

PROFESSIONAL RESPONSIBILITY
Interim Exam - Fall 1998
5013 - Prof. Kilpatrick

Exam No.: _____

INSTRUCTIONS

This exam contains five multiple choice questions, and comprises 25% of your final grade.

1. **PLACE YOUR EXAMINATION NUMBER ON THIS PAGE OF THE EXAM.**
2. **THE EXAM IS “OPEN BOOK.”** You may consult the Brill book of Rules, the Aronson textbook, and any written (hard copy) notes and outlines prepared by you. Computers are not allowed.
3. **READ EACH QUESTION CAREFULLY BEFORE YOU BEGIN.** You are asked to provide an explanation of your choice of answer. Please cite to the applicable Rule(s) and indicate your reasoning in making the particular choice. You may use the back of the page if you need additional space, but succinctness is appropriate and encouraged.

(continue to next page)

1. [4 points] Which of the following payments (a, b, c, d) by an attorney to a witness are IMPROPER if they are reimbursed by a client? Why?

a. Payment to an expert for her written report, prepared in advance of trial; her usual hourly rate for her appearance in court, her airfare, lodging, meals, and taxi receipts.

Proper.

b. Payment to an expert of costs and a bonus if the client wins the case.

Improper. Payment of “bonus” is not “reasonable” under R 1.5; offers inducement for testimony, prohibited under R 3.4; shares fees with non-lawyer, prohibited under R 5.4.

c. Payment to an expert of 3% of the recovery in the case.

Improper. Same as “b”.

d. Payment to an expert for first-class airfare from her vacation home, baby-sitting costs incurred by the witness while testifying, and the hourly rate of her usual fee for testifying.

Proper if not “unreasonable” under 1.5. Witnesses can be reimbursed for costs incurred in testifying/consulting; no requirement that they fly coach.

2. [4 points] Adam represented Sara in a medical malpractice suit. The lawsuit was settled for \$25,000. When the check arrived, Sara was out of town and was not due back for three weeks. There was no dispute between Adam and Sara as to what Adam’s fee should be, so when he received the check, he deposited it into his business account and immediately mailed Sara a check for the amount of settlement less the attorney fees. Did Adam act properly?

a. Adam acted improperly by commingling Sara’s money with his own.

Violation of R 1.16. Adam should have (1) deposited settlement check in his trust account; (2) sent notice to Sara of receipt of settlement check; (3) wait for check to clear; (4) then, as there was no dispute as to his fee, he may withdraw his own fees (and pay other properly-made costs, e.g., to doctors); and (5) send Sara’s portion to her, along with a detailed accounting of disbursements. All of this procedure should have been included in his agreement (advisedly a written agreement) with Sara. Her vacation does not change his required actions (although he might, if he had

discussed the possibility with her and obtained her consent, hold her check until her return for safety reasons).

b. Adam acted improperly by commingling Sara's money with his own, but the improper behavior was cured when Adam immediately sent Sara her check.

Violation cannot be "cured" by subsequent action. Rule is a "technical" one.

c. Adam acted properly since there was no dispute as to the amount Sara owed him.

Still a violation to commingle funds, even briefly.

d. Adam acted properly because he was required under the Rules to tender the settlement award immediately upon receiving it.

Same as above.

3. [4 points] Al, an attorney, lives in Arkansas and is an expert on the Fourth Amendment. He has been contacted by a lawyer in Texas who has asked for his assistance in the defense of a client who has been charged with the illegal possession of a controlled substance. The substance was obtained during a search of the defendant's home. The Texas lawyer believes the search was in violation of the Fourth Amendment. Al is not licensed in Texas. Nevertheless, the lawyer wants Al's input into the case. Which, if any, of the following is correct?

a. Al may be an expert witness and offer his interpretation of the law, but Al may not advise the defendant.

This is correct, under the facts as stated.

b. Al may talk with the Texas lawyer and the defendant, but may not participate in the trial.

This is correct, under facts as stated, as long as his participation is as an expert witness.

c. Al may talk with the Texas lawyer and the defendant and sit at counsel's table at trial, but cannot examine or cross-examine witnesses.

Under facts stated, this is not correct. It would be improper for the witness to sit at counsel's table (and bad judgment, as it would affect the expert's credibility) and witnesses cannot examine other witnesses.

d. Al may not talk with either the Texas lawyer or the defendant without filing a motion *pro hac vice*.

Under facts stated, this is not correct.

[If Al became formally “associated” as the defendant’s attorney with the Texas lawyer, then he could “advise,” “participate as counsel,” “sit at counsel’s table” and “examine (or cross-examine) witnesses.”]

4. [4 points] Edna represents Alan in a products liability case. Edna has a disease that sometimes affects her ability to think clearly. She has noticed lately that she has gotten worse. In fact, there was a deposition scheduled in the case, and she forgot all about it. Opposing counsel has filed a motion with the court as a result of her missing the deposition, and has asked for sanctions. In addition to missing the deposition, she thought she had sent out interrogatories to opposing counsel, but discovered a month later than she had not. According to the rules of ethics:

a. Edna can continue the case if she eventually can get all the things done she needs to do and personally pays all sanctions imposed by the court because of her mistakes.

Rule 1.16 does not provide for this course of action.

b. Edna is required to withdraw from the case.

This is correct answer. The issue is blurred as R 1.16 seems to give the attorney power to determine whether his or her physical or mental condition “materially impairs” the client representation. Edna must factor in the requirements of R 1.1 to determine if her actions meet the objective standards in the community with regard to competent representations.

c. Edna may withdraw from the case at the time she feels she no longer can handle the case.

This incorrectly suggests that Edna’s opinion alone determines the answer.

d. Edna may continue with the case so long as she informs Alan about her medical problem and he agrees, in writing, to her continued representation.

Given the fact that Edna’s condition is “worsening,” she cannot fully inform Alan of it and its consequences. Any consent he gives would be incomplete. It would probably be a violation of 1.8(h) if she tried it, as attempting to contract her way out of liability for malpractice.

If Edna’s participation is critical to Alan’s case for some reason, e.g., she is the expert in an arcane area of law, her best bet for continuing involvement would be to, with Alan’s consent, associate another attorney who would undertake primary responsibility for the case, while Edna continues as expert consultant. [Outside this question.]

5. [9 points] A, B, and C, Attorneys, undertook some joint marketing ventures under the trade name — “The Counsellors.” What problems, if any, are raised by the following?

a. They purchased a yellow pages advertisement using this name and listing the attorneys’ individual names and the areas in which each practiced.

R 7.5(a) permits use of a “trade name” if doesn’t confuse the reader (by implying connection with government agency or with public or charitable legal services organization, or (d) imply that the three practice in a partnership or other organization when they do not.) Use of Yellow Pages advertisement is okay (R 7.2(a)), and inclusion of names and areas of practice is proper, if information is true and not misleading (R 7.1) and doesn’t imply that the three are specialists in their areas (if that is not correct) (R 7.4).

b. They also retained a telemarketing firm which called residents in the area and said:

“Hello, I am (real name of solicitor). I am calling on behalf of The Counsellors, three attorneys who practice in our community. They offer free consultations and conscientious service. Would you like to receive a brochure about their services?”

R 7.3(a) prohibits a lawyer from using “live telephone contact” to solicit employment for “pecuniary gain” from persons “with whom the lawyer has no family or prior professional relationship.” The lawyer cannot do through third parties what s/he is prohibited from doing directly. Here, the attorneys’ purpose is to acquire clients who will (presumably) pay fees and there is no indication of prior relationship with phone call recipients.

If the telemarketing firm considered a “recorded communication,” then both R 7.3 and 7.2 must be consulted. Comment [2] of R 7.3 indicates that “autodialing” prospective clients is appropriate. Although R 7.3(c) requires that recorded communications to persons “known to be in need of legal services in a particular matter” contain the words “Advertising Material” at the beginning and end of the communication, there is no selection going on here with regard to phone call recipients. R 7.3(b) requires that the content of a recorded communication not involve “coercion, duress or harassment” and that it not be extended to persons who

have “made known . . . a desire not to be solicited by the lawyer; . . .” R 7.2(d) requires that the communication include the name of “at least one lawyer responsible for its contents.” That was not done here. Of course, copies must be kept for five years, along with additional information, under R 7.2(b).

Content of the communication raises additional concerns under R 7.1. The terms “free consultations” and “conscientious service” could be false or misleading. The first, because it implies that no fees will be required, and the second, because it is unverifiable (may raise “unjustified expectations about results”) and may “compare” the lawyers’ services with those of other lawyers.

c. If asked, the phone solicitor was told to disclose: the areas in which each lawyer did and did not practice; directions to the office; the schools each attorney attended; when each was admitted to the bar; and how long each had practiced in the state. For all other questions, the telemarketer was to refer the client to A, B, and C’s office.

Since this is an in-person communication, it violates R 7.3 (as stated above). A recorded communication likely could not provide for responses to questions. [Consider whether a recorded/written communication via the Internet is subject to same statement]

Regarding the stated responses, all are verifiable, subject to the R 7.4 concern about specialization. Suggesting that the respondent call the lawyer’s with regard to other questions also is appropriate.

d. For the purposes of the Yellow Pages and phone marketing, “The Counsellors” had a joint phone number that was answered “Law Offices.” Each attorney also had separate phone and individual listings in the Yellow Pages directory.

The concern raised here involves R 7.1’s prohibition against “misleading” and R 7.5(d)’s prohibition against falsely implying that the lawyers practice in a partnership or other organization if that is not the case.

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