

ADVOCATES' EXAMINATION

PAPER 4

Ethics, and Constitutional Law and Customary Law

Regulations 7(9)(f) and 7(9)(h)

Open-book

2 SEPTEMBER 2021

14:00-15:15

Total: [50]

Candidates are allowed 15 minutes to peruse the paper before starting to answer the questions. No candidate may start writing in the answerbook during this period. The examination of 1 hour then follows.

1. Candidates must answer all the questions.
2. Candidates must remember that marks are awarded for good draftsmanship.
3. Candidates must invent their own facts wherever necessary.
4. Please write only in pen on the right-hand pages, the left side (underside) must only be used for your own notes.
5. Except if a special reason exists, a candidate will not be required to do an oral in this part if 50% or more is attained. If a candidate achieves less than 40% he/she will not qualify for an oral and will have failed this section.
6. Admission papers 1 to 4 have orals for candidates who achieves a score from 40% and below 50%.
7. The legal writing and drafting paper (paper 5) does not have any orals, candidates must achieve a minimum score of 50% to pass this paper.

Form of assessment:

Read the extract from The Advocate.
Code of Conduct – **open-book**

Answer all the questions.

Extract from
THE ETHICS OF THE HOPELESS CASE
Where Judge Owen Rogers said in December 2017:

I conclude by summarising my views on the two related questions canvassed in this article and making some practical suggestions:

- (i) Pleadings and affidavits must be scrupulously honest. Nothing should be asserted or denied without reasonable factual foundation. Counsel who acts contrary to this standard is guilty of misleading the court and may make herself party to perjury. She also fails to honour her paramount duty to the court and the administration of justice.
- (ii) It is improper for counsel to act for a client in respect of a claim or defence which is hopeless in law or on the facts. Counsel must be able to formulate a coherent argument consisting of a sequence of logical propositions for which there is reasonable foundation in the facts and on the law and which, if they are all accepted by the court, will result in a conclusion favourable to the client. Counsel may properly act even though she thinks one or more of the essential links are likely to fail. But if she is quite satisfied that one or more of them will fail, the case is hopeless.
- (iii) A necessary correlative is that counsel must properly research the law and insist on adequate factual instructions. They must not fill gaps with guesswork or plead denials because their instructions are incomplete.
- (iv) In principle counsel may properly conclude that a case is hopeless on the facts though in general counsel cannot be expected to be the arbiter of credibility.
- (v) There is an ethical obligation to ensure that only genuine and arguable issues are ventilated and that this is achieved without delay.
- (vi) . . .

Answer all the questions.

ETHICS

QUESTION 1

[5]

Under what circumstances may an advocate refuse to take a brief despite the cab-rank rule? Motivate your answer clearly.

QUESTION 2 **[5]**

Under what circumstances may an advocate receive instructions and direct payment from a person who is not an attorney? Explain your answer.

QUESTION 3 **[8]**

If an accused confesses to you that he committed the crime for which he is being charged, what professional rules must you explain before continuing in his defence?

QUESTION 4 **[7]**

In a civil law case, if the client confesses to you and your attorney that he deliberately breached a contract to gain an advantage elsewhere, are you in a position analogous to the previous question? If so, how do you resolve your conundrum?

QUESTION 5 **[5]**

You are a committee member of a public benefit organisation (PBO). The committee requests you to act on behalf of the organisation in an application against the South Africa Revenue Service to prevent SARS Tax Exemption Unit from withdrawing its PBO status. Are you entitled to act? Would your answer be different if you act *pro bono*?

CONSTITUTIONAL LAW

QUESTION 6 **[3]**

When did the Constitutional Court become the 'apex court' of South Africa? ¹ In other words, when was the Constitutional Court given jurisdiction to decide non-constitutional matters that raise arguable points of law of general public importance which it ought to consider? Choose **one** of the following dates:

- 3.1 27 April 1994;
- 3.2 4 February 1997;
- 3.3 21 November 2001;
- 3.4 23 August 2013.

QUESTION 7 **[7]**

What is a constitutional issue?

¹ Per Cameron J (Mogoeng CJ, Nkabinde ADCJ, Froneman J, Jafta J, A Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring) in *Jordaan and Others v Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC) (2017 (11) BCLR 1370; [2017] ZACC 31) at para [7].

CUSTOMARY LAW

QUESTION 8

[10]

What kind of living customary law does the case of *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) (2005 (1) BCLR 1; [2004] ZACC 17) endorse? Explain living customary law briefly.

- THE END -

LAW SOCIETY
OF SOUTH AFRICA