August 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%)

Question 1:	Explain, with reference to relevant authority, why the Costs Lawyer Code of Conduct prohibits costs lawyers from handling client money.
Total Marks Attainable Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+	5
Indicative Content	**Marks**
Must include a discussion as to what client money is, e.g: ***No Definition:*** 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. ***Rule 12 of the SRA Account Rules:*** Categories of money. ***Rule 12.1 of the SRA Account Rules:*** 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: ***Rule 12.1(a) of the SRA Account Rules:*** "Client money" - money held or received for a client or as trustee, and all other money which is not ***Rule 12.1 (b) of the SRA Account Rules:*** "Office money" - money which belongs to you or your firm. ***CILEx Account Rules:*** Define client money as money beneficially owned by anyone other than the Authorised Entity.	Up to 2 marks A pass must refer to a definition of client money.
May also include a discussion on the protection of the public and minimising risks, e.g: ***Principle 3 of the CLSB Code of Conduct:*** Generally, is about acting in the best interests of the client ***Principle 3.6 of the Costs Lawyer Code of Conduct:*** A costs lawyer must not accept client money save for disbursements and payment of your proper professional fees. ***CLSB Practising Rules:*** There is no mention of the CLs handling client money in the CLSB Practising Rules.	Up to 3 marks To achieve more than a pass a candidate 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

Rule 1.1 of the SRA Account Rules: 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. ***Section 1 LSA 07:*** 8 regulatory objectives. The regulatory objectives are: Protecting and promoting the public interest; Supporting the constitutional principle of the rule of law; Improving access to justice; Protecting and promoting the interests of consumers; Promoting competition in the provision of services; Encouraging an independent, strong, diverse and effective legal profession; Public understanding of citizens' legal rights and duties and Promoting and maintaining adherence to the professional principles. ***Section 20 LSA 07:*** Approved regulators. ACL is named as the approved regulator but the CLSB have the delegated functions.	conduct to act in the best interest of the client.
May also include a discussion on whether the professional fees of a costs lawyer are in fact client money, e.g: ***Rule 12.7 of the SRA Account Rules:*** 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.	Up to 1 mark

Question 2:	Summarise the relevant authority and explain how a solicitor with unpaid fees may have a potential lien over a client's property.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Required: Candidates must explain what a lien is and demonstrate knowledge of the types of lien, e.g: ***A lien is:*** A right to keep possession of property belonging to another person until a debt owed by that person is discharged. ***A solicitor with unpaid fees has a potential lien over the client's property in one of three ways:*** Common law lien, an equitable lien or a statutory lien under section 73 of the Solicitors Act 1974.	Up to 3 marks To pass a response must include an explanation of what a lien is.

Common law lien: 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. ***Equitable lien:*** 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. ***Section 73 of the Solicitors Act 1974:*** Solicitors have the right to apply to the court for a charge on any property recovered or preserved through their efforts.	
Candidates should explain what a retaining lien is and demonstrate knowledge of how it operates, e.g: ***Leo Abse and Cohen v Evan G Jones Builders Limited [1984]:*** 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 ***Loescher v Dean [1950]:*** 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 ***Withers v Rybeck [2011]:*** The property over which such a client can be exercised may include money held on client account. ***Withers v Langbar [2011]:*** 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.	Up to 4 marks 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.
Candidates should explain what a preserving lien is and demonstrate knowledge of how it operates, e.g: ***Welsh v Hole [1779]:*** **T**he first decision recorded where the equitable lien was recognised. This type of lien exists because there should be honest and fair dealing. 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. 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.	Up to 4 marks

Read v Dupper [1765]: 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 solicitor's interest and pays lay opponent direct may have to pay again. ***Barker v St Quinton [1844]:*** The equitable lien operates by way of security or charge. ***Halvanon Insurance Co Ltd v Central Reinsurance [1988]:*** 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. ***Gavin Edmonson Solicitors Ltd v Haven Insurance Co Ltd [2018]:*** Historically it was thought there must be proceedings in order to have the right to a preserving lien, however, there does not 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.	
Candidates should explain what a statutory lien is and demonstrate knowledge of how it operates, e.g: ***Section 73 of the Solicitor Act 1974:*** 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. ***Shaw v Neale (1858):*** 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. ***Harrison v Harrison (1883):*** A solicitor must also be able to make out a prima facie case that they will not be paid unless an order is made. ***Kahn Solicitors v Secretary of state [2013]:*** Costs belong to the client so any application under section 73 must be prompt.	Up to 3 marks

Question 3:	Describe what is meant by third party litigation funding and discuss whether the availability of this type of funding facilitates access to justice.

Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	**Marks**
Candidates must explain what third party funding is, e.g: ***Third party funding:*** 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.	Up to 1 mark A pass must include the demonstration that the candidate understands what Third Party Funding is.
Credit the chronological developments (and the change in stance to such funding arrangements) e.g: ***Seear v Lawson (1880):*** Third Party funding is permitted in matters arising out of insolvencies. ***British Cash & Parcel Conveyors v Lamson. Store Service Co [1908]:*** 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. ***Chitty 28 Ed Vol 1 17 – 054:*** Champerty 'occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit'. ***The Legal Aid and Advice Act 1949:*** The availability of government funding for litigation suggested a shift in attitude towards the use of funding from outside parties for litigation. ***Section 13 of the Criminal Law Act 1967:*** Abolished the criminal offences and torts of champerty and maintenance. ***Section 14 of the Criminal Law Act 1967:*** Agreements may still be unenforceable on the grounds of public policy. ***Section 58 CLSA 1990:*** Contingency Fee Agreements (CFAs) expressly permitted by statute. These agreements would have historically been deemed champertous.	Up to 7 marks To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base.

Arkin v Borchard Lines Ltd & Ors [2005]: The court gave tacit approval to this type of litigation funding ***Merchant bridge & Co Ltd & Another v Safron General Partner Ltd [2011]:*** Third party funders could be liable to the full extent of the claimant's costs. ***Section 45 LASPO 2012:*** A new form of contingency fee agreement was permitted by statute. ***JEB Recoveries LLP v Linstock [2015]:*** The judge held that given the current climate and changing attitudes to litigation funding, the agreement did not offend public policy. ***Davey v Money and Others [2019]:*** 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.	
Credit a discussion on whether the availability of this type of funding facilitates access to justice, e.g: ***Control and free decision making:*** 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. However, even though third party funders are, in theory, unable to control proceedings, there is a concern that they may influence some of the decisions because they are ultimately funding all or part of the claim. ***Restrictions:*** Agreements based on champerty and maintenance still remain. Courts still have to decide on the facts of each litigation funding agreement whether the contract is unenforceable on the grounds of public policy. This may restrict access to justice. ***Policy:*** Change in approach by both the legislative and judiciary but there has been no legislation around this type of funding meaning it only tends to get used in a commercial context. ***2017 Government has no plans to regulate:*** 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. ***Association of Litigation Funders:*** Established in 2011, they have a voluntary code of conduct. ***Third party funding facilitates access to justice by:*** Allowing claimants to pursue a claim where they may not have done so; enabling the risk of pursuing the claim to be shared; contributing to the success of the	Up to 6 marks To achieve a distinction, candidates will provide some commentary on the regulation.

claim by increasing cash flow; being used in conjunction with other funding options, including a conditional fee agreement and/or after the event insurance; and allowing a company with multiple claims to finance more actions than their limited budget would otherwise allow. ***Third party funding may further restrict access to justice because:*** A successful claimant will have to pay a significant proportion of its recoveries (usually up to 50%) to the funder and this type of funding is not usually available for non-monetary claims.	

Question 4:	Summarise the costs provisions found in the Arbitration Act 1996.
Total Marks Attainable Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+	15
Indicative Content	**Marks**
Required: Candidates must set out the legislative framework of the costs provisions found in the Arbitration Act 1996 and set out the categories of costs, e.g: ***Section 59-65 of the Arbitration Act 1996:*** Contain the main costs provisions. ***Section 59(1) of the Arbitration Act 1996:*** 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. ***Section 59(2) of the Arbitration Act 1996:*** 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. ***Essar Oilfields v Norscott [2016]:*** Costs incidental to proceedings may include funding, this case concerned third party funding which can be used in arbitration. ***Challenges to an award are possible:*** Which would also go to the court. Section 67 of the Arbitration Act 1996 (as to jurisdiction), section	Up to 4 marks To pass candidates must refer to the relevant sections of the Arbitration Act 1996.

68 of the Arbitration Act 1996 (serious irregularity), and section 69 of the Arbitration Act 1996 (point of law).	
Credit any points advanced on the framework of the assessment procedure under the Arbitration Act 1996, e.g: ***Section 60 of the Arbitration Act 1996:*** Concerns the agreement to pay costs in any event. Such an agreement, for a party to pay the 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. ***Section 63(3) of the Arbitration Act 1996:*** The arbitrator must assess costs as he 'sees fit'. ***Section 63(4) and section 63(1) of the Arbitration Act 1996:*** 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. ***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.	Up to 9 marks To achieve more than a pass, candidates must not simply cite law, but should show a greater depth to their knowledge base.

Credit any other relevant points cited e.g: ***Section 66(2) and (3) of the Arbitration Act 1996:*** 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. ***Refusal of Leave:*** If the court finds that the award is not legally valid, it may refuse leave (*Re Stone and Hastie Arb.* [1903 and *Middlemiss & Gould v Hartlepool Corp* [1972]). ***CPR 62.18:*** 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. ***Section 67 of the Arbitration Act 1996:*** 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. ***Section 68 of the Arbitration Act 1996:*** 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. ***Section 69 of the Arbitration Act 1996:*** 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. ***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).	Up to 6 marks

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.	

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

Question 5:	You work as a costs lawyer for a costs firm based in Blackpool. You have been approached by Mr Arshad Warsi, the Compliance Officer for Finance and Administration at the firm Harrisons LLP. He has requested that you draft some training materials for circulation to his firm's fee earners. Mr Warsi has instructed that over recent years it has proved more problematic to get clients to pay their invoices. In his instructions to you, he has explained that for a number of years some long-standing clients paid bills without delay. However, more recently there have been problems even with these clients. He instructed that some of the firm's loyal clients have become slow to pay bills and have raised, what you may consider to be, meritless arguments in order to delay payment. Mr Warsi has also informed you that different fee earners take different approaches to billing and their level of knowledge varies. Some bills are headed 'on account of costs', some include a breakdown of each individual item billed and others only include a gross sum. He was clear in his instructions that all bills are signed by a partner and are sent via first class post. He would like the training notes to cover interim bills and invoices on account, an explanation as to what is meant by a statute bill and some information on detailed and gross sum bills. He would also like the notes to set out the right of the firm to seek payment of its bills through the courts. Prepare the body of the training notes for Mr Warsi setting out the information he has requested.
Total Marks Attainable	20

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: the requirements of a statute bill, the two kinds of interim bill, the time limits in relation to solicitor and client assessment, the format and contents of the different types of bill. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the legal framework under the Solicitors Act 1974 and the underpinning 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 comment on the retainer and the relevance of this in relation to interim billing. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a Pass and Merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates will provide an excellent set of notes with reference to a broad range of authority. Candidates are likely to observe that IN THIS SCENARIO we are told that fee earners approach billing in different ways and candidates may identify that whilst this may be compliant it will not enable easy monitoring and certainty as to enforcement. 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
Required: Candidates must explain what a bill is and demonstrate knowledge of the types of bill, e.g: ***There are two kinds of interim bill:*** Interim invoices on account and interim statute bills; the difference between them is crucial. Depending on what sort of interim bill has been sent out, a lawyer may be able to: sue the client on such bills (and not just the final bill) or seek a different amount from the client at the end of the case for the period that the interim bill covers. ***Interim invoices on account:*** Are merely requests for money on account of work undertaken. They must be for a reasonable sum. If these have been rendered, a solicitor will be able to seek a different amount from the client at the end of the case for the period that the interim bill covers. A solicitor cannot enforce them and a client cannot request an assessment of them. ***An interim statute bill:*** Is an invoice which is fully compliant with the requirements of s 69(2) of the Solicitor's Act 1974 (signed and delivered). A solicitor can enforce them and a client can request an assessment of them. Interim Statute bills are full and final for the work which they cover (i.e. no additional sums/adjustment for further work can be requested from the client later). ***Final statute bills:*** Are the same as interim statute bills, but rendered upon the termination of the contract of retainer rather than at an interim stage. Statute bills can be either "gross sum" bills or detailed.	Up to 5 marks To pass candidates must distinguish between the types of invoice/bill.

A gross sum bill: Will simply contain the total to be paid to the lawyer, without any breakdown of the figure.	
Any other relevant point to describe interim bills/invoices on account (credit any of the following and/or any other relevant point): ***Section 65(2) of the Solicitors Act 1974:*** A solicitor may seek a payment on account in respect of any contentious business. If the request is for a reasonable amount and the client does not pay then there is good cause to terminate. ***Turner & Co v O Palomo SA [2000]:*** If the client refuses to pay an interim invoice on account then the solicitor's remedy is to terminate the contract of retainer and render a final statute bill. 5 bills rendered during the course of the litigation had been headed 'on account of charges and disbursements incurred or to be incurred' could not be construed as final or statute bills. The time for assessment would not begin to run until a final bill had been rendered and served. ***At the conclusion of a matter:*** The solicitor should render a FINAL INVOICE, containing the required statutory information and taking into account the payments made to that date. ***Rule 17 of the SRA Account Rules 2017:*** Interim invoices on account must be restricted to costs incurred to ensure compliance with the Solicitor Accounts Rules 2011. Once a bill has been rendered, solicitors would be entitled to treat money that may previously have been client money as money belonging to the office so this will impact money held on account and money received once the bill has been rendered (rule 17.4 of the SRA Account Rules 2017).	Up to 6 marks
Any other relevant point to describe interim/final statute bills (credit any of the following and/or any other relevant point): ***Contents of a statute bill:*** A statute bill will specify the period of work covered and will describe the work done, as well as complying with section 69(2) of the Solicitors Act 1974. ***Kingstons Solicitors v Reiss Solicitors [2014]***: This was held not to amount to a statute bill. A bill must be drafted in such a way as to be regarded as a demand for payment. ***Carter-Ruck v Mireskandari [2011]:*** An interim statute bill with insufficient information may not be considered an interim statute bill, but may be deemed to be a request for payment on account. ***Entire contracts and natural breaks:*** A retainer is deemed to be an entire contract and, as such, an interim statute bill cannot be rendered before the end	Up to 9 marks

of the contract, other than in contentious work where it can be rendered by agreement or at a natural break. ***Davidsons v Jones-Fenleigh [1980]:*** Lawyers are entitled to require a bill to be treated as a completely self-contained bill of costs to date; they must make it clear to their clients, either expressly or by implication, that this is the purpose of sending the bill for that amount at that time. Where a client pays a bill in its entirety without question, it is not difficult to infer that the bill is to be treated as a complete self-contained bill of costs to date. ***Abedi v Penningtons (a firm) [2000]:*** Agreement to interim statute bills could be both inferred by the client's behaviour and from the express agreement. ***Re Romer v Haslam [1893]:*** Not entitled to payment because the solicitors had never asked for payment of any of their bills; they had simply asked for and received payments on account. ***Wilson v William Sturges & Co (a firm) [2006]:*** The bill delivered at the end of the first stage of proceedings was held to be a statute bill. This was despite the fact the court held the bill to be 20% in excess of the proper amount. The solicitors insisting on it being paid before proceeding further did not terminate the retainer and disentitle the solicitors to the reasonable costs. ***Bari v Rosen (trading as RA Rosen & Co Solicitors) [2012]:*** Interim statute bills are final bills in respect of the work they cover in that there can be no subsequent adjustment in the light of the outcome of the business. ***Richard Slade and Company v Boodia and Boodia [2017]:*** The QBD, in an appeal from the SCCO, upheld Master James' finding that interim statute bills must include disbursements. ***Sprey v Rawlison Butler LLP [2018]:*** High Court ruled monthly bills under discounted CFA were not statute bills but interim invoices. CFA provided that claimant would pay 40% of firm's normal rates if lost the claim and if won, he would pay the normal rates plus a 50% success fee. A statute bill cannot be amended and the CFA provided that the 40% invoices were liable to be changed later on. ***Section 69(1) of the Solicitor's Act 1974:*** No action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a statute bill is delivered; a solicitor may also issue proceedings to recover the sums owed in that bill.	
Any other relevant point to describe final statute bills/Gross sum bills (credit any of the following and/or any other relevant point):	Up to 3 marks

Section 64 (1) of the Solicitors Act 1974: In respect of contentious business provides that a bill may be, at the option of the solicitor, either a bill containing detailed items or a gross sum bill. ***Section 64(2) of the Solicitors Act 1974:*** If a gross sum bill is delivered then, within 3 months, the party charged with the bill may require the solicitor to deliver a detailed bill. This must be done before the solicitor issues proceedings to recover costs. ***Detailed bill following gross sum:*** The gross sum bill is no longer effective and the detailed bill can therefore be for a different sum than the original bill.	

Question 6:	You are a costs lawyer working in-house for a firm of solicitors in Hartlepool. One of the fee earner's at the firm, Jonathan Orange, has approached you for some advice in relation to one of his cases. He is acting for Zoey Diamond on an appeal against a tax assessment. A directions order has been made under which the parties were required to provide lists of documents to each other on 26 May 2019. HMRC's documents were sent to Mr Orange three days late. On receiving the relevant letter, Mr Orange opened the envelope and appreciated what the documents were but did not read them and instead returned them to HMRC "because they were late". As the documents were highly relevant to the proceedings and in the absence of any compelling reason to rule otherwise, the Tribunal subsequently directed that the documents should be admitted into evidence. However, as Mr Orange had not read the papers it was necessary to request an adjournment of his presentation of Ms Diamond's case, to allow him time to consider the documents. In the circumstances, Mr Orange is now concerned that the Tribunal may be persuaded by HMRC that it would be appropriate that Mr Orange should pay HMRC's wasted costs of the adjourned hearing. Prepare the body of an email to Mr Orange setting out the rules in the lower tier tribunals in respect of costs and specifically when a costs order may be made against a legal representative.	
Total Marks Attainable		20

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: This matter is a matter before a first tier tribunal (Tax Chamber), it is not one of the first tier tribunals that cannot make orders for costs, the framework of provisions in the Tribunals, Courts and Enforcement Act 2007 and the relevant rules specific to this tribunal - Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009. Candidates are also likely to have explored wasted costs orders. Candidates will demonstrate a good depth of knowledge of the subject with good application and some analysis having regard to the facts, although candidates may demonstrate some areas of weakness.
Merit	12+	An answer which includes ALL the requirements for a pass (as set out above) PLUS candidates will demonstrate a very good depth of knowledge of the subject (i.e. a very good understanding of the law on wasted costs in tribunals) with very good application and some analysis having regard to the facts. Candidates are likely to observe that, in this scenario, that, whilst the tribunal does have jurisdiction to make orders for costs, that they will only be made where conduct leads to the making of such an order. Most views expressed by candidates should be supported by relevant authority and/or case law.
Distinction	14+	An answer which includes ALL the requirements for a pass and merit (as set out above) PLUS the candidates' answers should demonstrate a deep and detailed knowledge of law in this area and an ability to deal confidently with relevant principles. Candidates will provide an excellent advice setting out when a costs order may be made and the provisions around such 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**
Required: Candidates must demonstrate knowledge of the tribunal structure (candidates are not required to list all chambers). ***There are seven first tier tribunals:*** 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. ***Relevant rules include:*** 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.	Up to 3 marks 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.
Candidate should refer to legislative framework to describe the jurisdiction, e.g: ***Tribunals, Courts and Enforcement Act 2007:*** Tribunals governed by TCEA 2007, but each chamber is also governed by its own set of Procedure Rules	Up to 5 marks

Section 29 (1) of the Tribunals, Courts and Enforcement Act 2007: costs shall be in the discretion of the tribunal. ***Section 29 (2) of the Tribunals, Courts and Enforcement Act 2007:*** the tribunal has full power to determine by whom and to what extent costs are to be paid. ***Section 29 (3) of the Tribunals, Courts and Enforcement Act 2007:*** subsections (1) and (2) have effect subject to Tribunal Procedure Rules. ***Section 29(4) of the Tribunals Courts and Enforcement Act 2007:*** orders can be made against a representative. ***Section 29(5) of the Tribunals Courts and Enforcement Act 2007:*** Defines wasted costs as any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.	
Candidate should refer to any of the specific tribunal rules and how that effects its jurisdiction to make costs orders, e.g: ***Rule 10 of the Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008:*** The First Tier Tribunal Social Entitlement Chamber has no power to award costs. ***Rule 10 of the Tribunal Procedure (First Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008:*** The First Tier Tribunal Social Entitlement Chamber has no power to award costs. ***Other first tier tribunals***: May make orders in respect of wasted costs and unreasonable conduct. ***Rule 10(1)*** *of the* ***Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008:*** may make orders for wasted costs (under s.29(4) TCEA 2007) or if the 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. ***Rule 10(1)(a)*** *of the* ***Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009:*** May make orders for wasted costs (under s.29(4) TCEA 2007), if the tribunal considers that a party has acted	Up to 6 marks To achieve a merit or distinction candidates must state some specific rules which impact the jurisdiction of a tribunal to make a costs order.

unreasonably in bringing, defending or conducting proceedings or the proceedings have been allocated as a Complex case under rule 23 and prescribed circumstances apply.	
Candidate should refer to any specific authority on wasted costs orders, e.g: ***Rule 10(3)*** *of the* ***Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009:*** A person making an application for costs under paragraph (1) of the rules must send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made and a schedule of the costs or expenses claimed. ***Rule 10(4)*** *of the* ***Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009:*** An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends a decision notice recording the final decision or a notice which ends the proceedings. ***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.	Up to 8 marks

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.	
Credit any other relevant law cited where comparisons are drawn to the upper tier e.g: ***4 upper chambers, 3 chambers governed by the Tribunal Procedure (Upper Tribunal) Rules 2008:*** Administrative Chamber, Tax and Chancery Chamber, Tax and Chancery Chamber. Lands Chamber governed by the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010. May make orders in respect of wasted costs, unreasonable conduct and appeals. ***Appeals:*** 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.	Up to 2 marks

Question 7:	Costings R us is a small costs firm in Bath. They instruct a number of freelance costs professionals. It is the responsibility of Boris Turner, a costs lawyer at the firm, to delegate and send the work to the costs professionals. You have recently taken up a position with Costings R us as a freelance costs lawyer. You have received three legal aid files from Boris and the instructing solicitor is Hannah Hewitt of Hewitt and Haversham LLP. Boris has written you a short set of notes on the files as follows: a) The file of Minesh Patel. On this file the substantive certificate has been revoked because representations have been made to the Legal Aid Agency (LAA) that Mr Patel has concealed income he receives from some investments. b) The file of Helen Sharp. Ms Sharp has made an application for judicial review in respect of the lawfulness of her detention in 2017. On this file a notice to show cause was issued by the LAA on 3 March 2019 in respect of Ms Sharp's funding certificate. c) The file of Daniel Sutherland. The funding certificate (Certificate Number KM1223078A-A1) is discharged following completion of an action brought on behalf of Daniel (d.o.b 03.04.2016). The certificate had been live since

	19 June 2016 and the notice of discharge is dated 19 February 2019. Consider the above file notes and prepare an explanation and a brief description of the implications in each of the cases. Provide the body of a letter of advice, to Hannah Hewitt, on the particular circumstances on the files and any action that should be taken.

Total Marks Attainable Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+	20

Fail	up to 9.9	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.
Pass	10+	An answer which addresses MOST of the following points: An outline of what certificated work is, an explanation of what revocation means, an explanation as to what a notice to show cause means and what it means for a certificate to be discharged. Candidates should identify the relevant issues in the case and deal with the circumstances in their advice.
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 legal aid funding) with very good application and some analysis having regard to the facts. Candidates should identify specific facts in each of the situation and apply the regulations accordingly. 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 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.

Indicative Content	**Marks**
Required: ***The Legal Aid Agency:*** Will grant legal aid, and issue a funding certificate. The certificate is known as the substantive certificate provided all relevant paperwork and documentation have been provided. ***Legal Representation:*** Differentiated from controlled work (work under a legal help). This is work undertaken under a public funding certificate. ***Certificates will:*** Have a costs limit and detail the scope of the work that may be undertaken.	Up to 3 marks To pass, candidates are required to demonstrate general knowledge of public funding certificates .

Any other relevant points cited in relation to scenario 1 e.g: ***Certificates that are current:*** Are described as live, 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 (LAA) request for further information or the legal representative has recommended that the certificate should be discharged or revoked. ***Certificates that are revoked:*** The client will become personally liable for the costs. The client may have to pay for the work their legal representative has done so far under the certificate. If a certificate is discharged or revoked a legal representative cannot carry out any further work under the certificate. ***The LAA will communicate with the client:*** If it is thinking of discharging or revoking a certificate and a client can object by writing to the LAA within a given period of time, usually 14 days. ***No longer entitled to legal aid for their case:*** Though they can reapply. Note, however, that the statutory charge applies.	Up to 6 marks 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.
Any other relevant points discussed in relation to scenario 2 e.g: ***Embargo (Notice to Show Cause):*** 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. ***Embargo (Show Cause) Under Funding Code:*** 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. ***Embargo Show Cause under LASPO (intention to withdraw a determination):*** 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". ***Show Cause Process under LASPO:*** For certificates issued after April 2013, Regulation 42(3) of the Civil Legal Aid (Procedures) Regulations 2012 provides for an equivalent of the show cause procedure under the funding code procedures through notification of an intention to withdraw a determination (see also section 8.36 of the Lord Chancellor's Guidance). The scheme is different in that, if the determination is withdrawn as a result of this procedure, the withdrawal takes place with effect from the initial notification of	Up to 8 marks 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.

intention (42(3)). That represents a difference from the position under the funding code in that: 1. 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; 2. 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. This means that if the show cause/notification of an intention to withdraw a determination is removed, 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 will not be able paid for any work following the date of show cause/intention to withdraw a determination. ***No Instructions from Client:*** If the client has failed to provide instructions to his solicitor, a show cause should be placed on the certificate giving the client the opportunity to contact his solicitor, failing which the certificate will be discharged. If the certificate is still live and there has been no show cause then a referral should be sent to the legal team for them to place a show cause on the certificate. The claim should be returned to the solicitor pending resolution of the show cause. ***Means Re-assessment:*** 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.	
Any other relevant points discussed in relation to scenario 3 e.g: ***Either by the firm or the LAA:*** Identify that discharge can be invoked by either the firm or the LAA. ***The LAA will communicate with the client:*** If it is thinking of discharging a certificate a client can object by writing to the LAA within a given period of time, usually 14 days. ***Consequence of discharge:*** If a certificate is discharged, the client does not have to pay for all the work the legal representative has done up to	Up to 7 marks 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.

the date the certificate was discharged. However, they will no longer be entitled to legal aid for their case, though they can reapply. 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. ***The relationship between the Provider and the client ceases upon notice of Discharge:*** 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. ***Discharge/Withdrawal for no claim on the fund:*** The process for discharging certificates for no claim on the fund is to discharge the certificate and process a nil final [£0] bill to correctly close the matter. This is not applicable in this scenario. ***Discharge/Withdrawal on Contribution Cases:*** Where the client is paying contributions on a case the certificate should be manually discharged to the date of the final work on the case, excluding billing. This ensures that the client receives notification that the certificate has been discharged and they can cease paying contributions. Cases where contributions have been paid in should be referred to a refund caseworker post bill paying for consideration.	

Question 8:	You are a costs lawyer working for a costs firm in Peterborough. You have been instructed by a solicitor who works for Brown and Bourne LLP, Mickey Inskip. Brown and Bourne LLP are a firm that conduct a large volume of road traffic accident cases under Conditional Fee Agreements (CFAs). Your instructing solicitor has taken over conduct of a matter from a fee earner that has now left. The lay client is Heather Scott. Heather was involved in a road traffic accident when she was a younger and, although at the time she appeared to have escaped serious injury, she now suffers with back and joint pain. On first review of inherited files Mickey always looks at the retainer and noted that another firm of solicitors had previously been instructed in Heather's case. The case, potentially worth seven figures, proceeded under a CFA entered into in October 2012 with Hammer and Hawksmore. That CFA provided for a success fee (of up to 100% of base costs) to be recovered from the losing party if they were successful. On 2 May 2015 the claimant signed a new CFA with Brown and Bourne LLP. On 4 May 2015 notice of change of solicitors was filed with the

	Court. Aware that the provisions of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force on the 1 April 2013, Mickey has requested that you provide him with an advice as to the transfer of CFAs. Prepare the body of a letter to Mr Inskip providing him with an advice as to the transfer of CFAs from one firm to another, having particular regard to the specific circumstances referred to.
Total Marks Attainable	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.

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

Indicative Content	**Marks**

Required: ***Circumstances when a CFA may need to be transferred:*** 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. ***Definition of assignment:*** 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 deed, same agreement, client not involved but can accept/reject, benefit and burden must pass. ***Novation:*** 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.	Up to 5 marks In order to achieve a pass, candidates must provide an explanation of assignment and novation.
Key priority for transferring a CFA: 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. ***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.	Up to 4 marks 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.
Credit any other points relevant to the scenario in relation to CFAs e.g ***Conditional Fee Agreements: introduced by Courts and Legal Services Act 1990:*** are contingency agreements or 'no win no fee agreements' for advocacy and litigation services.	Up to 5 marks To achieve a merit or distinction, candidates should identify that in this scenario there is a

Section 58(1) of the Courts and Legal Services Act 1990: 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. ***Section 58(3) of the Courts and Legal Services Act 1990:*** Requires that CFAs must comply with formalities, e.g they must be in writing. ***Section 58(4) of the Courts and Legal Services Act 1990:*** 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. ***Access to Justice Act 1999:*** amended section 58 CLSA 1990 to allow for recovery of success fee (section 27), ATE insurance premiums (section 29). ***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.	pre LASPO CFA and must show an ability to apply the rules to the scenario.
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	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.

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. ***Budana v Leeds Teaching Hospitals NHS Trust [2017]:*** 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. ***Roman v Axa Insurance [2019]:*** 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, wil not be transferable.	

Question 9:	You are a costs lawyer working in-house for a small firm of solicitors, Williams and Ansty. Your role has recently diversified and because of your previous experience you are now supervising the work done by both the costs team and the accounts department.

	The accounts team has, historically, had a very high turnover of staff. The firm have asked for you to consider upskilling some of the junior members of the costs team in order to try and ensure a more efficient service and to avoid having to recruit more staff. This means that you are required to train members of your established team. As part of the training materials that you are preparing you have created a mock client and file. The client is Danny Dwyer and he is on the system under reference DDD00440011. The file involves a claim by Mr Dwyer for personal injuries sustained arising from an accident at work. Mr Dwyer has been set up as a privately paying client. You now need to create some 'mock' letters to go on the hard copy file and are drafting notes in order to help you and your secretary prepare those. Your notes need to cover: a) the categories of money; b) why the firm keep and use separate bank accounts for client and office money; and c) why the firm cannot accept large sums of cash to pay bills or make payments on account. Provide the body of the set of notes on the particular issues listed. Your notes should cite any relevant rules.
Total Marks Attainable	20

Fail	up to 9.9	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.
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 reasons for keeping client and office money separate, the operation of the money laundering regulations and the accounts rules generally. There will be very good application to the scenario, i.e some explanation as to why it is important these issues be communicated clearly and the rules complied with. 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**
Required: Candidates must explain the categories of money, the requirement to keep client money safe and the regulations on money laundering, e.g: ***Rule 12 of the SRA Account Rules:*** Categories of money. Rule 12 divides money into two categories, namely: client money and office money. ***Rule 1.1 of the SRA Account Rules:*** 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. ***Legal Guidance, Proceeds Of Crime Act 2002 Part 7 - Money Laundering Offences:*** Money laundering is "the process by which criminal proceeds are sanitised to disguise their illicit origins". ***Relevant Legislation and Regulations:*** 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.	Up to 4 marks To achieve a pass, an explanation should be given as to what is client money and what money laundering is.
Credit any further discussion on the categories of money, e.g: ***Rule 12.1 of the SRA Account Rules:*** These rules do not apply to out-of-scope money, save to the limited extent specified in the rules. ***Rule 12.1(a) of the SRA Account Rules:*** "client money" - money held or received for a client or as trustee, and all other money which is not ***Rule 12.1 (b) of the SRA Account Rules:*** "office money" - money which belongs to you or your firm.	Up to 3 marks
Credit any further discussion on the need to keep separate bank accounts for client and office money, e.g:	Up to 8 marks

Rule 1.2 of the SRA Account Rules 2017: 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. ***Rule 14.1 of the SRA Accounts Rules 2017:*** 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. ***Rule 14.3 of the SRA Accounts Rules 2017:*** 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. ***Rule 14.5 of the SRA Accounts Rules 2017:*** Firms must only use the client account to hold client funds for a legal transaction. ***Rule 20.8 of the SRA Account Rules 2017:*** Money held for a particular client (or trust) must not be used for payments for another client. ***Rule 20.9 of the SRA Account Rules 2017:*** Client account should never be overdrawn except in the 2 listed circumstances. ***Transferring from Client to Office:*** 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. ***Rule 17.2 of the SRA Accounts Rules 2017:*** Firms must first send a bill before money is transferred from client to office.	
Credit any further discussion on money laundering regulations and offences explaining why the firm cannot accept large sums of cash, e.g: ***Regulation 27 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** 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 adequacy of documents or information previously obtained for the purposes of identification or verification.	Up to 9 marks

Regulation 28 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017: 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. ***Regulation 18 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** 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. ***Regulation 19 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** 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. ***Regulation 21 of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017:*** 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. ***The Proceeds of Crime Act 2002 (POCA):*** Contains the principal money laundering offences and defences. ***Section 327 of the Proceeds of Crime Act 2002:*** 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. ***Section 328 of the Proceeds of Crime Act 2002:*** 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. ***Section 329 of the Proceeds of Crime Act 2002:*** If a person acquires, uses or possesses property for which he has not given adequate consideration, he may be liable of an offence.	

Section 45 of the Serious Crime Act 2015: **I**ntroduced 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.	