

Examiners' Comments on the 2019 Examination

HEAD IV: Accounts and Professional Conduct

Part A ACCOUNTS

Question 1

1. This year's question was straightforward and should not have caused any difficulties to the candidates.
2. The question was split into two parts.

Part A

- (i) The first part dealt with the part-time bookkeeper being able to sign office and client accounts. Again, the rules in this are straightforward. However, some of the candidates failed to have any real application and understanding of the rules and in particular, dealt with irrelevant information. They did not deal with issues arising out of office money. However, overall, this question was reasonably well-answered.
- (ii) This was a question on client account reconciliation and its meaning. Some of the candidates just repeated and set out the rules without applying these as to the rationale behind them but again, this was reasonably well-answered.
- (iii) This question was very straightforward. However, surprisingly, a few candidates made it clear that HK\$5 million which was in client account could be used to pay expenses, etc.! However, most candidates picked up the essential points.

Part B

Part B dealt with the term "Management Accounts". However, the examiner's concern here was that it seems that many candidates did not give sufficient time to deal with this and set out the reasons for having Management Accounts. However, many of the candidates

just repeated the commentary in the manual without sufficient or little application.

PART B PROFESSIONAL CONDUCT

Question 1

The question focuses on an experienced lawyer Andy who was asked by his managing partner Boris to handle his long term valuable client Calvin's case. Calvin intended to challenge the extradition bill in early 2019. Boris asked David, the firm's litigation partner, to supervise Andy. Boris talked Calvin into paying the firm \$30 million, seemingly as an agreed fee, for preparing the challenge. Because of his own improper reasons, David directed Andy to retain five local matrimonial barristers, paying each a retainer fee of HK\$1 million. Andy did as told. Andy also took the initiative to instruct a London barrister to prepare the paper work. The extradition bill was shelved in June 2019; Boris was upset with Andy incurring HK\$5 million Counsel fees. David suggested Andy to lie to Calvin. Instead Andy decided to come clean with Calvin, who not only was agreeable to pay another HK\$5 million more to cover Counsel fees, he gave Andy an expensive sports car as a reward.

The facts of the case are exaggerated and the marks are 'up for grabs', such as:-

- (a) A solicitor should obtain client's consent before instructing counsel;
- (b) A solicitor may be duty bound to report another solicitor for serious misconduct;
- (c) A general duty of loyalty and not to taking advantage of client;
- (d) A solicitor should return an expensive gift to client.

Candidates would only have to look at the relationship between solicitors and client, relationship between solicitors and barristers, duty to act honestly and duty to maintain confidentiality, how to deal with fee quotes and agreed fee etc. to score a high mark.

Instead many candidates went on a frolic of their own and provided long answers on AMLO, Practice Direction P, competence, handling a criminal case, supervision, client's mental state etc. While no marks have been deducted for referring to those matters, no extra marks have been awarded.

Question 2

The scenario upon which this question was based involved Andrew, a partner in a medium-sized firm who practises personal injury litigation, acting on the instructions of his brother-in-law for a Hong Kong company, the prospective plaintiff in a large-scale commercial dispute. The question was divided into three discrete parts, each of which raised a number of fairly straightforward issues.

The first part of the question required candidates to discuss the fact that Andrew, as a PI lawyer, might not have been competent to handle such a dispute. Most were able to identify this issue but their discussions lacked detail (i.e. they did not explain the meaning of "competence" within the Solicitors' Guide). Most candidates also recognised that there was a potential conflict of interest in respect of Andrew acting for his brother-in-law Bernard. Few of them, however, also noted that a board resolution or other written authorisation, not just Bernard's approval, would be needed for Andrew to act for the company. Most candidates addressed the other issues raised in the first part of the question - relating to the company's prior retainer of another firm; Andrew's purported exclusion of liability; and contingency fees - but detailed explanations were, again, lacking.

The second part of the question concerned Andrew threatening the defendant company with negative media exposure; his relationship with counsel; and his failure to advise his client about the defendant's invitation to mediate. Most candidates identified two or more of these issues but many of them gave answers that reflected a lack of knowledge of the detail of the relevant law and practice.

The third part of the question concerned Andrew's receipt of a communication from the defendant's expert witness which had been intended for the defendant's solicitors. This question raised issues dealt with in *Koay Ai See v St Teresa's Hospital* [2015] HKEC 1053 and related cases. Very few candidates appeared to be familiar with the relevant case law, although they were able to refer to (but not discuss) the relevant Solicitors' Guide commentary. Rather worryingly, some candidates did not appreciate that Andrew ought not to read the expert's communication; inform the defendant's solicitors of what had happened; and return the communication without making a copy.

Question 3

The question is about a solicitor, Larry, who was asked to act for his old school friend Jason and his wife in a share purchase transaction, where the seller, Steve, happened to be Larry's old client whom he knew had some financial problems. Larry then relied mainly on his trainee solicitor to run the deal. Subsequently, Larry was asked by Jason to also act for him in his divorce with his wife. The question ended with the scenario that the seller, Steve, in the share purchase transaction disappeared after he had received a HK\$2 million deposit for the transaction, and Jason received an interim bill from Larry with a large amount of disbursements charged.

The first part of the question concerned various issues which Larry should have considered (i) when he was asked to act for Jason and his wife – Larry should have obtained separate written instructions from Jason's wife, considered the potential conflict of interest between his former client Steve and Larry and his wife, got the agreed capped fee recorded in writing and signed by clients; and (ii) after he had accepted instructions - should carry out instructions with diligence, care and skill instead of passing the whole matter to his trainee solicitor. Most candidates were able to identify the potential conflict of interest issue but their analysis lacked details (e.g. a solicitor has duty to pass all information material to his retainer while trying to avoid disclosure of confidential information concerning another client, otherwise should have declined instructions). Many candidates also did not discuss the duty of confidentiality owed to clients which survives the professional relationship. Regarding the 1% shares in the target company which Jason offered to pay Larry if the share purchase completes, many candidates missed the issue that such contingency fee arrangement is not restricted given that it does not involve the institution of proceedings. Some candidates also confused the due diligence on the target company with due diligence on clients.

The second part of the question required the candidates to discuss the situation where a solicitor is acting for two clients and subsequently a conflict arises between them, exactly where Larry was asked by Jason to act for him in his divorce with his wife. Most candidates briefly discussed the potential conflict of interest, but failed to discuss in detail (e.g. Larry should have ceased to act for both client unless he can continue to act for one client with another's consent and without embarrassment and with propriety).

The third part of the question concerned the interim bill issued to the client by Larry. This is a relatively straightforward question. Most candidates discussed the need to obtain client's agreement in writing before issuing an interim bill, but some failed to further discuss the implications where such agreement is not obtained. Not many candidates discussed the issue relating to the large amount of disbursements incurred and some discussion lacked details.

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