

## June 2019: Marker Guidance: Unit 2

---

The marking rubric and guidance is published as an aid to markers, to indicate the requirements of the examination. It shows the basis on which marks are to be awarded by examiners.

However, candidates may provide alternative correct answers and there may be unexpected approaches in candidates' scripts. These must be given marks that fairly reflect the relevant knowledge and skills demonstrated. Where a candidate has advanced a point that is not included within the marking rubric please do make a note of the same so that it can be raised at the standardisation meeting.

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

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

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

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

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

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

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

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

## SECTION A (all compulsory – 40%)

|   |   |
|---|---|
| <b>Question 1:</b>  | Explain what the CLSB Costs Lawyer Code of Conduct means when it states that costs lawyers must not accept client money save for disbursements and payment of their professional fees.  |
| <b>Total Marks Attainable</b><br><br>Fail = 0-2.4<br>Pass = 2.5+<br>Merit = 3+<br>Distinction = 3.5+  | 5   |
| <b>Indicative Content</b>   | <b>Marks</b>  |
| <p><b>Must include a discussion as to what client money is, e.g:</b></p> <p><b>No Definition:</b> There is no definition of client money within any rules set by the CLSB and therefore you must look to either CILEx or SRA rules for the definition.</p> <p><b>Rule 12 of the SRA Account Rules:</b> Categories of money.</p> <p><b>Rule 12.1 of the SRA Account Rules:</b> These rules do not apply to out-of-scope money, save to the limited extent specified in the rules. All other money held or received in the course of practice falls into one or other of the following categories:</p> <p><b>Rule 12.1(a) of the SRA Account Rules:</b> "client money" - money held or received for a client or as trustee, and all other money which is not</p> <p><b>Rule 12.1 (b) of the SRA Account Rules:</b> "office money" - money which belongs to you or your firm.</p> <p><b>CILEx Account Rules:</b> define client money as money beneficially owned by anyone other than the Authorised Entity.</p> | Up to 2 marks<br><br>A pass must refer to a definition of client money.   |
| <p><b>May also include a discussion on the protection of the public and minimising risks, e.g:</b></p> <p><b>Principle 3 of the CLSB Code of Conduct:</b> Generally is about acting in the best interests of the client</p> <p><b>Principle 3.6 of the Costs Lawyer Code of Conduct:</b> A costs lawyer must not accept client money save for disbursements and payment of your proper professional fees.</p> <p><b>CLSB Practising Rules:</b> There is no mention of the CLs handling client money in the CLSB Practising Rules.</p> <p><b>Rule 1.1 of the SRA Account Rules:</b> The purpose of these rules is to keep client money safe. This aim must always be borne in mind in the application of these rules.</p>  | Up to 3 marks<br><br>To achieve more than a pass candidates must not simply cite the rules but should show a deeper understanding of the rules including an appreciation (even if not explicitly stated) of the requirement by the CLSB code of conduct to act in the |

|  |   |
|--|---|
| <p><b>Section 1 LSA 07:</b> 8 regulatory objectives.</p> <p><b>Section 20 LSA 07:</b> Approved regulators. ACL is named as the approved regulator but the CLSB have the delegated functions.</p>   | <p>best interest of the client.</p>   |
| <p><b>May also include a discussion on whether the professional fees of a costs lawyer are in fact client money, e.g:</b></p> <p><b>Rule 12.7 of the SRA Account Rules:</b> office money includes payments received in respect of fees due to the firm against a bill or written notification of costs incurred, disbursements already paid by the firm and disbursements incurred but not yet paid by the firm.</p> | <p>Up to 1 mark</p> <p>To achieve more than a pass candidates may not simply cite the rules show a deeper understanding of the rules by discussing whether client money includes professional fees.</p> |

|  |   |
|--|---|
| <p><b>Question 2:</b></p>  | <p>Summarise the relevant authority and explain the circumstances when a solicitor may terminate a retainer and pursue the client for their fees.</p>   |
| <p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9<br/>Pass = 5+<br/>Merit = 6+<br/>Distinction = 7+</p>   | <p>10</p>   |
| <p><b>Indicative Content</b></p>   | <p><b>Marks</b></p>   |
| <p><b>Required (a description of a retainer):</b></p> <p><b>J H Milner &amp; Son v Percy Bilton Ltd [1966]:</b> A retainer is the business agreement between solicitor and client, it serves as the right to payment &amp; is fundamental to the recovery of costs. Where there is no retainer there is no entitlement to charge.</p> <p><b>Underwood, Son v Piper Lewis [1894]:</b> The law must imply that the contract of the solicitor upon a retainer in the action is an entire contract to conduct the action till the end.</p>   | <p>Up to 2 marks</p> <p>To pass a response must include an explanation of what a retainer is</p>  |
| <p><b>Candidate should refer to when a solicitor may terminate a retainer (good reason and reasonable notice) e.g:</b></p> <p><b>Solicitors Act 1974 Section 65 (1)&amp;(2):</b> Client's failure to make a payment on account of costs.</p> <p><b>Wong v Vizards (a firm) [1997]:</b> Solicitor declined to act at a hearing unless substantial payment made on account of a disputed bill. Amount claimed by the solicitor was unreasonable, they had wrongfully terminated the retainer on non- payment and were not entitled to any payment at all for the work done in preparing for the hearing.</p> | <p>Up to 4 marks</p> <p>To achieve more than a pass candidates must not simply cite the examples but should show a holistic understanding of how the law operates in relation to the termination of a retainer.</p> |

|   |   |
|---|---|
| <p><b>Warmingtons v McMurray [1936] 2 All ER 745:</b> It is not reasonable that a solicitor should engage to act for an indefinite number of years, winding up estates, without receiving any payment on which he can maintain himself.</p> <p><b>Hilton v Barker Booth &amp; Eastwood [2005]:</b> Conflict of interest/Professional embarrassment</p> <p><b>Re Jones [1896]:</b> Suspected duress or undue influence. If the Solicitor is not confident the client is giving instructions freely they can cease to act.</p> <p><b>Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owens &amp; Law Society (intervener) (Second Appeal)[2010]:</b> Requirement to act improperly</p> <p><b>Gill v Heer Manak Solicitors [2018]:</b> Reasonable notice will be case sensitive.</p>   |   |
| <p><b>Candidate should also raise some of the following points on the implications of wrongful termination by a solicitor:</b></p> <p><b>Re Romer &amp; Haslam [1893] 2 QB 286:</b> If a solicitor wrongfully terminates the retainer, he is not entitled to be paid.</p> <p><b>Wild v Simpson [1919] 2 KB 544:</b> Where a solicitor terminates a retainer unreasonably he may not be entitled to payment even on a quantum meruit basis.</p> <p><b>Gill v Heer Manak Solicitors [2018]:</b> Where reasonable notice has not been given there will be no entitlement to payment. Reasonable notice will be case sensitive.</p>   | <p>Up to 3 marks</p> <p>To achieve a distinction candidates must show that they understand the link between payment and termination with good cause and reasonable notice</p> |
| <p><b>Candidate should refer to the form and content of a retainer e.g:</b></p> <p><b>Groom v Crocker [1939]:</b> Can be in writing, made orally, or implied by conduct</p> <p><b>Parrott v Etchells [1839]:</b> Leaving files at a solicitor's office may be sufficient to establish a retainer</p> <p><b>Section 58(3) of the Courts and Legal Services Act 1990:</b> Some agreements must follow specific formalities, such as a CFA which needs to be in writing.</p> <p><b>Section 13 of the Supply of Goods and Services Act 1982:</b> A retainer is a contract for legal service between a lawyer and client and there is an implied term that the service will be carried out with satisfactory care and skill</p> <p><b>The SRA Code of Conduct:</b> has the effect of implying terms into the retainer between solicitor and client O(1.1) clients will be treated fairly, O(1.3) in deciding to terminate instructions solicitors will comply with the law and code and O(1.5) solicitors will provide competent and timely service.</p> | <p>Up to 2 marks</p> <p>To pass a response must demonstrate an understanding of the nature and form of a retainer.</p>  |

|   |  |
|---|--|
| <b>IB (1.26):</b> implies a term into a retainer that where a solicitor ceases to act for a client they must have good reason and provide reasonable notice |  |
|---|--|

|  |  |
|--|--|
| <b>Question 3:</b>   | Critically discuss whether regulations should be introduced to ensure that third party litigation funders are subject to statutory duties and obligations. |
| <b>Total Marks Attainable</b>  |  |
| Fail = 0-4.9<br>Pass = 5+<br>Merit = 6+<br>Distinction = 7+  |  |
| <b>Indicative Content</b>  | <b>Marks</b>   |
| <b>Candidates must explain what third party funding is, e.g:</b>   | Up to 1 mark   |
| <b>Third party funding:</b> is an alternative method of litigation funding where a commercial funder with no connection to the proceedings will pay some or all of the costs of the case in return for a share of any sum of money awarded in damages if the case is won.      | A pass must include the demonstration that the candidate understands what Third Party Funding is.  |
| <b>Credit reference to the chronological developments (and the change in stance to such funding arrangements) e.g:</b>   | Up to 6 marks  |
| <b>Seear v Lawson (1880):</b> Third Party funding is permitted in matters arising out of insolvencies.   | To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base.                                  |
| <b>British Cash &amp; Parcel Conveyors v Lamson. Store Service Co [1908]:</b> maintenance is said to be the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend the civil proceedings without lawful justification. |  |
| <b>Chitty 28 Ed Vol 117 – 054:</b> Champerty ‘occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit’.  |  |
| <b>The Legal Aid and Advice Act 1949:</b> The availability of government funding for litigation suggested a shift in attitude towards the use of funding from outside parties for litigation.  |  |
| <b>Section 13 of the Criminal Law Act 1967:</b> Abolished the criminal offences and torts of champerty and maintenance.  |  |
| <b>Section 14 of the Criminal Law Act 1967:</b> Agreements may still be unenforceable on the grounds of public policy.   |  |
| <b>Section 58 CLSA 1990:</b> Contingency Fee Agreements (CFAs) expressly permitted by statute. These agreements would have historically been deemed champertous.   |  |

|   |  |
|---|--|
| <p><b>Arkin v Borchard Lines Ltd &amp; Ors [2005]:</b> The court gave tacit approval to this type of litigation funding</p> <p><b>Merchant bridge &amp; Co Ltd &amp; Another v Safron General Partner Ltd [2011]:</b> Third party funders could be liable to the full extent of the claimant's costs.</p> <p><b>Section 45 LASPO 2012:</b> A new form of contingency fee agreement was permitted by statute.</p> <p><b>JEB Recoveries LLP v Linstock [2015]:</b> The judge held that given the current climate and changing attitudes to litigation funding, the agreement did not offend public policy.</p> <p><b>Davey v Money and Others [2019]:</b> The Arkin cap is not a principle that Courts are bound by and third party funders may be liable to the full extent of costs.</p>  |  |
| <p><b>Credit a discussion on the issues that might arise and a discussion regarding the current regulatory framework, e.g:</b></p> <p><b>Control and free decision making:</b> historically such funding arrangements have been unlawful because of the influence that a funder may have on the decisions of the litigator. Today, agreements tend to be structured so that the client retains full control over the way in which they conduct their action.</p> <p><b>Policy:</b> change in approach by both the legislative and judiciary.</p> <p><b>Restrictions:</b> on agreements based on champerty and maintenance still remain.</p> <p><b>Courts still:</b> have to decide on the facts of each litigation funding agreement whether the contract is unenforceable on the grounds of public policy.</p> <p><b>Association of Litigation Funders:</b> Established in 2011, they have a voluntary code of conduct.</p> <p><b>2017 Uk Government has no plans to regulate:</b> The UK government has no plans to formally regulate third party providers of litigation funding, as there are no "specific concerns" about the current voluntary framework.</p> | <p>Up to 6 marks</p> <p>To achieve a distinction, candidates will provide some commentary on the regulation.</p> |

|  |   |
|--|---|
| <b>Question 4:</b>   | Explain the jurisdiction first tier tribunals have to make a costs order. |
| <p><b>Total Marks Attainable</b></p> <p>Fail = 0-7.4<br/> Pass = 7.5+<br/> Merit = 9+<br/> Distinction = 10.5+</p> | 15  |
| <b>Indicative Content</b>  | <b>Marks</b>  |

|   |  |
|---|--|
| <p><b>Required: Candidates must demonstrate knowledge of the tribunal structure (candidates are not required to list all chambers).</b></p> <p><i>There are seven first tier tribunals:</i> Social Entitlement Chamber; Health, Education and Social Care Chamber; Tax Chamber; General Regulatory Chamber; Immigration and Asylum Chamber; War Pensions and Armed Forces Compensation Chamber; and Property Chamber.</p> <p><i>Relevant rules include:</i> Tribunal Procedure (First Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008; Tribunal Procedure (First Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008; Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008.</p>  | <p>Up to 3 marks</p> <p>To achieve a pass, candidates must demonstrate an understanding of the make-up of the first tier tribunals and provide an outline as to which may award costs and which tribunals may not make an order for costs.</p> |
| <p><b>Candidate should refer to legislative framework to describe the jurisdiction e.g:</b></p> <p><i>Tribunals, Courts and Enforcement Act 2007:</i> Tribunals governed by TCEA 2007, but each chamber is also governed by its own set of Procedure Rules</p> <p><i>Section 29 (1) of the Tribunals, Courts and Enforcement Act 2007:</i> costs shall be in the discretion of the tribunal.</p> <p><i>Section 29 (2) of the Tribunals, Courts and Enforcement Act 2007:</i> the tribunal has full power to determine by whom and to what extent costs are to be paid.</p> <p><i>Section 29 (3) of the Tribunals, Courts and Enforcement Act 2007:</i> subsections (1) and (2) have effect subject to Tribunal Procedure Rules.</p> <p><i>Section 29(4) of the Tribunals Courts and Enforcement Act 2007:</i> orders can be made against a representative.</p> <p><i>Section 29(5) of the Tribunals Courts and Enforcement Act 2007:</i> defines wasted costs</p> | <p>Up to 5 marks</p>   |
| <p><b>Candidate should refer to any of the specific tribunal rules and how that effects its jurisdiction to make costs orders, e.g:</b></p> <p><i>Rule 10 of the Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008:</i> The First Tier Tribunal Social Entitlement Chamber has no power to award costs.</p> <p><i>Rule 10 of the Tribunal Procedure (First Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008:</i> The First Tier Tribunal Social Entitlement Chamber has no power to award costs.</p> <p><i>Other first tier tribunals:</i> May make orders in respect of wasted costs and unreasonable conduct.</p> <p><i>Section 10(1) Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008:</i> may make orders for wasted costs (under s.29(4) TCEA 2007) or if the</p>  | <p>Up to 7 marks</p> <p>To achieve a merit or distinction candidates must state some specific rules which impact the jurisdiction of a tribunal to make a costs order.</p>   |

tribunal considers that a party has acted unreasonably in bringing, defending or conducting proceedings.

***Unreasonable Conduct***: defined in the other chamber specific First Tier Rules where applicable e.g. rule 10 (1) of the Tribunal Procedure (First Tier Tribunal) Health, Education and Social Care Chamber) Rules 2008.

***Harley v McDonald (2001)***: wasted costs orders are discretionary.

***Ridehalgh v Horsefield (1994)***: A mere mistake is not sufficient for a wasted costs order, there must be unreasonable, improper or negligent conduct.

***Orchard v SE Electricity Board (1987)***: wasted costs orders should not be used as a threat.

***Cancino [2015]***: An Immigration and Asylum Tribunal decision. The respondent must be alerted to the possibility of a WCO, must be apprised of the case against him and must be given adequate time and opportunity to respond.

***Awuah and Others [2017]***: An Immigration and Asylum Tribunal decision. A WCO can never be made where the causal link between conduct and costs incurred does not exist. The Tribunal should exercise its power to make a WCO of its own motion with restraint.

***Noorani v Calver [2009]***: Indemnity costs orders are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. Can be made even when the conduct could not properly be regarded as deserving of moral condemnation. The court must consider each case on its own facts.

***Kiam v MGN Limited No2 [2002]***: Conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight.

***Wates Construction Limited v HGP Greentree Alchurch Evans Limited [2006]***: Whilst the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to an indemnity basis order.

|   |  |
|---|--|
| <p><b>Credit any other relevant law cited where comparisons are drawn to the upper tier e.g:</b></p> <p><i>4 upper chambers, 3 chambers governed by the Tribunal Procedure (Upper Tribunal) Rules 2008:</i> Administrative Chamber, Tax and Chancery Chamber, Tax and Chancery Chamber.</p> <p>Lands Chamber governed by the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.</p> <p>May make orders in respect of wasted costs, unreasonable conduct and appeals.</p> <p><i>Appeals:</i> only the upper tribunals can make costs orders in respect of these). Rule 10 (1) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Rule 10 (4) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.</p> | <p>Up to 2 marks</p> <p>To achieve more than a pass, candidates must not simply cite law, but should show a greater depth to their knowledge base. This may be done by drawing comparisons to the upper tribunals.</p> |
|---|--|

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

|                                      |   |  |
|--------------------------------------|---|--|
| <p><b>Question 5:</b></p>            | <p>You are a trainee costs lawyer in a small high street costs firm in Buckinghamshire. You are instructed by Mr Donovan of Harwich and Donovan Solicitors, a large firm in Milton Keynes.</p> <p>Harwich and Donovan Solicitors undertook some work for a building company, Let's Go Construction Ltd. Approximately eight months into the litigation they were dismissed and Borris and Beckett LLP took over the case on their undertaking to return the papers and preserve Harwich and Donovan Solicitors' lien. The case on behalf of Let's Go Construction Ltd was successfully concluded and the papers returned.</p> <p>Harwich and Donovan Solicitors subsequently submitted a bill and the defendant demanded the bill be assessed. Harwich and Donovan Solicitors require the papers for assessment and Borris and Beckett LLP also require the papers for assessment against the unsuccessful party in the concluded action.</p> <p>Mr Donovan has asked you to advise on whether there are grounds for Harwich and Donovan Solicitors to hold the papers until their bill is paid. Prepare <b>the body of an email</b> of advice to Mr Donovan. The advice must explain what a lien is and whether it is possible to have a lien over a file of papers.</p> |  |
| <p><b>Total Marks Attainable</b></p> |   | <p>20</p>  |
| <p>Fail</p>                          | <p>up to 9.9</p>  | <p>This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.</p> |

|             |     |  |
|-------------|-----|--|
| Pass        | 10+ | An answer which addresses MOST of the following points: the three categories of lien, the difference between a retaining and preserving lien, the definition of property over which a lien can be exercised, the role of undertakings, the limits of the lien. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the legal framework on liens which is mainly found in the common law) with good application and some analysis having regard to the facts, although a candidate may demonstrate some areas of weakness.   |
| Merit       | 12+ | An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the applicable common law and how it operates) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO we are told that an undertaking was given and it does not appear to have been breached. Candidates may discuss and critically analyse why, for example, there is an argument that the firm may retain the file of papers and exercise the lien until their bill is paid. Most views expressed by candidates should be supported by relevant authority and/or case law.  |
| Distinction | 14+ | An answer which includes ALL the requirements for a Pass and Merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates are likely to observe that in this scenario there may be an application made to the Court for the delivery up of papers. Candidates may also identify that an application could be made in order to preserve property by way of a charge over the property recovered or preserved by the lay client. Candidates will provide an excellent advice setting out the right to refer the matter to the court and the difficulties faced with enforcing an order. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions. |

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

| Indicative Content   | Marks  |
|--|--|
| <p><b>Required: Candidates must explain what a lien is and demonstrate knowledge of the types of lien, e.g:</b></p> <p><b>A lien is:</b> A right to keep possession of property belonging to another person until a debt owed by that person is discharged.</p> <p><b>A solicitor with unpaid fees has a potential lien over the client's property in one of three ways:</b> Common law lien, an equitable lien or a statutory lien under section 73 of the Solicitors Act 1974.</p> <p><b>Common law lien:</b> Retaining – this is the right to hold property already in possession. it is a lien that can only exist where the party claiming the lien has property in their hands over which they can assert a claim, and in respect of which they have a right to keep</p> <p><b>Equitable lien:</b> Preserving – the equitable lien arises in cases where funds do not pass into the solicitor's hands and so the solicitor does not have the basic 'possession' required in order for a common law lien to arise. The court has an equitable jurisdiction to intervene to protect the solicitor's interests and to order that a payment is made to the solicitor direct.</p> <p><b>Section 73 of the Solicitors Act 1974:</b> Solicitors have the right to apply to the court for a charge on any property recovered or preserved through their efforts.</p> | <p>Up to 3 marks</p> <p>To pass candidates must identify that the question concerns liens and set out the relevance regarding the solicitors unpaid fees</p> |

|  |   |
|--|---|
| <p><b>Candidates should explain what a retaining lien is and demonstrate knowledge of how it operates, e.g:</b></p> <p><b><i>Barratt v Gough-Thomas [1951]</i></b>: the retaining lien confers on solicitors a right to withhold possession of the documents or other personal property.</p> <p><b><i>Leo Abse and Cohen v Evan G Jones Builders Limited [1984]</i></b>: An example of the property they may have in their possession is the file of papers, solicitors are entitled to hold the papers until his fees are paid</p> <p><b><i>Gavin Edmonson Solicitors Ltd v Haven Insurance Co Ltd [2018]</i></b>: Whilst this lien offers protection it can be seen as a defensive remedy, it does not allow for positive steps to be taken by a solicitor in order to protect their position.</p> <p><b><i>Loescher v Dean [1950]</i></b>: The property over which such a client is exercised must have come into the solicitor’s possession through employment and the work done on behalf of the client</p> <p><b><i>Withers v Rybak [2011]</i></b>: The property over which such a client can be exercised may include money held on client account.</p> <p><b><i>Withers v Langbar [2011]</i></b>: The property over which such a client can be exercised may include money held on client account unless the money held is held for a specific purpose.</p> <p><b><i>Bentley v Gaisford [1997]</i></b>: If matters are ongoing and the file of papers is needed this will usually be dealt with through an undertaking by the new solicitors. Photocopies are a breach.</p> <p><b><i>Slatter v Ronaldson [2002]</i></b>: It is possible to apply, where there is an undertaking, for the delivery up of the file of papers. Court may order the papers be released.</p> <p><b><i>Udall v Capri Lighting Ltd [1988]</i></b>: If the new firm of solicitors breaches it’s undertaking then a claim for compensation may be made.</p> | <p>Up to 8 marks</p> <p>To pass candidates must describe in detail the operation of the retaining lien and the right to hold on to the file of papers until the bill is paid.</p> |
| <p><b>Candidates should explain what a preserving lien is and demonstrate knowledge of how it operates, e.g:</b></p> <p><b><i>Welsh v Hole [1779]</i></b>: This is the first decision recorded where the equitable lien was recognised. In this case, the plaintiff had been awarded damages of £20. Pending a writ of error, the plaintiff and defendant entered into a direct settlement of ten guineas including costs. On the facts of the case, the Court refused to intervene, but it was recognised that a lien may exist to prevent defendants dealing directly with their lay opponents resulting in the opponent solicitors not being paid. This type of lien exists because there should be honest and fair dealing.</p> <p><b><i>Read v Dupper [1765]</i></b>: In this case the defendant paid the judgment sum directly to the plaintiff, having received notice from the plaintiff’s lawyer not to do so, because their bill was unsatisfied. If a paying party has notice of solicitors interest and pays lay opponent direct may have to pay again</p> <p><b><i>Barker v St Quinton [1844]</i></b>: The equitable lien operates by way of security or charge.</p>  | <p>Up to 5 marks</p>  |

|  |               |
|--|---------------|
| <p><b>Halvanon Insurance Co Ltd v Central Reinsurance [1988]:</b> This case sets out what a solicitor must show in order to apply to the court for a preserving lien. They must have been instructed, there must be fees owed as a result of the instruction, the property over which they are claiming the lien must have been recovered or preserved and that must have been as a result of the proceedings.</p> <p><b>Gavin Edmonson Solicitors Ltd v Haven Insurance Co Ltd [2018]:</b> Historically it was thought there must be proceedings in order to have the right to a preserving lien, however, there does not need to be proceedings. For example, if the matter settled through ADR the solicitor would still have the right to make an application to the court. The rationale for this is that modern day litigation, and the existence of the protocols, encourages parties to settle before the need to litigate.</p>  |               |
| <p><b>Candidates should explain what a statutory lien is and demonstrate knowledge of how it operates, e.g:</b></p> <p><b>Section 73 of the Solicitor Act 1974:</b> Solicitor can apply to the court for a lien over property, the provisions are similar to that in Halvanon. The court may declare the solicitor is entitled to a charge on any property recovered or preserved through his instrumentality for his assessed costs in relation to that suit, matter or proceeding. The Court may also make such orders for the assessment of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit.</p> <p><b>Shaw v Neale (1858):</b> The purpose of creating a statutory lien was to codify existing law and to extend the ability for a solicitor to have a lien in respect of the recovery of real property.</p> <p><b>Harrison v Harrison (1883):</b> A solicitor must also be able to make out a prima facie case that they will not be paid unless an order is made.</p> <p><b>Kahn Solicitors v Secretary of state [2013]:</b> Costs belong to the client so any application under section 73 must be prompt.</p> | Up to 4 marks |
| <p><b>Any other relevant point to describe liens (credit any of the following and/or any other relevant point):</b></p> <p><b>Retainer:</b> Solicitors have a common law right to a retaining lien but should also ensure that their retainer provides for a general lien in the broadest possible terms to enable them to exercise a lien against any funds that enter their hands for any purpose.</p> <p><b>Apply as soon as a matter is settled:</b> If applying under section 73 solicitors should apply as soon as a matter is settled or judgment is given to prevent funds being paid and dissipated.</p> <p><b>Order for assessment of costs:</b> If an application is made under section 73, it may result in a cross order for an assessment of costs. This is an order that can be made even if the client is otherwise out of time to seek a statutory assessment.</p> <p><b>Tell opponent:</b> Make sure you tell your opponent that you will be seeking payment of costs from the damages/judgment. This will give protection if an opponent makes a payment direct to lay client.</p>  | Up to 4 marks |

**Question 6:** Henry Carlisle is an arbitrator who has just made an award in a matter involving Hatfield Horticultural Equipment Ltd (HHE Ltd) and Ainsley Motor Ltd (AM Ltd). The award found HHE Ltd liable to AM Ltd for repudiatory breach of contract and sums due but unpaid. HHE Ltd was found liable to AM Ltd in the total sum of £112,000 which included around £17,000 in respect of the costs order.

Henry Carlisle was highly critical of HHE Ltd’s conduct which he described as setting out to cripple AM Ltd financially by refusing to make payment resulting in AM Ltd’s managing director, Jeremy Holmer, remortgaging his home and the company having no alternative but to resort to third-party funding which, on expert evidence, was on standard market terms. In those circumstances, and because of unsubstantiated personal attacks and accusations of fraud, Henry Carlisle ordered HHE Ltd to pay costs on the indemnity basis.

Henry Carlisle also held that AM Ltd was entitled to recover the costs of the litigation funding which remained to be quantified but would be in the region of just over £4,250. HHE Ltd had argued, unsuccessfully, that “other costs” did not include the costs of funding the arbitration.

Prepare **the body of a letter** of advice to Jeremy Holmer. The advice must explain what an award is and set out how the provisions of the Arbitration Act 1996 govern the assessment of costs, when a matter must be referred to the court and the rules on enforcement in an arbitration matter.

|                               |           |
|-------------------------------|-----------|
| <b>Total Marks Attainable</b> | <b>20</b> |
|-------------------------------|-----------|

|       |           |   |
|-------|-----------|---|
| Fail  | up to 9.9 | This mark should be awarded to candidates whose papers fail to address any of the requirements of the question, or only touch on some of the more obvious points without dealing with them or addressing them adequately.   |
| Pass  | 10+       | An answer which addresses MOST of the following points: Costs should be determined by agreement or arbitrator, assessment as arbitrator ‘sees fit’, 3 categories of costs, matter may be referred to the court, enforcement would be through the usual methods under the CPR. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the framework for assessment of costs and the relationship between arbitration proceedings and the courts) with good application and some analysis having regard to the facts, although candidate may demonstrate some areas of weakness.  |
| Merit | 12+       | An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the framework for assessment) with very good application and some analysis having regard to the facts. Candidates are likely to observe that IN THIS SCENARIO we are told there are three main points that need addressing (assessment, court and enforcement) and candidates will show a clear knowledge base as to how the particular sections of the Arbitration Act relate to those points. Candidates may discuss and critically analyse why, for example, the assessment of costs by the court is very unlikely i.e that the starting point will be the parties agreement followed by the potential assessment by the arbitrator. Most views expressed by candidates should be supported by relevant authority and/or case law. |

|  |     |   |  |
|--|-----|---|--|
| Distinction  | 14+ | An answer which includes ALL the requirements for a Pass and Merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates are likely to observe that in this scenario there may be grounds for the court to review the decision, for example because of procedural irregularity. They may then identify that if reasons for the decision have not been included on the award the arbitrator may ask that the arbitrator gives reasons before they will consider any challenge to the award. Candidates will provide an excellent advice setting out the right to refer the matter to the court and the difficulties faced with enforcing an order. All views expressed by candidates should be supported by relevant authority and/or case law. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions. |  |
| <p>Fail = 0-9.9<br/> Pass = 10+<br/> Merit = 12+<br/> Distinction = 14+</p>  |     |   |  |
| <b>Indicative Content:</b>   |     |   | <b>Marks</b>   |
| <p><b>Required: Candidates must explain what an award is, what costs are and how they will be assessed, and some detail as to when a matter may go to court, e.g:</b></p> <p><b>An award:</b> Is the final decision in arbitration. It is effectively a final order and, under s 66(1) of the <u>Arbitration Act 1996</u>, can therefore be enforced with the leave of the court if a party fails to comply with it.</p> <p><b>Section 59(1) of the <u>Arbitration Act 1996</u>:</b> Costs in arbitration proceedings fall into three categories - the arbitrator's fees and expenses, the fees and expenses of any arbitral institution concerned and the legal or other costs of the parties.</p> <p><b>Section 59(2) of the <u>Arbitration Act 1996</u>:</b> Costs will also include the costs of or incidental to any proceedings when determining the amount of the recoverable costs of the arbitration in accordance with section 63 of the Act.</p> <p><b>Essar Oilfields v Norscott [2016]:</b> Costs incidental to proceedings may include funding, this case concerned third party funding which can be used in arbitration.</p> <p><b>Section 63(3) of the <u>Arbitration Act 1996</u>:</b> The arbitrator must assess costs as he 'sees fit'.</p> <p><b>Section 63(4) and section 63(1) of the <u>Arbitration Act 1996</u>:</b> If costs are not determined by agreement or by the arbitrator, the parties can apply to the court (the application should be on-notice) and the court may then determine the recoverable costs.</p> <p><b>Challenges to an award are possible:</b> Which would also go to the court. Section 67 (as to jurisdiction), section 68 (serious irregularity), and section 69 (point of law).</p> |     |   | <p>Up to 5 marks</p> <p>To pass candidates must refer to the Arbitration Act 1996.</p> |
| <p><b>Credit any points advanced on the framework of the assessment procedure under the Arbitration Act 1996 e.g:</b></p> <p><b>Section 60 of the <u>Arbitration Act 1996</u>:</b> Concerns the agreement to pay costs in any event. Such an agreement, for a party to pay the</p>   |     |   | Up to 8 marks  |

whole or part of the arbitration, can only be valid in the arbitration if made after the dispute arose.

**Section 61(1) of the Arbitration Act 1996:** The arbitrator can allocate the costs of the arbitration between the parties.

**Section 61(2) of the Arbitration Act 1996:** For any award of costs, unless the parties have agreed otherwise, the arbitrator shall award costs on the general principle that costs should follow the event.

**Section 62 of the Arbitration Act 1996:** The effect of an agreement or award about costs and stipulates any such agreement extends only to such costs as are recoverable, unless the parties decide otherwise.

**Sections 63(4) and (5) of the Arbitration Act 1996:** Mean that, where costs are determined by the arbitrator they are assessed on the standard basis as it was defined before the introduction of the CPR, unless the arbitrator or the court orders otherwise.

**Section 65 (1) of the Arbitration Act 1996:** Empowers the arbitrator, unless the parties have agreed otherwise, to limit the recoverable costs of the arbitration, or of any part of the arbitral proceedings, to a specified amount.

**Section 65 (2) of the Arbitration Act 1996:** Allows for the arbitrator to do this at any stage, but requires that it must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.

**Credit any points advanced on when the matter may go to court e.g:**

**Section 28 (2) of the Arbitration Act 1996:** If a party applies to the court to consider the fees, the court may make any adjustments it sees fit.

**Section 70(2) of the Arbitration Act 1996:** An application or appeal may not be brought if the applicant or appellant has not first exhausted any available arbitral process of appeal or review and any available recourse under section 57 of the Arbitration Act 1996 (correction of award or additional award).

**Section 70(5) of the Arbitration Act 1996:** Where, on an application or appeal, the court feels that the award does not contain the tribunal's reasons, or does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

**Section 70(3) of the Arbitration Act 1996:** Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

Up to 7 marks

|   |               |
|---|---------------|
| <p><b>Sections 67-69 of the Arbitration Act 1996:</b> Cover the situations where an award may be challenged:</p> <p><b>Section 67 of the Arbitration Act 1996:</b> A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging any award of the arbitral tribunal as to its substantive jurisdiction; or for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.</p> <p><b>Section 68 of the Arbitration Act 1996:</b> A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.</p> <p><b>Section 69 of the Arbitration Act 1996:</b> Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.</p> |               |
| <p><b>Credit any other relevant points cited on enforcement e.g:</b></p> <p><b>Section 66(2) and (3) of the Arbitration Act 1996:</b> Where the court gives leave, judgment can be entered in the terms of the award except where the person against whom the order is sought can show that the arbitrator lacked jurisdiction to make the award.</p> <p><b>Refusal of Leave:</b> If the court finds that the award is not legally valid, it may refuse leave (<i>Re Stone and Hastie Arb.</i> [1903 and <i>Middlemiss &amp; Gould v Hartlepool Corp</i> [1972]).</p> <p><b>CPR 62.18:</b> Sets out the procedure to enforce an award - the application should include the costs to be included in the order giving permission and, if judgment is to be obtained, for the costs of any judgment to be entered.</p>   | Up to 4 marks |

|                           |   |
|---------------------------|---|
| <p><b>Question 7:</b></p> | <p>You are a trainee costs lawyer in a small high street firm, Bonnets, which has a franchise with the Legal Aid Agency to provide civil legal aid. You have been passed the file of Khalid Mohammed, the claimant in an action for unlawful detention. Mr Mohammed was represented by Jeremey Clerk, a senior partner at the firm.</p> <p>The claimant is a 29 year old Moroccan national. On 5 March 2003, at the age of 15, the claimant entered the United Kingdom. Shortly after his arrival, he claimed asylum. This claim was refused, but the claimant was granted Discretionary Leave to Remain until his 18th birthday. On 4 February 2008, the claimant was made subject of a deportation order because of his offending history. For one reason or another Mr Mohammed has not been deported and he has continued to offend and spend periods of time detained.</p> <p>The Secretary of State detained the claimant, pursuant to immigration powers, from 12 July 2016 until 3 May 2017. The file relates to an application</p> |
|---------------------------|---|

|  |   |  |                  |   |             |            |   |              |            |  |                    |            |   |
|--|---|--|------------------|---|-------------|------------|---|--------------|------------|--|--------------------|------------|---|
|  | <p>for judicial review of the lawfulness of this period of detention. The outcome of protracted proceedings was that the claimant was unlawfully detained from 12 July 2016 to 3 May 2017 and the Secretary of State was found liable to pay the claimant damages in the sum of £40,000 with “no order as to costs”.</p> <p>The matter was funded by the LAA (Certificate Number KM1223078A-A1) and the certificate was issued on 1 February 2018. Proceedings were issued on 15 February 2018. The certificate appears to remain live. The profit costs recorded on the file total £15,920 exclusive of VAT. There is a notice to show cause on the file covering a period of two weeks in relation to a reassessment of means. You have been asked to consider the next steps, how the costs in the claim should be assessed and the impact of the notice to show cause.</p> <p>Prepare a <b>summary</b> of the next steps, how the costs in the claim should be assessed and the impact of the notice to show cause.</p> |  |                  |   |             |            |   |              |            |  |                    |            |   |
| <p><b>Total Marks Attainable</b></p> <p>Fail = 0-9.9<br/>Pass = 10+<br/>Merit = 12+<br/>Distinction = 14+</p>  | <p>20</p>   |  |                  |   |             |            |   |              |            |  |                    |            |   |
| <table border="1"> <tr> <td data-bbox="209 1010 363 1160"> <p>Fail</p> </td> <td data-bbox="363 1010 469 1160"> <p>up to 9.9</p> </td> <td data-bbox="469 1010 1305 1160"> <p>An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.</p> </td> </tr> <tr> <td data-bbox="209 1160 363 1310"> <p>Pass</p> </td> <td data-bbox="363 1160 469 1310"> <p>10+</p> </td> <td data-bbox="469 1160 1305 1310"> <p>An answer which addresses MOST of the following points: An outline of the assessment process of licensed work in civil legal aid, an outline of the relevant CPR applicable to court assessment and an overview of the impact of a notice to show cause. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.</p> </td> </tr> <tr> <td data-bbox="209 1310 363 1509"> <p>Merit</p> </td> <td data-bbox="363 1310 469 1509"> <p>12+</p> </td> <td data-bbox="469 1310 1305 1509"> <p>An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the operation of legal aid assessment) with very good application and some analysis having regard to the facts. Candidates should identify that IN THIS SCENARIO that the certificate is a post LASPO funding certificate. Candidates should note the position with ‘at risk’ work. Most views expressed by candidates should be supported by relevant authority and/or case law.</p> </td> </tr> <tr> <td data-bbox="209 1509 363 1659"> <p>Distinction</p> </td> <td data-bbox="363 1509 469 1659"> <p>14+</p> </td> <td data-bbox="469 1509 1305 1659"> <p>An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates’ answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.</p> </td> </tr> </table> |   | <p>Fail</p>  | <p>up to 9.9</p> | <p>An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.</p> | <p>Pass</p> | <p>10+</p> | <p>An answer which addresses MOST of the following points: An outline of the assessment process of licensed work in civil legal aid, an outline of the relevant CPR applicable to court assessment and an overview of the impact of a notice to show cause. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.</p> | <p>Merit</p> | <p>12+</p> | <p>An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the operation of legal aid assessment) with very good application and some analysis having regard to the facts. Candidates should identify that IN THIS SCENARIO that the certificate is a post LASPO funding certificate. Candidates should note the position with ‘at risk’ work. Most views expressed by candidates should be supported by relevant authority and/or case law.</p> | <p>Distinction</p> | <p>14+</p> | <p>An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates’ answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.</p> |
| <p>Fail</p>  | <p>up to 9.9</p>  | <p>An answer which deals with the basic requirements of the question, but in dealing with those requirements only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts.</p>  |                  |   |             |            |   |              |            |  |                    |            |   |
| <p>Pass</p>  | <p>10+</p>  | <p>An answer which addresses MOST of the following points: An outline of the assessment process of licensed work in civil legal aid, an outline of the relevant CPR applicable to court assessment and an overview of the impact of a notice to show cause. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.</p>  |                  |   |             |            |   |              |            |  |                    |            |   |
| <p>Merit</p>   | <p>12+</p>  | <p>An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the operation of legal aid assessment) with very good application and some analysis having regard to the facts. Candidates should identify that IN THIS SCENARIO that the certificate is a post LASPO funding certificate. Candidates should note the position with ‘at risk’ work. Most views expressed by candidates should be supported by relevant authority and/or case law.</p> |                  |   |             |            |   |              |            |  |                    |            |   |
| <p>Distinction</p>   | <p>14+</p>  | <p>An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates’ answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc.</p>  |                  |   |             |            |   |              |            |  |                    |            |   |
| <p><b>Indicative Content</b></p> <p><b>Required: Candidates are required to demonstrate knowledge of the assessment process of civil legal aid matters, e.g:</b></p> <p><b>CCMS:</b> Before any bill can be submitted for payment, the case must be discharged and the outcome codes completed on CCMS. Once the case has been discharged and the outcome codes completed, the final bill option is made available on CCMS.</p>  | <p><b>Marks</b></p> <p>Up to 3 marks</p> <p>To pass, candidates are required to demonstrate general knowledge of the assessment process</p>   |  |                  |   |             |            |   |              |            |  |                    |            |   |

|  |   |
|--|---|
| <p><b>All licensed work (work under a certificate):</b> Is assessed unless a family fixed fee applies. Assessable costs under £2500 excluding VAT are assessed by the LAA on a Claim 1 form.</p> <p><b>Assessable costs over £2500 excluding VAT:</b> Are assessed by the court under Part 47 of the Civil Procedure Rules (detailed assessment).</p>  | <p>in civil legal aid matters.</p>  |
| <p><b>Required: Candidates are required to demonstrate knowledge of the consequence of a notice to show cause, e.g:</b></p> <p><b>Embargo (Notice to Show Cause):</b> A “show cause” notice puts an embargo on the legal aid certificate until clients are able to “show cause” why it should not be revoked or discharged.</p> <p><b>Embargo (Show Cause) Under Funding Code:</b> Pre LASPO certificates. Embargo placed on certificate and no work can be claimed for the date that the show cause was in place even if the show cause is subsequently removed.</p> <p><b>Embargo Show Cause under LASPO (intention to withdraw a determination):</b> If show cause is removed, then funding will be continuous (as though the show cause was never placed on the certificate). If the certificate is withdrawn (discharged/revoked) then no work can be claimed from the date the show cause was placed on the certificate. Provider can undertake work “at risk”.</p>  | <p>Up to 3 marks</p> <p>To pass, candidates are required to demonstrate general knowledge of a notice to show cause.</p>  |
| <p><b>Candidates should set out how the costs in the claim should be assessed, e.g:</b></p> <p><b>CPR 47.18:</b> Details the procedure. The bill of costs is lodged for provisional assessment with a Form N258A (or D258A for family work). The primary document in assessing costs is the bill of costs or the claim form submitted, which sets out the items and amounts being claimed. Items not appearing in the bill or claim form will not be paid.</p> <p><b>The original assessed bill is returned with N253:</b> “Notice of Amount Allowed on Provisional Assessment”.</p> <p><b>The solicitor must notify:</b> Counsel of any reduction.</p> <p><b>CPR 47.18(7):</b> If the provider objects to the outcome of the assessment they can request a hearing within 14 days of receiving notice of provisional assessment. Although it is common for written objections to be sent.</p> <p><b>If the provider consents:</b> To the assessment or after outcome of a hearing and/or appeal, they must return the bill of costs with a completed Legal Aid Assessment Certificate EX80a or EX80b (where costs are subject to family fixed fees).</p> <p><b>The EX80a/b is approved by the court and returned:</b> The bill of costs is kept on the court file.</p> <p><b>A claim for payment of the bill of costs is sent to the LAA using a Claim 1 form:</b> This must be sent with a copy the bill of costs,</p> | <p>Up to 8 marks</p> <p>To achieve more than a pass, candidates are required to demonstrate an ability to apply the law to the scenario set rather than simply state the relevant points.</p> |

|  |   |
|--|---|
| <p>counsel's fee notes, expert's invoices and disbursement vouchers, any other supporting evidence required (e.g. copies of court orders made for expert reports or evidence).</p> <p><b>CPR 44.3(2):</b> On the standard basis, the court will: only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.</p> <p><b>The Civil Legal Aid (Remuneration) Regulations 2013:</b> All hourly rates paid from the Fund for civil legal aid are now prescribed under statutory instrument.</p> <p><b>Section 6 of the 2013 Standard Civil Contract Specification:</b> Contains the criteria for the enhancement of provider's bills. It is for the provider to claim an enhancement where he or she considers that it is justified and to indicate the level of enhancement sought.</p>   |   |
| <p><b>Credit a detailed discussion on the notice to show cause, e.g:</b></p> <p><b>Regulation 42(3) of the Civil Legal Aid (Procedures) Regulations 2012:</b> Applies to certificates issued after 1 April 2013. There will have been a notification of an intention to withdraw a determination. If the withdrawal had taken place it would have taken effect from the initial notification of intention. The client will not have cost protection, under the Civil Legal Aid (Costs) Regulations 2013, in the period from when the Director first notified an intention to withdraw the determination. The provider can carry out work "at risk" in relation to whether the withdrawal does occur, whereas no work could be carried out within the show cause period under the funding code without express permission irrespective of the ultimate outcome of the show cause.</p> <p><b>If notification of an intention to withdraw a determination is removed:</b> The work can be claimed as though there has been no gap in cover. If the determination is subsequently withdrawn (the certificate is discharged) the withdrawal will be effective from the date of the show cause – providers would not be paid for any work following the date of show cause/intention to withdraw a determination.</p> <p><b>Means Re-assessment:</b> Where there is an outstanding means assessment on a live certificate, this must be resolved prior to payment of the claim. In accordance with the billing checklist, caseworkers should reject any claim submitted.</p> | <p>Up to 5 marks</p> <p>To achieve more than a pass, candidates are required to demonstrate an ability to apply the law to the scenario set rather than simply state the relevant points.</p> |
| <p><b>Candidates may discuss the certificate or any other relevant point, e.g:</b></p> <p><b>Certificates will:</b> have a costs limit and detail the scope of the work that may be undertaken.</p>  | <p>Up to 5 marks</p> <p>To achieve more than a pass, candidates are required to demonstrate an</p>  |

|  |  |
|--|--|
| <p><b>Certificates that are current are described as live:</b> but certificates may be "discharged" or "revoked" because for example, clients are no longer eligible or have failed to respond to a Legal Aid Agency request for further information or the legal representative has recommended that the certificate should be discharged or revoked.</p> <p><b>Consequence of discharge:</b> If a certificate is discharged, the client does not have to pay for all the work the legal representative has done up to the date the certificate was discharged. Note, however, that the statutory charge applies. The client won't be pursued by the LAA for costs incurred as they would if the certificate was revoked. The statutory charge can arise at a later date if the client proceeds under a different funding arrangement and is successful in recovering any money.</p> <p><b>The relationship between the Provider and the client ceases upon notice of Discharge:</b> Upon receipt of this notification it might be reasonable to write a closing letter to the client advising them of this fact. The content should be minimal and paid as a routine letter.</p> | <p>ability to apply the law to the scenario set rather than simply state the relevant points</p> |
|--|--|

|                           |  |
|---------------------------|--|
| <p><b>Question 8:</b></p> | <p>You are a costs lawyer working for a costs firm in Manchester. You have been instructed by Felicity Evans, a solicitor who works for Pickle and Branston LLP, a large firm in Blackpool which conducts a large volume of slip and trip cases under Conditional Fee Agreements (CFAs). Mrs Evans has recently acted on behalf of Mrs Cricket.</p> <p>On 17 May 2012 the claimant, Mrs Cricket, was involved in a road traffic accident. On 27 May 2012 the claimant entered into a conditional fee agreement with Monster Law providing for a 100% success fee. The original conditional fee agreement was in the form of the Law Society model conditional fee agreement. On 26 April 2014 Monster Law issued proceedings on behalf of the claimant.</p> <p>In November 2015, Monster Law decided to close their personal injury department. In a letter to the claimant and other clients, they wrote that they propose to transfer Mrs Cricket's claim to, Pickle and Branston LLP, another firm who undertook personal injury work. They stated that Pickle and Branston LLP would continue to act on her behalf and represent her on the same basis as was agreed by Monster Law.</p> <p>On 10 December 2015 the claimant signed a new CFA with Pickle and Branston LLP. On 11 December 2015 notice of change of solicitors was filed with the Court. On 17 May 2016 the defendant made a Part 36 offer of £22,500 which was accepted by the claimant, the defendant therefore having to pay the claimant's standard basis costs under the deemed costs provisions applying under CPR Part 36.</p> <p>Costs assessment is now underway. The defendant has raised an argument that Monster Law, having chosen not to continue with the claim for the claimant, are not entitled to be paid. Further, the Defendant is also arguing that the success fee in the CFA between the claimant and Pickle and</p> |
|---------------------------|--|

|  |   |   |
|--|---|---|
|  | Branston LLP is also not recoverable.   |   |
|  | Prepare the <b>body of a letter</b> of advice to Mrs Evans advising on the transfer of CFAs from one firm to another, having particular regard to the specific circumstances referred to. |   |
| <b>Total Marks Attainable</b>  |   | 20  |
|  |   |   |
| Fail   | up to 9.9   | An answer which deals with the basic requirements of the question, but in dealing with this only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that candidates have any understanding of the legislative framework governing a CFA, or any view expressed will be unsupported by evidence or authority.   |
| Pass   | 10+   | An answer which addresses MOST of the following points: Candidates must provide an explanation of assignment and novation; circumstances when a transfer may be required and the key priority for a transfer. Candidates should refer to CLSA 1990 and LASPO 2012 as the governing law. Candidates MAY have outlined most of the regulatory framework of a CFA and the requirements as to form. Some key case law may be included, but this may not be specifically applied or only superficially.  |
| Merit  | 12+   | An answer which includes ALL the requirements for a pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the transfer of CFAs) with very good application and some analysis having regard to the facts. Candidates should identify that, in this scenario, the reason for the transfer is because of the firm is ceasing to undertake that particular type of work. Candidates are likely to conclude that there is a degree of uncertainty, or has been, about whether or not there can be payment of the first solicitors' costs and/or additional liabilities can be recovered. Most views expressed by candidates should be supported by relevant authority and/or case law. |
| Distinction  | 14+   | An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law throughout. Candidates should be able to show critical assessment and capacity for independent thought on the topics. Candidates should have reached a conclusion, which is likely that the court would deem that the CFA had been novated/terminated. Work should be written to an exceptionally high standard taking into consideration that it is written in exam conditions.                                     |
| <p>Fail = 0-9.9<br/> Pass = 10+<br/> Merit = 12+<br/> Distinction = 14+</p>  |   |   |
| <b>Indicative Content</b>  |   | <b>Marks</b>  |
| <p><b>Required:</b></p> <p><b><i>Circumstances when a CFA may need to be transferred:</i></b> There are a number of situations when a CFA may need to be transferred. A firm may go into administration, close or close a department. A solicitor may move firms and client wants to retain the same agreement. A firm may be bought by another firm or merges. A firm may changes its name.</p> <p><b><i>Definition of assignment:</i></b> The agreement between one of the original parties and a new party. It does not create new rights, but transfers existing rights under a contract from one party to another. There are two parties to the agreement. In writing, by</p> |   | <p>Up to 5 marks</p> <p>In order to achieve a pass, candidates must provide an explanation of assignment and novation.</p>  |

|   |   |
|---|---|
| <p>deed, same agreement, client not involved but can accept/reject, benefit and burden must pass.</p> <p><b>Novation:</b> Where parties to the original contract agree with a new party that the original agreement comes to an end and a new agreement comes into being between one of the original parties and the new party, in relation to the same subject matter and on the same terms.</p>   |   |
| <p><b>Key priority for transferring a CFA:</b> Assignment should be distinguished from novation. It was thought that there must be assignment to maintain the ability to collect a success fee from a losing party in relation to work done after 31 March 2013 when the client moves firms after that date. This is now not the case, there must be assignment or novation and not a termination to recover additional liabilities and first solicitors' costs.</p> <p><b>If the CFA is dated after 1 April 2013:</b> then the success fee will not be recoverable from the losing party unless it relates to a matter that falls under the following exceptions (CPR 48.2(1)(a)):</p> <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> publication and privacy proceedings; and</li> <li><input checked="" type="checkbox"/> mesothelioma cases.</li> </ul> <p><b>If the CFA is pre 1 April 2013:</b> then the success fee can be recovered from the client if the 'win' under the terms of the CFA is triggered.</p>   | <p>Up to 4 marks</p> <p>To achieve a merit or distinction, candidates should not simply cite the relevant rules but must show an ability to apply the rules to the scenario.</p>                      |
| <p><b>Credit any other points relevant to the scenario in relation to CFAs e.g</b></p> <p><b>Conditional Fee Agreements: introduced by Courts and Legal Services Act 1990:</b> are contingency agreements or 'no win no fee agreements' for advocacy and litigation services.</p> <p><b>Section 58(1) of the Courts and Legal Services Act 1990:</b> A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.</p> <p><b>Section 58(3) of the Courts and Legal Services Act 1990:</b> Requires that CFAs must comply with formalities, e.g they must be in writing.</p> <p><b>Section 58(4) of the Courts and Legal Services Act 1990:</b> Requires that if a CFA includes the provision for a success fee they must be stated and must not exceed the amount set by the Lord Chancellor.</p> <p><b>Access to Justice Act 1999:</b> amended section 58 CLSA 1990 to allow for recovery of success fee (section 27), ATE insurance premiums (section 29).</p> | <p>Up to 5 marks</p> <p>To achieve a merit or distinction, candidates should identify that in this scenario there is a pre LASPO CFA and must show an ability to apply the rules to the scenario.</p> |

**Legal Aid, Sentencing & Punishment of Offenders Act 2012:**

abolished recovery of success fees (section 44) and ATE premiums (section 46).

***If the CFA is dated after 1 April 2013:*** then the success fee will not be recoverable from the losing party unless it relates to a matter that falls under the following exceptions (CPR 48.2(1)(a)):

- publication and privacy proceedings; and
- mesothelioma cases.

***If the CFA is pre 1 April 2013:*** then the success fee can be recovered from the client if the 'win' under the terms of the CFA is triggered.

**Credit any other relevant points cited in relation to the problems the courts have faced and the arguments raised by the paying party e.g:**

***Halsall v Brizell [1957]:*** The party could not take the benefit under a contract without the corresponding burden.

***Jenkins v Young Brothers Transport [2006]:*** Where the client was loyally following the solicitor as they changed firms a few times, there was an exception to the rule that prevented personal contracts from being assigned as the benefit and burden of the contract was allowed.

***Davies v Jones [2009]:*** It was held that the exception in *Jenkins* could not be relied upon. This case re-iterated that the burden of a contract cannot be assigned.

***Jones v Spire Healthcare 2015:*** At first instance the first CFA was deemed to be at an end and the subsequent CFA was deemed to be a new retainer, so a novation had taken place. Therefore the existing rights under the CFA were not transferrable.

***Budana v Leeds Teaching Hospitals [2016]:*** Telling the client the personal injury department was closing and seeking no further instructions amounted to termination of the first retainer. Had the CFA not been terminated an assignment may have been permitted as the higher court decision in *Jenkins* showed it was possible for a burden to be assigned. In light of the first CFA being terminated, a novation had taken place.

***Webb v Bromley [2016]:*** The CFA did not comply with section 58 of the Courts and Legal Services Act 1990 and the Conditional Fee Agreements Order 2013, having more than a 25% success fee, and was therefore unenforceable.

***Jones v Spire Healthcare [2016]:*** On appeal, the case of *Jenkins* was determined to be authority that allowed the burden under a CFA to be assigned to a new firm and the CFA in this case was validly assigned. It was also suggested at the time that the decision was likely to be appealed further however it was not.

Up to 10 marks

To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base. Candidates may have referred to ***Roman v Axa Insurance [2019]*** but should not be penalised if they have not because of the ACLT six month rule.

|   |  |
|---|--|
| <p><b><i>Budana v Leeds Teaching Hospitals NHS Trust [2017]</i></b>: It is possible to transfer a CFA. The judiciary were divided on whether a novation or assignment had taken place but it was decided it did not matter which had taken place and that the intention of parliament, when they legislated and LASPO was passed, would not have been that the first solicitor could not be paid or that the additional liabilities would not be recovered where a CFA was transferred. This case was thought to have settled the arguments on the transfer of a CFA.</p> <p><b><i>Roman v Axa Insurance [2019]</i></b>: This case held that the CFA had not been assigned or novated but that it had in fact been terminated. This has created potential uncertainty in relation to the transfer of CFAs. It will be a question of evidence and each individual case must be considered based on the individual circumstances surrounding the purported transfer. Where there has been a termination the first solicitor will not be entitled to payment and the pre LASPO benefits, i.e recoverability of additional liabilities, will not be transferable.</p> |  |
|   |  |

|                           |   |
|---------------------------|---|
| <p><b>Question 9:</b></p> | <p>You are a costs lawyer and have been recruited on a consultancy basis to advise on the setting up of an SRA regulated firm of solicitors. The proposed new firm will specialise in personal injury and clinical negligence matters. They have approached you because of your costs knowledge but also because of your previous experience in the legal accounts and compliance department at a leading law firm.</p> <p>You have been asked to assist with the drafting of a business proposal for the bank to consider in order that the new firm can secure a loan to cover start-up costs. You have been asked to specifically advise on the risks and regulations associated with going into practise. The business proposal needs to adequately demonstrate that the firm will be alert to, and take responsibility for, managing risks as to its delivery of legal services. You therefore need to write a summary to be included in the business proposal in respect of the money laundering regulations that you must comply with and the handling of client money.</p> <p>Prepare a <b>summary</b> that you will include in your business proposal on the aspects detailed above.</p> |
|---------------------------|---|

|                                      |           |
|--------------------------------------|-----------|
| <p><b>Total Marks Attainable</b></p> | <p>20</p> |
|--------------------------------------|-----------|

|             |                  |   |  |
|-------------|------------------|---|--|
| <p>Fail</p> | <p>up to 9.9</p> | <p>An answer which deals with the basic requirements of the question, but in dealing with only does so superficially and does not address, as a minimum, all the criteria expected of a pass grade (set out in full below). The answer will only demonstrate an awareness of some of the more obvious issues. The answer will be weak in its presentation of points and its application of the law to the facts. There will be little evidence that candidates have any understanding of the regulatory framework governing client accounts and money laundering.</p> |  |
|-------------|------------------|---|--|

|             |     |  |
|-------------|-----|--|
| Pass        | 10+ | An answer which addresses MOST of the following points: A definition of client money, an explanation of what money laundering is, identification of the relevant legislation/regulations. Some key authority should be included, but this may not be specifically applied or only superficially.   |
| Merit       | 12+ | An answer which includes ALL the requirements for a Pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the operation of the money laundering regulations and the accounts rules) with very good application to the scenario, i.e some explanation as to why it is relevant and how it will be presented within the proposal. There will be some analysis having regard to the facts. Most views expressed by candidates should be supported by relevant authority and/or case law.            |
| Distinction | 14+ | An answer which includes ALL the requirements for a Pass (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. All views expressed by candidates should be supported by relevant authority and/or case law throughout. Candidates should be able to show critical assessment and capacity for independent thought on the topics. Work should be written to an exceptionally high standard with few, if any, grammatical errors or spelling mistakes etc. |

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

| Indicative Content   | Marks   |
|--|---|
| <p><b>Required: Candidates must explain what client money is, e.g:</b></p> <p><b>Rule 12 of the SRA Account Rules:</b> Categories of money. Rule 12 divides money into two categories, namely: client money and office money.</p> <p><b>Rule 12.1 of the SRA Account Rules:</b> These rules do not apply to out-of-scope money, save to the limited extent specified in the rules.</p> <p><b>Rule 12.1(a) of the SRA Account Rules:</b> "client money" - money held or received for a client or as trustee, and all other money which is not</p> <p><b>Rule 12.1 (b) of the SRA Account Rules:</b> "office money" - money which belongs to you or your firm.</p>   | <p>Up to 4 marks</p> <p>To achieve a pass, an explanation should be given as to what is client money.</p>     |
| <p><b>Required: Candidates must explain what money laundering is, e.g:</b></p> <p><b>Legal Guidance, Proceeds Of Crime Act 2002 Part 7 - Money Laundering Offences:</b> Money laundering is "the process by which criminal proceeds are sanitised to disguise their illicit origins".</p> <p><b>Relevant Legislation and Regulations:</b> The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, the Proceeds of Crime Act 2002 and the Terrorism Act 2000.</p> <p><b>Regulation 27 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:</b> Must apply customer due diligence measures if they establish a business relationship; carry out an occasional transaction that amounts to a transfer of funds exceeding 1,000 euros; suspects money laundering or terrorist financing; or doubts the veracity or</p> | <p>Up to 6 marks</p> <p>To achieve a pass, an explanation should be given as to what money laundering is.</p> |

|  |   |
|--|---|
| <p>adequacy of documents or information previously obtained for the purposes of identification or verification.</p> <p><b>Regulation 28 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:</b> A firm must identify the customer, verify the customer’s identity and assess the purpose and intended nature of the business relationship or occasional transaction.</p>   |   |
| <p><b>Candidates should discuss the use of client account including the rules on withdrawing money e.g:</b></p> <p><b>Rule 1.1 of the SRA Account Rules:</b> The purpose of these rules is to keep client money safe. This aim must always be borne in mind in the application of these rules.</p> <p><b>Rule 1.2 of the SRA Account Rules 2017:</b> requires that a firm and its employees must comply with the principles set out in the SRA Handbook (or Code of Conduct) and specifically the outcomes in chapter 7 of the Handbook in relation to the effective financial management of the firm.</p> <p><b>Rule 14.1 of the SRA Accounts Rules 2017:</b> Client money must, without delay, be paid into a client account and must be held in a client account, except when the rules provide to the contrary.</p> <p><b>Rule 14.3 of the SRA Accounts Rules 2017:</b> Client money must be returned to the client (or other person on whose behalf the money is held) promptly, as soon as there is no longer any proper reason to retain those funds.</p> <p><b>Rule 14.5 of the SRA Accounts Rules 2017:</b> Firms must only use the client account to hold client funds for a legal transaction.</p> <p><b>Rule 20.8 of the SRA Account Rules 2017:</b> Money held for a particular client (or trust) must not be used for payments for another client.</p> <p><b>Rule 20.9 of the SRA Account Rules 2017:</b> Client account should never be overdrawn except in the 2 listed circumstances.</p> <p><b>Transferring from Client to Office:</b> Involves the bank moving money from one bank account to another. It occurs when the solicitor instructs the bank to transfer money from the client bank account to the office bank account, or from the office bank account to the client bank account. The solicitor must make entries on the firm’s internal cash accounts and client ledger to reflect the fact that the money has actually moved between bank accounts.</p> <p><b>Rule 17.2 of the SRA Accounts Rules 2017:</b> Firms must first send a bill before money is transferred from client to office.</p> | <p>Up to 8 marks</p> <p>To achieve a merit or distinction candidates should give an explanation of the rules and why they are relevant to the proposal i.e they must apply the law to the scenario.</p> |
| <p><b>Candidates should discuss how duties under money laundering regulations can be discharged and managed, e.g:</b></p>  | <p>Up to 3 marks</p>  |

|   |               |
|---|---------------|
| <p><b>Regulation 18 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:</b><br/>Firms must take appropriate steps to identify and assess the risks of money laundering and terrorist financing to which its business is subject. They must also keep records of any identified risks.</p> <p><b>Regulation 19 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:</b><br/>Firms must establish and maintain policies, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing identified in any risk assessment undertaken by the relevant person. They must review any such policies and maintain records of them.</p> <p><b>Regulation 21 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:</b><br/>Where appropriate with regard to the size and nature of its business, firms must appoint one individual who is a member of the board of directors (or if there is no board, of its equivalent management body) or of its senior management as the officer responsible for the relevant person's compliance with these Regulations.</p>   |               |
| <p><b>Candidates may discuss the principal money laundering offences, e.g:</b></p> <p><b>The Proceeds of Crime Act 2002 (POCA):</b> Contains the principal money laundering offences and defences.</p> <p><b>Section 327 of the Proceeds of Crime Act 2002:</b> A person will be liable if he conceals, disguise, converts, transfers or removes criminal property. Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.</p> <p><b>Section 328 of the Proceeds of Crime Act 2002:</b> A person commits an offence if he enters into, or becomes concerned in, an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.</p> <p><b>Section 329 of the Proceeds of Crime Act 2002:</b> If a person acquires, uses or possesses property for which he has not given adequate consideration, he may be liable of an offence.</p> <p><b>Section 45 of the Serious Crime Act 2015:</b> Introduced the offence of participating in an organised crime group into English law. It has the potential to seriously widen the scope of criminal liability for lawyers and other professionals working in the non-regulated sector.</p> | Up to 3 marks |