

**THE LAW SOCIETY OF SCOTLAND
EXAMINATIONS**

PROFESSIONAL RESPONSIBILITY

Friday 28 July 2023

**(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. Steven is a junior partner in a niche Glasgow law firm which specialises in personal injury litigation. Steven persuades Audrey, the firm's senior partner to allow him to implement an ambitious marketing plan. First, to have brochures, beer mats and business cards printed with a photo of several rottweiler guard dogs, with the heading, "world class litigators" and describing the firm as offering "an unrivalled personal injury service". Steven plans to distribute the brochures in the A and E departments of hospitals as well as pubs. Secondly, to draw up an arrangement with an accident insurance company to pay them a referral fee amounting to 0.5% of any settlement achieved on behalf of that client by the firm. Steven plans to make up for the cost of this by charging a 35% success fee from damages based arrangements with each client. Third, to carry on an active twitter commentary from any large personal injury case that goes to proof in the Court of Session covering not only the comparative expertise of the expert witnesses giving evidence but also the strength and weaknesses of the judge hearing the case.

Finally, in a bid to make his fees competitive Steven indicates that (1) although he does not normally undertake legal aid cases, for clients who are eligible for advice and assistance he will use it to obtain an expert's opinion before switching to a private fee for the rest of the case and (2) that for legal aid litigation he only charges 5% of any damages recovered from the other side (including wage loss and future care costs).

Advise Steven and Audrey as to their ethical position.

2. Andrea has acted for twenty years as the personal lawyer for Marina, a wealthy widow, helping her in many and varied ways e.g to master internet banking, to send provocative messages on Twitter under a pseudonym and arranging cheap flights on-line, that go far beyond the normal role of the solicitor. To celebrate their 20 year association Marina takes Andrea on a free cruise round the world on

a large ocean liner. Andrea and Marina are genuinely fond of each other and it is eventually agreed that Andrea will move into Marina's large mansion to look after Marina in her old age and provide her legal services for free during the period of the arrangement. In return, Andrea will receive 25% of the value of the mansion if the arrangement lasts for five years and a further 25% if it lasts for 10 years. Andrea drafts an agreement implementing these conditions, and arranges for it to be independently witnessed. At the same time Andrea drafts Marina's revised will, which leaves the remaining 50% of the mansion to Andrea after Marina's death, together with a cash legacy of £75,000. Andrea arranges for the revised will, which leaves Marina's estranged daughter, Noele, unprovided for in the estate, to be independently witnessed also. Marina insists that Andrea is appointed as the sole executor and the solicitor to the executry. Marina further insists, and Andrea with some reluctance agrees, that when Andrea is the executor she will not inform Noele as to her legal rights.

As Marina grows more frail Andrea decides that a power of attorney is necessary. Considering that it might be improper for her to draft it, she arranges for her partner, Peter, to draft the power (which is in Peter's name), assuring him that Marina is still fully alert as a Skype conversation with Marina will prove. Peter makes the call, drafts the power of attorney and gives it Andrea for Marina to sign. The signed power is put in the law firm's safe.

Advise on the ethical issues raised in these scenarios.

3. 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 Aberdeen 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?
4. Norma is a successful solicitor advocate specialising in public law and civil cases generally. She is approached by Robert who is a famous media star who has been accused of purchasing explicit photographs from a seventeen year old male model for substantial sums. Robert fears that his actions may be exposed in the tabloid press so instructs Norma to offer the male model £150,000 for his silence, provided the male model signs a Non Disclosure Agreement (NDA) which binds him from disclosing to anyone any of the relevant facts unless he is required by legal process to disclose the name of the purchaser of the explicit photographs. The NDA will also require him to limit the scope of any disclosure he is required to make, to as little as possible. In short the NDA prevents the model from volunteering his story to the police unless they find a way to make him a compellable witness. Norma drafts the Non-Disclosure Agreement which the model duly signs.

Norma is uncomfortable about the NDA and indicates to Robert that she will not draft any further NDAs for him unless Robert agrees to a clause in Norma's letters of engagement which stipulates that Robert cannot complain against her to the SLCC for the quality of service which she has provided him in these cases. Further she stipulates that Robert agrees (in writing) that what Robert tells her in any case involving an NDA will not be covered by professional privilege or client confidentiality.

In a separate matter, Norma is acting in a litigation for large Electronics company. She is approached by a former employee of the company who swears her to secrecy before disclosing that the corporate client (Smiths plc) on the other side of the litigation has potentially (and inadvertently) been guilty of what some might consider to be a fraudulent activity. Accordingly, she writes to Smiths, indicating that she expects them to make a donation of £50,000 to a named charity. She states that if they do not do so within a month, she will have no option

but to refer the matter to the police to clear up the matter. Norma, mindful of her undertaking to the former employee of her client, does not intend to mention the potential fraudulent activity and her proposals to Smith plc, to her own client.

Advise Norma as to her ethical position in relation to the issues raised in this problem.

- 5(a) Andrew is a solicitor in the Highlands who has a specialism in the buying and selling of crofts. He is contacted by the Gillespies whom he has acted for in the past, who now wish to sell their croft in Angus to the Dignans a couple from the South of England. Andrew first met the Dignans two weeks earlier when they were referred to him by an estate agent as individuals who were interested in acquiring a croft. At that stage the Dignans had not heard of the croft owned by the Gillespies. Andrew advises both couples on the price and then does the conveyancing for them both as well, arguing that it would be unfair to have to send one of them away to the nearest solicitor with crofting experience who is 60 miles away. Half way through the transaction, the Dignans accuse Andrew of favouring the Gillespies in the missives negotiations and hand him a mandate in favour of a sole practitioner in a town ten miles away. Andrew indicates that he will not implement the mandate until his fee note has been made up and paid. Andrew is in no hurry to do this, taking a month to even send the file to a law accountant.

Advise Andrew as to the ethical implications of his behaviour in this case.

- 5(b) Gregory, Andrew's partner is a court practitioner who has taken on more work than he can properly handle. As a result he is beginning to let things slip. With a view to resolving his predicament he begins settling some of his minor cases so that he can make more time for the remainder. On the other hand he has failed to settle the account of an expert witness or of counsel in one case claiming that his client (who has disappeared without leaving him in funds) should pay the accounts.

Advise Gregory as to his position in terms of professional responsibility.

6. Louisa is a young and ambitious civil litigator in a large Edinburgh firm who hopes to make partner in record time. However, driven by the increasingly unreasonable management targets within the firm she has found herself under great pressure to inflate her time sheets, and to claim that she is meeting the set deadlines in all her cases, irrespective of the complexities of the cases. Her supervising partner, Gerald, is part of the problem and is completely unsympathetic. On one occasion in an important employment case Louisa, under Gerald's verbal instructions, Louisa creates a "report" that suggests to the client that their case has been raised before the ET and an award successfully obtained, when no such action has even been

raised. Louisa has misgivings about some of her actions but reassures herself that she can safely blow the whistle on Gerald and in any event the SSDT is likely to take a lenient view of her “creative compliance” because of her youth and the unreasonable stress at her workplace.

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

Louisa and Gerald are involved in a long running case relating to Harold, a client who was badly injured in a road accident where a European tourist in a forgetful moment started driving down the wrong side of the road. The defending insurance company surprisingly chose to fight the case all the way. The key debates were over the issues of (1) contributory negligence and (2) the extent of Harold’s injuries and his prognosis for recovery. Louisa gets an expert medical report that suggests that Harold’s prognosis is very good and his injuries are considerably less serious than they first appeared. The other side got an expert medical report which was much more gloomy on both fronts. Louisa does not lodge her medical report and accepts that of the defence. After the proof has been completed but before the judge can issue a judgment, Harold (whose marriage broke down after the accident) uses his expert medical report which was not used in the damages case, in a contested hearing over contact and residence to his children. He is trying to persuade the sheriff that his health has much improved and that his prognosis is excellent and therefore he is quite fit enough to look after his children for extended periods. By coincidence the doctor for the insurance company in the damages case meets his counterpart for the pursuer in both the damages and the children case, and they compare notes. The insurance doctor forms the impression that he has made a terrible mistake and that he should inform the judge in the damages case of this, before he hands down his judgment. The doctor informs the counsel and solicitors on both sides of the case. However, no one takes any action to tell the judge.

Advise Louisa as to her position in terms of professional ethics

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