



Staff Memorandum

HOUSE OF DELEGATES
January 31, 2020

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Standards of Attorney Conduct.

The Committee on Standards of Attorney Conduct (COSAC) is in the process of a comprehensive review of the Rules of Professional Conduct. During the past year, the House approved a number of amendments to the Rules for transmittal to the Administrative Board of the Courts. In November, COSAC circulated another set of proposed amendments for comment by interested groups. In response to comments received, the committee has made several amendments to its report, and is presenting its report to you for debate and vote at this meeting.

The proposed amendments may be summarized as follows:

- **Rule 1.8:** Amend paragraph (e) by adding a “humanitarian exception” that will (subject to certain restrictions) allow the following lawyers and organizations to provide financial assistance to indigent litigation clients, beyond the costs and expenses of litigation:
 - lawyers providing legal services without charging a fee
 - non-profit legal services organizations
 - public interest organizations
 - law school clinical programs
 - law school pro bono programs, and
 - lawyers who work for or volunteer with such organizations or programs
- **Rule 3.4:** Add a new Rule 3.4(f), which would prohibit a lawyer from requesting any person (except a client) not to speak with or provide information to another party, unless (i) the unrepresented person is the client’s relative, employee, or other agent and (ii) the advice would not harm the person’s interests – but a new sentence in Comment [4] to Rule 3.4 makes clear that a lawyer may inform any person of the right not to be interviewed by another party.
- **Rule 8.1 (first proposal).** Add a new Rule 8.1(b) and a new Comment [3] to clarify that the disclosure requirements of Rule 8.1(a) are subject to certain confidentiality requirements in the Rules.

- **Rule 8.1 (second proposal).** Amend Comment [1] to make clear that the Rule applies to applications for reinstatement just as it applies to applications for admission.
- **Rule 8.3 (first proposal).** Amend Rule 8.3(c)(1) to provide that the exception to mandatory reporting where information regarding a lawyer's violation of law or rules is confidential under Rule 1.6 also extends to information that is confidential under Rules 1.9 or 1.18. Also amend Comment [2] to make clear that the disclosure obligations of the Rule cannot be avoided by entering into confidential settlements or other private agreements.
- **Rule 8.3 (second proposal).** Amend Comment [3] to provide guidance on the application of the Rule by making clear that a lawyer's conversion or theft of a client's or third party's funds presumptively raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer.

Also attached is a City Bar report that originally proposed the "humanitarian exception" to Rule 1.8(e) that COSAC references at page 3 of its report.

The report will be presented by Prof. Roy D. Simon, co-chair of the Committee on Standards of Attorney Conduct.

MEMORANDUM

January 15, 2020

COSAC Proposals to Amend Rules 1.8, 3.4, 8.1, and 8.3 of the New York Rules of Professional Conduct

The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") is engaged in a comprehensive review of the New York Rules of Professional Conduct. In this memorandum, COSAC presents some (but not all) of the proposals that it circulated for public comment, in two separate reports, dated August 13, 2019 and October 31, 2019. COSAC received formal or informal comments on these proposals from the following groups:

- United States Attorneys in New York
- NYSBA Committee on Professional Ethics
- NYSBA Real Property Law Section
- NYSBA Committee on Attorney Professionalism
- NYSBA Dispute Resolution Section
- New York City Bar Committee on Professional Discipline
- New York City Bar Committee on Professional Responsibility

COSAC thanks all of these groups for the time and thought they invested in commenting on COSAC's proposals. COSAC carefully considered every comment. COSAC accepted many of the suggested revisions, and all of the comments directed COSAC's attention to areas of potential concern and helped COSAC to improve its earlier proposals or COSAC's explanation of those proposals.

In light of the comments received, COSAC has revised its proposals to amend or delete the following black letter Rules (and to amend or eliminate some of the Comments to these Rules):

- Rule 1.8: Current Clients: Specific Conflict of Interest Rules
- Rule 3.4: Fairness to Opposing Party and Counsel
- Rule 8.1: Candor in the Bar Admission Process (two proposals)
- Rule 8.3: Reporting Professional Misconduct (two proposals)

Proposed changes to the black letter Rules can take effect only if they are adopted by the Appellate Divisions of the New York state courts. Proposed changes to Comments can be made by the House of Delegates of the New York State Bar Association without judicial approval (although some

proposed changes to the Comments are contingent on Appellate Division approval of the related changes to the black letter Rules).

We first summarize the proposals, then explain the issues and reasoning that led COSAC to propose each amendment, and then set out the essence of the public comments and COSAC's response to these comments. We set out each proposed amendment in redline style, striking out deleted language (~~in red~~) and underscoring added language (in blue).

Summary of Proposals

- **Rule 1.8:** Amend paragraph (e) by adding a “humanitarian exception” that will (subject to certain restrictions) allow the following lawyers and organizations to provide financial assistance to indigent litigation clients, beyond the costs and expenses of litigation:
 - lawyers providing legal services without charging a fee
 - non-profit legal services organizations
 - public interest organizations
 - law school clinical programs
 - law school pro bono programs, and
 - lawyers who work for or volunteer with such organizations or programs
- **Rule 3.4:** Add a new Rule 3.4(f), which would prohibit a lawyer from requesting any person (except a client) not to speak with or provide information to another party, unless (i) the unrepresented person is the client's relative, employee, or other agent and (ii) the advice would not harm the person's interests – but a new sentence in Comment [4] to Rule 3.4 makes clear that a lawyer may inform any person of the right not to be interviewed by another party
- **Rule 8.1 (first proposal).** Add a new Rule 8.1(b) and a new Comment [3] to clarify that the disclosure requirements of Rule 8.1(a) are subject to certain confidentiality requirements in the Rules.
- **Rule 8.1 (second proposal).** Amend Comment [1] to make clear that the Rule applies to applications for reinstatement just as it applies to applications for admission.
- **Rule 8.3 (first proposal).** Amend Rule 8.3(c)(1) to provide that the exception to mandatory reporting where information regarding a lawyer's violation of law or rules is confidential under Rule 1.6 also extends to information that is confidential under Rules 1.9 or 1.18. Also amend Comment [2] to make clear that the disclosure obligations of the Rule cannot be avoided by entering into confidential settlements or other private agreements.
- **Rule 8.3 (second proposal).** Amend Comment [3] to provide guidance on the application of the Rule by making clear that a lawyer's conversion or theft of a client's or third party's funds presumptively raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer.

The remainder of this report will explain each of COSAC's recommendations.

Rule 1.8

Current Clients: Specific Conflict of Interest Rules

In March 2018 the Professional Responsibility Committee of the New York City Bar Association issued a detailed report (the "City Bar Report," attached as Appendix A) recommending a "humanitarian exception" to Rule 1.8(e), as well as a new Comment to Rule 1.8 to explain the exception. The Report was later approved by the City Bar President and represents the position of the City Bar. The new exception to Rule 1.8(e) proposed in the City Bar Report would permit lawyers representing indigent clients on a pro bono basis, lawyers working in legal services or public interest offices, lawyers working in law school clinics, and the legal services offices, public interest offices, and law school clinical programs themselves, to provide financial assistance to indigent litigation clients.

COSAC has carefully considered the City Bar Report and strongly supports the proposal to add a humanitarian exception to Rule 1.8(e). COSAC therefore recommends the City Bar proposal to the House of Delegates with a few relatively minor edits and additions. COSAC has discussed these edits and additions with the City Bar and understands that the City Bar supports COSAC's proposal to amend Rule 1.8(e) as set forth below.

As amended, Rule 1.8(e) would provide 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:

- (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 or pro bono client may pay court costs and expenses of litigation on behalf of the client; ~~and~~
- (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~~

(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 Comment to Rule 1.8 would be amended as follows:

COMMENT

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,~~ subparagraphs (e)(1)-(3) ~~limits~~ 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. Permitted expenses under subparagraphs (e)(1)-(3) do not include living or medical expenses other than those listed above.

[10] Except in representations covered by subparagraph (e)(4), ~~L~~awyers 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.

[10A] Subparagraph (e)(4) allows certain lawyers and organizations to provide financial assistance beyond court costs and expenses of litigation to indigent clients in connection with contemplated or pending litigation. Examples of financial assistance permitted under subparagraph (e)(4) include payments or loans to cover food, rent, and medicine - but loans must comply with Rule 1.8(a) (governing business transactions with clients). Subparagraph (e)(4) permits lawyers providing legal services without fee, not-for-profit legal services or public interest organizations, and law school clinical or pro bono programs (as well as lawyers employed by or volunteering for such organizations or programs) to provide financial

assistance to indigent clients. The organizations or programs (and lawyers employed by or volunteering for such organizations or programs) may provide such financial assistance even if the organization or program is eligible to seek or is seeking fees under a fee-shifting statute, a sanctions rule, or some other fee-shifting provision. However, subparagraph (e)(4) does not apply to any other legal services provided “without fee.” Thus, subparagraph (e)(4) does not permit lawyers or other organizations to provide financial assistance beyond court costs and expenses of litigation in matters in which they 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 ultimately does not receive a fee.

[10B] Subparagraph (e)(4) 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. To avoid incentivizing abuses, such as “bidding wars” between qualifying organizations or pro bono lawyers to attract or keep clients, subparagraph (e)(4) does not permit a lawyer or organization to promise or assure financial assistance to a prospective client as a means of inducing the client to retain the lawyer or to continue an existing lawyer-client relationship. Nor does subparagraph (e)(4) permit a lawyer or organization to publicize or advertise a willingness to provide financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation. However, the restrictions on promises, assurances, advertising, and publicity in subparagraphs (e)(4)(i) and (ii) apply only to financial assistance allowed under subparagraph (e)(4) and not to costs and expenses of litigation that are permitted under subparagraphs (e)(1)-(3).

COSAC Discussion of Rule 1.8(e)

Currently, Rule 1.8(e) allows payment of “court costs and expenses of litigation” for indigent clients represented in connection with contemplated or pending litigation on a pro bono basis but bars other financial assistance to indigent clients as well as other clients. As described in the City Bar Report, the proposed “humanitarian exception” would give certain attorneys and organizations discretion to provide financial assistance to indigent clients represented on a pro bono basis as long as the attorney or organization (i) does not promise financial assistance allowed under Rule 1.8(e)(4) in order to induce a client to commence or continue an attorney-client relationship, and (ii) does not advertise or publicize a willingness to provide such financial assistance.

Some form of humanitarian exception similar to proposed subparagraph (e)(4), with varying terms and limitations, has been adopted by ten other states and the District of Columbia.

COSAC supports the proposed humanitarian exception. COSAC believes that the concerns about attracting clients and fomenting litigation through loans or payments (and the attendant conflicts and professionalism issues that such assistance could raise) would generally not exist for outright payments or loans to (or on behalf of) indigent, non-fee paying litigants for necessities of life such as food, rent, and medicine. (Rule 1.8 already permits lawyers to advance the costs of medical examinations to create evidence or comply with discovery requests, but the rule does not permit lawyers to advance other expenses for medicines or medical treatment.)

Any likelihood of abuse is reduced by the City Bar proposal to prohibit advertising or promises of humanitarian assistance designed to induce a client to retain the lawyer or to continue an existing attorney-client relationship. In addition, COSAC believes that payments of such expenses may sometimes be necessary to enable potentially meritorious litigation to proceed (much as litigation funding already does for many non-indigent clients).

According to the City Bar Report, the public interest bar is said generally to support a humanitarian exception. This claim is based on an ABA nationwide survey of legal aid and public defender organizations and on the City Bar Professional Responsibility Committee's own inquiries of some law school clinics and legal services organizations in New York and New Jersey. The Report notes the prospect that lawyers representing indigent clients with desperate needs could be placed in a difficult position regarding whether to provide financial assistance to their clients (perhaps out of their own pockets), but also notes that law firms and legal services organizations could adopt (and in some cases have adopted) policies that would make decisions on financial assistance less personal, or would assign the decisions on financial assistance to attorneys or administrators who are not involved in the matter in question.

Though not mentioned in the City Bar Report, lawyers and legal service providers may also ethically discuss and actively explore with their clients other available charitable resources that may reduce or eliminate the client's need for financial assistance under subparagraph (e)(4). Nothing in COSAC's recommendation is meant to detract from those efforts. In any case, whether or not the Courts adopt a humanitarian exception, COSAC encourages lawyers to educate themselves and their clients about other charitable organizations that may assist litigants who are struggling financially, and COSAC encourages lawyers to support such organizations and to urge others to support them.

Public comments on Rule 1.8(e) and COSAC's response

New York State Bar Association Committee on Professional Ethics.

The NYSBA ethics committee supports the proposed amendments to Rule 1.8(e) and related Comments but urges COSAC to do three things: (a) define or clarify the meaning of "indigent" in Rule 1.8(e); (b) explain COSAC's view that contingent fee personal injury cases do not qualify for the humanitarian exception; and (c) make clear that a "loan" to a client must comply with Rule 1.8(a) (governing business transactions with clients). Specifically, the ethics committee said:

With the following observations, we agree with COSAC's proposal, which originates with the New York City Bar's Committee on Professional Responsibility.

The N.Y. Rules of Professional Conduct (the "Rules") do not explicitly define "indigent." So noting in our Opinion 786 (2005), which interpreted the identical predecessor of Rule 1.8(e), we said that the New York courts "have defined the term as 'destitute of property or means of comfortable subsistence; needy; poor; in want; necessities' (citing *Healy v. Healy*, 99 N.Y.S.2D 874, 877 (Sup Ct. Kings County 1950)." Since then, Comment [3] to Rule 6.1 was added to define "poor person" in the context of pro bono representations. In our Opinion 1044 (2015), at ¶ 8, we opined that a person qualifying as a "poor person" under that Comment would be "indigent" under Rule 1.8(e). We assume that COSAC's proposal uses the term "indigent" in this same ordinary and common sense, but we believe

that COSAC should expressly so state in a Comment; the matter should not be left to our assumptions.

Also needful of clarity is proposed paragraph (c)(4), which extends to any lawyer providing services without fee to indigent clients, with the explanation in proposed Comment 10A that this does not exclude “an organization or program” that is eligible to seek fees under a fee-shifting statute, common in, among other things, civil rights laws. This is not what the proposed revision of paragraph (c)(4) actually says, so a discordance exists between the proposed Rule and the proposed Comment. Equally unclear is whether a so-called “non-public” interest matter is confined to personal injury contingency cases, and why such cases are invariably of a “non-public” character. Wise public policy may be that such matters are not apt for the “humanitarian exception” but the bar deserves greater guidance than the COSAC proposal puts forth.

That COSAC contemplates that the financial aid may take the form of a loan implicates Rule 1.8(a), to which our Committee has consistently required adherence in loan transactions between a lawyer and client. See, e.g., N.Y. State 1145 ¶ 9 (2018); N.Y. State 1104 ¶ 4 (2016); N.Y. State 1055 ¶ 13 (2015). Although mention is made of other parts of Rule 1.8 in its commentary on the proposed change, COSAC does not say whether the proposal would require compliance with the strict standards of Rule 1.8(a). While we are loath to burden a humanitarian measure with undue complexity, we believe that any business transaction with a client – that is, a transaction other than an act of charity – compels application of Rule 1.8(a). At a minimum, if COSAC disagrees, then we think clarification and explanation is needed.

COSAC has deliberated regarding each of the ethics committee’s suggestions and will address each one.

With respect to the term “indigent,” COSAC does not believe it is a necessary to clarify the meaning of “indigent.” That term has been in Rule 1.8(e) or its predecessor, DR 5-103(B)(2), for at least twenty-five years and has not created problems. Also, as the ethics committee noted, ethics opinions have addressed the meaning of the term “indigent” and have provided substantial guidance that is not readily captured in a short Comment.

With respect to making clear that a “loan” to a client must comply with Rule 1.8(a), COSAC agrees and has added appropriate language to proposed Comment [10A].

With respect to whether personal injury cases serve the public interest, COSAC believes that sometimes they do and sometimes they do not. COSAC has excluded them for the same reason that the New York City Bar excluded them: abuses of the financial assistance exception are least likely to occur when financial assistance to clients is provided by lawyers providing legal services without fee, by not-for-profit legal services or public interest organizations, by law school clinics or law school pro bono programs, or by lawyers working for or with such organizations or programs. Lawyers in the for-profit sector have different incentives and motivations. COSAC understands that a number of jurisdictions allow lawyers to provide financial assistance to a wider variety of needy individual clients (including contingent fee clients) beyond the costs and expenses of litigation, and COSAC recognizes that extending the humanitarian exception to contingent fee lawyers might be an

appropriate step at a later time, but adopting the proposed humanitarian exception would be a big step for New York, and COSAC thinks it best to see how the humanitarian exception works in pro bono and public interest cases before expanding it to the private sector.

New York City Bar

The New York City Bar originated the proposed humanitarian exception and generally supports COSAC's changes to its proposals, but requested the following modifications:

Proposed Comment 10A to proposed Rule 1.8(e)(4) seems to describe the universe of lawyers who may provide financial assistance to indigent clients more narrowly than does the proposed Rule itself. The proposed Rule provides that such assistance may be provided by, among others, “[a] lawyer providing legal services without a fee...” The third sentence of comment 10A lists the other categories of attorneys who are covered by the rule, but excludes this category (except to the extent that it overlaps with lawyers volunteering for public interest organizations or law school clinical or pro bono programs, which is a separately listed category under the Rule). We suggest clarifying language so that the comment does not create confusion about the ability of a lawyer or law firm providing pro bono services to an indigent client to provide such assistance.

COSAC agrees with the City Bar's suggestion and has made the requested modification to COSAC's earlier proposal.

Rule 3.4 **Fairness to Opposing Party and Counsel**

COSAC proposes to add a new paragraph (f) to Rule 3.4. The new paragraph would provide as follows:

Rule 3.4. A lawyer shall not ...

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COSAC also proposes to amend Comment [4] to Rule 3.4 to explain the new provision. As amended, Comment [4] would provide as follows:

[4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer's client. See Rule 4.3. However, subject to Rule 4.3, a lawyer may inform any person of the right not to

[be interviewed by any other party.](#)

COSAC Discussion of Proposed Rule 3.4(f)

COSAC proposes to make clear that a lawyer ordinarily may not request a person other than a client to refrain from voluntarily talking with or giving relevant information to another party unless (1) the person is a client's relative, employee, or other agent and, in addition, (2) the lawyer reasonably believes that such a person's interests will not be adversely affected by refraining from giving such information.

COSAC's proposal is based verbatim on the black letter text of ABA Model Rule 3.4(f). The Restatement (Third) of the Law Governing Lawyers adopts a nearly identical position, but explicitly adds in a Comment that lawyers may inform third parties that they have the *right* not to be interviewed by another party if they so choose. COSAC recommends that New York add the Restatement language to Comment [4] to Rule 3.4.

The prohibition (with limited exceptions) on lawyers asking persons not to provide information to opposing counsel derives from the general view that witnesses do not "belong" to any particular party and that "fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." ABA Model Rule 3.4, Comment [1].

The New York Rules do not contain the proposed language. A constellation of other rules might be interpreted to prohibit the conduct at issue, but according to N.Y. City 2009-5 (2009), they do not. Opinion 2009-5 noted that in 2008 the New York State Bar Association recommended that the Courts adopt Rule 3.4(f), and that the COSAC Reporter's Notes explained the need for Rule 3.4(f) as follows:

... Rule 3.4(f) has no equivalent in the existing Disciplinary Rules but deserves a place in the mandatory rules because it provides clear guidance on a question lawyers for entities face on a daily basis. The Rule strikes an appropriate balance between the justice system's search for the truth through the presentation of evidence and an organization's right to control the disclosure of trade secrets or other proprietary information to the organization's adversaries.

Despite the State Bar's support, the Appellate Divisions did not include Rule 3.4(f) in the final version of the Rules that took effect on April 1, 2009. According to Opinion 2009-5, "there is no rulemaking history shedding any light on the omission." Opinion 2009-5 went on to state: "We do not know why the Appellate Divisions declined to adopt Proposed Rule 3.4(f), but we view the omission as a factor reinforcing our conclusion that it would be inappropriate to imply a restriction nowhere found on the face of the Rule, as approved." Thus, at least according to the City Bar ethics committee, lawyers are not currently prohibited from asking witnesses to refrain from voluntarily providing information to opposing counsel.

The vast majority of states closely follow the ABA Model Rule 3.4(f). In fact, anecdotal evidence suggests that even in New York many attorneys believe that the prohibition in proposed Rule 3.4(f) already exists, perhaps because the prohibition exists in many other jurisdictions and because many attorneys intuitively believe that the behavior is wrong.

COSAC has also been told by some criminal defense attorneys that the lack of the prohibition in proposed Rule 3.4(f) leads to asymmetric access to witnesses. This lack magnifies the already asymmetric nature of criminal discovery in New York, where prosecutors have many tools to gather evidence that defense lawyers do not have. We are also told that some defense lawyers refrain from telling a third party witness not to speak to law enforcement or a prosecutor out of a concern that making such a request might lead to a charge of obstruction of justice. Yet on the prosecution side there does not appear to be any (realistic) danger that a prosecutor risks discipline or sanctions for requesting a witness not to speak to defense counsel – even though a “request” coming from a prosecutor or law enforcement official might sound more like an order than a mere request.

Whether or not New York’s Courts adopt proposed Rule 3.4(f), COSAC recommends that the State Bar add the language from the Restatement explicitly stating: “A lawyer may inform any person of the right not to be interviewed by any other party.” That language appears in Comment e to § 116 of the Restatement. COSAC believes this language should be placed in the Comment rather than in the black letter text of Rule 3.4. The ABA Model Rule 3.4(f) contains no analogous language in its Comment, but COSAC believes the Restatement language is valuable.

Public comments regarding Rule 3.4(f), and COSAC’s response

New York State Bar Association Committee on Professional Ethics. After summarizing COSAC’s proposal, the ethics committee said:

We have no objection to the proposals, which hail from the ABA Model Rules as well as The Restatement (Third) of the Law Governing Lawyers.

The Rules do not currently contain an explicit injunction against a lawyer advising anyone from voluntarily providing information to another party. In 2008, the State Bar recommended that the Appellate Divisions adopt a variation of COSAC’s proposed 3.4(f), but the courts declined to do so. In its Opinion 2009-5, the New York City Bar Association cited this omission as a factor in concluding that a lawyer is ethically permitted to advise anyone to refrain from providing information to another party. Thus, COSAC’s proposed Rule 3.4(f) would sharply curtail the City Bar’s expansive view of the Rules.

COSAC explains, persuasively we think, that clarity on this question is important. Despite the City Bar’s cogent opinion, many practitioners believe that advising someone to refrain from voluntarily providing information to another party is wrong and, whether guided by ethics or tactics, forbear from doing so. As COSAC notes, in the context of criminal defense, such advice is rife with peril if the conduct approaches the border of obstruction. We see benefit in stating with some measure of precision whom a lawyer may permissibly advise not to cooperate with another party, and we think that the proposed Rule 3.4(f) achieves an appropriate balance.

In all events, we endorse COSAC’s proposed addition to the Comments to Rule 3.4 that a lawyer may always tell anyone that a person has the right to decline to volunteer information to others.

COSAC appreciates the ethics committee’s support for Rule 3.4(f) as proposed.

Rule 8.1

Candor in the Bar Admission Process

COSAC recommends two changes to Rule 8.1: an entirely new Rule 8.1(b), and an amendment to Comment [1] to Rule 8.3.

Proposal # 1: Proposed amendment adding a new Rule 8.1(b) and Comment [3]

Rule 8.1 requires lawyers to make disclosures in specified circumstances, but the Rule contains no exception for protected information. To remedy this shortcoming, COSAC proposes the following new paragraph (b) to Rule 8.1 and accompanying Comment:

(b) This Rule does not require disclosure of information protected by Rules 1.6, 1.9, or 1.18, or information gained through participation in a bona fide lawyer assistance program.

COMMENT

— ...

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-lawyer relationship, including Rules 1.6, 1.9, 1.18 and, in some cases, Rule 3.3.

COSAC Discussion of Rule 8.1(b)

ABA Model Rule 8.1 has an explicit exception for information protected by Rule 1.6. The 2005 COSAC version of proposed Rule 8.1 followed the ABA's lead by explicitly providing that disclosure is not required of information otherwise protected by Rule 1.6. A provision in the 2008 NYSBA version of proposed Rule 8.1(b) included that same exception and added an additional clause providing that disclosure is not required of information gained while participating in a *bona fide* lawyer assistance program.

Consistent with the exception to ABA Model Rule 8.1 for confidential information, Comment [3] to ABA Model Rule 8.1 notes that a lawyer representing an applicant for admission is governed by Rule 1.6 (and in certain cases by Rule 3.3). Likewise, Comments to Rule 8.1 proposed by COSAC in 2005 and by the NYSBA in 2008 also referred to the applicability of Rule 1.6.

However, when the New York Courts adopted Rule 8.1 effective April 1, 2009, the Courts dropped proposed Rule 8.1(b), and thus eliminated the exceptions for information protected by Rule 1.6 or gained in a *bona fide* lawyer assistance program. Since Rule 8.1 as adopted did not contain any exception for confidential information, the textual basis for proposed Comment [3] no longer existed, so COSAC deleted it. (In this report COSAC proposes to restore it.) The current version

of Rule 8.1 has only two Comment paragraphs and does not refer to Rule 1.6 or to lawyer assistance programs.

Rule 8.1 is thus in tension with Rule 8.3, which ordinarily requires a lawyer to report a serious violation of the Rules by another lawyer, but includes an express exception providing that Rule 8.3 “does not require disclosure of: (1) information protected by Rule 1.6; or (2) information gained ... while participating in a bona fide lawyer assistance program.” COSAC proposes adding similar confidentiality exceptions to Rule 8.1.

When the Courts omitted these exceptions in 2009 by rejecting the language of proposed Rule 8.1(b), it is not clear whether the Courts meant to require disclosure of information protected by Rule 1.6 and information obtained through a lawyer assistance program. Simon and Hyland suggest that the Courts did not mean to require lawyers to tell bar admission authorities about such confidential information, and further suggest that the Rule be interpreted to include an implied exception. *Simon’s New York Rules of Professional Conduct Annotated* 1666 (2019 ed.) (“we should imply language in Rule 8.1 protecting confidential information and information acquired through a *bona fide* lawyer assistance program”).

COSAC recommends resolving this ambiguity by proposing a new Rule 8.1(b) and Comment [3], using the same language that the NYSBA recommended in 2008, to clarify that there are indeed exceptions for information protected by Rule 1.6 and information gained while participating in a *bona fide* lawyer assistance program. The justification for these exceptions is similar to the justification that underlies the parallel exceptions in Rule 8.3(c). Moreover, the same justification extends to confidential information as to former clients under Rule 1.9, and as to prospective clients under Rule 1.18, so COSAC has added references to Rules 1.9 and 1.18. Finally, the proposed exceptions are justified by the need to avoid discouraging bar applicants who desire to retain counsel or to contact a lawyer assistance program for help with substance abuse, stress, or other problems.

Proposal # 2: Proposed amendment to Rule 8.1, Comment [1]

While the Rule and Comment refer only to applications “for admission” to the Bar, COSAC proposes to make clear in a Comment that the Rule applies equally to applications for reinstatement. The amended Comment would read as follows:

[1] If a person makes a material false statement in connection with an application for admission [or reinstatement](#), it may be the basis for subsequent disciplinary action if the person is admitted [or reinstated](#) and in any event may be relevant in a subsequent admission [or reinstatement](#) application. The duty imposed by this Rule applies to a lawyer’s own admission [or reinstatement](#) as well as that of another.

COSAC Discussion of Rule 8.1, Comment [1]

COSAC believes that the policies supporting discipline for false statements in bar applications apply just as strongly in the case of applications for reinstatement as they do in the case of original applications for admission. COSAC therefore proposes to make clear that the Rule applies equally in both contexts.

Public comments regarding Rule 8.1, and COSAC's response

New York State Bar Association Real Property Law Section. The NYSBA Real Property Law Section supports the addition of a new Rule 8.1(b) but is concerned that (i) the phrase “bona fide” is not a defined term and that (ii) using the modifier “bona fide” before “lawyer assistance program” might be read as restricting lawyers from helping other lawyers.

COSAC does not intend to restrict lawyers helping lawyers and does not believe that limiting the exception in proposed Rule 8.1(b) to a “bona fide” lawyer assistance program will discourage lawyers from helping other lawyers. The phrase “bona fide” does not require definition. The Real Property Section is correct that the phrase “bona fide” is not defined in Rule 1.0 (“Terminology”) or in proposed Rule 8.1(b) or its Comment, but the phrase “bona fide lawyer assistance program” is used in several places in the Rules - see Rules 7.1(b)(1), 7.2(b)(1)(ii), 7.2(b)(4) and, most importantly, 8.3(c).

Specifically, Rule 8.3(c)(2) expressly “does not require disclosure of ... information gained ... while participating in a bona fide lawyer assistance program.” The proposed revision to Rule 8.1 is designed to make the exception to mandatory reporting of material facts in the bar admission process consistent with the exception to mandatory reporting of misconduct of lawyers to bar authorities. Since COSAC has not heard about problems interpreting the phrase “bona fide lawyer assistance program” in Rule 8.3(c)(2), COSAC is not persuaded that it should be defined for purposes of the proposed amendments to Rule 8.1.

New York City Bar

The New York City Bar, while not taking a formal or official position, expressed “overall support” for COSAC’s proposed amendments to Rule 8.1.

Rule 8.3 **Reporting Professional Misconduct**

COSAC recommends two kinds of changes to Rule 8.3:

- Amendments to Rule 8.3(c)(1) and a related change to Comment [2] to Rule 8.3; and
- Amendments to Comment [3] to Rule 8.3

Proposal # 1: Proposed amendments to Rule 8.3(c)(1) and Comment [2]

COSAC proposes two changes to Rule 8.3 and its comments so as to refine or clarify the scope of that Rule’s reporting obligation and its exceptions.

First, Rule 8.3 requires that lawyers in certain circumstances report professional misconduct, and Rule 8.3(c) sets forth certain exceptions to that requirement. While the exceptions currently apply

to information confidential pursuant to Rule 1.6, they do not currently extend to information that is confidential under Rules 1.9 or 1.18.

Second, some lawyers and law firms may believe that they can escape from the duty to report another lawyer in their own firm by entering into a confidential settlement agreement (or other form of nondisclosure agreement) with an accuser.

To remedy these shortcomings, COSAC proposes both (i) an amendment to the text of Rule 8.3(c)(1) and (ii) a corresponding explanatory amendment to Comment [2] to Rule 8.3. The proposed amendment to the text of Rule 8.3 provides that there is an exception to the reporting requirement for information that is confidential under certain rules other than Rule 1.6. The proposed amendment to Comment [2] makes clear that confidential settlement agreements by themselves do not excuse otherwise mandatory reporting. The amended versions of the Rule and Comment would provide as follows:

(c) This Rule does not require disclosure of:

- (1) information otherwise protected by [Rules 1.6, 1.9, or 1.18](#); or ...

Comment

[2] A report about misconduct is not required where it would result in violation of Rules 1.6, 1.9, or 1.18. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests. [If a lawyer knows reportable information about misconduct that is not protected by Rule 1.6 or other confidentiality rules, then Rule 8.3\(a\) requires a lawyer to report the information to a tribunal or other appropriate authority even if there are contractual restrictions on disclosing the information, such as in a settlement agreement or nondisclosure agreement. For example, if a lawyer is accused of sexual harassment, and if other lawyers in the firm know that such misconduct occurred and raises a substantial question about the alleged harasser's fitness as a lawyer, the other lawyers in the firm cannot avoid their reporting obligations under Rule 8.3\(a\) by signing a confidential settlement agreement with the accuser. However, Rule 8.3\(a\) does not necessarily override the obligation of a person bound by a legal duty to maintain confidentiality. A clash between Rule 8.3\(a\) and a statutory or other legal duty of confidentiality would present a question of law that this Comment does not attempt to resolve.](#)

COSAC Discussion of Rule 8.3(c)(1) and Comment [2]

The proposed change to the text of Rule 8.3(c)(1) would provide that the exception includes not only information that is confidential with respect to current clients under Rule 1.6, but also information that is confidential with respect to former clients under Rule 1.9 and with respect to prospective clients under Rule 1.18. COSAC believes that the policy considerations supporting the

exception apply equally no matter which of these Rules provides the basis of confidentiality. This proposal would align the confidentiality exception to Rule 8.3 with the confidentiality exception to Rule 8.1 as COSAC has proposed to amend the latter (discussed above), and for the same reasons.

The second issue addressed in this proposal concerns the relationship between Rule 8.3 and nondisclosure agreements (“NDAs”) or other contractual confidentiality provisions. This issue came to COSAC’s attention in March 2018 when the Solicitors Regulation Authority in the U.K. sent lawyers a notice reminding them that lawyers are required to report potential professional misconduct to disciplinary authorities, and warning law firms that nondisclosure agreements do not negate that reporting requirement. “The authority noted that it has received ‘relatively few’ complaints of inappropriate sexual behavior, just 21 complaints over a two-year period ending in October 2017,” and noted that media reports have suggested that “the low levels of reporting may be the result of NDAs and cultural issues within some firms.” Coe, *UK Regulator Sends Law Firms Gag Order Warning Shot* (Law360 Mar. 12, 2018).

The proposed amendment would clarify that a lawyer otherwise required to report misconduct cannot expand the exceptions to the reporting requirement set forth in Rule 8.3(b) by contracting to keep the information confidential. See Krane, *You Can’t Stop Client from Complaining* (NYPRR Sept. 2003).

Proposal # 2: Proposed amendment to Comment [3] to Rule 8.3

Many lawyers are uncertain about when Rule 8.3(a) requires them to report another lawyer’s violation of the Rules of Professional Conduct. COSAC proposes to add some guidance in this area by amending Comment [3] to Rule 8.3 as follows:

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. [For example, when a lawyer knows that another lawyer has violated the Rules through conversion or theft of a client’s or third party’s funds, such a violation raises a substantial question as to the accused lawyer’s honesty, trustworthiness or fitness as a lawyer. For other examples of violations that would presumptively mandate reporting, see Rule 8.4, Comment \[2\].](#) A report should be made to a tribunal or other authority empowered to investigate or act upon the violation.

COSAC Discussion of Rule 8.3, Comment [3]

Rule 8.3(a) mandates reporting when a lawyer’s known violation of the Rules “raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer.” That standard is extremely

ambiguous. None of the terms triggering a reporting obligation are defined in Rule 1.0 (“Terminology”) or elsewhere in the Rules. Comment [3] to Rule 8.3 is relevant but not particularly helpful to the practitioner – it merely states that a “measure of judgment” is required, and that the word “substantial” refers to the “seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” By contrast, ABA Model Rule 1.0(*l*) defines the term “substantial” as follows: “‘Substantial’ when used in reference to degree or extent denotes a material matter of clear and weighty importance.” (New York has not adopted this definition and the New York Rules do not define the term “substantial.”)

Comment [2] to Rule 8.4 (not Rule 8.3) says more about the types of conduct that meet the mandatory reporting test. It says:

[2] ... Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Simon and Hyland comment that it is easy to come up with examples of violations that implicate a lawyer’s “honesty” (*e.g.*, fraud, deception, misrepresentation, backdating documents, creating false evidence, and stealing funds from trust accounts), but it is difficult to come up with examples of conduct that implicates “fitness as a lawyer.” *Simon’s New York Rules of Professional Conduct Annotated* 1681 (2019 ed.).

In Massachusetts, the Office of Bar Counsel (the Massachusetts disciplinary authority) has published an official Policy Statement that provides some additional guidance on conduct lawyers are required (or not required) to report. Of particular import here, the Policy Statement says:

There are some such matters that clearly fall within the scope of “substantial” misconduct: theft, conversion, or negligent misuse of client funds resulting in deprivation to the client; a felony conviction, or perjury or a misrepresentation to a tribunal or court. As to an impaired or disabled lawyer, certainly when a mental or physical problem results in the abandonment of clients or law practices, the lawyer with knowledge of these types of problems is required to report the situation to Bar Counsel.

There are other matters that must be reported, such as when, as noted in Comment [1] to Rule 8.3, in a lawyer’s judgment, there is likelihood of harm to a victim who is unlikely to discover the offense. For example, an attorney with knowledge of a lawyer’s misrepresentation to a client and concomitant failure, or impending failure, to file a claim within the statute of limitations, which does not fall within the confidentiality exception, is required to report that lawyer if the client is unaware of

the problem and would likely suffer substantial damage as a result of the lawyer's misconduct.

There also are some violations that clearly do not fall within the scope of Mass. R. Prof. C., 8.3. For example, the failure of a lawyer to return a file as promptly as might have been optimal would not require a report, nor would knowledge that a lawyer failed to act with reasonable diligence, if the matter caused little or no potential injury to the client or others. [Emphasis added.]

Reporting Professional Misconduct: An Analysis of the Duties of a Lawyer Pursuant to Mass. R. Prof. C. 8.3 (1998) (citations omitted). See also S. Best, *The Snitch Rule and Beyond, Mandatory and Permissive Reports of Lawyer Misconduct under Mass. Rule 8.3* (2016).

The Massachusetts Bar Counsel's Policy Statement thus "clearly" mandates reporting of misconduct involving client financial matters.

Courts in New York have also consistently emphasized the serious nature of escrow account violations and other financial malfeasance by lawyers. Each Appellate Department has in recent years disbarred lawyers who misused or misappropriated escrow funds or otherwise breached fiduciary duties regarding money. See, e.g., *In re Bloomberg*, 154 A.D.3d 75 (1st Dep't 2017) (disbarment for lawyer who intentionally converted \$200,000 of client funds); *Matter of McMillan*, 164 A.D.3d 50 (2d Dep't 2018) (disbarment for lawyer who deprived sister of inheritance while acting as administrator of deceased mother's estate); *Matter of Castillo*, 157 A.D.3d 1158 (3d Dep't 2018) (disbarment for converting client funds to personal use); *In re Agola*, 128 A.D.3d 78, 6 N.Y.S.3d 890 (4th Dep't 2015) (disbarment for misappropriating client advances earmarked for expenses).

Likewise, all four Appellate Departments have suspended lawyers who engaged in financial misconduct. See, e.g., *Matter of Pierre*, 170 A.D.3d 36 (1st Dep't 2019) (five year suspension for commingling client and personal funds using escrow account to pay personal and business expenses); *Matter of Costello*, 174 A.D.3d 34 (2d Dep't 2019) (one year suspension for misappropriating client funds and failing to maintain required bookkeeping records for attorney escrow accounts); *Matter of Kayatt*, 159 A.D.3d 101 (3d Dep't 2018) (two year suspension for using escrow accounts as business and personal accounts to shield personal funds from tax authorities); *In re McClenathan*, 128 A.D.3d 193 (4th Dep't 2015) (one year suspension for misappropriating client funds and engaging in other escrow account violations).

Ethics opinions also emphasize the importance of abiding by the rules relating to honesty and escrow accounts. See N.Y. State Ethics Op. 1165 (2019) (under Rule 1.15, a lawyer "must not remove from the trust account those sums that the client questions until the dispute is resolved"); N.Y. City 2017-2 (a lawyer who learns that another lawyer has fraudulently billed a client must report the other lawyer pursuant to Rule 8.3 unless the report would reveal client confidences without client's consent); N.Y. State Ethics Op. 965 (2014) (under Rules 1.15 and 8.4, "[c]lient funds in a lawyer's

escrow account may not be shielded from lawyer’s creditor by transferring them to an escrow account held by the lawyer’s lawyer”).

COSAC believes it would make sense for the Comments to Rule 8.4 to include a statement recognizing the consistent treatment by courts of lawyers who convert or steal client funds, or otherwise breach their duty to maintain “a high degree of vigilance” to ensure that funds entrusted to lawyers in a fiduciary capacity are returned upon request. *See Matter of Galasso*, 19 N.Y.3d 688 (2012) (affirming finding of Rule 1.15 violation by a lawyer who had failed to supervise his law firm’s bookkeeper, resulting in loss of client funds). The proposed amendment to Comment [3] to Rule 8.3 therefore makes clear that offenses such as conversion or theft of client funds must be reported. The proposed amendment also cross-references Comment [2] to Rule 8.4, which provides additional and helpful guidance as to what kinds of misconduct reflect adversely on fitness to practice law.

Public comments regarding Rule 8.3, and COSAC’s response

United States Attorneys in New York

The United States Attorneys based in New York, as well as other New York components of the United States Department of Justice (the “Department”), said the Department “believes the proposed amendments to Rule 8.3(c)(1) provide useful clarification for purposes of reporting misconduct.”

Regarding proposed amendments to Comment [2], however, the Department raised an important issue:

The Department occasionally confronts non-disclosure agreements (“NDAs”) during its investigations, although NDAs covering lawyer misconduct are likely rare. We believe that, in general, the public policy in favor of reporting wrongdoing will override an NDA. But we also believe the circumstances in which public policy will override an NDA raise a question of law. And ethicists do not give advice on questions of law. Yet proposed Comment [2], which is only a Comment, and not even a proposed Rule to be officially enacted, sets forth a rather strong statement of law, requiring a lawyer to disregard contractual NDAs. To be consistent with its role as giving ethical advice, as opposed to making a statement of law, perhaps the proposed amendment to Comment [2] could be rephrased as follows:

If a lawyer knows reportable information about misconduct that is not protected by Rule 1.6 or other confidentiality Rules but is subject to a contractual restriction (or proposed contractual restriction) on disclosing the information, such as in a settlement agreement or nondisclosure agreement, the lawyer should still evaluate whether the public policy in favor of disclosing wrongdoing would render the contractual restriction (or proposed contractual restriction) void and accordingly ineffective to relieve the lawyer from the obligation to report under Rule 8.3(a).

COSAC disagrees. The proposed additions to Comment [2] to Rule 8.3 address a question of ethics, not a question of law. It is well established that lawyers cannot contract out of the Rules of Professional Conduct unless a particular rule provides for waiver. Otherwise, lawyers might seek to draft partnership agreements, retainer agreements, and other contracts that would prohibit counterparties from reporting information to an attorney grievance committee even when Rule 8.3 mandates such a report. Rule 8.3 contains no provision for waiver. Once the elements of Rule 8.3(a) are met, the only exception to mandatory reporting arises when the information to be reported is protected by Rule 1.6 or other confidentiality rules per Rule 8.3(c) – but COSAC’s proposal applies only when a lawyer knows reportable information about misconduct that is “not protected by Rule 1.6 or other confidentiality rules.”

The case-by-case analysis suggested by the U.S. Attorneys could allow lawyers in effect to barter with the professional responsibilities and obligations imposed by Rule 8.3. A settlement provision precluding reporting under Rule 8.3 would be counter to the goals and mission of the bar, especially the goals of protecting the public and protecting the integrity and reputation of the legal profession. Lawyers have a duty to report when the elements of Rule 8.3 are met, and it is the role of an attorney grievance committee to determine whether a violation has occurred and, if so, what penalty should be imposed on the offending attorney in light of all of the facts and circumstances.

If lawyers are currently unsure whether Rule 8.3 or an NDA would take precedence, or if some lawyers think that the issue must be decided on a case-by-case basis, amended Comment [2] will make clear that Rule 8.3 mandates a report despite a non-disclosure agreement. Moreover, if lawyers know they cannot evade mandatory reporting by inserting an NDA into a settlement agreement arising out of sexual harassment or other offenses, COSAC believes that lawyers may be less likely to engage in the prohibited conduct in the first place.

New York State Bar Association Dispute Resolution Section

The NYSBA Dispute Resolution Section submitted the following comment:

The Section believes that the proposed changes to Rule 8.3 and its accompanying commentary are generally desirable With respect to the proposed amendment to Comment [2] to Rule 8.3, on its face, the amendment addresses confidentiality and non-disclosure agreements. Notably, it does not address the issues of mediation confidentiality and a mediator’s confidentiality obligations. Although we do not understand the amendment to be so broadly drafted as to encompass mediation confidentiality, we are concerned that it could be misunderstood to have such an effect. We propose, therefore, that the amendment include the following express limitation: [“This rule does not affect the obligation of a mediator to maintain the confidentiality of mediation proceedings.”](#)

The Section has no other recommendations regarding the balance of the text in, or the other changes proposed by COSAC to, Rule 8.3 and its accompanying commentary.

COSAC agrees with the Dispute Resolution Section’s comment to the extent that a mediator has a legal obligation not to disclose what occurs in mediation proceedings, but takes no position on that legal question. COSAC has added language at the end of Comment [2] recognizing that Rule 8.3(a) does not necessarily override the obligation of a person bound by a legal duty to maintain

confidentiality. Such a clash would present a question of law beyond the purview of a Comment to resolve.

New York State Bar Association Committee on Attorney Professionalism

Regarding COSAC's proposed amendments to Comment [2] to Rule 8.3, two individual members of the NYSBA Committee on Attorney Professionalism ("CAP") raised questions about the standard "come to know"? Is it good faith? Is an investigation or other due diligence required?

COSAC has changed the phrase "come to know" to the single word "know," which is defined in Rule 1.0(k). A lawyer who "knows" a fact must at some point have "come to know" the fact in the past, so reducing the phrase to the word "know" does not sacrifice any meaning. As for whether an investigation or other due diligence is required, that is an issue more closely related to a lawyer's or law firm's supervisory duties under Rule 5.1 and need not be addressed in the Comments to Rule 8.3.

CAP also noted that reporting a lawyer to an attorney grievance committee is likely to have strong negative ramifications regarding the reported lawyer's reputation and perceived character, and might even trigger libel or slander liability for attorneys and firms filing a report under Rule 8.3. The Committee also questioned whether COSAC's proposal could have unintended consequences if an accused would only agree to a monetary settlement where there is confidentiality. Would the ability of a complaining witness to procure a reasonable settlement would be adversely affected?

COSAC acknowledges all of these concerns but does not believe that mandatory reporting is a policy choice requiring or allowing a balancing of interests. COSAC's proposal is simply intended to point out that a non-disclosure agreement cannot negate a mandatory reporting duty under Rule 8.3.

New York State Bar Association Real Property Law Section

The NYSBA Real Property Law Section believes that the proposed amendments to Comments [2] and [3] to Rule 8.3 are acceptable.

New York City Bar

One committee of the New York City Bar submitted the following comment on COSAC's proposed amendment to Comment [3] to Rule 8.3:

[T]he New York City Bar proposes that the text of the amendment be altered slightly to make clear that the conduct described in Comment [2] to Rule 8.4 (which is referenced in the proposed revision to Comment [3] to Rule 8.3) must be evaluated on a case-by-case basis in order to determine whether the conduct raises a "substantial question" about a lawyer's honesty, trustworthiness, or fitness as a lawyer. Existing Comment [2] to Rule 8.4 states that "illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law." However, it does not follow that the conduct described in Comment [2] to Rule 8.4 always raises a substantial question about a lawyer's honesty, trustworthiness or fitness as a lawyer. For instance, an act of violence such as misdemeanor assault may

constitute conduct that reflects adversely on a lawyer's fitness to practice law. However, if the act of violence was an aberration in the lawyer's life and did not involve aggravating factors (e.g. non-domestic violence, extenuating circumstances, etc.) it may not be the case that the incident raises a "substantial question" about the lawyer's fitness as a lawyer. As a result, the Committee believes that the proposed addition to Comment [3] to Rule 8.3 should be modified to make clear that whether actions mandate reporting under Rule 8.3 must be evaluated on a case-by-case basis.

COSAC understands these concerns, and has added the word "presumptively" before the citation to Rule 8.4, Comment [2]. COSAC thinks this is an accurate reflection of New York case law and gives better guidance to attorneys about the kinds of offenses that trigger mandatory reporting while leaving room for a case-by-case analysis of the particular offense. As for mitigating circumstances, however, those are for the attorney grievance committee to take into account in determining discipline and are not generally relevant to determining whether a lawyer has a reporting duty under Rule 8.3.

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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