

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Pupillage/Work-Based Learning

Professional Ethics

Sample question

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Composition of papers and division of time

1. This exam comprises six Short Answer Questions (SAQs) comprising two parts.
2. You will have three hours to complete the exam.
3. Please use a new page for each of the SAQ sub-parts.

Materials

4. You **MUST NOT** remove the exam paper or the SAQ answer book from the examination centre if you are undertaking a pen and paper test.
5. **This examination is OPEN BOOK.** You are **NOT** allowed to use any materials other than those made available to you.

SAQ grading scheme

6. Each of the six SAQs is divided into two sub-parts. Each sub-part is of equal weight.
7. Markers are instructed to grade each answer as follows:

Satisfactory (Competent)	<p>A competent answer demonstrating satisfactory understanding of the material issues, but with some inaccuracies and/or omissions. Such inaccuracies and/or omissions do not materially affect the integrity of the answer.</p> <p>Analysis and/or evaluation may be present but is not highly developed.</p> <p>Some evidence of insight, but it may be limited.</p> <p>Some use of appropriate information and principles drawn from syllabus materials.</p> <p>Addresses or resolves some of the material issues, using appropriate application and relevant reasoning.</p> <p>A competent answer may exceed these minimum criteria.</p>
Unsatisfactory (Not competent)	<p>Poor understanding of the material issues with significant omissions and/or inaccuracies.</p> <p>Limited or completely lacking in understanding.</p> <p>Interpretation, analysis and/or evaluation is shallow and poorly substantiated.</p> <p>Little or no evidence of insight.</p> <p>Limited use of information and principles.</p> <p>Not evident that syllabus materials were understood and/or incorporated into answer.</p>

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	<p>Addresses or resolves material issues to a very limited extent, with little or no focus and/or relevant reasoning.</p> <p>Further or alternatively, the answer contains material which is so clearly incorrect that it would significantly affect the client's interests and/or place the barrister at risk of a finding of serious misconduct.</p>
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8. There is no restriction, other than the time available for the test, on the number of words you are permitted to use by way of a response to each sub-part of a question. You should use your good judgement in order to provide a comprehensive answer to each question, ensuring that you address what is asked of you.
9. In answering SAQs, you are expected to quote accurately the Core Duties, principles and source material which are applicable in any sub-part of a question. This exam is intended to test your ability to identify and analyse the ethical issues engaged in the questions and then to apply your knowledge of Professional Ethics in seeking to resolve those issues.
10. The close application of ethical principles to the facts outlined in each scenario is the key to success in this exam. In order to obtain a grade of "satisfactory," you are advised to write coherently so as to evidence fully your knowledge and understanding of the issues involved and your evaluation of the correct ethical approach to adopt in the circumstances in order to effect the appropriate resolution. Examiners are looking for answers that clearly demonstrate a full appreciation of the ethical issues engaged and the application of the relevant principles and Core Duties. Therefore, answers should provide a detailed description of these as well as a comprehensive and clearly reasoned explanation in support of the resolution proposed. A statement of principle without the demonstration that its application has been properly understood will not meet the "satisfactory" threshold. Bullet-point answers are acceptable but they must be coherent.
11. Candidates are reminded that markers are instructed as follows:
 - To undertake an holistic evaluation of a candidate's answer: markers will therefore not ignore ambiguous or mutually exclusive answers when undertaking the grading exercise.
 - Not to piece together a coherent answer from incoherent fragments of information distributed throughout an answer.
 - Not to grade as "satisfactory" an answer they deem to be inadequately coherent prose at sentence level.

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Professional Ethics sample question SAQ6

- To grade an SAQ answer which has been deemed illegible by the Central Examinations Board (CEB) as “unacceptable”.
- To grade answers which are ethically unsound as “unacceptable”. It must be emphasised that an otherwise satisfactory (or good) answer which also, in the examiners’ view, contains material which is so clearly incorrect that it would significantly affect the client’s interests and/or place the barrister at risk of a finding of serious misconduct will be graded as “unacceptable.”

The exam starts on the next page

QUESTION 6

You are representing a local authority in a prosecution at the Magistrates' Court for offences relating to health and safety and fly tipping committed by an industrial waste company. The defendant directors personally and on behalf of the company plead guilty and the case is committed to the Crown Court for sentence. You feel much sympathy for the Defendants and believe that the prosecution is somewhat oppressive and probably need not have been brought. Prior to the sentencing hearing, the local authority instructs you to apply for forfeiture of certain goods related to the offences as well as prosecution costs. The schedule of costs sent to you involves a sum that would, to your knowledge, significantly affect the defendant company's future viability.

There is no representative from the local authority present at the sentencing hearing, which is actually the first time you have appeared in the Crown Court. As a result of being nervous, and quite unintentionally, you forget to apply for either forfeiture or costs during the hearing. You only realise your error after the Judge has pronounced the sentence and you and the other barristers are leaving the courtroom. You are now too embarrassed to raise the issue. Thereafter, you do not contact the local authority after the hearing to inform them of the sentence imposed. In response to an email from them asking about the orders made, you inform them that the forfeiture and costs applications were refused by the Judge.

- (6a) Identifying the relevant ethical principles and applying them to the facts, explain how you should have dealt with your omission at the hearing and the local authority's enquiry about the outcome and what steps you should now take. You must give a detailed explanation supporting your answers.

You attend the Magistrates' Court to represent Miss Charlotte Dickson at her trial for causing actual bodily harm to a ticket inspector who challenged her about travelling on a train without paying. The papers contain a list of her previous convictions, which is purportedly up to date. Although Miss Dickson has convictions for shoplifting, there are no recorded convictions for violence. As a result, you were intending to adduce the previous convictions as a tactic to show that she has no propensity for violence. In conference prior to the trial starting, you go through the evidence and list of previous convictions with Miss Dickson. She explains that the list is not actually up to date as she was convicted six weeks earlier in Paris of assaulting two police officers during a street disturbance.

When the current trial is called on, the Prosecutor seems completely unaware about this recent conviction and no notice has been given of any prosecution application to adduce Miss Dickson's bad character.

- (6b) Identifying all relevant ethical principles and applying them to the facts, explain how you should proceed in respect of the trial and of the Paris conviction, both with Miss Dickson and the Court. You must give a detailed explanation supporting your answers.

This is the end of the exam paper

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Professional Ethics

Pilot/Mock examination

Mark scheme (including indicative content)

QUESTION: 6a

APPLICATION OF KNOWLEDGE

Grades: Good; **Satisfactory**; Poor; Unacceptable

A **satisfactory** level of application of knowledge should contain evidence that the candidate understands:

- CD3 - the barrister has lied to the client as to the reason that the orders were not made
- CD5 - the barrister's actions in lying to the client are likely to diminish the trust and confidence that the public places in the profession
- Once the barrister realised his mistake he should have sought to rectify it before leaving court
- The barrister should now contact the client and tell them the truth about the failure to apply for the orders
- The barrister should self-report to the BSB since dishonesty amounts to serious misconduct

Moving upwards from satisfactory application of knowledge

A **good** answer may additionally contain reference to:

- That in failing to make the applications as instructed, the barrister has breached CD2 and CD7
- That the barrister's personal views and sympathy for the client are irrelevant to the matter, and in any event were not a reason for his failure to make the applications (he simply forgot)
- That the barrister must take steps to rectify his breaches, and that these must be taken regardless as to the potential consequences to himself (rC15.2)
- Recognition that in raising the matter before leaving the court, and asking for it to be dealt with there and then, the barrister could have avoided the need for a further hearing, and thus avoiding wasting the court's time/ incurring further costs
- That the barrister will need to provide the client with details of Chambers' complaints procedure and information regarding the procedure for complaining to the Legal Ombudsman

Moving downwards from satisfactory application of knowledge

A **poor** answer will contain the following omission(s) or irrelevant/incorrect material, namely:

- A failure to identify that there has been a breach of CD3 (lying to the client)

			<ul style="list-style-type: none">• A failure to recognise that barrister should have raised issue before leaving court• A failure to identify that the barrister must now take steps to rectify his breach (contacting the client to tell them the truth about the failure to apply for the orders) <p>An unacceptable answer will fail to address any of the key issues/provide an ethically unsound response which presents a significant risk to the lay client and/or the administration of justice, including behaviour requiring reporting to the BSB</p> <ul style="list-style-type: none">• The candidate fails to identify the need to report to BSB due to serious misconduct having been committed
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SAQ6a) INDICATIVE CONTENT COMFORTABLY EXCEEDING SATISFACTORY ANSWER

The ethical issues arising in this question relate primarily to my duty under CD2, acting in my client's best interests and CD7, the duty to provide a competent standard of work and service, as well as CD3, the duty to act with honesty and with integrity. CD5, the duty not to behave in a way which is likely to diminish the trust and confidence which the public holds in me or the profession, also has a bearing in this situation.

I should have applied for a forfeiture order and costs but failed to do so. I have therefore breached CD2 and CD7 because in failing to apply for the orders I have not acted in the best interests of the local authority, my client, and have failed to provide a competent standard of service. The failure to let the local authority know of the result of the hearing is also a breach of CD7.

I have a duty to take reasonable steps to mitigate any breaches of the handbook and to do so regardless of the consequences to myself (rC15.2). I therefore should have taken steps to remediate the breaches by letting the court and my opponent know as soon as I realised my mistake and certainly before the parties left the court building. I should at least have contacted the court office when leaving the building to alert the judge to the issue.

I have compounded matters by lying to my client and this is a clear breach of CD3 because this duty means that I should act with honesty and with integrity at all times and should not knowingly mislead anyone and this includes my client.

Lying to a client would also be breach of CD5 because the public expects barristers to be honest and to act with integrity towards everyone and this includes their clients.

I should contact the local authority and tell the truth about my failures to apply for the forfeiture and costs orders. I should also explain the complaints procedure, including the procedure for complaining to the Legal Ombudsman. I should also report myself to the BSB for having committed serious misconduct (gC96.1).

QUESTION: 6b

APPLICATION OF KNOWLEDGE Grades: Good; **Satisfactory**; Poor; Unacceptable

	<p>A satisfactory level of application of knowledge should contain evidence that the candidate understands:</p> <ul style="list-style-type: none">• CD1- the barrister owes an overriding duty to the court, which includes the duty not to mislead• CD6- the barrister's duty of confidentiality means the barrister cannot disclose the existence of the Paris convictions to prosecution or court without the client's consent• That to suggest that the client has no prior convictions for violence would mislead the court, and as such the barrister must not do this• That the barrister should therefore not adduce the client's previous convictions to show that they have no propensity for violence• The barrister will need to advise the client that he cannot adduce her previous convictions to show that	<p><i>Moving upwards from satisfactory application of knowledge</i></p> <p>A good answer may additionally contain reference to:</p> <ul style="list-style-type: none">• CD3- to make assertions regarding the client's convictions that he knows to be untrue would put the barrister in breach of CD3• CD5- the trust and confidence that the public has in the profession would be diminished if the barrister were to knowingly mislead the court in this way• That whilst the barrister owes a duty to the client to act in her best interests (CD2), his overriding duty is to the court (CD1)• The duty to the court under CD1 does not require a barrister to act in breach of his duty to keep the client's affairs confidential (rC5)• It is the prosecution's duty to ensure that the previous convictions are accurate; there is no duty on the barrister to disclose the fact that they are not up to date• The candidate's answer either does not refer to mandatory sentencing at all, since the scenario is set in a trial context, or only briefly refers to the same, in order to discount it from being relevant due to the fact that the scenario is set in a trial context
		<p><i>Moving downwards from satisfactory application of knowledge</i></p> <p>A poor answer will contain the following omission(s) or irrelevant/incorrect material, namely:</p> <ul style="list-style-type: none">• The candidate's answer focuses on mandatory sentencing, despite the scenario being set in a trial context

	<p>she has no propensity for violence, explaining why that is the case</p> <ul style="list-style-type: none"> • The barrister will then need to consider their position based on the client's response • If the client accepts the barrister's advice that the submission cannot be made to the court, the barrister may continue to act for the client • If the client insists that the barrister makes the submission to the court, the barrister must cease to act, explaining why to the client 	<ul style="list-style-type: none"> • The candidate fails to identify that the barrister owes an overriding duty to the court, which includes the duty not to mislead • The candidate suggests that this is a scenario in which the barrister cannot continue to act for the client unless the client agrees to the disclosure of the existence of the Paris convictions <p>An unacceptable answer will fail to address any of the key issues/provide an ethically unsound response which presents a significant risk to the lay client and/or the administration of justice, including behaviour requiring reporting to the BSB</p> <ul style="list-style-type: none"> • The candidate suggests that the barrister should proceed in making the submission that the client has no propensity for violence
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SAQ6b) INDICATIVE CONTENT COMFORTABLY EXCEEDING SATISFACTORY ANSWER

This situation raises ethical issues involving the application of CD1, my duty to the Court in the administration of justice, CD2, my duty to act in Miss Dickson's best interests and CD6, my duty to keep the affairs of Miss Dickson's confidential.

I must explain to Miss Dickson that although I have a duty to act in her best interests, I also have an overriding duty to the court in the administration of justice and I therefore must not knowingly or recklessly mislead the court (rC3.1) by suggesting that she does not have any previous convictions for violence. Considering the new discovery, I will therefore be limited in what I can say about her character evidence as I must not mislead the court. I cannot therefore assert that she does not have any previous convictions for violence when I am aware of the Paris conviction. I would advise her that my duty of confidentiality to keep her affairs confidential under CD6 means that I must not disclose the conviction without her consent to do so.

Although the Prosecution (and the Court therefore) seem to be unaware of the recent Paris conviction, I have no obligation to disclose it to the court – rC5 is active here as my duty to the court does not require me to breach my duty of confidentiality to my client. I should add that this is not a situation which mandates me to make a disclosure.

Regarding the proceedings, I may therefore continue to act for Miss Dickson subject to how she responds to the advice I have just given her. If she insists that I must put forward the character evidence as initially planned, I must cease to act and explain to her my reason for doing so (rC25 and rC21.6).