BAR STANDARDS BOARD

REGULATING BARRISTERS

Bar Professional Training Course Examination 2011-2012

Professional Ethics multiple choice and short answer test

Week Commencing 23 January 2012

10am – 12pm

ANSWER SHEET

Section A

Multiple choice questions

QUESTION 1

[A] Wrong. It would be wrong to take action as set out in answer [A] without consulting first with the victim of the harassment. The Code warns that the victim must be consulted and in most circumstances their wishes considered and respected.

[B] Wrong. It would be wrong to take action as set out in answer [B] without consulting first with the victim of the harassment. The Code warns that the victim must be consulted and in most circumstances their wishes considered and respected.

[C] Correct. The misconduct here is harassment which is dealt with under the Equality and Diversity Code. Harassment is covered by Section E. The conduct is covered within para 1.74.

The most important point here is the impact of the "Reporting Professional Misconduct Guidance". The matter should first be discussed with the victim (Paragraph 18). There are procedures which may then be followed.

[D] Wrong**.** It would be wrong to take action as set out in answer [D] without consulting first with the victim of the harassment. The Code warns that the victim must be consulted and in most circumstances their wishes considered and respected.

QUESTION 2

[A] Wrong.

[B] Wrong.

[C] Wrong. There is no requirement to withdraw in the circumstances described, so [C] is wrong.

[D] Correct. WS 3.3: "A barrister should always be alert to the possibility of a conflict of interests. If the conflict is between the interests of his lay client and his professional client, the conflict must be resolved in favour of the lay client."

QUESTION 3

[A] Correct. Counsel must promote and protect fearlessly the lay client's interests. Code of Conduct 303 (b). There is nothing in the facts given to suggest that you are "misleading your opponent".

[B] Wrong. This would not be securing the best settlement for the client.

[C] Wrong. This would not be securing the best settlement for your client.

[D] Wrong. It is not in your client's best interests to go to trial.

QUESTION 4

[A] Wrong. You must take on any brief for any client within your sphere of practice. You cannot act exclusively for the Prosecution.

[B] Wrong. You should not increase fees simply to deter work.

[C] Wrong. This would be to lie.

[D] Correct**.** This is the application of the 'cab-rank' rule. See Code Rule 601(a).

QUESTION 5

[A] Correct. (WS 5.4) states that a barrister must not undertake any task which s/he knows (or ought to know) s/he is not competent to handle. Code of Conduct paragraph 603(a) states that a barrister will be professionally embarrassed if s/he lacks sufficient experience or competence to handle a matter.

[B] Wrong. It is the barrister's judgment that matters and not the solicitors'.

[C] Wrong. The potential obligation to return the brief has not yet been triggered given the information provided.

[D] Wrong. There is no obligation of disclosure to the client in the circumstances.

QUESTION 6

[A] Wrong.

[B] Wrong.

[C] Wrong.

[D] Correct**.** 708. A barrister when conducting proceedings in Court:

(a) is personally responsible for the conduct and presentation of his case and must exercise personal judgement upon the substance and purpose of statements made and questions asked.

(b) must not unless invited to do so by the Court or when appearing before a tribunal where it is his duty to do so assert a personal opinion of the facts or the law.

(c) must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argues.

(d) must bring any procedural irregularity to the attention of the Court during the hearing and not reserve such matter to be raised on appeal.

QUESTION 7

[A] Wrong.

[B] Wrong.

[C] Correct. Code of Conduct paragraph 705(c) states that a barrister must not, except with the consent of the representative of the opposing side or of the Court, communicate directly or indirectly about a case with any witness ... once that witness has begun to give evidence until the evidence of that witness has been concluded. The alternative options are all in conflict with this applicable rule and suggest greater or lesser access to witnesses than is truly the case.

[D] Wrong.

QUESTION 8

[A] Wrong. You may accept a noting brief during the non-practising six months of pupillage therefore answer [A] is wrong.

[B] Correct. Code of Conduct paragraph 802 permits non-practising pupils to accept a noting brief with the permission of their Head of Chambers or pupil supervisor. This is the only requirement.

[C] Wrong. A noting brief does not require permission of the lay client, therefore answer [C] is wrong.

[D] Wrong. There are restrictions on your ability to accept a noting brief during the non-practising six-months of pupillage as you require permission, therefore answer [D] is wrong (see answer B).

QUESTION 9

[A] Wrong. The duty of confidentiality continues even though the case is over.

[B] Wrong. The duty is not confined to matters which your client has specifically told you are confidential. They extend generally to the "lay client's affairs", "papers in any instructions", and information from the lay client which has been "entrusted to him in confidence", see Code of Conduct, paragraph 702.

[C] Correct. Whether or not your relationship with your client is continuing, you must preserve the confidentiality of his/her affairs, see Code of Conduct, paragraph 702.

[D] Wrong. The answer contradicts the point made in 702, namely that a barrister "must not reveal the contents of the papers in any instructions".

QUESTION 10

[A] Wrong.

[B] Wrong.

[C] Wrong.

[D] Correct. WS 11.4 states that a barrister acting for a Defendant should advise his/her client as to whether or not to give evidence in his/her own defence but the decision must be taken by the client themselves. An inference may be drawn against him/her if s/he does not.

QUESTION 11

[A] Wrong. There is nothing to prevent a barrister from drafting the statement pro bono.

[B] Correct. BSB Guidance on Preparation of defence statements paragraph 3, Code of Conduct paragraph 604(b) states that a barrister is not obliged to accept instructions other than at a proper fee having regard to various matters set out at this paragraph.

[C] Wrong. There is no requirement to see the Defendant in conference prior to drafting a statement.

[D] Wrong. No such consents are required.

QUESTION 12

[A] Wrong.

[B] Wrong.

[C] Correct. A barrister may not publish details of his/her success rates (Code of Conduct paragraph 710.2(d)). A barrister may publish photographs, rates and charging methods and details of cases which are already publicly available (Code of Conduct paragraph 710.1 (a), (b) and (d))**.**

[D] Wrong.

QUESTION 13

[A] Wrong. Statement number (i) is wrong. It is Counsel's duty to draw any financial circumstances of client to LSC's attention promptly. The fact she is likely to win is irrelevant; Counsel has a duty to protect fund resources. **Reason supplied by Provider, unchecked by examiners.*

[B] Wrong. [B] is wrong as (iv) is also correct. **Reason supplied by Provider, unchecked by examiners.**

[C] Correct. The relevant provisions are to be found in Code of Conduct 608(c). The barrister must withdraw if the client does not take immediate action. See also the funding provisions in Annex E to the Code of Conduct Guidelines on Opinions paragraphs 20- 22 & Code of Conduct 304.

[D] Wrong. [D] is wrong as (ii) is also a correct statement. **Reason supplied by Provider, unchecked by examiners.*

QUESTION 14

[A] Correct. Code of Conduct paragraph 608e & (WS 7.4) states that if a barrister becomes aware of the existence of a document which should have been disclosed but has not been disclosed, on discovery of the document s/he should advise his/her professional client to disclose it forthwith; and if it is not then disclosed, s/he must withdraw from the case.

[B] Wrong.

[C] Wrong.

[D] Wrong.

QUESTION 15

[A] Wrong. This statement is wrong as you can continue to represent the client.

[B] Wrong. There is no stipulation that the Court must be informed that the client has pleaded guilty against his Counsel's advice and this would breach client confidentiality unless it had been waived by the client.

[C] Correct. See paragraphs 11.5.1, 11.5.2 & 11.5.3 in the Written Standards for the Conduct of Professional Work:

"11.5.1 Where a Defendant tells his Counsel that he did not commit the offence with which he is charged but nevertheless insists on pleading guilty to it for reasons of his own, Counsel should:

(a) Advise the Defendant that, if he is not guilty, he should plead not guilty but that the decision is one for the Defendant; Counsel must continue to represent him but only after he has advised what the consequences will be and that what can be submitted in mitigation can only be on the basis that the client is guilty.

(b) Explore with the Defendant why he wishes to plead guilty to a charge which he says he did not commit and whether any steps could be taken which would enable him to enter a plea of not guilty in accordance with his profession of innocence.

11.5.2 If the client maintains his wish to plead guilty, he should be further advised:

(a) what the consequences will be, in particular in gaining or adding to a criminal record and that it is unlikely that a conviction based on such a plea would be overturned on appeal;

(b) that what can be submitted on his behalf in mitigation can only be on the basis that he is guilty and will otherwise be strictly limited so that, for instance, Counsel will not be able to assert that the Defendant has shown remorse through his guilty plea."

11.5.3 If, following all of the above advice, the Defendant persists in his decision to plead guilty:

(a) Counsel may continue to represent him if he is satisfied that it is proper to do so;

(b) before a plea of guilty is entered Counsel or a representative of his professional client who is present should record in writing the reasons for the plea;

(c) the Defendant should be invited to endorse a declaration that he has given unequivocal instructions of his own free will that he intends to plead guilty even though he maintains that he did not commit the offence(s) and that he understands the advice given by Counsel and in particular the restrictions placed on Counsel in mitigating and the consequences to himself; the Defendant should also be advised that he is under no obligation to sign; and

(d) if no such declaration is signed, Counsel should make a contemporaneous note of his advice."

[D] Wrong. You cannot assert in a plea in mitigation that the client's guilty plea is evidence of remorse.

QUESTION 16

[A] Correct. Code of Conduct paragraph 704 prevents a barrister from drafting any statement of case containing facts or contentions which are not supported by the lay client or his/her instructions. However, it also states that nothing in the paragraph shall prevent a barrister drafting a document containing specific factual statements or contentions included by the barrister subject to confirmation of their accuracy by the lay client.

[B] Wrong. This statement is an inaccurate version of the principle. * *Reason supplied by Provider, unchecked by Examiner.*

[C] Wrong. This statement is an inaccurate version of the principle. * *Reason supplied by Provider, unchecked by Examiner.*

[D] Wrong. This statement is an inaccurate version of the principle. * *Reason supplied by Provider, unchecked by Examiner.*

QUESTION 17

[A] Wrong. The Code and the Guidelines make answer [A] wrong.

[B] Correct. Code of Conduct paragraphs 709 (prohibition on expressing personal opinions about current or contemplated proceedings), 702 (confidentiality) and 301 (avoiding conduct likely to diminish public confidence in the legal profession or the administration of justice) cover this situation and prohibit the making of personal comment about the facts and/or the merits of a case in which a barrister is instructed – in the type of circumstances described – even if the barrister gives both sides of the case. The BSB Guidelines for Barristers on Commenting to the Media on Cases also applies.

[C] Wrong. The Code and the Guidelines make answer [C] wrong.

[D] Wrong. The Code and the Guidelines make answer [D] wrong.

QUESTION 18

[A] Wrong. There is no representative of the solicitors present. This is a civil case and Counsel may see the witnesses and take a proof/ further proof in such circumstances see Code para 707. Written Standards 6.1.2 points out there is no longer any such absolute rule in relation to contact with witnesses.

[B] Wrong. It is correct insofar as it says that the witnesses can be spoken to. But there is no obligation to see the witness together and indeed Written Standard 6, paragraphs 6.2.2 and 6.2.5 point in the other direction. The point is that they should be seen separately to avoid risk of contamination and suggestions of witness coaching.

[C] Correct. The guiding principle is what is in the best interests of the client: see Written Standards para 6.2.3. Also the Guidance on witness statements - dealing with witnesses, para 9(iii). Paragraphs 6.2.2 and 6.2.5 in particular suggest the course of action most appropriate is to see the witnesses separately. The Guidance on witness statements para 9(iv) (iv) also applies.

[D] Wrong. No permission is required from the Judge to speak to a witness. That would only arise if a witness were in the course of giving their evidence. What matters is that Counsel comply with Written Standard 6 paragraphs 6.2.2 and 6.2.5 and para 9(v) of the Guidance on witness statements.

QUESTION 19

[A] Wrong. (i) is wrong because although it is permissible to withdraw if a client impugns your professionalism (Code 609 (b)), the client's conduct falls far short of that – he simply does not wish to follow your advice – this is not sufficient for you to draw the conclusion that your professionalism has been impugned (therefore [A] is wrong).

[B] Wrong. (ii) is wrong because you have no grounds to withdraw anyway (so the phrase "normally… should withdraw" is wrong). Therefore [B] is wrong.

[C] Wrong. (iii) is wrong as, although there is a stipulation under 307 (a) & (c) of the Code of Conduct that a barrister must not compromise his/her professional standards to please his/her client etc, this does not cover a situation such as this. It may be you think further negotiation would be fruitless because the offer is unlikely to be bettered, but to do so is not a compromise of your professional standards. This is why [C] is wrong.

[D] Correct. This is because none of the statements are correct.

QUESTION 20

[A] Wrong. See below Written Standards paragraph 5.8.

[B] Wrong. It ignores a client's instructions; so [B] is wrong.

[C] Correct. Written Standards paragraph 5.8: a barrister must use his/her personal judgment as to substance of a pleading and generally not plead a contention which is not properly arguable and in particular (5.8 (c)) not allege fraud unless s/he has before him credible evidence establishing a prima facie case of fraud. Counsel should explain to the client that the highest degree of proof is needed to substantiate an allegation of fraud and that there is insufficient evidence to do so here. If the client insists on his instructions Counsel should withdraw from the case because he will be professionally embarrassed. He should not proceed with a claim or put himself into a position where he would have to make a submission he does not consider to be properly arguable, see Code 708 F. It would be wrong to refuse to amend the claim and simply carry on.

[D] Wrong. It would still include an allegation that is not properly arguable.

Section B

Short answer questions

Professional Ethics

QUESTION 1

(10 marks in total)

ANSWER

(a) Maximum 8 marks (of 9 available)

In these circumstances, you should inform the Defendant that the information he has provided will remain confidential unless he chooses to waive privilege [1 mark].

However if he chooses not to waive privilege and allow you to disclose the mistake, then some mitigation that you can advance will be limited [1 mark].

In particular, you will not be able to say anything about the time period since his last conviction [1 mark].

You should specifically advise about the nature of the sentence should the antecedents be discovered [1 mark].

You should advise the Defendant that if you are asked directly, you cannot mislead the Court, even though you cannot disclose the information without his consent [2 marks].

You should advise the Defendant that the Judge and/or the Prosecution are likely to notice if nothing is said about the absence of previous convictions and investigate further [1 mark].

You should advise the Defendant that the choice is his [1 mark] but he can expect credit for disclosing the conviction voluntarily [1 mark].

(b) Maximum 2 marks

To continue to allow the Court to believe that the Defendant is John Smith would amount to misleading the Court and is prohibited for you as a barrister [1 mark]. He must either reveal the deception or you must withdraw from the case [1 mark].

QUESTION 2

(10 marks in total)

ANSWER

Answer – (a)

- Advise Charles not to accept this gift, (1 mark); because
- the extent (value) of the gift and the tone of the accompanying note (1 mark) – see Code of Conduct 307: "A barrister must not: (a) permit his absolute independence, integrity and freedom from external pressures to be compromised (b) do anything (for example accept a present) in such circumstances as may lead to any inference that his independence may be compromised. See also Code of Conduct 301: A barrister must not.....engage in conduct whether in pursuit of his profession or otherwise which is .....likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute..."

- "may lead to an inference that his independence may be compromised in any further proceedings" (1 mark). See General Code of Conduct 307 (a) and (b).

Answer - (b)

- Charles could accept this gift because a gift of one bottle of champagne is quite acceptable. (1 mark); because,
- such matters require personal judgment and nothing in the making or receiving of this gift compromises Charles' professional integrity. (1 mark). See General Code of Conduct 307. Note that some students may take the view the view that it is inadvisable to accept a bottle of champagne. The Code is not specific on this point. Providing that Charles is courteous (see Code of Conduct 701) in refusing the gift, there is nothing in the Code to state that he must accept it. However students answer this question, their answer must be supported by reasoning.

Answer – (c)

- Advise Charles not to accept the instructions from Media Moguls under such circumstances (1 mark); because
- he would be professionally embarrassed in such circumstances (1 mark); due to a
- conflict of interest created by having acted for Paul Ratcliffe in related matters (1mark) see Code of Conduct 603(e) ; and
- there is a significant risk that information confidential to Paul might be communicated to or used for the benefit of MM; (1 mark) See Code of Conduct 603 (f)
- The above applies unless all relevant persons consent to Charles accepting the instructions. See 603 (e): The facts of the matter suggest that no such consent would likely be given (1 mark).

SAQ 3 is on the next page

QUESTION 3

(10 marks in total)

ANSWER

(a) Total 5 marks

(a)(i) Maximum 4 marks.
See Code of Conduct 601 and 602 - A self-employed barrister must comply with the 'Cab-rank rule' (1 mark for mention of the "Cab rank rule") and accordingly '(a) accept any brief to appear before a Court in which he professes to practise (1 mark); (b) accept any instructions…and do so irrespective of (i) the party on whose behalf he is instructed (1 mark) [or] (ii) the nature of the case (1 mark).

(a)(ii) Maximum 1 mark
Part VI of the Code of Conduct, 601 (b) prevents a barrister from withholding services 'on the ground that the conduct, opinions and beliefs of the prospective client are unacceptable to him or any section of the public' (1 mark). Students could also mention that a barrister should not discriminate against a client because of any "belief" – see Part III para. 305.1 of the Code , 'A barrister must not in relation to any other person (including a client or another barrister or a pupil or an employee or a student member of an Inn of Court) discriminate directly or indirectly because of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability, age, religion or belief.' (1mark). Belief is a protected characteristic under Equality Act 2010 s10 and the situation is therefore covered by Equality Act 2010 s13. Students are not expected to make specific reference to the Act for this question but should have a general understanding of the provisions of code 305.

(b) Maximum 2 marks.

Mr Given would be "professionally embarrassed" and would be able to decline instructions under 603 (d) 'if the matter is one in which he has reason to believe that he is likely to be a witness (1 mark) or in which whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced (1 mark)'.

(c) Maximum 2 marks.

Code of Conduct paras 603(b) & 701(b)(ii) provides that a barrister must not accept any instructions if to do so would cause him to be professionally embarrassed (1 mark) which includes 'if having regard to his other professional commitments he will be unable to do or will not have adequate time and opportunity to prepare that which he is required to do; (1 mark)'.

(d) Maximum 1 mark.

Code of Conduct paras 603(a) & 701(b)(i) provides that a barrister must not accept any instructions if to do so would cause him to be professionally embarrassed, which includes if he lacks sufficient experience or competence to handle the matter (1 mark).