Examiners' Comments on the 2018 Examination

HEAD IV: Accounts and Professional Conduct

Part A ACCOUNTS

Question 1

1. This year's question was very straightforward and should not have caused any difficulties at all to the candidates. Overall, the answers were far more focused and fuller than previous years.

2. The questions concerned two parts:-

Part A

(i) The candidates were asked to address various accounting entries which were straightforward.

(ii) However, many of the candidates still did not read the question, for example, some still insisted on all about Know Your Client obligations, etc. when it was made perfectly clear that these had been dealt with.

(iii) The candidates also did not look carefully at the allocations of marks attributable to each particular part. For example, certain candidates spent far much time on answering (a) and did not devote sufficient time to deal with the issues raised in (e) which carried far more weight and marks.

(iv) One of the issues was the ability of the candidates to recognise the correct treatment of disbursements.

(v) However, what was worrying was that in respect of (f), the question required the candidates how to deal with a cashier's order which was payable to the vendor's solicitors. Unfortunately, most candidates took the view that it should be paid into clients account! This again showed that the lack of application and the ability to read the question carefully.

Part B

It was very straightforward and required a discussion on online banking and its use as an essential tool in managing a firm. However, many of the candidates failed to answer this in any detail despite the fact that 5 marks was attributable to it and many candidates just copied the relevant extracts from the Accounting Manual.

3. However, overall, the pass rate for the Accounts section was far better than in previous years.

PART B PROFESSIONAL CONDUCT

Question 1

Q1 of Part B required the candidates to comment on the professional conduct of Andrew, a junior commercial lawyer (part (a)) and the professional conduct of Gerald, the managing partner (part (b)), of G & Co. G & Co's release of the escrow money from the firm's trust account to Barry had resulted in G & Co being investigated by police, and Andrew and Gerald being accused of handling stolen property and participating in money laundering.

In part (a), candidates would have to examine the conduct of Andrew in handling an escrow transaction. Whether Andrew had taken appropriate steps in the identification, verification and due diligence of his clients Barry and Digital Ltd, represented by Cyril, its CEO. Whether he had sought proper advice from Gerald in the course of acting. How he was wrong-footed when Digital Ltd was replaced by a BVI company Indigo Ltd on the day of signing the escrow agreement. How he failed to conduct customer due diligence measures on Indigo Ltd, a company which in fact did not exist. 18 marks (out of 25 marks) have been allocated to part (a).

In part (b), candidate would have to examine the conduct of Gerald, whether or not he had properly supervised Andrew, whether his direction to Andrew to accept instructions to act was motivated by greed of a fee of $2 million. Whether he had suspicion of the escrow transaction; whether he had acted properly when his firm did not stop acting and he did not report his suspicion to JFIU. 7 marks (out of 25 marks) have been allocated to part (b).

It is disappointing that most candidates did not prepare the subject well despite AML/CTF is a serious subject for lawyers in today's practice environment. The Anti-Money Laundering & Counter-Terrorist Financing Ordinance Cap 615 ("AMLO") has been passed into law on 1 March 2018 and lawyers are designated non-financial businesses and professions ("DNFBP"). The Law Society has specifically informed all candidates by its letter of 1 August 2018 that AMLO falls within one of the pieces of legislation for examination under paragraph 12 of Section C of the OLQE Information Package, the syllabus of Head IV has been amended to include AMLO. Indeed the Law Society's above letter may probably be the biggest tip-off in the 2018 OLQE.

Candidates paid more attention to the Law Society's own PDP and less to AMLO. In marking the scripts no distinction was made between the two so long as a candidate could correctly make reference to either the PDP or the AMLO in support of an answer.

Many candidates made general references to a host of irrelevant issues such as the competence of Andrew, which cannot be an issue as he had been supervised by Gerald; the obtaining of a huge fee being a misconduct and the lack of a written agreement on the fee; these cannot be relevant issues as the fee was freely agreed, it was paid and there was no challenge on the fee whatsoever. The real issue is why Barry was willing to pay a big fee for a small job and whether a justifiable suspicion would have arisen because of Barry's willingness to pay such a big fee. Nevertheless some bonus marks ranging from half a mark to two marks were given for good effort. Also bonus marks were given for good presentation.

Question 2

This was a 'stock' question on litigation ethics. Simon was retained to represent his client (charged with a criminal offence) through to trial. The following issues should have been identified and dealt with:

Part (a)

(i) Simon (and his firm) appear to have breached para 6(f) of the Solicitors' Practice Promotion Code which prohibits solicitors referring to their success rate.

(ii) A solicitor must not accept instructions to act in a matter where another solicitor is acting for the client in respect of the same matter unless the first solicitor consents: Principle 5.11, SG. This principle does not, however, preclude a solicitor from giving a second opinion without the first solicitor's knowledge but in no circumstances should the second solicitor seek to influence the client to determine the first solicitor's retainer: commentary 2 of Principle 5.11.

(iii) Is Simon competent? He is a corporate and commercial lawyer and he has accepted a retainer in a criminal case. Principle 6.01, SG, provides that a solicitor owes a duty to his client to be competent to perform any legal services undertaken on the client's behalf. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedure by which such principles can be effectively applied and the ability to put such knowledge to practical effect: commentary 4 of Principle 6.01, SG. Principle 5.03, SG, further says that a solicitor must not act in circumstances where he cannot represent the client with competence; he may act, however, where he instructs competent counsel (see commentary 3 of Principle 5.03, SG), although, even so, he must be able to exercise sufficient care and control in the matter: *Davy-Chiesman v Davy-Chiesman* [1984] 1 All ER 321 (CA). It is doubtful whether Simon is competent to represent Chris.

(iv) There was no written retainer which is in breach of rule 5D, *Solicitors' Practice Rules*, which requires a written retainer to be provided within 7 days of the oral instructions identifying the instructions given, the services to be provided, the name of the solicitor in charge, the solicitor's fee and counsel's fee; further the signed agreement of the client is required.

(v) Simon sought advice from Benny (barrister) without his client's authority. Two breaches of Simon's professional duties to his client may be involved. First, although a solicitor has implied authority to brief counsel, a solicitor should advise his client when it is

appropriate to instruct a barrister and obtain the client's authority before doing so: commentary 3 of Principle 5.17, SG. Here counsel has not been briefed to represent Chris but he has been instructed to advise Simon and has given Simon written advice on how best to conduct the defence. If Simon intends to pass Benny's bill for HK$20,000 to Chris for payment, he should have secured Chris' approval in briefing Benny in advance. Further, since counsel's fees are a disbursement, if substantial, they must be agreed in advance with the client in writing: see commentary to Principle 4.03, SG.

Secondly, Simon has breached his duty of confidentiality to Chris in briefing Benny. Specifically, he has breached Principle 8.01, SG, which provides that a solicitor has a legal and professional duty to his client to hold in strict confidence all information concerning the business and affairs of his client acquired in the course of his professional relationship and must not disclose such information unless disclosure is expressly or impliedly authorized by the client.

(iv) Re his fee, Simon has provided an estimate when he said that his fee for preparing the defence and representing Chris at trial would be about HK$200,000. To give an estimate is quite proper but the solicitor must not pitch the estimate at an unrealistically low level solely to attract the client and subsequently charge a higher fee: commentary 3 of Principle 4.01, SG. It is not known whether such was the case here. Oral estimates should be confirmed in writing: Principle 4.04, SG.

Part (b)

Part (b) dealt with the ethics of interviewing an expert who has already been interviewed by the other party (here the prosecution). It is permissible for a solicitor to interview and take statements from any witness or prospective witness at any stage of the proceedings, whether or not that witness has been interviewed or is to be called as a witness by another party: Principle 10.12, SG. This principle is often summarised by saying that 'There is no property in a witness': see *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380, CA, 1384, per Lord Denning MR. To avoid accusations of tampering with the witness, however, this should be done in the presence of the lawyer acting for the other party. The limitation is that the expert, when providing a report for the second party, must not disclose anything confidential obtained by the expert from the first party.

Part (c)

Part (c) involved the case where the client admits his guilt to his solicitor before the trial has begun. In brief, if the client confesses that he is guilty of the charge to his solicitor before the trial has begun, the solicitor must decline to act in the proceedings if his client insists on giving evidence in the witness box in denial of his guilt or requires the making of a statement asserting his innocence. The advocate who acts for a client who has admitted his guilt but has pleaded not guilty (as he is so entitled), is under a duty to put the prosecution to proof of its case and may submit that there is insufficient evidence to justify a conviction. Although the advocate may advance any defence open to his client, he must not assert his client's innocence or suggest, expressly or by implication, that someone other than his client committed the offence: commentary 4 of Principle 10.15, SG. Chris, accordingly, may plead not guilty but Simon must explain to him the limitations on the conduct of the defence – namely that Chris may not testify in his defence, attempt to lay the blame on another person or assert his innocence, for example, by running an alibi.

Question 3

(a) Part (a) involves the complex issue whether it is the duty of an advocate who is aware of a material fact for the hearing of an appeal (here a second expert report on his client's personal injuries showing a profound recovery) which he knows would assist the other party or the court in arriving at the truth to disclose that fact. This issue clearly highlights the tension arising in the adversarial system between counsel's duty to the court and his duty to his client. As a general principle, a solicitor who knows of facts which, or a witness who, would assist his adversary is not under a duty to inform his adversary or the court of this to the prejudice of his client. He must not, however, knowingly put forward or let his client put forward false information with intent to mislead the court: commentary 6 of Principle 10.03, SG. It is suggested that keeping silent about the second expert report and arguing the appeal on the strength of the first expert report would constitute deceiving the court. Solicitors have a professional duty to disclose the second report. If a client refuses to permit a solicitor to do so, he must withdraw. As for the law, this issue arose in *Vernon v Bosley (No 2)* [1997] 1 All ER 614, CA. In this case the plaintiff sued for

personal injuries as a result of nervous shock suffered when his children drowned after a car accident (post-traumatic stress disorder) and substantial damages were awarded. Before the appeal was heard the defendants discovered medical reports made before trial which showed that the plaintiff had substantially recovered from his illness; this had been known to plaintiff's counsel, but had not been brought to the trial court's attention; held that every litigant was under a duty not to mislead the court or his opponent; where the case had been conducted on the basis of certain material facts which were an essential part of the party's case and they were discovered to be significantly different before judgment was given and there was a danger that the court might be misled, it was counsel's duty to advise his client that disclosure should be made and if the client refused to accept that advice, he should not make the disclosure himself but should withdraw from the case (per Stuart-Smith LJ). In such circumstances counsel should disclose the correct facts to his opponent and, unless agreed otherwise, to the judge (per Thorpe LJ).

(b) The problem in part (b) is that a solicitor must not accept instructions to act as an advocate for a client where it is clear that the solicitor or a member of his firm will be called as a witness on behalf of the client, unless his evidence is purely formal: Principles 5.10 and 10.13, SG. In this case Patrick may be called as a witness to Fred's injuries so he would be disqualified from acting for Fred. The best solution is to call a doctor immediately to inspect Fred's injuries. In this case Patrick would no longer need to be called as a witness.

(c) This last question involves Jenny's professional duty to the court where she reasonably believes that her client intends to mislead the court. In general, there is no duty upon a solicitor to inquire when he is instructed as to whether his client is telling the truth and it will be for the court to assess the truth or otherwise of the client's statement: commentary 2 of Principle 10.03, SG. When, however, it comes to the knowledge of a solicitor that a client intends to mislead the court by making false statements, the solicitor has a duty to advise the client not to do so and explain the consequences of misleading the court which may amount to a grave criminal offence such as perjury or perverting the course of justice. If the client refuses to accept the advice, the solicitor must cease to act: commentary 3 of Principle 10.03, SG. Applying these principles to the facts, it has not inevitably come to Jenny's knowledge that

Charles intends to mislead the court; rather there are two possibilities; first that Charles told Jenny the truth – that he was present but took no part in the incident so that he is now lying to the court on oath – or, secondly, that he had not told Jenny the truth and was now telling the truth under oath to the court. Jenny needs to find out which is true. She must seek the leave of the judge to speak privately to her client (i.e. in accordance with commentary 6 of Principle 10.12, SG) and ascertain from Charles which is the true case. If Charles says he is now lying to the court, Jenny must cease to act for Charles unless he purges his contempt of court. This must be explained to Charles. Jenny will, of course, need the leave of the court to withdraw, thereby leaving Charles unrepresented at his trial and most likely necessitating the trial dates to be vacated. Alternatively, if Charles now insists that he is telling the truth under oath, Jenny may continue to act for him although she may feel that she is entitled to withdraw on the grounds of a serious breakdown in confidence between her and her client: see commentary 3 of Principle 5.22, SG. (this is not dissimilar to *O'Neil v Hayley (No 1)* [2015] FCCA 2197.

(d) Finally the candidates were tested as to whether they are aware of a recent important judgment: *Fung Hing Chiu Cyril v Henry Wai & Co (a firm)* [2018] 1 HKLRD 808. It was found that they were not!

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