Legal Costs: Solicitors’ Relations with Counsel and Clients

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About the Presenter

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Introduction

My purpose in this paper is to consider the relationship between solicitors in private practice and their clients, on the one hand, and the counsel whom they brief, on the other, in relation to legal costs.

The Legal Profession Act 2004 (LPA 2004) replaced the Legal Profession Act 1987 (LPA 1987) with effect from 1 October 2005. It is the local representative of an integrated but non-uniform body of State and Territory legislation designed to regulate legal practice and resolve interstate conflicts of law in favour of one system or another. My focus here is solely intrastate, and I shall ignore the interstate aspects.

LPA 2004 Part 3.2 regulates legal costs in New South Wales. To understand its structure, one must differentiate between several distinct but related concepts:

- the direct retainer of a law practice by a client, or its indirect retainer by another law practice on behalf of a client;
- the various disclosures that a law practice must make to a client, a retaining law practice, and/or a third party payer (TPP);
- a costs agreement between a law practice and a client, a retaining law practice, or an associated third party payer (ATPP); and
- the rights and obligations of a law practice relating to billing, assessment and recovery of professional fees and other legal costs as against a client, a retaining law practice and/or a third party payer.
The familiar practical distinction between a client’s retainer of a solicitor and a solicitor’s retainer of a barrister corresponds to the statutory distinction between a retainer by a client of a law practice and the case where a ‘law practice’ retains ‘another law practice on behalf of the client’.\(^1\) Generally speaking, a directly retained law practice has more onerous disclosure obligations than an indirectly retained law practice. The policy reason for this is obvious. The consumer protection provisions of the Act generally look to the relationship between the client and the directly retained law practice – typically, a solicitors’ firm with principal conduct of litigious or non-litigious business on the client’s behalf. Both formally and in substance, the indirectly retained law practice, whether a barrister or another solicitors’ firm, stands at second remove from the client.

The Act defines both ‘client’ and ‘law practice’.\(^2\) Broadly speaking, a law practice includes a barrister, solicitors’ firm or sole practitioner solicitor in private practice. The term does not include an employed solicitor who is not in practice on his or her own account,\(^3\) and it probably does not include the Australian Government Solicitor and similar public sector entities. As the focus of this paper is on lawyers in private practice, it is unnecessary to explore that issue further. In most of what follows, I shall also abandon the language of law practices in favour of references to a Solicitor – by which I mean a solicitors’ law practice directly retained by a client – and references to a Barrister – by which I mean a barrister law practice retained by a Solicitor on behalf of the Solicitor’s client. I have capitalised these terms – Solicitor, Barrister and Client – to emphasise these assumptions and to facilitate discussion of the typical tripartite relationship between Barrister, Solicitor and Client.

Since 2006, the Act has also had special terms for non-clients who undertake to pay a client’s legal costs. These are the concepts of ‘third party payer’ and ‘associated third party payer’, defined in s 302A. It was perceived that a non-client (in the ordinary sense) who incurs an obligation to pay a client’s legal costs should have some protection, other than whatever general equitable or contractual obligations the client might have to protect the non-client’s position. The Act confers on a ‘third party payer’ a defined subset of the rights accorded to a

\(^1\) LPA 2004 Part 3.2 s 310 and passim.

\(^2\) LPA 2004 s 4(1): ‘In this Act … client includes a person to whom or for whom legal services are provided … law practice means: (a) an Australian legal practitioner who is a sole practitioner, or (b) a law firm, or (c) a multi-disciplinary partnership, or (d) an incorporated legal practice, or (e) a complying community legal centre.’ The terms referred to in the definition of ‘law practice’ are themselves defined, sometimes by reference to other defined terms. Relevant definitions are either contained or signposted in s 4(1).

\(^3\) See n 2 and the definition of ‘sole practitioner’ in s 4(1).
client. Broadly, a third party payer is a non-client who is obliged to pay legal costs or who, being obliged, has paid such costs. The obligation may be owed to the law practice or to someone else – often but not necessarily the client. If the third party payer’s obligation is owed to the law practice (with or without some other obligee) it is an associated third party payer and has, as one might expect, stronger rights than a non-associated third party payer.4

The present paper addresses selected topics relating to legal costs, highlighting issues that bear on the relationship of a Solicitor with the Client or retained Barrister and differences in the position of Barristers and Solicitors in the conventional tripartite relationship. In this context, Solicitors both pay and receive legal costs; hence the importance of distinguishing between the rights and obligations of Barristers and Solicitors in relation to their fees.

Part A addresses the basic disclosure obligations owed by a Barrister and a Solicitor. Part B briefly identifies relevant payment obligations. Part C addresses the consequences of a Barrister’s or Solicitor’s failure to discharge disclosure obligations. Part D deals with issues relating to costs agreements. Part E addresses some issues relating to costs assessment and recovery of legal costs by Barristers and Solicitors.

A. Disclosure Obligations

The operative provisions imposing disclosure obligations under LPA 2004 Pt 3.2 Div 3 are ss 309, 310, 313, 314, 317 and 318A.5 There are other, similar obligations elsewhere, such as under the special provisions governing personal injury litigation in Div 9. For present purposes, I shall confine attention to the general disclosure regime in Div 3. Table 1 provides a summary in the conventional cases of a Solicitor retained by a Client and a Barrister retained by a Solicitor, differentiated to identify who bears the obligation and to whom the disclosure must be made.

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4 The TPP provisions were enacted by the Legal Profession Further Amendment Act 2006 and represent a welcome improvement of the Act, which previously attempted to deal with the same policy issues in a most unsatisfactory way by extending the definition of a ‘client’ to include entities that clearly were not clients.

5 The obligation to provide work in progress updates on request under LPA 2004 ss 318 and 318A(4) do not appear to be conceived by the Act as ‘disclosure’.
A Solicitor’s general obligations of disclosure under ss 309 and 310(1) are well known to any solicitor in private practice. They are extensive and onerous. Over 20 separate items of mandatory disclosure may be identified.\(^6\) Failure to disclose any of them has potentially serious and costly consequences.

In addition to the basis of charging by the Solicitor and, when briefed, a Barrister, the Solicitor must disclose ‘an estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs’. This item arises under s 309(1)(c), and secondarily under s 310(1). It deserves special mention.

## Solicitor’s Disclosure of Estimates

First, the expression ‘total legal costs’ in s 309(1)(c) begs the question, ‘costs of what?’ The implicit answer seems to be, the subject matter of the present retainer.\(^7\) If the present retainer is to investigate the client’s rights or prospects of success in a potential claim or in resisting a suit or demand, the scope of the required estimate is correspondingly limited. However, if

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\(^7\) Part 3.2 of the Act refers in several places to a ‘matter’, or retainer of a law practice in a ‘matter’ (e.g. s 311(1)), without clear indication of its intended sense. The term is undefined. Although widely used by lawyers, it has no settled technical meaning.
the Client then instructs the solicitor to sue or defend, there is a new retainer and a fresh obligation of disclosure pertaining to the whole of that subject matter.\(^8\)

Secondly, the obligation leaves no scope for a non-numerical response in respect of the whole or any part of the costs, bearing in mind that costs includes disbursements and uplift fees.\(^9\) It is no compliance to estimate, ‘$100,000 for our professional costs, plus counsel’s fees and other disbursements’. The Solicitor must give either a dollar-estimate or a dollar-range for the total legal costs. There is only limited scope for deferral of the estimate, in that disclosure is required before or ‘as soon as practicable after’ the Solicitor is retained.

Thirdly, the business of making estimates is increasingly difficult as one departs from (a) the small and (b) the routine; and the importance of a reliable estimate to the Client increases in precisely those same circumstances. The Act appears to assume that a body of scientific knowledge and expertise exists about the estimation of legal costs, and that solicitors’ training equips them to apply it. Both assumptions are questionable. Legal training as such does not well equip a person to make such estimates. No doubt a knowledge of what is involved in, say, preparing and running an action for specific performance of a contract for sale of land, or an action for infringement of copyright, or to restrain and obtain damages for predatory pricing in a market, goes some distance to enable a lawyer to estimate likely costs; but I am aware of no body of statistical evidence that has been gathered on the subject. I understand that the dark art of estimation is not covered in the practice component of solicitors’ training. A small number of professional costs consultants have gone some way towards developing a scientific approach to quantifying costs outside the assessment process in the context of s 98(4) of the Civil Procedure Act 2005 (NSW), which provides for lump sum costs orders to be fixed by a court.\(^10\) That learning may provide a useful starting point.

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\(^8\) It might be argued that there is no new retainer, but that the original retainer has merely been extended. If so, the Solicitor would still be obliged to make disclosure in respect of the costs of the extended retainer, whether under s 309 or under the continuing disclosure obligations in s 316.

\(^9\) LPA 2004 s 302, ‘costs’, ‘uplift fee’.

\(^10\) The subject is considered in the judgment of Einstein J in Idoport Pty Ltd v National Australia Bank Ltd [2007] NSWSC 23, which resulted in a $50 million quantification of costs. The principal expert evidence was given by Michelle Castle, then of D G Thompson & Co. Ms Castle is now at the New South Wales bar. Of course, quantification under s 98(4) is still retrospective, but some of the theoretical methods considered in the judgment are capable of prospective application. Such methods require the gathering of empirical or statistical data. It is one thing for a cost consulting firm to assemble such data, but quite another for a solicitors’ firm to do so.
Fourthly, the Act requires an estimate, not an accurate estimate. The statute is strictly complied with by communicating a numerical estimate, or a numerical range plus explanation of major variables. If the Solicitor becomes ‘aware’ of a substantial ‘change’ in anything ‘included in’ prior disclosure, there is a duty to update the disclosure under s 316, but that still turns on actual awareness, not accuracy. No doubt the Act requires the Solicitor to make an estimate which is genuine, but that is not an obligation of accuracy. More significant in that respect are the Solicitor’s duty of professional care arising under the general law and the potential operation of trade practices legislation.

Given a statutory obligation to give an estimate, which obligation clearly exists for the protection and benefit of the client, and given the nature of the professional relationship involved, it could not be doubted that a Solicitor is obliged to exercise that degree of care and skill in making an estimate which would be exhibited by a reasonably skilled and prudent solicitor in that position. Consider the following example: Client, a small business operator, consults Solicitors complaining that he has been forced out of business by misleading and deceptive conduct by a large competitor; the claim in itself has reasonable prospects of success; a relatively junior employed solicitor quite genuinely estimates the cost of running his case will be $50,000; in fact, a more experienced practitioner would have recognised that the cost would probably be $150,000 to $250,000; Client retains Solicitors, but runs out of money after spending $100,000 and is forced to settle the litigation on walk-away terms. In this case, the Solicitors have complied with LPA 2004 s 309(1)(c), but have breached their professional duty of care to Client by failing to exercise proper care in their estimate. The real failing in this case lies partly with the junior solicitor, for failing to check with someone more experienced, but more importantly with the Solicitors, for failing to implement a practice management system that ensures proper oversight and continuing scrutiny of estimates by senior and experienced personnel.

One would also expect it to be concluded that a Solicitor’s estimate is given ‘in trade or commerce’ in the sense of the prohibition of misleading or deceptive conduct in trade or commerce in s 52 of the Trade Practices Act 1974 (Cth) and s 42 of the Fair Trading Act 1987 (NSW). Given that predictive representations are taken to be misleading if they lack reasonable grounds, proof of which lies on the person making the representation, and that corresponding liability for damage caused by infringing conduct does not require proof of

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11 Fair Trading Act 1987 (NSW) s 41; Trade Practices Act 1974 (Cth) s 51A.
negligence or fault, those statutes may provide a stronger remedy for a dissatisfied client than the common law.\textsuperscript{12}

The considerations discussed above point to three important lessons. The first is the importance of implementing and maintaining office systems that provide for the recording and review of compliance with disclosure obligations under the Act, including scrutiny by relatively senior practitioners at the point of initial disclosure and from time to time as a case progresses. The second is the importance of good communication with the Client. Bad communication is the cause of a very large proportion of professional complaints and costs disputes. Good communication can prevent or defuse potential disputes. In complying with the Act, a Solicitor should consider what the Client wants and needs to know, and how it is best expressed. This is professionally responsible, as well as providing a measure of practical protection to the Solicitor. The third lesson is the importance of training in the practical skill of costs estimation – a subject on which much work still needs to be done.

The comments I have made about estimation of costs under s 309(1)(c) apply also to the obligation to disclose likely party/party cost recovery and liability under s 309(1)(f) – an even more difficult and esoteric task.

\textbf{Barristers and Initial Disclosure}

The Solicitor has special disclosure obligations to the Client under s 310(1) where a Barrister is to be retained. The Solicitor must disclose the basis of calculation of the Barrister’s fees as if under s 309(1)(a), an estimate of those fees as if under s 309(1)(c), and the Barrister’s billing interval details as if under s 309(1)(d). The obligation under s 310(1) arises before or as soon as practicable after retainer of the Barrister.\textsuperscript{13} It should not be thought, however, that this allows the Solicitor to exclude counsel’s fees from an earlier estimate given under s 309(1)(c). Total costs under that provision includes disbursements for barrister’s fees that will be incurred in the discharge of the subject retainer, even if counsel is not yet identified or briefed. The point of the separate estimate under s 310 is to identify counsel’s fees specifically, something which is not required under s 309.

\textsuperscript{12} The \textit{Trade Practices Act} only applies to corporations within s 51(xx) of the Constitution and entities that are engage one of the other Commonwealth heads of power by reference to which the Act has secondary operation; however, many law practices are now incorporated.

\textsuperscript{13} Section 311(2).
The Barrister’s disclosure obligations under s 310(2) differ significantly from those of the Solicitor. The Solicitor must disclose identified matters to the Client. The Barrister must disclose to the Solicitor only ‘the information necessary for the [Solicitor] to comply with [s 310(1)]’; unlike the Solicitor’s disclosure, the Barrister’s disclosure need not be in writing although, as a matter of prudence and good practice, it usually is. The Barrister’s obligation only exists to the extent that the Solicitor needs extra information to enable him or her to comply with s 310(1). The Act recognises that the Solicitor is a skilled professional already retained and in possession of knowledge about the case. At the point where the Barrister is retained, the Solicitor will generally know the case better than the Barrister. The Barrister’s obligation under s 310(2) is to ‘top-up’ the Solicitor’s knowledge. Recognising this, a commonly used form of Barrister’s disclosure includes an invitation to the Solicitor to identify any further information that the Solicitor needs in order to comply with s 310(1).

As far as the estimate of Barrister’s fees is concerned, the Solicitor may be expected already to have a good idea of what the case will require. The Solicitor (but not necessarily the Barrister) should have a sense of what tasks the Solicitor intends to brief to counsel – just the hearing; perhaps an advice on evidence; perhaps settling the affidavits; perhaps interviewing witnesses; perhaps interlocutory appearances; etc. There is also great variation between Solicitors in the degree to which they rely on counsel. Once the Solicitor knows the Barrister’s rates, the Solicitor may not need any more information to make an estimate of the Barrister’s likely costs. It follows in my view that the Barrister is not automatically required to convey an estimate as such in the absence of a specific request.

As in the relationship between Solicitor and Client, the black letter requirements of the Act should not be allowed to obscure the proper professional requirements of good communication and courtesy between Barrister and Solicitor in matters relating to professional fees.

**Disclosure Exemptions**

An important qualification on the onerous one-size-fits-all approach in LPA 2004 ss 309 and 310 is provided by the disclosure exemptions in s 312. These have been extended since their original enactment, largely to avoid the absurdity of requiring disclosure to sophisticated corporate clients on the same basis as if they were vulnerable and illiterate. The most
important class of disclosure exemption applies to ‘sophisticated clients’ within s 312(1)(c) or (d), such as government entities, listed companies and their subsidiaries, and large professional partnerships. These also attract exemption from some of the consumer protection measures concerning costs agreements and recovery, and they may even contract out of assessment. In addition, there is an exemption for very small matters, an awkward and arguably impractical exemption for clients with repeat business, an exemption for cases where the Client ‘will not be required to pay the legal costs’ or the costs will not ‘otherwise’ be recovered by the Barrister or Solicitor, and a small class of exemptions in the Regulations.

Barristers and Other Disclosure

LPA 2004 explicitly recognises the distinction between Barristers and Solicitors in some provisions, but not others.

Pre-settlement disclosure obligations under s 313 distinguish explicitly between the Barrister and Solicitor. The Barrister has an obligation, but it can be absolved by corresponding compliance on the part of the Solicitor. A commonly used form of Barristers’ costs agreement includes a Solicitors’ warranty to make all disclosures required by the Act.

Less clear are ss 314 and 316. These require disclosure ‘to the client’. Both are secondary provisions. Section 314 relates to a costs agreement with an uplift; s 316 relates to

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14 See ss 314, 323, 332, 333, 350, 359A.
15 LPA 2004 s 312(1)(a), (b), (e), (f); LPR 2005 reg 110.
16 ‘313 Additional disclosure—settlement of litigious matters
(1) If a law practice negotiates the settlement of a litigious matter on behalf of a client, the law practice must disclose to the client, before the settlement is executed:
   (a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay), and
   (b) a reasonable estimate of any contributions towards those costs likely to be received from another party.
(2) A law practice retained on behalf of a client by another law practice is not required to make a disclosure to the client under subsection (1), if the other law practice makes the disclosure to the client before the settlement is executed.’
17 ‘314 Additional disclosure—uplift fees
(1) If a costs agreement involves an uplift fee, the law practice must, before entering into the agreement, disclose to the client in writing:
   (a) the law practice’s legal costs, and
18
a case where something has already been included in Div 3 disclosure. It may be inferred that they address cases where the costs agreement is with the Client (s 314) and where prior disclosure was to the Client (s 316). On this basis, if the Barrister’s agreement was with the Solicitor or prior disclosure was to the Solicitor, no further obligation arises. The alternative interpretation would require the Barrister to communicate unilaterally with the Client. That seems unlikely to have been intended. In the case of s 314, the Solicitor is by definition a professional; a Barrister’s contract with the Solicitor does not call for consumer protection measures. In the case of s 316, it is the Solicitor who has the general conduct of a case, not the Barrister. If either is concerned that the costs of a case are likely to blow out, normal professional courtesy between them and care for the interests of the Client indicate that they should discuss the topic and, if need be, the Solicitor should make further disclosure to the Client.

The work-in-progress reporting obligations in s 318, which are not structured as ‘disclosure’ but as a separate obligation to inform upon request, differentiate between Barristers and Solicitors along lines which reflect the logic of s 310. If the Client asks the Solicitor for a w.i.p. report, the Solicitor is entitled to relevant information from the Barrister on request.

B. Payment Obligations

The obligation to make payment for legal services can arise in several ways: (1) as remuneration by a Client to a Solicitor for an executed consideration under a Solicitor’s retainer; (2) as payment under a Solicitor’s costs agreement with a Client; (3) as payment under a Solicitor’s costs agreement with an ATPP; (4) as payment under some other legal

(b) the uplift fee (or the basis of calculation of the uplift fee), and
(c) the reasons why the uplift fee is warranted.

(2) A law practice is not required to make a disclosure under subsection (1) to a sophisticated client.’

18 ‘316 Ongoing obligation to disclose

A law practice must, in writing, disclose to a client any substantial change to anything included in a disclosure already made under this Division as soon as is reasonably practicable after the law practice becomes aware of that change.’

19 Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221 turns on the distinction between an action in assumpsit on an executed consideration and a claim under a contract and the separate existence of the former independently of the latter.
obligation\(^{20}\) of an ATPP to a Solicitor; (5) as remuneration or honorarium by a Solicitor to a Barrister; (6) as payment under a Barrister’s costs agreement with a Solicitor; (7) as payment under a Barrister’s costs agreement with a Client; (8) as payment under a Barrister’s costs agreement with an ATPP.\(^{21}\) Subject to any overriding fixed costs provision, remuneration as prescribed by s 319 is by applicable costs agreement or by quantum meruit, described as ‘fair and reasonable value’. The matrix of payment obligations is summarised in Table 2.

Table 2: Payment Obligations

<table>
<thead>
<tr>
<th>By:</th>
<th>Solicitor retained by Client</th>
<th>Barrister retained by instructing Solicitor</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Without costs agreement</td>
<td>Without costs agreement</td>
</tr>
<tr>
<td>Client</td>
<td>319(1)(a),(c): fixed cost / quantum meruit</td>
<td>319(1)(a),(b): fixed cost / costs agreement 322(1)(a)</td>
</tr>
<tr>
<td>Instructing Solicitor</td>
<td></td>
<td>319(1)(a),(c): fixed cost / quantum meruit</td>
</tr>
<tr>
<td>Associated Third Party Payer</td>
<td>319(1)(a),(c): fixed cost / quantum meruit 302A ‘other legal obligation’</td>
<td>319(1)(a),(b): fixed cost / costs agreement 322(1)(d)</td>
</tr>
</tbody>
</table>

These payment obligations bear a logical relationship to the disclosure obligations summarised in Table 1, though they are not identical. In the event of a dispute about costs giving rise to costs assessment under LPA 2004 Part 3.2 Div 11 or civil litigation, the proper parties are identified by reference to the payment obligations, not the retainer or disclosure obligations.

Thus, in the conventional case of a Barrister retained by a Solicitor, with or without a costs agreement between them and assuming no other relevant Barrister’s costs agreement with the Client or a Third Party Payer, the proper parties to a costs assessment are the Solicitor and the

\(^{20}\) LPA 2004 s 302A(2).

\(^{21}\) I cannot think of any case where an ATTP could owe an obligation of payment to a Barrister within LPA 2004 s 302A(2). If there is, it supports an extra category.
Barrister only. The Client may have a dispute with the Solicitor about the Client’s liability to reimburse the Solicitor for the Barrister’s fees as a disbursement, but that is a separate matter. What is recoverable between Barrister and Solicitor is not necessarily the same as that which is recoverable by the Solicitor from the Client in respect of the Barrister’s services.

A Solicitor who does without a costs agreement is entitled to sue the Client or to have costs assessed on the basis of a scale, if there is one, or quantum meruit. A Barrister who does without a costs agreement probably has no general law cause of action now, any more than before 1 July 1993 when the costs deregulation and assessment reforms enacted by the Legal Profession Reform Act 1993 commenced, but has a right to take the Solicitor to assessment. Assessment lies against the Solicitor on the basis that LPA 2004 ss 351 and 352 recognise the longstanding professional convention that Solicitors brief Barristers on the basis that they will pay the Barrister’s fees and, correspondingly, that Barristers bill Solicitors. A costs assessor’s certificate is registrable as a judgment, and gives rise to enforceable legal rights of recovery.

C. Effect of Failure to Disclose

Where a Barrister or Solicitor owes a disclosure obligation under Div 3 to a Client or ATPP, and the Client or ATPP owes a payment obligation to the Barrister or Solicitor, the general consequences of failure in that disclosure are governed by s 317(1)-(4). Separate rules apply under s 317(5) where a Barrister is retained by a Solicitor and fails in the disclosure obligation in s 310(2), which is owed not to the Client but to the Solicitor. The distinction turns on the retainer, not on any applicable costs agreement.  

Between Solicitor and Client or ATPP

If the Solicitor fails to disclose ‘to a client or an associated third party payer anything required by [Div 3] to be disclosed’, five basic consequences follow. The first four correspond to the sub-sections of s 317: (1) the Client or ATPP need not pay ‘the legal costs’

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22 In the unlikely case of a Barrister failing to make s 314 uplift disclosure to a Client with whom the Barrister has contracted for costs under s 322(1)(b), the Barrister being retained by a Solicitor, s 317(1)-(4) would apply of their own force. This case is simply not within s 317(5).
without assessment; (2) the Client or ATPP has a good defence to civil recovery action in the meantime; (3) the Client or ATPP can, in the context of assessment, apply to have any applicable costs agreement with the Solicitor set aside; and (4) a costs assessor may reduce the Solicitor’s costs by an amount considered by the assessor to be ‘proportionate to the seriousness of the failure to disclose’. The fifth consequence is that the Solicitor whose fees are in issue must pay the costs of the assessment, including the costs assessor’s fee and costs incurred by the Client or ATPP,\(^2^3\) regardless whether the Client or the Solicitor has applied for the assessment.\(^2^4\)

These consequences apply where there has been ‘any’ failure to disclose as required by Div 3. This contrasts with the approach under LPA 1987, which required disclosure of the basis of charging and an estimate of costs, but only attached adverse recovery consequences to failure in disclosure of the former.\(^2^5\) Section 317 applies not only where there is a failure to disclose the basis of charging under s 309(1)(a), but also a failure to disclose an estimate that complies with s 309(1)(c), billing interval details under s 309(1)(d), or any of the other many items of varying triviality or importance under s 309. It also applies to failure under such other Div 3 disclosure provisions as may be applicable: ss 310(1), 313, 314, 316, 318A. This can give rise to difficult questions, such as whether and when a Solicitor has incurred an obligation to make continuing disclosure under s 316 in the circumstances of a particular case. As far as I can ascertain, no such case has yet been decided.

It is arguable that the use of the definite article in the expression ‘the legal costs’ in s 317 allows the consequences of that section to be confined to those legal costs to which the failure of disclosure relates, assuming that such a distinction can be drawn on the facts. For example, if the failure arises under s 310(1), the requirement of assessment might be confined to the Solicitor’s claim to recover counsel’s fees from the Client.

It is unclear how the costs assessor’s discretion in s 317(4) to reduce costs for non-disclosure is intended to operate – whether as a penalty, as compensation for some loss or hardship that the Client might demonstrate as having flowed from the non-disclosure, or as an additional

\(^2^3\) LPA 2004 s 369(3)(a), (10).
\(^2^5\) LPA 1987 ss 175, 177, 182.
factor of relevance as if under s 363. The reference to proportionality does not resolve the dilemma; it is suggestive of penalty but, where a penalty is intended, it should be more clearly specified.

Between Barrister and Solicitor

If a Barrister fails in disclosure under s 310(2) and the Solicitor ‘fails to disclose something to the client solely because the [Barrister] failed to disclose relevant information’ to the Solicitor as required by that provision, s 317(5) prescribes that sub-ss (1)-(4) do not apply to costs owing by the Client or ATPP to the Solicitor for the Barrister’s fees ‘to the extent that’ the Solicitor’s non-disclosure was caused by the Barrister’s failure to disclose, but that they do apply – presumably mutatis mutandis – to costs owing by the Solicitor to the Barrister.

As far as I can ascertain, no case has yet arisen under s 317(5). It would require an odd and unlikely conjunction of facts for a Barrister’s failure under s 310(2) to be the sole cause of a Solicitor’s failure under s 310(1). All the Solicitor need do to find out the ‘relevant information’ is to ask, and all the Barrister need do is answer, whether orally or in writing.

D. Costs Agreements

Costs agreements are primarily regulated by LPA 2004 Part 3.2 Div 5. They are subject to requirements relating to subject matter, parties, form and content. A ‘costs agreement’ is defined as ‘an agreement about the payment of costs’. This is the subject matter constraint. An agreement about the performance of legal services, such as a retainer, is not a costs agreement, though a Solicitor’s costs agreement may be embedded in a retainer agreement. The Act limits the parties between whom a costs agreement may be made to four cases, set out in the paragraphs of s 322(1). Relevantly, these are: (a) Client and Solicitor; (b) Client

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26 That section already refers to ‘any disclosures’; this reading of s 317(4) would effectively add ‘any failures of disclosure’.

27 Application of s 317(5) to ATPPs in the same way as to Clients arises from references to the latter in sub-ss (1)-(4), the relationship between Client and ATPP disclosure mandated by s 318A, and the facilitatory nature of Barristers’ disclosure under s 310(2).

28 LPA 2004 s 302.
and Barrister; (c) Solicitor and Barrister; (d) Solicitor or Barrister and ATPP. The agreement must be in writing or evidenced in writing as prescribed by s 322(2)-(4). 29 The content of a costs agreement cannot purport to exclude costs assessment: s 322(5).

If the costs agreement provides that ‘payment of some or all of the legal costs is conditional on the successful outcome of the matter to which those costs relate’, it is a conditional costs agreement and must comply with additional requirements of form and content under s 323. The more onerous of these requirements are excluded for Barrister/Solicitor agreements and for agreements with sophisticated Clients and some others covered by s 312, the point being that special consumer protection measures are not warranted in these situations.

It is difficult to understand why Parliament thought that extra consumer protection measures should be attached to conditional agreements as such. The real point at which protection is justified is the ‘uplift’, which is separately regulated under ss 314 and 324. Many conditional agreements do not include an uplift, particularly given the prohibition of uplifts in damages cases by s 324(1).

Drafting Considerations

LPA 2004 does not repeat the invitation to bad drafting in LPA 1987 s 179(2), which expressly permitted disclosure to be included in a costs agreement. A costs agreement is a contract. The function of a contract is to set rules for a relationship of private law between the contracting parties who have reached agreement, one would hope, of their own free wills. The function of disclosure is to give information – that is, to effect a unilateral communication from one person to another. A contract that tries to do both at once is likely to fail or falter in at least one of them.

29 A Full Court of the South Australian Supreme Court held in McNamara Business & Property Law v Kasmeridis [2005] SASC 269 that a provision of the Legal Practitioners Act 1981 (SA) which allowed a legal practitioner to ‘make an agreement in writing with a client’ for payment of legal costs on a basis specified in the agreement is satisfied if a solicitor writes to a client with a proposed fees agreement, offering to act on that basis, and the client orally accepts the solicitor’s offer. The Court declined to follow Jovicic v Stoddart & Co (1992) 7 WAR 208, 218 (Seaman J), Re Walsh Halligan Douglas’ Bill of Costs [1990] 1 Qd R 288 (Dowsett J), and a number of English authorities which would have required relevant writing from the client, whether in the form of a signature to the agreement or some other writing that constitutes or evidences acceptance. An application for special leave to appeal to the High Court was dismissed for insufficient prospects of success. McNamara may assist practitioners under the writing requirements of LPA 2004 ss 322 and/or 323.
Disclosure is naturally expressed in the second person, or thou-form: We tell you this and that. A set of rules is naturally expressed in the third person: the Solicitor shall do this, the Client shall do that. Some people draft contracts in thou-form: We shall do this for you; You must do that for us. My own view is that one should never use thou-form for a contract. Whenever I read a second-person contract, I feel that I am being patronised – especially if I am the second person. It conveys the message that there is a rule-giver and a rule-taker. This sits awkwardly with the policy of the Act that Clients should be aware that they really can try to negotiate with their lawyers.

LPA 2004 contemplates that disclosure will precede any costs agreement. The gap may be short, but it should exist. The point of disclosure, so far as it relates to the terms of a costs agreement, is to ensure that the client is properly informed and has a fair opportunity to negotiate and to seek whatever independent advice the client thinks appropriate before committing to a proposed agreement. On the other hand, the Act requires disclosure by the law practice of its proposed basis of charging, billing and interest. In practical terms, this requires the lawyer to give the client a copy of a proposed costs agreement, along with all the other required disclosures. If they then negotiate some different agreement, so be it; the Act contemplates such a process.

The practical requirements to sever disclosure from agreement and to provide a draft agreement as part of disclosure can be reconciled by providing a letter or notice addressed from the Solicitor to the Client or prospective Client referring to and enclosing a proposed form of costs agreement drafted as a conventional contract, which can conveniently be executed in a form that evidences antecedent disclosure.

**Consequences of Contravening Div 5**

The general consequences of contravention of Div 5 are prescribed by s 327(1)-(3). The costs agreement is void, but the Solicitor or Barrister can still recover on the basis of quantum meruit subject to any applicable fixed costs provisions, and with any recovery capped at the amount provided by the agreement. The statute characterises recovery as being ‘under’ the

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30 Section 309(1)(b)(i).
31 Section 323(3)(d).
agreement that it has just declared to be ‘void’; this reflects a remarkable conceptual confusion, but it probably does not impair the practical working of the Act.

Of course, the existence of a costs agreement does not relieve a law practice of the consequences of breaching the statutory disclosure rules, discussed above.

Uplifts and Contingency Fees: Gouging Lawyer or Ungrateful Client?

LPA 2004 s 324(2)-(5) permit a conditional costs agreement to provide for an ‘uplift fee’, defined as ‘additional legal costs (excluding disbursements) payable … on the successful outcome of the matter to which the agreement relates’.32 The agreement must separately identify the uplift fee. It must also express either an estimate or a range of estimates with an explanation of major variables.33 If the agreement ‘relates to a litigious matter’, the permitted uplift is capped at ‘25% of the legal costs (excluding disbursements) otherwise payable’: s 324(5). Breach of these provisions not only attracts the general consequences of contravention; s 327(3A) also denies the offending Solicitor or Barrister the right to any uplift and requires repayment of any uplift received.

As between Solicitor and Client, a Barrister’s fees have the character of disbursements. This is also true of any uplift charged under a costs agreement between Barrister and Solicitor. At first blush, one might think s 324(5) this prevents the Solicitor from recovering the Barrister’s uplift from the Client, but that is not so. As between Barrister and Solicitor, the uplift is not charged on disbursements, but on the Barrister’s professional fee. As between Solicitor and Client, the corresponding claim for reimbursement is not an uplift, but simply an element of the disbursements. The Solicitor cannot charge an extra uplift based on the Barrister’s charges, but any proper uplift charged by the Barrister to the Solicitor can be passed on.

Failure by a Barrister or Solicitor to make the disclosure required by s 314 before entering into an uplifting costs agreement with a Client or ATPP separately attracts the operation of

32 LPA 2004 s 302.

33 This requirement, which reflects the logic of the costs estimate disclosure obligation in s 309(1)(c), confuses disclosure with agreement. A disclosure is a unilateral communication of information by one person to another: ‘I tell you this’. A contractual agreement is a set of rules to govern a private law relationship between two or more persons: ‘A shall do this; B shall do that’.
s 317(1)-(4), discussed above. On the view that I have taken of the statute, this does not apply where the agreement is between Barrister and Solicitor.

Section 324(1) prohibits a conditional costs agreement ‘in relation to a claim for damages’ from containing an uplift clause at all. Section 325 prohibits a costs agreement under which any part of the amount payable to the law practice ‘is calculated by reference to’ the value of the subject matter of a relevant transaction or proceeding. Contravention of either of these provisions not only avoids the costs agreement, but s 327(4) also disentitles the law practice to enter any fees whatsoever and requires repayment of any fees received. The statute is deliberately draconian: the offending Barrister or Solicitor must go unremunerated for his or her professional services. Arguably, the provision extends to disbursements as well as professional fees, so that a Solicitor may end up not only unpaid, but out of pocket. It is interesting to speculate whether a Barrister or Solicitor, having realised that a costs agreement contravenes these provisions before a matter is finished and repented of the offending agreement, could be compelled to complete the relevant retainer unremunerated.

Sections 324 and 325 and related consequences under s 327 apply to agreements between Barrister and Solicitor as well as between Solicitor and Client. Infringement of either section is also an offence.

Given how nasty the consequences of infringement are, the critical concepts in ss 324 and 325 are not as clear as one might wish.

The first point in issue is the concept of a costs agreement ‘in relation to a claim for damages’ in s 324(1). The notion of a claim for damages is relatively well understood. A few things remain unclear. Does a costs agreement ‘relate’ to a claim for damages where that claim is not made by the Client, but by another party? What if the case is primarily about one topic – say, a claim for specific performance of a contract for sale of land – but includes a claim in the alternative for damages? What if the case starts out as one thing, but part way through a claim for damages is added as a further or alternative prayer, or as a cross-claim?

Secondly, what is the relevant counterfactual situation contemplated by the notion of ‘costs … otherwise payable’ in s 324? Fortunately, this issue has been clarified by two decisions of the Victorian Court of Appeal, *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250

34 See the definition of ‘costs’, LPA 2004 s 302.
and Coadys v Getzler (2007) 18 VR 288. Both dealt with the cognate concept under the Victorian statute of a ‘premium’ on costs ‘otherwise payable’. As there is no evident difference in meaning between a ‘premium’ and an ‘uplift’, the decisions are persuasive for the interpretation of the New South Wales statute. Both concerned solicitors who had contracted to take a case on a contingency basis, such that a fraction of their usual fees would be payable regardless of outcome, but their full fees would be payable if the case succeeded. The full fees were considerably more than 125% of the fraction payable in any event; Victoria, like New South Wales, capped premiums at 25%. At first instance it was held in both cases that the difference amounted to excessive uplifts, which were non-recoverable. In both cases, the Court of Appeal held that there was no premium. The decisions on appeal were clearly right. The first instance decisions had taken an untenable view of the meaning of ‘otherwise payable’. Fees are not ‘otherwise payable’ if they would be payable in the event of failure; they are ‘otherwise payable’ if they would be payable without the lawyer agreeing to the payment of fees being wholly or partly conditional.

Section 323 explicitly allows a Solicitor or Barrister to make part only of his or her costs conditional, and there should be no ethical objection to allowing part of one’s normal or proper fees to be conditional. A case may have apparent merit, but the litigant may not have the means fully to fund the case, and the case may be too big for the practitioner to risk remaining unpaid for what might be months of work. To charge (say) a quarter or half of one’s normal fees unconditionally and the balance conditionally in such circumstances is ethically unobjectionable and facilitates access to justice.\(^{35}\) The outcome in Equuscorp and Coadys is consistent with these principles.

The two Victorian decisions appear to have involved genuine discounts to the solicitors’ normal fees, but they were not decided on that basis. A question remains whether the damages uplift prohibition in s 324(1) and the uplift limit in sub-s (5) may simply be circumvented by setting a higher than normal contract rate and making part of the fee conditional and part non-conditional. Equuscorp and Coadys appear to sanction an approach that does not look beyond the terms of the contract. In the situation that I have suggested, ethical and statutory questions of overcharging may also arise. One might then reformulate

\(^{35}\) See Clyne v NSW Bar Association (1960) 104 CLR 186 at 203, Schokker v FCT (No. 2) (2000) 106 FCR 134 at 139-9; Ladd v London Road Car Co (1900) 110 LT Jo 80; Sievwright v Ward [1935] NZLR 43 at 48 per Ostler J; Re Sheehan (1990) 13 Fam LR 736 at 749; and cf. Wentworth v Rogers; Wentworth & Russo v Rogers [2006] NSWCA 145 at [120], [121], [128].
the question more sharply: to what extent is it proper to have regard to the risk of non-payment (including the risk that recovery of fees may be commercially impractical or morally unattractive if the case fails) in setting a professional fee?

The third point of potential unclarity relates to contingency fees as prohibited by s 325. On one possible reading, the section does not differentiate between a case where a Solicitor takes a personal, quasi-proprietary interest in the outcome of proceedings (an interest beyond what is inevitably involved in charging a usual and proper fee), and a case where one contracts for a proper fee, but agrees to take less if the case does not fail, but ends badly.

The interpretation placed on the corresponding Victorian provision in Equuscorp and Coadys was that it only applied where the calculation of costs was based on the value of the judgment, etc, not where variations in that value might affect the amount of costs payable in another way, such as by serving as a condition for part of the costs to become payable. The costs agreement in Equuscorp provided for the proceeds of the action to be applied in a particular way: first, to cover certain disbursements; at a later stage, each additional dollar was to be split 50/50 between the client and in payment of the solicitors’ fees until those fees were paid. The Court held that this did not infringe a provision corresponding to s 325 because the calculation of costs was unaffected by the magnitude of the judgment; the fact that the solicitors’ entitlement to money out of the proceeds of the action might be limited by reference the magnitude of the judgment did not alter this conclusion. This was a narrow basis of decision. The limitation was not expressed as a limitation on costs or the payment obligation of the client, but on the solicitors’ right of recovery from a particular fund. While this may provide some comfort, it does not put the question of statutory interpretation entirely to rest. It does not decide that a clause limiting a Solicitor’s costs or a Client’s personal payment obligation by reference to the magnitude of judgment or recovery from the adverse party will survive scrutiny. A Client may reasonably want contractual assurance that the Solicitor will not be entitled to payment in excess or save out of the proceeds of action, but that assurance may be dangerous for the Solicitor to give. Drafting one’s way around s 325 is not necessarily straightforward, even if one’s real objective is to protect the client.

It is salutary to recall that distinctions based on value of outcome were embedded in Court scales before deregulation. A provision explicitly capping one’s fees so as not to exceed the

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36 Equuscorp Pty Ltd v Wilmoth Field Warne (2007) 18 VR 250, 284-5 [132]-[133].
proceeds of the action (which may be defined to include recoverable party/party costs) or a calculable portion of the proceeds of action should be ethically unobjectionable if the fees before application of the cap are calculated on the normal professional basis. The cap in such a case only serves to protect the client from having a bill that eats up or exceeds all the proceeds of the action. It would be unfortunate if 325 were so interpreted as to outlaw such practices.

Set-Aside Applications

LPA 2004 s 328 provides a mechanism for setting aside a costs agreement in whole or part in the context of a costs assessment on the grounds that the agreement is ‘not fair or reasonable’. A set-aside order may be made and consequential relief granted by the costs assessor on application by a qualified party under the section.

A set-aside application can be made by a Client or ATPP. Ex hypothesi, the application can only be made by a party to the agreement. There is no provision, nor could there be, for a Client or ATPP to apply to set aside a costs agreement between the Barrister and the Solicitor. The proper forum to air an argument that the Client should not have to pay for the Barrister’s services on the basis of such an agreement would be an assessment between the Client and the Solicitor. In that context, the argument would take the form that the Solicitor is not entitled to claim reimbursement for unreasonably incurred disbursements. The Barrister is not a proper contradictor in an assessment between Client and Solicitor, nor is the Client a proper contradictor in an assessment between Barrister and Solicitor. It is submitted that it would be an error of law to allow a Client to seek to set aside a costs agreement to which the Client was not party and by which the Client was not bound.

It is odd that s 328(1) uses the expression ‘not fair or reasonable’ rather than ‘not fair and reasonable’. If an agreement is fair, but not reasonable, does it survive scrutiny? What if the agreement is reasonable, but not fair? The Act elsewhere uses the expression ‘fair and reasonable’, including in ss 319(1)(c), 328(5), 329, 338, 363, 364, 365, 367, 367A and 375. The expression ‘fair or reasonable’ only occurs in s 328(1) and (2).

Section 328 contains a number of ambiguities. It is not clear how the ‘fair and reasonable’ test relates to the use of similar wording in the ordinary quantum meruit assessing provision, s 363, from which it must presumably be distinguished. The assessor has power to determine ‘fair and reasonable’ costs after setting aside an offending agreement or provision, and may take account of the ‘seriousness’ of the ‘conduct of the law practice’; as with s 317(4) (see p 14), it is unclear how the assessor’s discretion is intended to operate in relation to this factor.

LPA 2004 s 322(6).
There is no provision under s 328 enabling a Solicitor to make a set-aside application. This is not surprising. Section 328 is a consumer protection measure for which there is no need where the contracting parties are both members of the legal profession.

It might be argued that a set-aside application could also be made by a Solicitor in a Barrister/Solicitor costs assessment in the limited circumstances envisaged by s 317(5) by way of extended operation of s 317(3). This is far from clear, and it is difficult to envisage practical circumstances in which such an application could succeed.

E. Costs Assessments and Recovery

If the Client or ATPP does not pay, the Solicitor has the option of (1) suing for fees in the civil courts, subject to Div 7, (2) applying for assessment under s 352, or (3) exercising recovery rights against moneys in trust or controlled money in accordance with s 261 and reg 88 of the Legal Profession Regulation 2005 (LPR 2005).

Suing for Fees

A law practice (Barrister or Solicitor) cannot commence court proceedings for recovery until at least 30 days after it has given a complying bill to the person sued (Client, ATTP or Solicitor). The bill must be either a ‘lump sum bill’ or an ‘itemised bill’ and must meet the other technical requirements of ss 332 relating to form, signature and service.

An itemised bill is defined in s 302 as ‘a bill that specifies in detail how the legal costs are made up in a way that would allow them to be assessed under Division 11.’ Regulation 111B prescribes the required content of an itemised bill; the requirements differ between bills of barristers and those of other law practices. A ‘lump sum bill’ is defined in s 302 as ‘a bill that describes the legal services to which it relates and specifies the total amount of the legal costs’. Despite the fact that this definition is wide enough to include an itemised bill, the logic of Part 3.2 treats them as mutually exclusive categories.

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40 Section 317(3) does not overcome the need to demonstrate under s 328 that a costs agreement is not fair and reasonable, a test which addresses the relation between the parties to it.

41 LPA 2004 s 331. The time limits may be abridged by order of the Supreme Court if the defendant is about to leave New South Wales: s 331(2).
If the initial bill is in ‘lump sum’ form and the recipient requests an ‘itemised bill’ before the law practice commences proceedings, the right to sue is effectively cancelled until 30 days after the law practice gives the itemised bill. 42

A bill must include a notice of client’s rights under s 333 unless one of the exceptions in sub-s (2) or (3) is engaged. These repeat some of the disclosure exceptions under s 312, including the case of a ‘sophisticated client’. A safe-harbour form of words is prescribed under s 333(4) and LPR 2005 reg 111A and Sch 5.

There should be a general exemption under s 333 for a bill given by one law practice to another law practice, such as the conventional bill from a Barrister to a Solicitor. The retaining law practice is a professional practitioner, and needs no consumer protection notice; the inclusion of the notice of client’s rights in a bill addressed to such a non-client is at best misleading. There is no such exemption, however, and practitioners must ensure that their paperwork complies with this silly requirement.

The above requirements are technical but substantive. Non-compliance is a complete defence, and is judged at the date when the recovery action is commenced.

Solicitor/Client Assessment

I do not intend to undertake a general review the assessment process here, but a few simple issues should be noted.

The giver or recipient of a bill of costs may apply for assessment of costs under LPA 2004 Part 3.2 Div 11. A non-associated TPP may also apply, 43 though no bill will have been served on that person by the billing law practice. In the case of a non-associated TPP, the amount assessed is not the amount payable by the Client to the Solicitor, but the amount payable by the TPP to or on account of the Client: Boyce v McIntyre [2009] NSWCA 185. 44

42 LPA 2004 s 332A.
43 LPA 2004 s 350.
44 Cf M L Brabazon, ‘The Price is the Price: GST and Other People’s Legal Costs’ (2009) 47(11) LSJ 66, which focuses on GST issues but also contains a brief synopsis of the case.
There is no maximum time limit on an application for assessment of costs by a Barrister or Solicitor who has served a bill. A Client or TPP who receives a bill or pays costs without a bill has 12 months to apply for assessment, subject to limited provisions for extension. By contrast, a Solicitor who receives a Barrister’s bill has only 60 days to apply, and there is no provision for extension.

The time limits may effectively be extended in the case of costs in an ‘interim bill’, seemingly for the benefit of any party, by s 334, which allows such costs to be assessed in the alternative ‘at the time of the final bill’ – what this presumably means is that an application for assessment of a final bill that is made within time relative to that bill may include any unassessed interim bills, even if they would otherwise have been out of time. An ‘interim bill’ is one ‘covering part only of the legal services the law practice was retained to provide’. The definition focuses on the state of the relevant retainer, whether of a Barrister or a Solicitor, at the time of the bill. Where a Barrister is briefed with successive tasks in a case, a nice question may arise under this test whether particular Barrister’s bills are final or interim.

The net result of assessment will be one or more certificates of determination which can be filed as deemed judgments in a court of appropriate monetary jurisdiction.

Resort to Trust Money

Regulation 88(3) permits transfer of trust or controlled moneys to the Solicitor’s own general account if (a) the withdrawal is authorised by a complying costs agreement or instructions of the Client, or the money is owed to the Solicitor ‘by way of reimbursement of money already paid by the [Solicitor] on behalf of the [Client]’ and (b) the Solicitor gives prior notice to the Client in the form of a ‘request for payment, referring to the proposed withdrawal’. The regulation does not say how specific the authorisation in a costs agreement need be, but it is difficult to see how a costs agreement could be expected to identify a future payment in any great detail. This implies that a suitably worded costs agreement may validly give the Solicitor a wide power to transfer money owing for costs. If the Solicitor relies on an

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45 LPA 2004 s 352. There is a modest minimum time limit.
46 Section 350.
47 Section 351.
48 LPA s 368 and, as to costs of assessment, s 369.
instruction from the Client, it must be given in writing or, if not given in writing, it must be confirmed in writing either before, or not later than five working days after, the withdrawal; the instruction or confirmation must then be preserved ‘as a permanent record’. A moment’s reflection will show that the second limb of this rule gives rise to a nonsensical impasse if a Client gives oral instruction, the Solicitor complies, and the Client refuses to confirm in writing.

Regulation 88(4) permits transfer if the Solicitor has given the Client a bill and the Client does not within seven days object to withdrawal from trust or, having so objected, does not within 60 days from being given the bill apply for its assessment, or the money otherwise becomes legally payable, such as by the determination of a costs assessment between Solicitor and Client.

**Barristers’ Fees**

If the Solicitor does not pay the Barrister and the Barrister has a costs agreement with the Solicitor, the Barrister has options (1) (civil suit) and (2) (assessment) above. Without a costs agreement, it is questionable whether option (1) exists. If there is no real dispute about costs, the Solicitor may also be liable to disciplinary proceedings for infringement of Solicitors’ Rules 26, 32 and 33\(^{49}\) and an order enforcing payment.\(^{50}\)

\(^{49}\) ‘26 - Undertakings

A practitioner who, in the course of the practitioner's practice, communicates with another practitioner orally, or in writing, in terms which expressly, or by necessary implication, constitute an undertaking on the part of the practitioner, to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the other practitioner will rely on it, must honour the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time.

\(^{50}\) 32 - Contracting for services

A practitioner who deals with a third party on behalf of a client for the purpose of obtaining some service in respect of the client's business, must inform the third party when the service is requested, that the practitioner will accept personal liability for payment of the fees to be charged for the service or, if the practitioner is not to accept personal liability, the practitioner must inform the third party of the arrangements intended to be made for payment of the fees.

33 - Undertakings

A practitioner who, in the course of providing legal services to a client, and for the purposes of the client's business, communicates with a third party orally, or in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the practitioner to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the third party will rely on it, must
It sometimes happens that a Client becomes dissatisfied with a Barrister and instructs the Solicitor not to pay the Barrister’s fees and not to apply money in the Solicitor’s trust account for that purpose. The Solicitor may agree or disagree with the Client’s opinion about the Barrister. Such situations are always uncomfortable for Solicitors. A few propositions may assist in their resolution:

1. The Solicitor has a personal obligation to pay the Barrister’s proper fees, regardless of the Client’s opinion or instructions. The obligation is professional, arising under the conventional relationship between solicitors and counsel and recognised by the Solicitors Rules. It is also a legal obligation, arising by implication from the Barrister’s assessment rights against the Solicitor, and (if present) from a Barrister/Solicitor costs agreement.

2. The Solicitor has the right to test the Barrister’s bill by assessment, and the Solicitor’s payment obligation is subject to the right of assessment. Solicitors should, however, be mindful of the applicable time limits.

3. LPA 2004 s 356 provides for the Manager, Costs Assessment to notify ‘any law practice or client concerned or any other person whom the Manager thinks it appropriate to notify’ of an application for costs assessment. The notified person becomes a ‘party’ to the assessment and, if the costs assessor so determines, is bound by the outcome. This provision may be useful to bind a third party payer or a Client who has not yet been joined with fellow Clients in an assessment, but it would be of doubtful utility to join a Client to a Barrister/Solicitor assessment (absent a Barrister/Client costs agreement) or a Barrister to a Solicitor/Client assessment. Supposing that a Barrister becomes party under s 356 to a Solicitor/Client assessment, the only determination by which the Barrister could be bound is the determination of costs as between the Solicitor and the Client; that is not a determination of costs as between the Barrister and the Solicitor.

4. If there are funds in trust, the Solicitor may resort to those funds to pay the Barrister under reg 88(4) if the Solicitor has billed the Client for the Barrister’s fees as a

honour the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time.’

50 LPA 2004 Part 4.9 provides for compensation orders in disciplinary proceedings under the Act.

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disbursement and the Client has not objected within seven days or, having objected, has not sought assessment against the Solicitor within 60 days of being given the bill.

(5) If there are funds in trust, the Solicitor may resort to those funds to pay the Barrister under reg 88(3)(a)(i) if a costs agreement between Solicitor and Client authorises that course and the Solicitor has given the Client the requisite notice under reg 88(3)(b).

(6) If there are funds in trust, the Solicitor may resort to those funds under reg 88(3)(a)(iii) if the Solicitor has paid the Barrister as a disbursement and given the Client the requisite notice under reg 88(3)(b). Although there may be no payment obligation between the Client and the Barrister, it would be correct to regard the Barrister’s fees as money paid by the Solicitor ‘on behalf of’ the client in terms of reg 88(3)(a)(iii) because the cost of the Barrister’s services, assuming that the Solicitor was actually authorised to retain counsel, are ultimately chargeable to the Client, and those services are rendered to and for the Client.

(7) The Solicitor’s right of resort to funds in trust does not prevent the Client from later challenging the Solicitor’s entitlement to recover the Barrister’s fees as a disbursement. The challenge would take the form of an application by the Client for assessment of the Solicitor’s costs, bearing in mind that costs include disbursements.

(8) Prompt notice and billing by the Solicitor to the Client of the Barrister’s fees, and prompt payment by the Solicitor to the Barrister, are strategies that should generally reduce the scope for disputation and complaint.

(9) If the Barrister has sought and received assurance that a certain level of funds will be held in trust to cover the Barrister’s fees, ordinary equitable principles may have the effect that the trust moneys are impressed with an equitable charge in the Barrister’s favour to secure payment of those fees. Such a charge may arise by contract or by estoppel, though it may be necessary to analyse the actual communications and authorities between Solicitor, Client and Barrister with some care. If such a charge exits, the Solicitor cannot apply the trust moneys in a manner inconsistent with it, even if the Client so directs.

51 I am content to assume this proposition for present purposes.
Payments in Advance and Security for Fees

Money received by a law practice on account of legal costs in advance of providing the services is deemed to be trust money under LPA 2004 s. 243. This has the general effect that a Solicitor cannot receive costs in advance unless the solicitor maintains a trust account.

Section 252 prohibits a Barrister from receiving trust money. Unless the Solicitor has funds in trust, this creates obvious problems. The Client who has already had the benefit of legal services, but lost the case, is often ill-disposed to pay the lawyer’s bills, and the rights of an unsecured creditor against an unco-operative debtor, whose assets may be elusive, limited or already secured to other parties, are not an attractive basis on which to earn a living. This is so, regardless whether the pursuing creditor is the Barrister or the Solicitor.

An exception to s 252 is provided by LPR 2005 reg 106A, under which a barrister may receive fees in advance provided that they are deposited in a practice account which is kept sufficiently in credit for a specified time – usually, until a corresponding bill is rendered, but the exception only applies where the money is received ‘in connection with instructions accepted by the barrister directly from a person who is not a solicitor’. This may provide a workable solution in a direct access situation but many solicitors, particularly in criminal practice, now operate without trust accounts, and that creates a serious problem for Barrister, Solicitor and Client. Suppose that the Client retains such a Solicitor, who retains a Barrister. The Barrister knows nothing about the Client’s credit, and will certainly not want to have to pursue the Client on an unsecured debt if the fees are unpaid. The Solicitor may be understandably reluctant to incur personal exposure for counsel’s fees without security from the Client. A Client who cannot provide security that is lawful for the Barrister and Solicitor to take is likely to be deprived of legal representation, or choice of legal representation. For centuries, the Barrister’s protection was to take a fee with the brief. That is no longer permitted. Nor can the Barrister or the Solicitor insist on the Solicitor holding a certain amount in trust, charged with payment of the Barrister’ fees, if the Solicitor does not have a trust account. So what lawful security can the lawyers take, and what can the Client conveniently offer, to protect their legitimate interests?

LPA 2004 does not prohibit a Barrister from taking security for professional fees, whether owed by the Solicitor or by the Client. Nor does it prevent a Solicitor from taking security as

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The reason for this is simple: solicitors’ professional insurance premiums are much lower without a trust account.
such. Security could take virtually any form, as long as it does not infringe the trust money rules. It could be a mortgage or a bank guarantee. In some cases, the Client may have enough unencumbered property to provide a meaningful mortgage or to procure a bank guarantee in favour of the Solicitor and/or the Barrister. In many or most cases, however, those forms of security will be too costly, impracticable or inconvenient for all concerned, including the Client.

One option that may be considered in relation to Barrister’s fees, and incorporated into a costs agreement between Barrister and Solicitor, is a requirement that the Solicitor hold a bank cheque or a series of bank cheques drawn payable to the Barrister charged with payment of the Barrister’s fees upon irrevocable instructions to deliver the cheques to the Barrister once bills are rendered for the relevant work. This is not an ideal solution, but it appears to work around the constraints identified above without infringing the spirit or the letter of the legislation. It does so by way the concept of ‘transit money’.

Transit money and trust money are defined in s 243. Transit money means ‘money received by a law practice subject to instructions to pay or deliver it to a third party, other than an associate of the practice’. Transit money is a subset of ‘trust money’. Transit money received in cash must be deposited to a general trust account: s 258A(4). The requirement under s 253 to maintain a general trust account does not apply if the only trust money received is controlled money and/or transit money not in cash: s 253(3).

Transit money generally is governed by s 257, which provides:

1. Subject to section 258A, a law practice that has received transit money must pay or deliver the money as required by the instructions relating to the money:
   
   (a) within the period (if any) specified in the instructions, or
   
   (b) subject to paragraph (a), as soon as practicable after it is received.

   **Maximum penalty:** 50 penalty units.

2. The law practice must account for the money as required by the regulations.

   **Maximum penalty:** 50 penalty units.

Reg 81 imposes accounting requirements for transit money received by a law practice, but these are not onerous. The law practice is required to ‘record and retain brief particulars
sufficient to identify the relevant transaction and any purpose for which the money was received’. Reg 92 also provides that, if the only trust money received by a law practice during a year is transit money, its trust records for the year are not required to be externally examined.

The result is that transit money received by a Solicitor in the form of a bank cheque drawn payable to a Barrister need not be deposited in a general trust account, but must be paid or delivered as required by the instructions relating to that money. If those instructions include a charge in favour of the Barrister of which the Solicitor has notice, the Solicitor would not be required or entitled to return the cheque to the Client contrary to that charge, even if the Client should later demand its return. The Act does not require the Solicitor to ignore validly created security interests in transit money.

It will be seen that a Solicitor who practises without a trust account may also take security for future professional costs generally in forms other than trust money, but that the Solicitor’s ability to rely on the ‘transit money’ exception is effectively limited by the definition of that term in s 243 to disbursements payable to non-associated third parties. In this context, Barristers’ fees are simply a class of disbursements.

Conclusions

In conclusion, a few general points can be made about a solicitor’s relations with counsel and clients concerning legal costs.

The first is the importance of good communication. The technical disclosure obligations in LPA 2004 should not obscure the importance of maintaining good channels of communication with clients and counsel. This requires forethought and good practice management systems.

Secondly, it is necessary to be aware of the technical requirements of the Act, and to ensure that one’s practice management systems both provide a fail-safe against inadvertent non-compliance and facilitate the fair recovery of costs and prompt payment of liabilities incurred with third party providers, including Barristers.
Thirdly, it is necessary to be aware of the differences in the rights, obligations and roles of solicitors as directly retained law practices and barristers as indirectly retained law practices under LPA 2004. The significance of these differences does not always leap from the page, and a large part of this paper has been devoted to making some of them explicit.

Fourthly, it is useful to be aware of what is permitted, not just what is required or forbidden, whether in relation to the avenues available to resolve disputes about legal costs or in fashioning a costs agreement with a client or other paying party.

Finally, there is a case for practical training of solicitors – and of barristers – in the estimation of costs. If this is to happen, there should first be a genuine scientific body of knowledge about the real cost of legal services, particularly litigation. The disclosure obligations in the Act and the costs assessment system proceed on assumptions that this knowledge exists and that it is readily available to practitioners, including costs assessors. Experience and observation suggest that both assumptions are unsound. Some practitioners are indeed skilful at quantifying the typical, proper legal costs for a case of given proportions and characteristics in areas of their experience and expertise, but they are relatively few in number.