

REPORT BY THE PROFESSIONAL RESPONSIBILITY COMMITTEE

**PROPOSED AMENDMENT TO RULE 1.8(E), NY RULES OF PROFESSIONAL
CONDUCT**

We propose an amendment to New York’s Rule 1.8(e), Rules of Professional Conduct, and its comments, in order to allow attorneys handling pro bono matters to provide financial assistance to indigent clients, beyond the court costs and expenses of litigation allowed by the current Rule.

**I. NY RULE 1.8(e) AND COMMENTS, WITH PROPOSED NEW LANGUAGE
UNDERLINED**

NY Rule 1.8(e)

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- a. (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- b. (2) A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; ~~and~~
- c. (3) A lawyer, in an action in which an attorney’s fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer’s own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred; and
- d. (4) A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship, and shall not publicize or advertise a willingness to provide such financial assistance to clients.

Comments to Rule 1.8(e): Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain “ultimately liable” to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer’s fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer’s own account. However, like the former New York rule, paragraph (e), subsections (1) to (3), limit permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Under those subsections, permitted expenses do not include living or medical expenses other than those listed above.

[10] With the exception of representations covered by subsection (e)(4), 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 against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

[11] Subsection (e)(4) allows financial assistance, beyond court costs and expenses of litigation, to be given to indigent clients in connection with contemplated or pending litigation, in certain circumstances. For the purposes of subsection (e)(4), legal services provided "without fee" do not include cases accepted on a contingent fee basis, regardless of whether the lawyer receives a fee, and do not include litigation in which the lawyer collects fees under a fee-shifting statute. As the rule indicates, however, not-for-profit legal services or public interest organization, or a law school clinical or pro bono programs, may provide financial assistance to indigent clients under subsection (e)(4) even if the organization or program is seeking fees under a fee-shifting statute. Subsection (e)(4) is narrowly drawn to allow acts of charity in some specific circumstances in which it is unlikely that the giving of financial assistance would cause serious conflicts of interest or incentivize abuses.

II. RATIONALE FOR THE PROPOSAL

President Trump's first travel ban recently stopped a four-month old Iranian baby and her family from entering the United States for life-saving surgery. Lawyers worked to help the family, and the lawyers' firm agreed to underwrite the expense of bringing the family and the baby to New York and back to Iran, and all costs while in New York City. If the lawyers were representing the girl and her family in connection with actual or contemplated litigation, this act of charity could have been a violation of the disciplinary rules.

New York's bar should be taking the lead in enhancing access to justice and facilitating the charitable impulses and public service tradition of its lawyers. The proposed Rules change, with its narrow focus and careful safeguards, will increase the scope of the charity New York bar members can offer without sacrificing other important goals of the Rules of Professional Conduct.

a. Background

Paralleling the ABA's Model Rules of Professional Responsibility, the New York Rules of Professional Conduct prohibit a lawyer giving financial assistance to a client, in connection with litigation, except in narrowly defined circumstances. A lawyer may advance "costs and expenses of litigation" under some circumstances and conditions, and may pay such expenses on behalf of "an indigent or pro bono client." Rule 1.8(e). The rule under the last iteration of New York's prior Code was the same. *See* DR 5-103(B).

Rule 1.8(e) derives from the historical prohibitions on champerty and maintenance.¹ Champerty was the crime of improperly stirring up litigation by investing in a lawsuit; maintenance was a variety of champerty, usually taking the form of "providing living or other expenses to a client so that the litigation could be carried on."² These prohibitions have been narrowed in modern times, but still survive in part in the law of many jurisdictions. The New York Judiciary Law embodies some of the ancient concerns about champerty and maintenance.³

¹ *See* 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* § 13:18 (4th ed. 2014); ROY D. SIMON & NICOLE HYLAND, *SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED* 532 (2016 ed.); 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, 50 (2015).

² HAZARD, HODES & JARVIS, *supra* note 1, § 13:18.

³ Judiciary Law § 488: An attorney or counselor shall not:

2. By himself or herself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his or her hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this subdivision does not apply to:

b. "Humanitarian" Exceptions in Ten States and the District of Columbia

In recent years, some jurisdictions have made exceptions to the prohibition on giving financial assistance to clients that allow lawyers to make loans or gifts to relieve necessitous circumstances. In some states, this "humanitarian" exception is tied to client financial difficulties that could cause the client to settle the litigation that is the subject of the representation early and for a lower amount than could likely be obtained later. The main justifications for these "humanitarian exceptions" are (1) motives of simple charity, (2) easing access to the justice system for the indigent,⁴ or (3) helping "level the playing field between financially unbalanced parties."⁵

Eleven U.S. jurisdictions—including some with very large bars, notably California, D.C., and Texas—have codified humanitarian exceptions of different kinds. The full texts of these rules and, if applicable, comments, are attached to the end of this report as Appendix A. In summary, this is what the different rules allow:

- i. **Alabama:** "A lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer." Alabama Rule 1.8(e).

a. an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received;

b. a lawyer representing an indigent or pro bono client paying court costs and expenses of litigation on behalf of the client;

c. a lawyer advancing court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; or

d. a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, paying on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

3. A lawyer that offers services as described in paragraphs b, c and d of subdivision two of this section shall not, either directly or through any media used to advertise or otherwise publicize the lawyer's services, promise or advertise his or her ability to advance or pay costs and expenses of litigation in such manner as to state or imply that such ability is unique or extraordinary when such is not the case.

4. An attorney or counselor who violates the provisions of this section is guilty of a misdemeanor.

⁴ See, e.g., North Dakota Rules of Prof'l Responsibility, Rule 1.8(e), cmt. 11.

⁵ SIMON & HYLAND, *supra* note 1, at 547. See also D.C. Rules of Professional Conduct, Rule 1.8.(d), cmt. 9.

- ii. **California:** A lawyer may pay or agree to pay "personal or business expenses" of a client to third persons from funds collected or to be collected for the client as a result of the representation, and "[a]fter employment," may lend money to the client upon the client's written promise to repay. California 4-210(a).
 - (1) The Board of Trustees of the California Bar recently proposed to change and broaden this rule. The proposal would allow attorneys or their firms to "pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person in a matter in which the lawyer represents the client" California Proposed Rule 1.8.5(b)(4).
- iii. **District of Columbia:** In addition to court costs and litigation expenses, a lawyer may "pay or otherwise provide" "[o]ther financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings." District of Columbia Rule 1.8(d).
- iv. **Louisiana:** "In addition to costs of court and expenses of litigation, a lawyer may provide financial assistance to a client who is in necessitous circumstances" subject to a variety of conditions and limitations, including: the client's necessitous circumstances must "adversely affect the client's ability to initiate and/or maintain the cause," and the financial assistance cannot be advertised, used as an inducement to hire the lawyer, given prior to hiring of the lawyer, or be subject to any interest, fees, or charges. Louisiana Rule 1.8(e)(4)-(5).
- v. **Minnesota:** "A lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client." Minnesota Rule 1.8(e)(3).
- vi. **Mississippi:** A lawyer may "advance" "[r]easonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation" and "[r]easonable and necessary living expenses." which shall be repaid if the matter is successfully concluded, and subject to a variety of limitations and conditions, including: client must be in "dire and necessitous circumstances," financial assistance cannot be advertised and cannot be given prior to 60 days after the

representation started, it must be reported to the Mississippi Bar Standing Committee on Ethics, and cannot exceed \$1500 without approval of that Committee. Mississippi Rule 1.8(e)(2).

- vii.** *Montana:* "A lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client." Montana Rule 1.8(e)(3).
- viii.** *New Jersey:* "[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 [NJ Court Rules] may provide financial assistance to indigent clients whom the organization, program, or attorney is representing without fee." New Jersey Rule 1.8(e).
- ix.** *North Dakota:* "A lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided that the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that no promise of financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by the client." North Dakota Rule 1.8(e)(3).
- x.** *Texas:* "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." Texas Rule 1.08(d)(1).
- xi.** *Utah:* "[A] lawyer representing an indigent client may pay . . . minor expenses reasonably connected to the litigation." Utah Rule 1.8(e)(2).

The remaining U.S. jurisdictions have rules paralleling the ABA's and New York's Rule 1.8(e).

Although a few states with the same ABA/NY wording in their rules of professional conduct have construed them to allow small "humanitarian" gifts in some circumstances,⁶ or have held that a humanitarian motive might mitigate the need to punish a violation,⁷ New York appears to strictly construe its Rule 1.8(e).⁸ In New York, financial assistance provided under the exceptions must be "directly related to litigation,"⁹ and the exceptions listed in the rule are exclusive.¹⁰ New York courts have disciplined attorneys for giving or loaning money to clients for living or medical expenses, seemingly without regard for the amount of money involved or whether the client's financial situation was dire.¹¹

⁶ See, e.g., Fla. Bar v. Taylor, 648 So. 2d 1190 (Fla. 1994) (no violation to give indigent client used clothing for child and \$200 for necessities as "act of humanitarianism"); Okla. Bar Ass'n, Ethics Op. 326 (2009) (permitting "[n]ominal monetary gifts by a public defender to a death row inmate for prison system expenses" because such gifts "offer no possibility of a share of the proceeds of any pending action, nor is such a gift related to 'officials intermeddling' to enable the inmate to prosecute or defend a pending action. The client's choice of a public defender is dictated by his or her indigent circumstances, and not by expectation of financial assistance"); Va. State Bar, Ethics Op. 1830 (2006) (public defender may give indigent client nominal amount to buy personal items at jail commissary; gift not "in connection with" client's case); Maryland Ethics Docket 2001-10 (opining that a "de minimus gift" is not a violation but attorney cannot "provide housing or other financial assistance in connection with litigation"); Ariz. Bar Ass'n, Ethics Op. 91-14 (1991) (attorney may give a gift, but not extend a loan, to a "previously-retained client[]," "if it truly resulted from a charitable motivation by the attorney, and so long as the gift was not accompanied by any business, proprietary or pecuniary overtures, and there was no expectation by the attorney of any repayment by the client at any future time") (quotation marks omitted).

⁷ See, e.g., In re Berlant, 458 Pa. 439, 446 (1974) (stating that the fact that a lawyer violated professional responsibility rules by advancing money to an indigent client "for rent, food, and other necessities" "may be a mitigating factor when considering the sanction"); John Sahl, *Helping Clients With Living Expenses: "No Good Deed Goes Unpunished,"* 13 No. 2 Prof. Law. 1 (Winter 2002) (noting that the Ohio Supreme Court appears to have a practice of imposing the least onerous sanction—public reprimand—on attorneys for violating the rule against paying client living expenses).

⁸ But note that, by the plain text of the rule gifts or financial assistance are allowed in non-litigation matters. And according to Roy Simon, without violating Rule 1.8(e), "[a] lawyer may give the client things that have *de minimis* monetary value, such as a ride to the court house, a fruit basket at the holidays, or an occasional lunch, and a lawyer may certainly assist the client in purely non-monetary ways, such as by writing a favorable employment recommendation for the client." SIMON & HYLAND, *supra* note 5, at 540.

⁹ N.Y. Rules Prof'l Conduct, Rule 1.8, cmt. 9B. See also N.Y.C. Bar Comm. on Prof'l Ethics, Formal Op. 2010-03 (stating that Rule 1.8(e)(1) "is strictly limited to those expenses and costs incurred in litigating a lawsuit to completion").

¹⁰ See, e.g., N.Y.S. Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 852 (2011) (attorney representing client in asbestos litigation may not as part of settlement indemnify defendants for client's Medicare liens); N.Y.S. Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 553 (1983) (attorney in matrimonial matter may not lend money or guarantee a loan to allow client to bid on matrimonial property being sold pursuant to an equitable distribution decree); N.Y.S. Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 133 (1970) (no loans or guarantees of money for client are allowed except those specially enumerated in the rules); SIMON & HYLAND, *supra* note 5, at 547 ("[A] lawyer may not pay or guarantee any expenses that go beyond court costs and expenses of litigation.").

¹¹ See, e.g., In re Cellino, 21 A.D.3d 229 (4th Dep't 2005); Matter of Arensberg, 159 A.D.2d 797, 798 (3d Dep't 1990). See also In re Moran, 42 A.D.3d 272, 273 (4th Dep't 2007) (disciplining attorney for circumventing ban on providing financial assistance to clients); Waldman v. Waldman, 118 A.D.2d 577 (2d Dep't 1986) (upholding disqualification of attorney for violating rule against financial assistance to clients).

c. Rationales for the Current N.Y. Rule 1.8(e) and the Proposed Amendment

The Comments to N.Y. Rule 1.8(e) set out the current justifications for the prohibition:

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 against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.¹²

Commentators have also identified an additional policy reason supporting this rule: a humanitarian exception to the ban on giving financial assistance to clients might lead lawyers to compete with each other for business through the generosity of the gifts or loan terms.¹³

The concern about encouraging frivolous lawsuits is not persuasive. First, it is rooted in an ancient hostility to litigation that has been largely rejected in the United States for decades.¹⁴ Second, frivolous litigation is deterred directly in other ways, making Rule 1.8(e) unnecessary for that purpose. Frivolous litigation is sanctionable in New York courts under 22 NYCRR 130-1.1 and CPLR 8303-a, and in federal courts in New York under Fed. R. Civ. P., Rule 11. In addition, the New York Rules of Professional Conduct directly prohibit frivolous lawsuits, claims, and defenses in Rule 3.1, and litigation tactics that "have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense" in Rule 3.2. Third, the financial self-interest of lawyers and their concern for the professional reputations provide incentives against pursuing frivolous litigation.¹⁵

¹² Cmt. 10.

¹³ HAZARD, HODES & JARVIS, *supra* note 1, § 13:18 n.26.

¹⁴ See Utah State Bar, Ethics Advisory Opinion Comm., Op. No 11-02 (2011) ("The original goal of not stirring up litigation is no longer a justification for this rule. The United State Supreme Court has made clear, in finding lawyer's advertising to be protected commercial speech, that there is no state interest in suppressing litigation in general as an individual has a right to seek judicial redress for wrongs he has suffered.") (citing *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988)).

¹⁵ See, e.g., 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, 486 (2014) ("Similar to contingency fee cases, lawyers are less likely to lend money to clients during litigation of claims with little merit.").

The concern about lawyer-client conflicts is a real one. But the concern is not weighty enough to justify a total prohibition on humanitarian assistance to clients. A tailored exception, surrounded by safeguards, would provide significant benefits to indigent clients in New York while avoiding the core concerns that underline the current Rule 1.8(e).

For one thing, there will rarely be conflicts concerns if the lawyer makes an outright gift, rather than extending a loan.¹⁶ Our proposal allows both gifts and loans, but because it is limited to representations of the indigent undertaken pro bono, we think it unlikely that many loans will occur. If a loan is made under the proposed new rule, any conflicts which may arise could be address under the usual process of Rule 1.7. Moreover, the Rules already tolerate the potential for conflicts created by contingency fees and by advances of court costs and litigation expenses. Loans to clients for humanitarian reasons would not seem to create greater and fundamentally different kinds of potential conflicts than those currently tolerated.

The concern about lawyers competing based on financial assistance they can provide is addressed by provisions in the proposed new rule (1) limiting financial assistance to pro bono cases and specifically excluding contingency fee representations, and (2) banning the advertising of financial assistance, the offer of financial assistance prior to establishment of the attorney-client relationship, and the use of financial assistance as an inducement to retain an attorney in the first instance or to continue the representation. In addition, where there is no financial incentive for obtaining a client, competition for pro bono clients should continue to be rare.

Some may be concerned that a rule change allowing lawyers to give financial assistance to indigent clients will result in lawyers and organizations providing legal services to the indigent being inundated with requests for money—requests that will likely exceed available resources, and requests that, if rebuffed, could potentially cause tension in the attorney-client relationship. We note that the proposed rule change would not require that financial assistance be given; it would merely permit it. Lawyers and legal services providers could decide to have an organizational policy against providing such assistance. Being able to point to such an organization-wide policy would allow attorneys to decline requests from clients without causing interpersonal discomfort and potential damage to the attorney-client relationship. Or organizations could have policies that, for example, channel all requests for financial assistance away from the individual attorney to a central-decisionmaker who operates under pre-existing rules and standards.

¹⁶ Okla. Bar Ass'n, Ethics Op. 326 (2009) (“It is the expectation of repayment which gives rise to the conflict of interest concern, creating the risk that the lawyer might encourage the bird in hand of a settlement offer over the two birds which might be available at trial. Here, as there is no expectation of repayment, there is no concern of a conflict of interest.”).

The committee making this proposal reached out to several law school clinics and legal services organizations in New York and New Jersey to see whether they had any concerns about a rule allowing financial assistance to be given to indigent clients in pro bono representations. This was not an exhaustive survey, and so the responses should be understood to be anecdotal rather than broadly representative. But we can report that the responses received to date to our inquiries have not found concerns about such a rule.

The proposing committee is also aware that, at the request of the ABA Standing Committee on Legal Aid and Indigent Defendants (SCLAID), the National Legal Aid and Defender Association (NLADA) conducted a nationwide survey of legal aid and public defender organizations to determine whether they would support a change to the ABA's Model Rules of Professional Conduct 1.8(e), to allow an exception for subsistence payments to litigation clients of legal aid and defender offices. We understand that a large majority of the legal aid and defender organizations which responded were supportive of such a change, especially if the dollar amounts involved were limited. We also understand that there have been discussions between SCLAID and the ABA Standing Committee of Ethics and Professional Responsibility about whether Model Rule 1.8(e) might be amended to allow a humanitarian exception.

Finally, 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. The only concerns which we heard about came from a few jurisdictions which allow loans or gifts to clients in for-fee cases; it appears that some plaintiff-side attorneys in personal injury or related areas may have been tempted to use promises of loans or gifts for living expenses or other purposes as a way to induce clients to hire the attorney. Since the proposed change for New York is very clearly limited to representations in which the motive for financial gain by the attorney is absent, and since the text of the proposal clearly bars any promises, inducements, or advertising, we are satisfied that any significant abuse of the proposed rule is unlikely to occur in practice.

III. APPENDIX A: FULL TEXT OF STATE RULES

a. Alabama 1.8(e):

- (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;

- (3) A lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and
- (4) In an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, from his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.
- ***Comments – Emergency Financial Assistance:***
 - On occasion, a client of a lawyer may suffer a financial emergency. The client may be totally unable to turn to traditional sources of emergency financial assistance such as banks, families, or neighbors to obtain necessary assistance in meeting such a financial emergency. While the client may have an expectation that a recovery in a pending lawsuit would provide ample funds from which to repay a loan, the collateralization of a loan with the anticipated proceeds of litigation is not generally accepted as a good business practice. In these circumstances, the only alternative to whom the client may realistically be able to turn is the lawyer handling the lawsuit. For true financial emergencies, arising from circumstances beyond the control of the client, the Rule permits the lawyer either to advance a loan to the client or to guarantee the repayment of a loan by a third party to the client.
 - A lawyer departs from the role of advocate when the lawyer becomes a lender to the client. The lawyer as lender is placed in a position adverse to the client, particularly if the client refuses to repay. Since the repayment by the client may not be contingent on the outcome of a matter, the client is always responsible for repayment of any loan, whether the client wins or loses the pending lawsuit.
 - Rule 1.8(e)(3) permits the lawyer to act as both advocate for and lender to the client under only the narrowest and most compelling of circumstances. The lawyer must not, prior to employment, directly or indirectly, have assured the client of the availability of emergency financial assistance. The assistance must meet a true emergency. Emergency financial assistance does not include the regular provision of income and support to a client. Rather, the Rule is intended to permit the lawyer to help in those few cases which rise to the level of an emergency. The lawyer is never obligated to provide such assistance, and he is obligated to attempt collection from the client regardless of the outcome of the matter.

b. California 4-210(a):

- (a) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:
 - (1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or
 - (2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or
 - (3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

c. California—Proposed Rule 1.8.5 (Proposed Rule Adopted by the Board of Trustees of the State Bar of California on March 9, 2017¹⁷):

- (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client.
- (b) Notwithstanding paragraph (a), a lawyer may:
 - (1) pay or agree to pay such expenses to third persons,* from funds collected or to be collected for the client as a result of the representation, with the consent of the client;
 - (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so;
 - (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and
 - (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.

¹⁷ <http://ethics.calbar.ca.gov/Committees/RulesCommission2014/ProposedRules.aspx>

- (c) “Costs” within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.
- (d) Nothing in this rule shall be deemed to limit the application of rule 1.8.9.

d. District of Columbia 1.8(d):

- (d) 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.
- ***Comment – Paying Certain Litigation Costs and Client Expenses:***
 - [9] Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this court in 1980 in an amendment to DR 5-103(B) that eliminated the requirement that the client remain ultimately liable for costs of litigation, even if the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the result of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client that are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. 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 unfavorable terms in order to receive the immediate proceeds of settlement. This 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. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8(d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The rule merely permits such payments to be made without requiring reimbursement by the client.

e. Louisiana 1.8(e):

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except as follows.
 - (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, provided that the expenses were reasonably incurred. Court costs and expenses of litigation include, but are not necessarily limited to, filing fees; deposition costs; expert witness fees; transcript costs; witness fees; copy costs; photographic, electronic, or digital evidence production; investigation fees; related travel expenses; litigation related medical expenses; and any other case specific expenses directly related to the representation undertaken, including those set out in Rule 1.8(e)(3).
 - (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
 - (3) Overhead costs of a lawyer's practice which are those not incurred by the lawyer solely for the purposes of a particular representation, shall not be passed on to a client. Overhead costs include, but are not necessarily limited to, office rent, utility costs, charges for local telephone service, office supplies, fixed asset expenses, and ordinary secretarial and staff services.
 - With the informed consent of the client, the lawyer may charge as recoverable costs such items as computer legal research charges, long distance telephone expenses, postage charges, copying charges, mileage and outside courier service charges, incurred solely for the purposes of the representation undertaken for that client, provided they are charged at the lawyer's actual, invoiced costs for these expenses.
 - With client consent and where the lawyer's fee is based upon an hourly rate, a reasonable charge for paralegal services may be chargeable to the client. In all other instances, paralegal services shall be considered an overhead cost of the lawyer.
 - (4) In addition to costs of court and expenses of litigation, a lawyer may provide financial assistance to a client who is in necessitous circumstances, subject however to the following restrictions.
 - (i) Upon reasonable inquiry, the lawyer must determine that the client's necessitous circumstances, without minimal financial assistance, would adversely affect the client's ability to initiate and/or maintain the cause for which the lawyer's services were engaged.
 - (ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.
 - (iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a

client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

- (iv) Financial assistance under this rule may provide but shall not exceed that minimum sum necessary to meet the client's, the client's spouse's, and/or dependents' documented obligations for food, shelter, utilities, insurance, non-litigation related medical care and treatment, transportation expenses, education, or other documented expenses necessary for subsistence.

- (5) Any financial assistance provided by a lawyer to a client, whether for court costs, expenses of litigation, or for necessitous circumstances, shall be subject to the following additional restrictions.

- (i) Any financial assistance provided directly from the funds of the lawyer to a client shall not bear interest, fees or charges of any nature.

- (ii) Financial assistance provided by a lawyer to a client may be made using a lawyer's line of credit or loans obtained from financial institutions in which the lawyer has no ownership, control and/or security interest; provided, however, that this prohibition shall not apply to any federally insured bank, savings and loan association, savings bank, or credit union where the lawyer's ownership, control and/or security interest is less than 15%.

- (iii) Where the lawyer uses a line of credit or loans obtained from financial institutions to provide financial assistance to a client, the lawyer shall not pass on to the client interest charges, including any fees or other charges attendant to such loans, in an amount exceeding the actual charge by the third party lender, or ten percentage points above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding, whichever is less.

- (iv) A lawyer providing a guarantee or security on a loan made in favor of a client may do so only to the extent that the interest charges, including any fees or other charges attendant to such a loan, do not exceed ten percentage points (10%) above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding. Interest together with other charges attendant to such loans which exceeds this maximum may not be the subject of the lawyer's guarantee or security.

- (v) The lawyer shall procure the client's written consent to the terms and conditions under which such financial assistance is made. Nothing in this rule shall require client consent in those matters in which a court has certified a class under applicable state or federal law; provided, however, that the court must have accepted and exercised responsibility

for making the determination that interest and fees are owed, and that the amount of interest and fees chargeable to the client is fair and reasonable considering the facts and circumstances presented.

- (vi) In every instance where the client has been provided financial assistance by the lawyer, the full text of this rule shall be provided to the client at the time of execution of any settlement documents, approval of any disbursement sheet as provided for in Rule 1.5, or upon submission of a bill for the lawyer's services.

- (vii) For purposes of Rule 1.8(e), the term “financial institution” shall include a federally insured financial institution and any of its affiliates, bank, savings and loan, credit union, savings bank, loan or finance company, thrift, and any other business or person that, for a commercial purpose, loans or advances money to attorneys and/or the clients of attorneys for court costs, litigation expenses, or for necessitous circumstances.

d. Minnesota 1.8(e):

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

- ***Comment – Financial Assistance:***

- [10] Lawyers may not subsidize lawsuits brought on behalf of their clients, such as by making loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing

indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted. A lawyer may guarantee a loan to enable the client to withstand delay in litigation under the circumstances stated in Rule 1.8 (e)(3).

e. Mississippi 1.8(e):

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, except that:
 - 1. A lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation for hearing or trial, the repayment of which may be contingent on the outcome of the matter; and
 - 2. A lawyer representing a client may, in addition to the above, advance the following costs and expenses on behalf of the client, which shall be repaid upon successful conclusion of the matter.
 - a. Reasonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and
 - b. Reasonable and necessary living expenses incurred.
 - The expenses enumerated in paragraph 2 above can only be advanced to a client under dire and necessitous circumstances, and shall be limited to minimal living expenses of minor sums such as those necessary to prevent foreclosure or repossession or for necessary medical treatment. There can be no payment of expenses under paragraph 2 until the expiration of 60 days after the client has signed a contract of employment with counsel. Such payments under paragraph 2 cannot include a promise of future payments, and counsel cannot promise any such payments in any type of communication to the public, and such funds may only be advanced after due diligence and inquiry into the circumstances of the client.
 - Payments under paragraph 2 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, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. An attorney contemplating such payment must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation, and, if so, the total of such payments, without approval of the Standing Committee on Ethics shall not in the aggregate exceed \$1,500. Upon denial of such application, the decision thereon shall be subject to review by the Mississippi Supreme Court on petition of the attorney seeking leave to make further payments. Payments under paragraph 2 aggregating

\$1,500 or less shall be reported by the lawyer making the payment to the Standing Committee on Ethics within seven (7) days following the making of each such payment. Applications for approval by the Standing Committee on Ethics as required hereunder and notices to the Standing Committee on Ethics of payments aggregating \$1,500 or less, shall be confidential.

f. Montana 1.8(e):

- (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;
 - (3) A lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client.

g. New Jersey 1.8(e)

- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
 - 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 indigent clients whom the organization, program, or attorney is representing without fee.¹⁸

¹⁸ New Jersey Rule of Court, Rule 1:21-11(a) provides:

(1) Qualifying Pro Bono Service. Qualifying pro bono service consists of:

(i) legal assistance to low-income persons;

(ii) legal assistance to nonprofit charitable, religious, civic, community, or educational organizations or governmental entities in matters that are designed primarily to address the needs of low-income persons;

h. North Dakota 1.8(e):

- (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 may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided that the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that no promise of financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by the client.
- ***Comment – Financial Assistance to Client:***
 - [11] Rule 1.8(e) recognizes the impact of finances on a client's access to the judicial system and provides limited avenues to improve the client's financial ability to be represented by counsel through negotiation or litigation or both without undue financial pressure to settle prematurely. This provision is not to be interpreted as requiring lawyers to provide financial assistance to clients.

i. Texas 1.08(d):

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

(iii) legal assistance to individuals, groups, or organizations seeking to secure, protect, or advance civil rights, civil liberties, or other rights of great public importance; or

(iv) legal assistance to nonprofit charitable, religious, civic, community, or educational organizations or governmental entities in matters in furtherance of their purposes, where payment of standard legal fees would significantly deplete the organization's or entity's economic resources or would otherwise be inappropriate.

Qualifying pro bono service does not include partisan political activity or service on a nonprofit board of directors or other service that is unrelated to the provision of legal representation or legal advice. It does include legal mentoring and training to prepare attorneys, or students in a law school clinical or pro bono program as defined in subsection (a)(3), to provide qualifying pro bono service.

Qualifying pro bono service is undertaken outside the course of ordinary commercial practice and is performed without a fee from the client. If a fee-shifting statute applies in a qualifying pro bono case, attorneys or firms in commercial practice may seek fees and are strongly encouraged to donate them to a legal services or public interest organization or law school clinical or pro bono program as defined in subsections (a)(2) and (3). If an attorney or firm in commercial practice retains fees in a qualifying pro bono case, no attorney may claim an exemption from court-appointed pro bono service based on the hours expended on that case. See R. 1:21-12(b). Cases accepted on a contingency-fee basis do not constitute qualifying pro bono service regardless of whether the attorney receives a fee.

- (1) A lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, 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.

j. Utah 1.8(e)

- (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, and minor expenses reasonably connected to the litigation, on behalf of the client.
- **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 and minor sums reasonably connected to the litigation, such as the cost of maintaining nominal basic local telephone service or providing bus passes to enable the indigent client to have means of contact with the lawyer during litigation, regardless of whether these funds will be repaid, is warranted.
 - [10a] Relative to the ABA Model Rule, Utah Rule 1.8(e)(2) broadens the scope of direct support that a lawyer may provide to indigent clients to cover minor expenses reasonably connected to the litigation. This would include, for example, financial assistance in providing transportation, communications or lodging that would be required or desirable to assist the indigent client in the course of the litigation.

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