

ADMISSION EXAMINATION / TOELATINGSEKSAMEN

ATTORNEYS' PRACTICE / PROKUREURSPRAKTYK

PART 3 / DEEL 3

11 FEBRUARY / FEBRUARIE 2015

ANSWERS / ANTWOORDE

PLEASE NOTE THAT THE GUIDELINE ANSWERS TO PREVIOUS PAPERS MAY NOT BE A CORRECT REFLECTION OF THE LAW AND/OR PRACTICE AT THE MOMENT OF READING.

NOTE TO EXAMINER: *This guideline records the views of the drafters. There may be justifiable variations in practice which are brought out in the answers. When this happens the examiner should apply his discretion in marking the answer.*

QUESTION 1

[14]

- 1.1 The appointment of such a person is normal practice. However the practitioner must supervise the work and remains ultimately responsible for whatever is done. (3)
- 1.2 Clients may be seen and new matters accepted only in the field of expertise of the non-professional. (2)
- 1.3 These activities fall within the normal duties of a collection assistant but the practitioner must supervise the results and give guidance on what should be done. (2)
- 1.4 Legal advice is a professional activity and may not be given by support staff. (2)
- 1.5 High Court matters are always specialised and professional work and must be attended to by professionals. (3)
- 1.6 No. This entails abandoning control of trust funds. At most he/she can be a co-signatory. (2)

QUESTION 2

[6]

It is normal that the attorney will not be familiar with accounting systems or computer programmes. This does not mean that trust books must be written up by hand if that is what the attorney knows. Attorneys must find out enough to ensure that the computer systems entail compliance with the Act and Rules and must be able to check that the system is being adhered to.

QUESTION 3

[12]

Candidates must show insight into the applicable Law Society's rules on marketing as opposed to touting.

- 3.1 It is acceptable to reduce fees in the case of large volumes of work. The fee must still be reasonable. (3)
- 3.2 Attorneys may not share fees with non-professionals. Paying for mandates is an extreme form of touting. (3)
- 3.3 Supporting a client is in order if it is done in good taste. Neither the publicity, nor the prizes may be excessive or extravagant. (3)
- 3.4 Accepting secret commissions is against common law rules and could also constitute touting and sharing of fees. Declare commission. (3)

QUESTION 4 **[8]**

The practitioner should feel free to accept the mandate. It is a fairly routine matter and will assist in gaining experience. It is not wrong to seek help from an experienced colleague and to ask for precedents but own research is essential. Inform the client that you wish to study the legal position and procedure.

Firstly study a text book on the topic and available authority (e.g. previous judgements) which clarify the rules. If you experience problems, use further assistance in a good library such as a noter-up. As guide to the drafting of the relevant documents consult practice guides (Forms and Precedents, etc.). The most important requirement is that the documents are thoroughly and carefully drafted and that the attorney properly prepares and qualifies himself. Be careful of negligence.

QUESTION 5 **[8]**

The introduction of FICA impinges upon the traditional role and independence of the attorneys' profession and upon the confidentiality of all communications between attorneys and their clients. Apart from having the duty to establish and verify the identity of clients and of their authority, they are obliged to keep detailed records of clients, business relationships and of transactions for a specified period; they are also under an obligation:

- 5.1 to make such records available to the Financial Intelligence Centre on the strength of a warrant;
- 5.2 to inform the centre on request of the existence of a current or past mandate;
- 5.3 to report cash transactions above a prescribed amount to the Centre; and;
- 5.4 to report to the Centre the conveyancer in terms of a transaction with a client of cash above a prescribed amount to or through a specified account or institution.

QUESTION 6 **[15]**

There will be a number of ways of answering this question. The appended list is not necessarily comprehensive. There may also be others that are raised and may be accepted. The additional 3 marks go for style, clarity, comprehension and presentation.

- 6.1 Benefits of partnership (six of)
- Cost of procedure
 - Simplicity to arrange
 - Quicker to establish

- Ease of future management and administration
- Less outside administration in future
- Less expense in future administration
- Easy to make contributions in kind and value (6)

6.2 Benefits of company

The following are essential elements:

Separate personality which means

- Possible non personal liability and
- Continued existence after death of member
- Something about insolvency/liquidation
- More flexible tax position
- Act provides guidance on administration (6)

QUESTION 7 **[12]**

Legal professional privilege and confidentiality apply to communications between you and your client:

- 7.1 where the communication relates to your professional or intended professional relationship;
- 7.2 made for the dominant purpose of seeking or giving legal advice or for use in existing or anticipated legal proceedings;
- 7.3 whether written or oral and even;
- 7.4 where the client confesses to you the commission of a prior crime or fraud.

Bear in mind that it is information that is protected by privilege. If such information is contained in a document, the document is privileged. If, however, the document is contained in a file containing a number of documents, the entire file does not become protected by privilege.

Professional privilege does not apply to:

- documents which are not otherwise privileged. They do not become privileged merely because your client hands them to you;
- communications made for the purpose of facilitating a crime or fraud. Harksen v Attorney-General Cape and Others 1999(1) SA 718(C), Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003(2) SA 515 (W).
- the name of your client – you can be compelled to disclose it;
- facts learned by you with your own senses and;
- where a statute expressly or by implication provides that the privilege is inapplicable.

QUESTION 8 **[25]**

- 8.1.1 This agreement is conditional upon the purchaser obtaining a bond on standard terms for R750 000 within 30 days from date hereof. If the bond is not obtained this agreement shall be null and void and neither party shall have any claim against the other arising herefrom. (5)

8.1.2 Should the purchaser be advised in writing that his application for a bond for R750 000 in respect of the purchase price has been unsuccessful or should the purchaser not be successful in obtaining the said bond within 21 days from date of signature hereof, this agreement shall terminate and each party shall, insofar as any terms of this agreement have been implemented, be obliged to restore the other to the same position as he would have been had the agreement never been concluded. (5)

8.2 The issue involved in this question is the indemnity of the seller by the purchaser. If the seller had employed agents and is likely to be responsible towards them for commission he must be sure that the purchaser who approaches him directly has not in fact been introduced by an agent. In addition it is likely that if the seller sells directly he will have discussed a reduction in the purchase price because he will be relieved of paying commission. These factors must be taken into consideration. An answer along these lines is suggested:

8.2.1 The purchaser confirms that this contract was entered into without the purchaser having been introduced to the seller directly or indirectly by any estate agent or that any agent was the effective cause for the conclusion of this contract of sale.

8.2.2 As a result of the sale by the seller to the purchaser on these grounds the purchase price has been reduced by an amount equal to the expected agent's commission.

8.2.3 The purchaser consequently indemnifies the seller against any legitimate claim which may be brought against the seller for agent's commission arising from this sale. The seller shall call upon the purchaser to assist the seller in any actual or threatened litigation arising from any claim for commission and to put the seller in funds to do so. The seller shall however be free to decide on the best manner of settlement of any such action. Any costs or charges including legal fees on all scales and any capital sum payable shall be recoverable from the purchaser as liquidated damages. (10)

8.3

Mr John Drake
378 Long Market Street
Pietermaritzburg

PER REGISTERED POST

Dear Sir,

Re: Purchase of Property Erf 102 Pietermaritzburg

We refer to the agreement of purchase and sale concluded between you and the Trustees of the Peter Smith Family Trust dated the 20th of February 2014.

In terms of clause 3 of the agreement the deposit was payable within 15 days.

You have failed to make the aforesaid payment, despite several requests.

The seller has instructed us to give you notice in terms of the breach clause (clause 15), as we hereby do, to remedy the breach and make payment to us within 7 days from date hereof failing which the seller will be ascertaining his rights in terms of the aforesaid agreement.

We accordingly await to here from you.

TOTAL: [100]