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Guaranteeing Loans to Clients Under Minnesota’s Code of Professional Responsibility

I. INTRODUCTION

On November 6, 1981, the Minnesota Supreme Court amended Disciplinary Rule (DR) 5-103(B) of Minnesota’s Code of Professional Responsibility, allowing attorneys to guarantee loans to clients for reasonable living expenses during the pendency of a lawsuit. The new rule rectifies an anomalous situation. Under the old rule, an attorney generally was prohibited from advancing or guaranteeing financial assistance to a client. The drafters of the Code apparently believed that such activities would result in an attorney acquiring an interest in the litigation that might impair the exercise of the attor-

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2. 9 MINN. STAT. 709 (1980). The Minnesota Supreme Court in 1970 incorporated by reference the American Bar Association Model Code of Professional Responsibility. 286 Minn. ix (1970). Prior to the 1981 amendment, the Court had amended the Code four times. See BENCH & BAR, July-Aug. 1980, at 5; 310 Minn. ix (1978); 303 Minn. xvi (1976); 301 Minn. xxxv (1975). This Note will cite to the Minnesota Code of Professional Responsibility and will refer to the Model Code of Professional Responsibility when the relevant language differs from the Minnesota Code.

3. DR 5-103(B) (2) provides:
A lawyer may 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 a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in his behalf, prior to the employment of that lawyer by that client.

MINN. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (2), 52 MINN. STAT. ANN. 21 (West Supp. 1982).

4. DR 5-103(B) provided:
While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except 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.

Id. DR 5-103(B), 9 MINN. STAT. 731 (1980).

5. Id. DR 5-103(A), 9 MINN. STAT. 728 (1980).
ney's professional judgment on behalf of a client. Nevertheless, the Code recognized that, without some financial assistance from counsel, a potential client with a good cause of action might be unable to afford to litigate his or her claim. The Code therefore condoned arrangements such as contingent fee contracts and loans for the expenses of litigation, under which an attorney invested resources in the case and looked to the proceeds of the suit for reimbursement.

Financial assistance for living expenses, however, was not permitted. Although an indigent client might require an attorney's financial assistance during the preparation and trial of the case, the Code drew an arbitrary distinction between permissible loans for litigation expenses and contingent fee contracts, and financial assistance for living expenses. Because an attorney acquired an interest in the litigation under each of these three practices, the lack of a more specific justification for the prohibition of subsistence loans made the old rule particularly inequitable. Minnesota therefore amended DR 5-103 to accord similar treatment to all three arrangements.

This Note traces the historical development of the prohibition of financial assistance by attorneys. The Note then examines the legitimacy of this prohibition. Finally, the Note discusses the desirability of the amendment allowing loan guarantees, identifies potential problems in its application, and suggests guidelines to ensure ethical loanmaking activity.

II. HISTORICAL DEVELOPMENT OF THE PROHIBITION OF SUBSISTENCE LOANS

A. THE COMMON LAW RULE

The broad prohibition in DR 5-103(B), which forbids attorneys to advance or guarantee financial assistance to their clients, has been called the last major vestige of the law's traditional condemnation of champerty. The proscription

6. Id. EC 5-7, 5-8, 9 Minn. Stat. 728 (1980).
7. Id.
10. See Minn. Code of Professional Responsibility DR 5-103(B), 9 Minn. Stat. 731 (1980); supra note 4.
against champerty developed in England during the 13th and 14th centuries in response to uniquely medieval problems and was not traditionally directed at attorneys. In that respect, the medieval offense was quite distinct from its modern counterpart.

Many American courts condemned a fee arrangement as champertous when an attorney agreed to conduct the litigation at his or her own expense in return for a portion of the proceeds of the lawsuit. These courts justified the condemnation of such fee arrangements by concluding that a broad prohibition was necessary "to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation." The courts therefore held that an attorney who bore the cost of a client's lawsuit committed champerty. An attorney could, however, loan money to a client while litigation was pending, but only if the advances were made pursuant to an express or implied agreement for repayment. The traditional rule condoned both loans "necessary to carry on the suit" and

13. Champerty was a particular species of the broader offense of maintenance. The essence of maintenance was the intervention of powerful feudal lords in lawsuits in which they had no direct interest. Such intervention distorted the administration of justice in the king's court. Champerty and maintenance developed against a background of clerical opposition to litigation. A common theme of the prohibitions, therefore, was the policy against encouraging litigation. See Radin, Maintenance by Champerty, 24 CALIF. L. REV. 48, 60-66 (1935).

14. "[W]hen these words [—maintainers and champertors—were] first used . . ., they were not supposed to refer primarily to lawyers, but rather to men of property who speculated in the results of litigation or to feudal magnates who supported an army of retainers." Id. at 67.

15. See id. at 66.

16. Some jurisdictions in the United States accepted the common law doctrine prohibiting champerty; some accepted the doctrine in a modified form; others never accepted it at all. CYCLOPEDIA OF LAW AND PROCEDURE 854-55 (1903). Courts tended, however, to relax the common law doctrine to permit greater freedom of contract between attorney and client, because the peculiar conditions giving rise to the doctrine no longer existed. See Courtright v. Burnes, 13 F. 317, 320 (C.C.W.D. Mo. 1881).


18. Huber v. Johnson, 68 Minn. 74, 78, 70 N.W. 806, 807 (1897).


those required by a client for living expenses during the suit.22

Although loans subject to repayment survived the challenge of champerty, their propriety was still suspect unless the client retained the attorney before receiving the loan.23 Courts were concerned that attorneys might use loans to induce either the employment relationship24 or the pursuit of the claim.25 Nevertheless, if the client remained liable for repayment of the loan and the agreement was made after the attorney's retention, the courts consistently recognized the necessity and desirability of allowing such loans.26 As one court remarked: "Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim."27

B. RULES OF PROFESSIONAL ETHICS

Although not frequently cited by the courts,28 several canons in the American Bar Association's Code of Professional Ethics as originally enacted29 were consistent with the existing

22. People ex rel. Chicago Bar Ass'n v. McCallum, 341 Ill. 578, 589, 173 N.E. 827, 831 (1930) (advanced living expenses to needy clients); Ryan v. Pennsylvania R.R., 268 Ill. App. 364, 374-76 (1932) (advances to client who was "very sorely in need"); Johnson v. Great N. Ry., 128 Minn. 365, 369, 151 N.W. 125, 127 (1915) (monetary advances to cover client's living expenses during the litigation); Bristol v. Dann, 12 Wend. 142, 144 (N.Y. 1834) (monetary advances, made "from motives of humanity and benevolence," to help client support his family and to prevent his being taken to jail on small executions).

23. See, e.g., Hildebrand v. State Bar of Cal., 18 Cal. 2d 816, 824, 117 P.2d 860, 864 (1941) (loan made by an attorney to a client was "of slight importance" since it was made after the attorney was retained).

24. See, e.g., Fail v. Gulf States Steel Co., 205 Ala. 148, 151, 87 So. 612, 614 (1920); In re McDonald, 204 Minn. 61, 63, 72, 282 N.W. 677, 679, 683 (1938); In re Gilman, 251 N.Y. 265, 289-70, 167 N.E. 437, 439 (1929); Bristol v. Dann, 12 Wend. 142, 144 (N.Y. 1834).


26. E.g., Northwestern S.S. Co. v. Cochran, 191 F. 146, 152 (9th Cir. 1911); In re Gilman, 251 N.Y. 265, 270, 167 N.E. 437, 439 (1929); Bristol v. Dann, 12 Wend. 142, 144 (N.Y. 1834).


28. But see id. at 589-90, 173 N.E. at 831; In re McDonald, 204 Minn. 61, 71, 282 N.W. 677, 683 (1938); State ex rel. Neb. Bar Ass'n v. Rein, 141 Neb. 758, 765, 4 N.W.2d 828, 832 (1942). The McCallum and McDonald opinions suggest a possible explanation for the judiciary's limited use of the canons. Both courts qualified their reliance upon the canons by noting that the American Bar Association was not a legislative tribunal and, therefore, its Canons of Ethics were not enforced as binding obligations by the courts.

29. The original thirty-two canons, based on the Alabama State Bar Association's 1887 Code of Ethics, were approved at the 1908 meeting of the American Bar Association. In 1928, canons 35 through 45 were adopted and canon 28 was amended. In 1933, canon 46 was adopted and canons 11, 13, 34, 35, and 43 were
common law rule. By forbidding an attorney's purchase of any interest in the subject matter of a lawsuit, canon 10\(^3\) prohibited attorneys from making champertous agreements.\(^3\) The canon therefore reflected the common law's requirement that the client be ultimately responsible for the costs of litigation.\(^2\) Canons 27 and 28 prohibited attorneys from "seeking out those with claims . . . in order to secure them as clients"\(^3\) or soliciting "business . . . by personal communications."\(^3\) These prohibitions corresponded to the courts' concern that the loan be made after the attorney's retention to eliminate its potential effect as an inducement to employment.\(^5\) Although the canons did not specifically address the propriety of loans for living expenses, one court analogized such loans to advances for ex-

amended. In 1937, canon 47 was adopted and canons 7, 11, 12, 27, 31, 33, 34, 37, 39, and 43 were amended. Thereafter, individual canons were occasionally amended but the ABA did not reexamine the canons as a whole and consider a possible revision until 1958. AMERICAN BAR FOUNDATION, REPORT OF THE SPECIAL COMMITTEE ON CANONS OF ETHICS 6-7 (1958) (discussing enactment of the canons). The canons, therefore, reflected the conscience of the profession in the nineteenth and early twentieth centuries, and remained the governing standard of conduct until January 1, 1970 when the current Code of Professional Responsibility became effective. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

30. "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting." ABA CANONS OF PROFESSIONAL ETHICS No. 10 (1908).


32. The vague command in canon 10 prohibited attorneys from engaging in two activities. Attorneys were forbidden from purchasing all or part of a claim for purposes of speculation. The prohibition thus prevented an attorney, with his or her superior ability to estimate the value of a claim, from taking advantage of a client who was ignorant of the claim's true value and possibly in immediate financial need. In addition, the canon forbade attorneys to agree to bear the expenses of a suit in return for a share of the recovery. The Code prohibited this conduct to prevent the prosecution of questionable claims, which would not arise but for the attorney's assumption of expenses. Id. at 1434-37.

33. It is unprofessional for a lawyer to volunteer advice to bring a lawsuit . . . . Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up . . . causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims . . . in order to secure them as clients . . . .

ABA CANONS OF PROFESSIONAL ETHICS No. 28 (1908).

34. The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. . . . [S]olicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional.

ABA CANONS OF PROFESSIONAL ETHICS No. 27 (1908).

35. See supra notes 23-25 and accompanying text.
expenses of litigation\(^{36}\) permitted under canon \(^{42}.^{37}\)

Notwithstanding the courts' consistent approval of loans for living expenses, in 1925 the Committee on Professional Ethics of the Association of the Bar of the City of New York issued its first of five advisory opinions condemning such loans as professionally improper.\(^{38}\) In response to an attorney's inquiry concerning the propriety of loaning money to an unemployed, destitute client to prevent his "actual physical suffering," the Committee concluded that such loans would be improper.\(^{39}\) The Committee feared that loanmaking attorneys would acquire an undue personal interest in the subject matter of the litigation that would be inconsistent with the client's control of the suit.\(^{40}\) Even if the loan were made to an existing client, the Committee also believed that such loans might nevertheless have induced the attorney's employment.\(^{41}\)

In a later opinion, the Committee qualified its broad condemnation, stating simply that loans for living expenses were not improper in "sporadic instances," provided that neither the loan nor the expectation of the loan induced or influenced the retainer.\(^{42}\) The Committee subsequently ignored its exception for infrequent loans and reiterated its concern that even an isolated loan might induce a client to employ a particular attorney.\(^{43}\) Citing canon 29,\(^{44}\) the Committee warned that loans to support a destitute client would impair the dignity of the profession.\(^{45}\) In addition, the Committee reasoned that because

\(^{36}\) People ex rel. Chicago Bar Ass'n v. McCallum, 341 Ill. 578, 589, 173 N.E. 827, 831 (1930).

\(^{37}\) "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." ABA CANONS OF PROFESSIONAL ETHICS No. 42 (1928).

\(^{38}\) Bar Ass'n of the City of New York, Comm. on Professional Ethics, Op. 20 (1925).

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) Bar Ass'n of the City of New York, Comm. on Professional Ethics, Op. 391 (1936).


\(^{44}\) Bar Ass'n of the City of New York, Comm. on Professional Ethics, Op. 779 (1953). Canon 29 provides that lawyers "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice." ABA CANONS OF PROFESSIONAL ETHICS No. 29 (1908).

\(^{45}\) Bar Ass'n of the City of New York, Comm. on Professional Ethics, Op. 779 (1953).
repayment of the proposed loan presumably was contingent on the success of the lawsuit, the loanmaking lawyer would essentially finance the litigation in violation of canons 28 and 42.\footnote{46. Id. Although the attorney argued in Opinion 779 that the client would earn a fairly substantial sum of money once he returned to work and "could very readily repay the loans involved," the Committee found that this fact did not change its conclusion that the loan would be improper. Id.}

In 1954, the American Bar Association's Committee on Professional Ethics followed the New York City Bar Association's departure from the common law rule and issued Advisory Opinion 288,\footnote{47. ABA Comm. on Professional Ethics and Grievances, Formal Op. 288 (1954), reprinted in 41 A.B.A. J. 33 (1955) [hereinafter cited as Formal Op. 288].} prohibiting loans for living expenses.\footnote{48. Id.} The opinion justified the prohibition on several grounds. The Committee explained that permissible expenses of litigation under canon 42 referred only to "court costs, witness fees and expenses resulting from the conduct of the litigation itself."\footnote{49. Id.; see supra note 37.} Advances for any other purpose, although not explicitly prohibited by canon 42, were therefore improper.\footnote{50. Formal Op. 288, supra note 47, reprinted in 41 A.B.A. J. 33, 33 (1955).} The Committee also condemned subsistence loans because the lending attorney would acquire an interest in the subject matter of the litigation in violation of canon 10,\footnote{51. Id.; see supra note 30.} and the loan would violate canon 6\footnote{52. Formal Op. 288, supra note 47, reprinted in 41 A.B.A. J. 33, 38 (1955).} by creating a conflict of interest between attorney and client. In addition, if the practice were publicized, the loan would constitute an improper inducement for employment in violation of canon 27.\footnote{53. ABA CANONS OF PROFESSIONAL ETHICS No. 6 (1908).}

The drastic departure from the existing case law in Opinion 288 was justified on the ground that the loan would be improper as a matter of public policy. The Committee noted that the proposed loan was intended to enable the client to continue litigation for which he had already paid a substantial sum of money and to which he still expected to contribute. The Committee further noted that the loan would enable the client to retain the services of a lawyer who was not the regular attorney of the plaintiff, thereby creating a conflict of interest between the plaintiff's and defendant's interests.

The Committee also noted that the loan would be improper as a matter of professional ethics. The Committee explained that the loan would create a conflict of interest between the loanmaking lawyer and the client, and that the loan would be improper as a matter of public policy. The Committee further noted that the loan would be improper as a matter of the attorney-client relationship, and that the loan would be improper as a matter of the duty of a lawyer to maintain the confidence of his client.

The Committee therefore concluded that the loan would be improper as a matter of public policy, as a matter of professional ethics, as a matter of the attorney-client relationship, and as a matter of the duty of a lawyer to maintain the confidence of his client. The Committee further noted that the loan would be improper as a matter of the duty of a lawyer to maintain the confidence of his client, and that the loan would be improper as a matter of the duty of a lawyer to maintain the confidence of his client.

ABA CANONS OF PROFESSIONAL ETHICS No. 6 (1908).

\footnote{53. Formal Op. 288, supra note 47, reprinted in 41 A.B.A. J. 33, 38 (1955); see supra note 34.}
ion 288 engendered confusion and inconsistency among the courts. The court in *El Janny v. Cleveland Tankers, Inc.*,\(^{54}\) for example, after quoting Opinion 288 at great length, concluded that loans for any purpose other than "costs connected with the actual prosecution of a case" were improper.\(^{55}\) In *In re Moore*,\(^{56}\) the Illinois Supreme Court held, without mentioning Opinion 288, that an attorney who advanced money to his client to "help him out" did not violate canon 42.\(^{57}\) In allowing the loans, the court explained they were neither a means of solicitation nor associated with an agreement to purchase an interest in the litigation.\(^{58}\) The Kansas Supreme Court in *In re Ratner*\(^{59}\) acknowledged Opinion 288's interpretation of canon 42, but nonetheless held that an attorney who guaranteed bank loans for his needy clients was not acting improperly.\(^{60}\) The court concluded that because the bank loans were valid legal obligations not contingent on the successful prosecution of the claim, such loans did not constitute an unethical acquisition of an interest in the subject matter of the litigation.\(^{61}\) Moreover, the evidence did not support the inference that the attorney's willingness to guarantee loans improperly induced his employment.\(^{62}\)

Courts sometimes disagreed about the propriety of an identical loan arrangement. The Ohio Supreme Court suspended an attorney from practice because he advanced small sums of money for living expenses to two recently widowed clients pursuing claims against a railroad for the deaths of their hus-

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\(^{54}\) 209 F. Supp. 91 (N.D. Ind. 1962) (attorney advanced a total of $5,000, allegedly for living and medical expenses, $1,200 of which was used to finance a trip to Lebanon for the client's wife and children).

\(^{55}\) *Id.* at 94.

\(^{56}\) 8 Ill. 2d 373, 134 N.E.2d 324 (1956).

\(^{57}\) *Id.* at 381-82, 134 N.E.2d at 328.

\(^{58}\) *Id.* at 381, 134 N.E.2d at 328. In *Moore*, an attorney advanced approximately $400 to his client, who was also the sole eyewitness to an accident in which another client was killed. The money was intended to pay another attorney to get the client out of jail, to help the client at the time of his marriage, and to help the client with car payments. The court emphasized the importance of the attorney remaining friendly with an indispensable witness. *Id.* at 381-82, 134 N.E.2d at 328.


\(^{60}\) *Id.* at 374-75, 399 P.2d at 874-75.

\(^{61}\) *Id.*

\(^{62}\) The court concluded that the mere bulk of cases in which bank loans were secured for clients (67 out of 312 railroad accident claims; 67 out of 8600 total claims handled during the period involved) did not prove that the attorney's practice of securing loans was known to prospective clients. *Id.* at 374, 399 P.2d at 875.
bands. The court, adopting the rationale articulated in Opinion 288, held that the loans violated canons 10 and 42. On the same facts, the district court for the Northern District of Ohio refused to find the attorney's conduct improper. The court reasoned that canon 42 neither implicitly nor explicitly dealt with loans for living expenses, and held that the attorney had not made a purchase in violation of canon 10. The court observed that the evidence of the client's unconditional obligation to repay the attorney was uncontroverted; moreover, the court noted that the loans, which were not substantial in amount, were made to relatively few clients and only at their request after they had retained counsel.69

Despite the confusion in the courts, when the American Bar Association adopted the Model Code of Professional Responsibility in 1969, the ABA did not include a rule dealing explicitly with loans for living expenses, although such a rule had been requested. The Model Code essentially codified Opinion 288's interpretation of canon 42 in DR 5-103(B), allowing advances or guarantees for the "expenses of litigation," such as "court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence." Because the rule does not purport to be an exclusive enumera-


64. Id. The court found that the only reasonable source of repayment was the proceeds of the suit and that the attorney therefore purchased an interest in the subject matter of the litigation in violation of canon 10. The court concluded that under canon 42, such a purchase was permissible only if the advance was for "expenses of litigation." Id. at 264-65, 199 N.E.2d at 398; see supra notes 30, 37.


66. Id.

67. Id. The court, noting the lack of evidence concerning the clients' ability to repay the attorney with funds other than those received at trial or settlement, rejected the Ohio court's inference that such repayment was impossible. Id. at 443.

68. Id.

69. Id.

70. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969), incorporated by reference, MINN. CODE OF PROFESSIONAL RESPONSIBILITY, 286 Minn. ix (1970). Although the Association subsequently amended its Rules of Professional Responsibility, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980), the current loan provisions are identical to their 1969 counterparts. Minnesota's loan provisions remained unchanged until their recent amendment. See supra note 2 and accompanying text.

71. See Note, supra note 31, at 1421.

72. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1980).

73. Id.; see supra note 4.
tion of allowable expenses, the scope of permissible financial assistance is unclear. Similarly, in DR 5-103(A), the Model Code prohibits an attorney from acquiring a proprietary interest in the subject matter of the litigation. Although the Association neglected to define explicitly the nature of the forbidden interest, the rule tacitly clarifies the scope of forbidden conduct by providing two notable exceptions; the rule allows an attorney to acquire a lien granted by law to secure a fee or expenses and to contract for a reasonable contingent fee.

The Model Code implicitly adopts the Committee's conclusions in Opinion 288 that subsistence loans might create a conflict of interest between an attorney and client and that such loans are an improper inducement to employment. In its Ethical Considerations, the Model Code provides that a lawyer's professional judgment should be exercised solely for the benefit of the client, undiluted by other interests, including the attorney's own. The Model Code therefore advises attorneys

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74. DR 5-103(B) provides 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." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1980) (emphasis added). See supra note 4. The rule does not indicate that the list is intended to be exhaustive as opposed to simply illustrative.

75. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) (1980). DR 5-103(A) provides: 
[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
(1) Acquire a lien granted by law to secure his fee or expenses.
(2) Contract with a client for a reasonable contingent fee in a civil case.

Id.; cf. ABA CANONS OF PROFESSIONAL ETHICS No. 10 (1908) (prohibiting purchasing of interest); supra note 30.

76. Read literally, DR 5-103(A) prohibits the acquisition of an interest in the right that one claims against another, such as the right to recover money. See generally Flower Hosp. v. Hart, 178 Okla. 447, 450-51, 62 P.2d 1248, 1252 (1936) (defining "subject matter").

77. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(A) (1980). This type of conduct would be more accurately identified as the acquisition of an interest in the proceeds of the litigation, rather than the acquisition of an interest in the subject matter of the litigation.

78. See supra notes 47-53 and accompanying text.

79. According to the Code's Preliminary Statement, the Ethical Considerations are not mandatory, but are "aspirational in character and represent the objectives toward which every member of the profession should strive." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1980).

80. See id. EC 5-1, which provides:
The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of com-
against acquiring a proprietary interest in a client's cause,\textsuperscript{81} advancing money to clients,\textsuperscript{82} or otherwise becoming financially interested in the outcome of the litigation.\textsuperscript{83} In addition, the Ethical Considerations\textsuperscript{84} under canon\textsuperscript{285} suggest that any practice, particularly if publicized, may be improper if it either directly or indirectly influences a client to retain a particular attorney.\textsuperscript{86}

In states that adopted the Model Code, courts regularly held that loans were improper if they were made for any purpose other than satisfying the actual expenses of litigation.\textsuperscript{87} In \textit{Louisiana State Bar Association v. Edwins},\textsuperscript{88} however, the Louisiana Supreme Court permitted a subsistence loan.\textsuperscript{89} The court observed that although DR 5-103(B) included a list of permitted expenses, the rule did not apparently exclude other expenses "similarly necessary to permit the client his day in court."\textsuperscript{90} Because the rule was ambiguous, the court relied on case law prior to Opinion 288 to support its conclusion that advances for living expenses were proper.\textsuperscript{91}

Three other states, in addition to Louisiana, allow loans for living expenses. California's Rules of Professional Conduct\textsuperscript{92}
and Alabama's Code of Professional Responsibility93 allow an attorney to provide financial assistance94 for living expenses95 if the loan is made after the attorney's retention and the client is liable for repayment of the loan. Texas, which did not adopt DR 5-103(B), also allows subsistence loans in appropriate circumstances.96 In addition, the Proposed Final Draft of the American Bar Association's Model Rules of Professional Conduct97 permits a lawyer to advance living expenses to a client.98

... regarding any such payments or agreements to pay; provided this rule shall not prohibit a member:

(2) after he has been employed, from lending money to his client upon the client's promise in writing to repay such loan;


93. (B) 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, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in his behalf, prior to the employment of that lawyer by that client.

ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1975).

94. Both the California and Alabama rules allow an attorney to advance or guarantee financial assistance. The Alabama Code specifically allows such actions and the California Rules implicitly embrace both methods by providing that an attorney may lend money to a client. See supra notes 92-93.

95. Neither the Alabama nor the California rules explicitly state the extent of permissible financial assistance. The Alabama Code allows an attorney to extend "emergency" financial assistance. The California Rules do not limit an attorney's lending activities to a stated purpose, presumably permitting loans for any reason. See supra notes 92-93.

96. See State Bar of Texas, Comm. on Professional Ethics, Formal Op. 230 (1959). In 1954, the Committee on Professional Ethics of the State Bar of Texas issued Formal Opinion 106, condemning advances for living expenses in order for an attorney to retain employment. State Bar of Texas, Comm. on Professional Ethics, Formal Op. 106 (1954). Formal Opinion 230 modified this position. While advances to prospective clients for the purpose of obtaining employment were considered improper, advances after employment were permissible unless the advances were made "with such publicity, frequency or notoriety as to constitute indirect solicitation of employment in other matters." State Bar of Texas, Comm. on Professional Ethics, Formal Op. 230 (1959). The committee also stated that repayment from the proceeds of the claim did not affect the propriety of the loan, implying that ultimate repayment was necessary. Id.


98. Rule 1.8(e)(1) provides:

(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, expenses of litigation, and reasonable and necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter;

The proposed rule suggests that the timing of the loan agreement is irrelevant, and provides that repayment of the loan may be contingent on the outcome of the litigation.

III. DR 5-103(B)(2)—THE NEW MINNESOTA RULE

In 1981, the Minnesota Supreme Court, upon petition by the Minnesota Lawyers' Professional Responsibility Board, amended DR 5-103(B) to allow an attorney to guarantee loans that are reasonably necessary to relieve substantial financial pressure on a client to settle. The amendment, with some variation, restores the original common law rule on subsistence loans.

A. ETHICAL PROBLEMS OF FINANCIAL ASSISTANCE TO CLIENTS

The Minnesota Supreme Court correctly determined that the practice of guaranteeing loans to needy clients is consistent with sound professional ethics. Although the Code discourages arrangements that may create a conflict of interest between the attorney and the client and may improperly influence the client's choice of counsel, these concerns do not justify a complete prohibition of financial assistance for living expenses. The Ethical Considerations state that an attorney should avoid becoming financially interested in the outcome of the suit, because the interest may impair an attorney's ability to exercise professional judgment on behalf of a client. By identifying impermissible interests as financial or proprietary, the Code implies that a conflict of interest may arise when an attorney...
commits any of his or her financial resources in prosecuting a client's claim. The drafters apparently feared that attorneys might subordinate their clients' best interests to their own interests to protect their financial interest in the lawsuit. Nevertheless, the Ethical Considerations\textsuperscript{106} and the Disciplinary Rules,\textsuperscript{107} by sanctioning advances for litigation expenses and contingent fees, recognize that the need for access to the judicial system may outweigh the conflict of interest problem. The Code thus allows an attorney to commit some of his or her own resources to a case,\textsuperscript{108} even if the proceeds from judgment or settlement provide the sole source of repayment,\textsuperscript{109} because if these practices were prohibited a needy client might be unable to raise the funds necessary to litigate the claim.\textsuperscript{110}

An attorney who guarantees a loan to a client for living expenses acquires an interest similar to that acquired by a permissible advance or guarantee of the expenses of litigation.\textsuperscript{111} In either situation, the proceeds of the suit may provide the source of repayment. But the loan might be repaid from subsequently available funds, despite the client's desperate financial condition at the time of the loan.\textsuperscript{112} In contrast to a loan for the expenses of litigation, however, a guaranteed loan for living expenses may eventually involve a substantial commitment of the attorney's resources to the client's cause of action. Court costs, witness fees, and investigation expenses will seldom match the considerable expense of maintaining the client through a lengthy lawsuit. Moreover, an attorney guaranteeing a loan for living expenses will usually advance the litigation expenses also. Because an attorney's inclination to protect his or her financial interest presumably increases with the size of the interest, guaranteeing a loan for living expenses may arguably

\textsuperscript{106.} Id. EC 5-7, EC 5-8, 9 Minn. Stat. 728 (1980).
\textsuperscript{107.} Id. DR 5-103, 9 Minn. Stat. 731 (1980).
\textsuperscript{108.} Id. DR 5-103(B)(1), 52 Minn. Stat. Ann. 21 (West Supp. 1982); see Model Code of Professional Responsibility DR 5-103(B) (1980).
\textsuperscript{110.} Id. EC 5-7, EC 5-8, 9 Minn. Stat. 728 (1980).
\textsuperscript{111.} The Code has always allowed an attorney to advance or guarantee the expenses of litigation while representing a client. See id. DR 5-103(B), 9 Minn. Stat. 731 (1980); supra note 4. The interests acquired by advancing or guaranteeing the expense of litigation does not appear to be a "proprietary interest" within the meaning of DR 5-103(A). See supra note 75.
\textsuperscript{112.} See Bar Ass'n of the City of New York, Comm. on Professional Ethics, Op. 781 (1953) (client was a seaman and could easily repay the loan with his wages once he returned to work).
present a greater conflict of interest problem than simply advancing the expenses of litigation.

The Code's treatment of contingent fees, however, demonstrates that a substantial investment in a client's cause of action does not support a presumption that the attorney has acquired an interest in the litigation that creates an impermissible conflict of interest. Little practical difference may exist between allowing an attorney to commit his or her time pursuant to a contingent fee arrangement and allowing an attorney to commit his or her money pursuant to a loan guarantee. Because an attorney presumably could bill his or her time at an hourly rate, an attorney retained under a contingent fee arrangement in effect loans the client an amount equal to the normal fee for the number of hours devoted to the case. By permitting contingent fee contracts, the Code condones a substantial investment by an attorney in appropriate circumstances. An attorney's guaranteed loan may be as essential to a litigant's ability to pursue a cause of action as a contingent fee arrangement. Public policy thus supports the propriety of both practices.

Of course, a contingent fee arrangement can be distinguished from a loan in that, under the former, the attorney will not receive compensation for his or her time if the suit is unsuccessful. A client's liability for a subsistence loan continues, however, even if the suit fails, and the client must repay the loan despite the absence of proceeds from the lawsuit. Nevertheless, in some instances, a client may be unable to pay unless the suit is successful. Since an attorney is unlikely to advance either the time or the credit a client requires to pursue a claim if the attorney believes that success is unlikely, investing either resource creates an equivalent potential for a conflict of interest. To the extent that the attorney's recovery of fees or liability on the loan depends upon the successful resolution of the lawsuit, the attorney's and the client's interests are in accord under either a contingent fee or a loan guarantee.113

113. In at least one situation, however, a loanmaking attorney may have a greater incentive to pursue his or her own interests at the client's expense than an attorney operating under a contingent fee arrangement. If an attorney believes that the ultimate recovery will only be enough to satisfy the outstanding loan, the attorney will want to settle the suit for any amount that is sufficient to repay the loan. Because the client gains little from such a settlement, he or she would prefer to gamble on the possibility of a larger recovery at trial. By contrast, under a contingent fee contract, the attorney's compensation is a percentage of the ultimate recovery, and both attorney and client have the same interest in maximizing the proceeds of the suit. Nevertheless, it seems unlikely
Thus, guaranteeing a loan for living expenses will not impair a scrupulous attorney's allegiance to a client to any greater extent than a contingent fee arrangement; the potential conflict of interest is similar under both practices. As with the other practices permitted by the Code, any conflict of interest associated with loan guarantees is offset by the benefits of greater access to the judicial process for litigants with limited resources.

The availability of financial assistance also does not violate the Code's policy against improper influence of a client's choice of counsel. Guaranteeing loans is not an improper inducement to employment, but simply a factor that a potential client may consider in choosing his or her attorney. Perhaps in the ideal situation, a potential client should select an attorney based solely on the client's personal knowledge of the attorney's professional competence.114 Both the Minnesota Code and the Model Code, however, recognize the limited efficacy of the traditional selection process employed by potential clients.115 To facilitate the process of informed selection, the Model Code provides a compilation of information that a lawyer, subject to certain restrictions, may publish or broadcast.116 This compilation includes fee and credit information.117 Allowing and encouraging the dissemination of specified information clearly implies that the Model Code recognizes factors other than the

that an attorney would accept the case if his or her compensation were limited to repayment of any amounts loaned to the client. For a further discussion of this problem, see infra note 129.

114. EC 2-6 provides: "Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one." MINN. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-6, 9 MINN. STAT. 715 (1980); cf. ABA CANONS OF PROFESSIONAL ETHICS No. 27 (advertising, direct or indirect); supra note 34.

115. MINN. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-7, 9 MINN. STAT. 715 (1980). The Model Code differs slightly from the Minnesota Code by recognizing that lack of information about lawyers and "the expense of legal representation leads laypersons to avoid seeking legal advice." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-7 (1980).

116. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1980). The Minnesota Code, unlike the Model Code, does not provide a list of the types of information a lawyer may publish or broadcast. See MINN. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B), 9 MINN. STAT. 715 (1980).


118. Model Code EC 2-8 provides: "Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties ... and disclosures of relevant information about the lawyer and his practice may be helpful." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-8 (1980).
attorney's professional competence as legitimate considerations for potential clients. Much of this information, such as fee schedules, hourly rates, and the availability of contingent fee arrangements, relates to a potential client's financial ability to retain a particular attorney. Because the availability of financial assistance during litigation is relevant to a client's choice of counsel, its consideration should be as permissible as the consideration of other kinds of financial information that attorneys may currently publish under the Model Code.

The Minnesota Code attempts to limit the influence of loan guarantees on a client's employment decision by forbidding the attorney to promise a guarantee before the client hires the attorney. This timing distinction is artificial because the timing of the loan does not significantly reduce its influence on the client's decision to retain counsel. If a client requires financial assistance to pursue his or her claim, the availability of such assistance will be an essential consideration whether the client considers it before or after the retention of an attorney. Requiring that the attorney inform the client of its availability only after retention fosters uninformed decision making by the client and leads to the useless retention and dismissal of attorneys that cannot or will not provide the financial assistance that the client requires. Besides being inappropriate and superfluous, the requirement that the loan agreement be initiated after retention is difficult, if not impossible, to enforce. Although the Minnesota rule seems to prohibit guaranteeing a loan prior to retention of counsel, the rule does not prohibit an attorney from discussing the availability of a guaranteed loan. Thus, as drafted, the rule is consistent with informed decision making.

119. Information that may be publicized pursuant to Model Code DR 2-101(B) includes that which is relevant to the issue of the attorney's professional competence. See supra note 117 and accompanying text.

120. The Minnesota Code arguably permits the communication of financial information, provided the statement is not false, fraudulent, misleading, or deceptive. See Minn. Code of Professional Responsibility DR 2-101(B), 9 Minn. Stat. 719 (1980).


B. ENSURING THE PROPRIETY OF GUARANTEED LOANS

Guaranteeing loans, although justified on policy grounds, may unduly inhibit a client from exercising control over a lawsuit.\textsuperscript{124} For example, a client receiving financial assistance for living expenses from the attorney might be reluctant to discharge the attorney\textsuperscript{125} or to accept a settlement offer which the attorney thinks is inadequate\textsuperscript{126} because the client might feel psychologically and morally indebted to the attorney. In addition, it seems likely that in many cases a client who needs a loan for living expenses will retain counsel under a contingent fee arrangement\textsuperscript{127} which may create additional problems. Because the attorney has more invested in the suit, he or she potentially has a greater stake in the outcome of the litigation.\textsuperscript{128} The greater investment may increase the attorney's possible inclination to protect his or her interest at the expense of the client's interest.\textsuperscript{129} An unscrupulous attorney could also use the suggestion of a loan for living expenses to induce a needy client to accept a contingent fee contract that promised the attorney an excessive percentage of the ultimate proceeds.

To minimize the potential for these problems, an attorney should guarantee loans for living expenses only when a client genuinely needs assistance, and the amount loaned should not exceed the client's reasonable living expenses.\textsuperscript{130} Disciplinary

\textsuperscript{124} See generally MINN. CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1, EC 7-7, EC 7-8, EC 7-9, 9 MINN. STAT. 727, 735 (1980) (general admonitions to attorneys that the client should make ultimate decisions about the case).

\textsuperscript{125} See, e.g., Fluhr v. Roberts, 463 F. Supp. 745, 747 (W.D. Ky. 1979) (attorney-client relationship may always be terminated by the client with or without cause).

\textsuperscript{126} See, e.g., Kotsifakis v. A. Lusi, Ltd., 138 F. Supp. 945, 947 (E.D. Va. 1955) (client controls the acceptance or rejection of a settlement offer).

\textsuperscript{127} Because a client who needs a loan to withstand a delay in litigation will rarely have the financial resources to retain an attorney, the attorney will often be operating under a contingent fee contract. The loan may be appropriate, however, in domestic relations cases, where a contingent fee is not proper. See MINN. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20, 9 MINN. STAT. 717 (1980).

\textsuperscript{128} See supra notes 111-13 and accompanying text.

\textsuperscript{129} For example, a loanmaking attorney might accept a settlement adequate to insure the attorney's reimbursement but too small to compensate the client adequately. This, however, is not likely. Although the attorney negotiates for and advises the client, the attorney cannot accept or reject a settlement offer without the client's consent. See supra note 126. Furthermore, the attorney is unlikely even to encourage the client's acceptance of an inadequate settlement offer because the loan in many cases will have been made to enable the client to reject an inadequate settlement offer. See supra text accompanying note 27.

\textsuperscript{130} In McCallum, the Supreme Court of Illinois recognized that the purpose of advances for living expenses was to prevent acceptance of an unjust settlement offer out of financial necessity. The court allowed advances for liv-
Rule 5-103(B)(2) limits the availability of guaranteed loans to those situations in which a loan is "reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits.")131 The phrases "reasonably needed," "substantial pressure," and "financial hardship," however, invite varied and manipulative interpretations. The new rule provides inadequate guidance in determining precisely what the requisite necessity is under the amendment.132 Because of these ambiguities, the Minnesota Lawyer's Professional Responsibility Board (Board) should consider issuing an opinion clarifying the requisite standard of necessity. Prohibiting an attorney from guaranteeing loans for living expenses until the client has attempted to obtain an unguaranteed loan through ordinary commercial channels is one way to ensure the client's necessity. If a client's loan application is rejected, the rejection notice provides adequate assurance that the client's circumstances require the attorney's guarantee. To ensure the attorney's ability to respond to an
emergency situation, the Code should permit the attorney to make a small loan immediately, pending the client's unsuccessful attempt at independent financing.

The new rule also limits the loan to the amount necessary to withstand delay in litigation, but the time required to constitute delay under the rule is unclear. Loan guarantees might be permissible during the ordinarily lengthy process of instituting, pursuing, and completing a lawsuit, but delay could be interpreted to require time in excess of that ordinarily involved. Whether the delay must have occurred prior to the loan agreement or whether a reasonable expectation of delay is adequate is also unclear. Loan guarantees are intended to prevent settlement solely on the basis of the client's immediate financial need. If the requisite necessity is present, the Board should interpret the amendment to permit the attorney to guarantee the client's loan immediately upon his or her retention. The new rule specifies that an attorney may not directly loan a client funds for living expenses; such assistance must take the form of a loan guarantee. This restriction is desirable in light of the severe feeling of indebtedness that might result from a direct loan, possibly inhibiting the client's control of the suit. The attorney serves the same function whether acting as lender or guarantor—providing financial assistance to a client who without such assistance would be unable to pursue a claim. In either capacity, the attorney assumes an identical risk. Yet some of the potential dangers inherent in direct loans are minimized through the use of loan guarantees. The client's legal obligation to a third party eliminates the psychological impact of receiving money directly from the attorney; a loan guarantee thus may reduce the client's feeling of indebtedness.

133. See supra note 3.
134. See MINN. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B)(2), 52 MINN. STAT. ANN. 21 (West Supp. 1982).
135. The California Code, the Alabama Code, and the Model Rules of Professional Conduct (Proposed Final Draft), all of which allow some form of financial assistance for living expenses, do not incorporate a delay requirement. See supra notes 92-93, 98.
137. See supra text accompanying notes 125-26.
138. If the client is unable to repay the direct loan, the lending attorney will simply not be repaid. The guaranteeing attorney will be responsible to the lending party for repayment, and similarly will have no one but the client to look to for repayment.
edness and resultant reluctance to exercise the right of control over the cause of action. In addition, the formalities associated with a guaranteed loan—third party participation and the legal forms and procedures—will help ensure that the client has carefully considered the decision to accept the loan and to pursue the claim.

The rule correctly incorporates the common law requirement that the client remain "ultimately liable for repayment of the loan without regard to the outcome of the litigation."\(^{139}\) Although the outcome of the lawsuit should not determine the client's liability on the loan obligation, the words "ultimately liable" are somewhat ambiguous. Cases will surely arise where the lender, unable to collect from the client, demands payment from the attorney. It is clear that the Code should not require an attorney to proceed against the client to hold the client "ultimately liable."\(^{140}\) The practice would be unseemly and, in most circumstances where guaranteed loans are necessary, collection efforts would be futile.

Drafting the loan agreement as a conditional guarantee\(^{141}\) would enhance the efficacy of the amendment's repayment requirement without requiring an attorney to attempt to enforce the client's obligation. A conditional agreement would require that the lender exercise due diligence in attempting to collect the debt from the client.\(^{142}\) Only if the lender's diligent efforts were unsuccessful would the guarantee bind the attorney.\(^{143}\) The attorney need not proceed against the client except in those rare instances in which the lender was unsuccessful and

\(^{139}\) MINN. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B)(2), 52 MINN. STAT. ANN. 21 (West Supp. 1982). The purpose of this requirement is unclear. Repayment was traditionally required to prevent attorneys from prosecuting questionable claims and from taking advantage of their superior ability to evaluate claims for the purpose of speculative litigation. See supra notes 21-22 and accompanying text. Requiring repayment to discourage the assertion and litigation of questionable claims is unnecessary. Not only do the present Codes forbid lawyers from engaging in frivolous suits, but the time and expense involved in litigating a claim discourages both attorneys and potential claimants from instigating questionable suits. See MINN. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109, DR 2-110(B)(1), 9 MINN. STAT. 722, 740 (1980).

\(^{140}\) See MINN. CODE OF PROFESSIONAL RESPONSIBILITY EC 2-23, 9 MINN. STAT. ANN. 717 (1980).

\(^{141}\) A conditional guaranty is not enforceable immediately upon the principal debtor's default, but only upon the happening of some stated contingency, such as suit against the principal debtor or exhaustion of security. See, e.g., Dahmes v. Industrial Credit Co., 261 Minn. 26, 33, 110 N.W.2d 484, 489 (1961).

\(^{142}\) See, e.g., Pavlantos v. Garoufalis, 89 F.2d 203, 206 (10th Cir. 1937).

\(^{143}\) Id.
the circumstances justified the suit.\footnote{144 See Minn. Code of Professional Responsibility EC 2-23, 9 Minn. Stat. 717 (1980).}

Conditioning loan guarantees on specified criteria does not ensure compliance with the rule's limitations on ethical loanmaking. The Board must enforce the limitations on permissible financial assistance imposed by DR 5-103(B)(2). According to Minnesota's Rules of Lawyers Professional Responsibility,\footnote{145 Minn. Rules on Lawyers Professional Responsibility Rule 2, 9 Minn. Stat. 780 (1980). The Rules on Lawyers Professional Responsibility govern the investigations of lawyers' alleged unprofessional conduct and the disciplinary proceedings brought as a result of the investigations.} the Board may investigate any lawyer either with or without a specific complaint of alleged misconduct.\footnote{146 Id. Rule 8(b), 9 Minn. Stat. 752 (1980).}

In the absence of a specific complaint, the Director of the Board (Director) may initiate an investigation at any time.\footnote{147 Id.} Most disciplinary agencies, however, although authorized to institute investigations, rarely use this authority, possibly because of inadequate staff or funds, the absence of sources of information other than specific complaints, or the absence of initiative.\footnote{148 American Bar Association, Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 60 (1970) [hereinafter cited as Disciplinary Enforcement].}

The principle impetus for the enforcement of ethical standards, therefore, is the specific complaint.

Specific complaints require the cooperation of either the attorney who acted as guarantor, the lending party, another attorney who is aware of the financial arrangement, or the client who received the loan. The Board cannot rely on any of these sources of specific complaints to ensure adequately that loans are guaranteed only under appropriate circumstances. Because the vague language of DR 5-103(B)(2) provides limited guidance,\footnote{149 See supra text accompanying notes 131-33.} an attorney attempting to remain within the scope of permissible conduct will require supervision.\footnote{150 The amendment's insufficient guidance as to the scope of permissible financial assistance is particularly disturbing in light of the mandatory character of the disciplinary rules. According to the Code's Preliminary Statement, the Disciplinary Rules provide "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Minn. Code of Professional Responsibility Preliminary Statement, 9 Minn. Stat. 712 (1980).}

The lending party is under no obligation to report unethical conduct to the Board and will have no incentive to do so.\footnote{151 The lending party, anxious to make guaranteed loans, may actually have a disincentive to report unethical conduct, particularly because as the client's need becomes more tenuous and therefore the possibility of a violation
who is aware of the financial arrangement, although obligated to report unethical conduct, is also unlikely to make a report since attorneys are often reluctant to complain about their colleagues. In addition, an attorney who is aware of the financial arrangement is likely to be the guarantor's partner or associate and therefore even more reluctant to report the potentially unethical conduct. Clients receiving the loans will provide the best, although an inadequate, source of specific complaints. If a client is dissatisfied with the attorney's performance or the ultimate outcome of the lawsuit, he or she may file a complaint with the Board. In many instances, however, the loan ultimately benefits the client, and he or she will have no reason to report improper loan guarantees.

Because specific complaints inadequately ensure effective enforcement of DR 5-103(B)(2), the Director must initiate independent investigations of potentially unethical loanmaking activity. To facilitate this process, the Board should develop an independent and reliable source of information about loan guarantees made pursuant to DR 5-103(B)(2). The Board could draft a standard loan agreement, which the parties would

increases, the lender's risk of either a lengthy collection procedure or an ultimate loss decreases.

152. "A lawyer possessing unprivileged knowledge of a violation of [a disciplinary rule] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." MINN. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A), 9 MINN. STAT. 714 (1980).

153. DISCIPLINARY ENFORCEMENT, supra note 148, at 167.

154. Perhaps unintentionally, the client might mention the financial arrangement to another attorney, who is neither a partner nor an associate of the guarantor, who might be less reluctant to report the guarantor's unethical conduct. The Special Committee on Evaluation of Disciplinary Enforcement, however, identified the reluctance to inform as "almost universal." Id. at 168.

155. Although a dissatisfied client may be unaware of the existence of DR 5-103(B)(2) and therefore unaware of its violation, the Board, upon receiving a complaint and investigating the relationship, would be likely to discover the violation.

156. The client's lack of incentive to report unethical conduct is a problem whenever the attorney's misconduct benefits the client. This is true, for example, in the case of the falsification of personal injury claims and immigration frauds to enable noneligible aliens to gain admission to the country. See DISCIPLINARY ENFORCEMENT, supra note 148, at 6.

157. In 1928, Justice Wasservogel of the New York Supreme Court, after investigating the abuses of the contingent fee, concluded that the contingent fee should not be prohibited because to do so would deny justice to many poor claimants with meritorious claims. He suggested, however, that the courts supervise all contingent retainers in order to protect noneligible aliens to gain admission to the country. See DISCIPLINARY ENFORCEMENT, supra note 148, at 6.

158. In 1928, Justice Wasservogel of the New York Supreme Court, after investigating the abuses of the contingent fee, concluded that the contingent fee should not be prohibited because to do so would deny justice to many poor claimants with meritorious claims. He suggested, however, that the courts supervise all contingent retainers in order to protect claimants in their relations with attorneys. Justice Wasservogel's recommendation that the court require the filing of retainer agreements was adopted. F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES, A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 161-62 (1964).
use whenever an attorney acts as a guarantor. The agreement would require the parties to supply specific information regarding the client's financial need. To ensure that the Board received a copy of the agreement, the promissory note could provide that the attorney's guarantee was not binding prior to filing with the Board. The lender would therefore have a strong incentive to file a copy of the agreement with the Board. In addition, by charging a filing fee, the Board could recoup a portion of the cost of regulating loan guarantees. This proposal, requiring a minimum of inconvenience and expense, would provide an adequate source of information upon which the Board could initiate investigations of potentially unethical financial assistance.

IV. CONCLUSION

The Minnesota Supreme Court correctly amended the Code of Professional Responsibility to allow an attorney to guarantee a loan where reasonably necessary to relieve substantial pressure on the client to settle. Loan guarantees present no greater potential for conflicts of interest than other practices permitted by the Code. In addition, the availability of financial assistance for living expenses is not an improper inducement to the employment of an attorney. Nevertheless, financial assistance may adversely affect the attorney-client relationship by making the client feel unduly indebted to the attorney. In addition, because a client who needs a loan may have retained counsel pursuant to a contingent fee contract, the combination of the two arrangements may cause the attorney to subordinate the client's interests to his or her interests. Unfortunately, the amended rule provides inadequate guidance for attorneys who wish to minimize those problems. The Board should therefore consider exercising its discretionary authority to issue opinions on questions of professional conduct to clarify the scope and method of permissible financial assistance. The Board should also consider requiring attorneys to file copies of the loan guarantee agreements to facilitate enforcement of the ethical limitations on such guarantees.

158. Requiring the lawyer or the client to file would be self-defeating. In the situation in which neither the attorney nor the client has an incentive to complain of unethical conduct, neither party will have an incentive to file a record of the unethical guaranteed loan.