FEBRUARY 2001 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS

Professional Responsibility

QUESTION

Jones & Smith is a law firm concentrating on plaintiffs' personal injury litigation. The firm has decided to take several steps to increase its business volume.

First, the firm plans to run television advertisements stating that the firm offers to handle cases for discount contingency fees. The advertisements will state that, while most firms normally charge a 33% contingency fee for handling a personal injury case, Jones & Smith will undertake representation for a fee of 25%. In addition, the advertisements will state that the firm offers interest-free advances against prospective judgments in cases of clear liability of up to 50% of the firm's estimated value of the case.

Second, the firm plans to acquire from the police department lists of individuals who have been involved in automobile accidents, and to mail letters to those persons informing them that the firm is available for consultation about their legal rights arising out of the accident. Individuals who have been hospitalized as a result of an accident will receive a flower arrangement, delivered "compliments of Jones & Smith, Attorneys at Law."

Finally, the firm plans to make use of non-lawyers in order to reduce costs. The firm will employ several paralegals and investigators who will be responsible for working up personal injury cases. Their activities will include fact investigation, witness interviews, negotiation with insurance adjusters, meetings with clients to discuss proposed settlements, and settlement conferences with clients to explain releases and to execute other documents necessary to conclude a case.

Do the proposed actions violate any rules of professional conduct? Discuss.

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ANSWER A

The ABA Model Rules generally provide the majority ethical rule standards governing the conduct of attorneys. California has some rules which are more strict, less strict or different than the ABA rules on various issues. As to advertising, in particular, California has detailed requirements requiring that ads be labeled and that any staged recreations or simulations be labeled, and also designating a number of practices as presumptively deceptive or misleading. That includes any guarantees or warranties of results, as one example.

1. The Television Ads

Lawyer advertising is commercial speech, which is subject to regulation that balances the First Amendment free expression rights with limitations such as that there is no constitutional right to make false statements.

Thus, while lawyer advertising is permitted, it must be truthful and not misleading.

A law firm is entitled to advertise its rates. The Jones & Smith (J & S) ad's statement that while most firms normally charge a 33% contingency fee, they will charge 25% is potentially misleading in that it may not be true that most firms charge a 33% contingent fee. If that statement can be supported (and may well be true), the next problem is that the ad does not disclose that costs for advanced items will be recovered as well.

California requires contingent fee contracts to be in writing and to specify not only the contingency percentage but also whether costs are recovered before or after the contingency percentage is applied. The absence of that information (i.e., whether costs are recovered before or after the 25% contingency is calculated) may render the ad misleading.

The Interest-Free Advances

The offer of interest-free advances against prospective judgments in cases of clear liability of up to 50% of the firm's estimated value is clearly an ethical violation, in several respects.

First, a lawyer is not permitted to acquire a personal financial interest in a case, apart from the permitted contingent fee. Lawyers may not pay to get a case. Lawyers also are generally not permitted to loan clients money. They may advance litigation expenses or sometimes necessary medical expenses necessary for litigation. California does permit loans, but only after the representation is established and only if the client signs an IOU in writing.

The ad contemplates advances on loans even before the potential client has become an actual client.

Additionally, the parts of the ad that deal with "cares of clear liability" and "50% of the firm's estimated value of the case," are suggestive of guarantees or assurances of case outcome which, as noted above, are presumptively misleading and impermissible in California.

2. The Mailings to Accident Victims

The Supreme Court has upheld targeted mail solicitations such as letters to accident victims. However, the ABA Model Rules and California impose various restrictions and requirements on such letters. Both the letters themselves and the outside envelope must note that it is a commercial solicitation. The information about the firm and its availability also must be truthful and not misleading. So the plan to mail letters is not ipso facto any ethical violation assuming that the accident information is obtained lawfully. Informing that the firm is available for consultation is permissible.

The plan to send flower arrangements to hospitalized victims that say, "compliments of Jones & Smith," is not ethically permissible.

As noted above, any advertising has to be labeled as such. This would be considered advertising and would have to be labeled.

Second, there is a problem of direct solicitation. The law firm is not sending out a general mailing advising of its availability, but instead soliciting business from an individual.

Just as it is not ethically proper for a lawyer to fling his business card to an accident victim as he goes by (without any direct discussion) it would likewise be impermissible to solicit business by a card on a floral display.

Additionally, a lawyer may not offer payments or gifts to obtain business. A floral display sent to a friend or colleague with the compliments card would be permissible. A floral arrangement sent to a potential client to encourage him/her to hire the firm is not ethically permissible. It violates duties of fairness to other lawyers and of decorum to the public.

Use of Non-lawyers

Non-lawyers may be used by lawyers to assist with legal tasks, subject to several restrictions. Lawyers may not share legal fees with a non-lawyer. The non-lawyers must be supervised by the lawyer(s) and the lawyers are responsible for any ethical breaches committed by their supervisee. Additionally, it is ethically impermissible for lawyers to assist non-lawyers in the unauthorized practice of law.

Some of the activities contemplated here are proper for non-lawyers, such as fact investigating and witness interviews, as long as the paralegals and investigators observe client confidentiality and other strictures.

Professional Responsibility

Some of the activities contemplated involve the practice of law, and the law firm is in ethical violation if it assists in that.

Meetings with clients to discuss settlements and settlement conferences to discuss releases and to execute other documents involve legal functions - judgments about the legal strength of claims and the evaluation of legal documents and their consequences. The paralegals and investigators should not be performing those functions.

Likewise, negotiations with insurance adjusters is not an investigatory function or a paralegal one. It involves legal evaluations and a number of legal judgments and legal strategies. That should be done by a lawyer. Paralegal or investigator involvement would involve the unauthorized practice of law. The law firm would be in ethical violation by assisting or allowing that to occur.

Supervising lawyers are liable for any ethical violations which they direct or know about and fail to correct.

ANSWER B

Jones & Smith (J & S) as a law firm has proposed several actions that raise potential conflicts with, and violations of, both the ABA Rules of Professional Conduct and those specific to California. Where appropriate, the split between the ABA and California Rules is mentioned below.

I. TELEVISION ADS

There is nothing inherently wrong with a firm running ads seeking to inform the public that it wishes to offer its legal services. While some may find ads seeking representation on T.V. to encroach upon the duty of dignity and decorum to the profession and public, commercial speech under the First Amendment is protected speech so long as it is not deceptive, false or misleading.

J & S must make clear in their T.V. ads that the spots are ads seeking to gain clients and must not make any unverified claims or comparisons. If actors are used in the spots, the ads should clearly state the ad is a "dramatization" and contain an attorney name and contact number for the ad.

California's statutory code provides a series of presumptions concerning improper lawyer advertising. Among these is that a firm should not make any unsubstantiated guarantees, warranties or representations.

Here, J & S plan to state that most firms handle contingency fees for a personal injury case for 33% of the eventual recovery. J & S will need to verify this claim before giving such an ad and also make clear how the costs are calculated. Since it is inherently difficult to offer an

industry-wide practice, particularly where the geographic scope is not mentioned; regarding costs, J & S may be engaged in deceptive or misleading advertising.

J & S then plans to compare its 25 % fee to that of "most" firms at 33 %. The ad is deceptive, or potentially misleading, in that "most" is very imprecise (51 % or 99%?) and does not state what is involved. Then J & S attempts to state that it will "undertake" representation for a 25 % fee. What does undertake mean? Does it mean that all personal injury cases are for a 25% fee, or does it mean that this is a floor for negotiation or for most cases?

More importantly, a contingency fee arrangement is a contractual relationship between the client(s) and firm in which all relevant factors must be made clear to the parties. The fee arrangement should detail, inter alia, (i) what costs are included or excluded, (ii) whether the percentage includes or excludes such costs, and (iii) what costs are involved in the event counsel is dismissed or withdraws before settlement.

The ABA provides that contingency fees must not be unreasonable while California requires that fees not be unconscionable. Additionally, personal injury cases often involve medical malpractice claims and such claims in California can be capped at a set percentage.

Loans

The ads also plan to mention that J & S will offer interest-free advances against prospective judgments in "cases of clear liability" of up to 50% of the firm's "estimated value" of the case. Both standards appear to be very subjective and offer the consumer no true idea how or whether a loan will be granted.

More importantly, loans are improper under both the ABA and California Rules. The ABA provides that loans may only be advanced to indigent clients for necessary litigation expenses, while California provides that loans are per se improper unless accompanied by a signed promissory note.

Additionally, the loans serve to provide J & S with an improper interest in the subject of litigation. However, this is not fatal since contingency fee arrangements inherently involve interest in the client's litigation.

II. IN-MAIL SOLICITATION

It is proper for J & S to acquire the names of potential clients from the police because this is public information made available to the public.

While it would be improper for lawyers to use such lists for in-person solicitation of clients, sending letters is different. Lawyers are prohibited by the rules of professional conduct from in-person solicitation of prospective clients for personal pecuniary gain in the absence of a

pre-existing legal or familial relationship. The rationale is that potential clients may feel coerced to assent to representation under the duress of face-to-face confrontation.

This concern is lessened with solicitation for profit through the mail. There is less pressure and the client is better able to weigh his options. The rules pertaining to such letters are similar to those for T. V. acts above - there should be a prominent disclaimer that this is an ad for legal services and provide an attorney contact and number. Attorneys are required in California to keep a copy of all such ads for 2 years and make them available for inspection to the state bar.

The letters should not make any unverified claims, comparisons, or contacts or influence with local agencies and officials. Additionally, while the firm may state that it concentrates in the area of personal injury, it should not claim any specialization unless certified by the state bar or an approved independent organization.

Flowers

Attorneys are forbidden to either personally, or through the use of runners and agents, solicit representation in person at the scene of an accident or in the hospital. Such scenarios increase the likelihood of pressure and duress in gaining solicitation, and is a breach of the public's trust in the profession.

The flowers may or may not be improper. However, no matter the variety, something smells bad when a law firm sends flowers or gifts to prospective clients. As such, the flowers may constitute solicitation and would be improper. Even if they do not, J & S should refrain from sending flowers.

III. USE OF NON-LAWYERS

Non-lawyers may not direct nor supervise the work of lawyers. Additionally, lawyers may not share fees with non-lawyers for conducting legal work (with exceptions for death benefits and pensions).

Here, J & S seeks to have non-lawyers conduct the following activities:

i) Fact investigation
This is proper, and many firms employ paralegals and even private investigators to do such work.

ii) Witness interviews
This may be appropriate, but attorneys owe their clients a duty of competence to fully prepare and handle their cases. Witness interviews should only be conducted with sufficient firm oversight so that important factual matters giving rise to legal claims do not go unnoticed.

iii) Negotiations
This is prohibited. Non-lawyers may not engage in the providing of legal services. Since insurance adjusters often determine the size of the claim, attorneys should oversee such negotiations.

iv) Proposed Settlement Meetings
This is also prohibited. Lawyers have a duty to communicate with their clients and relay all proposed settlement offers. A client is owed a duty of loyalty and confidentiality, and this entails that all such communications are to be between the client(s) and attorney(s).

Additionally, clients oversee substantive decisions (whether to settle) while attorneys oversee procedural/tactical decisions. Thus, non-lawyers should not conduct settlement conferences since it violates the above rules and duties.

v) Execute other documents
Lastly, non-lawyers are not to execute any documents with legal significance that require legal analysis and professional judgment. To allow otherwise breaches duties to the client, profession, public and the courts.