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

9 In the Matter of:

10 **PETITION TO AMEND ER 1.8,**
11 **RULE 42 OF THE ARIZONA**
12 **RULES OF SUPRME COURT**

Supreme Court No. R-23-0051

STATE BAR OF ARIZONA
COMMENT

13 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby submits the following as its comment to the
15 above-captioned Petition.

16 Petition R-23-0051 proposes to amend Ethical Rule (“ER”) 1.8, Arizona Rule
17 of the Supreme Court 42. In its current form, ER 1.8(e) generally prohibits a lawyer
18 from providing “financial assistance to a client in connection with pending or
19 contemplated litigation.” This Petition proposes to modify this Rule to allow
20 lawyers to provide modest gifts for living expenses to indigent clients. The State Bar
21 generally supports this proposed Rule change and its underlying rationale, albeit
22 with two revisions. Specifically, the State Bar recommends the deletion of the last
23 sentence in proposed ER 1.8(e) and deletion of proposed Comment [11], as
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1 explained further below.

2 The proposed addition to ER 1.8(e), in the last sentence, states that, “Financial
3 assistance under this Rule may be provided even if the representation is eligible for
4 fees under a fee-shifting statute.” Proposed Comment [11], in turn, states:

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

14 The Petition contains no explanation for permitting financial assistance to
15 indigent clients when fees may be awarded or recovered, but *only* when recovery is
16 pursuant to a fee-shifting statute. *See* Ariz. R. Sup. Ct. 28(a)(4)(A)(i) (a rule petition
17 “must . . . explain why the Court should adopt, amend, or abrogate rules”).

18 This carve-out could lead to confusion about the scope of the Rule, as well as
19 inconsistent application and enforceability.

20 A hypothetical illustrates some of these concerns: Two parties are litigating
21 an alleged breach of contract. The contract contains a fee-shifting provision (which
22 would mean the lawyer could *not* give financial assistance under proposed ER
23 1.8(e)).

24 At the outset of the representation, one party disputes the validity of the
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1 contract (and, by extension, the contractual fee-shifting provision). If the contract is
2 found to be valid and enforced, the contractual provision likely would apply to shift
3 fees to the prevailing party. But if the contract is *not* upheld, fees still may be
4 available pursuant to statute, such as A.R.S. § 12-341.01 (which generally permits
5 fee shifting in cases arising out of contract). In the latter instance, a lawyer *would* be
6 permitted to provide financial assistance to a client under proposed ER 1.8(e).
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9 A lawyer in such a representation, however, would have a very difficult time
10 discerning whether he/she could offer financial assistance to the client, particularly
11 before any conclusions regarding fee shifting (and the basis therefore) are reached.
12 Arguably, ER 1.8(e) as-written both expressly permits AND disallows such
13 assistance in this case, unless application of the Rule requires the parties to wait until
14 the court awards or denies fees. In addition to causing confusion, such delays would
15 be of little help to lawyers or clients subject to the financial assistance permitted by
16 proposed ER 1.8(e), particularly in the absence of any meaningful justification for
17 the distinction.
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20 As another example, under the current proposal, a lawyer in a contingency fee
21 representation could not provide financial assistance to a client, even if all other
22 provisions of proposed ER 1.8(e) are met; yet if the court determines a lawyer or
23 party in that representation has engaged in unreasonable conduct, fees *could* be
24 awarded pursuant to A.R.S. § 12-349. In this example, financial assistance both
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