

Question 5

Attorney mailed a professional announcement to several local physicians, listing his name and address and his area of law practice as personal injury. Doctor received Attorney's announcement and recommended that her patient, Peter, call Attorney. Peter had become very ill; he thought the cause was breathing fumes from a chemical company near his home.

Attorney agreed to represent Peter in a lawsuit against the chemical company. At Attorney's request, Doctor agreed to testify as an expert witness on Peter's behalf at the trial. Attorney advanced Doctor expert witness fees of \$200 an hour for her time attending depositions, preparing for trial, and testifying.

Attorney learned in discovery that numerous scientific studies had failed to find any medical risks from the chemical company's fumes. Doctor was nevertheless willing to testify, on the basis of her clinical experience, that the fumes had harmed Peter. Attorney did not know whether Doctor's testimony was true or false. He offered Doctor's testimony at trial, and Peter won a judgment.

After the trial, Attorney sent a \$500 gift certificate to Doctor, with a note thanking her for recommending that Peter call him.

What, if any, ethical violations has Attorney committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 5

Answer A

What, if any, ethical violations has Attorney committed?

The attorney may be liable for ethical violations for: 1) mailing a professional announcement to physicians in the area, 2) paying an expert witness fee, 3) allowing the doctor to testify, and 4) sending the doctor a gift.

Mailing a Professional Announcement to Physicians in the Area

Both the ABA and California prohibit in person, live solicitation to individuals who the attorney does not have a familial or professional relationship with. However, attorneys are allowed to send professional announcements, letters, cards, etc. to people in the area. Moreover, the document must have certain information contained in it, such as the attorney's name or if it is a firm, a name of one attorney in the firm. It must also have an address listed for the attorney and/or any other relatable contact information. However, the document must be accurate and fair, the attorney is not allowed to guarantee success rates or hold himself out as a specialist unless he is certified by the proper authorities in the state.

Here, the attorney is not soliciting in person and is rather sending professional announcements to physicians in the area. This is not prohibited by the ABA or California rules. Furthermore, the attorney has included his name and address as well as his practice of law. The announcement is not misleading and is the accurate reflection of the attorney's information. Moreover, it is of no consequence that the doctor referred her client to the attorney. The attorney and the doctor have not set up a referral service and are not sharing in any of the fee. The doctor simply referred her injured client to the attorney based on the announcement she received. Therefore, the attorney will not be in violation of any ethical rules for sending out professional announcements.

Paying an Expert Witness Fee

Both the ABA and California rules permit attorneys to compensate expert witnesses for their time exerted on the case. However, the compensation cannot be hinged on favorable testimony from the witness. The compensation must also be reasonable in light of factors such as the expert's familiarity with the subject, his experience in the field and other similar factors.

Here, the attorney is advancing the doctor an expert witness fee of \$200 an hour for her time attending depositions, preparing for trial, and testifying. These are all ethical reasons for the attorney to compensate the expert witness for. There are no facts to indicate that the attorney is paying for favorable testimony or that the fee being paid is unreasonable. Therefore, the attorney has not violated any ethical rules by compensating his expert witness.

Allowing the Doctor to Testify

An attorney is allowed to call witnesses to testify on his client's behalf. However, there are some exceptions to this rule. One major exception to this rule is if the attorney knows that the witness will perjure him or herself. This is also a place where the ABA and California rules differ.

ABA

Under the ABA, an attorney shall not call a witness to testify if the attorney knows the witness will commit perjury. However, if the witness is the defendant in a criminal case he has a constitutional right to testify on behalf of himself. The ABA states that if her client insists on testifying and perjuring herself the attorney must attempt to persuade her not to. If the client still insists on testifying, then the attorney should attempt to withdraw as counsel if the court will allow it depending on how damaging it will be to the client. Finally, if the attorney is unable to withdraw he must carefully weigh

the balance of his duty of confidentiality with his duty of candor to the court. If the client persists on testifying then the attorney may advise the court about the perjury.

California Rules

Under California, the rule regarding witnesses who are not the clients are the same. An attorney is prohibited from calling a witness who he knows will perjure himself. However, the California rules differ from the ABA regarding a client who wishes to testify on behalf of himself and who wishes to perjure himself as well. In California, an attorney must make the same effort to attempt to persuade the client to not perjure himself. Furthermore, the attorney must try to withdraw as counsel if the court permits it. The big distinction is that in California an attorney is allowed to let his client testify in narrative fashion regarding the false information. He also is not required to breach his [sic] duty of confidentiality and warn the court of the perjury.

In this Case

Here, the doctor who is testifying is not the client and therefore the attorney under both the ABA and California rules is not permitted to call the doctor if he knows he will perjure himself. The facts state that the attorney learned in discovery that numerous scientific studies had failed to find any medical risks from the chemical company's fumes. Nevertheless, the doctor was willing to testify, on the basis of her clinical experience, that the fumes had harmed Peter. Although the scientific studies failed to find any risks of the fumes, this does not mean that the doctor is necessarily lying. An attorney has a duty to represent his client zealously and just because there is some evidence that states the fumes may not be dangerous there are no facts to indicate that the doctor is lying. The doctor is testifying based on her clinical experience and is allowed to testify even if it contradicts some of the scientific studies. The only way the attorney will not be allowed to call the doctor as a witness is if he knows that she will be committing perjury when she goes on the stand. In light of all the facts, the attorney has not breached any ethical duties by allowing the doctor to testify.

Sending the Doctor a Gift

Both the ABA and the California rules prohibit sending gifts to witnesses who testify on their behalf. The attorney is only allowed to compensate the expert witness for her services in the case such as depositions, preparing for trial and testifying. Moreover, a gift to an expert witness may compromise the witness's ability to be fair and not to give favorable testimony in anticipation of a gift. If the gift was intended for the doctor as a thank you for testifying it will not be allowed.

Referral Fee

Also, an attorney is not allowed to send a gift to a person whether they are a witness or not for referring someone to him. This would be a kickback or a referral service fee. These are explicitly prohibited unless the attorney satisfies certain criteria such as: 1) getting informed consent from the client, 2) having in the contract how the referral is to be split up, and 3) the referral must not be exclusive between the attorney and the referring party.

Here, the attorney has sent a \$500 gift certificate to the doctor with a note thanking her for recommending that Peter call him. This violates both the referral arrangement stated above and also violates the ethical rules for compensating an expert witness. Thus, the attorney will be in violation for sending the doctor the \$500 gift certificate.

Conclusion

In light of all the facts, the attorney has not violated any rules by his conduct except sending the \$500 gift certificate to the doctor, of which he will be found to be in violation of the ethical rules both under the ABA and California.

QUESTION 5

Answer B

Ethical violations committed by Attorney in the representation of Peter (P).

A. Attorney advertising

i The applicable rules

The issue is what limits there are on an attorney's right to send out advertising for her services. The Supreme Court has held that attorney advertising is protected by the First Amendment as commercial speech. While states may prohibit in-person and over-the-phone solicitation entirely, states may only proscribe attorney advertising sent by mail, as it was here if it is either false or misleading. States may impose other regulations as well. For example, in California, all attorney advertisements by mail must announce on the cover of the envelope and on the ad within that this is attorney advertising. It must name an attorney responsible for the ad, as well as the attorney's address. It must list the attorney's area of law practice, and may include information about past results if the attorney makes clear that such results are not typical and that they are not a prediction of future results. A copy of the advertisement must also be held for two years.

ii. Rules applied to A's conduct

In this case, Attorney (A) mailed an advertisement for his services to local physicians. His mailing has First Amendment protection. There is nothing to suggest that the ad was false or misleading. Also, while it is true that the ad will be presumed false/misleading if it is sent to a hospital or some other place where prospective clients may be under undue pressure or distress, there is no indication that A sent the mailing to clients; rather, he sent it to their physicians, who would in such a vulnerable condition [sic]. Thus, A does not have a false or misleading ad, and he will not be liable on that count.

Further, we are told that the ad listed his name and address. However, we are not told whether the advertisement stated on the envelope and on the letter that this was an advertisement. If not, A may have committed an ethical violation.

Therefore, it appears that the mailing does not violate any rules of professional conduct under either ABA or California authorities.

B. Solicitation of prospective clients

i. The applicable rules

As noted, the ABA and California rules of professional conduct prohibit attorneys from soliciting clients for pecuniary gain in person or over the phone. There is an exception where the client and the attorney have an established relationship, are family members, or the client is a corporation.

ii. Rules applied to A's conduct

While none of these exceptions apply in this case, the attorney has not committed any ethical violation because he did not solicit clients over the phone or in person. Rather, he sent a broad mailing. This type of advertising is acceptable and does not constitute a violation of the rules.

C. Paying an expert witness's fees

i. The applicable rules

Under ABA Professional Rules, an attorney may not make any advance payments to a client in anticipation of litigation. Nor may an attorney give loans to the client, even if the client promises to repay. The only exception under the ABA rules is that an attorney may advance the costs of litigation to a client in order to facilitate the client's commencement of a claim. However, under the California Rules of Professional

Conduct (CRPC), attorneys may make loans to clients in anticipation of litigation, as well as fronting any legal costs associated with bringing the claim.

Additionally, clients/attorneys pay compensate an expert witness for his testimony/work so long as the payment is not given in exchange for specific testimony, such as testimony that is favorable to the client's case.

ii. Rules applied to A's conduct

In this case, A has advanced to Doctor (D) an amount of money intended to compensate him for his work as an expert witness. Under the ABA Rules, this probably [does] not constitute a violation of the ethical rules. The costs of hiring an expert witness are high, and many prospective clients would be unable to hire one. However, without the ability to hire an expert witness, the client might not know if he has a colorable claim against the defendant. Thus, advancing the costs of hiring an expert, as A has done here, probably would not violate the ABA Ethical Rules. These are the costs of litigation, and are probably covered under the exception under these rules.

With respect to the CRPC, it is even more likely that advancing D's fees will not constitute an ethical violation. The CPRC makes clear that attorneys may make loans to a client so long as the client has an obligation to pay the attorney back. Here, when Peter (P) wins on his claim, he will have to either pay A for the costs of hiring D as a witness, or the costs will be taken out of any contingency fee awarded to A from P's judgment against the chemical company.

Thus, under both the ABA and California rules, advancing costs to D is not a violation of the ethical rules.

D. Offering D's testimony at trial

i. The applicable rules

There are two sets of conflicting ethical rules that make resolution of this issue somewhat complex. First, A has an obligation to represent his client zealously, in good faith, and to make all colorable claims that support his client's case. This means that A has an ethical obligation to make every argument on P's behalf that A thinks is supported by the record. He should do so only in good faith, but he must be a zealous advocate at all times.

In contrast, all attorneys also have a duty of candor to the court. This means that attorneys should not offer false evidence into the record. Where there is authority that is controlling and on point, the attorney must bring such authority to the court's attention, even if the authority is detrimental to the attorney's position. Attorneys must conduct themselves honestly in court, and may not make any malicious, unfounded claims that the attorney knows have no support in the record.

As noted, these two duties often conflict, and may put attorneys in a precarious position.

ii. The rules applied to A's conduct

In this case, A learned during discovery that numerous scientific studies had failed to find any medical risk from the defendant's fumes. Nevertheless, D, the expert witness who has treated P and was hired by A to prove A's case, believes otherwise. D is willing to testify, on the basis of her experience and knowledge, that the fumes had harmed P. A has offered D's testimony at trial without knowing whether it is true or false. The question is whether this is a violation of A's duty of candor to the court.

In answering this question, it is important to analyze what A knew and didn't know at the time he offered D's testimony into evidence. First, it should be noted that only the studies A found in discovery were able to find no link between the chemicals and P's injury. We are not told whether there may be other studies out there that support such a connection that A has yet to find. In fact, if the list of studies reviewed by A is not exhaustive, there very well may be a study out there that supports such a

connection. Second, it is not clear who funded these studies, or whether the authors had some sort of bias that might discredit their findings. Further, we are not told whether this is a field of science that has been closed to further research, or whether it is a relatively new field that is still developing. It is possible that the chemical in question is relatively new, and therefore its consequences are only recently being analyzed/discovered. There might be other scientists (like D) that are using new techniques to study the connection between the chemicals and injuries, but the results just haven't been published yet. In sum, we can conclude that A has very little information that should convince him, one way or another, that D's testimony is false. There are many open questions about the chemical and a possible link between the chemical and P's injuries.

As noted, attorneys have a duty to represent their clients zealously and to make all colorable claims. The facts tell us that A did not know whether D's testimony was false or true, and this makes sense because D was the expert in the field. While it is unethical for an attorney to offer testimony that she knows to be false, there is no ethical problem under either the ABA rules or the CRPC if the attorney merely has doubts. This is especially true in light of the attorney's obligation to her client. The attorney has an obligation to represent her client vigorously. Thus, it would likely be an ethical violation of A's duty to her client were she to not offer D's testimony into evidence. Since A did offer the testimony on P's behalf, and A did not knowingly offer any false evidence in the process, A did not violate any ethical rules with respect to offering D's testimony.

E. Sharing fees with non-attorneys

i. Applicable Rule

Under the ABA rules, an attorney may not share legal fees with a non-attorney. In California, the attorney may share a fee if the attorney discloses the fee-sharing arrangement to the client and the client consents.

ii. The rules applied

In this case, we are told that A contacted D, a non-attorney, with a mailing advertisement, seeking potential clients. At first, there was no arrangement to share any resulting fees with D. However, after A won a judgment for P, he sent D a \$500 gift certificate (the certificate). This is arguably an offer from A to D to share the fees from P's case. A was compensated for his work representing P, and presumably the money that paid for the certificate came from these funds. Thus, A has arguably violated the ethical rule against sharing attorney's fees with a non-attorney. However, A will argue that he gave D the money not for D's work at trial, but for D's recommending P to A as a client. While this may free him from a violation under the "sharing-of-fees" rule, it will support an argument that he violated another ethical rule, as discussed immediately below.

Note that had A disclosed the arrangement to P ahead of time, and had P consented, this would not have been an ethical violation under California's ethical rules. However, because A failed to do so, his conduct is a violation of both the ABA and the California rules of professional conduct.

F. Paying for Referrals

i. Applicable Rule

Under the ABA ethical rules, attorneys may not offer money or services in exchange for getting referrals for prospective clients for pecuniary gain. However, in California, the attorney may pay for a referral if the attorney discloses the referral to the client at the outset of contacting the client, and the client consents to the representation despite having this knowledge.

ii. Rule Applied

The same facts discussed above in section "E" (compensation for referral) are applicable here. However, as noted above, it is also significant that A included a note with the certificate, thanking D for recommending that Peter call him. This sounds like a tit-for-tat situation, in which A is compensating D for making a referral. Thus, one would argue that A gave the certificate to D as compensation for referring P's case to A. Holding A liable under this rule is just another way of characterizing the gift certificate that was given to D after P won his case. In this scenario, the money was given to D for D's work before the case began, rather than for D's work during the trial that contributed to P's judgment and A's resulting compensation (as suggested in section "E", supra). As mentioned above, A's note to D supports the argument that the certificate was intended to compensate D for making the referral, which is a direct violation of the ABA and California rules.

Under the California rules, an attorney may compensate [a] third party who referred a client so long as the compensation is disclosed to the client and the client consents to being represented by the attorney. Because A did not get P's consent before sending the certificate, A's conduct violated the ABA and California ethical rules.