



LEGAL SERVICES COMMISSION

Regulatory Guide 8

Billing Practices – Some Key Principles

Version 1, 16 September 2013

The key principles, in summary

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Introduction

The Legal Services Commission (the Commission or LSC) receives more complaints about lawyers' billing practices and costs than any other single issue.¹ We have published this guide to help lawyers and users of legal services alike better understand some of the key principles that apply to lawyers' billing practices, to help lawyers avoid complaints about their bills and billing practices and to set out the factors we take into account in dealing with related complaints.²

¹ We note at the outset that lawyers deal with clients ranging from 'retail' consumers who go to them for assistance to buy or sell a house, make a will or to deal with deceased estate, personal injury, criminal and family law matters through to business clients and corporations who go to them for assistance in relation to mergers and acquisitions, commercial disputes, complex financial transactions and the like. The guide is directed primarily to the conduct of lawyers in their dealings with 'retail' consumers.

² We have prepared the guide having regard to the feedback we received in response to a consultation draft that we circulated widely among the profession and others during March 2012. The draft guide (headed *Billing Practices – Key Principles*) is published on the Consultations page of the LSC website together with the submissions we received in response. We are indebted to the people and organisations who responded to our call for submissions. We are especially indebted to Roger Quick, one of the authors of *Quick on Costs* and a Special Costs Consultant with QICS Law; Doug Kerr, also of QICS Law and a Court Appointed Costs Assessor; Graham Robinson, a barrister and Court Appointed Costs Assessor; and Stephen Warne, a barrister and author of the Australian Professional Responsibility Blog for their helpful comments on earlier versions of this guide. The Commission remains entirely responsible however for any remaining 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 them. The Overview is published on the Regulatory Guides page of the LSC website. We note that we 'hope and intend that the guides will help lawyers avoid complaints, help promote adherence to high professional standards and help prevent non-compliance, especially inadvertent non-compliance by that vast majority of lawyers who want to do the right thing.' We hasten to add, however, that the guides 'are not, nor can they ever be binding.' We explain that '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 in laws enacted by parliaments, in the judgments of the disciplinary bodies and the courts and in the conduct rules developed by the professional bodies.'

We have already and will in the future publish 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) that they are not always well understood.³

The key principles are established in both legislation (most relevantly in the *Legal Profession Act 2007* and the *Australian Consumer Law*) and in the common law. We have listed them under those three headings accordingly. It is not nor intended to be an exhaustive list. We have canvassed the key principles established by the *Australian Consumer Law* (the ACL) in a separate guide⁴ and so will not further elaborate those principles here. Rather we will confine the discussion to the principles established by the *Legal Profession Act* (the LPA) and in the common law, highlighting the principles that appear to us to be the most relevant to our day to day work dealing with complaints.

Principles derived from 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 regulatory objectives it seeks to achieve. Some principles are apparent, nonetheless. They include the following:

1. Lawyers should give their clients valid costs disclosure

The LPA sets out a lawyer's costs disclosure obligations in considerable detail, over ten pages of legislation.⁵ Stripped to its bare essentials, it says that:

- Lawyers should disclose to their clients in writing the basis on which they propose to calculate their legal costs, and before or as soon as practicable after they accept a client's instructions;
- Lawyers should give their clients an estimate of the total legal costs if it is reasonably practicable to do so or, if not, a range of estimates and an explanation of the major variables that will affect the calculation of those costs;
- Lawyers in litigation matters should disclose the range of costs that may be recovered if the client is successful in the litigation and the range of costs the client may be ordered to pay if the client is unsuccessful;⁶
- Lawyers should give 'ongoing disclosure' – that is to say, they should disclose in writing any substantial changes to any previous disclosures as soon as reasonably practicable after they become aware of the changes; and

We are very clear that the guides simply 'set out the factors we take into account in exercising our regulatory responsibilities in grey areas where it is uncertain how a lawyer's professional obligations apply.' This is no more than lawyers and users of legal services are entitled to expect of a transparent and accountable regulator. Nothing is set in stone however. We recognise that the disciplinary bodies and the courts are constantly shedding new light on hitherto grey areas of professional responsibility, and similarly parliaments and the professional bodies through new and/or amended legislation and conduct rules. Clearly in those eventualities we will revise and update our guides accordingly.

³ All the guides are, or will be, accessible on the [Regulatory Guides](#) page of the LSC website.

⁴ *Regulatory Guide 7: The Application of the Australian Consumer Law to Lawyers*.

⁵ The *Legal Profession Act 2007* sets out a lawyer's costs disclosure obligations at Part 3.4, Division 3, 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 LSC website.

⁶ *Legal Profession Act 2007* ss 308(1)(f) and 308(4).

- 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.

Importantly lawyers do not satisfy their obligation to give ongoing costs disclosure simply by giving clients interim bills which add up to a figure which approaches or exceeds their earlier estimate(s). They should give a revised estimate of their total legal costs and/or likely future costs.⁷

2. Lawyers should ensure that their costs agreements with clients are both fair and reasonable

The LPA allows lawyers to enter into contracts with their clients called costs agreements.⁸ It requires some kinds of costs agreement to meet special requirements⁹ and prohibits one kind of costs agreement altogether,¹⁰ but otherwise allows lawyers considerable flexibility. It clearly implies however that lawyers should ensure their costs agreements with clients are both fair and reasonable - that is to say, that their costs agreements are both fairly entered into and reasonable in their terms.¹¹

That is because the LPA entitles a client to apply to the Supreme Court (the court) or the Queensland Civil and Administrative Tribunal (QCAT) to set aside a costs agreement on the grounds that the agreement is either unfair or unreasonable or both.

It gives both the court and QCAT a broad discretion to set aside a costs agreement having regard (among other things) to:

- Whether the lawyer gave valid costs disclosure;
- The circumstances and conduct of the parties before, when and after the agreement was made; and
- Whether and how billing under the agreement addresses changed circumstances affecting the nature and extent of the legal services provided under the agreement.¹²

⁷ *Franklin v Barry and Nilsson Lawyers* [2011] QDC 55 at [98-101]. The obligation to disclose legal costs is prospective whereas interim bills are retrospective and advise clients of the amounts they have been charged for past legal services.

⁸ *Legal Profession Act 2007* Part 3.4, Division 5, sections 322 – 328. Notably section 326 says that a costs agreement may be enforced in the same way as any other contract subject to its compliance with the requirements of Division 5 and also Division 7, sections 334 – 344 (which deal with costs assessment). Section 319 deals with the consequences of not having a costs agreement.

⁹ *Legal Profession Act 2007* section 323 for an example sets out some specific requirements of costs agreements which provide that the payment of some or all of the legal costs is conditional on the successful outcome of the matter (conditional costs agreements); Section 324 sets out some further specific requirements of conditional costs agreements which provide for the payment of an uplift fee.

¹⁰ *Legal Profession Act 2007* s 325 prohibits costs agreements which provide for the payment of contingency fees, i.e. fees which are calculated in whole or in part by reference to the amount of any award or settlement or the value of any property that may be recovered in the proceedings to which the agreement relates.

¹¹ *Legal Profession Act 2007* s 328 and the discussion in *Lawyers' Professional Responsibility*, Dal Pont, 3rd ed. at [14.165]

¹² *Legal Profession Act 2007* s 328(1) and (2).

The court or QCAT in the event they set aside a costs agreement may make whatever order they consider to be appropriate as to the costs of the work the subject of the agreement including by applying the applicable scale of costs or by deciding the 'fair and reasonable' legal costs of the work to which the agreement related.¹³

They may not however order the payment of an amount in excess of the amount the lawyer would have been entitled to recover if the agreement had not been set aside.¹⁴

2. Lawyers should not charge excessive legal costs

The LPA clearly implies that lawyers should not charge excessive legal costs. It lists 'charging excessive legal costs' as one of a series of examples of conduct that is capable of constituting unsatisfactory professional conduct or professional misconduct.¹⁵

Interestingly the wording of the section refers only to 'charging' excessive costs, not to 'deliberately' charging excessive costs, and it refers only to 'excessive' costs, not to 'grossly' or 'manifestly' excessive costs. Those words framed the relevant disciplinary tests prior to the commencement of the LPA in 2004 and it may be that the LPA has deliberately lowered the threshold in this respect. The courts and the disciplinary bodies have yet to consider the issue.¹⁶

3. Lawyers should charge no more than reasonable costs

The LPA establishes the primacy of costs agreements in determining the amount lawyers can charge for their services but equally it reflects the well established principle at common law that lawyers are not protected from disciplinary action for charging excessive legal costs on the basis simply that they billed a client consistently with their costs agreement with the client.¹⁷

Determining the amount of a bill is always a two-step process: lawyers should first ask themselves whether they have calculated their costs in accordance with their costs agreement with the client and secondly, even if they have, whether the costs they are claiming under the agreement may be excessive even so.

The LPA sets out how lawyers can properly bill for their services in considerable detail over twenty-four pages of legislation.¹⁸ When read as a whole it clearly implies that lawyers should charge no more than fair and reasonable costs.

¹³ *Legal Profession Act 2007* s 328(4) and (5).

¹⁴ *Legal Profession Act 2007* s 328(6).

¹⁵ *Legal Profession Act 2007* s 420.

¹⁶ The Commission's David Edwards discusses this issue in his paper *Wounding the Bull - Costs in a Disciplinary Context*. The paper is published on the [Speeches and Papers](#) page of the LSC website.

¹⁷ *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198; *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138; and *Council of Queensland Law Society v Roche* [2003] QCA 469 in which the Chief Justice observed that 'the circumstance that a solicitor's right to exact certain charges is enshrined in an executed costs agreement will not necessarily protect the solicitor from a finding of gross overcharging.' He went on to refer to statements made by Kirby P in *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 to the effect that 'no amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety' (page 422). See also *Wounding the Bull* (above).

¹⁸ *Legal Profession Act 2007* s 319-343.

That is because it provides that the amount lawyers can charge for their services may be determined in one of only three ways:

- It can be the amount that is recoverable under a valid costs agreement (that is to say, a costs agreement that is both fair and reasonable - see principle 2, above); 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 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.'¹⁹

The LPA entitles clients to apply to have their costs assessed by an independent court appointed costs assessor.²⁰

It requires costs assessors to assess costs that are subject to a costs agreement by reference to the agreement provided that the agreement specifies the amount or a rate or other means of calculating the costs and provided also that the agreement has not been set aside and the assessor is satisfied that it gives valid costs disclosure.²¹ It requires assessors in these circumstances to assess the costs by deciding whether or not it was reasonable to carry out the work to which the costs relate and whether or not the work was carried out in a reasonable way.²²

If a costs agreement has been set aside, however, or if the assessor believes the client has not been given valid costs disclosure, the assessor must assess the costs by deciding the 'fairness and reasonableness' of the amount of the costs having regard among other things to any relevant advertisements as to the lawyer's costs; the lawyer's skills; the complexity, novelty of difficulty of the matter; the quality of the work done; and the urgency of the matter.²³

5. Lawyers should on a request made within time give a client sufficient information about the costs they have charged the client to enable the client to make an informed decision whether to have the costs assessed by an independent court appointed costs assessor and, if the client applies to have the costs assessed, to enable the costs assessor to undertake the assessment.

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 assess the bill).

¹⁹ *Legal Profession Act 2007* s 319. Section 341 sets out the factors cost assessors may take into account in deciding what is fair and reasonable.

²⁰ *Legal Profession Act 2007* s 335-339, especially section 335. See also [Challenging Legal Costs](#) published on the Legal Services Commission website At www.lsc.qld.gov.au.

²¹ *Legal Profession Act 2007* s 340.

²² *Legal Profession Act 2007* s 341(1)(a)-(b). See also *Mathieson Nominees Pty Ltd v AJH Lawyers* [2013] VSC 325, 13-15, where it was decided under the comparable provisions of the Victorian LPA that the parties to a valid costs agreement are to be held to their bargain and hence that a cost assessor's job in these circumstances is to decide not the 'fair and reasonable value of the legal services provided' but simply whether the costs at the agreed rate were reasonably incurred - whether it was reasonable to carry out the work to which the costs relate and whether the work was carried out in a reasonable way. The former criterion comes into play only if a costs agreement has been set aside or the assessor believes that it fails to give valid costs disclosure. *Mathieson* relied upon two decisions of McGill DCJ in the District Court of Queensland - *Paroz v Clifford Gouldson Lawyers* [2012] QDC 151 and *Southwell v Jackson* [2012] QDC 65 at 22-24.

²³ *Legal Profession Act 2007* s 341(1)(c) and 341(2).

It requires lawyers to provide the itemised bill within 28 days of any such request, to prepare the bill free of charge and to attach a written statement setting out how the client can dispute the bill if the client so chooses.²⁴

The LPA does not set a time limit for clients to request an itemised bill but in our view a request should be made wherever possible before the original lump sum bill becomes payable and in any event within twelve months of having received the bill, allowing the lawyer time to comply with the request.

Principles derived from the *Australian Consumer Law*

We have published a stand-alone regulatory guide²⁵ which describes how the ACL applies to lawyers. It canvasses the **principles 6 -10** that are listed at the front of this guide and, rather than repeat that discussion here, we refer readers who are interested in how those principles apply to the discussion in that guide.

Principles derived from the common law

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

11. 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;²⁶
- 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 bill is not excessive in amount.²⁷

²⁴ *Legal Profession Act 2007* s 331-332. We have published a regulatory guide which specifically addresses these issues: *Regulatory Guide 6 - Itemised Bills*. The law underpinning the principle is usefully summarised by Reid DCJ in *Clayton Utz Lawyers v P&W Enterprises Pty Ltd* [2010] QDC 508. See also *Tabtill no2 Pty Ltd & Ors v DLA Phillips Fox* [2012] QSC 115.

²⁵ *Regulatory Guide 7: The Application of the Australian Consumer Law to Lawyers*.

²⁶ The term 'bill' includes an account, invoice or other demand for payment. It is not enough for the principals of a law firm 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 consistently with their professional obligations. This not only satisfies their supervisory obligation under Rule 37 of the Australian Solicitors Conduct Rules 2012 (Qld) 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' (see Queensland Law Society, *Guide to Costs, Billing and Profitability*, March 2009, page 15).

²⁷ *Legal Profession Act 2007* s 420(b): 'charging of excessive legal costs in connection with the practice of law'. See also principle 4 and *Liu v Barakat*, unreported, District Court of New South Wales, Matter 22407 of 2010, Curtis J, 8 November 2011.

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.

That is because '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 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.'²⁸

12. Lawyers should not charge legal costs for work other than professional legal work

Professional work comprises legal work performed by lawyers in their capacity as legal practitioners (that is to say, work they perform as qualified legal practitioners and to the exclusion of people who are not). It does not include work performed by lawyers in some other capacity, even when that work is incidental to work they perform in their professional capacity.

Thus a lawyer's legal costs should be confined to the work they perform in their capacity as qualified legal practitioners. Lawyers who perform work which does not require legal professional knowledge and which they perform in some other capacity are entitled to be paid for that work in the same way as any other person who performs that same kind of work. Thus for example the executor of a deceased estate may engage a solicitor to collect rent or perform clerical work related to the administration of the estate but the solicitor should charge the estate no more for that work than is proper for a rent collector or person who performs clerical work.²⁹

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).³⁰ This is not professional work but a practice overhead.³¹

²⁸ Beazley J in *Leon Nikolaidis v Legal Services Commissioner* [2007] NSWCA 130 at paragraphs 84-85.

²⁹ 'For legal costs to be charged by a solicitor the work done must be professional in nature. It must concern business conducted within the profession – work done because the person is a solicitor and to the exclusion of someone who is not a solicitor. Accordingly, 'costs' do not include work which is not professional work. It follows that a solicitor who is engaged to perform work which is not professional in nature and which does not require professional legal knowledge is merely entitled to be paid for in the same way as any other person performing that type of work... The remuneration for it would usually be fixed in the same way but is subject to whatever agreement is reached by the parties. A personal representative 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... As the remuneration of a solicitor for non-professional work does not involve 'costs', he or she is not obliged to deliver an itemised bill and the charges are not subject to assessment' - see *Wills, Estates and Administration Practice*, Queensland Law Society, 1995, volume 2 at paragraph 502.

³⁰ *Council of Queensland Law Society v Roche* [2003] QCA 469.

³¹ See the analysis in *D'Alessandro and D'Angelo v Bouloudas* (1994) 10 WAR 191.

The distinction is not always clear cut but in the Commission's view lawyers require compelling justification to count work performed by non-legally qualified law practice employees as professional work (and therefore chargeable) unless it is necessary for the proper completion of legal work and is performed under a lawyer's supervision.³²

Similarly, lawyers require compelling justification to charge for work performed by paralegals at a rate approaching the rate appropriate for a qualified legal practitioner.³³

13. Lawyers should not charge for work beyond the scope of their retainer³⁴ or for work that is done for the lawyer's not a client's benefit

It goes without saying that a lawyer should not charge a client for work that is performed contrary to the client's instructions or, unless the lawyer has the client's specific and informed agreement, for work that is performed without the client's instructions. The principle is broader than that, however, and implies that a lawyer should not charge:

- For researching basic law and procedure that a competent lawyer who has accepted the client's instructions should already know or have at his or her fingertips, or for work that might be described more accurately as 'self-education on the part of an inexperienced or ill-educated practitioner' as opposed to 'work that is fairly attributable to the presentation of [the client's] case';³⁵
- For negotiating a costs agreement or variations to a costs agreement or complying with the lawyer's costs disclosure obligations;
- For drafting and registering securities given by a client to secure payment of fees;
- For copying a client's file for the lawyer's, not the client's purposes;
- For responding to a client's queries and complaints about the lawyer's costs, or calls from a client for the delivery up of the file; and
- For responding to complaints at the request of the commission.³⁶

³² 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. See also *D'Alessandro and D'Angelo v Bouloudas* (above).

³³ *Council of Queensland Law Society v Roche* [2003] QCA 469.

³⁴ A retainer is the contract by which a client employs a solicitor. A costs agreement is a contract which may differ from a retainer in three ways: it provides for the payment of legal costs to the solicitor; it must be accompanied by disclosure in accordance with the provisions of the LPA; and it must be in writing or evidenced in writing – see *Quick on Costs*, R Quick and L Harris at [20.280] and [20.1220]. Contracts create contractual obligations and liabilities. A statute such as the *Australian Consumer Law* and a civil wrong such as negligence can create other obligations and liabilities which are beyond the scope of this guide.

³⁵ Dowsett J in *Re Walsh Halligan Douglas' Bill of Costs* [1990] 1 Qd R 288. None of this prevents a lawyer entering into an informed agreement with a client who says 'I know you don't normally do family law work but you're the best lawyer I know and I am prepared to pay you to bring yourself up to speed. I understand that I will not recover the costs of your getting yourself up to speed even if I win.'

³⁶ Stephen Warne, *Costs and Misconduct*, a paper delivered at a LegalWise Seminar on costs held in Melbourne on 7 September 2011. See also Queensland Law Society, *Guide to Costs, Billing and Profitability*, March 2009, pages 14-15 and 47; and *Quick on Costs*, 1997 to date, paragraphs 3.35-3.38.

14. Lawyers should 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

Lawyers should not charge their clients for costs the lawyers incur:

- As a result of the lawyers' negligence;
- Doing work which is 'useless, unnecessary or excessive' to accomplish their clients' objectives;
- Doing work with undue delay or in such a way as to amount to other misconduct or default;
- Preparing and giving negligent advice;³⁷
- Correcting the lawyer's errors, mistakes or negligence; or
- By way of adverse costs orders consequent upon the lawyer's error, mistake or negligence.³⁸

The conduct of lawyers in charging clients for work performed in these circumstances in the absence of a compelling justification exposes them potentially to disciplinary action for charging costs to which they are not entitled and/or for charging excessive legal costs.

Similarly lawyers should not charge a client for time spent over-servicing the client, doing work that was not reasonably necessary or doing it in an unreasonable way.³⁹

15. Lawyers who agree with a client to calculate their legal costs on a time-costed basis should 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.

³⁷ *Ryan v Hansen* [2000] NSWSC 354; (2000) NSWLR 184 in relation to both 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 legal costs of the work the subject of the agreement.

However, a lawyer may be 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 negligent, unless he can show (the onus being on him) that, despite the negligence, some real advantage has accrued to the client from those services, or some of them, which would render it unjust for the client to escape liability for those fees or part of those fees.'

³⁸ *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.

³⁹ 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 Queensland Law Society v Roche* [2004] 2 Qd R 574; *Quick on Costs* at [5.4090] and Stephen Warne, *Costs and Misconduct* at paragraph 4.3 (see note 34, above).

This is known as 'time costing' or 'time-based billing'. It seems obvious that lawyers who use time-costed billing should not charge a client for more time than the time they actually spend performing work for the client, and so for example should not charge a client for an hour's work drafting a document when in fact it took only half an hour, much less if they spent the hour working for another client in another matter.

But the principle thus expressed is deceptively simple. That is because lawyers who use time-based billing typically enter into costs agreements with their clients which provide that they will calculate their costs in minimum units of time 'or part thereof', most commonly in 6 minute units of time 'or part thereof' but sometimes in units of time that are much longer, including when lawyers charge 'a daily rate'. Interpreted literally, these costs agreements purport to allow the lawyers to charge a client for more time (and potentially significantly more time) than the time they actually spend on the client's matter and so to artificially inflate their bill.⁴⁰

Consider the following scenarios:

- A solicitor who charges out his or her time at \$400 per hour in 6 minute units of \$40 includes in a bill a claim for \$160 or .4 of an hour (i.e., four 6 minute units). The actual time the solicitor spent on the matter might be anywhere between a few seconds over 18 minutes and exactly 24 minutes - a variation potentially of just short of 6 minutes or 25% of the amount claimed.
- Worse, imagine that the same solicitor repeatedly over the life of a matter charges 1 unit of time or 6 minutes for tasks which actually take much less than 6 minutes, and often no more than a minute (to peruse a doctor's invoice for the preparation of a medical report, for example, or to compose a brief email). Thus the solicitor charges the client much more than (and potentially many times more than) the agreed hourly rate of \$400 per hour when the bill is measured against the total number of hours the solicitor actually spent on the matter.⁴¹
- Or imagine a barrister who without his or her client's informed consent charges the client his or her full daily rate for what in reality is much less than a full day's work - and possibly charging two or more clients the full daily rate for the same day's work if he or she performed a part-day's work for each of them over the course of the day.

⁴⁰ The use of the term 'or part thereof' has attracted widespread criticism since the early 1990's. See, for example, *Burns Philip Investment Pty Ltd v Dickens (No. 2)*, Supreme Court of NSW, 31 May 1993, unreported, per Young J at page 8; *Vilensky v Banning FC(WA)*, 20 June 1996, unreported, per Ipp J at paragraphs 6-8 and the other comments collected in GE Dal Pont's *Law of Costs*, 2nd ed, 2009, at [3.33] page 56, FN 115. See also *Re Morris Fletcher & Cross' Bill of Costs*, [1997] Qd R228 per Fryberg J at page 239: 'there is, in my view, inherent scope for error in the number of hours charged. That is because time charging depends upon charging of time in blocks of six minutes. That time is charged regardless of whether the block is fully utilised or merely invoked because there was a 30 second telephone call.'

See also Stephen Warne, *On Rapacity*, Precedent, Issue 110, May/June 2012 at page 14: 'the most pernicious trick employed by lawyers, of course, is use of the words 'or part thereof' in costs agreements, which many believe allow them to pretend to charge a mere \$550.00 per hour, but to achieve that in six separate attendances of a few seconds each. There is nothing good about billing by units of time which are exclusively rounded up. A client who is charged \$500.00 per hour is entitled to deadly accuracy in time recording, and scrupulous fairness in rounding protocols.'

Interestingly the term 'or part thereof' appears in the Federal Court scale (items 1.1, 1.2 and 1.3) which came into effect on 1 August 2011. We note however that the scale is one that operates only between the parties to proceedings, not between solicitor and client, and is subject to the control of the court.

⁴¹ *Liu v Barakat*, unreported, District Court of New South Wales, Matter 224007 of 2010, Curtis J, 8 November 2011.

We noted earlier that lawyers should charge no more than reasonable costs and, if their costs are challenged and go to assessment, they are entitled to no more than their reasonable costs.⁴²

Some independent court appointed costs assessors respond to bills like the bill in the first of the above scenarios with a form of ‘mathematical averaging’. They would allow the lawyer in that scenario not the claimed 24 minutes but only 21 minutes (and hence not \$160 but \$140) based on a statistical analysis to the effect that there is an ‘in built’ overcharge of 3 minutes, on average, in every claim based on multiples of 6 minute units of time or part thereof.⁴³ Taxing Officers of both the Supreme Court of Queensland and the Family Court have accepted submissions premised on this analysis.

Different (and less precise) considerations apply in relation to the second and third scenarios, but the lawyers in either case are entitled to charge no more on a time-costed basis than an amount which reflects the time they actually spent on the matter or, if that is unknown and/or unknowable, their fair and reasonable costs having regard to their skills, the quality of their work, the complexity, novelty or difficulty of the matter and the like.

The conduct of the lawyers in the above scenarios exposes them not only to complaint and to having their costs reduced on assessment but also potentially to disciplinary action for charging excessive legal costs⁴⁴ – and this notwithstanding that they may have entered into costs agreements with their clients which purport to allow them to bill the clients for work performed in the specified units of time ‘or part thereof.’

We reiterate in this context that lawyers are not protected from a finding that they charged excessive legal costs on the basis simply that they billed the client consistent with their costs agreement with the client.⁴⁵ Determining the amount of a bill is always a two-step process: lawyers should ask themselves firstly whether they have calculated the bill in accordance with their costs agreement with the client and secondly, even if they have, whether the costs they are claiming under the agreement may be excessive even so.

16. Lawyers should 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] 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 proceedings... The precise mechanism of apportionment will depend on the circumstances of the case... However... in all cases

⁴² See the discussion in relation to principle 4, above.

⁴³ GJ Robinson, B.Sc., B.Econ., former Assistant Deputy Commonwealth Statistician and now a barrister who specialises in legal costs elaborates this statistical analysis as follows: ‘when the length of the attendances is randomly distributed (i.e. there is no inherent bias which causes them to cluster around a particular point), statistical theory predicts that with a fairly large number of attendances, the average will be the midpoint of the final unit, i.e. of 3 minutes. For this purpose, it is irrelevant whether we are considering four units, ten units or one hundred and ten units. It is only the last unit which will need to be considered. On this analysis, there is an in-built overcharge factor of 3 minutes, on average, in every claim based on a time charging system incorporating 6 minute units.’

⁴⁴ We note that a solicitor in Western Australia was recently suspended for six months for overcharging by reason of charging units of 6 minutes or part thereof and repeatedly charging one unit of time for work that took little time at all, such as reviewing incoming correspondence – see *Legal Profession Complaints Committee v O’Halloran* [2011] WASAT 95(S) and *Legal Profession Complaints Committee v O’Halloran* [2013] WASAT 105.

⁴⁵ See the discussion in relation to principle 4, above.

the apportionment must pay due regard to the principle that one unit of time may not be charged more than once.’⁴⁶

The same reasoning applies to a situation in which, for example, a lawyer who acts for multiple clients in a class action updates them all as to the progress of the matter by sending them each a short email via a group distribution list - by sending only the one email, in effect. The principle that lawyers must not charge one unit of time more than once precludes the lawyer in this situation from charging each and every client the one unit of time it took to compose and send the email.

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, but we believe it has broader application. Indeed the wording of the judgment itself 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 for a lawyer to seek to charge each of two clients in entirely separate matters their full rate for work purportedly performed for both of them at the same time.

We believe that the principle has other, less obvious implications for lawyers who calculate their costs on a time-costed basis, including for example to lawyers in the following, familiar fact situations, all of which expose them to complaint and potentially to disciplinary action for charging costs to which they are not entitled and/or for charging excessive legal costs.

We have mentioned one of them already. The principle implies in our view that barristers who undertake work for multiple clients on the same day and who charge a daily rate should not charge each client the full daily rate. The barrister has performed but one day’s work, and the costs of that one day’s work should be apportioned between the client’s pro rata. But consider these scenarios also:

- 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 should not charge one unit of time more than once implies in our view that the lawyer should 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), and this notwithstanding that the lawyer might have a costs agreement with the interstate client which allows the lawyer to charge ‘travel time’.
- A solicitor who bills in ‘6 minute units or part thereof’ and who makes a telephone call to a client which takes say 2 to 3 minutes and promptly within the same 6 minute period makes a call to another client in another matter that also takes 2 to 3 minutes.

The principle that a lawyer should not charge one unit of time more than once implies in our view that the solicitor should 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 quickly add up to a substantial sum over the life of a file.

⁴⁶ *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.

- A solicitor who purports to bill in '6 minutes units or part thereof' and who performs a continuous series of discrete tasks but who calculates his or her bill not by 'counting' the units of time it took to complete the series of tasks but by 'counting' each of the discrete tasks and charging one unit of time for performing each of those tasks - and so charges the client not for the (say) 10 minutes or 2 units of time or part thereof it actually took to read, consider and reply to a letter but 5 units of time, or effectively 30 minutes: 1 unit to read the letter; 1 unit to consider it; 1 unit to draft a reply; 1 unit to revise the draft; and 1 unit to send the letter.

The principle that a lawyer should not charge one unit of time more than once implies in our view that the solicitor should charge only the time it took to perform the series of tasks considered as a whole.

- A barrister who charges a client a 'cancellation fee' for time previously set aside in a matter which unexpectedly settles and who uses the time now 'freed up' (a day or several days, perhaps, or even longer) to perform work for other clients and bills those other clients for that work.

The principle that a lawyer should not charge one unit of time more than once implies in our view that the barrister requires a compelling justification to charge a cancellation fee in these circumstances, or any other circumstance in which he or she substitutes other paid work for the work that has been 'cancelled' (or for that matter makes no reasonable attempt to find other paid work to substitute for the work that has been 'cancelled').⁴⁷

The principle applies equally to solicitors who pass on a barrister's cancellation fee in these circumstances to their clients as an outlay, and who should satisfy themselves that the fee is fair and reasonable before passing it on.

We reiterate once again in this context that determining the amount of a bill is always a two-step process. Lawyers should ask themselves firstly whether they have calculated the bill in accordance with their costs agreement with the client and secondly, even if they have, whether the costs they are claiming under the agreement may be excessive even so.

<u>Version</u>	<u>Notes</u>	<u>Version date</u>
<u>1</u>		<u>16 September 2013</u>
<u>2</u>	<u>LSC Telephone number change</u>	<u>5 April 2019</u>
3		
4	Minor formatting and editing	18 August 2020

Formatted Table

⁴⁷ *Australian Federal Police v Razzi* (1991) 101 ALR 425; *Stefanou v Fairfield Chase Pty Ltd* (Federal Court of Australia, NSW District Registry, Einfield J, 10 December 1993 (unreported) BC9305153; and *Levy v Berseng* [2008] NSW SC 294.