EXAMINER’S COMMENTS

The exam was a closed book exam comprised of four (4) questions. **Question 1** related to the Solicitor’s arm of the profession; **question 2** to the profession as a whole and although **questions 3 and 4** dealt with the role of Counsel, they applied equally to Solicitor advocates.

**Question 1** provided quotes from *Jones and Dupal* on the topic of improper use of trust funds.

The Question related to the need for honesty when dealing with client funds.

What did students think of the 'high bar' which had been set by the Courts? Why?

An appropriate answer would have been expected to contain some discussion on, at least, the question of professional misconduct; the way the Courts have dealt with dishonest behaviour - eg *Mayes, Bridges, Bolster, Harvey etc.* and how the legislature had imprinted these principles in LUPL (especially the trust account requirements).

What is the solicitor/client relationship all about - fiduciary obligations.

Why are such severe sanctions necessary - *cf Walsh's case.*

One student, at least, thought that the bar was too high - the student argued, quite logically, that although honesty remains a fundamental issue, the modern form of practice (with large firms and many principals) required some relaxation of the individual's responsibility - especially where they had not been a party to any personal/actual (mis)conduct.

Some students properly referred to *Brereton's case* and how one should objectively look at the conduct.

**Question 2** was all about personal conduct as a standard to fitness to practice. Why should we care what practitioners do in their private lives? Have the Courts and the legislature overstepped the mark?

Again, the underlying theme was honesty as a prerequisite of fitness.

By reference to various cases - eg *Cummins, Somosi, Murphy etc* students would have been expected to distinguish why certain conduct, unrelated to practice, reflected adversely on the question of fitness whereas other conduct did not. For example, the contrast between *Harrison and Hamman* was a good one as was a summary of the issues relevant to *Ziems.*

Many other cases such as *Davis, Wentworth etc* could have been used as examples.

The legislature had, after the exposure in the media of certain practitioners’ conduct, reflected the public’s concern in the disclosure provisions – it was expected that they would be briefly explained.
Question 3 referred to the issue of ‘guilty’ clients and the manner in which advocates should behave having regard to their obligations both to the client and to the Court.

An appropriate answer would have explained and commented on Bar Rule 26; the elements in Bar Rule 80 and the requirements of Bar Rules 101 and 107.

An explanation of Tuckiar, its facts and what the High Court had to say about counsel’s conduct was imperative when dealing with this question.

Question 4 posed the more general question – what are the limits to an advocate’s conduct when exercising his obligations to a client.

The limits to be discussed included:

(i) Not to make closing submissions for which there was no evidence at the hearing: Smout v Smout.

(ii) Not to make opening submissions for which the advocate had no evidence: Clynes’ Case; Bar Rules 35 and 36.

(iii) Not to act outside authority and/or instructions: Harvey v Phillips; R v Birks, Swinfen v Chelmsford.

(iv) Not to mislead the Court: Meek v Fleming and Bar Rules 21, 25 and 29.

(v) Not to frustrate the Court process: Ex parte Bellanto; Costello’s case; Kennedy’s case; Mechanical and General Inventions v Austin.

Generally, the marks were well scattered – over 11% gaining a Distinction and nearly 35% gaining a Merit grade. On the other hand over 20% failed (prior to any re-marking – over 12% after re-marking) and some of the failing marks were extremely disappointing. Of this last group a number of scripts indicated that the student had done little if any work in the subject.

In general, questions 2 and 4 were the better answered question with question 3 being the least well answered. It was interesting that students could do well in the majority of questions, yet fail one or more of the remaining questions – in most cases this appeared to reflect revision issues.

One issue which remains of concern was the poor grammar used by a number of students. Law is a language based discipline. The proper use of grammar is crucial to professional life. Students need to work hard on improving their English language skills. Failure to have a strong command of written English could result in students facing grave difficulties in their future legal practice.