BILLING PRACTICES – KEY PRINCIPLES

Regulatory Guide 3-2012
Consultation Draft

March 2012
The Legal Services Commission receives and deals year after year with more complaints about legal costs than any other single issue. The Commissioner has decided to issue this regulatory guide to help lawyers and users of legal services better understand a lawyer’s professional obligations in relation to their billing practices and the factors the Commission takes into account in dealing with complaints about lawyers’ bills.¹

The guide sets out some of the key principles that govern how lawyers can properly bill or charge for their services. We will publish in due course a number of more specific guides which examine how these and other relevant principles apply in particular fact situations where it seems to us (based on what we see at the Commission) they are not always well understood.

The key principles are established by legislation and the common law and we will set them out accordingly. There are two primary sources of relevant legislative principle: the Legal Profession Act 2007 (the LPA) and the Australian Consumer Law (the ACL). The LPA is likely to be repealed and replaced in the near future by the Legal Profession National Law (the National Law).² We will publish an updated guide before the National Law commences (probably on 1 July 2013).

THE LEGAL PROFESSION ACT 2007

The LPA describes at length how lawyers and law practices can properly charge for their services but implies rather than spells out the fundamental principles that underpin the objectives it seeks to achieve. Some principles are apparent nonetheless. They include the following:

- lawyers must give valid costs disclosure

  The LPA sets out a lawyer’s costs disclosure obligations in considerable detail, over ten pages of

Notes

¹ We are deeply indebted to Roger Quick, a Special Costs Consultant with QICS Costs Consultants, for his helpful comments on earlier versions of this draft regulatory guide. The Commission accepts full responsibility however for any errors and omissions.

Please refer to Regulatory Guides: An Overview (the Overview) for further information about the regulatory guides and what we hope to achieve by publishing the guides, how we propose to go about developing them and, importantly, their status. The Overview is published on the Commission’s website. We emphasize as we explain in the Overview that ‘the guides will be persuasive but they are not, nor could they ever be binding. The Commission is responsible for promoting, monitoring and enforcing appropriate standards of conduct in the provision of legal services, not for setting them. The standards are set by legislation, by the professional bodies and by the disciplinary bodies and the courts. The guides…simply articulate for the benefit of lawyers and users of legal services alike the factors we will take into account in exercising our responsibilities, most relevantly our responsibilities to settle consumer disputes including costs disputes between lawyers and their clients and to decide after investigating a lawyer’s conduct if it is inconsistent with the lawyer’s professional responsibilities and whether to commence disciplinary proceedings.’

Please note that we use the term ‘lawyer’ throughout the document to refer to solicitors and barristers alike. We use the terms ‘solicitor’ and ‘barrister’ when we are referring to members of those particular branches of the profession only.

² The National Law can be accessed on the website of the Commonwealth Attorney-General’s Department at www.ag.gov.au/legalprofession. Notably the National Law unlike the LPA is ‘principles-based’ or ‘outcomes-based’ legislation. It is ‘firm about outcomes, flexible about means’. It puts more emphasis than current legislation on spelling out the broadly stated principles that define the policy outcomes it seeks to achieve and less on prescribing in detail exactly how those outcomes should be achieved.
legislation. Stripped to its bare essentials, it says that:

- **lawyers must disclose to their clients in writing the basis on which they propose to calculate their bill for their legal costs, and before or as soon as practicable after they accept a client’s instructions**
- **lawyers must give ‘ongoing disclosure’ – that is to say, they must disclose in writing any substantial changes to any previous disclosures as soon as reasonably practicable after they become aware of the changes**
- **a client ‘need not pay’ a lawyer’s legal costs if the lawyer fails to comply with his or her costs disclosure obligations unless and until the costs have been assessed by an independent court appointed costs assessor.**
- **lawyers must not charge excessive legal costs**

The LPA says explicitly that a lawyer must not charge excessive legal costs. It lists ‘charging excessive legal costs’ among a series of examples of conduct that is capable of constituting unsatisfactory professional conduct or professional misconduct.⁴

- **lawyers should charge no more than fair and reasonable costs (and if their costs are challenged, will not be allowed more than their fair and reasonable costs)**

The LPA sets out how lawyers can properly bill for their services in considerable detail also, over twenty-four pages of legislation. When read as a whole it clearly implies that a lawyer should charge no more than fair and reasonable costs. That is because it provides that the amount lawyers can charge for their services must be determined in one of only three ways:

- it can be the amount that is recoverable under a valid costs agreement - but as we note in more detail below the Supreme Court and the Queensland Civil and Administrative Tribunal (QCAT) can set aside a costs agreement on the grounds that

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³ The LPA sets out a lawyer’s costs disclosure obligations at sections 308-318. The Commission and the Queensland Law Society have jointly summarised them in a fact-sheet headed Legal Costs – Your Right to Know. The fact-sheet is published on the Commission’s website under the Information for Consumers page on the horizontal menu bar. Notably the proposed National Law sets out the obligations not over ten, but two pages, at sections 4.3.6 - 4.3.9.

⁴ See LPA section 420. Similarly the National Law provides at section 4.3.37 that ‘a contravention of a requirement that a law practice must not charge more than fair and reasonable costs is capable of constituting unsatisfactory professional conduct or professional misconduct.’

⁵ See LPA sections 319-343. The National Law sets out the obligations not over twenty-four but eight pages, at sections 4.3.10-4.3.38.

⁶ The National Law states the relevant principles quite explicitly. It provides that:

- a lawyer ‘must charge costs that are no more than fair and reasonable in all the circumstances and that in particular are proportionately and reasonably incurred and proportionate and reasonable in amount’ (section 4.3.4); and
- a lawyer ‘must not act in a way that unnecessarily results in increased legal costs payable by a client, and in particular must act reasonably to avoid unnecessary delay resulting in increased legal costs’ (section 4.3.5).
the agreement is unfair or unreasonable and, in the event they do, can decide the fair and reasonable costs of the work the subject of the agreement; or

- if there is no valid costs agreement, it can be the amount allowable under a scale of costs issued by a court (which is deemed to be fair and reasonable); or

- if there is no valid costs agreement and no applicable scale of costs, it is the amount an independent court appointed assessor or a court determines to be ‘the fair and reasonable value of the legal services provided.’

- to be valid, a costs agreement must be fair and reasonable

The LPA entitles a client to apply to the Supreme Court or QCAT to set aside a costs agreement on the grounds that it is ‘not fair or reasonable’. It gives them broad discretion to set aside a costs agreement having regard (among other things) to:

- whether the lawyer made valid costs disclosure

- the circumstances and conduct of the parties before, when and after the agreement was made

- whether and how billing under the agreement addresses changed circumstances affecting the nature and extent of the legal services provided under the agreement.

The LPA reflects in this respect the well established principle at common law that lawyers are not protected from a finding of over-charging or other misconduct on the basis simply that they billed a client consistent with their costs agreement.

- lawyers must on request give a client sufficient information about the costs the lawyer has charged the client to enable the client to make an informed decision whether to exercise his or her entitlement to have them independently assessed and, if the client applies to have the costs assessed, to enable the costs assessor to decide whether the costs are fair and reasonable.

The LPA entitles clients who are given a lump sum bill to request an itemised bill (that is to say, a bill which includes sufficient description of each item of work for which a charge has been made to enable a costs assessor to decide whether the bill is fair and reasonable). It requires lawyers to provide an itemised bill within 28 days of the request to provide the bill, to prepare the bill free of charge, and to include a written statement setting out the avenues open to the client to dispute the bill.

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7 See LPA section 319
8 See LPA section 328.
10 See LPA sections 331-332. The Commission has published a regulatory guide which specifically addresses this issue (Regulatory Guide 1-2012 - Itemised Bills) which is published on the Commission’s website. The National Law contains similar provisions at sections 4.3.18 to 4.3.32. The law underpinning the principle is usefully summarised by Reid DCJ in Clayton Utz Lawyers v P&W Enterprises Pty Ltd [2010] QDC 508.
THE AUSTRALIAN CONSUMER LAW

The ACL (more accurately, the majority of the ACL) commenced on 1 January 2011. It modernised and replaced the consumer protection provisions of the Commonwealth Trade Practices Act 1974 and the various state Fair Trading Acts. It sets minimum standards of marketplace behaviour in trade and commerce and, because it defines ‘trade and commerce’ to include ‘any business or professional activity’, it applies to the provision of legal services just as it does to the provision of other business and professional services and trade and commerce more generally.

We have published a standalone regulatory guide which describes in some detail how it applies but, in summary, the ACL requires that:

- **lawyers must not be misleading or deceptive in their dealings with clients and third parties**

  The words ‘misleading or deceptive’ have their ordinary meaning. A lawyer’s conduct is misleading or deceptive if it leads, or is capable of leading a client or third party into error, intentionally or otherwise, including by silence. The principle applies potentially to a broad range of conduct including (but not only) misleading advertising about a lawyer’s costs; misrepresentations as to fees payable and the circumstances in which they are payable; and representations that a service will be provided by a lawyer when in fact it is provided by a paralegal.

- **lawyers must not engage in unconscionable conduct in dealings with clients**

  Hence a lawyer must not act in a way which is ‘clearly unfair or unreasonable’ or that is ‘irreconcilable with what is right or reasonable’.

- **lawyers who provide legal services to an individual for personal, domestic or household use or consumption must ensure that the terms of any standard form contract they enter into with the individual to provide those services are not unfair**

  Legal services in relation to residential conveyances, deceased estates, personal injury, criminal and family law matters among others are all legal services for personal, domestic or household use or consumption. A costs agreement that is tailored to an individual client only in so far as the client’s details, the details of the services to be provided to the client and the cost of those services are inserted into a standard form ‘template’ document is likely be regarded to be a standard form contract. Unfair terms include terms which cause a significant imbalance in the rights and obligations of the parties, terms which are not reasonably necessary to protect the lawyer’s legitimate interests and terms which would cause detriment to the client.

The LPA distinguishes four types of bill. It distinguishes not only between lump sum and itemised bills but between interim and final bills. The distinction between an interim and a final bill rests on the time of delivery of the bill. An interim bill is a bill delivered when only some but not all the services a lawyer has been retained to provide have been provided if the costs agreement allows such an interim bill to be delivered. A final bill is a bill delivered when all the work to be provided under the retainer has been provided or when the client wishes nothing further done by the lawyer. McGill DCJ discusses the distinctions in Turner v Mitchell [2011] QDC 61.

11 The ACL is found at Schedule 2 to the Commonwealth Competition and Consumer Act 2010 and applies as a law of the Commonwealth by virtue of section 131 of that Act. It applies as a law of Queensland by virtue of the Queensland Fair Trading (Australian Consumer Law) Act 2010.

Hence the principle may apply to terms which purport to allow a lawyer to unilaterally vary or terminate a retainer without just cause or to suspend work pending payment or to claim assets or property as security, for example. It may also apply to terms which are scattered throughout a costs agreement rather than grouped together to help a client to fully understand the inter-relationship between the terms and give his or her fully informed consent to the terms.

- lawyers must not use undue harassment or coercion in connection with the payment of their costs

Hence lawyers must not, for example, seek to recover their costs by writing or otherwise communicating with a client in a way that is calculated to intimidate, demoralise, tire out or exhaust the client rather than simply convey a request for payment.

- lawyers guarantee when they provide legal services where either the amount paid or payable for the services does not exceed $40,000 or the services are provided for personal, domestic or household use or consumption that the services:
  - are rendered with due care and skill
  - are reasonably fit for their purpose and of a quality that they may be expected to achieve the result the client wishes the services to achieve
  - are supplied within a reasonable time.

These principles parallel the fundamental expectation of lawyers under the LPA that they must meet or exceed the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent lawyer (or otherwise be exposed to civil claims such as negligence or disciplinary action for unsatisfactory professional conduct or professional misconduct). That said, the precise application of the principle to services provided by lawyers is uncertain and likely to be the subject of future case law.

The ACL sits side by side with and overlaps the LPA. It uses different language, and it brings a lawyer’s ‘customer service’ obligations into sharper focus, but arguably imposes few if any new obligations on lawyers further to their obligations under the LPA. It is not acceptable under the LPA for lawyers to engage in misleading, deceptive or unconscionable conduct, for example, or to enter into unfair contracts with their clients or to provide legal services incompetently or with unreasonable delay.

This is an emerging jurisdiction and time will tell, but it is hard to imagine a circumstance in which lawyers who contravene the ACL in connection with the practice of law will not have contravened their professional or service obligations under the LPA. The very same conduct that contravenes the ACL will likely involve an issue of unsatisfactory professional conduct or professional misconduct, and if not then certainly a consumer dispute which will require the lawyer to provide the aggrieved consumer with fair and reasonable redress or to take other corrective action.13

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13 The LPA establishes the system for dealing with complaints and disciplinary matters at Chapter 4 (at ss.416-492). It defines a consumer dispute to be a dispute between a person and a law practice about the conduct of an lawyer to the extent that the Commissioner considers the complaint does not involve an issue of unsatisfactory professional conduct or professional misconduct, or a dispute involving a law practice employee to the extent that the Commissioner considers the complaint does not involve an issue of misconduct (section 440). It defines unsatisfactory professional conduct to include conduct of a lawyer ‘happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner’ (section 418). It defines
THE COMMON LAW

The courts and disciplinary bodies have established, interpreted and applied further key principles including the following:

- lawyers who issue a bill represent that the costs they claim in the bill are properly chargeable

Lawyers who issue a bill represent in so doing that:

- they have reviewed the bill
- they have complied with their disclosure obligations
- the costs they are claiming are properly chargeable consistent with their costs agreement and professional obligations
- any disbursements they are claiming were reasonably incurred and reasonable in amount, and generally that
- the amount of the bill is not excessive.

A lawyer’s bill is not an ‘offer’, nor is it an initial ambit claim in a commercial negotiation about the amount that might eventually be charged. It is an obvious point but a point that needs to be made. Lawyers sometimes argue in response to complaints they have overcharged a client that they can’t be held responsible for the alleged overcharge because the client who disputed the bill had the right to have the bill assessed, or was being represented by another lawyer when the bill was sent. These things may be true but they are irrelevant.

The simple fact is that ‘the professional and ethical requirement that legal practitioners not engage in conduct that constitutes professional misconduct is not dependent upon whether a client asserts a

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professional misconduct to include ‘substantial or consistent’ unsatisfactory professional conduct or ‘conduct happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice’ (section 419). Chapter 4 spells out the Commission’s powers and responsibilities in relation to consumer disputes and disciplinary matters at some length.

The Commission publishes comprehensive complaints data in its annual and monthly performance reports which are readily accessible under the About the Commission page on the Commission’s website.

14 The term ‘bill’ includes an account, invoice or other demand for payment. It is not enough for principals simply to sign a bill before sending it out to a client. They must actively turn their mind to whether or not the costs being charged are being charged consistent with their professional obligations. This not only satisfies their supervisory obligations under Rule 37 of the Legal Profession (Solicitors) Rule 2007 but gives them an opportunity also ‘to discuss any concerns with the fee-earner, make amendments as necessary, and… to identify any areas where a fee-earning team might need additional training or guidance. The simple knowledge that all bills will be checked will also add discipline to the practice of time recording’ – an extract from QLS Guide on Billing.

15 see LPA section 420(b). See also Wounding the Bull: Costs in a Disciplinary Context, a paper presented by the Commission’s David Edwards at a Legalwise Seminars Best Billing Practice Seminar held in Brisbane on 18 March 2009. The paper is published on the Commission’s website under the Speeches and Publications page.
legal right after the conduct has been engaged in. The requirement on the legal practitioner is not to engage in the conduct which would otherwise constitute professional misconduct.16

- **lawyers must not charge legal costs for work other than professional work**

Professional work comprises legal work performed by a lawyer in his or her capacity as a qualified legal practitioner. It does not include work performed by a lawyer in another capacity, even when that work is incidental to work the lawyer performs in his or her professional capacity. Hence a lawyer must not charge legal costs for any clerical or other non-legal work he or she performs incidental to his or her work as the solicitor to a deceased estate, for example, including collecting rent or closing bank accounts. Non-legal work should not be charged out at professional rates but at a rate appropriate to the nature of the work (and in the context of work on a deceased estate, for example, will be recoverable as commission not as legal costs).17

Professional work also includes paraprofessional (‘paralegal’) work performed by non-legally qualified law practice employees. It does not however include work of a merely administrative, secretarial or clerical nature (including diarising appointments, typing letters, making travel arrangements, photocopying accounts, looking up phone numbers, making internal phone calls or sending internal emails, searching for documents and files which cannot readily be located, purchasing gifts and the like).18 This is not professional work but a practice overhead.19

The distinction is not always clear cut but in the Commission’s view a lawyer must have compelling justification to count work performed by a non-legally qualified law practice employee as professional work (and therefore chargeable) unless it is necessary for the proper completion of legal work, is performed under a lawyer’s supervision and requires an understanding of substantive and procedural law in a general or specialty area of practice.20 Similarly the Commission believes a lawyer must have compelling justification to charge for such work at a rate approaching the rates appropriate to a qualified legal practitioner.21

- **lawyers must not charge for work beyond the scope of their retainer or for work that is done for the lawyer’s, not a client’s benefit**

It goes without saying that a lawyer must not charge a client for work that is performed without or contrary to the client’s instructions. The principle is broader than that, however, and implies that a lawyer must not charge for:

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16 Beazley J in **Leon Nikolaidis v Legal Services Commissioner** [2007] NSWCA 130 at paragraphs 84-85.

17 So, for example, ‘a personal representative [in a deceased estate] may employ a solicitor to collect rent or do clerical work but he or she should pay the solicitor only the charges proper for a rent collector or for a person performing clerical work’ – see de Groot’s Wills, Probate and Administration (Queensland), (Loose-leaf Service), at paragraph 502. See also **Quick On Costs** (Loose-leaf Service) at paragraph [2.1130] and Alyson Ashe, Legal Costs (New South Wales) LexisNexis Butterworth’s (online service) at paragraph 1510.

18 **Council of Queensland Law Society v Roche** [2003] QCA 469.

19 **D’Alessandro and D’Angelo v Bouloudas** (1994) 10 WAR 191.

20 This is the definition of ‘paralegal’ adopted by the Paralegal Taskforce of the Law Society of British Columbia in 2003 when it was researching the introduction of a paralegal certification scheme. See also Cowley J, 2004, **A comparative study of paralegals in Australia, the United States of America and England and Wales** at chapters 1 and 4, Masters Thesis, Southern Cross University, Lismore, NSW.

21 **Council of Queensland Law Society v Roche** [2003] QCA 469.
- lawyers must not charge a client costs that are incurred through the lawyers’ mistakes, negligence or misconduct, or the costs of rectifying the lawyers’ mistakes, negligence or misconduct

The Commission believes that it is rarely if ever proper for a lawyer to charge a client for costs the lawyer incurs:

- as a result of the lawyer’s ignorance or negligence
- doing work which is ‘useless, unnecessary or excessive’ to accomplish the client’s objectives
- doing work with undue delay or in such a way as to amount to other misconduct or default on the part of the lawyer
- preparing and giving negligent advice

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22 See Dowsett J in Re Walsh Halligan Douglas’ Bill of Costs [1990] 1 Qd R 288

23 See Stephen Warne, Costs and Misconduct, a paper delivered at a Legalwise Seminar on costs held in Melbourne on 7 September 2011.

24 See Ryan v Hansen [2000] NSWSC 354; (2000) NSWLR 184 in relation to this, and the previous three bullet points. See also Re Windeyer, Fawl & Co: Ex parte Foley (1930) 31 NSWLR 145; Cacchia v Isaacs (1985) 3 NSWLR 366; Abrahams and Anor v Wainwright Ryan [1999] 1 VR 102; and Re Baker Johnson’s Bill of Costs [1995] 2 Qd R 234. See also the Legal Profession Act 2007 at section 328(7)(g) which provides that the Supreme Court or QCAT, having set aside a costs agreement, may have regard to the quality of the work done under the agreement in deciding the fair and reasonable costs.

However, a lawyer maybe entitled to costs in certain circumstances notwithstanding some of the work was negligent. In Cacchia v Isaacs (1985) 3 NSWLR 366 at 371 the Court stated ‘the result of the authorities (which are reviewed by Hope JA) and of the principles of contract law of which this is but a special species is that a solicitor, who has been found to be negligent, may nonetheless recover from his client those costs which are severable, untainted by negligence and which relate to matters distinct from those upon which the solicitor has been found negligent. He may not recover fees in respect of the very proceedings in which he has been found
o correcting the lawyer’s errors, mistakes or negligence, or

o by way of adverse costs orders consequent upon the lawyer’s error, mistake or negligence.\(^\text{25}\)

The Commission believes that a lawyer’s conduct in charging clients for work performed in these circumstances in the absence of a compelling justification will amount to charging excessive legal costs and may constitute unsatisfactory professional conduct or professional misconduct.

- lawyers who agree with a client to charge for their services on a time-costed basis must ensure that the time they charge the client in a matter is no more than, and fairly and reasonably reflects the time they actually spend on the matter

It is common for lawyers to bill their clients according to the time the lawyer spends on the client’s work. This is known as ‘time costing’ or ‘time-based billing’. It goes without saying that lawyers who use time-based billing should not charge a client for more time than they actually spend performing work for the client, but the principle thus expressed can be deceptively simple. Lawyers who use time-based billing often bill in units of time ‘or part thereof’, and commonly in units of ‘6 minutes or part thereof’. Sometimes the units of time are much longer, including when lawyers charge ‘a daily rate’. These practices can have the effect of allowing (or purporting to allow) the lawyer to artificially inflate their charges when compared with the time they actually spend on a matter. So for example:

- they allow (or purport to allow) a solicitor who has agreed to charge out his or her time at $350 per hour in 6 minute units of $35 to repeatedly over the life of a matter charge 6 minutes of time for tasks which actually take much less than 6 minutes, and often even less than a minute. This can result in the lawyer billing a client much more than the agreed hourly rate of $350 per hour when the bill is measured against the total number of hours actually spent on the matter \(^\text{26}\); and

- it allows (or purports to allow) a barrister who has agreed to charge by the day to charge for a full day at his or her full daily rate when he or she has done much less than a full day’s work, especially if a day has been defined as say 10 hours.

Such conduct may amount to charging excessive legal costs and hence to unsatisfactory professional conduct or professional misconduct, notwithstanding that the client has agreed to pay the lawyer for work performed in the specified units of time. And of course, to reiterate in this context some of the points made earlier, lawyers may be found to have charged excessive legal costs even when they charge no more than the time they actually spend on a matter – if some of the time was spent over-servicing or performing work that was not reasonably necessary or performing it in an unreasonable way.\(^\text{27}\)

\(^{25}\) See Legal Services Commissioner v James Xavier Madden [2008] LPT 2 and Legal Services Commissioner v Madden [2008] QCA 52 in relation to both this and the previous bullet point.

\(^{26}\) See for example Eileen Liu v Tony Barakat, Russell Walter Keddie and Scott John Roulstone trading as Keddis Lawyers, District Court of New South Wales, Matter 224007 of 2010, 8 November 2011.

\(^{27}\) As to the limits of what is allowable, see Moray v Lane trading as Lane and Lane (unreported 26/2/1993, Allen J SCNSW BC9303682); Legal Professional Complaints Committee v O’Halloran (2011) WASAT 95; Council of
- **lawyers must not charge one unit of time more than once**

The New South Wales Court of Appeal articulated the principle as follows: ‘where a solicitor is retained to act for multiple clients whose proceedings are heard together with evidence in one being evidence in the other… and the clients are charged on a time costed basis, there must be an apportionment of time spent on matters common to two or more of the proceeding… The precise mechanism of apportionment will depend on the circumstances of the case… However… in all cases the apportionment must pay due regard to the principle that one unit of time may not be charged more than once.’\(^{28}\)

Some commentators interpret the principle narrowly, to apply only where a lawyer acts for multiple clients and the benefit of his or her professional work is shared among those clients. The Commission interprets the principle more broadly. The wording of the judgment suggests that the ‘shared benefit’ facts of the matter the Court found itself called upon to decide illustrate rather than limit how the principle applies, and that is clearly correct: it is self-evidently wrong (and possibly fraudulent) for a lawyer to seek to charge two clients in entirely separate matters the same unit of time for work purportedly performed for both of them in that unit of time.

The Commission believes that the principle has other and less obvious applications also, including for example to the following, familiar fact situations:

- a lawyer who flies for 2 hours to attend a meeting with an interstate client and uses the time on the plane to work on another client’s file. The principle that a lawyer must not charge one unit of time more than once implies that the lawyer must not charge both clients for the time he or she was on the plane, but at most one of them (viz., the client whose file the lawyer worked on);

- a solicitor who bills in minimum units of ‘6 minutes of time or part thereof’ and who makes a telephone call to a client which takes say 2 to 3 minutes and promptly makes a call to another client that also takes 2 to 3 minutes. The principle that a lawyer must not charge one unit of time more than once implies that the solicitor must not charge both clients the same 6 minute unit of time, but charge each client pro rata. This seems a trivial example at first blush but (as noted above) the small amounts of money involved can add up to a substantial sum over the life of a file;

- a barrister who charges a client a cancellation fee for a unit of time previously set aside in a matter which unexpectedly settles but uses the time now ‘freed up’ (a day or several days, perhaps) to perform work for other clients and bills those other clients for that work. The principle that a lawyer must not charge one unit of time more than once appears to imply in our view that the barrister should not charge a cancellation fee in these circumstances, or any other circumstance in which he or she substitutes other paid work for work that is ‘cancelled’.\(^{29}\)

There is one final and overarching principle which bears repetition in the current context no less than in the context of professional conduct more generally:

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\(^{28}\) *Queensland Law Society v Roche* [2004] 2 Qd R 574; *Quick on Costs* at [5.4090] and Stephen Warne, *Costs and Misconduct* at para4.3 (see note 23, above).

\(^{29}\) *Bechara v Legal Services Commissioner* [2010] NSWCA 369 per Young JA at paragraphs 4 and 5 and McClellan CJ at CL at paragraphs 138 and 139.

The Commission is developing a consultation draft of a regulatory guide which addresses this issue specifically.
- lawyers must be fair and reasonable in their dealings with clients, colleagues and third parties; must conduct themselves honestly and with integrity; and must adhere to generally accepted standards of common decency

The High Court has noted, for example, that while many of the rules that govern a lawyer’s conduct are reduced to writing and from time to time interpreted and modified, there is another and more fundamental set of rules that are for the most part not to be found in writing - and ‘it is not necessary that they be reduced to writing because they rest essentially on nothing more and nothing less than a generally accepted standard of common decency and common fairness.’

The Queensland Court of Appeal has commented to similar effect that ‘the major criteria which ultimately inform the professionalism of the law are integrity, and as concomitants, honesty and reasonableness.’

This is as it should be. Sir Gerard Brennan once noted, wisely, that ‘if ethics were reduced to rules, a spiritless compliance would soon be replaced by skilful evasion.’

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30 See Clyne v NSW Bar Association [1960] HCA 40; (1960) 104 CLR 186 at 200. See McClellan CJ at CL in Bechara (see note 28, above) at paragraph 42

31 Council of Queensland Law Society v Roche [2003] QCA 469 at paragraph 32