

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 105: PROFESSIONAL ETHICS & PRACTICE

MONDAY 25TH JULY, 2011

DURATION: 3 HOURS

Instructions to Candidates

- (a) Answer Question ONE and any other THREE Questions
- (b) All questions carry 15 marks each
- (c) Marks may be lost for illegibility

PLEASE TURN OVER

1. Kiumi retains Ole Kipin & Kamau as her Advocates regarding some protracted legal proceedings by beneficiaries in the matter of the Estate of her late father. Ole Kipin & Kamau Advocates demand legal fees of Kenya Shillings two million (Kshs.2,000,000/-) which Kiumi promptly pays, and a fees agreement is executed accordingly. The case drags on for two years and in a lengthy judgment, the High Court awards Kiumi a sizeable share of her father's estate and also awards her costs of the suit. Ole Kipin & Kamau Advocates promptly file a Party and Party Bill of Costs which is taxed at Kenya Shillings Three Million (Kshs.3,000,000/-). Ole Kipin & Kamau Advocates recover the costs from the defendants. About three (3) years later, a disgruntled former employee of Ole Kipin & Kamau Advocates informs Kiumi about the recovery of the costs by the law firm and even provides documentary proof in support. Upon Kiumi demanding payment of the said costs, Ole Kipin & Kamau Advocates decline to pay Kiumi the sum of costs recovered on the basis that Kiumi had not fully paid up the fees due and that there were some other outstanding fees relating to other legal services rendered by the firm to Kiumi about four years before the judgment in the matter of the estate of Kiumi's father's. Ole Kipin gets extremely agitated when Kiumi refuses to leave the law firm's reception and physically ejects her and gives instructions to the reception staff that Kiumi should not be allowed into the office again. Kiumi sends a demand letter to both partners of the law firm. Kamau, who ceased to be a partner shortly after Kiumi instructed the law firm in the matter of her father's estate, denies liability and pleads ignorance over the matter. Ole Kipin does not bother to respond to the demand letter or even to a subsequent letter sent by the Law Society of Kenya making inquiries over the matter.

- i) Identify and discuss the ethical issues in this narrative.
- ii) Advise Kiumi on the procedures for lodging her complaint and the possible outcomes

(15 marks)

2. A complaint has been made to the Law Society of Kenya by a Judge regarding the behaviour in Court of Advocate Mohammed. At issue is whether or not Mohammed's conduct, relating to the following events, amounts to professional misconduct:

- (a) On 16 February 2010, the advocate appeared for the defendant in a civil case at the Milimani Courts:
- (b) During his cross examination of the plaintiff the following exchange occurred between Mohammed and the Judge:

JUDGE: "Counsel, I must intervene at this point. I find your cross examination objectionable. I believe that you are suggesting fraud or serious misconduct on the part of the plaintiff. Not only is it not part of any pleading, it has nothing to do with any of the issues in this case."

Mohammed: "It is for my learned friend to object to my questions, not Your Lordship. I am entitled to ask anything I want in cross examination. Just let me get on with the case instead of your needless interjection."

JUDGE: "You will not speak to me in that manner. I can intervene when the need arises and that was the appropriate time. I find your comment offensive. You will apologize to the Court"

Mohammed: "I will not. I am covered by advocates' immunity, and I will continue because I believe it is in my client's interest. You are just biased against my client."

JUDGE: "If you believe so, make a formal application but do note that you are in contempt of this Court."

The Judge requests both counsel to step outside the court room for 15 minutes to enable him discharge other advocates waiting to be heard.

Whilst outside the court room, Mohammed, in the hearing of a court clerk and Maina Advocate, yells at the Plaintiff's counsel and swears that the days of corrupt judges and their accomplice advocates are over.

What ethical issues (if any) arise in this story and how should these be addressed?

(15 marks)

3. You are a newly admitted Advocate employed by a large firm.

The Managing Partner tells you that he thinks that you might have a fresh perspective on Profession Ethics and Conduct as you are the most recent graduate from the Kenya School of Law within the firm. He asks you to write short articles (no more than, say, 400 words each) giving, succinct day- to- day practitioner experiences, for the firm's in-house magazine.

The Managing Partner has selected the following topics for you.

- i) What factor(s) determine whether an Advocate is fit/unfit to remain on the Roll?
- ii) Legal professional privilege – an Advocate's tool.
- iii) The responsibility of Advocates for the professional conduct of their partners.

Proceed. (15 marks)

4. You are a solo practitioner specializing in the area of professional ethics and responsibility. Your office is in Nairobi, Kenya. Recently, you have been contacted by an attorney, Moses , who has an ethical problem. Upon graduation from law school in 2005, Moses took a job with the law firm of Ouma , Korir and Kamau (OKK) in Nairobi . The firm currently has 20 advocates . Approximately three months ago, Moses left the firm and took a new job with the law firm of Jerusha , Agatha and Sarah (JAS) in Mombasa . JAS employs over 30 advocates , and Moses has been assigned to the firm's conveyancing department. For the past two years, OKK has been handling a personal injury case against Millennium Industries. The plaintiff in the action was involved in a road traffic accident and alleges that she suffered severe injuries as a result of the negligence of the driver of a motor vehicle owned by Millennium. JAS is defending Millennium in the lawsuit and has been involved in the case since it was originally filed.

When Moses was interviewed by JAS for his current position with the firm, he was asked whether he had worked in any manner or in any capacity whatsoever on the Millennium case. Moses truthfully answered No. His work for OKK was limited to conveyancing. Moses was then asked whether he had attended any staff meetings at OKK , formal or informal, at which time the Millennium case was discussed. Again, Moses answered No. Moses was hired and, up to recently, was doing well at JAS.

Approximately one week ago, JAS received a motion from OKK to disqualify JAS from the Millennium case. The basis of the motion is that Moses was working for OKK while the firm was handling the claim against Millennium . JAS are opposing the motion and have prepared an affidavit for Moses to sign. The affidavit states, in part, that: 1) while with OKK , Moses did not work on the MillenniumAdmiral case, 2) in addition, while working for OKK , Moses acquired no knowledge and/or confidential information relating to the Millennium case , and 3) the motion to disqualify, therefore, is frivolous.

Moses confides in you, however, that there is a problem. When Moses was at OKK , his good friend and former Law School classmate, Salim , was substantially involved in the Millennium litigation. Salim was assigned to the case by the firm. As friends and colleagues, Moses and Salim spent a great deal of time together outside of the office. In fact, when Moses and Salim both began working for the firm, the two shared an apartment. Unfortunately, Salim talked nonstop about the Millennium case. Moses knows all about the Millennium case, although his information has been obtained on a purely informal basis from his friend, Salim.

Moses has called Salim , and Salim is "pretty sure" that no one else knows about these conversations. Salim has confided in Moses that the motion to disqualify is just another tactical manoeuvre in the case on the part of OKK . Moses's plan is to sign the affidavit as drafted. Based upon the affidavit, he anticipates that the motion to disqualify JAS will be denied, and Salim and Moses will have no further communications about the case.

Moses tells you that he will not share any of the information that he has about the Millennium case with members of his current firm. Neither the plaintiff, therefore, nor the defendant will be harmed. And Moses will be able to keep his job.

Moses wants your opinion about all of this. How would you advise him? Based upon your advice, what do you think is a likely outcome of the motion to disqualify JAS

Illustrate your answer with decided cases from Kenya and other countries with comparable ethical standards.

(15 marks)

5. You have been approached by the Council of Legal Education to prepare a policy paper on the future of legal education in Kenya. Based on your knowledge of the current structure and history of the legal profession, what recommendations would you give the Council with regard to the content, prerequisites, structure, administration , management and regulation of legal education?

(15 marks)

6. for the last ten years you have been acting for a client who is now running for the presidency of Kenya. Opinion polls leave no doubt that he is a clear favourite for the presidency. The elections are due in one month's time . You have served the client very well, save for a few instances where there have been what you agree to be unjustifiable delays in the prosecution of some of his matters. Recently, a serious disagreement arose because your client is not happy that you are a supporter of his rival in the presidential elections. You have made it clear that political affiliation is your constitutional right and it is obvious that it has never affected the quality of your services to the client

The client through his new lawyer wants all his files and any funds held by you from various debt collection matters and damage claims . Your accountant informs you that the client still owes you substantial fees in respect of many, but not all the files. You are also holding funds for the benefit of your client but the amount held is less than one third of the amount your accountant informs you is due and owing. Your client is shocked that he has ran up such a huge bill and blames you for not always updating him on the accrued fees and disbursements. You are also a little surprised that you have not been efficient in collecting fees from this client but are relieved that you have earned such a tidy amount of money from professional services well rendered. You know that only by retaining the files and the funds can you ensure that your now hostile client will pay your fees without delay. You have outstanding rents salaries and other commitments to attend to and you are determined to use the most efficient and effective method of collecting your unpaid fees.

- a) Do you have to deliver up the files and the funds to the new lawyer ?
- b) What options are available to the client who disputes your fees and who urgently needs some of the documents in your custody to prosecute an extremely urgent application to protect a property the value of which is very high?
- c) What options are available to your client in respect of the other files he needs to ensure the new lawyer prosecutes the same without delay?

(15 marks)