June 16: 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:	In what circumstances would a precedent H not need to be completed?
Total Marks Attainable Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+	5
Indicative Content	**Marks**
Required explanation of what a Precedent H is: Precedent H is the required document for preparation of a budget	1 Mark A pass must include an explanation of what a Precedent H is
Required explanation of costs management: "Costs management" procedures were introduced for multi-track cases commenced on or after 1 April 2013 in both the county court and the High Court The change has been implemented by the introduction of new Civil Procedure Rules 3.12 to 3.18 and new Practice Direction 3E on Costs Management, as well as amendments to the Costs Practice Direction.	1 Mark A pass must include an explanation
Any other relevant point to describe costs management e.g: Reference to the courts' case and costs management powers and the overriding objective (CPR 3 and 1) Applies to most Part 7 multi track cases	1 Mark
Credit any of the following, where provisions do not apply: • Where the court uses its discretion…either to not manage or to manage costs • Litigants in person • Fixed or scale costs • Fast track cases • Cases issued prior to 1.4.13 • Cases commenced on or after 22.4.14 value over £10m (£2m prior thereto) • Cases commenced on or after 22nd April 2014 - monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10 million or more • Proceedings commenced on or after 6/4/16 by or on behalf of a child (change is within 6 months so candidates	Up to 4 To achieve more than a pass candidates must not simply cite the examples, but should show a holistic understanding of costs management

not expected to know this, but give credit where correctly referred to)	

Question 2:	Explain what is meant by proportionality
Total Marks Attainable Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+	5
Indicative Content	**Marks**
Required explanation of proportionality: Overriding objective – "at proportionate cost" Court has discretion BUT emphasis on proportionality	1 Mark A pass must include an explanation
Any other point to describe proportionality: The tests - old and new (Lownds v Home Office 2002 for old test, CPR 44.3 for new test)	1 Mark
Credit any of the following or any other relevant point to describe prportionality: Rule 44.3(5) – costs are proportionate if they bear a reasonable relationship to sums in issue, value of non-monetary relief, complexity of litigation, additional work generated by conduct, wider factors. When old and new tests apply, transitional provisions and dates Rule 44.3(2) – costs which are disproportionate can be disallowed or reduced even where reasonably incurred (reverses Lownds) Proportionality on the standard and indemnity bases Underpins costs budgeting rules After looking at the factors in CPR 44.3(5) step back to consider the total Case law e.g. BP v Cardiff, BNM v MGN 2016	Up to 4 To achieve more than a pass candidates must not simply cite the examples but should show a holistic understanding

Question 3:	Explain when, and in what circumstances, an application for an interim payment may be made in detailed assessment proceedings. Outline the procedure.

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required reference to the CPR CPR 44.2(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so (the presumption) CPR 47.16 – power to issue an interim costs certificate	2 Marks A pass must include reference to these rules
Any other point regarding interim payments Voluntary Reduces interest for the paying party Cashflow SCCO guidance states that on a PA the court are unlikely to make an order for the paying party to pay a sum on account of costs	2 Marks
Credit any of the following: CPR 23 applications where a request cannot be filed and a further interim payment is required – demonstrating an understanding of the application process and the need to give good reason. Case law: Dyson v Hoover 2003 - claim settled after trial but before inquiry into damages held - not appropriate for judge to decide on interim payment application where unaware of detailed issues covered in trial Mars v Teknowledge – looked at the merits of making of order for interim costs. An additional point in this case was once it had been decided to make an order for payment of interim costs, how much should be ordered to be paid. This case suggests that the amount awarded as an interim payment should be two thirds of what the judge thinks will be awarded between the parties on a subsequent Detailed Assessment.	Up to 8 To achieve more than a pass candidates must not simply cite the examples but should show a holistic understanding of interim payments; for a distinction candidates are likely to refer to the CPR 23 process

Question 4:	Explain the application that may be made to conclude a matter without trial where a defendant's defence is fabricated and the claimant does not believe there is any real prospect of success.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Identify this question requires knowledge of summary judgments CPR 24	1 A pass must identify the relevant law/procedure
Any other relevant point to describe the procedure e.g: CPR 23: Application for summary judgment is by notice of application with evidence in support of application in the form of witness statement and documentation. CPR 24.4(1): Claimant can apply for summary judgment at any time after the Defendant has either acknowledged service or served a Defence. CPR 24.2: The test is whether the court is satisfied that: • the defendant has no real prospect of successfully defending (or the claimant has no real prospect of succeeding on) the claim or issue; AND • there is no other compelling reason why the case or issue should be disposed of at a trial. CPR 24.4(3): requires applicant to give opponent at least 14 days' notice of hearing date (contrast with timings in CPR 23) CPR 24.5(1): If the application is to be opposed, the opposing party should reply at least 7 clear working days before the hearing together with supporting evidence. CPR PD24 para 4: Where the court considers that there is an arguable point but it is improbable or unlikely to succeed, the court may make a conditional order.	Up to 8 To achieve a merit or distinction candidates must state specifically that it is C who would apply in this instance because the D has no real prospect of defending the claim i.e they must show an ability to apply the law to the scenario rather than just cite the law
Credit any other relevant law cited e.g: Contrasting to Part 23 – application notices only usually require 3 day's notice CPR 7 - issue (i.e particulars of claim and statement of truth that the D either does not replay adequately or defence is so weak) Acknowledgement of service and defence are found in the response pack - N9 Part 45 fixed costs applicable here (and for default judgments)	Up to 3 To achieve more than a pass candidates must not simply cite law but should show a greater

	depth to their knowledge base

Question 5:	Outline a costs lawyer's duty to the court.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: PRINCIPLE 2: Comply with your duty to the court in the administration of justice Reference may also be made to situtations 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)	Up to 2 To pass students must cite the relevant principle in the CLSB Code of conduct
May also raise further points on the CLSB Code of conduct: CLSB/SRA Code of Conduct Principle 2: 2.1 You must at all times act within the law. 2.2 You must not knowingly or recklessly either mislead the court or allow the court to be misled. 2.3 You must comply with any court order which places an obligation on you and you must not be in contempt of court. 2.4 You must advise clients to comply with court orders made against them. Further discussions on the conflict of the duty to the court and client: CLSB/SRA 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.	Up to 2 To achieve a distinction candidates should demonstrate knowledge of the change in the CL duty from before regulation to now and students 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
Any other relevant points e.g a discussion on wasted costs orders and personal liability for costs: 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.	Up to 2

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 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. CPR 46 PD 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. 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 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) Orchard v S E Electricity Board [1987] QB: Wasted Costs Orders should not be used as a threat to intimidate the other party - 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 Harrison v Harrison [2009] wasted costs were neither a punitive nor a regulatory jurisdiction, but rather a compensatory one. 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 its' made you're unlikely to get it appealed]	
Credit any case law/points of law cited e.g: ***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. ***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. ***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. ***Arthur J S Hall & Co v Simmons* [2007] 1 AC 615:** Lord Hoffman (at page 691): "*The fact is that the advocate, like other professional*	Up to 6 To achieve more than a pass candidates must not simply cite law but should show a greater depth to their knowledge base

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" ***Buxton v Mills-Owens* [2010] 1 WLR 1997:** If a point is not properly arguable, it should not be argued. ***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. ***Saif Ali v Sydney Mitchell* [1978] 3 All ER 1033:** The immunity conferred by *Rondel v Worsley* 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. ***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 *Arthur JS Hall v Simons [2002]* 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. 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:	You work for Horsefield Costs, a firm dealing in legal costs. You have been instructed on a regular basis by Miss Hannah Field who is a solicitor. She has recently taken on a new job with a local firm and has been asked by them to set up and run a personal injury department. She has contacted you as she needs to prepare some promotional material for prospective clients. One of these will be on funding methods in relation to claims for personal injury. Prepare a **summary** for Miss Field of the methods of funding that should be considered by a solicitor advising her client in relation to a claim for damages for personal injury.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required format and content:	Up to 1

A summary is required dealing specifically with funding in personal injury matters.	Answer must be in the correct format (a summary) and refer to funding methods for PI matters
Consideration of the types of funding available: *Private funding:* The traditional method of civil claims funding, depends on the terms of the retainer. This would involve the client paying at an hourly rate out of his or her own funds. The essential feature is that the client always remains responsible for the payment of his/her solicitor's costs regardless of the outcome of the case, EVEN if there is an order from the court at the end of the claim for the opponent to pay the costs. The privately paying client can recover the costs order from the opponent to cover the amount that they owe to the solicitor, but the contractual obligation is always for the client to pay the solicitor directly. The ordered costs may not, in some circumstances, match exactly the amount owed by the client to the solicitor, and the client will have to stand those additional costs his/herself. In civil claims also the danger is always that if a privately paying client loses the claim, he/she may be ordered to pay all or most of the opponent's costs. For a private paying client, everything depends on the terms of the retainer. *Legal Expenses Insurance (Before the Event Insurance):* These type of insurances can be found in a variety of places: home contents, buildings policies, credit cards or other club memberships. *Conditional Fee Arrangements:* Such agreements have the following characteristics: ✓ Representative only recovers costs if the case is successful ✓ Some cases client will take out ATE ✓ Client will pay disbursements and insurance as case progresses ✓ A success fee/uplift can be claimed from the other party (Note: Rules differ on recovery deepening on when the CFA was entered) Under s58 of the Courts and Legal Services Act 1990 a CFA must: ✓ be in writing ✓ not relate to criminal or family proceedings ✓ the percentage of any success fee must be specified ✓ the success fee must not exceed 100% of the base costs For CFAs entered into before the 1 April 2013 success fees were fixed for low value road traffic and employer's liability cases. Also they could not exceed 100% of costs. If a party was successful, both the success fee and ATE premium were recoverable providing notice had been given to the other party (Form N251). Ss 44 and 46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012	Up to 11 To achieve a pass candidates must at least briefly discuss the relevance of each funding type in relation to PI matters. For a distinction candidates must discuss the various types of funding available in PI matters in detail and show an excellent depth to their knowledge base.

amended section 58 CLSA 1990 and Success fees and ATE premiums are no longer recoverable from the losing party, these are now to be deducted from the winning party's damages. The aim of this amendment was to make claimants have a financial interest in their claims. Success fees are still still calculable as a percentage of costs chargeable to the client. There is a maximum Limit (or 'cap') on personal injury cases of 25% and all other claims of 100%. The success fee applies to general damages and past losses – does not apply to future loss and should be calculated on Solicitors Base Costs. *Damages Based Agreements:* These are contingency fee agreements whereby solicitor gets fees if their client wins and the payment comes from their damages. S45 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 introduced this new type of funding which became operational on April 1 2013. *After the Event Insurance:* Is a policy that can be taken out by your solicitor, on your behalf, to ensure that in the event of a claim not being successful you are not left liable for the payment of any legal fees. For claims made before the 1 April 2013 if the claim is successful, the cost of the premium is usually recovered but for those made after that date the premium is no longer recoverable from the other side – candidates are being asked to prepare promotional material so pre 1/4/13 cases are not relevant here. Candidates at the upper end of the marking scale may also consider: *Third party funding*: generally commercial, but are becoming more widely available and are being seen in some PI matters. *Legal Aid*: very limited, e.g. birth injuries	

Question 7:	You work for Costs Assessors Ltd and have received instructions from a paying party on a clinical negligence matter. The opponent has applied for and obtained a default costs certificate. The paying party is unsure why the default costs certificate has been obtained and what the implications are. He would like to apply to have the default costs certificate set aside as he has fully complied with everything that he was asked of by his solicitors. Prepare a **summary** as to what a default costs certificate is, in what circumstances it may be obtained, in what circumstances it may be set aside and what steps will need to be taken in order to have the default costs certificate set aside.	
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+		10

Indicative Content	Marks
Required explanation of what a DCC is: Order for payment of costs as claimed by the RP when there has been no receipt of PODs following the expiry of the time for serving the same. CPR 47.9 (2) requires POD to be served 21 days after the date of service of the NOC 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 POD.	Up to 2 Marks Answer must be in the correct format (a summary) and candidates must at the very minimum explain what a DCC is
Further discussion of DCCs: Why obtained? For payment of costs due in default of POD When obtained? The period for serving POD must have expired with no receipt by the RP of the POD How obtained? **CPR 47.11(1)** Application for requesting a DCC is on Form N254 Circumstances for setting aside? **CPR r 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)**) Steps to set aside? Make application supported by evidence (see **CPR r 47.12 PD 11.2(1))**	Up to 6 Marks To achieve more than a pass candidates also need to explain when obtained and circumstances for setting aside. For a distinction candidates must include all of the above and explain the steps required to set aside.
Credit any other points made e.g.: **CPR 47.9 (5)** If any party serves POD before the issue of a DCC the court may not issue the DCC. Implications of a DCC? Order made for payment of the costs as claimed. **CPR 47.12(1)** Court will set aside if RP not entitled to the order **CPR r 47 PD 11.2(2):** matters to which the court must have regard include whether the party seeking the order made the application promptly **CPR 47.11(2)** Will include an order to pay costs to which the DCC relates **CPR 47.11(3)** Sum payable is set out in PD (£80 fixed costs plus court fee – CPR PD 47 para 10.7)	Up to 4 To achieve more than a pass candidates must not simply cite law but should show a greater depth to their knowledge base

CPR 47.12(1): The court will set aside a default costs certificate if the receiving party was not entitled to it **CPR 47.12(3)**: S.194(3) of the Legal Services Act 2007 pro bono orders, the receiving party must send a copy of the order setting aside or varying the default costs certificate to the prescribed charity	

Question 8:	You work for X & Y Solicitors, a large, reputable firm of solicitors in Liverpool. You have just qualified as a costs lawyer. The senior partner knows that the area of ethics and professional standards is one which you have studied as part of the costs lawyer training course and considers that you are the best placed person to prepare a memo to all fee earning staff (including costs lawyers and trainee costs lawyers) covering the areas of professional standards and ethics so that everyone is able to maintain the firm's high expectations in this area. You have been asked to have particular regard to the principles of ethics and professional standards which apply when preparing bills of costs and during negotiations. She would like you to explain why it may be that staff within the costs department may not be able to act in accordance with instructions provided to them and why it is not in the instructing fee earner's best interests for these instructions to be followed. Prepare the **body** of the memo requested by the senior partner.	
Total Marks Attainable Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+		20
Indicative Content		**Marks**
Required format and content: Candidates are required to prepare the body of a memo directed at fee earners, costs lawyers and trainees so the language should be appropriate. The content is on professional standards and ethics with particular focus on bills of costs and negotiations.		Up to 2 Question requires candidates to draft the body of a memo directed to fee earners including CL and TCL and must focus on professional standards and ethics with reference to bills of costs and negotiations. A pass may not be achieved if appropriate

	language is not used.
Consideration of the right to recover costs and relevant codes of conduct: The right to recover costs (retainers): Candidates at the lower end may cover this quite superficially. Candidates at the higher end will give more consideration to this, particularly in relation to the effect on bill drafting and negotiations. There is discretion to pass candidates who do not discuss this provided there is justification from the remainder of the answer for them to pass. A higher end mark should not be awarded if there is no discussion of this area. This is likely to be covered in conjunction with the preparation of bills of costs. **Guidance to Rule 2 Solicitors Regulation Authority Code of Conduct 2007:** A retainer is the contract for legal services. Historic guidance to the Solicitors Code of Conduct defined a retainer as a "....contractual relationship and subject to legal considerations". ***J H Milner & Son v Percy Bilton Ltd*** **[1966] 1 WLR 1985:** is authority that the retainer is fundamental to the right to recover costs, without a valid retainer the solicitor is not able to recover costs from his client. Where there is no retainer there is no entitlement to charge because there is no business relationship, the retainer is a contract for services by the solicitor. ***Groom v. Crocker*** **[1939] 1 QB 194:** The usual rules of contract apply and as a general rule it isn't always necessary for the retainer to be in writing. The retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. ***Parrott v Etchells*** **[1839] 3 J.P. 771:** the leaving of files at the office of a solicitor sufficient evidence that there was a retainer. **Outcome 1 of the SRA Code of conduct:** It is advisable that the retainer between a solicitor and his own client is in writing in order for a solicitor to evidence that Outcome 1 of the SRA Handbook 2011 has been complied with. Higher end marks may be given for a discussion of the following points: The failure by solicitors to properly set out their fees in writing (or historically failure to comply with the terms of paragraph 2.03 of the Solicitors Code of Conduct 2007) has led to difficulties being encountered on the detailed assessment of costs. For example, when the solicitor has not been able to prove that a reasonable estimate of the prospective costs was given to the client when instructions were given or that information has not been up-dated as the matter progressed.	Up to 12 To achieve a pass candidates must refer to the COC for CL

It should be noted that the Law Society's Solicitors' Costs Information and Client Care Code 1999 did not require, but merely recommended, that costs information should be in writing. The contract of retainer is not rendered unenforceable by the failure to give an estimate but the judge must take any failure into account in assessing costs. **Moy v. Pettman Smith (a Firm) [2002] EWCA Civ 872:** Where the terms of the retainer are disputed the courts prefer the client's version. Better responses may include details as to why this is the case (exploring the power of the parties, actual and presumed undue influence and fiduciary duties) Higher marks may be given where candidates have explained that where the solicitor has given an estimate of costs to his client but failed to revise it during the course of proceedings, the solicitor is likely to have some of his costs disallowed. There may be some consideration and discussion of the indemnity principle and this should be credited if correct. **ACL, CLSB, SRA:** Candidates should demonstrate a knowledge of the roles of the ACL and CLSB and an understanding of entity regulation. For a pass candidates must refer to the CL COC. As they work in-house candidates should also refer to the SRA COC. **CL COC:** Principle 1: Act with integrity and professionalism. Principle 2: Comply with your duty to the court in the administration of justice. Principle 3: Act in the best interests of your client. Principle 4: Provide a good quality of work and service to each client. Principle 5: Deal with the regulators and Legal Ombudsman in an open and co-operative way. Principle 6: Treat everyone with dignity and respect. Principle 7: Keep your work on behalf of your clients confidential. For a distinction candidates must make application of and discuss the principles in relation to bill drafting and negotiations. <u>The SRA code of Conduct (some or all of which may be referred to – please note that this is not an exhaustive list):</u> O(1.9): Clients are informed in writing at the outset of their matter of their right to complain and how complaints can be made O(1.14): Clients are informed of their right to challenge or complain about your bill and the circumstances in which they may be liable to pay interest on an unpaid bill	

IB(1.13): Discussing whether the potential outcomes of the client's matter are likely to justify the expense or risk involved, including any risk of having to pay someone else's legal fees IB(1.14): Clearly explaining your fees and if and when they are likely to change IB(1.16): Discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees and whether the fees may be paid by someone else such as a trade union O(2.3): You make reasonable adjustments to ensure that disabled clients, employees or managers are not placed at a substantial disadvantage compared to those who are not disabled and you do not pass on the costs of these adjustments to these disabled clients, employees or managers IB(11.1): Providing sufficient time and information to enable the costs in any matter to be agreed IB(1.28): Acting for a client when there are reasonable grounds for believing that the instructions are affected by duress or undue influence without satisfying yourself that they represent the client's wishes	
<u>Consequence of steps asked to take - Liability of a CL (and/or solicitor)</u> For a merit candidates should consider liability. For a distinction candidates are highly likely to have given consideration to this. **Professional Misconduct:** This is generally taken to mean breaches of the conduct rules and principles committed in the course of practicing 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. **Bailey v IBC Vehicles Ltd [1998] 3 All ER 570:** Proceedings are usually issued in the solicitor client's name, and it is the solicitor client that is responsible for the contents of the bill drafted by a costs lawyer **Part 42 of the CPR:** has recently been amended to allow any person who an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Legal Services Act 2007) to be entered on the court record. ***Ahmed v Powell* [2003] EWHC 9011:** is authority that solicitors are responsible for the conduct of the detailed assessment	Up to 4

proceedings and cannot avoid that responsibility merely by instructing a costs draftsman. A breach of the CLSB Code of Conduct or the SRA Handbook may result in a firm being investigated. O 10.4) of the SRA Handbook requires that a lawyer should report serious misconduct to the SRA. Principle 5 of the CLSB Code of Conduct requires that costs lawyers deal with the regulators & Legal Ombudsman in an open & co-operative way. Moreover, under Rule 8 of the Costs Lawyers Practising Rules you would be required to disclose the consequence of any investigation upon application for a practising certificate. An adverse finding can have a serious impact on your professional standing. Candidates have been asked to particularly focus on the areas of bill drafting and negotiations, but if they discuss advocacy, for example, then credit may be given provided they have dealt also with bill drafting and negotiations. Some of the points that may be raised are (this is indicative and non-exhaustive – for higher marks candidates are likely to have given some good examples): However an opponent may act during negotiations, they have their own professional duty to comply with. They should minimise the impact of any ill conduct on the part of their opponent. The primary duty is to the court. Cases such as ***Orchard v South Eastern Electricity Board]1987] 2 WLR 565*** could be considered. Candidates have been asked to explain why it may be that staff within the costs department may not be able to act in accordance with instructions received and why it is not in the instructing fee earner's best interest for these instructions to be followed.	
Credit any other point or case law/points of law cited e.g: Regulated Costs Lawyers can be reported to the ACL and/or CLSB for breaches. Whilst candidates are trainees they may wish to refer to the fact that they are members of ACL so whilst not bound by the code of conduct by the regulator the ACL would expect them to comply with the code and any breach may result in action taken by the ACL. Candidates may refer to when the rules were created, who created the rules, who must comply with the rules etc. Candidates may refer to the practising rules – again, they may refer to when the rules were created, who created the rules, who must comply with the rules etc.	Up to 4 To achieve more than a pass candidates must not simply cite law but should show a greater depth to their knowledge base

Question 9:	You are a costs lawyer working in-house for a firm of solicitors, Smarties LLP. The head of the personal injury department wants her department to become more knowledgeable about legal costs and has asked you to carry out some training. The first session you have been asked to do is to help the department understand the difference between a summary

	and detailed assessment, the time when each may be carried out and the procedure for each. You have been specifically asked to detail any forms and paperwork required in both forms of assessment. You are tasked with preparing a **handout**, which will accompany your training session.
Total Marks Attainable Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+	20
Indicative Content	**Marks**
Required format and content: Candidates are required to prepare a handout which can be in any reasonable format. They must refer to both summary assessment and detailed assessment in adequate detail in order to pass. For higher than a pass they must consider the differences between the two. For a distinction candidates must refer to timings, procedure, forms and paperwork required.	Up to 2 Marks Answer must be in the correct format (handout to accompany the training session) and must focus on summary assessment and detailed assessment. For a pass candidates must refer to both in adequate detail.
What is summary assessment and what is detailed assessment?: THE LAW: Procedure for assessing costs: rule 44.6 *CPR PD 44, PD 8.1:* 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). Summary assessment: general provisions: *When the court should consider whether to make a summary assessment* CPR PD 44, 9.1 Whenever a court makes an order about costs which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs. *Timing of summary assessment* CPR PD 44, 9.2	Up to 14 Marks To achieve a pass candidates must explain what each is

The general rule is that the court should make a summary assessment of the costs:
(a) at the conclusion of the trial of a case which has been dealt with on the fast track, in which case the order will deal with the costs of the whole claim; and
(b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim,

unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily.

CPR PD 44, P.D 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 statement of costs (N260) or schedule must be filed:

- not less than 2 days for fast track trial
- not less than 24 hours for 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

The Schedule (N260) must include:

- 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.

The schedule must be signed by the party or party's legal representative.

Part 47 deals with the procedure for the assessment of costs.
Time:
47.1 The general rule is that the costs of any proceedings or any part of the proceedings are not to be assessed by the detailed procedure until the conclusion of the proceedings, but the court may order them to be assessed immediately.
Candidates may discuss relevant sections for detailed assessment such as 47.6 (commencement), 47.7 (period for commencing), 47.9 (POD), 47.13 (optional reply) and 47.14 (DAH). Candidates may discuss PA but should not be penalised if they focus only on detailed assessment.

Explanation of what DA is
Detailed Assessment Hearings- governed by CPR 47.14 and PD 13.

CPR 47.14: RP must file request for DA Hearing within 3 months of expiry of period for commencing DA proceedings. CPR PD 47, 13.1: Reiterates the above position. CPR PD 47, 13.2 sets out the documents to be filed with a request for DA: • N258 needs to be filed plus NOC, • Bill, • Order/Judgment/Doc 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. • Statement signed by legal representative and estimate of the length of time the DA hearing will take. Court fee will also need to be paid. CPR PD 47, 13.4- On receipt of request for DA, Court will fix a date for hearing CPR PD 47, 13.6- Court will give at least 14 day's notice of time and place of hearing.	
Credit any other points/case law/points of law cited e.g: ***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 hearing no costs were allowed ***MacDonald v Taree Holdings*** (2000) Good discussion of the differences – candidates may produce a table within the handout to show timings etc.	Up to 6 To achieve more than a pass candidates must not simply cite law but should show a greater depth to their knowledge base. For higher than a pass candidates must discuss the differences even if this means discussing each in isolation and making links wherever possible