



# THE LAW SOCIETY OF SCOTLAND EXAMINATIONS

## PROFESSIONAL RESPONSIBILITY

Friday 9 FEBRUARY 2018  
0900 – 1215  
(Three hours and fifteen minutes)  
(15 minutes are allowed for reading)

**Candidates should answer FOUR questions only**

**All questions carry equal marks.**

***(Where a question is in more than one part you are expected to answer ALL parts of the question. You are expected to cite authority for your answers.)***

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1. Adrian is a sole practitioner who was once an able lawyer but a series of personal crises including a car crash in which members of his family were severely injured, a mental breakdown and incipient alcoholism have greatly reduced his ability to practice effectively. Even at 10am when Adrian goes into court his breath smells heavily of drink, although he could not be described as intoxicated on these occasions. Following the breakdown, Adrian suffers from memory impairment and has lost several cases in the Sheriff Court which objective observers consider that he should have won. David, a longstanding friend of Adrian is concerned as to Adrian's fitness to practice.

Advise David as to whether the Law Society or the SLCC has any grounds to take disciplinary action against Adrian on the facts stated.

David hesitates for a month or two in which time he discovers that Adrian has forgotten to take out his practising certificate for several weeks, has failed to complete his requisite hours of Continuing Professional development for several years and recently been convicted of assaulting his wife in a cinema car park. Unaccountably, the media fails to get Adrian's surname correct in reporting the conviction, or to identify him as a solicitor, although a number of local lawyers are aware of the details. Adrian has begun an affair with a new client, who suffers from anorexia and low self-esteem, who is suing the local hospital for medical negligence. Adrian has never handled a medical negligence case before but sees no reason why he cannot "learn the ropes" as he goes along.

Advise David as to the ethical issues raised by Adrian's behaviour, including what, if anything he should do about Adrian.

David is very concerned at the foregoing chain of events. He resolves to go to Adrian and encourage him to withdraw from practice until he had pulled himself together. Adrian takes the suggestion as an officious insult.

"I represent my clients better than you do", Adrian says, "At least I don't take on more work than I can handle - as you do, and I never take cases on a speculative fee when the client is eligible for legal aid". David has no intention of giving up doing speculative actions but resolves to settle some of the less urgent cases so that he can have more time to handle the others.

What criticisms could you make of David from an ethical standpoint?

2. **(a)** Hamish, presently a qualified assistant of five years standing in a small west coast firm, has signed a restrictive covenant undertaking not to act for the firms' clients (wherever they reside) for a period of eight years from his departure from the firm. He is a keen wind surfer and is shortly to become the secretary of the local club. He is approached by a rival firm offering him a partnership if he will write (a) to his clients indicating that he is moving firm and of his willingness to continue acting for them if they were to instruct him in the future (b) to all members of the wind surfing club telling them of his move to the new firm and inviting them to consider sending him their work and (c) to all his legal aid clients indicating that he will be moving to a new firm but that he will remain their lawyer there and retain their files when he moves. Hamish agrees to do as they ask. He indicates that once established in his new firm he will write to all the sports clubs in the area indicating that he is a specialist in all aspects of the law relating to sports and offering to act for them at very competitive rates if they do not already have an established firm of solicitors. Finally he proposes to place a large advert for the new firm on the internet and at the local shinty ground, saying: "Judge us by our results, we are the winning team and second to none".

Advise Hamish as to his proposed course of action.

*AND*

**(b)** You have been in practice for 30 years. For over 20 years you have acted for an elderly, and wealthy, widow Elsie. You have always given of your very best to Elsie since she is a delightful client, generous, appreciative and willing to take guidance. Now she has become like an Aunt to you – you regularly help her with the weekly shop and you have made yourself available at all times to deal with the hundred and one irritating problems that she has from the size of her telephone bill to the burned out electric kettle.

Elsie wants to make a will. She wants to leave you a legacy of £10,000. You know that she really wants to do that and you feel that you have earned it and deserved it.

- i) May you make the will?
  - ii) What should you do?
  - iii) Does it make any difference if the legacy is only for £1,000?
  - iv) What would be the position if Elsie was your Grandmother?
  - v) What would be the position if Elsie were to include the legacy in a holograph will – would it depend on where the idea of a holograph will came from?
  - vi) What would be the position if you were to say to Mrs. Morris, “I won’t draft the will, but if you wish you can give me £12,000 as a Christmas present”?
3. Roger is a partner in one of the leading corporate firms in the country. Although his partners have yet to embrace limited liability partnership status for the firm, he determines that as a precursor to an inevitable merger with a large English law firm, he will introduce his own form of limited liability. Accordingly in the written fee charging agreements which he reaches with each client he insists that the liability of himself and the firm for professional negligence will be limited to £1.5 million per claim. His hourly rates work out at £650 per hour, which he regards as modest for an elite law firm. In any event he considers that the Law Society has changed the rules on remuneration such that his clients cannot now take him to taxation if they do not wish to pay his fee. In his letters of engagement Raymond indicates that unless he hears from them to the contrary he will deem that his clients are happy for him to act on their behalf in situations of actual conflict of interest that might arise. He further indicates that if litigation is required, he will work for a speculative fee of 200% of his normal fee or a contingent fee of 30%.

Roger has tried for years to ensure that the firm are chosen to handle the executry of one of the wealthiest men in Scotland. He had persuaded the billionaire – a longstanding friend and client that Roger should not only be one of the executors for the estate but that the firm should do the legal work associated with the winding up of the estate. Roger’s relationship with the billionaire’s young wife was not a happy one and fearing that if she survived her husband she would seek to displace him and the firm from handling the estate he persuaded the billionaire in his will to stipulate that it would not be possible for the executors to instruct another firm of solicitors than Roger’s, without the express permission of Roger (which he had no intention of granting). Now that the billionaire has died and Roger is winding up the estate, the widow has indeed signed a mandate seeking to transfer the handling of the legal work in the estate to a new firm of lawyers. Roger

believes that he does not have to implement the mandate because of the clause in the will, and if that fails he will rely on his lien for his fees. He considers that he can delay for seven weeks before sending the file to a law accountant with instructions to fee it to the hilt and not to rush matters. Roger considers that during the delay he will be able to ingather several more million pounds of the estate and therefore increase his ultimate fee.

Advise Roger as to his ethical position.

4. Eleanor is a middle aged housewife who bursts into your office one day without an appointment. Her breath smells strongly of gin and her clothes are dishevelled. She claims that she is being followed by a man who she suspects is a store detective from an upmarket establishment in Glasgow where she has just been shopping. She thinks his interest is in a necklace which she has absent-mindedly placed in her shopping bag and failed to pay for. She suggests that you should place it in the firm safe and forget about it. You decline and in the course of advising her as to her legal position you indicate firmly that she should return the necklace and take the chance that they will not believe her protest of innocence. Eleanor, outraged at this advice storms out shouting, "All this fuss over a bling necklace. I'll make sure I take more next time". Minutes later a man, who is in fact a plain clothes policeman, enters the office. He explains that following a series of thefts at the shop he has been assigned to keep an eye on the clientele. He claims to have seen a lady answering Eleanor's description stealing a necklace. He lost her in the street but shortly thereafter saw her dash out of your office and leap into a taxi.
  - 1) The policeman asks you whether you were consulted by the lady, whether she appeared distressed and what the lady's name and address are. How should you reply?
  - 2) After the policeman has left you notice that Eleanor has dropped the necklace beside her chair. What should you do with it?
  - 3) Eleanor sensing that you may be called as a witness against her complains to the Scottish Legal Complaints Commission as to the quality of the advice which you gave her. Eleanor is subsequently arrested and you are cited by the Crown as a witness. What can you say in defence of the complaint and what may you say in court as to the contents of the interview (including her outburst), Eleanor's sobriety and appearance?

5. **(a)** Two siblings John and Jane are joint owners of their flat in Aberdeen which is their sole residence. John runs a computer games shop and is a discharged bankrupt with a track record for enthusiasm rather than acumen in business matters - a fact that Simon, the family lawyer, is all too aware of. Jane is the more creative of the siblings and is hoping for a career in dress design, however Jane is even less worldly wise than John. John's computer games business is going surprisingly well but he requires additional capital of around £120,000 in order to open up a new shop. Jane has no involvement in the computer games business but agrees to allow their home to be used as security to raise the extra money.

John persuades his friendly manager at the Arcadian Bank to lend them £120,000 secured over the flat which is valued at 200,000. It is agreed that Simon will act for both siblings and to save time and money the bank agree to appoint Simon to act for them also subject to their usual guidelines to solicitors to ensure that they receive an effective security.

What ethical issues, if any, should Simon be considering at this stage?

Unfortunately, after three years the computer gaming business founders and the bank calls up the security and sells the flat. Worse still there is a shortfall in repaying the bank because of recent falls in property prices in Aberdeen due to the decline in the North Sea Oil economy. However, it is accepted that the £200,000 valuation was reasonable at the time. You are appointed by the bank to investigate whether Simon has failed in his ethical or fiduciary obligations to them. (Simon did not tell the bank of John's bankruptcy since their guidelines mention no such requirement. His report had merely stated that the bank would receive a valid and enforceable security). What do you say to the bank?

*AND*

**(b)** Brown is the sole beneficiary and co-executor in his mother's estate. His mother died last year and the house, which was the bulk of his late mother's estate, has still not been sold. Brown appreciates that the property market is very sluggish in respect of old houses which have not been modernised. Brown is constantly telephoning the solicitors who are acting as co-executors and administrators of his late mother's estate since he is very anxious to realise the capital from the sale of the house. One day the solicitors telephone him to advise that they have located an interested purchaser who is prepared to pay £240,000 for the house. The house had been valued at £300,000 and Brown is exceptionally disappointed at the size of the offer having waited so long. He suggests to the solicitors that instead of advertising the property at offers over £275,000, they should reduce the price still further to see if that would attract a higher offer than the £240,000 which has been offered. The

solicitors advise against this on the grounds that the prospective purchaser is interested in another property, and unless they can give him an answer that day as to whether or not his offer will be successful then they are likely to lose him as a potential purchaser, and it might be difficult to find any other purchaser who is prepared to pay even the £240,000. Reluctantly Brown concedes that they (the solicitors) must do what they think is best in the circumstances, and the offer is accepted. That evening, at the golf club Brown overhears a conversation in the bar. A man is telling his colleagues how his solicitor managed to get him a really good deal on a big old house. Brown listens very carefully and he discerns that the identity of this man's solicitor is the same as his own. Furthermore, it is clear from the familiar terms of reference to the solicitor that the man in the golf club is on personal terms with his solicitor. Brown goes home deeply depressed. Mrs Brown tries to comfort him. She says that they are better off having £240,000 now to spend on renovating their own house, buying a car and going on a holiday of a lifetime, than waiting indefinitely for a higher offer, especially in the light of the impact of the Government's Stamp Duty Land Tax on property prices, and that they have no way of knowing whether they could ever have obtained a better price.

What advice would you give Brown if he came to you to complain about his solicitor? What arguments could the solicitor use to defend himself if Brown complains to the Scottish Legal Complaints Commission?

6. (a) Norman is a sheriff court practitioner of some notoriety. He is representing Sam in a personal injury action against his employers for injuries sustained when he fell off a wind farm rig whilst erecting a turbine five years ago. (The action has been raised timeously). Sam is adamant that the safety harness available to him was inadequate. Norman, however, discovers just before the proof, from documents and photographs made available by the other side that Sam's precognition contains a glaring error as to the safety procedures in place at the time. Sam insists on giving his evidence as he recalls it. Rather to Norman's surprise the other side who have access to the same records do not detect the error and fail to cross-examine his client accordingly. The judge, not unnaturally, accepts Sam's account on the point since it is uncontradicted by the other side. Had the error been detected it would have provided an almost cast iron defence to the employers. Norman is aware of this. Is Norman entitled to keep quiet about the error? Would it make any difference if counsel were involved in the case?

*AND*

**(b)** Norman acts unsuccessfully for an asylum seeker before the first-tier tribunal. He then seeks leave to appeal from the decision citing the directions contained in the first-tier tribunal's decision letter and asserting that in terms of these directions the request for leave to appeal was in time. Unfortunately, Norman is in a hurry and fails to note that no directions were included with the tribunal's decision letter and the ones that he had quoted (and wrongly claimed to have been included with the tribunal's letter) were in fact the wrong ones and that in terms of the right directions the application for leave to appeal had been made out of time. The Upper Tribunal asks Norman for a copy of the directions which he had quoted to them and on re-examination of the correspondence Norman discovers that he has quoted the wrong directions, has wrongly claimed that they had been included in the tribunal's decision letter and that under the right directions the leave to appeal application was out of time. Embarrassed, Norman does not come clean with the Upper Tribunal, but merely says he has made an unspecified error in his first letter seeking leave to appeal, and asks that the Upper Tribunal does not punish his client for the mistake. The Upper Tribunal are not impressed by Norman's reticence to explain himself and refer the matter to the SLCC.

Advise Norman as to his position in terms of professional ethics.

*AND*

**(c)** Norman is contacted by a criminal client Maisie, one day. Maisie states that when arrested for drunk driving last month she had panicked and told the police that her name was Amy (which is indeed her middle name and the name by which she is known by all her former schoolmates in the community). She had also given her mother's address because that was where she was residing that week as she did quite regularly. Maisie is now realising that all her previous convictions were all ones in which her name was given as "Maisie" and her address is that of the flat she has been renting for the last 5 years, some streets away from her mother's house. At the pleading diet Maisie confirms that her name is Amy and that her address is that of her mother and Norman says nothing to the Court. As far as the Court and the fiscal are concerned, Maisie is a first offender.

Advise Norman as to his position in terms of professional ethics.

**END OF QUESTION PAPER**