



STRATHMORE LAW SCHOOL

MASTER OF LAWS (LL.M)

END OF MODULE MAIN EXAMINATION

LLD 9106: LEGAL ETHICS IN RESEARCH AND PRACTICE

Date: Friday, 12th July 2024

Time: 3 Hours

INSTRUCTIONS

1. This examination consists of four questions. Answer QUESTION 1 (COMPULSORY) and any other TWO questions.
2. This is an open book exam. You may refer to reference material provided during the course, or any other reading material you find relevant.
3. You are not permitted to obtain assistance by improper means or ask for help from or give help to any other person.
4. You should spend a fair amount of time organizing your thoughts before starting to write. Careful organization and clarity will be highly valued.

Question 1

Lawyers play an important role in society, having the power, through their work, to impact people's lives, freedom and property rights. In the lawyer's professional work, he/she encounters clients, opposing counsel, clients of the opposing counsel, interacting third parties, government officials etc. As a professional, the lawyer's world has special characteristics derived from his/her function in society and the multiple roles he plays. The lawyer also encounters the nonprofessional community - family, relatives, friends, neighbors, former schoolmates, etc.

Owing to the power of the lawyer that comes with the nature of their work and the nature of the responsibilities that they have as a profession, there is an assumption, particularly by outsiders to the legal profession, that lawyers can do anything. The lawyer's duty has been interpreted by some to include "morally disreputable functions" such as "being a partisan rhetorician". The lawyer acts as agent for another, i.e., a client; and has in that regard been said to serve as a partisan advocate in systems that have power to inflict serious but lawful consequences on the client.

In their relationship with their clients, lawyers have a duty to safeguard clients' secrets. The duty of the lawyer to give confidential counsel to a client has been interpreted as "keeping secrets" to the advantage of favoured parties (clients) and to the disadvantage of others who could benefit from the information".

Geoffrey C. Hazard Jr., *Law Practice and the Limits of Moral Philosophy in Rhode D.L Ethics in practice: Lawyers' roles, responsibilities, and regulation*, Oxford University Press, Oxford (2000), 75-93.

- a) Is the accusation by outsiders to the profession of lawyers being tyrants, of promoting secrecy or of being partisan advocates in courses of action that can have serious adverse effects on third parties, in your view justifiable? **[15 Marks]**
- b) It has been argued that to the extent that politicians represent their constituents in government and are beholden to them, or businesspeople manage enterprises on behalf of shareholders and have an obligation to uphold their interests above all others, these, like lawyers, occupy an agency position in which the interests of those they represent are held above that of third parties.

In your view, is the legal profession comparable to politics, or business as described above and are the duties and responsibilities of the lawyer comparable to those of a politician or business executive? **[15 Marks]**

QUESTION 2

Numerous laws and codes exist to regulate ethical conduct in the public space, and to guide the conduct of advocates in exercising their professional obligations. In Kenya, these laws and guidelines include the Mwongozo Code of Governance for State Corporations, Public Procurement

and Disposal Act (2015), Bribery Act (2016), Anti-Corruption and Economic Crimes Act (2003), the Public Officers Ethics Act (2003), Public Procurement and Disposal Act (2005), Proceeds of Crimes and Anti-money Laundering Act (2009), The Ethics and Anti-Corruption Act (2011) - enacted to operationalize the Ethics and Anti-Corruption Commission, Leadership and Integrity Act (2012), the Advocates Act and the LSK Code of Standards of Professional Practice and Ethical Conduct (2017) SOPPEC, among others.

In spite of the existence of all these laws, corruption continues to afflict the Kenyan society in all sectors. Some people are ignorant of the existence of the laws, or their subjection to it, as a survey carried out indicated. The survey found that “about 610 businesses or 44% of all respondents indicated that they were unaware of the legislation (the Bribery Act, 2016) and 45% further indicated that they were unaware of their businesses' obligation to comply with the new legislation and the potential liability for noncompliance.” *Corruption Risk Mapping in Kenya's Private Sector*, A report by the Kenya Private Sector Alliance (April 2019), 7.

Others blatantly disregard the laws with impunity, confident that they will not be taken to task, and those who are eventually apprehended get out without being tried or convicted for the offenses they were arrested for.

You are an ethics and governance consultant working with at your County Government. Concerned about the rising incidents of blatant abuse of office, embezzlement, extortion, demands for facilitation payments, favoritism, fraud, a culture of demanding kickbacks, nepotism and other procurement-related misconduct that now seems be drowning his county, your County Governor approaches you with his concerns. Share with him the reasons why you think that corruption and other unethical conduct continue in spite of the numerous laws passed to curb the menace. Propose to him an ethical approach the County can take to turn things around and reform the institution.

[15 Marks]

Question 3

You have graduated with your LLD degree and you head the National Applied Legal Ethics Institute. A colleague from your former firm, a criminal law practitioner, sends you this voice message:

Hey, it's June. I've got a problem so please call me right back. I have a trial starting this Monday. It's an armed robbery case where all the prosecutor has is a pretty weak witness identification. My client told me how he did the crime and we focused on how to discredit the identification. However, this morning around 11:00 am, he suddenly tells me he has an alibi story and that he didn't even do the crime in the first place. He said that at the time the crime was committed he was walking by himself in the park by the lake, far from the crime. He said that he originally told me that he did the crime because he didn't think I would believe in his innocence. I was at a loss about what to say and just stared at him. Then I started asking him questions like a prosecutor would and not surprisingly I tore his story to pieces. So

he gets real mad at me and asks me whose side I'm on. I said that, although I want to get him acquitted, as a licensed lawyer I can't put up any perjury. So he says, *"don't worry about that, because I've got a new lawyer. You are fired. You are not my lawyer. I am not your client."* And he handed me a piece of paper with the name and phone number of Kisia Ndemo, a well known criminal lawyer this side of town. I've worked with her before. She's good. I trust her. So I called Ndemo and she said she entered into an attorney client relationship with my client this morning around 9:00 am. I didn't say anything else or ask her anything else. She didn't say anything else either. I'm sure you understand. But I am still on record as the counsel on this matter and after Ndemo tried to file a substitution of counsel around noon today the judge's clerk called me and Ndemo jointly and told us both to show up on Monday because the trial will definitely start that morning and the judge wants to keep things under control and decide about the supposed switch in counsel. Anyway, I've spent this afternoon reading SOPPEC over and over and now it's just becoming a blur. I don't want to hurt my client—if he even is my client at this point. But I don't want to kill my career either. Can you get me some advice in writing about how to handle this situation?

Advise June. **[15 Marks]**

Question 4

Although the number of law graduates emerging from law schools in the country has increased exponentially over the last decade, the problem of access to justice especially among the lower income households remains. Many sections of the population cannot afford to pay lawyers to meet their legal needs.

To meet the challenge of serving the underserved lower income population, lawyers need to take it upon themselves to offer part of their time to pro bono legal services to those who need but cannot afford to pay for the services. However, one of the biggest challenges of expecting lawyers especially in a developing country like Kenya to grow in the spirit of offering their services without pay is the low income that they themselves earn especially when beginning their careers.

You have been invited to give the speech at the dinner of this year's graduating class at the Kenya School of Law. Write a speech making a critical reflection on the justification and importance of pro bono work for the legal profession. **[15 Marks]**