



REGULATING BARRISTERS

Pupillage/Work-Based Learning

Professional Ethics

Practice test 2

Mark scheme (including indicative content)

QUESTION: 1**GRADES:** GOOD, **SATISFACTORY**, POOR, UNACCEPTABLE

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. Adem should not discuss a client's case in the presence of another client or where he can be overheard, as doing so, is likely to breach his duty of confidentiality (CD6).

S2. Adem must therefore explain to Becky and Sharon that he cannot discuss the evidence in their cases in public and should not continue the conversation.

S3. Adem should not rehearse evidence with his clients (rC9.4, CD3) and must advise them of this.

S4. Adem has further breached CD6 in relation to the assault case by having confidential papers/exhibits out in a public place where they can be/have already been seen (Confidentiality Guidance).

S5. Adem should notify the CPS of his breach of confidentiality.

S6. Adem is also likely to breach CD5 in that members of the public would expect a barrister to ensure there is no risk that a client's confidential information could be overheard or seen.

Moving upwards from satisfactory knowledge

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

G1. It is not in the best interests of either client for their cases to be discussed in a public place where people might overhear, or did in fact overhear (CD2 and CD7).

G2. Adem should have advised Becky and Sharon to contact their solicitors with any questions/concerns or, if they wished, to arrange a conference with him to discuss their case further.

G3. Adem should not have printed out the photographs unless strictly necessary.

G4. In light of his failure to keep confidential material secure, Adem is further in breach of his obligations under CD10, his duty to take reasonable steps to manage his practice so as to comply with his legal and regulatory obligations.

G5. The breach of confidentiality does not necessarily amount to serious misconduct (and therefore Adem does not need to self-report) but he should inform his head of chambers as a complaint may be made by the CPS.

G6. Adem should implement ways of working that are more private, such as using privacy screens/using secure/private networks.

G7. Adem is permitted to discuss the generalities of Court procedure with his clients.

G8. Adem will also need to consider whether there has been a data breach in relation to the photographs and ensure that he complies with his obligations under GDPR if he concludes that there has been a breach.

Moving downwards from satisfactory knowledge

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

P1. Failure to recognise that Adem has breached (or is likely to breach) his duty of confidentiality to the lay clients, by discussing their cases in front of each other, or where he can be overheard.

P2. Failure to recognise that Adem has further breached his duty of confidentiality (to the CPS) in relation to the papers/exhibits which could be seen by others in a public place. (CD6).

P3. Failure to recognise that Adem cannot rehearse evidence with his clients (rC9.4, CD3).

An **unacceptable** answer may include **any or all** of the following:

U1. A statement that Adem can discuss the evidence to be given and questions that will be asked in the trial with Becky and/or Sharon.

U2. A statement that Adem's very junior status and recent call excuse his behaviour or any breach of the Handbook.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

There is nothing wrong in principle for Adem to work in a coffee shop but he needs to be mindful of his duties under the handbook when doing so. Adem owes a duty of confidentiality (CD6, rC15.5) to both Becky and Sharon. Adem should not be discussing either case in a public space due to the risk that third parties or other members of the public could overhear the conversation, thereby breaching confidentiality. The conversation between Adem and Becky was clearly capable of being overheard, as it was overheard by Sharon, sitting on the next table.

Notwithstanding the fact that Adem should not be discussing the case with Becky in these circumstances, he should not have then allowed Sharon to join the conversation. This is because Adem should not be discussing either case in the presence of another client. When approached by Becky and subsequently by Sharon, he should have politely explained that it would not be proper for him to discuss their cases with them in public and advised them to contact their solicitors should they have any questions/concerns they wanted to be addressed, or should they wish to arrange a conference with him to discuss their cases. To continue with the discussion would breach his duty of confidentiality (CD6).

In addition, because discussing a case in public presents a risk that any type of response would be audible to other members of the public, it may diminish public trust and confidence in the profession under CD5 if members of the public were to see barristers conducting their work in this way/ discussing confidential matters in a public setting.

Adem must act in the best interests of his clients (CD2) and provide a competent standard of work and service (CD7). It is a breach of both duties to discuss the client's evidence in a coffee shop and within the hearing of members of the public.

Adem must not rehearse, practise or coach a witness in respect of their evidence (rC9.4). If Adem were to do this, he would also be acting in breach of his duty under CD3 to act with honesty and integrity. Adem must therefore not rehearse the questions that will be asked of Becky and Sharon with them (separately or together).

Adem is in breach of CD6 in relation to his instructions in the assault case. There is nothing prohibiting Adem from working in a public place such as a coffee shop, but when doing so he should ensure that papers are not left where others can see them and that his computer is positioned so that it cannot be overlooked (Confidentiality Guidance). He should implement ways of working that are more private, if he has to work in the setting described, such as using privacy screens. Adem should not have printed off the photographs unless necessary, and certainly should not have had them out in a public place where they could be seen and now have been seen by both Becky and Sharon.

In light of his failure to keep confidential material secure, Adem is further in breach of his obligations under CD10, his duty to take reasonable steps to manage his practice so as to comply with his legal and regulatory obligations. Adem must inform the CPS about what he has done. The photos do not amount to personal data and as such there has not been a breach of GDPR. Furthermore, the breach of confidentiality does not necessarily amount to serious misconduct (and therefore Adem does not need to self-report). However, he should inform his head of chambers as a complaint may be made by the CPS.

QUESTION: 2**GRADES:** GOOD, **SATISFACTORY**, POOR, UNACCEPTABLE

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. Emily cannot take on public access work unless she has completed the requisite public access training and/or registered with the BSB as a public access practitioner (rC120).

S2. Filing documents with the court, as Jacob has requested, amounts to conducting litigation. Emily is not able to do this without an extension to her practising certificate, which she does not have.

S3. Once public access qualified, given her personal relationship with Jacob and Tim, Emily will need to have regard to whether she can properly maintain her independence in deciding whether to accept or decline the instructions.

Moving upwards from satisfactory knowledge

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

G1. Emily should consider whether she is competent/experienced enough to accept the instructions and should not accept the instructions if she lacks competence/experience (rC21.8).

G2. As Emily has less than three years' standing, she will also need to ensure she has a suitably qualified person in chambers who is readily available to provide guidance to her (rC121).

G3. Emily will need to consider whether Jacob's best interests may be served by instructing a solicitor / professional client (rC122).

G4. Once Emily is public access qualified, if the instructions were accepted, Emily would be under a continuing duty to keep under review whether Jacob's interests would be best served by instructing a solicitor (rC123).

G5. In accepting public access instructions, Emily would have to make clear to Jacob the limitations of what she is able to do for him (rC125).

G6. Conducting litigation when not authorised to do so amounts to a criminal offence and/or a breach of CD10 and/or contempt of court.

G7. Emily would be permitted to draft the proceedings for Jacob to issue at court himself.

G8. Emily is not able to apply for a litigation extension without having first obtained authorisation to carry out public access work.

Moving downwards from satisfactory knowledge

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

P1. Failure to identify that Emily will need to have completed her public access training and registered as a public access practitioner with the BSB before she can take on public access work.

P2. Failure to identify that filing documents at court amounts to conducting litigation, and an extension to Emily's practising certificate is required to do so.

P3. A failure to consider whether Emily's friendship with both Jacob and Tim means that she may be unable to maintain her independence (CD4) and therefore may impact whether she accepts or declines the instructions (once qualified).

P4. A statement that the Cab Rank Rule applies to Jacob's case.

An **unacceptable** answer may include **any or all** of the following:

U1. A statement that Emily can take on public access work immediately.

U2. A statement that Emily can issue the proceedings at court for Jacob without the litigation extension to her practising certificate.

U3. A statement, without any consideration of the close relationship between Emily and Jacob and Tim/the need to maintain independence, that Emily can accept these instructions.

U4. A statement that Emily's personal relationship with both Jacob and Tim would assist her conduct of the case.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

Before accepting any public access instructions, Emily will need to have completed the appropriate public access training and registered with the Bar Standards Board (BSB) as a public access practitioner (rC120; Public Access Guidance for Barristers). As she has not yet completed this training or registered as a public access practitioner, she cannot accept the instructions at this point.

Jacob has indicated that he intends to start proceedings in a few months' time. If by this time Emily has completed the requisite training and registered as a public access practitioner in principle she may be able to accept the instructions at that stage.

However, as Emily is of less than three years' standing, she will still require a barrister who is a qualified person and has registered with the BSB as a public access practitioner readily available to provide guidance to her (rC121; rs22; Public Access Guidance for Barristers). If there is not such a person in Emily's chambers, then she will not be able to accept the instructions.

If there is a qualified person in chambers who is readily available to provide guidance to Emily, then she may be able to accept the instructions. However, rC122 provides that if in all the circumstances it would be in the best interests of the public access client or in the interests of justice for the public access client to instruct a solicitor or other professional client, then the barrister may not accept the instructions. Emily will therefore need to consider whether Jacob's best interests might be served by instructing a solicitor or another barrister who is public access qualified. Given Jacob's comments about not being very good with paperwork, and his request that Emily commence the proceedings on his behalf, this may be the case here.

Unless Emily has obtained a litigation extension to her practising certificate, which does not appear to be the case on the facts, then she will not be permitted to file the proceedings with the court for Jacob, as this amounts to conducting litigation (Conducting Litigation Guidance). Emily would be committing a criminal offence if she were to conduct litigation without authorisation (LSA 2007). This would also amount to a breach of CD10. However, there would be nothing preventing her from drafting the proceedings for Jacob to file with the court himself.

If Emily were to accept Jacob's instructions once she has completed her public access training and registered with the BSB, then she would have to explain clearly to Jacob the limits of what she is able to do on his behalf, and this would include explaining to him that she is not authorised to conduct litigation, and cannot be expected to perform the functions of a solicitor who is authorised to conduct litigation (rC125). She would also be under a duty to keep in review the developing circumstances of the case. If at any time she did form the view

that Jacob's best interests would be served by instructing a solicitor, then she would need to inform Jacob of this and withdraw from the case unless Jacob instructed a solicitor or professional client to act (rC123; CD2; rC25).

Simply because Emily might be able to act (if she has received the required training, registered with the BSB and has a qualified person in chambers to offer guidance) does not mean that she should. She needs to consider whether her connection with Jacob and Tim is so close that she might find it difficult to maintain her professional independence (CD4). Emily is being asked to represent a friend in a dispute with a spouse with whom she has also been friends since school. Jacob has indicated that the dispute may be acrimonious. Emily will need to consider whether her knowledge of and friendship with Jacob and Tim places her in a position of conflict such that she cannot provide independent advice or representation, or act in Jacob's best interests (CD2). Emily must also consider whether, given her personal relationship with Tim, there is a realistic prospect of her independence being compromised or her becoming professionally embarrassed during the course of the proceedings. It may be that if the matter is contested (and, here, there is a real risk that the financial dispute resolution proceedings may have to be contested), their personal relationship may be brought up during the course of proceedings, which would undermine both CD1 and CD5.

Emily must also consider whether the instructions are within her competence, bearing in mind she has only recently completed pupillage and bearing in mind that dealing directly with a client can be more demanding than acting for a professional client. If Emily lacks the relevant experience or competence to deal with the matter, then she must not accept the instructions (rC21.8; Public Access Guidance for Barristers).

QUESTION: 3**GRADES:** GOOD, **SATISFACTORY**, POOR, UNACCEPTABLE

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. Giles must act in the best interests of his client (CD2).

S2. As the victim of a past sexual assault, Marcus is vulnerable and should be treated as such.

S3. Giles has been informed of Marcus' guilt. He cannot therefore advance a positive case that indicates Marcus is not guilty of the offence but he could test the prosecution case. He must explain this to Marcus (rC4; gC9).

S4. Giles has a duty to keep Marcus' affairs confidential (CD6). He must not therefore disclose Marcus' past sexual abuse to the Judge or anyone else without consent.

S5. Although he has a duty to the court under CD1, Giles must not disclose the previous arrest for sexual assault without Marcus' consent (CD6). Giles should advise Marcus of this.

Moving upwards from satisfactory knowledge

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

G1. Bearing in mind Marcus' vulnerability, Giles should try to avoid any unnecessary distress for Marcus (gC41) and/ or any other reasonable discussion as to steps that Giles may consider in light of Marcus' vulnerability.

G2. Giles may need to allow extra time in this conference or arrange a further conference given the vulnerability raised so that Marcus has a full opportunity to digest the advice.

G3. Giles should advise Marcus of the reduction in sentence if he pleads guilty (CD2; CD7).

G4. Giles should explain to Marcus that if he pleads guilty, it is likely the Judge will request pre-sentence reports and it would be in his best interests to disclose his past to the probation officer compiling the report as, although not excusing his behaviour, it may provide some mitigation.

G5. Giles may want to consider obtaining a psychological assessment for Marcus given his comments about personal boundaries.

G6. In relation to the past sexual abuse, Giles should explain to Marcus that there are ways in which this information can be given to the Judge without it being in open court.

G7. Giles cannot mislead the court. The prosecution may well be aware of the previous arrest and raise it as bad character/information relevant to sentence. Giles cannot deny it/ pretend he was unaware as that would be a breach of CD1/ be a failure to act with honesty and integrity (CD3).

G8. If Marcus insists Giles advance a positive case that he did not commit the offence, Giles would need to cease to act and return his instructions on the basis that they require him to act otherwise than in accordance with the Handbook (rC25; rC21.6).

G9. If Giles is required to return his instructions, he would need to seek Marcus' consent and/ or explain to the client his reasons for doing so (rC27).

Moving downwards from satisfactory knowledge

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

P1. A failure to recognise Marcus is vulnerable.

P2. A failure to address Giles' duty to advise Marcus on how the trial could proceed now he has made the admissions in conference (i.e. that Giles cannot advance a positive case).

P3. A failure to recognise the applicability of CD6 in one of the following ways: EITHER in respect of the sexual abuse OR with regard to the circumstances giving rise to the previous arrest.

An **unacceptable** answer may include **any or all** of the following:

U1. A statement that Giles can ignore that Marcus has said he was guilty of the offence and advance a positive case that Marcus did not commit the sexual assault.

U2. A statement that Giles can put either the past abuse or the previous arrest before the court without consent having been given or without any reference to the issue of consent having been made in the response.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

Giles must act in the best interests of his client (CD2). As the victim of a past sexual assault Marcus is vulnerable and should be treated as such. Giles should try to avoid any unnecessary distress for Marcus (gC41).

Giles has been informed of Marcus's guilt; he cannot therefore advance a case that indicates Marcus is not guilty of the offence but he could test the prosecution case (rC4; gC9). However, Giles should advise Marcus of the reduction in sentence if he pleads guilty as well as the restrictions on how the case can be run if Marcus maintains a not guilty plea.

Giles has a duty to keep Marcus's affairs confidential (CD6). He must not therefore disclose Marcus's past sexual abuse without consent. Giles should explain to Marcus that it is likely the judge will request pre-sentence reports and it would be in his best interests to disclose his past to the probation officer compiling the report as, although not excusing his behaviour, this information may provide some mitigation. Giles should also advise Marcus that there are ways in which this can be disclosed which will ensure it is not referred to in open court or known by anyone other than the judge and prosecutor. Giles may wish to advise that his instructing solicitors seek a psychological assessment for Marcus given the points he raised about personal boundaries.

Marcus was not convicted of another sexual assault but, in any event, if the arrest for it is not referred to on the list of previous convictions, there is no mandatory sentence here so there is no duty to disclose the arrest which was not proceeded with insofar as CD1 is concerned. If there was such a duty, Giles would still be required to seek consent to disclose it. In this scenario, Giles must maintain client confidentiality (CD6). If the previous arrest is raised by the prosecution in court then Giles could not mislead the court and deny the arrest or pretend he was unaware of it as that would breach CD1. However, Giles may need to seek further instructions from Marcus about what he says about it and be mindful of his duty of confidentiality when taking instructions and making any submissions. Giles would need to continue to act in Marcus's best interests which may well include pointing out it was an arrest only and not a conviction.

Given the volume of advice to be given to Marcus and his vulnerability, Giles may wish to allow additional time to ensure that Marcus understands the advice given or arrange a further conference to enable Marcus to fully digest the advice and to make informed decisions.

QUESTION: 4**GRADES:** GOOD, **SATISFACTORY**, POOR, UNACCEPTABLE

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

- S1.** Legal Aid has been wrongly obtained as a result of false and inaccurate information. Jennifer must act with honesty and integrity and take all reasonable steps to ensure that action is taken by the lay and professional clients to remedy this situation (CD3).
- S2.** Jennifer must cease to act and return her instructions in this scenario unless remedial action is taken by the client or solicitor (rC25.1).
- S3.** If Jennifer fails to take all reasonable steps to remedy this issue, given that this matter involves the expenditure of public money, she would also be a breach of CD5.
- S4.** Jennifer should not allow Warren's comments to compromise her independence (CD4).

Moving upwards from satisfactory knowledge

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

- G1.** Beth appears to be unaware of the mistake in the application. Jennifer needs to properly inform her of the situation as soon as possible in order to ensure she acts in her best interests (CD2).
- G2.** Jennifer must act in the best interests of her lay client and do so without fear of the consequences to anyone else, including her professional client (rC15).
- G3.** Jennifer should consider her duty to Beth and whether Beth's best interests would be served by different solicitors (rC17 and gC49.4).
- G4.** Where Jennifer considers that the solicitor has been negligent, she should ensure that she advises Beth of this (gC51).
- G5.** If she has to withdraw Jennifer must explain her reasons to both Beth and Warren for doing so (rC27.1).
- G6.** If Jennifer is obliged to withdraw, she must ensure that she continues to maintain the client's confidentiality as per CD6.

Moving downwards from satisfactory knowledge

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

P1. Failure to recognise the applicability of CD3 in that Jennifer must take all reasonable steps to ensure action is taken by the lay and professional client to remedy the situation (rC27.1).

P2. Failure to recognise the applicability of CD4 in relation to the solicitor's comments.

P3. Failure to recognise that Jennifer must cease to act if the position with regard to Legal Aid is not rectified (rC25.1).

An **unacceptable** answer may include **any or all** of the following:

U1. A statement that Jennifer can ignore the funding issue and proceed with the case as Warren instructs.

U2. A failure to make reference to the funding issue.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

Jennifer must cease to act and return her instructions in a case where it becomes apparent to her that Legal Aid has been wrongly obtained by false or inaccurate information, and action is not taken by the client or solicitor to remediate the situation immediately (rC25.1). This would appear to be the case here. Jennifer has attempted to raise the matter with both Beth and Warren, and neither have taken, or appear to plan to take, any action to remedy the situation. As such, Jennifer must return her instructions. Before doing so, Jennifer must either obtain her client's consent, or clearly explain to either Beth or Warren her reasons for having to cease to act (rC27.1).

If, despite Jennifer having explained her reasons for having to cease to act, Beth or Warren refuses to take action to remediate the situation, then Jennifer must withdraw (rC25.1).

If Jennifer continued to act in this situation, she would be in breach of the Handbook, and would also be behaving contrary to her duty to act with honesty and integrity (CD3), since she has become aware of the fact that Legal Aid has been wrongly obtained. Such action would also amount to a breach of CD5, since members of the public would not expect barristers to act in such a way.

Jennifer should consider Warren's statement that the error in the application for Legal Aid was the fault of a paralegal at the firm, and if so, whether her duty to Beth includes advising Beth that her best interests might be served by being represented by different solicitors (rC17; CD2). If Jennifer considered that the firm's mistake amounted to negligence and/or that Warren's unwillingness to correct the issue compounds the mistake, then she should inform Beth of this (gC51).

Jennifer should not allow Warren's comments about the delay or the inference any delay is attributable to her or the reference to the nature of the proceedings or their being held up to influence her decision-making in terms of what action she should take in this case. To do so would be to undermine her independence (CD4). Jennifer must not do anything that could reasonably be seen by members of the public as undermining her honesty, integrity and independence (rC8). Continuing to act in the case in the knowledge of the improperly obtained Legal Aid would breach this rule, and would also amount to a breach of CD5.

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QUESTION: 5**GRADES: GOOD, SATISFACTORY, POOR, UNACCEPTABLE**

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. Reference to **or** application of “Compliance with price, service and redress transparency rules” (D6) should be made. Jason is responsible for compliance with these rules **OR** Barristers must comply with CD10.

S2. The website should be reviewed annually / Jason should undertake a review of the website immediately. (rC160)

S3. Jason should notify the BSB of a change of website address within 28 days of the change. (rC162)

S4. Jason's website must provide information about the factors which might influence the timescales of his most commonly provided legal services. (rC159.4)

S5. Any hyperlinks on the webpage should work properly / Jason should ensure that the hyperlinks for the LeO website and the Barristers' Register on the BSB's website work. (rC103.2(b) and (c))

Moving upwards from satisfactory knowledge

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

G1. rC163 provides “When offering their services to *clients* and prospective *clients*, all *self-employed barristers*..., must have regard to guidance published from time to time by the *Bar Standards Board* in relation to price and service transparency.”

G2. The annual review of the website is to ensure that it is accurate and complies with the transparency requirements referred to in Rules C103 and C159.

G3. Jason should engage with the BSB to explain and ask for time to rectify any issues if necessary.

G4. Two of the most common omissions are the links required in rC103:

2.b a link to the decision data on the Legal Ombudsman's website; and

2.c a link to the Barristers' Register on the BSB's website.

G5. Jason should ensure that client confidentiality and data protection rules are complied with when using his nephew to update the website.

G6. The need to ensure the links are working is to comply with the mandatory rC159 which requires the links in the website to be “sufficiently accessible”: the links not working or going to the wrong page is equivalent to the links not being present at all.

	<p>Moving downwards from satisfactory knowledge</p> <p>A poor answer will contain any or all of the following omission(s) or irrelevant/incorrect material, namely:</p> <p>P1. Failure to identify or apply the "Compliance with price, service and redress transparency" rules OR failure to identify the application of CD10.</p> <p>P2. Failure to identify that Jason may be in breach of the rules if he does not update his website/Failure to identify that Jason must comply with the rules.</p> <p>P3. A statement that the website does not need to contain hyperlinks for either the decision data for adverse decisions in the last 12 months on the <u>LeO's</u> website or the Barristers' Register or both.</p> <p>P4. A conclusion that the website complies with the rules and/or is not regulated and/or does not need to comply with the rules.</p> <p>P5. A statement that chambers' websites are not regulated and/or do not need to comply with rules.</p>
	<p>An unacceptable answer may include any or all of the following:</p> <p>---NONE</p>

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

There are several specific points raised in this scenario (not just those considered by Jason) that need to be addressed.

Fundamentally, Jason must consider and comply with all of the BSB guidance on “Compliance with price, service and redress transparency rules” as a whole. This is made clear in rC103.4: “*Self-employed barristers*, must have regard to guidance published from time to time by the *Bar Standards Board* in relation to redress transparency.”

Furthermore, rC163 provides “when offering their services to *clients* and prospective *clients*, all *self-employed barristers*...must have regard to guidance published from time to time by the *Bar Standards Board* in relation to price and service transparency.” Jason should therefore be taking proactive steps regarding the content of his website to ensure it complies with the guidance.

Those found to be failing to comply or failing to engage to take corrective action are likely to be referred for possible disciplinary action. There are mandatory rules and additional transparency rules that need to be complied with and, if Jason cannot be sure that his website complies, then the website arguably must be taken down while it is improved or discussions entered into with the BSB to make amendments to an agreed timescale.

Part 2 D6 of the Code of Conduct applies to the more specific problems with the website in this scenario.

The website was built 18 months ago, so there is a breach of the rules by Jason: according to rC160 “all *self-employed barristers*...must review their website content at least annually to ensure that it is accurate and complies with the transparency requirements referred to in Rules C103 and C159.” He has failed to do this. If necessary, he should engage with the BSB to explain and ask for time to rectify any issues.

Jason is required to contact the BSB in order to notify them of the change of his website address in any case, so it would reflect far better on him if he showed an awareness of the website’s failings. rC162 provides: “All *self-employed barristers*... must notify the *Bar Standards Board* of their website address offering *legal services*, and any changes to their website address(es), within 28 days of the creation or change of the same.”

From the enquiries made, it would appear that the website does not comply with rC159.4.

“Each website of *self-employed barristers* must, in a sufficiently accessible and prominent place:

4. provide information about the factors which might influence the timescales of their most commonly provided *legal services*.” The Guidance provides all of the information in order to satisfy this mandatory requirement; it just needs including on his website. The Guidance provides that for example, you can include generic information about how the following might influence the timescales:

- Your availability;
- The availability of the client or relevant third parties;

- The complexity of the case;
- The amount of papers you need to review;
- The need for additional information or documents;
- The approach taken by the other side;
- Third parties intervening in the case; and
- Court waiting times.

Two of the most common omissions are the links required in rC103:

rC103.2.b a link to the decision data on the Legal Ombudsman's website; and

rC103.2.c a link to the Barristers' Register on the BSB's website.

If these are omitted, again this amounts to a failure to comply and needs to be amended promptly. It is not good enough to say one can find them by searching online. There must be a working hyperlink to the correct page.

The website should be updated in accordance with the guidance and rules above in order for Jason not to be subject to disciplinary action.

QUESTION: 6**GRADES:** GOOD, **SATISFACTORY**, POOR, UNACCEPTABLE

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. It is possible that Ranjeev is being treated less favourably in terms of the allocation of work than other junior members of the civil team on the grounds of his race (ethnicity).

S2. The affairs of chambers must be conducted in a manner which is fair and equitable for all members of Chambers, and/or a reference to the fair distribution of work opportunities amongst members of Chambers (rC110.3.i).

S3. As Equality and Diversity Officer, Sue is responsible for monitoring Chambers' compliance with equality and diversity policies (gC141) / equality monitoring / regularly reviewing how unassigned work is allocated within Chambers (rC110.3.f).

Moving upwards from satisfactory knowledge

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

G1. Ranjeev's allegation potentially amounts to one of discrimination based on race (ethnicity), which is a protected characteristic under the Equality Act 2010.

G2. Barristers are under a duty to take reasonable steps to ensure Chambers is administered competently and efficiently (rC89).

G3. This includes ensuring that non-authorised persons working in Chambers (which would include clerks) are competent to carry out their duties (rC89.6).

G4. The review of unassigned work explicitly considers those Barristers under 4 years standing rC112.2

G5. Chambers should have in place procedures for dealing effectively with complaints or concerns about allocation of work (Supporting Information for Chambers BSB Handbook Equality Rules, Section 8).

G6. Sue's equality monitoring/ reviews of unassigned work should include the collection and analysis of data broken down by race, disability and gender, investigating the reasons for any disparities in that data, and taking appropriate remedial action (rC110.3.g).

G7. If there are disparities in the data / there has been an unfair allocation, Sue must ensure Chambers takes remedial action aimed at removing any disadvantage being experienced by Ranjeev (rC103.3.g; gC146).

G8. This would include speaking to Matthew about this/ensuring training is provided regarding equality and diversity and/or ensuring a fair allocation of work in the future. Matthew cannot be reported to the BSB.

G9. In her role as Equality and Diversity Officer, Sue should ensure that Chambers arranges regular practice development meetings for tenants to enable discussion of work allocation and opportunities (Supporting Information for Chambers BSB Handbook Equality Rules, Section 8).

S4. Sue must investigate Ranjeev's complaint regarding the fair allocation of work/Sue should approach Matthew (or another clerk with access to the data) and try to ascertain what is happening to the allocation of the unassigned civil work and why (gC150).

G10. If an issue is identified Sue would need to bring to HoC or Management Committee attention/address in line with Chambers policies.

G11. Sue should reassure Ranjeev / ensure Ranjeev is not victimised as a result of his disclosure.

Moving downwards from satisfactory knowledge

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

P1. Failure to identify that Ranjeev may be being treated less favourably than other junior members on the grounds of his race/ethnicity.

P2. Failure to identify that chambers is under an obligation to ensure the fair and equitable distribution of work opportunities amongst members of Chambers (rC110.3.i).

P3. Failure to identify that Sue is under a duty to investigate Ranjeev's complaint.

P4. A statement that Matthew should be sacked without any investigation taking place or opportunity being given to him to respond.

An **unacceptable** answer may include **any or all** of the following:

U1. A statement that Sue has no responsibility to investigate this matter and/or that it is for the Head of Chambers to deal with instead.

U2. A statement that there is no duty to ensure that work is allocated fairly within Chambers.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

Race, the definition of which includes ethnicity, is a protected characteristic under the Equality Act 2010. Ranjeev's comment to Sue could be interpreted as an allegation that he is being discriminated against based on his race (his ethnicity). The discrimination arises as it appears to Ranjeev that he may be being treated less favourably in terms of the allocation of work than other junior members of the civil team who are all white British.

Barristers are under a duty to take reasonable steps to ensure chambers is administered competently and efficiently (rC89). This duty includes ensuring that non-authorised persons working in Chambers (which would include Matthew, the clerk) are competent to carry out their duties (rC89.6).

The affairs of chambers must be conducted in a manner which is fair and equitable for all members of Chambers, and this includes the fair distribution of work opportunities amongst members of Chambers (rC110.3.i). As Equality and Diversity Officer, Sue is responsible for monitoring Chambers' compliance with equality and diversity policies (gC141) generally and for equality monitoring. Part of this role would include regularly reviewing how unassigned work is allocated within Chambers (rC110.3.f).

Chambers should have in place procedures for dealing effectively with complaints or concerns about allocation of work (Supporting Information for Chambers BSB Handbook Equality Rules, Section 8). Sue must now investigate Ranjeev's complaint regarding the fair allocation of work, following any procedures that Chambers has in place to deal with such matters. As the clerk responsible for the distribution of the unassigned civil work in Chambers, Matthew should be approached. Sue should request access to the data relating to the allocation of the unassigned civil work so that she can try to ascertain what is happening (gC150). The data should be broken down by race, disability and gender.

If there are disparities in the data/ if Sue's investigations substantiate that there has been an unfair allocation, Sue must ensure Chambers takes remedial action aimed at removing any disadvantage being experienced by Ranjeev (rC103.3.g; gC146). This would include speaking to Matthew about the unfair allocation and ensuring training is provided regarding equality and diversity in order to ensure a fair allocation of work going forwards.

QUESTION: 7**GRADES: GOOD, SATISFACTORY, POOR, UNACCEPTABLE**

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. rC10 applies - you must not pay or receive referral fees.

S2. Scott should not make the arrangement to pay for dinner for Rupert and the firm's partners in return for work. Scott should retract this offer because this appears to be a fee arrangement which is contrary to Bribery Act/ breach of rC10 and/or the giving of entertainment or gift at a disproportionate level which could be seen to affect independence (gC20, CD4).

S3. Scott needs to give consideration as to whether the arrangement proposed by Katrina to Abigail amounts to a referral fee by looking at the underlying nature and purpose of this arrangement.

S4. With regard to the pro bono work, Scott is entitled to take on pro bono work as suggested by his clerk and part of the effect of that may be to gain experience and raise his profile.

S5. However, Scott must be mindful in relation to the pro bono work and the situation with Hamid that he does not breach core duties.

Moving upwards from satisfactory knowledge

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

G1. rC9.7 provides as follows: "Your duty to act with honesty and integrity under CD3 includes the following requirements: ...you must only propose, or accept, fee arrangements which are legal."

G2. Working for no financial reward or for a reduced fee could be a breach of rC8 and the Referral and Marketing Arrangements Guidance by Scott and any other members of chambers who may benefit from Scott taking on pro bono work.

G3. Working pro bono could breach the fair distribution of work opportunities among *pupils* and members of *chambers* (rC110). Scott is very junior and must not be placed in a position where he is working for free to gain advantage for more senior members of chambers.

G4. Scott would also be in breach of gC30 - referring to public funding (if these cases are legal aid) and bribes.

G5. Although the clerk appears to have made the arrangement for Scott, Scott is responsible for this (gC66).

G6. Sensible discussion surrounding CD5 and public perception of the arrangements proposed.

Moving downwards from satisfactory knowledge

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

P1. Failure to conclude that Scott cannot continue with the arrangements with Rupert (either because it amounts to referral fee or excessive gift/excessive entertainment).

P2. Failure to discuss the pro bono/Hamid situation (candidates may come to any reasoned conclusion on this but must address it).

P3. Failure to discuss the proposal made to Abigail (candidates may come to any reasoned conclusion on this but must address it).

P4. A statement that Scott is not responsible for his clerk's behaviour.

An **unacceptable** answer may include **any or all** of the following:

U1. An unqualified statement that Scott can accept the arrangement with Abigail.

U2. An unqualified statement that it is acceptable to continue the arrangement with Rupert.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

Scott has a duty to maintain his independence under CD4 and under rC8 must not do anything which could reasonably be seen by the public to undermine his honesty, integrity (CD3) and independence (CD4). Scott is a BSB regulated person to whom rC10 applies and as such he is prohibited from offering or receiving referral fees under this rule: the payment or receipt by a barrister of any referral fee for the purpose of procuring professional instructions is expressly forbidden. rC9.7 also applies to each of the examples: “you must only propose or accept fee arrangements which are legal.” Working for no financial reward or for a reduced fee would be a breach of rC8 and the Referral and Marketing Arrangements Guidance by Scott and other members of chambers who may benefit from Scott’s work due to him taking on pro bono work. gC29 makes it clear that “making or receiving payments in order to procure or reward the referral to you by an intermediary of professional instructions is inconsistent with your obligations under CD2 and/or CD3 and/or CD4 and may also breach CD5.”

Scott’s offer to take the partners in Rupert’s firm out for dinner for each trial instruction that he is sent is likely to constitute a referral fee in breach of rC10. This is because it is a benefit in kind that can constitute a referral fee and the benefit provided is specifically linked to each set of instructions Scott is sent (BSB guidance on referral fees). Furthermore the referral is made to a solicitor who has an obligation to act in the client’s best interest: there is therefore a risk that they would refer a client to Scott not because it is the client’s best interests but in order to receive the reward. By making this offer, Scott has likely breached rC10 and rC8. He has also likely to be in breach of CD5 as there would be a diminution in public trust and confidence in Scott and the profession because the public would expect barristers to maintain their independence and not to offer referral fees. It is likely that CD3 would also be undermined as offering a prohibited referral fee would not amount to acting with integrity. Scott should have considered that a referral fee to which a client has not consented may constitute a criminal offence under the Bribery Act 2010, and may also breach the terms of the LAA standard contract if any of the clients are legally aided.

As to the circumstances relating to Abigail, Katrina, the clerk, has proposed an offer on Scott’s behalf that he will agree to be paid less than his usual fee for each case that Abigail sends him. This is likely also to amount to a referral fee in breach of rC10. Scott must speak to Katrina and explain that this is not an acceptable offer as it is contrary to the Bribery Act and in breach of rC10. He should ask her to contact the solicitor to retract the offer and explain that any work would have to be paid at proper rates with no referral fee element at all. Scott should refer her to Referral and Marketing Arrangements Guidance and the “features which are likely to indicate that the payment is a prohibited referral fee”, in particular “In a publicly funded case, the fee paid to an instructed barrister is less than the Legal Aid Agency fee for those advocacy services” and “The payment is a condition of receiving a referral”. Scott would also be bound by rC89.6 and should make Katrina aware of the position she has put him in:

“all non-authorised persons working in your *chambers* (irrespective of the identity of their *employer*):

c. are made clearly aware of such provisions of this *Handbook* as may affect or be relevant to the performance of their duties;

.d do nothing which causes or substantially contributes to a breach of this *Handbook* by any *BSB authorised individual* or *authorised (non-BSB) individual* within chambers.”

The fact that Katrina rather than Scott made this arrangement is irrelevant, as Scott is responsible for all the services provided by his clerks (gC66). This arrangement is therefore a breach of rC8, CD5, CD4 and CD3.

With regard to Hamid's email there is unlikely to have been any breach of the Handbook. This is because taking on pro bono work in order to build his reputation with solicitors is unlikely to be seen by the public to undermine his independence in breach of rC8. This would be different had Hamid offered to provide Scott with a certain number of cases if he did a certain number of cases pro bono: that would likely constitute a referral fee in breach of rC10. However on the facts Hamid has simply provided some pro bono work to Scott and indicated that, presumably if the work is of a high standard, he may instruct Scott in the future. As there is no absolute promise of further instruction a reasonable member of the public is unlikely to think Scott has compromised his independence in any way through this arrangement; indeed doing pro bono work is a valuable public service and it is encouraged in the profession that barristers do so. Scott should monitor the situation however and ensure that he does not breach core duties.

Scott owes a duty to mitigate the effects of the breaches outlined above (gC2). In order to do this he should either himself contact or get his clerk to contact Abigail and Rupert immediately and explain that he is unable to agree to the proposals as they would likely constitute prohibited referral fees. In future, Scott should ensure that neither he, nor Katrina on his behalf, enters into arrangements which could amount to referral fees.

QUESTION: 8**GRADES:** GOOD, **SATISFACTORY**, POOR, UNACCEPTABLE

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. Fatima had advised that the expert evidence is necessary and maintains that view. She should therefore ensure that Emily is aware this remains her view. (CD2/CD7).

S2. Fatima must ensure Emily is made aware of Dean's failure to obtain the expert report (CD3/ gC51).

S3. Fatima must not let her own interests or those of the solicitor override her duty to act in Emily's best interest. (CD2 and rC15.2).

S4. Fatima must not let Dean's words about getting further work by impressing the senior partner or any other matter including her concern about not receiving much work affect her duty to maintain independence (CD4).

Moving upwards from satisfactory knowledge

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

G1. Identify/consider that Emily's interests may be best served by an alternative solicitor and Fatima should advise her of that (rC17 and/or gC49).

G2. Emily will need to be advised that given the proximity of the trial, it is likely that an application to adjourn will also need to be made so as to allow time for the expert evidence to be obtained.

G3. If the court asks for the reason for the adjournment, Emily should be honest and inform the court of her solicitor's failure.

G4. Fatima needs to be mindful of the duty to keep her client's affairs confidential and so should be careful about discussing the case in a public space (CD6).

G5. The offer from Dean of extra work is not in and of itself a breach of CD4, but if Fatima were to act on this promise and ignore his failures, she would be in breach of CD4.

G6. As per rC20 Fatima must use her own professional judgment re the expert evidence, even if her views are different to her professional client.

Moving downwards from satisfactory knowledge

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

P1. Failure to identify the application of CD2/CD7 in the context of ensuring Emily is properly advised of Fatima's view that an expert report is still required. *[It is sufficient if a candidate includes a proposed step that would either expressly or impliedly let the client know of the issue e.g. adjourning the case, advising on different representation etc]*

P2. Failure to identify CD2 and/or CD4 in the context of putting the client's best interests before the barrister's or solicitor's interests in the context of the solicitor's failure to conduct the litigation properly.

An **unacceptable** answer may include **any or all** of the following:

U1. Any unqualified statement that Fatima could simply work with the evidence she has and proceed to trial without saying anything to Emily.

U2. A statement that Fatima should immediately withdraw as matters currently stand.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

Fatima must act in the best interests of each client (CD2).

If a barrister considers that his/her professional client, another solicitor or intermediary, another barrister, or any other person acting on behalf of his/her client has been negligent, he/she should ensure that the client is advised of this (gC51). Fatima should, therefore, consider what she should do about Dean's failure to obtain expert evidence since he appears to have been negligent in this regard. In this instance, Fatima should tell Emily. This would be in compliance with her duty under CD3 to act with honesty and integrity.

The duty to act in the best interests of each client (CD2) includes a duty to consider whether the client's best interests are served by different legal representation and, if so, to advise the client to that effect (rC17). Fatima should, therefore, consider whether Dean's conduct of the case has been so poor that Emily's best interests would be served by different legal representation. If so, Fatima should advise Emily to that effect.

A barrister must provide a competent standard of work and service to each client (CD7). The duty to act in the best interests of each client (CD2), and to provide a competent standard of work and service to each client (CD7), includes obligations to promote fearlessly and by all proper and lawful means the client's best interests, and to do so without regard to the barrister's own interests or to any consequences to them (rC15.1 and rC15.2).

As the personal injury case is next week, Fatima should also advise Emily of the need to obtain the necessary expert evidence, and make an application to rely upon the same, as a matter of urgency. Given the proximity of the trial, it is likely that an application to adjourn the trial will also need to be made to allow time for the evidence to be obtained. In compliance with her duties under CD2 and CD7, Fatima will need to explain all of this to Emily in terms she can understand.

Fatima must act in Emily's best interests, without regard to whether this means she might not get new work from Dean. Barristers must maintain their independence (CD4). The duty to act with honesty and with integrity (CD3) and to maintain independence (CD4) is fundamental. The client's best interests (CD2) can only be properly served if the barrister maintains his/her independence from external pressures, as required by CD4 (gC14). Fatima must, therefore, not allow the possibility of receiving future work from Dean to compromise her independence, as this would prevent her from acting in Emily's best interests. She must therefore advise Emily, if it is her firmly held view, that an expert report is required and that there has been a failure on Dean's part to obtain it. Any failure by Fatima to do so on the basis that she might upset or annoy Dean and/or that she might not receive any new instructions from him or his firm would be a breach of CD4. The fact that Dean has promised Fatima future work is not, in and of itself, a breach of CD4 but if Fatima acts on the promise by ignoring Dean's failures, then she would be in breach of CD4.

Fatima and Dean are talking about this in a public place. Fatima must be mindful of her CD6 duty of confidentiality when discussing her client's case.

QUESTION: 9**GRADES: GOOD, SATISFACTORY, POOR, UNACCEPTABLE**

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. The BSB Social Media Guidance applies to Harry posting, sharing, and promoting legal activity on social networking sites such as Flashquik and Social Media Publique.

S2. Harry must maintain public confidence and not act in such a way that could bring the profession into disrepute. In choosing to use a platform such as Flashquik to communicate with clients, Harry must be alert to the risks of posting personal and business comments over a range of platforms. (CD5; rC8).

S3. Harry should not contact Musetta via social media unless she has agreed to communicate in this way and he is satisfied that the client's confidentiality will not be at risk (CD2; CD6).

S4. In relation to the public post on Social Media Publique Harry has breached his duty of confidentiality (CD6) since Musetta has not consented to public communication in this manner.

S5. The post on Social Media Publique identifies both location and identity of sender (Harry) and the receiver (Musetta) AND/OR The geotag generated by Flashquik identifies where the conference is being held and could be used to identify Musetta's location / home address.

Moving upwards from satisfactory knowledge

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

G1. Flashquik is associated with obscene and derogatory content; Harry risks diminishing public trust and/or confidence in both him and/or the profession, by using this particular platform in breach of CD5.

G2. Harry has likely failed to consider the security of the social media system that he was using and its settings to ensure that confidentiality is not at risk. By using the Flashquik platform, it is likely that Harry has failed to consider its privacy policy, which allows the Flashquik site to access and store private information, whether or not it is made publicly available (CD6).

G3. The decision to undertake client contact using the Flashquik platform could be a breach of GDPR / confidentiality as the video content is recorded and retained by the Flashquik site (CD6).

G4. The logging of Harry's location at the co-working space was also a breach of his duty of confidentiality as it identifies location, and the link between Harry and Musetta.

G5. Harry's breach of confidentiality (identifying the location of the conference and the geotag) places him in further breach of CD5 as members of the public would expect barristers to maintain confidentiality at all times.

G6. Harry's conduct may alienate clients, future clients, and members of the public who identify as part of those groups and make them feel uncertain about engaging with a barrister and/or the profession and/or trusting that the barrister and/or the profession will act in their best interests.

S6. Harry should remove the post as soon as possible AND/OR apologise to Musetta AND/OR ensure that he uses confidential means of communication from now on.

This could be seen as a risk to access to justice, and it is therefore likely to be in the public interest to regulate such conduct.

Harry thus may be in breach of CD5 and rC8.

G7. Harry should remind Musetta of her right to make a complaint to chambers and/or the BSB for his actions.

G8. Harry should notify chambers' HOLP of his actions.

G9. Harry should re-evaluate the way he conducts his practice and stop using platforms such as Flashquik which put client confidentiality at risk.

Moving downwards from satisfactory knowledge

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

P1. Failure to apply the contents of the BSB Social Media Guidance (EITHER by specific reference to the guidance OR, where the guidance is not referred to explicitly, by reference to the key core duties and principles discussed in the guidance).

P2. Failure to identify that there have been breaches of CD6 by Harry through the public contact on social media, and by publicly revealing his location at the co-working space.

P3. Failure to identify any sensible remedial action that should be taken (examples may include but are not limited to: removing the post AND/OR apologising to Musetta AND/OR ensuring that he uses confidential means of communication from now on).]

An **unacceptable** answer may include **any or all** of the following:

U1. A statement that it was acceptable for Harry to reveal the location of the conference and/or to reveal information about Musetta's case on her public social media channels.

U2. A statement that it is generally acceptable for barristers to communicate with their clients using social media without any reference to the need to maintain confidentiality.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

The Social Media Guidance for barristers applies to Harry in both his professional work and personal communication. His obligations under CD5 apply to him at all times, even when using personal and private messaging channels. There is a risk of Harry diminishing public trust and/or confidence in both him and/or the profession, in breach of CD5 and CD3, by choosing to use a controversial platform associated with obscene and derogatory content.

Given that Flashquik permanently retains the potentially sensitive and confidential information it records, and there have been doubts in respect of its policy/ security Harry appears to have failed to consider the security of the social media systems that he was using and its settings to ensure that confidentiality is not at risk. In particular, by using the Flashquik platform, it is likely that Harry has failed to consider its privacy policy, which allows the Flashquik site to access and store private information, whether or not it is made publicly available.

Musetta has consented to communicate via Flashquik as this is quick and expedient. She may not have considered the privacy risks, or the issues of data storage. Harry appears not to have alerted her to any risk that could or may exist. Harry must act in his client's best interests and must be satisfied that Musetta's confidential communications are not at risk (CD2 & CD6).

Harry contacting the client on her public-facing social media channel [Social Media Publique] is likely to put him in breach of CD6. The public post was the first time the case had been mentioned in connection with Musetta. Musetta has implicitly agreed to communication with Harry via social media, but not on a public-facing channel as this is not appropriate. There are other ways of contacting the client and her confidentiality is at risk.

The Social Media Guidance cautions against less obvious breaches of client confidentiality, such as the use of platforms which 'tag' physical locations of individuals. Harry sending a public message links him and the client and reveals private and sensitive information about her, i.e. she lives close to the co-working space Harry has chosen for the conference, and this is in breach of CD6.

Social media use includes private messages to individuals so even if Harry is sending messages or 'flashing' he has to be aware of the guidance, and the risk that his behaviour or comments may be in breach of CD5. Harry must always act in the best interests of his lay client and as Harry is an experienced practitioner in defamation law, he would be aware of the risks to privacy of his client. He should have taken care to keep all communication private, and been aware that his geotag along with his comments could have identified personal information linked to Musetta (home address etc) in breach of CD2 and CD5.

Harry must remove the public post as soon as possible, and advise Musetta, so she can delete or change the privacy settings on her own account to prevent any further public viewing. He should also remove any reference from his own social media profile to reduce any risk of publicity or further breaches of her privacy and confidentiality.

Harry must apologise to Musetta, and seek to ensure her that he will only use confidential means of communication from now on.

Harry should re-evaluate the way he conducts his practice and stop using platforms such as Flashquik which may put client confidentiality at risk.

QUESTION: 10**GRADES: GOOD, SATISFACTORY, POOR, UNACCEPTABLE**

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. Joshua must refuse to plead the allegation of fraud as whilst he has clear instructions to do so, he does not have reasonably credible material establishing an arguable case of fraud (rC9.2.c; rC7; CD3).

S2. Joshua should explain to Raheem that while he must act in Raheem's best interests (CD2) and/ or provide him with a competent standard of work and service (CD7), these duties are subject to his duty not to mislead (CD3).

S3. Providing Raheem consents, Joshua can continue to act and draft the particulars of claim without the allegations of fraud.

S4. If Raheem refuses to withdraw the allegation of fraud / insists Joshua plead the fraud allegation, Joshua must cease to act (rC21.5; rC21.6; rC25).

S5. Joshua has a duty of independence (CD4) and should therefore disregard Raheem's comments in respect of his team affiliation. He must advise Raheem of his ethical duties and in particular that he must maintain his independence and the separation of his personal and professional interests.

Moving upwards from satisfactory knowledge

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

G1. The duty to the court under CD1 includes not abusing your position as an advocate (rC3.2). If there are no reasonable grounds to make the allegation, it would be a waste of the court's time (rC3.3).

G2. Joshua is responsible for his own professional work. He must use his own professional judgment, notwithstanding the views of his client (rC20).

G3. In these circumstances following his instructions would not be in Raheem's best interests as there could be a risk of costs, and / or his claim for breach of contract could be undermined.

G4. There would be a real risk that the reputation of the bar would be diminished in the minds of members of the public if Joshua pleaded fraud in these circumstances (CD5).

G5. If ceasing to act, Joshua would have to explain to Raheem the reason for doing so.

G6. Although Joshua holds a season ticket with CLRFC, there is a sufficient and appropriate degree of separation in his private and personal roles. Objectively there is no conflict of interest/ breach of his duty to remain independent in his acting for Raheem (CD4; CD5).

G7. Joshua must not let concerns regarding how returning the brief may affect his relationship with his clerks affect on his decision as to how to proceed.

Moving downwards from satisfactory knowledge

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

P1. Failure to identify the applicability of CD3/rC9.2.c namely that Joshua cannot advance a case of fraud if there is no credible material which establishes an arguable case of fraud.

P2. Failure to recognise that Joshua must cease to act if Raheem insists that the allegation of fraud should be pleaded.

P3. Failure to recognise the applicability of CD4.

An **unacceptable** answer may include **any or all** of the following:

U1. A statement that Joshua could make the serious allegation (of fraud) without material in support/ simply based on Raheem's clear instructions.

U2. A statement that Joshua can proceed with his representation of Raheem without doing anything/ addressing the issue.

U3. A statement that Joshua could act against his instructions by not including the allegation of fraud without informing Raheem and thus continue to act.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

In this scenario Raheem wishes Joshua to plead fraud.

Joshua has a duty to act with honesty and with integrity at all times (CD3). To comply with this duty Joshua should inform Raheem that, as he does not believe there is sufficient evidence to support the allegation of fraud that Raheem wishes to put before the court, he would not be acting with honesty or integrity were he to do so.

As Joshua has been instructed to draft a statement of case which pleads fraud he would need reasonably credible material on which to base an arguable case (rC9.2.c). Having concluded that the case papers and evidence contain no reasonably credible material he cannot draft the pleadings making such allegations.

Dishonesty cannot be pleaded in a vague manner. A trial judge is likely to confine any case on dishonesty to the pleaded allegations. Further, there are clear professional duties on the person pleading the case to have evidence before them upon which they can properly found the allegations. Joshua must therefore explain in simple terms why this vague allegation will not suffice as fraud.

Joshua must also inform Raheem that he has a duty to the court in the administration of justice under CD1 and this duty includes not abusing his position as an advocate, rC3.2. If he were to make a serious allegation against HRFC, in this instance, fraud, the allegation would have to be relevant to the case or an issue of credibility and he would also need reasonable grounds to support the allegation (rC7).

Joshua must therefore advise Raheem to withdraw the instruction to draft a particulars of claim that pleads fraud. This will ensure that Joshua would be acting in Raheem's best interests (CD2) and would be in compliance with CD7. An allegation of fraud which is unfounded can also be seen as wasting the court's time, and would do nothing to assist Raheem's claim (rC3.3).

Should Raheem wish to proceed with his allegation of fraud, and have Joshua prepare particulars of claim without reasonably credible material, the public trust and confidence in Joshua and/or the profession would be diminished (CD5) because members of the public expect barristers to act with honesty and with integrity at all times, and in particular not to plead serious allegations such as fraud without reasonable grounds in support.

Joshua should explain very clearly what the issues in the case are and why it is not in Raheem's best interests to plead fraud, and get further instructions from him. If Raheem refuses to withdraw the instruction to plead fraud Joshua would be in a position where he would have to cease to act; this is because his instructions would require him to act other than in accordance with the law or the provisions of the Handbook (rC21.6) and his instructions would also arguably seek to limit his ordinary authority in the conduct of proceedings in court (rC21.5).

Joshua has a duty to maintain his independence (CD4) and should therefore disregard Raheem's comments in respect of his team affiliation. He must advise Raheem of his ethical duties and in particular that he must maintain his independence and the separation of his personal and professional interests.

QUESTION: 11**GRADES:** GOOD, **SATISFACTORY**, POOR, UNACCEPTABLE

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. Bertha owes a duty to the court in the administration of justice under CD1 and this duty overrides her duty to act in the best interests of the client (CD2).

S2. Bertha is now aware of a prejudicial document, the rota, which she would be under a duty to disclose if she continued to act.

S3. Bertha must advise her lay client that she must disclose the correct rota and advise the position in the witness statement appears to be in conflict with the content of the rota.

S4. Bertha must advise the client that she must not mislead the court and that the witness statement must be corrected.

S5. Without instructions to disclose the rota, Bertha would be obliged to withdraw under rC25.

Moving upwards from satisfactory knowledge

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

G1. rC16 sets out that CD3, Bertha's duty to act with honesty and integrity, and CD4, her duty to maintain her independence, also override CD2.

G2. gC4 provides that "you must not be complicit in another person misleading the court".

G3. rC9.3 provides "you must not encourage a witness to give evidence which is misleading or untruthful".

G4. Bertha can put a positive case in relation to the level of damages.

G5. Bertha should not act in a way that is likely to diminish the trust and confidence which the public places in her or in the profession. By misleading the court, Bertha would undermine any trust in the profession, thereby breaching CD5.

G7. Bertha would be required to explain to the court, without breaching her duty of confidentiality the need to withdraw (CD6)

G8. It is irrelevant for these purposes that Busy Buses will no longer have representation if Bertha has to cease to act.

S6. If Stanley refuses to correct the statement in these circumstances, Bertha must withdraw.

Moving downwards from satisfactory knowledge

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

P1. Failure to identify that Bertha must not mislead the court.

P2. Failure to identify Bertha needs to advise her lay client of the options available given what its director has disclosed to her and must advise that the witness statement should be corrected (CD1)

P3. Failure to identify that Bertha must advise that the rota must be disclosed.

P4. Failure to discuss the possibility that Bertha may have to withdraw.

An **unacceptable** answer may include **any or all** of the following:

U1. A statement that the case could proceed without the rota being disclosed.

U2. A statement that Bertha could proceed to represent Busy Buses at trial in circumstances where Stanley admitted that he had lied/ made an error in his witness statement but refused to correct its contents.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

Bertha's primary duty is to the court. Pursuant to rC3 she owes a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which she may have, and includes that she must not knowingly or recklessly mislead or attempt to mislead the court.

Bertha's duty to the court in the administration of justice overrides her duty to act in the best interests of the client, CD2. The scenario specifically raises the conflicting duties between CD1 and CD2: 'He tells Bertha that..the witness statement is what he and Busy Buses need the court to hear.... "We have to run the case as drafted...forget I ever said anything or showed you that rota.'" Where there is a conflict, Bertha's duty to the court overrides her duty to act in her client's best interests because not to do so would inevitably result in the court being misled.

Bertha must not follow Stanley's wishes to rely on the witness statement because he has told her that it is untrue and has shown her a document which shows other assertions are also untrue. It is irrelevant that Busy Buses is under financial threat because of the mistake. Bertha's actions, were she to act in accordance with these instructions, would be dishonest and would amount to serious misconduct.

As per gC14, Bertha's honesty, integrity and independence are fundamental. The interests of justice (CD1) and the *client's* best interests (CD2) can only be properly served, and any conflicts between the two properly resolved, if Bertha conduct herself honestly and maintains her independence from external pressures, as required by CD3 and CD4.

Under rC16, Bertha's duty to act with honesty and integrity and CD4, her duty to maintain her independence, also override CD2. If she allows the witness statement to be relied on as it stands and evidence sworn or affirmed before the court, this amounts to dishonesty and is obviously not acting with integrity. Again these are serious breaches of the Code and Bertha should not follow her client's instructions.

Bertha must also have regard to rC6 – her duty not to mislead the court means she must not make submissions, representations or any other statement, or ask questions which suggests facts to witnesses which she knows or are instructed are untrue or misleading. Bertha must also not call witnesses to give evidence or put a witness statement to the court which she knows, or is instructed are untrue or misleading, unless she makes clear to the court the true position as known by her or instructed to her.

In having regard to gC4 Bertha must not be complicit in another person misleading the court and pursuant to rC9.3 must not encourage a witness to give evidence which is misleading or untruthful. Were Bertha to allow Stanley to persuade her to mislead the court, this would clearly illustrate that her independence had been compromised, which would amount to serious misconduct.

Bertha should not act in a way that is likely to diminish the trust and confidence which the public places in her or in the profession. By misleading the court, Bertha would undermine public trust and confidence in her and/or the profession thereby breaching CD5.

Bertha should explain that there are now inconsistencies in the accounts given and that, unless Stanley (on behalf of Busy Buses) agrees that she should present the true position to the court then she will be forced to withdraw. If Stanley/Busy Buses insists that Bertha continue to rely on the witness statement in its current form, she would be unable to reconcile the conflict in the duties as described above and she must withdraw, pursuant to rC25. She should inform the client as soon as possible. Bertha would be required to explain to the court, without breaching her duty of confidentiality (CD6), that she is no longer able to represent Busy Buses. It is irrelevant for these purposes that Busy Buses will no longer have representation. It might be helpful to apply for an adjournment but this is not necessary and would potentially put the next advocate in exactly the same position and / or allow the court to be misled, which Bertha must try to prevent despite no longer representing Busy Buses, as her duty to the court continues for the duration of the case (gC4.4).

If Busy Buses conceded that it needed to amend its position, then Bertha could put forward a positive (and honest) case with respect to the level of damages claimed by DJKC and challenge those.

Stanley has shown Bertha a document which is prejudicial to the case which Busy Buses has thus far asserted. It would seem that Stanley does not want to disclose it. Under rC3.5, Bertha must ensure that her duty to the court and her ability to act honestly and independently are not compromised. Her duty to the court takes priority in the same way as outlined above and so she should advise Stanley/Busy Buses to disclose the document she has seen on Stanley's phone. The rota is a document that is in the possession of Busy Buses so it had a duty to disclose it. If Busy Buses refuses permission to disclose it, Bertha cannot reconcile her conflicting duties. She would have no alternative but to withdraw from the case. Failure to do so would be a serious breach of her core duties and would amount to serious misconduct.

QUESTION: 12**GRADES: GOOD, SATISFACTORY, POOR, UNACCEPTABLE**

A **satisfactory** level of application of knowledge will contain evidence that the candidate understands and can apply:

S1. Lucia is a self-employed barrister, instructed by a professional client, and with the appropriate experience/expertise to act and so the 'cab rank rule' applies (rC29).

S2. Lucia cannot withhold her services on the ground that the nature of the case is objectionable to her or on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to her (rC28).

S3. Lucia owes a duty to act with independence (CD4) and must not allow her personal views/the views of her followers/the refuge impact her accepting the brief/her duty in representing Huw.

S4. Lucia must also not allow Chris's insistence that the defendant is represented by Lucia for her views to be a factor in determining whether or not she should accept the brief. (CD4).

Moving upwards from satisfactory knowledge

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

G1. Lucia must not discriminate against Huw gC88.

G2. Whatever Lucia feels about Huw's views she must ensure that she deals with Huw's question with courtesy and consideration (gC38.1)

G3. If Lucia were to refuse to accept the brief on the basis that she holds contrary views to the defendant or because people would disapprove, this would be a breach of CD3 and CD5.

G4. The fact that Lucia volunteers at the charity would not amount to a conflict of interest as envisaged by the Code of Conduct.

G5. Lucia has a duty to act in her client's best interests (CD2) and to provide a competent standard of work (CD7) and must do this regardless of her views or any views of her client.

G6. Lucia must not let the fact that she maintains a highly public internet profile interfere with her duties under the Handbook and the cab rank rule in particular.

G7. Lucia must ensure that any view she shares publicly does not fall foul of BSB Social Media Guidance, noting in particular that Art 10 is a qualified right and she must ensure that she does not breach CD3 and CD5 when posting publicly.

Moving downwards from satisfactory knowledge

S5. Lucia must not manipulate Chambers' well-being policy/ her diary to avoid the PTPH. To do so would be a breach of CD3 and/or CD5 duty.

S6. There are no reasons which justify Lucia rejecting the brief, thus she must accept it.

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

P1. Failure to recognise that you cannot withhold your services on the grounds that the nature of the case is objectionable or the conduct, opinions or beliefs of the prospective client are unacceptable. rC29

P2. Failure to recognise the application of CD4.

P3. Failure to recognise that Lucia has no reason to reject the brief.

An **unacceptable** answer may include **any or all** of the following:

U1. Any statement that Lucia can refuse to accept the brief/does not have to continue to represent Huw on the basis that she does not agree with Huw's views or that there is a conflict of interest between her views and that of the client.

U2. An unqualified statement that Lucia can take two days off in order to avoid the PTPH.

INDICATIVE CONTENT COMFORTABLY EXCEEDING “SATISFACTORY” ANSWER

Lucia is a self-employed barrister, instructed by a professional client, and with the appropriate experience/expertise to act and so the ‘cab rank rule’ applies (rC29). This rule applies irrespective of the identity of the client, the nature of the case and any belief or opinion Lucia may have formed as to the character, cause, conduct, guilt or innocence of the client.

Lucia must also not discriminate against Huw and withhold her services on the ground that the nature of the case is objectionable or the conduct, opinions or beliefs of Huw are unacceptable to her or any section of the public (rC28).

Lucia owes a duty to act with honesty and integrity (CD3) and not to undermine the trust and confidence that the public place in her and the profession (CD5). If Lucia were to refuse to accept these instructions on the basis that she disagreed with Huw's views, she would be in breach of these core duties.

Whatever Lucia feels about Huw's views she must ensure that she deals with Huw's question with courtesy and consideration (gC38.1).

In accepting the brief, Lucia owes Huw a duty under CD7 to provide a competent standard of work and service at all times and to conduct the case in Huw's best interests under CD2, and any personal beliefs/views she holds should not impact her ability to carry out those duties.

Lucia must disregard the comments made by Chris as to why she is being instructed and that her views would reflect positively on Huw's case. If she were to take this into account, she would be in breach of her duty under CD4. Lucia should also disregard any impact to herself in respect of what her followers may think, or what the refuge may think, if they find out that she is representing Huw. This is in line with her duty under CD4.

It would be a breach of CD3 and CD5 if Lucia were to abuse Chambers' well-being policy to manipulate her diary so as to avoid the PTPH listed in two days' time, given that Chris has stated that it is important that there is continuity of counsel in the proceedings. Such action would be lacking in integrity and would diminish public confidence in Lucia and/or the profession since members of the public expect barristers to adhere to the cab rank rule and not to manipulate their diary so as to avoid difficult cases.

Lucia is therefore duty bound to accept these instructions under the cab rank rule.