

THE KENYA SCHOOL OF LAW



EXAMINATION FOR ADMISSION TO
THE ROLL OF ADVOCATES

PROFESSIONAL ETHICS – ATP 105

28TH NOVEMBER, 2014

DURATION: 3 HOURS

Instructions to Candidates

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

PLEASE TURN OVER

QUESTION ONE (1)

Brian, Hezbon, Dave & Associates is an upcoming law firm in Nairobi. The three partners are young energetic and intelligent advocates in their mid-twenties. On the 17th November, 2012, they put an advertisement in the firms 'wall' in Facebook for their "legal clinic," stating that they were offering "legal services at very reasonable fees," and listing their fees (a maximum of 20% of the value of the subject matter) for certain services, namely, uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name.

The advert was again posted in Twitter on the 17th of November, 2014. Shortly thereafter, the law firm engaged Alliance Media, an outdoor advertising giant, to erect a giant billboard measuring 16 square meters (4 by 4 meters) at the Uhuru Highway – Haile Selassie roundabout with a similar advert. In the billboard a very attractive and somewhat sensually dressed female model proclaims the virtues of the law firm declaring it the undisputed law firm of the moment, thanks to its spectacular successes in and out of the court room. The law firm then ran an advertising blitz on citizen TV from 18th November, to 25th November 2014. In an attention-reverting 90-second commercial some very pretty female models proclaim the firm as the law firm of the future. For good measure the adverts list the names of the firm members and their employees, highlight their areas of specialization, and give contact details of the firm.

The Law Society of Kenya reacted furiously accusing the law firm of violating the Advocates (Marketing and Advertising) Rules, 2014 LN No. 42 of 2014. The LSK instructs one of its advocates to institute disciplinary proceedings against the law firm. The law firm takes out judicial review proceedings to prohibit the Disciplinary Tribunal from proceeding action citing a violation of their 'constitutional freedom of commercial speech'.

Justice Helen, the judge before whom the judicial review application is argued, is a former partner of the firm. As a former partner of the firm, Justice Helen, like all former partners, enjoys a very comfortable monthly pension from a pension scheme administered by Alexander Forbes on behalf of the law firm. The Law firm, as part of its regular corporate social responsibility programme, recently paid tuition fees for Winnie, Justice Helen's granddaughter, who had graduated with a first class honours degree from the Catholic University of Eastern Africa and is proceeding to Oxford University. Winnie was competitively selected from a list of 50 eligible applicants.

The law firm is represented in the case by Leonora, one of its most promising associates who had scored over 90 in all units taken at the Kenya School of Law ATP Programme on first attempt. Dave acknowledges Leonora's extraordinary competencies as a lawyer and is satisfied that she is equal to the task of representing the firm. Dave nevertheless insists on drafting the application himself. Dave also prepares written submissions for Leonora. Leonora is uncomfortable with some aspects of the averments in the statement in support of the application for leave.

According to Leonora the averments, though verified by affidavit are not factual. Leonora would also prefer to draft the submissions differently and is unable to follow the gist the argumentation as presented in the submissions. She calls the attention of Dave to her concerns during a pretrial bringing but Dave dismisses the concerns with a smile saying no one will ever find out about the 'so-called factual inaccuracies'. As for the submissions Dave takes great exception to Leonora's presumptuous attitude and maintains the submissions must be presented as drafted. Leonora is far from persuaded but nevertheless choses to prosecute the

application as proposed by Dave because of her great respect for Dave. Dave is rated by Chambers 500 one of the most accomplished advocates in Kenya. Leonora nevertheless shares her concern with her best friend and former classmate Samrita. Samrita, a practicing advocate is concerned that an advocate of Dave's caliber is actually capable of such indiscretions. She considers the story way too juicy to keep to herself. She immediately calls Divya and shares the story with her. Divya for her part posts the story on Twitter and soon word is out that something is not right with the application by the law firm. During the hearing Caroline, Maggie and Linet, who are representing the Law Society of Kenya raise the matter informally with Leonora. Leonora responds that she cannot discuss the matter as it is covered by advocate-client confidentiality. Justice Hellen is anxious to steer the debate away from those controversies as she is uncomfortable sitting in judgement over her former partners' professional conduct. She therefore agrees with Leonora and rules that Leonora is under no obligation to discuss issues as they are covered by advocate-confidentiality. In the course of the hearing Leonora choses to steer clear of the controversial averments, much to the chagrin of Dave who accuses her of gross insubordination. Dave is particularly concerned that Leonora conceded a number of important points based on two recent decisions of the Supreme Court. Dave knows that these concessions have considerably weakened their case and is unable to understand why Leonora referred the decisions in her submissions when counsel for the respondents had not themselves raised the issues. According to Dave, Leonora had scored two own goals for no apparent reason.

The Chief Justice feels justice Helen ought not to have presided over the case and seeks your advice on whether or not there could be grounds for taking disciplinary action against Justice Helen.

- a) With the aid of decided cases, provisions of the digest, the Advocates Act and any other statues, identify the ethical issues raised in this hypothetical scenario and explain which of the disciplinary organs has jurisdiction to entertain a possible disciplinary action against Samitra, Divya, Leonora and her employers.

(10 Marks)

- b) Advice the Chief Justice on whether or not Justice Helen has committed any act of judicial misconduct and sequentially outline the process that can be used to discipline Justice Helen should the Chief Justice find that there are indeed grounds for disciplining Justice Helen.

(5 Marks)

QUESTION TWO (2)

In 2013 the Mteja Juamingi was charged at the Chief Magistrates court in Nairobi with causing grievous bodily harm to one Bahati Mbaya. Brian was requested by the court to represent Mteja Juamingi pro bono. In accordance with his duty as an advocate, Brian agreed to act for Juamingi. Juamingi gave to Brian his (Juamingi's) account of the affair. Juamingi was convicted and it is plain that he had no real defence. But he was much aggrieved by evidence that he had used a knife; he wanted to establish that he had inflicted Bahati Mbaya's injuries with his hands alone, or by biting, Louis-Suarez-Style. Apparently Brian did not ask all the questions or lead all the evidence that Juamingi had suggested.

Juamingi has sued Brian for professional negligence. The Law society of Kenya has been invited to appear as amicus curiae in the case. You have been appointed to represent the Law Society. You are expected to prepare an amicus curiae's brief detailing the definition of negligence, the requirements. The constitutional and statutory basis, the source of the obligation, the standard of care, the relationship between negligence and mistake, the case for and against immunity of advocates against claims for negligence, the case against immunity and the purpose of professional indemnity. You are also expected to review local and foreign case law on negligence.

Proceed to prepare the amicus curiae's brief.

(15 Marks)

QUESTION THREE (3)

You are a newly admitted advocate employed at Faith, Winnie, Victor & Company Advocates, a limited liability law firm (the "firm"). Your firm has applied to be recruited into the panel of advocates for Bridge Bank Limited (the "Bank") for its debt collection matters. The Company Secretary of the Bank has written to your firm requesting that your firm signs an annexed retainer agreement. The agreement contains clauses on fees as follows:

"... (i) The firm will on completion of a matter only be paid 30% of the scale fees provided in the Remuneration Order.

(ii) If the Firm is successful in its representation of the Bank, it will be entitled to a further 30% of the scale fees provided in the Remuneration Order."

- (a) With the aid of the applicable statutory provisions and case law give your opinion on the viability of the agreement.

(8 Marks)

- (b) Victor seeks to introduce a clause in the agreement as follows:

"the liability of the limited partners for any professional advice given is limited to the contribution of the limited partners to the capitalization of the firm but in any event none of the partners is liable for any mistakes committed in the conduct of any litigation proceedings". Advise the firm on the legality of this clause.

(7 Marks)

QUESTION FOUR (4)

Roy an advocate in private practice requested his brother, Judge Joan, to introduce him to Judge Beryl, before whom he has a case in which he represents a party. The case has been pending for some time. Roy wants to be assisted to "fast-track" the conclusion of the case in his client's favour.

Judge Joan, a close friend of Judge Beryl, acceded to the request, telling the latter that Roy is her brother and that Roy simply wanted to ask for advice on how to expedite the resolution of his case. The three met, as arranged, in the fine dining restaurant of a five-star hotel. Roy hosted the dinner.

At the end of the dinner, Roy thanked Judge Beryl for her understanding and offered her a very expensive Rolex watch as a token of his appreciation which Judge Beryl gladly accepted.

- (a) Identify the ethical violations by Roy, Judge Joan and Judge Beryl.

(9 Marks)

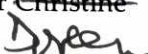
- (b) What difference, if any would it make if Roy merely asked Judge Beryl for advice on how to fast-track a case?

(3 Marks)

- (c) The Judicial Service Commission frames a charge against the two judges accusing them of acting contrary to the Bangalore Principles and the UN Principles for Judicial Independence. What possible constitutional issue could you raise with regard to the charge as framed?

(3 Marks)

QUESTION FIVE (5)

You are a lawyer working at the Office of the Director of Public Prosecutions and you are handling the case against Senator Christine who is charged with assault of a voter known as Jette during one of his campaign rallies. Based on your assessment of the evidence that the complainant Jette submitted, you know that the case against Senator Christine is weak. You however, decide to prosecute the case nonetheless because Senator Christine failed to secure for your wife a job as his personal assistant three years ago. You consult your friend known as Curiosity (who works with the office of Senator Doreen, a known political rival of Senator Christine) regarding your case. Curiosity springs a surprise by informing you that Senator ~~Christine~~  has offered to give you a gift of a brand new car if you proceed with the case.

(a) Identify the ethical issues that arise from this scenario.

(6 marks)

(b) Explain the ethical and policy considerations involved in exercising a prosecutorial discretion under the national prosecution code of conduct and ethics

(9 Marks)

QUESTION SIX (6)

Omar Godhana Dor has been charged with the offense of incitement to violence. c/sec 96 of the Penal Code Cap 63 Laws of Kenya. He is also charged with a number of offenses arising from the bombing of a church in Umoja Estate in Nairobi, such as attempting to injure by explosive substances c/sec 234 of the Penal Code Cap 63 Laws of Kenya. Omar is the Leader of the Nairobi Republican Council (NRC) which has been proclaiming that "*Nairobi Si Kenya*". Omar comes to you seeking legal representation. He is escorted by ten members to NRC. The ten are also being sought by the police in connection with various offenses relating to the NRC activities. In a meeting held in your boardroom in the presence the ten members of the NRC, Omar confesses his guilt and also gives you a lot of highly incriminating information about the NRC. He informs you about the plans of NRC to blow up Anniversary Towers, which houses the IEBC.

He also gives you details of where the NRC has kept a huge cache of explosives. You record the entire conversation on a High Resolution HD camcorder and keep three copies of the DVDs of the recording in your safe. The DVD recording shows unmistakable pictures of the persons present at the meeting and the sound quality is extremely good making voice identification easy. One day one of your clerks who you have just given a notice to show why he should not be dismissed from employment decides to cut his losses. Using a master key, he accesses the safe and makes a copy of the DVD recording. He turns over the copy of the recording to the police in exchange for a substantial payment being part of the reward money the police had promised the public for information that could assist in securing a conviction against Omar.

On your way home, you decide to take along one of the DVDs with an intention of reviewing the recording at home. You pass by Njuguna's your favorite pub. By some stroke of a bad luck you drop the DVD at the gate to Njuguna's. A curious security officer picks the DVD and plays the same on his high-tech 3D Blue Ray Home-Theatre. He cannot believe his good fortune. He is aware of the reward. He turns over the DVD to the police who happily receive the same in exchange for a substantial payment out of the reward money. One of the persons who had accompanied Omar to your office, called Wasiwasi Msaliti also decides to cut a deal with the police. He offers to give the police information against Omar including telling them about the confessions of Omar in your office. Meanwhile the police have decided to charge Omar together with the

remaining members of the MRC who escorted Omar to your office. The nine have not instructed you to represent them. The police send you a summons requiring that you give them the following information:

- (i) The names of the people who accompanied Omar to your office (assume you know their names,) the residential address that Omar gave you as his place of abode in Kitengela in Nairobi and the account number the bank account from which Omar paid your fees by an Electronic Funds Transfer. The fees was paid from Omar's account at Equitable Bank to your account at Mwananchi Commercial Bank;
- (ii) What Omar told you about previous offenses committed by the ten NRC members which do not involve Omar; and
- (iii) Omar's confession about the offense he is charged with.

Meanwhile, the Kenya Revenue Authority (KRA) has also written to you demanding particulars or account details of the account from which Omar paid your fees to facilitate an investigation into possible tax evasion by Omar. They are particularly interested in where you have kept a substantial sum of money paid to you from that account to keep in safe custody until the case is over.

- a) Would you reveal the information required by the police and the KRA? (6 Marks)
- b) From the perspective of advocate-client relationship, would the two DVDs be admissible in evidence in court against Omar? (6 Marks)
- c) Is Msaliti's evidence admissible against Omar and his co-accused? (1 Mark)
- d) Would Omar's co-conspirators be allowed to testify about what transferred at the meeting in your boardroom? (2 Marks)

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