

## December 2022: Marker Guidance: Unit 2

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The marking rubric and guidance is published as an aid to markers, to indicate the requirements of the examination. It shows the basis on which marks are to be awarded by examiners. However, candidates may provide alternative correct answers and there may be unexpected approaches in candidates' scripts. These must be given marks that fairly reflect the relevant knowledge and skills demonstrated. Where a candidate has advanced a point that is not included within the marking rubric please do make a note of the same so that it can be raised at the standardisation meeting.

Mark schemes should be read in conjunction with the published question paper and any other information provided in this guidance about the question.

Before you commence marking each question you must ensure that you are familiar with the following:

- the requirements of the specification
- these instructions
- the exam questions (found in the exam paper which will have been emailed to you along with this document)
- the marking rubric

The marking rubric for each question identifies indicative content, but it is not exhaustive or prescriptive and it is for the marker to decide within which band a particular answer falls having regard to all of the circumstances including the guidance given to you. It may be possible for candidates to achieve top level marks without citing all the points suggested in the scheme, although the marking rubric will identify any requirements.

It is imperative that you remember at all times that a response which:

- differs from examples within the practice scripts; or,
- includes valid points not listed within the indicative content; or,
- does not demonstrate the 'characteristics' for a level

may still achieve the same level and mark as a response which does all or some of this.

Where you consider this to be the case you should make a note on the script and be prepared to discuss the candidate's response with the moderators to ensure consistent application of the mark scheme.

## SECTION A (all compulsory – 40%)

<p><b>Question 1:</b></p>	<p>Describe the procedure, including the factors the court will consider, where a claimant has obtained a default judgment and the defendant wishes to have that set aside.</p>
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9          Pass = 5+          Merit = 6+          Distinction = 7+</p>	<p>10</p>
<p><b>Indicative Content</b></p>	<p><b>Marks</b></p>
<p><b>Required: Candidate should set out that an application should be made for Default Judgment under Part 12 Civil Procedure Rules (CPR), e.g</b></p> <p><i>May apply:</i> Where a defendant does not respond after 14 days, or acknowledges service within 14 days of service, but does not file and serve a defence within 28 days, the claimant can apply for 'judgment by default'. The date of service is determined by the rules set out within the CPR. Default judgment means judgment without trial where a defendant has failed to file an acknowledgment of service; or has failed to file a defence. The claimant may obtain judgment in default of an acknowledgment of service only if at the date on which judgment is entered the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and the relevant time for doing so has expired. A default judgment is requested by completing and returning to the court Form N225 - Request for judgment and reply to admission. This form is also used in cases of admissions, considered in the next section.</p> <p><i>Credit reference to any authority cited on occasions when a default judgment may not be obtained or permission may require, e.g:</i> CPR 12, CPR 12.1, CPR 12.3(1), CPR PD 12, para 4.1, CPR 6, CPR 10.2, CPR 15.3 and Form N225.</p>	<p>Up to 3 marks</p> <p>A pass must refer to CPR 12 and set out what it means to apply for a default judgment</p>
<p><b>Could also include a discussion on circumstances when a default judgment may not be obtained or when permission of the court may be needed, e.g:</b></p> <p><i>May not obtain or may need permission:</i> A claimant may not obtain a default judgment on a claim for delivery of goods subject to an agreement regulated by the Consumer Credit Act 1974; where he uses the procedure set out in Part 8 (alternative procedure for claims); or in any other case where a practice direction provides that the claimant may not obtain default judgment. A default judgment may only be obtained by a claimant with the permission of the court (for which an</p>	<p>Up to 4 marks</p>

<p>application under CPR Part 23 will be required) in the following cases: D was served outside the jurisdiction, D is a child or protected party, C seeks costs (other than fixed costs), Tort claims between spouses or civil partners and C wants delivery of goods, not simply damages.</p> <p><b>Credit reference to any authority cited on occasions when a default judgment may not be obtained or permission may require, e.g:</b> CPR 12.2 and CPR 12.10.</p>	
<p><b>Credit a discussion on setting aside a default judgment, e.g:</b></p> <p><b>Setting aside a default judgment:</b> The mandatory grounds, upon which the court must set the judgment aside are that the defendant has filed an admission with request for time to pay, the defendant had applied for summary judgment against the claimant, the claim was satisfied before judgment or the defendant has complied with the rules. In any other case, the court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim; or it appears to the court that there is some other good reason why the judgment should be set aside or varied; or the defendant should be allowed to defend the claim.</p> <p><b>Credit reference to any authority cited on setting aside a default judgment, e.g:</b> CPR 13.2 and CPR 13.3.</p> <p><b>Prompt application:</b> A lack of promptness is a factor for the court to consider when deciding whether to set aside a default judgment. However a lack of promptness (and even a positive decision not to act promptly) does not prevent the court setting a judgment aside if the defendant can show a real prospect of successfully defending the claim. Recently, it was stated that it would be 'unconscionable' for the claimant to benefit from the Covid-19 crisis.</p> <p><b>Credit reference to any authority cited on making a prompt application, e.g:</b> Page v Champion Financial Ltd [2014], Gentry v Miller [2016] and Stanley v London Borough Tower Hamlets [2020].</p> <p><b>Relief from sanctions:</b> On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application. There is a three-stage approach to addressing applications for relief from sanctions: the court should identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order, the court should consider why the default occurred and the court should evaluate all of the circumstances of the case so as to deal with the case justly. An application for relief from sanctions must be supported by evidence. Applications will normally be made under CPR 23, with a supporting witness statement.</p>	Up to 3 marks

<p><b>Credit reference to any authority cited on making an application for relief from sanctions prompt application, e.g:</b> Regione Piemonte v Dexia Crediop Spa [2014], Michele Robinson v Royal Borough of Kensington and Chelsea [2016], Gentry v Miller [2016], Denton v TH White [2014], CPR 3.9(1), CPR 3.9(2) and CPR 23.</p>	
<p><b>Credit a discussion on making an application to set aside a default judgment, e.g:</b></p> <p><b>Making an application:</b> Under CPR 23 an application notice means a document in which the applicant states his intention to seek a court order and respondent means the person against whom the order is sought and such other person as the court may direct. The general rule is that a copy of the application notice must be served on each respondent. An application may be made without serving a copy of the application notice if this is permitted by a rule a practice direction or a court order. An application notice must state what order the applicant is seeking and briefly, why the applicant is seeking the order. A copy of the application notice must be served as soon as practicable after it is filed and except where another time limit is specified in these Rules or a practice direction, must in any event be served at least 3 days before the court is to deal with the application. When a copy of an application notice is served it must be accompanied by a copy of any written evidence in support and a copy of any draft order which the applicant has attached to his application.</p> <p><b>Credit reference to any authority cited on the application, e.g:</b> CPR 23.1, CPR 23.4(1), CPR 23.4(2), CPR 23.6, CPR 23.7(1) and CPR 23.7(3).</p>	Up to 2 marks

<p><b>Question 2:</b></p>	<p>Discuss whether a Costs Order may include provision requiring the payment of an amount in respect of all or part of an after the event Insurance premium.</p>
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9  Pass = 5+  Merit = 6+  Distinction = 7+</p>	10
<p><b>Indicative Content</b></p>	<b>Marks</b>
<p><b>Required: Candidates must demonstrate knowledge of the legislative framework governing the recoverability of ATE premiums, e.g:</b></p>	Up to 6 marks

**The legislative framework:** The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) renders that ATE premiums are no longer recoverable from the paying party. The Act introduced a new section 58C of the Courts and Legal Services Act 1990 which prevents recovery of any premium for an after the event insurance policy. A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless permitted under the legislation. The legislation provides that the Lord Chancellor may make regulations in clinical negligence cases permitting for the recovery of ATE premiums in relations to medical experts reports.

**Credit reference to the citing of any supporting authority on the legislative framework, e.g:** Section 46(1) of the Legal Aid Sentencing and Punishment of Offenders Act 2012, section 58C(1) of the Courts and Legal Services Act 1990 and section 58C(2) of the Courts and Legal Services Act 1990.

**Further rules:** Insurance premiums are recoverable where the insurance is against the risk of incurring experts fees re liability and causation in clinical negligence proceedings, the part of the policy recoverable relates to the experts reports, and the damages claimed are valued at £1000.00 or more. There are no other rules or practice directions to give guidance on the assessment and recoverability of premiums and it was commented in the C of A decision that this ought to be looked at by the Rules Committee.

**Credit reference to the citing of any supporting authority on the further rules, e.g:** Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013 and Peterborough & Stamford Hospital NHS Trust v McMenemy [2017].

**Credit any discussion on the court's discretion, e.g:**

**Court's discretion:** Court has discretion as to costs BUT emphasis on proportionality because of the standard basis of assessment. Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party. Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

Up to 2 marks

<p><b>Credit reference to any authority cited in relation the court's discretion as to costs, e.g:</b> Section 51 of the Senior Courts Act 1981, CPR 44.2, CPR 44.3(2), CPR 44.3 (3).</p>	
<p><b>Candidates should have developed their discussion on what challenges may be made to the such a premium, e.g:</b></p> <p><b>Challenges:</b> There have been a number of challenges to ATE premiums: Not all sum paid was premium, the premium is too high compared to others available on the market and the formula used leads to disproportionate premium. Identifying which part of the premium relates to experts' reports may be difficult.</p> <p><b>Credit reference to any authority cited in relation to challenges as to recoverability, e.g:</b> Emily Nokes v Heart of England Foundation NHS Trust [2015]</p> <p><b>Applicability of CPR:</b> Despite a period of uncertainty in relations to an ATE premium taken out after 1 April 2013, it is now clear that the new proportionality test applies to post-LASPO clinical negligence ATE premiums. The CPR is engaged when assessing recoverability of ATE premiums and they are subject to the scrutiny of the Court.</p> <p><b>Credit reference to any authority cited in relation to the applicability of the CPR, e.g:</b> BNM v MGN Ltd [2016], King v Basildon &amp; Thurrock Hospital NHS Trust [2016], Murrell v Cambridge University Hospital NHS Trust [2017] and Peterborough &amp; Stamford Hospital NHS Trust v McMenemy [2017].</p> <p><b>Proportionality:</b> Proportionality is a two-stage test and once reasonableness has been considered the Court should remove all unavoidable costs before making any deduction to reach a proportionate figure. Unavoidable costs may include ATE premiums. The Court require expert evidence if a premium is to be challenged.</p> <p><b>Credit reference to any authority cited in relation to the test of proportionality, e.g:</b> BNM v MGN Ltd [2017], May v Wavell Group [2016], May v Wavell Group [2017] and West and Demouilpied v Stockport NHS Foundation Trust [2020].</p>	Up to 4 marks

<p><b>Question 3:</b></p>	<p>Explain what the Costs Lawyer Standards Board Code of Conduct means when it says that Costs Lawyers must ensure the client's interest is always paramount. Your explanation should include details of any exceptions to this requirement.</p>
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9  Pass = 5+  Merit = 6+  Distinction = 7+</p>	10

Indicative Content	Marks
<p><b>Required: Discussion of the costs lawyer's duty to the client and court, e.g:</b></p> <p><b>CLSB Code of Conduct Principle 2:</b> Costs Lawyers must comply with their duty to the court in the administration of justice. Costs Lawyers must at all times act within the law. Costs Lawyers must not knowingly or recklessly either mislead the court or allow the court to be misled. Costs Lawyers must comply with any court order which places an obligation on them and they must not be in contempt of court. Costs Lawyers must advise clients to comply with court orders made against them.</p> <p><b>Credit reference to any authority cited in relation to Principle 2 of the CLSB Code of Conduct, e.g:</b> CLSB Code of Conduct Principle 2, CLSB Code of Conduct Principle 2.1, CLSB Code of Conduct Principle 2.2, CLSB Code of Conduct Principle 2.3 and CLSB Code of Conduct Principle 2.4.</p> <p><b>CLSB Code of Conduct Principle 3:</b> Costs Lawyers must act in the best interests of their client. Costs Lawyers must act at all times to ensure the client's interest is paramount except where this conflicts with your duties to the court or where otherwise permitted by law. You must decline to act if it would not be in the client's best interests or if that client's interests conflict directly with your own or with those of another client.</p> <p><b>Credit reference to any authority cited in relation to Principle 3 of the CLSB Code of Conduct, e.g:</b> CLSB Code of Conduct Principle 3 and CLSB Code of Conduct Principle 3.1.</p> <p><b>Responsibility and authority on an assessment hearing:</b> The solicitors are responsible for the conduct of the detailed assessment proceedings and cannot avoid that responsibility merely by instructing a costs draftsman. Costs draftsmen can appear on behalf of the party only as a duly authorised representative of the solicitor who has instructed him to be there. Work undertaken by independent costs draftsmen could be treated as part of the instructing solicitor's profit costs such as to attract a success fee. The costs draftsman has the same authority as the solicitor would have had to consent to orders.</p> <p><b>Credit reference to any authority cited in relation to the responsibility and authority on an assessment hearing, e.g:</b> Crane v Canons Leisure Centre [2007], Ahmed v Powell [2003] and Waterson Hicks v Eliopoulos [1997].</p> <p><b>Negligence:</b> Initially, claimant's civil actions for negligence could not be sustained: a barrister's immunity was justified by public policy. This immunity extended to pre-trial work if and only if it is so intimately connected with the conduct of the case in court as to amount to a preliminary decision about it. However, it has subsequently been recognised that the advocate, like other professional men, undertaking</p>	<p>Up to 6 marks</p> <p>To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed</p>

<p>a duty to his client to conduct his case, subject to the rules and ethics of his profession, should do so with proper skill and care.</p> <p><b>Credit reference to any authority cited in relation to negligence, e.g:</b> Rondel v Worsley [1967], Saif Ali v Sydney Mitchell [1978] and Arthur J S Hall &amp; Co v Simmons [2007].</p> <p><b>Approach to advocacy:</b> The principle that an advocate is liable to his client for professional should not stifle the manner in which they conduct litigation and advise their clients. This might lead to defensive advocacy, where barristers would hedge their opinions with qualifications and be reluctant to give clients the advice which they require in their best interests. The courts have not yet developed a clear set of principles governing the terms in which an advocate's advice should be given. If a point is not properly arguable, it should not be argued. It is the duty of an advocate to draw the judge's attention to authorities that are in point, even if they are adverse to that advocate's case.</p> <p><b>Credit reference to any authority cited in relation to approach taken to advocacy, e.g:</b> Moy v Pettmann Smith (A Firm) &amp; Anor [2005], Buxton v Mills-Owens [2010] and Copeland v Smith [2002].</p>	
<p><b>Candidates should include an explanation of the legislative framework governing the regulation of authorised persons / reserved legal activities, e.g:</b></p> <p><b>The legislative framework governing the regulation of authorised persons:</b> Authorised persons are people who are authorised to carry out the relevant activity by a relevant approved regulator or a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity. An approved regulator is a body which is designated as an approved regulator by Schedule 4 of the LSA 07. ACL is approved regulator, as an approved regulator under the LSA ACL regulate those undertaking reserved legal activities who are known as Costs Lawyers. However, there is a memorandum of understanding between ACL and the CLSB delegating the regulatory function to the CLSB.</p> <p><b>Credit reference to any authority cited in relation to the legislative framework governing the regulation of authorised persons, e.g:</b> Section 18 of the Legal Services Act 2007, Section 20 of the Legal Services Act 2007, Section 20(5) of the Legal Services Act 2007 and Schedule 4 of the Legal Services Act 2007.</p> <p><b>Undertaking reserved legal activities:</b> The reserved legal activities relevant to Costs Lawyers include: the exercise of rights of audience, the conduct of litigation and the administration of oaths. A person is entitled to carry on a reserved legal activity where that person is authorised in relation to the activity in question. If a person is not authorised, they may still be entitled to carry out a reserved legal</p>	<p>Up to 4 marks</p> <p>To pass candidates must demonstrate their understanding of the legislative framework governing the regulation of authorised persons</p>



<p>activity if they are an “exempt person” in relation to the activity. Costs Lawyers must adhere to CLSB code of Conduct. Breach will result in disciplinary proceedings by CLSB. An individual who is not authorised by the CLSB, but who is a manager or employee of an authorised person, is also considered a regulated person under the LSA and must comply with all relevant regulatory arrangements.</p> <p><b>Credit reference to any authority cited in relation to undertaking reserved legal activities, e.g:</b> Section 12 and Sch 2 of the Legal Services Act 2007, Section 13(1) of the Legal Services Act 2007, Section 13(2)(a) of the Legal Services Act 2007, Section 13(2)(b) of the Legal Services Act 2007, Section 176(1) of the Legal Services Act 2007 and Section 176(2)(b) of the Legal Services Act 2007.</p>	
<p><b>Credit a discussion on the CLSB Practising Rules, e.g:</b></p> <p><b>CLSB Practising Rules:</b> <i>These Rules govern the practice of Costs Lawyers and the issue and revocation of practising certificates by the CLSB. No person shall be entitled to practise as a Costs Lawyer unless they have qualified as a Costs Lawyer in accordance with the Training Rules, they have a current Practising Certificate which has been issued in accordance with these Rules and which is not suspended and they comply with CPD requirements set out in the CPD Rules. An applicant or Costs Lawyer must disclose certain information when making an application for a Practising Certificate or throughout the lifetime of a Practising Certificate. This includes criminal convictions. A Practising Certificate may be revoked by the CLSB. Costs Lawyers must ensure that they have professional indemnity insurance.</i></p> <p><b>Credit reference to any authority cited in relation to the practising rules, e.g:</b> Rule 1 of the CLSB Practising Rules, Rule 4 of the CLSB Practising Rules, Rule 8 of the CLSB Practising Rules and Rule 10 of the CLSB Practising Rules.</p>	<p>Up to 2 marks</p> <p>To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base and apply the authority to the question posed</p>

<b>Question 4:</b>	Describe the provisions relating to client money found in the Costs Lawyer Code of Conduct and CLSB Practising Rules.
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-7.4  Pass = 7.5+  Merit = 9+  Distinction = 10.5+</p>	10
<b>Indicative Content</b>	<b>Marks</b>
<p><b>Required: A discussion on the CLSB rules, e.g:</b></p> <p><b>Principle 3 of the CLSB Code of Conduct:</b> Generally is about acting in the best interests of the client. A costs lawyer must not accept client</p>	Up to 3 marks

<p>money save for disbursements and payment of your proper professional fees. There is no mention of the CLs handling client money in the CLSB Practising Rules.</p> <p><b>Credit reference to any authority cited on the principle, e.g:</b> Principle 3.6 of the Costs Lawyer Code of Conduct and CLSB Practising Rules.</p>	
<p><b>Required: Students must include a discussion as to what client money is what proper professional fees are and what disbursements are, e.g:</b></p> <p><b>No Definition:</b> There is no definition of client money within any rules set by the CLSB and therefore you must look to either CILEx or SRA rules for the definition. The SRA provide that "Client money" includes money held or received relating to regulated services delivered to a client and money held or received in respect of fees and any unpaid disbursements if held or received prior to delivery of a bill for the same. The CILEx account rules define client money as money beneficially owned by anyone other than the Authorised Entity.</p> <p><b>Credit reference to any authority cited on the definition of client money, e.g:</b> Rule 2.1(a) of the SRA Account Rules 2019, Rule 2.1(b) of the SRA Account Rules 2019, Rule 2.1(c) of the SRA Account Rules 2019, Rule 2.1(d) of the SRA Account Rules 2019 and the CILEx Account Rules.</p> <p><b>Proper professional fees:</b> Fees incurred on having complied with a client instruction, made up of payment for services provided; and disbursements paid on behalf of the client.</p> <p><b>Disbursements:</b> A disbursement is a sum that a Costs Lawyer spends on behalf of their client including the VAT element. Disbursements include, but are not limited to, court fees, counsel's fees, travel costs, postal costs (if exceptional sum e.g. courier), photocopying costs (if exceptional sum). Disbursements do not include hourly rates, telephone calls made or received, faxes made or received, or general office overheads.</p> <p><b>Credit reference to any authority cited on professional fees and disbursements, e.g:</b> CLSB Guidance Note Handling Client Money (Principle 3.6)</p>	Up to 6 marks
<p><b>Credit discussion on whether the principle is relevant when a costs lawyer works for an SRA regulated firm, e.g</b></p> <p><b>Relevance:</b> The principles of the CLSB Code of Conduct are relevant to all authorised persons that are regulated by the CLSB. The CLSB are an approved regulator and must ensure they meet the 8 regulatory objectives set out in the Legal Services Act 2007. They do this by issuing rules, e.g the a code of conduct and practising rules.</p> <p><b>Credit reference to any authority cited on approved regulators and authorised persons, e.g:</b> Section 18 of the Legal Services Act 2007,</p>	Up to 3 marks

Section 20 of the Legal Services Act 2007 and Section 1 of the Legal Services Act 2007

**Requesting payment in advance:** A costs lawyer can request payment in advance of their services when a Costs Lawyer is employed (PAYE) by, or is a partner in, a firm authorised and regulated under the Legal Services Act 2007 (LSA). For example, a firm of solicitors regulated by the Solicitors Regulation Authority (SRA), in which case prevailing SRA rules and regulations apply. A costs lawyer cannot request payment in advance of their services when a Costs Lawyer is working for a firm not authorised and regulated under the LSA or is a sole practitioner. Interim billing arrangements can be agreed with a client to reduce financial exposure on payment for services provided and reimbursement for disbursements.

## SECTION B (choice of 3 out of 5 – 60%)

### Question 5:

You work in the Litigation department of an SRA regulated firm, Fletcher and Inskip LLP, in Doncaster. You are contacted by a fee earner, Nichola Harper, who has requested help on the file of Jeffery Morgan.

Mr Morgan is a builder who entered into an oral contract with Mr and Mrs Travers to build a conservatory at their home address. The price was agreed as £18,500 + VAT, and Mr and Mrs Travers paid an £8,000 deposit on 14 December 2021.

Mr Morgan commenced the building works on 12 January 2022 and completed the main body of work by 18 February 2022. However, by this stage the relationship between the parties had deteriorated. By an invoice dated 18 February 2022 Mr Morgan requested the balance of £14,500 be paid within seven days, thus by 25 February 2025. Mr and Mrs Travers have refused to pay, alleging that the materials used, and the work undertaken was substandard.

Mr Morgan instructed your firm to issue proceedings on his behalf and subsequently Mr and Mrs Travers have filed their defence. Nichola is of the view that Mr and Mrs Travers have no real prospect of successfully defending the claim or issue and she has advised Mr Morgan that he should make an application for summary judgment. She has asked you to write a letter of advice to Mr Morgan setting out the following:

- a) The test for summary judgment.

	<p>b) What stage in the proceedings an application for summary judgment can be made.</p> <p>c) The deadlines for exchange of evidence on an application for summary judgment.</p> <p>d) The orders the court can make on a summary judgment application.</p> <p>Write the body of a letter Mr Morgan providing advice on summary judgments.</p>
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**Total Marks Attainable**

20

Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.
Pass	10+	An answer which addresses MOST of the following points: Definitions and salient points in respect of summary judgment, consideration of what summary judgment is, how it can be obtained and the possible outcomes. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the civil procedure rules concerning summary judgment) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the following points: consideration of what summary judgment is, how it can be obtained and the possible outcomes. The answer is also likely to include some discussion on costs consequences and other aspects of the process (e.g. setting aside). Candidates will demonstrate a very good depth of knowledge of the subject (i.e. a good understanding of the relevant civil procedure rules) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates will provide an excellent advice setting out when summary judgment will be obtained and the provisions around such an order. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.

**Required: Candidate should set out the grounds for a summary judgment and the proceedings in which a summary judgment is available, e.g**

**Grounds for summary judgment and proceedings in which a summary judgment is available:** CPR 24 sets out a procedure by which the court may decide a claim or a particular issue without a trial. The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue or the defendant has no real prospect of successfully defending the claim or issue; and there is no other compelling reason why the case or issue should be disposed of at a trial. The court may give summary judgment against a claimant in any type of proceedings. The court

Up to 5 marks

A pass must refer to CPR 24 and set out what it means to apply for a summary judgment

<p>may give summary judgment against a defendant in any type of proceedings except proceedings for possession of residential premises (against a mortgagor; or a tenant or a person holding over after the end of his tenancy whose occupancy is protected within the meaning of the Rent Act 1977 or the Housing Act 1988) and proceedings for an admiralty claim in rem.</p> <p><b>Credit reference to any authority cited on grounds for summary judgment and proceedings in which a summary judgment is available, e.g:</b> CPR 24.1, CPR 24.2, CPR 24.3(1) and CPR 24.3(2).</p>	
<p><b>Credit any relevant point to explain the procedure, e.g:</b></p> <p><b>Procedure applicable to summary judgments:</b> A claimant may not apply for summary judgment until the defendant against whom the application is made has filed an acknowledgement of service or a defence. This is unless the court gives permission; or a practice direction provides otherwise. Where a summary judgment hearing is fixed, the respondent (or the parties where the hearing is fixed of the court's own initiative) must be given at least 14 days' notice of the date fixed for the hearing and the issues which it is proposed that the court will decide at the hearing.</p> <p><b>Credit reference to any authority cited on the procedure applicable to summary judgments, e.g:</b> CPR 24.4(1) and CPR 24.4(3).</p> <p><b>Making an application:</b> Under CPR 23 an application notice means a document in which the applicant states his intention to seek a court order and respondent means the person against whom the order is sought and such other person as the court may direct. The general rule is that a copy of the application notice must be served on each respondent. An application may be made without serving a copy of the application notice if this is permitted by a rule a practice direction or a court order. An application notice must state what order the applicant is seeking and briefly, why the applicant is seeking the order. A copy of the application notice must be served as soon as practicable after it is filed and except where another time limit is specified in these Rules or a practice direction, must in any event be served at least 3 days before the court is to deal with the application. When a copy of an application notice is served it must be accompanied by a copy of any written evidence in support and a copy of any draft order which the applicant has attached to his application.</p> <p><b>Credit reference to any authority cited on the application, e.g:</b> CPR 23.1, CPR 23.4(1), CPR 23.4(2), CPR 23.6, CPR 23.7(1) and CPR 23.7(3).</p>	<p>Up to 6 marks</p> <p>A pass must refer to CPR 24 and set out what it means to apply for a summary judgment</p>

<p><b>Could also include a discussion on the evidence required for the purpose of a hearing and the power of the court, e.g:</b></p> <p><b>Evidence for the purposes of a summary judgment hearing:</b> If the respondent to an application for summary judgment wishes to rely on written evidence at the hearing, he must file the written evidence and serve copies on every other party to the application, at least 7 days before the summary judgment hearing. If the applicant wishes to rely on written evidence in reply, he must file the written evidence and serve a copy on the respondent, at least 3 days before the summary judgment hearing.</p> <p><b>Credit reference to any authority cited on the evidence for the purposes of a summary judgment hearing, e.g:</b> CPR24.5(1) and CPR24.5(2).</p> <p><b>Court's powers when it determines a summary judgment application:</b> When the court determines a summary judgment application it may give directions as to the filing and service of a defence and give further directions about the management of the case. When dealing with an application under CPR 24 it does not involve the court conducting a mini trial and the criteria that the court needs to apply is not one of probability but is an absence of reality.</p> <p><b>Credit reference to any authority cited on the court's powers when it determines a summary judgment application, e.g:</b> CPR 24.6, Swain v Hillman [2001] and Three Rivers District Council v Bank of England (No. 3) [2001].</p>	<p>Up to 8 marks</p> <p>To achieve more than a pass a candidate must not simply cite the rules but should show a deeper understanding of the rules including an appreciation of the approach the court will take to an application for a SJ</p>
<p><b>Credit a discussion on the costs consequences of such an application, e.g:</b></p> <p><b>CPR 45.1 (1):</b> This section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of legal representatives' charges.</p> <p><b>CPR 45.1 (2) (a)(i):</b> This section applies where summary judgment is obtained.</p> <p><b>CPR 45.1 (3):</b> No sum in respect of legal representatives' charges will be allowed where the only claim is for a sum of money or goods not exceeding £25.</p> <p><b>CPR 45.1 (4):</b> Any appropriate court fee will be allowed in addition to the costs set out in this Section.</p> <p><b>CPR 45.1 (5):</b> The claim form may include a claim for fixed commencement costs.</p> <p><b>CPR 45.2:</b> Amount of fixed commencement costs in a claim for the recovery of money or goods</p>	<p>Up to 6 marks</p>

**CPR 45.2 (1):** The amount of fixed commencement costs in a claim will be calculated by reference to Table 1; and the amount claimed, or the value of the goods claimed if specified, in the claim form is to be used for determining the band in Table 1 that applies to the claim.

**CPR 45.2 (2):** The amounts shown in Table 4 are to be allowed in addition, if applicable. These are miscellaneous costs in respect of service.

**CPR 45.4:** Where the claimant has claimed fixed commencement costs under rule 45.2; and judgment is entered the amount to be included in the judgment for the claimant's legal representative's charges is the total of the fixed commencement costs; and the relevant amount shown in Table 2. For default judgment these will depend on whether the default was on an acknowledgment of service or default of a defence. These range between £22-£35.

**Question 6:**

You work in the Costs department of Boswell and Cooper Law, an SRA regulated firm that specialises in clinical negligence claims. Your colleague, Amanda Boswell, has requested your help on the file of Jakub Nowak.

In 2020 Jakub Nowak commenced proceedings in the Queen's Bench Division against Dr Harry Marshall and Blackburn Health Services NHS Trust for damages for clinical negligence. Following a split trial on liability in May 2021, the claim against the Dr Harry Marshall was dismissed. As against Blackburn Health Services NHS Trust, Jakub Nowak obtained judgment for damages to be assessed. Jakub Nowak had been advised with the benefit of a conditional fee agreement throughout the proceedings.

In a ruling on consequential matters, following the split trial on liability in May 2021, the court felt there was no alternative other than to order Jakub Nowak to pay Dr Harry Marshall's costs limited to the issue of breach of duty. These were to be paid on the standard basis. The order made provided, at paragraph 3, that: the Claimant do pay the First Defendant's costs in respect of breach of duty, such costs to be subject to a detailed assessment if not agreed. These costs are to be payable from any damages awarded to the Claimant at the conclusion of his action against the Second Defendant but are not to be enforced without permission of the Court. The First Defendant is not entitled to his costs arising out of the causation argument.

Amanda Boswell has asked you to prepare some advice for Jakub Nowak on when a claimant is entitled to the protection

	of QOCS and whether he will have to pay Dr Harry Marshall's costs.  Write the body of a letter to Jakub Nowak advising when a claimant is entitled to the protection of QOCS and in what situation that protection may be lost.	
<b>Total Marks Attainable</b>		20
Fail	up to 9.9	This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.
Pass	10+	An answer which addresses MOST of the following points: an explanation as to how QOCs operates, which cases the rules apply to, when an order can be enforced without the courts permission, to what extent an order can be enforced and when an order can be enforced only with the court's permission. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the legislative framework around) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which addresses ALL of the following points required for a pass AND most of the following points: the impact where a claim has been struck out, the impact where there has been a finding of fundamental dishonesty, the impact where the claim involves an element for another person and mixed claims. Candidates will demonstrate a very good depth of knowledge of the subject (i.e. a good understanding of the legislative framework) with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.
<p>Fail = 0-9.9  Pass = 10+  Merit = 12+  Distinction = 14+</p>		
<b>Indicative Content:</b>		<b>Marks</b>
<p><b>Required: Candidates are required to explore what QOCS is:</b></p> <p><b>QOCS and the court's discretion:</b> QOCS limits the circumstances in which such costs orders can be enforced and provides for circumstances where they can be enforced with or without court permission. The Court retains discretion as to costs and QOCS does not impact this. The normal rule that the losing party to litigation is ordered to pay the winning party's costs is not displaced by QOCS. Where costs are ordered against a claimant, this may be on a standard or indemnity basis and may be subject to a summary or detailed assessment.</p>		Up to 2 marks



<p><b>Credit reference to any authority cited on QOCS and the court's discretion, e.g:</b> CPR 44.2(1), CPR 44.2(2)(a) and CPR PD 44, para 12.7.</p>	
<p><b>Credit reference to any relevant point to describe where QOCS does/doesn't apply, e.g:</b></p> <p><b>QOCS applies:</b> QOCS applies to personal injury and fatal accidents claims both under the Fatal Accidents Act 1976 and under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934. QOCS will not apply to applications for pre-action disclosure. QOCs will not apply where the claimant had entered into a 'pre-commencement funding arrangement'. A pre-commencement funding arrangement is essentially a CFA entered into before 1 April 2013.</p> <p><b>Credit reference to any authority cited in relation to when QOCS applies, e.g:</b> CPR 44.13, CPR 44.17, CPR 48, Wagenaar v Weekend Travel Ltd (trading as Ski Weekend) &amp; Serradj [2014], Catalano v Espley-Tyas Development Group [2017], Price v Egbert Taylor &amp; Co. [2016] and Landau v Big Bus Co Ltd [2014].</p>	Up to 3 marks
<p><b>Credit reference to any relevant point to describe the enforcement of costs orders, under CPR 44.14, where QOCS applies, e.g:</b></p> <p><b>Enforcement up to the extent of damages without the court's permission:</b> Orders can be enforced to the extent that the amount of the costs does not exceed the damages awarded to the claimant. The court's permission is not required. This covers a situation where a claimant fails to beat a defendant's Part 36 offer. May only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.</p> <p><b>Credit reference to any authority cited in relation to enforcement up to the extent of damages without the court's permission, e.g:</b> CPR 44.14(1), CPR 36 and CPR 44.14 (2).</p>	Up to 4 marks
<p><b>Credit any relevant point made in relation to enforcing an order when a claim has been struck out, e.g:</b></p> <p><b>Struck out:</b> Orders can be enforced where proceedings are struck out because there were no reasonable grounds for bringing the proceedings, there is an abuse of process or the conduct of the claimant (or a person acting on his behalf with his knowledge) is likely to obstruct the just disposal of the proceedings. There have been cases where a claimant may have discontinued and the defendant has applied to have the discontinuance set aside however the court have made clear that the claimant has the right to discontinue. It has also been highlighted that there is a potential lacuna in the rules because where a defendant is outside of the jurisdiction the court do not have the power to strike out a claim but must set it aside, in these circumstances the defendant would be unable to enforce their costs against the claimant.</p>	Up to 4 marks

<p><b>Credit reference to any authority cited in relation to enforcement when a claim has been struck out, e.g:</b> CPR 44.15, Wall v British Canoe Union [2015], Brahilka v Allianz Insurance, Reckitt Benckiser (UK) Ltd v Home Pairfum Ltd [2004], Kite v Phoenix Pub Group [2015] and Shaw v Medtronic Corevalve LLC and others [2017].</p>	
<p><b>Credit any relevant point made in relation to enforcing an order where there is a finding of fundamental dishonesty, e.g:</b></p> <p><b>Fundamental dishonesty:</b> Costs orders against claimants can be enforced to their full extent only with court permission where the claim is found, on the balance of probabilities, to be fundamentally dishonest. The orders against claimants can be enforced to their full extent only with court permission. An exaggeration of symptoms may be fundamental dishonesty but it isn't always the case and will be fact dependant. Fundamental dishonesty is a two stage test, firstly is there dishonesty and secondly is it fundamental to the claim. It is not necessary for the defendant to raise fundamental dishonesty in their defence.</p> <p><b>Credit reference to any authority cited on enforcement where there is a finding of fundamental dishonesty, e.g:</b> CPR 44.16(1), CPR 44.16(3), Menary v Darnton [2016], Gosling v Hailo and Screwfix Direct [2014], Zurich Insurance v Bain [2015], Wagett v Witold [2015] and Howlett v Davies [2017].</p>	Up to 4 marks
<p><b>Credit any relevant point made in relation to enforcing an order where the claim may include an element for another or is a mixed claim, e.g:</b></p> <p><b>Involving another person:</b> Where the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses) the orders against claimants can be enforced to their full extent only with court permission.</p> <p><b>Mixed claims:</b> Costs orders against claimants can be enforced to their full extent providing the court has given permission where the claim includes a claim for financial benefit unrelated to personal injury either for the claimant or for another party. This part therefore gives the court the power to deny a claimant QOCS protection in a claim, for example, which is primarily a property damage claim but which includes a personal injury claim. Examples of such claims are subrogated claims and claims for credit hire. In mixed claims cases the starting point will be that claimants have QOCs protection but that is only the starting point.</p> <p><b>Credit reference to any authority cited on where a claim may include an element for another or is a mixed claim, e.g:</b> CPR 44.16(2)(a), CPR 44.16(2)(b), CPR 44.16(3), CPR PD 44, para 12.2, Howlett and Howlett v Davies and Ageas [2017], Jeffreys v Commissioner of Police for the</p>	Up to 5 marks

Metropolis [2017] and Brown v Commissioner of Police of the Metropolis & Anor [2019].	
<p><b>Credit any relevant point to describe set-off of costs orders, e.g:</b></p> <p><b>Set off:</b> Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay. The defendant is unable to set off costs against the claimants costs but may against the claimant's damages where those damages were awarded in an order.</p> <p><b>Credit reference to any authority cited on set off, e.g:</b> CPR 44.12(1), Howe v Motor Insurers' Bureau [2017], Faulkner v Secretary of State for Energy and Industrial Strategy [2020], Ho v Adekun (no.2) [2020] and Jeffrey Cartwright v Venduct Engineering Limited [2018] and Ho v Adekun [2021].</p>	Up to 1 mark
<p><b>Question 7:</b></p>	<p>You work as a Costs Lawyer for Legal Costing Experts Ltd, a costs firm in Bolton. You have recently been instructed by an SRA regulated firm, Basil and Rosemary LLP, to undertake some work for them on the file of Kamala Zhang.</p> <p>Your contact at Basil and Rosemary LLP is Bob Brush, a paralegal at the firm. Bob sent you Kamala Zhang's file. The file is a personal injury matter, a Noise Induced Hearing Loss claim, that settled for £2,750 damages. The defendant has been ordered to pay Ms Zhang's costs, to be assessed if not agreed.</p> <p>You have been instructed to deal with the detailed assessment proceedings, but Bob Brush is insistent that you must include all costs, including those that you do not believe to be recoverable between the parties, in the bill of costs. Bob Brush has also asked you to justify non recoverable funding costs claimed in the bill within the narrative of the bill.</p> <p>You have discussed your concerns with your colleague, Jenny Tupper, and she has suggested you write an email to Bob explaining the implications to you as a Costs Lawyer if you carry out the instructions you have received.</p> <p>Prepare the body of the email to Bob.</p>
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-9.9 Pass = 10+</p>	20

Merit = 12+ Distinction = 14+		
Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.
Pass	10+	An answer which addresses MOST of the following points: an outline of how the legal profession is regulated, an outline of the relevant professional conduct rules which govern a costs lawyer, an outline of the relationship between a solicitor and the instruction of a costs professional, the duty to the court of advocates and the potential consequence of misleading the court and liability.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the personal liability of a legal representative, including costs lawyers) with very good application and some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.
Indicative Content		Marks
<p><b>Required: Candidates must explain the legislative framework governing the regulation of lawyers and reserved legal activities, e.g:</b></p> <p><b>Regulation of lawyers:</b> An authorised persons is a person, or company, who is authorised to undertake reserved legal activities by an approved regulator. An approved regulator is a body which is designated as an approved regulator by Schedule 4 of the LSA 07. ACL is the approved regulator of Costs Lawyers. A Memorandum of Understanding between ACL and the CLSB delegates the regulatory function to the CLSB. This is similar to the relationship between the SRA and Law Society, the SRA regulate solicitors and SRA regulated firms. Reserved legal activities include the exercise of rights of audience, the conduct of litigation and the administration of oaths.</p> <p><b>Credit reference to any authority cited on the regulation of lawyers, e.g:</b> Section 18 of the Legal Services Act 2007, Section 20 of the Legal Services Act 2007, Section 20(5) of the Legal Services Act 2007, Schedule 4 of the Legal Services Act 2007, Section 12 of the Legal Services Act 2007, Sch 2 of the Legal Services Act 2007.</p> <p><b>Reserved legal activities:</b> Any question of entitlement to undertake reserved legal activities is determined solely in accordance with the LSA 07. A person is entitled to carry on a reserved legal activity where that person is authorised in relation to the activity in question. If a person is not authorised, they may still be entitled to carry out a reserved legal activity if they are an "exempt person" in relation to the activity. Costs Lawyers must adhere to CLSB code of Conduct. Breach will result in</p>		Up to 8 marks

<p>disciplinary proceedings by CLSB. An individual who is not authorised by the CLSB, but who is a manager or employee of an authorised person, is also considered a regulated person under the LSA and must comply with all relevant regulatory arrangements.</p> <p><b>Credit reference to any authority cited on undertaking reserved legal activities, e.g:</b> Section 13(1) of the Legal Services Act 2007, Section 13(2)(a) of the Legal Services Act 2007, Section 13(2)(b) of the Legal Services Act 2007, Section 176(1) of the LSA 2007, Section 176(2)(b) of the LSA 2007.</p>	
<p><b>Credit discussion of the costs lawyer's duty to the court, e.g:</b></p> <p><b>Costs Lawyer's duty to the court:</b> A regulated costs lawyer must comply with your duty to the court in the administration of justice. Costs Lawyers must at all times act within the law and must not knowingly or recklessly either mislead the court or allow the court to be misled. Costs Lawyers must comply with any court order which places an obligation on them and they must not be in contempt of court. Costs Lawyers must advise clients to comply with court orders made against them. Costs Lawyers must act in the best interests of your client. They must act at all times to ensure the client's interest is paramount except where this conflicts with your duties to the court or where otherwise permitted by law. You must decline to act if it would not be in the client's best interests or if that client's interests conflict directly with your own or with those of another client.</p> <p><b>Credit reference to any authority cited on the Costs Lawyer's duty to the court, e.g:</b> CLSB Code of Conduct Principle 2, CLSB Code of Conduct Principle 2.1, CLSB Code of Conduct Principle 2.2, CLSB Code of Conduct Principle 2.3, CLSB Code of Conduct Principle 2.4, CLSB Code of Conduct Principle 3 and CLSB Code of Conduct Principle 3.1.</p> <p><b>Advocate's duty to the court:</b> It is the duty of an advocate to draw the judge's attention to authorities that are in point, even if they are adverse to that advocate's case. If a point is not properly arguable, it should not be argued.</p> <p><b>Credit reference to any authority cited on the advocates's duty to the court, e.g:</b> Copeland v Smith [2002] and Buxton v Mills-Owens [2010].</p>	Up to 6 Marks
<p><b>Credit discussion on the consequence of a costs lawyer that breaches the applicable professional conduct rules, e.g:</b></p> <p><b>The CLSB Practising Rules:</b> These Rules govern the practice of Costs Lawyers and the issue and revocation of practising certificates by the CLSB. No person shall be entitled to practise as a Costs Lawyer unless they have qualified as a Costs Lawyer in accordance with the Training Rules, they have a current Practising Certificate which has been issued in accordance with these Rules and which is not suspended and they comply with CPD requirements set out in the CPD Rules. An applicant or</p>	Up to 4 Marks

<p>Costs Lawyer must disclose certain information when making an application for a Practising Certificate or throughout the lifetime of a Practising Certificate. This includes criminal convictions. A Practising Certificate may be revoked by the CLSB. Costs Lawyers must ensure that they have professional indemnity insurance.</p> <p><b>Credit reference to any authority cited on the CLSB Practising Rules, e.g:</b> Rule 1 of the CLSB Practising Rules, Rule 4 of the CLSB Practising Rules, Rule 8 of the CLSB Practising Rules and Rule 10 of the CLSB Practising Rules.</p> <p><b>A Practising Certificate may be revoked by the CLSB:</b> If a Costs Lawyer is subject to an order suspending their Practising Certificate, they will not be able to practise as a Costs Lawyer for the period of the suspension. If the Practising Certificate is still current when the suspension ends, the Practising Certificate will remain valid. If the Practising Certificate has expired during the period of the suspension, the Costs Lawyer must apply for a new Practising Certificate.</p> <p><b>Credit reference to any relevant authority cited, e.g:</b> Rule 8.1 of the CLSB Practising Rules, Rule 8.2 of the CLSB Practising Rules and the CLSB Disciplinary Rules and Procedures.</p>	
<p><b>Credit discussion on the liability of an advocate for example in negligence or wasted costs orders, e.g:</b></p> <p><b>Negligence:</b> The fact is that the advocate, like other professional men, undertaking a duty to his client to conduct his case, subject to the rules and ethics of his profession, with proper skill and care. The principle that an advocate is liable to his client for professional negligence should not stifle the manner in which they conduct litigation and advise their clients. This might lead to defensive advocacy, where barristers would hedge their opinions with qualifications and be reluctant to give clients the advice which they require in their best interests.</p> <p><b>Credit reference to any relevant authority cited on negligence, e.g:</b> Rondel v Worsley [1967], Arthur J S Hall &amp; Co v Simmons [2007] and Moy v Pettmann Smith (A Firm) &amp; Anor [2005].</p> <p><b>Wasted costs:</b> The court shall have full power to determine by whom and to what extent the costs are to be paid. The court may disallow or order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court. Where the court orders a legal representative to pay wasted costs it must inform an approved regulator or the Director of Legal Aid Casework as it considers appropriate.</p>	<p>Up to 6 Marks</p> <p>To achieve a distinction candidates should demonstrate a sound ability to apply the law to the facts of the scenarios presented.</p>

**Credit reference to any relevant authority cited on wasted costs, e.g:**

Section 51(3) of the Senior Courts Act 1981, Section 51(6) of the Senior Courts Act 1981 and Section 51(7A) of the Senior Courts Act 1981

**Making the Order:** The court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order. When the court makes a wasted costs order, it will specify the amount to be disallowed or paid or direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid.

**Credit reference to any relevant authority cited on making an order, e.g:** CPR 46.8(1), CPR 46.8(2), CPR 46.8(3)(a) and CPR 46.8(3)(b).

**Question 8:**

You work in the Costs department for an SRA regulated firm, Marshall and Chaton LLP based in Liverpool. The firm predominately undertake work for claimant parties. The Costs department also receive external instructions predominantly from receiving parties.

You have just qualified as a Costs Lawyer. One of the supervising Costs Lawyers has approached you to draft some marketing materials. She wishes to attract more instructions from external clients. She has asked that you write a note summarising the benefits of instructing a costs professional and specifically the benefits of instructing a regulated costs professional.

The marketing materials are to be aimed at all fee earning staff at various SRA regulated firms and need to outline the reserved legal activities a regulated costs professional can undertake and the principles of the CLSB Code of Conduct. You have been asked to have particular regard to the principles which apply when preparing bills of costs and during negotiations.

Prepare the body of the marketing materials as requested by the supervising Costs Lawyer.

**Total Marks Attainable**

20

Fail = 0-9.9  
Pass = 10+  
Merit = 12+  
Distinction = 14+

Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.
Pass	10+	An answer which addresses MOST of the following points: An outline of what it means to be an authorised person, an explanation of the costs lawyers duty to the court, an explanation of the professional conduct rules, an explanation of what a reserved legal activity is and what work can be undertaken by non-qualified costs professionals. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of authorised persons/reserved legal activities) with very good application and some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.
Indicative Content		Marks
<p><b>Required: Candidates must explain the legislative framework governing the regulation of lawyers and reserved legal activities, e.g:</b></p> <p><b>Regulation of lawyers:</b> An authorised persons is a person, or company, who is authorised to undertake reserved legal activities by an approved regulator. An approved regulator is a body which is designated as an approved regulator by Schedule 4 of the LSA 07. ACL is the approved regulator of Costs Lawyers. A Memorandum of Understanding between ACL and the CLSB delegates the regulatory function to the CLSB. This is similar to the relationship between the SRA and Law Society, the SRA regulate solicitors and SRA regulated firms. Reserved legal activities include the exercise of rights of audience, the conduct of litigation and the administration of oaths.</p> <p><b>Credit reference to any authority cited on the regulation of lawyers, e.g:</b> Section 18 of the Legal Services Act 2007, Section 20 of the Legal Services Act 2007, Section 20(5) of the Legal Services Act 2007, Schedule 4 of the Legal Services Act 2007, Section 12 of the Legal Services Act 2007, Sch 2 of the Legal Services Act 2007.</p> <p><b>Reserved legal activities:</b> Any question of entitlement to undertake reserved legal activities is determined solely in accordance with the LSA 07. A person is entitled to carry on a reserved legal activity where that person is authorised in relation to the activity in question. If a person is not authorised, they may still be entitled to carry out a reserved legal activity if they are an "exempt person" in relation to the activity. Costs Lawyers must adhere to CLSB code of Conduct. Breach will result in disciplinary proceedings by CLSB. An individual who is not authorised by the CLSB, but who is a manager or employee of an authorised person, is</p>		<p>Up to 8 marks</p> <p>An explanation should be given as to what it means to be an authorised person</p>



<p>also considered a regulated person under the LSA and must comply with all relevant regulatory arrangements.</p> <p><b>Credit reference to any authority cited on undertaking reserved legal activities, e.g:</b> Section 13(1) of the Legal Services Act 2007, Section 13(2)(a) of the Legal Services Act 2007, Section 13(2)(b) of the Legal Services Act 2007, Section 176(1) of the LSA 2007, Section 176(2)(b) of the LSA 2007.</p>	
<p><b>Credit discussion of the costs lawyer's duty to the court, e.g:</b></p> <p><b>Costs Lawyer's duty to the court:</b> A regulated costs lawyer must comply with your duty to the court in the administration of justice. Costs Lawyers must at all times act within the law and must not knowingly or recklessly either mislead the court or allow the court to be misled. Costs Lawyers must comply with any court order which places an obligation on them and they must not be in contempt of court. Costs Lawyers must advise clients to comply with court orders made against them. Costs Lawyers must act in the best interests of your client. They must act at all times to ensure the client's interest is paramount except where this conflicts with your duties to the court or where otherwise permitted by law. You must decline to act if it would not be in the client's best interests or if that client's interests conflict directly with your own or with those of another client.</p> <p><b>Credit reference to any authority cited on the Costs Lawyer's duty to the court, e.g:</b> CLSB Code of Conduct Principle 2, CLSB Code of Conduct Principle 2.1, CLSB Code of Conduct Principle 2.2, CLSB Code of Conduct Principle 2.3, CLSB Code of Conduct Principle 2.4, CLSB Code of Conduct Principle 3 and CLSB Code of Conduct Principle 3.1.</p> <p><b>Advocate's duty to the court:</b> It is the duty of an advocate to draw the judge's attention to authorities that are in point, even if they are adverse to that advocate's case. If a point is not properly arguable, it should not be argued.</p> <p><b>Credit reference to any authority cited on the advocates's duty to the court, e.g:</b> Copeland v Smith [2002] and Buxton v Mills-Owens [2010].</p>	Up to 8 marks
<p><b>Credit a discussion on the CLSB Practising Rules, e.g:</b></p> <p><b>The CLSB Practising Rules:</b> These Rules govern the practice of Costs Lawyers and the issue and revocation of practising certificates by the CLSB. No person shall be entitled to practise as a Costs Lawyer unless they have qualified as a Costs Lawyer in accordance with the Training Rules, they have a current Practising Certificate which has been issued in accordance with these Rules and which is not suspended and they comply with CPD requirements set out in the CPD Rules. An applicant or Costs Lawyer must disclose certain information when making an application for a Practising Certificate or throughout the lifetime of a Practising Certificate. This includes criminal convictions. A Practising</p>	Up to 8 Marks

Certificate may be revoked by the CLSB. Costs Lawyers must ensure that they have professional indemnity insurance.

**Credit reference to any authority cited on the CLSB Practising Rules, e.g:**  
 Rule 1 of the CLSB Practising Rules, Rule 4 of the CLSB Practising Rules, Rule 8 of the CLSB Practising Rules and Rule 10 of the CLSB Practising Rules.

**Question 9:**

You are a Costs Lawyer and head the Costs and Accounts department at Roger and Skinner LLP, a large high street firm in Tewksbury. You work alongside Tim Green, who is the firm's Compliance Officer for Finance and Administration.

Tim has asked you to assist with the drafting of some training materials on VAT. The materials should explain the rules regarding when VAT is generally charged on the provision of services. Whilst Tim is keen for you to explain the distinction between input and output tax, he has asked that your materials specifically focus on output tax. He has also asked for you to include an explanation of exempt supplies.

Prepare a summary that you will use to form the basis of the training materials on the aspects detailed above.

**Total Marks Attainable**

20

Fail	up to 9.9	An answer which deals with the basic requirements of the question, but in dealing with only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that candidates have any understanding of the regulatory framework governing client accounts and money laundering.
Pass	10+	An answer which addresses MOST of the following points: A definition of VAT, an explanation of output tax, an explanation of a taxable supply, exempt supplies, taxable person and input tax. Some key authority should be included, but this may not be specifically applied or only superficially.
Merit	12+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the operation of VAT). There will be some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law throughout. Candidates should be able to show critical assessment and capacity for independent thought on the topics. Work should be written to an

		exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.
<p>Fail = 0-9.9  Pass = 10+  Merit = 12+  Distinction = 14+</p>		
Indicative Content	Marks	
<p><b>Required: Candidates should include an explanation of what VAT is, e.g:</b></p> <p><b>VAT:</b> Vat involves two different aspects: Output tax and input tax.</p> <p><b>Output tax:</b> Charged by a business to its customers.</p> <p><b>Input tax:</b> Charged to the business by its suppliers.</p> <p><b>A business registered for VAT:</b> Charges its customers output tax and then accounts to HM Customs and Excise for tax. In other words, it acts as an unpaid tax collector. It will normally be possible for such a business to deduct input tax charged to the business from the amount accounted for to HM Customs and Excise, thus reducing or absolving their liability.</p>	Up to 4 marks	
<p><b>Candidates should discuss output tax and exempt supplies, e.g:</b></p> <p><b>Section 4(1) of the Value Added Tax Act 1994:</b> VAT is chargeable on the supply of goods or services where the supply is a taxable supply and is made by a taxable person in the course or furtherance of a business carried on by him.</p> <p><b>Supply of Goods:</b> The supply of goods covers all forms of supply whereby the whole property in goods is transferred, including a gift of goods. The supply of Services is anything which is not a supply of goods but is done for consideration. A gratuitous supply of service is not a supply for VAT purposes.</p> <p><b>Taxable Supply:</b> A taxable supply is any supply of goods or services other than an exempt supply.</p> <p><b>Exempt supplies:</b> Are listed in schedule 9 of the <u>Value Added Tax Act 1994</u> and include supplies of land, insurance, postal services, finance, health services and burial and cremation. A reduced rate of 5% applies to mobility aids, domestic fuel, installation of energy-saving materials, renovation and alteration of dwellings and residential conversions. A solicitors firm supplying legal services will be making a</p>	Up to 12 marks	

<p>standard-rate supply, this includes professional charges and some payments made for clients.</p> <p><b>Taxable Person:</b> A person is a taxable person if he is or is required to be registered under the Act. A person must register if, broadly the value of his taxable supplies (not his profit) in the preceding 12 months exceeded a figure specified in each year's budget. A firm of solicitors will almost always have to be registered. Voluntary registration is permitted. A person may register voluntarily in order to recover input tax charged to him.</p> <p><b>Business:</b> VAT is chargeable by a taxable person only on taxable supplies made in the course of furtherance of a business carried on by him. Business includes any trade, profession or vocation, but the term is not limited to these activities since it also covers certain clubs and associations. Although the services of an employee are not generally taxable, Value Added Tax Act 1994 provides that where a person in the course of a business.</p>	
<p><b>Credit a discussion on input tax, e.g:</b></p> <p><b>Input VAT:</b> Is the value added tax added to the price when you purchase goods or services that are liable to VAT. If the person or businesses that is buying is registered for VAT they can deduct the amount of VAT paid from his/her settlement with the tax authorities.</p> <p><b>Deductible:</b> Where a taxable person is charged VAT on the supply of goods or services for the purposes of his business, by virtue of section 25(2) of the <u>Value Added Tax Act 1994</u> he can deduct the tax charged to him from the amount of output tax which he accounts for to HMRC.</p> <p><b>Exempt Supplies:</b> Where a taxable person makes both taxable and exempt supplies, he is then partially exempt and may recover only a proportion of the input tax charged to him, a solicitor who supplies insurance may be in this position.</p> <p><b>The time of supply:</b> Decides the quarter at the end of which a taxable person becomes liable to account for output tax on a particular supply. It also determines in which quarter the taxable person can claim input on a taxable supply made to him.</p> <p><b>Tax point for goods:</b> By virtue of section 6(2) of the <u>Value Added Tax Act 1994</u> when the goods are removed or made available to the purchaser.</p> <p><b>Tax point for services:</b> By virtue of section 6(3) of the <u>Value Added Tax Act 1994</u> when the services are completed.</p>	Up to 6 marks
<p><b>Credit a discussion on tax invoices, collection and accounts, e.g:</b></p>	Up to 2 marks

**Frequency:** Accounting for VAT generally be by reference to quarterly accounting periods.

**Form:** A taxable person must submit a completed return form to HMRC, together with a remittance for the tax due. The return must contain a list of the tax exclusive value of all outputs and also the total of all inputs exclusive of tax. The amount payable, i.e. total output tax charged less deductible input tax, will be obtained from a statutory VAT account which is required to be kept by every taxable person for each tax period.