Examiners' Comments on the 2020 Examination

HEAD IV: Accounts and Professional Conduct

Part A ACCOUNTS

Question 1

1. This was a very straightforward question which was split into 8 different parts. The object of the question was to ensure that the candidates have the ability to address particular issues raised in each sub-section. None of the facts should have caused any difficulties.

2. However, some of the candidates did not read the question carefully and did not realise that they needed to address the accounting issue on an ongoing basis.

3. In particular, there was a considerable amount of confusion by the candidates as to the fact that there were insufficient monies in client account at the appropriate time to ensure that payment could be made out of client account.

4. Hence, basic errors were made as to identifying the exact monies in client account at the relevant time which resulted in fundamental mistakes being made.

5. Some candidates also ventured into irrelevant issues despite being told only to address accounting issues. They decided to raise issues as to conduct vis-à-vis leading counsel's request re his brief.

6. Some of the candidates also failed to read the question carefully in that they did not take into account that the monies paid to leading counsel were on account of future fees and failed to take this into account when dealing with the specific issues they were asked to address.

7. Another issue that caused difficulties to the candidates was that despite there being an agreed fee, i.e. monies due to the firm, they took the view that part of this agreed fee could be used to pay counsel's fees.

8. Some of the candidates who did well were able to provide a continuous accounting of the various issues being raised and in particular, identified the monies that had been received into client account and the monies that were due from the client regarding counsel's fees, etc. However, most candidates missed this point.

9. As can be seen from the marks allocated to item (g) and (h), the objective here was for there to be some discussion as to the final accounting with regard to the monies received and paid and very few were able to provide clear and concise answer to the various issues they were asked to address and deal with.

10. Irrelevant points and lack of application was the main cause for the candidates to a fail. They just repeated the provisions set out in the manual or the rules without applying them to the actual facts that they were asked to address and failed to provide any considered discussion.

PART B PROFESSIONAL CONDUCT

Question 1

This year there are altogether 109 scripts for marking. Out of those 109 candidates, only 36 managed to obtain a mark of 12½ or above in the first marking. The failure rate is high despite this Q1 of Part B is not difficult.

The question looks at three solicitors, Andrew, David and Elvis. Andrew, a litigation partner of B&B, was approached by his long lost classmate Charles, who wanted B&B to act for him in developing a drug based on a 'secret formula' and finding professional investors. The circumstances clearly required substantial customer due diligence ("CDD"). Andrew rightly asked his managing partner David and a junior commercial lawyer Elvis to assist him. David rightly asked Elvis to find out as much as possible about Charles, the 'secret formula' and whether Charles was telling them the truth, before accepting Charles as their client.

Elvis met with Charles, obtained documents and made extensive enquiries to establish the veracity of Charles' instructions. Elvis however failed to check whether Charles was a politically exposed person ("PEP"). Elvis took some four months and still the CDD was incomplete.

Andrew was upset, left B&B, set up his own practice and Charles immediately became his first client without completing the CDD. Andrew then sent out letters to all the major corporate clients of his old firm B&B making exaggerated claims about the profitability of Charles' project. Many people put money with Andrew's firm in order to invest in the project; they lost their entire savings when Charles disappeared taking their money with him.

Police executed a search warrant on B&B seeking for documents relating to the project. David asked Elvis to give police the documents taking the wrong view that because Charles was not 'formally' a client of B&B, they could pass the documents to the police.

Candidates were asked to discuss the professional conduct of Andrew, David and Elvis, and what B&B should do regarding the police search.

Most candidates commented on the CDD requirements under Practice Direction P ("PDP") and Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615) ("AMLO") and scored marks. Most candidates however have missed out the requirement under AMLO (and PDP) to check whether Charles was a PEP. Most have identified a quasi-retainer existed between Charles and B&B and therefore an obligation of confidentiality had arisen. Some argued that there was no issue on legal professional privilege because no advice had been given by B&B. While that may be argued, the approach limited those candidates in scoring more marks under section (d).

Many candidates wrote lengthy passages on the competence of Andrew, whether a written retainer was necessary; some suggested that B&B should provide fee estimation. Some wrote the Solicitors' Practice Promotion Code ("SPPC") was breached (wrong because Andrew was promoting Charles' project, not his firm). Quite a number thought Andrew should not accept Charles as a client because Charles was a client of B&B. While not accepting Charles as a client must be right because the CDD about him and his 'secret formula' could not be satisfactorily concluded, it would be wrong to think law firms enjoy some kind of monopoly and no other lawyers can touch their existing clients. Finally, not a small number of candidates thought Charles wanted B&B to help developing the drug as opposed to help him on the legal work in developing the drug and found that objectionable.

There is a feeling that candidates have been coached to take a potshot at the questions and cover all the main topics in the Hong Kong Solicitor's

Guide to Professional Conduct ("SG") in the answers. While no marks have been deducted for referring to irrelevant issues, no extra marks have been awarded for those wasted efforts.

Question 2

This question had two distinct parts. The first concerned the operation of the SPPC and related parts of SG whilst the second addressed the requirements of PDP.

The scenario upon which the first part of the question was based involved a three-partner general commercial firm which embarked on various practice promotion initiatives. Among these were a change of the firm's name; distribution of its literature at a chain of restaurants owned by a relative of one of the firm's assistant solicitors; and a redesign of the firm's website. All these initiatives raised potential breaches of the SPPC.

Candidates were asked to explain the nature and scope of 'practice promotion' and the SPPC's provisions thereupon. Many were only able to do so in a basic sense and seemed to be unfamiliar with the actual relevant terms of the SG (e.g. SG Principle 3.02) or the SPPC (e.g. rule 1, SPPC). Candidates were also asked to identify what, if any, breaches of the SPPC had been committed by the firm. Many candidates did not identify all the breaches or refer to the relevant requirements of the SPPC. For example, some candidates merely stated that using actors to impersonate satisfied clients in video 'interviews' on the firm's website was 'unethical' without explaining why this was so.

The second part of the question dealt with one of the partners of the same firm receiving an unsolicited e-mail from a potential overseas client. This potential client wished to purchase business premises in Hong Kong and intended to deposit US$3,000,000 into the firm's bank account as part of that process. Candidates were asked what action the partner should take before accepting the instructions and what he should remain aware of after having done so (if the instructions were accepted).

Although the answers to this second part of question 2 were better than those to the first part, many candidates continued to provide only vague and basic explanations of PDP and related legislation such as AMLO. There was, for example, little detailed explanation of the requirements of, and distinctions between, client identification and verification. Further,

few candidates mentioned the need to keep proper records of this particular transaction for 15 years in accordance with PDP Section A, Item 6.

Question 3

This question concerned a personal injury claim arising out of a motor traffic accident, with candidates being asked to consider issues from the point of view of both the plaintiff and the defendant. Generally speaking, candidates' answers to question 3 were better than those they gave to question 2.

The first part of question 3 addressed the involvement of a recovery agent in the plaintiff's retainer of a firm of solicitors on a contingency fee basis. Most candidates were able to identify the salient issues although only some were able to discuss them in detail. There were, in particular, few references to such authorities as *Unruh v Seeberger* [2007] 2 HKC 609. The competence and conduct of the partner at the firm were also matters for consideration. Although most candidates recognised that - as someone who specialised in employment law - he was not competent to handle personal injury litigation, many did not discuss the details of SG Chapter 6. Moreover, some candidates did not appreciate the fact that solicitors may not exclude or limit their liability in negligence when representing clients in litigation. Other issues raised by the question, such as the correct way to instruct counsel, were dealt with relatively well.

The second part of question 3 dealt with the conduct of the solicitor acting for the defendant. Firstly, the defendant informed him that, if asked during cross-examination, she would deny that she was tired at the time of the accident even though she admitted to the solicitor that she had been exhausted. Most candidates correctly explained that, pursuant to SG Principle 10.03, Commentary 6, there was no obligation upon him to inform the court (or the other side) of the defendant's exhaustion at the time of the accident. They also recognised, however, that he could not knowingly put forward or let his client put forward false information with intent to mislead the court. Most also added that he should advise her not to attempt to mislead the court and, if she refused to accept this advice, he should cease to act for her.

Further, candidates were asked to discuss the fact that, notwithstanding the defendant's refusal to settle, the solicitor agreed to compromise the claim for a payment of $300,000 to the plaintiff. Many candidates' answers were very brief, possibly reflecting a lack of time having been accorded by them

to deal with this – the last – question of the exam. Some did not answer the question at all. Those candidates who were able to provide a substantive answer explained that the solicitor should have sought the defendant's agreement before settling and most referred to SG Principle 10.17, Commentary 1 and SG Principle 5.12, Commentary 6 here. Unfortunately, some candidates were confused about the consequences for the defendant of the solicitor's actions. There were, in particular, very few references to *Waugh v HB Clifford* [1982] 2 WLR 679 in this regard.

Finally, a minority of candidates mistakenly assumed that the defendant was facing a criminal action in their answers to the second part of question 3. This suggests a worrying lack of attention to detail and preparation on their part.

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