

**DISTRICT OF COLUMBIA BAR**  
**RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE**

**DRAFT REPORT**  
**PROPOSED CHANGES TO**  
**D.C. RULE 1.8(d) (HUMANITARIAN EXCEPTION)**

The views expressed herein are those of the Committee  
and not those of the D.C. Bar or its Board of Governors.

**(OCTOBER 2023)**

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## INTRODUCTION

The D.C. Bar Rules of Professional Conduct Review Committee (“Rules Review Committee”) proposes amendments to broaden D.C. Rule 1.8(d)(2), one of two exceptions to D.C. Rule 1.8(d), commonly understood to be a “humanitarian exception,” or one which permits financial assistance to clients beyond the costs or expenses of litigation under certain circumstances.

Rule 1.8(d) prohibits, *inter alia*, “advanc[ing] or guarantee[ing] financial assistance to the client.” Two exceptions to that rule currently permit financial assistance to clients under certain circumstances.

The Committee thinks that amendments to Rule 1.8(d) would be helpful to clarify and elaborate on financial assistance that may be provided to indigent clients receiving *pro bono* legal services in the District and ethical limitations on such assistance. The Committee proposes the following amendments to the Rule and Comments (shown in red-line below).

## BACKGROUND

The Rules Review Committee’s work was prompted by relatively recent amendments to ABA Model Rule 1.8 as well as adoption of New York’s “humanitarian exception.” In addition to review and discussion of these amendments, Committee members also considered their own experiences and observations on common practices in the District of Columbia related to the existing Rule 1.8(d)(1) and (2) exceptions.

To contextualize the Committee’s recommendations, this Background section proceeds in three steps. First, it sets out the current D.C. Rule 1.8(d) and relevant Comment. Second, it summarizes the Rule’s legislative history. Third, it summarizes the recent adoption of a “humanitarian exception” to the ABA Model Rules and two other jurisdictions’ analogs to D.C. Rule 1.8(d), namely, New York and Louisiana.

### I. CURRENT RULE AND COMMENT

In its current form, D.C. Rule 1.8(d) provides:

- (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.

The second exception to Rule 1.8(d) is commonly called a “humanitarian exception” to that rule, as it permits assistance beyond the expenses of litigation or administrative proceedings.

Current comments to Rule 1.8 state:

#### 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.

## **II. HISTORY OF D.C. RULE 1.8(d)**

In 1972, the D.C. Court of Appeals adopted the D.C. Code of Professional Responsibility modeled after the ABA Model Code of Professional Responsibility. D.C. Code DR 5-103 (B) (Avoiding Acquisition of Interest in Litigation) was the predecessor to D.C. Rule 1.8(d). As adopted, D.C. Code DR 5-103(B) was identical to the ABA Model Code DR 5-103 (B) and specified that:

[w]hile representing a client in connection with contemplated or pending

litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

On April 18, 1980, the Court amended D.C. Code DR 5-103(B) to remove the language that required the client to remain ultimately liable for the expenses guaranteed or advanced by the lawyer. This was a departure from the ABA Model Code (later amended by the 1983 ABA Model Rules), which retained the language regarding client responsibility.

In 1986, the Bar’s Jordan Committee<sup>1</sup> recommended that D.C. Rule 1.8(d) incorporate the language of D.C. Code DR 5-103(B) with language that would also permit lawyers to provide “other financial assistance which is reasonably necessary to permit the client to initiate or maintain the litigation or administrative proceeding.” As indicated in Comment 9 (*see supra*), the addition of this language made the rule broader than the newly adopted ABA Model Rule.<sup>2</sup> D.C. Rule 1.8(d) and its corresponding comment have remained the same in substance since 1991.

### III. OTHER ANALOGS TO D.C. RULE 1.8(d)

#### A. ABA Model Rule 1.8(e)

Historically, the prohibition on a lawyer’s ability to advance or guarantee financial assistance to a client was derived from the common law prohibitions of champerty and maintenance.<sup>3</sup>

[Such prohibitions] existed in large part to prevent lawyers (and others) from ‘stirring up baseless litigation’ . . . [and] . . . also sought to prevent an

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<sup>1</sup> *Proposed Rules of Professional Conduct and Related Comments*, District of Columbia Model Rules of Professional Conduct Committee, November 19, 1986. The so-called “Jordan Committee” was a special committee, appointed by the Bar and chaired by Robert Jordan, to recommend to the D.C. Bar Board of Governors whether the District should adopt rules similar to the newly adopted ABA Model Rules of Professional Conduct. The Board of Governors adopted the Jordan Committee Report and recommendations in 1986 and transmitted the report to the Court of Appeals. After a lengthy process of public comment and additional recommendations by Robert Jordan in 1989, the Court promulgated the D.C. Rules effective March 1, 1991.

<sup>2</sup> In 1983, the ABA adopted Model Rule 1.8(e) which stated that, “a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.”

<sup>3</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [16] (2019) (paragraph (e) “has its basis in common law champerty and maintenance”).

adverse impact on the professional judgment of the lawyer, who might become overly concerned about protecting his or her personal investments to the client's detriment.<sup>4</sup>

ABA Model Code of Professional Responsibility DR 5-103(B) (Avoiding Acquisition of Interest in Litigation) was the predecessor to ABA Model Rule 1.8(e). It provided that:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

In 1983, the ABA adopted Model Rule 1.8(e), which provided that:

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

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Thus, unlike the Model Code provision, Model Rule 1.8(e) permitted lawyers to advance litigation costs and expenses, the repayment of which “may be contingent on the outcome,” and also allowed lawyers to advance these expenses for indigent clients without expectations of reimbursement. However, the rule did not permit lawyers to lend or donate money to clients for other expenses, such as living expenses. *See id.*

In 2001, on the recommendation of the ABA Ethics 2000 Commission, Comment [10] was added to the Model Rule for clarification and stated:

[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

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<sup>4</sup> Hope C. Todd, Speaking of Ethics, *Washington Lawyer*, November 2010 *citing* The Law of Lawyering § 12.11 at 12-30 (3d ed. Supp. 2004).

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.

In 2019, the ABA Standing Committee on Ethics and Professional Responsibility (SCEPR) and the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) proposed adding a narrow exception to Model Rule 1.8(e) that was intended to increase access to justice:

The amendment SCEPR and SCLAID propose is client-centric, focused on the most vulnerable populations, and protects the ability of indigent persons to gain access to justice where they might otherwise be foreclosed as a practical matter because of their poverty.

The then-proposed humanitarian exception would permit a limited form of financial assistance for living expenses but only:

1. to indigent clients;
2. in the form of modest gifts not loans;
3. when the lawyer/legal organization is working *pro bono* without fee from the client; and
4. where there is a need for help to pay for life's necessities.

In essence, the exception would permit *pro bono* lawyers to help their indigent clients meet basic human necessities such as food, rent, transportation, and medicine during the course of the representation without threat of running afoul of the ethics rules.

In its August 2020 Report to the ABA House of Delegates, the SCEPR and SCLAID examined the two reasons found in Comment [10] for the prohibition on providing living expenses, namely, that 1) it prevents lawyers from having “too great a financial stake in the litigation;” and 2) such assistance would “encourage clients to pursue lawsuits that would not otherwise be brought.”

As to the first reason, the proponents reasoned that “because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer’s advice. Further, the amounts will often be small compared to the sums lawyers may now advance for litigation costs, which are repayable from a client’s recovery and therefore

could affect the lawyer’s judgment.”<sup>5</sup> As to the second reason—that financial assistance will “encourage . . . lawsuits that might not otherwise be brought”—the reports notes in the limited circumstances the amendment describes, that outcome, if it occurs, furthers ABA policy. By enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule’s restrictions, the amendment ensures equal justice under law, a core ABA mission.”<sup>6</sup>

In drafting the proposed rule, the proponents also considered the eleven jurisdictions, including the District of Columbia, which already permitted some form of living expenses or humanitarian exception in their ethics rules, seven of which limited such assistance to “modest amounts.”<sup>7</sup> The

proponents also provided safeguards in Comment [12] to guard against conflicts and abuse by prohibiting lawyers from (i) using assistance to lure clients, (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client, and (iii) advertising the availability of assistance.

The report essentially argues that because of the narrowness the exception and its limitations, the

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<sup>5</sup> ABA Standing Committee on Ethics and Professional Responsibility Standing Committee on Legal Aid and Indigent Defense, Report to the House of Delegates at 2.

<sup>6</sup> See ABA MISSION STATEMENT, [https://www.americanbar.org/about\\_the\\_aba/aba-mission-goals/](https://www.americanbar.org/about_the_aba/aba-mission-goals/) (last visited May 4, 2020). Many ABA policies support equal justice. See, e.g., ABA CONSTITUTION Art. 10, sec. 10.1 (creation of the Civil Rights and Social Justice Section and Criminal Justice Section); ABA CONSTITUTION Art. 15 (creation of the ABA Fund for Justice and Education); ABA BY-LAWS sec. 31.7 (creation of SCLAID).

<sup>7</sup> See D.C. Rule of Prof’l Conduct 1.8(d) (a lawyer may “pay or otherwise provide . . . financial assistance which is *reasonably necessary* to permit the client to institute or maintain the litigation or administrative proceedings”) (emphasis added); Minn. Rule of Prof’l Conduct 1.8(e)(3) (a lawyer may guarantee a loan “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship”; prohibits promises of assistance prior to retention and requires that client remain liable for repayment without regard to the outcome of the litigation) (emphasis added); Miss. Rule of Prof’l Conduct 1.8(e)(2) (permits a lawyer to advance (i) “*reasonable* and necessary” (a) “medical expenses associated with treatment for the injury giving rise to the litigation” and (b) “living expenses incurred”; client must be in “dire and necessitous circumstances”; other limitations and conditions apply) (emphasis added). Mont. Rule 1.8(e)(3) (a lawyer may guarantee a loan from certain financial institutions “for the sole purpose of providing basic living expenses;” the loan must be “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship;” client must remain liable for repayment without regard to the outcome; prohibits promises or advertisements before retention) (emphasis added); N.D. Rule of Prof’l Conduct 1.8(e)(3) (a lawyer may guarantee a loan “*reasonably needed* to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship;” client must remain liable for repayment without regard to the outcome; no promise of assistance before retention) (emphasis added); Tex. Rule of Prof’l Conduct 1.08(d)(1) (a lawyer may “advance or guarantee . . . *reasonably necessary* medical and living expenses, the repayment of which may be contingent on the outcome of the matter”) (emphasis added); Utah Rule of Prof’l Conduct 1.8(e)(2) (a lawyer representing an indigent client may “pay . . . minor expenses *reasonably connected* to the litigation”) (emphasis added).

exception does not:

1. encourage frivolous litigation, but may provide meaningful access to courts for indigent clients;
2. interfere with a lawyer's independent professional judgement; nor
3. encourage competition for clients.

In August 2020, the ABA adopted the following humanitarian exception to Model Rule 1.8(e) on the recommendation of the SCEPR and SCLAID:

- (1) a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
- (2) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; ~~and~~
- (3) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
- (4) a lawyer representing an indigent client *pro bono*, a lawyer representing an indigent client *pro bono* through a nonprofit legal services or public interest organization and a lawyer representing an indigent client *pro bono* through a law school clinical or *pro bono* program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:
  - (i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;
  - (ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and
  - (iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

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

The ABA also added the following comments:

### **Financial Assistance**

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[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client *pro bono* through a nonprofit legal services or public interest organization and a lawyer representing an indigent client *pro bono* through a law school clinical or *pro bono* program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine, and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

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

### **B. New York**

In March 2018, the New York City Bar Professional Responsibility Committee issued a report recommending a “humanitarian exception” to New York Rule 1.8(e). Specifically, that committee recommended amendments to allow attorneys handling *pro bono* matters to provide financial assistance to indigent clients beyond advances of court costs and the expenses of litigation.

In January 2020, the New York State Bar Association Committee on Standards of Attorney Conduct (“COSAC”) recommended that New York adopt a humanitarian exception and various new and amended Comments to Rule 1.8. In April 2020, during the height of the Covid-19 pandemic, the New York State Bar Association asked the Administrative Board to approve the proposed humanitarian exception.

Effective June 24, 2020, Rule 1.8(e) was amended to add a new Rule 1.8(e)(4), which allows non-profit legal services organizations, public interest organizations, law school clinics, law school *pro bono* programs, and lawyers representing indigents *pro bono* to provide financial assistance to indigent litigation clients, subject to certain restrictions. These restrictions prohibit promising or assuring assistance prior to retention, do not allow funds raised for purposes of providing legal services to be used for humanitarian purposes, and prohibit loans or other forms of support that could cause the client to be financially beholden to the provider of the assistance.<sup>8</sup>

COSAC’s proposed Comments to Rule 1.8, published in March 2021, clarify that the restrictions in subparagraph (e)(4) on using funds raised to provide legal services does not apply to financial assistance for court costs and expenses of litigation referred to elsewhere in Rule 1.8. The Comments also make clear that any financial assistance provided is voluntary and not part of a lawyer’s duty when representing an indigent client.

### C. Louisiana’s Rule

By way of comparison, the Committee also considered Louisiana’s humanitarian exception in its Rule 1.8. In 2006, the Louisiana Supreme Court amended Louisiana’s Rule 1.8(e) to allow for some limited exceptions to the rule’s prohibition on lawyers providing financial assistance to clients unrelated to court costs and litigation expenses.<sup>9</sup> The rule permits an attorney to provide financial assistance to a client “who is in necessitous circumstances,” subject to the following restrictions: (1) the lawyer must, through reasonable inquiry, determine that without “minimal” financial assistance, the client’s ability to initiate or maintain the matter would be adversely affected; (2) the lawyer or their representative cannot use the advance or loan, or an offer of such, as an inducement to secure employment; and (3) the lawyer or their representative cannot make

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<sup>8</sup> The New York addition to Rule 1.8 (e)(4) reads as follows:

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. Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered usable for providing financial assistance to indigent clients, and financial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.

<sup>9</sup> Prior to the rule’s formal revision in 2006, the Louisiana Supreme Court recognized that “the jurisprudence of this court, as exemplified by *Louisiana State Bar Ass’n v. Edwins*, 329 So.2d 437 (La.1976), has permitted attorneys to advance funds to their clients for minimal, necessary living expenses.” *In re Maxwell*, 783 So. 2d 1244, 1249 (2001).

offers of financial advances or loan guarantees prior to the client hiring the lawyer or advertise “a willingness to make advances or loan guarantees to clients.” The rule is not limited to attorneys providing *pro bono* legal services or attorneys working at legal services or non-profit organizations.

The rule clarifies that the financial assistance provided by the lawyer cannot exceed the “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.”

Louisiana’s rule subjects any financial assistance provided by a lawyer to a client “whether for court costs, expenses of litigation, or for necessitous circumstances,” to a number of restrictions. For example, the lawyer cannot charge the client interest or fees when the financial assistance is provided directly from the lawyer’s own funds and the lawyer is only permitted use credit or loans to provide financial assistance under certain circumstances.<sup>10</sup> The lawyer is also required to obtain the client’s written consent to the terms and conditions of the financial assistance agreement. Further, “in every instance where the client has been provided financial assistance by the lawyer,” the lawyer is required to provide the full text of Rule 1.8(e) 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.”

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<sup>10</sup> See LA ST BAR ART 16 RPC Rule 1.8(e)(5)(ii-iv):

(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.

#### IV. ANALYSIS

The Committee examined current D.C. Rule 1.8(d) in light of the ABA Model Rule and the foregoing analogs from other jurisdictions. In doing so, the Committee considered common practices under the humanitarian exceptions to Rule 1.8(d) among D.C. practitioners; whether the current rule adequately addressed those common practices; and whether D.C. Rule 1.8(d) could be improved with amendments similar to those recently adopted by the ABA and other jurisdictions.

The Committee agreed that D.C. Rule 1.8(d) could be amended to clarify and expand the financial assistance that public defender offices, legal services organizations, law school clinics, and *pro bono* attorneys could provide to their indigent clients. The Committee considered several options, including among other things (i) revising RPC 1.8 to include various limitations similar to those in Louisiana's rule and (ii) expounding upon subsection (d) to elaborate on the *pro bono* lawyer's responsibilities under the financial assistance provisions.

The Committee proposes to add a new paragraph (3) to D.C. Rule 1.8(d) modeled primarily on New York's rule. The New York rule more generally, and more generously, allows "financial assistance," whereas the ABA Model Rule allows only "modest gifts" for "food, rent, transportation, medicine and other basic living expenses." The Committee found the use of the modifier "modest" to be vague, subjective, and potentially problematic. For example, a question arises whether the gift must be "modest" in the view of the attorney or in the view of the client. The Louisiana rule was rejected because, while it was helpful for the Committee to consider, it was thought to be too complicated and thus too likely to create confusion.

The Committee also rejected the ABA rule's limitation that the attorney could not accept reimbursement from the client, a relative of the client or anyone affiliated with the client. The Committee agrees with New York's approach and proposes restricting an attorney from seeking reimbursement, but does not prohibit an attorney from accepting reimbursement offered *sua sponte* by the client or someone on behalf of the client.

Having chosen the New York rule to start, the Committee made a few adjustments based on the needs of the D.C. legal community. The Committee added government-funded legal services organizations to the list in the New York rule of legal entities that provide services to indigent clients to make clear that agencies such as public defender offices are covered by the proposed new paragraph.

The Committee recommends the language and formatting of the ABA rule to state the limitations on the financial assistance legal services entities and *pro bono* programs can provide to indigent clients; the New York rule, in comparison, states its limitations more briefly and in one long sentence. The formatting is intended, among other things, to make clear that sub-subparagraphs (A) through (C) only apply to subparagraph (d)(3). This formatting was chosen in favor of clarity.

## V. PROPOSED AMENDMENTS

Ultimately, the Committee proposes the following amendment to D.C. Rule 1.8(d) (shown in blackline format):

- (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; and
  - (3) Financial assistance to indigent clients when the lawyer is affiliated with a not-for-profit or government-funded legal services organization, a public interest organization, or a law school clinic, or is providing legal services *pro bono* and prior to providing the assistance has agreed in writing to the client not to collect fees under any applicable fee-shifting statute, but the lawyer may not:
    - (A) promise, assure, or imply the availability of such financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention;
    - (B) seek reimbursement from the client, a relative of the client, or anyone affiliated with the client; or
    - (C) publicize or advertise a willingness to provide such financial assistance to prospective clients.

The Committee also developed a comment that will provide guidance on the additional provisions and the meaning of “providing legal services *pro bono*” as follows:

### **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.

**Rule 1.8(d)(3) permits a lawyer to give financial assistance to an indigent client beyond that which is permissible under Rule 1.8 (d)(1) or (2). Rule 1.8(d)(3) allows financial assistance in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. For the purposes of Rule 1.8(d)(3), providing “legal services *pro bono*” may include providing services eligible for fees under a fee-shifting statute, but, as stated in (d)(3), prior to giving the financial assistance, such a lawyer must agree in writing to the client not to collect the fees allowed by the statute. Providing “legal services *pro bono*” does not include providing legal services where the lawyer may eventually recover a fee, such as cases accepted on a contingent fee basis or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee. Neither the prohibition on recovering fees nor the requirement that the lawyer agree in writing not to collect fees allowed by a statute applies to lawyers affiliated with a not-for-profit or government-funded legal services organization, a public interest organization, or a law school clinic. The requirement on *pro bono* lawyers to waive collecting fees under fee shifting statutes does not prohibit lawyers from collecting fees as sanctions pursuant to applicable court rules. Subparagraphs (A) – (C) apply to the lawyer providing legal services *pro bono* and to the lawyer affiliated with a not-for-profit or government-funded legal services organization, a public interest organization, or a law school clinic.**

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.

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