

2014

# Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients

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## Recommended Citation

Rulli, Louis S., "Roadblocks to Access to Justice: Reforming Ethical Rules to Meet the Special Needs of Low-Income Clients" (2014). *Faculty Scholarship*. Paper 1531.  
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ROADBLOCKS TO ACCESS TO JUSTICE:  
REFORMING ETHICAL RULES TO MEET THE SPECIAL NEEDS  
OF LOW-INCOME CLIENTS

LOUIS S. RULLI\*

INTRODUCTION

The fiftieth anniversary of *Gideon v. Wainwright*<sup>1</sup> sparked a robust conversation about our nation's justice system and the difficult barriers that ordinary citizens confront in seeking access to justice.<sup>2</sup> A right to counsel for the accused has made our criminal courtrooms fairer, as Justice Hugo Black envisioned when he authored the Supreme Court's unanimous opinion in *Gideon* and recited Justice Sutherland's prophetic words, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>3</sup> But the true promise of *Gideon* remains unrealized. We have yet to muster the political will and financial resources for indigent defense representation that are needed to balance the scales of justice.<sup>4</sup>

*Gideon's* anniversary has also focused needed attention on our civil courtrooms. The decline in financial support for civil legal assistance to the poor and years of economic recession have only deepened the nation's justice gap, with millions of vulnerable residents having to stand alone in court when attempting to protect their most important interests.<sup>5</sup> The organized bar, in collaboration with legal aid organizations, has provided a consistent voice for expanding access to justice by raising public awareness of this crisis and mounting strong efforts to increase public funding for civil legal assistance, obtain greater pro bono legal assistance, and promote a right to

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<sup>1</sup> 372 U.S. 335, 339-42 (1963) (holding that individuals accused of a crime have a right to legal assistance and that state courts must appoint counsel for indigent defendants who cannot afford counsel).

<sup>2</sup> Yale Law Journal's 2013 symposium focused on the fiftieth anniversary of *Gideon* and included articles on the current status of *Gideon*, its effects, and potential changes. See generally Symposium, *The Gideon Effect: Rights, Justice, and Lawyers Fifty Years After Gideon v. Wainwright*, 122 YALE L.J. 2106 (2013).

<sup>3</sup> *Gideon*, 372 U.S. at 344-45 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

<sup>4</sup> Public defense must provide effective representation in order to pass the *Gideon* standard of counsel. This burden is not met when systematic flaws due to an inadequate budget deprive indigent criminal defendants of Sixth Amendment right to counsel. See *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. Dec. 4, 2013) ("Mere appointment of counsel to represent an indigent defendant is not enough to satisfy the Sixth Amendment's promise of the assistance of counsel."); see also *id.* at 1137 ("The notes of freedom and liberty that emerged from *Gideon's* trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right."). Further, public defenders need to be able to meet their ethical burdens on each case individually rather than fail to meet it on any when overburdened. See *Pub. Defender, Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 281-82 (Fla. 2013) (holding that the overworked public defender's office may withdraw from assigned cases and reject new ones where crippling caseloads threaten the ability of defenders to meet ethical obligations).

<sup>5</sup> See *infra* notes 10-29 and accompanying text.

counsel in civil matters involving basic human needs. The judiciary has also increasingly become a leader and innovator in these efforts. Many prominent state court judges have assumed leadership roles in advocating for increased funding for legal aid, while also developing pilot programs and implementing changes in court rules that promise to expand access to legal help.<sup>6</sup> Rapid change defines the current legal environment, and bold and aggressive measures are needed to make headway at ameliorating the justice gap.<sup>7</sup>

While many states have modified court rules to increase funding for civil legal assistance and expand pro bono legal assistance to the poor, there have been relatively few changes to the Model Rules of Professional Conduct over the past fifteen years aimed at promoting access to justice for those who are unable to afford counsel.<sup>8</sup> The Model Rules have failed to keep pace with the changing ways in which lawyers are struggling to provide legal help to the poor. Our profession's ethical rules remain largely situated in a traditional lawyering paradigm where lawyers meet with paying clients in the comfort of their offices and have ample time and resources to explore the full range of client needs. This model assumes that clients have the financial means and freedom of choice to select lawyers who best meet their needs. Based upon this paradigm, the Model Rules impose reasonable constraints on lawyering activities designed to prevent lawyer overreaching and protect the public in the delivery of for-profit services. The Model Rules purposely employ vagueness and ambiguity to give lawyers flexibility in exercising professional judgment in situations where context often makes an important difference.<sup>9</sup>

Today, however, low-income individuals infrequently encounter the traditional paradigm when they need legal help. Rather, in their non-traditional lawyering world, legal help is

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<sup>6</sup> See, e.g., James C. McKinley, Jr., *Rule Change Could Ease 'Justice Gap' For the Poor*, N.Y. TIMES, Dec. 3, 2013, at A22 (detailing rule changes by the New York chief judge to increase the availability of lawyers by allowing out-of-state non-licensed corporate lawyers to engage in pro bono work); Press Release, Supreme Court of Ill., Chief Justice Kilbride and the Illinois Supreme Court Announce New Initiative to Ease Access to Courts 2 (June 13, 2012), available at <http://www.state.il.us/court/media/PressRel/2012/061312.pdf> (discussing such initiatives as creating standardized forms and utilizing law students, as well as the similar commissions created in 26 other states); *Judge Rizzo on White House Panel*, PHILA. BAR REP. Jan. 2011, at 8, available at [http://www.philabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Jan\\_2011.pdf](http://www.philabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Jan_2011.pdf) (discussing Philadelphia's widely acclaimed Residential Mortgage Foreclosure Diversion Pilot Program launched by Judge Annette Rizzo of the Philadelphia Court of Common Pleas).

<sup>7</sup> See Sheldon Krantz, *Aggressive Action – Not Tinkering – Is Required to Resolve the Access to Justice Crisis*, A.B.A. J. (Feb. 6, 2014, 9:00 AM), [http://www.abajournal.com/legalrebels/article/aggressive\\_action--not\\_tinkering--is\\_required\\_access\\_to\\_justice/](http://www.abajournal.com/legalrebels/article/aggressive_action--not_tinkering--is_required_access_to_justice/) (discussing current shortcomings in the legal profession's approach to solving the justice gap and offering several solutions).

<sup>8</sup> See generally LEGAL SERVS. CORP., REPORT OF THE PRO BONO TASK FORCE (2012), [http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF\\_%20Report\\_FINAL.pdf](http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf) (noting that changes in the rules of areas such as bar admission, student practice, and emeritus lawyers could significantly increase pro bono access). The Model Rules have been amended on nine separate occasions since February 2002 with many of the changes directed to multijurisdictional practice, corporate responsibility, client protection, conflicts of interest, and technology and global legal practice developments. See, e.g., AM. BAR ASS'N, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 4-6 (2002), available at [http://www.americanbar.org/content/dam/aba/migrated/final\\_mjp\\_rpt\\_121702\\_2.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_121702_2.authcheckdam.pdf) (summarizing adopted recommendations to amend the Model Rules of Professional Conduct to better address the legal work of lawyers in jurisdictions in which they are not admitted to practice law). There have been several important changes affecting access to justice, largely taken from the report of the Ethics 2000 Commission, and these are discussed more fully in this Article.

<sup>9</sup> See *infra* notes 49-51 and accompanying text.

increasingly delivered by agencies of last resort at a high volume and in community settings or courtroom corridors quite distant from the comfort of well-resourced law firm offices. It is in these non-traditional settings that the profession has an obligation to ask: Do the Model Rules of Professional Conduct promote or hinder access to justice? Have the Model Rules kept pace with a rapidly changing legal environment that does not often resemble the traditional lawyering paradigm upon which so many of our ethical rules are squarely based?

This Article contends that the Model Rules have not kept pace with the demands of the justice gap. The Model Rules unnecessarily constrain public interest and pro bono lawyers based upon assumptions grounded in a traditional, for-profit paradigm that have little to do with the delivery of short-term legal services in a high-volume, non-profit world. Ambiguity and vagueness in the Model Rules that serve the needs of traditional, private sector attorneys too often act to chill needed help from public interest or pro bono lawyers who are uncertain whether their well-intended efforts will be regarded as professional misconduct.

This Article also describes how the current Model Rules impair the ability of lawyers to provide discrete services to unrepresented individuals, extend financial assistance to indigent clients, and conclude agreed-upon representation in pro bono matters. Through these examples, the Article illustrates the need for the Model Rules to adapt more quickly to the realities of the justice gap and to meet the special challenges that legal aid and volunteer lawyers face when helping the poor. There is a greater need than ever for the appointment of a high level, blue ribbon ethics commission, populated generously by leaders of legal aid and pro bono organizations and of state courts that serve the poor, to conduct a comprehensive review of the Model Rules viewed through the lens of a non-traditional lawyering paradigm. This commission should be charged with the goal of promoting access to justice through ethical lawyering.

#### *The Justice Gap in an Inverted Funding Environment*

The funding mechanism for civil justice functions exactly the opposite of how it should. Resources for civil justice evaporate when they are needed most. As the need for free legal help explodes in economically distressed times, the very funding sources designed to support civil legal assistance are almost certain to decline. Currently, there is unprecedented need for free legal help, as poverty rates are near their highest levels in fifty years.<sup>10</sup> The poor are struggling to hold on to their homes and incomes, as we see record rates of mortgage foreclosures and increased predatory lending practices only growing more nefarious with the passage of time. As unemployment and poverty rates have increased,<sup>11</sup> public resources for civil legal assistance have declined.

Federal funding for civil legal aid has once again become a predictable victim of federal budget cuts, with the total appropriations from Congress dropping to pre-1980 levels.<sup>12</sup> Interest on

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<sup>10</sup> Hope Yen, *U.S. Poverty on Track to Rise to Highest Since 1960s*, HUFFINGTON POST (July 22, 2012, 5:47 PM), [http://www.huffingtonpost.com/2012/07/22/us-poverty-level-1960s\\_n\\_1692744.html](http://www.huffingtonpost.com/2012/07/22/us-poverty-level-1960s_n_1692744.html).

<sup>11</sup> See CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, at 13 fig. 4 (2013), available at <http://www.census.gov/prod/2013pubs/p60-245.pdf> (showing a recent rise in poverty rate); see also *Household Data*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/cps/cpsaat01.pdf> (showing the percent of the labor force unemployed from 1943 to 2013).

<sup>12</sup> See *Funding History*, LEGAL SERVS. CORP., <http://www.lsc.gov/congress/funding/funding-history> (last visited Oct. 3, 2014) (documenting the historical amount of Legal Services Corporation funding and showing that 2013 funding was less than half the 1980 funding level when adjusted for inflation).

Lawyer Trust Accounts (“IOLTA”) funding, the nation’s second largest funding source for civil legal assistance to the poor, has plummeted with near-zero interest rates and declining business activity.<sup>13</sup> Supplemental funding streams adopted in some states, such as surcharges on court filings, have also declined as the number of new court filings has fallen with decreased business activity.<sup>14</sup> During tough economic times, when the poor need their lawyers most, the funding streams that make free legal assistance possible decline markedly, leaving behind a serious justice gap that undermines our civil justice system.<sup>15</sup>

We spend less on civil legal aid during times of economic distress, even though research has shown that legal needs rise sharply and that having a lawyer makes a real difference for the poor.<sup>16</sup> With legal help, low-income families have a much better chance of saving their homes, obtaining needed public benefits, and escaping intimate partner violence.<sup>17</sup> Research studies predictably tie evidence of a lawyer’s value to enhanced litigation outcomes.<sup>18</sup> Litigation outcomes alone, however, cannot capture the non-quantitative benefits derived from having a lawyer. Most litigants are better able to accept unfavorable results and maintain confidence in the integrity of the justice system when they believe the process was fair and their voices were

<sup>13</sup> See Terry Carter, *IOLTA Programs Find New Funding to Support Legal Services*, A.B.A. J. (Mar. 1, 2013, 1:29 AM), [http://www.abajournal.com/magazine/article/iolta\\_programs\\_find\\_new\\_funding\\_to\\_support\\_legal\\_services/](http://www.abajournal.com/magazine/article/iolta_programs_find_new_funding_to_support_legal_services/) (discussing the significant decrease in IOLTA funding due to a zero percentage interest rate and the inadequacy of potential changes to the system).

<sup>14</sup> See PA. INTEREST ON LAWYERS TRUST ACCOUNT BD., *IOLTA ANNUAL REPORT 2012*, at 22 (2012), available at <http://www.paiolta.org/operations/2012-IOLTA.pdf>; *id.* at 31-32 (detailing the importance of new administrative fees for funding IOLTA programs).

<sup>15</sup> The problem of reverse order funding is perhaps most apparent in the case of IOLTA funding, where during prosperous economic times business activity increases and interest rates rise, producing much higher IOLTA revenues to support civil legal assistance. But when economic conditions falter, IOLTA funds fall dramatically just as legal need is at its highest. The challenge for public funding is to build funding streams that grow with legitimate demand, rather than shrink when needed most. See Jonathan Lippman, *New York’s Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL’Y REV. 13, 13 (2013) (“There is a growing justice gap between the dire need for civil legal services and the dwindling resources available.”).

<sup>16</sup> See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 64-65 (2010) (“Studies of state tax appeals, Federal Compensation Act (‘FECA’) claims, and claims for veterans benefits all report a jump in success rates of 15% to 20% for represented claimants compared to unrepresented ones. Regarding welfare ‘fair hearings,’ the data is both murkier and dated. Two reports describe minimal or no benefit from attorney representation, while others show a sizable benefit. Recent data from Massachusetts falls within the 15-20% gap in success rates.”); see also BOS. BAR ASS’N TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, *THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION* 15 (2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf> (finding in a randomized study in Quincy, Massachusetts that tenants with full representation “fared, on average, twice as well in terms of retaining possession, and almost five times as well in terms of rent waived and monetary awards.”). But see D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2118 (2012) (“Our randomized evaluation found that the offers of representation from the clinic had no statistically significant effect on the probability that unemployment claimants would prevail in their ‘appeals,’ but that the offers did delay proceedings by, on average, about two weeks.”).

<sup>17</sup> See *supra* note 16; Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL’Y 158, 167 (2003) (“Most services provided to help battered women do not impact the likelihood of abuse, but the provision of legal services significantly lowers the incidence of domestic violence.”).

<sup>18</sup> See *supra* note 16.

heard.<sup>19</sup> We all win when litigants have confidence in the rule of law and in the fairness of our justice system, whether or not a given individual prevails on a particular claim or defense.

Providing lawyers to the poor also produces significant financial benefits to states and local communities.<sup>20</sup> Recent economic impact studies have documented that between three and eleven dollars are returned to states and local communities for each dollar spent on legal aid to the poor.<sup>21</sup>

Despite tangible proof of societal benefits from the provision of civil legal assistance to

<sup>19</sup> The view of the courts by self-represented litigants is based on their perception of “procedural justice” as being fair – meaning that they were able to tell their story, their process was without error, and they received an outcome based on the cumulative facts of the case. See Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 179 (2003) (“[R]esearch has shown people are more affected by the fairness of the process or the procedures followed to arrive at a decision. Most notably, Thibaut and Walker (1975) found that people were more apt to accept court decisions if they thought the court procedures were fair, subsequently coining the term *procedural justice*.”).

<sup>20</sup> An increasing number of empirical studies of the economic impact of legal services to the poor have revealed that the gains from such programs significantly outpace their costs. See generally *Philadelphia Bar Association’s Civil Gideon Corner – Studies*, PHILA. BAR ASS’N, <http://www.philadelphiabar.org/page/CivilGideonStudies?appNum=2> (last visited Oct. 3, 2014) (providing links to various empirical studies on civil legal assistance). When indigent clients receive increased representation, it introduces savings and increased welfare to the economy, the state, and the individual. See, e.g., LAURA K. ABEL, NAT’L CTR. FOR ACCESS TO JUSTICE AT CARDOZO LAW SCH., *ECONOMIC BENEFITS OF CIVIL LEGAL AID 1-2* (2012), available at <http://ncforaj.org/wp-content/uploads/2012/09/final-economic-benefits-of-legal-aid-9-5-2012.pdf> (asserting that civil legal aid saves public money by reducing domestic violence, helping children leave foster care more quickly, reducing evictions, and protecting patients’ health); Louis S. Rulli, *Money Well Spent: The Value of Civil Legal Assistance to the Poor*, PHILA. LAW., Fall 2012 at 24, 25 (“In a report dated April 11, 2012, researchers found that for each dollar spent on legal aid, \$11 of quantifiable economic outcomes and savings were realized for all residents of the Commonwealth.”) (internal quotations omitted). Beyond economics, civil legal assistance supports important societal values by boosting both trust in the community and accountability by government. *Id.* at 28 (“Perhaps the most important lesson about the value of civil legal assistance is that it bolsters the poor’s view of our justice system and holds government accountable to make sure that everyone is treated with respect and fairness. This guiding principle fosters trust and hope that keeps low-income families connected to mainstream society and enhances their ability to move out of poverty.”).

<sup>21</sup> See, e.g., IOWA LEGAL AID, *THE ECONOMIC IMPACT OF IOWA LEGAL AID 1* (2013) (reporting a \$6.71 return per dollar invested in Iowa Legal Aid), available at <http://www.iowalegalaid.org/files/A3ED30CF-AFFE-7431-9310-0D521E4312AF/attachments/CF9C722F-986A-48F4-A399-D664E1837D79/economic-impact-study-1-22-13.pdf>; KENNETH A. SMITH & ANDREA J. BREWER, RES. FOR GREAT PROGRAMS, INC., *ECONOMIC IMPACTS OF CIVIL LEGAL AID ORGANIZATIONS IN VIRGINIA: CIVIL JUSTICE FOR LOW-INCOME PEOPLE PRODUCES RIPPLE EFFECTS THAT BENEFIT EVERY SEGMENT OF THE COMMUNITY 14* (2011), available at <http://www.vplc.org/wp-content/uploads/2012/10/VA-Report-on-Economic-Impacts.pdf> (reporting a \$5.27 return per dollar invested in Virginia legal aid programs); MD. ACCESS TO JUSTICE COMM’N, *ECONOMIC IMPACT OF CIVIL LEGAL SERVICES IN MARYLAND 14* (2013), available at <http://mdcourts.gov/mdatjc/pdfs/economicimpactofcivillegalservicesinmd201301.pdf> (reporting a \$190 million per year rise in “economic activity, cost savings, and productivity” for Maryland attributable to legal aid providers); THE PERRYMAN GROUP, *CURRENT AND POTENTIAL ECONOMICS BENEFITS OF LEGAL AID SERVICES IN TEXAS: 2013 UPDATE 9* (2013), available at <http://www.teajf.org/news/docs/Impact-of-Legal-Aid-2013-FINAL.pdf> (“For every direct dollar expended in the state for indigent civil legal services, the overall annual gains to the economy are found to be \$7.48 in total spending, \$3.59 in output (gross product), and \$2.22 in personal income. Moreover, this activity generates approximately \$47.5 million in yearly fiscal revenues to State and local government entities.”); *Economic Impact Studies: An Argument for Funding*, DIALOGUE (Winter 2012), [http://www.americanbar.org/content/dam/aba/publishing/dialogue/ls\\_dial\\_wi12\\_full\\_issue.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/dialogue/ls_dial_wi12_full_issue.authcheckdam.pdf) (“The savings and economic impact in New York State totaled nearly \$1 billion representing a five to one gain in the monies spent for civil legal services.”).

the poor, the justice gap continues to grow at an alarming pace. Legal aid providers, judges, and bar leaders are working together to respond in bold and innovative ways to promote access to justice. To enhance the success of these efforts, the Conference of Chief Justices and the Conference of State Court Administrators have urged all states to establish blue-ribbon commissions dedicated to promoting access to justice.<sup>22</sup> Known as Access to Justice Commissions, these entities bring together key stakeholders to promote access to justice and remove obstacles that hamper civil legal assistance to the poor.<sup>23</sup> These Commissions explore ways to boost legal aid funding, encourage pro bono legal services, improve court access for self-represented individuals, and consider the extension of a right to counsel to additional areas of civil legal assistance.<sup>24</sup> Thirty-one states have already established access to justice commissions, and other states are actively considering doing so.<sup>25</sup> Access to justice commissions operate mostly under the auspices of state supreme courts and usually include the active participation of state judges at all levels.<sup>26</sup>

The increasing role of state judges, and particularly that of chief justices, in leading efforts to expand access to justice is making a vital difference across the nation. Chief Judge Jonathan Lippman of New York has championed bold initiatives that have boosted public funding for civil legal assistance, initiated pilot projects, and adopted new court rules requiring fifty hours of pro bono legal assistance as a condition of admission to the New York State bar, to name just a few.<sup>27</sup> Chief Justices John Broderick of New Hampshire and Ronald George of California collaborated in an article published in the *New York Times* that voiced deep concern over the increasing number of unrepresented individuals and the need to assist courts in assuring that

<sup>22</sup> See generally CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM'RS, RESOLUTION 13: REAFFIRMING COMMITMENT TO ACCESS TO JUSTICE LEADERSHIP AND EXPRESSING APPRECIATION FOR ACCESS TO JUSTICE PROGRESS AND COLLABORATION (2013), available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07312013-Reaffirming-Commitment-Justice-Leadership-Expressing-ATJ-Collaboration-CCJ-COSCA.ashx> (reaffirming the conferences' support of access to justice programs).

<sup>23</sup> See generally CTR. ON COURT ACCESS TO JUSTICE FOR ALL, ACCESS BRIEF: ACCESS TO JUSTICE COMMISSIONS 1-5 (Jan. 2013), available at <http://ncsc.contentdm.oclc.org/utills/getfile/collection/accessfair/id/271> (describing different issues and potential solutions for current problems in access to justice).

<sup>24</sup> Resource Center for Access to Justice Initiatives, AM. BAR ASS'N, [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/resource\\_center\\_for\\_access\\_to\\_justice.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html) (last visited Oct. 3, 2014).

<sup>25</sup> See Resource Center for Access to Justice Initiatives – State ATJ Commission Directory, AM. BAR ASS'N, [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/resource\\_center\\_for\\_access\\_to\\_justice/state\\_atj\\_commissions.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html) (last visited Oct. 3, 2014) (providing a directory of links for the various state access to justice initiatives).

<sup>26</sup> See CTR. ON COURT ACCESS TO JUSTICE FOR ALL, *supra* note 23, at 2-4 (discussing the role of state supreme courts and state judges in lower courts).

<sup>27</sup> Lippman, *supra* note 15, at 13. Chief Judge Lippman also authored a leading article on the work of the task force that he put into place. *Id.* at 17-21 (discussing the burden on the court presented by unrepresented litigants and emphasizing the importance of judicial leadership in solving this gap, including targeting the problems specifically, establishing task forces, increasing funding, and reforming the court process to make it simpler). In 2014, Judge Lippman also announced a pro bono scholars program for the final semester of law school. See James C. McKinley, Jr., *New York State's Top Judge Permits Early Bar Exam in Exchange for Pro Bono Work*, N.Y. TIMES, Feb. 11, 2014, at A22 (discussing Chief Judge Lippman's initiative to allow New York law students to take the bar exam in February "in return for devoting their last semester to pro bono work").

justice is available to all.<sup>28</sup> Chief Justice Ronald Castille of Pennsylvania led his court to adopt a *cy pres* rule that requires that half of undistributed residual funds in state court class actions go to Pennsylvania's IOLTA program for distribution to providers of free civil legal assistance,<sup>29</sup> and to direct the Court's pro hac vice funds to support a statewide student loan repayment assistance program for lawyers working in qualifying public interest organizations.<sup>30</sup>

While state judicial leaders have been outspoken advocates for promoting access to justice for the poor,<sup>31</sup> leaders of the federal judiciary have been disappointingly silent. The 2013 year-end report on the federal judiciary delivered by Chief Justice John Roberts failed to acknowledge the civil justice gap or even the fiftieth anniversary of *Gideon v. Wainwright*.<sup>32</sup> Similarly, the 2012 year-end report noted the comparatively small amount of funding consumed by the judiciary in the overall federal budget as well as multi-year efforts of the judiciary to contain costs, but failed to mention decreased federal funding for civil legal aid or the plight of low-income litigants who are unable to obtain legal help in the federal courts.<sup>33</sup> The Chief Justice's year-end reports for 2011 and 2010 were equally silent about the need to promote access to justice for low-income Americans, choosing instead to focus on the budgetary concerns of the

<sup>28</sup> See John T. Broderick, Jr. & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 2, 2010, at A21 (discussing the importance of coordinating judicial efforts and noting specifically their own efforts in New Hampshire and California working with other legal actors in order to shrink the access gap).

<sup>29</sup> See Michael P. Tremoglie, Pa. *Starting New Procedures for 'Cy Pres' Funds*, LEGAL NEWSLINE (May 14, 2012, 11:29 AM), <http://legalnewsline.com/news/236144-pa-starting-new-procedures-for-cy-pres-funds> (reporting the modifications to the Pennsylvania civil procedure rules for *cy pres* to direct 50% to IOLTA).

<sup>30</sup> In a news release issued on June 28, 2010, the Supreme Court of Pennsylvania "announced a student loan forgiveness program for attorneys employed by agencies that help people who cannot afford legal representation." News Release, Admin. Office of Pa. Cts., Student Loan Assistance to Boost Public Legal Service (June 28, 2010) *available at* <http://www.pacourts.us/assets/files/newsrelease-1/file-1380.pdf?cb=10a509>. The program is administered by the Pennsylvania Bar Foundation using the Supreme Court's pro hac vice funds granted to the Foundation by the Pennsylvania IOLTA program. *See id*; *see also Pennsylvania Bar Foundation—PA IOLTA Board Loan Repayment Assistance Program*, PA. BAR FOUND. <http://www.pabarfoundation.org/lrap/lrap.aspx> (last visited Oct. 3, 2014); *Statewide Loan Repayment Assistance Program Begins Fifth Year*, PA. LEGAL AID NETWORK, <http://www.palegalaid.net/news/plan-e-news/statewide-loan-repayment-assistance-program-begins-fifth-year> (last visited Oct. 3, 2014).

<sup>31</sup> See Maura Dolan, *A Chief Justice's Lament in a Legal History Lesson*, L.A. TIMES (Mar. 12, 2013), <http://articles.latimes.com/2013/mar/12/local/la-me-chief-justice-20130312> (noting the significant "civil rights crisis" California faces following budget cuts). Further examples include Judge Fern A. Fisher's efforts as Director of New York State Courts Access to Justice Program and Judge Annette Rizzo's mortgage foreclosure diversion pilot program in Philadelphia. *See* JONATHAN LIPPMAN ET AL., NEW YORK STATE COURTS ACCESS TO JUSTICE PROGRAM 2013 REPORT iii (2014), *available at* [http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J\\_2013report.pdf](http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2013report.pdf) (featuring Judge Fisher's letter describing the efforts undertaken this year and the problems still faced); Peter Hall, *Phila. Anti-Foreclosure Program Touted as National Model*, LEGAL INTELLIGENCER, Oct. 27, 2008 (discussing the mandatory free counseling and other features of the pilot program and their effects on access to justice outcomes) (accessible through Lexis).

<sup>32</sup> *See generally* JOHN G. ROBERTS, JR., 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2013). While the Supreme Court has recognized increased challenges in accessing justice, the high Court's primary focus in year-end reports has been on the Court's limited budget and cost-savings effected by the Court, with little or no mention of the crisis in civil legal assistance to the poor. *See id.* at 1 ("The budget remains the single most important issue facing the courts.").

<sup>33</sup> *See generally* JOHN G. ROBERTS, JR., 2012 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3-5 (2012) (discussing specific administrative cost saving changes made by the courts).



Court.<sup>34</sup>

There is a need for strong leadership at all levels of the judiciary. The justice gap threatens fairness in every court and reminds us that much work needs to be done if *Gideon*'s full promise is to be achieved in our justice system. Unfortunately, there is no silver bullet that will solve this crisis quickly. The most promising strategy is a comprehensive, multi-layered approach that integrates many methods of delivering legal assistance to those who cannot afford legal counsel.

At its core, we must continue to aspire to achieve the gold standard of full representation for as many indigent families as possible, especially in high priority matters that threaten shelter, sustenance, health, safety, and the well-being of children. Full representation is what corporations and wealthy individuals expect and receive when their vital legal interests are threatened. In 2006, the American Bar Association ("ABA") adopted Resolution 112A calling for the provision of counsel for indigent individuals as a matter of right in contested matters where basic human needs are at stake.<sup>35</sup> This action reignited the civil *Gideon* movement, fostering activities throughout the states and intensifying the call for legal help as a matter of right in serious civil cases.<sup>36</sup> Many believe that our constitutional framework demands no less.<sup>37</sup>

Advocates of a right to counsel in civil cases pressed for recognition of such a right before the Supreme Court in *Turner v. Rogers*, but the high Court rejected a constitutional right to legal help in that child support contempt case even though the child's father (support-obligor) spent a full year in a South Carolina jail without having the benefit of a lawyer.<sup>38</sup> While this result

<sup>34</sup> See generally JOHN G. ROBERTS, JR., 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2010) (detailing the problems the court had faced in 2010 and providing for budget goals going forward); JOHN ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2-3 (2011) (describing changes in the judicial ethics code exclusively). While the Federal Judiciary did release a strategic plan in 2010 organized around seven fundamental policy questions or challenges affecting the judiciary's mission, including discussion of providing justice in a more effective manner and enhancing access to courts, much of the plan still focused on the Court's budgetary concerns. See generally JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY (Sept. 14, 2010) available at <http://www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010.pdf> (detailing strategies in response to problems faced by the federal judiciary, including simplifying court processes to lower costs).

<sup>35</sup> See AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A, 1, 12 (2006), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf) (urging governments to "provide legal counsel as a matter of right at public expense to low income persons . . . where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction" and arguing that the "right proposed in this resolution is long overdue and deeply embedded in the nation's promise of justice for all.").

<sup>36</sup> See JUDICIAL COUNCIL OF CAL., FACT SHEET: SARGENT SHRIVER CIVIL COUNSEL ACT (AB 590) (FEUER) 1-4 (2012), available at <http://www.courts.ca.gov/documents/AB-590.pdf> (detailing the pilot programs promoting civil counsel access for basic needs in California); see also BOS. BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 26-29 (2008), available at <https://www.bostonbar.org/prs/reports/GideonsNewTrumpet.pdf> (detailing the Boston Bar Association's inquiry into the civil right to counsel following the 2006 ABA Resolution and proposing solutions). See generally NAT'L COAL. FOR A CIVIL RIGHT TO COUNSEL, <http://www.civilrighttocounsel.org> (last visited Oct. 3, 2014).

<sup>37</sup> See John Nethercut, "This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases, CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 481, 481-84 (2004) (discussing the role of a constitutionally recognized to counsel and potential strategies to obtain it).

<sup>38</sup> 131 S. Ct. 2507, 2519-2520 (2011).

disappointed advocates seeking to extend *Gideon*'s promise to civil proceedings, especially where a liberty interest was so directly at stake, the *Turner* opinion also brought new hope to advocates. The Supreme Court discussed a court's duty to ensure that courtrooms are fair to all parties and suggested that more complex civil proceedings or actions in which opposing governmental parties are routinely represented by counsel may require an appointment of counsel in order to satisfy basic due process protections.<sup>39</sup>

The challenge now falls to advocates to bring this language to life in individual cases where such special conditions exist or where courtroom procedures fail to meet fairness standards.<sup>40</sup> Without strong advocacy, the *Turner* decision is prone to be misread by courts as simply a rejection of a right to counsel, without engaging in a probing due process determination as to whether counsel is required under the circumstances of an individual case. For this reason, lawyers for the poor have a special challenge to educate trial courts and actively press in appropriate cases for an appointment of counsel under *Turner*, as well as to step up efforts to push state legislatures and state courts to expand substantive areas in which counsel should be provided as a matter of state law or sound public policy.<sup>41</sup>

While there is no substitute for full-time, paid professionals experienced in the special legal needs of the poor, we must also add to their ranks by boosting pro bono participation from experienced members of the private bar, law students, newly-admitted lawyers, retired lawyers, government lawyers, and in-house counsel, among others. We need all hands on deck, and lawyers at both the beginning and twilight of their careers have much to contribute.

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<sup>39</sup> See *id.*

<sup>40</sup> See Daniel Curry, *The March Toward Justice: Assessing the Impact of Turner v. Rogers on Civil Access-to-Justice Reforms*, 25 GEO. J. LEGAL ETHICS 487, 487 (2012) ("But in *Turner v. Rogers*, the Supreme Court held there is no categorical right to counsel for low-income individuals, even when the proceeding could result in incarceration. Nevertheless, *Turner* is a landmark decision for poor and self-represented litigants. The decision requires judges to affirmatively act to ensure due process for self-represented litigants, supports a right to counsel in certain proceedings, and bolsters numerous access-to-justice reforms. This Note argues that the Supreme Court's opinion in *Turner v. Rogers* requires court reforms ensuring that everyone, regardless of income, can seek justice in civil courts."); see also Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, JUDGES' J. Fall 2011, at 16, 21 ("Turner holds that judicial intervention is appropriate and sometimes necessary to ensure due process in self-represented cases. The best practices described here suggest the relative ease of making such interventions where the parties lack representation. These interventions clearly lie within the traditional discretionary power of a judge to manage the courtroom and the receipt of evidence. Finally, it must not be forgotten that, under *Turner*, if a judge feels that the procedures that he or she can appropriately adopt are not sufficient to ensure fairness and accuracy in the protection of constitutionally protected interests, there may be a constitutional requirement for counsel.").

<sup>41</sup> For example, several state legislatures have mandated a right to counsel in dependency, adoption, involuntary termination of parental rights and involuntary mental health treatment civil proceedings. See generally Paul Marvy & Laura Klein Abel, *Current Developments in Advocacy to Expand the Civil Right to Counsel*, 25 TOURO L. REV. 131, 132-34 (2009) (detailing updates by bar associations and state legislatures in expanding civil access to justice in special cases up to 2009); JOHN POLLOCK, NAT'L COAL. FOR A CIVIL RIGHT TO COUNSEL, MOST RECENT CIVIL RIGHT TO COUNSEL DEVELOPMENTS 1-6 (2013), available at [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2013/05/nat\\_1\\_mtg\\_of\\_accesstojusticecmnchairs/ls\\_sclaid\\_atj\\_memo\\_on\\_recent\\_rtc\\_efforts.authch\\_eckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2013/05/nat_1_mtg_of_accesstojusticecmnchairs/ls_sclaid_atj_memo_on_recent_rtc_efforts.authch_eckdam.pdf) (detailing the many changes at the state and federal level in law to promote access to justice for families, the mentally handicapped, and other groups). One court has construed Section 504 of the Rehabilitation Act to mandate a right to counsel in immigration cases involving the incompetent. KATE M. MANUEL, CONG. RESEARCH SERV., R43613, ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 9 (2014) (citing *Franco-Gonzalez v. Holder*, 828 F. Supp. 2d 1133, 1145 (C.D. Cal. 2011)).

As we move forward, we cannot afford to be stuck in only one mode of legal services delivery to the poor. New technologies and changes in the legal environment permit greater use of limited scope representation, pilot projects, and court-sponsored or non-profit-sponsored initiatives (such as telephone hotlines, help desks, advice-only clinics, and internet resources) to ameliorate barriers that impede access to our courts. We certainly can do more to identify court procedures that should be simplified or shortened, asking ourselves routinely for each legal objective sought: Should a lawyer really be necessary to obtain the desired objective? We must make it easier for the public to handle simple matters on their own when other options are just not available.<sup>42</sup>

There are many other measures that might enhance access to justice, but which are less likely to secure broad consensus from the organized bar. For example, at least one state now licenses non-lawyers to be legal technicians who are permitted to provide basic legal help in simple matters after training and licensing, and with supervision.<sup>43</sup> More extreme, some scholars propose an end to the legal profession's long-standing ban on the corporate practice of law as a way of giving the public broad access to routine legal services from large-scale corporate entities in places where consumers routinely purchase other goods and services.<sup>44</sup> Measures such as these are controversial, but they are likely to gain increased support if other measures to expand legal help do not succeed.

As many diverse measures go forward to address the justice gap, lawyers also have a heightened duty to ensure that ethical rules that regulate the legal profession promote, and do not hinder, access to justice. It is here that we must question whether the Model Rules of Professional Conduct, which heavily influence the adoption of state ethical rules, have kept pace with the needs of the profession and the public.<sup>45</sup>

#### *Model Rules of Professional Conduct*

Ethical rules are designed to promote high standards for the legal profession and to protect clients and the public from lawyer misconduct.<sup>46</sup> A genuine commitment to self-regulation

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<sup>42</sup> A comment was added to Rule 2.2 (Impartiality and Fairness) of the Model Code of Judicial Conduct that clarified judges may assist pro se litigants without violating their duties of impartiality and fairness. See MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. ¶ 4 (2011 ed.), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct/model\\_code\\_of\\_judicial\\_conduct\\_canon\\_2/rule2\\_2impartialityandfairness/commentonrule2\\_2.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/commentonrule2_2.html) ("It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.").

<sup>43</sup> See WASH. ADMISSION TO PRACTICE R. 28 (2013) (allowing non-lawyers to provide technical help on routine matters).

<sup>44</sup> See, e.g., Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 51-52 (Supp. 2014) (noting the importance of large scale legal providers that are not lawyers in lowering legal access costs).

<sup>45</sup> Rigorous ethics standards designed for profit-sector lawyering have had an unintended chilling effect on pro bono representation and other resources. See Esther Lardent, *Do Our Ethical Rules Impair Access to Justice?*, NAT'L L.J. (May 30, 2013) (outlining ways the current judicial and lawyer ethics codes inhibit representation due to conflict of interest concerns, multi-state practice limitations, student limitations, and other reasons) (accessible through Lexis).

<sup>46</sup> See MODEL CODE OF PROF'L RESPONSIBILITY pmb1. (1980) ("Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system.").

is a hallmark of the legal profession and is especially important today, as law is increasingly viewed as a business. The preamble of the Model Rules instructs, “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.”<sup>47</sup> The Model Rules are the organized bar’s voice in providing guidance to lawyers as they are called upon to fulfill their responsibilities to clients, the legal system, and themselves.<sup>48</sup>

Viewed in their entirety, the ethical rules are framed primarily from the perspective of a traditional lawyering model in which for-profit lawyers provide legal services to paying clients after careful review and detailed discussion in traditional office settings conducive to the needs of both lawyer and client. The lawyer chooses whether to accept a prospective client for representation after review of the prospective client’s objectives, the merits of potential claims and defenses, and the client’s ability to pay the fees of the lawyer. In this model, prospective clients possess the financial resources and sophistication to shop around and to help shape the terms of a representation agreement reasonably tailored to the client’s needs, after consideration of material benefits and risks. In this traditional model, the marketplace works for many, but not for all.

To promote the ethical practice of law in a self-regulated profession, the Model Rules constrain a lawyer’s conduct in dealing with clients, tribunals, and third persons. The Rules also integrate ambiguity and vagueness in order to give lawyers flexibility to exercise professional judgment when balancing competing interests in situations where context matters greatly.<sup>49</sup> Ambiguity and vagueness also serve important enactment purposes that permit drafters to agree upon text that will be flexible enough to provide guidance in many different contexts.<sup>50</sup> Ambiguity and vagueness are not without cost, however, especially when they combine to chill needed lawyering activities that would otherwise expand the availability of legal help to underserved populations.<sup>51</sup>

Unfortunately, the Model Rules infrequently acknowledge the unique challenges of

<sup>47</sup> MODEL RULES OF PROF’L CONDUCT pmb. ¶ 12 (2013).

<sup>48</sup> See MODEL RULES OF PROF’L CONDUCT pmb. ¶ 9 (2013) (noting the many potential conflicts that may arise in a lawyer’s practice and prescribing guidance through the rules).

<sup>49</sup> See MODEL RULES OF PROF’L CONDUCT pmb. ¶ 16 (2013) (noting that the rules are enforced through voluntary efforts and “provide a framework for the ethical practice of law”).

<sup>50</sup> See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 628 (2002) (“Ambiguity serves a legislative purpose. When legislators perceive a need to compromise they can, among other strategies, obscure the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish.”) (internal quotations omitted).

<sup>51</sup> See David Hricik, *Uncertainty, Confusion, and Despair: Ethics and Large-Firm Practice in Texas*, 16 REV. LITIG. 705, 707 (1997) (“The principal impact of the legal ethical rules is to create uncertainty, doubt, and confusion with regard to the propriety of many activities which occur on a daily basis in the legal profession . . . . Because of this uncertainty, inefficiencies result, hampering the delivery of legal services.”); see also *In re Application of Okla. Bar Ass’n to Amend the Okla. Rules of Prof’l Conduct*, 171 P.3d 780, 781 (Okla. 2007) (“The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise.”) (emphasis omitted); Mark H. Aultman, *Moral Character and Professional Regulation*, 8 GEO. J. LEGAL ETHICS 103, 110 (1994) (“[T]here are many due process short-cuts necessary to keep discipline systems functioning . . . . They make the system more unfair to lawyers against whom it is applied, but they are less likely to be applied against lawyers who can effectively demand fairness.”).

providing legal services to indigent clients in settings that do not resemble the traditional lawyering model. The rules provide very little guidance about fulfilling professional responsibilities when lawyers attempt to serve poor or disadvantaged litigants in high volume settings that occur outside of traditional law offices. Despite enormous changes in the legal profession and rapid advances in technology over the past decade, there have been relatively few changes to the Model Rules that provide meaningful guidance to lawyers who struggle in non-traditional settings to assist low-income individuals who have little access to legal help.

Model Rule 6.1 recognizes the importance of encouraging pro bono legal services, but the rule remains aspirational and it has not been modified since the Ethics 2000 Commission completed its review almost fifteen years ago. At a time when the poor so desperately need legal help, Rule 6.1's call for fifty hours of annual pro bono legal service is honored more in the breach.<sup>52</sup> According to the ABA's latest pro bono survey of lawyers, only one-third of lawyers reach the fifty-hour goal.<sup>53</sup> Despite this fact and the widening justice gap, Model Rule 6.1 remains static. At the same time, some states are adopting new court rules in an attempt to secure greater pro bono assistance from retired lawyers, in-house counsel, law students, and newly minted lawyers. Model Rule 6.1 is stuck at the status quo.

The two most significant changes to the Model Rules since 2000 relating to access to justice are probably Model Rules 6.5 and 1.2(c). As discussed later in this Article, Rule 6.5 relaxes conflict rules for lawyers when participating in court-sponsored or non-profit legal services projects. Yet the rule surprisingly speaks only to that one issue, and not to the many other ethical issues implicated by short-term service in such projects. Rule 6.5 appears to be directed mostly at private lawyers, without corresponding consideration of the range of ethical challenges that confront all lawyers, especially full-time public interest lawyers, in these special settings.

Similarly, more recent amendments to Model Rule 1.2(c) encourage greater use of limited scope representation so that unbundled legal services may reach the poor, but once again the amended rule is written largely from the perspective of for-profit lawyers without serious mention of the unique settings in which non-profit lawyers find themselves when delivering expanded access to the poor. Rule 1.2(c) appears more concerned with lowering the cost of legal services for paying clients so that larger segments of middle- and upper-class Americans will be encouraged to seek greater legal help from the private bar, rather than addressing the challenges of non-profit and pro bono lawyers trying to serve low-income communities in discrete ways.

Legal aid organizations struggle to provide legal help to millions of indigent individuals and families who need their help.<sup>54</sup> For these prospective clients, obtaining full representation from a legal services lawyer is sometimes compared to winning the lottery. It is more likely than not that they will be turned down because demand so greatly outstrips supply.<sup>55</sup> As a result, many

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<sup>52</sup> See JANET BUCZEK ET AL., ABA STANDING COMM. ON PRO BONO & PUBLIC SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 34 (2013) available at [http://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/lc\\_pb\\_Supporting\\_Justice\\_III\\_final\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lc_pb_Supporting_Justice_III_final_authcheckdam.pdf) (finding that only one-third of all lawyers satisfy the aspirational goal of fifty hours of pro bono service annually, and eleven percent of all lawyers provide no pro bono service at all).

<sup>53</sup> *Id.*

<sup>54</sup> For example, the Legal Services Corporation estimates that 61.8 million Americans were eligible for services in 2012 – a year in which legal aid organizations served nearly two million people. See LEGAL SERVS. CORP., 2012 FACT BOOK 7, 22 (2013), available at [http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/2012\\_Fact%20Book\\_FINALforWEB.pdf](http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/2012_Fact%20Book_FINALforWEB.pdf).

<sup>55</sup> See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL

indigent clients are only able to obtain pieces of information, small doses of advice, or limited assistance through hotlines, help desks, Internet resources, and advice-only clinics. The reality is that indigent litigants frequently proceed without any representation in state courts:

Nationally, more than three out of five cases have at least one unrepresented party. Particularly high volume courts, such as traffic, housing, family, and small claims, are crowded with pro se litigants. While the reasons for the dramatic increase in pro se representation may vary, the impact on courts' operations is considerable.<sup>56</sup>

The legal community is encouraged to develop programs that will assist self-represented individuals, as the number of self-represented litigants is unlikely to decrease without a substantial response from the bar.<sup>57</sup> Most troubling, of course, to this direction is that "pro se litigants are less likely to obtain equal justice when compared to litigants represented by competent counsel."<sup>58</sup>

In most instances, the ethical rules that constrain private lawyers representing corporations and paying individuals apply equally to lawyers providing free legal help to indigent clients where there is no profit motive involved. While there is good reason to hold all lawyers to the same high level of professional duty regardless of the financial status of their clients, there must also be recognition that some constraints are unnecessary in non-profit settings and may actually diminish the availability of legal help when it is needed most.

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LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf) ("[F]or every client served by an LSC-funded program, at least one person seeking help will be turned down due to limited resources. This conclusion is almost identical to the 'Unable to Serve' finding of the 2005 study.") (emphasis omitted).

<sup>56</sup> Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 564 (2007) (footnotes omitted) (emphasis omitted).

<sup>57</sup> See Alan T. Schroeder, Jr., *Why Access to Justice Is Important*, AALL SPECTRUM, July 2010 at 24, 27 ("Justices Broderick and George encourage the legal community to pitch in during these times by creating various programs for pro se litigants . . . More now than [sic] ever, 'Access to Justice' and 'Equal Access to Justice' type programs are critical for our society. The self-represented litigant isn't going away anytime soon."); Richard Zorza, *An Overview of Self-Represented Litigation Innovation, Its Impact, and an Approach for the Future: An Invitation to Dialogue*, 43 FAM. L.Q. 519, 521 (2009) ("There is absolutely no reason to believe that the phenomenon of self-representation is going to go away. On the contrary, there is every reason to believe that it will increase. The vast majority of the self-represented make that choice, not for any political or self-image reason, but for simple economic reasons. . . . The current trends in the economy can only make matters worse, forcing more litigants to forgo lawyers.")

<sup>58</sup> See Farley, *supra* note 56 (noting specifically the worse outcomes in North Carolina); see also Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 979 (2009) ("The problem of access to justice is one that affects the ordinary American who cannot afford an attorney and is disqualified from receiving free legal aid, and thus must rely on self-representation in court. But, the unrepresented litigant often does not stand a chance against the represented litigant. Herein lies the problem—unequal access to justice. Self-help centers, alternative dispute resolution options, and the unbundling of legal services have not adequately addressed this problem. Judges may be able to help unrepresented litigants, but under the American adversarial system of justice, stringent limitations on judicial activism prohibit such interference. In contrast, in many civil law countries, the legal system and the role of the judge are construed differently, resulting in greater access to justice for ordinary citizens. There are aspects of the civil law system that the American system may borrow in its effort to expand access to justice for all.")

In short, some ethical rules grounded in the traditional lawyering model do not translate well to public interest projects where profit motives are not present. It is in these settings that such rules can actually hinder the flow of free legal services. The profession should ask itself whether one rule really fits all, especially when lawyers are helping the poor by delivering unbundled services in community or other non-traditional settings. Model Rule 6.5 can be viewed as an acknowledgment that the public and the profession are better served when ethical requirements that are designed for formal settings, but which actually hinder pro bono help in community settings, are relaxed to expand legal assistance to the poor. Similarly, an easing of certain other ethical constraints in non-profit contexts will achieve important societal objectives without undermining ethical standards of the profession.

In the following sections, this Article looks briefly at three model rules of professional conduct to illustrate areas of possible change in light of access to justice goals. All three rules are critically important to indigent clients. First, the Article examines document assistance and limited scope representation under Model Rules 1.2 and 6.5, which are vital to self-represented litigants who seek help from court-sponsored or non-profit projects. Second, the Article questions the wisdom of current restrictions on financial assistance by lawyers under Rule 1.8 when financial help to the poor is needed to preserve the status quo or prevent immediate harm while awaiting the outcome of legal proceedings. Third, the Article discusses withdrawal of representation rules under Model Rule 1.16 and suggests that modifications would facilitate increased volunteer assistance from lawyers wishing to assist self-represented individuals in limited ways. From a more global perspective, this Article questions whether key assumptions underlying the Model Rules, which are appropriate in a traditional, profit-making lawyering paradigm, should apply to constrain lawyers when delivering free legal services to the poor. This Article argues that outright prohibitions contained in some model rules, and intentional ambiguity and vagueness in others, act to inhibit access to justice.

## I. LIMITED SCOPE REPRESENTATION

In 2013, the American Bar Association urged lawyers to increase the availability, use, and advertising of unbundled legal services. ABA Resolution 108, adopted on February 11, 2013, encouraged lawyers to limit the scope of their representation in order to increase the public's access to legal help.<sup>59</sup> Model Rule 1.2(c), which was last revised in 2002, provides that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>60</sup> Since its adoption, forty-one states have enacted an identical or similar limited representation rule.<sup>61</sup>

Over the past decade, the organized bar has expressed increasing concern that many Americans are not using legal services even when they can afford to purchase them, and may not be aware of their ability to limit the scope of representation and thereby reduce costs through the sharing of responsibilities. Bar leaders have also received input from trial judges about the need to

<sup>59</sup> ABA House of Delegates, Res. 108, at 44 (2013), available at [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2013/05/nat\\_1\\_mtg\\_of\\_accesstojusticecmmnchairs/ls\\_sclaid\\_atj\\_adopted\\_unbundling\\_resolution\\_108.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2013/05/nat_1_mtg_of_accesstojusticecmmnchairs/ls_sclaid_atj_adopted_unbundling_resolution_108.authcheckdam.pdf).

<sup>60</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2013).

<sup>61</sup> ABA House of Delegates, Res. 108, at 49 (2013). Some states have adopted a modified rule requiring the client's consent in writing, and several others have “set out a checklist of tasks to be assumed when the lawyer provides a limited scope of representation.” *Id.*

2014]

ROADBLOCKS TO ACCESS TO JUSTICE

361

provide greater legal assistance to self-represented litigants.<sup>62</sup> Resolution 108 urges lawyers to embrace limited scope representation because “[t]he organized bar has an obligation to use all reasonable resources to assure people have access to the benefits that can only be provided by lawyers.”<sup>63</sup>

While limited scope representation permits lawyers to unbundle their services, they are not excused from meeting many professional obligations required in full representation. Resolution 108 states:

Rule [1.2(c)] places the burden on the lawyer to determine if and when limited scope representation is appropriate. The lawyer must measure the capacity of the potential client to assume the responsibility of the segmented tasks. . . . The lawyer must both measure the capability of the potential client and the complexity of the legal issue to meet this standard. Consequently, the lawyer must be every bit as competent in the subject matter as a lawyer who exclusively provides full services in that field.<sup>64</sup>

Under Rule 1.2(c), “[a] lawyer may limit the scope of the representation if the limitation is reasonable” and the lawyer obtains informed consent from the client.<sup>65</sup> The comment to Rule 1.2(c) emphasizes that “limited representation does not exempt a lawyer from the duty to provide competent representation, [although] the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>66</sup> Agreements to limit representation must be in accord with the Rules of Professional Conduct and other law,<sup>67</sup> and a lawyer must be competent in the subject matter for which limited representation is provided.<sup>68</sup>

In 2002, the ABA modified the language of Rule 1.2(c).<sup>69</sup> Originally, the rule read, “A lawyer may limit the *objectives* of the representation if the client *consents after consultation*.”<sup>70</sup> The revision reads, “A lawyer may limit the *scope* of the representation if *the limitation is reasonable under the circumstances and the client gives informed consent*.”<sup>71</sup> Informed consent

<sup>62</sup> See *id.* at 46 (“High percentages of judges reported that self-represented litigants failed to include important evidence, committed procedural errors and were ineffective in raising objections, examining witnesses and crafting arguments. Nearly two-thirds of the judges reported that the outcomes of self-represented parties were worse than if they had been represented.”).

<sup>63</sup> *Id.* at 52.

<sup>64</sup> *Id.* at 49.

<sup>65</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2013).

<sup>66</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt ¶ 7 (2013).

<sup>67</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. ¶ 8 (2013).

<sup>68</sup> ABA House of Delegates, Res. 108, at 49 (2013) (“Consequently, the lawyer must be every bit as competent in the subject matter as a lawyer who exclusively provides full services in that field.”).

<sup>69</sup> See *Ethics 2000 Commission Report on the Model Rules of Professional Conduct Rule 1.2*, AM. BAR ASS’N (2002), [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule12.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule12.html).

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> *Id.* (emphasis added).



requires the lawyer to explain to the client the material risks of a proposed course of action and to inform the client of reasonably available alternatives to a proposed course of conduct.<sup>72</sup> Equally important, a lawyer must make a careful judgment whether competent assistance may be rendered in a limited fashion. To do so, the lawyer is expected to assess “the legal knowledge, skill, thoroughness, and preparation reasonably necessary” for limited representation.<sup>73</sup>

In short, a lawyer who unbundles legal services is not excused from complying with core ethical requirements that apply to full representation, including duties of competence,<sup>74</sup> diligence,<sup>75</sup> communication,<sup>76</sup> confidentiality,<sup>77</sup> conflict avoidance,<sup>78</sup> and formation of representation agreements.<sup>79</sup> Resolution 108 emphasizes that local bar associations should take measures to assure that practitioners who limit the scope of their representation do so with “full understanding and recognition of their professional obligations . . . .”<sup>80</sup>

The fulfillment of these formal ethical duties anticipates a traditional lawyering model in which a lawyer and prospective client meet in the lawyer’s office and have ample time to discuss the respective merits of full representation versus limited representation and the attendant benefits and risks of each. It assumes that prospective clients do not present language barriers, literacy issues, or learning disabilities, and are able to provide informed consent for limited representation, after full consideration of the reasonable alternatives available to them. In the real world, however, this is a scenario that more accurately describes what takes place in the traditional lawyering model with well-resourced clients who desire to limit representation in order to reduce costs or who are willing and able to undertake shared responsibilities. But, in the context of high volume clinics or legal hotlines, in which lawyers struggle to provide limited assistance to the poor on the theory that some help is better than none, it is a scenario that is unrealistic and unworkable.<sup>81</sup>

How does a responsible lawyer meet such professional duties over the telephone while

<sup>72</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2013).

<sup>73</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2013) (noting the competence required in any kind of representation, including limited representation).

<sup>74</sup> *Id.*

<sup>75</sup> MODEL RULES OF PROF’L CONDUCT R. 1.3 (2013).

<sup>76</sup> MODEL RULES OF PROF’L CONDUCT R. 1.4 (2013).

<sup>77</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (2013).

<sup>78</sup> MODEL RULES OF PROF’L CONDUCT R. 1.7-1.12 (2013); see also MODEL RULES OF PROF’L CONDUCT R. 6.5 (2013) (noting conflict checks for a lawyer providing short-term legal services).

<sup>79</sup> MODEL RULES OF PROF’L CONDUCT R. 1.5 (2013).

<sup>80</sup> ABA House of Delegates, Res. 108, at 53.

<sup>81</sup> See ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009), available at [http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose\\_white\\_paper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf) (“While written consent to a limited representation is clearly a best practice . . . the Committee believed that such an ethical requirement would frustrate the ability of lawyers to provide services through telephone hotlines . . . or other electronic communications that do not lend themselves to an exchange of written or signed documents.”). This acknowledgement that expression of informed consent could occur verbally allowed an expansion of limited representation but did not fully resolve potential ethical conflicts under the Rules of Professional Conduct or applicable civil procedure rules, though there continue to be key questions in its execution from state to state. See *id.* at 8-10 (detailing different rules adopted by various states).

many other callers are waiting to access the hotline? How does a lawyer help a client to weigh benefits and risks of limited representation, knowing that the prospective client has no realistic alternatives for legal help? How does a lawyer determine the reasonableness of limited representation when full representation is simply not an option? How does a client provide informed consent when the proposed course of action is largely beyond the client's comprehension or capacity due to no fault of the client? These are just some of the difficult questions that arise in non-traditional venues where limited help to the poor is frequently needed. It is in the courthouse corridors or over the telephone that lawyers are increasingly called upon to make these professional judgments on the spot. And, yet, the Model Rules are silent or, at best, vague about the real world ethical challenges that public interest lawyers routinely confront and which too often deter private lawyers from volunteering for fear of violating ethical duties.<sup>82</sup>

#### *A. Document Assistance to Self-Represented Litigants*

One of the most important forms of limited scope representation to the poor takes the form of document assistance. Indigent clients frequently need help in preparing documents for filing in court so that they may preserve claims, vacate default judgments, or comply with technical court rules that are beyond their understanding or skill. Consider the plight of a low-income tenant who is unable to attend an eviction hearing due to her child's serious health problems and later discovers that a default judgment has been entered against her. She bears the burden of filing a motion, memorandum of law, or other legal document in an attempt to open the judgment so that she may have her day in court. To be successful, she will be expected to know the legal requirements for opening a default judgment and to apply the facts of her situation to the legal requirements in a timely, coherent court filing. Many indigent individuals cannot manage this task successfully without legal help; yet full representation is often unavailable due to scarce resources. The only realistic option for this tenant may be to turn to a help desk or advice-only clinic, if they exist in her locale, in order to obtain limited help in preparing court documents that might offer her a fair chance of having her day in court and preventing the loss of her home.

The need for document assistance arises in almost every substantive area of the law affecting the poor. Consider the legal needs of a minimum-wage, immigrant restaurant employee who busses tables for several weeks but is never paid fully for his work. He files a wage claim on his own in small claims court and successfully represents himself before a judge. He is gratified by a favorable court decision, but soon learns that the restaurant's counsel has filed an appeal to the county court of general jurisdiction where the employer has a right to a trial *de novo*. The low-income worker is now in a formal court and must prepare and file proper legal pleadings to prosecute his claim. He may also need to respond to discovery requests or legal motions, but he is unable to do this on his own and the local legal aid program does not have sufficient resources to represent him. Without legal help, the worker runs a serious risk of losing the benefit of the prior judgment he rightfully earned, not because his claim lacks merit but solely because he cannot navigate the technical requirements of a more formal court on his own. His only hope may be to

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<sup>82</sup> Under Rule 1.1 and its comment, a lawyer is required to exercise "[c]ompetent handling of a particular matter [that] includes inquiry into and analysis of the factual and legal elements of the problem . . . [but an] agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible." MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. ¶ 5 (2013). Even with this exception, the requirement of "inquiry" still leads to an unsettled question of whether a lawyer who provides only limited help or information, especially in a clinic-like setting, complies with the rule.

reach out for document assistance from a non-profit legal provider, court-sponsored help desk, or advice-only clinic. Without any help, he is plunged into a legal world that is unfriendly and unforgiving.

In circumstances such as these, lawyers who are unable to undertake full representation may be willing to provide a limited amount of undisclosed help that will give clients a fair chance of having their claims or defenses heard. But, many lawyers are hesitant to provide undisclosed document assistance because they know that some courts have labeled this form of limited assistance “ghostwriting”<sup>83</sup> and have criticized it as unethical. At times, some judges have even sanctioned lawyers for engaging in this practice.<sup>84</sup>

Federal courts in particular have harshly criticized the practice of ghostwriting. At least two circuit courts of appeals have long held that lawyers may not ghostwrite appellate briefs.<sup>85</sup> Federal district courts have also frequently condemned ghostwriting by lawyers. A Pennsylvania district court found that ghostwriting for a pro se litigant “implicates the lawyer’s duty of candor to the Court[,] . . . interfere[s] with the Court’s ability to superintend the conduct of counsel and parties during the litigation[,]” and misrepresents the litigant’s right to a more liberal construction of his pleadings as a pro se litigant.<sup>86</sup> Similarly, a New Jersey district court opined that ghostwriting contravenes the spirit of Federal Rule of Civil Procedure 11, and held that undisclosed ghostwriting of briefs or other submissions to the Court is improper.<sup>87</sup>

More recently, a Nevada federal court condemned ghostwriting as a violation of Rule 11 responsibilities and a misrepresentation to the court.<sup>88</sup> A federal court in Virginia issued a “Ghost-Writer Warning” to lawyers, specifically warning that sanctions may arise from such unethical activities.<sup>89</sup> In the past few years, several other district courts have condemned ghostwriting as a

<sup>83</sup> “Ghostwriting” is a term commonly used to describe unbundled legal services, limited scope representation, or discrete task representation in which an attorney drafts court or agency documents for a pro se litigant, but does not reveal to the tribunal on the papers or otherwise that an attorney assisted in the document preparation. The term is most often used in the litigation context, although the practice also occurs in transactional settings. See Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility & Phila. Bar Ass’n Prof’l Guidance Comm., Joint Formal Op. 2011-100, at 1, 3 (2011), available at <http://www.padisiplinaryboard.org/documents/PBAJointFormalOpinion2011-100.pdf>.

<sup>84</sup> See, e.g., John C. Rothermich, Note, *Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 *FORDHAM L. REV.* 2687, 2701 (“[In 1985, the Illinois State Bar Association] admonished as unethical a bankruptcy attorney who provided limited drafting services to his clients and subsequently refused to attend hearings or meetings with creditors.”).

<sup>85</sup> See *Duran v. Carris*, 238 F.3d 1268, 1272-73 (10th Cir. 2001) (cautioning that a lawyer must sign ghostwritten briefs); *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (noting that a member of the bar must sign any briefs he substantially helps to prepare).

<sup>86</sup> See *United States v. Eleven Vehicles*, 966 F. Supp. 361, 367 (E.D. Pa. 1997) (noting that ghostwriting and not signing is a violation of candor and tampers with the courts ability to be lenient on pro se clients).

<sup>87</sup> See *Delso v. Trs. for the Ret. Plan for the Hourly Emps. of Merck & Co.*, No. 04-3009, 2007 WL 766349, at \*16 (D.N.J. Mar. 6, 2007) (noting that while “ghostwriting may not *per se* violate Fed. R. Civ. P. 11 . . . , it clearly violates the intention that attorneys be responsible for their submissions to the Court.”); FED. R. CIV. P. 11 (defining the rules on signing pleadings, motions, other papers, and representations to the court).

<sup>88</sup> *Liguori v. Hansen*, No. 2:11-cv-00492-GMN-CWH, 2012 WL 760747, at \*5 (D. Nev. Mar. 6, 2012).

<sup>89</sup> *Davis v. Back*, No. 3:09cv557, 2010 WL 1779982, at \*11 (E.D. Va. Apr. 29, 2010); see *Bush v. Adams*, No. 3:09cv674, 2010 WL 2640064, at \*3 (E.D. Va. June 29, 2010) (finding that the plaintiff “impermissibly utilized an attorney ghost-writer” and discussing previous warning to plaintiff about possible sanctions for this action). Another

violation of Rule 11.<sup>90</sup> These decisions have all discouraged well-intentioned lawyers from providing undisclosed document assistance to the poor.

On the other hand, two recent federal circuit court opinions may signal an easing of such harsh judicial treatment when well-intentioned ghostwriting takes place. The Second Circuit Court of Appeals declined to sanction an attorney accused of ghostwriting petitions for pro se litigants.<sup>91</sup> Noting that several ethics bodies, including the ABA, have found ghostwriting to be ethical under appropriate circumstances,<sup>92</sup> the Circuit Court found that the ghostwriting lawyer was motivated by a desire to help her clients, rather than to seek unfair advantage in court.<sup>93</sup> Similarly, the Eleventh Circuit Court of Appeals reversed a Florida district court's entry of sanctions against a lawyer who filled in blanks on a Chapter 13 bankruptcy petition for a debtor, without signing the lawyer's name.<sup>94</sup> These two decisions may reflect a new direction emerging among federal courts on the practice of ghostwriting, but it is too early to know for certain.

In contrast to many federal court decisions condemning undisclosed document assistance, the American Bar Association has provided guidance to lawyers that the practice is ethical.<sup>95</sup> In 2007, an ABA formal opinion concluded that undisclosed assistance is not an ethical violation, unless a jurisdiction specifically prohibits the practice<sup>96</sup> or the lawyer does so "in a manner that violates rules that otherwise would apply to the lawyer's conduct."<sup>97</sup> The ABA opinion found that a lawyer may provide legal assistance to litigants appearing pro se before tribunals and help prepare written submissions without disclosing the nature or extent of their assistance.<sup>98</sup> While acknowledging the existence of conflicting professional guidance opinions on

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Virginia federal court criticized ghostwriting assistance provided to a plaintiff, finding that "'ghostwriting' motions for a pro se plaintiff is contrary to the spirit of the Federal Rules of Civil Procedure and the privilege of liberal construction afforded to pro se litigants." *Couch v. Jabe*, No. 7:09-cv-00434, 2010 WL 1416730, at \*1 n.1 (W.D. Va. Apr. 8, 2010) (emphasis omitted). There has also been strong condemnation by federal courts in Illinois. *See, e.g., Thigpen v. Banas*, No. 08 C 4820, 2010 WL 520189, at \*1-2 (N.D. Ill. Feb. 11, 2010) (refusing to accept an amended complaint because it was ghostwritten).

<sup>90</sup> *See, e.g., Anderson v. Kohl's Corp.*, No. 2:12-cv-00822, 2013 WL 1874812, at \*2 n.4 (W.D. Pa. May 3, 2013) (noting the quality of the pleadings and threatening a warning to the lawyer if they had been ghostwritten); *Kear v. Kohl's Dep't Stores*, 12-1235-JAR-KGG, 2012 WL 5417321, at \*1 (D. Kan. Nov. 6, 2012) (noting that undisclosed ghostwriting could work to circumvent Fed. R. Civ. P. 11 and should not be condoned).

<sup>91</sup> *See In re Fengling Liu*, 664 F.3d 367, 372-73 (2d. Cir. 2011) (noting that the ambiguity in the area prevented clear knowledge of the wrongness of ghostwriting).

<sup>92</sup> *Id.* at 370-72.

<sup>93</sup> *Id.* at 373.

<sup>94</sup> *See In re Hood*, 727 F.3d 1360, 1365 (11th Cir. 2013) (holding that filling in blanks on a standard form petition is not drafting a document and the lawyer's assistance was not substantive enough to constitute fraud, even where local rules required the insertion of a statement when drafting documents that were prepared with the assistance of counsel).

<sup>95</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007), available at [http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/aba\\_07\\_446\\_2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/aba_07_446_2007.authcheckdam.pdf) (discussing undisclosed legal assistance to pro se litigants).

<sup>96</sup> *See id.* at 2 n.6.

<sup>97</sup> *Id.* at 4.

<sup>98</sup> *Id.* ("We conclude that there is no prohibition in the Model Rules of Professional Conduct against

the subject, the ABA's guidance opinion concluded that attorney ghostwriting is ethical and disclosure is not required by the rules of professional conduct.<sup>99</sup>

In 2011, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and the Philadelphia Bar Association Professional Guidance Committee issued a joint formal opinion on the ethics of limited scope engagements.<sup>100</sup> The joint opinion concluded that undisclosed document assistance is not an ethical violation under the Pennsylvania Rules of Professional Conduct and lawyers may provide such limited representation so long as it is reasonable under the circumstances and the client gives informed consent.<sup>101</sup> The joint opinion rejected the notion that ghostwriting provides an unfair advantage to pro se litigants, noting instead that lawyers are encouraged to render public interest legal service under Rule 6.1, and limited scope representation, which is intended to expand access to justice, is envisioned by Rule 6.5.<sup>102</sup> The Pennsylvania bar opinion also supported the ABA's position that attorney disclosure is not required in the absence of a rule or some other source of authority requiring it,<sup>103</sup> but cautioned that attorneys must understand that all professional responsibility rules that apply to non-limited representation also apply to limited scope arrangements.<sup>104</sup>

undisclosed assistance to pro se litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer's conduct.").

<sup>99</sup> *Id.* at 3-4.

<sup>100</sup> Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility & Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2011-100 (2011).

<sup>101</sup> *Id.* at 16.

<sup>102</sup> *Id.* at 4.

<sup>103</sup> The opinion also notes that the Model Rules of Professional Conduct do not require attorney disclosure. *Id.* at 12. It rejects the contention that Pennsylvania Rule of Professional Conduct 3.3—providing that a lawyer shall not knowingly “make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer”—or Pennsylvania Rule of Professional Conduct 8.4—barring a lawyer from “engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation” or from conduct “that is prejudicial to the administration of justice”—necessarily prohibits undisclosed ghostwriting, as non-disclosure is not a misrepresentation to the court and is not dishonest so long as it is not abused. *Id.* at 12; PA. RULES OF PROF'L CONDUCT R. 3.3 (2012); PA. RULES OF PROF'L CONDUCT R. 8.4 (2012). To the contrary, Pennsylvania Rules of Professional Conduct 1.2 and 1.6 emphasize the rights of the client to limited scope representation, as well as a lawyer's duty to respect a client's wish that legal assistance be limited or remain confidential or undisclosed. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility & Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2011-100, at 13 (2011).

<sup>104</sup> Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility & Phila. Bar Ass'n Prof'l Guidance Comm., Joint Formal Op. 2011-100, at 15 (2011). New Jersey's professional guidance committee has also opined on this subject. See N.J. Advisory Comm. on Prof'l Ethics, Op. 713, at 4-5 (2008) available at <https://www.judiciary.state.nj.us/notices/ethics/ACPE713.pdf> (detailing the changes in ghostwriting policies as it applies to New Jersey lawyers). The New Jersey opinion, issued after the ABA 2007 opinion on ghostwriting, acknowledged the ABA's “concern for expanding legal assistance to the unrepresented” that is represented in changes made to the ABA Model Rule 1.2(c) and by the addition of Model Rule 6.5. *Id.* at 2. In examining whether disclosure is required, the Committee acknowledged the applicability of Rule 1.6(a) and the duty of confidentiality to limited representation situations, but also noted the concerns expressed by some courts that “ghostwriting is unethical *per se* as a fraud upon the court” in the absence of notice to the court that attorney assistance was rendered. *Id.* at 3. It noted further that some courts require a limited duty of disclosure, depending on the amount or nature of legal aid rendered. *Id.* at 3. The New Jersey Committee concluded that “[d]isclosure is not required if the limited assistance [to the unrepresented] is part of an organized . . . program designed to provide legal assistance to people of limited means.” *Id.* at 4. However, disclosure is required “where such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking traditional

Today, lawyers are confronted by split authority in which many federal courts condemn undisclosed document assistance as violating a lawyer's duty of candor to the tribunal, while an increasing number of professional guidance opinions conclude that the practice is ethical as a means of promoting access to our courts. In the face of this split, the Model Rules remain silent. Without affirmative authority, many lawyers are understandably reluctant to provide document assistance to indigent litigants. The Model Rules' failure to expressly address this issue misses an important opportunity to influence the development of state court rules and to shape professional responsibility norms throughout the country.

Concerns that ghostwriting allows deceptive litigants to gain an unfair advantage in litigation simply do not apply to the bulk of honest, indigent litigants who need document assistance because they have no other recourse to protect their legal interests. Model Rule 1.2 could easily be amended to state that it is not an ethical violation for lawyers to provide free undisclosed document assistance to indigent litigants so that they may have the opportunity to have their legal matters fairly heard.<sup>105</sup> To the extent that judicial concerns about such a practice remain, the Model Rules might also offer helpful guidance in a comment or explanatory note suggesting that lawyers consider appending a statement that assistance was provided by a licensed member of the bar (without identifying the lawyer). In this way, lawyers may signal to the court that some measure of limited legal help was provided, without fear of violating ethical concerns and without entering an appearance that might obligate continuing legal help.

In conclusion, the Model Rules instruct lawyers to adhere to a broad range of professional responsibilities associated with full representation when rendering limited assistance, but fail to offer meaningful guidance on how lawyers are reasonably expected to fulfill these duties under real world circumstances in which the poor present a dire need for legal help. Professional guidance opinions are helpful on a case-by-case basis, but the absence of bright line guidance in the Model Rules misses an important opportunity to influence the development of professional norms and the crafting of local court rules that will foster greater legal assistance to the poor.

### *B. Model Rule 6.5*

Despite the justice gap crisis, there have been relatively few amendments to the Model Rules over the past fifteen years that address the special challenges of delivering legal services to low-income individuals. One notable exception is Model Rule 6.5. A product of the ABA Ethics 2000 Commission's work, Rule 6.5 recognizes that limited legal representation is increasingly delivered in non-traditional settings and a new rule relaxing formal conflict requirements was needed to remove obstacles that discouraged private attorneys from volunteering to provide pro

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judicial leniency toward pro se litigants while still reaping the benefits of legal assistance . . . . Similarly, disclosure is required when, given all the facts, the lawyer, not the pro se litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation. If neither of these required disclosure situations is present, and the limited assistance is simply an effort by an attorney to aid someone who is financially unable to secure an attorney, but is not part of an organized program, disclosure is not required." *Id.* at 4-5 (emphasis omitted).

<sup>105</sup> The Model Code of Judicial Conduct uses similar language in the comment to Rule 2.2 (Impartiality and Fairness) to clarify that judges do not violate ethical rules when assisting self-represented litigants. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. ¶ 4 (2011) ("It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.").

bono help.<sup>106</sup>

Rule 6.5 acknowledges that lawyers will be called upon to provide short-term legal assistance in courthouses or community settings as part of special projects conducted by non-profit organizations or court-sponsored programs.<sup>107</sup> Many such projects depend upon the private bar for volunteers, but many lawyers expressed concern that their participation would create unknowing conflicts of interest that would later cause them or their law firms to withdraw or decline representation of paying clients.<sup>108</sup> They also were concerned that their participation might constitute lawyer misconduct since they could not reasonably conduct standard conflict checking of their law firm records from community locations or while engaged in high-volume clinics.<sup>109</sup>

To respond to these concerns, Model Rule 6.5 relaxed formal conflict requirements of Model Rules 1.7, 1.9, and 1.10 in order to facilitate short-term assistance under these special circumstances.<sup>110</sup> At the same time, the rule retained conflict prohibitions for known actual or imputed conflicts,<sup>111</sup> striking a reasonable balance that promotes access to legal help without undermining ethical standards. While Rule 6.5 is a positive step forward in promoting access to justice, the rule is narrowly drawn to address only a lawyer's duty to identify and manage potential conflicts of interest in these settings. It does not offer guidance to lawyers on how to responsibly manage a range of other ethical duties in short-term, non-traditional settings, including duties of competence, diligence, and communication.<sup>112</sup>

Without such guidance, responsible lawyers are uncertain of the boundaries of their ethical duties, causing understandable concerns that chill participation. In Rule 6.5 projects, lawyers are uncertain whether they should, or are required, to execute written limited scope representation agreements. Are lawyers able to fulfill their duty of competence when called upon to advise indigent clients on how to proceed in their cases based upon just a few minutes of consultation, often without an opportunity to review relevant documents? May a lawyer ethically engage in short-term assistance where there are difficult language barriers that impair communication or if it appears to the lawyer that the client lacks the time, sophistication, or capacity to implement what both the lawyer and client agree needs to be done?

While the Model Rules may not be able to anticipate or answer every question that will arise in non-traditional settings, the absence of any guidance is troubling and, more to the point, chilling upon the voluntary efforts of lawyers. Model Rule 6.5 needs more careful thought with an eye toward expanding its reach to address ethical concerns that extend beyond simply managing conflicts of interest. An expanded Model Rule 6.5 that provides guidance on difficult questions such as these will encourage greater participation from the bar in pilot projects and other access to

<sup>106</sup> See ABA ETHICS 2000 COMM'N, ABA CTR. FOR PROF'L RESPONSIBILITY, REPORT TO THE ABA HOUSE OF DELEGATES 8 (2001) available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_hod\\_082001.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_082001.authcheckdam.pdf) (outlining the reasoning for the adoption of Rule 6.5).

<sup>107</sup> MODEL RULES OF PROF'L CONDUCT R. 6.5 (2013).

<sup>108</sup> See ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., *supra* note 81, at 26.

<sup>109</sup> *Id.*

<sup>110</sup> See MODEL RULES OF PROF'L CONDUCT R. 6.5 (2013) (stating a lawyer "is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation involves a conflict of interest" and is subject to Rule 1.10 only if the lawyer knows another lawyer at the firm is disqualified under 1.7 or 1.9(a)).

<sup>111</sup> MODEL RULES OF PROF'L CONDUCT R. 6.5 (2013).

<sup>112</sup> See *id.*

justice initiatives designed to increase legal representation to the poor. Silence does not provide the ethical guidance or encouragement that lawyers need.

## II. FINANCIAL ASSISTANCE TO INDIGENT CLIENTS

Under Model Rule 1.8(e), lawyers are permitted to advance court costs for their clients and may make repayment contingent upon the outcome of the litigation.<sup>113</sup> Clients are not required to guarantee repayment of advanced costs if the lawyer and the client agree that repayment will depend on the success of the litigation.<sup>114</sup> This principle represents an important change from prior provisions that required that clients remain liable for expenses advanced by the lawyer for their court costs, investigation expenses, medical examinations, and trial presentations.<sup>115</sup> The change was designed to enhance access to courts for personal injury victims seeking court remedies to be made whole. In essence, the change made treatment of court expenses largely indistinguishable from that of contingent attorney's fees.<sup>116</sup>

The treatment of court costs and litigation expenses in Model Rule 1.8 is one of the few places in the Model Rules in which an explicit distinction is drawn based upon the indigent status of a client. Lawyers for the poor may *pay*, and not merely *advance*, court costs and litigation expenses for their indigent clients.<sup>117</sup> This special provision reflects the reality that many legal claims or defenses of the poor are not handled on a contingency basis, and that access to our courts is significantly enhanced when lawyers representing indigents are able to pay such costs outright.<sup>118</sup> Abandoning the rule that clients must remain responsible for court costs and litigation expenses regardless of outcome and authorizing lawyers for the poor to pay gateway expenses are two examples of modest, but important, changes that have fostered access to justice without undermining legitimate ethical concerns.

At the same time, lawyers are not permitted to subsidize lawsuits or guarantee loans to their clients for living expenses because of concerns that financial assistance will create conflicts of interest between lawyers and clients and may encourage unmeritorious lawsuits.<sup>119</sup> The Model

<sup>113</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2013).

<sup>114</sup> See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.2.3 (1986).

<sup>115</sup> See MODEL CODE OF PROF'L RESPONSIBILITY Canon 10 (1908) (noting that "the lawyer should not purchase any interest in the subject matter of the litigation"); ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 288 (1954) (stating that forwarding living expenses is a violation of multiple canons); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1980) (noting a lawyer may advance financial assistance for the costs of litigation but not for living expenses).

<sup>116</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. ¶ 10 (2013); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 (2000) (stating that a lawyer shall not extend financial assistance except in the covering of court costs and expenses of litigation).

<sup>117</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(e)(2) (2013) ("[A] lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.").

<sup>118</sup> Court filing fees may be waived if an indigent client is granted *in forma pauperis* (IFP) status, but some other necessary litigation expenses are generally not included within IFP status. See, e.g., Kenneth R. Levine, *In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions*, 53 FORDHAM L. REV. 1461, 1461-64 (1985) (noting that while the federal courts may waive court fees for indigent civil litigants, they must still pay for other necessary expenses such as witness retainers).

<sup>119</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. ¶ 10 (2013) (noting that lawyers should not extend



Rules prohibit lawyers from making loans to clients for living expenses, even to indigent clients under dire circumstances, and are ambiguous as to the precise boundaries of court or litigation expenses that are permissible expenditures by lawyers on behalf of their clients. Protectionist rules in this context are grounded on the assumption that the supply of lawyers exceeds demand and permitting financial assistance by lawyers will have adverse consequences on clients and other members of the bar. The ban reflects a fear that financial assistance by lawyers is tantamount to purchasing an interest in litigation which clients will be required to repay, and that lawyers who market their ability to extend funds to clients will gain an unfair advantage.<sup>120</sup> The prohibition also seeks to protect clients who may be unduly influenced by promises of financial assistance when making representational decisions.<sup>121</sup>

Courts have disciplined lawyers for violating this basic prohibition,<sup>122</sup> although they are

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loans for living expenses because it would encourage lawsuits that would otherwise not be brought).

<sup>120</sup> Current restrictions on financial assistance by lawyers are based upon three historical doctrines: champerty (acquisition of a share of another's claim), maintenance (supporting a litigant to carry on a claim), and barratry (incitement or encouragement of another to bring a claim). James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 223-25 (2003) (calling the rules "flawed maintenance, champerty, and barratry rules" and explaining their historical bases). Despite these rules' long history, one court found that there was no risk of unfair competition when a lawyer advanced living expenses. See *In re Ruffalo*, 249 F. Supp. 432, 443 (N.D. Ohio 1965) (holding that the making of loans for living expenses to "relatively few clients" did not "constitute[] a practice calculated to solicit employment by others" or unethical advertising of attorneys services, and that the advances did not constitute the purchase of an interest in the subject matter of the litigation where "the clients had an unconditional obligation to repay the advances").

<sup>121</sup> See, e.g., *Att'y Grievance Comm'n of Md. v. Kandel*, 563 A.2d 387, 390 (Md. 1987) ("Clients should not be influenced to seek representation based on the ease with which monies can be obtained, in the form of advancements, from certain law firms or attorneys."); *Topps v. Pratt & Callis, P.C.*, 564 N.E.2d 196, 197-98 (Ill. App. Ct. 1990) (finding an agreement between attorney and client that required attorney to advance living expenses during pendency of client's workers' compensation case violated the Code of Professional Responsibility and was "void as against public policy"); *In re Rue*, 663 So. 2d 1320, 1320 (Fla. 1995) (reinstating a lawyer after ninety-one day suspension "for various offenses including: advancing living expenses to clients"); *Att'y Grievance Comm'n of Md. v. Eisenstein*, 635 A.2d 1327, 1337 (Md. 1994) ("Advancing non-litigation related expenses smacks of 'purchasing an interest in the subject matter of the litigation' in which the lawyer is involved, and the majority view thus prohibits it. Although we find that the funds advanced by respondent may have been made in part because of the long-standing personal relationship between respondent and his client, we nevertheless find that the loans here violated Rule 1.8(e).") (internal citations omitted); *Curtis v. Ky. Bar Ass'n*, 959 S.W.2d 94, 95-96 (Ky. 1998) (suspending for sixty days an attorney who gave financial assistance to clients in connection with pending or contemplated litigation and committed other violations).

<sup>122</sup> The majority rule is that 1.8(e) does not permit lawyers to make humanitarian loans to their clients even after the lawyer has been retained, but the punishment is rarely more than censure or reprimand. See, e.g., *State ex rel. Okla. Bar Ass'n v. Smolen*, 17 P.3d 456, 457, 462-63 (Okla. 2000) (upholding a sixty-day suspension for attorney who loaned money to client for travel expenses as a violation of 1.8(e) and upholding the constitutionality of the prohibition on lending money to clients); *In re Arensberg*, 553 N.Y.S.2d 859, 859 (1990) (censuring two attorneys for making loans to clients after having been previously warned about this type of conduct); *Ligon v. Rees*, 364 S.W.3d 28, 39-42 (Ark. 2010) (applying a one year suspension and \$676.60 fine for violations including of Rule 1.8(e)); *Att'y Grievance Comm'n of Md. v. Pennington*, 733 A.2d 1029, 1038 (Md. 1999) (holding the appropriate sanction for violation of 1.8(e) with no prior discipline to be a reprimand). *But see* *Disciplinary Counsel v. Ranke*, 956 N.E.2d 288, 290-92 (Ohio 2011) (holding the lawyer would receive an indefinite suspension for violations including of rule 1.8(e)). Disqualifications for violations of Rule 1.8(e) are generally not appropriate. *But see* *Waldman v. Waldman*, 499 N.Y.S.2d 184, 184 (N.Y. App. Div. 1986) (holding disqualification could be appropriate even when attorney's loan to client for automobile insurance premiums was motivated only by the "attorney's genuine concern for his client's financial plight"). Courts weigh the lawyer's intent for

generally reluctant to disqualify lawyers from further representation if there is no pattern of offending conduct and financial assistance did not impact the representation.<sup>123</sup> Courts have imposed discipline for violations even where an offer of financial help is intended to satisfy “humanitarian needs,”<sup>124</sup> enable a client to pay an electric bill,<sup>125</sup> provide bus tokens for a client’s travel to medical appointments,<sup>126</sup> or cover living expenses under difficult circumstances.<sup>127</sup> The irony of this absolute rule, which has not been lost upon some courts, is that advancing money to a client for living expenses or other dire needs is prohibited on the basis that it threatens the independence or judgment of the lawyer, but a lawyer’s advancement of even larger sums needed to cover litigation expenses is authorized.<sup>128</sup>

Historically, it was not uncommon for lawyers to lend money to poor clients and this practice was not regarded as illegal or against public policy.<sup>129</sup> Indeed, some courts deemed a

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humanitarian aid of the client against the penalties given. *See Toledo Bar Ass’n v. McGill*, 597 N.E.2d 1104, 1106 (Ohio 1992) (finding that “guaranteeing financial assistance to clients while representing them in connection with contemplated or pending litigation” is barred by DR 5-103(B) and warrants public reprimand, even if the provision merits “re-examin[ation]”). The ban on extending living expenses includes not only loans but also gifts, housing, and other forms of non-litigation based financial assistance. *See In re Hoffmeyer*, 656 S.E.2d 376, 378 (S.C. 2008) (“Rule 1.8(e) prohibits a lawyer from providing ‘financial assistance in connection with pending or completed litigation’ . . . . The rule does not distinguish between loans and gifts, and the term ‘financial assistance’ is unambiguous and encompasses both loans and gifts of money.”); *Gex v. Miss. Bar*, 656 So. 2d 1124, 1130 (Miss. 1995) (finding that providing financial assistance and housing while awaiting a delay in settlement violated rule 1.8(e)). *But see Shade v. Great Lakes Dredge & Dock Co.*, 72 F. Supp. 2d 518, 520-22 (E.D. Pa. 1999) (finding an attorney who provided plaintiff free use of apartment and paid family related expenses because plaintiff had lost his job, suffered an emotional breakdown, and plaintiff’s wife was injured did not warrant a disqualification because the client would not be required to repay the law firm so there was a low risk of conflict of interest).

<sup>123</sup> *See Hernandez v. Guglielmo*, 796 F. Supp. 2d 1285, 1291 (D. Nev. 2011) (noting that most penalties for violation of Rule 1.8(e) are modest and holding that the disqualification of counsel for violation of the rule is “not appropriate unless there is evidence of a pattern of such violations, the loan actually impacted the attorney’s handling of the case, or other misconduct was present.”).

<sup>124</sup> *See In re Ballew*, 695 S.E.2d 573, 576 (Ga. 2010) (“[T]he State Bar rejects Ballew’s assertion that his decision to give the client money for ‘humanitarian needs’ obviated his obligation to comply with the Bar Rules regarding his trust fund and accounting requirements.”); *Miss. Bar v. Shaw*, 919 So. 2d 51, 55-56 (Miss. 2005) (disciplining for “humanitarian” aid due to policy concerns about competition between lawyers).

<sup>125</sup> *See In re Strait*, 540 S.E.2d 460, 462 (S.C. 2000) (finding that “advanc[ing] money to a client in order for her to pay her electric bill” was a violation of Rule 1.8(e)).

<sup>126</sup> *See Rubenstein v. Statewide Grievance Comm.*, No. CV020516965S, 2003 WL 21499265, at \*9 n.14, \*11 (Conn. Super. Ct. June 10, 2003) (upholding the Grievance Committee’s public reprimands against two attorneys who made loans for bus tokens for travel to the doctor and for medical expenses).

<sup>127</sup> *See, e.g., In re Minor Child K.A.H.*, 967 P.2d 91, 93-97 (Alaska 1998) (holding that the state’s version of Rule 1.8(e) precludes an attorney “from making loans for living expenses to a client after the attorney has been retained.”).

<sup>128</sup> *See Miss. Bar v. Att’y HH*, 671 So. 2d 1293, 1298 (Miss. 1995) (“We are sensitive to the concern over leveling the playing field for injured parties. We also recognize the logical inconsistency of asserting that a lawyer’s interest in recovering moneys lent to a client for living and medical expenses would affect his judgment while the prospect of losing possibly vast sums advanced in the form of litigation expenses would not. . . . We invite the bench, bar and public to suggest a mechanism for dealing with the problem of the impecunious civil litigant with a viable and valuable claim. In the meantime we enforce our standards of conduct as written.”).

<sup>129</sup> *See Shapley v. Bellows*, 4 N.H. 347, 355 (1828) (“And it is not uncommon that attorney[s] [sic] commence

lawyer's offer of financial help to be appropriate and necessary so that an indigent client would not be forced to accept an inadequate settlement simply because of poverty.<sup>130</sup> The Model Rules have strayed far from this noble proposition.

Even if a prohibition on extending financial assistance holds merit in the traditional lawyering model, it is questionable, at best, when applied to the delivery of free legal services to indigent clients. The assumptions that underlie this prohibition simply do not apply when providing free legal assistance to impoverished communities. There is no real concern that lawyers will overreach to obtain clients and in many types of cases involving the poor, such as landlord-tenant evictions or mortgage foreclosures, there is no sizeable monetary recovery that would give substance to ethical concerns.

Poverty presents special ethical and moral challenges for lawyers serving the poor. What should a lawyer do if an indigent client is unable to preserve important legal defenses or protect basic human needs in the courts without short-term financial assistance from the lawyer? Should a humanitarian act of kindness from a lawyer to an indigent client in this dire setting be deemed an act of professional misconduct?

To explore these concerns, consider the plight of an indigent tenant defending against an eviction action brought by her landlord for non-payment of rent.<sup>131</sup> Due to the scarcity of legal help, the tenant proceeds on her own in a housing court where the landlord is likely to be represented by counsel. Although the tenant may have a meritorious warranty of habitability defense based upon deplorable housing conditions, the tenant may not be aware of those defenses and may not know how to present relevant information to the court without legal help. If a judgment for possession is awarded to the landlord, the tenant will be advised of her right to appeal to a higher court of general jurisdiction for a hearing *de novo*. But, to appeal and receive a "supersedeas," or a stay of the eviction, so that she may stay in her home while awaiting her day in court, the tenant will be required to post a bond or pay an amount equal to the lesser of three months of rent or the amount of rent actually in arrears on the date of the filing of the appeal.<sup>132</sup>

If the tenant again seeks legal help again from her local legal aid organization, she may obtain help because the consequences are so dire. Without further court review, the tenant and her

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actions for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a person in indigent circumstances is enabled to obtain justice in cases where, without such aid, he would be unable to enforce a just claim."); *see also* Johnson v. Great N. Ry. Co., 128 Minn. 365, 369 (Minn. 1915) ("But is it champerty or maintenance or against public policy for an attorney to solicit business, to pay money to a poor client for his living expenses during the litigation, or to advise him against a settlement of his case? . . . [W]e are aware of no authority holding that it is against public policy [to advance money to the injured client.]"); *People ex rel. Chi. Bar Ass'n v. McCallum*, 173 N.E. 827, 831 (Ill. 1930) (stating an attorney does not violate ethics laws or offend public policy by lending money to an indigent client for living and medical expenses while case is pending).

<sup>130</sup> *See In re Teichner*, 387 N.E.2d 265, 272 (Ill. 1979) (noting that "offer of financial assistance" by lawyer was not "necessarily improper" and that "[t]his court long ago rejected any rule which would permit indigent plaintiffs to be forced into a hasty, inadequate settlement by their indigency."); *see also* Dupuis v. Faulk, 609 So. 2d 1190, 1193 (La. Ct. App., 1992) ("Nor do we see how a lawyer's guarantee of necessary medical treatment for his client, even for a non-litigation related illness, can be regarded as unethical, if the lawyer for reasons of humanity can afford to do so."); *Att'y Grievance Comm'n of Md. v. Harris*, 528 A.2d 895, 903 (Md. 1987) (stating that advances against anticipated settlement of tort claims were acceptable).

<sup>131</sup> The following example is based upon a common factual situation arising in Philadelphia under the rules and procedures of the First Judicial District of Pennsylvania.

<sup>132</sup> *See* PHILA. CIV. R. 1008(b)-(c).

children will face homelessness. But, to perfect her appeal and stay of eviction proceedings, the tenant must now pay an amount (or post the required bond), which is beyond her current financial means. Is a court-required bond a litigation expense that a legal aid lawyer may pay, in order to ensure that the tenant has an opportunity to be heard represented by counsel in a formal court? Or, will a lawyer regard payment of the bond for this rental expense as outside the boundaries of permissible court costs?<sup>133</sup>

Assume, further, that court rules require the tenant to also pay monthly rent as it becomes due, but that the tenant experiences a disruption in her disability benefits due to no fault of her own. The legal aid lawyer agrees to also represent the tenant to restore her disability benefits but this process will take time, perhaps two or more months, before the client's public benefits can be restored. May a lawyer provide financial assistance to the client for rental payments as they become due while awaiting the restoration of disability benefits so that the landlord-tenant case may proceed and the tenant's family can remain in their home pending a court determination? Or, must the lawyer stand idly by as the tenant and her family are evicted because monthly rent cannot be posted with the court due to the administrative error of the disability agency?

Let's consider one additional example. A low-income homeowner who is delinquent on real estate tax payments to her local municipality faces legal proceedings to schedule her home for a sheriff's sale to collect the delinquency. Local law permits the homeowner to enter into a repayment agreement and, as long as she stays current with the terms of the agreement, to avoid loss of her home. With the assistance of her pro bono lawyer, the homeowner enters into a payment agreement that sets the terms of monthly payments under local law to stop the sheriff's sale of her home, but the agreement will not go into effect unless the first payment of less than one-hundred dollars is received within thirty days. The low-income homeowner has already spent her modest monthly income on other necessities, and cannot get help from family members to tender this additional payment within thirty days. May the homeowner's lawyer advance this modest sum so that the agreement goes into effect, the client's home is not sold at sheriff's sale, and the client has needed time to budget in the future for this additional expense?

It is in emergency situations such as these that wealthier clients can draw upon a safety net in savings or family resources, so that their legal claims are not lost. Low-income individuals have far fewer options, and often turn to their public interest lawyers for whatever assistance can be obtained. In this setting, does it make sense to have an ethical rule that prohibits a non-profit lawyer from advancing financial assistance that will prevent the homelessness of a client, especially when the same rules permit a lawyer to advance even larger sums to pay the lodging expenses of an out-of-state client to attend a deposition?<sup>134</sup>

Some states have forged different responses to this problem. The Louisiana Supreme Court, for example, declined to find an ethical violation where a lawyer extended financial assistance solely for "minor sums" to cover minimal living expenses, to prevent foreclosure, or to

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<sup>133</sup> See Pa. Bar Ass'n. Comm. on Legal Ethics & Prof'l Resp., Informal Op. 2000-14, at \*2 (2000) (available on WestLaw, 2000 WL 1616267) (finding that it is ethically permissible for lawyer with an indigent client to post bond for the lesser of three months of rent or the amount of the judgment, but not to pay for living costs, because "the posting of the bond is much more akin to court costs and litigation expenses" than "it is to 'financial assistance' prohibited by [Rule 1.8(e)]").

<sup>134</sup> See Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 00-21, at \*1 (2000) (available on WestLaw, 2000 WL 33170670) (stating that the litigation costs that a lawyer may pay include the travel and lodging expenses for an out-of-state client to attend a deposition, despite a 1990 opinion that a lawyer may not advance \$300 in rent to prevent homelessness, even to continue a case that would likely "yield considerably more than \$300").

obtain “necessary medical treatment.”<sup>135</sup> There, the Court stated that no “bar disciplinary rule can or should contemplate depriving poor people from access to the court so as effectively to assert their claim.”<sup>136</sup> Louisiana has adopted an ethical rule that permits the advancement of funds to clients for minimal, necessary living expenses, under appropriate circumstances.<sup>137</sup> Indeed, some have questioned whether a ban on humanitarian, non-interest-bearing loans by lawyers violates constitutional guarantees.<sup>138</sup>

Other states have also departed from the approach taken by the Model Rules. Alabama, for example, allows “emergency” financial assistance by lawyers, provided repayment is not contingent on the outcome of the matter and that the lawyer does not promise financial assistance before being hired.<sup>139</sup> Under Alabama’s rule, “[t]he lawyer is never obligated to provide such assistance, [but the lawyer] is obligated to attempt collection from the client regardless of the outcome of the matter.”<sup>140</sup> Minnesota permits a lawyer to “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 [the] case because of financial hardship rather than on the merits . . . .”<sup>141</sup> Mississippi allows advancement of medical expenses and living expenses “under dire and necessitous circumstances . . . limited to minimal living expenses of minor sums such as those necessary to prevent foreclosure or repossession or for necessary medical treatment.”<sup>142</sup>

<sup>135</sup> La. State Bar Ass’n v. Edwins, 329 So. 2d 437, 445–46 (La. 1976) (finding that there is no violation for a lawyer already retained by a client who only forwarded small amounts and for which the client remains ultimately liable, and the attorney “did not encourage public knowledge of this practice” to recruit clients).

<sup>136</sup> *Id.* at 446.

<sup>137</sup> See LA. RULES OF PROF’L CONDUCT R. 1.8(e)(4) (2006) (permitting a lawyer to “provide financial assistance to a client who is in necessitous circumstances, subject to . . . restrictions” such as extending only minimum financial assistance and that it not serve as “an inducement”); see also *In re Maxwell*, 783 So. 2d 1244, 1249 (La. 2001) (noting that advancing “minimal, necessary living expenses” is acceptable and calling for a committee to amend Louisiana Rule 1.8).

<sup>138</sup> See, e.g., *Dupuis v. Faulk*, 609 So. 2d 1190, 1193 (La. App. Ct. 1992) (noting that the “court-adopted bar disciplinary rule which places an unreasonable burden upon an individual’s right to enforce claims” may violate the guarantee of access to courts under the state constitution); *Oklahoma ex rel. Okla. Bar Ass’n v. Carpenter*, 863 P.2d 1123, 1132 (Okla. 1993) (Kauger, J., concurring in part and dissenting in part) (“Overreaching for pecuniary gain by an attorney should be vigorously investigated and discipline imposed if warranted. However, the provision of humanitarian, non-interest bearing loans to clients does not warrant discipline. Rule 1.8(e), of the Oklahoma Rules of Professional Conduct, prohibiting such loans, violates both the Oklahoma and the United States Constitutions.”) (footnotes omitted). *But see Oklahoma ex rel. Okla. Bar Ass’n v. Smolen*, 17 P.3d 456, 463 (Okla. 2000) (rejecting the claim that Rule 1.8(e) violates the federal equal protection guaranty).

<sup>139</sup> ALA. RULES OF PROF’L CONDUCT R. 1.8(e)(3) (2009). The ABA has provided detailed treatment of model rules and modifications adopted by the states. See ABA CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 1.8 (2013) available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_8.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.authcheckdam.pdf) (cataloging differences in the promulgation of Rule 1.8 between states).

<sup>140</sup> ALA. RULES OF PROF’L CONDUCT R. 1.8 cmt. (2009).

<sup>141</sup> MINN. RULES OF PROF’L CONDUCT R. 1.8(e)(3) (2011).

<sup>142</sup> MISS. RULES OF PROF’L CONDUCT R. 1.8(e) (1999). In the wake of disaster relief following Hurricane Katrina, Mississippi relaxed its ethical rules and permitted a \$2,500 cap that a lawyer could advance in living expenses and medical treatment but that must be reported within seven days and would need to be repaid upon successful conclusion of the matter. *In re Rules of Professional Conduct*, No. 89-R-99018-SCT (Miss. Oct. 3, 2005), available at

In short, several states have departed from the Model Rules' approach and permit a lawyer to advance living expenses or other financial assistance under real hardship circumstances that adversely affect the client's ability to maintain a claim or defense in court. The rules vary in their requirements, but generally limit financial assistance to basic human needs, such as shelter, utilities, or emergency medical expenses. Lawyers may not promise assistance as a means of obtaining a client and may not extend financial assistance prior to being retained.<sup>143</sup>

A different approach to this problem is to fashion a special rule only for approved providers of free legal assistance, such as legal aid offices, law school clinical programs, and approved pro bono organizations. New Jersey has adopted this approach.<sup>144</sup> New Jersey's ethical rules permit approved provider organizations or lawyers rendering qualifying pro bono services to provide financial assistance to indigent clients whom they are representing for free.<sup>145</sup>

The time has come to revisit the Model Rules' financial assistance prohibitions that unnecessarily restrict lawyers for the poor from being able to safeguard the claims of their clients and to ensure access to the courts under dire circumstances. There are at least two approaches deserving of serious consideration. The first approach, adopted by Louisiana, is a broad-based rule applicable to all licensed lawyers that permits financial assistance when assisting clients who experience dire circumstances that threaten access to the court and where modest assistance is needed to meet emergency needs, such as shelter, utilities, or health. Safeguards can be imposed in such a rule to protect against overreaching and to minimize conflict of interest concerns.

A second approach, adopted by New Jersey, is to craft a special rule for recognized providers of legal services to the poor that relaxes restrictions on financial assistance when such assistance is provided in the course of delivering free legal services to indigent clients. New Jersey's approach is similar to that adopted by Model Rule 6.5, which relaxes conflict rules for lawyers serving the poor in special projects sponsored by the courts or legal aid providers.<sup>146</sup> In this limited universe, a special rule such as New Jersey's largely eliminates the risks associated with extending financial assistance to clients and represents valuable progress in promoting access to the courts.

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<http://courts.ms.gov/rules/ruleamendments/2005/sn127102.pdf>; MISS. RULES OF PROF'L CONDUCT R. 1.8(e) (1999).

<sup>143</sup> See, e.g., LA. RULES OF PROF'L CONDUCT R. 1.8(e)(4) (2006) (restricting loans to a client, outside litigation expenses, to those necessary due to a client having financial "circumstances" that would "adversely affect the client's ability to initiate and/or maintain the cause," those that provide only "minimum . . . necessary" living requirements, and those that do not induce the client to employ the lawyer).

<sup>144</sup> See, e.g., N.J. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2004) ("[A] non-profit organization . . . may provide financial assistance to indigent clients whom it is representing without fee.").

<sup>145</sup> N.J. Rules of Prof'l Conduct R. 1.8(e) (2004). In 2012, the New Jersey Bar Association proposed an update to its Rule 1.8(e) in order to clarify and expand the number of groups able to provide financial aid to clients. See EMILY GOLDBERG & KAREN SACKS, N.J. STATE BAR ASS'N PRO BONO TASK FORCE, CLOSING THE JUSTICE GAP 58 (2012) (proposing altering the rules to allow "a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualified pro bono service as defined in R. 1:21-XX(a)" to provide financial assistance those "clients whom the organization, program, or attorney is representing without fee.").

<sup>146</sup> MODEL RULES OF PROF'L CONDUCT R. 6.5 (2013).

### III. WITHDRAWAL OF REPRESENTATION

The justice gap is severe in almost all trial courts, but is perhaps most dire in family courts where the overwhelming number of litigants are unrepresented in critical matters affecting the best interests of their children. Family court judges are called upon to make incredibly important decisions that hold long-term consequences for the well-being of families without having the benefit of carefully marshaled facts or legal arguments provided by knowledgeable attorneys. Legal aid programs are stretched far beyond their limited resources in family courts and nowhere is the need greater for pro bono legal assistance.<sup>147</sup>

At the same time, pro bono programs routinely report that it is difficult to secure volunteer lawyers in child custody cases.<sup>148</sup> While personal rewards from helping children obtain stability and gain prosperity through family court proceedings are great, many lawyers avoid volunteering for child custody cases. The reasons are many, but one important factor is the real concern that a lawyer's offer of representation in one discrete family court hearing will obligate the lawyer to months or years of continuing pro bono service, extending beyond the lawyer's available time or resources.<sup>149</sup> Lawyers are acutely aware that volunteering for one child custody hearing may require their continued assistance in prolonged, subsequent custody modifications and enforcement disputes that frequently drag on for years, sometimes only ending when the child turns eighteen years of age.

The American Bar Association's Standing Committee on Pro Bono and Public Service has studied factors that discourage pro bono service. In a report published in 2013, the ABA committee found that fifty-nine percent of lawyers polled believed that greater opportunities to provide limited scope representation would encourage lawyers to do more pro bono.<sup>150</sup> Lawyers who were surveyed identified time constraints as a top factor discouraging greater pro bono services.<sup>151</sup> The ABA report found that more lawyers would volunteer their services to the poor if they could be assured that their service was not open-ended and could be reasonably limited in ways that would still provide a valuable service.<sup>152</sup>

Instead of addressing this recurring input from lawyers, the Model Rules retain onerous requirements for withdrawal of representation once a lawyer's entry of appearance is entered and fail to create relaxed rules for short-term, limited representation. As a result, many lawyers are

<sup>147</sup> See LEGAL SERVS. CORP., *supra* note 55, at 15, 18-19.

<sup>148</sup> See ABA STANDING COMM. ON PRO BONO & PUBLIC SERV. & ABA FAMILY LAW SECTION, ENHANCING THE REPRESENTATION OF CHILDREN IN CUSTODY CASES: RESOURCE AND LESSONS LEARNED FROM THE ABA CHILD CUSTODY AND ADOPTION PRO BONO PROJECT 2001-2008, at 24 (2008).

<sup>149</sup> See Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 St. Mary's J. on Legal Malpractice & Ethics 166, 260 (2012) ("The unique legal and emotional challenges involved in domestic-relations cases requiring more than perfunctory court involvement make it almost impossible for the attorney to conclude that offering some representation, leaving the litigant pro se status for aspects of the case, is reasonable.").

<sup>150</sup> BUCZEK ET AL., *supra* note 52, at vii-viii (detailing factors that lawyers believed would encourage or discourage pro bono service).

<sup>151</sup> *Id.* at viii.

<sup>152</sup> See *id.* at 26 ("Attorneys surveyed were asked to rate how influential they believed specific statements about actions referral organizations could take to encourage pro bono were. [Fifty-nine percent] of attorneys believed that providing limited scope representation opportunities was highly influential.").

reluctant to appear in court solely to argue a motion or to provide limited representation in a specific one-day hearing, for fear of obligating themselves for continuing responsibility beyond that originally intended. Judges are understandably reluctant to allow lawyers to withdraw their appearances when they know that to do so will leave an unrepresented litigant with little hope of obtaining new counsel.

It is apparent that more lawyers would be willing to lend their assistance for family court hearings if they could be assured that their voluntary service would conclude at the end of the day or at the end of a particular event or stage of the proceedings. But such an assurance, even if consented to by an indigent client, is subject to ethical constraints and court rules that make withdrawal of a lawyer's representation difficult and uncertain.<sup>153</sup>

Generally, lawyers may not withdraw their representation from a court case without simultaneously entering the appearance of a new counsel or securing the consent of the tribunal. The fact that a volunteer lawyer does not wish to continue beyond a point mutually agreed upon between the lawyer and client is not sufficient reason under model ethical rules to assure that the lawyer will be permitted to withdraw. Model Rule 1.16(c) provides that where a lawyer has entered an appearance on behalf of a client and the rules of the tribunal require approval of the withdrawal by the tribunal, the lawyer shall continue to provide representation even though there is good cause for terminating the representation.<sup>154</sup> As a general matter, courts look to several factors when deciding whether to approve a lawyer's withdrawal of representation, such as whether there is a simultaneous entry of appearance of successor counsel, motions are outstanding, or a trial date been set.<sup>155</sup> A "decision whether to allow" a lawyer's proposed withdrawal of representation lies within "the sound discretion" of the court and will not be altered on appeal absent an abuse of discretion.<sup>156</sup>

As a result, a lawyer cannot be assured that withdrawal will be permitted simply because the lawyer and client agree to limit the extent of a lawyer's pro bono service. Indeed, many judges may consider themselves duty-bound to deny withdrawal despite client consent if it is likely to adversely affect the client's interests. When a client has the resources to hire new counsel, or possesses the education, training, or sophistication to self-represent effectively, adverse consequences are not generally present. But, when a client is indigent, lacks basic understanding of legal matters, and has nowhere else to turn for legal help, the withdrawal of representation by a volunteer lawyer will almost always have a material adverse effect on the client's interests. Under this standard, courts are entitled to routinely deny withdrawals by volunteer lawyers, and lawyers have little recourse.<sup>157</sup>

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<sup>153</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.16 (2013) (providing the rules guiding declining or terminating representation).

<sup>154</sup> *Id.*; see also, e.g., *In re Kiley*, 947 N.E.2d 1, 4-5 (Mass. 2011) (noting that the tribunal's approval itself may be required before a lawyer may withdraw).

<sup>155</sup> See, e.g., *In re Kiley*, 947 N.E.2d at 5.

<sup>156</sup> *Id.*

<sup>157</sup> A New Jersey court denied a lawyer's motion to withdraw when it viewed the client as being significantly disadvantaged if forced to proceed pro se due to the extensive factual and procedural history and substantial discovery required as well as the likelihood of not being able to retain new counsel or new counsel not being able to become familiar with the case in a timely manner. See *Cuadra v. Univision Commc'ns, Inc.*, No. 09-4946 (JLL), 2012 WL 1150833, at \*9 (D.N.J. 2012) ("Even if counsel had provided good cause to withdraw, the other factors weigh against granting this motion. The prejudice that withdrawal would cause to the parties, the harm to the administration of justice, and delay of resolution of this case all demonstrate that the Court should exercise its discretion [to continue



While courts have long permitted lawyers to withdraw representation when a client fails to pay the fees of the lawyer, they are less willing to permit a volunteer lawyer to withdraw representation of an indigent client because of the additional burdens that such withdrawal places upon the courts and the client.<sup>158</sup> As a result, cases that are likely to involve multiple or recurring hearings or which will last for long periods of time, such as child custody disputes, are less likely to attract pro bono legal assistance even though the stakes in such cases are high and legal help is so vital to a proper determination.

This is certainly not a new development. Nonetheless, the Model Rules remain silent in the face of this important concern.<sup>159</sup> Model Rule 6.5 fails to address this issue in the context of short-term assistance in innovative projects, even though modifications would likely promote greater pro bono assistance in our family courts.<sup>160</sup> In the void left by the Model Rules, some states are beginning to develop new approaches.

New Hampshire, for example, has endorsed limited entries of representation to encourage greater short-term legal assistance and has added an additional paragraph to its ethics Rule 1.16, which provides for automatic termination of representation:

(e) The representation of a lawyer having entered a limited appearance as authorized by the tribunal under a limited representation agreement under Rule 1.2(f)(1), shall terminate upon completion of the agreed representation, without the necessity of leave of court, upon providing notice of completion of the limited representation to the court.<sup>161</sup>

Under this rule, lawyers are more likely to volunteer because they are ensured that their service will be limited to the specific matters or events, which were agreed upon with their clients. Similarly, California has adopted a specific rule that provides for limited entries of appearance and that establishes a streamlined procedure for being relieved as the attorney of record upon completion of tasks specified in the notice of limited scope representation.<sup>162</sup>

Innovations such as these signal the importance of responding to the concerns of lawyers who want to volunteer but also want to limit their service within reasonable boundaries upon which they may confidently rely. The Model Rules should play a valuable role in recommending thoughtful responses to this problem for states to consider. While ethical rules relaxing constraints on withdrawal of representation in these special settings will not preempt specific court rules governing this practice, ethical rules are likely to be persuasive in encouraging courts to take into

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representation]”); *see also* Gerold v. Vehling, 89 A.3d 767, 771 (Pa. Commw. Ct. 2014) (“[T]he question of whether an attorney should be permitted to withdraw an appearance is within the discretion of the trial court . . .”).

<sup>158</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(5) (2013) (noting that the lawyer may withdraw when “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled”).

<sup>159</sup> Neither Model Rule 1.2 governing limited scope representation nor Model Rule 1.16 governing withdrawal of representation speaks to this question. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2 (2013); MODEL RULES OF PROF’L CONDUCT R. 1.16 (2013).

<sup>160</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 6.5 (2013).

<sup>161</sup> N.H. RULES OF PROF’L CONDUCT R. 1.16(e) (2013).

<sup>162</sup> CAL. RULES OF COURT R. 3.36 (2006) (providing the new California procedure governing limited scope appearances by attorneys).

account access to justice needs when crafting local rules governing the withdrawal of free legal representation to the poor.

#### IV. CONCLUSION

Our challenge is to ensure equal justice under law in every courtroom.<sup>163</sup> Some believe that poverty will always be with us and that ethical rules should not attempt to address this problem.<sup>164</sup> To the contrary, this Article asserts that the Model Rules of Professional Conduct have the ability to play a very important role in shaping needed change among the states to achieve access to justice. Although the organized bar has been a staunch advocate for expanding access to lawyers, it has acted too slowly in adapting the Model Rules to the special needs of low-income individuals who are directly affected by the nation's justice gap. The Model Rules continue to be largely situated in a traditional lawyering paradigm which has grown increasingly distant from how legal services are actually delivered to the poor. Ethical rules must adjust more quickly to the realities of a delivery system that unbundles its services in diverse settings and attempts triage under very difficult circumstances.

To make meaningful progress against the justice gap, we must step up our efforts to boost public funding for civil legal assistance while also advocating for a right to counsel when basic human needs are at stake. We must also undertake bold innovations in the manner and places in which we provide legal help to the poor. This means expanding limited scope representation and unbundled legal services in nontraditional settings and adopting new measures to assist unrepresented individuals. Low-income individuals who cannot obtain full representation are turning to limited assistance when it is available from help desks, telephone hotlines, community fairs, and advice-only clinics. Ethical constraints that restrict the provision of legal services to the poor in these settings must be reexamined. The Model Rules should lift unnecessary restrictions and provide greater flexibility to lawyers who struggle to provide some measure of legal help in such demanding circumstances.

This Article has highlighted three areas of the Model Rules to illustrate the need for comprehensive and modern reforms. In such areas as document assistance to unrepresented litigants, financial assistance to indigent clients, and withdrawal of representation in limited scope representation, the Model Rules' approach of restrictions, silence, and ambiguity coalesce to impede access to justice. While occasional professional guidance opinions offer valuable help on a case-by-case basis, the time has come for a comprehensive review of the Model Rules from the perspective of providing greater legal assistance to those who have so little access to our civil justice system. The surprisingly few changes in the Model Rules over the past fifteen years directed at promoting access to justice are simply not enough to constitute a meaningful response to the challenges that confront our legal system in a justice gap crisis.

This Article proposes that the ABA appoint a blue ribbon commission to conduct a comprehensive and systematic review of the entire Model Rules from an access to justice perspective. The commission should include leaders of the judiciary and legal aid and pro bono

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<sup>163</sup> See generally Randall T. Shepard, *The Self-Represented Litigant: Implications for the Bench and Bar*, 48 FAM. CT. REV. 607 (2010) (exploring the challenge of providing equal access to justice when self-representation is increasing).

<sup>164</sup> See Wendy Watrous, *Lawyer or Loan Shark? Rule 1.8(E) of Louisiana's Rules of Professional Conduct Blurs the Line*, 48 LOY. L. REV. 117, 142 (2002) (stating that the rules of professional conduct "cannot and should not" help solve poverty and should instead "focus first and foremost" on regulating lawyers).

communities so that it will have a deep and practical understanding of how legal services are increasingly delivered to the poor. The commission's review should be heavily influenced by the well-intended motivations of non-profit lawyers trying under difficult circumstances to expand this country's delivery of civil legal assistance in non-traditional settings, often at high speed and to large audiences. The three areas of the Model Rules discussed in this Article are offered to highlight some of the ways in which ethical constraints grounded in a traditional, profit-motivated, lawyering paradigm do not serve the needs of indigent clients.

There is much work for such a newly-constituted commission. Many areas of our ethical rules require revisions or additions in light of a rapidly changing legal environment affecting the poor. Since the appointment of the Ethics 2000 Commission, the Model Rules have been amended on roughly ten occasions, but relatively few adopted changes have related to access to justice concerns. These revisions have mostly addressed multijurisdictional practice, corporate responsibility, client protection, and technology and global practice developments.<sup>165</sup> Even the Ethics 2000 Commission, which was charged with the responsibility to review the need to expand access to legal services for low and moderate income persons as part of a comprehensive review of the model rules, only produced three major changes relating to access to justice for the poor. Model Rule 5.4 (permitting the sharing of court-awarded fees with a non-profit organization),<sup>166</sup> Model Rule 6.1 (adding to the first sentence regarding a lawyer's professional responsibility to provide legal service to those unable to pay),<sup>167</sup> and Model Rule 6.5 (crafting a new rule relaxing conflict of interest and imputation rules in short-term, limited legal services delivered in non-profit or court-sponsored projects)<sup>168</sup> were welcome additions, but these changes simply do not go far enough in promoting access to justice.

This Article suggests that there are many topics in the Model Rules that would benefit from comprehensive review viewed through an access to justice lens. In addition to those items already discussed in this Article, a blue-ribbon commission might want to revise anti-solicitation rules that have never applied well to the provision of free legal services to the poor.<sup>169</sup> The Model Rules should affirmatively encourage, rather than hinder, the activities of lawyers designed to reach out to low-income communities to inform and advise residents and to sign up clients who need free legal help to protect their incomes, shelter, and safety.

A high-level commission might also undertake a comprehensive (and overdue) review of the ethical dimensions of onerous congressional restrictions imposed upon lawyers in legal aid organizations that receive federal funds from the Legal Services Corporation (LSC). In 1996 Congress enacted sweeping restrictions upon lawyering activities that legal aid lawyers may undertake with federal funds, and also barred lawyers from providing legal help to certain disfavored poverty populations, even with non-federal funds.<sup>170</sup> As a result, legal aid lawyers are

<sup>165</sup> See *supra* note 8 and accompanying text.

<sup>166</sup> MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

<sup>167</sup> MODEL RULES OF PROF'L CONDUCT R. 6.1 (2013).

<sup>168</sup> MODEL RULES OF PROF'L CONDUCT R. 6.5 (2013).

<sup>169</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 7.3 (2013) (prohibiting certain methods of solicitation).

<sup>170</sup> Congress imposed a broad range of onerous restrictions on lawyers employed by LSC-funded programs which applied for the first time to activities undertaken with private or non-LSC government funds, as well as with LSC funds. These restrictions include limitations on class actions, lobbying and rule-making, attorney's fees, in-person solicitation of clients, most welfare reform activities, and representation of disfavored populations. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-50 to

2014]

ROADBLOCKS TO ACCESS TO JUSTICE

381

unable to help vulnerable individuals and families, such as prisoners, public housing tenants facing charges of criminal or drug activity, and non-U.S. citizens (with limited exceptions), even when private or other public funds are available to do so.

Model Rule 5.4, which is intended to protect the professional independence of lawyers, prohibits a lawyer from permitting a person who employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering legal services to a client.<sup>171</sup> After almost twenty years of such congressional restrictions on lawyers for the poor, hasn't the time finally arrived for the legal profession to speak through its Model Rules to the ethical dimensions of such heavy-handed and harmful governmental intrusion into the attorney-client relationship?

We should agree that there is no substitute for full representation when a lawyer is needed to protect a client's vital interests. This is as true for the poor as it is for the rich. But, as we struggle to expand access to justice, the Model Rules should do much more to reflect the realities of our civil legal assistance delivery system and to remove obstacles transported from a traditional lawyering paradigm that needlessly hinder lawyers for the poor.

The Model Rules may not solve the justice gap, but they should no longer be part of the problem.

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1321-56 (1996). Congress removed the 1996 restriction on attorney's fees in fiscal year 2010. *See* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3148-57 (2009) (extending the general restrictions on LSC funding and then, in § 533, specifically "striking paragraph (13)" of § 504(a)).

<sup>171</sup> MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).