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April 24, 2020*

Hon. Janet DiFiore
Chief Judge
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Hon. Elizabeth A. Garry
Presiding Justice
Supreme Court of New York
Appellate Division, Third Department
Capitol Station, P.O. Box 7288
Albany, New York 12224

Hon. Rolando T. Acosta
Presiding Justice
Supreme Court of New York
Appellate Division, First Department
27 Madison Avenue
New York, New York 10010

Hon. Gerald J. Whalen
Presiding Justice
Supreme Court of New York
Appellate Division, Fourth Department
50 East Avenue
Rochester, New York 14604

Hon. Alan D. Scheinkman
Presiding Justice
Supreme Court of New York
Appellate Division, Second Department
45 Monroe Place
Brooklyn, NY 11201

Re: Urgent Amendment to Rule 1.8(e) of the New York Rules of Professional Conduct to Provide “Humanitarian Exception”

Dear Chief Judge DiFiore, Justice Acosta, Justice Scheinkman, Justice Garry and Justice Whalen:

First, on behalf of the New York City Bar Association, please accept our thanks and gratitude for your collective leadership during these challenging times, and for all that you are doing to keep New Yorkers safe and to safeguard our court system.

* The online version of this letter was modified to include the Professional Discipline Committee as a signatory.

We write here to urge the Administrative Board of the Courts to immediately adopt the proposed amendment to Rule 1.8(e) of the New York Rules of Professional Conduct, which is already before the Courts for consideration. The proposed amendment would create a “humanitarian exception” to the current rule, which prohibits lawyers from providing financial assistance to litigation clients. As the Court is well aware, New Yorkers are experiencing severe financial consequences as a result of the COVID-19 pandemic. Thousands of New Yorkers have lost their jobs, been forced to close their businesses, or are unable to work because of illness. In addition, lawyers throughout the State have answered the call to provide *pro bono* assistance to those dealing with the repercussions of the pandemic. But these same lawyers, who may wish to provide basic financial assistance to indigent clients – such as money for groceries, clothes or medical supplies – would be prohibited from doing so under the current ethics rules. The proposed humanitarian exception to Rule 1.8(e) would allow lawyers to provide much needed financial assistance to those in need during this unprecedented time.

BACKGROUND

The current version of Rule 1.8(e) states that a lawyer who is representing a client in connection with a “contemplated or pending litigation . . . shall not advance or guarantee financial assistance to the client” except that the lawyer may advance court costs and expenses of litigation and, if the lawyer is representing an indigent or *pro bono* client, the lawyer may agree to pay court costs and expenses of litigation.¹ The current rule does not permit lawyers, law firms or legal service organizations from providing any other forms of financial support to indigent clients.

In March 2018, the New York City Bar Association issued a report (the “City Bar Report”) by its Professional Responsibility Committee, which proposed a humanitarian exception to Rule 1.8(e).² The City Bar Report proposed amending Rule 1.8(e) to permit lawyers representing indigent clients on a *pro bono* basis, as well as lawyers working for legal service providers, public interest offices, and law school clinics, to provide financial assistance to indigent clients under limited circumstances. Examples of permitted activities under the humanitarian exception to Rule 1.8(e) include: a *pro bono* lawyer helping a client pay for groceries or essential living supplies; a non-profit law office establishing a client assistance fund to allocate resources based on need; and a law school clinic leveraging its resources to provide assistance to a client who may be struggling to meet basic living expenses. The City Bar Report reasoned that “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.”³

After its release, the New York State Bar Association (NYSBA) Committee on Standards of Attorney Conduct (COSAC) studied the City Bar Report and voiced its strong support for the proposed humanitarian exception to Rule 1.8(e). COSAC agreed with the findings in the City Bar Report that the humanitarian exception would serve a valuable purpose and that the proposed limitations in the rule – namely that the lawyer would not be permitted to offer financial assistance as an inducement to continue the representation and would not be permitted to advertise the

¹ See N.Y. R. Prof. Cond. 1.8(e)(1)-(3).

² Available at https://s3.amazonaws.com/documents.nycbar.org/files/2017292-Amending_Rule_1-8e.pdf.

³ *Id.* at 3.

availability of financial assistance – would mitigate any risk of abuse. In addition, because the humanitarian exception would be limited to *pro bono* representation of indigent clients, the risk that the rule could be exploited for pecuniary gain would be even further limited.⁴ COSAC also recommended that the NYSBA adopt a new comment to Rule 1.8(e), which would make clear that the humanitarian exception “is narrowly drawn to allow charitable financial assistance to clients in circumstances in which such financial assistance is unlikely to cause conflicts of interest or to incentivize abuses.”

At the January 31, 2020 meeting of the NYSBA House of Delegates, the NYSBA approved the humanitarian exception to Rule 1.8(e) and transmitted its recommendation to the Administrative Board of the Courts for consideration. We are therefore urging the Courts to act quickly to approve the humanitarian exception.

THE HUMANITARIAN EXCEPTION TO RULE 1.8(e)

The proposed amendment to Rule 1.8(e), as recommended by COSAC and approved by the NYSBA, reads as follows:

(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:

* * * * *

(4) A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, a law school clinical program, a law school pro bono program, or a lawyer employed by or volunteering for such an organization or program, may provide financial assistance to indigent clients, provided that:

(i) the lawyer, organization or program does not promise or assure financial assistance allowed under subparagraph (e)(4) to a prospective client before retention, or as an inducement to continue the lawyer-client relationship after retention, and

(ii) the lawyer, organization or program does not publicize or advertise a willingness to provide such financial assistance to clients.

THE URGENT NEED TO ADOPT THE HUMANITARIAN EXCEPTION

Almost immediately after the COVID-19 pandemic hit, our members began receiving calls from lawyers and non-profit organizations who wanted to provide small amounts of financial

⁴ As the City Bar Report notes, eleven other states have already adopted various forms of a humanitarian exception and there have not been any reports of widespread abuse of the rule. See Ala. R. Prof. Cond. 1.8(e); Cal. R. Prof. Cond. 1.8.5; D.C. R. Prof. Cond. 1.8(d); La. R. Prof. Cond. 1.8(e)(4)-(5); MN R. Prof. Cond. 1.8(e)(3); Miss. R. Prof. Cond. 1.8(e)(2); Mont. R. Prof. Cond. 1.8(e)(3); N.J. R. Prof. Cond. 1.8(e); N.D. R. Prof. Cond. 1.8(e)(3); Tex. R. Prof. Cond. 1.08(d)(1); Utah R. Prof. Cond. 1.8(e)(2).

assistance to indigent clients. For example, a non-profit organization that serves an immigrant community learned that a significant number of the organization's clients had become unemployed as a result of COVID-19. The organization wanted to provide assistance to the clients to help pay for food and rent. Another inquiry involved a lawyer who represented a community restaurant in a low-income area with limited options for affordable food. The restaurant was providing food to the community for free, but could not do so without assistance. The lawyer wanted to contribute to enable the restaurant to continue feeding the community.

Moreover, the need for the humanitarian exception is not limited to the current pandemic. Even before the current crisis, lawyers representing indigent clients *pro bono* have sought to provide financial assistance to clients in order to help them with basic necessities such as food, clothing, and access to healthcare.

Under the current version of the ethics rules, a lawyer or law office could face disciplinary action for engaging in many of the activities described above. But that should not be the case. The humanitarian exception before the Courts is consistent with lawyers' ethical and moral obligations to "seek improvement of the law; and to promote access to the legal system and the administration of justice."⁵ Especially now, lawyers should not be limited in their ability to provide assistance to clients who are struggling to make ends meet.

As an alternative, if the Courts require more time to study the humanitarian exception and decide whether to fully amend Rule 1.8(e), the Courts should consider taking immediate short-term action, such as issuing a temporary order adopting the humanitarian exception until such a time as New York is no longer in a state of emergency. Alternatively, the Courts could issue an interim order that would expressly permit lawyers to provide financial assistance to indigent clients they are representing *pro bono* if the client has been financially impacted by the COVID-19 pandemic.

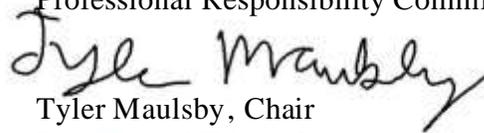
Respectfully,



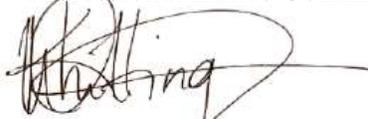
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⁵ See N.Y. R. Prof. Cond. Preamble [1].