the proceeds of a settlement or judgment. This application of the rule appears in the *Cockrell*, *Smolen*, *K.A.H., Rubenstein*, *Morse*, *Pheils*, *Shefren*, *Kratina*, and *Rubio* cases[148]; in addition, the rules in Texas, Alabama, California, North Dakota, Mississippi, and Louisiana explicitly deal with loans or loan guarantees and regulate whether the client must or may not require repayment. This makes sense, though not necessarily for the reasons given by the courts. Lawyers are responsible adults and do not need state protection from their clients' requests for money, as the *Rubenstein* court posited.[149] Nor is competition among lawyers on the basis of their willingness to make loans to be feared, despite the misgivings of the *Smolen*[150] court and of the rule-writers who promulgated variations of the rule that explicitly barred advertising the lawyers' willingness to help their clients. Personal injury lawyers who represent clients on the basis of contingent fees can compete for clients in many other ways, such as by offering to accept lower percentages of recoveries, or to deduct expenditures before rather than after taking their percentages. And helping would-be clients to access justice through the courts—despite the labels of champerty and maintenance attached by the *Pheils* court[151]—is as American as apple pie; we encourage such assistance through stockholder derivative suits, class actions, lawyer advertising, contingent fees, legal aid programs, pro bono assistance, and many other devices.

But there is a real problem that loans repayable out of recoveries can present, and it is illustrated by the facts of the *Pheils* case—not so much by the sham through which the attorney had his wife advance the funds, but by the size of the loans, more than $14,000. A loan of that magnitude does have the possibility of making the client beholden to the lawyer, and less able to exercise independent judgment. For example, if the client wants to accept a settlement offer for less than the loan amount, and the lawyer wants to keep going with the litigation in

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representing Rubio, who had sued his employer under the Federal Employer's Liability Act. Rubio had revealed, during a deposition, that the McKinneys had loaned him money for living expenses because his disability income was insufficient to cover them. *See* Rubio v. BNSF Ry. Co., 548 F. Supp. 2d 1220, 1227 (D. N.M. 2008).

148. *Cockrell* is described in the text at *supra* notes 29–32. *Smolen*, *Rubenstein*, *Morse*, *Pheils*, *Shefren* and *Kratina* are discussed in the text at *supra* notes 128–146. *K.A.H.* and *Rubio* are summarized in *supra* note 147.

149. *See generally* Rubenstein v. Statewide Grievance Comm., 2003 Conn. Super. Ct. LEXIS 1727 (Conn. Super. Ct. 2003).

150. *See* Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 462–63 (Okla. 2000).

151. *See* Toledo Bar Ass'n v. Pheils, 951 N.E.2d 758, 763 (Ohio 2011).

the hope of recovering the full amount that she has advanced, the lawyer is likely to lean on the client quite hard to reject the offer.

Other forms of lawyer assistance to clients do not necessarily present the same problem. Although some states, such as California, require clients to promise to repay a loan from a lawyer,[152] a state may prohibit lawyers from making the obligation to repay contingent on the client's successful recovery. This is the approach taken by Alabama.[153] It presents a different problem, however; if the client's suit is not successful, the lawyer will either have to write off the loan or pressure an unsuccessful and in most cases impecunious client to repay. Alabama lawyers who lend money to their clients may state in their loan instruments that the repayment obligation is not contingent, but as a practical matter, they will collect only if they win the case.

It is also striking that none of the state rules, and none of the recent decisions, deal with pro bono cases. Although pro bono lawyers, like other lawyers, are required to obey the rule, no jurisdiction seems to distinguish between pro bono and fee-charging lawyers for purposes of the bar on assistance to clients. Pro bono lawyers are, in fact, entirely absent from the rule's published jurisprudence. One possible explanation is that the rule writers were really concerned only with curbing possible abuses of clients by contingent fee lawyers. Another is that the rule-writers may simply not have given much thought to the special considerations applicable to pro bono litigation. Pro bono lawyers may have been unrepresented on the ABA and state bar committees that wrote the rules, or the committee members may have been unwilling to break from the traditional view that, except for criminal cases in which the Sixth Amendment may impose different duties on lawyers, the ethics rules should apply uniformly to all attorneys. However, a rule barring financial assistance to clients in fee-generating cases but allowing it in pro bono cases would be reasonable. Pro bono lawyers are less likely than other lawyers to compete for clients by implicit or explicit offers to loan money to clients, because they are not in the business of providing services in exchange for fees. More important, even if they represent clients who are seeking substantial monetary awards, their own incomes do not depend on the size of the award, so they lack an incentive to lend money to a client as a means of controlling the client's decisions.

The state variations and cases also suggest that it would make sense to focus on the distinction among gifts, loans, and assistance in obtaining financial aid from third parties. The Model Rule does not distinguish between gifts and loans; both are "financial assistance," and both the Maryland State Bar opinion[154] and the *Hoffmeyer* case[155] explicitly reject any difference in the treatment of the two

152. CAL. RULES OF PROF'L CONDUCT R. 4-210(A)(2) (2012).
153. ALA. RULES OF PROF'L CONDUCT R. 1(8)(e)(3) (2008).
154. *See supra* text accompanying notes 50–51.
155. *See supra* note 147.

types of assistance. Furthermore, the *Model Rules* specify that professional misconduct includes an attempt to violate the *Rules of Professional Conduct* "through the acts of another," at least implying that a lawyer would violate the rule by arranging for a third party, such as a spouse, friend, or charitable organization to give or loan money to a client.[156] For example, when the Center for Applied Legal Studies was bound by the less strict District of Columbia rule, one of our students arranged for her mosque to support her client, who would otherwise have been homeless; this conduct is arguably prohibited by the Maryland version of the rule that now applies to representation by the clinic's students.

Florida's opinion in the *Taylor* case recognizes the distinction, refusing to find that a gift violated the rule.[157] Virginia's bar opinion was also delivered in the context of a gift rather than a loan.[158] Curiously, among states that have more lenient versions of the rule, some permit *only* loans, and not outright gifts.[159] But it is not clear why outright gifts, even from fee-charging lawyers, should be prohibited. After a genuine gift is made, the client is not obligated to the lawyer, and the lawyer therefore has little control over the client resulting from a financial bond. "Little" rather than "no" control is the operative word, of course, because the client may hope to receive additional gifts if she remains loyal to the lawyer, who may even encourage such an idea in order to keep the client and the prospect of receiving a large contingent fee.[160] Nevertheless, the hold of the lawyer is less than in the case of a loan, and it is altogether absent in the case of a gift from a pro bono lawyer.

Similarly, the possibility of abuse is less if diminished, even for loans, when the lawyer helps the client to obtain the loan from a truly independent third party rather than making the loan himself or arranging for a relative to do so. Commercial third party lending to finance litigation is already a well-established industry, and it is part of the landscape in cases running the gamut from personal injury litigation to high-stakes divorce.[161] Montana permits certain loans to clients, but they must come from regulated financial institutions.[162] Some members of the bar are skeptical about third-party financing of cases, but at least a bank that loans money to a client for living expenses is less likely than the client's lawyer to direct the litigation in which the client is involved.

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156. *See* MODEL RULES R. 8.4(a).

157. Fla. Bar v. Taylor, 648 So. 2d 1190, 1192 (Fla. 1994).

158. Va. State Bar, Legal Ethics Op. 1830 (2006).

159. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(d)(1) (2013); ALA. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2008).

160. Moliterno notes that a client who receives a gift from her lawyer may feel inhibited about making independent judgments "because of a sense of obligation" but notes that this problem could occur in any pro bono case in which the lawyer is supplying free services. *See* Moliterno, *supra* note 54, at 247.

161. *See* LERMAN & SCHRAG, *supra* note 80, at 946–47 (discussing third-party litigation financing).

162. MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2004).

The jurisprudence, though not the Model Rule, also suggests that states might reasonably pay attention to the amount of assistance provided. The Mississippi rule imposes a $1,500 limit on loans without prior approval of an ethics committee,[163] several states with lenient rules limit the amount to what is "reasonably needed" to prevent financial hardship or to amounts for "basic living expenses," and the Virginia bar's ethics opinion allows gifts of "small amounts."[164] While the limit set by Mississippi is likely too low to sustain an indigent client, even at subsistence levels, for several months or more, states might want to set some limit on the amount that lawyers could loan, or might want to permit lawyers to lend money up to the amount needed for clients' actual medical expenses, housing appropriate for low-income tenants, and a reasonable sum for food.

The cases and state variants also suggest one other factor that some officials apparently consider important: several states that are willing to consider allowing some form of lawyer assistance nevertheless appear wary of lawyers who might advertise the availability of loans as a way of enticing clients to hire them. As noted above, this concern seems misplaced because there are so many other ways in which lawyers are allowed and even encouraged to compete for clients. In addition, there is no way that a ban on advertising can be entirely effective because, as the *Smolen* court noted, news of lawyers' willingness to make loans to clients could be spread by word of mouth.[165]

VI. HOW TO FIX RULE 1.8(e)

Professors Jack Sahl and James Moliterno want the ABA and the states to abandon Rule 1.8(e). Sahl states that they should "reject the majority view that proves the adage that no good deed goes unpunished."[166] Instead, "all states [should] adopt a rule permitting attorneys to advance living expenses to clients when litigation is pending or occurring."[167] Moliterno urges that "the financial assistance . . . rules ought to be abolished or substantially amended . . . . Abolition of these rules would . . . eliminate the awkwardness of courts punishing innocent lawyer financial assistance to clients based on vacuous reasoning."[168]

Despite the advice of these professors, Rule 1.8(e) endures as the ABA Model and is the law in forty-two states (or in at least forty, as the interpretations of the Virginia bar and courts in Florida may in fact gloss the rules of those states). It is time to try another approach. I therefore propose to cut the rule back rather than to

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163. MISS. RULES OF PROF'L CONDUCT R. 1.8(e)(2) (2005).

164. Va. State Bar, Legal Ethics Op. 1830 (2006).

165. Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 463 (Okla. 2000).

166. Jack Sahl, *The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment*, 34 ST. MARY'S L.J. 795, 870 (2003).

167. *Id.* at 800–01.

168. Moliterno, *supra* note 54, at 256–57.

repeal it outright. States could preserve the rule's restrictions as to certain cases in which policy makers believe that it has some arguable value, while relaxing it as to situations in which it makes the least sense. To the extent that they preserve restrictions for some types of cases, they could allow waivers or could make those restrictions less severe than they currently are.

Option 1: Apply the rule's limitations only to contingent fee cases.

As noted above, a review of the reported cases and opinions suggests that most of the concern about financial assistance to clients centers on contingent fee cases. That concern may be unjustified because it may be motivated in part by distaste for competition, and because other forms of competition among contingent fee lawyers is now the norm. But there is at least a plausible argument that the contingent fee arrangement already creates potential conflicts between lawyers and their clients, which could be exacerbated if clients are their lawyers' debtors. In some cases, clients will want to accept proffered settlements that their lawyers would prefer them to reject; the clients may have short-term needs for the money (e.g., for medical treatment), while the lawyers may see larger potential gains, for their clients and themselves, that could be obtained only after protracted pre-trial litigation, or even a trial. While the decision to accept or turn down a settlement is one that only a client can make,[169] the lawyer may subtly push the client to do what the lawyer wants, pointing out that because the lawyer is operating on a contingent fee basis, the client hasn't laid out any money. The client may feel guilty if she refuses to go along with her "free" lawyer's suggestion. If the client also owes the lawyer a substantial amount of money—especially if the amount is more than the proffered settlement—the client may think she has no "right" to accept the settlement, for to do so could prevent the lawyer from being able to recover the money that had been loaned. So a state might reasonably allow the ban on loans to stand with respect to contingent fee cases.

Option 2: Apply the bar only to loans and not gifts.

The possibility of abuse by lawyers is much diminished in the case of a gift, because the client is not legally obligated to repay the lawyer, even if the client recovers a substantial amount of money. This situation does not entirely solve the problem of lawyer pressure on clients, because the client may feel so much gratitude for the gift that she is unable to resist the lawyer's suggestions for case strategy, but at least the lawyer is not figuratively holding a promissory note over the client's head. A lawyer might claim that the funds transferred were actually a loan, not a gift, but courts could prevent such claims by refusing to enforce

169. *See* MODEL RULES R. 1.2(a).

alleged promises by clients to pay their lawyers, except to the extent of fees specified in written retainer agreements. Ethics rules already require contingent fee agreements to be in writing,[170] and the rules could be changed to require all fee arrangements to be written.

Option 3: Exempt from the rule gifts to clients in all cases in which no fee is being charged to indigent clients.

The *Model Rules* and the rules of the vast majority of states make no exception for pro bono cases, but these are the cases in which lawyers are most likely to be motivated by humanitarian impulses rather than self-interest. The rule could be amended to allow pro bono lawyers give money or in-kind assistance to help their indigent clients to meet their most urgent needs. A possible variant would be to allow assistance if the client was not paying a fee and the lawyer was the salaried employee of a tax-exempt non-profit organization. This would be a further limitation, but, like a rule that allowed a gift in any no-fee case, it would solve the kind of problem that has arisen in the clinic that I direct.[171] Another variant would allow pro bono lawyers to lend as well as give money to such clients, which of course would be repaid only if the clients eventually became wealthy enough to repay it. But that expansion of the exemption seems unnecessary, because very few pro bono lawyers would want to seek eventual remuneration, and obtaining compensation from indigent clients seems inconsistent with the very concept of pro bono representation.[172]

Option 4: Allow gifts and loans to needy civil and criminal defendants and to respondents in administrative proceedings.

Defendants and respondents include such persons as the criminal defendants referred to in the Virginia bar opinion, tenants threatened with eviction, and the respondents in immigration removal proceedings represented by lawyers and law students who work in law school clinics and other non-profit organizations. These individuals are involuntary parties to proceedings. To the extent that what states are concerned about is "champerty and maintenance," as suggested by the court in Connecticut,[173] that concern is inapplicable to them. They are not the initiators of litigation; they are its unwilling targets.

Plaintiffs' lawyers might object to all four of these options, insisting that outright repeal of the rule is the only way to assure injured clients who have

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170. MODEL RULES R. 1.5(c).

171. *See supra* text following note 5.

172. My definition of a pro bono case is one in which the lawyer does not charge a fee, but perhaps the term is more elastic than that. *See* GERALD M. STERN, THE BUFFALO CREEK DISASTER 5, 20, 272 (2d ed. 2008) (noting that a 25% contingent fee mass tort case, in which the plaintiffs were represented by Arnold & Porter, was one in which the lead lawyer was the "pro bono partner" spending all his time on a "public interest" case.).

173. *See supra* text accompanying notes 130, 141.

limited means of being able to resist, with the help of their lawyers, low-ball settlement offers that are extended with knowledge that the clients are in immediate need of cash for urgent living expenses. However, now that litigation lending by third parties is becoming more common, at least for cases that the lenders believe are meritorious,[174] the need for lawyers to lend money to personal injury clients is diminishing.

Option 5: Define indigence.

To the extent that states are reluctant to allow loans or gifts to clients because of the potential for lawyers to have too much control over decision-making in too many cases, the universe of cases in which assistance is permitted can be limited by allowing assistance only where the client is truly needy. Indigence could be measured either objectively (for example, if the client's annual income were less than 150% of the federal poverty level for a family of the client's family size), or through a case by case determination by a third party, as is done when a client makes a motion to file litigation *in forma pauperis*.[175] Third party determination, however, raises the specter of forced disclosure to a defendant when plaintiff's lawyer desires to lend money to a client. A repeat defender, such as an insurance company, could then surmise, by observing which equally needy defendants were not receiving loans from their lawyers, which cases were those in which the plaintiffs' lawyers did not have a great deal of confidence.

Option 6: Limit the amount of assistance.

A state supreme court could think that a loan of $11,000, as in the *Kratina* case,[176] created such a large debt for a client that the clients could be strongly pressured by the lawyer to make decisions in the best interest of the lawyer rather the best interest of the client. It might think assistance of a more modest nature

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174. *See* James Podgers, *Litigation Lending Makes its Case*, A.B.A. J., Mar. 1, 2011, http://www.abajournal.com/magazine/article/litigation_lending_makes_its_case/. Litigation funding of personal injury suits may not survive, however. Critics are attempting to outlaw or limit them, pointing out high interest rates that are charged to some plaintiffs. The rates are unregulated by usury laws because litigation loans in personal injury cases are typically non-recourse loans, which a plaintiff need not repay if there is no recovery. Martin Merzer, *Cash-now Promise of Lawsuit Loans Under Fire*, FOX BUSINESS, Apr. 19, 2013, http://www.foxbusiness.com/personal-finance/2013/03/29/cash-now-promise-lawsuit-loans-under-fire/. The U.S. Chamber of Commerce supports an effort to persuade state legislatures to require notification to defense counsel if a litigation lender is supporting a plaintiff, which opponents of such legislation believe could unfairly enable insurance companies to judge a plaintiff lawyer's degree of optimism about a case, and possibly even to estimate the plaintiff's litigation budget. *See* Denise Johnson, *Should Insurers Be Concerned About Litigation Funding*, CLAIMS JOURNAL, May 20, 2013, http://www.claimsjournal.com/news/national/2013/05/20/229242.htm.

175. *See* 28 U.S.C. § 1915 (2006); FED. R. APP. P. 24. Any indigent person may apply to file a federal case in *forma pauperis*; the word "prisoner" in 28 U.S.C. § 1915 is a typographical error. Floyd v. U.S. Postal Serv., 105 F. 3d 274, 275–76 (6th Cir. 1997).

176. *See supra* note 146 and accompanying text.

would be genuinely humanitarian without promoting subservience to a lawyer's desires. This is the approach taken by Mississippi, which limits assistance to a loan of $1,500.[177] Although that figure seems low (and apparently is not indexed to inflation), Mississippi does allow an application to the state bar for permission to advance a larger sum; that procedural step could discourage abuse.[178] For even greater control, a state could require that *all* loans require advance approval from some outside body, such as a bar committee or a court.

This option may not be desirable, however, because states might set the limit too low, and because a requirement for outside approval raises the same issues as disclosure of a lawyer's desire to lend to a person with income above a certain level, discussed in connection with the previous option.

Option 7: Allow a lawyer to arrange for assistance, but only if it comes from another party unrelated to the lawyer.

A client may feel less beholden to a lawyer if the funds come from a third party as, for example, when, before the Maryland ethics rules became applicable, my student arranged for the worshippers at her mosque to support her indigent client so that she would not be homeless. A state bar could, through a comment, make it clear that Rule 8.4(a), barring lawyers from violating other rules through the acts of another, does not apply to Rule 1.8(e). This is the approach of Montana, at least with respect to loans; that state allows the lawyer to arrange for a loan to a client from a regulated financial institution.[179] A state adopting this option would have to decide whether, in the case of such a loan, the lawyer would be permitted to guarantee the loan. A guarantee might be necessary for a regulated institution to extend a loan to a needy individual, but the guarantee would put the lawyer in the position of the client's creditor if the client defaulted and the institution collected from the lawyer. Another variant of this option would be to allow the lawyer to arrange for a guarantee by an unrelated person but not to guarantee such a loan herself.

This reform is weak, compared to those described above. Without the feature permitting the lawyer to guarantee a loan, it would simply make it clear that lawyers could properly be intermediaries to arrange for litigation lending, which lawyers are already doing. Permitting lawyers to guarantee third party loans, however, creates the same potential conflict between lawyer and client that courts appear to have concerns about. If a guarantee by a litigant's lawyer is permitted, states might just as well simply repeal Rule 1.8(e).

177. *See* MISS. RULES OF PROF'L CONDUCT, *supra* note 103.
178. *See* MISS. RULES OF PROF'L CONDUCT, *supra* note 103.
179. MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2004).

Option 8: Limit advertising.

Several states have tried to limit publicity about the availability of loans or gifts from lawyers, apparently out of a concern that lawyers would compete for clients with each other by offering greater assistance than other lawyers would provide. Although this concern seems misplaced, because lawyers can compete over price in other ways (such as the percentage of a contingent fee, whether expenses are deducted before or after the percentage is computed, or their hourly rates when fees are a function of time spent), it has found its way into the jurisprudence of some jurisdictions. Montana bars such advertising, and the bar to assistance in Oklahoma resulted at least in part from the concern that lawyers would advertise and that even if they did not do so, news of their generosity would spread by word of mouth. However, even if the objective were worthy and the means of achieving it were constitutional,[180] the task of limiting information about lawyers' willingness to assist clients cannot be accomplished. The Internet takes the spread of information by word of mouth to the nth degree. There is no practical way to prevent clients (or lawyers acting through their clients) from sharing with others the information about the assistance that they obtained from their legal representatives.

Option 9: Rely on waivers based on informed consent.

States could also rely on disclosures and waivers, rather than prohibitions, to allow financial assistance to clients. This is a solution proposed by Moliterno, who argues that "in [nearly] all other conflicts situations, clients are empowered to waive the conflict and go forward with the lawyers of their choice, understanding and accepting the conflict's risks in exchange for benefits they perceive from the engagement of the lawyer."[181] He advocates that in lieu of banning assistance, states should subject loans and gifts by lawyers to the regime of Model Rule 1.8(a).[182] Thus, the transaction would have to be "fair and reasonable," its terms would have to be reduced to reasonably understandable writing,[183] the client must be given the opportunity to seek independent legal advice before entering into the transaction, and must be "advised in writing of the

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180. Sahl suggests that a blanket restriction, even on the lawyers themselves, that banned advertising a willingness to lend money to clients would be barred by the First Amendment. *See* Sahl, *supra* note 166, at 853 ("Lawyer advertisements about living expense advances are commercial speech and are entitled to some measure of First Amendment protection."). He acknowledges that certain restrictions designed to ensure that the information supplied to potential clients is truthful and complete would be consistent with the Constitution. *Id.* at 865–66.

181. Moliterno, *supra* note 54, at 249.

182. *Id.*

183. California requires loans to clients to be reduced to writing but does not require that the language describing the terms be reasonably understandable by the client. CAL. RULES OF PROF'L CONDUCT R. 4-210(A)(2) (2012).

desirability of seeking" such advice, and the client must give "informed consent" in writing.[184] These procedural requirements, which were designed to address potential conflicts in joint business ventures between lawyers and clients, seem a bit problematic, however, as applied to loans and gifts to clients. Loans and gifts are generally extended only to clients who are in dire need, and most often, to clients who are indigent or, in some cases, disabled, often by a personal injury. These clients are in many cases less educated than business clients, and they will often be in no position to turn down offers of largesse from their lawyers. In addition, they will usually be unable to retain a second lawyer to advise them about the risks of accepting a loan or gift from the lawyer who is already representing them.

CONCLUSION

As other commentators have noted, the bar on lawyers' loans and gifts to clients seems a holdover from an earlier age, when facilitating litigation was thought to be evil rather than a way of promoting the just resolution of disputes, and when law was thought of as a genteel profession in which it was considered normal for practitioners to avoid competing with each other.[185] In the 21st century, we are more concerned than in the past with access to justice for tort victims and others, and competition (including advertising) by lawyers is considered in the public interest because it lowers the cost of legal services. Yet the bar on lawyers' financial assistance to their clients persists, and even most jurisdictions that have opened the door to humanitarian assistance have done so in very limited ways. The restrictions have persisted despite withering academic criticism of them by leading ethics experts.

The ABA has been unwilling to withdraw Rule 1.8(e), and most state supreme courts have been unwilling to repeal or even modify it. One reason for that resistance may be a concern that in some situations, a restriction on lawyers' financial assistance to clients may serve a useful function in protecting clients from becoming heavily indebted to their lawyers and, as a result, allowing their lawyers to reduce their autonomy when given settlement offers, or to make other important litigation decisions. This article suggests that the problem, if there is one, seems to arise most often in the context of loans to clients in contingent fee cases in which the lawyer expects to be repaid out of the proceeds of a settlement to his plaintiff-client. But if that is the concern, the rule could be more narrowly written with that scenario in mind. In particular, the policy of protecting clients in

184. MODEL RULES R. 1.8(a).

185. *See* Elizabeth Lesly Stevens, *Bar Examined*, WASHINGTON MONTHLY, March/April 2013 http://www.washingtonmonthly.com/magazine/march_april_2013/on_political_books/bar_examined043320.php?page=all (reviewing Steven J. Harper's, The Lawyer Bubble: A Profession in Crisis, noting that "Harper chronicles the disruption of his once-genteel profession").

contingent fee cases has no application to pro bono cases, to the defense of cases, or to cases not involving monetary relief. In addition, even in the contingent fee situation, the prohibition is less justifiable for gifts than for loans, less justifiable where the lawyer merely arranges for a loan or gift by an unrelated third party, and less justifiable for small amounts of assistance to truly indigent clients, which appear to be humanitarian gestures by the lawyers, than to large loans to clients who are not as needy.

The ABA and the states that have simply accepted the ABA's wording should now engage in a searching reconsideration of their reasons for adopting restrictions on lawyer financial assistance to clients. In connection with their review of this rule, they should consider, individually or in combination, the options identified in this article. They should then tailor their versions of Rule 1.8(e) to impose the fewest limitations necessary to achieve the legitimate objective of preventing lawyers from dictating their clients' decisions about accepting proffered settlements. If some version of Rule 1.8(e) survives, it should avoid the contributions that the current text makes to homelessness, inadequate medical care, starvation, and, in some cases, denial of access to justice because clients are forced by their poverty to accept inadequate settlements. At the very least, the ABA and the states should eliminate the ban on outright gifts by pro bono lawyers to meet the survival needs of their indigent clients, particularly those who are involuntary parties to legal proceedings.