

PROPOSED AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT (MRPC) RULE 1.8. TO CREATE A NARROW HUMANITARIAN EXCEPTION

Issue

Should the Representative Assembly request that the Michigan Supreme Court amend Michigan Rules of Professional Conduct (MRPC) Rule 1.8 and related commentary to add a narrow humanitarian exception to the general prohibition on providing financial assistance to an indigent client?

RESOLVED, that the State Bar of Michigan supports amendment of the MRPC to add a narrow humanitarian exception to the general prohibition on providing financial assistance to an indigent client.

FURTHER RESOLVED, that the State Bar of Michigan proposes an amendment to Chapter 1 of the MRPC by amending MRPC 1.8(e) as follows:

(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 shall ultimately be the responsibility of the client; ~~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 may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses provided that the lawyer represents the indigent client pro bono, pro bono through a nonprofit legal services or public interest organization, or pro bono through a law school clinical or pro bono program. The legal services must be delivered at no fee to the indigent client and 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 financial gifts to prospective clients.

Financial assistance provided under (3) may be provided even if the indigent client's representation is eligible for a fee under a fee-shifting statute.

FUTHER RESOLVED, that the State Bar of Michigan proposes an amendment to the related commentary of MRPC 1.8 as follows:

A lawyer representing an indigent client, pro bono through a nonprofit legal services or public interest organization, or pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) are limited to modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client (including, but not limited to: eligibility for government benefits or social services or tax liability) the lawyer should consult with the client before providing the modest gift. The exception in paragraph (e)(3) 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 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. Paragraph (e)(3) does not permit lawyers to provide assistance in 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.

Synopsis

On August 3, 2020, the American Bar Association (ABA) House of Delegates adopted an amendment to the Model Rules of Professional Conduct to provide a humanitarian exception to the prohibition on a lawyer providing financial assistance to a client. The Diversity & Inclusion Advisory Committee proposes that a parallel amendment be added to the MRPC 1.8. Conflict of Interest: Prohibited Transactions.

The ABA House of Delegates also adopted commentary to the rule amendment, and the Diversity & Inclusion Advisory Committee also recommends that Michigan adopt parallel commentary for MRPC 1.8 that would be added as a second paragraph to the MRPC Commentary to Rule 1.8.

Background

The amendments adopted by the ABA House of Delegates were sponsored by the Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Legal Aid and Indigent Defendants, who offered the following explanation to support the amendment especially in times of acute national economic distress:

[The] narrow exception to Model Rule 1.8(e) ... will increase access to justice for our most vulnerable citizens. [The current rule] forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit* 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 to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. 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;
- 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.

The only 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).^[footnote omitted]

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.”^[footnote omitted] Another wrote: “I hate that helping a client . . . is against the rules.”^[footnote omitted] 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.”^[footnote omitted]

The amendment . . . 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.

Additional 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; and 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. 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), and APBCo support it.

Eleven jurisdictions currently have a form of humanitarian exception in their rules of professional conduct. Outreach to the bar counsel of these jurisdictions did not reveal any disciplinary problems associated with the narrow exception proposed.

Opposition

None known.

Prior Action by Representative Assembly

None pertaining to the proposed amendment.

Fiscal and Staffing Impact on State Bar of Michigan

No fiscal or staffing impact.

State Bar of Michigan Position

By vote of the Representative Assembly on September 17, 2020

Should the State Bar of Michigan support an amendment to MRPC Rule 1.8 and related commentary to add a narrow humanitarian exception to the general prohibition on providing financial assistance to an indigent client?

(a) Yes

or

(b) No

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

4 **Model Rule 1.8: Current Clients: Specific Rules**

5 ***

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

8
9 (1) a lawyer may advance court costs and expenses of litigation, the repayment of
10 which may be contingent on the outcome of the matter; ~~and~~

11
12 (2) a lawyer representing an indigent client may pay court costs and expenses of
13 litigation on behalf of the client; and

14
15 (3) a lawyer representing an indigent client pro bono, a lawyer representing an
16 indigent client through a nonprofit legal services or public interest organization and
17 a lawyer representing an indigent client through a law school clinical or pro bono
18 program may provide modest gifts to the client for food, rent, transportation,
19 medicine and other basic living expenses if financial hardship would otherwise
20 prevent the client from instituting or maintaining the proceedings or from
21 withstanding delays that put substantial pressure on the client to settle. The legal
22 services must be delivered at no fee to the indigent client and the lawyer:

23
24 (i) may not promise, assure or imply the availability of such gifts prior to
25 retention or as an inducement to continue the client-lawyer relationship after
26 retention;

27
28 (ii) may not seek or accept reimbursement from the client, a relative of the
29 client or anyone affiliated with the client; and

30 (iii) may not publicize or advertise a willingness to provide such financial
 31 assistance to clients.

32
 33 Financial assistance under this Rule may be provided even if the representation is
 34 eligible for fees under a fee-shifting statute.

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 36 ***

37 **Comment**

38 ***

39 **Financial Assistance**

40
 41 [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf
 42 of their clients, including making or guaranteeing loans to their clients for living expenses,
 43 because to do so would encourage clients to pursue lawsuits that might not otherwise be
 44 brought and because such assistance gives lawyers too great a financial stake in the
 45 litigation. These dangers do not warrant a prohibition on a lawyer lending a client court
 46 costs and litigation expenses, including the expenses of medical examination and the
 47 costs of obtaining and presenting evidence, because these advances are virtually
 48 indistinguishable from contingent fees and help ensure access to the courts. Similarly, an
 49 exception allowing lawyers representing indigent clients to pay court costs and litigation
 50 expenses regardless of whether these funds will be repaid is warranted.

51
 52 [11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client
 53 without fee, a lawyer representing an indigent client through a nonprofit legal services or
 54 public interest organization and a lawyer representing an indigent client through a law
 55 school clinical or pro bono program may give the client modest gifts if financial hardship
 56 would otherwise prevent the client from instituting or maintaining pending or contemplated
 57 litigation or administrative proceedings or from withstanding delays that would put
 58 substantial pressure on the client to settle. Gifts permitted under paragraph (e)(3) include
 59 modest contributions as are reasonably necessary for food, rent, transportation, medicine
 60 and similar basic necessities of life. If the gift may have consequences for the client,
 61 including, e.g., for receipt of government benefits, social services, or tax liability, the
 62 lawyer should consult with the client about these. See Rule 1.4.

63
 64 [12] The paragraph (e)(3) exception is narrow. A gift is allowed in specific circumstances
 65 where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits
 66 the lawyer from (i) promising, assuring or implying the availability of financial assistance
 67 prior to retention or as an inducement to continue the client-lawyer relationship after
 68 retention; (ii) seeking or accepting reimbursement from the client, a relative of the client
 69 or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to

70 provide financial assistance to clients beyond court costs and expenses of litigation in
71 connection with contemplated or pending litigation or administrative proceedings.

72
73 [13] Financial assistance may be provided pursuant to paragraph (e)(3) even if the
74 representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3)
75 does not permit lawyers to provide assistance in other contemplated or pending litigation
76 in which the lawyer may eventually recover a fee, such as contingent-fee personal injury
77 cases or cases in which fees may be available under a contractual fee-shifting provision,
78 even if the lawyer does not eventually receive a fee.

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

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 will 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* 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 to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. 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;
- 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.

The only 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

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.

ABA Standing Committee on Legal Aid and Indigent Defendants (“SCLAID”), on file with SCLAID (hereinafter, “SCLAID Survey”). See also Schrag, *supra* note 1 at 40.

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.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 clients in order to subsidize lawsuits or administrative proceedings in a way

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, on file with SCEPR. SALT is one of the largest associations of law professors in the United States.

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 litigation, e.g. for food, rent, and other basic necessities, were never permitted by the rule

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).

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.

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 poor people pro bono or through certain organizations or programs to contribute to the living expenses of their indigent clients. As further explained below, the contributions must be gifts not loans for basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the litigation or administrative proceedings or from withstanding the delays that put substantial pressure on the client to settle. 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 through a nonprofit legal services or public interest organization and a lawyer representing an indigent client 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 if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. The legal services must be delivered at no fee to the indigent client and 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 financial assistance to clients.

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

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]”).

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

Comment [11]

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 through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may give the client modest gifts if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle. Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary 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 as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life.” This would include reasonable 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 and the Comments permit contributions of modest and reasonable amounts. This follows seven of the eleven jurisdictions that have already adopted a humanitarian exception.²⁸ The flexibility gives lawyers room to decide amounts based on

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

the cost of living in their jurisdictions and other factors. Rent assistance and food costs in New York City, for example, would differ from that in a rural area. Lawyers routinely make judgments about reasonableness. See, e.g., Model Rule 1.4(a)(2) (lawyers must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”); Model Rule 1.4(a)(3) (lawyers must “keep the client reasonably informed about the status of the matter”); Model Rule 1.4(a)(4) (lawyers must “promptly comply with reasonable requests for information”); Model Rule 1.5 (lawyers must “not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses”); and Model Rule 1.6 (limiting the disclosure of confidential information “to the extent the lawyer reasonably believes necessary”); see *also*, Model Rule 1.0(h), (i) and (j) (defining “reasonable,” “reasonably,” “reasonable belief” and “reasonably should know”).

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 (1) “indigent” as “suffering from indigence” and “impoverished” and (2) “indigence” as (3) “a level of poverty in which real hardship and deprivation are suffered and comforts of life are wholly lacking” and (4) “impoverished.”

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 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).

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. A gift is 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 financial assistance to 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 may be provided pursuant to paragraph (e)(3) 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.

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 necessities 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”).

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.

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

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

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.

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.

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 because it prohibits advertising or publicizing the availability of financial assistance for living expenses. More importantly, however, pro bono lawyers don't compete for business. As stated by SCLAID: "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. Some commenters seemed to suggest that the proposed rule might affect a client's tax status or the ability to qualify for public assistance or social services or, potentially, a financial disclosure requirement. SCEPR and SCLAID have seen no evidence that the type of modest assistance to indigent clients

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

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.

for basic necessities of life permitted by the proposed rule will have such consequences.⁴¹ However, Model Rule of Professional Conduct 1.4 requires lawyers to consult with clients about the representation and 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).⁴² Ethics Committees generally interpret the prohibition strictly.⁴³ Courts generally discipline lawyers for providing clients with non-litigation expenses.⁴⁴ 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.⁴⁵

⁴¹ SCEPR asked Tom Callahan, Chair of the ABA Tax Section, about the tax consequences of the proposed rule. He told the Committee that the proposed rule appears to be a gift with true donative intent; that the gift should be neither income to the donee nor deductible by the donor for federal income tax purposes; and that there is an exclusion from gift taxes of up to \$15,000 per donee for 2020. Tom Callahan also indicated that the tax impact, if any, of state and local taxes has not been considered. Email exchange between Tom Callahan and SCEPR Chair Barbara S. Gillers, on file with SCEPR.

⁴² 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”).

⁴³ 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 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”).

⁴⁴ 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).

⁴⁵ 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

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.⁴⁶ 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.⁴⁷

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 respects to the one SCEPR and SCLAID propose for the Model Rules.⁴⁸

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 Bar Counsel Experience

SCEPR asked bar 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,

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").

⁴⁶ 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).

⁴⁷ 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.

⁴⁸ 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.

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.⁴⁹

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 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).⁵⁰

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

⁴⁹ Letter from Chief Disciplinary Counsel in Louisiana, Charles B. Plattsmier to SCEPR Member Michael H. Rubin (Apr. 8, 2020) (on file with SCEPR).

⁵⁰ 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.")).

communities.⁵¹ 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. 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), and APBCo support it.⁵² Just recently— 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 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.⁵³

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

⁵¹ See Section II of this Report.

⁵² *Id.*

⁵³ 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).

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 will 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* 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 and without fee 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 if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle.

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. The only 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 will increase access to justice and permit lawyers to follow their humanitarian instincts.

2. Approval by Submitting Entity. The Resolution was approved in May 2020 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 will 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 financial assistance to indigent clients by lawyers representing those clients in litigation or administrative proceedings pro bono or through a nonprofit legal services or public interest organization or a law school clinical or pro bono program.

The proposed rule would *permit* 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 if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. 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 clients.

2. Summary of the issue that the resolution addresses.

ABA Model Rule of Professional Conduct 1.8(e) is at odds with the ABA's goal of increasing access to justice. It 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 even where financial hardship prevents the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle.

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).

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. SCEPR and SCLAID have 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.

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, when financial hardship would otherwise prevent these clients from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on these clients to settle.

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 again 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.

SCEPR and SCLAID made amendments to the report and resolution as a result. We believe these changes address most of the concerns raised.

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