

## August 2020: Marker Guidance: Unit 2

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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, with reference to appropriate authority, why the Costs Lawyer Code of Conduct prohibits costs lawyers from handling client money.
<b>Total Marks Attainable</b>  Fail = 0-2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+	5
<b>Indicative Content</b>	<b>Marks</b>
<b>Note to Markers:</b> The SRA Account rules changed in November 2019. However, because of the ACLT rules on learning new authority/changes to the law and the consequence of COVID 19 delaying the examination sitting, the second part of the guidance set out below should be considered where candidates have referred to the old account rules.	
<b>Part A</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 2.1(a) of the SRA Account Rules 2019:</b> "Client money" includes money held or received relating to regulated services delivered to a client.</p> <p><b>Rule 2.1(b) of the SRA Account Rules 2019:</b> "Client money" includes money held or received on behalf of a third party in relation to regulated services (such as money held as agent, stakeholder or held to the sender's order).</p> <p><b>Rule 2.1(c) of the SRA Account Rules 2019:</b> "Client money" includes money held or received as a trustee or as the holder of a specified office or appointment, such as donee of a power of attorney, Court of Protection deputy or trustee of an occupational pension scheme.</p> <p><b>Rule 2.1(d) of the SRA Account Rules 2019:</b> "Client money" includes money held or received in respect of fees and any</p>	Up to 2 marks  A pass must refer to a definition of client money.

<p>unpaid disbursements if held or received prior to delivery of a bill for the same.</p> <p><b>CILEx Account Rules:</b> define client money as money beneficially owned by anyone other than the Authorised Entity.</p>	
<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>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>Up to 3 marks</p> <p>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 best interest of the client.</p>
<p><b>May also include a discussion on the definition of “proper professional fees” and disbursements e.g:</b></p> <p><b>CLSB Guidance Note Handling Client Money (Principle 3.6):</b> Fees incurred on having complied with a client instruction, made up of payment for services provided; and disbursements paid on behalf of the client.</p> <p><b>CLSB Guidance Note Handling Client Money (Principle 3.6):</b> A disbursement is a sum that a Costs Lawyer spends on behalf of their client including the VAT element. Disbursements include, but are not limited to, court fees, counsel's fees, travel costs, postal costs (if exceptional sum e.g. courier), photocopying costs (if exceptional sum).</p> <p><b>CLSB Guidance Note Handling Client Money (Principle 3.6):</b> Disbursements do not include hourly rates, telephone calls</p>	<p>Up to 1 mark</p>

made or received, taxes made or received, or general office overheads.	
<b>Part B</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>	<p>Up to 2 marks</p> <p>A pass must refer to a definition of client money.</p>
<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> <p><b>Section 1 LSA 07:</b> 8 regulatory objectives.</p>	<p>Up to 3 marks</p> <p>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</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>act in the best interest of the client.</p>
<p><b>May also include a discussion on the definition of “proper professional fees” and disbursements e.g:</b></p> <p><b>CLSB Guidance Note Handling Client Money (Principle 3.6):</b> Fees incurred on having complied with a client instruction, made up of payment for services provided; and disbursements paid on behalf of the client.</p> <p><b>CLSB Guidance Note Handling Client Money (Principle 3.6):</b> A disbursement is a sum that a Costs Lawyer spends on behalf of their client including the VAT element. Disbursements include, but are not limited to, court fees, counsel's fees, travel costs, postal costs (if exceptional sum e.g. courier), photocopying costs (if exceptional sum).</p> <p><b>CLSB Guidance Note Handling Client Money (Principle 3.6):</b> Disbursements do not include hourly rates, telephone calls made or received, faxes made or received, or general office overheads.</p>	<p>Up to 1 mark</p>

<p><b>Question 2:</b></p>	<p>Explain when a lawyer may terminate a retainer. Write a summary, with reference to any relevant law, briefly outlining the implications should a retainer be wrongfully terminated by a lawyer.</p>
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9 Pass = 5+ Merit = 6+ 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>Up to 2 marks</p> <p>To pass a response must include an explanation of what a retainer is</p>

<p><b><i>Underwood, Son v Piper Lewis [1894]:</i></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><b>Candidate should refer to when a solicitor may terminate a retainer (good reason and reasonable notice) e.g:</b></p> <p><b><i>Solicitors Act 1974 Section 65 (1)&amp;(2):</i></b> Client's failure to make a payment on account of costs.</p> <p><b><i>Wong v Vizards (a firm) [1997]:</i></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><b><i>Warmingtons v McMurray [1936] 2 All ER 745:</i></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><i>Hilton v Barker Booth &amp; Eastwood [2005]:</i></b> Conflict of interest/Professional embarrassment</p> <p><b><i>Re Jones [1896]:</i></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><i>Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owens &amp; Law Society (intervener) (Second Appeal)[2010]:</i></b> Requirement to act improperly</p> <p><b><i>Gill v Heer Manak Solicitors [2018]:</i></b> Reasonable notice will be case sensitive.</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>Candidate should also raise some of the following points on the implications of wrongful termination by a solicitor:</b></p> <p><b><i>Re Romer &amp; Haslam [1893] 2 QB 286:</i></b> If a solicitor wrongfully terminates the retainer, he is not entitled to be paid.</p> <p><b><i>Wild v Simpson [1919] 2 KB 544:</i></b> Where a solicitor terminates a retainer unreasonably he may not be entitled to payment even on a quantum meruit basis.</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</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>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>Up to 2 marks</p> <p>To pass a response must demonstrate an understanding of the nature and form of a retainer.</p>

<p><b>Question 3:</b></p>	<p>Distinguish between novation and assignment and explain why these concepts are important when determining how a pre-LASPO CFA has been transferred.</p>	
<p><b>Total Marks Attainable</b></p> <p>Fail = 0-4.9  Pass = 5+  Merit = 6+  Distinction = 7+</p>		<p>10</p>
<p><b>Indicative Content</b></p>		<p><b>Marks</b></p>
<p><b>Required (assignment should be distinguished from novation e.g):</b></p> <p><b>Definition of assignment:</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. (Two parties, in writing, by 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</p>		<p>Up to 5 marks</p> <p>A pass must include the demonstration that candidates understand the distinction between novation and assignment.</p>

<p>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. (Tri party agreement, client involved, different agreement, only benefit passes).</p>	
<p><b>Credit the identification of the key priority for transferring a CFA/a CFA being assigned e.g:</b></p> <p><b><u>Section 27 Access to Justice Act 1999:</u></b> amended section 58 CLSA 1990 to allow for recovery of success fee.</p> <p><b><u>Section 29 Access to Justice Act 1999:</u></b> includes a similar provision to allow for recovery of ATE insurance premiums.</p> <p><b><u>Section 44 of the Legal Aid, Sentencing &amp; Punishment of Offenders Act 2012:</u></b> abolished recovery of success fees.</p> <p><b><u>Section 46 of Legal Aid, Sentencing &amp; Punishment of Offenders Act 2012:</u></b> abolished recovery of ATE premiums.</p> <p><b><u>CPR 48.2(1)(a):</u></b> 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: insolvency related cases; publication and privacy proceedings; and mesothelioma cases.</p>	<p>Up to 4 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.</p>
<p><b>Candidates should refer to additional authority e.g:</b></p> <p><b><u>Halsall v Brizell [1957]:</u></b> The party could not take the benefit under a contract without the corresponding burden.</p> <p><b><u>Jenkins v Young Brothers Transport [2006]:</u></b> Where the client was loyally following the solicitor as he 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 and CFA validly assigned.</p> <p><b><u>Davies v Jones [2009]:</u></b> re-iterated that the burden of a contract cannot be assigned.</p> <p><b><u>Jones v Spire Healthcare [2015]:</u></b> At first instance, it was found that the first CFA had deemed to be at an end and the subsequent CFA was a new retainer so a novation had taken place. The existing rights under the CFA were not transferrable.</p> <p><b><u>Budana v Leeds Teaching Hospitals [2016]:</u></b> Telling the client the injury department was closing and seeking no further</p>	<p>Up to 4 marks</p> <p>To achieve a merit or distinction, candidates will refer to several decisions made by the courts on how the statutory provisions operate.</p>

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 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.

**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, will not be transferable.

**Question 4:** Explain the provisions contained within sections 59-65 of the Arbitration Act 1996.

**Total Marks Attainable**

15

Fail = 0-7.4

Pass = 7.5+ Merit = 9+ Distinction = 10.5+	
Indicative Content	Marks
<p><b>Required:</b></p> <p><b>Sections 59-65 of the <u>Arbitration Act 1996</u>:</b> These sections set out the rules in relation to costs of arbitration.</p> <p><b>Section 59 of the <u>Arbitration Act 1996</u>:</b> Costs of the arbitration.</p> <p><b>Section 60 of the <u>Arbitration Act 1996</u>:</b> Agreement to pay costs in any event.</p> <p><b>Section 61 of the <u>Arbitration Act 1996</u>:</b> Award of costs.</p> <p><b>Section 62 of the <u>Arbitration Act 1996</u>:</b> Effect of agreement or award about costs.</p> <p><b>Section 63 of the <u>Arbitration Act 1996</u>:</b> The recoverable costs of the arbitration.</p> <p><b>Section 64 of the <u>Arbitration Act 1996</u>:</b> Recoverable fees and expenses of arbitrators.</p> <p><b>Section 65 of the <u>Arbitration Act 1996</u>:</b> Power to limit recoverable costs.</p>	5 marks  To achieve a pass candidates should describe the provisions within the question, albeit in brief.
<p><b>Credit any points advanced on the framework of the assessment procedure under the <u>Arbitration Act 1996</u> e.g:</b></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>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 whole or part of the arbitration, can only be valid in the arbitration if made after the dispute arose.</p>	12 marks  For a mark higher than a pass, candidates should include more detail about each of the sections demonstrating a holistic understanding of the legislation.

**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. Challenges to an award are possible, which would also go to the court. Section 67 (as to jurisdiction), section 68 (serious irregularity), and section 69 (point of law).

**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.

**An award:** is effectively a final order and, under section 66(1) of the Arbitration Act 1996, can therefore be enforced with the leave of the court if a party fails to comply with it.

<p><b>Section 28 (2) of the Arbitration Act 1996:</b> if a party applies to the court to consider the fees, the court may make any adjustments it sees fit.</p>	
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## SECTION B (choice of 3 out of 5 – 60%)

### Question 5:

You work in-house for a small firm of solicitors, Arnold and Timmons LLP. One of the solicitors in that firm, Mr Tony Bacon, has been instructed by Mr Amare Kimathi. Mr Kimathi is the proprietor of a commercial lettings company. For twelve years Mr Kimathi has been instructing Heath and Rogers LLP for his business purposes. However, recently he has encountered a number of problems with that firm which include problems with one of the assistant solicitors, Miss Penelope Church.

Mr Kimathi became concerned when the firm failed to draft a lease in a timely manner. This had serious implications for Mr Kimathi and resulted in the loss of rental income and subsequently proceedings being issued against his firm. Miss Church was dealing with the proceedings but for some time she hadn't returned any of Mr Kimathi's calls or emails.

Mr Kimathi made a formal complaint to the senior partner, Mr Heath, at Miss Church's firm. Mr Kimathi met with Mr Heath in their office to discuss the complaint. Four days later Mr Kimathi received a letter through the post from Mr Heath advising him that the firm was no longer going to act on his behalf. A gross sum bill for a very large sum of money was attached to the letter, it was headed 'final bill'.

Mr Bacon would like to accept Mr Kimathi's instructions to continue with the litigation. He has also agreed to advise Mr Kimathi in relation to his liability to pay the final bill rendered by Miss Church. Mr Bacon does not have sufficient knowledge as to whether the previous solicitors acted properly in terminating their retainer with Mr Kimathi and is seeking your opinion. Mr Kimathi has not been able to provide a lot of information because his own records are disorganised. For example, he is not able to advise whether there was ever a written retainer and he does not have one within his papers.

Prepare the body of an email of advice to Mr Bacon advising when a retainer between a solicitor and client may be terminated and the potential costs implications of wrongful termination. The memo should also include details of what is meant by a final bill and any right Mr Kimathi has to obtain a more detailed breakdown of the costs claimed by Miss Church.

**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 retainer is the contract for service, retainers can only be terminated by a lawyer with good cause having given reasonable notice, what may amount to good cause, categories of bills, statute bills and the right of a client to request a detailed bill. Candidates will demonstrate a good depth of knowledge of the subject (i.e. a good understanding of the Solicitors Act 1974) 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 Solicitors Act 1974) 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 two main points that need addressing (termination and final bills) and candidates will show a clear understanding as to how the common law and legislation would apply in this scenario. 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 not have been good cause or reasonable notice, so the retainer may have been terminated wrongly. Candidates may also observe that payment may be unlikely if the court makes such a finding. Candidates will provide an excellent advice setting out the right to request a detailed bill and the need for the bill to meet statutory requirements in order for it to be actionable. 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>Note:</b> Candidates may not achieve more than 10 marks for discussing termination of retainers.</p>	
<p><b>Required a discussion on when a retainer between a solicitor and client may be terminated 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><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>Up to 6 Marks</p>
<p><b>Discussion on the potential costs implications of wrongful termination e.g:</b></p> <p><b>Re Romer &amp; Haslam [1893]:</b> If a solicitor wrongfully terminates the retainer, he is not entitled to be paid.</p> <p><b>Wild v Simpson [1919]:</b> Where a solicitor terminates a retainer unreasonably he may not be entitled to payment even on a quantum meruit basis.</p>	<p>Up to 2 Marks</p>
<p><b>Credit any points on the nature of a retainer e.g:</b></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 4 Marks</p>

**J H Milner & Son v Percy Bilton Ltd [1966]:** A retainer serves as the right to payment & is fundamental to the recovery of costs where no retainer, no entitlement to charge.

**Groom v Crocker [1939]:** Can be in writing, made orally, or implied by conduct

**Parrott v Etchells [1839]:** Leaving files at a solicitor's office may be sufficient to establish a retainer

**Section 58(3) of the Courts and Legal Services Act 1990:** Some agreements must follow specific formalities, such as a CFA which needs to be in writing.

**Section 13 of the Supply of Goods and Services Act 1982:** 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

**The SRA Code of Conduct:** has the effect of implying terms into the retainer between solicitor and client. Clients will be treated fairly, in deciding to terminate instructions solicitors will comply with the law and code and solicitors will provide competent and timely service.

**Note: Candidates may not achieve more than 10 marks for discussing bills.**

**Required a discussion on the meaning of a final bill e.g:**

Up to 8 marks

**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.

**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.

**Section 69(2) of the Solicitor's Act 1974:** is an invoice which is fully compliant with the requirements of s 69(2) of the Solicitor's Act 1974 (signed and delivered) is a statute bill. A solicitor can enforce them and a client can request an assessment of them. They 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).

**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.

**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]:** a statute bill with insufficient information may not be considered a statute bill, but may be deemed to be a request for payment on account.

**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.

**Bari v Rosen (trading as RA Rosen & Co Solicitors) [2012]:** 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 statute bills must include disbursements.

**Credit a discussion on the meaning of any right a client has to obtain a more detailed breakdown of the costs claimed:**

**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.

**A gross sum bill:** will simply contain the total to be paid to the lawyer, without any breakdown of the figure.

**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.

Up to 3 marks

To achieve more than a pass candidates must discuss the option to obtain a detailed bill as well as what would make a bill 'final'.

<p><b>Detailed bill following gross sum:</b> the gross sum bill is no longer effective and the detailed bill can therefore be for a different sum than the original bill.</p>	
<p><b>Credit a discussion on the different types of invoices e.g:</b></p> <p><b>Interim invoices on account:</b> 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.</p> <p><b>Section 65(2) of the Solicitors Act 1974:</b> 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.</p> <p><b>Turner &amp; Co v O Palomo SA [2000]:</b> 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.</p>	<p>Up to 2 Marks</p>

<p><b>Question 6:</b></p>	<p>You are a Costs Lawyer working in-house for a firm of solicitors in Manchester. The firm specialises in clinical negligence matters but a client, Cecily Brown, has asked her solicitor, Derek Tupper, for some advice in respect of a potential claim outside his normal area of expertise. The potential claim is for disability discrimination which she believes her six-year-old son, Kyle, has suffered.</p> <p>Cecily believes that Manchester Little Priory Primary School (MLPPS) discriminated against Kyle when making arrangements for deciding who will get a place in the school and the admissions process because Kyle has spinal cord injury.</p> <p>Cecily has instructed Mr Tupper that she had spent some time online in chat rooms and has been warned by another user of the chat room that she should be cautious in bringing a claim because of the potential costs consequences. Cecily would therefore like advice on the power of lower tribunals to make an order for costs</p>
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	<p>and in what circumstances they may make an order that she pays the costs.</p> <p>Mr Tupper does not consider himself to have sufficient knowledge to advise Ms Brown. However, he knows that you have had experience of such matters and has asked you to assist.</p> <p>Prepare the body of an email to Ms Brown setting out the rules in the lower tier tribunals in respect of costs and specifically when a costs order may be made against a claimant.</p>
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**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 (Health, Education and Social Care Chamber), it is not one of the first tier tribunals that cannot make orders for costs, the framework of provisions in the <u>Tribunals, Courts and Enforcement Act 2007</u> and the relevant rules specific to this tribunal Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008. 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 framework for assessment) 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**

<p><b>Required: Candidates must demonstrate knowledge of the tribunal structure (candidates are not required to list all chambers).</b></p> <p><b><i>There are seven first tier tribunals:</i></b> 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><b><i>Relevant rules include:</i></b> 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><b><i>Tribunals, Courts and Enforcement Act 2007:</i></b> Tribunals governed by TCEA 2007, but each chamber is also governed by its own set of Procedure Rules</p> <p><b><i>Section 29 (1) of the Tribunals, Courts and Enforcement Act 2007:</i></b> costs shall be in the discretion of the tribunal.</p> <p><b><i>Section 29 (2) of the Tribunals, Courts and Enforcement Act 2007:</i></b> the tribunal has full power to determine by whom and to what extent costs are to be paid.</p> <p><b><i>Section 29 (3) of the Tribunals, Courts and Enforcement Act 2007:</i></b> subsections (1) and (2) have effect subject to Tribunal Procedure Rules.</p> <p><b><i>Section 29(4) of the Tribunals Courts and Enforcement Act 2007:</i></b> orders can be made against a representative.</p> <p><b><i>Section 29(5) of the Tribunals Courts and Enforcement Act 2007:</i></b> 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.</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><b>Rule 10 of the Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008:</b> The First Tier Tribunal Social Entitlement Chamber has no power to award costs.</p> <p><b>Rule 10 of the Tribunal Procedure (First Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008:</b> The First Tier Tribunal Social Entitlement Chamber has no power to award costs.</p> <p><b>Other first tier tribunals:</b> May make orders in respect of wasted costs and unreasonable conduct.</p> <p><b>Rule 10(1) of the Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008:</b> 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.</p> <p><b>Unreasonable Conduct:</b> 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.</p> <p><b>Rule 10(1)(a) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009:</b> May make orders for wasted costs (under s.29(4) TCEA 2007), if the tribunal considers that a party has acted unreasonably in bringing, defending or conducting proceedings or the proceedings have been allocated as a Complex case under rule 23 and prescribed circumstances apply.</p>	<p>Up to 6 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>
<p><b>Candidate should refer to any specific authority on wasted costs orders, e.g:</b></p> <p><b>Rule 10(3) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009:</b> 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.</p> <p><b>Rule 10(4) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009:</b> An application for an order under paragraph (1) may be made at any time during the</p>	<p>Up to 8 marks</p>

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.

**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:**

Up to 2 marks

**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.

**Question 7:**

Harpers LLP is a small high street firm with a Legal Aid franchise. The firm provides civil legal aid. You are a trainee costs lawyer in the firm and have been passed the file of Abdul Muzanni, the claimant in an action for unlawful detention. Sophia Harper, a senior partner at the firm, represented Mr Muzanni.

Abdul Muzanni is an Afghan national whose parents died when he was three years old. He was then cared for by his grandmother. He came to the UK in 2011 after his grandmother died. At the time he was 11 years old. Upon arrival into the UK he claimed asylum. The claimant's asylum claim was refused on the 14 November 2012 by the First Tier Tribunal. Permission to appeal that decision was also refused. It was noted that the claimant would be at real risk of serious harm in Kabul and that removal would breach the UK's obligations under Article 15C Qualification Directive, the judge found that the claimant should be returned to Afghanistan. Permission to appeal was initially refused. However, ultimately, after protracted proceedings, leave to remain was granted.

Following the outcome of the proceedings, Mr Muzanni commenced an action for unlawful detention against the Secretary of State for the Home Department. Judicial review proceedings were issued on the 10 February 2016 and the matter concluded with an apology with "no order as to costs". The matter was funded by the LAA (Certificate Number HOP697078A-A2) and the certificate was issued on the 1 February 2017. There is a notice to show cause on the file covering a period of two weeks in relation to a reassessment of means. The certificate appears to remain live.

	<p>The profit costs recorded on the file total £10,370 exclusive of VAT. 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 summary of the next steps, how the costs in the claim should be assessed and the impact of the notice to show cause.</p>
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<b>Total Marks Attainable</b>	20
Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+	

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 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.
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 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.
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.

<b>Indicative Content</b>	<b>Marks</b>
<p><b>Required: to pass candidates are required to demonstrate general knowledge of public funding certificates e.g</b></p> <p><b>Legal Representation:</b> Differentiated from controlled work (work under a legal help). This is work undertaken under a public funding certificate.</p>	<p>Up to 4 Marks</p> <p>An explanation should be given as to the nature of a funding certificate</p>

<p><b>Certificates will:</b> Have a costs limit and detail the scope of the work that may be undertaken.</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>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>that has been discharged</p>
<p><b>Credit discussion of the notice to show cause e.g:</b></p> <p><b>Notice to Show Cause:</b> Work should not be claimed for when a "show cause" notice is in place. A "show cause" notice puts an embargo on legal aid certificates until clients are able to "show cause" why it should not be revoked or discharged.</p> <p><b>Show Cause Under Funding Code:</b> Embargo placed on certificate and no work can be claimed for date that show cause is in place even if show cause is subsequently removed</p> <p><b>Show Cause under LASPO (intention to withdraw a determination):</b> If show cause is removed then funding will be continuous (as though show cause was never placed on the certificate). If 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><b>Funding code procedures C55.3:</b> Rule C55.3 of the procedures states that no further work can be carried out following a show cause being placed on a certificate and, there is no provision that it will be covered if the show cause is subsequently lifted. Work undertaken post show is not claimable subject to the following exceptions:</p> <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> Work pending appeal, where permission granted to protect clients interests and arising out of the proceedings</li> </ul>	<p>Up to 6 Marks</p>

- Successful appeal and rescinding  
Discharge/revocation
- Closing letters

**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 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 we can allow work to 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.

These provisions are not retrospective and only apply to certificates issued under LASPO

**No Instructions from Client:** If the client has failed to provide instructions to their solicitors a show cause should be placed on the certificate giving the client the opportunity to contact their solicitors, 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 solicitors pending resolution of the show cause.

**Means Reassessment:** 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

**Candidates were asked to explain how the costs would be assessed e.g:**

**CCMS:** Before any bill can be submitted for payment, the case must be discharged and the outcome codes completed on CCMS. The outcome codes are very similar to the codes used on page 2 of the paper Claim 1/1As. Once the case has been discharged and the outcome codes completed, the final bill option is made available on CCMS.

**All licensed work (work under a certificate):** Is assessed unless a family fixed fee applies. Assessable costs under £2500 excluding VAT are assessed by the LAA on a Claim 1 form, or where a family fixed fee is included this is on Claim 1A form.

**Assessable costs over £2500 excluding VAT:** Are assessed by the court under Part 47 of the Civil Procedure Rules (detailed assessment). This is under provisional assessment, which is separate to inter partes provisional assessment (CPR 47.15) and is provided under separate procedure (CPR 47.18). This provisional assessment process for legal aid costs has existed since before the introduction of the Civil Procedure Rules in 1999.

**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.

**The original assessed bill is returned with N253:** "Notice of Amount Allowed on Provisional Assessment"

**The solicitor must notify:** Counsel of any reduction

**Up to 8 Marks**

To achieve a distinction candidates should demonstrate a sound ability to apply the law to the facts of the scenarios presented together with knowledge of how funding certificates operate generally.

**If the provider objects:** They can request a hearing within 14 days of receiving notice of provisional assessment. Although it is common for written objections to be sent.

**If the provider objects to the outcome of a hearing/response to written objections:** They must then follow the same route as other costs under Part 47, and appeal under Part 52.

**If the provider consents:** 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).

**The EX80a/b is approved by the court and returned:** The bill of costs is kept on the court file.

**A claim for payment of the bill of costs is sent to the LAA using a Claim 1 or Claim 1A form:** This must be sent with:

- A copy the bill of costs
- Counsel's fee notes
- Expert's invoices and disbursement vouchers

Any other supporting evidence required (e.g. copies of court orders made for DNA and Drug testing)

**Candidates should have considered the work claimable following Discharge of the certificate e.g**

Up to 4 Marks

**Where the costs are to be assessed by the LAA:** only the reasonable costs in preparing the claim and the checking and signing the Claim form will be recoverable. Putting the file in order, instructing a Costs Draftsman to prepare the claim and any correspondence arising in this respect would not be recoverable. Please note the comments on bill preparation and escape case where the costs are subject to fixed fee see 13.4.

**Where the costs have been subject to Detailed Assessment by the Court, what can legitimately be claimed as fee earner case specific functions may include:**

1. Completing N258A (Request for a Detailed Assessment),
2. Letter out to Court,
3. Diarising,
4. Considering provisional assessment,
5. Casting up Bill of Costs

<p>6. Completing EX80A 7. Letter to Court</p> <p><b>Where the court allows these costs on assessment they will not usually be queried:</b> The exceptions are items 4 and 5 which are dependent on whether there has been a reduction on provisional assessment.</p>	
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<p><b>Question 8:</b></p>	<p>You work for the Family Law Agency, an SRA regulated firm specialising in family law. You have been approached by Mr Alfred Hitch who is a senior partner at the firm. He has contacted you in respect of a recent decision made by the High Court that there is no basis to ban the use of third-party litigation funding in divorce cases.</p> <p>Mr Hitch told you that in that recent case it had been argued that these funding arrangements were unlawful because they were contrary to the public policy against the champertous maintenance of litigation, and specifically the important issue of public policy of whether third-party litigation funding should be permitted in family proceedings. An analogy had been drawn with the exclusion of family proceedings from the rules allowing conditional fee agreements (CFAs).</p> <p>However, Mrs Justice Torbay found that the fact CFAs are banned in family cases does not mean third-party litigation funding should be too. Torbay J said the analogy with CFAs was misplaced because, unlike with CFAs, the lawyers did not have a financial stake in the outcome.</p> <p>Whilst funding of matters using third party funders is now a regular occurrence in substantial commercial litigation and international arbitration, Mr Hitch is aware of the theory but has little experience of the practice of third party funded actions. He believes this is something fee earners at the firm may be obliged to provide advice on and is therefore seeking you provide some guidance.</p> <p>Prepare a summary of advice for Mr Hitch of the circumstances in which a litigant might wish to use third party funding, the ethical issues that might arise, the type of proceedings for which funding might be available and what that funding might cover.</p>
<p><b>Total Marks Attainable</b></p>	<p>20</p>

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 framework governing third party funding, 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 what third party funding is; the concept of maintenance and champerty; and what third party funding may cover. Candidates should refer to the developments in the common law to describe the change in attitude towards this type of funding. Candidates MAY have commented on the lack of legislative framework of this form of funding. 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 third party funding) with very good application and some analysis having regard to the facts. Candidates should identify that, in this scenario, the party may be considered to be commercially alert and therefore there is likelihood that he will understand the implications of such a funding arrangements. 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. 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:</b></p> <p><b>Definition:</b> 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 your case in return for a share of any sum of money awarded in damages if you win your case.</p>	<p>Up to 2 marks</p> <p>In order to achieve a pass, candidates must (albeit not explicitly) describe what is meant by third party funding.</p>

<p><b>Credit a discussion on the ethical issues that might arise 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>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.</p> <p><b>Chitty 28 Ed Vol 1 17 – 054:</b> Champerty 'occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit'.</p> <p><b>Section 13 The Criminal Law Act 1967:</b> Abolished the criminal offences and torts of champerty and maintenance.</p> <p><b>Section 14 The Criminal Law Act 1967:</b> Agreements may still be unenforceable on the grounds of public policy.</p>	<p>Up to 6 marks</p> <p>To achieve a merit or distinction, candidates should not simply cite the relevant rules and principles but must show an ability to apply the rules to the scenario.</p>
<p><b>Credit discussion on the type of proceedings for which funding might be available and what that funding might cover e.g:</b></p> <p><b>Success fees and premiums have now ceased to be recoverable:</b> so litigation funding by a third party may be a more attractive option in some cases.</p> <p><b>Claimants will have the resources:</b> to be represented by highly experienced solicitors and counsel.</p> <p><b>The minimum size of claim:</b> most litigation funders will fund is approximately £350,000. There needs to be sufficient damages available to make the time and effort invested worth it.</p> <p><b>The minimum eligibility criteria:</b> for considering funding of a claim are a defendant who can pay the amount claimed and good legal merits both in relation to liability and quantum.</p>	<p>Up to 6 marks</p> <p>To achieve a merit or distinction, candidates should not simply cite the relevant rules and principles but must show an ability to apply the rules to the scenario.</p>

<p><b>Seear v Lawson (1880):</b> Third Party funding is permitted in matters arising out of insolvencies.</p> <p><b>Factortame 2002:</b> Arrangement for third party funders to cover the costs of forensic accountants was held to be lawful. The Claimant's remained in control of the conduct of the litigation.</p>	
<p><b>Credit any other relevant law cited to illustrate the change of attitude towards this type of funding e.g:</b></p> <p><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.</p> <p><b>Section 58 CLSA 1990:</b> Contingency Fee Agreements (CFAs) expressly permitted by statute. These agreements would have historically been deemed champertous.</p> <p><b>Section 45 LASPO 2012:</b> A new form of contingency fee agreement was permitted by statute.</p> <p><b>Akin 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 1 Ltd [2011]:</b> Third party funders could be liable to the full extent of the claimant's costs.</p> <p><b>Association of Litigation Funders:</b> Established in 2011, they have a voluntary code of conduct.</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>Restrictions:</b> on champerty and maintenance still remain.</p> <p><b>Courts decide on the facts:</b> Of each litigation funding agreement whether the contract is unenforceable on the grounds of public policy.</p>	<p>Up to 8 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</p>

<p><b>Question 9:</b></p>	<p>You are a costs lawyer and have been recruited as a consultant</p>
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to an advisory panel to provide advice on the setting up of an SRA regulated firm of solicitors. The proposed new firm will specialise in catastrophic injury cases. You were recruited because of your costs knowledge but also because of your previous experience in the legal accounts and compliance department at a large international law firm.

The panel are assisting 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. Specifically, your role is to advise on the risks and regulations associated with going into practise. You need to ensure that the business proposal adequately demonstrates 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 must be complied with. You also need to provide details about how client money should be handled.

Prepare a summary that you will include in the business proposal on the aspects detailed above.

**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 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.	
<p>Fail = 0-9.9  Pass = 10+  Merit = 12+  Distinction = 14+</p>			
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</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>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</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 unless the identity of that 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>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>

**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.

**Candidates should discuss how duties under money laundering regulations can be discharged and managed, e.g:**

**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.

Up to 3 marks

**Candidates may discuss the principal money laundering offences, e.g:**

Up to 3 marks

***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:*** 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.