

# QLTS School OSCE Practice Area Summaries – Sample Material

## CIVIL LITIGATION

### CLIENT CARE – INTERVIEW, INSTRUCTIONS, COSTS ADVICE AND SOURCES OF FUNDING

<b>CONDUCT AND ANTI-MONEY LAUNDERING CONSIDERATIONS</b>	<b>BEFORE MEETING THE CLIENT</b>
<ul style="list-style-type: none"> <li>○ Comply with the client care provisions in Chapter 1 (costs element considered separately below):                             <ul style="list-style-type: none"> <li>○ Outcomes 1.1-1.5:                                     <ul style="list-style-type: none"> <li>▪ Provide a proper standard of service</li> <li>▪ Take into account the individual needs and circumstances of each client</li> <li>▪ Provide information to enable clients to make informed decisions about the services they require and explain how services will be delivered</li> </ul> </li> </ul> </li> <li>○ Explain the distinction between solicitor and client costs and costs between the parties</li> <li>○ Ensure clients aware of complaints handling procedure within the firm and their right to complain, as well as information about the Legal Ombudsman</li> <li>○ You cannot act if there is a conflict or significant risk of conflict between two parties</li> <li>○ Bear in mind your confidentiality and disclosure obligations</li> <li>○ Money Laundering                             <ul style="list-style-type: none"> <li>○ You must identify your client’s name and address                                     <ul style="list-style-type: none"> <li>▪ Usually through a driver’s licence and utility bill for individuals (including company directors) and documents from a company search for limited companies, as needed</li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>○ Prepare and send initial client care letter – firms terms and conditions for acting, scope of the retainer etc.                             <ul style="list-style-type: none"> <li>○ Can also be done after interview</li> </ul> </li> <li>○ Conflict searches</li> <li>○ Request money on account (client money)                             <ul style="list-style-type: none"> <li>○ Clarify whether there is a charge for initial interview or not</li> </ul> </li> <li>○ Request relevant documentation pre-interview</li> <li>○ Prepare pre-interview questionnaire and send out prior to meeting or go through at meeting</li> <li>○ Ensure client brings money laundering documentation to first meeting</li> </ul>
<b>INITIAL MEETING AND TAKING INSTRUCTIONS</b>	<b>POST-INTERVIEW ACTIONS AND FOLLOW-UP</b>
<ul style="list-style-type: none"> <li>○ Deal with professional conduct and client care issues which may be outstanding</li> <li>○ Verify client’s identity</li> <li>○ Ascertain client objectives                             <ul style="list-style-type: none"> <li>○ Nature of dispute, desired outcomes</li> </ul> </li> <li>○ Take full details of client’s version of events                             <ul style="list-style-type: none"> <li>○ It will form the basis of a proof of evidence and – later – a witness statement</li> <li>○ Clarify and secure further details where needed</li> </ul> </li> <li>○ Manage expectations, identify the basic legal issues and advise of basic legal principles, dispute resolution options, risks and responsibilities</li> </ul>	<ul style="list-style-type: none"> <li>○ Ascertain who you actually act for</li> <li>○ Confirm authority of person you are taking instructions from</li> <li>○ Confirm authority, if needed with client</li> <li>○ Identify potential parties to claim against                             <ul style="list-style-type: none"> <li>○ Depends on the facts of each situation</li> <li>○ If more than one potential party, consider the best course and cause of action and against whom, bringing in additional parties, vicarious liabilities and the capacity in which parties acted</li> <li>○ Identify whether potential opponents have the means to meet any judgment</li> </ul> </li> </ul>

<ul style="list-style-type: none"> <li>○ If you are not sure of the correct answer to a client's question, inform him that you will need to check and let him know what the correct answer is</li> <li>○ Summarise your client's position and the options available; advise of follow-up and next steps</li> </ul>	<ul style="list-style-type: none"> <li>▪ Conduct bankruptcy, company, credit, Land Registry etc. searches as well as Register of Judgments, Orders and Fines</li> <li>▪ Consider whether opponent insured (or is the insurance company)</li> <li>○ Risk assessment as to strength of case, prospects of success and loss, costs of proceeding and likelihood of costs recovery</li> <li>○ Write to the client <ul style="list-style-type: none"> <li>○ Funding arrangements</li> <li>○ Issue at hand</li> <li>○ Scope of retainer</li> <li>○ Costs estimate</li> <li>○ Request for documentation from client</li> <li>○ When you will next contact your client</li> </ul> </li> <li>○ Draft witness statement/proof of evidence for client</li> <li>○ Advise opponent that you are instructed to act for client</li> <li>○ Start liability and damages investigations</li> </ul>
<b>COSTS – CONDUCT CONSIDERATIONS</b>	<b>COST CONSIDERATIONS IN LITIGATION GENERALLY</b>
<ul style="list-style-type: none"> <li>○ Provide clients with the information they need to make informed decisions about the services they need, how these will be delivered and how much they will cost</li> <li>○ O1.13 – ensure clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter</li> <li>○ IB1.5 – explain any limitations or conditions on what you can do for the client, for example, because of the way the client's matter is funded</li> <li>○ Fee arrangements with your client</li> <li>○ 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</li> <li>○ IB(1.14) - clearly explaining your fees and if and when they are likely to change</li> <li>○ IB(1.15) - warning about any other payments for which the client may be responsible</li> <li>○ 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</li> <li>○ IB(1.17) - where you are acting for a client under a fee arrangement governed by statute, such as a conditional fee agreement, giving the client all relevant information relating to that arrangement</li> <li>○ IB(1.18) - where you are acting for a publicly funded client, explaining how their publicly funded status affects the costs</li> <li>○ IB(1.19) - providing the information in a clear and accessible form which is appropriate to the needs and circumstances of the client</li> </ul>	<ul style="list-style-type: none"> <li>○ Costs are awarded at the discretion of the court</li> <li>○ The losing party usually pays the winner's costs, but won't always get them in full</li> <li>○ Litigation is expensive and even a successful outcome involves the party incurring costs which won't always be fully recovered (but which the client will still need to pay you for) <ul style="list-style-type: none"> <li>○ The cost benefit of continuing with litigation should be considered at each stage</li> </ul> </li> <li>○ Conduct of the parties is taken into account <ul style="list-style-type: none"> <li>○ In some cases conduct is such that costs may be awarded on the indemnity basis, rather than the standard basis</li> </ul> </li> <li>○ Costs are assessed by summary assessment or detailed assessment</li> <li>○ Breaching professional conduct rules may render you liable to the client for damages as well as disciplinary proceedings</li> </ul>

- o Keep clients updated on costs and funding in writing
- o Put general costs information in client care letter
- o Keep detailed attendance notes of any costs discussions

#### METHODS OF FUNDING

- o 10% increase in damages for all non-pecuniary loss claims
- o Before the Event Insurance
  - o Client may have pre-existing legal expenses insurance
- o After the Event Insurance
  - o Can be used with or without a Conditional Fee Agreement
  - o Insurer covers client against own and opponent's legal costs
  - o Is only available after dispute has arisen ('the event' may be letter of claim or commencement of proceedings)
  - o Last resort option
  - o Won't cover damages payments
  - o Client must pay premium (except for insolvency, defamation and mesothelioma cases, where it is recoverable from the opponent if the client wins, they are of a reasonable sum and the decision to purchase ATE was reasonable), and may be staged to be more affordable to the client
- o Private Funding
  - o Client responsible for profit costs, disbursements and VAT
- o Union Funding
  - o If union funding conditional on appointing panel solicitors, retainer must be terminated
- o Public Funding
  - o Solicitors can only undertake work funded by the Legal Services Commission (LSC) where the practice has a contract with the LSC
  - o Eligibility test required of the client
  - o Publicly-funded client cannot be ordered to pay opponent's costs
  - o Funding can be partial (client contributes to LSC) or total
  - o Extent and conditions of coverage indicated on funding certificate
  - o Work which cannot be publicly funded
    - Personal injury work
    - Matters of property, trust, probate or commercial work
- o Conditional Fee Agreements (CFA) (post-1 April 2013 only)
  - o CFA with success fee: client pays no legal costs to legal representative until after the case is concluded
    - If case is concluded and the client is successful:
      - Most of the reasonable base costs and disbursements can be recovered from the opponent via a favourable costs order; and
      - Post 1 April 2013 (previously recoverable from losing party), the client pays a success fee to his legal representative (VAT inclusive) (except in insolvency, defamation, mesothelioma (lung cancer caused by asbestos exposure) and clinical negligence claims so far as they relate to the sum of the premium paid to cover the costs of expert reports, if the client wins, they are of a reasonable sum and the decision to purchase ATE was reasonable):
        - o No more than 25% of damages for personal injury cases, except for future pecuniary losses and net of state benefits; or
        - o No more than 100% of legal representative's fees in all other cases
      - Success criteria varies by agreement

- Some barristers may enter into a CFA regarding their fees
  - Discounted CFA
    - Enhanced percentage of base costs paid by the client at stages in litigation
    - If client loses, legal costs reduced and client may have a reimbursement
  - CFA must be in writing, relate to proceedings which can be covered by a CFA (not criminal, excluding certain environmental matters, or family proceedings), the success fee cannot be recovered from an opponent (post-1 April 2013) and the client must be fully advised of the operation of the CFA and liability for costs
  - Failure to comply means CFA may not be enforceable
  - Collective CFAs:
    - Used by legal representatives acting for clients routinely involved in litigation, like trade unions or some corporations or associations
    - One CCFA for client, not per matter
    - Fees paid on a common basis relating to the type of claim
    - Risk assessment document for each individual claim
  - Damages-Based Agreements (DBA) (not available for appeals)
    - Representatives recover fees from damages client awarded if successful :
      - Cap of no more than 25% on the sum recovered in personal injury cases, excluding claims for future care and loss
      - Cap of no more than 50% on the sum recovered in all non-personal injury cases, excluding employment tribunal cases
      - VAT and counsel's fees included in caps, but not court fees or expert's reports
    - Barristers may enter into DBA with client
    - Client can recover costs plus disbursements from losing party in a favourable costs order, which legal representative would set off against DBA fee, and client makes up shortfall
    - If client loses, no payment to legal representative except for disbursements
    - Defendant may be able to use DBA in a counterclaim
    - DBA agreement must be in writing and contain specific particulars; minimal guidance available, but should also include:
      - Definition of success criteria
      - Method of calculation of legal representative's entitlement
      - Who pays the disbursements and adverse costs
      - Dispute resolution between the client and representative and
      - When DBA can be terminated
    - Some uncertainty about DBAs
  - Litigation Funding (3<sup>rd</sup> party pays fees – usually for large commercial cases)
    - Voluntary code of conduct:
      - Funder must have adequate financial resources to cover funding for 36 months
      - Funder can only withdraw in limited circumstances
      - Funder cannot control litigation by way of the funding agreement
    - Association of Litigation Funders may introduce additional requirements
    - Funding may be in full, partial or disbursements only
- If case being funded is unsuccessful, funder may be ordered by court to pay costs of successful party (only in exceptional circumstances)

#### DISCLOSURE TO OPPOSING PARTY REGARDING FUNDING

- CFAs:
  - Pre-1 April 2013: Notice of CFA and success fee and any ATE insurance and premium (especially if staged) required to be disclosed to opponents
    - Both pre-action and once claim commenced
    - No notice required for CFA without success fee and no ATE insurance
  - Post-1 April 2013: No notice as neither premium nor success fee recoverable against opponent
- DBAs/Litigation funding:
  - No formal requirement to give notice
  - May be tactically beneficial to give notice
- BTE, Union and Public Funding:
  - Pre-existing funding (BTE/union) does not require notice to be given, but best practice to do so
  - Mandatory to notify opponent that case is publicly funded