



THE LAW SOCIETY OF SCOTLAND  
QUALIFIED LAWYERS ASSESSMENT

**PROFESSIONAL CONDUCT**

12 May 2021

1300 – 1430  
(90 minutes)

Two questions only to be attempted. Where a question is in more than one section you are expected to answer ALL sections of the question. You are expected to cite authority for your answers.

## Question 1

- a) Malcolm is a partner in a largish law firm in the central belt. Last month like other readers of the tabloid press he has enjoyed reading about the daring exploits of a gang of antique thieves who have stolen a Monet painting from under the nose of the painting's billionaire owner in a Perthshire castle. Today Malcolm receives a phone call from Killjoy, an antique dealer that Malcolm is acquainted with, saying that he may know where the Monet is and would Malcolm be interested in acting as a go between and negotiating with the billionaire for the safe return of the painting. Malcolm, bored by the tedium of COVID lockdown agrees to carry out the mission. When negotiations are at a critical stage Malcolm is surprised to receive a large parcel, delivered by hand to his receptionist. On opening it, he discovers that it is the painting, looking as though it had just been retrieved from a dirty basement. Malcolm completes the negotiations, returns the painting in exchange for a reward to its owner and (after deducting his fee) passes the remainder to the antique dealer.

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

What would be his position if:

- (i) Malcolm, before returning the painting to its owner had wiped the dirt from the painting and frame; AND
  - (ii) the negotiations had broken down and the billionaire had declined to pay the "reward" that Malcolm had been requesting.
- b) Alastair is an ambitious young associate in a commercial law firm. His girlfriend Zoe works for a major car manufacturer who has been systematically falsifying its emissions data in order to avoid the need for expensive alterations to their cars. Alastair offers to tell an investigative journalist what he knows, in return for £5,000. The journalist balks at paying for the story but seeks to use the courts to force Alastair to reveal his information. Alastair claims that the information is confidential and privileged because Zoe sought his legal advice as to her position were she to become a whistle blower.

Is Alastair's argument likely to succeed in Scotland?

## Question 2

- a) Naomi is an experienced solicitor in the prosecution service who has risen to the rank of procurator fiscal. Whilst Naomi is handling a particularly tricky attempted rape case, Helena, the defence agent sends Naomi the draft s.275 application ( Criminal Procedure (Scotland) Act 1995 ) to allow her to refer to the complainer's character or sexual history at the trial. Helena proposes to cross examine the alleged victim / complainer, Cherry, amongst other things, as to (i) her tendency to injure herself e.g. by falling off motor bikes or horses, which she does regularly (ii) her frequently getting very drunk and falling down and (iii) her encounters with several sexual partners of a violent persuasion in the month running up to the date of the alleged attempted rape. Naomi tells Helena that she will object to the defence raising any of these matters in the trial, unless Helena can show that Cherry's injuries as noted by the medical examiner soon after the alleged offence, might have been caused by (i), (ii) or (iii).

Helena agrees to remove references to the other possible sources of injury, unless she can get that evidence. Helena is a busy practitioner and delegates the taking of a witness statement from the medical examiner before the trial to a junior assistant, who, not being properly prepared, fails to ask the medical examiner if the injuries sustained by Cherry might have come from any of the sources identified in the s. 275 application. Unfortunately, Helena's administrative staff submit the early version of the s. 275 application to the sheriff by mistake, and because Naomi is ill, a harassed colleague in the Crown Office informs the sheriff that the s.275 application has been agreed with the defence.

Naomi is not prosecuting the case at trial, so when she recovers, she is unaware that the wrong s.275 application has been approved by the sheriff. However, she hears from a colleague that Cherry is indeed very accident prone and had fallen off her motorcycle at speed in the week of the alleged assault.

Advise Naomi and Helena as to the ethical issues which have arisen in the case.

- b) Naomi has also been involved in the prosecution of a number of sub postmasters in rural post offices for theft and false accounting. In each case the shortfall in the post office balances has been evidenced by a bespoke software package used in all post offices. Some of the sub postmasters claimed that the software must have been defective, but the Post Office resolutely denied this claiming that there were no cases where defects in the software had been established.

Over time Naomi became aware, however, that there were sometimes defects with the software and that there was rarely enough evidence to prove a charge of theft in these cases, although false accounting was easier to establish because of the apparent shortfalls being shown by the software. Accordingly, Naomi's practice was to charge the sub postmasters with theft and false accounting in the hope that they would plead guilty to the latter charge in return for Naomi dropping the theft charge, thus enabling the sub postmasters to avoid a prison sentence. Naomi persisted in charging the sub postmasters with theft, despite knowing that it was unlikely to prove, because it provided a lever with which to recover the alleged shortfalls from the accused.

Advise Naomi as to the ethical issues arising from these cases.

### Question 3

- a) Fiona is a partner in a medium sized general practice firm in Aberdeen. For the last ten years she has acted for a couple Robert and Samantha in assisting them to buy dilapidated houses on Deeside and renovating them as holiday cottages and then selling them on. This year Samantha has come to Fiona saying that the marriage has broken down and would she act for Samantha in drafting a separation agreement prior to a divorce. Fiona is more comfortable doing conveyancing work and feels it would be safer to pass Samantha to her court work partner, Raymond. Robert is outraged that "his" firm of solicitors should be considering acting against him in a separation and divorce, seeing it as a conflict of interest and a breach of confidentiality. Raymond rejects both the allegation that there is a conflict of interest and that any confidentiality is under threat. However, he tells Fiona to advise Robert to go to another firm of solicitors to handle the separation and divorce. Raymond tells Samantha that he will draw up the separation agreement and send it to Robert.

Advise Fiona and Raymond as to the ethical issues raised by their conduct.

- b) Raymond is acting for Brian an elderly client who already has a power of attorney in operation for his property. Brian wants to revise his will to leave everything to his carer who has befriended him and to disinherit his children whom he feels have neglected him in recent years. Brian seems slightly confused when the carer brings him in to see Raymond, but Raymond recalls from his training that the solicitor is the arbiter of capacity and concludes that there is no need for him to obtain a medical opinion as to Brian's capacity to alter his will.

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

- c) Fiona acts for a local builder / developer who has a reputation in the area for building defective houses which can, on occasion endanger their new owners or passers-by, and only agreeing to repair them if the client agrees to sign a contract (drawn up by Fiona) before any repairs are done, saying that they will not mention the defects to any third party.

Advise Fiona as to her position in terms of professional ethics.

**END OF QUESTION PAPER**