

# PROKUREURSEKSAMEN

## DEEL 3 PROKUREURSPRAKTYK

22 FEBRUARIE 2012

09:00-11:15

Totaal: [100]

*Kandidate kry 15 minute om die vraestel deur te lees voor hulle begin skryf. Geen kandidaat mag tydens hierdie tyd in die antwoordboek begin skryf nie. Die eksamen van 2 uur volg dan.*

1. Kandidate moet al die vrae beantwoord.
2. Kandidate moet daarop let dat punte vir goeie opstelwerk toegeken word.
3. Waar nodig, moet kandidate hulle eie feite versin.
4. Skryf asseblief slegs in pen op die regterkantse bladsye.
5. Tensy daar 'n spesiale rede bestaan, word 'n kandidaat nie vir 'n mondeling in hierdie deel ingeroep as 50% en meer behaal is nie. Indien 'n kandidaat minder as 40% behaal sal hy/sy nie kwalifiseer vir 'n mondeling nie en sal hierdie deel druip.

# ATTORNEYS' EXAMINATION

## PART 3 ATTORNEY'S PRACTICE

22 FEBRUARY 2012

09:00-11:15

Total: [100]

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2. Candidates must remember that marks are awarded for good draftsmanship.
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5. Except if a special reason exists, a candidate will not be required to do an oral in this part if 50% or more is attained. If a candidate achieves less than 40% he/she will not qualify for an oral and will have failed this section.

*Handwritten notes in Afrikaans:*  
Kandidate:  
① Kandidate moet al die vrae beantwoord.  
② Kandidate moet daarop let dat punte vir goeie opstelwerk toegeken word.  
③ Waar nodig, moet kandidate hulle eie feite versin.  
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**VRAAG 1 [11]**

Omskryf of beskryf, kortliks en sonder gebruik van voorbeelde:

- 1.1 Geskik en gepas om 'n prokureur te wees; (1)
- 1.2 'n Botsing van belange; (1)
- 1.3 Uitbuit/uitoorsê ("overreaching"); (1)
- 1.4 Dokumente wat onderhewig is aan 'n prokureur se retensiereg t.o.v. gelde; (1)
- 1.5 Die doel waarvoor die Getrouheidsfonds in die lewe geroep is; (2)
- 1.6 Professionele privilegie; (2)
- 1.7 Omstandighede waaronder 'n prokureur 'n mandaat moet weier. (3)

**VRAAG 2 [10]**

- 2.1 Verstrek redes waarom dit soms beter is om sake te bedryf deur 'n regs persoon eerder as enkeleienaar of vennootskap; (5)
- 2.2 Welke vorms van 'n maatskappy kan kragtens die nuwe Maatskappywet ~~Ne~~ van 2008 opgerig word? (5)

**VRAAG 3 [5]**

Wat is die regsverhouding tussen 'n prokureur en kliënt? Noem vier regsgevolge van die regsverhouding met betrekking tot bv. vergoeding, onttrekking, kommissie, afrekening.

**VRAAG 4 [3]**

Noem drie pligte van 'n opdragnemende korrespondent.

**QUESTION 1 [11]**

Define or describe, briefly and without use of examples:

- 1.1 Fit and proper to be an attorney; (1)
- 1.2 A conflict of interest; (1)
- 1.3 Overreaching as opposed to overcharging; (1)
- 1.4 The documents subject to an attorney's lien/hypothec for fees; (1)
- 1.5 The purpose for which the Attorneys Fidelity Fund was established; (2)
- 1.6 Legal professional privilege; (2)
- 1.7 The circumstances requiring an attorney to decline a mandate. (3)

**QUESTION 2 [10]**

- 2.1 Give reasons why in certain circumstances conducting a business through a legal entity is preferable to doing so as a sole proprietor or partnership; (5)
- 2.2 What types of company can be incorporated under the New Companies ~~Act No. 71~~ of 2008? (5)

**QUESTION 3 [5]**

What is the legal relationship between an attorney and client? List four legal consequences arising from that relationship relating to e.g. reward, termination, commissions, accounting.

**QUESTION 4 [3]**

List three duties of an instructed correspondent.

**VRAAG 5** [6]

Noem ses voorbeelde/gevalle van minagting *in facie curiae*. ("in the face of the court")

**VRAAG 6** [24]

A leen R200 000.00 by B terugbetaalbaar in 60 gelyke paaient. Stel 'n volledige skuld-erkenning op met uitsluiting van die klousules oor die rentekoers, vervroegde betaling en domisilie.

**VRAAG 7** [12]

- 7.1 Wat is die essensiële sake waaroor partye moet ooreenkom om 'n geldige vennootskap tot stand te bring? (4)
- 7.2 Stel 'n gepaste klousule op wat handel met ontbinding tussen drie vennote wat insluit dood, uittrede, kontrakbreuk. (8)

**VRAAG 8** [15]

Stel enige drie van die volgende klousules op vir gebruik in enige ooreenkoms:

- ~~8.1~~ Volle ooreenkoms; (5)
- 8.2 Wysigings; (5)
- 8.3 Jurisdiksie van distrikshowe; (5)
- 8.4 Verdeelbaarheid van bepalings. (5)

**VRAAG 9** [9]

Skryf aan u klient wat gehoor het van die kurator in die insolvente boedel van een van sy debiteure om hom raad te gee oor hoe om 'n eis te bewys vir goedere verkoop en gelewer en die oorwegings oor of hy hoegenaamd die eis moet bewys.

**QUESTION 5** [6]

List six examples/instances of contempt in the face of the court. ("*in facie curiae*")

**QUESTION 6** [24]

A borrows from B an amount of R200 000,00 repayable in 60 equal monthly instalments. Draw a complete acknowledgement of debt omitting only clauses relating to the rate of interest, early repayment and domicile.

**QUESTION 7** [12]

- 7.1 What are the essential matters on which parties must agree in order to create a valid partnership? (4)
- 7.2 Draft a suitable clause to deal with dissolution of the partnership between 3 partners including retirement, breach and death. (8)

**QUESTION 8** [15]

Draft any three of the clauses listed below for inclusion in any agreement:

- 8.1 Whole agreement; (5)
- 8.2 Variation; (5)
- 8.3 Jurisdiction for district courts; (5)
- 8.4 Severability of provisions. (5)

**QUESTION 9** [9]

Write to your client who has heard from the trustee in the insolvent estate of one of his creditors. Advise him how to prove a claim for goods sold and delivered and the considerations as to whether to prove a claim at all.

**VRAAG 10** [5]

Welke van die volgende sou ingesluit word by die berekening van aanwas;

- 10.1 Groot inkomste deur die man verdien terwyl sy vrou die huishouding behartig; (1)
- 10.2 Geld wat die vrou verdien deur deelyds vir bure klere te maak; (1)
- 10.3 Die man erf R20 000,00 van sy oorlede vader; (1)
- 10.4 Die vrou ontvang R20 000,00 as algemene skade na 'n motorbotsing; (1)
- 10.5 Die POF betaal die vrou R50 000,00 mediese uitgawes; (1)

**QUESTION 10** [5]

Which of the following would be included in the calculation of the accrual as between spouses;

- 10.1 Large income earned by the husband while his wife remained at home to manage the household; (1)
- 10.2 Money earned by the wife by part-time dressmaking for neighbours; (1)
- 10.3 The husband inherits R20 000,00 out of his father's estate; (1)
- 10.4 The wife receives R20 000,00 general damages arising from an accident; (1)
- 10.5 The RAF pays the wife R50 000,00 for medical expenses. (1)

**DIE EINDE**

**THE END**

**ADMISSION EXAMINATION / TOELATINGSEKSAMEN  
ATTORNEYS' PRACTICE / PROKUREURSPRAKTYK  
PART 3 / DEEL 3**

**22 FEBRUARY / 22 FEBRUARIE 2012**

**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.**

- NOTES TO EXAMINER:**
1. *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.*
  2. *Some questions involve fairly new material and are thus relatively difficult, in others the question really indicates the answer and the test is drafting more than facts. Please mark as indicated.*

**QUESTION 1**

**[11]**

**Note: too many examples indicate lack of understanding or of drafting ability**

- 1.1 A person who displays the characteristics of honesty, integrity and reliability; (1)
- 1.2 Anything which is likely to affect your judgment adversely in advising or representing your client; (1)
- 1.3 Overreaching is abusing the ignorance of another in recovering excessive amounts from clients or debtors containing an element of impropriety; (1)
- 1.4 Documents on which the attorney has bestowed skill and labour; (1)
- 1.5 The Fund was established to reimburse members of the public who have suffered financial loss through the theft by an attorney, his employee or candidate attorney of funds or goods entrusted to that attorney; (2)
- 1.6 It is a rule of evidence that an attorney may not disclose to the Court without the consent of the client information given to him for purposes of legal advice or representation; (2)
- 1.7 Lack of expertise/qualification/experience (1); danger of a conflict of interest (1); mandate to do or assist in the doing of something illegal or improper. (1)

**QUESTION 2****[10]**

- 2.1 A body corporate gives continuity and sometimes protection against personal liability. It may be beneficial to avoid sequestration and has a better organised regulatory structure and may have tax flexibility. (5)
- 2.2 See Section 8 and definition of "non-profit company" in new Companies Act no 71 of 2008. Types of company are:
- 2.2.1 Profit company, which can be either a
- (a) State-owned company; or
  - (b) Private company;
  - (c) Personal liability company; or
  - (d) Public company.
- 2.2.2 Non-profit company, ie incorporated for a public benefit or other object (similar to old Section 21 Company). (5)

**QUESTION 3****[5]**

**Note: answer implied in question.**

The relationship is one of mandate (1). In common law the agent may not terminate without good cause (1); is not entitled to reward until the mandate has been executed (1); may not take a secret commission (1); must give a financial accounting to the principal on completion (1).

**QUESTION 4****[3]**

The instructed correspondent may not settle without instructions (1); may not communicate directly with the client (1); is deemed to have granted a one-third allowance on fees unless otherwise agreed (1); must keep instructor informed (1).

**QUESTION 5****[6]**

Contempt in facie curiae includes insulting the bench; threatening the bench; wilfully interrupting or disturbing court proceedings; defying the rulings/directions of the bench; failure to appear in court; destroying documents; breach of court orders; breaching sub judice rule.

**QUESTION 6****[24]**

**Note: this precedent is what is taught to candidates in the practice manual to reflect "plain English"**

The agreement:

**1. ACKNOWLEDGEMENT**

I, the undersigned,

JOHN DOE,

acknowledge that I owe

ABC LOAN SPECIALISTS CC,  
CK 90/00492/23

("the creditor")

R200 000 (two hundred thousand rands)  
("the capital sum")

(4)

in respect of monies lent and advanced to me by the creditor.

## 2. INSTALMENTS

2.1 I will pay the capital sum and all interest due in terms of this acknowledgement of debt in 60 (sixty) monthly instalments of [insert the applicable amount and clearly indicate how it has been calculated by providing a breakdown of its components ] ([state the instalment amount in words]) each. If at any time the interest rate changes, the amount of the instalments from then on must be changed to an amount that will result in the loan being repaid over the same period.

2.2 I will pay the instalments

2.2.1 in cash, free of deduction or set-off.,

2.2.2 on the first day of each month, commencing in the month following that in which this acknowledgement is signed.

2.2.3 to the creditor at the address which it specifies in writing from time to time, being initially [state payment address]

2.3 if so required by the creditor, I shall arrange (at my own expense) for payments to be made by means of a stop or debit order. (4)

## 3. ADDITIONAL CHARGES (2)

The creditor may include in the principal debt or recover all amounts permitted by the National Credit Act, 2005, to be included or recovered if the creditor is authorised by written agreement to do so. Such charges are the following: [The consumer has a right to information in terms of the NCA and such charge amounts must be set out in the agreement. Be lenient.]

## 4. DEFAULT (8)

4.1 Should I fail to make payment on due date of any amount owing in terms of this acknowledgement, [ will be liable for interest on that amount at the rate then payable on the capital sum in terms of 2.1.

4.2 If any of the following occurs:

- 4.2.1 I fail to make payment of any amount by due date;
- 4.2.2 I am sequestrated (provisionally or finally) or if I take steps to surrender my estate;
- 4.2.3 I make, or attempt to make, a compromise with any of my creditors;
- 4.2.4 any of my property is attached in execution of a court judgment; the full balance outstanding (including interest) will immediately become due and payable and the creditor will be entitled, without prejudice to any other remedy he may have against me, to proceed immediately for recovery of the balance.

5. PROOF OF AMOUNT OF INDEBTEDNESS (2)

A certificate signed by a person identified in the certificate (or otherwise) as a member of the creditor will be proof, until the contrary is proved, of the amount then owing by me and the due date (dates) for payment.

6. LEGAL COSTS (4)

I will be liable for:

- 6.1 the legal costs (including any tax or duty) incidental to the negotiation, preparation, and signing, of this acknowledgement of debt;
- 6.2 any legal costs, including attorney and own client costs, incurred by the creditor in enforcing this acknowledgement of debt, except costs which the creditor incurred, or which were incurred on its behalf, before it gave instructions to institute proceedings.
- 6.3 Value added Tax on the costs and collection commission.

[Date and place for debtor and witnesses to sign.]

[Magistrates' Court has jurisdiction ito s 29 of the Magistrates' court Act for enforcing the AOD.]

## QUESTION 7

[12]

Note: answers implied in question. Consider drafting.

- 7.1 Each partner must contribute; all must share in profits; the purpose must be to conduct business and earn profits. (4)

7.2 TERMINATION

### Death / Insolvency

The partnership will terminate automatically upon the death of a partner or the surrender or sequestration of his estate. (2)



## Retirement

A partner may retire from the partnership by giving not less than 6 (six) months' prior written notice to that effect to all the other partners.

A partner shall automatically retire from the partnership at the end of the financial year in which he attains the age of 65 (sixty five) years.

Should a partner, as a result of illness or injury, be unable to perform his duties for longer than 6 (six) months, then the other partners may give him notice requiring him to retire at the end of 2 (two) months from the date of the notice. (4)

(On the expiration of the periods referred to in 19-2, 19-3, or 19-4, the partnership will terminate.)

## Breach/Misconduct

A partner may terminate the partnership by written notice to the other partners in the event of any of the following: (2)

- a breach of a material term of this contract by one of the other partners;
- misconduct of one of the other partners which offends against the duty of good faith between the partners;
- a conviction of one of the other partners for theft, fraud, forgery or uttering. (8)

## QUESTION 8

[15]

## WHOLE AGREEMENT

This document contains the entire agreement between the parties. Neither party will have any right or remedy arising from any undertaking, warranty, or representation not included in this document.

(In consumer legislation such as the NCA s90 and the CPA s50(1)(g)(1) such a term will be unlawful and is prohibited.)

## VARIATION

This contract cannot be varied, added to, or cancelled by agreement otherwise than by means of a further written agreement between the parties.

(Note that variation requirements of certain contracts are dealt with in legislation. Eg consumer legislation such as the NCA, ss116 to 120 and the CPA s46)

## JURISDICTION OF MAGISTRATE'S COURT

Each party consents in terms of section 45 of the Magistrate's Courts Act, 1944, to the jurisdiction of the district magistrate's court in respect of any proceedings pursuant to this agreement.

(From 15 October 2010, there are also Regional Magistrates' Courts with civil jurisdiction up to R300 000 in some instances and hence the word "district" can be inserted to avoid uncertainty in this type of clause.)

(Such a clause is not necessary for credit agreements as the Magistrates' Court has unlimited jurisdiction in such instances.)

### SEVERABILITY

Each clause or part of a clause in this agreement is separate and severable from the rest of the agreement (unless severing would render the agreement unlawful or it would not be reasonable to do so having regard to the price, the clause or the agreement as a whole.)

Should any clause or part thereof be unenforceable, it will not affect the enforceability of the rest of the agreement (unless severing would render the agreement unlawful or it would not be reasonable to do so having regard to the price, the clause or the agreement as a whole.)

### QUESTION 9

[9]

Dear A

Your claim for goods sold and delivered against X must now be prosecuted against the trustee in his insolvent estate viz Y. In order to prove the claim we shall have to lodge:

- (a) A resolution;
- (b) Special power of attorney;
- (c) Affidavit; and
- (d) Statement of account.

Before we prove the claim we have to consider the danger that you may be held liable for a contribution to costs of sequestration. If there are not sufficient funds in the insolvent estate to pay these costs the shortfall is recovered pro rata from the concurrent creditors who have proved claims. It is accordingly advisable to establish the probable financial position of the estate before we decide whether to prove.

### QUESTION 10

[5]

- |      |          |     |
|------|----------|-----|
| 10.1 | Included | (1) |
| 10.2 | Included | (1) |
| 10.3 | Excluded | (1) |
| 10.4 | Excluded | (1) |
| 10.5 | Included | (1) |

TOTAL: [100]

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Kantoor:

- ① down a line of 5 or 6 marks
- ② up a line of 8 or 10 marks
- ③ up a line of 10 or 12 marks (large handwriting)

**NOTAS:**

1. Die lengte van die antwoord en die hoeveelheid detail hang af van die aantal punte.
2. Antwoorde word beoordeel met inagneming van die opstelwerk.

**VRAAG 1 [17]**

By welke forum, tribunaal of kantoor sal u of u kliënt verligting soek in die volgende gevalle:

- 1.1 'n Eis om skadevergoeding van R6 000,00 (1)
- 1.2 'n Bevel dat 'n bepaling wat R100 000,00 raak ongrondwetlik is; (2)
- 1.3 'n Eis om heraanstelling na onregmatige ontslag; (2)
- 1.4 'n Onregverdige berekening van pensioenvoordele deur 'n pensioenfonds; (1)
- 1.5 Ondervraging van 'n insolvent wat bates verberg; (2)
- 1.6 Wysiging of afdwing van 'n onderhoudsbevel van die Hoë Hof; (2)
- 1.7 'n Buitensporige fooi wat 'n prokureur in 'n strafszaak gehef het; (2)
- 1.8 Trustgelde skynbaar deur 'n prokureur gesteel; (3)
- 1.9 Verlies vanweë professionele nalatigheid van 'n kollega. (2)

**VRAAG 2 [16]**

Stel 'n klousule op vir gebruik in enige handelseoreenkoms wat betref die gee van kennis met insluiting van elektroniese middele en diening van prosesstukke (domisilie).

**NOTES:**

1. The length of answers and the amount of details should be based on the number of marks awarded.
2. Answers will be assessed with due regard to the draftmanship displayed.

**QUESTION 1 [17]**

At which tribunal, forum or office would you or your client seek relief in respect of the following:

- 1.1 A claim for damages for R 6 000,00; (1)
- 1.2 An order that a provision affecting R100 000,00 is unconstitutional; (2)
- 1.3 A claim for reinstatement after unfair dismissal; (2)
- 1.4 An unfair calculation of pension benefits by a pension fund; (1)
- 1.5 The interrogation of an insolvent who hides assets; (2)
- 1.6 Amendment or enforcement of a High Court maintenance order; (2)
- 1.7 An excessive fee charged by an attorney in a criminal trial; (2)
- 1.8 Trust money apparently stolen by an attorney; (3)
- 1.9 Loss due to professional negligence of a colleague. (2)

**QUESTION 2 [16]**

Draft a clause suitable for any commercial agreement dealing with the giving of notice including electronic means and serving of process (domicile).

**VRAAG 3** [21]

Stel 'n volledige uit-en-uitsessie van boekskulde deur A aan B in die vorm van 'n ooreenkoms op. Versin u eie feite.

**VRAAG 4** [23]

Bespreek kortliks:

- 4.1 Betalings deur die Getrouheidsfonds:
- 4.1.1 vir die direkte voordeel van individuele praktyke; (3)
- 4.1.2 vir die voordeel van die hele professie. (3)
- 4.2 Korrespondensie "sonder benadeling" tussen prokureurs. (8)
- 4.3 Die regte en pligte van 'n prokureur om van 'n mandaat te onttrek; hoe die onttrekking hanteer word as dit ontstaan uit versuim om instruksies te gee; retensiereg en die professionele plig van 'n nuwe prokureur. (9)

**VRAAG 5** [20]

Stel 'n uitvoerige arbitrasieklausule op wat geskik sou wees in enige handelsooreenkoms.

**VRAAG 6** [3]

Teen wie kan koste *de bonis propriis* toegeken word en hoekom?

**QUESTION 3** [21]

Draft a complete out-and-out cession of book debts by A to B in the form of an agreement. Use your own detail and facts.

**QUESTION 4** [23]

Discuss briefly:

- 4.1 Payments by the Attorneys Fidelity Fund:
- 4.1.1 for the direct benefit of individual practices; (3)
- 4.1.2 for the benefit of the profession generally. (3)
- 4.2 Correspondence between attorneys "without prejudice" (8)
- 4.3 The right and duty of an attorney to withdraw from a mandate; the way the withdrawal should be implemented if it arises from the failure of the client to give instructions; rights of retention and the professional duty of any new attorney. (9)

**QUESTION 5** [20]

Draft an extensive arbitration clause that could be used in any commercial agreement.

**QUESTION 6** [3]

Against whom can costs be awarded *de bonis propriis* and why?

DIE EINDE

THE END

**ADMISSION EXAMINATION / TOELATINGSEKSAMEN  
ATTORNEYS' PRACTICE / PROKUREURSPRAKTYK  
PART 3 / DEEL 3**

**22 AUGUST / 22 AUGUSTUS 2012**

**ANSWERS/ANTWOORDE**

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**QUESTION 1**

**[17]**

Approach:

- |     |  |     |
|-----|--|-----|
| 1.1 | The small claims court;  | (1) |
| 1.2 | A High Court;  | (2) |
| 1.3 | The CCMA;  | (2) |
| 1.4 | The Pension Fund Adjudicator;  | (1) |
| 1.5 | The Master of the High Court who may appoint a magistrate;   | (2) |
| 1.6 | The Maintenance Court;   | (2) |
| 1.7 | The Law Society (Assessment Panel);  | (2) |
| 1.8 | The Attorneys Fidelity Fund and Law Society;   | (3) |
| 1.9 | Sue the attorney in the appropriate court. The attorney may approach the AIF and his own indemnity insurers. | (2) |

**QUESTION 2**

**[16]**

The parties to this agreement choose the following addresses and telefax numbers for (1) purposes of this agreement.

PARTY 1

Physical Address

Postal Address

Telefax No

e-mail

(2)

Any notice or legal process to be served on either party may be served on it at the address specified above (1) and each party hereby chooses that address as its address for all purposes under this agreement. (1)

A notice which is sent by prepaid registered post in a correctly addressed envelope to the postal address specified above will be deemed to have been received (unless the contrary is proved by the addressee) within 10 (ten) days from the date it was posted (2). A notice which is delivered by hand to a responsible person during ordinary business hours at the above physical address will be deemed to have been received (unless the contrary is proved by the addressee) on the day of delivery (2).

A Telefax sent to the telefax number specified above will be deemed, (unless the contrary is proved by the addressee), to have been received on the first business day after transmission (2).

An e-mail sent to the e-mail address specified above will be deemed, (unless the contrary is proved by the addressee), to have been received on the first business day after transmission. (2) A party shall be entitled to amend its addresses as aforesaid by giving 7 (seven) days written notice to that effect to the other party. (1)

[If no specific agreement re e-mail is concluded, the Electronic Transactions and Communications Act applies].

### QUESTION 3

[21]

#### 1. PARTIES

The parties to this agreement are

##### 1.1 A

(the cedent) (1)

and

##### 1.2 B

("the cessionary") (1)

#### 2. BACKGROUND

The cedent wishes to cede the book debts of his business, Hotti Attires, 122 Park Lane, Dorpsville ("the business") to the cessionary for the sum of R.....; (1)

#### 3. CESSION

3.1 The cedent cedes to the cessionary all the existing book debts of the business, of whatsoever nature and from whatsoever cause arising ("the book debts"). (1)

3.2 The cessionary accepts the cession. (1)

Upon delivering of the documents specified in 4, the cessionary shall pay the cedent the amount specified in 2 in cash. (1)

4. DELIVERY OF DOCUMENTS EVIDENCING BOOK DEBTS

The cedent shall, upon demand by the cessionary, deliver, cede, transfer or negotiate to the cessionary any documents of title, agreements, negotiable instruments, or other securities held by the cedent in respect of the book debts. (2)

5. WARRANTIES BY THE CEDENT

The cedent warrants and undertakes that

5.1 he has not entered into any agreement restricting or excluding the transferability of any of the book debts; (1)

5.2 he has no knowledge of any counterclaims that may extinguish any of the book debts; (1)

5.3 he has not, prior to this cession, ceded any of the book debts to any other person or concern. (1)

6. NOTICE TO DEBTORS

The cedent authorises the cessionary to give notice of the cession to any of the debtors of the business. (1)

7. INFORMATION REGARDING BOOK DEBTS

7.1 The cedent shall deliver to the cessionary within 7 (seven) days of signature of this agreement, a full list of all debtors of the business, reflecting (1)

7.1.1 their names, occupations, and addresses;

7.1.2 the nature and amount of the indebtedness of each of them;

7.1.3 particulars of any agreements, documents of title, negotiable instruments, or other securities of whatsoever nature held in respect thereof,

7.1.4 whether the indebtedness is on open account or on credit, and in the latter event the terms of such credit. (4)

7.2 The cedent shall make available for inspection by the cessionary (or his authorised agent) at any time during normal business hours at the cedent's place of business all books of account, receipts and other books, papers, and correspondence relating to the book debts. (2)

7.3 The cedent shall give the cessionary all such information concerning the debtors of the business as he may reasonably require to enable him to recover the amount owing by each of them, (2)

SIGNED ..... etc



4.1

4.1.1 The Fidelity Fund contributes to bank charges on trust bank accounts; the cost of annual examination by accountant (auditor) and pays the premiums to the AIF; (3)

4.1.2 The Fund contributes to the administration of the LSSA; Finances De Rebus; subsidises schools for legal practice and Practical Courses and Seminars. (3)

4.2 Statements which are made expressly or impliedly without prejudice in the course of bona fide negotiations for the settlement of a dispute (1) cannot be disclosed in evidence without the consent (1) of both parties. A letter written by one attorney to another with the object of settling a dispute is thus not admissible (1) in evidence. It is considered public policy (1) to allow people to try to settle their disputes without the fear that what they may have said will be held against them if the negotiations should break down. A statement to be privileged must form part of the negotiations, and is not privileged merely by having been written in a letter containing the words "without prejudice" at the top (1).

The reply to such a letter is likewise not admissible in evidence (1). If a letter contains a statement which is irrelevant with regard to the dispute, such statement may be actionable (1). When the settlement offer contained in a letter written without prejudice is in fact accepted by the other side and the dispute is then settled on that basis both letters will become admissible in evidence (1).

[8]

4.3 The client can terminate his mandate at any stage. (1)  
On the other hand, after an attorney has accepted his brief, he cannot withdraw without sound reasons e.g. failure to pay deposit (1) or to give instructions (1), conflict of interest (1), illness (1). Before withdrawal the attorney must place client on terms (1) and withdraw at an opportune time (1).

The attorney has a lien on documents on which he bestowed skill and labour (1). New attorney should not act until first attorney's cost have been paid/secured (1).

[9]

## QUESTION 5

[20]

## ARBITRATION

Any dispute, difference, impasse, or deadlock between the parties pursuant to this agreement must be referred to arbitration in terms of the rules and regulations of the Arbitration foundation of South Africa ("AFSA"). (2)

Please note that arbitrations before AFSA are not mandatory, and parties may choose a different form of arbitration, where the clause appears as follows:

"1 Arbitration

1.1 Should any dispute arise between the Parties in regard to:

- 1.1.1 the interpretation of;
- 1.1.2 the carrying into effect of; or
- 1.1.3 the Parties' respective rights and obligations in terms hereof; or
- 1.1.4 the rectification of; or
- 1.1.5 the termination or arising out of the termination of; or
- 1.1.6 any question as to whether a valid and binding agreement was concluded between the Parties or whether such agreement is of legal force or effect; or
- 1.1.7 any other matter whatsoever emanating from this Agreement; (3)

that dispute shall be submitted to and finally settled by arbitration. (1)

1.2 Any Party to this Agreement may demand that a dispute be settled in terms of this clause by giving written notice to the other Party. (1)

1.3 This Clause 1 shall not prevent a Party from obtaining relief on an urgent basis from a competent court, pending the decision of the arbitrator; (1)

1.4 That arbitration shall be held –

1.4.1 In Pretoria and at the Brooklyn Advocates' Chambers; (½)

1.4.2 with only the Parties and their representatives, present thereat; (1)

1.4.3 mutatis mutandis in accordance with the Rules promulgated in terms of the Supreme Court Act, No 59 of 1959 and the uniform Rules of the High Court of South Africa, provided that no time period specified therein shall be longer than 10 court days for the purposes of the arbitration; (½)

1.4.4 Otherwise in terms of the Arbitration Act No. 42 of 1965, it being the intention that the arbitration shall be held and concluded as soon as possible. (1)

1.5 The arbitrator shall, if the matter in dispute is principally -

1.5.1 a legal matter, be a practising counsel or a practising attorney of not less than 10 (Ten) years standing; (1)

1.5.2 an accounting matter, be a practising chartered accountant of not less than 10 (Ten) years standing; (1)

1.5.3 any other matter, be an independent person qualified to hear and adjudicate upon such matter; (1)

and shall be agreed to between the Parties to the dispute.

1.6 Should the Parties to a dispute fail to agree whether the dispute is principally a legal, accounting or other matter within 7 (Seven) days after arbitration has been demanded, the matter shall be considered to be a legal dispute. (1)

1.7 Should the Parties fail to agree upon an arbitrator within 14 (Fourteen) days after the arbitration has been demanded, then the arbitrator shall be appointed at the request of either of the Parties to the dispute by the President for the time being of the Law Society of ..... (1)

- 1.8 The Parties irrevocably agree and undertake with each other that any award that may be made by the arbitrator: (1)
- 1.8.1 shall be final and binding upon them; (1)
- 1.8.2 will be carried into effect; (1)
- 1.8.3 May be made an order of court of the country to whose jurisdiction such Party to the dispute may be subject. (1)
- 1.9 The provisions of this clause constitute the irrevocable consent of the Parties to the arbitration proceedings in terms hereof and none of the Parties shall be entitled to withdraw therefrom or to claim at any such arbitration proceedings that it is not bound by the provisions of this clause." (1)

[Also note that consumer legislation such as the Rental Housing Act, 1999, the NCA, and the CPA introduces consumer tribunals and other ADR for which may also be made use of in such clauses. One must just be careful to read the various applicable statutes as there are limitations. (For example, the Rental Housing Tribunal does not have jurisdiction to evict tenants)]

**QUESTION 6**

**[3]**

Costs *de bonis propriis* may be awarded against an attorney (1) or any person in a fiduciary position (trustee, etc) (1) as a mark of displeasure at abusing the process of court (1).

**TOTAL: [100]**

# PROKUREURSEKSAMEN

## DEEL 3 PROKUREURSPRAKTYK

23 FEBRUARIE 2011

09:00-11:15

Totaal: [100]

*Kandidate kry 15 minute om die vraestel deur te lees voor hulle begin skryf. Geen kandidaat mag tydens hierdie tyd in die antwoordboek begin skryf nie. Die eksamen van 2 uur volg dan.*

1. Kandidate moet al die vrae beantwoord.
2. Kandidate moet daarop let dat punte vir goeie opstelwerk toegeken word.
3. Waar nodig, moet kandidate hulle eie feite versin.
4. Skryf asseblief siegs in pen op die regterkantse bladsye.
5. Tensy daar 'n spesiale rede bestaan, word 'n kandidaat nie vir 'n mondeling in hierdie deel ingeroep as 50% en meer behaal is nie. Indien 'n kandidaat minder as 40% behaal sal hy/sy nie kwalifiseer vir 'n mondeling nie en sal hierdie deel druip.

# ATTORNEYS' EXAMINATION

## PART 3 ATTORNEY'S PRACTICE

23 FEBRUARY 2011

09:00-11:15

Total: [100]

*Candidates are allowed 15 minutes to peruse the paper before starting to answer the questions. No candidate may start writing in the answerbook during this period. The examination of 2 hours then follows.*

1. Candidates must answer all the questions.
2. Candidates must remember that marks are awarded for good draftsmanship.
3. Candidates must invent their own facts wherever necessary.
4. Please write only in pen on the right-hand pages.
5. Except if a special reason exists, a candidate will not be required to do an oral in this part if 50% or more is attained. If a candidate achieves less than 40% he/she will not qualify for an oral and will have failed this section.

**VRAAG 1 [15]**

- 1.1 'n Opskortende voorwaarde het 'n ander uitwerking op 'n kontrak as 'n ontbindende voorwaarde. Verduidelik kortliks die verskil. (5)
- 1.2 Partye wil 'n koopkontrak ten opsigte van onroerende eiendom sluit wat onderworpe sal wees aan die voorwaarde dat die koper 'n verband oor die eiendom vir 80% van die koopprys sal kry. Gebruik sodanige ander feite as wat u nodig mag ag en stel die klousule op wat u in die kontrak sal insluit om:
- 1.2.1 in die eerste instansie inwerking-trede van die kontrak afhanklik te maak van die verkryging van die verband; (5)
- 1.2.2 in die tweede instansie die kontrak te laat verval indien die verband geweier word. (5)

**VRAAG 2 [12]**

Stel 'n klousule in 'n koopkontrak van onroerende eiendom op wat handel met agentekommissie. U tree vir die verkoper op en u word geadviseer dat die koper die verkoper direk genader het nadat hy die huis, wat leeg staan, gesien het. Die koper waarborg dat hy die verkoper direk genader het sonder om bewus te wees van agente.

**VRAAG 3 [10]**

- 3.1 Waarsal u 'n trust registreer wat u namens u kliënt gestig het? (1)
- 3.2 Welke dokumente moet ingedien word wanneer u 'n trust registreer? (3)
- 3.3 Watter ander inligting sal u aan die betrokke owerhede voorlê wanneer u 'n trust registreer? (3)

**QUESTION 1 [15]**

- 1.1 A suspensive condition has a different effect on a contract to a resolutive condition. Explain the difference briefly. (5)
- 1.2 Parties wish to enter into a deed of sale of immovable property which is conditional upon the purchaser obtaining a bond for 80% of the purchase price. Using any additional facts which you consider necessary, draw the clauses which you would include in the agreement which:
- 1.2.1 in the one instance will make the operation of the agreement dependant on the bond being obtained; (5)
- 1.2.2 in the other instance will terminate the agreement upon the bond being refused. (5)

**QUESTION 2 [12]**

Draft a clause in a deed of sale of immovable property dealing with agent's commission. You act for the seller and you are advised that the purchaser approached the seller directly after seeing that the house was vacant. The purchaser warrants that he approached the seller directly without being aware of estate agents.

**QUESTION 3 [10]**

- 3.1 With whom would you register a Trust that you formed on behalf of your client? (1)
- 3.2 What documents must be lodged when registering a Trust? (3)
- 3.3 What other information will you submit to the relevant authorities when registering a Trust? (3)

3.4 Welke seëlregte moet aangebring word wanneer u 'n trust laat registreer? (1)

3.4 What stamp duty will you pay when registering a Trust? (1)

3.5 Wat is die wesenlike kenmerk van 'n diskresionêre trust? (2)

3.5 What is the essential characteristic of a discretionary Trust? (2)

**VRAAG 4 [15]**

**QUESTION 4 [15]**

U word gekonsulteer deur 'n man wat u opdrag gee om dringend 'n privaat maatskappy met beperkte aanspreeklikheid waarin hy die alleen aandeelhouer en direkteur sal wees, te registreer. Hy vertel u dat die naam van die maatskappy reeds gereserveer is maar dat hy daardie aand oorsee vertrek vir twee weke. Hy wil u magtig om alles te doen en alle dokumente te teken wat nodig mag wees om die maatskappy te registreer en 'n sertifikaat om besigheid te begin daarvoor te verkry terwyl hy weg is.

You are consulted by a man who instructs you to attend urgently to the registration of a private company with limited liability in which he will be the sole shareholder and director. He tells you that the name for the company has already been reserved but that he is leaving for overseas that night for two weeks. He wants to authorise you to do and sign everything that is necessary to effect registration of the company and obtain a certificate to commence business for it whilst he is away.

Stel daardie gedeelte van die prokurasie op wat u sal voorberei vir sy handtekening en wat u die nodige magtiging sal gee om sy opdrag uit te voer. In die prokurasie moet u elke handeling wat u moet uitvoer en elke dokument wat u namens u kliënt moet onderteken, uiteensit om aan sy opdrag te voldoen.

Draw that part of the power of attorney that you will prepare for his signature which will give you the authority to carry out his instructions. In the power of attorney you must mention every action that you will take and name each document which must be signed on behalf of your client to complete your mandate.

**VRAAG 5 [16]**

**QUESTION 5 [16]**

U tree as prokureur op vir 'n groot finansiële instelling. Bespreek kortliks die volgende:

You are an attorney acting for a large financial institution. Discuss the following briefly:

5.1 U kom ooreen om die verbandregistrasiegelde wat u normaalweg vra, te verminder as gevolg van die volume werk wat u van die kliënt ontvang. Is dit toelaatbaar? (4)

5.1 You agree to reduce the bond registration fees you normally charge because of the volume of work received from the client. Is this permissible? (4)

5.2 Mag u vir die personeel van die finansiële instelling in egskeidingsake *pro amico* optree? (2)

5.2 May you act *pro amico* for the staff of the financial institution in divorce matters? (2)

5.3 Mag u 'n vakansiewoonstel gratis aan die senior bestuurslede van u kliënt beskikbaar stel? (2)

5.3 May you make your holiday apartment available to the senior management of the client free of charge? (2)

5.4 Mag u 'n eiendomsagent se kommissie voor die oordrag van 'n onroerende eiendom betaal? (4)

5.4 May you pay an estate agent the commission due prior to transfer of immovable property? (4)

5.5 'n Konkurrent van u op die finansiële instelling se paneel van prokureurs wil graag 'n groter aandeel van u kliënt se regswork bekom en stel voor dat hy/sy haar gelde sal verminder na 'n bedrag wat minder is as wat u vra. Mag hy/sy dit doen? (4)

5.5 A competing attorney on the panel of attorneys of the financial institution wishes to gain a larger portion of the client's total legal work and proposes reducing his/her charges below those which you charge. May he/she do this? (4)

**VRAAG 6 [10]**

**QUESTION 6 [10]**

Skryf 'n aantekening oor die toelaatbaarheid as getuieenis van 'n brief wat deur een prokureur aan 'n ander geskryf word sonder benadeling van regte en in die loop van 'n hofgeding tussen hulle onderskeie kliënte. Sal 'n lasterlike bewering in so 'n brief kan dien as skuldoorsaak in 'n lastereis?

Write a note on the admissibility in evidence of a letter written without prejudice by one attorney to another in the course of litigation between their respective clients. Would a defamatory statement made in such a letter be a cause of action for a defamation action?

**VRAAG 7 [8]**

**QUESTION 7 [8]**

Deur nalatigheid laat u 'n skadevergoedingseis (nie persoonlike beserings nie) verjaar. U vennoot wat oorsee is, het versoek dat u aan hom moet verduidelik wat u gedoen het toe u van die problem bewus geword het en wat die kliënt en u regte is as aanvaar word dat die verjaarde eis beslis R200 000,00 werd was. Skryf 'n brief aan u vennoot waarin u sy navraag beantwoord en handel met u firma se posisie teenoor die kliënt en die firma se potensiele aanspreeklikheid.

You negligently permit a damages (not personal injuries) claim to prescribe. Your partner who is overseas requests you to explain what you did on discovering the problem and what the client's and your own rights are if it is assumed that the claim was good for R200 000,00. Draft a letter to your partner responding to his enquiry dealing with your firm's position vis a vis the client and the firm's potential liability.

**VRAAG 8 [10]**

**QUESTION 8 [10]**

U het 'n ooreenkoms vir die verkoop van 'n besigheid opgestel namens u kliënt. Die ooreenoms is geteken deur beide partye en u mandaat is afgehandel. U moet nou 'n rekening aan u kliënt lewer. Gebruik u verbeelding en stel die rekening op wat u aan u kliënt wil lewer, waarin u al die werk wat u gedoen het, uiteensit.

You have prepared an agreement for the sale of a business on behalf of a client. The agreement has been signed by both parties and your mandate is completed. You must now render an account to your client. Use your imagination and prepare the account which you will render to your client, setting out details of all the work you have done.

**VRAAG 9 [4]**

U tree vir A op in 'n motorbotsing saak op die basis dat u gelde 15% sal wees van die bedrag wat die hof aan A toeken. Die hof bevind dat A se skade R60 000 was en dat hy 20% nalatig was. Die hof bevind op B se teeneis dat B se skade R20 000 was en dat B 80% nalatig was. Wat is u fooi? Toon u berekeninge.

**QUESTION 9 [4]**

You act for A in a motor collision on the basis that your fee will be 15% of what the court awards A. The court finds that the damage to A's car was R60 000 but that he was 20% negligent. The court finds on B's counterclaim that B's claim was R20 000 and B was 80% negligent. What is your fee? Show your calculation.

**DIE EINDE**

**THE END**



**ADMISSION EXAMINATION / TOELATINGSEKSAMEN  
ATTORNEYS' PRACTICE / PROKUREURSPRAKTYK  
PART 3 / DEEL 3**

**23 FEBRUARY / 23 FEBRUARIE 2011**

**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**

**[15]**

- 1.1 The difference between a suspensive condition and a resolutive condition is that a suspensive condition suspends the operation of the obligations flowing from the contract until the occurrence of a future uncertain event, whereas a resolutive condition terminates the obligations flowing from the contract upon the happening of a future uncertain event. (5)
- 1.2
- 1.2.1 This agreement is conditional upon the purchaser obtaining a bond for 80% of the purchase price from a financial institution, 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)
- 1.2.2 Should the purchaser be advised in writing that his application for a bond for 80% 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 into the same position as he would have been had the agreement never been concluded. (5)

**QUESTION 2****[12]**

The issue involved in this question is the indemnity of the seller by the purchaser. If the seller has 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. I suggest, therefore, an answer along these lines:

- 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.
- 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.
- 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 shall 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.

**QUESTION 3****[10]**

- 3.1 The Trust will be registered with the Master of the High Court in the area in which your client resides. (1)
- 3.2
  1. Two copies of the Deed of Trust.
  2. Letter from an Auditor.
  3. Acceptance of Trust by the trustees. (3)
- 3.3
  1. The name of the bank at which the Trust will operate its account.
  2. The name and address of the person who will keep and maintain the records of the trust.
  3. Occupation of the trustees.
  4. Motivation for the standard provision in Trust deeds whereby trustees are exempt from providing security for their administration of the Trust, in the form prescribed by the Master. (4)
- 3.4 Nil. (1)
- 3.5 The trustees have a discretion regarding the benefits that beneficiaries will receive, if at all. (1)

**QUESTION 4****[15]**

On my behalf as my attorney and agent to subscribe for one share in a company to be registered with a name XYZ (Pty) Ltd and on my behalf to sign the following documents required for the registration of the company and to obtain a certificate to commence business for it.

1. The Memorandum and Articles of Association
2. The Application for a certificate to Commence Business (CM46)
3. The Notice stating the registered office (CM22)
4. The consent to act as Director (CM27)
5. The return of Director and Auditor (CM29)
6. The statement re the adequacy of capital (CM47)

To lodge the above documents with the Registrar of Companies for registration. To make any amendments thereto which may be required by the Registrar and to uplift the Certificate of Incorporation and Memorandum and Articles of Association once registration has been effected and generally to do everything that may be necessary on my behalf to effect registration of the company and to obtain a certificate to commence business therefor.

**NOTE TO EXAMINER:** *In setting out the forms which must be signed the candidate may be given half the mark for giving the number of the form instead of its title or purpose.*

**QUESTION 5****[16]**

- 5.1 Attorneys may legitimately negotiate fees with clients provided such negotiation does not constitute either overreaching or touting. Owing to the volume of work a reduction in charges may be justified and may be appropriate. (4)
- 5.2 Acting *pro amico* for staff members in general who by implication are unknown to the attorney would not be permitted. This would constitute some form of indirect touting. (2)
- 5.3 The same argument in 2 above about indirect touting would apply and so making an apartment available free of charge would be unacceptable. (2)
- 5.4 An attorney may well be regarded as touting by making such payment. However, if it is a genuine transaction the payment is made at the attorney's risk. It must be done out of his own funds. The deposit may not be utilised for this purpose. (4)
- 5.5 Clearly the intention of the new attorney in reducing fees is to attract more work and is not based on the attorney's financial structure which would permit reduction in fees. This could be construed as touting and such conduct is consequently improper. (4)

**QUESTION 6****[10]**

Statements which are made expressly (1) or impliedly (1) without prejudice in the course of *bona fide* negotiations for the settlement of a dispute cannot (1) be disclosed in evidence without the consent (1) of both parties. A letter written by one attorney to another with the object of settling a dispute is not admissible (1) in evidence. It is considered public policy (1) to allow people to try to settle their disputes without the fear that what they may have said will be held against them if the negotiations should break down. A statement to be privileged must form part of the negotiations, and is not privileged merely by having been written in a letter containing the words "without prejudice" at the top.

The reply to such a letter is likewise not admissible in evidence (1). If, however, statements are made in such a letter which are not relevant to the dispute, such statements may well be admissible in evidence (1). Thus, if a letter contains a defamatory statement which is irrelevant with regard to the dispute, such statement will be actionable (1) and an acknowledgement of inability to pay debts is an act of insolvency even if it is made without prejudice. When the settlement offer contained in a letter written without prejudice is in fact accepted by the other side and the dispute is then settled on that basis both letters will become admissible in evidence (1).

**QUESTION 7****[8]**

Dear X

On discovering that the claim of A had prescribed due to our negligence I called A in and informed him of the position. While not admitting liability I advised him to consult another attorney to assert his rights. As you know we cannot continue to act in this matter (e.g. by taking the chance that the defendant will not raise a plea of prescription).

The client will no doubt get his new attorney to send us a letter of demand which I shall pass on to the Attorney Indemnity Fund. We are covered for amounts in excess of R200 000,00 and should be out of pocket in the worst case by no more than the excess payment of R20 000,00. I understand that the AIIF normally instructs their own attorneys to handle the matter and either to defend or settle same as they may be advised in consultation with us.

**QUESTION 8****[10]**

To fees for arranging the appointment, consultation with you and the purchaser (1), perusal of your memorandum with particulars about the transaction (1), preparing the first draft, copies for you and the purchaser, delivery or faxing thereof (1), telephone consultation with you about proposed changes to the contract (1), discussions with purchaser's attorney about amendments to the contract (1), preparation of second draft, copies thereof, delivery to yourself and to purchaser's attorney (1), receipt of telephonic instruction to finalise the contract, final amendments and draft final draft (1), telephone calls between you, the purchaser and his attorney to make arrangements for the signing of the contract (1), attendance at signing (1), correspondence, other telephone calls as well as postage and sundry expenses (1). (There are a host of possibilities. Examiners are requested to use their own discretion).

**QUESTION 9****[4]**

A's claim	$80/100 \times 60\,000$	=	48 000
B's nett claim	$20\,000/1 \times 20/100$	=	<u>4 000</u>
Award to A			<u>44 000</u>
15% fee:	$44\,000/100 \times 15/1$	=	R6600.00

**TOTAL: [100]**

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## PART 3 ATTORNEY'S PRACTICE

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1. Candidates must answer all the questions.
2. Candidates must remember that marks are awarded for good draftsmanship.
3. Candidates must invent their own facts wherever necessary.
4. Please write only in pen on the right-hand pages.
5. Except if a special reason exists, a candidate will not be required to do an oral in this part if 50% or more is attained. If a candidate achieves less than 40% he/she will not qualify for an oral and will have failed this section.

**VRAAG 1** [10]

Stel 'n klousule op in 'n ooreenkoms vir die verkoop van 'n besigheid wat die hele ooreenkoms opskort totdat paslike reëlings getref is met die eienaars van die perseel waaruit die onderneming bedryf word ten einde okkupasie van die perseel deur die onderneming te verseker. Die klousule moet voorsiening maak vir die moontlikheid van:

- 1.1 sessie en delegasie van die regte en verpligtinge kragtens die bestaande huurkontrak van die huurder na die koper met die toestemming van die verhuurder; of (5)
- 1.2 die sluit van 'n nuwe huurkontrak tussen die koper en die verhuurder tesame met 'n kansellasie van die vorige huurkontrak. (5)

**VRAAG 2** [10]

Mnr Verkoper, 'n algemene handelaar, wil sy besigheid as 'n lopende saak aan mnr Koper verkoop. Sy opdrag aan u is om 'n konsepooreenkoms op te stel sodat dit met mnr Koper bespreek kan word. Die omset van die besigheid beloop R500 000,00 per jaar. Dit sal 'n kontanttransaksie wees.

**Noem** al die belangrike klousules wat u in so 'n ooreenkoms sal insluit sonder om daarop uit te brei.

**VRAAG 3** [20]

U het 'n welgestelde kliënt. Hy het die verkoop van een van sy besighede onderhandel. Die voornemende koper dring daarop aan dat die verkoping adverteer word ingevolge Artikel 34 van die Insolvensiewet. Verduidelik aan die kliënt die vereistes, die redes vir en die effek van advertensie of versuim om te adverteer.

**QUESTION 1** [10]

Draft a clause in an agreement for the sale of a business suspending the entire sale agreement until such time as suitable arrangements have been made with the landlord of the premises from which the business is conducted to secure the tenure of the business in the premises. The clause should allow for the possibility of:

- 1.1 cession and delegation of the rights and obligations in terms of the existing lease from the tenant to the purchaser with the consent of the landlord; or (5)
- 1.2 the conclusion of a new lease agreement between the purchaser and the landlord, together with the cancellation of the previous lease. (5)

**QUESTION 2** [10]

Mr Seller, a general dealer, wants to sell his business as a going concern to Mr Buyer and instructs you to prepare a draft agreement for discussion with Mr Buyer. The turnover of the business is R500 000,00 per annum. It will be a cash transaction.

**List** all the important clauses you would incorporate in such an agreement. Do not expand on any of them.

**QUESTION 3** [20]

You have a wealthy client. He has negotiated the sale of one of his businesses. The intending purchaser is insisting that the sale be advertised in terms of Section 34 of the Insolvency Act. Explain to the client the requirements, the reasons for and the effects of advertising and of not advertising.

**VRAAG 4** [10]

Skryf 'n brief aan u kliënt mev Smith wat buite gemeenskap van goed getroud is met haar eggenoot. Haar man se boedel is pas gesekwestreer en sy vrees dat dit haar bates mag raak. Adviseer haar van die moontlike risiko's, asook wat sy kan doen om haar belange te beskerm en haar regte af te dwing.

**VRAAG 5** [14]

'U word geraadpleeg deur twee persone wat 'n hardewarebesigheid in vennootskap met mekaar wil begin. Hulle gee u opdrag om die vennootskapsooreenkoms voor te berei. Stel die klousules op wat handel met:

- 5.1 die trekkings van die vennote en die verdeling van wins en verlies; (4)
- 5.2 die bydraes van elkeen van die vennote; en (2)
- 5.3 die ontbinding van die vennootskap. (3)

U moet u eie denkbeeldige feite gebruik. Moet nie die hele ooreenkoms opstel nie.

**VRAAG 6** [8]

U boekhouer steel X se trustgeld deur 'n tjek in u afwesigheid deur u vennoot te laat onderteken en in haar man se spaarrekening te deponeer. Wanneer u die diefstal agterkom het sy en haar man reeds verdwyn. Verduidelik in 'n brief aan X wat sy regte is.

**VRAAG 7** [21]

- 7.1 Verduidelik die verskil/le tussen 'n prokureur se plig om die sake van 'n kliënt vertroulik te hou en prokureur-en-kliënt privilege. (5)

**QUESTION 4** [10]

Write a letter to your client Mrs Smith who is married out of community of property to her husband. Her husband's estate has just been sequestrated and she fears that this may have an influence on her assets. Advise her of the potential risks and what she can do to protect her interests and enforce her rights.

**QUESTION 5** [14]

You are consulted by two persons who wish to start a hardware business in partnership with each other. They instruct you to prepare a partnership agreement. Draft the clauses in the agreement which deal with:

- 5.1 the drawings of the partners and the division of profit and loss; (4)
- 5.2 the contributions of each partner; and (2)
- 5.3 the dissolution of the partnership. (8)

You must use your own imaginary facts. Do not draft the whole agreement.

**QUESTION 6** [8]

Your bookkeeper steals X's trust money by getting your partner to sign a cheque in your absence and depositing it into her husband's savings account. By the time you discover the theft she and her husband have disappeared. Explain to X in a letter what his rights are.

**QUESTION 7** [21]

- 7.1 Explain the difference/s between the attorney's duty to keep the affairs of a client confidential and attorney-and-client privilege. (5)



7.2 Bespreek hoe u reageer op 'n aanbod van 'n kliënt om aan u geld te leen as u dit graag sou wou leen. (3)

7.2 Discuss how you handle an offer by a client to lend you money if in fact you would like to borrow the amount. (3)

7.3 'n Kliënt dring daarop aan dat u dagvaarding uitreik vir 'n eis wat klaarblyklik verjaar het. Hoe verduidelik u die posisie aan u kliënt? (6)

7.3 A client insists that you issue summons on a claim that has clearly prescribed. How will you explain the situation to your client? (6)

7.4 U word skuldig bevind aan bestuur onder die invloed. Die Prokureursorde doen aansoek om u van die rol te laat verwyder. Wat sal die Hoë Hof waarskynlik beslis en hoekom? Sou die posisie anders wees as die misdryf oneerlikheid behels het? (3)

7.4 You are convicted of driving under the influence of liquor. The Law Society applies to have your name struck from the roll. What is the High Court likely to do and why? Would the situation be different if the offence involved dishonesty? (3)

7.5 U vennoot het 'n beëdigde verklaring in 'n dringende Hoë Hof aansoek opgestel. Geen kommissaris van ede is beskikbaar nie. Kan u die eed afneem? Sou die posisie anders gewees het as dit 'n aktesaangeleentheid was? Hoekom? (4)

7.5 Your partner has drawn an affidavit in an urgent High Court application. No other commissioner of oaths is available. May you administer the oath? Would the position be different if it were a Conveyancing matter? Why? (4)

**VRAAG 8 [7]**

**QUESTION 8 [7]**

Wat verstaan u onder die volgende?

What do you understand by the following?

8.1 Optrede *Pro Amico*; (2)

8.1 Acting *Pro Amico*; (2)

8.2 Party-en-party koste; (3)

8.2 Party and party costs; (3)

8.3 Prokureur-en-eie kliënt fooie. (2)

8.3 Attorney and own client fees. (2)

**DIE EINDE**

**THE END**

**ADMISSION EXAMINATION / TOELATINGSEKSAMEN  
ATTORNEYS' PRACTICE / PROKUREURSPRAKTYK  
PART 3 / DEEL 3**

**27 JULY / 27 JULIE 2011**

**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**

**[10]**

**SUSPENSIVE CONDITION:**

This agreement shall be of no force or effect unless, within 30 days reckoned from the effective date or any extension of such date by mutual agreement in writing,

- 1.1 the Seller's rights and obligations in terms of the existing lease agreement concluded between (A) as landlord and the Seller as tenant in respect of the premises are ceded and assigned from the Seller to the Purchaser with effect from the effective date with the consent of the landlord (5); or
- 1.2 the existing lease agreement between the landlord and the Seller is cancelled and a new lease agreement is concluded between the Purchaser and the landlord on terms and conditions mutually acceptable to them (5).

**QUESTION 2**

**[10]**

**Sale of business (Clauses)**

**(½ MARK FOR EACH CLAUSE)**

1. Business must be a going concern and the VAT implications must be appreciated.
2. Sale and purchase
3. Purchase price
4. Payment of purchase price
5. Suspensive conditions
6. Stocktaking
7. Assets and liabilities
8. Delivery of assets
9. Adjustment accounts

10. Effective date
11. Warranties
12. Voetstoots
13. Employees and pension fund
14. Publication in terms of Insolvency Act
15. Restraint
16. Breach
17. Domicilia and notices
18. Whole agreement
19. Waiver
20. Jurisdiction
21. Dispute resolution
22. Agent's commission
23. Costs

**NOTE TO EXAMINER:**

*The above list may not be exhaustive and candidates must be given marks for clauses which may be relevant but are not included in this list. Allocate ½ mark per clause up to a maximum of 10 marks.*

**QUESTION 3**

[20]

If a trader disposes of any business (or part thereof) belonging to him and

- 3.1 \* does not publish notice of the intended disposition;  
 \* in the Government Gazette; and  
 \* two issues each of an English and Afrikaans newspaper;  
 \* circulating in the district where the business is conducted;  
 \* within less than 30 days; and  
 \* not more than 60 days before the date of disposition; (8)

3.2 the disposition shall be void as against his creditors:

- for a period of six months after such disposition;
- and shall be void as against the trustee of his estate;
- if his estate is sequestrated within the six-month period.

The section is intended to prevent traders in financial difficulties disposing of their business whereafter the trader can spend the purchase price and the purchaser can liquidate the assets to the detriment of creditors. (10)

- 3.3 Accordingly the intending purchaser is concerned that if proper notice is not advertised -
- the sale may be voided and he may not become the owner;
  - and should the seller be sequestrated he will have paid (or must pay) the price and receive nothing. (2)

As soon as any of the notices appear all the liquidated liabilities in connection with the business become due forthwith. Creditors are entitled to demand immediate payment subject only to deduction of interest on amounts not yet otherwise due.

**QUESTION 4**

[10]

Dear Mrs Smith

I would like to inform you that as a result of the insolvency of your husband legal consequences in regard to your estate do ensue.

Section 24 of the Insolvency Act (No 24 of 1936) provides that where the spouse of an insolvent person is in possession of any property, such property may be claimed by the insolvent's trustee and in this event the property is deemed to be the property of the insolvent and could therefore form an asset in his insolvent estate.

If your husband is in possession of any of your assets you would have to take steps to recover those assets. You would have to lodge a claim, normally by way of an affidavit, with the trustee for release of your property. You will have to furnish the trustee with proof establishing your ownership.

If the trustee refuses to release the goods, it will be necessary to obtain a court order to compel him to do so. If this step becomes necessary I shall advise you further at a later stage of what such action entails.

Yours faithfully

**QUESTION 5**

[14]

**5.1 DRAWINGS AND DIVISION OF PROFIT AND LOSS**

5.1.1 The partners shall share equally in all profit and loss;

5.1.2 The partners shall be entitled to draw an agreed monthly amount as remuneration for their services, which amount shall be determined from time to time;

5.1.3 Profits remaining after payment of monthly drawings as determined by the auditors of the partnership shall accrue to partners every six months. (4)

**5.2 CONTRIBUTIONS BY PARTNERS**

The first and second partner shall each contribute R25 000,00 in cash to the capital of the partnership, payable within seven days of the signing of the agreement. (2)

**5.3 DISSOLUTION**

5.3.1 The partnership shall automatically be dissolved on:

5.3.1.1 the death of a partner;

5.3.1.2 the voluntary or compulsory sequestration of a partner's estate.

5.3.2 Each partner shall be entitled to dissolve the partnership by giving three months notice of termination to the other party without stating any reasons;

5.3.3 Either partner can summarily terminate the partnership in the event of:

5.3.3.1 breach of a material term of this agreement by the other partner; or

5.3.3.2 misconduct by the other party which breaches the utmost good faith between partners; or

5.3.3.3 conviction of the other party of theft, fraud, forging or uttering; or

5.3.3.4 mental or physical incapacity of the other party to perform his duties.

(8)

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#### QUESTION 6

[8]

Dear X

I regret to have to confirm to you that our bookkeeper appears to have stolen some of your trust money deposited with us. Since she was in our employ my partner and I are liable to replace this amount to your trust account, which we shall do the moment we have established the exact amount. We have reported the trust shortfall to our law society which will also exercise supervision that we act correctly in this matter. If it appears that we are unable to pay the amount you will be entitled to recover any shortfall as well as your reasonable costs and reasonable interest from the Attorneys Fidelity Fund. They will require you to have given timeous notice of the possibility of a claim and will want to be satisfied that you were unable to recover from us or from any other source. Whatever the position, you should not suffer any loss. Please feel free to obtain independent representation in prosecuting your claim against us and the Fidelity Fund.

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#### QUESTION 7

[21]

7.1 The attorney is in contract obliged to keep the affairs of the client confidential. There are provisions in legislation which compel attorneys in certain circumstances to disclose certain information. Legal privilege belongs to the client and the attorney cannot be compelled to disclose in evidence information given to him by a client with a view to legal action or legal advice. It is actually a rule of evidence. (Some credit can be given if candidates deal with the rules regarding which disclosures by clients are subject to legal privilege or not but this is not essential). (5)

7.2 It is improper to borrow money from a client unless the client is in the business of money lending or has been referred to take independent legal advice. In other situations there will be a conflict of interest. (3)

7.3 It is not wrong to issue summons on a claim which you believe will not succeed as in the case of prescription. The client must, however, be fully informed of the implications i.e. the probability of an order for costs against the client if the claim is unsuccessful. It is wise to confirm your advices to client in a letter as clients often choose to forget how

They were advised. In the particular case the position is that if prescription is raised as a special plea the claim can be withdrawn before too much costs are incurred and if it is not raised by the Defendant the court may not do so *mero motu*. (3)

- 7.4 The High Court is not likely to strike the name of an attorney from the roll for an offence such as driving under the influence of liquor as the test to be applied is whether the individual is a fit and proper person to practise as an attorney. The court will probably nevertheless award costs to the society as it is performing a fiduciary duty. If an offence were to include an element of dishonesty this would clearly affect the fitness of the person to practise as an attorney who would probably be struck or suspended. (3)
- 7.5 You may not administer the oath in a matter in which you have an interest. By definition a court case in which your firm is involved is a matter in which you or your firm has an interest. It is permissible to administer the oath in Conveyancing matters as the act and regulations specifically exclude Conveyancing matters from those in which you are regarded as having an interest. (4)

#### QUESTION 8

[7]

- 8.1 An attorney may act *pro amico* for a friend or relative without charging fees. There must be a genuine friendship or family relationship between the attorney and his client to avoid there being any suspicion of touting. Colleagues are often regarded as friends for this purpose. The attorney need not charge fees but may recover disbursements incurred in carrying out the mandate; (2)
- 8.2 Party and Party costs are costs according to tariff which a successful litigant may recover from the losing party if the court makes a costs award in favour of the winner. If the costs cannot be recovered from the losing party, the successful party's attorney may only recover the party and party costs from his own client unless there is an agreement that he may charge more. If an attorney fails to discuss fees with the client he may not charge him more than the party and party fees. (3)
- 8.3 Attorney and own client fees are fees which an attorney is entitled to recover from his own client. The manner in which these fees must be determined is incorporated in an agreement between the attorney and the client, preferably the agreement should be in writing or at least confirmed in a letter. The fee must be reasonable. (2)

TOTAL: [100]