

## Regulatory Guide 8

# Billing Practices – Some Key Principles

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## Introduction

The Legal Services Commission (the Commission or LSC) receives more complaints about lawyers' bills and billing practices than any other single issue.<sup>1</sup> We have published this guide to help lawyers and users of legal services alike better understand some of the key principles that apply to this fundamental aspect of the provision of legal services; to better understand

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<sup>1</sup> Broadly, lawyers have three kinds of client: 'retail' clients (sometimes called 'consumers') who purchase legal services only infrequently and primarily in relation to personal matters - personal injury, criminal and family law or deceased estate matters, making a will and buying or selling a house and the like; high net worth individuals and corporate and institutional clients. The last two kinds of client are experienced commercial operators who purchase legal services primarily in relation to business matters - corporations law, commercial disputes, complex financial transactions and the like.

This guide is directed primarily to the conduct of lawyers in their dealings with 'retail' clients. That is because, first, 'retail' clients make the vast majority of the complaints we receive at the Commission, including the costs complaints. Secondly and more importantly, it is because of the 'information asymmetry' and comparative lack of bargaining power that characterises their dealings with their lawyers - their reliance upon and the trust they place in their lawyers to explain unusual terminology in proposed costs agreements, to fully and frankly explain their options and likely costs and to bill them fairly and reasonably – see *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 and *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138 (at paragraphs 56-61).

The *Legal Profession Act 2007* (the LPA) recognises the difference between 'retail' and 'sophisticated' clients by imposing less stringent costs disclosure and assessment obligations on lawyers in their dealings with 'sophisticated' clients (see sections 300 and 308-311). The *Australian Consumer Law* (the ACL) recognises the difference also, by imposing more stringent requirements on service providers (including lawyers) when they are providing services to individuals for 'personal, domestic or household use or consumption' than otherwise apply (see [Regulatory Guide 7: The Application of the Australian Consumer Law to Lawyers](#)).

how they apply in particular fact situations where it seems to us based on what we see in our day to day work that they are not always well understood; to help lawyers avoid complaints about their bills and billing practices; and to set out the factors we take into account in dealing with such complaints.<sup>2</sup>

The key principles are established in both legislation - most relevantly in the *Legal Profession Act 2007* (the LPA) and the *Australian Consumer Law* (the ACL) - and in the common law. We have listed and discuss them under those three headings accordingly. It is not intended to be an exhaustive list. We have canvassed the key principles established by the ACL in a separate guide<sup>3</sup> and so will not further elaborate those principles here. Rather we will confine the discussion to the principles established by 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.<sup>4</sup>

## 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.<sup>5</sup>

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<sup>2</sup> This is one of a series of guides we have published on our website which we hope will help promote adherence to high professional standards in the provision of legal services and help prevent non-compliance, especially inadvertent non-compliance, by that vast majority of lawyers who want to do the right thing. Notably however 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 promulgated by the professional bodies. Thus the guides are not, nor can they ever be binding. They simply set out how we understand the relevant principles and standards and 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.

<sup>3</sup> [Regulatory Guide 7: The Application of the Australian Consumer Law to Lawyers.](#)

<sup>4</sup> We prepared the first version of this guide having regard to the feedback we received in response to a consultation draft we circulated widely among the profession and others during March 2012. We prepared this second version having regard to the feedback we received following the publication of the first version in September 2013. The consultation draft and the submissions we received in response to both that document and first version of the finalised guide are all published on the Consultations page of the LSC website. We are indebted to everyone who gave us their feedback. The guide is a much better document for their input. 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. The Commission remains entirely responsible however for any remaining errors and omissions.

<sup>5</sup> The LPA sets out a lawyer's costs disclosure obligations at Part 3.4, Division 3, sections 308-318.

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, before or as soon as practicable after, they accept a client's instructions;<sup>6</sup>
- 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;<sup>7</sup>
- 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;<sup>8</sup>
- 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;<sup>9</sup> and
- 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.<sup>10</sup>

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.<sup>11</sup>

## **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.<sup>12</sup> It requires some kinds of costs agreement to meet special requirements<sup>13</sup>

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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 Information for Consumers page on the LSC website.

<sup>6</sup> See LPA section 308(1)(a)

<sup>7</sup> See LPA section 308(1)(c)

<sup>8</sup> See LPA sections 308(1)(f) and 308(4)

<sup>9</sup> See LPA section 315

<sup>10</sup> See LPA section 316(1)

<sup>11</sup> See *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.

<sup>12</sup> See 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.

<sup>13</sup> Thus for example section 323 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); and section 324 sets out some further specific requirements of conditional costs agreements which provide for the payment of an uplift fee.

and prohibits one kind of costs agreement altogether,<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

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.<sup>18</sup>

### 3. 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.<sup>19</sup>

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 at common law prior to the commencement of the LPA in 2004 and it appears that the LPA has deliberately lowered the threshold in this respect.<sup>20</sup>

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<sup>14</sup> Section 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.

<sup>15</sup> See section 328 and the discussion in *Lawyers' Professional Responsibility*, Dal Pont, 3<sup>rd</sup> ed. at [14.165]

<sup>16</sup> See LPA sections 328(1) and (2).

<sup>17</sup> See LPA sections 328(4) and (5).

<sup>18</sup> See LPA section 328(6).

<sup>19</sup> See LPA section 420.

<sup>20</sup> 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.

#### 4. lawyers should charge no more than reasonable costs

The LPA allows lawyers to enter into costs agreements with their clients and, when they do, establishes the primacy of the costs agreement in determining the amount they can charge for their services. Equally, however, 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.<sup>21</sup>

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.<sup>22</sup> When read as a whole, it requires in our view that lawyers should charge no more than fair and reasonable costs. 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.'<sup>23</sup>

The LPA entitles clients to apply to have their costs assessed by an independent court appointed costs assessor.<sup>24</sup>

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 the client has been given valid costs

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<sup>21</sup> See *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 n20).

<sup>22</sup> See LPA sections 319-343.

<sup>23</sup> See LPA section 319. Section 341 sets out the factors cost assessors may take into account in deciding what is fair and reasonable.

<sup>24</sup> See LPA section 335. Sections 336-337 entitle lawyers to apply to have their costs assessed also. The LSC and the Queensland Law Society have jointly published a factsheet headed [Your Right to Challenge Legal Costs](#) which is published on the Information for Consumers page of the LSC website.

disclosure.<sup>25</sup> 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.<sup>26</sup>

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, difficulty and urgency of the matter; and the quality of the work that was done.<sup>27</sup>

**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). 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.<sup>28</sup>

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.

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<sup>25</sup> See LPA section 340.

<sup>26</sup> See LPA sections 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.

<sup>27</sup> See LPA sections 341(1)(c) and 341(2).

<sup>28</sup> See LPA sections 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.

## Principles derived from the *Australian Consumer Law*

We have published a stand-alone regulatory guide<sup>29</sup> which describes how the ACL applies to lawyers. It canvasses the **principles 6 to 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;<sup>30</sup>
- 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.<sup>31</sup>

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 which allege overcharging 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 two things may be true but they are irrelevant to deciding what action, if any, to take on a complaint.

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<sup>29</sup> [Regulatory Guide 7: The Application of the Australian Consumer Law to Lawyers.](#)

<sup>30</sup> 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).

<sup>31</sup> See LPA section 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.

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.’<sup>32</sup>

## 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 (and, as we describe below, ‘paralegal’ work performed by non-legally qualified law practice employees under the lawyer’s supervision). 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.<sup>33</sup>

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).<sup>34</sup> This is not professional work but a practice overhead.<sup>35</sup>

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 under an agreement to pay

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<sup>32</sup> Beazley J in *Leon Nikolaidis v Legal Services Commissioner* [2007] NSWCA 130 at paragraphs 84-85.

<sup>33</sup> ‘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.

<sup>34</sup> *Council of Queensland Law Society v Roche* [2003] QCA 469.

<sup>35</sup> See the analysis in *D’Alessandro and D’Angelo v Bouloudas* (1994) 10 WAR 191.

for professional work) unless it is necessary for the proper completion of legal work and is performed under a lawyer's supervision.<sup>36</sup>

Similarly lawyers require compelling justification to charge for work performed by paralegals at a rate approaching the rate appropriate for a qualified legal practitioner.<sup>37</sup>

### **13. lawyers should not charge for work beyond the scope of their retainer<sup>38</sup> or for work that is done for the lawyer's not a client's benefit**

Lawyers should not charge their clients, except in certain limited circumstances, for work they perform contrary to the clients' instructions or, unless the lawyer has a client's specific and informed agreement, for work that is performed without the client's instructions.<sup>39</sup> 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';<sup>40</sup>
- 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

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<sup>36</sup> 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).

<sup>37</sup> *Council of Queensland Law Society v Roche* [2003] QCA 469.

<sup>38</sup> 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.

<sup>39</sup> Exceptions arise in litigation, for example, when a client simply refuses to give instructions or instructs his or her lawyer not to disclose a document which the lawyer is duty bound to disclose or instructs the lawyer to act contrary to the lawyer's professional obligations.

<sup>40</sup> See Dowsett J in *Re Walsh Halligan Douglas' Bill of Costs* [1990] 1 Qd R 288. None of this necessarily 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.'

- for responding to complaints at the request of the Commission.<sup>41</sup>

**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 they incur by way of:

- preparing and giving negligent advice;<sup>42</sup>
- correcting their errors, mistakes or negligence;
- adverse costs orders consequent upon their errors, mistakes or negligence;<sup>43</sup>
- doing work with undue delay or in such a way as to amount to other misconduct or default; or
- 'over-servicing' a client, deliberately or otherwise, or doing work which is 'useless, unnecessary or excessive' to accomplish their clients' objectives.<sup>44</sup>

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.

**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**

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<sup>41</sup> See 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.

<sup>42</sup> See *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. The LPA at section 328(7)(g) also 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.'

<sup>43</sup> 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.

<sup>44</sup> 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 above n34).

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 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 in that way to artificially inflate their bill.<sup>45</sup>

Consider the following scenarios:

- a solicitor who charges out his or her time at \$400 per hour in 6 minute units or part thereof and who 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 one unit for tasks which actually take much less than 6 minutes, and often less than a minute (to peruse a doctor's invoice for the preparation of a medical report, for example, or to send 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

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<sup>45</sup> 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*, 2<sup>nd</sup> 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.

when the bill is measured against the total number of hours the solicitor actually spent on the matter.<sup>46</sup>

- similarly 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.

We noted earlier that lawyers should charge no more than reasonable costs and, if their costs are challenged and go to assessment, they will be entitled to no more than their reasonable costs.<sup>47</sup>

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.<sup>48</sup> 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, the amount allowed on assessment as being fair and reasonable.

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 costs<sup>49</sup> - 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.'

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<sup>46</sup> See for example *Liu v Barakat*, unreported, District Court of New South Wales, Matter 224007 of 2010, Curtis J, 8 November 2011.

<sup>47</sup> See the discussion in relation to principle 4, above.

<sup>48</sup> 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.' This form of 'rounding up' was referred to without adverse comment by Irwin DCJ in *Franklin v Barry Nilsson Lawyers (No.2)* [2011] QDC 55 and was unchallenged when the respondent in effect sought a review of the cost assessor's decision in *Franklin v Barry Nilsson Lawyers (No.3)* [2011] QDC 112.

<sup>49</sup> We note that a solicitor in Western Australia was recently suspended for six months for reasons including overcharging by 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* [2013] WASAT 105 and the earlier decision in that matter at [2011] WASAT 95(S).

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.<sup>50</sup> 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 the apportionment must pay due regard to the principle that one unit of time may not be charged more than once.’<sup>51</sup>

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 lawyers 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 may have 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. It is wrong in our view 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.<sup>52</sup>

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

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<sup>50</sup> See the discussion in relation to principle 4, above.

<sup>51</sup> *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.

<sup>52</sup> See the Formal Opinion 93-379 of the American Bar Association’s Standing Committee on Ethics and Professional Responsibility, *Billing for Professional fees, Disbursements and Other Expenses*, December 1993.

day's work, and the costs of that one day's work should be apportioned between the clients 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 pursuant to time-costed cost agreements 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 minutes and before the 6 minutes are up makes a call to another client in another matter that takes 2 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.

- 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').<sup>53</sup>

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<sup>53</sup> See *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.

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.

## In conclusion

The question remains how we deal with complaints about lawyers' bills and billing practices when the evidence after investigation establishes that a lawyer has acted contrary to these principles thus understood.

The short answer is that we decide what action, if any, to take on a complaint about a lawyer's billing practices (or on an 'own motion' investigation or compliance audit about a lawyer's or law firm's billing practices) in the same way we decide what action, if any, to take on any other complaint (or 'own motion' investigation or compliance audit).<sup>54</sup>

We take a remedial and preventative approach whenever we reasonably can in preference to a punitive or 'gotcha' approach. Everyone makes mistakes, and most complaints about lawyers' bills and billing practices, like most other complaints, involve honest and minor mistakes, errors of judgment, oversights, 'stuff-ups' and the like. They call out when they are substantiated not for a disciplinary response but rather for the lawyers subject to complaint to make good their mistake, not least by giving the complainants and others who have been adversely effected fair and reasonable redress, including as appropriate financial redress, and otherwise fixing whatever it was that went wrong so as to prevent the same or similar mistake arising in the future.

That said, the public interest demands and we are not shy about initiating disciplinary proceedings in response to more serious malpractice, including wilful, reckless and repeated malpractice, for reasons including both personal and general deterrence.

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<sup>54</sup> We spell out our approach in general terms in *Our Performance Framework* which is published on the About Us page of our website and in more detail in our *Discipline Applications Guidelines* and *Own Motion Investigations* policy which are published on the Publications Policies page.

<b>Version</b>	<b>Notes</b>	<b>Version date</b>
1		16 September 2013
2	Amended having regard to the feedback we received following the publication of the first version in September 2013.	21 November 2013