IRAC method of completing exams

Issues - Outline the issues that you are going to discuss.
Rules - Define the legal rules that are relevant to the question.
Application - Apply the legal rules to the facts of the question (this is the hard part!).
Conclusion - Tie things up, usually in the form of an advice to your hypothetical client.

Always use your reading time wisely to PLAN YOUR ANSWER before writing. This is of utmost importance as it will help you clarify your thoughts and ensure that you avoid following desperate exam strategies that unprepared students commonly resort to, such as:

i) ‘the kitchen sink’ i.e. spilling all of your knowledge that is vaguely related to the topic onto the exam paper and hoping for the best.

ii) ‘the garden path’ i.e. going off on an irrelevant tangent

Remember that the APPLICATION IS THE MOST IMPORTANT SECTION of your answer and should take up the bulk of your time. The actual conclusions you reach are often superfluous. Rather, your marker will be most interested in how you arrived at your conclusion.
**Question One: Answer**

A lawyer has a duty to decline a retainer that is likely to give rise to a conflict of interests. A lawyer is prohibited from acting against a former client if a reasonable observer, aware of all the relevant facts, would think there is a real possibility that confidential information might be used by the lawyer to advance the interests of a new client to the detriment of the former client (*Carindale Country Club Estate v Astill*). Thus, a lawyer possessed with relevant confidential information cannot act against a former client.

The notion of ‘confidential information’ extends beyond matters of direct forensic and evidentiary relevance. It may relate to more general matters such as the client’s weaknesses and strengths, their honesty or lack thereof, their reaction to crisis, pressure or tension, or their attitude to litigation and tactics.

It is arguable that the lawyer has gained confidential information in relation to Wendy. Namely, the lawyer believes he knows Wendy’s likely reaction to the pressure of being sued and/or her attitude to litigation. That the lawyer has formed the opinion that Wendy is likely to settle the case early indicates he may have confidential information that he could use against Wendy. On the other hand, it is not exactly clear on what basis the lawyer has formed his opinion. If this is a mere opinion not based on anything concrete, then perhaps the lawyer does not actually possess confidential information in relation to Wendy………

**Question Two: Answer**

The lawyer owes a duty of care to the client, Bob. If the lawyer has failed to attain the standard of competence expected, he may be liable in negligence. The scope of the duty of care in tort is generally prescribed by contract, namely the terms and limits of the retainer (*Hawkins v Clayton*). Matters which arise in the course of carrying out those instructions must be regarded as coming within the ambit of the retainer (*Frost & Sutcliffe v Tuira*).

The relevant standard of care expected of the lawyer is that of the ordinary skilled person exercising and professing to have that special skill. The standard is one of a qualified, competent and careful lawyer. The standard of care will not be reduced here merely because Bob’s lawyer is inexperienced in legal practice. To reduce the standard of care for this reason would go against public policy.
A lawyer retained to carry out an improvident transaction must consider whether the client should be warned against pursuing the transaction, or at the very least advised of the risks involved in doing so. On the facts, it does not appear that the lawyer has advised Bob of the risks associated with suing the bank. The lawyer has failed to advise Bob of the unlikelihood of success and the lack of ground and evidence on which he based his allegations. Given the lawyer truly believed the case was a hopeless one, he should have explicitly advised Bob not to pursue the litigation. If, however, after fully informing Bob he still wished to sue the bank, then the lawyer would have fulfilled his duty and could act in the transaction (Cousins v Cousins). On the other hand, the fact that Bob’s case was so weak may nonetheless have indicated that Bob truly understood the transaction. A prudent lawyer in this situation who had serious reservations as to Bob’s understanding would have declined to act in the matter. ………

**Question Three: Answer**

Trust money is defined as money received in the course of or in connection with the provision of legal services by a law practice for or on behalf of another person (NSW s 243(1); NT s 235(1); Qld s 237(1); Tas s 231(1); Vic s 3.3.2(1); WA s 205(1)).

Trust money includes controlled money, which is trust money received or held by a law practice in respect of which the practice has a written direction to deposit the money in an account (not a general trust account) over which the practice has or will have exclusive control. Controlled money must be deposited in the specified account as soon as practicable after receiving it (ACT s 224(1); NSW s 256(1); NT s 248(1); Qld s 251(1); Tas s 245(1); Vic s 3.3.15(1); WA s 218(1)).

Trust money also includes transit money, which is money received by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice (CT 210(1); NSW s 243(1); NT s 235(1); Qld s 237(1); Tas s 231(1); Vic s 3.3.2(1); WA s 205(1)). Transit money must be paid or delivered as required by those instructions rather than put into a trust account (ACT s 225(1); NSW s 257(1); NT s 253(1); Tas s 247(1); Vic s 3.3.16(1); WA s 220(1)). For example, a client agrees to purchase property and delivers to lawyer a cheque drawn in favour of selling agent and instructs lawyer to pay the cheque to agent on exchange of contracts………
Question Four: Answer

(a) A retainer need not be in writing, it may be oral. However, this was very unwise on the lawyer’s behalf. Here, the lawyer bears the onus of proving the existence of the retainer. He must adduce evidence in the form of words or conduct of the parties sufficient to satisfy a court on the balance of probabilities that the retainer alleged in fact existed (Murphy v Liesfield). Even if the lawyer can prove there existed an agreement between himself and Lauren, it will be difficult to define the exact scope and detail of it. The fact that Lauren believes the lawyer did not properly follow her instructions and did not complete the work as asked may indicate that the scope of the retainer is unclear. Whether the lawyer can prove there existed an oral retainer depends on the evidence adduced. If it transpires that the evidence consists of the lawyer's word against Lauren’s, the court is likely to side with Lauren. This is because the client is ignorant and the lawyer is educated, thus it is the lawyer’s fault that no written retainer was obtained (Griffith v Evans).

(b) A lawyer must avoid transactions that involve the mixing of his personal affairs with the affairs of his client (Law Society of NSW v Harvey), because in doing so the lawyer is likely to place himself in a position of conflict between interest and duty. On the facts, the lawyer has entered into a personal transaction with his client Lauren. Namely, he has borrowed $4000 from Lauren. This is a prima facie conflict of interest situation, because the interests of lender and borrower conflict; the lender’s interest is to secure the greatest return whilst the borrower’s interest is to pay the least interest.

Question Five: Answer

Introduction

The High Court in D’Orta v Victorian Legal Aid (2005) confirmed the existence of advocate immunity in Australia. This immunity protects barristers and solicitors from claims for negligence in the course of advocacy, in respect of conduct in court or the giving of advice out of court which leads to a decision affecting the conduct of the case in court. Advocate immunity is premised on considerations of public policy due to the potential injury to the public interest in the administration of justice. The immunity facilitates finality of decisions, promotes efficient conduct of court proceedings and most importantly maintains counsels’ overriding duty to the court.
Arguments for the immunity

Collateral attack on original decision

Making advocates amenable to suit in respect of the conduct of cases in court would have the undesirable and unwelcome effect of re-opening and re-trying the original case. Unsuccessful litigants would bring an action to demonstrate that their advocate’s negligence in the conduct of litigation had caused damage to the client, and but for this negligence a more favourable outcome would have resulted. This undermines the principle of finality by allowing the decision of the court to become the subject of re-litigation other than by way of appeal………

Question Six: Answer

General principle

Legal professional privilege (“privilege”) is a fundamental common law immunity. It allows a client, subject to defined exceptions, to preserve the confidentiality of communications which have been made for the dominant purpose of obtaining legal advice or in connection with existing or anticipated legal proceedings. Privilege is not to be sacrificed even to promote the search for justice or truth in cases and extends to protect clients from compulsory disclosure of protected communications and materials to any authoritative body. There are, however, a number of exceptions to privilege which attempt to balance the public interest served by confidentiality against a potentially more compelling public policy.

The main justification for legal professional privilege is the public interest of encouraging full and frank communications between lawyer and client. However, the courts will not allow this public interest to be abused. There is a recognition that the public interest can be jeopardised by clients who seek to use legal professional privilege to hide their internal deliberations. In particular, the privilege should not be used to hide communications with legal practitioners which do not involve the giving of independent legal advice. ……..
Question Seven: Answer

Introduction

It is well established that a solicitor owes a fiduciary duty to his or her client. The Professional Rules recognize a wide array of potential lawyer-client interactions that generate conflicts of interest and attempt to govern them accordingly. Once of the potential conflicts of interests arises where a lawyer purports to act against a former client. In deciding whether to disqualify a lawyer from acting against a former client, it is the court's task to balance the competing interests - the client's right to be represented by the lawyer of his or her choice; each party's right to be free from the risk of even inadvertent disclosure of confidential information; and the public's interest in the scrupulous administration of justice........

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