



**Strathmore**  
UNIVERSITY

**STRATHMORE LAW SCHOOL  
MASTER OF LAW (LL.M)  
END OF MODULE MAIN EXAMINATION  
LLM 8003: LEGAL ETHICS**

**Date: Thursday, 20<sup>th</sup> April 2023**

**Time: 3 Hours**

**Instructions**

1. This examination consists of **FIVE** questions.
2. Answer **Question ONE (COMPULSORY)** and **any other TWO questions**
3. You should spend a fair amount of time organizing your thoughts before starting to write.
4. Careful organization and clarity will be highly valued.
5. Please start your answer for each question on a new page

**QUESTION 1**

Victoria left a job as a lawyer at the Attorney General’s office and began working Women Lawyers Association doing mostly representations of domestic violence victims. At 9:00 A.M., on her first day at the new job, Victoria listened to this voicemail from her supervising advocate, Wamuyu:

Hey, Victoria, sorry I couldn’t be there this morning, but I’m at Riverside Hospital. Njeri, a former colleague who is now a solo practitioner in town, had a massive stroke over the weekend. Very sad. Anyway, there’s some things you need to do. First, Mrs. Meli, a former client, doesn’t want to pay our fees and so threatened us with a malpractice suit. We’ve reached an agreement with her to write off the fees in exchange for her releasing any claims against us. See my secretary Kate, who will show you the correct form, which is pretty straight forward; but ask Kate if you have any questions. Second, around noon grab the file with our public speeches and head down to the Keala Women’s Club (in Rongai) for lunch and deliver our speech “*How A Lawyer Can Protect You from Domestic Violence.*” After the speech, hang around and see if you can drum up some prospective clients. If they are worried about the costs, assure them they won’t have to pay a shilling if we take their case. We’ll front all the costs, including medical exams and whatever. Third, in our case for Mrs. Bungei, her mother is paying us the legal fees but she’s fallen behind. Call her to get another payment. She may want to know what’s going on in the case, but we keep telling her that nothing is really happening yet. If you need to, make up something about how the court is

backlogged with all the election petition cases. Whatever... Or, if you prefer, just have Kate call her. I'll catch up with you after work. We can grab dinner and drinks at Di's Bistro – the one on Kasuku Road.

- (a) Identify and analyze the issues arising from the above facts. [15 Marks]
- (b) Wamuyu's attitude and choices reflect the atmosphere of moral indifference and decline in legal professionalism – a "crisis in litigation" – that currently permeates the practice of law not only in Kenya, but in many other jurisdictions.

A research study on ethics and professionalism in litigation undertaken at the request of the American Bar Association to "*understand the ethical climate in litigation ... the social factors, incentives and cultural norms that shape the decision making of lawyers in their daily practice*" found that generally, ethical problems were not high on the list of the lawyers and judges. When breaches occurred,

"responsibility for incivility and professional deviance was placed elsewhere – by large firm lawyers on plaintiffs' lawyers, in-house counsel and judges; by plaintiffs' lawyers on defendants and their lawyers who allegedly hide documents and abuse discovery and on a "defense oriented" judiciary; by in-house counsel on plaintiffs' lawyers who file frivolous cases and use discovery as fishing expeditions;... by judges on lawyers who do not take their professional obligations seriously enough and on appellate courts which routinely undo whatever trial judges try to do to manage the discovery process."

Austin Sarat, *Ethics in Litigation: Rhetoric of Crisis, Realities of Practice* in Deborah L. Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities and Regulation*, (2000) 46, 155-159.

In the research, the author asked, amongst other questions:

- a) What role does the law firm play in controlling behavior in litigation?
- b) How effective are firms at socializing their members into the highest standards of professionalism and at responding to problems of incivility or to breaches of ethics?
- c) Do firms have distinctive cultures which encourage ethical behavior and discourage abuses and uncivil behavior?

Assuming you were the Managing Partner in the Law Firm where Wamuyu is employed, and therefore her Senior, attempt to answer the above questions in the context of legal practice in Kenya, based either on your practice experience or considered opinion.

If your response to any of the questions is in the negative, please proceed to answer whether, in your view, a) law firms should play a role in controlling litigation behavior of their lawyers; b) if they should play an effective role in socializing their members to high standards of professionalism; and c) if they should create cultures that encourage ethical behavior. In your answer, you can share your views whether you think that the ethical problems in civil litigation are as a result of "hyper-adversariness" in litigation, because they are "inextricably bound up with the adversary system".

[15 Marks]

## QUESTION 2

The practice of legal ethics can be described as tension between moral ideals and practical possibilities as exemplified in opposing approaches to its study. Various philosophical approaches have been used to help navigate the complexity of ethics, including the deontological, consequentialist and virtue ethics theories. Critically discuss which ethics theory (or theories), in your view, will help curb the widespread breakdown in the fundamental values that should anchor the arguably declining legal profession and restore it to its honorable status. [15 Marks]

## QUESTION 3

The problem with the legal or constitutional formulation of fundamental phrases used in legal documents can be *as vacuous as they are undefined, commonly presupposed but rarely articulated*, leading to endless debate about their meaning. Philosophy, the study of the fundamental nature of knowledge, reality, and existence, can come in to help the lawyer in giving meaning to terms and concepts.

Fredric L. Bor in his article “The Nexus Between Philosophy and Law” says:

“... the law continues to be a living reality of problems, acute problems, requiring people to make decisions and engage in actions of one kind or another. Law is still in process. In the language of philosophy, law is not an area of being but an area of becoming. Man, too, is more of a human becoming than a human being. We may take a hand Law into what we are to become. We have to make law into what it ought to be to help us become who we must be.”

In whatever field the philosopher looks to – biology or nature or society or politics – he looks for the principles that order the subject matter; how is it put together, on what is it based, how does it proceed? ...

Journal of Legal Education, 1974, Vol. 26, No. 4 (1974), 539 at 541

- (a) Define the term “legal ethics”. In your answer, explain whether the differentiated application of the principles of ethics into several divisions of ethical studies (eg legal ethics, and medical ethics or accounting ethics) results in a change of the general principles of ethics. [7 Marks]
- (b) Explain the concepts of i) man as a rational being and ii) man as a social/relational being and how they help to understand the nature of the human person, leading to a deeper appreciation of ethics. [8 Marks]

## QUESTION 4

The trouble is," said the Judge, "young men choose the law as a profession merely from what they see of it from the outside through eyes of impressionable youth. Every young man starts out to be 'famous' and respected, and if he be from the South particularly he is the victim of traditions that even now make professional career a guarantee of social position and a cloak which to cover a multitude of failings.”

"He hears some jury lawyer talk mightily on the abstract virtues. His imagination is fired by the applause and prominence come to a few leaders at the local Bar. Then he reads in the press dispatches of the great orator or inquisitor or prosecutor, some powerful speech in defense of a man accused of crime he is thus led still further along the road of unbridled imagination and fancy to false ideas about the law as a calling. Then told of some fee of five hundred thousand or a million dollars that this or that lawyer has secured for saying 'yes' or 'no' to a question, and visions of great wealth are seen at the end of the rainbow of his enthusiasm."

Champ S. Andrews, *The Law. A Business or a Profession?* The Yale Law Journal, Vol. 17, No. 8 (Jun., 1908), pp. 602-610

It is arguable that what was the perception of the legal profession in the author's time in America – of lawyers as intellectual dilettanti and not moral reformers ... who think great thoughts but do not live them – continues to be so even in Kenya more than a century later.

Discuss the misconceptions of the young lawyer highlighted in the quote and explain the salient features of professionalism and the legal profession that are necessary to give an accurate picture of the "calling", and thus inform a young person's choice of career. [15 Marks]

#### **QUESTION 5**

For various reasons, justice is said to be the deepest virtue that any person can possess, the *sine qua non* for human socialization. In Aristotle's view, "justice is the most important kind of excellence a person can possess because it is useful to others both in times of peace and of war".

- (a) Define justice as a virtue and explain two other virtues related to justice that are necessary to bring about the desired effect of harmony in society. [5 Marks]
- (b) Conceptualize the intrinsic relationship between the concepts of law and justice and explain why ethics of law must, of necessity, be premised on the value/virtue of justice. [10 marks]