AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

Model Rule 1.8: Current Clients: Specific Rules

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

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

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

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client 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 financial assistance reasonably necessary to institute or maintain pending or contemplated litigation so long as the legal services are delivered at no fee to the indigent client and neither the lawyer, nor the program, nor the organization that offers the legal services:

(i) promises or assures financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) seeks reimbursement or repayment for any financial assistance provided; and

(iii) publicizes or advertises 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.

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Comment

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Financial Assistance

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

[11] Paragraph (e)(3) provides another exception. It allows 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 to provide reasonable financial assistance beyond litigation expenses and court costs to help indigent clients meet basic needs in connection with contemplated or pending litigation or administrative proceedings. Financial assistance permitted under paragraph (e)(3) includes reasonable contributions toward food, rent, transportation, medicine and similar necessities of life.

[12] 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, organizations, or programs 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 or organization or program does not eventually receive a fee.

[13] The paragraph (e)(3) exception is narrow. Humanitarian acts are allowed in specific circumstances where it is unlikely that the financial assistance would cause conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer, the program, and the organization from (i) promising or assuring financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention, (ii) seeking reimbursement or repayment of any financial assistance provided, 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.

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

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

REPORT

I. Introduction

> "The legal system at its most fundamental level, is about access to justice." ABA President Judy Perry Martinez, April 6, 2020[1]

The Standing Committee on Ethics and Professional Responsibility (SCEPR) proposes adding a narrow humanitarian 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 a pending or contemplated litigation or administrative proceedings. SCEPR's proposal 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 such items as medical treatment, food, rent, and transportation while the case is pending. Humanitarian exceptions, variously worded, appear in the rules of ten U.S. jurisdictions.

The proposal 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); and
- 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.

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] *Coping with a Pandemic: ABA President Judy Perry Martinez*, Law360, April 6, 2020.
[2] Statement of Legal Services Corporation ("LSC") Program Executive Director in connection with a Survey conducted by the National Legal Aid and Defender Association (NLADA) for the ABA Standing Committee on Legal Aid and Indigent Defense ("SCLAID"), on file with SCLAID (hereinafter, "SCLAID Survey"). *See also*, Philip G. Schrag, THE UNETHICAL ETHICS RULE: NINE WAYS TO FIX MODEL RULE OF PROFESSIONAL CONDUCT 1.8(E), 28 GEORGETOWN JOURNAL OF LEGAL ETHICS, 39, 40 (Model Rule 1.8(e) "is at odds with the legal profession's goal of facilitating access to justice. [It] bars lawyers from

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]

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 SCEPR's proposal 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 proposals restrictions, the amendment ensures equal justice under law, a core ABA mission.[5]

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 "there 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—depends on the amount of money a client has.

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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").

[3] Statement of LSC Program Executive Director in connection with the SCLAID Survey.

[4] *Id.*

[5] *See* ABA Mission Statement, https://www.americanbar.org/about_the_aba/aba-mission-goals/ ; 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 the 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. 1H.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 SCPR proposes 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 this Proposal in the Nonprofit Community

SCEPR has received support from approximately sixty lawyers in nonprofit organizations and legal services and legal aid offices, the Legal Aid Society in NYC—an office of over 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 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;

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

[9] *See* emails dated April 10 and April 11, 2020 from Daniel L. Greenberg and Barbara S. Gillers to public interest lawyers and law school clinicians, and responses, on file with SCEPR.

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 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

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[10] *See* Letter, April 14, 2020, APBCo to the ABA Board of Governors, on file with SCEPR.
[11] Art Garwin, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 at 193 (2013).

[12] *See* Rule 1.8 cmt. [16] (paragraph (e) "has its basis in common law champerty and maintenance"); 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, 466 ("the restrictions in Rule 1.8(e) were adopted to protect the poor by incorporating rules against champerty and maintenance") (2014); Utah State Bar, Eth. Ad. Op. No. 11-02 (2011), 2011 WL 6143436 (Rule 1.8(e) is "derived from the common law prohibition of champerty and maintenance")(cite omitted); Michigan State Bar Ethics 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.)); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986) § 8.13 (same).
[14] S. Gillers, *supra* n.10 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] M.R. 1.8 cmt. [10].
[16] *See* Garwin, *supra* n.8 at 207.
[17] M.R. 1.8 cmt. [10].
[18] NYC Op. 2019-6, 2019 WL 3987636 at 3.

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 SCEPR's proposal.

IV. Analysis

A. The Current Rule

Model Rule 1.8(e)(1) and (2) strictly limit financial assistance to clients in pending or contemplated litigation. Only court costs and litigation expenses are permitted. The Rule reads: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client."[23]

Comment [10] explains why Rule 1.8(e) permits financial assistance for litigation expenses and court costs only: "Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, *because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation*."[24] The Comment continues: "[L]ending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence" is permitted "because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

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[19] REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING, February 28, 2020 at p.5-8 ("[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] S.Gillers, *supra* n.10 at 631 (cites omitted).
[21] *See, e.g*. Utah State Bar, Eth. Ad. Op.No. 11-02 , supra n.9 at 4, (2011), 2011 WL 6143436 (permitting "small charitable gifts" under Utah R.PC 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, See* Memo from SCLAID to the SCEPR dated June 14, 2016, on file with SCEPR (hereinafter, "SCLAID Memo"),
[23] Model Rule 1.8(e).
[24] M.R. 1.8 cmt. [10] (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 Proposal

SCEPR proposal adds a new exception,1.8(e)(3). The new exception permits lawyers representing poor people pro bono or through certain organizations or programs ("pro bono lawyers") to contribute to the living expenses of their indigent clients. The contributions must be reasonably necessary to permit the client to institute or maintain the litigation. 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 reimbursement, 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 financial assistance reasonably necessary to institute or maintain pending or contemplated litigation so long as the legal services are delivered at no fee to the indigent client and neither the lawyer, nor the program, nor the organization that offers the legal services:
>
> > (i) promises or assures financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention;
> >
> > (ii) seeks reimbursement or repayment for any financial assistance provided; and
> >
> > (iii) publicizes or advertises 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.

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

Comment [11]

New Comment [11] offers guidance on covered expenses, permitted amounts, and who besides the client may be aided. No definition of "indigent" is added. Below, this

[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]").

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. It allows 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 to provide reasonable financial assistance beyond litigation expenses and court costs to help indigent clients meet basic needs in connection with contemplated or pending litigation or administrative proceedings. Financial assistance permitted under paragraph (e)(3) includes reasonable contributions toward food, rent, transportation, medicine and similar necessities of life.

Living Expenses

Comment [11] gives examples of permitted assistance: "reasonable contributions toward food, rent, transportation, medicine and similar necessities of life. " This would include reasonable contributions for meals, clothing, transportation, housing and the like. 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 "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 the cost of

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

[28] *See,* D.C. Rule 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); Minnesota Rule 1.8(e)(3) (a lawyer may guarantee a loan "*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship"; prohibits promises of assistance prior to retention and requires that client remain liable for repayment without regard to the outcome of the litigation)(emphasis added);)(Mississippi Rule 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). Montana 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); North Dakota Rule 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); Texas Rule 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 1.8(e)(2) (a lawyer representing an indigent client may "pay . . . minor expenses *reasonably connected* to the litigation")(emphasis added).

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., M.R. 1.4(a)(2)(lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished"); M.R. 1.4(a)(3) (lawyers must "keep the client reasonably informed about the status of the matter)"; M.R. 1.4(a)(4)(lawyers must "promptly comply with reasonable requests for information"); M.R. 1.5 (lawyers must "not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses"); and M.R. 1.6 (limiting the disclosure of confidential information "to the extent the lawyer reasonably believes necessary"); see also, M.R. 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 for "indigent." 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." Synonyms include "needy, necessitous, and impoverished."[31] Finally, lawyers covered by the exception generally serve only the poor and the most economically disadvantaged.[32]

New Comment [12]

[29] Cmt. [3] to Rule 6.1 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. Formal Opinion 06-441 *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation* (2006)(discussing the ethical obligations of lawyers "who represent *indigent* persons")(emphasis added).

[31] *See* Roget's International Thesaurus § 836.8 (3rd Edition). *See also*, The Compact Oxford English Dictionary, New Edition, Second Edition (1994) ("indigent" means "destitute," "lacking in the necessaries of life," "in needy circumstances," "characterized by poverty," "poor," "needy").

[32] *See, e.g.*, LSC, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, An Updated Report of the LSC, September 2009 n.4 (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* https://aspe.hhs.gov/poverty-guidelines *See also*, https://www.americanbar.org/groups/legal_services/flh-home/flh-faq/ (clients of public defenders are "indigent").

New Comment [12] 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:

> [12] 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, organizations, or programs 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 or organization or program does not eventually receive a fee.

Comment [13]

Comment [13] contains safeguards against conflicts and abuse by prohibiting lawyers from (i) using humanitarian assistance to lure clients, (ii) seeking reimbursement or repayment and (iii) advertising the availability of humanitarian assistance. It provides:

> [13] The paragraph (e)(3) exception is narrow. Humanitarian acts are allowed in specific circumstances where it is unlikely that the financial assistance would cause conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer, the program, and the organization from (i) promising or assuring financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention, (ii) seeking reimbursement or repayment of any financial assistance provided, 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.

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 financial circumstances. The Committee deems this a worthy objective. It reflects the view that it is not the proper office of the legal profession's ethics rules to impede a poor client's access to the courts, as the current rule does, where the conditions described in the proposal are present. Furthermore, as noted earlier, in public interest fee-shifting cases the proposal will reinforce the legislative goal of facilitating rather than impeding court access. It would frustrate that goal and achieve no

[33] M.R. 1.8(e) cmt. [10].

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 a poor client with living expenses that 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 interest 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), on the other hand, 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

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[34] *See,* Lockwood, supra n.9 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"); March 2018 Report by the Professional Responsibility Committee of the New York City Bar (hereinafter "City Bar Rpt.") at 7 (NYRPC 1.8 cmt. [10], which is identical to M.R. 1.8 cmt. [10]), is aimed, in part, to curb frivolous litigation) https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/proposed-amendment-to-rule-18e-ny-rules-of-professional-conduct **.** 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 M.R 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] M.R. 3.1 (emphasis added).

[36] FED.R.CIV.PRO 11 (emphasis added).

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

[38] M.R. 1.8 cmt. [10](emphasis added).

judgment in the advice they give clients and not be influenced by their own financial concerns.

SCEPR's proposal presents none of these 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 that could influence their advice to clients.

No Competition for Clients

Some opponents of expanding a lawyer's discretion to provide financial assistance under Rule 1.8(e) argue that lawyers will use this discretion to improperly compete for clients.[39] SCEPR's proposal avoids this problem because it prohibits advertising or publicizing the availability of financial assistance for living expenses. More importantly, however, pro bono lawyers simply 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. Among possible collateral consequences, some comments have mentioned tax law.[41] The issue here, however, is solely whether the limitations in Rule 1.8(e) should be modified consistent with the goals of an American legal ethics document.

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

[39] *See, e.g.*, Sahl, *supra* n.13 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* n.2 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* n.2.

[41] SCEPR asked Tom Callahan, Chair of the ABA Tax Section, about the tax consequences of the proposal. He told the Committee that the proposal 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.

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]

Of the jurisdictions that have adopted a humanitarian exception to Rule 1.8(e), nearly all go well beyond the modest amendment SCEPR proposes.[46] They permit, for example, advances and loans for basic needs and other living expenses. Reimbursement by the client is sometimes required. By contrast, SCEPR's proposal permits gifts only. No loans. No advances. No reimbursements.

SCEPR's proposal is modeled principally on the D.C. Rule but also on New Jersey Rule 1.8(e)(3), which addresses public interest and law school clinical representations specifically.

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[42] *See* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 47 (9th ed. 2019) at 173 ("[m]ost jurisdictions do not allow an exception for assisting indigent clients").

[43] *See* NYC Op. 2019-6, *supra* n.15 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. Eth. Op. 10, 2011 WL 13290336 (water bills; $300 in advance rent to avoid eviction); Pennsylvania Informal Ethics Opinion 94-12 (1994) (bond for preliminary injunction); Arizona Ethics Opinion 95-01 (1995) (transportation costs); Illinois Ethics Op. 95-6 (1995) (medical care); South Carolina Ethics Op. 89-12 (1989) (medical treatment). But see N.C. Eth. Op. 7, 2001 WL 1949557 (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* n.2 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., Fla. 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, Ethics Op. 326 (2009) ("[n]ominal monetary gifts by a public defender to a death row inmate for prison system expenses"); Virginia State Bar Legal Ethics Op. 1830 (Va. 2006), 2006 WL 3289280 ("nominal amounts" to an incarcerated client to buy personal items or food at the jail commissary); Maryland Ethics Op. 2001-10 (2001) (a "de minimus gift" does not violate 1.8(e)); Arizona State Bar Ethics 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* Alabama Rule 1.8(e)(lawyer may advance or guaranty emergency assistance; prohibits (i) making repayment may contingent on the outcome and (ii) promises or assurance of assistance before retention); California Rule 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"); Louisiana Rule 1.8(e)(permits financial assistance in addition to court costs and litigation expenses to clients in "necessitous circumstances"; conditions and limitations apply); The New Jersey Rule is discussed in the text.

D.C. Rule 1.8(d) permits a lawyer to provide "financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.[47] A Comment explains that "a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. . . . . 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."[48] However, even where a settlement is not possible, for example "in the case of an indigent in deportation proceedings . . . the potential consequences of homelessness, starvation, or medical inattention [while awaiting relief in the proceeding] are even more serious than having to accept artificially low financial compensation. The client may die while waiting for a court hearing, or may be unable to remain in communication with counsel, causing a winning case to become a losing one, or causing the client to be unable to participate in the hearing at all, with the result that the client would be ordered deported in absentia."[49]

New Jersey Rule of Professional 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."[50]

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) similar to the one SCEPR proposes for the Model Rules.[51]

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

[47] D.C. Rules of Prof'l Conduct R. 1.8(d).
[48] D.C. Rules of Prof'l Conduct R. 1.8(d) cmt. [9].
[49] Schrag *supra* n.2 at 46 (cite omitted). See also *id*. at 72 ("[a]t the very least, the ABA and the states should eliminate the ban on outright gifts by pro bono lawyers to meet the survival needs of their indigent clients . . . . ").

[50] N.J. Rules of Court, Rule, 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.

[51] NYSBA Committee on Standards of Attorney Conduct Memorandum dated January 15, 2020, at 3-6 City Bar Rpt. *supra n*. 35.

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 have broader exceptions than the one SCEPR proposes. They permit loans for living expenses and apply in contingency matters. Chief Counsel for the Louisiana Attorney Disciplinary Board wrote that Louisiana's version of Rule 1.8(e), which has been in effect since 1976,

> permits lawyers to advance monies to clients in necessitous circumstances. The Louisiana rule is not limited to non-profits and does not prohibit a lawyer from obtaining reimbursement, although it does not permit a lawyer to obtain reimbursement of interest for funds the lawyer advances directly . . . The Louisiana Office of Disciplinary Counsel has received very few complaints against lawyers concerning Rule 1.8(e) and (f). The complaints that have been lodged primarily involve how the lawyer calculated disbursement of funds from monetary recoveries resulting from a suit or settlement. Because you have informed me that the proposed ABA Rule prohibits any reimbursement of any necessitous circumstances advances, I do not anticipate that such a rule would lead to any complaints (such as the ones we have received) to a state's disciplinary counsel. Based upon my experience as the Chief Disciplinary Counsel in Louisiana, it is my belief that the rule discussed would not lead to an increase in disciplinary enforcement action nor increase the potential for harm to the public or to the legal profession.[52]

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).[53]

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[52] Letter, dated April 8, 2020, from Chief Disciplinary Counsel for the Louisiana Attorney Disciplinary Board Charles B. Plattsmier to SCEPR Member Michael H. Rubin, on file with SCEPR.

[53] Email dated April 8, 2020 from Hamilton P. Fox, Disciplinary Counsel in D.C. to SCEPR Member Thomas H. Mason, 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, March 16, 2018)). *See also* Sahl, *supra* n.13 at (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* n.35 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.").

VII. Support from the Pro Bono Community

Commentors have questioned whether the pro bono community supports adding a humanitarian exception to Rule 1.8(e). SCEPR's work in connection with this proposal shows that there is broad support in this community.[54] 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, and the Standing Committee on Disaster Response & Preparedness. In addition, 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.[55] 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.[56]

Some lawyers outside the pro bono and legal services 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 SCEPR's amendment to Rule 1.8(e) permitting pro bono lawyers to provide financial assistance for living expenses to indigent clients.

Respectfully submitted,
Barbara S. Gillers, Chair, SCEPR
August 2020

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[54] *See* Section II of this Report.
[55] *Id.*
[56] Email dated April 10, 2020, from Michael Pope, Executive Director of Youth Represent, to Daniel L. Greenberg and Barbara S. Gillers, on file with SCEPR.