

COUNCIL OF LEGAL EDUCATION



EXAMINATION FOR ADMISSION
TO THE ROLL OF ADVOCATES

ATP 105: PROFESSIONAL ETHICS & PRACTICE

MONDAY 5TH AUGUST, 2013

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

NB: Support your answer with relevant statutory provisions, provisions of any applicable ethical codes local and relevant foreign case law. This constitutes up to one third of the available marks.

PLEASE TURN OVER

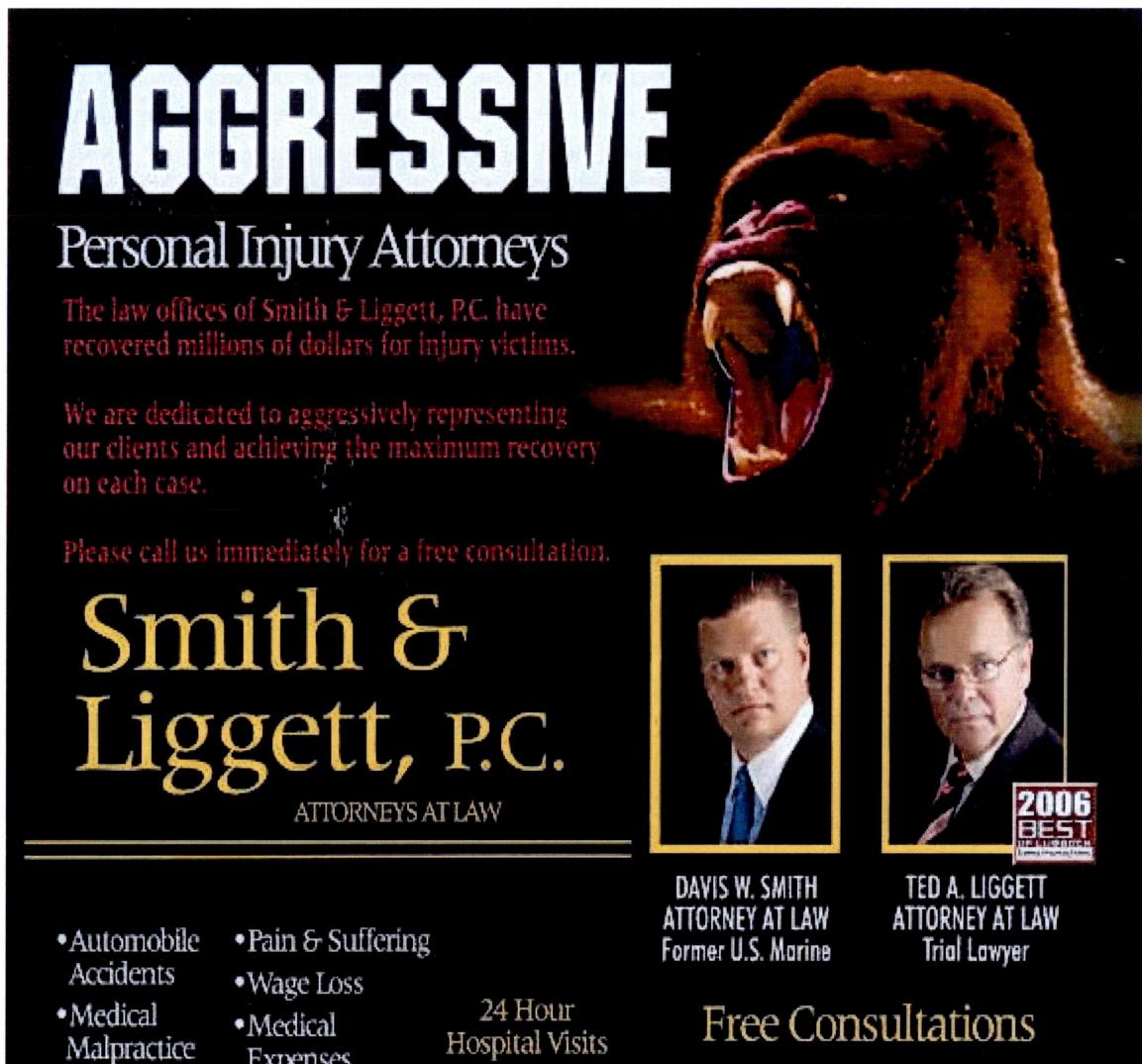
1. George received the sum of Kshs.5,000,000/ from his client to hold as a stakeholder in a conveyancing transaction. He promptly applies the money to offset legal fees owed to him by the client. The police are considering a criminal action against George. George's defense is that he applied the money received from his client to settle outstanding fees in some 50 litigation files where his client owes him about Kshs.10,000,000=. He seeks your advice on:
 - a) Whether or not he has violated any ethical or legal prohibitions. **(6 marks)**
 - b) Assuming he has violated any ethical or legal prohibitions, what sanctions he could face if he was charged before the disciplinary tribunal. **(6 marks)**
 - c) Whether or not the criminal case against him is sustainable in law and if so, what are the possible criminal penalties **(3 marks)**
2. (i) Upon admission to the bar, you are fortunate to be employed by the firm of Rooney & Smith Advocates as an Advocate in the litigation department. You notice that Mr. Rooney West has the habit of engaging one of the firm's paralegal clerks, Kimberly Rihanna to draft simple pleadings and other documents and to argue basic applications before the magistrate courts. Mr. Rooney shares his profits from these cases with Rihanna. As a matter of fact you further note that Mr. Rooney's charges for these matters are way below the rates stipulated under the Advocates Remuneration Order, which Mr. Rooney usually justifies on the basis of 'the hard times Kenyans are facing.'
- (ii) One of your long time clients, Hollywood Bank has instructed your firm to defend it against a suit brought by one of its debtors, Akili Mingi Limited for an injunction to stop the sale of its property offered as security for a loan given to them by the bank. Their main contention is with the validity of the mortgage document which was drawn by Mrs. Angelina Smith the other partner in your firm. Mrs. Smith has confided in you which information you have also verified that the mortgage document was drawn at a time when she had no practicing certificate.

Upon filing your notice of appointment of advocates, Akili Mingi's Advocates apply to have your firm disqualified from acting on the basis that your firm acted for their client and the Bank in the preparation and registration of the mortgage document.

 - a) What ethical issues emerge from the above narrative? **(6 marks)**
 - b) Would you act for the bank in the suit filed by Akili Mingi Limited? **(6 marks)**
 - c) What remedies does the bank have against Rooney & Smith? **(3 marks)**

3. a) Should advocates be allowed to advertise? **(5 Marks)**

- b) The following advertisements appeared in a local tabloid



AGGRESSIVE
Personal Injury Attorneys

The law offices of Smith & Liggett, P.C. have recovered millions of dollars for injury victims.

We are dedicated to aggressively representing our clients and achieving the maximum recovery on each case.

Please call us immediately for a free consultation.

**Smith &
Liggett, P.C.**

ATTORNEYS AT LAW

•Automobile Accidents •Pain & Suffering
•Medical Malpractice •Wage Loss
 •Medical Expenses

24 Hour Hospital Visits

DAVIS W. SMITH
ATTORNEY AT LAW
Former U.S. Marine

TED A. LIGGETT
ATTORNEY AT LAW
Trial Lawyer

**2006
BEST**

Free Consultations

Using the reasoning of the court in **Okendo Omwansa George & Anor v The Attorney General & 2 others, Petition No.126 of 2011**, asses the legal and ethical propriety of this advertisement (5 marks)

- c) The following advertisements was placed by a state corporation in a local daily.

Introduction

The Government of the Republic of Kenya through The National Treasury is considering accessing the international capital markets by the second half of calendar year 2013 to issue a sovereign bond. The targeted amount is provisionally set at USD 1,000 million and will primarily be used to finance infrastructure development in Kenya. Through the proposed transaction, the Government of the Republic of Kenya intends to diversify its investor base, establish a pricing benchmark for future issuance by both the public and private sector, as well as to promote the Republic's reputation and visibility amongst the international investor community.

Scope of work

To provide comprehensive lead counsel services in international sovereign bond issue. This shall inter-alia include:

1. Working with the National Treasury to ensure timely completion of the transaction;
2. Conducting due diligence, drafting and reviewing documentation for the issuance, including the prospectus and related documentation;
3. Advising the issuer on US and European securities law relating to disclosure, liability and placement issues as they may arise;
4. Advising the issuer and assisting with negotiating contractual arrangements with lead managers/book runners;
5. Preparing and coordinating legal and disclosure opinions to be given in connection with the issue; and
6. Performing such other services as may be mutually agreed between the law firm and the Government of the Republic of Kenya.

The National Treasury now invites eligible and experienced international law firms to indicate their interest in providing the aforementioned services. Prospective candidates should demonstrate the following in their response:

1. Verifiable track record over the past five years in providing legal advice for sovereign bond issuances in emerging markets, including debut issuance;
2. International track record reflecting the firm's sovereign finance transactions in the last five years, with particular emphasis on the emerging markets.
3. Professional capability to undertake the work.

Submission

Completed Expression of Interest documents in plain sealed envelope clearly marked on top "EOI for International Lead Counsel" should be sent to the address below:-

Financial Secretary

The National Treasury

6th Floor Treasury Building

Harambee Avenue

P.O. Box 30007 – 00100 GPO

Nairobi, Kenya

Identify the potential legal and ethical problems that an advocate who wishes to respond to this advertisement would face **(5 marks)**

4. The British Government has just released the sum of Kshs.1,800,000,000/= to Leigh Day & Co, a British firm of Solicitors as agreed damages for the 5000 Mau Mau victims of torture at the hands of the British Government. The LSK has written to Leigh Day & Co demanding the identity of the beneficiaries of the claim. Leigh Day says the information is covered by advocate client confidentiality.

- a) Does the LSK have a statutory basis for demanding for the disclosure of the identities of the claimants? **(6 marks)**
- b) Can Leigh Day and Company be compelled to disclose the identities of the claimants? **(3 marks)**
- c) Leigh Day & Co was instructed by Paul Muite Advocate. Can Paul Muite be compelled to disclose the identity of the claimants? **(3 marks)**
- d) Paul Muite received the instructions from Kenya Human Rights Commission. Can Kenya Human Rights Commission be compelled to disclose the identities of the claimants? **(3 marks)**

5. The lawyer is not just a hired gun'

With the aid of decided cases, discuss the accuracy of this statement with reference to the multiple duties of an advocate. Use specific duties to illustrate your arguments

(15 Marks)

6. Duke was admitted as an advocate of the high court of Kenya in July 2006. Duke recently joined the Office of the Director of Public Prosecutions (ODPP) as Counsel and was posted to Habaswein, a newly established office. Duke is determined to occupy the office of the Deputy Assistant DPP within two years of very hard work. He is cognizant of the fact that under the new constitutional order, the process of application for public office and the interview process are subject to strict and invasive public scrutiny. He is determined to undergo the arduous process, but, in the meanwhile, he must build an irresistible profile.

Duke is barely in office for a month when the golden opportunity is presented. A robbery with violence at the only mall in the town occurs and the owner couple critically injured by shooting. Duke's wife, who is employed as a cashier at the mall, narrowly escapes death. Needless to state, Duke is very emotional and angry about this incident and is even more determined to execute a successful prosecution. The police investigations narrow down to Gyro and Malu. A gun and some spent cartridge, confirmed by the ballistics expert to have been used during the robbery are recovered from Gyro. Duke immediately contacts the Investigating officer and together they visit Gyro at the local police station where Gyro is held in police custody. Duke makes it clear to Gyro that the evidence gathered against him shall be conclusive and the case prosecuted with speed. Gyro, in fear implicates Malu and both suspects are subsequently charged with the offence. Duke then offers and Gyro accepts a plea agreement to the effect that Gyro pleads guilty to the lesser offence of robbery. The Chief Magistrate accepts the plea.

Similar overtures by Duke, to Malu, bear no fruit as Malu insists that he is innocent. The investigator discloses to Duke that a Mr. Hemed visited the police station a week after the plea was taken and recorded a statement. According to Hemed, Malu was at the material time of the robbery participating at a community event 20 kilometers from the venue of the robbery and could, not, therefore have been an accomplice to the crime. Duke insists that as Gyro has already implicated Malu, it is the court that should determine the guilt or otherwise of Malu. Duke dismisses Mr. Hemed as a pathological known liar and reassures the investigator that Hemed's statement would only embarrass the court proceedings. Duke convinces the victims' family to hire Dave, a renowned local lawyer to hold a watching brief in the criminal proceedings against Malu. Dave is Duke's close friend. Malu, who is unemployed, has no legal representation and is also unable to raise the cash bail imposed by the Court.

- a) Determine the ethical issues arise in this hypothetical scenario? (10 marks)
 - b) Should Duke ascend to the office of the Assistant Deputy Director of Public Prosecutions? Give reasons for your answer. (5 marks)
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