

June 16: 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 what client money is and what the Costs Lawyer Code of Conduct and Practising Rules provide in relation to client money.
Total Marks Attainable Fail = 0–2.4 Pass = 2.5+ Merit = 3+ Distinction = 3.5+	5
Indicative Content	Marks
<p>Principle 3 of the Costs Lawyer Code of Conduct generally is about acting in the best interests of the client</p> <p>Principle 3.6 of the Costs Lawyer Code of Conduct: A CL must not accept client money save for disbursements and payment of your proper professional fees.</p>	<p>Up to 2 Marks</p> <p>A pass must include reference to the CLSB code of conduct.</p>
<p>There is no mention of the CLs handling client money in the CLSB Practising Rules.</p> <p>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>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.</p> <p>Rule 12 of the SRA Account Rules: Categories of money</p> <p>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:</p> <p>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</p> <p>Rule 12.1 (b) of the SRA Account Rules: "office money" - money which belongs to you or your firm.</p> <p>CILEx Account Rules: Client Money: money beneficially owned by anyone other than the Authorised Entity.</p> <p>No entity regulation by the CLSB – this may have led to a change in rules in handling client money.</p> <p>LSB have undertaken a lot of research on client money and have even proposed reducing the number of firms entitled to hold client money.</p>	<p>Up to 4</p> <p>To achieve more than a pass candidates must not simply cite the examples but should show a holistic understanding of the rules including an appreciation (even if not explicitly stated) of the requirement to act in the best interest of the client.</p>

Question 2:	Explain the nature of a lien and how a solicitor with unpaid fees may have a potential lien over a client's property. Write a summary, considering any relevant law and discussing briefly how the lien may be exercised.
Total Marks Attainable Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+	10
Indicative Content	Marks
A lien is a right to keep possession of property belonging to another person until a debt owed by that person is discharged.	1 Mark A pass must include an explanation of what a lien is.
A solicitor with unpaid fees has a potential lien over the client's property in one of two ways: Common law lien or a statutory lien under <u>section 73 of the Solicitors Act 1974</u>	Up to 2 Marks
<p>Any other relevant point to describe liens (credit any of the following and/or any other relevant point):</p> <p><u>Common Law Liens</u></p> <p>A Retaining Lien: The right for a solicitor to retain a client's property (e.g file of papers) in their possession until they are paid their outstanding fees.</p> <p><i>Leo Abse and Cohen v Evan G Jones Builders Limited [1984] WL 282817:</i> Where Eveleigh LJ explained that a solicitor who is discharged by clients in a case they are entitled to hold the papers until his fees are paid.</p> <p><i>Loescher v Dean [1950] Ch 491:</i> Sets out that as long as the property over which the lien is to be exercised comes into the solicitor's possession through their position, then they have a lien over that property until their fees are discharged.</p> <p><i>Withers LLP v Rybak [2011] EWHC 1151 (Ch):</i> Case law on retaining liens. Confirms that the definition of property covers monies held in client account.</p> <p>A preserving Lien: The right to ask a court to order that personal property recovered under a judgment, he has helped to obtain, stand as security for his costs.</p> <p><i>Halvanon Insurance Co Ltd v Central Reinsurance Corporation and another [1988] 3All ER 857:</i> Application for a preserving lien the solicitors will need to show:</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> they were instructed by the party; <input checked="" type="checkbox"/> that they have unpaid fees owing, 	Up to 8 Marks To achieve more than a pass candidates must not simply cite the examples but should show a holistic understanding of the operation of liens.

<ul style="list-style-type: none"> ☑ that the property in respect of which they seek an order is property recovered, or preserved, or the proceeds of a judgment; and ☑ it was recovered as a result of their work. <p>Statutory Liens</p> <p>Section 73 of the Solicitors Act 1974: any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceedings may at any time:</p> <ul style="list-style-type: none"> ☑ declare the solicitor 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; and ☑ make such orders for the assessment of those costs and for raising money to pay or for the paying of them out of the property recovered or preserved as the court thinks fit. <p>To rely on this lien the solicitor must have been instructed by the party to prosecute or defend the proceedings and have unpaid costs. This lien also extends to property recovered or preserved. This legislation applies to solicitors only.</p>	
--	--

Question 3:	Explain the advantages and disadvantages of third party funding with specific reference to champerty and maintenance.
<p>Total Marks Attainable</p> <p>Fail = 0-4.9 Pass = 5+ Merit = 6+ Distinction = 7+</p>	10
Indicative Content	Marks
<p>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>British Cash & Parcel Conveyors v Lamson. Store Service Co [1908] 1 KB 1006: 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>Chitty 28 Ed Vol 117 – 054: Champerty ‘occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit’.</p>	<p>Up to 3 Marks</p> <p>A pass must include the demonstration that the candidate understands what third party funding, maintenance and champerty are even if they are not explicitly defined.</p>

<p>Any other relevant points to third party funding (credit any of the following and/or any other relevant point):</p> <p>To achieve a merit or distinction candidates must state specifically a number of advantages and disadvantages supported by a range of authority.</p> <p><u>Advantages</u></p> <ul style="list-style-type: none"> ☑ Agreements are structured so that the client retains full control over the way in which they conduct their action. ☑ Now that success fees and premiums have ceased to be recoverable, litigation funding by a third party may be a more attractive option in some cases. ☑ Claimants will have the resources to be represented by highly experienced solicitors and counsel. ☑ ALS code <p><u>Disadvantages</u></p> <ul style="list-style-type: none"> ☑ Restrictions 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 ☑ The minimum size of claim 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. ☑ In addition to value, the minimum eligibility criteria for considering funding of a claim are: <ul style="list-style-type: none"> ☑ A defendant who can pay the amount claimed ☑ Good legal merits both in relation to liability and quantum 	<p>Up to 5 Marks</p>
<p>Credit any other relevant law cited e.g:</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>Seear v Lawson (1880): Third Party funding is permitted in matters arising out of insolvencies.</p> <p>Section 13 The Criminal Law Act 1967: Abolished the criminal offences and torts of champerty and maintenance.</p> <p>Section 14 The Criminal Law Act 1967: Agreements may still be unenforceable on the grounds of public policy</p> <p>Section 58 CLSA 1990: Contingency Fee Agreements (CFAs) expressly permitted by statute.</p> <p>Factortame 2002: 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>Akin v Borchard Lines Ltd & Ors 2005: The court gave tacit approval to this type of litigation funding</p>	<p>Up to 5 Marks</p>

<p>Merchant bridge & Co Ltd & Another v Safron General Partner 1 Ltd 2011: Third party funders could be liable to the full extent of the claimant's costs</p> <p>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.</p>	
--	--

<p>Question 4:</p>	<p>Which of the first tier tribunals have the power to award costs? In what circumstance(s) can a tribunal make an order for costs?</p>
<p>Total Marks Attainable</p> <p>Fail = 0-7.4 Pass = 7.5+ Merit = 9+ Distinction = 10.5+</p>	<p>15</p>
<p>Indicative Content</p>	<p>Marks</p>
<p>Required:</p> <p>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. Property Chamber.).</p> <p>2 have no power to award costs at all (Social Entitlement Chamber and the War Pensions and Armed Forces Compensation Chamber).</p> <p>Other 5 may make orders in respect of wasted costs and unreasonable conduct.</p> <p>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.</p>	<p>Up to 4 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 when the tribunals may make an order for costs.</p>
<p>Any other relevant point to describe the procedure e.g:</p> <p>Wasted Costs</p> <p>Tribunals Courts and Enforcement Act 2007 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 Harley v McDonald 2001: Are discretionary Ridehalgh v Horsefield 1994: Mere mistake is not sufficient Orchard v SE Electricity Board 1987: Should not be used as a threat</p> <p>Unreasonable Conduct</p> <p>Rule 10(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008</p>	<p>Up to 8</p> <p>To achieve a merit or distinction candidates must state specifically which rules give the relevant tribunals the power to make an order for costs i.e they must show an ability to apply</p>

<p>Rule 10 (1) of the Tribunal Procedure (First Tier Tribunal) Health, Education and Social Care Chamber) Rules 2008 Also defined in the other chamber specific First Tier Rules where applicable</p>	<p>the law to the question asked rather than just cite the law</p>
<p>Credit any other relevant law cited e.g:</p> <p>To achieve more than a pass, candidates must not simply cite law but should show a greater depth to their knowledge base, this may be done by drawing comparisons to the Upper Tribunals</p> <p>4 Upper Chambers, 3 Chambers Governed by the Tribunal Procedure (Upper Tribunal) Rules 2008: Administrative Chamber, Tax and Chancery Chamber, Tax and Chancery Chamber.</p> <p>Lands Chamber governed by the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.</p> <p>May make orders in respect of wasted costs, unreasonable conduct and appeals</p> <p>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</p>	<p>Up to 5 Marks</p>

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

<p>Question 5:</p>	<p>You work in-house for a local firm of solicitors. One of the solicitors in that firm, Miss Elise Gold, has recently been instructed by a new client, Mr Kevin King. Mr King is the proprietor of a fish and chip shop. For some years he had instructed another firm of solicitors for his business purposes, but encountered a number of issues with them. He had specific difficulties with one of the assistant solicitors, Mr Matt Smith who had been allocated to matters relating to Mr King's business affairs. For some time, Mr Smith hadn't returned any of Mr King's calls or emails and he was concerned that Mr Smith was deliberately avoiding him. Any correspondence which Mr King did have was in disarray. When Mr Smith had been communicating with Mr King he asked him on several occasions to return documents which Mr King had already returned. Mr Smith also asked for information that had already been provided and receipt acknowledged.</p> <p>Mr King became extremely concerned when Mr Smith failed to put in a timely defence and counterclaim in one of the commercial matters being dealt by the firm. This had serious implications for Mr King and proceedings are continuing with Mr King applying to the court for acceptance of a late served defence and counterclaim.</p> <p>A heated discussion took place between Mr King and the senior partner at the original firm, Mrs Fatima Westwood. Unfortunately for Mr King, the very next day he received a letter through the post (1st class) from Mrs Westwood advising him that the firm was no longer going to act on his behalf. A bill for a very large sum of money was attached to the letter.</p>
---------------------------	---

	<p>Miss Gold would like to accept Mr King’s instructions to continue with the current proceedings and any other business-related work, but she does not have sufficient knowledge as to whether the previous solicitors acted properly. Mr King has not been able to provide a lot of information as his own records are minimal and disorganised. He is not able to advise whether there was ever a written retainer. He does not have one within his papers.</p> <p>Prepare the body of a letter of advice to Miss Gold advising:</p> <p>a) in what circumstances a contract of retainer between a solicitor and client may be terminated (15 marks); and</p> <p>b) what are the implications as to costs where a solicitor wrongfully terminates a retainer (5 marks).</p>
<p>Total Marks Attainable</p> <p>Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+</p>	<p>20</p>
<p>Indicative Content</p>	<p>Marks</p>
<p>Required:</p> <p>To pass candidates must refer to termination of a contract and to implications of wrongful termination by a solicitor</p> <p>Re Romer & Haslam [1893] 2 QB 286: If a solicitor wrongfully terminates the retainer, he is not entitled to be paid.</p> <p>Wild v Simpson [1919] 2 KB 544: Where a solicitor terminates a retainer unreasonably he may not be entitled to payment even on a <i>quantum meruit</i> basis.</p> <p>Underwood, Son v Piper Lewis [1894] 2 QB 306: 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</p> <p>Required format (body of a letter of advice to Miss Gold). The format of the response should dictate language and style. A distinction will not be achievable where a candidate has not used appropriate business language.</p>
<p>May also raise some of the following points:</p> <p>When a client may terminate and that none of those apply and therefore the answer focuses on termination by a solicitor</p> <p>The client may terminate the retainer at any time for any reason.</p> <p>Examples of reasons (effluxion of time, death, bankruptcy, insanity, where a retainer is unlawful)</p> <p><u>SRA Code of Conduct 2016</u></p>	<p>Up to 2 Marks</p> <p>To achieve a merit or distinction candidates should demonstrate knowledge of the examples of reasons that may</p>

<p>Objective O(1.1) Treat clients fairly O(1.3) in deciding to terminate instructions you comply with the law and code. O(1.5) Provide competent and timely service</p> <p>Complied with the principles if:</p> <p>IB(1.7) Consider ceasing to act if can't act in the client's best interest</p> <p>IB(1.10) Where you cease to act, advising the client of their possible options pursuing the matter</p> <p>Not complied with the principles if:</p> <p>IB (1.26) ceasing to act for a client without good reason and without providing reasonable notice</p>	<p>lead to a client terminating a retainer.</p>
<p>Any other relevant points cited e.g:</p> <p>In Conditional Fee Agreements (CFA) the solicitor will only be paid at the conclusion of the matter and therefore that type of retainer is an entire contract.</p> <p>In non-CFA cases the solicitor's statutory right to charge payments on account in contentious business, pursuant to section <u>65(2) Solicitors Act 1974</u>, often makes the issue of the nature of the retainer academic.</p> <p>Standard terms and conditions means that the issue of non payment is usually dealt with expressly in the retainer.</p>	<p>Up to 2 Marks</p>
<p>Credit any case law/points of law cited e.g:</p> <p>To achieve a merit or distinction candidates must state specifically which authority governs the termination of a retainer i.e they must show an ability to apply the law to the question asked rather than just cite the law</p> <p>May discuss validity of retainer – if the retainer is not valid then there would not be any termination</p> <p>Termination by client cases</p> <p><u>Termination by solicitor cases – good cause and reasonable notice</u></p> <p>Solicitors Act 1974 Section 65 (1)&(2) Client's failure to make a payment on account of costs.</p> <p><i>Wong v Vizards (a firm)</i> [1997] 2 Costs LR 46, QBD: 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><i>Warmingtons v McMurray</i> [1936] 2 All ER 745 and <i>Re Hall v Barker</i> [1893] 9 Ch D 538 Jessel MR said "It is not reasonable that a solicitor should engage to act for an indefinite number of years,</p>	<p>Up to 12</p> <p>To achieve more than a pass candidates must not simply cite law but should show a greater depth to their knowledge base by demonstrating a holistic understanding</p>

winding up estates, without receiving any payment on which he can maintain himself"

Minkin v Cawdery Kaye Fireman & Taylor [2011] EWHC 177 (QB), LS Gaz 03 March 2011 did not succeed on the same argument because the Solicitor's prior failure to comply with its own contract terms and update their costs estimate that had been grossly exceeded amounted to repudiation of contract. Nor was there sufficient notification given before the contract termination was effected.

Hilton v Barker Booth & Eastwood [2005] 1 W.L.R. 567 and *Lumley v Gye* (1853) 2 E. & B 216 and *Young v Robson Rhodes* [1999] Lloyd's Rep. P. N. 641: Conflict of interest/Professional embarrassment

Re Jones [1896] 1 Ch 222 Suspected duress or undue influence. If the Solicitor is not confident the client is giving instructions freely they can cease to act. If this is because the client has made a decision against their own best interest it is for the Solicitor to explain the consequences and get confirmation of instructions in writing, then there is no reason to cease acting. If it is found that the undue influence or pressure to make certain decisions is being put on the client by their solicitor. Then the retainer may be set aside.

Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owens & Law Society (intervener) (Second Appeal)[2010] EWCA Civ 122 [2010] 3 Costs LR 421 and *Wild v Simpson* [1919] 2 KB 544: Requirement to act improperly

Automatic Termination

The category of good reason the retainer is automatically terminated we have

Pool v Pool [1889] 58 LJP 67 Where the client dies, but the Solicitor can accept instruction to continue the subject claim on behalf of the estate

Yonge v Toynbee [1910] 1 KB 215 The client is declared to not have the mental capacity to give instructions

Scott v Fenning [1845] LJ CH 88 Bankruptcy of either Solicitor or Client

Wild v Simpson [1919] 2 KB 544 Solicitor was imprisoned and unable to perform the retainer

Allen Limited v. Fuglers SCCO No 13 of 2003 The Solicitor was struck off as a Solicitor

Additional Work

Bilkus v Stockler Brunton [2010] 1 WLR 2526: it was held that once the work required under a contract of retainer has been completed if a solicitor undertakes further work the agreement of the client is required. If this is not done the solicitor will not be paid for the further work done. If a solicitor wishes to change the terms of remuneration the agreement of the client is required.

Question 6:

Wendy Jenkins is an assistant solicitor. She has recently started to sit as an arbitrator once a fortnight, and is, as yet, inexperienced. She would like your assistance with some queries and has asked you to prepare a memo to her answering these queries with specific reference to the provisions of the Arbitration Act 1996. Prepare the **body** of one memo incorporating the response to the following queries.

- a) In her first arbitration (a commercial matter), Mrs Jenkins has decided to make an award in favour of Build Limited following its action against The Garden Centre Limited. She is thinking of making an order that The Garden Centre Limited pay Build Limited's costs with the direction that she should undertake the assessment of those costs. She would, briefly, like to know the best approach to the procedures for the assessment of costs and, particularly, how the provisions of the Arbitration Act 1996 affect this situation.

(10 marks)

- b) In her second arbitration the unsuccessful party, Norths Limited, has advised Mrs Jenkins that, as arbitrator, she is not able to assess the costs herself and must refer the matter to court. This occurred last Friday afternoon and the matter will resume on her next sitting. Mrs Jenkins would like your advice as to whether there is any truth in the statement made and in what circumstances the assessment must go to court.

(3 marks)

- c) In the same arbitration as (b), Norths Limited is represented not by an expensive legal team, but by the CEO, Mr Nigel North. Whilst he could have afforded legal representation, he decided to appear in person. This could have been a factor in Norths Limited not succeeding, but that factor is to be left aside. The matter of some concern to Mrs Jenkins is that Mr North shouted to the successful party's representative, Miss South of Souths Limited, that she would "never see a penny of the money anyway!" Mrs Jenkins would like to know how an arbitration award is enforced so she can tell Mr North, in no uncertain terms, what will happen if he fails to pay.

(3 marks)

- d) Finally, also in the arbitration between Norths Limited and Souths Limited, Mrs Jenkins is deeply concerned about some comments which Mr North made to her personally. He said that he did not believe that such a young woman could know anything about the subject matter of the arbitration. Whilst Mrs Jenkins, 45, was flattered that Mr North thought her to be younger, she was concerned that he was making derisory comments. Whilst she had been practising in the relevant area of law her entire career, as a novice arbitrator she wants reassurance as to the situations when an arbitrator's award may be challenged. She

	<p>has asked you to briefly outline these situations and advise whether any possible challenges are of relevance here.</p> <p style="text-align: right;">(4 marks)</p>
<p>Total Marks Attainable</p> <p>Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+</p> <p>Divided into a) 10 marks; b) 3 marks; c) 3 marks and d) 4 marks</p>	<p>20</p>
<p>Indicative Content:</p>	<p>Marks</p>
<p>Required:</p> <p>a) Section 63(3) of the <u>Arbitration Act 1996</u>: The arbitrator must assess costs as he 'sees fit'.</p> <p>b) Section 63(4) and section 63(1) of the <u>Arbitration Act 1996</u>: if costs are not determined by agreement or by the arbitrator, the parties can apply to the court (the application should be on-notice) and the court may then determine the recoverable costs.</p> <p>c) An award is effectively a final order and under s 66(1) of the <u>Arbitration Act 1996</u> can therefore be enforced with the leave of the court if a party fails to comply with it.</p> <p>d) Challenges to an award are possible by section 67 (as to jurisdiction), section 68 (serious irregularity), and section 69 (point of law).</p>	<p>Up to 4 Marks</p> <p>To pass candidates must refer to the <u>Arbitration Act 1996</u> and show an ability to apply sections of the Act to the problem question set.</p>
<p>Any other relevant points cited e.g:</p> <p>a) Section 59(1) of the <u>Arbitration Act 1996</u> costs in arbitration proceedings fall into three categories; The arbitrator's fees and expenses. The fees and expenses of any arbitral institution concerned. The legal or other costs of the parties.</p> <p>Section 59(2) of the <u>Arbitration Act 1996</u>, 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 to section 63 of the <u>Arbitration Act 1996</u>.</p> <p>Section 60 of the <u>Arbitration Act 1996</u>: 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> <p>Section 61(1) of the <u>Arbitration Act 1996</u>: The Arbitrator can allocate the costs of the Arbitration between the parties.</p> <p>Section 61(2) of the <u>Arbitration Act 1996</u>: For any award of costs, unless the parties have agreed otherwise, the Arbitrator shall</p>	<p>Up to 16 Marks</p>

award costs on the general principle that costs should follow the event.

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

Sections 63(4) and (5) 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.

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

Section 70 of the Arbitration Act 1996: Contains supplementary provisions.

Section 70(4) of the Arbitration Act 1996: Where on an application or appeal the Court feel 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.

Sections 67-69 of the Arbitration Act 1996: Cover the situations where an award may be challenged.

c) Section 66(2) & (3) of the Arbitration Act 1996: Where the court gives leave, judgement 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.

If the court finds that the award is not legally valid, it may refuse leave (*Re Stone and Hastie Arb.* [1903] 2 K.B. 463, CA and *Middlemiss & Gould v Hartlepool Corp* [1972] 1 W.L.R. 1643; [1973] 1 All E.R. 172).

The procedure to enforce an award is set out in CPR 62.18, 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.

d) Under 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).

Timing of An appeal

In accordance to 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.

Arbitrators Reasons

Under section 52(4) of the Arbitration Act 1996, an award should contain reasons for the award, there is however no sanction within that section for failure to give reasons. Where there are no reasons for a costs award would not render that award void but would allow a party to apply to the court seeking reasons, such an application would be made under section 68 of the Arbitration Act 1996 (see below). It should be noted that where an agreement has been reached to dispense with reasons for the tribunal's award this agreement shall be considered an agreement to exclude the court's jurisdiction under section 69 of the Arbitration Act 1996. In other words, neither party may appeal to the court on a question of law arising out of an award made in the proceedings.

Where on an application or appeal the Court feel 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. This is set out in 70(4) of the Arbitration Act 1996. In such circumstances, in accordance with 70(3) of the Arbitration Act 1996, the Court may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

Substantive Jurisdiction

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 67(4) of the Arbitration Act 1996: Leave must be obtained in order to make an appeal.

Section 67 (3) of the Arbitration Act 1996: upon such an application, the court may:

- Confirm the award.

- Vary the award.
- Set aside the award in whole or in part.

Serious Irregularity

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 68(2) of the Arbitration Act 1996 defines serious irregularity as an irregularity which the court considers has caused or will cause substantial injustice to the applicant.

Section 68(3) of the Arbitration Act 1996: If the court finds serious irregularity affecting the tribunal, the proceedings or the award, under the court may:

- Remit the award to the tribunal, in whole or in part, for reconsideration.
- Set the award aside in whole or in part.
- Declare the award to be of no effect, in whole or in part.

Section 68(4) of the Arbitration Act 1996: Leave must be acquired before any such application is made.

Point of Law

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.

Under section 69(2) of the Arbitration Act 1996: an appeal shall not be brought under this section except where there is an agreement with all of the other parties to the proceedings, or with the leave of the court.

Under section 69(7) of the Arbitration Act 1996 on an appeal under this section the court may:

- Confirm the award.
- Vary the award.
- Remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination.
- Set aside the award in whole or in part.

Question 7:

Miss A Rusty, a recently qualified solicitor who has been tasked with taking over the caseload of a recently retired colleague, Mr Jonathan Strachan, has instructed you. Miss Rusty works in the civil department at Tenterden LLP, a high street firm in Maidstone. Miss Rusty has inherited a number of legal aid matters and her experience of such matters is extremely limited. Accordingly, Miss Rusty has requested your advice and, specifically, a brief description of the implications of each of the following items:

	<p>a) A discharge of a funding certificate following completion of an action brought on behalf of Harry Kentish (d.o.b 02.02.2015). The certificate had been live since 19 March 2015 and the notice of discharge is dated 19 February 2016.</p> <p>b) A revocation of a substantive certificate issued to Mr Piers Trumpet, who apparently concealed income from an investment portfolio from the Legal Aid Agency (LAA) when advising them of his means.</p> <p>c) A notice to show cause issued by the LAA on the 9 April 2014 in respect of a funding certificate issued to Mrs Beverly Arnett, a claimant in a clinical negligence matter (in respect of which the defendants have evidently been petitioning the LAA to discharge the funding certificate).</p> <p>Provide the body of a letter of advice on the particular circumstances on the files and any action that should be taken.</p>
<p>Total Marks Attainable</p> <p>Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+</p>	<p>20</p>
<p>Indicative Content</p>	<p>Marks</p>
<p>Required:</p> <p>a) Discharge: If a certificate is discharged the lawyer cannot carry out any further work under the certificate. A certificate must be discharged before a claim for costs may be made.</p> <p>b) Revocation: If a certificate is revoked the lawyer cannot carry out any further work under the certificate.</p> <p>c) Notice to Show Cause: 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>Up to 3 Marks</p> <p>An explanation should be given as to the nature of a funding certificate that has been discharged/revoked or where there is an a notice to show cause in place</p>
<p>Any other relevant points cited e.g:</p> <p><u>Certificates Generally</u></p> <p>Legal Representation: Differentiated from controlled work (work under a legal help). This is work undertaken under a public funding certificate.</p> <p>Certificates will have a costs limit and detail the scope of the work that may be undertaken.</p> <p>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 request for further information or the legal representative has recommended that the certificate should be discharged or revoked.</p>	<p>Up to 17 Marks</p> <p>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.</p>

The Legal Aid Agency will communicate with the client if they are thinking of discharging or revoking a certificate and a client can object by writing to them within a given period of time, usually 14 days. If a certificate is Discharged the client does not have to pay for all the work the legal representative has done up to the date the certificate was discharged. However, they will no longer be entitled to legal aid for their case, though they can reapply.

Discharge

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.

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

Work claimable following Discharge/Withdrawal of the certificate

The relationship between the Provider and the client ceases upon notice of Discharge or Revocation, 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.

Where proceedings have been issued, the Provider should serve the appropriate notice of Discharge or Revocation to the Court. The reasonable costs arising from this would legitimately fall under the certificate where hourly rate or form part of the costs should they escape fixed fee. Any additional costs in respect of coming off the court record cannot be claimed.

Subsequent to these limited steps the expectation will be that Provider prepares their claim for costs, the reasonable costs arising in this respect will be a legitimate claim on the fund.

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
6. Completing EX80A
7. Letter to Court

Where the court has allowed these costs on assessment they will not usually be queried. The exceptions are items 4 and 5 which are dependent on whether there has been a reduction on provisional assessment.

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.

Revocation

If a Certificate is Revoked a client may have to pay for the work their legal representative has done so far under the certificate.

Sometimes Legal Aid Certificates granted as an emergency will be revoked later when the Agency has looked at details of the client's income and they decide that they are not eligible for legal aid. Emergency Certificate is no guarantee of a client's entitlement to a Full Legal Representation Certificate.

Paragraphs 5.30 of the 2010 Standard Civil Contract Specification and 5.16 of the 2013 Specification confirm the client has a financial interest if the certificate is revoked.

When a certificate is revoked the client must be given 21 days to consider the bill and make any representations, as they have a financial interest in the costs. If the certificate was revoked either less than 21 days before or anytime after the bill has been submitted (to the LAA for assessed bills or to the court for bills where they are the assessing body), the claim will be rejected unless there is documentation confirming the client has seen a copy of the bill and has no objections. This will be a priority reject unless there is another valid reject reason.

For assessed bills the date the Claim1/1A certification is signed should be used to determine whether the provider would have had the opportunity to send the client the bill and allow 21 days to pass. For taxed bills, the financial interest certification at the back of the

bill will need to be completed to determine whether the client has been sent a copy of the bill.

This will not apply where the client already had a financial interest by virtue of the statutory charge applying or contributions paid, as the client should already have been provided with the bill.

Notice to Show Cause

Show Cause Under Funding Code: 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

Show Cause under LASPO (intention to withdraw a determination): 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".

Funding code procedures C55.3: 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:

- Work pending appeal, where permission granted to protect clients interests and arising out of the proceedings
- 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.

Question 8:

You are a costs lawyer working in-house for a firm of solicitors, Smarties LLP. You have a matter, the file of Ms Josephine Harlett, which would normally have been dealt with within the provisional assessment regime, but has been listed before for a detailed assessment hearing on 9 September 2016, pursuant to an order made by District Judge Jones on 23 March 2016. The order listing the matter for a detailed assessment hearing was made because there is a particularly contentious issue to be resolved, namely whether or not the conditional fee agreement (CFA) that the claimant entered with one firm of solicitors had been validly assigned to a second firm of solicitors, and, if not, what the consequences were.

Ms Harlett sustained an accident at work on 27 July 2012. On 3 February 2012 Ms Jones entered into a CFA with Trapest solicitors. The CFA was a valid one in the light of the CFA regulations as they then were. It was largely based on the Law Society model CFA, although amended in parts. It imputes the usual obligations on both solicitor and client. It records that the person primarily responsible for the conduct of the claim would be Mr Sidhu, a partner at Trapest, although it clearly envisaged that other fee earners may also be involved.

At some point prior to 17 January 2014, Trapest became insolvent and administrators were appointed. They decided to sell Trapest’s personal injury work to your firm of solicitors, Smarties LLP. On 21 January 2015, a document entitled "Deed of Assignment" was executed between the administrators of Trapest and Smarties LLP which sought to assign the benefits and obligations of 418 retainers between Trapest and various clients, including Ms Harlett, to Smarties LLP.

Provide the **body** of a memo of advice on the particular circumstances of this case setting out when a retainer may be validly assigned. Your advice should also consider whether it is possible to transfer insurance from one firm to another.

Total Marks Attainable

20

Fail = 0-9.9

<p>Pass = 10+ Merit = 12+ Distinction = 14+</p>	
Indicative Content	Marks
<p>Required:</p> <p>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.</p> <p>Assignment should be distinguished from Novation.</p> <p>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.</p>	<p>Up to 4 marks</p> <p>In order to achieve a pass candidates must provide an explanation of assignment and novation.</p> <p>Question requires candidates to draft the body of a memo directed to fee earners including CL and TCL and must focus on professional standards and ethics with reference to bills of costs and negotiations. A pass may not be achieved if appropriate language is not used.</p>
<p>Any other relevant points cited e.g:</p> <p>Assignment: Two parties. In writing, by deed, same agreement, client not involved but can accept/reject, benefit and burden must pass.</p> <p>Novation: Tri party agreement, client involved, different agreement, only benefit passes.</p> <p><u>Circumstances when a CFA may need to be transferred</u></p> <p>Firm A goes into administration or closes its doors</p> <p>Current solicitor moves firms and client wants to retain the same agreement</p> <p>Firm A is bought or merges</p> <p>Firm A changes name or practice type</p> <p><u>Key priority for transferring a CFA</u></p>	<p>Up to 4 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 play the rules to the scenario before them</p>

<p>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.</p>	
<p>Credit any case law/points of law cited e.g:</p> <p>Halsall v Brizell [1957] The party could not take the benefit under a contract without the corresponding burden.</p> <p>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 and CFA validly assigned.</p> <p>Davies v Jones [2009] re-iterated that the burden of a contract cannot be assigned.</p> <p>At the first instance of Jones v Spire Healthcare 2015 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>Budana v Leeds Teaching Hospitals [2016] Telling the client the 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.</p> <p>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.</p> <p>On the appeal of Jones v Spire Healthcare [2016] 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.</p>	<p>Up to 12 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>Question 9:</p>	<p>You are a costs lawyer working in-house for a firm of solicitors, Bibird LLP. Your role has recently diversified and you are now required to undertake 2 days a week in the firm's accounts department as you have previous experience. Your friend has also just started working for the firm in the accounts department and is very confused by the accounting rules that apply in practise. You have agreed to go through the file of Imran Khan (Ref: IMKH00440011) with her. This file involves a claim by Mr Khan for personal injuries sustained arising from an accident at work. Mr Khan is a privately paying client.</p> <p>In compliance with Rule 1 of the SRA Account Rules 2011 the firm keep and use separate bank accounts for client and office money. The firm also uses dual cash accounts and Mr Khan has his own client ledger. Your friend is unsure why this is the case.</p>
---------------------------	--

	<p>On 1 February 2016 Mr Khan came in to the office to pay his most recent invoice. Mr Khan wished to pay the total sum, £2,762.90, in cash. He was eventually persuaded to pay that sum by cheque.</p> <p>On 20 April 2016 a negotiated settlement was achieved in the sum of £35,000 plus costs in respect of Mr Khan's personal injury claim. On 1 May 2016 your firm received a cheque from the other side's solicitors payable to the firm (Bibird LLP). The cheque was in the sum of £45,000. The accompanying letter confirmed that £35,000 was in full and final settlement of Mr Khan's claim. The costs on the file are estimated to be £25,000 and the remaining £10,000 of the cheque related to a payment on account of costs.</p> <p>On receipt of your final invoice Mr Khan has been in touch with your firm and asked for an invoice for VAT purposes. He has also asked for your firm to set out the law governing both input and output tax.</p> <p>Provide the body of a memo of advice to your friend/colleague on the particular circumstances raised by her. Your advice should cite any relevant rules.</p>
<p>Total Marks Attainable</p> <p>Fail = 0-9.9 Pass = 10+ Merit = 12+ Distinction = 14+</p>	<p>20</p>
<p>Indicative Content</p>	<p>Marks</p>
<p>Required:</p> <p>Compliance with Rule 1 of the SRA Account Rules 2011 the firm keep and use separate bank accounts for client and office money: Rule 1.1 makes it clear that the purpose of the rules is to keep client money safe.</p> <p>Due Diligence and Money Laundering: The Money Laundering Regulations 2007 (the 'Regulations') require you to: carry out client due diligence, so that you know who you are dealing with, conduct ongoing monitoring, so that you know what you are being asked to do and can spot warning signs of money laundering.</p> <p>Mixed payments: A lawyer will often receive a cheque which is made up of partly office and partly client money. Rule 18.1 of the SRA Account Rules 2011 defines a "mixed payment" is one which includes client money as well as office money and/or out-of-scope money. It is possible to split the cheque under rule 18.2(a) of the SRA Account Rules 2011.</p> <p>VAT: Vat involves two different aspects: Output tax: charged by a business to its customers and Input tax: charged to the business by its suppliers. A business registered for VAT charges its customers output tax and then accounts to HM Customs and Excise for tax. In other words, it acts as an unpaid tax collector. It will normally be possible for such a business to deduct input tax charged to the</p>	<p>Up to 6 Marks</p> <p>To achieve a pass an explanation should be given on the need for firms to comply with the relevant rules regarding the handling of client money, mixed payments and VAT.</p> <p>Question requires candidates to draft the body of a memo directed to fee earners including CL and TCL and must focus on professional standards and ethics with reference to bills of costs and negotiations. A pass may not be achieved if appropriate</p>

<p>business from the amount accounted for to HM Customs and Excise, thus reducing or absolving their liability.</p>	<p>language is not used.</p>
<p>May also raise points on conduct:</p> <p>Rule 1.2 of the SRA Account Rules 2011: requires that a firm and their employees must comply with the principles set out in the SRA Handbook (or Code of Conduct 2011) and specifically the outcomes in chapter 7 of the Handbook in relation to the effective financial management of the firm.</p> <p>The existence and enforcement of the rules reduces the risk of accidental or deliberate misuse of client money. However the rules also demonstrate to the public that the profession is determined to police itself and protect clients from the risks of accidental or deliberate mishandling of their money.</p> <p>Rule 6.1 of the Solicitors Accounts Rules states that: “all principals in a firm must ensure compliance with the Solicitors Accounts Rules by the principals themselves and by everyone employed in the firm”. That duty extends to directors and members of recognised and licensed bodies and to the Compliance Officers for Finance and Administration (COFA) even if the COFA is not a manager of the firm.</p> <ul style="list-style-type: none"> • All recognised and licensed bodies must nominate a compliance officer for legal practice (COLP) and a compliance officer for finance and administration 3 <p>(COFA). It is rule 8.5(d) of the SRA Authorisation Rules that requires all firms to have a COFA.</p> <p>The appointment of a COFA satisfies the requirement under section 92 of the Legal Services Act 2007 for a licensed body to appoint a Head of Finance and Administration. Under rule 6 of the accounts rules, the COFA must ensure compliance with the accounts rules. This obligation is in addition to, not instead of, the duty of all the principals to ensure compliance (the COFA may be subject to this duty both as COFA and as a principal).</p> <p>Under rule 8.5(e) of the SRA Authorisation Rules, the COFA of a licensed body must report any breaches, and the COFA of a recognised body must report material breaches, of the accounts rules to the SRA as soon as reasonably practicable. The COFA of a recognised sole practitioner has a duty to report material breaches under regulation 4.8(e) of the SRA Practising Regulations. All COFAs must record any breaches and make those records available to the SRA on request. (See also outcomes 10.3 and 10.4 of Chapter 10 of the SRA Code of Conduct in relation to the general duty to report serious financial difficulty or serious misconduct.)</p> <p>All the principals in a firm must ensure compliance with the rules by the principals themselves and by everyone employed in the firm. This duty also extends to the directors of a recognised body, or a licensed body which is a company, or to the members of a recognised body or license body which is an LLP. It also extends to</p>	<p>Up to 14 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>

that COFA of a firm (whether a manager or non- manager). This duty is found in the rule 6.1.

The case of *Weston v The Law Society* (1998) The Times, July 15 is a reminder of how careful a principal must be. The Court of Appeal confirmed that it was appropriate to strike off a lawyer when no dishonesty was alleged. However, the solicitor in question was liable for breaches of the rules committed by his partners even though he had been unaware of them. A partner is responsible for all breaches committed.

Money Laundering

The Proceeds of Crime Act 2002 (POCA) contains the principal money laundering offences and defences. You also need to be aware of the risks of breaching financial sanctions. These are issued by HM Treasury and prevent the use of all economic resources by or for the benefit of a designated individual, either directly or indirectly, without a licence. This will include purchasing or selling a property on their behalf.

Mixed Payments

Distinguish between office and client: Rule 12 divides money into two categories, namely: Client money and Office money.

Client monies are defined in rule 12.1 of the SRA Account Rules 2011 as being money held or received for a client, or as trustee, and all of the money which is not office money.

Splitting Cheques: As we have seen, depending on who regulates the firm within which a lawyer works and depending on how that individual is qualified and regulated, it is possible to split mixed payments. Under the SRA Account Rules 2011 if you do not split a cheque you must pay it all into the client bank account under Rule 18.3 of the SRA Account Rules 2011 and transfer to the office account within 14 days of receipt.

VAT

VAT is chargeable on the supply of goods or services where the supply is a taxable supply and is made by a taxable person in the course or furtherance of a business carried on by him (s 4(1) of the Value Added Tax Act 1994). The elements of the definition are:

⌋ supply of goods. ⌋ supply of services. ⌋ taxable supply. ⌋ taxable person. ⌋ business.

The person making the supply is liable to account to HM Customs and Excise for the amount of tax which he charges.

Supply of Goods: This comprises all forms of supply whereby the whole property in goods is transferred, including a gift of goods.

Taxable Supply: This means any supply of goods or services other than exempt supply. Exempt supplies are listed in Value Added Tax Act 1994, Schedule 9.

Taxable Person: A person is a taxable person if he is or is required to be registered under the Act. A person must register if, broadly the value of his taxable supplies (not his profit) in the preceding 12 months exceeded a figure specified in each year's budget. A firm of solicitors will almost always have to be registered. Voluntary registration is permitted. A person may register voluntarily in order to recover input tax charged to him.

Business: VAT is chargeable by a taxable person only on taxable supplies made in the course of furtherance of a business carried on by him. Business includes any trade, profession or vocation, but the term is not limited to these activities since it also covers certain clubs and associations. Although the services of an employee are not generally taxable, Value Added Tax Act 1994 provides that where a person in the course of a business.

Input Tax

Where VAT is charged on the supply to a taxable person of any goods or services for the purpose of his business, he may generally deduct such tax from the amount of output tax for which he is liable to account to HM Customs and Excise (S25(2) Value Added Tax Act 1994). Since input tax charged to a taxable person is recoverable by him, it follows that VAT is not an expense of a person who makes only taxable supplies, whether at the standard or zero rate. A person who makes only exempt supplies is not a taxable person and so is unable to recover any input tax.

Where a taxable person makes both taxable and exempt supplies, he is then partly exempt and may only recover a proportion of the input tax charged to him. A solicitor who supplies insurance may find himself in this position.

Where the exempt supplies made by a taxable person fall within certain *de minimis* limits, they can be ignored, with the result that all his input tax is recoverable.

Input Tax : Where VAT is charged on the supply to a taxable person of any goods or services for the purpose of his business, he may generally deduct such tax from the amount of output tax for which he is liable to account to HM Customs and Excise (S25(2) Value Added Tax Act 1994). Since input tax charged to a taxable person is recoverable by him, it follows that VAT is not an expense of a person who makes only taxable supplies, whether at the standard or zero rate. A person who makes only exempt supplies is not a taxable person and so is unable to recover any input tax.

Where a taxable person makes both taxable and exempt supplies, he is then partly exempt and may only recover a proportion of the input tax charged to him. A solicitor who supplies insurance may find himself in this position.

Where the exempt supplies made by a taxable person fall within certain *de minimis* limits, they can be ignored, with the result that all his input tax is recoverable.

Value of Supply: Where a supply is fully taxable, VAT at the rate of £20% is payable on the value of the supply. If the consideration is in money, the value of the supply is such amount as, with the addition for the total tax payable, is equal to the consideration (s19(2) Value Added Tax Act 1994).

If a price or fee is agreed, this will be deemed to include VAT unless expressly stated to be tax exclusive.

Time of Supply: The importance of the time of the supply (or tax point) is that it decides the quarter at the end of which the taxable person becomes liable to account for output tax on a particular supply. It also determines the quarter in which a taxable person can claim input tax on a taxable supply made to him. The basic tax points are as follows:

Goods: when the goods are removed or made available to the purchaser (s6(2) of the Value Added Tax Act 1994).

Services: when the services are completed (s6(3) of the Value Added Tax Act 1994).