THE LAW SOCIETY
OF NEW SOUTH WALES

COSTS GUIDE
7TH EDITION

CHAPTER 1
CLIENT ENGAGEMENT

Costs Guidebook 7th Edition (revised) – Foreword

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This edition of the Costs Guidebook is the 7th edition since first published in 1994 .

The Law Society of NSW thanks Neil Oakes and FMRC for their kind permission to reference FMRC material in this practitioner guide.

The 7th edition is the result of a collaboration of a number of dedicated experts in the area of costs and all members of the Costs Committee of the Law Society of NSW.
It has taken countless hours of sustained work and I believe the Profession owes them a debt of gratitude as do I.

Terence Stern
Chair, Costs Committee
Law Society of NSW

The Uniform Law is a suite of legislation including:

Legal Profession Uniform Law (NSW) ["LPUL"]

Legal Profession Uniform Law Application Act 2014 ["LPULAA"]

Legal Profession Uniform Law Application Regulation 2015 ["LPULAR"]

Legal Profession Uniform General Rules 2015 ["LPUGR"]

Prior legislation referred to:

Legal Profession Act 2004 ["LPA 2004"]

Legal Profession Regulation 2005 ["LPR"]

The Uniform Law applies for instructions first received from your client on or after 1 July 2015 (LPUL Schedule 4 clause 18).

The Uniform Law applies for proceedings commenced on or after 1 July 2015 (LPULAR clause 59).

1.1. INTRODUCTION

The purpose of this chapter is to guide law practices in initiating and managing a client engagement. In this sense, "engagement" has a far wider meaning than a practitioner's retainer (the contract between the practitioner and the client). When a law practice enters into an engagement with a client, it brings into play a range of rights, expectations and responsibilities for both parties that, once embraced, may be difficult to alter or terminate. Merely supplying a written costs disclosure that complies with the requirements of the Legal Profession Uniform Law (NSW) (the "Uniform Law"), and completing a costs agreement, is not sufficient. Other issues need to be considered and, as in the case of all contracts, it is important that the agreement between practitioner and client is clearly documented. Clear communication with the client, and the use of plain language, will help to achieve this.

The focus of this chapter is the engagement process, rather than the legal product itself. It is primarily the law practice's responsibility to manage the engagement process. The issues that must be considered are detailed in the following sections.

1.2 ASSESSING THE SUITABILITY OF THE ENGAGEMENT

Difficulties arise when law practices do not manage client engagement properly from the outset. This does not mean immediately signing a costs agreement or providing a written disclosure. It might mean refusing the work, not because of any lack of technical competence, but because accepting the engagement is not appropriate for the firm at that time. The law practice should ask itself these questions before embarking on a new engagement:

- Is the matter suitable given the current and future workload of the law practice and the practitioner? Maternity leave and long service leave may also affect staff availability within the practice.
- Is there sufficient time to undertake the matter and also manage proper communication with the client?
- Did the client instruct another law firm in this matter before seeking to engage you, and have they ceased instructing that firm? If so, it would be wise to try to find out why the client was dissatisfied with the other law practice as this may reveal unreasonable expectations on the client's part.
- Does the client understand the amount of time they may have to devote to the matter, and are they committed to the task? Specifically, is the client aware of what will be expected of them?
- Does the law practice have the technical expertise and resources to undertake the matter?
- Does the matter or the client pose any risk to the law practice. For example, would accepting instructions give rise to a conflict of interest?
- Can the law practice meet the client's objectives and expectations, and has the client made these clear?
- Does the client agree to the terms of engagement, including payment, or do they appear reluctant to sign the costs agreement and disclosure?

The law practice should also consider the client's likely expectations of the engagement. The client may expect that:

- the law practice is going to solve their problems
- the service will be delivered in a timely fashion
- the fee will reflect true value to the client
- the law practice is there to serve them and to solve their problems
- there will be a high level of lawyer–client communication.

In some situations it is reasonable and prudent to decline to undertake work for a prospective client. You may simply feel that the prospective client is likely to be difficult or unpleasant to work for, and is unlikely to be happy with whatever work you may do. If you are unable to handle a matter, it is far better to refer the client to another law practice than risk the possibility of a matter being handled badly. An analysis of Lawcover claims indicates that reluctance to decline work is a source of complaints and claims.

If you decide to decline a matter, explain to the client why you have made that decision. It may be because of existing work pressures or a possible conflict, or because it is outside the law practice's expertise. A client may recognise the logic in what you say and be happy to return for subsequent work.

If you do enter into an engagement, you should serve the client competently and diligently. You should be acutely aware of the fiduciary nature of the relationship with your client, and always deal with them fairly, free of the influence of any interest that may conflict with their best interests. You should maintain the confidentiality of your client's affairs, but give them the benefit of all the information you have that is relevant to their affairs. You should obviously not engage in, or assist conduct that is calculated to, circumvent justice, or otherwise be in breach of the law.

1.3 THE IMPORTANCE OF COMMUNICATION

The Uniform Law dictates the way law practices establish client engagements, manage client expectations, vary or terminate engagements and communicate with clients.

Carefully and sensibly implementing the requirements of the Uniform Law with regard to disclosure and costs agreements will help ensure a high standard of practice and a high level of professionalism. It will also reduce the number of complaints and claims from clients.

The cornerstone of a successful engagement is good communication between the law practice and the client throughout their association. The agreement that the law practice enters into with the client involves two-way communication. It should spell out what the practice will do for the client (and also, where appropriate, what work the law practice will NOT do – such as providing financial advice). It should also spell out what the client can expect from the law practice, such as the name of the lawyer who will be handling the matter, the likely duration of the matter, the likely cost and billing arrangements, how the retainer can be terminated, and how progress on the matter will be communicated to the client.

The genesis of many complaints or claims is the start of an engagement. They may arise because the client:

- misunderstands what is likely to happen in the matter, and has unreal and/or unjustified expectations
- in litigation matters, does not properly appreciate the possibility that they will be unsuccessful, and the costs that may be payable as a result
- feels that the practitioner is not readily available to speak to them or is not advising them of progress at reasonable intervals
- does not understand why there is a delay or why the matter is taking more time than expected
- feels they have been "shunted" about the law practice, from one practitioner to another
- is not given adequate information about costs and when these are payable
- is surprised when costs and expenses are more than they were led to believe
- is not informed that they may be entitled to legal aid
- does not understand what has happened to money given to the law practice and does not understand the law practice's bill or statement of account
- feels there is a long delay in recovering costs from the other party
- does not understand why the other side should not pay all their costs when the case has been won
- does not know that a barrister has been briefed, and as a result objects to paying the barrister's fee
- is not given genuine estimates of legal costs to be or being incurred.

Always ensure the client understands the difference between a costs estimate and a costs quotation, and explain why costs can increase. Always update costs estimates where appropriate.

The Law Society finds that giving adequate information to clients early on in a matter can prevent complaints arising.

1.4 IDENTIFYING THE CLIENT

As in any contract, it is important to establish the identity of the client at the outset. This is particularly important when acting for a business entity rather than an individual or individuals, or when acting for a number of persons in the same matter. It is essential that the costs agreement or disclosure document properly lists the correct client. For example, it is not uncommon for the directors of a corporate client that becomes insolvent to refuse to pay the company's legal fees on the basis that the solicitor's

retainer was with the company and not the directors personally. At the outset, the law practice should consider clearly naming both the company and the directors as clients or obtaining a personal guarantee from the directors that they will pay the law practice's fees and disbursements in the event that the company becomes insolvent. You should also conduct the appropriate searches to ensure that anyone purporting to be a director of a company is in fact a director of that company.

In all cases, it is a good policy to require new clients to provide you with photo identification and other proof of identity to ensure you are acting for the person or persons they claim to be.

The Conveyancing Rules, which were made pursuant to section 12E of the Real Property Act 1900 (NSW), came into effect on 1 May 2016. These rules require a representative (defined as an Australian Legal Practitioner, a Law Practice or a Licensed Conveyancer who acts on behalf of a client) to take reasonable steps to verify the identity of each client or each of their client's agents and persons to whom certificates of title are provided. Law Practices working in this area of law should carefully read the Conveyancing Rules – which include details of the Verification of Identity Standard – and verify the identity of a person in some other way that constitutes the taking of reasonable steps. It should also be remembered that the Conveyancing Rules require a representative to retain the evidence supporting the dealing for at least seven years from the date of lodgement of the dealing that is registered or recorded, including any evidence supporting the verification of a party's identity.

When acting for both spouses in any transaction, it is advisable to make it clear in writing, preferably in the costs agreement or disclosure document, that:

- each spouse is considered the agent for the other for the purposes of giving instructions binding on both (if that is appropriate for the clients)
- if a conflict of interest arises at any time between the spouses, you will terminate the retainer, and the parties will be liable to pay your costs up to that time.

1.5 DEFINING AND DOCUMENTING THE ENGAGEMENT

A client's expectations of the legal system need to be realistic. If they are not, the client will be dissatisfied, and a complaint or a claim may follow. The law practice must take the time to properly determine the client's expectations, to make sure they do not have an inflated idea of the law practice's ability to make some event occur or to win a case. By properly communicating what is possible, the client can make an informed decision about whether to proceed with a matter. Once a decision is taken to proceed, it should be clearly documented in writing.

Section 174 of the Uniform Law sets out the disclosure obligations of a law practice and should be carefully read and implemented. In the case of litigious matters, there are additional disclosure obligations regarding settlements (s. 177 of the LPUL).

A costs agreement should document the shared understanding between the law practice and client about objectives, scope, timing and costs. It should also identify how and when variation and/or termination might occur. It can provide a reminder to clients to seek changes to the terms of engagement when necessary. Without such a written document, it is difficult to defend a complaint or a claim and also difficult to recover the costs owing to the law practice. It is therefore very much in the law practice's interest that a proper costs agreement and disclosure document is prepared and accepted by the client.

A good costs agreement can also be a useful management tool for the legal practice – for reviewing the progress of a matter. It can also be used by the partners of the law practice who supervise matters handled by employed practitioners.

A good costs agreement can also prevent problems before they arise. It can be used as an early warning device by either the client or the law practice. If a matter is not progressing according to plan, or a substantial increase in costs appears likely, or the client is not paying the firm's bills, this can be dealt with at an early stage. Remedial action, such as reviewing the costs estimate, revising the scope of the instructions or terminating the retainer, can then occur.

1.5.1 COSTS

Section 174(1) of the Uniform Law provides that a law practice must, when or as soon as practicable after instructions are initially given in a matter, provide the client with information disclosing the basis on which legal costs will be calculated, and an estimate of the total legal costs. There is also an obligation to update the client as soon as practicable after any significant change to anything previously disclosed. The requirements of the Uniform Law place the onus on law practices to hone their

skills at estimating the value of their professional work.

Section 179 of the Uniform Law provides that a client of a law practice has the right to require and to have a negotiated costs agreement with the law practice. Section 180 provides that the costs agreement must be in writing or evidenced in writing, and may consist of a written offer that is accepted in writing or (except in the case of a conditional costs agreement) by other conduct. It is recommended that the law practice requires the client to confirm acceptance of the agreement in writing rather than relying on "other conduct".

If the retainer is accepted on the basis that some or all of the legal costs payable are conditional on the successful outcome of the matter to which the costs relate, then the costs agreement must comply with the requirements set out in section 181 and section 182 of the Uniform Law. A conditional costs agreement must be in writing and signed by the client.

Conditional costs agreements are not permitted in relation to a matter involving criminal proceedings, or proceedings under the *Family Law Act 1975* (Cth).

If a law practice is seeking to recover the costs of paralegal and secretarial services from the client, it is essential that these services are specified in any disclosure document or costs agreement provided to the client. Similarly, if the firm intends to seek the cost of miscellaneous items that cannot be correctly classified as disbursements – such as charges for telephone calls, facsimile transmissions, photocopying and postage – this should be specified in any disclosure document or costs agreement, and the rate should be specified. It should be clearly shown whether the amount includes or excludes GST.

Law practices should also maintain records that identify the charges raised so that if there is a challenge, the records will verify claims.

1.5.2 PRO BONO WORK

Party/party costs, if awarded by an order to one of the parties, indemnify that party (in part) against the payment of their law practice's costs. If there was never, under any circumstances, a liability to pay costs to that party's law practice, then, as no costs have been incurred, they cannot recover costs on a party/party basis, even if there was an award of a court or tribunal.

If a law practice wishes to preserve the client's entitlement to an indemnity for costs, it should issue a conditional costs agreement.

1.6 MANAGING VARIATIONS AND TERMINATION

An agreement should make it clear under what circumstances the engagement may be varied or terminated. It should also include a clear statement that the client will be liable for the law practice's costs in those circumstances.

Also, s. 174(1)(b) of the Uniform Law requires that the law practice must notify the client of any substantial changes.

The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 deal with some of the issues around terminating a retainer – for example, when it can be terminated, providing appropriate notice, and the retention of documents. It is important that the client understands at the outset that they need to assist the law practice to resolve their matter.

1.6.1 VARYING THE ENGAGEMENT

Legal matters frequently change as they progress, for a range of reasons. For example:

- the scope or character of a matter may change, in which case the client should be informed of the changes and the impact of those changes on costs
- there may be a subtle but definite change in the matter, such that it becomes an entirely new engagement – for example, when a failed mediation leads to litigation or a contract settlement leads to rescission.

If there is good, ongoing communication between the law practice and the client, variations in the engagement that would change the client's expectations or understanding of the work to be done will be handled as a matter of course. It would still be useful to pause at this point to re-address the matters that were raised by both the client and the law practice at the outset of the engagement.

Professional obligations and risk management issues must be kept in mind. Hurried, undocumented and uncommunicated changes could easily turn into a contested bill of costs, a complaint or a claim via Lawcover.

1.6.2 TERMINATING THE ENGAGEMENT

Risk management issues arise when a law practice seeks to withdraw from a matter before it is concluded. Law practices are advised to read the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and, in litigation matters, be aware of the relevant court rules and practice notes, which have specific notice and documentary requirements. It is important for law practices to recognise and react to signals that indicate that the law practice should disengage. These might include that:

- the client refuses to take advice given
- the client fails to answer letters
- the client fails to pay the law practice's bills
- the matter extends beyond the competence of the law practice
- the law practice's position is being compromised by a conflict of interest.

When situations of this sort occur, it is important to communicate with the client and discuss options.

If a decision is taken to terminate the matter, then a law practice must establish a clear and reasonable basis for doing so, and confirm this in writing for the client.

Once again, the grounds for termination should have been spelt out in the agreement, and included a provision for payment of costs up to the termination.

Potential causes for termination may include that:

- the client fails to pay any fee or other monies requested by the law practice, in accordance with the agreement
- the client fails to provide the law practice with proper instructions (including information) as requested by the law practice within a specified reasonable time frame
- the client refuses to accept, contrary to the law practice's advice, an offer of settlement that the law practice considers reasonable
- a conflict of interest arises or is discovered, which prejudices the performance of the law practice and their obligations to the client
- the client requires the law practice to conduct the matter in an improper or unreasonable manner
- the client gives the law practice misleading information relating to the matter
- the client fails to co-operate with the law practice, to appear for any medical or other expert examination, or to attend a court hearing without good reason
- the client changes representation or decides to act as a litigant in person – particularly important in conditional costs agreements.

If the client believed that more work was to be done, a letter from the law practice closing the matter and enclosing a final bill may rectify this misunderstanding. Even if the client sees the law practice for a brief consultation, it may be appropriate for the practice to write to the client, documenting the matters discussed. This could be done by sending a letter with a précis of the discussion and making sure that nothing more is expected by the client.

Under the Uniform Law, where instructions are received on or after 1 July 2015, Applications for Assessment by a law practice must be made within 12 months of the bill being given or the request for payment being made – see ss. 198 (3) and (4) of the LPUL. There is no provision for the law practice to obtain an extension of time to make an Application for Assessment to have costs assessed.

1.7 CONCLUSION

Entering into an engagement with a client brings into play responsibilities, expectations and rights for both parties. These should be documented in an agreement as soon as a mutual understanding of the matter is reached, so that the parties understand what is required of each of them. Like any contract, a costs agreement should be carefully and clearly drafted.

The existence of a costs agreement gives the law practice authority to carry out the terms of the agreement, and implied authority to do all things incidental to achieving the objectives of the agreement. The existence and terms of the agreement, and the appearance of the agreement to third parties, will dictate the extent to which a law practice is able to bind the client.

Finally, it is the existence of the agreement that leads the law to superimpose fiduciary duties on the law practice, and the terms of that agreement dictate the extent or scope of those duties.

1.8 FURTHER INFORMATION

Law practices are becoming increasingly aware of risk management issues. The Risk Management Education Program (RMEP) conducted by Lawcover has helped to bring engagement issues into sharp focus, and law practices are encouraged to use the opportunity offered by the RMEP and similar facilities to develop their skills and knowledge in this area. Further information is available from Lawcover at http://www.lawcover.com.au/risk-management-education-program/

The Ethics Committee of the Law Society is available to consider general ethical issues and concerns relating to the practice of law and the Solicitors' Conduct Rules. The Ethics Committee includes the Law Society's Senior Ethics Solicitor and members of the profession who are committed to upholding high ethical standards within the profession. Further information is available from the Ethics section of the Law Society's website: www.lawsociety.com.au/ethics

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