EXAMINER’S COMMENTS – MARCH 2019

The exam was an open-book exam comprising of four questions of equal value (80% of the total course mark). A compulsory assignment had earlier been completed by students (worth 20% of the total course mark). Each question was equally weighted. One question permitted the student to address two of four sub-questions and one question was divided into two parts.

Of the four questions, one dealt exclusively with the conduct of advocates and the three others covered the conduct of legal practitioners generally.

**Question 1** had four sub-questions. (1) dealt with legal professional privilege; (2) looked at the concept of trust money; (3) raised the issue of ethics generally and (4) touched on the issue of professional misconduct.

(1) Legal Professional Privilege (LPP) – the question was designed to have students explain what LPP was, some of its history, the exceptions to it (illegality etc.). It is the client’s privilege which should, where possible, be used by practitioners to protect/enhance their client’s case.

(2) Trust money – an answer to this question would have explained what is trust money, the importance of the Solicitor’s obligations to the proper maintenance of trust funds and the rights of clients. At the same time, through liens, there is some protection for practitioners.

(3) Ethics – the obligations which the lawyer has to the client are compared to the overriding duty to the Court and the administration of justice. Results are important but subservient to the lawyer’s fundamental obligations. Ethics symbolises the legal profession.

(4) Professional Misconduct – what is professional misconduct (at common law and legislatively) and what is its importance in the context of legal practice – professional misconduct raises a *prima facie* question as to a practitioner’s fitness. It is an important concept in understanding a lawyer’s professional obligations.

All four questions required the student to refer to appropriate legislative provisions - Legal Profession Uniform Law (LUPL); Conduct Rules; Regulations etc as well as appropriate case law.

**Question 2** asked students to address two issues – conflict of interest and the requirements/ramifications of the ‘show cause’ provisions in LUPL.

Conflict of interest – with appropriate references to the applicable cases and Rules, students would have identified that conflict is not only an ‘event’ but a ‘possibility’ to which practitioners should be vigilant. Students would have discussed what practitioners should do to avoid it and what the Courts have done when it has occurred.

Show cause events – show cause have not changed the areas of conduct which can lead to disciplinary action. The disclosure provisions simply put in place a regime for mandatory self-reporting after which the regulators have to consider the practitioner’s fitness to hold a Practising Certificate and, in extreme cases, fitness to remain on the Roll.

Again, with both questions, students were required to refer to appropriate legislation and case law in support of their position.
**Question 3** raised the issue of a practitioner’s duty to the Court in light of his duty to his client and saw the advocate come face to face with locating a crucial authority in two fact scenarios.

The question required students to compare what the Court had said in both *Clyne* and *Rondel v Wolseley* as well as the provisions of the Bar Rules insofar as they deal with the responsibilities of advocates to the Court.

In addition, subject to which of the alternative scenarios the student was considering, the student was further required to consider the question of professional conduct and how best the advocate might be able to attend to his client’s position given his responsibilities to the Court.

Most students went to the extent of considering the ramifications on professional indemnity insurance and in doing so would have referred to *Heydon v NRMA*.

**Question 4** asked students to have regard to the legal principles applicable when determining whether a practitioner’s conduct should or should not result in his/her name being removed from the Roll. Further, to compare and contrast the application of those principles with regard to conduct within practice and outside of practice.

Having dealt with the concept of professional misconduct and how such a finding may lead to the removal of a practitioner’s name from the Roll, students would have addressed the fundamental issues of honesty and dishonesty which have been raised in cases such as *Davis*, *Jetnikoff*, *Moore*, *Re B*, *Wentworth*, *Coe*, *Pangallo*, *Kennedy* and *Hamman* and contrasted those cases with *Costello*, *Thomas*, *Del Castillo*, *Re H*, *Harrison* and *Ziems*.

The examiners wish to again stress that 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. Similarly, students should not expect that questions will simply require a student to deal with any one topic within the course – 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).