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8 **IN THE SUPREME COURT**  
9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-23-

11 **PETITION TO AMEND RULE 42**  
12 **(ER 1.8), ARIZ. R. SUP. CT.**

13 Pursuant to Rules 28 and 42.1(b)(2) of the Arizona Supreme Court Rules, the  
14 Petitioner, the Arizona Supreme Court Ethics Advisory Committee petitions the  
15 Court to amend ER 1.8, Conflict of Interest: Current Clients: Specific Rules, to  
16 expressly permit a lawyer representing an indigent client in litigation to provide  
17 modest gifts to the client for food, rent, transportation, medicine, and other basic  
18 living expenses.  
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20 **I. Background.**

21 In its current form, ER 1.8(e) generally prohibits a lawyer from providing  
22 “financial assistance to a client in connection with pending or contemplated  
23 litigation.” This prohibition on financial assistance is rooted in common law rules  
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1 against champerty and maintenance.<sup>1</sup> At common law, maintenance occurred when  
2 a person with no legal interest in a lawsuit supported the litigation, financially or  
3 otherwise.<sup>2</sup> Champerty was a subset of maintenance in which the person providing  
4 maintenance made an agreement to be paid from the litigation's proceeds.<sup>3</sup>  
5 Prohibitions on these practices were viewed as necessary to "to prevent officious  
6 intermeddlers from stirring up strife and contention by vexatious and speculative  
7 litigation which would disturb the peace of society, lead to corrupt practices, and  
8 prevent the remedial process of law."<sup>4</sup>

11 In the context of ER 1.8, the general prohibition on financial assistance is  
12 intended to prevent a lawyer from acquiring "too great an interest in the  
13 representation," thereby creating a conflict between the lawyer and client.<sup>5</sup> A related  
14 concern is the potential for lawyers to use the promise of financial assistance to  
15 attract prospective clients. Doing so may "encourage clients to pursue lawsuits that  
16 might not otherwise be brought."<sup>6</sup> Additionally, this practice could lead clients to  
17 hire a lawyer based on the financial inducement rather than the lawyer's experience,  
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23 <sup>1</sup> ER 1.8 cmt. ¶ 14.

24 <sup>2</sup> 14 Am. Jur. 2d *Champerty, Maintenance, Etc.* § 1.

25 <sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> ER 1.8 cmt. ¶ 14.

<sup>6</sup> ER 1.8 cmt. ¶ 8.

1 skill, or other professional attributes.<sup>7</sup>

2 On the other hand, our modern understanding of legal representation  
3 recognizes that allowing some forms of financial assistance to clients allows  
4 meritorious claims and defenses to be asserted on behalf of clients who would  
5 otherwise be financially unable to do so. ER 1.8(e) currently has two exceptions.  
6 First, a lawyer may advance the court costs and expenses of litigation and may make  
7 repayment contingent on the matter's outcome.<sup>8</sup> Second, a lawyer representing an  
8 indigent client may pay court costs and litigation expenses on the client's behalf.<sup>9</sup>  
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11 Over the years, however, Arizona lawyers have sought ways to further expand  
12 their ability to ethically provide financial support to clients. Throughout the 1970s  
13 and 1980s, the State Bar of Arizona Ethics Committee addressed several inquiries  
14 relating to this topic.<sup>10</sup> In 1989, in Opinion 89-03, the Ethics Committee concluded  
15 that a lawyer representing a client pro bono could ethically donate money to the  
16 client for living expenses as long as the motive was "purely charitable" and the  
17 lawyer expected no repayment.<sup>11</sup> In 1991, in Opinion 91-14, the Ethics Committee  
18 extended this conclusion to allow similar gifts from lawyers to indigent clients, even  
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23 <sup>7</sup> *E.g., In re Carroll*, 124 Ariz. 80, 86, 602 P.2d 461, 467 (1979) ("We are compelled to point out that the practice of  
24 making advances to clients, if publicized, would constitute an improper inducement for clients to employ an  
25 attorney.").

<sup>8</sup> ER 1.8(e)(1).

<sup>9</sup> ER 1.8(e)(2). Note that ER 1.8(e)'s prohibitions apply also to administrative proceedings. ER 1.8 cmt. ¶ 8.

<sup>10</sup> *See* Ariz. Ethics Op. 91-14 (1991).

<sup>11</sup> Ariz. Ethics Op. 89-03 (1989).

1 when the lawyer was not representing the client pro bono.<sup>12</sup>

## 2 **II. Purpose of the Proposed Amendment.**

3 Since 1991, two developments have made this topic ripe for consideration as  
4 a rule change. First, the State Bar of Arizona in 2019 ceased providing ethics  
5 opinions, with this function transferred to the Supreme Court Ethics Advisory  
6 Committee. Although the State Bar’s ethics opinions remain available on the Bar’s  
7 website, they are (and always have been) advisory and nonbinding. Second, in 2020  
8 the American Bar Association amended Model Rule 1.8(e) to add subsection (e)(3),  
9 which permits lawyers to provide modest gifts for living expenses to indigent pro  
10 bono clients.<sup>13</sup>

11 The Petitioner proposes that the Court amend ER 1.8(e) for the purpose of  
12 providing clear, binding authority. Arizona lawyers with charitable intentions may  
13 be reluctant to rely on a nonbinding ethics opinion from over thirty years ago.  
14 Indeed, even when Opinion 91-14 was published, it included a dissent calling for a  
15 rule change.<sup>14</sup> Additionally, the difference between ER 1.8(e) and the amended  
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21 <sup>12</sup> Ariz. Ethics Op. 91-14 (1991).

22 <sup>13</sup> Amanda Robert, *Model Rule Revision Allows Attorneys to Help Pro Bono Clients in Need*, ABA JOURNAL (Dec. 1,  
2020), [https://www.abajournal.com/magazine/article/model-rule-revision-allows-attorneys-to-help-pro-bono-clients-  
in-need](https://www.abajournal.com/magazine/article/model-rule-revision-allows-attorneys-to-help-pro-bono-clients-in-need); MODEL RULES OF PRO. CONDUCT R. 1.8(e) (2021).

23 <sup>14</sup> Ariz. Ethics Op. 91-14 (dissent) (“With two exceptions not applicable here, ER 1. 8(e) plainly prohibits a lawyer  
24 from providing financial assistance to a client in connection with pending litigation. The result reached by the majority  
25 requires a change in the rule.”); *see also* David D. Dodge, *Paying to Help Your Client's Lawsuit*, ARIZ. ATT’Y,  
February 2007, at 6 (noting that, despite the State Bar’s ethics opinions, “the best choice here is to play by the rules  
set forth in ER 1.8(e) and not try to circumvent [its prohibition on financial assistance] by calling payments to clients  
‘gifts’”).

1 Model Rule could create confusion, especially if an Arizona lawyer is admitted to  
2 practice in another jurisdiction that has adopted Model Rule 1.8(e)(3).<sup>15</sup>

### 3 **III. Content and Rationale for the Proposed Amendment.**

4 The Petitioner’s proposed amendment would add subsection (e)(3) to ER 1.8  
5 along with three related comments, as set forth in Appendix A. The proposed  
6 language is nearly identical to that of Model Rule 1.8(e)(3) and Model Rule 1.8,  
7 Comment ¶¶ 11 to 13, **set forth at Appendix B**. The key distinction is that unlike the  
8 Model Rule, the proposed ER 1.8(e)(3) (and its related comments) omit the  
9 requirement of pro bono representation. Elimination of the pro bono requirement  
10 aligns the proposed ER 1.8(e)(3) with Arizona Ethics Opinion 91-14.

11 Notably, the proposed language applies only to “modest” gifts. Providing  
12 substantial gifts to clients, even with charitable motives, could potentially create a  
13 conflict of interest between lawyer and client.<sup>16</sup> Limiting ER 1.8(a)(3) to modest  
14 gifts reduces this risk.

15 In sum, if adopted, ER 1.8(e)(3) would essentially codify the holding of  
16 Arizona Ethics Opinion 91-14. Doing so would provide clear guidance to Arizona  
17 lawyers. Moreover, this proposed amendment would reflect the rationale stated by  
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24 <sup>15</sup> The American Bar Association provides a chart reflecting which jurisdictions have adopted, inter alia, Model Rule  
1.8(e)(3): [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc-1-8.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-8.pdf)  
(current as of March 2023).

25 <sup>16</sup> See ER 1.7(a)(2) (stating that a conflict of interest could arise when a lawyer’s personal interest creates a significant  
risk of materially limiting the client’s representation).

1 the State Bar of Arizona Ethics Committee decades ago: “It would be an unfortunate  
2 and unreasonable limitation upon members of the Bar to prohibit them from making  
3 gifts which are truly charitable in nature.”<sup>17</sup>  
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5 **IV. Conclusion.**

6 The Petitioner respectfully requests that the Court adopt the proposed rule as  
7 set forth in Appendix A. In the alternative, Petitioner requests that the Court refer  
8 the matter back to the Committee with directions.  
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10 RESPECTFULLY SUBMITTED this 21 day of November, 2023.  
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13 /s/  
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 Judge Christopher Staring  
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17 Electronic copy filed with the  
18 Clerk of the Supreme Court of Arizona  
19 this \_\_\_\_\_ day of \_\_\_\_\_, 2023.  
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<sup>17</sup> Ariz. Ethics Op. 91-14 (quoting Ariz. Ethics Op. 89-03).

A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.8

ER 1.8. Conflict of Interest: Current Clients: Specific Rules

Effective: January 1, 2021

**(a)** A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to 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.

**(b)** A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

**(c)** A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

**(d)** Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

**(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; and

(3) a lawyer representing an indigent client may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

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

**(f)** A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by [ER 1.6](#).

**(g)** A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

**(h)** A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement:

(2) make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities; or

(3) settle such allegations, claims, or potential claims with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

**(i)** 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.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(l) A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(m) A lawyer wishing to engage in a business transaction with a client must comply with both [ER 1.7](#) and 1.8(a) if:

(1) the client expects the lawyer to represent the client in the transaction; or

(2) the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction.

### **Credits**

Amended June 9, 2003, effective Dec. 1, 2003; Aug. 27, 2020, effective Jan. 1, 2021.

### **Editors' Notes**

#### **COMMENT [2021 AMENDMENT]**

##### **Business Transactions Between Client and Lawyer**

[1] The risk to a client is greatest when the client expects the lawyers to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with requirements of paragraph (a), but also with requirements of [ER 1.7](#). Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, including when lawyers refer clients for nonlegal services provided in the firm by either the lawyer or nonlawyer in the firm or refer clients through a separate entity in which the lawyer has a financial interest, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some

cases, the lawyer's interest may be such that [ER 1.7](#) will preclude the lawyer from seeking the client's consent to the transaction.

[2] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

### **Use of Information Related to Representation**

[3] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See ERs 1.2(d), 1.6, 1.9(c), 1.14, 3.3, 4.1(b), 8.1 and 8.3.

### **Gifts to Lawyers**

[4] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer or a related person a more substantial gift, paragraph (c) does not prohibit the lawyer or related person from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not solicit a substantial gift to be made to the lawyer or related person, or for the benefit of the lawyer or a related person, except where the lawyer is related to the client as set forth in paragraph (c). Nothing in paragraph (c) is intended to interfere with a lawyer's efforts on behalf of a charitable institution, provided that the lawyer or related person has no financial interest in the charitable institution.

[5] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[6] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in [ER 1.7](#) when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the

nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

### **Literary Rights**

[7] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to [ER 1.5](#) and paragraphs (a) and (i).

### **Financial Assistance**

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

[9] A lawyer representing an indigent may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

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

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

or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

### **Person Paying for Lawyer's Services**

[12] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also [ER 5.4\(c\)](#) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[13] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with [ER 1.7](#). The lawyer must also conform to the requirements of [ER 1.6](#) concerning confidentiality. Under [ER 1.7\(a\)](#), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under [ER 1.7\(b\)](#), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under [ER 1.7\(b\)](#), the informed consent must be confirmed in writing.

### **Aggregate Settlements**

[14] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under [ER 1.7](#), this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, [ER 1.2\(a\)](#) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also [ER 1.0\(e\)](#) (definition of informed consent). This rule does not apply to lawyers representing governmental agencies or officials unless, in the particular action, there is a potential for a conflict of interest between the jointly represented government agencies or officials on the issue of settlement. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

### **Limiting Liability and Settling Claims**

[15] Agreements prospectively limiting a lawyer's liability for malpractice, whether made at the outset of the representation or at any time when the client is unaware of a claim or potential claim, are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for that lawyer's own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with [ER 1.2](#) that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[16] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel. Notwithstanding the provisions of paragraph (h)(3), agreements that purport to limit a person's ability to report professional misconduct are not binding on disciplinary authorities.

### **Acquiring Proprietary Interest in Litigation**

[17] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by [ER 1.5](#).

## **Client-Lawyer Sexual Relationships**

[18] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[19] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See [ER 1.7\(a\)\(2\)](#).

[20] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

## **Imputation of Prohibitions**

[21] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraphs (j) and (l) are personal and are not applied to associated lawyers.

## **Personal Relationships Between Lawyers**

[22] [ER 1.8\(l\)](#) applies to related lawyers who are in different firms. A lawyer related to another lawyer, e.g., as parent, child, sibling, spouse or cohabitant ordinarily may not represent a client in a matter where the other lawyer is representing another party, unless each client gives informed consent. The disqualification arising from the relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See [ER 1.10](#).

[Notes of Decisions \(55\)](#)

17A Pt. 2 A. R. S. Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 1.8, AZ ST S CT RULE 42 RPC  
ER 1.8

State Court Rules are current with amendments received and effective through July 15, 2023. The Code of Judicial Administration is current with amendments received through July 15, 2023.

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