

Examiners' Comments on the 2017 Examination

HEAD IV: Accounts and Professional Conduct

PART A ACCOUNTS

Question 1

This year's question was very straightforward and should not have caused any difficulties to the candidates. They were asked to provide a memorandum to address 6 issues:-

- (i) Question 1(a) - Client account reconciliation – Most of the candidates answered this question by just regurgitating and repeating the relevant provisions and the Rules as well as extracts from the Manual. They failed to give a clear explanation for the rationale as to why a client account reconciliation is required and needed. Some candidates did indeed apply themselves to actually answering the question.
- (ii) Question 1(b) - This was a very obvious question whereby they were asked to advise as to whether a bookkeeper who only worked 10 years ago should be able to sign cheques. Unfortunately, a majority of the candidates did everything possible to try to justify and set out as to why this bookkeeper could be able to sign cheques. Many of them spent time advising that an application for a waiver could be made to the Law Society. Of course, this lacked thought or application in that such waivers will never be granted to bookkeepers who had little experience. In short, they failed to apply themselves and indeed, made it perfectly clear that this particular bookkeeper was totally unsuitable to sign any form of cheques being client or office. Very few candidates recognised the point that most banks here in Hong Kong would not allow anyone to sign any

cheques either office or client without production of a practising certificate.

- (iii) Question 1(c) - This was again very straightforward and dealt with the way in which the sum of money was to be treated. Again, however, many candidates did not apply themselves to the actual facts and did not really address the new Rules.
 - (iv) Questions 1(d) and 1(e) were similar questions regarding opening of bank accounts. Again, there was a lack of application or an attempt to try to answer it by indicating that waivers to the relevant Rules could be obtained.
 - (v) Question 1(f) was reasonably well answered. However, many candidates failed to set out the rationale for why such accounts would be needed. Again, there are many instances of extracts of the Accounting Manual just being copied out.
1. Overall, this was a very straightforward paper and indeed, however, an overall improvement in the answers was noticed. However, the main concern was that those who failed did so due to the fact that they could not answer the question and apply the facts to the actual Rules. Finally, the new procedure implemented, ie the Accounts Question, that Part A being separated from Part B may very well have allowed the candidates to at least complete and answer the question.
 2. Overall, it was concluded that those who failed really deserved to and those who passed did so by at least applying themselves to the issues. However, it was noted there was a lack of candidates who distinguished themselves.

PART B PROFESSIONAL CONDUCT

Question 1

The question comprises five parts.

In respect of *part (a)*, candidates would examine the conduct of a young solicitor Ashley, whether he should have acted for an elderly lady in selling her expensive property on the Peak when the elderly lady appeared to be of ill-health and have been manipulated by her estate agent or other people.

Candidates did reasonably well generally and most were able to score 4 to 6 marks out of the allocated 9 marks.

In respect of *part (b)*, candidates would examine the conduct of Barry, Ashley's supervising partner, who was eager to do the transaction despite his own lack of experience in property transactions. Barry took a few bold steps which are questionable.

Again candidates did reasonably well generally and most were able to score 3 to 4 marks out of the allocated 6 marks.

In respect of *part (c)*, candidates were asked to examine the conduct of Eden, a partner working in the property department of Ashley's former firm, when he disclosed information regarding his former client's connection with the property.

Candidates did not do well. Most would only get 1 out of the allocated three marks. While most could identify Eden's breach of his own duty of confidentiality, very few were able to point out the danger of indiscreet conversations. None was able to further comment that Eden might have a duty to update his former client if the retainer had not yet terminated.

In respect of *part (d)*, candidates would have to consider the conduct

of Fanny, the solicitor who acted for the buyer in the transaction. Fanny made known to Barry her *personal* view on a particular requisition she raised.

Once again, this was an indiscreet conversation between lawyers but without involving client's confidential information. While one might have hoped that Fanny did not make that comment in the first place, it is a question whether the indiscreet conversation represented Fanny's honest belief, whether it had misled Barry, what would be the consequence in professional conduct regarding an honest opinion which has been badly taken by the opposing party?

Candidates did badly. Those who could marginally touch on the truthfulness of Fanny's statement would be given 1 out of the allocated 3 marks. Most candidates mistakenly took the view that Fanny had been incompetent. Fanny only surmised that as her client was to redevelop the land lot, whether there was a certificate of compliance regarding the existing building would be a non-issue. Others went on to suggest there was breach of confidentiality. That could not be right as Fanny was just expressing her own opinion.

In respect of *part (e)*, candidates were asked what Ashley and Barry should do when faced with the buyer's extraordinary request of a huge price reduction or else he would cancel the transaction.

Surprisingly many candidates did badly. On average most could only get 2 out of the allocated 4 marks.

In all, the candidates did poorly in this question.

Question 2

This was the 'usual' question on trial ethics involving solicitor Frank. The question also involves Frank's duty when counsel Charles is instructed.

Part (a)

- (i) The first issue to determine was who was the client: it might be Edith alone or Edith and Wong or Edith and ABC. This might simply be a case of third party instructions from Wong (and/or ABC) on behalf of Edith in which case Edith is probably the only client. In this case Frank must obtain written instructions from Edith that she wishes him (and Charles) to act for her: Principle 5.06, SG. This has not been done.

Is Wong also a client?

- (ii) Turning now to Frank, is Frank so emotionally involved in the case so as to impair his objectivity: see commentary 2 of Principle 7.02, SG? See *Chan Wai Shan v Ocean Park Corpn* (2009) HCPI No 644/2006; *Au Leung Shuet Hung v Au Wing Lun* [2012] 1 HKC 392 and *Windsor-Essex Children's Aid Society v BD* [2013] OJ 481.
- (iii) A written retainer is required for criminal matters: rule 5D, Solicitors' Practice Rules.
- (iv) Frank should have secured Edith's agreement to the instruction of Charles as counsel before Charles was instructed: commentary 3 of Principle 5.17, SG.
- (v) Re the fee, on taking instructions a solicitor should normally give his client the best information he can under the circumstances about the likely costs of the matter. For Frank simply to tell Wong that he will charge Edith only a modest fee is a serious breach. Further, Frank's fee was never discussed with Edith. Charles' fee (a disbursement) should have been agreed with Edith in writing if substantial: commentary to Principle 4.03, SG.

- (vi) Instructing Charles. Frank, when instructing counsel, must ensure that counsel instructed is competent for the particular case: *Re A (a minor)* [1988] NLJLR 79, CA.
- (vii) Charles should have been approached in the first instance by Frank and not by his clerk. Further, Charles' fee should have been negotiated directly with Frank and not with Frank's clerk. According to Practice Direction F1(3), whenever counsel is instructed, he should always be approached in the first instance by the instructing solicitor and not by his clerk and only such instructing solicitor, and not the clerk, is entitled to negotiate a fee with counsel or his clerk. This obligation has been breached.
- (viii) Frank should not keep from Charles the true facts and should probably disclose Wong's relationship with Edith to Charles (is it relevant?).
- (ix) A solicitor must refuse to act as a surety or stand bail for a person for whom he or any partner in his firm is acting as solicitor or agent: Principle 10.19, SG, and failure to comply with this duty will render Frank liable to disciplinary action.

This question was generally well answered.

Part (b)

A very straight-forward question on the solicitor's duty where the client confesses her guilt before the trial begins. The client asks how this will affect the presentation of her defence at trial.

In brief, if the client confesses her guilt to her 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 her guilt or requires the making of a statement asserting her innocence. The solicitor is, however, 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 solicitor may advocate any defence open to the court, 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.

Several considerations arise. Is Edith really guilty of the offence in law? Frank must make sure of this and advise Edith accordingly. Secondly, he should inform Edith that she is still entitled to plead not guilty. Frank is entitled to put the prosecution to strict proof of guilt and, if he is so instructed, by way of mitigation to explain that Edith had taken the money to pay for her mother's operation and had intended to pay back the money within one year. He must not, however, permit Edith to testify as to her innocence, try to lay the blame on another person or put forward any false alibi or defence.

Question 3

Question 3 involved two questions on conflict of interest and one on professional undertakings.

Part (a)

The first question involved the interesting issue whether it is proper for a lawyer to be involved in an appeal where the lawyer's own negligence is at issue.

Would it be proper for Stella to represent Global in an appeal against the Court of First Instance's refusal to reduce the award of damages on the basis of Patrick's contributory negligence? Probably it would not because Stella might be held legally responsible in negligence for the failure to plead contributory negligence on Patrick's part if the appellate judgment goes against Global. Any immunity Stella may have as an advocate (which is probably none after *Hall v Simons* [2000] 3 All ER 673, HL!) will not extend to advice on settling the pleadings: see *Saif Ali v Sydney Mitchell & Co (a firm)* [1980] AC

198, HL. She has, accordingly, a personal interest in the outcome of the appeal and her objectivity might be impaired: see *Afkos Industries Pty Ltd v Pullinger Stewart (a firm)* [2001] WASCA 372 (the candidates were not expected to know this case).

Part (b)

This question involved representing jointly father, mother and son injured in a car crash where the father's negligent driving might become an issue by way of a counterclaim.

There is no reason in principle why you should not agree to a joint retainer of father, mother and son. However, the defendant Mr Yip may seek in his defence to lay all (or some) of the blame on Peter by alleging contributory negligence on Peter's part by breaking hard to avoid hitting the dog on the road. If such might be substantiated, Paul and Mary require separate representation as they may seek (Paul through his next friend), to recover some (or all) of the damages from Peter if Peter's negligence is found either to have caused or contributed to the accident. Paul and Mary should, therefore, be advised to seek separate representation (facts based on *Re Louis Gordon Sabeau* [2016] OJ No 5340 which the candidates were not expected to know).

Part (c)

This was a very straightforward question on undertakings which could be answered simply by identifying and applying the relevant provisions in the Guide.

An undertaking is any unequivocal declaration of intention made orally, or in writing or by conduct addressed by a solicitor to someone who reasonably places reliance on it: commentary 1 of Principle 14.01, SG.

For an undertaking to be enforceable, it must be given in unequivocal

terms and the SG provides that the wording and extent of any undertaking should be carefully considered before it is given since a solicitor becomes personally bound by an undertaking given by him: commentary 1 of Principle 14.02, SG.

Is Sally's firm bound by the undertaking? According to Principle 14.01, SG, an undertaking is binding upon the solicitor personally and, if given in the course of practice, also binds her firm. Further, commentary 4 of Principle 14.01, SG, provides that, where a partner gives an undertaking on behalf of her firm, the undertaking binds her personally and the firm.

As regards Sally's arguments:

- (i) First, she has argued that the undertaking is not legally or ethically binding on her since it was given to a family member by way of a personal letter and not under the firm's letterhead. Commentary 2 of Principle 14.01 provides that a solicitor is personally bound by an undertaking given by her in her personal capacity. Despite the fact that the undertaking had been given by way of a personal letter, the undertaking was given in unequivocal terms and, looked at objectively, it was given by Sally in her capacity as solicitor (she had been retained by Aunt Winnie). Yet cf *Geoffrey Silver & Drake v Baines* [1971] 1 QB 396 and *SH Chan & Co v DS Cheung & Co* [1999 2 HKC 541.
- (ii) As regards Sally's second argument, an undertaking is still binding even if it is to do something outside the solicitor's control: Principle 14.08, SG. Commentary 1 of Principle 14.08, SG, further provides that it is no defence to a complaint of professional misconduct that the undertaking was to do something outside the solicitor's control (for example, that it was dependent upon action being taken by a third party and that the action has not been taken unless the undertaking was suitably qualified. In this case it was not so qualified.

- (iii) As regards Sally's third argument, commentary 2 of Principle 14.08, SG, provides that, if an undertaking involves the payment of money, a solicitor must decide whether he is able to give such an undertaking since he can be required to discharge this out of his own and his partners' resources. It is no defence that Sally cannot afford to fulfill the undertaking personally through lack of money.

- (iv) As regards the question whether her firm (and fellow partners) are bound, the undertaking is binding on her firm provided it has been given in the course of Sally's practice: Principle 14.01, SG (see also commentary 4 of Principle 14.01, SG). The undertaking appears to have been given in the course of her practice (she had been professionally retained to draft the agreement between Bill and Aunt Winnie) so that her firm (and fellow partners) will also be liable to honour the undertaking.

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