

Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients

By CRISTINA D. LOCKWOOD*

Introduction

A LAWYER IS RESPONSIBLE FOR PURSUING a client's objectives while protecting the client's interests. This duty is fulfilled when the lawyer, in conjunction with the client, determines the scope of the representation and then zealously works on the client's behalf. The lawyer must require all parties involved to adhere stringently to the rule of law and any procedural safeguards meant to ensure a fair process. The lawyer's hard work, however, will not protect the client's interests if the client does not have the economic means necessary to purchase basic necessities while awaiting the conclusion of the legal proceedings. Impecunious clients may be forced to accept discounted settlements—abandoning their right to proceed in court on meritorious claims—simply to be able to eat.

The American Bar Association (“ABA”) has recognized in the *Model Rules of Professional Conduct* (“MRPC”) the importance of maintaining client dignity through client participation during the legal process. The MRPC require client participation in formulating the means and the objectives of the representation and client-informed consent in many areas of the representation.¹ Yet, MRPC 1.8(e) prohibits lawyers from giving or lending clients money for basic life neces-

* Associate Professor of Law, University of Detroit Mercy School of Law. I wish to thank Professor Larry Dubin for his helpful comments; Amanda Gougeon, my research assistant, for her hard work; and Jennifer Holzworth for assisting me with the citations.

1. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2013) (requiring “each affected client give[] informed consent, confirmed in writing” before an attorney can represent the client if representation creates a conflict of interest); *id.* R. 1.2 (requiring that “a lawyer [] abide by a client's decisions concerning the objectives of representation and,

sities, thereby forcing some clients to suffer while seeking legal redress.² The justifications for this rule against humanitarian gifts and loans do not withstand scrutiny and perpetuate the idea that the ABA favors corporate lawyers with wealthier clients.

Wealthy clients, such as corporate representatives, generally do not worry about whether they will have money for shelter or enough food while awaiting the outcome of litigation. The same is not true for some injured plaintiffs, especially those who are no longer able to work because of their injuries. These individuals may not be able to sustain a decent standard of living during protracted litigation.³ Certainly, attorneys can help clients obtain any available state, federal, or other agency aid. Often, however, clients have limited options.⁴

The case of *Cleveland Bar Association v. Mineff*⁵ presents an example. George Mineff agreed to represent Mario Cianci who was injured in an industrial accident.⁶ Approximately seven weeks after the start of representation, Mr. Cianci asked Mr. Mineff for money for living expenses.⁷ Mr. Cianci had already been evicted once. He told Mr. Mineff that he had only enough money to eat one meal a day and faced eviction again.⁸ Mr. Mineff recognized that Mr. Cianci was losing weight and that his clothes were ragged. He wrote Mr. Cianci a check for \$500 and wrote additional checks, over the next several months, totaling \$5300. There was no agreement or understanding between the

as required by Rule 1.4, [] consult with the client as to the means by which they are to be pursued”).

2. *Id.* R. 1.8(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 on behalf of the client.”).

3. COMM’N ON ETHICS 20/20, AM. BAR ASS’N, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 7 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf (“Injured plaintiffs are often disabled or at least unable to work at their previous job, and may lack access to conventional sources of capital, such as bank loans and credit cards.”).

4. Douglas S. Eakeley, *Role of the Legal Services Corporation in Preserving Our National Commitment to Equal Access to Justice*, 1997 ANN. SURV. AM. L. 741, 743 (1997) (“Even with increased funding from other sources, such as Interest on Lawyers’ Trust Accounts (‘IOLTA’), state and local government support, and voluntary and pro bono contributions, the national Legal Services Program delivery system today is capable of serving only a small fraction of those in need.”).

5. *Cleveland Bar Ass’n v. Mineff*, 652 N.E.2d 968 (Ohio 1995).

6. *Id.* at 969. Mr. Cianci was not receiving temporary benefits. *Id.*

7. *Id.*

8. *Id.*

two men regarding repayment of the money.⁹ At the end of November 1991, Mr. Cianci burst into Mr. Mineff's office yelling and using abusive language.¹⁰ The employment relationship was severed, but Mr. Mineff told Mr. Cianci that he did not need to repay the money.¹¹ Mr. Mineff had not previously lent or given money to a client.¹² The disciplinary panel determined Mr. Mineff's violation of the governing ethics rule required a public reprimand.¹³ Two members of the panel dissented and would have suspended Mr. Mineff from the practice of law for six months.¹⁴

In the majority of states, attorneys like Mr. Mineff, who give or lend money to a client in dire need, subject themselves to the possibility of discipline.¹⁵ When attorneys are not able to provide financial aid to their clients, clients can be forced to take desperate measures. Larry Long's story was chronicled in the *New York Times*.¹⁶ Mr. Long suffered a stroke while taking the pain medicine Vioxx.¹⁷ To stave off eviction from his home, Mr. Long borrowed \$9150 from Oasis Legal Finance.¹⁸ Oasis is one of many companies that lend money to plaintiffs at high interest rates contingent upon a successful outcome of the lawsuit.¹⁹ Within eighteen months of borrowing the money from Oasis he received his \$27,000 payment from the Vioxx settlement; he owed Oasis \$23,588—258% of what he borrowed.²⁰ Mr. Long's and Mr. Cianci's stories are not unique.²¹ Relaxing the bar that prohibits lawyers from giving or lending money to clients for basic life necessities

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 969–70.

13. *Id.* at 970.

14. *Id.* at 971.

15. See discussion *infra* Part II.C.

16. Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES, Jan. 16, 2011, at A1, available at <http://www.nytimes.com/2011/01/17/business/17lawsuit.html>.

17. *Id.*

18. *Id.*

19. *Id.* These companies lend money to plaintiffs at high interest rates. *Id.* The companies are allowed to charge such high interest rates because repayment is contingent upon a successful outcome for the plaintiff and thus considered an investment, not a loan. *Id.*

20. *Id.*

21. One need only look to the cases or ethics opinions concerning lawyers' humanitarian loans for other examples. See, e.g., *Hanish v. Ky. Bar Ass'n*, 875 S.W.2d 95 (Ky. 1994); *Medina Cnty. Bar Ass'n v. Kerek*, 809 N.E.2d 1 (Ohio 2004); *Cleveland Bar Ass'n v. Nusbaum*, 753 N.E.2d 183 (Ohio 2001); *State ex rel. Okla. Bar Ass'n v. Smolen*, 17 P.3d 456 (Okla. 2000).

would allow lawyers, who so choose, to be a fair funding source for clients in need.

Attorneys should be allowed to provide existing clients financial assistance for basic life necessities during litigation. When lawyers are permitted to finance living expenses for existing clients, these clients are less likely to suffer during the legal representation due to an inability to purchase basic necessities. These humanitarian gifts or loans would not only preserve client dignity during pursuit of legal redress but, consequently, would prevent clients from having to either pay an exorbitant interest rate for a third-party loan or accept a discounted settlement to have money to sustain themselves. Ensuring equal access to the judicial system while preserving a client's dignity and interests fulfills important aspects of a lawyer's duties and the legal profession's mission.

This Article supports the position to change MRPC 1.8(e) by first discussing lawyering as a profession and the resultant professional duty to ensure that the poor not only have equal access to the legal system but that their dignity is not compromised in the course of pursuing their legal rights. Part II discusses the history of MRPC 1.8(e) and the relevance of maintenance restrictions and the contingency fee. Part III sets forth the arguments against the current rule and discusses the impact of third-party litigation financing. Part IV examines the rules in those few states that have elected to modify MRPC 1.8(e) and concludes that the majority of these modifications are too restrictive. Instead, it is proposed that the ABA and the states amend MRPC 1.8(e) to permit attorneys to provide financial assistance to existing clients where the conduct satisfies MRPC 1.8(a) and 1.7²² and where the attorney did not solicit clients with a promise of financial assistance for living expenses.

22. MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (2013) ("A lawyer shall not enter into a business transaction with a client . . . unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."); *id.* R. 1.7 ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. . . . Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . and (4) each affected client gives informed consent, confirmed in writing.").

I. Law as a Profession

Lawyers are members of a profession. “Professional work . . . requires the practitioner to adhere to demanding standards of competence and public service.”²³ William M. Sullivan, in his work for the Carnegie Foundation, lists the following as fundamental characteristics of a profession:

[S]pecialized training in a field of codified knowledge usually acquired by formal education and apprenticeship, public recognition of certain autonomy on the part of the community of practitioners to regulate their own standards of practice, and a commitment to provide service to the public that goes beyond the economic welfare of the practitioner.²⁴

This commitment to provide service to the public can be seen as a partnership between the public and the occupation.²⁵

This partnership arises because professions generally provide “services that are widely demanded among virtually all groups within the community, thereby reflecting the belief that these services are crucial to the overall well-being of society.”²⁶ Further, these services, such as health care and legal representation, require specialized knowledge.²⁷ The necessity of the service to the public, along with the specialized nature of the skill needed to deliver the service, then demands that the professionals use their skills to advance the interest of those they serve and thus creates a partnership with the public.²⁸ The ABA recognized the partnership in the 1986 *Report from the Commission on Professionalism*.²⁹ The Commission adopted the definition of profession as “refer[ring] to a group . . . pursuing a learned art as a common

23. WILLIAM SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 38 (2d ed. 2005).

24. *Id.* at 36. Professor Richard K. Greenstein, writing in this area, states that there is a lack of consensus as to what defines a profession. Richard K. Greenstein, *Against Professionalism*, 22 *GEO. J. LEGAL ETHICS* 327, 330 (2009). He would define the necessary elements as: (1) [T]hat the occupation provides services requiring a high level of specialized skill, including intellectual skill; (2) that the occupation provides services that are widely demanded among virtually all groups within the community, thereby reflecting the belief that these services are crucial to the overall well-being of society; and (3) that the privilege of providing these services is regulated by the state (or a proxy for the state).

Id.

25. SULLIVAN, *supra* note 23, at 4.

26. Greenstein, *supra* note 24, at 330.

27. *Id.*

28. SULLIVAN, *supra* note 23, at 4–5.

29. There can be little doubt that the ABA and members of the bar believe that lawyers, as professionals, owe a duty to the public. See MODEL CODE OF PROF'L RESPONSIBILITY preface (1980) (statement of Chief Justice Harlan Fiske Stone) (“Before the Bar can function at all as a guardian of the public interests committed to its care, there must be ap-

calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. *Pursuit of the learned art in the spirit of public service is the primary purpose.*³⁰ Thus, a chief duty for a professional is to “work in such a way that the outcome of the work contributes to the public value for which the profession stands.”³¹

There is, however, a “widespread perception that professional integrity is breaking down or is seriously at risk of doing so.”³² Perhaps this breakdown is an inevitable result of increased commercialization in professional fields and the resulting economic pressure on professionals to maximize profits.³³ If the relationship between the profession and the public will not generate profits, it may be a secondary consideration.³⁴ Another factor may be the abuse of public trust, which has been “a discouragingly familiar aspect of professional history.”³⁵

A source of public dissatisfaction with the legal profession, in particular, is the belief that participation by lawyers in scandals, such as in Enron and WorldCom, demonstrates that lawyers are more concerned with profits than public welfare.³⁶ “[T]he public perception of lawyers remains overwhelmingly negative”³⁷ The litigation section of the ABA conducted a survey in which “69% of those polled agreed that

praisal and comprehension of the new conditions, and the chained relationship of the lawyer to his clients, to his professional brethren and to the public.”).

30. Ronald C. Minkoff, *Reviving a Tradition of Service: Redefining Lawyer Professionalism in the 21st Century*, 19 PROF. LAW., no. 4, 2009, at 1 (quoting AM. BAR ASS’N COMM’N ON PROFESSIONALISM, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986) [hereinafter IN THE SPIRIT OF PUBLIC SERVICE], available at http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf).

31. SULLIVAN, *supra* note 23, at 23.

32. *Id.* at 283. “As if in illustration, the story of the demise of the venerable and long-trusted auditing firm of Arthur Andersen stands as a sad emblem of professional failure and its consequences for the general welfare.” *Id.* at 45. This anxiety suggests that many people feel socially vulnerable and personally threatened by the loss of professional integrity. *See id.* It testifies to the importance of professional functions in modern society, even when professionals hold little power over others. *See id.*

33. *Id.* at 23–24 (“Emphasis upon the efficiency of markets, which in practice often means stimulating competition, threatens essential features of the professional-client relationship.”).

34. *Id.* at 44 (“By defining all public activities as self-interested, profit-oriented enterprises, this powerful trend works to strip away any moral understanding of the relationship between profession and society, or between professional and client, except that of commercial exchange.”).

35. *Id.* at 41.

36. *Id.* at 2.

37. Minkoff, *supra* note 30, at 22 (“[I]t has not been helped by recent headlines showing lawyers involved in large Ponzi schemes, frauds on large estates, and other defalcations.”).

lawyers are more interested in making money than in serving their clients.”³⁸ To assuage public dissatisfaction, the ethical codes and legal regulations that are part of a profession must reflect an institutional framework that supports the public good.³⁹ “Without [a] willingness to uphold the contract with society, professional work ceases to be good, for individual practitioners or for the public.”⁴⁰

Lawyers and specifically the ABA should promote the profession’s commitment to the public. Sullivan argues that “professionalism can be renewed as a positive force” when the professional leadership creates standards that strengthen the profession’s ties to the public.⁴¹

The legal community’s belief in its partnership with the public and its corresponding professional duties are reflected in the MRPC. Lawyers are expected to engage in pro bono representation.⁴² MRPC 6.1 states “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.”⁴³ Although no state mandates pro bono activity for its practicing attorneys,⁴⁴ the expectation that lawyers will serve those in need is a basic tenet of the legal profession. The idea is that lawyers should “investigate claims, and give professional aid in redressing the wrongs, of the indigent who have been injured, for in this way many poor people would be enabled to obtain justice where, without such an aid, they would be remediless.”⁴⁵

This sentiment is echoed in the preamble of the MRPC, which begins by recognizing that lawyers are members of a profession mandating a special responsibility to the public.⁴⁶ It states:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . . A lawyer

38. *Id.* at 3 (citing AM. BAR ASS’N SECTION OF LITIG., PUBLIC PERCEPTIONS OF LAWYERS CONSUMER RESEARCH FINDINGS 7 (2002)).

39. SULLIVAN, *supra* note 23, at 24.

40. *Id.* at 40.

41. *Id.* at 56; *see also* COMM’N ON ETHICS 20/20, *supra* note 3, at 7.

42. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2013).

43. *Id.*

44. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2013) (“Every applicant admitted to the New York State bar on or after January 1, 2015 . . . shall complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate Division department of the Supreme Court.”).

45. Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1121 (1994) (citing *Reece v. Kyle*, 31 N.E. 747, 750 (Ohio 1892)).

46. MODEL RULES OF PROF’L CONDUCT pmb. [1].

should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.⁴⁷

The preamble defines the duties public lawyers assume as members of the legal profession. These duties include working to improve access to the legal system;⁴⁸ using their time, resources, and “civic influence to ensure equal access to our system of justice for those who because of economic and social barriers cannot afford or secure adequate legal counsel;”⁴⁹ and ensuring that bar regulations are in the public interest.⁵⁰

These duties provide a mandate for amending MRPC 1.8(e), which currently limits the poor’s access to the judicial system by barring lawyers from using their resources to ensure equal access. Lawyers should be permitted to give or lend money to existing clients in need of basic necessities during legal representation in order to prevent the client from having to accept a discounted settlement or abandoning a meritorious claim. The outright bar in MRPC 1.8(e) arguably serves defense attorneys’ clients’ interests at the expense of the poor. Not only does the inability to obtain fair funding limit legal redress for the poor, but where a defendant only pays a discounted amount to compensate plaintiffs for the defendant’s wrongful conduct, the financial deterrent to prevent the defendant’s future injurious behavior against other members of the public is reduced. Members of the legal profession must scrutinize whether the self-regulation rules that they are entrusted to create serve the public interest. Where such rules limit the poor’s access to the judicial system and where such rules do—or even are perceived to—favor wealthy clients at the expense of the poor, then the legal profession has failed to perform its professional duties to the public.

Equal access to the legal system is an important goal of the legal profession and the ABA.⁵¹ Another equally important responsibility is

47. *Id.* pmb. [6].

48. *Id.* The ABA’s white paper on professionalism also emphasizes the need to “[f]ind ways to increase access to lawyers and the legal system.” Minkoff, *supra* note 30, at 26.

49. MODEL RULES OF PROF’L CONDUCT pmb. [6].

50. *Id.* Section 6 of the preamble mentions that bar regulations should benefit the public. *Id.* This idea is mentioned again in Section 12, which states, “[t]he legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.” *Id.* pmb. [12].

51. One objective of the ABA Center for Human Rights’s mission is to “assure meaningful access to justice for all persons.” *About Us*, AM. BAR ASS’N CTR. FOR HUMAN RIGHTS, http://www.americanbar.org/groups/human_rights/about_us.html (last visited May 22, 2014); *see also* MODEL RULES OF PROF’L CONDUCT pmb.; *id.* R. 6.1; Minkoff, *supra* note 30.

ensuring that clients are treated with dignity throughout the legal representation. Professor David Luban asserts that the protection of human dignity lies at the foundation of the lawyer's work.⁵² Certain rules in the MRPC reflect a concern for human dignity by ensuring that clients are entitled to decide important aspects of their representation, such as the objectives of the representation,⁵³ what plea to enter, and whether to settle or testify.⁵⁴ The burden falls upon lawyers as fiduciaries to ensure that the ethics rules and other governing rules are interpreted and followed as to promote their clients' interests.⁵⁵ Lawyers as fiduciaries must exercise the utmost loyalty to their clients' interests.⁵⁶

Additionally, Martha F. Davis, whose work explores the relationship between human rights and legal ethical rules, has stated "ethical codes could encourage lawyers to strive for results that accord with human rights principles . . ." ⁵⁷ She uses MRPC 1.8(e) as an example of a failure to consider human rights principles and argues:

Instead of focusing on potential conflicts of interest and the integrity of the judicial system, a human rights approach to the question of subsidy would acknowledge the inequality . . . that a *meritorious* lawsuit might be thwarted if the client cannot subsist during its pendency. . . . [A] client's lack of access to subsistence support (that is, access to economic rights) has a critical impact on his or her ability to vindicate other procedural or substantive legal rights. A human rights approach would reformulate this rule . . . [and] explicitly encourage lawyers to extend subsistence support to

52. DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 65–95 (2007).

53. MODEL RULES OF PROF'L CONDUCT R. 1.2 ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.").

54. *Id.* ("A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."). Ensuring client dignity in the judicial system is also embodied in the constitutional mandate of the Sixth Amendment, which provides that criminal defendants are entitled to the assistance of counsel. U.S. CONST. amend. VI.

55. Sande Buhai, *Lawyers as Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 584 (2009) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000)) ("A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary.").

56. Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1149 (1999).

57. Martha F. Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 COLUM. HUM. RTS. L. REV. 157, 158 (2010).

clients when such support would contribute to vindicating important human rights.⁵⁸

Whether viewed through a human rights lens, a professionalism lens, or as a matter of fiduciary duty, lawyers must advocate for preserving human dignity during the legal representation. Equal access to the legal system to vindicate legal rights and the ability to have one's basic needs met during the legal representation fundamentally impact dignity and should weigh heavily in a determination as to whether an outright ban on humanitarian gifts and loans is necessary and whether it furthers the legal profession's commitment to the public.

II. History Leading to Rule 1.8(e)

A. Champerty and Maintenance

Although MRPC 1.8(e) can impede access to the legal system for impecunious clients, the restrictions in Rule 1.8(e) were adopted to protect the poor by incorporating rules against champerty and maintenance. These rules developed to prevent the rich from manipulating the legal system through involvement in lawsuits in which they were not parties.⁵⁹ "Maintenance" was defined in a United States Supreme Court dissenting opinion as follows:

[O]fficious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it . . . This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression.⁶⁰

It defined "champerty" as "a species of maintenance, . . . being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon

58. *Id.* at 180–81.

59. COMM'N ON ETHICS 20/20, *supra* note 3, at 9 (quoting *Casserleigh v. Wood*, 59 P. 1024, 1026 (Colo. Ct. App. 1900)).

60. *Sprint Commc'ns Co. v. A.P.C.C. Serv., Inc.*, 554 U.S. 269, 306 n.3 (2008) (Roberts, C.J., Scalia, Thomas & Alito, JJ., dissenting) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *134–35 (1769)). Officiousness is defined as "[i]nterference in the affairs of others without justification under the circumstances." *Officiousness Definition*, BLACK'S LAW DICTIONARY 1195 (9th ed. 2009).

the champertor is to carry on the party's suit at his own expense."⁶¹ William Blackstone's *Commentaries* were cited for these definitions.⁶²

Blackstone further stated "[a] man may however maintain the suit of his near kinsman, servant or poor neighbor, out of charity and compassion, with impunity."⁶³ Thus, in earlier times, some U.S. courts recognized that lawsuits brought to redress "the wrongs of the indigent . . . [were a] duty of the profession" and were an exception to the maintenance restrictions.⁶⁴ Such an exception furthers the intent of the maintenance restrictions, which is to prevent oppression of those without power.⁶⁵ "The historical justifications for prohibiting any form of maintenance was because the wealthy and powerful would 'buy up claims, and, by means of their exalted and influential positions, overawe the courts, secure unjust and unmerited judgments, and oppress those against whom their anger might be directed.'"⁶⁶ As stated by the Ohio Supreme Court in 1892, "[i]t was common then for nobles and other powerful men to take transfers of pretended rights in action, especially of lands, from persons not in possession, and prosecute them, to the great oppression of the weak."⁶⁷

Given the purpose to stop oppression and a recognized exception for charitable causes, the rules prohibiting champerty and maintenance should not be applied to prevent an attorney from providing

61. *Sprint Commc'ns Co.*, 554 U.S. at 315 n.3 (quoting BLACKSTONE, *supra* note 59, at *135); *see also* State *ex rel.* Okla. Bar Ass'n v. Smolen, 837 P.2d 894, 897 (Okla. 1992) (Kauger, J., concurring in part and dissenting in part) ("A champertous agreement is one in which a person lacking an interest in another's litigation finances the suit for personal gain. Champerty is officious intermeddling in litigation in which one has no interest by assisting its prosecution with the intent to derive compensation from the proceeds of the suit.").

62. *Sprint Commc'ns Co.*, 554 U.S. at 315 n.3; *see also* Reece v. Kyle, 31 N.E. 747, 748-49 (Ohio 1892).

63. BLACKSTONE, *supra* note 59, at *135; *see also* Smolen, 837 P.2d at 897 (Kauger, J., concurring in part and dissenting in part) ("However, it was not considered maintenance for a rich man to assist a poor man with money or advice in order to enable him to bring or defend an action, provided the assistance was given out of charity. It was not maintenance for an attorney to take money for his advice or to expend money for his client, if it was to be repaid.").

64. Moore v. Trs. of Campbell Acad., 17 Tenn. 115, 118 (1836); *see also* Johnson v. Great N. Ry. Co., 151 N.W. 125, 127 (Minn. 1915) ("It is generally held that a person, whether an attorney or a layman, who furnishes assistance by money or otherwise to a poor man to enable him to carry on an action, is not guilty of maintenance.").

65. James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 229 (2003) (citing Reece, 31 N.E. at 749).

66. COMM'N ON ETHICS 20/20, *supra* note 3, at 9 (quoting Casserleigh v. Wood, 59 P. 1024, 1026 (Colo. Ct. App. 1900)).

67. Reece, 31 N.E. at 749.

financial assistance to an existing client for humanitarian purposes during the representation. Such an application “contributes to the very type of system inequities” the rules were created to fix.⁶⁸ Plaintiffs in need are forced to settle prematurely at a discount due to an inability to maintain a decent standard of living.⁶⁹ The poor plaintiff’s access to the legal system is curtailed.

Further, Max Radin has argued that if the doctrines were applied true to their ancient roots, attorneys would be exempt.⁷⁰ He recognized that today, however, attorneys are not exempt. Instead, defense lawyers can accuse plaintiffs’ lawyers of champertous conduct.⁷¹ He further argued that the crimes of champerty and maintenance are largely obsolete,⁷² but if restrictions on champerty and maintenance are applied in a modern context, the restrictions should only apply to prevent evils, such as frivolous litigation and oppressive bargains.⁷³

A recent survey found that twenty-seven out of fifty-one jurisdictions support this position and permit some form of champerty, as long as the practice is not being used to promote frivolous litigation, engage in litigation with improper motives, or intermeddle with the litigation.⁷⁴ Thus, “a large minority of states have abandoned champerty restrictions. However, the majority of states have retained the prohibition.”⁷⁵

68. Maya Steinitz, *Whose Claim Is this Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1273–74 (2011).

69. *Id.* at 1276.

70. Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 60, 65 (1935).

In the early common law the attorney was secure from being thought of as a calumniator merely by being an attorney, because he had a royal writ to justify his appearance, and the *narratores*, the *serjeants-conteurs*, were removed from that classification, because they were advisers and colleagues of the king’s judges.

Id. at 60.

71. *Id.* at 66.

72. *Id.* at 67 (“As crimes, they have become obsolete. Some of them are still found in our penal codes. But actual prosecution under them is rare in either England or the United States.”).

73. *Id.* at 72 (citing *Brown v. Bigné*, 28 Pac. 11 (Or. 1891)) (“Champerty is an evil, because it may increase improper litigation, because as between attorney and client, it may lead to hard and oppressive bargains, because it encourages solicitation of legal business and tends to degrade the profession. . . . Surely it would be more rational and sensible to say that champerty is an evil when, and only when, it leads to these evils. When it does not, it is not merely unobjectionable, but may actually serve a good purpose, as so many courts have expressly and quite justifiably found.”).

74. COMM’N ON ETHICS 20/20, *supra* note 3, at 11 (citing Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98–99 (2011)).

75. ETHICS COMM. OF THE COMMERCIAL AND FED. LITIG. SECTION, N.Y. STATE BAR ASS’N, REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING 11 (2013).

Some of these states that have revived and retained the champerty restrictions have used the rules as a tool of oppression.

In the middle 1950's [sic] seven southern states suddenly discovered a need to reinvigorate and extend existing champerty, maintenance and solicitation rules. The flurry of legislation came on the heels of the Supreme Court's decision in *Brown v. Board of Education* in which five civil rights organizations appeared as *amicus curiae*. The two events were not unconnected. The action of the legislatures was a vigorous political response to the success of these organizations before the courts.⁷⁶

Certainly, these rules should not be invoked to perpetuate oppression of the poor and disenfranchised. As stated by the Ohio Supreme Court:

[I]t would not be wise to carry rules adopted originally for the purpose of preventing the powerful from oppressing the weak, by groundless suits in the courts, to the extent of hindering the weak in efforts to avail themselves of lawful remedies against the powerful, now that the conditions making the ancient rules necessary have substantially disappeared, and new conditions arisen, by reason of which it has become the interest of the powerful to embarrass and hinder the dependent and weak from obtaining speedy justice in courts.⁷⁷

Further, the ABA currently allows attorneys to pay the litigation costs for indigent clients⁷⁸ and allows attorney fees and litigation costs to be paid contingent upon the outcome of the matter.⁷⁹ These exceptions to the rules against champerty and maintenance call into question using the rules as a justification for the current version of MRPC 1.8(e).⁸⁰

B. The Contingency Fee

Contingency fees, in early times, were often deemed champertous.⁸¹ The courts, however, moved to allow contingency fees as a le-

76. Steinitz, *supra* note 68, at 1287–88 (internal quotation marks omitted) (citing Comment, *The South's Amended Barratry Laws: An Attempt to End Group Pressure Through the Courts*, 72 *YALE L.J.* 1613, 1613 (1963)).

77. *Reece v. Kyle*, 31 N.E. 747, 751 (Ohio 1892).

78. MODEL RULES OF PROF'L CONDUCT R. 1.8(e)(2) (2013).

79. *Id.* R. 1.5(c), 1.8(e)(1).

80. Moliterno, *supra* note 65, at 229–30.

81. Radin, *supra* note 70, at 69 (“When the practice first arose of offering a lawyer a share of the profit of litigation in lieu of his fee, it was clearly champerty—more precisely ‘maintenance by means of champerty’ . . . —because it would have been champerty, if anybody, lawyer or layman, had acquired such a share in the profits with or without consideration.”); Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 *DEPAUL L. REV.* 231, 234–35 (1998) (a form of contingency fees occurred in early cases, but generally courts deemed them champertous);

gitimate method for both the rich and the poor to have access to counsel and the legal system.⁸² Exploring the arguments for and against contingency fees lays the groundwork for understanding these same arguments as applied to attorney gifts and loans to clients for living expenses.

In the United States, some have posited that the shift to legitimacy for the contingency fee was, in part, due to the unsettled land claims of the early 1800s. Litigants, without any other assets besides the land, could only offer to pay an attorney a percentage of the value of any land recovered.⁸³ It has also been stated that the burgeoning forms of rapid transportation, and the negligence that ensued, were the catalyst for the contingency fee, which aided poor plaintiffs seeking recovery in litigation against rich defendants.⁸⁴ One scholar concluded that it was many factors, including “the selection of jurists by a political process resting on an increasingly broad-based franchise, coupled with the pervasive influence of evangelical thought . . . that influenced nineteenth century jurists to sanction contingency fee contracts.”⁸⁵ The result was that courts and state legislatures sanctioned contingency fee payments.⁸⁶

The contingency fee is not without its critics. Contingency fees are said to facilitate unwarranted litigation.⁸⁷ In addition, they are viewed as allowing attorneys to reap “unconscionably large fees” while also “allowing an excessive shifting of control . . . from litigant to counsel.”⁸⁸ Further, it has been argued that the attorney’s large finan-

see also Baskin v. Pass 19 N.E.2d 30 (Mass. 1939). *But see* Kelly v. Kelly, 56 N.W. 637 (Wis. 1893) (holding that the contingent fee agreement would not be champertous if the attorney received a fee contingent on the judgment as long as the attorney did not pay for litigation expenses).

82. Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 262 (1998). The Supreme Court had endorsed the contingency fee in 1853. Adam Shajnfeld, *A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements*, 54 N.Y.L. SCH. L. REV. 773, 775 (2009–2010) (citing *Wylie v. Coxe*, 56 U.S. 415, 420 (1853)).

83. Karsten, *supra* note 81, at 236.

84. Radin, *supra* note 70, at 71.

85. Karsten, *supra* note 81, at 248.

86. *Id.* at 240.

87. Landsman, *supra* note 82, at 261; Shajnfeld, *supra* note 82, at 807 (“Critics of the contingent fee have for years castigated it as a device by which frivolous and excessive litigation is promoted.”).

88. Landsman, *supra* note 82, at 264; Steinitz, *supra* note 68, at 1293. The unconscionably large fees argument stems from the belief that attorneys charge the client a large percentage of the recovery even when there is little to no risk involved in obtaining the recovery for the client. Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 748 (2002) (dispelling seven myths about contingency fees). Profes-

cial stake in the litigation may compromise the attorney's independent professional judgment and create a conflict with the client.⁸⁹

There are several arguments for the contingency fee that have prevailed. First, it increases access to the legal system.⁹⁰ Litigation costs and attorney fees can be substantial. If attorneys were not permitted to advance these costs and fees, then the poor would be without the resources needed to pursue their legal rights.⁹¹ Even those with resources might be risk-averse and choose not to seek legal redress if it were not for the ability to pay the attorney's fee contingent on the outcome. Second, a contingency fee may reduce frivolous claims.⁹² In choosing whether to take a case on a contingency basis, the attorney will select only those cases that seem meritorious and likely to result in a judgment or favorable settlement for the plaintiff. Otherwise, the attorney risks not being reimbursed for her time expended on the case.⁹³ Third, a contingency fee encourages attorneys to work efficiently towards the attorney and client's common interest of maximizing the result.⁹⁴ Lastly, it allows adults to contract freely and to pay the attorney to take the risk of a no damage award.⁹⁵

The ABA initially fought against the use of the contingency fee because it sought to protect clients from unjust charges.⁹⁶ Some believe that the organization's position against the contingency fee was because "the bar was represented in its official utterances by the more successful members, who represented litigants of means and who had

sor Kritzer points out, however, that even where there is guaranteed recovery the real risks are "uncertainty about the amount that will be recovered, uncertainty about what [the lawsuit] will cost, in both effort and expenses, to obtain the recovery; and uncertainty about how much time will pass before recovery will be obtained." *Id.*

89. Kritzer, *supra* note 88, at 776; Shajnfeld, *supra* note 82, at 797-99 (discussing potential conflicts of interest regarding settlement offers).

90. Shajnfeld, *supra* note 82, at 776.

91. *Id.*; see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-389 (1994).

92. Kritzer, *supra* note 88, at 754-57.

93. *Id.*

94. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-389; Shajnfeld, *supra* note 82, at 776.

95. Shajnfeld, *supra* note 82, at 776. There are rules that regulate contingency contracts. These standards include any governing ethics rules along with any statutory rules governing contingency fees. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5 (2013).

96. COMM. ON CODE OF PROF'L ETHICS, AM. BAR ASS'N, FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS 567, 579 (1908), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/1908_code.authcheckdam.pdf ("Contingent fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges.").

consequently little occasion to enter into contingent fee contracts.”⁹⁷ The ABA has now sanctioned the contingency fee with certain restrictions as evidenced in MRPC 1.5.⁹⁸ The ABA’s acceptance of the financing of attorney fees in MRPC 1.5 led to the allowance of the financing of litigation expenses in MRPC 1.8(e) as well.

C. MRPC 1.8(e) Formation

Although the arguments supporting contingency fees have allowed attorneys to finance attorneys’ fees and litigation expenses contingent upon recovery, the same arguments advanced against this practice are still being used to prevent attorneys from financing living expenses. A line has been drawn in the sand. Attorneys may advance their fees, advance litigation expenses, and even pay litigation expenses for indigent clients, but may not advance any living expenses to any client. Rule 1.8(e) currently states:

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.⁹⁹

The arguments against attorneys financing living expenses are found in the comment to MRPC 1.8(e). It states:

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.¹⁰⁰

The comment further explains the difference between humanitarian loans and litigation expenses by stating that “[t]hese 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.”¹⁰¹ The comment then states “an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be re-

97. Moliterno, *supra* note 65, at 229–30; Radin, *supra* note 70, at 71.

98. MODEL RULES OF PROF’L CONDUCT R. 1.5.

99. *Id.* R. 1.8(e).

100. *Id.* cmt. [10].

101. *Id.*

paid is warranted.”¹⁰² The authors give no reason as to why such an exception is warranted. It is perplexing why no explanation is necessary to show that indigent clients need financial assistance for litigation expenses, yet the equally obvious fact that those same indigent clients might need financial assistance for living expenses during the litigation process is not recognized. Instead, the assertion, as quoted above, is that, unlike the financing of litigation expenses, financing living expenses is somehow distinguishable from contingency fee financing and leads to frivolous litigation and the lawyer having too great a financial stake in the litigation.¹⁰³

The financing of living expenses by attorneys was not always seen as warranting such concern. The early common law allowed attorneys to lend their clients living expenses. The Ohio Supreme Court noted in 1892 that “such advances by the attorney in the progress of litigation were so common that to denounce the practice as improper would be to condemn the daily acts of the most honorable members of the profession.”¹⁰⁴ Courts generally imposed the requirement that the client must repay any costs and expenses advanced.¹⁰⁵ But the practice was seen as humanitarian and permitted so these individuals had access to the court system.¹⁰⁶

Subsequently, the ABA adopted Canon 42 as part of the 1908 *Final Report of the Committee on Code of Professional Ethics* (1908 Canons).¹⁰⁷ The 1908 Canons were largely based on the professional codes that were in existence in the states. They focused heavily on Chief Justice Sharswood’s book, *Professional Ethics*, and the State of Alabama’s code of professional ethics, which had been adopted with slight modification by eleven other states at that time.¹⁰⁸ Canon 42 stated, “[a] lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a

102. *Id.*

103. *Id.*

104. *Reece v. Kyle*, 31 N.E. 747, 750 (Ohio 1892).

105. *See Johnson v. Great N. Ry. Co.*, 151 N.W. 125, 127 (Minn. 1915) (“As before stated, an agreement to loan the client funds with which to carry on the suit or to maintain himself during its pendency is not regarded as per se opposed to public policy. It is only when the attorneys are to ultimately stand the costs, or when the client is indemnified from liability for them in case of no recovery, that the law declares the arrangement void.”).

106. *Koval*, *supra* note 45, at 1121; *see also, e.g., Johnson*, 151 N.W. at 127; *Shapley v. Bellows*, 4 N.H. 347, 355 (1828); *Reece*, 31 N.E. at 750.

107. COMM. ON CODE OF PROF’L ETHICS, *supra* note 96, at 568–69.

108. *Id.* at 568–70.

matter of convenience, but subject to reimbursement.”¹⁰⁹ After the adoption of Canon 42, many courts continued to follow earlier court decisions allowing lawyers to lend their clients living expenses subject to reimbursement.¹¹⁰

The ABA then issued *Formal Opinion 288* in 1954,¹¹¹ clarifying that Canon 42 was contrary to previous practice, which resulted in some courts overruling previous decisions.¹¹² In *Formal Opinion 288*, an attorney requested an opinion as to whether other personal injury attorneys who paid substantial sums of money monthly to their clients during the time the clients’ suits were pending were acting within the 1908 Canon restrictions.¹¹³ The attorney stated that sometimes the sums were enough to cover living expense and sometimes the amounts were more.¹¹⁴ The committee considered Canon 42 and interpreted the term, “expenses” in that Canon as only including “court costs, witness fees and expenses resulting from the conduct of the litigation itself, and not expenses unconnected with the litigation, although resulting from the accident.”¹¹⁵ It also referenced Canon 10, which stated “[a] lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.”¹¹⁶ Reading its interpretation of Canon 42 in conjunction with Canon 10, the committee determined that a lawyer who advances living expenses would improperly acquire an interest in the subject matter of the litigation because the expenses would by necessity be reimbursed from any money the plaintiff received.¹¹⁷ The committee further determined that the advancement of living expenses would also violate Canon 6, which prohibited an attorney “from representing conflicting interests,

109. ABA CANONS OF PROF'L ETHICS Canon 42 (1928), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf.

110. See, e.g., *People v. McCallum*, 173 N.E. 827, 831 (1930) (holding that it is permissible for an attorney to advance costs and court charges for his client when the understanding is that the same are ultimately to be paid by the client); *Johnson*, 151 N.W. at 127 (holding that an agreement where an attorney advanced money for expenses and deducted the amount expended from the client's recovery was not against public policy despite an absence of agreement that the client should not be liable for the expenses in case of no recovery); *In re Sizer*, 306 Mo. 356 (1924) (finding various agreements between attorney and clients to bring personal injury suit in exchange for living expenses were ethical and not grounds for disbarment).

111. ABA Comm. on Prof'l Ethics & Grievances, *Formal Op. 288* (1954).

112. See *Mahoning Cty. Bar Ass'n v. Ruffalo*, 199 N.E.2d 396 (Ohio 1964).

113. ABA Comm. on Prof'l Ethics & Grievances, *Formal Op. 288*.

114. *Id.*

115. *Id.*

116. ABA CANONS OF PROF'L ETHICS Canon 10 (1908).

117. ABA Comm. on Prof'l Ethics & Grievances, *Formal Op. 288*.

and imposing upon the lawyer the duty to represent his client with undivided fidelity.”¹¹⁸ Thus, *Formal Opinion 288* made clear that the ABA’s position was that Canon 42 was to be interpreted as barring attorneys from lending money to clients for living expenses.

In 1969, the ABA adopted the *Model Code of Professional Conduct* (“Model Code”).¹¹⁹ The Model Code consisted “of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules.”¹²⁰ The Canons were norms stated in general terms.¹²¹ The Ethical Considerations were aspirational, and the Disciplinary Rules were mandatory stating the minimum level of ethical conduct.¹²² DR 5-103(B) of the Model Code codified *Formal Opinion 288*, further solidifying the ABA’s position. DR 5-103(B) stated:

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.¹²³

DR 5-103(B) affirmed the ABA’s position on financial assistance to clients and clarified what constituted litigation expenses, illustrating that living expenses were not litigation expenses.

In 1983, the ABA adopted the *Model Rules of Professional Conduct*. The ABA eliminated with the tripartite format, and instead the MRPC are *Restatement*-style disciplinary rules that set forth the minimum level of ethical conduct. Explanatory comments follow each rule. During

118. *Id.* The committee recognized that this conflict was not different than the conflict created by the attorney working for a fee. It stated, however, that such conflict:

[S]hould not be extended to permit the lawyer to acquire an additional stake in the outcome of the suit which might lead him to consider his own recovery rather than that of his client, and to accept a settlement which might take care of his own interest in the verdict but not advance the interest of his client to the maximum degree. Such an extension would be inconsistent with the lawyer’s duty of undivided fidelity to his client.

Id.

119. MODEL CODE OF PROF’L RESPONSIBILITY Preface (1980).

120. *Id.* Preliminary Statement.

121. *Id.*

122. *Id.*

123. MODEL CODE OF PROF’L RESPONSIBILITY EC 5–8 (1980) (“A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.”).

the drafting stages of MRPC 1.8(e) in 1979, there was an unofficial pre-circulation draft that proposed, contrary to the Model Code, that attorneys be allowed to advance living expenses.¹²⁴ It stated:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may advance expenses, including: *Alternative (1)*: Court costs, expenses of investigation, medical and other experts, and obtaining and presenting evidence. *Alternative (2)*: Court costs, expenses of litigation, and living expenses.¹²⁵

Alternative one was the template for the version of MRPC 1.8(e) adopted in 1983, which is the current version of the rule.

Despite not changing the rule on financing living expenses, there are several differences between Model Code 5-103(b) and MRPC 1.8(e). Initially, MRPC 1.8(e) does not list what constitutes litigation expenses. The rationale for eliminating clarity as to what constitutes litigation expenses is not clear, but the change did not result in lawyers being allowed to finance client living expenses. Secondly, a lawyer may pay court costs and litigation expenses for indigent clients, eliminating the responsibility of the indigent client to repay the lawyer for these expenses.¹²⁶ Adopting this change furthers the ABA's commitment to ensuring access to the legal system for those in need. An additional distinction is that even if the client is not indigent, the lawyer may finance the client's litigation expenses with the repayment of these expenses contingent on the outcome of the matter.¹²⁷ Consequently, if no money is recovered, the litigation expenses need not be repaid. Previously, repayment was required in accordance with the laws restricting champerty and maintenance. This change in the rule is a move away from adherence to those restrictions in this context. The ABA's adoption of MRPC 1.8(e) was then a step furthering the ABA's commitment to ensuring equal access to the legal system and reaffirming the contingency method of payment for attorney fees and litigation expenses, despite champerty and maintenance restrictions.

Parallel to the ABA's work creating rules governing lawyers' conduct, the American Law Institute was working on restatements regarding the law governing lawyers. Charles Wolfram, the chief reporter for the first *Restatement of the Law Governing Lawyers*, stated that the *Restatement* drafters' focus was different than the ABA's because the drafters

124. STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 228-29 (2013).

125. *Id.*

126. MODEL RULES OF PROF'L CONDUCT R. 1.8(e)(2) (2013).

127. *Id.* R. 1.8(e)(1).

would solely consider existing prescriptions relevant to the lawyer's duty and would not limit the regulations considered to any particular legal discipline.¹²⁸ Despite this different approach, the *Restatement's* current rule is similar to MRPC 1.8(e).¹²⁹ It states:

A lawyer may not make or guarantee a loan to a client in connection with pending or contemplated litigation that the lawyer is conducting for the client, except that the lawyer may make or guarantee a loan covering court costs and expenses of litigation, the repayment of which to the lawyer may be contingent on the outcome of the matter.¹³⁰

Comment c sets forth the justifications for this rule:

Lawyer loans to clients are regulated because a loan gives the lawyer the conflicting role of a creditor and could induce the lawyer to conduct the litigation so as to protect the lawyer's interests rather than the client's. This danger does not warrant a rule prohibiting a lawyer from lending a client court costs and litigation expenses such as ordinary- and expert-witness fees, court-reporter fees, and investigator fees, whether the duty to repay is absolute or conditioned on the client's success. Allowing lawyer to advance those expenses is indistinguishable in substance from allowing contingent fees and has similar justifications, notably enabling poor clients to assert their rights. Requiring the client to refund such expenses regardless of success would have a particularly crippling effect on class actions, where the named plaintiffs often have financial stakes much smaller than the litigation expenses.

. . . .

Loans for purposes other than financing litigation expense are forbidden in most jurisdictions and under this Section. That prohibition precludes attempts to solicit clients by offering living-expenses loans or similar financial assistance. A few jurisdictions permit such payments, limiting them to basic living and similar expenses and sometimes with the restriction that they not be discussed prior to the lawyer's retention. Such permission is usually based on a policy

128. Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 199 (1987–1988) (“Where the Kutak Commission attempted to formulate rules of professional conduct that would be effectively enforced by lawyer disciplinary agencies, the restatement will focus both more narrowly and more broadly. More narrowly, the restatement will concern itself entirely with existing legal prescriptions More broadly, the restatement will examine the law affecting legal practice, whether it finds expression in doctrines of professional discipline, evidence, agency, tort, or contracts.”).

129. Such a result is not surprising because the majority of states follow the *Model Rules of Professional Conduct*, which means that most courts refer to the MRPC when deciding cases involving attorney misconduct. See State Adoption of the ABA Model Rules of Professional Conduct, CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited May 22, 2014) (listing forty-nine states, the District of Columbia, and the Virgin Islands as adopting the MRPC).

130. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36(2) (2000).

of enabling clients to avoid being forced to abandon meritorious claims or to agree to inadequate settlements.¹³¹

The *Restatement* rule only prevents loans, as opposed to also regulating gifts as is implied by MRPC 1.8(e), which bans “financial assistance.”¹³² The comment, however, lumps together “living-expenses loans or similar financial assistance” in discussing solicitation of clients, perhaps indicating that there is no distinction.¹³³ Interestingly in the Reporter’s Notes referencing comment c, the reporters stated that “[t]he Reporters support the minority position, but that position was not accepted by the Institute.”¹³⁴ The Institute chose a rule that reflects the current rule in the majority of states, which prohibits attorneys from advancing money to clients for living expenses.

Similar to the committee drafting the MRPC, the reporters for the *Restatement (Third) of the Law Governing Lawyers* proposed a rule that would allow lawyers to advance living expenses:

[T]he proposed § 48 to the Restatement (Third) Governing Lawyers . . . restricts advances to clients to circumstances in which a “loan is needed to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits”¹³⁵

Proposed comment d to section 48 would have noted that while loans to clients beyond litigation expenses are forbidden in most jurisdictions:

[T]hey are justified when needed to help a financially pressed client proceed with a suit rather than accepting whatever settlement may be offered. A client whose resources may have been depleted by an injury giving rise to a suit may have difficulty obtaining food, clothing, shelter and medical treatment during protracted litigation.¹³⁶

The proposed section did not win acceptance.

This history demonstrates that prior to the ABA creating the 1908 Canons, the courts recognized an exception to the champerty and maintenance restrictions and allowed attorneys to advance living expenses to clients in need.¹³⁷ Although not clear at first, it later became

131. *Id.* § 36 cmt. c (citation omitted).

132. MODEL RULES OF PROF’L CONDUCT R. 1.8(e) (2013).

133. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 cmt. c (citation omitted).

134. *Id.* at § 36 Reporter’s Note cmt. c.

135. State *ex rel.* Okla. Bar Ass’n v. Smolen, 837 P.2d 894, 900 (Okla. 1992) (Kauger, J., concurring in part and dissenting in part).

136. *Id.* at 906 (Opala, C.J., Hodges, V.C.J., concurring).

137. See *supra* notes 104–106 and accompanying text.

certain that the ABA's position was against such an exception.¹³⁸ The majority of states have adopted the ABA's position.¹³⁹ However, the history also demonstrates that there is a strong undercurrent of resistance to the ABA's and the *Restatement's* position. To date, this has only resulted in MRPC 1.8(e) more closely reflecting the ABA's mission to provide equal access to the judicial system and evidencing the ABA's move away from strict adherence to champerty and maintenance restrictions. This resistance to the current ban on financial assistance for living expenses most likely exists because the justifications for the ban do not withstand scrutiny. Without valid competing interests, the policy supporting equal access to the legal system and promoting human dignity should result in elimination of the ban against attorneys financing client living expenses, as was done for financing attorney fees and litigation expenses.

III. The Justifications for MRPC 1.8(e) Do Not Withstand Scrutiny

The heart of the debate over financial assistance to clients for living expenses involves conflicting ideals: protecting individuals' equal access to the legal system and dignity during legal representation versus preventing needless litigation and protecting clients from lawyers whose financial stake in the litigation might influence their professional judgment causing their clients harm. Attorneys should be allowed to advance living expenses for basic necessities because this humanitarian assistance does not necessarily result in needless litigation or improper influence making an outright ban unwarranted.

A. Conflicts and Professional Judgment

The relevant comment to MRPC 1.8(e) cites as a justification for the ban on lawyers financing client living expenses that "such assistance gives lawyers too great a financial stake in the litigation."¹⁴⁰ The concern is that an attorney who lends money to a client for basic necessities acquires a personal financial stake in the litigation that could create an impermissible conflict of interest. An attorney who has lent money to a client contingent on the outcome of the litigation may advise the client to accept an early settlement, guaranteeing money to repay the attorney and avoiding the risk of going to trial and receiving

138. See *supra* notes 110–112 and accompanying text.

139. See *infra* notes 226–246 and accompanying text.

140. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) cmt. [10] (2013).

no recovery at all.¹⁴¹ Conversely, there is a concern that “[i]f large sums of money are advanced to maintain the client’s lifestyle, settlement may be frustrated.”¹⁴² Settlement may not be possible because the settlement offer may be too low to allow the client to repay the attorney. The lending of the money creates a conflict of interest, which could potentially interfere with the lawyer’s independent professional judgment and the client’s best interest.

This conflict, however, is no more severe, and often less severe, than conflicts created by fee agreements universally recognized as ethical. Such billing arrangements include hourly rates, contingency fees, and acquiring ownership interest in corporations in lieu of fees. Inherent in the hourly billing arrangement is the concern that the attorney will not work efficiently because the attorney is being paid based on hours of work expended.¹⁴³ This conflict does not even invoke a conflict analysis under the MRPC.¹⁴⁴

The contingency fee billing arrangement creates conflicts similar to the conflicts created when an attorney lends a client living expenses contingent on the outcome of the litigation. As described earlier, the attorney might advise the client to accept a settlement as opposed to taking a risk of no recovery at trial, or the attorney might advise against an early settlement holding out for the chance of a much larger recovery at trial. The difference is that “the magnitude of the lawyer’s interest attributable to the financial assistance will be far less than that attributable to the contingent fee contract.”¹⁴⁵ Thus, the conflicts created by the contingency fee agreement are more likely to influence the lawyer’s professional judgment than conflicts created by advancing a client living expenses contingent on the outcome of the litigation. The same point could be made regarding advancing litigation expenses contingent on the litigation outcome. As with the contingency fee, the amount of money advanced for litigation expenses can be substantial and may pose a greater risk of interference with the lawyer’s professional judgment than the lawyer’s advancing living expenses.¹⁴⁶ The amount advanced, and the circumstances surrounding

141. Moliterno, *supra* note 65, at 244.

142. Utah State Bar Ass’n, Ethics Advisory Op. Comm., Op. 11-02 (2011) (internal quotation marks omitted) (citing *In re G.M.*, 797 So. 2d 931, 935 (Miss. 2001)).

143. Moliterno, *supra* note 65, at 245.

144. *Id.*

145. *Id.* at 246; *see also* John Sahl, *Helping Clients with Living Expenses: “No Good Deed Goes Unpunished,”* 13 PROF. LAW., no. 2, 2002, at 1, 5.

146. *See* Moliterno, *supra* note 65, at 238 (finding the ABA’s choice to relax the restriction on contingent repayment of litigation expenses in adopting the Model Rules “indi-

the advance, determines the severity of the conflict. Often, conflicts created by advancing attorney fees and litigation expenses would be more likely to affect the lawyer's professional judgment because the amount of the advance will be much larger. This fact undermines using this conflicts justification to ban advancements of client living expenses.

Further, the conflicts created by attorneys acquiring an ownership interest in a corporate client in lieu of fees would also likely be more severe than the potential conflicts created by attorneys advancing living expenses to existing clients.¹⁴⁷ In *ABA Formal Opinion 00-418*, the committee recognized that this fee arrangement creates conflicts and suggested that “[a]t the outset, the lawyer . . . should inform the client that events following the stock acquisition could create a conflict between the lawyer’s exercise of her independent professional judgment as a lawyer on behalf of the corporation and her desire to protect the value of her stock.”¹⁴⁸ The ABA, however, allows this fee arrangement and gave the following reasons: (1) “to satisfy client needs;”¹⁴⁹ (2) because the attorney investing in the company “is viewed as a vote of confidence in the enterprise’s prospects;”¹⁵⁰ and (3) because “permitting clients to pay with stock or options creates a financing device that allows clients broader access to legal services by providing an alternative currency to pay for those services.”¹⁵¹ These reasons equally apply to a lawyer advancing living expenses to a client in need where the advance (1) satisfies the client’s need, (2) may be viewed as a lawyer’s vote of confidence in the client’s case, and (3) provides a financing device that may be the only way for a cash-

cated . . . at least an acknowledgment that its dangers are no greater than those already found in the contingent fee arrangement itself”); *id.* at 246 (analogizing to a contingent fee agreement by substituting for the lawyer’s uncompensated time and effort the lawyer’s money or other assets as raising a negligible difference in the lawyer’s personal interests in the outcome of the matter).

147. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 00-418, at 10 (2000) (“For example, the lawyer might have a duty when rendering an opinion on behalf of the corporation in a venture capital transaction to call upon corporate management to reveal material adverse financial information that is being withheld, even though the revelation might cause the venture capital investor to withdraw.”); *id.* at 2 n.2 (quoting *IN THE SPIRIT OF SERVICE*, *supra* note 30, at 31) (“[The lawyer’s investment] may make the client’s financing efforts easier, [but] it creates a potential or actual conflict of interest, changing the lawyer-client relationship in a very fundamental way.”).

148. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 00-418, at 6.

149. *Id.* at 2.

150. *Id.*

151. *Id.* at 2 n.4 (“Similar to contingent fees, permitting clients to pay with stock or options creates a financing device that allows clients broader access to legal services by providing an alternative currency to pay for those services.”).

strapped client to have full access to the legal system because otherwise the client may be forced to settle at a discounted rate so as to have money for needed living expenses.

A fourth justification for allowing a lawyer to accept an ownership interest in a client corporation in lieu of fees is that a lawyer's willingness to invest in the company, "[f]requently . . . may be the determining factor in the client's selection of a lawyer."¹⁵² As to this fourth rationale, the fact that a client may select a lawyer based on the lawyer's willingness to advance living expenses has been cited as a concern in allowing lawyers to advance living expenses. It has been asserted that potential clients should choose an attorney based on qualifications and not on the availability of money.¹⁵³ Certainly, the ABA may not see a need to protect sophisticated corporate clients in the attorney selection process. The result, however, that a corporate client attorney financing option that creates conflicts is allowed while an impecunious client attorney financing option is banned seems wrong when the reasoning is based on the need to protect poor clients from potential conflicts arising from an attorney who was willing to lend the client money for groceries.

In light of the ABA condoning these billing practices and condoning the financing of litigation expenses, the ban in Rule 1.8(e) cannot be justified on a conflicts basis. These practices create potential conflicts of interest often more severe than the potential conflicts of interest created by attorneys financing clients' living expenses. Instead, the ban in MRPC 1.8(e) should be lifted, and attorneys should be allowed to lend money to clients for basic necessities, such as food, transportation, and medical assistance, under the restrictions of Rule 1.8(a) and Rule 1.7. According to Professor Charles Wolfram, where the client gives informed consent and the advancement of funds or lawyer time and effort are made "in a way that avoids the possibility of adverse impact upon a lawyer's exercise of judgment . . . no sound reason exists to prevent it."¹⁵⁴

152. *Id.*

153. Utah State Bar Ass'n, Ethics Advisory Op. Comm., Op. 11-02 (2011) (citing *In re G.M.*, 797 So.2d 931, 935 (Miss. 2001)).

154. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-416 (2000) (internal quotation marks omitted) (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.13 (1986)) (concerning an attorney purchasing a client's accounts receivable).

B. Proprietary Interest

An attorney advancing a client living expenses contingent upon the outcome of the litigation arguably invokes MRPC 1.8(i), which states:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case.¹⁵⁵

Similar to MRPC 1.8(e), this rule is “rooted in the common law doctrines of maintenance and champerty . . . [and] is intended to prevent conflicts of interest that might interfere with the lawyer's exercise of independent professional judgment on the client's behalf.”¹⁵⁶

The arguments disputing that humanitarian loans will always create impermissible conflicts¹⁵⁷ equally apply to the position that advancing living expenses will always result in lawyers acquiring an impermissible proprietary interest in the litigation. Conduct resulting in an attorney acquiring a proprietary interest in the litigation does not automatically result in the attorney acquiring an impermissible proprietary interest.

There are several situations where attorneys acquire a proprietary interest in the litigation, and the conduct is not banned. For example, as long as authorized by law, the ABA condones a lawyer obtaining a contractual security interest in a client's property to secure payment of fees earned or to be earned, even if it is a security interest in the subject matter of the litigation in which the lawyer represents the client.¹⁵⁸ Where the subject matter of the litigation secures the attorney's fee, the attorney has a proprietary interest in the litigation.¹⁵⁹

155. MODEL RULES OF PROF'L CONDUCT R. 1.8(i) (2013).

156. *Id.* cmt. [16]; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-416.

157. *See supra* Part III.A.

158. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 02-427 (2002) (“[T]aking possession of client property to secure payment of a fee can be regarded as a possessory security interest.”).

159. *Id.* n.13 (listing state bar opinions that find “that the taking of a security interest in property that is related to or the subject of litigation is a ‘proprietary’ interest”); Radin, *supra* note 70, at 71–72 (“To say that [lawyers] have no pecuniary interest in the case, therefore, is in itself a palpable absurdity. It becomes even more so, when we remember that in many American states, a lawyer has both a charging and a retaining lien on the properties, on the monies recovered and on the documents necessary for such recovery. That is to say, he has a proprietary interest . . . as tangible as any other such interest, in everything of value that comes out of the particular litigation. There is certainly nothing in logic or in common sense that denies the existence of the interest because this money value is not determinable in advance.”).

Yet, similar to the billable hour billing method being exempt from a conflicts analysis under the relevant conflict rules, the ABA decided the lien that secures property that is the subject matter of the litigation does not even need to meet the fair dealing requirements between attorneys and clients in MRPC 1.8(a).¹⁶⁰

Another example is the ABA condones an attorney purchasing the client's accounts receivable and pursuing collection to benefit the attorney, even if the accounts receivable are the subject matter of the litigation.¹⁶¹ The attorney must meet the requirements of MRPC 1.8(a), general conflict rules, and must purchase the entire account.¹⁶² Where these requirements are met, the ABA has taken the position that MRPC 1.8(i) is satisfied, and the attorney is not acquiring an impermissible interest in the litigated matter.¹⁶³ There is no question, however, that where the attorney will benefit from the accounts that are a subject matter of the litigation, the attorney's proprietary interest in the litigation creates potential conflicts.¹⁶⁴

One more example is that the ABA has decided that lawyers may post a bond for their clients.¹⁶⁵ The ABA allows this practice when the requirements of MRPC 1.7 are met, despite the conflict that is created by the "significant risk that this personal interest [in substantial funds or assets securing a client's release on bail] will materially limit her ability to exercise her independent professional judgment on the client's behalf."¹⁶⁶ The ABA did not ban this conduct because it recognized that there may be unusual situations where a conflict will not be created, such as where the funds posted are negligible.¹⁶⁷ As to the

160. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 02-427.

161. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-416 (2000).

162. *Id.*

163. *Id.*

164. *Id.* ABA Op. 00-416 lists conflict possibilities. For example, the committee discussed the possibility that:

If the lawyer anticipates acquiring an interest in these accounts at a discounted price, the lawyer may be tempted to pursue the collection action less zealously than she would otherwise in the hope that the client will then consider selling her the uncollected debts or that the price of acquiring the debts will be reduced.

Id. Recognizing the potential for additional conflicts, the committee stated that it could not "over-emphasize the importance of the lawyer's addressing potential conflicts in her written disclosure to a client from whom she may purchase accounts receivables." *Id.*

165. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 04-432 (2004). The opinion also lists several states that do not allow this practice. *Id.* at n.4.

166. *Id.*

167. *Id.* One reason that might have influenced the committee to stretch to reach this decision can be found in footnote six, which states that situations where the posting of a bond would be allowed is where "civil rights lawyers . . . post[] bond on behalf of criminal

possibility that posting a bond is impermissible financial assistance under Rule 1.8(e), the committee opined that the bond could be seen as a litigation expense.¹⁶⁸

These interests—the lien on property in the litigation, the client’s accounts receivable involved in the litigation, and the bond—create proprietary interests in the litigation. They are allowed when they conform to governing ethics rules.¹⁶⁹ Banning an attorney from advancing living expenses to an existing client in need because the attorney acquires a proprietary interest in the litigation is inconsistent with these practices. Further, in some cases the proprietary interest in these practices would be larger than the proprietary interest acquired through advancing living expenses, and thus these situations create more severe conflicts of interest. Humanitarian loans should not be banned. Instead, consistent with the ABA committee’s analysis in similar situations, the approach should be to determine whether the conflict creates an impermissible interference with the lawyer’s professional judgment.

Perhaps, there could be an argument that where humanitarian loans are allowed some lawyers will lend money beyond what is needed for basic necessities and line drawing in this context will be difficult. The ABA committee’s analysis in conflict situations, however, is often fact specific. Such an analysis should be available to regulate the advancement of living expenses. For example, in *ABA Formal Opinion 00-418*, the committee chose not to ban attorneys from acquiring ownership interest in corporate clients.¹⁷⁰ Instead, it gave a factual example where the conduct would create an impermissible conflict.¹⁷¹ The committee stated, “the stock of the client might be the lawyer’s major asset so that the failure of the venture capital opportunity could create a serious financial loss to her. This would disqualify her under Rule 1.7.”¹⁷² Additionally, in *ABA Formal Opinion 00-416*, the committee chose not to ban attorneys from purchasing clients’ accounts receivables that are a subject matter of the litigation. The committee

defendant clients in circumstances where it was likely, or even certain that no one else would do so.” *Id.* at n.6.

168. *Id.* However, the Committee noted that “[g]iven the coercion and duress inherent in the client’s incarceration, using the promise of securing the client’s release from custody as an inducement to engage the lawyer would be a violation of Model Rule 7.3(b)(2).” *Id.* at n.7.

169. ABA Comm. on Ethics & Prof’l Responsibility, Formal Ops. 00-416, 02-428 (2002), 04-432.

170. ABA Comm. on Ethics & Prof’l Responsibility, Formal Ops. 00-416, 02-428, 04-432.

171. ABA Comm. on Ethics & Prof’l Responsibility, Formal Ops. 00-416, 02-428, 04-432.

172. ABA Comm. on Ethics & Prof’l Responsibility, Formal Ops. 00-416, 02-428, 04-432.

noted that this situation would lead to potential conflicts, but allowed the conduct recognizing that it could be done “in a way that avoids the possibility of adverse impact upon a lawyer’s exercise of judgment during the course of the representation.”¹⁷³

The ABA committees, in similar conflict situations, recognized that the questioned conduct created potential conflicts of interest due to the proprietary interest in the subject matter of the litigation but did not ban the conduct.¹⁷⁴ Instead, the ABA determined that for cases at the margins the analysis could be based on the factual circumstances to determine whether an impermissible conflict existed.¹⁷⁵ A similar analysis is possible in regards to lawyers advancing clients living expenses. The factual determination would involve whether the money was lent for basic necessities and whether it was done to allow the client to be able to continue to pursue legal redress. Such a factual analysis negates the need for an outright ban.

C. Litigation Creation

Another justification for the ban, as stated in the comment to MRPC 1.8(e), is that if lawyers are allowed to lend clients living expenses, it “would encourage clients to pursue lawsuits that might not otherwise be brought”¹⁷⁶ This concern does not compel a ban on humanitarian loans. There are already rules in place to control frivolous litigation. These include doctrines concerning standing and ripeness, ethical rules such as MRPC 3.1 and 3.4, and procedural rules such as *Federal Rules of Civil Procedure* Rule 11.¹⁷⁷ These rules are “better designed to prevent or to punish intermeddling and the obstruction of justice.”¹⁷⁸ Further, the current ban on financial assistance for living expenses “disproportionately prevent[s] the bringing of meritorious claims, not frivolous ones.”¹⁷⁹ Similar to contingency fee cases,¹⁸⁰ lawyers are less likely to lend money to clients during litigation of claims with little merit. A lawyer will likely only fund those cases that the lawyer believes have a chance of success because that

173. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-416 (quoting WOLF-
RAM, *supra* note 128, § 8.13).

174. See *supra* notes 170–173 and accompanying text.

175. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-418 (2000).

176. MODEL RULES OF PROF'L CONDUCT R.1.8(e) cmt. [10] (2013).

177. Moliterno, *supra* note 65, at 251; Sahl, *supra* note 145, at 6.

178. Sahl, *supra* note 145, at 6.

179. Moliterno, *supra* note 65, at 251.

180. Shajnfeld, *supra* note 82, at 807–08.

might be the only realistic way that the lawyer will recover financial assistance expended.¹⁸¹

The unwarranted litigation argument stems from the profession's historical concern about lawyers or other nonparties funding a suit that would permit a wealthy person to oppress an impecunious adversary in courts or permit an intermeddler to obstruct justice. Living expense advances by lawyers today do not oppress poor clients but instead empower them to prosecute their rights in court.¹⁸²

Further, a litigant has a right to seek redress through the legal system as recognized by the United States Supreme Court in *Bates v. State Bar of Arizona* in its landmark decision regarding lawyer advertising.¹⁸³ In response to the argument that advertising might create needless litigation, the Court stated, “[a]lthough advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.”¹⁸⁴

The ban in MRPC 1.8(e) cuts too wide. Litigation is not something to be avoided under all circumstances.¹⁸⁵ Frivolous litigation is unethical and must be avoided. Meritorious litigation, however, promotes justice and punishes wrongful conduct.¹⁸⁶ The proper rule would draw this distinction. An outright ban restricts the meritorious litigation, along with the frivolous.

D. Obtaining Clients Fairly

Another concern is that a client may choose a lawyer based on the lawyer's willingness to lend funds for living expenses instead of based on the quality of the lawyer's services.¹⁸⁷ As discussed previously, the ABA viewed the fact that a client might specifically select an attorney because the attorney was willing to invest in the corporate client as a reason for allowing an attorney to accept stock in lieu of fees.¹⁸⁸ Perhaps in personal injury situations, however, there is more of a risk that lawyers may seek to “purchase clients with lucrative

181. Moliterno, *supra* note 65, at 251; *see, e.g.*, Sahl, *supra* note 145, at 6.

182. Sahl, *supra* note 145, at 6.

183. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *see also* Utah State Bar Ass'n, Ethics Advisory Op. Comm., Op. 11-02 (2011).

184. *Bates*, 433 U.S. at 376.

185. Radin, *supra* note 70, at 69.

186. *Id.* at 72.

187. Utah Bar Ass'n, Ethics Advisory Op. Comm., Op. 11-02.

188. *See supra* text accompanying notes 170–175.

cases,”¹⁸⁹ causing other lawyers to be at a competitive disadvantage if they are without funds to lend.¹⁹⁰

Attorneys might even advertise their willingness to lend living expenses as they advertise their ability to take contingency fees and to finance litigation expenses.¹⁹¹ In comparison to litigation expenses, it could be argued that advancing living expenses poses more of a risk that attorneys could “purchase” clients. Living expenses is potentially a broader category than litigation expenses. Litigation expenses are tied to the litigation process and arguably are more definitive. Individuals might differ on what expenses would fall within, or outside of, the category of living expenses. Given these concerns, it is proposed that attorney financing of living expenses be limited to existing clients. Attorneys should be prohibited from soliciting clients with the promise of payment of living expenses. Further, it is proposed that any gift or loan be only for basic necessities, as a subset of living expenses, where such aid is necessary to prevent the client from being forced to accept a settlement. These restrictions should alleviate concerns regarding the purchase of clients while still fulfilling the goal of providing clients in need with money or a fair financing option to allow continued access to the legal system.

MRPC 1.8(e) should be amended. The justifications for the ban in MRPC 1.8(e) are not persuasive. An attorney financing a client’s living expenses should only be prohibited in those circumstances where it creates an impermissible conflict of interest. Whether an impermissible conflict is created should be judged under the existing conflicts rules on a fact-specific basis, as is regularly done for other conduct that creates potential conflicts. Where the advancement of living expenses to an existing client is for basic necessities and meets Rule 1.8(a) and other conflict rule requirements, many potential conflicts will likely not affect the lawyer’s independent professional judgment as much as other practices currently condoned by the ABA. Lifting the ban is further warranted because it would protect the important countervailing interests of equal access to the legal system and the protection of human dignity during legal representation.

189. Utah State Bar Ass’n, Ethics Advisory Op. Comm., Op. 11-02 (citing GEOFFREY HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 12.12 (3d ed. 2011)).

190. Sahl, *supra* note 145, at 5.

191. Moliterno, *supra* note 65, at 253–54 (advocating both for allowing attorneys to lend clients living expenses and to advertise this fact); Sahl, *supra* note 145, at 6.

IV. The Impact of Third-Party Litigation Funding

A. Consumer Legal Funding

Another reason that attorneys, as members of the legal profession, should advocate for the removal of the ban in MRPC 1.8(e) is that the current rule opens the door for entities that some have termed “legal loan sharks.”¹⁹² Certainly, lawyers can explore options for state, federal, or other organization aid for clients in need.¹⁹³ Where such aid is not available, clients may experience “litigation fatigue.”¹⁹⁴ As explained by the Louisiana Supreme Court:

If an impoverished person is unable to secure subsistence from some source during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his course of action. He may for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount.¹⁹⁵

To avoid having to settle, some clients in need turn to companies that supply nonrecourse loans to plaintiffs with pending legal claims. These companies advertise the ease and convenience of these loans.¹⁹⁶ A former employee of such a company told the *New York Times* that in 2007 he answered fifty to sixty calls each day from either plaintiffs or their lawyers.¹⁹⁷ This consumer legal funding industry is largely unregulated. The loans provided fall outside of regular banking regulations because the payments are contingent on a recovery.¹⁹⁸ Thus, these companies can charge much higher interest rates than other regulated financial institutions.

This financing “presents several problems, namely the unequal bargaining position of the customer and the financing firm, the financial duress prompting the customer to sign a loan agreement, the usurious profit by the financing firm, and the ethical pressures placed on

192. Appelbaum, *supra* note 17.

193. Sahl, *supra* note 145, at 5.

194. Steinitz, *supra* note 68, at 1301 (citing Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 48 *STAN. L. REV.* 1339, 1349 (1994)) (“This diminished ability to fully participate in society comes in addition to the familiar problem of lack of funding and so-called litigation fatigue—depleted monetary and emotional resources needed to pursue lengthy litigation—which leads one-shotters to settle meritorious cases at a discount or to refrain from bringing them altogether.”).

195. Louisiana State Bar Ass’n v. Edwins, 329 So.2d 437, 446 (La. 1976).

196. Appelbaum, *supra* note 17.

197. *Id.*

198. *Id.*

the attorney-client relationship.”¹⁹⁹ It has been asserted that this consumer financing industry has arisen due to the broad ban preventing lawyers from lending money to clients for living expenses.²⁰⁰ As an example, an attorney faced disciplinary charges for providing a client’s child used clothing and persuading the law firm to issue one check in the amount of \$200 for his client’s basic necessities.²⁰¹ Although he was ultimately not disciplined,²⁰² such charges evidence that there is no recognized *de minimis* exception to the financial assistance ban in MRPC 1.8(e). Further, these charges seem peculiar when lawyers’ and law firms’ holiday gifts to corporate clients raise no such concerns. The argument that the corporate client does not need gifts and thus, it is not “financial assistance” seems irrelevant. These gifts are given in appreciation for the corporate client’s business and to generate future legal business.

The scrutiny of the ban in MRPC 1.8(e) is thus not only warranted by the troubling double standard that allows corporate clientele gifts but prohibits needy client gifts, again evidencing a wealthy client bias, but also because the ban effectively propels the needy client to use these “legal loan sharks.”²⁰³ When a client’s only choice is between securing a loan with a high interest rate from a legal loan shark or securing a loan or gift from the client’s attorney, the client could rightly question the state bar’s assertion that the ban in MRPC 1.8(e) protects the client’s interests.

B. Large Litigation Funding

Related to, yet different from, the loans mentioned in the previous Part, plaintiffs and their lawyers could obtain third-party funding for large complex cases.²⁰⁴ In such cases, finance companies will normally fund a sizable portion of the litigation.²⁰⁵ This practice has

199. Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT’L & COMP. L. 343, 357 (2011).

200. *Id.* at 358.

201. Florida Bar v. Taylor, 648 So.2d 1190 (Fla. 1995).

202. *Id.* at 1192.

203. See Morpurgo, *supra* note 199, at 358.

204. The financing can be between the plaintiff, usually a corporation, and an investment company, with the investment company securing the financing with the proceeds from the plaintiff/corporation’s potential recovery; or the financing can be between the law firm and the financing company with the loan being secured by law firm fixtures and/or accounts receivables; or the financing could be secured by the attorney’s portion of the litigation proceeds. COMM’N ON ETHICS 20/20, *supra* note 3, at 8.

205. *Id.* at 6; Nicholas Dietsch, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687, 687–88 (2011) (“These

gained momentum in the United States.²⁰⁶ In its white paper on alternative litigation finance, the American Bar Association Commission on Ethics 20/20 did not report that the ABA was considering a ban on third-party litigation funding,²⁰⁷ and the practice is allowed in some states.²⁰⁸ Additionally, such funding is permissible in other countries, such as Australia, Germany, Spain, and the United Kingdom.²⁰⁹ The willingness of these countries to abolish maintenance restrictions “have created a global environment in which some jurisdictions enable litigants, including multinational litigants, who can comparison shop among international law firms to make use of litigation finance.”²¹⁰ If these trends continue, it seems inevitable that this type of funding will continue to be available to United States litigants.²¹¹

companies advance money to plaintiffs and attorneys to cover personal and legal expenses while pursuing litigation.”).

206. See COMM’N ON ETHICS 20/20, *supra* note 3, at 39 (concluding that there is a demand for alternative litigation funding).

207. See *id.* at 2–3. The Working Group on Alternative Litigation Finance was directed to study the impact of alternative litigation finance on the professional responsibility of lawyers. *Id.* at 2. The Working Group stated within the paper that it did not consider social policy, normative issues, legislative response, or regulatory response. *Id.* However, the implication is that the ABA will not be recommending a ban on alternative litigation funding. For example, the Working Group commented that a theme of the paper is that “it is difficult to generalize about the ethical issues for lawyers associated with alternative litigation finance across the many differences in transaction terms, market conditions, relative bargaining power of the parties to the transactions, and type of legal services being financed.” *Id.* at 3. It then concluded that “[r]egulation that maybe appropriate for products in a sector of the market . . . might be inappropriate in a different segment of the market . . .” *Id.*

208. Dietsch, *supra* note 205, at 693–94 (listing Massachusetts, South Carolina, New Jersey, and Arizona as such states).

209. COMM’N ON ETHICS 20/20, *supra* note 3, at 2; see also Dietsch, *supra* note 205, at 687.

210. Steinitz, *supra* note 68, at 1282.

211. While there are clearly those that oppose corporate and institutional third-party litigation funding (“TPLF”), this form of litigation financing is becoming an increasingly popular way to finance a lawsuit in the United States. Indeed, most states have already had to affirmatively address the issue that TPLF presents as it is becoming a common way to pay for commercial lawsuits. COMMERCIAL & FED. LITIG. SECTION, N.Y. STATE BAR ASS’N, REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING 14–15 (2013), available at <http://www.nysba.org/workarea/DownloadAsset.aspx?id=25665>; COMM’N ON ETHICS 20/20, *supra* note 3, at 1–2 (“[Alternative litigation finance] activities have become increasingly prominent in recent years, leading to significant attention in the legal and popular press, scrutiny by state bar ethics committees, and scholarly commentary. The continuing globalization of the market for legal services makes alternative litigation finance available to clients in markets such as the United Kingdom, Australia, Germany and Spain, where it is legally permitted and generally available.”).

This type of litigation financing involves nonrecourse loans,²¹² but the money is advanced “in exchange for a share of the proceeds of the judgment on, or settlement of, the financed claim.”²¹³ The Ethics 20/20 Commission’s white paper on this issue discussed the myriad of possible ethical conflicts and dilemmas created by this type of third-party litigation funding.²¹⁴ It gave four possible scenarios that could arise and discussed the potential ethical issues, such as the threat of conflicts of interest, the threat to the lawyer’s independent professional judgment, and the implications of the ban on financial assistance.²¹⁵ For example, the Ethics 20/20 Commission acknowledged:

It is a significant open question whether [a client’s irrevocable authorization to the alternative litigation funding supplier to approve or reject a settlement offer] is such a significant limitation on the lawyer’s representation of the client—because it interferes with the lawyer’s exercise of independent professional judgment—that the lawyer must withdraw from the representation of a client who has agreed to such a contract provision.²¹⁶

This ethical concern is significant because it arguably prevents any lawyer from being able to ethically represent a client in these circumstances, and it is just one of many ethical concerns associated with third-party litigation funding.²¹⁷

Despite numerous and serious ethical concerns, the implication of the white paper is that the demand for, and availability of, these services makes third-party litigation financing a current alternative, and attorneys will need to carefully traverse the ethical minefield it presents. The commission concluded:

Lawyers must adhere to principles of professional independence, candor, competence, undivided loyalty, and confidentiality when representing clients in connection with [alternative litigation funding] transactions. In the event that the lawyer’s involvement in the funding process significantly limits the lawyer’s capacity to carry

212. See COMM’N ON ETHICS 20/20, *supra* note 3, at 5–6.

213. *Id.* at 6.

214. *Id.* at 13–39.

215. *Id.* at 13–38. As to the latter, the paper states that Rules 1.8(e) and 1.8(i) may be implicated “[w]hen lawyers themselves become the suppliers, except through the established mechanism of contingency fee financing” *Id.* at 20.

216. *Id.* at 27.

217. An Australian court stated numerous concerns, recognizing that the funders can solicit potential plaintiffs, conduct advertising campaigns, and charge unreasonable fees. Further, where the court does not know about the funders or the funders’ activities, a court does not have the ability to monitor and swiftly react to inappropriate funder behavior that may result in an abuse of process. Steinitz, *supra* note 68, at 1288–89 (citing Campbell’s Cash & Carry Pty. v Fostif Pty. (2006) 229 CLR 386, 487 (Austl.) (Callahan & Hydon, JJ, concurring)).

out these professional obligations, the lawyer must fully disclose the nature of this limitation, explain the risks and benefits of the proposed course of action, and obtain the client's informed consent.²¹⁸

Given the significant ethical risks associated with third-party litigation funding and the lack of any movement by the ABA to ban it, the ABA's ban on attorney's financing client living expenses makes little sense. Where third-party litigation funding is allowed, a plaintiff can contract with a third-party litigation finance company to finance attorney fees, litigation expenses, and living expenses. The third-party litigation funding company is not governed by MRPC 1.8(e) and consequently may finance the plaintiff's living expenses. Restricting the attorney, acting alone, from financing the plaintiff's living expenses while allowing the plaintiff to contract with a third party to finance those same living expenses may be detrimental to the client. Regardless of the type of third-party litigation financing, an attorney might be able to offer financing that costs the client less. If the attorney were allowed to advance the client living expenses, the attorney might decide not to charge the client interest. Even if the attorney chose to charge interest, under this paper's proposal that MRPC 1.8(a) govern these attorney humanitarian loans, the transaction must be fair and reasonable to the client.²¹⁹ The attorney would be required to charge a reasonable, non-usurious interest rate and the other safeguards within Rule 1.8(a) would also be implicated.²²⁰

Yet, when a third-party litigation finance company is contracted, this alternative source of funding comes at a cost. As to the consumer litigation lending companies, the *New York Times* reported that clients were charged as high as 99 percent interest in the first year.²²¹ The ABA white paper reported that "ALF [alternative litigation funding] suppliers . . . assert that they are making an investment or purchasing a share of a claim, not making a loan,"²²² and thus not triggering usury rules. Further, as to the large-litigation funding, "[a] typical contingency fee would be between twenty and fifty percent of the damages, with a cap of three to four times the legal costs advanced by the funder."²²³ State bars that have addressed the issue have allowed attorneys to pass through interest paid to finance companies to finance the

218. COMM'N ON ETHICS 20/20, *supra* note 3, at 39.

219. MODEL RULES OF PROF'L CONDUCT R. 1.8(a)(1) (2013).

220. *Id.*

221. Appelbaum, *supra* note 17, at 3.

222. COMM'N ON ETHICS 20/20, *supra* note 3, at 12.

223. Steinitz, *supra* note 68, at 1276.

litigation as a litigation expense.²²⁴ Thus, this financing is expensive for clients, and the ban on attorney financing of living expenses limits the competition that might otherwise reduce this cost.

The arguments for third-party litigation funding focus on “increased access to justice” and the leveling of the resources available between individual litigants and other categories of litigants,²²⁵ such as corporate clients. The benefits extolled in support of litigation funding apply equally to humanitarian loans by attorneys. Allowing attorneys to provide a fair source of funding would create additional competition for these firms and provide another funding option for needy plaintiffs.

V. State Modifications to MRPC 1.8(e)

Despite the inapplicability of the champerty and maintenance restrictions and the unsupported justifications for the ban on attorney gifts and loans to clients for basic necessities, the vast majority of states have adopted unchanged MRPC 1.8(e). Of those states that have modified the ABA rule, some allow for financing of living expenses only under highly-restrictive conditions. There are only six jurisdictions that can truly be categorized as allowing attorneys to lend living expenses.

A. Highly Restrictive Modification

There are several states that allow financial assistance for client living expenses under restrictive conditions. Initially, New Jersey’s professional conduct rules allow only nonprofit organizations to provide financial assistance to pro bono clients.²²⁶ Under the *California Rules of Professional Conduct*, a lawyer is prohibited from paying the personal or business expenses of a client, except the attorney may, with client consent, pay such expenses to third persons from funds collected for the client or pay such expenses after the representation has ended.²²⁷ The

224. Jennifer Anglim Kreder & Benjamin A. Bauer, *Litigation Finance Ethics: Paying Interest*, 2013 J. PROF. LAW. 1, 7 (2013).

225. See Steinitz, *supra* note 68, at 1326.

226. N.J. RULES OF PROF’L CONDUCT R. 1.8(e)(3) (2002), available at <http://www.judiciary.state.nj.us/rules/apprpc.htm#x1dot8> (“[A] non-profit organization authorized under R. 1:21-1 (e) may provide financial assistance to indigent clients whom it is representing without fee.”).

227. CAL. RULES OF PROF’L CONDUCT R. 4-210(A)(1) (1992), available at <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules.aspx>. California has proposed rules that include Rule 1.8.5, which would allow the payment of personal and business expenses of a client “after the lawyer is retained by the client” and where the client

professional conduct rules in Mississippi and Alabama require financial emergencies.²²⁸ Mississippi's rule would allow an attorney to provide financial assistance to existing clients but restricts the financial assistance to \$1500 in any one matter for "reasonable and necessary living expenses incurred . . . under dire and necessitous circumstance[s] . . ."²²⁹ This assistance must be repaid upon successful conclusion of the matter.²³⁰ The attorney must report such loans to the Mississippi bar and can apply to the Mississippi bar to lend more money.²³¹ Further, the attorney must have inquired into the client's circumstances and cannot advertise promises of such payments.²³² Alabama's rule, although less detailed, states that a lawyer may provide emergency financial assistance to clients only in the "narrowest and most compelling of circumstances," which does not include "the regular provision of income or support."²³³ It also requires repayment of the financial assistance and prohibits a lawyer from making a promise of such financial assistance prior to the lawyer's employment.²³⁴ Utah has adopted the MRPC 1.8(e) language and relevant comment. Utah, however, added a comment that expands the rule and allows financial aid to indigent clients for living expenses. It states:

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

promises in writing to repay the loan. CAL. RULES OF PROF'L CONDUCT R. 1.8.5(a)(1)-(2) (Proposed Official Draft 2010). The transaction would then need to meet the requirements of Proposed Rule 1.8.1, which is similar to Rule 1.8(a) of the Model Rules of Professional Conduct. *Id.* R. 1.8.1, 1.8.5 cmt. 2.

228. MISS. RULES OF PROF'L CONDUCT R. 1.8(e)(2)(b) (1999), available at http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf; ALA. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2008), available at http://judicial.alabama.gov/library/rules/cond1_8.pdf.

229. MISS. RULES OF PROF'L CONDUCT R. 1.8(e)(2)(b), available at http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf ("[S]uch payments . . . 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.").

230. *Id.*

231. An attorney may petition the Standing Committee on Ethics of the Mississippi Bar by *ex parte* application for approval of more money. *Id.* cmt. ¶ 2. Further, the attorney "must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation . . ." *Id.*

232. *Id.*

233. ALA. RULES OF PROF'L CONDUCT R. 1.8(e)(3) cmt. ¶ 5 (2008), available at http://judicial.alabama.gov/library/rules/cond1_8.pdf.

234. *Id.*

be required or desirable to assist the indigent client in the course of the litigation.²³⁵

These rules allow attorneys to offer limited financing for financial emergencies, often with restrictive conditions such as “dire and necessitous circumstance[s]”²³⁶ or the “narrowest and most compelling of circumstances.”²³⁷

B. Moderately Restrictive Modifications

Rules in other states that allow attorneys to help clients with living expenses can be categorized as imposing more moderate restrictions. These restrictions include that the attorney not have solicited the client with a promise of a loan, that the client ultimately remain responsible for repayment of the loan, or that the loan be necessary to prevent the client from settling prematurely.²³⁸ Minnesota, North Dakota, and Montana’s rules contain all of these restrictions and further only allow the attorney to guarantee a loan on a client’s behalf.²³⁹

The Louisiana rule is not limited to only guaranteeing loans and does not discuss the requirement for client repayment.²⁴⁰ It, however,

235. UTAH RULES OF PROF’L CONDUCT 1.8(e) cmt. [10a], *available at* http://www.utcourts.gov/resources/rules/ucja/ch13/1_8.htm.

236. MISS. RULES OF PROF’L CONDUCT R. 1.8(e)(2)(b), *available at* http://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf.

237. ALA. RULES OF PROF’L CONDUCT R. 1.8(e)(3) cmt. ¶ 5, *available at* http://judicial.alabama.gov/library/rules/cond1_8.pdf.

238. Minnesota Rules of Professional Conduct Rule 1.8(e)(3) states:

[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.

MINN. RULES OF PROF’L CONDUCT R. 1.8(e)(3) (2011), *available at* <http://lprb.mncourts.gov/rules/Documents/MN%20Rules%20of%20Professional%20Conduct.pdf>. North Dakota’s rule is identical. N.D. RULES OF PROF’L CONDUCT R. 1.8(e)(3) (2009), *available at* <http://www.ndcourts.gov/rules/conduct/frameset.htm>. Montana’s rule is almost identical except that it states that the “lawyer may, for the sole purpose of providing basic living expenses” guarantee a loan and that the guarantee of the loan must be from “a regulated financial institution whose usual business involves making loans” MONT. RULES OF PROF’L CONDUCT R. 1.8(e)(3) (2011), *available at* <http://www.montanabar.org/associations/7121/files/rpc.pdf>.

239. MINN. RULES OF PROF’L CONDUCT R. 1.8(e)(3); MONT. RULES OF PROF’L CONDUCT R. 1.8; N.D. RULES OF PROF’L CONDUCT R. 1.8(e)(3).

240. LA. RULES OF PROF’L CONDUCT R. 1.8(e)(4) (2011), *available at* <http://www.lad.org/Material/Publication/2011-10-30%20ROPC.pdf> (“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.”).

contains the other restrictions mentioned and adds additional restrictions that are similar to the requirements of MRPC 1.8(a) mandating fair dealing in business transactions with clients.²⁴¹ It further includes specific rules regarding when charging interest is allowable.²⁴²

Texas has a lenient rule that allows living expenses to be advanced.²⁴³ The only requirements under the rule are that it be an advance or a guarantee for reasonably necessary medical and living expenses.²⁴⁴ The advance may be contingent on the outcome of the litigation.²⁴⁵ The District of Columbia's rule is also lenient in that it allows the lawyer to provide financial assistance for living expenses restricted only by a requirement that they be necessary and minimum living expenses and that they be necessary for the client to maintain the litigation.²⁴⁶

Thus, several jurisdictions recognize that attorneys should be allowed to give or lend money to clients in need. There is no consensus, however, as to how to accomplish this objective. Interestingly, in a few states that follow the MRPC 1.8(e), disciplinary agencies sometimes avoid the ban by allowing gifts. For example, in Arizona, although the disciplinary agency stated that an attorney could not lend money for needed car repairs²⁴⁷ or guarantee a loan for a client,²⁴⁸ a lawyer could give a client money for things, such as needed medical care,

241. *Id.* (“[A] lawyer may provide financial assistance to a client who is in necessitous circumstances . . .”). The restrictions on such assistance include the requirement of reasonable inquiry that the cause would not be able to be maintained, that the assistances not exceed the minimum sum necessary to meet the client's needs, and that the promise of assistance cannot have induced or come before the hiring of the lawyer or be advertised. *Id.* R. 1.8(e)(4)(i)–(iv).

242. *Id.* R. 1.8(e)(5)(i)–(v).

243. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.8(d)(1) (2005), available at http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Help_line&Template=/CM/ContentDisplay.cfm&ContentFileID=96.

244. *Id.*

245. *Id.*

246. D.C. RULES OF PROF'L CONDUCT R. 1.8(d) (2006), available at <http://www.dcbbar.org/bar-resources/legal-ethics/amended-rules/rule1-08.cfm>; *id.* R. 1.8 cmt [9] (“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.”).

247. Ariz. Bar Ass'n, Ethics Op. 95-01 (1995).

248. Ariz. Bar Ass'n, Ethics Op. 91-19 (1991).

where there is no expectation of repayment.²⁴⁹ In Virginia, de minimis gifts²⁵⁰ have been allowed.

Conclusion

To streamline the various states' rules, the ABA and the states should amend MRPC 1.8(e) to allow attorneys to give or lend money for basic necessities to existing clients to prevent them from having to settle their cases for a discounted amount or seek assistance from so-called litigation loan sharks. Living expenses should be treated similarly to litigation expenses under MRPC 1.8(e) in that repayment can be contingent on recovery in the litigation and be paid by the attorney for indigent clients.²⁵¹ Different from litigation expenses, however, advances for living expenses should be governed by MRPC 1.8(a).

These proposed rule changes balance the competing concerns regarding attorney aid for client living expenses. First, lifting the ban on humanitarian loans and gifts advances the legal profession's mission to ensure that needy clients' dignity is preserved during legal representation and those clients have equal access to the judicial system. Second, to address the concern that such loans create an impermissible conflict of interest affecting the lawyer's independent professional judgment, permissible loans should be limited to those for basic necessities to prevent clients from being forced to accept a settlement offer. Such loans would be subject to governing ethics rules, such as MRPC 1.8(a). Further, loans and gifts should be limited to existing clients to prevent individuals from selecting an attorney based solely on whether that attorney will fund living expenses. The idea is to curtail the possibility that clients select the attorney who offers to pay the most but to still allow attorneys to provide a fair source of financing. Unlike third-party lender financing, when humanitarian loans must meet MRPC 1.8(a) standards, as is required for attorney client loans outside of the litigation context, clients' interests are protected.²⁵²

These proposed changes could be effectuated by amending MRPC 1.8(e) to add a third section that would state: (3) A lawyer may give or advance money for basic necessities to enable an existing client

249. Ariz. Bar Ass'n, Ethics Op. 91-14 (1991); *see also* Okla. Bar Ass'n, Ethics Op. 326 (2009) (allowing nominal monetary gifts by public defender to death row inmate).

250. Va. Bar Ass'n, Ethics Op. 1830 (2006).

251. MODEL RULES OF PROF'L CONDUCT R. 1.8 (e)(1)–(2) (2013).

252. *Id.* R. 1.8(a) cmt. [1] ("The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to 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.²⁵³ The repayment of an advance may be contingent on the outcome of the matter, but financial assistance may not be promised prior to the start of the lawyer client relationship. Comment 10 to MRPC 1.8 would need to be amended to delete the information concerning the prohibition of such loans. Information could be inserted that the purpose of the rule is to prevent needy clients from being forced to choose between accepting a discounted settlement offer, pursuing expensive third-party financing, or pursuing legal redress without basic necessities. It could emphasize that loans and gifts are permissible so long as no promise of financial assistance was made to the client by the lawyer, or by another on the lawyer's behalf, prior to the employment of the lawyer by the client.²⁵⁴ It could include a specific prohibition on attorneys advertising that they provide gifts or loans for living expenses. Further, the comment could state that similar to attorney client loans outside of the litigation context, loans for living expenses during litigation are also subject to MRPC 1.8(a).

Where lawyers are allowed to financing living expenses for existing clients, those clients are less likely to suffer during the legal representation due to an inability to purchase basic necessities. These humanitarian gifts or loans would not only preserve the clients' dignity during the representation, but consequently would prevent the clients from having to either procure expensive third-party funding or accept a discounted settlement to have money to sustain themselves. Ensuring equal access to the judicial system and preserving client dignity fulfills an important aspect of lawyers' duties and the legal profession's mission.

253. See, e.g., MINN. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2011).

254. See, e.g., *id.*

