

August 17: Marker Guidance: Unit 1

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 (5 QUESTIONS; ALL COMPULSORY – 40%)

Question 1:	Explain what is meant by the indemnity principle.	
Total Marks Attainable	5	
Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+		
Indicative Content	Marks	
<p>Required explanation of the requirement to follow formalities for validity:</p> <p><i>Define the indemnity principle e.g:</i> the indemnity principle provides that the receiving party cannot recover more costs from the paying party than he himself would be liable to pay his own solicitors.</p>	1 mark	
<p>Any other relevant point to describe the principle e.g:</p> <p><i>It is very common:</i> for paying parties to dispute or at least question the terms of the receiving party's retainer agreement and, furthermore, demand sight of the retainer.</p> <p><i>Does not apply:</i> the indemnity principle does not apply in certain circumstances e.g. legal aid.</p> <p><i>Certification of a bill of costs:</i> indicates that the principle has not been breached, but the court can be asked to go behind it.</p>	Up to 2 marks	
<p>Credit any points of law cited e.g:</p> <p><i>Harold v Smith (1860):</i> costs award should not be seen as a punishment.</p> <p><i>Gundry v Sainsbury (1910):</i> unsuccessful party should not have to pay more to the successful party's solicitor than the individual successful party.</p> <p><i>General of Berne Insurance v Jardine (1998):</i> look at the costs on an item by item basis, not globally.</p> <p><i>Hollins v Russell (2003):</i> applies to CFA cases.</p> <p><i>Bailey v IBC (1998):</i> signature of bill is sufficient to show that the indemnity principle has not been breached.</p>	Up to 4 marks	
	To achieve more than a pass candidates must not simply cite cases, but should show a holistic understanding of the development of the principle	

Question 2:	In what circumstances would it be appropriate to apply for a default costs certificate?	
Total Marks Attainable	5	
Fail = 0-2.4		

Pass = 2.5+ Merit = 3+ Distinction = 3.5+	
Indicative Content	Marks
<p>Required explanation of what a DCC is:</p> <p>Order for payment of costs as claimed by the receiving party (RP) when there has been no receipt of PODs following the expiry of the time for serving the same.</p>	<p>1 mark</p> <p>A pass must include an explanation of what a DCC is</p>
<p>Required explanation of the procedure:</p> <p>CPR 47.9 (2): requires PODs to be served 21 days after the date of service of the NOC.</p> <p>CPR 47.9 (4): The RP may file a request for a DCC if the 21 days (or relevant period) has expired and the RP has not been served with any PODs.</p>	<p>Up to 2 marks</p> <p>A pass must include an explanation</p>
<p>Any other relevant point to describe DCCs e.g:</p> <p>Why obtained? For payment of costs due in default of PODs.</p> <p>When obtained? The period for serving PODs must have expired with no receipt by the RP of the PODs.</p> <p>How obtained? CPR 47.11(1) Application for requesting a DCC is on Form N254. The RP will often also send a draft order to the court with Form N254.</p> <p>Implications of a DCC? Order made for payment of the costs as claimed.</p> <p>Circumstances for setting aside? CPR 47.12(2) - court may set aside or vary if it appears to the court that there is some good reason why the DA proceedings should continue (see also CPR PD 47 para 11.2(3)).</p> <p>Steps to set aside? Make application supported by evidence (see CPR 47.12 PD 11.2(1)).</p>	<p>Up to 2 marks</p> <p>To achieve more than a pass candidates must not simply explain what a DCC is, but should show a holistic understanding of DCCs</p>
<p>Credit any other points made e.g.:</p> <p>CPR 47.9 (5): If any party serves PODs before the issue of a DCC, the court may not issue the DCC.</p> <p>CPR 47.12(1): The court will set aside the DCC if the RP is not entitled to the order.</p> <p>CPR 47 PD 11.2(2): Matters to which the court must have regard when deciding whether to set aside or vary the DCC include whether the party seeking the order made the application promptly.</p> <p>CPR 47.11(2): A DCC will include an order to pay costs to which it relates.</p> <p>CPR 47.11(3): Sum payable is set out in PD (£80 fixed costs plus court fee – CPR PD 47 para 10.7)</p>	<p>Up to 2 marks</p> <p>To achieve more than a pass candidates must not simply cite the examples, but should show a holistic understanding of DCCs</p>

CPR 47.12(3): S.194(3) of the <u>Legal Services Act 2007</u> – for pro bono orders the receiving party must send a copy of the order setting aside or varying the DCC to the prescribed charity.	
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Question 3:	When may summary assessment take place? Outline the procedure.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	Marks
Required: CPR 44.6: procedure for assessing costs - 1 (a) the court may make a summary assessment of costs. CPR PD 44, 9.2: at conclusion of a fast track trial or any other hearing which has lasted not more than 1 day.	Up to 2 marks A pass must include an explanation.
Any other relevant point to describe summary assessment e.g: CPR PD 44, 9.5: it is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs. Each party who intends to claim costs must prepare and file either a statement of costs (N260) or a schedule: not less than 2 days for fast track trial or not less than 24 hours before other hearings. CPR PD 44, 9.6: failure to comply will be considered when looking at the costs. CPR PD 44, 9.8: no time to summarily assess. CPR PD 44, 9.10: disproportionate and unreasonable costs	Up to 6 marks
Any other relevant point to describe the content of the schedule or N260: CPR PD 44, 9.5(2): <i>The statement of costs (N260) or schedule must include:</i> the number of hours to be claimed; the hourly rate to be claimed; the grade of fee earner; the amount and nature of any disbursement to be claimed, other than counsel's fee for appearing at the hearing; the amount of legal representative's costs to be claimed for attending or appearing at the hearing; counsel's fees; and any VAT to be claimed on these amounts. CPR PD 44, 9.5(3): the statement of costs should follow as closely as possible Form N260 and must be signed by the party or the party's legal representative. Where a party is: (a) an assisted person; (b) a LSC funded client; (c) a person for whom civil legal services (within the meaning of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) are provided under arrangements made for the purposes of that Part of that	Up to 3 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base

<p>Act; or (d) represented by a person in the party's employment, the statement of costs need not include the certificate appended at the end of Form N260.</p> <p>The schedule must: be signed by the party or parties legal representative.</p>	
<p>Credit any case law/points of law cited e.g:</p> <p>Williams & Gergiou v Wayne Hardy builders (SCCO) (unreported 2014): highlights the importance of filing N260 on time. As no N260 was filed 24 hours prior to the hearing, no costs were allowed</p> <p>MacDonald v Taree Holdings (2000): failure to file the N260 24 hours before should not deprive a party to his costs entirely.</p>	<p>Up to 2 marks</p> <p>At least one other point of law must be cited to acquire a distinction</p>

Question 4:	Explain what is meant by basis of assessment.	
Total Marks Attainable		10
<p>Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+</p>		
Indicative Content		Marks
<p>Required reference to the CPR</p> <p>There are two ways: in which the court will assess a claim for costs: the standard basis and the indemnity basis. However, in each situation, the claim must be reasonable.</p> <p>CPR 44.3 (1): Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs (a) on the standard basis; or (b) on the indemnity basis, but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.</p>		<p>Up to 3 marks</p> <p>A pass must include reference to the relevant CPR</p>
<p>Credit any of the following:</p> <p>CPR 44.3 (2): Where the amount of costs is to be assessed on the standard basis, the court will (a) 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 (b) 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.</p> <p>CPR 44.4: Factors which the court may take into account. (Formerly known as "the 7 pillars of wisdom" although this now includes an 8th (RP's budget): (a) conduct (before and during the proceedings); (b) the amount or value of any money or property involved; (c) the importance of the matter to all the parties; (d) the particular complexity of the matter or the difficulty or novelty of the questions raised; (e) the skill, effort, specialised knowledge and responsibility involved; (f) the time spent on the case; (g) the place where and the circumstances in which work or any part of it was done; and</p>		<p>Up to 6 marks</p> <p>To achieve more than a pass candidates must not simply cite the CPR but should show a holistic understanding of basis of assessment; for a distinction candidates are likely to refer to proportionality</p>

<p>(as referred to above) (h) the receiving party's last approved or agreed budget.</p> <p>CPR 44.3 (3): 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.</p> <p>CPR 44.3 (4) (a): Where the court makes an order about costs without indicating the basis on which the costs are to be assessed; or (b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis.</p> <p>CPR 44.3 (5): Costs incurred are proportionate if they bear a reasonable relationship to (a) the sums in issue in the proceedings; (b) the value of any non-monetary relief in issue in the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; and (e) any wider factors involved in the proceedings, such as reputation or public importance.</p>	<p>and make reference to the fact that costs recoverability on the indemnity basis is likely to be for a higher percentage</p>
<p>Credit any additional point e.g:</p> <p>CPR 44.5: sets out how the court decides the amount of costs payable under a contract.</p> <p>CPR 44.3 (7): paragraphs (2)(a) and (5) do not apply in relation to cases commenced before 1 April 2013; or costs incurred in respect of work done before 1 April 2013. In these cases rule 44.4.(2)(a) as it was in force immediately before 1 April 2013 will apply instead.</p> <p>Lownds v Home Office [2002]: Pre-LASPO test on proportionality, necessity trumps proportionality.</p> <p>BNM v MGN [2016]: Post-LASPO test on proportionality, consider if items reasonable and then step back and consider if global sum is proportionate.</p>	<p>Up to 4 marks</p>

Question 5:	Outline a costs lawyer's duty to the court.	
<p>Total Marks Attainable</p> <p>Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+</p>	10	
Indicative Content	Marks	

<p>Required:</p> <p>PRINCIPLE 2: Comply with your duty to the court in the administration of justice.</p> <p>Reference may also be made to situations where there is a conflict between the duty to the court and duty to the client (PRINCIPLE 3: Act in the best interests of the client).</p>	<p>Up to 2 marks</p> <p>To pass, candidates must cite the relevant principle in the CLSB Code of conduct</p>
<p>May also raise further points on the CLSB Code of Conduct (and SRA Code of Conduct):</p> <p>CLSB Code of Conduct Principle 2.1: You must at all times act within the law.</p> <p>CLSB Code of Conduct Principle 2.2: You must not knowingly or recklessly either mislead the court or allow the court to be misled.</p> <p>CLSB Code of Conduct Principle 2.3: You must comply with any court order which places an obligation on you and you must not be in contempt of court.</p> <p>CLSB Code of Conduct Principle 2.4: You must advise clients to comply with court orders made against them.</p> <p>CLSB Code of Conduct Principle 3.1: You 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>As costs lawyers may work in-house and also be regulated by the SRA through entity regulation, candidates may have referred also to the relevant provisions in the SRA code of conduct.</p>	<p>Up to 2 marks</p> <p>To achieve more than a pass, candidates must not simply cite the principles but should show a greater depth to their knowledge base</p>
<p>Any other relevant points e.g a discussion on wasted costs orders and personal liability for costs:</p> <p>S 51 of the Senior Courts Act 1981 and CPR 44.2: costs payable by one party to another are at the discretion of the court.</p> <p>CPR 46.8: The court can order a party or legal representative to pay a specified sum (or can disallow a specific sum) where costs have been wasted.</p> <p>Wasted costs applications: should be left until the end of the trial. Applications are usually raised by the aggrieved party but can be made by the court of its own initiative.</p> <p>CPR PD 46 5.4: A party may apply for a wasted costs order – (a) by filing an application notice in accordance with Part 23; or (b) by making an application orally in the course of any hearing.</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</p>

<p>Ridehalgh v Horsefield (1994) CA: The court should only make a wasted costs order where the legal representative has acted improperly, negligently or unreasonably - a mistake is not enough.</p> <p>Harley v McDonald [2001] AC: Wasted costs orders are discretionary and should be reserved for unjustifiable conduct (this is a New Zealand decision and persuasive only).</p> <p>Orchard v S E Electricity Board [1987] QB: Wasted costs orders should not be used as a threat to intimidate the other party.</p> <p>Symphony v Hodgson [1994] QB: Wasted costs orders should not be motivated by a resentment or inability to obtain an effective costs order against an impecunious litigant.</p> <p>Harrison v Harrison [2009]: Wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one.</p> <p>Persaud v Persaud [2003]: Court of Appeal held that it was not right to interfere with the judge's discretion to overturn a wasted costs order. So, basically once it's made an appeal is unlikely.</p>	
<p>Credit any case law/points of law cited e.g:</p> <p>Ahmed v Powell [2003] EWHC 9011: 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.</p> <p>Crane v Canons Leisure Centre [2007] EWCA Civ 1352: 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.</p> <p>Waterson Hicks v Eliopoulos [1997] Costs L.R.: The costs draftsman has the same authority as the solicitor would have had to consent to orders.</p> <p>Arthur JS Hall & Co v Simmons [2007] 1 AC 615: Lord Hoffman (at page 691): "<i>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</i>"</p> <p>Buxton v Mills-Owens [2010] 1 WLR 1997: If a point is not properly arguable, it should not be argued.</p> <p>Rondel v Worsley [1967] 3 WLR 1666: A claimant's civil action for negligence could not be sustained: a barrister's immunity was justified by public policy.</p> <p>Saif Ali v Sydney Mitchell [1978] 3 All ER 1033: The immunity conferred by <i>Rondel v Worsley</i> extends 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.</p> <p>Moy v Pettmann Smith (A Firm) & Anor [2005] 1 WLR 581: The barrister was not negligent. The principle that an advocate is liable to his client for professional negligence in <i>Arthur JS Hall v Simons [2002]</i> should not</p>	<p>Up to 7 marks</p> <p>To achieve a distinction, candidates may demonstrate knowledge of the change in the CL duty from before regulation to now and candidates may also discuss the fact that where a CL is not on court record the instructing fee earner may not absolve responsibility for the conduct of the proceedings</p>

stifle the manner in which he conducts litigation and advises his 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. Lady Hale said that the courts *"have not yet developed a clear set of principles governing the terms in which an advocate's advice should be given"*.

Copeland v Smith [2002] 1 WLR 1371: 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.

SECTION B (4 QUESTIONS; ALL COMPULSORY – 60%)

Question 6:		<p>You work for Dodgem Costs Consultants in Bradford. You are a trainee costs draftsman and are due to attend a one to one meeting with the director responsible for training and development. You want to study to become a costs lawyer, but you know that it may take a little persuasion for the director to approve the funding for this. You therefore decide to prepare for the meeting by producing some notes on how the qualification may improve your performance and what benefits it would bring to the firm for you to qualify. You are adamant that completing the course will be beneficial to the business; being regulated will ensure compliance with rules on professional conduct and allow you to undertake reserved legal activities. The first step in your preparation has been to consider the CLSB Code of Conduct for Costs Lawyers.</p> <p>Outline the principles of the code of conduct and give examples of when those principles may be applicable within your role as a costs draftsman.</p>
Total Marks Attainable		10
Fail	up to 4.9	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. This response may simply list pieces of authority or points of law and show no real understanding of how the rules operate in practice.
Pass	5+	An answer which addresses MOST of the following points: the regulatory framework of costs lawyers, the CLSB code of conduct and the 7 principles, the framework provided under the LSA 2007 and what it means to be an authorised person. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness. Candidates will have considered some authority which may include case authority.
Merit	6+	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 professional standing of a costs lawyer and the right afforded to authorised persons) with very good application and some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority including case authority.

Distinction	7+	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 to reach a measured conclusion. Candidates will provide an excellent summary and are likely to link the code of conduct to the CLSB practising rules drawing on their knowledge of professionalism and regulation. All views expressed by candidates should be supported by relevant authority including case authority. Work should be written to an exceptionally high standard taking into account the response will have been drafted in examination conditions.
Indicative Content		Marks
<p>Required - identification that the CLSB are responsible for the setting of standards and its role in monitoring compliance with those standards:</p> <p>S176(1) LSA 2007: Pursuant to this, costs lawyers to adhere to CLSB Code of Conduct for Costs Lawyers. Breach will result in disciplinary proceedings by CLSB.</p> <p>CLSB: set and publish the Code of Conduct for Costs Lawyers (original code 31/10/11 with the latest version being 26/03/14). The code includes 7 principles.</p>		<p>Up to 2 marks</p> <p>For a pass, candidates must refer to the COC for CL.</p>
<p>Required - specific principles must be referred to:</p> <p>Principle 1: Act with integrity and professionalism.</p> <p>Principle 2: Comply with your duty to the court in the administration of justice.</p> <p>Principle 3: Act in the best interests of your client.</p> <p>Principle 4: Provide a good quality of work and service to each client.</p> <p>Principle 5: Deal with the regulators and Legal Ombudsman in an open and co-operative way.</p> <p>Principle 6: Treat everyone with dignity and respect.</p> <p>Principle 7: Keep your work on behalf of your clients confidential.</p>		<p>Up to 4 marks</p> <p>Candidates must cite the relevant principles from the CL COC and show examples of how they would apply in practice to achieve more than a pass.</p>
<p>Credit any consideration of the regulatory framework e.g:</p> <p>ACL, CLSB, SRA: Candidates should demonstrate a knowledge of the roles of the ACL and CLSB and an understanding of entity regulation i.e. that there is no entity regulation by the CLSB, but an in-house CL will be regulated by the SRA through entity regulation and there may therefore be some reference to the SRA COC.</p> <p>Section 20(5) LSA 2007: ACL is approved regulator, independent regulatory authority is CLSB – ACL delegated the role to the CLSB. Approved regulators under the LSA regulate those undertaking reserved legal activities.</p> <p>Section 12 and Sch 2 LSA 07: defines and lists the reserved legal activities.</p> <p>Section 18 LSA 07: authorised persons, which can include an entity. CLSB does not currently regulate entities, but did have plans to apply to do so although these plans are no longer on the agenda.</p>		<p>Up to 3 marks</p> <p>To achieve more than a pass, candidates must show a deeper knowledge base and include some application to the question set.</p>

<p>Any other relevant point to describe the reserved legal activities undertaken by CLs e.g:</p> <p><i>The 6 Reserved Legal Activities are found at Section 12 and Schedule 2 of the LSA 2007 which are:</i> Section 12(1)(a) Exercise of rights of audience – relevant to a costs lawyer’s role; Section 12(1)(b) Conduct of litigation – relevant to a costs lawyer’s role, Section 12(1)(c) Reserved instrument activities (not relevant), Section 12(1)(d) Probate activities (not relevant), Section 12(1)(e) Notarial activities (not relevant), Section 12(1)(f) Administration of oaths – relevant to a costs lawyer’s role.</p>	Up to 2 marks
<p>Credit any consideration of the rules from the Practising Rules e.g:</p> <p>CLSB original Practising Rules came into effect 31/10/11. The latest version is dated 09/04/14.</p> <p><i>Rule 4:</i> application for practising certificate</p> <p><i>Rule 8:</i> notification requirements</p> <p><i>Rule 9:</i> continuing professional development</p> <p><i>Rule 10:</i> insurance</p>	Up to 2 marks

<p>Question 7:</p>	<p>You work for Costs Recovery Consultants Ltd in Cambridge and have been instructed by the paying party on a matter listed for detailed assessment before a deputy district judge. The receiving party has instructed a costs draftsman from Newmarket. You are finding him difficult to deal with and you do not consider him to be at all professional. He has sent what you consider to be an unreasonable and unnecessary amount of correspondence with the majority of communications being protracted. On a number of occasions, he has also raised petty points and you are of the opinion that he is dealing with the matter in a way which you believe to be wrong. Yesterday, he sent you an email (which was also sent by fax and received by hard copy this morning) threatening you with a wasted costs order if you do not respond by the end of the week.</p> <p>Prepare a summary on what is meant by a wasted costs order and when the court may be minded to make such an order.</p>
<p>Total Marks Attainable</p>	<p>10</p>

Fail	up to 4.9	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. This response may simply list pieces of authority or points of law and show no real understanding of how the rules operate in practice.
Pass	5+	An answer which addresses MOST of the following points: explanation of the court's discretion as to costs, the issue of conduct, when an application for a wasted costs order can be made and the court's power to make an order for costs against a legal representative. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	6+	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 with very good application and some analysis having regard to the facts i.e. an understanding of what steps may be taken in relation to the opponent's behaviour depending on whether he is regulated or not. Most views expressed by candidates should be supported by relevant authority.
Distinction	7+	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 summary with relevant application and analysis. All views expressed by candidates should be supported by relevant authority. Work should be written to an exceptionally high standard taking into account the response will have been drafted in examination conditions.
Indicative Content		Marks
<p>Required - a description of the court's discretion and jurisdiction to make a wasted costs order:</p> <p>Section 51 of the Senior Courts Act 1981 and CPR 44.2: costs payable by one party to another are at the discretion of the court.</p> <p>CPR 46.8: The court can order a party or legal representative to pay a specified sum (or can disallow a specific sum) where costs have been wasted.</p>		<p>Up to 2 marks</p> <p>An explanation should be given as to the discretion of the court when making an order for costs.</p>
<p>May also raise points on conduct e.g:</p> <p>Buxton v Mills-Owen [2010]: lawyers shouldn't plead matters that are meritless.</p> <p>Duty to the court</p> <p>Personal liability for costs</p> <p>CLSB/SRA Codes of Conduct</p> <p>There may also be some discussion over whether the costs professional is regulated or not.</p>		<p>Up to 3 marks</p> <p>To achieve a distinction candidates should demonstrate knowledge of the ethical considerations raised in the problem question</p>
<p>Any other relevant point to describe wasted costs orders e.g:</p> <p>Wasted costs applications: should be left until the end of the trial.</p> <p>Applications: are usually raised by the aggrieved party, but can be made by the court of its own initiative.</p> <p>CPR PD 46, 5.4: A party may apply for a wasted costs order – (a) by filing an application notice in accordance with Part 23; or (b) by making an application orally in the course of any hearing.</p>		<p>Up to 2 marks</p>
<p>Credit any case law/points of law cited e.g:</p>		<p>Up to 6 marks</p>

<p>Ridehalgh v Horsefield (1994) CA: The court should only make a wasted costs order where the legal representative has acted improperly, negligently or unreasonably - a mistake is not enough.</p> <p>Harley v McDonald [2001] AC: Wasted costs orders are discretionary and should be reserved for unjustifiable conduct.</p> <p>Orchard v S E Electricity Board [1987] QB: Wasted costs orders should not be used as a threat to intimidate the other party.</p> <p>Symphony v Hodgson [1994] QB: Wasted costs orders should not be motivated by a resentment or inability to obtain an effective costs order against an impecunious litigant.</p> <p>Harrison v Harrison [2009]: Wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one.</p> <p>Persaud v Persaud [2003]: Court of Appeal held that it was not right to interfere with the judge's discretion to overturn a wasted cost order. So, basically once it's made an appeal is unlikely.</p>	<p>To achieve more than a pass candidates must not simply cite law but should show a greater depth to their knowledge base</p>
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<p>Question 8:</p>	<p>You work for Abacus Costs Solutions, a large, reputable costing firm in Bristol. You qualified as a costs lawyer 3 years ago and have extensive experience working on behalf of both paying and receiving parties. You have received an email from Mr Henry Biggs, a solicitor within a small high street firm. He acted on behalf of Barry Bright who unsuccessfully defended a breach of contract claim brought by Sally Simms valued at £100,000. He has received a bill of costs from Miss Simms' representatives totaling £83,796.02. Mr Biggs has no prior experience of detailed assessment and he has asked you to explain the general procedure as well as the next steps he needs to take.</p> <p>Prepare the body of an email to Mr Biggs in response to his request.</p>
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Total Marks Attainable	20
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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: procedure for detailed assessment including how it is commenced, next procedural steps and the request for the hearing. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
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. Candidates may discuss authority for assessment and may also refer to provisional assessment not being appropriate in this situation. Most views expressed by candidates should be supported by relevant authority.
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 authority in respect of the procedure. Candidates will provide an excellent body of an email setting out the procedure in detail with excellent reference to relevant authority. Work should be written to an exceptionally high standard taking into account the response will have been drafted in examination conditions.

Indicative Content	Marks
<p>Required - consideration of the procedure for DA/PA:</p> <p>CPR: 44.6: procedure for assessing costs:</p> <p>CPR PD 44, para 8.1: where the court does not order fixed costs (or no fixed costs are provided for) the amount of costs payable will be assessed by the court. Rule 44.6 allows the court making an order about costs either (a) to make a summary assessment of the amount of the costs; or (b) to order the amount to be decided in accordance with Part 47 (a detailed assessment). In this scenario candidates are required to consider detailed assessment proceedings.</p> <p>CPR 47.1: General rule is that assessment takes place at the conclusion of proceedings.</p> <p>CPR 47.6 (1): Detailed assessment proceedings are commenced by the receiving party serving on the paying party notice of commencement in the relevant practice form (N252); and a copy of the bill of costs.</p> <p>CPR 47.6 (2): The receiving party must also serve a copy of the notice of commencement and the bill on any other relevant persons specified in Practice Direction 47.</p> <p>Practice Direction 47: deals with the form of a bill and other documents required to be served.</p> <p>CPR 47.7: sets out the period for commencing detailed assessment proceedings. (For higher end marks, candidates may suggest to Mr Biggs that he considers whether there has been a delay in service of the bill having regard to the CPR timescales.)</p>	<p>Up to 6 marks</p> <p>To pass, relevant CPR should be identified.</p> <p>Question requires candidates to draft the body of an email directed to a solicitor. A pass may not be achieved if appropriate language is not used.</p>
<p>Discussion on next procedural steps e.g:</p> <p>CPR 47.9 (1): The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute.</p> <p>In order to achieve higher than a pass mark candidates may demonstrate application to the given scenario and identify that Mr Biggs needs to prepare and serve POD.</p> <p>CPR 47.9 (2): The period for serving points of dispute is 21 days after the date of service of the notice of commencement.</p> <p>CPR PD 47, 8.2: Points of dispute must be short and to the point. They must follow Precedent G. They must: (a) identify any general points or matters of principle which require decision before the individual items in the bill are addressed; and (b) identify specific points, stating concisely the nature and grounds of dispute.</p> <p>CPR PD 47, 8.3: The paying party must state in an open letter accompanying the points of dispute what sum, if any, that party offers to pay in settlement of the total costs claimed. The paying party may also make an offer under Part 36.</p>	<p>Up to 6 marks</p> <p>To pass, relevant CPR should be identified.</p>

<p>CPR 47.14 (6): Only items specified in the points of dispute may be raised at the hearing, unless the court gives permission.</p> <p>CPR 47.13 (1): Where any party to the detailed assessment proceedings serves POD, the RP may serve a reply on the other parties to the assessment proceedings.</p> <p>CPR 47.13(2): RP may do so within 21 days after being served with the POD to which the reply relates.</p> <p>CPR PD 44, 12.1: Replies must be limited to points of principle and concessions only, must not contain general denials, specific denials or standard form responses.</p> <p>CPR PD 47, 12.2: When practicable replies must be set out in the form of Precedent G. (Candidates may indicate that it is usual for the replies to be included on the POD document).</p>	
<p>Discussion on Request for a Hearing e.g:</p> <p>CPR 47.14 and CPR PD 47, 13: governs detailed assessment hearings.</p> <p>CPR 47.14: RP must file request for DA hearing within 3 months of expiry of period for commencing DA proceedings.</p> <p>CPR PD 47, PD 13.1: Re-iterates the above position.</p> <p>In order to achieve higher than a pass mark, candidates should identify that, because of the amount of the claim for costs there will be an oral hearing and a provisional assessment is not appropriate.</p> <p>CPR PD 47, 13.2: N258 needs to be filed plus NOC, bill, order/judgment/document giving right to DA, Precedent G PODS and Replies, any other orders, fee notes and written evidence of disbursements (over £500 as per CPR PD 47, 5.2).</p> <p>A statement signed by the legal representative is required to be filed. This gives details of the parties and an estimate of the length of time the DA hearing will take.</p> <p>A court fee will also need to be paid.</p>	<p>Up to 4 marks</p> <p>To achieve more than a pass candidates must show a greater depth to their knowledge base</p>
<p>Credit any further authority cited e.g:</p> <p>CPR PD 47, 13.4: On receipt of request for DA, the court will fix a date for hearing</p> <p>CPR PD 47, 13.6: The court will give at least 14 days' notice of the time and place of hearing.</p>	<p>Up to 3 marks</p> <p>To achieve more than a pass candidates must show a greater depth to their knowledge base</p>
<p>Credit any discussion of the powers of an authorised court officer at DA e.g:</p> <p>CPR 47.3(1)(a): Can make wasted costs orders.</p>	<p>Up to 4 marks</p> <p>To achieve more than a pass candidates must show a</p>

<p>CPR 47.3(1)(b): Can make an order in relation to conduct and for the delay in commencing DA proceedings.</p> <p>CPR 47.8: Sanction for delay in commencing detailed assessment proceedings.</p> <p>CPR 47.20 (1): The receiving party is entitled to the costs of the detailed assessment proceedings. There are exceptions to this.</p>	greater depth to their knowledge base.
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<p>Question 9:</p>	<p>You are a costs lawyer and work in-house for a small high street firm of solicitors based in Nottingham. You have been asked by a junior fee earner, Ms Martha Tydfil, to draft the bill of costs on the file of Havanon. Ms Tydfil successfully settled the claim for damages for her client after proceedings were issued, but without the need for a trial. You have received the file of papers in the internal post and have considered the letter of instruction which provides details of specific charging rates which are to be utilised in the bill of costs. Upon perusal of the file, you have found a client care letter showing much lower rates.</p> <p>Prepare the body of a memo to Ms Tydfil explaining what you think you should do about this situation, giving reasons for your answer.</p>
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Total Marks Attainable	20
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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: duties of a costs lawyer, effects of regulation v no regulation, wasted costs orders and the indemnity principle. Candidates will demonstrate a good depth of knowledge of the subject and a good depth of understanding of what advice to give in such a situation. There will be good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
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. the effect that breaching the indemnity principle could have and the need to adhere to relevant codes of conduct). 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 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 excellent advice with, for example, reference to wasted costs. 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 account the response will have been drafted in examination conditions.

Indicative Content	Marks
<p>Required format and content:</p> <p>Candidates are required to prepare the body of an email to their colleague in appropriate business language. The content is their views on what they have been asked to do by their instructing solicitor, with justification for these views.</p>	<p>Question requires candidates to draft the body of an email directed to a senior colleague. A</p>

	pass may not be achieved if appropriate language is not used.
<p>Regulated v unregulated: regulated in the scenario as costs lawyer working in-house for an SRA regulated firm of solicitors. Therefore bound by the SRA and CLSB Codes of Conduct.</p> <p>Legal Services Act 2007: approved regulators of the legal service market are listed in paragraph 1 of Schedule 4, or designated as an approved regulator by an order under paragraph 17 of that Schedule.</p> <p>CL Code of Conduct: 7 principles that guide conduct under the CLSB COC which have the effect of transferring the values and principles enshrined in S.3 LSA 2007 into the code. The principles are: act with integrity and professionalism, comply with your duty to the court in the administration of justice, act in the best interests of your client, provide a good quality of work and service to each client, deal with the regulators and Legal Ombudsman in an open and co-operative way, treat everyone with dignity and respect and keep your work on behalf of your clients confidential.</p> <p>The indemnity principle: simply provides that the receiving party cannot recover more costs from the paying party than he himself would be liable to pay his own solicitors. The indemnity principle does not apply in certain circumstances e.g. legal aid. This does not appear to be a situation where the indemnity principle will not apply.</p> <p>Bailey v IBC (1998): signature on the bill is sufficient to show that the indemnity principle has not been breached. However, if a genuine issue is raised by the paying party then the court is likely to consider this. This is a situation which could arise in this situation.</p>	<p>Up to 6 marks</p> <p>To achieve more than a pass, candidates must show a greater depth to their knowledge base.</p>
<p>Any relevant point on the certification and responsibility for the detailed assessment proceedings e.g:</p> <p>Ahmed v Powell [2003]: 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.</p> <p>Crane v Cannon Leisure Centre [2007]: Work undertaken by a costs draftsman forms part of the solicitor's profit costs.</p> <p>However, this does not mean that a costs lawyer should follow the instructions given to them.</p> <p>Waterson Hicks v Eliopulous [1997]: The costs draftsman has the same authority as the solicitor would have to consent to orders.</p>	<p>Up to 3 marks</p>
<p>Any relevant point on duty to the court and conduct (should include discussion of both CL and Fee Earner) e.g:</p>	<p>Up to 6 marks</p>

CLSB Code of Conduct Principle 2.2: You must not knowingly or recklessly either mislead the court or allow the court to be misled. By including costs at a higher rate there is likely to be a breach of this principle.

CLSB Code of Conduct Principle 2.3: You must comply with any court order which places an obligation on you and you must not be in contempt of court. Carrying out the instructions could amount to contempt of court.

Rondel v Worsley [1967]: *Hall v Simmons* [2007] overruled this case. This case said an advocate would not be held liable for negligent advocacy.

Said Ali v Sydney Mitchell [1978]: Advocate’s immunity (and, now, therefore duty) extends to pre-proceedings work.

Arthur JS Hall & Co v Simmons [2007] 1 AC 615: Lord Hoffman (at page 691): “*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*”

Consideration may also have been given to the SRA Code of Conduct and the implications for the solicitor personally and the firm as a whole should the instructions be carried out.

Consideration may also have been given to conduct such as:

Professional Misconduct: This is generally taken to mean breaches of the conduct rules and principles committed in the course of practising as a costs lawyer;

Unbefitting Conduct: This may generally be defined as conduct by a lawyer which ought to render him as unfit to be an officer of the court (*Re Southerton* (1805) 6 East 126);

Breach of duty: This is something that gives rise to an action in law, for example in contract or tort.

Any relevant discussion on wasted costs e.g:

Conduct and wasted costs: instructions from solicitor or lay clients require a detailed understanding of the regulations that govern solicitors because the right to recover costs may be dependent on conduct.

S.51(6) Senior Courts Act 1981: the court may disallow, or (as the case may be) 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.

CPR 46.8: sets out the procedure for the court to make an order that a legal representative is personally liable for costs when the court makes a wasted costs order. The court must be satisfied that there has been an improper, unreasonable or negligent act or omission and that, as a result, costs have been incurred by a party. A mere mistake is not sufficient to justify an order; there must be a more serious error (*Ridehalgh v Horsefield* [1994] Ch 205 CA). Wasted costs orders are discretionary and should be reserved for those cases where the

Up to 4 marks

<p>unjustifiable conduct can be demonstrated without recourse to disproportionate procedures (<i>Harley v McDonald</i> [2001] 2 AC 678). Such orders should not be used as a threat to intimidate the lawyers on the other side (<i>Orchard v S E Electricity Board</i> [1987] QB 565).</p>	
<p>Credit any case law/points of law cited on the indemnity principle e.g:</p> <p><i>Harold v Smith (1860)</i>: costs award should not be seen as a punishment;</p> <p><i>Gundry v Sainsbury (1910)</i>: unsuccessful party should not have to pay more to the successful party's solicitor than the individual successful party.</p> <p><i>General of Berne Insurance v Jardine (1998)</i>: look at the costs on an item by item basis, not globally.</p> <p><i>Hollins v Russell (2003)</i>: applies to CFA cases.</p>	<p>Up to 4 marks</p>