

**VIRGINIA:**

**IN THE SUPREME COURT OF VIRGINIA  
AT RICHMOND**

**IN THE MATTER OF  
RULE OF PROFESSIONAL CONDUCT 1.8**

**PETITION OF THE VIRGINIA STATE BAR**

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TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE  
SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of proposed amendments to Rule 1.8(e)(1) and Comment 10, as set forth below. The proposed rule amendments were approved unanimously by the Council of the Virginia State Bar on October 26, 2018 (Appendix, Page 1).

**I. Overview of the Issues**

The Virginia State Bar Standing Committee on Legal Ethics (“Committee”) has proposed amendments to Rule 1.8(e)(1), as well as a new Comment 10. The proposed amendments, allowing the advancement of costs and expenses to be contingent on the outcome of the matter, would bring Virginia’s rule in line with at least 47 other states that have adopted the ABA Model Rule on this topic. The proposal also adds Comment 10, an ABA Model Comment that explains the rationale for the prohibition on providing financial assistance as well as the

permissible exceptions. No comment currently exists related to Rule 1.8(e).

Beyond bringing Virginia in line with the large majority of other jurisdictions, the proposed rule amendments also create a clearer rule that is more easily enforced. Under the current interpretation of the rule, a lawyer is permitted to advance costs to a non-indigent client as long as the client remains ultimately responsible for the costs, but the lawyer is not required to actually undertake collection efforts if any particular client does not reimburse the lawyer for the advanced costs. However, LEO 1237 concludes that a “consistent policy” of not attempting to collect advanced costs would be improper. The opinion does not give any guidance on what would rise to the level of a “consistent” practice of failing to take action against clients for advanced costs. Moreover, taking any kind of collection action against a former client is generally disfavored and risky for the lawyer; a rule that requires lawyers to take action against clients lest they be accused of a “consistent policy” of failing to do so is both difficult to apply and counterproductive to many other policies expressed by the Rules.

If the proposed changes are adopted, then the Committee will be asked to withdraw LEO 1237 as it will be overruled by the rule change.

The proposed amendments are included below in Section III.

## **II. Publication and Comments**

The Standing Committee on Legal Ethics approved the proposed rule amendments and comment at its meeting on May 16, 2018 (Appendix, Page 3).

The Virginia State Bar issued a publication release dated May 21, 2018, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 4).

Notice of the proposed amendments were also published on the bar's website on the "Rule Changes" page (Appendix, Page 6) and in the bar's E-News on June 1, 2018 (Appendix, Page 10).

One comment was received, from John C. Blair, II on behalf of the Local Government Attorneys of Virginia, Inc. (Appendix, Page 13), indicating no comment on the proposed amendments.

## **III. Proposed Rule Change**

### **Rule 1.8 Conflict of Interest: Prohibited Transactions**

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

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter ~~provided the client remains ultimately liable for such costs and expenses;~~ and

(2) a lawyer representing an indigent client may pay court costs and expenses of

litigation on behalf of the client.

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## **Comment**

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### **Financial Assistance**

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

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## **IV. Conclusion**

The Supreme Court is authorized to regulate the practice of law in the

Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910. Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The proposed rule change was developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve proposed Rule 1.8(e)(1) and Comment 10 for the reasons stated above.

Respectfully submitted,  
VIRGINIA STATE BAR

A handwritten signature in blue ink, appearing to read "Leonard C. Heath, Jr.", written in a cursive style.

Leonard C. Heath, Jr., President

A handwritten signature in black ink, appearing to read "Karen A. Gould", written in a cursive style.

Karen A. Gould, Executive Director

Dated this 29th day of October, 2018.