

PROGRAM : LLB

MODULE : APPLIED LEGAL STUDIES MEMORANDUM

CODE : ALS41Y0 / TPR 0000

DATE : WINTER EXAMINATION – 1 JUNE 2018

DURATION : 3 HOURS

WEIGHT : 50% of the first semester

TOTAL MARKS : 100

EXAMINERS : MR EJ HANEKOM
PROF DS DE VILLIERS

MODERATOR : PROF R CLOETE

NUMBER OF PAGES : 6 PAGES

INSTRUCTIONS :

- 1) Question papers must be handed in.
- 2) Answer all the questions.
- 3) Apply all the guidelines of clarity to all your answers.
- 4) You may not make up any facts unless the instructions at the question specifically grant permission to do so.
- 5) Questions may be answered in any order.
- 6) Simple and sometimes inappropriate language is used in order to assess your level of skills.

REQUIREMENTS : 1 EXAMINATION SCRIPT

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QUESTION 1

You are an attorney. You discuss a case on the phone with one of your clients. The discussion is about a possible settlement in the client's divorce case. The client gives you specific instructions to draft a settlement proposal and that you must convey that to the opposition and to arrange a round-table meeting with the opposition as well.

After this telephone conversation, what step will you take to ensure that you understood the client's instructions correctly and that there is no misunderstanding between yourself and your client? Explain. [5]

ANSWER 1

Confirm in writing – when / always? – No. [1]

- Sometimes – how do you decide? If critical e.g. settlement; [1] or

- If that conversation could have an influence – [1] whether positive or negative – on the outcome of the matter. [1]

- Arrangement for a meeting? Only if it's final i.e. no further contact will take place. After such a call what should you do? Confirm with the client by e-mail or letter. [1]

QUESTION 2

What would you regard as the rules of "clarity" that applies to sentences in legal drafting? Explain. [6]

ANSWER 2

Write short and simple sentences. [1]

Rule: One thought per sentence, each sentence between 15 - 35 words if possible. Keep yourself disciplined. [1]

If you use long complicated sentences you yourself could get confused and your reader even more. A long sentence, linked by a number of commas and "and"s, can leave the reader feeling so lost that they can no longer make head or tail of what you are trying to say. [1]

Use simple sentences - only one interpretation must be possible. [1]

Try to minimise descriptive phrases. [1]

Actively concentrate on using as few words as are possible to make your point. [1]

QUESTION 3

The Children's Act 38 of 2008, sections 18(1) and (2) refers to parental responsibilities and rights that a person may have in respect of a child.

What are they? [4]

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ANSWER 3

18. Parental responsibilities and rights

(1) A person may have either full or specific parental responsibilities and rights in respect of a child.

(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right

- (a) to care for the child; **[1]**
- (b) to maintain contact with the child; **[1]**
- (c) to act as guardian of the child; **[1]** and
- (d) to contribute to the maintenance of the child. **[1]**

QUESTION 4

Analyse the letter below. Indicate 15 aspects that are not good or correct format and explain briefly why the format is incorrect. **[15]**

University of Johannesburg
Law Clinic
Cnr University road and Kingsway
Auckland Park
Johannesburg

Mr. Yeagan Piet Naidoo
321 Empire road
Auckland Park
Johannesburg

LETTER OF DEMAND

Dear Mr Yeagan Piet Beyl.

COLLISION: Jenny versus Piet

We are acting on behalf of Miss Jenna Jameson, who instructed us to address this letter of demand to you.

On 1 January 2013 you drove through a robot-controlled intersection in Johannesburg on the corner of President and Ntemi Piliso streets. The traffic light was red for traffic approaching from the direction of your motor vehicle.

As a result a collision occurred between your motor vehicle and our clients' motor vehicle.

The collision occurred solely as a result of your negligence including (but not restricted thereto) not keeping a proper lookout, not stopping at a red traffic light and driving through an

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intersection at an inopportune time.

As a result of your sole negligence our client sustained damages to her property in the amount of R 120 000,00 (one hundred and twenty thousand rand) as her 1999 Honda motor vehicle had been damaged beyond repair in the collision.

On behalf of our client, I the writer, hereby demand the amount of R 120 000,00 (one hundred and twenty thousand rand) from you, together with mora interest at 15.5% per annum calculated from the date of this letter to the date of payment.

Should you fail to pay the above-mentioned amount within 40 (fourty) days from the date of this letter, summons will be issued against you without further notice.

Best wishes

Johnny

ANSWER 4

[15]

- Name and address of receiver should be left top under sender, not right [1]
- No date [1]
- No postal code at the addressee's address. [1]
- No reference [1]
- A demand should be registered post [1]
- "Dear Sir" or ("Madam") or "Dear Mr. Beyl"; Unsure? "Dear Sirs" **Nót:** "Dear Mr. Yeagan Piet Beyl " [1]
- Heading – to help reader identify the matter; Names of parties & 1 more identifying item [1]
- Avoid legalese like "*versus* etc." [1]
- Numbered paragraphs. [1]
- Don't write: "I, the writer" [1]
- Payment period is incorrect – it can never be 40 (fourty) days as it is too long. [1]
- There is no indication how and where payment should be made. [1]
- End of letter: Not Best wishes- Yours faithfully – formal [1]
- Yours sincerely – less formal, more intimate [1]
- Really too friendly. "Kind regards" - Nót in our Law Clinic or in practice necessarily. [1]
- Name of Law Clinic Principal / Attorney at the end. [1]

QUESTION 5

Read the set of facts and then answer questions 5.1 and 5.2.

(You may nó draft the whole Particulars of Claim!)

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You are an attorney. Your client is Mrs Lucky Dubazana. Her husband, Mr Letlhokwa Dubazana is a politician in Nigeria. They got married in Kimberley on 1 April 1992, in community of property and they are still married.

They lived together in her house at 123 Fox street. This is right next to the Johannesburg Magistrates' Court. (She was born there and lived her whole life in Johannesburg.)

You will represent Lucky in her divorce. Letlhokwa is committing adultery with another woman.

Letlhokwa belongs to a registered South African pension fund, named the "Hamba Kahle Pension Fund".

Lucky instructs you that that she wants nothing from the marriage, except half of Letlhokwa's pension fund. Lucky wants a payout in cash. She does not belong to a pension or provident fund.

Lucky and Letlhokwa agrees to settle their differences and that Lucky will go to court alone on the day of the divorce with a written deed of settlement. The case number is RC/GP/JHB 18/241.

QUESTION 5.1

Draft only those prayers that will come at the end of the Particulars of Claim that will give direct effect to Lucky's instructions relating to the pension. (Do not for instance draft "A decree of Divorce").

[10]

ANSWER 5.1

PRAYERS REGARDING THE DIVISION OF THE PENSION INTEREST:

WHEREFORE THE PLAINTIFF PRAYS FOR JUDGMENT AS FOLLOWS:

- 1.1 The Hamba Kahle Pension Fund or its successor in title is ordered **[1]** to pay 50 % of the benefits to which the Defendant is entitled to on the date of divorce as a member of the fund, to the Plaintiff, as a cash benefit, **[1]** as if the Defendant's membership of the fund is terminated on the date of the divorce on which date such benefit accrues to the Plaintiff. **[1]**

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- 1.2 An order directing the Registrar of this Honourable Court to forthwith notify [1] the Hamba Kahle Pension Fund or its successor in title to make an endorsement in its records that such part of the pension fund is so payable to the plaintiff [1] and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification. [1]
- 1.3 That the Hamba Kahle Pension Fund or its successor in title is ordered to endorse its records accordingly [1] that such a part of the pension benefits is so payable to the Plaintiff, [1] and to either make payment directly to Plaintiff of the benefits amount due to her, within sixty (60) days [1] of receipt of the court order and of her notice in which she elects to receive a cash payment. [1]

QUESTION 5.2

Draft the heading and the preamble to the Deed of Settlement:

[8]

ANSWER 5.2

**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF GAUTENG
HELD AT JOHANNESBURG**

Case No: RC/GP/JHB 16/241

In the matter between :

DUBAZANA, LUCKY

Plaintiff

and

[2]

DUBAZANA, LETLHOKWA

Defendant

SETTLEMENT AGREEMENT [1]

WHEREAS the Plaintiff instituted divorce proceedings in the above Honourable Court against the Defendant; [1]

AND WHEREAS both parties agree that there has been an irretrievable breakdown of their marriage relationship; [1]

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AND WHEREAS the parties are desirous of recording the terms of an agreement regarding the issues set out hereunder arising from the dissolution of their marriage; [1]

The parties hereby record that in the event of the above Honourable Court granting a decree of divorce, [1] the parties have agreed as follows: [1]

QUESTION 6

Read the set of facts and then answer the question below it

Set of facts

You are working at a firm of attorneys as an attorney. The secretary at reception informs you that a new client, Miss A, has arrived and that the attorney who supervises you has allocated this client to you for an immediate consultation.

You consult with the client. Miss A informs you that she is the human resources manager at a well-known firm. She wants your legal advice regarding a criminal case that might be instituted against her. She is of the opinion that she will be charged with fraud.

The facts are that she has recommended that another employee, named X that worked with her, should be allowed to retire on early pension. The managing director then offered X a retirement package amounting to R 1000 000. X accepted it and retired early.

After a year on retirement X however applied at the same firm to be re-appointed in his old position. Your client held the opinion that the early retirement of X was an immense loss for the firm, and she recommended that he should be reappointed. The managing director then made an offer to X to get his old job back. X accepted the offer and he now again works at the firm.

Another member of the firm's board of directors, director Y, is of the opinion that Miss A and X colluded unlawfully regarding X's early retirement and re-appointment. Y laid criminal charges with the police against A and X. Y is of the opinion that A and X committed fraud together in order to get their hands on the R 1 000 000 payout.

A tells you that she was honest and that she never colluded or committed fraud. She does admit that X gave her a little gift of R 50 000 after his early retirement.

A candidate attorney and a legal assistant from the firm of attorneys sat in during the consultation in order to assist you.

Evaluate whether the information that you received above is confidential or privileged and cover the following aspects in your answer:

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6.1 Explain the meaning of the two concepts, what exactly each concept covers, how it applies to the set of fact and which persons are bound to keep it. **[15]**

ANSWER 6

Confidentiality

Confidentiality of all communication is an implied term of the contract between the attorney and client. **[1]**

It extends to written and oral communication. **[1]** It covers everything that the client and the attorney communicated and even did not communicate. It survives termination of mandate and death of the client. **[1]**

Client's cases must not be discussed in a way that reveals their identity and files must be kept safe. **[1]**

Legal Professional Privilege

Certain communications between legal practitioner and client may not be used as evidence in court. **[1]**

All communications between legal practitioner and client are privileged, written and oral, **[1]** that are intended to be confidential, **[1]** brought into existence for the purpose of giving and receiving legal advice or for existing or contemplated litigation. **[1]**

All the information that she gave to the attorney as well as the attorney's legal advice is both confidential and privileged, **[1]** as she instructed him to give her legal advice **[1]** and to defend her in possible litigation.

You (the attorney) **[1]**
the candidate attorney, **[1]**
the legal assistant, **[1]**
and the receptionist **[1]**

are all bound to hold confidentiality and privilege, **[1]** insofar they have information obtained from the client.

6.2 Refer to and briefly discuss 2 relevant applicable cases to explain legal professional privilege. **[10]**

ALSO SEE ALL THE CASES ATTACHED AT THE END OF THIS MEMO - Any two of them coorrectly cited are worth a mark each and then an additional two marks each for a short explanation of its applicability here

Sasol III (Edms) Bpk v Minister van Wet en Orde en 'n Ander 1991 (3) SA 766 (T)

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- ❑ Judge Van Zyl says - privilege in law runs together with principles of public interest and policy
- ❑ There is no indication in the Criminal Procedure Act that the minister may interfere with the common law principle of privilege between client and attorney.
- ❑ Right to secrecy is fundamental.
- ❑ The right of privilege is in the interest of the public and justice and fairness.
- ❑ This right must be respected.
- ❑ No breach can be tolerated - judicial or quasi-judicial.
- ❑ Privilege forms part not only of law of evidence, but also of the substantive law.

Waymark NO v Commercial Union Assurance Co Ltd 1992 (3) SA 779 (Tk)

- ❑ Privilege forms part not only of law of evidence, but also of the substantive law.
- ❑ The right of privilege belongs to the client and the attorney owes client that duty.
- ❑ Communications between attorney and client must be frank and unreserved.
- ❑ The attorney needs the full facts of the case to give proper legal advice.
- ❑ The client needs the assurance that what he tells his attorney will be kept a close secret.
- ❑ Privilege serves the interests of the public

QUESTION 7

You are an advocate. You have been instructed by a Mr. Nair to act for him and also to defend him in court. The state alleges that he was involved in the illegal “rigging” of a tender process in order for his sister to obtain the tender. The tender was worth R 200 000 000,00.

Mr. Nair is also being sued by one of his former business partners, a Mr. Nkosi, for the amount of R 10 000 000. Mr. Nkosi alleges that he will lose this amount of money now that Nair is charged with corruption by the state. Nkosi is also the principal state witness in the criminal case against Nair.

Nair instructs you to interview Nkosi for purposes of both the above-mentioned cases.

Evaluate your chances of being allowed to do so with reference to current case law. **[15]**

ANSWER 7

- **INTERVIEW OF WITNESSES.**
- **SHABALALA & OTHERS v ATTORNEY GENERAL, TRANSVAAL 1996 (1) SA 275 (CC) [1]**
- In criminal cases:
- A blanket prohibition against this is too wide. **[1]**
- One must request the prosecuting authority for permission. **[1]**
- If permission is refused, bring an application to court. **[1]**
- The state witness may however refuse to consult with you. **[1]**

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- If the prosecuting authority agrees to an interview – they have the right to be present. [1]
- Director of Public Prosecutions may refuse if:
 - Witness will be intimidated; In this case there is a fear that Nkosi may be killed and it is likely that the NDPP will refuse Nair permission to interview him. [1]
 - State secrets may be divulged; [1]
 - Identity of informants will come to light; [1]
 - Evidence may be tainted; [1]
 - Justice will be prejudiced. [1]
- Interview of witnesses in civil cases:
- Not subpoenaed? May interview. [1]
- Subpoenaed? Inform the party who subpoenaed the witness of your interview. They are not entitled to attend. [1]
- Inform witness that he is not forced to make a statement. [1] There is no reason why Miss Zuma should not be interviewed, but of course, she may refuse. Clearly Nkosi will not be interviewed since he is the plaintiff in the civil case. [1]

QUESTION 8

You drive 16 minutes 40 seconds at 180 km/h. How far did you travel? Show all your calculations.

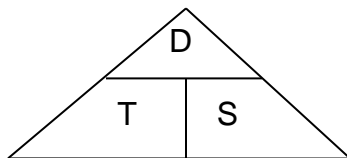
[7]

ANSWER 8

D= "distance"

S= "speed"

T= "time"



[1]

$$X \text{ km} = 180 \text{ km/h} \times 16 \text{ minutes } 40 \text{ seconds} \quad [1]$$

$$\text{Speed} = 180 \text{ km/h} \times 1000 \text{ metres} = 180\,000 \text{ metres per second} \quad [1]$$

$$\text{Time} = 16 \text{ minutes} \times 60 \text{ seconds} + 40 \text{ seconds} = 960 \text{ seconds} + 40 \text{ seconds} = 1\,000 \text{ seconds} \quad [1]$$

$$1000 \text{ seconds out of } 3\,600 \text{ seconds (a full hour)} \quad [1] = 0.277\,777\,777 \text{ hours (expressed as a decimal)} \quad [1]$$

$$180\,000 \text{ metres per hour} \times 0.277\,777\,777$$

$$= 49,999\,999\,986 \text{ km} = \text{rounded: } 50 \text{ km} \quad [1]$$

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QUESTION 9

You buy a photocopier for your practice that costs R 25 000,00 VAT inclusive. How much VAT did you pay? Show all your calculations. [5]

ANSWER 9

R 25 000,00 [1] x (15 ÷ 115) [1]

R 25 000,00 x 0.13043478 [1]

R 3260.869565 [1]

R 3 260.87 = The amount of VAT paid [1]

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Case law on legal professional Privilege

S v Moseli en 'n Ander 1969 (1) SA 650 (O)

- Privilege includes: (1) what was said, and (2) what was NOT said.

Venmop 275 (Pty) Ltd and another v Cleverlad Projects (Pty) Ltd and another 2016 1 SA 78 (GJ) General principles confirmed and waiver discussed.

The formulation in *The South African Law of Evidence* (2nd ed 2010 at 703): a statement which forms part of genuine negotiations for the compromise of a dispute is inadmissible as privileged.

Lane & Another NO v Magistrate, Wynberg 1997 (2) SA 869 (C) Letter from client to attorney to bring an application funded by a third party who supports the application, is not privileged as the letter is not intended for the purpose of obtaining legal advice.

Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) (31 July 2008)

148. The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.¹²⁴ The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer protected is necessary to uphold the right to a fair trial in terms of section 35 of the Constitution, and for that reason it is to be taken very seriously indeed.

A Company and Others v Commissioner for the South African Revenue Services (16360/2013) [2014] ZAWCHC 33; 2014 (4) SA 549 (WCC) (17 March 2014)

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'[t]he right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met.' The requirements are (i) the legal advisor must have been acting in a professional capacity at the time; (ii) the advisor must have been consulted in confidence; (iii) the communication must have been made for the purpose of obtaining legal advice; (iv) the advice must not facilitate the commission of a crime or fraud; and (v) the privilege must be claimed. The character of the rule is accepted to be substantive rather than procedural;

S v Safatsa and Others 1988 (1) SA 868 (A) at 885-6.

The Judges adopted a passage in the judgment of Dawson J in **Baker v Campbell** [1983] HCA 39, (1983) 153 CLR 52, (1983) 49 ALR 385. The passage quoted is from para 24 of Dawson J's judgment in the High Court of Australia to the effect that '[legal professional] *privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation....*'. (The judgments in **Baker v Campbell** provide a compendious and most useful international survey of the pertinent jurisprudence on the history and development of the rule.)

Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003 (2) SA 515 (W) An unlawfully made tape recording of telephone conversation between attorney and client indicates client wants to fabricate evidence to mislead the court. Criminal intention causes it to be admitted into evidence despite the fact that the recording was unlawfully made. Plaintiff applied for an interdict restraining the defendants from using this tape recording.

Goodriche & Son v Auto Protection Insurance Co Ltd (In Liquidation) 1967 (2) SA 501 (W) on 504 at paragraph 5. The court held that an attorney "must duly and faithfully keep the secrets of his client, and on no account disclose them without the client's consent". The client's right to privacy and attorney-client confidentiality is paramount and, save for in exceptional circumstances, information relevant to her case can only be disclosed by her legal representative with her consent.

Jansen van Vuuren and Another v Kruger 1993 (4) SA 842 (A) on page 849 at paragraph 4. The client also enjoys a right to confidentiality as between herself and a medical practitioner. Further, in terms of South African common law, there is not only an ethical duty but also a legal duty towards medical practitioners to respect the confidence of their patients.

NM v Smith 2007 5 SA 250 (CC) at paragraph 41. The court held that disclosing medical information could potentially instil fear in the patient, hence infringing his/her right to make fundamental choices. Further, the court held that it is of vital importance that an individual's HIV/Aids status is kept confidential as it encourages them to seek treatment and it could potentially result in the improvement of public health policies on HIV/Aids.

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South African Airways Soc v BDFM Publishers (Pty) Ltd and Others (2015/33205) [2015] ZAGPJHC 293; [2016] 1 All SA 860 (GJ); 2016 (2) SA 561 (GJ) (17 December 2015)

The nature of legal advice privilege is that it is a species of confidential information and that it is not an absolute right in SA law. It is a negative right to prevent admission into evidence of advice obtained from a legal advisor in confidence.

Therefore it is not a positive right to preserve confidentiality of advice if information disclosed by unauthorised means. Privilege covering legal advice therefore is not available to be invoked against the world learning of the communications between client and legal advisor.

A person may rely on a right to the preservation of confidentiality in one's own information, inclusive of legal advice in respect of which legal advice privilege can be claimed. If confidentiality is not yet breached, an interdict may be an appropriate form of relief to preserve confidentiality.

If confidentiality in information subject to a claim of legal advice privilege is lost or any other information loses its attribute of confidentiality. It is unlikely that any interdictory relief can be effective and then such an order will be inappropriate

Waiver of right of privilege or of right to confidentiality of information: the concept of an imputed waiver exists. This applicant had on four occasions communicated with journalists without claiming any of its rights were violated. This begs the question of whether this course of conduct amounted to a constructive intention to waive any rights which ought to be imputed to the applicant?

An imputed waiver must not to be lightly inferred. A claim of privilege can be belated on the facts no waiver is proven.

Any claim of a right to confidentiality subject to the public interest in the information being published to the public. Section 16 of the constitution must be weighed. On the facts, applicant was an organ of state and it's financial and governance affairs were of legitimate interest to all South Africans. Applicant has been subject to critical scrutiny for a long time and little of what was claimed as confidential information was not already in the public domain before the document containing the confidential legal advice was leaked to the media. Therefore no harm is demonstrable by applicant that outweighed publication in the public interest. The publication is therefore appropriate.

Criminal Procedure Act s201 Privilege of legal practitioner

No legal practitioner qualified to practise in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable

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to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is

professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned.

Article

C Brett & K Wagner "I heard it through the grapevine: The difference between legal professional privilege and confidentiality" 2016 *De Rebus* 27.

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