

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 104: TRIAL ADVOCACY

FRIDAY 18TH NOVEMBER, 2011

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer **Question ONE** and **ANY OTHER THREE (3) questions**
- (b) All questions carry **15 marks** each
- (c) Marks may be lost for illegibility

PLEASE TURN OVER

1. The pre-action stage is a critical phase for the trial lawyer as part of developing a winning strategy.

(a) Explain the purpose and technique of carrying out the following activities in connection with civil disputes.

- (i) Client interview
- (ii) Research and Documentation
- (iii) Demand letter
- (iv) Negotiations

(8 marks)

(b) Outline seven factors/steps that are critical in carrying out a comprehensive case analysis as part of pre-trial preparation in both civil and criminal cases.

(7 marks)

2. The trial lawyer presents his client's case primarily through examination of witnesses. There are however, certain rules and warnings that the advocate must always bear in mind when conducting examination-in-chief, cross examination and re-examination of witnesses.

Discuss these rules and warnings showing the questioning techniques suitable in each case.

(15 marks)

3. The trial lawyer owes various duties to the client, the court, the opposing counsel and witnesses. In addition, as an officer of the court, the advocate is obliged to "at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession."

Explain the various duties owed by trial lawyers, indicating how potential conflicts can be resolved.

(15 marks)

4. The opening speech and the closing arguments are unique tools in the hands of the trial advocate which, if properly and expertly executed, will go a long way in telling the client's story and persuading the factfinder to arrive at an opinion favourable to the client.

Present a critical analysis of those two trial processes and suggest useful strategies for executing them effectively.

(15 marks)

5. Trial advocates and judicial officers occasionally find themselves in situations of conflict of interest requiring that they either decline to take up certain cases or disqualify themselves from hearing a particular case.

Citing relevant examples and case law, discuss the concept of conflict of interest as it relates to advocates and judges/magistrates

(15 marks)

6. Write brief explanatory notes on the following:
- (a) Skeleton arguments (3 marks)
 - (b) Preliminary objections (3 marks)
 - (c) Contempt of Court (3 marks)
 - (d) Mediation (3 marks)
 - (e) Arbitration (3 marks)

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 104: TRIAL ADVOCACY

FRIDAY 22ND JULY, 2011

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer **Question ONE** and **ANY OTHER THREE (3) questions**
- (b) All questions carry **15 marks** each
- (c) Marks may be lost for illegibility

PLEASE TURN OVER

1. "Of course there's a search for truth going on in a trial, but it's not the main objective. Watching and listening to the witnesses, the factfinder is bound to be on the lookout for the liar. But trials often end up – usually end up, indeed – without any liars being unmasked. What the factfinders normally have to do is decide which parts of the evidence they prefer. An advocate's job is to lead his or her fact finder to a *preference* and thus to an *opinion*."

Keith Evans, The Golden Rules of Advocacy, p.51

Do you agree with this proposition? In this context, discuss the role of a trial advocate in court and indicate aspects of the psychology of advocacy that are critical in trial advocacy.

(15 marks)

2. "The success or failure of a trial advocate depends to a large extent on what witnesses say and how they say it. The lawyer who cannot control these two variables is as dangerous as a driver who cannot control his car." *Anonymous*

Critically discuss the ways in which a trial lawyer can control the testimony presented by witnesses in court.

(15 marks)

3. Section 300 of the Criminal Procedure Code provides that the advocate for the prosecution shall open the case against the accused person, and shall call witnesses and advance evidence in support of the charge.

Outline the elements of a prosecution opening statement in a criminal trial and explain whether the defence enjoys a similar right. If so, at what stage would the defence counsel make an opening statement?

(15 marks)

4. Present an analysis of the law and practice relating to the use of skeleton arguments and written submissions in civil and criminal proceedings in Kenya, noting to highlight the merits and demerits of their use.

(15 marks)

5. Distinguish between preliminary objections and trial objections and discuss the law and practice relating to both in Kenya.

(15 marks)

6. "It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors."

Refrigerator & Kitchen Utensils Limited vs Gulabeh and Popatal & Others (Court of Appeal, Civil Application No. 39 of 1990, Nairobi)

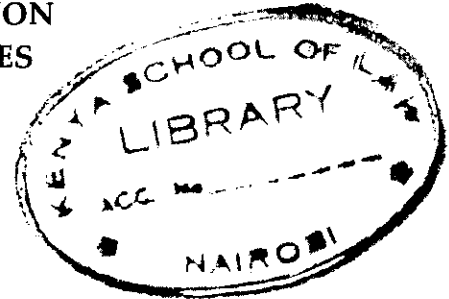
Discuss the law and practice relating to contempt of court in Kenya, indicating the standard of proof required and the penalties available against a contemnor.

(15 marks)

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES



ATP 104: TRIAL ADVOCACY

FRIDAY 5TH NOVEMBER, 2010

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer Question ONE and ANY OTHER THREE (3) questions
- (b) All questions carry 15 marks each
- (c) Marks may be lost for illegibility

PLEASE TURN OVER

1. "Cross-examination is hard. It is frequently dramatic, often exciting and in many ways it defines our adversarial system of justice. Cross-examination is the ultimate challenge for the trial lawyer... A poor cross examination... can be truly disastrous. The witnesses can range from un-co-operative to hostile, and you constantly run the risk of actually adding weight or sympathy to the other side's case. Moreover, most cross examinations will inevitably be perceived by the trier of fact as a contest between the lawyer and witness. You can seldom afford to appear to lose.

In other words, cross examination is inherently risky. The witness may argue with you. The witness may fill in the gaps left in the direct testimony. The witness may make you look bad. You may make yourself look bad. And whatever good you accomplish may be subject to immediate cure on re-direct examination.

None of these problems can be avoided entirely, but they can be minimized." *Lubert, Steven; Modern Trial Advocacy, Law School Edition (2004)*

- (a) Discuss the Rules that an advocate must adhere to in order to minimize the problems and perils of cross-examination and execute it effectively.

(10 marks)

- (b) Give an outline of the critical rules or warnings regarding what an advocate must not do in re-examination.

(5 marks)

2. Pre-trial preparation is a key component of advocacy and is integral in developing a winning strategy.

Discuss pre-trial techniques, outlining the various steps necessary in developing a legally-sustainable case theory and the skills required of a good trial lawyer in this respect.

(15 marks)

3. "They are all officers of the Court. Their duty lies first to the court and then to their clients." *Shah, J.A. in Malindi Air Service Ltd & Another v. Halima Abdinoor Hassan Civil Application No. 103 of 1999*

Present a critical analysis of the above statement, setting out concisely the respective duties of an advocate to the client and to the court and showing how a potential conflict between the two can be resolved.

(15 marks)

4. Critically analyse the special challenges faced by an Advocate when serving as a Prosecutor in a criminal proceedings. Are these any different from those of an Advocate serving as Counsel to a Judicial Commission of Inquiry?

(15 marks)

5. (a) Using appropriate examples, discuss the qualities essential to the making of an able trial advocate.

(10 marks)

- (b) The advocate has been described as a "story teller." What are the basics he must observe?

(5 marks)

6. Explain the law relating to final submissions in civil and criminal proceedings in Kenya and show the aims and techniques of presenting an appropriate closing argument.

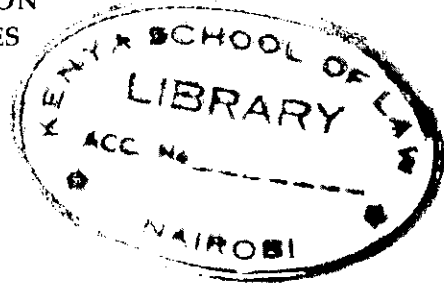
(15 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

DECEMBER, 2009

TRIAL ADVOCACY



Instructions

- (a) Answer **Question ONE** and **ANY OTHER THREE (3)** questions
 - (b) All questions carry **15 marks** each
 - (c) Marks may be lost for illegibility
 - (d) Time allowed is **3 hours**
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1. "The skill of examination-in-chief requires sound knowledge of the rules of evidence, a firm grasp of the facts and the law pertaining to the case and the ability to extract all the material evidence from the witness without asking leading questions. It is probably the most difficult skill to learn of all the techniques of trial advocacy. The reason is not hard to find. The evidence-in-chief a party may adduce is subject to a number of restrictions. The main restrictions relate to the content of the evidence and entail that the evidence has to be relevant to the content, material in its substance and admissible in form." *Anonymous*

Discuss.

(15 marks)

2. "Trial Advocates are servants of the justice system and play a crucial role in it. In litigation, Advocates serve two interests: the court and the client. There was a time when it was said that the interests of the client were always paramount, but it is now accepted that counsel has a higher duty to the court. Generally speaking, the Advocate serves the administration of justice by representing the client in accordance with the counsel's duty to the court." *C.G. Mamewick, SC, Litigation Skills for South African Lawyers 2nd Edition., page 271.*

- (a) Discuss the duties owed by the Trial Advocate to the client and to the court.

(10 marks)

- (b) What is/are the instance(s) of conflict between the Advocate's duties to the client and to the court and in what manner can such conflict(s) be reconciled?

(5 marks)

3. "All practitioners... act on instructions. In order to obtain instructions, a practitioner must be able to conduct an interview. Having conducted an interview, the practitioner will know how to give advice, how to conduct negotiations, write letters, draft documents and present arguments in court. These are skills that are required in legal practice." *R.J. Saragg, Sydney, 1966*

4. Court etiquette is a critical aspect of trial advocacy. Present an analysis of five elements of court etiquette indicating the qualities that would be expected of a good trial lawyer with respect to each of those qualities. (15marks)

5. "Your trouble is you're a lawyer! You always say things in such a way that the way is more important than what you are saying... you say things and ask things as if you've thought out in advance the answer you want to hear, and your question always leads to you getting that answer... Sometimes I don't know if you are just pulling strings to make me say something."
Anonymous

Bearing in mind the dimensions of advocacy in adversarial judicial systems, discuss the above statement as it relates to examination of witnesses. (15 marks)

6. "The closing speech is the reason advocates exist. It is their weapon, their art, the moment for persuasion", *Ian Morley, The Devil's Advocate, p.181*

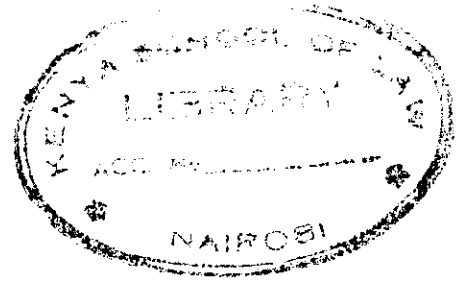
Present a critical analysis of the law, aims and technique relating to closing arguments/closing speech/final submissions in the Kenyan legal system. (15 marks)

COUNCIL OF LEGAL EDUCATION

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

NOVEMBER, 2009

TRIAL ADVOCACY



Instructions

- (a) Answer **Question ONE** and **ANY OTHER THREE (3)** questions
- (b) All questions carry **15 marks** each
- (c) Marks may be lost for illegibility
- (d) Time allowed is **3 hours**

1. The Trial Advocate is a representative of the client, an officer of the court and a public citizen having special responsibility for the quality of justice. The relationship between the Advocate and the client is of a fiduciary nature and it is the duty of the Advocate to fearlessly uphold the interests of the client by fair, honourable and lawful means. In all professional functions, the Advocate should be competent, prompt and diligent and should maintain communication with the client concerning the representation and avoid situations of conflict with the client's interests and keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by law. The conduct of the Trial Advocate should conform to the requirements of the law, both in professional service to the clients and in the Advocate's business and personal affairs. As an officer of the law and the court, the Trial Advocate should demonstrate respect for the legal system and for those who serve it, including judges and other Advocates. While it is the Advocate's duty to help maintain the integrity and impartiality of the judicial process and in so doing to apply when necessary, for disqualification of judicial officers, it is also the Advocate's primary duty to promote respect for judicial process. As part of her general duties to the public, the Advocate should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. The Advocate should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and resources in their behalf. As a member of the learned profession, the Advocate should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education and the legal profession. *(Anonymous)*

- (a) Bearing in mind the above statement, discuss the duties owed by the Trial Advocate to the client, the court and generally to the legal system.

(8 marks)

- (b) To be able to effectively discharge her duties to the client, the trial Advocate must be possessed of certain values and competencies. These virtues are tested most when an Advocate has to apply for the disqualification of a judicial officer.

Discuss the circumstance(s) under which an Advocate may apply for disqualification of a judicial officer highlighting the values and competencies she would need to be able to effectively do so.

(7 marks)

2. "Cross examination... the rarest, the most useful, and the most difficult to be acquired of all the accomplishments of the Advocate... It has always been deemed the surest test of truth and a better security than the oath. It requires the greatest ingenuity; a habit of logical thought, clearness of perception in general; infinite patience and self control; power to read men's mind intuitively, to judge of their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-matter itself; an extreme caution, and above all, the instinct to discover the weak point in the witness's testimony under examination. One has to deal with a prodigious variety of witnesses testifying under an infinite number of differing circumstances. It involves all shades and complexions of human morals, human passions and human intelligence. It is a mental duel between counsel and witness."

Francis Wellman, The Art of Cross-Examination (1919)

- (a) Discuss the purpose, and method of cross-examination as a trial process.

(10 marks)

- (b) What special techniques are required in cross-examining an expert witness?

(5 marks)

3. "A preliminary Objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

Sir Charles Newbold, P, Mukisa Biscuit Manufacturing Ltd v. West End Distributors Ltd [1969] EA 696, 701

- (a) Discuss in good detail the circumstances under which an Advocate would be entitled to raise a preliminary objection. In so doing, highlight the purpose, technique and ethics of preliminary objections.

(10 marks)

- (b) Distinguish preliminary objections from trial objections highlighting the purpose, grounds and technique(s) of the latter.

(5 marks)

4. Briefly discuss the meaning, essence and art of the following processes in court proceedings taking into account both criminal and civil proceedings:

- (a) (i) Pre-trial preparations
- (ii) case concept theory
- (iii) opening address
- (iv) submissions/closing arguments

(8 marks)

(b) "The Mediator uses the opening statement to not only give an overview of the mediation process to the participant parties but to also give a didactic lesson on its nature, what it entails and what is expected of the parties"

Give a detailed opening statement capturing these elements for the benefit of first time mediation participants.

(7 marks)

5. "Evidence occupies a special place and plays a crucial role in Trial Advocacy. Proceeding to trial of a case without necessary evidence is like seeking to drive a bus without a steering wheel. This may portend grave, if not suicidal, consequences to the cause of the client and to the Advocate's own reputation. The choice of evidence/witnesses, in trial advocacy, is thus a deliberate and skillful process dictated by various factors including the reliability, materiality and admissibility of the evidence and the competence of the witness(es), the burden of proof and the standard of proof requisite in the matter at hand."

Discuss the above statement having regard to both criminal and civil proceedings.

(15 marks)

6. "Where the verbal and non-verbal language used portray entirely different and opposed or confused messages, research suggests that it is the non-verbal communication which is likely to be the more accurate and hence the more reliable in helping you to assess what is really being said" *Inns of Court School of Law; Advocacy, Negotiation & Conference Skills*

(a) Discuss the importance of understanding non-verbal communication for the trial Advocate.

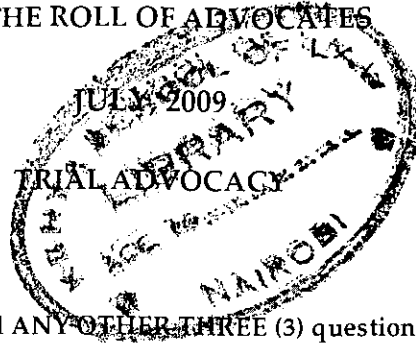
(5 marks)

(b) Describe five types of non-verbal communication in the conduct of a trial and suggest possible interpretations thereof.

(10 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES



Instructions

- (a) Answer Question ONE and ~~ANY OTHER THREE~~ (3) questions
- (b) All questions carry 15 marks each
- (c) Marks may be lost for illegibility
- (d) Time allowed is 3 hours

-
1. Evidence occupies a special place and plays a crucial role in Trial Advocacy. Proceeding to trial of a case without necessary evidence is like seeking to drive a bus without steering wheels. This may portend grave, if not suicidal consequences to the cause of a client and to the Advocate's reputation. The choice of evidence/witnesses in trial advocacy is thus a deliberate and deft process dictated by various factors including the materiality and admissibility of the evidence in question, the burden of proof and the standard of proof requisite in the matter at hand.

Discuss this statement bearing in mind both civil and criminal proceedings.

(15 marks)

2. "For [an advocate] now to practice, the conference with the client will often be the first occasion on which the legal skills, previously studied in a vacuum, will have to be assessed and applied in the context of a wide range of different and often wholly non-legal considerations... It is easy to see, therefore, the important role the interview assumes in the process of arriving at the appropriate solution to the client's legal and emotional situation... It is inevitable that you will encounter a difficult client at some stage..."

Bearing in mind the critical role client interviewing plays in trial advocacy, identify five categories of difficult clients then explain the manner in which you would handle each to achieve the objectives of conference.

(15 marks)

3. The Mediator is neither an observer nor a mere appendage to the process of mediation. He plays key and well defined roles or functions necessary for the efficacy integrity and success of the process."

Citing specific examples, identify the said role-functions.

(15 marks)

4. "The relationship between a trial advocate and a client is fiduciary and it is the duty of an Advocate to fearlessly uphold the interests of the client by fair, honourable and lawful means." *Anonymous*.

(a) Discuss the duties owed by the trial Advocate to the client

(5 marks)

(b) In order to effectively discharge her duties to the client, the trial Advocate must be possessed of certain qualities and should operate within certain ethical principles.

Discuss.

(10 marks)

5. Briefly discuss the nature, essence and technique of the following process in court proceedings:

- (a)
- (i) Opening statement
 - (ii) Examination-in-chief
 - (iii) Cross-examination
 - (iv) Re-examination
 - (v) Closing Arguments/Submissions

(10 marks)

(b) State the mode of dress by and addresses before the following judicial officers:

- (i) Magistrates Courts
- (ii) One (1) Judge of the High Court in Chambers
- (iii) Three (3) Judges and one (1) male Judge in Open Court
- (iv) A Judge of Appeal in Chambers
- (v) A bench of Judges of Appeal in Open Court

(5 marks)

6. The use of authorities in judicial proceedings is an integral part of trial advocacy. It is critical, however, that production of authorities is done in a careful and procedural manner.

Discuss in detail the various kinds of authorities that may be produced in different kinds of proceedings and the proper procedure of doing so.

(15 marks)

COUNCIL OF LEGAL EDUCATION

EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

DECEMBER, 2008

TRIAL ADVOCACY

Instructions

- (a) Answer Question ONE and ANY OTHER THREE (3) questions
 - (b) All questions carry 15 marks each
 - (c) Marks may be lost for illegibility
 - (d) Time allowed is 3 hours
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1. *"[G]ood advocacy is mostly a matter of common sense. The trouble is that we lawyers often leave common sense behind when we go into court. As a result, we often seem boring, pompous and devious, and we make the most unnecessary mistakes again and again. We are so pre-occupied with the complexities and pressures of our position we forget all the common sense simplicities...It is a barrier peculiar to the profession. Unless warned, almost all of us start out this way". - Keith Evans; Common Sense Rules of Advocacy for Lawyers (2004) P4.....*

Identify, discuss and justify with the aid of appropriate illustrative examples the observance of which you would consider indispensable to the effective conduct of cross-examinations and the avoidance of the unnecessary mistakes alluded to above. (15 marks)

2. (a) Outline the essential elements of an opening statement by a Prosecutor in a criminal trial. (5 marks)
- (b) Your client has been charged with murder contrary to Section 203 of the Penal Code. On taking his instructions the following is what he told you:

"I am a hawker and sell my wares at around Muthurwa bus terminus. On 9 November 2008, a Sunday afternoon at about 2 O'clock, I was walking on Jogoo road towards Buruburu. I was coming from town.

As I was passing the flyover, I noticed Grace Patel who was seated by the roadside. I smiled at her, waved and greeted her by saying 'How are you doing baby girl?' After I proceeded about 50 paces I heard a shout behind me.

On turning around I saw David Mlevi coming towards me. He was very angry and shouting incoherently. He came towards me in an aggressive manner and was almost running. When he came right up to me I turned around to face him. He shouted at me and asked why I was talking to his girlfriend without his permission. While I was

arguing with him I noticed his sister Joyce standing at the foot of the flyover with Grace. They appeared to be watching us.

I explained to David, who appeared to be fairly drunk, that I merely greeted Grace in a friendly manner. This did not appear to satisfy him and he made a movement towards his trousers and pulled out a knife. As he did this I pulled out my own knife and stabbed him once in the chest before he could stab me.

He fell down and I immediately started running away. As I was running I noticed a number of men pursuing me. I threw my knife into the bushes and ran all the way to Buruburu where I hid until nightfall.

Later at night I found my way to my father's house in Umoja. I explained to him what had happened and early next morning he took me to Buruburu Police Station where I was taken into custody.

I did not mean to kill David, who was known to me and I had no problems with him in the past. I knew that Grace was David's girlfriend and had no intention of flirting with her"

Provide an outline of what you would say in your opening statement at his trial.

(10 marks)

3. "Whereas advocacy is often concentrated on lawyers *speaking*, it is equally important that they should *listen*..." Identify, explain and illustrate the various styles of listening, noting to comment on the strengths and weaknesses of each.

(15 marks)

4. Truckers Limited have for several years been the sole transporters for Biashara Industries Limited. The value of goods transported for Biashara Industries per annum has recently been estimated at KShs.1 billion, earning for Truckers Limited annual revenue of KShs.10 million. Recently however, Truckers Limited mishandled and damaged a consignment of goods valued at KShs.50 million destined for Biashara Industries branch in Kigali, Rwanda. The consignment comprised of vital raw materials which Biashara needed to produce and supply fast-moving consumer goods for their Rwandese customers. Biashara had received and accepted orders worth KShs.200 million. The damage means Biashara will not be able to service the orders to their customers as promised. Biashara are obviously very upset about this development and have approached you for advice on the course of action they should take in the circumstances... Briefly provide a legal opinion to Biashara which you think will be in the best interest of Biashara giving reasons why you think the recommended cause of action is the most suitable in the circumstances.

(15 marks)

5. "An offer to negotiate is a concession that your client's case is weak. Good advocacy demands that disputes are resolved through the courts, from where your client can obtain judgment and execute against the judgment-debtor."

Discuss.

(15 marks)

6. Identify and describe five (5) considerations that you would use in leading a witness at a trial. Use examples of questioning style for each consideration and take into account situations where you require two produce documents and exhibits.

(15 marks)
