

## EXAMINER'S COMMENTS – MARCH 2018

The exam was a close-book exam comprised of four questions of equal value (80% of the total course mark). A compulsory assignment had earlier been completed by students (20% of the total course mark). Each question was equally weighted.

Of the four questions, two dealt with issues involving legal practitioners generally and two dealt exclusively with the conduct of advocates.

**Question 1** referred to show cause events and their purpose.

Students would have described the '*show cause*' process – the need to report various events and offences and the onus on the practitioner to satisfy the local regulatory authority of their continuing fitness to retain a practising certificate.

Cases such as **Cummins** and **Murphy** were appropriate contrasts as to the type of conduct which would/would not lead to an adverse finding – and the reason(s) for such a finding.

Students would have pointed out that there was now a method for the Bar Association/Law Society to have these matters come to its notice and to deal with them and any conduct issue which might arise from the *event*.

There is, clearly, a real value and purpose to the provisions.

**Question 2** dealt with the difference between confidentiality and legal professional privilege.

Both terms should have been contrasted - confidentiality, in short, is the practitioner's obligation whereas privilege is the client's right.

A good answer would have contained some discussion on privilege – definition; sole v dominant purpose test (**Grant v Downs/Esso**); quasi-judicial proceedings (**Campbell**); Exceptions (**Kearney** etc); present view (**Daniels**) etc.

On the other hand confidentiality was an obligation re-enforced by the Rules and expected of practitioners by their clients and the public at large.

Although they are different principles, confidentiality and legal professional privilege serve the same end – having a disclose to their lawyer everything required by the lawyer so that he/she can properly exercise their function.

**Question 3**

This question dealt with the conduct of advocates and how **Clyne's** case had set a number of standards that stand to this day.

Students were required to distinguish between the Bar Rules and the 'fundamental' rules and how the incorporation of the term - *unsatisfactory professional conduct* – highlighted the different concepts.

Students would have highlighted a number of Rules which relate specifically to the conduct of advocates during the course of proceedings, for example Bar Rules 24, 29 and, specifically, *Clyne's Rules* – 60 and 61.

The consequences of failing to abide by an advocate's responsibilities can be disciplinary action – student's would have highlighted what the Court said (p202) of the purpose of disciplinary proceedings. A fuller answer would also have highlighted Justice Beazley's judgment in ***Walsh's case***.

#### Question 4

This question related specifically to the responsibilities of a Prosecutor.

A good answer would have highlighted a number of principles extracted from the cases studied during the Semester:

- A Prosecutor has a discretion on whether or not to call a witness. There is no duty to call a witness whose evidence is not essential – ***R v Lucas***;
- A Prosecutor should call a witness to an event which goes to prove the elements of the crime, irrespective of whether the evidence strengthens or weakens the Crown's case – ***R v Lucas***. ***Ziems'*** case would have been a very good example of where such failure might disadvantage a defence ( inability to cross-examine);
- The requirements ( and exceptions) of BR 89
- *The effect of Whitehorn as reaffirmed in Apostolides.*
- *The role of the Judge in criminal proceedings - Apostolides:*

As with past exams, the questions were designed to cover a number of topics and, at the same time, encourage the student's consideration of ethical issues.

As stated in the comments to the September 2017 exam – “... *the exam questions are not to be seen as necessarily representative of a proportion of the course, that is, a question worth 20% of the exam mark should not be seen as being representative of a similar percentage of the course work. ... exam questions have as their primary purpose an examination of a student's understanding of the relevant principles raised in one or more (course) topic and the capacity to respond to a fact situation/question by use of those principles (and authorities).*”