

Examiners' Comments on the 2021 Examination

HEAD IV: Accounts and Professional Conduct

Part A - ACCOUNTS

Question 1

1. This year's question was a very straightforward one and should not have caused any difficulties to the candidates.
 - (a) This was very straightforward and required a discussion over whether or not a client account with a bank account had to be opened. Many of the candidates raised irrelevant comments and tried to write down everything they knew about the use of and rationale for a client account! There was a general lack of application.
 - (b) This was a more challenging question which required knowledge as to whether or not a client account can be opened outside Hong Kong as well as payment on account of costs by way of Bitcoin. Many of the candidates took the view that it was possible to do so by applying for a waiver of the Rules. However, very few candidates attempted to provide reasons as to why a waiver would be granted. As to Bitcoin, many of the candidates did not have any idea as to how to deal with this issue and did not look at the Rules carefully.
 - (c) This was very straightforward and should not have caused any difficulties but again, some of the candidates did not even attempt to give any considered discussion as to the relevant Rules and Practice Directions and at the same time, some candidates still took the view that the bookkeeper could sign client account's cheques! However, most candidates were able to pass this particular question.
 - (d) This again should have caused no issues and was an easy question to gain marks by identifying the rationale for reconciliation. However, most candidates just went straight to the manual and copied out the relevant section without any thought.

- (e) This was very badly answered by everybody. Indeed, it is clear that no one read the question carefully. Very few knew that each year Certified Public Accountants need to provide a report as to compliance with the Accounts Rules vis-à-vis examining the relevant client account, books, etc. Most of the candidates went on a detailed analysis of the use of management accounts, profit and loss, etc. Most of the candidates failed to pass this question.
2. Hence, overall, taking matters as a whole, this paper should not have caused any difficulties. However, the fact that they could not answer Question (e) resulted in some of the candidates failing the paper. Those who failed lacked knowledge and understanding of the Accounts Rules.

Part B - Professional Conduct

Question 1

This year there are altogether 98 scripts for marking. Out of those 98 candidates, only 24 managed to obtain a mark of 12½ or above in the first marking. The failure rate is very high despite this Q1 of Part B is not difficult.

The question looks at a senior lawyer whose partners had decided to close down the law firm. Candidates were asked to consider on the form and substance of legal practice which the senior lawyer would wish to start afresh. To begin, that senior lawyer would like to set up a one-man sole proprietorship in the same name as the old firm. He would use his family home as his office and engage clients in video conferencing. To him, his home office would be his virtual office and his adult children and wife would be his assistants and secretary respectively from time to time. The senior lawyer would buy a light bus and convert it into his mobile office. He would park the light bus near to police stations or magistracies when his former clerk would bring businesses to him. On the two sides of the light bus, that senior lawyer would post banners stating in golden bold prints that his law firm would be one of the best if not the best and that his law firm would practise all types of legal services.

That senior lawyer would conduct first hand property transactions in the light bus. When he had free time, he would study criminal law which he professed to be quite ignorant of.

Candidates were asked to provide their answers in the form of a draft opinion.

The question provides plenty of prompts to candidates and one would have thought that it would not be too difficult for any candidate to score 12.5 marks and above.

It turns out that the results are appalling. While most of the candidates would have some ideas on what constitutes practice promotion, the limits of doing practice promotion and why the senior lawyer would be in breach if he should proceed onto doing the “virtual office” and “mobile office” in his proposed new practice, there was insufficient depth in most of the answers.

Some candidates simply copied out long passages from the Solicitors' Guide.

The bad result demonstrates the overall quality of the candidates taking the Head IV exam in 2021.

Question 2

This question was concerned with solicitors' professional undertakings and its facts were based upon those of *Angela Ho & Associates (a firm) v Kwong Ka Yin t/a Phyllis KY Kwong & Associates* [2014] HKCU 2774.

The question contained two parts. The first required the candidates to provide a detailed discussion of the issues of professional conduct raised by the actions of a firm of solicitors (Firm A) in breaching a professional undertaking. The second part required them to address what steps, if any, the firm which had received the undertaking (Firm B) could take against Firm A. Despite it being a concerned with an important aspect of a solicitor's practice, only 22% of the candidates achieved a 'pass' mark of 12.5 or more.

With respect to the first part of the question, a significant number of candidates mentioned the issue of undertakings in only a cursory manner, with no little more than a sentence or two. Of those that spent a little more time on the subject, most only managed to identify a couple of the relevant provisions from *The Hong Kong Solicitors' Guide to Professional Conduct* ('SG'). Very few addressed the facts or the SG's provisions or case law in sufficient depth by, for example, discussing the fact that SG Principle 14.08 states that an undertaking is still binding even if it is to do something outside a solicitor's control. It is notable that not one candidate referred to *Angela Ho & Associates (a firm) v Kwong Ka Yin t/a Phyllis KY Kwong & Associates*. Nor did they refer to any other relevant judgments including the recent UK Supreme Court decision in *Harcus Sinclair LLP v Yours Lawyers Ltd* [2021] UKSC 32.

The facts of the question also made it clear that the partner in Firm A was in breach of SG Principles 2.03 and 2.04 for failing to properly supervise his assistant solicitor. Only a few candidates referred to this point in the first part of their answer. Further, most candidates missed a breach of confidentiality, under SG Principle 8.01 and in the retainer, by the assistant solicitor at Firm A in mistakenly sending a note (of a meeting with his client) to Firm B.

Rather than dealing with the pertinent facts and regulatory issues, many candidates discussed various irrelevant points, such as the SG provisions on briefing counsel (SG Chapter 12) and fees (SG Chapter 4). Some candidates wrote, in a very vague fashion, of the need for solicitors to act in ‘good faith’.

As to the second part of the question, few candidates were able to explain that Firm B could apply to the court to exercise its inherent jurisdiction to supervise solicitors by enforcing the undertaking against Firm A; make a complaint to the Law Society; or bring a claim for breach of contract against Firm A. Many mentioned only one or the other of the first two of these three options. Very few discussed the possibility of a contractual claim. Some, erroneously, discussed the inability of barristers to sue for their fees. Some, again, referred to the need for solicitors to act in ‘good faith’.

In summary, the answers given for this question demonstrated that the majority of the candidates were unfamiliar with the professional conduct obligations relating to solicitors’ undertakings, either in their entirety or in any satisfactory detail. Whilst this alone is worrying, there is also the fact that many candidates seemed to be incapable of comprehending the question set before them. The reference to numerous irrelevant matters in their answers revealed that they had not read the exam paper or did not understand what they had read.

Question 3

This was a straightforward question on competence divided into three parts. The first part concerned the issues of professional misconduct arising from a solicitor’s action – and lack of action - in respect of a Warning Notice and an Order from the Buildings Department requiring the demolition of a client’s property. The second part concerned the firm’s decision to bill the client. The third part concerned the firm’s senior partner’s interpretation of its retainer letter and his proposed response to the discovery that the solicitor had been negligent. Despite being a straightforward question, only 16% of the candidates achieved a ‘pass’ mark of 12.5 or more.

With respect to the first part of the question, whilst most (but not all) candidates recognised that the solicitor had not been competent to deal with the client’s dispute with the Buildings Department, very few considered and analysed the relevant facts, regulatory provisions and case law. Many

candidates did not even refer to any or all of SG Principles 5.03, 5.12 or 6.01. Further, few discussed the fact that the solicitor had not instructed suitable counsel and was also in breach of his duties pursuant to SG Principles 5.03 and 12.03 in respect of the fact that counsel's advice had been incorrect. Some candidates referred to *Davy-Chiesman v Davy-Chiesman* [1984] 1 All ER 321 but not to any other relevant authorities. There was also very little discussion of the fact the solicitor's 'loss' of an important letter from the Buildings Department was a clear breach of SG Principles 5.03, 5.12 and 6.01.

In terms of the solicitor's and the firm's legal liability for the former's negligence, very few candidates mentioned any cases other than *Midland Bank Trust Co Ltd v. Hett, Stubbs and Kemp* [1979] Ch 384. Most candidates failed to discuss legal liability at all.

In respect of the second part of the question, most candidates recognised that any interim bill from the firm should have been agreed in advance with the client as per SG Principle 4.08. It had not and, therefore, the firm could not render a bill until the conclusion of the matter. Many candidates also recognised that the firm had not obtained the client's authority to instruct counsel as per SG Principle 5.17, Commentary 3 and SG Principle 4.03. Some also correctly noted that the retainer letter had set out an agreed or capped fee as per SG Principle 4.02 or 4.05. Many 'correct' answers were, however, lacking in sufficient detail.

As to the third part of the question, many candidates stated that a limitation clause in the firm's retainer was ineffective, but fewer explained why by reference to section 59(2) of the Legal Practitioners Ordinance and SG Principle 6.01, Commentary 7. Only a couple of candidates mentioned section 3 of the Control of Exemption Clauses Ordinance. Finally, whilst many candidates also recognised that the senior partner was incorrect in his belief that the solicitor's negligence could be ignored and that the firm, instead, was obliged to notify both its client and the SIF of this negligent conduct, very few referred to the relevant SG Principles.

As with Question 2, most candidates displayed an ignorance of the detailed relevant regulatory provisions, legislation and case law in relation to the issues addressed by this question. Again, the inability of some candidates to read the question was evident.

Overall Comments to Part B on Professional Conduct

1. The followings were observed:-
 - (a) The various answers show a lack of understanding and knowledge in respect of Professional Conduct. There were numerous errors.
 - (b) The main issue was that the answers were not applicable at all to the actual questions that were posed. The questions were straightforward and could easily have been answered. Many of the answers put forward irrelevant points.
2. Overall, it is noted that the candidates lacked relevant application and knowledge.

January 2022

.6399993