

L.E.I. 83-6

(October 21, 1983)

**ADVANCEMENT OF EXPENSES BY  
A LEGAL AID SOCIETY**

The Committee on Legal Ethics has been requested to render an opinion on the following issue: Whether a not-for-profit legal aid society may pay the expenses of medical examinations for indigent clients who have disability benefit claims from a fund established for such purpose and funded by voluntary charitable contributions.

DR 5-103(B) states that, generally, a lawyer may not advance money to his client unless the client agrees to reimburse him:

5-103(B). 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.

The clear reason for this rule is to ensure that the lawyer's independent professional judgment remains unclouded by a personal financial interest in the case. (Canon 5: A lawyer should exercise independent professional judgment on behalf of his client.) (See EC 5-2, 5-7 and 5-8; L.E.I. 82-5: Duties of Lawyers Concerning "Protection" of Doctor's Fees Out of Client's Recovery.)

EC 5-8 recognizes that some exceptions can be made:

EC 5-8: 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 of 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.

In an opinion issued under former Canon 42, the American Bar Association noted that advancement by committees, not by lawyers, of costs to indigent servicemen without provisions for reimbursement was appropriate (ABA Formal Opinion 259, December 17, 1943). More recently, the ABA Committee on Ethics and Professional Responsibility has approved of the advancement of costs by legal aid societies in class actions undertaken on behalf of indigents. The Committee, in reply to an inquiry from a legal aid office, stated that:

. . . there is nothing unethical in your office's conduct in advancing such costs in the first instance and assuming the ultimate responsibility for such costs if there is no recovery of costs in the litigation. The Committee does not find a violation of DR 5-103(B) since it is the Legal Aid Society and not the lawyers who advances the monies. The Legal Aid Society may expend public or charitable funds for these purposes.

ABA Informal Opinion 1361 (June 3, 1976).

The Committee noted that "poor clients who are eligible for free legal services should not be deprived of the necessary

preparation for litigation . . . because they are unable to assume the ultimate responsibility for out-of-pocket costs." (Ibid.)

As in the exceptions noted above, where the lawyer himself does not advance costs and where the lawyer does not stand to profit from the outcome of the case, the Committee finds that no danger exists of impairment of the lawyer's independent professional judgment. Accordingly, it is the opinion of the Committee that legal aid societies may advance costs for medical examinations to indigent clients with disability benefit claims so long as: (1) monies for these costs are taken from an independent fund, unrelated to the funds from which the society's lawyers are paid; (2) care is exercised so as to ensure that the society's lawyers do not benefit financially from the outcome of the case; and (3) the client agrees that reimbursement of such costs will be made in the event that the client becomes financially able to do so in the future.