Advancing Money to Clients for Living Expenses

The Louisiana State Bar Association instituted disciplinary proceedings against respondent attorney, charging him, *inter alia*, with loaning money to two clients, Thomas and Seltzer. Respondent admitted advancing money to Thomas after being retained to represent him in a seamen's suit. Some of these advances were payments of litigation expenses, but the majority were for personal and living expenses, including payments on finance notes and costs of surgery for a non-accident related condition. While representing client Seltzer in a seamen's suit, respondent also made cash advances to him and paid expenses of litigation. Unlike the loans made to Thomas, however, these were not based on the client's needs. The commissioner, appointed to report to the supreme court his findings of fact and conclusions of law, concluded that respondent was guilty of "professional acts and omissions which do not conform to standards of character and conduct laid down by the profession." But he could not determine which disciplinary rule was violated and therefore found that no violation had occurred. The Louisiana Supreme Court held that respondent had violated Disciplinary Rule 5-103(B) by advancing money to Seltzer for the purpose of inducing employment. In finding no violation with regard to the advances made to Thomas, however, the court noted that the spirit and intent of the disciplinary rule is not violated by "the advance or guarantee by a lawyer to a client (who has already retained him) of minimal living expenses, of minor sums necessary to

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1. Respondent was also charged with soliciting employment and improperly accounting for disbursement of the proceeds of settlement in the Thomas case.
2. Respondent advanced $4,210 to Thomas of which $1,480 was for litigation expenses. The remainder represents cash advances, purchase of car tires, payments of car notes and finance notes, and hospital expenses over a two year period.
3. The court noted that without the advances from respondent, Thomas's income was well below the poverty level.
4. The loan to Seltzer consisted of $756.95 in cash plus expenses of litigation during a three month period. Due to Seltzer's repeated demands for money, respondent withdrew from his case.
6. Notes 31 and 32 infra and accompanying text.
prevent foreclosures, or of necessary medical treatment." Louisi-
ana State Bar Association v. Edwins, 329 So. 2d 437 (La. 1976). \(^8\)

Prior to the adoption by the American Bar Association of its Code of Professional Responsibility \(^9\) in 1969, the courts and the legal profession were divided over the propriety of advancing money to clients for living expenses while representing them in personal injury actions. The ABA Canons of Professional Ethics, \(^10\) forerunner of the Code of Professional Responsibility, permitted loans for expenses of litigation under certain conditions \(^11\) but made no mention of loans for living expenses. It was not until 1954 that the ABA Committee of Professional Ethics issued an advisory opinion on the subject, Opinion 288. \(^12\) This Opinion forbade such loans under any circumstances as violations of Canon 6 prohibiting representation of conflicting interests and of Canon 10 prohibiting purchase of the subject matter of litigation. In addition, it noted the possibility that Canon 27, prohibiting advertising and solicitation of clients, could be violated if the attorney made a practice of such advancements and thereby acquired a reputation that might attract clients to him. \(^13\)

Most of the pre-1955 cases recognized that an outright ban of loans to clients for living expenses might create a hardship for injured clients who are unable to work, unable to pay their bills, and who might be forced to accept an inadequate settlement out of necessity. \(^14\) These cases generally regarded such loans as improper

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7. Louisiana State Bar Ass’n v. Edwins, 329 So. 2d at 445.
8. The court found violations on all charges except the advancements to Thomas. Edwins was suspended from the practice of law for 90 days for soliciting employment and for 30 days for the advancements to Seltzer, the periods to run concurrently. He was reprimanded for the negligent accounting to Thomas.
9. Note 31 infra.
10. The American Bar Association’s Canons of Professional Ethics are published in H. DRINKER, LEGAL ETHICS 309-25 (1953). Individual canons will be referred to throughout the text as “Canon—.”
11. Canon 42 provides: “A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.”
13. The Committee found that Canon 42 offered “no justification” for loans for living expenses.
14. People ex rel. Chicago Bar Ass’n v. McCallum, 341 Ill. 578, 589-90, 173 N.E. 827, 831 (1930); Johnson v. Great N. Ry., 128 Minn. 365, 369-70, 151 N.W.
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if 1) the loan was offered as an inducement to employment\textsuperscript{15} or 2) the client was not liable for repayment unless the case resulted in a recovery.\textsuperscript{16}

Opinion 288 in 1954\textsuperscript{17} rejected this test developed by the case law with limited analysis of one case\textsuperscript{18} and with no discussion of the hardship its position might produce. It did not meet with universal approval or acceptance.\textsuperscript{19}

The federal district court in \textit{Re Ruffalo}\textsuperscript{20} declined to discipline an attorney whom the supreme court in the same state had suspended for an indefinite period in a similar proceeding.\textsuperscript{21} In refusing

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125, 127 (1915). See \textit{Jahn v. Champagne Lumber Co.}, 157 F. 407, 418 (7th Cir. 1908).
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17. Note 12 supra.
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18. The Professional Ethics Committee noted that the court in \textit{People ex rel. Chicago Bar Association v. McCallum}, 341 Ill. 578, 173 N.E. 827 (1930), found advancements of living expenses justifiable under Canon 42. The Committee said simply that it was "not convinced by the reasoning of the majority of that Court on this issue. . . ." Note 12 supra.
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In \textit{State ex rel. Beck v. Lush}, defendants were enjoined from loaning or promising to loan money in the procurement of cases. \textit{Opinion 288} was not cited. 170 Neb. 376, 103 N.W.2d 136 (1960).
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In \textit{State ex rel. Florida Bar v. Dawson}, the court refrained from deciding whether advances of sums incidental to business would be improper once the lawyer is employed. It found that in this case the advancements were conditions of obtaining employment. 111 So. 2d 427 (Fla. 1959).
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21. Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396,
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to find a violation of the *Canons of Professional Ethics* under Opinion 288, the court noted that respondent was not engaged in a "wide scale practice" of making loans, that the loans were not "calculated to solicit employment," and that the clients were "probably in desperate financial condition."22

In *Re Ratner*23 the court, rather than rejecting Opinion 288 outright, stated that it was "not intended to cover a situation like the one here," because the loans in question were made by a bank and guaranteed by respondent attorney and were "not contingent on the successful prosecution of the makers’ claims."24 This is clearly a misreading of Opinion 288 and represents a rejection of its literal wording.25 Similarly, in *Dombey, Tyler, Richards & Griesler v. Detroit, Toledo & Ironton Railroad Co.*,26 the court remanded for findings of fact to determine whether the attorney and client agreed that the advances would be repaid unconditionally and "whether there was any tenable prospect of repayment independent of successful disposition of the claim."27 A literal reading of Opinion 288 would make these factors irrelevant, since the loan would be improper regardless of any prospect for repayment.

In 1969 the ABA’s *Code of Professional Responsibility* replaced the *Canons of Professional Ethics*. This code has been adopted by various state courts as rules of court28 or used as a model for fashioning state ethics codes.29 In some courts it has been used as a standard for determining whether an attorney’s conduct is unprofessional.30

In response to requests for clarification of its position on loans to clients for living expenses, the ABA included a Disciplinary Rule

cert. denied, 379 U.S. 931 (1964). He was also disbarred from practice in the Sixth Circuit Court of Appeals, but not for furnishing living expenses. *In re Ruffalo*, 370 F.2d 447 (6th Cir. 1966). The United States Supreme Court reversed, 390 U.S. 544 (1968), because Ruffalo was not given fair notice of the charge.

24. Id. at 875.
26. 351 F.2d 121 (6th Cir. 1965).
27. Id. at 128-31.
28. E.g., FLA. STAT. ANN., Integration Rule of the Florida Bar, art. X (West).
29. See note 47 infra and accompanying text.
30. See, e.g., Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).
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(hereinafter referred to as DR) express expressly dealing with the subject, DR 5-103(B). It states:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

This disciplinary rule accepts the position of Opinion 288 in prohibiting advances to clients for living expenses. In view of the judicial dissatisfaction with Opinion 288, there may be many jurisdictions which refuse to apply the rule in cases where the attorney's motive is proper and the client's need is great.

Two courts finding violations of DR 5-103(B) have done so without questioning its underlying wisdom. In Re Berlant the court applied the literal wording of the rule in spite of suggestions of proper motive. It recognized that the client's indigency "may be a mitigating factor when considering the sanction" but found it "irrelevant to the commission of the offense under DR 5-103(B)." The court in Bar Association v. Cockrell suspended an attorney for violating DR 5-103(B) without comment on attenuating or aggravating circumstances of the case and without discussion of the rule.

31. The Code of Professional Responsibility is divided into Canons, Ethical Considerations, and Disciplinary Rules. There are nine Canons which are "axiomatic norms." The Ethical Considerations represent "objectives toward which every member of the profession should strive." The Disciplinary Rules are mandatory in character. A lawyer who falls below the level stated is subject to disciplinary action. Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437, 442 (La. 1976).

32. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1972). Ethical Consideration 5-8 states:

A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing or payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client. Id.


34. Id., 328 A.2d at 476 n.7.

35. 274 Md. 279, 334 A.2d 85 (1975).

36. Two cases found loans for expenses unrelated to the litigation unethical...
The Supreme Court of Louisiana adopted the ABA’s version of DR 5-103(B) as a rule of the court, and the rule was in effect at the time the principal case, *Louisiana State Bar Association v. Edwins*, was decided. However, in that case, the court’s first opportunity to apply the rule in a disciplinary proceeding, it refused to find a violation for advances that were “arguably prohibited by the letter of Disciplinary Rule 5-103(B).” This refusal did not amount to a rejection of the rule, for the court “applied the literal wording” and found a violation for other advances made by the same attorney under different circumstances.

The court gave three justifications for this circumvention of the rule. First, it noted that the disciplinary rules were to be interpreted in light of the corresponding canon and ethical considerations. It found that the policies reflected by the ethical considerations were served by allowing advances and fee arrangements where they “represent the only practicable method by which a client can enforce his cause of action.” Second, the court argued that the advances in the case before it were “more akin to the authorized advance of ‘expenses of litigation’ than to the prohibited advances made with improper motive to buy representation of the client or by way of advertising to attract other clients.” Third, it found that if the intent of the disciplinary rule was to proscribe advances like the ones made by respondent to Thomas, there is “some doubt as to its constitutionality.” The court said, “[A] court adopted bar disciplinary rule which places an unreasonable burden upon an individual’s right to enforce claims allowed him by law might be deemed violative of our access to the courts guaranteed . . . by our state constitution.”

without reference to DR 5-103(B). In *In re Sandifier*, 260 S.C. 633, 198 S.E.2d 120 (1973), respondent was publicly reprimanded for loaning money to his client for living expenses and for failing to give an intelligible statement of account to his client at the time of the settlement. In *Florida Bar Association v. Dawson*, 318 So. 2d 385 (Fla. 1975), respondent was disbarred for making advancements to his client for purposes unrelated to the conduct of the litigation and for receiving stolen property. The court failed to mention DR 5-103(B) which had been adopted as a rule of court, but relied on Ethical Consideration 5-8. See note 32 *supra* for the text of EC 5-8.

37. 329 So. 2d 437 (La. 1976).
38. *Id.* at 445.
39. *Id.* at 448.
40. See note 31 *supra*.
41. 329 So. 2d at 445.
42. *Id.* at 446.
43. *Id.*
Thus the court construed the rule narrowly to avoid the constitutional issues.

The *Edwins* court noted that advancements of living expenses were allowed in some jurisdictions under the former *Canons of Professional Ethics*,

so long as: (a) the advances were not promised as an inducement to obtain professional employment, nor made until after the employment relationship was commenced; (b) the advances were reasonably necessary under the facts; (c) the client remained liable for repayment of all funds, whatever the outcome of the litigation; and (d) the attorney did not encourage public knowledge of the practice as an inducement to secure representation of others.44

The court considered this "the better view," and, while it found that "[a] similar interpretation of the present Code of Professional Responsibility may be more difficult in view of the different wording of the present-day disciplinary rule at issue,"45 it effectively applied this four-part test in finding that the *Code* was not violated by respondent in his loans to Thomas.

The loans to Seltzer made by respondent did not meet the requirements of this four-pronged test in that they were not "reasonably necessary" and were therefore presumed to have been "improperly made with the intention of securing or keeping legal representation of Seltzer."46

The *Code of Professional Responsibility of the Alabama Bar* is patterned after the ABA *Code of Professional Responsibility* with some changes.47 Disciplinary Rule 5-103(B) of Alabama's code allows loans to clients for living expenses under some conditions:

While representing a client in connection with contemplated or pending litigation, a lawyer may advance or guarantee emergency financial assistance to his client, provided that the client remains ultimately liable for such assistance without regard to the outcome of the litigation and, provided further, that no promise of such financial assistance was made to the client by

44. *Id.*
45. *Id.* at 447.
46. *Id.* at 448.
the lawyer, or by another in his behalf, prior to the employment of that lawyer by that client.48

This rule resembles the four-part test advocated and applied by the court in Louisiana Bar Association v. Edwins. The requirement in the Edwins test that the attorney not "encourage public knowledge" of the practice is not spelled out in Alabama's rule, although it may be covered by prohibitions against advertising and solicitation in other parts of the Code.

The arguments supporting the Edwins view are fundamental: "The importance of financial aid from his lawyer to an injured worker may spell the difference between injustice and justice."49 A destitute plaintiff may be unable to wait out delays inherent in the judicial process and may be forced to accept an inadequate settlement offer. Financial assistance may enable him to pursue his claim until trial or a reasonable settlement.50

These arguments reflect both a concern for the plight of the indigent plaintiff who is unable to obtain a loan from other sources and a reluctance to punish attorneys who act with motives of generosity and concern for their clients' welfare. In addition they reflect a deep-seated belief that justice can and should be extended to all and that no regulation of the legal profession should interfere with that ideal.51

The fears generated by the rule advocated in the Edwins case cannot outweigh the social value in its favor, but they do merit serious consideration. Proponents of an outright ban of loans to clients for living expenses charge that such loans constitute a purchase of the subject matter of the litigation.52 This charge is prem-

48. CODE OF PROFESSIONAL RESPONSIBILITY OF THE ALABAMA BAR, DR 5-103(B).
49. Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 272, 199 N.E.2d 396, 403 (1964) (dissenting opinion).
50. In re Ruffalo, 249 F. Supp. 432 (N.D. Ohio 1965); People ex rel. Chicago Bar Ass'n v. McCallum, 341 Ill. 578, 589-90, 173 N.E. 827, 831 (1930); Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976); Johnson v. Great N. Ry., 128 Minn. 365, 369-70, 151 N.W. 125, 127 (1915); Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 272, 199 N.E.2d 396, 403 (1964) (dissenting opinion).
51. See, e.g., text accompanying note 43 supra. See also Jahn v. Champagne Lumber Co., 157 F. 407, 418 (7th Cir. 1908) ("The law does not tolerate the notion that a powerful defendant may force the abandonment of a suit whenever he is able to exhaust the slender means of a weak antagonist.").
ised on the notion that repayment cannot realistically be expected and is not usually sought unless there is some recovery.53

The Alabama version of DR 5-103(B) and the test advocated in the Edwins case provide that the client must remain ultimately liable for repayment regardless of the outcome of the litigation. Under this view, if the attorney and client have agreed that the loan is not contingent upon recovery, the court should not attempt to assess the likelihood that the client will be able to pay absent a recovery.54 The court in Re Ruffalo stated that:

It is not in consonance with this Court’s concept of justice . . . that a loan otherwise proper is rendered improper because of the indigency of the client . . . .[55] Whether it be the attorney’s fee, the expenses of litigation, or unconditional loans, the fact that it might be difficult or unlikely that the client will be able to reimburse the attorney . . . absent a recovery on his claim should not render the attorney’s conduct improper.56

An unconditional loan is not a “purchase” of litigation in the usual sense of the word.57 The most an attorney stands to gain is a return of the amount advanced. Thus, there is not the danger that attorneys will speculate on questionable claims.58 To be sure, more litigation would reach our already crowded courts. The difference in the number, however, would consist of a class of litigants who would not otherwise have access to the courts due to indigency; such an increase seems a worthy goal of the legal profession.59 Moreover, the requirement that the client agree to repay the loan unconditionally

53. Cases cited note 52 supra.
56. Id. at 445.
57. Strelow, supra note 25, at 1438.
58. Id. at 1439.
59. The practice of advancing money to the injured client with which to pay hospital bills during the pendency of the case and while he is unable to earn anything may, in a sense, tend to foment litigation by preventing a settlement from necessity; but we are aware of no authority holding that it is against public policy, or of any sound reason why it should be so considered.

Johnson v. Great N. Ry., 128 Minn. 365, 151 N.W. 125, 127 (1915).
would reduce the danger of “stirring up litigation” by attorneys.

A fear has also been expressed that loans to clients for living expenses would create a conflict of interests between the attorney and the client. The theory advanced is that the attorney will encourage acceptance of an inadequate settlement to insure that he will recover the amount of the loan. But this would be illogical behavior from an attorney who extended the loan in order that his client not be forced to accept an inadequate settlement out of necessity. And it would not improve the client’s situation to condemn the loan in the first instance.

It has been argued that loans to clients may become improper by virtue of being extended too often, regardless of the motives of the attorney. This has been said to violate proscriptions against advertising and solicitation of clients. The Edwins court would regard this as improper only if the attorney actively seeks publicity of the practice.

While a few courts have expressed the opinion that regularity in loaning activity may constitute advertising or solicitation, no case may be seen to turn on that point. The issue was discussed in Re Ruffalo and in Re Ratner, but in both cases the courts found that the attorney had not made a “wide scale” practice of advancements. El Janny v. Cleveland Tankers, Inc., following the reasoning of Opinion 288, found the advertising issue to be only one of three objections to advancements for living expenses.

It would be illogical to discipline an attorney for an otherwise proper activity simply because it is done too often. While he may be censured for actively seeking publicity, he should not be condemned because an activity brings him business.

Other objections may be raised which are related to the ones discussed above, but generally the problems generated by allowing loans for living expenses are no different from those inherent in

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62. Note 44 supra and accompanying text.
66. STRELOW, supra note 25, at 1448.
contingent fees and loans for expenses of litigation. While those practices have been hotly debated in the past, the balance has generally been struck in favor of making legal remedies available to indigent clients. No reason appears for treating loans to clients for living expenses differently.67

The American Bar Association’s position on loans to clients for living expenses does not seem well reasoned and may foster a difficult situation for an indigent litigant which a willing attorney might have been able to remedy. State courts should not feel bound to follow in its path but should consider adoption of a rule similar to the Alabama version of DR 5-103(B)68 or the rule suggested in Edwins.69 Courts which have already adopted the ABA’s version of the rule should not be hesitant to circumvent it when a literal application would penalize an attorney who appears to be acting in his client’s best interest.

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68. Notes 47 and 48 supra and accompanying text.
69. Note 44 supra and accompanying text. An alternative wording is proposed in Strelow, supra note 25, at 1449.