

COUNCIL OF LEGAL EDUCATION



**EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES**

ATP 105: PROFESSIONAL ETHICS & PRACTICE

THURSDAY 26TH NOVEMBER, 2015

DURATION: 3 HOURS

Instructions to Candidates

- (a) Candidates **MUST** answer **FOUR** Questions
- (b) **Question ONE is compulsory**
- (c) All questions carry **15 marks** each
- (d) Marks shall be lost for illegibility

PLEASE TURN OVER

1. Roy is a newly qualified and recently employed advocate. A few days after reporting for work he was summoned to the Senior Partner's office. The Senior Partner handed to Roy a brief about a case that was coming up the following day in court. Their client Mteja Asiyechoka has given firm and mandatory instructions about how his case is to be conducted.

Roy is required to:

Urgently file an application for the trial judge to excuse himself. The grounds upon which the application is to be filed are that the client is apprehensive about the fairness of the trial judge who comes from the same ethnic community as the defendant in the case.

File an a plication for defense counsel to disualify himself on the grounds that there is a conflict interest. The basis of the application is that the defense counse had unsuccessfully solicited for im Kichwa Baridi to compromise the case.

If none of the application is granted, We an appeal and application of sta pending appeal and drag on the of the appeal until such a time as Kichw Baridi advises that there is "more favourable litigation climate".

Roy is far from impressed by the ferocity of Kichwa Baridi's allegations and is concerned about the instructions given to him by his employer.

- (a) Identify the ethical issues arising and propose a resolution of the same. (10 marks)
- (b) Suppose Roy unsuccessfully files the applications as instructed and the trial judge found that the applications were in fact actuated by bad faith, what options does the trial judge have in sanctioning the behavior of Roy and his employer.

Support your answer with a statutory provision and illustrate your answer with a decided case. (5 marks)

2. "From the moment that any advocate can be permitted to say that he will not stand between the crown and the subject arraigned in court where he daily sits to practice from, that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defense, he assumes the character of the judge: may he assume it before the hour of the judgement and in proportion to his rank and reputation put the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favour the benevolent principles of English law make all assumptions and which commends the very judge to be counsel" *Per Thomas Erskine (1750-1823)*

- (a) Find a constitutional and statutory basis for the above statement in Kenya. (3 marks)
- (b) Identify situations where an advocate may be excused from acting for a client. (5 marks)
- (c) Use your answer in (b) to evaluate the correctness of the statement by Thomas Erskine. (3 marks)
- (d) Mgaidi is charged with various offences arising from brutal massacre of 148 students of Garissa University. Mgaidi cannot afford legal services. The registrar of the court requests Okil Masira

to do a pauper brief for Mgaidi. Okil Masira is very uncomfortable with the case because of the horrific nature of the crime.

Advise Okil Masira of the legal and ethical issues that arise. (4 marks)

3. XYZ is a state counsel prosecuting a murder case against EFG in the High Court of Kenya at Nairobi. The defense case is scheduled for 30th December, 2015. Before the date of the defense case XYZ learns from the investigating officer that EFG has a solid alibi. Without the alibi evidence is very likely that the court would return a verdict of guilty. EFG's lawyer inexplicitly advises EFG not to offer any evidence in his defense. EFG accordingly offers no evidence in response to the prosecution case.

(a) What are XYZ's ethical responsibilities in the case? (6 marks)

(b) XYZ chooses to do nothing and EFG is convicted and sentenced to three years imprisonment. On appeal EFG challenges his conviction on the grounds of incompetent legal representation in the lower court.

i. What are XYZ's ethical responsibilities in the appeal? (3 marks)

ii. How should the appellate court rule on the appeal? (3 marks)

(c) Suppose a comparable situation arose in a civil case and the defense counsel noticed that the plaintiffs counsel failed to raise a material point of law that would determine the case in favour of the plaintiff and the case would be dismissed if the point of law was not raised.

What would be the ethical obligations of defense counsel acting as a zealous advocate of his/her client? (3 marks)

4. ABC is a medium sized law firm practicing in Nairobi. In November, 2015 they placed an update on the firm's wall on face book. The update was on the following terms:

ABC is one of the fastest growing law firms in the country. The partners in the firm are a very exceptional variety of professionals. Prior to their admission as advocates, all the three partners were very successful professionals in disciplines which provided a very solid baCkground to their current practice areas. A who is currently specializing in construction disputes was a **civil** engineer. B who is specializing in running down claims was a medical doctor and C who is presently specializing in tax law was a certified public accountant. The firm has handled the following transactions in the last three years:

i. A sovereign bond floated by the Government of Kenya worth Kshs.400,000,000,000/-;

ii. An Aircraft leasing contract by Kenya Airways valued at Kshs.300,000,000/- and

iii. An oil exploration concession for Tullow Oil worth Kshs.500, 000,000,000/-.

The total fees earned from these transactions is Kshs.200,000,000/- which is considerably less than the Kshs.400,000,000/- other firms would have charged. This shows that ABC helps clients reduce the cost of legal services. ABC specializes in syndicated Finance Aircraft Leasing and Major Construction Disputes. No law firm has the kind of professional legal and other expertise that the ABC has in the listed practice areas. ABC promises to finalize all instructions in 1 year and a

"money back" guarantee for any dissatisfied client. ABC has not lost any of the 100 construction disputes they have either defended or prosecuted in court over the last 2 years and are looking to maintain that 100% record in the foreseeable future. There can be no doubt that when it comes to choice of clients, clients do not really have a choice. ABC is the only choice.

- (a) Evaluate the ethical appropriateness of the foregoing update using the Advocates Marketing Rules 2014. **(9 marks)**
- (b) Assuming there are ethical violations, what would be the role of the following organs:
- (i) The Law Society of Kenya;
 - (ii) The Advocates Complaints Commission; and
 - (iii) The Disciplinary Tribunal
- (6 marks)**

5. JC, an advocate enters into three agreements with her client Kate on the payment of fees on a succession related matter. The agreements provides that:

- Fees on the sale of the estate land to be charged at 35% of the scale fees. The estate land is valued at Kshs.1 billion. Scale fees is Kshs.3,000,000/-
- Fees on the succession to be charged at 2% of the amount Kate is entitled to. The estimated entitlement is Kshs.100,000,000/-
- If JC succeeds in the application to exclude two of the claimants for a beneficial interest in the estate JC to be paid an additional 0.5% of the additional benefit that accrues to Kate.

Determine:

- (a) The validity of the agreements. **(5 marks)**
- (b) The procedure for challenging the validity of the agreement and in particular the court that has jurisdiction. **(5 marks)**
- (c) The consequences of a finding on invalidity. **(5 marks)**

123 is a judge of the High Court of Kenya. On Saturday, the 1st October, 2014, 123 went to the Catholic University of Eastern Africa (CUEA) to facilitate a class on professional ethics. 123 is a part-time lecturer at the University and is paid Kshs.1,340 per hour. She has classes on Monday 2 to 5 p.m., Wednesday 8 to 11 a.m., Friday 5 to 8.30 p.m. and Saturday 8 a.m. to 2 p.m. The class at CUEA has 120 students. She also sets and marks exams which must be delivered within two weeks from the end of the semester exam.

CUEA operates a trimester system, January to April, May to August and September to December. It also has evening classes. 123 has classes on the day sessions, evening sessions and weekend sessions.

She was driven to the school in her official vehicle, a state of the art SUV Land Cruiser by her official police driver. She was also accompanied by her official bodyguard. On reaching the gate at CUEA the vehicle was stopped by the security guards who insisted on searching the vehicle. They also insisted that the passengers, meaning the judge and her body guard, alight from the

vehicle and be subjected to a body search. 123 and her bodyguard reluctantly obliged. Hell broke loose when the lady security guard insisted on searching the judge's Gucci handbag. What was worse, the guard insisted that the judge whose skirt rose a few inches above the knee and had a three inch long slit on either side of the skirt, was inappropriately dressed and would not be allowed entry. It was at this point that the judge told the guard "you must know people, you good for nothing watchman" and forced her way through the gate with her guard brandishing her pistol in the face of the terrified guard.

The University has chosen to deal with the matter diplomatically but the security guard has decided to vindicate her rights. She wants the judge sanctioned for judicial misconduct. She has come to you for advice.

- (a) Identify the possible ethical violations by the judge noting to anchor your answer on any applicable constitutional or statutory provisions and any applicable codes of conduct for judicial officers. (6 marks)
- (b) Narrate to the guard the procedural steps that must be followed in disciplining the judge. (6 marks)
- (c) Recommend a sanction against the judge. Provide a statutory and constitutional basis for the recommended sanctions. (3 marks)

7. Nasra is the manager of Good Hope Insurance Co. Ltd. Nasra instructed Lenny, Aisha and Phoebe, Advocates to act for Good Hope Insurance Co. Ltd in various matters including the sale of a property which was sold to Kesho Kutura Reinsurance Company. In that transaction, Lenny, Aisha and Phoebe Advocates acted for Good Hope Insurance Co. Ltd as Vendor and received a sum of Kshs.193,380,489/-.

Nasra contends that out of the said sum, Lenny, Aisha and Phoebe Advocates had irregularly continued to withhold a sum of Kshs.68,568,664/-.. Good hope Insurance Co. Ltd contends that the money held by Lenny, Aisha and Phoebe Advocates was so held in trust for it as a client and should not be diverted to other purposes. In the premises, Good Hope Insurance Co Ltd opined that it was improper for Lenny, Aisha and Phoebe Advocates to retain and utilize the sale proceeds on matters related to different instructions. Good Hope Insurance Co. Ltd also contended that most of the items in the statement provided by the respondent were unsupported by any documentary evidence and fee notes relied on by the Advocates could not stand as the same were contested and had not been verified.

- (a) Identify the ethical issue implicated in this hypothetical scenario and advise Nasra on propriety or otherwise of their advocate's action. (8 marks)
- (b) Prepare an application seeking appropriate orders in favour of Good Hope Insurance Co. Ltd. (No supporting affidavit is required) (7 marks)

8. 789 is an 'inactive' advocate of the High Court of Kenya. He is a fulltime lecturer at the Kenya School of Law. He facilitates a course on ATP 158 'Expanding frontiers of legal practice'. In the November 2014 examinations, there were reports of serious examination irregularities. 789 has been implicated in the irregularity.

The Kenya School of Law in addition to taking administrative action against 789 also wishes to institute professional disciplinary action against 789.

- (a) Determine:
- i. The role of the Advocates Complaints Commission. (5 marks)
 - ii. The jurisdiction of the Disciplinary Tribunal (2 marks)
- (b) Draft the appropriate charges in the Disciplinary Tribunal in the prescribed form. (5 marks)
- (c) Kscribe a sanction and justify your prescription. (3 marks)

9. XYZ is being sought by the anti-terrorism police in connection with a number of offences under the prevention of Terrorism Act. The police raid his advocates office and seize a number of incriminating documents such as the statement of XYZ admitting to the commission of the offences XYZ is suspected of, a legal opinion written by XYZ's advocate advising XYZ that the evidence against XYZ is very strong, a medical opinion by a psychiatrist who examined XYZ on his lawyer's request and found YZ fit to stand trial. The police also find a business plan under which XYZ and his advocate have planned to invest jointly on Treasury Bonds. They also recover Kshs.10,000,000 in cash stashed in a bag with the inscriptions `XYZ payments for comrades in arms`.

The police seize computers from which they recover bank statements for XYZ list of email and phone contacts as well as financial reports indicating XYZ has been understating the income from his business in his tax returns. The police wish to use the evidence against XYZ in a series of charges. You are the lawyer for XYZ.

- (a) Suppose the police summon XYZ's advocates to record a statement about what he knows about the items seized in his offices, specify what statutory or common law objections XYZ's advocate may set up against the police summons. (3 marks)
- From the perspective of duties of an advocate to his client, advise XYZ on the admissibility of the evidence obtained by the police. (9 marks)
- (c) What difference would it make if the advocate had after giving his opinion declined to act without charging any fees citing conflict of interest. (3 marks)

10. ; Advise the following categories of candidates on the requirements for the qualification for admission to the Kenyan Bar and for qualifications to practice law in Kenya.

- (a) A citizen of Kenya, Uganda, Tanzania, Rwanda and Burundi who studied law in their respective countries. (3 marks)
- (b) A citizen of Uganda, Tanzania, Rwanda and Burundi who are admitted as advocates of 5 years standing in their respective countries. (3 marks)

- (c) A citizen of the United Kingdom already admitted as a barrister or solicitor of 10 years standing in either case. (3 marks)
- (d) A citizen of Kenya, Uganda, Tanzania, Rwanda and Burundi who studied law in Zambia, Nigeria or Ghana and is an advocate in Zambia, Nigeria or Ghana respectively (of 6 years standing). (3 marks)
- (e) A citizen of the United States of America already admitted to one of the state associations in the USA (of 10 years standing). (3 marks)
