Securing your fees and getting paid

by Luke T. Fermanis
Edmund Barton Chambers

This paper is intended for educational and information purposes only and is not intended to be relied upon partly or solely as advice.

Introduction

1. There is nothing more satisfying than completing work for a client, sending out a memorandum of fees and receiving payment for services rendered within the time stipulated on that memorandum.

2. As you send out that memorandum of fees, you say to yourself "when those fees come in, I can spend it on …".

3. The due date for payment is imminent. You look at your calendar with a smirk and say to yourself "when those fees come in, I can pay for the thing I spent it on …".

4. The due date passes. You wake up at 5am, check your bank account or trust account online and … **the balance has failed to increase**.

5. Panic then anger sets in. Two thoughts emerge:

(Thought One)

(Goodfellas (1990))

(Thought Two)

(Scarface (1983))

6. If your thoughts were to sit down and watch Goodfellas and Scarface to sooth your mind, you are correct. The writer does not condone or endorse the use of violence to extract payment.

7. Hopefully, this paper will provide you with some guidance to securing and obtaining payment of your fees.

The Beginning

8. This paper is concerned with matters covered by the *Legal Profession Uniform Law* (NSW) (**UL**). In other words, matters in which the solicitor first received instructions on and from 1 July 2015. This paper **does not** discuss the recovery and enforcement of cost orders.

9. In general, the rules regulating legal costs are now found in several conveniently located places:

    a. *Legal Profession Uniform Law Application Act 2014* (NSW) (**AA**), Parts 6 and 7 – (Section 4 applies the Legal Profession Uniform Law set out in Schedule 1 to the Legal Profession Uniform Law Application Act 2014 of Victoria as a law of NSW);
    b. The UL – Part 4.3;
    c. Legal Profession Uniform General Rules 2015 (**Uniform Rules**) – Part 4.3; and
    d. Legal Profession Uniform Law Application Regulation 2015 (NSW) (**UL Regulation**), Parts 5 and 6

10. This paper does not intend to cover all aspects of cost provisions in every practice discipline (such as in personal injury cases in Part 6 of the AA and costs provisions in the *Motor Accidents Compensation Act 1999*, the *Motor Accidents Compensation Regulation 2020*, the *Workplace Injury Management and Workers Compensation Act 1998* and the *Workers Compensation Regulation 2016*). Nor is it intended to explore every aspect of the myriad of provisions spread across a number of pieces of legislation and legislative instruments concerning legal costs.

Do I need to disclose?

11. Sections 174 and 175 of the UL contain provisions regarding the general initial and continuing obligations of disclosure.

12. The critical matters to take from the abovementioned provisions are as follows:

a. You must **when** or **as soon as practicable** after a client initially gives instructions to provide the client with:

    i. information disclosing the basis upon which legal fees will be calculated in a matter; and
    ii. an estimate of the **total legal costs**. This includes barristers' fees and disbursements.

b. You must **as soon as possible** provide information to the client about their rights to negotiate a costs agreement, billing method, right to receive a bill and request an itemised bill and seek assistance from the Office of the Legal Services Commissioner in the event there is a dispute about costs.

c. You must **when** or **as soon as practicable** disclose that there is any significant change to the disclosure previously provided and provide information about that significant change including as to legal costs.

d. You **must** take all reasonable steps to satisfy yourself that the client understands and has given consent "to the proposed course of action for the conduct of the matter and the proposed costs".

e. If you are retaining a third party, such as a barrister then you must disclose:

    i. The basis of charging and estimate of total legal costs in relation to that retainer; and
    ii. Any significant changes in relation to that retainer.

f. **The disclosure must be in writing**.

13. Section 18 of the AA defines the lower threshold for disclosure as being $750 and the upper threshold as being $3,000. You do not need to provide disclosure if the estimate of fees is unlikely to exceed the lower threshold. If the total legal fees are unlikely to exceed the upper threshold, then you must make disclosure in accordance with the prescribed forms contained in Schedule 1 of the Uniform Rules.

14. What about commercial or government entities? No. Part 4.3 of the UL (except for sections 181(1), (7) and (8), 182, 183 and 185(3), (4) and (5) of the UL) does not apply if you have a commercial or government client or a third party payer (for the purposes of section 170 of the UL). The characteristics for a commercial or government entity are set out in section 170(2) of the UL and Rule 71 of the Uniform Rules.

15. Section 177 of the UL imposes a further obligation regarding the settlement of litigious matters. **Before** the settlement is executed you **must** disclose:

    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.

16. Putting to one side the mandatory nature of the disclosure obligations created by section 177 of the UL, this is good practice.

Failure to disclose

17. Section 178 of the UL prescribes the consequences of failing to comply with your disclosure obligations:

    (1) If a law practice contravenes the disclosure obligations of this Part—
    (a) the costs agreement concerned (if any) is void; and
    (b) the client or an associated third party payer is not required to pay the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority; and
    (c) the law practice must not commence or maintain proceedings for the recovery of any or all of the legal costs until they have been assessed or any costs dispute has been determined by the designated local regulatory authority or under jurisdictional legislation; and

(d) the contravention is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner associate or foreign lawyer associate involved in the contravention.

(2) In a matter involving both a client and an associated third party payer where disclosure has been made to one of them but not the other, this section—

(a) does not affect the liability of the one to whom disclosure was made to pay the legal costs; and

(b) does not prevent proceedings being maintained against the one to whom the disclosure was made for the recovery of those legal costs.

(3) The Uniform Rules may provide that subsections (1) and (2)—

(a) do not apply; or

(b) apply with specified modifications—

in specified circumstances or kinds of circumstances.

18. It is obvious that a failure to comply with Division 3 of Part 4.3 of the UL can have dire consequences. I will discuss the consequences as they relate to fee recovery under the headings "**Liens and Security**" and "**Fee Recovery**".

19. There are two disclosure matters which I am of the view should be brought to your attention (even though they do not fall within the ambit of Division 3 of Part 4.3 of the UL):

    a. Conditional costs agreements must identify the basis on which the uplift fee is to be calculated and include an estimate of the uplift fee (or, if it is impractical to provide an estimate, a range of estimates explaining the variation) (section 182(3) of the UL); and
    b. You must provide to a client upon reasonable request, without charge and within a reasonable period, a written report of the legal costs incurred by the client to date, or since the last bill (if any), in the matter. (section 190(1) of the UL).

Should I have a costs agreement?

20. Nothing in the UL requires a lawyer to have a costs agreement with their client (or solicitor). There are three reasons why you should have a costs agreement:

    a. A costs agreement provides you with the benefit of enforceability under section 184 of the UL and the rebuttable presumption of "fair and reasonable" in section 172(4) of the UL.
    b. A costs agreement creates a contractual right personal with the client.
    c. There may be exemptions from cost limits imposed by legislation (see for example Clause 4 of Schedule 1 to the AA).

21. Section 180 of the UL provides for the making of a costs agreement. The costs agreement **must** be written or evidenced in writing. The costs agreement can be accepted in writing or by conduct. I pause to note that by reason of section 181 of the UL, a conditional costs agreement **must**:

    a. be signed by the client;
    b. include a statement that the client has been informed of the client's rights to seek independent legal advice before entering into the agreement; and
    c. contain a provision containing a cooling-off period of not less than 5 business days.

22. Some of you may or may not be aware that certain conditional costs agreement are prohibited (section 181(7)):

    a. Criminal proceedings; and
    b. Proceedings under the *Family Law Act 1975* (Cth).

    I appreciate that there are those who agree to get paid at the end of proceedings under the *Family Law Act 1975* (Cth). There are a variety of reasons why you would agree to such a condition, such as money being tied up in assets. The distinction is that condition is not conditional on the successful outcome of the matter to which costs relate. That being said, for reasons which I shall discuss below, those kinds of conditions can be

problematic if care is not taken to draft conditions carving out when fees become payable.

23. I need not remind people that contingency fees are prohibited in NSW (section 183 of the UL).

24. Section 185 of the UL deems certain costs agreements as being void:

> *A costs agreement that contravenes, or is entered into in contravention of, any provision of this Division is void.*

Liens and Security

Fruits of Action Lien

25. Ah, the sweet nectar of the "fruits of action" lien. (**the Lien**)

26. In *Ex Parte Patience; Makinson v Minister* [1940] NSWStRp 11; (1940) 40 SR (NSW) 96 at 100-101, Jordan CJ gave the classic exposition of a solicitor's equitable right to have his or her costs and disbursements paid from money recovered for his or her client:

> *A solicitor has no lien for his costs over any property which has not come into his possession. If, however, as the result of legal proceedings in which the solicitor has acted for the client, the client obtains a judgment or award or compromise for the payment of money, although the solicitor acquires no common law title to his client's right to receive the money or to any part of that right, he acquires a right to have his costs paid out of the money, which is analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor. That is to say, the solicitor has an equitable right to be paid his costs out of the money; and if he gives notice of his right to the person who is liable to pay it, only the solicitor and not the client can give a good discharge to that person for an amount of the money equivalent to the solicitor's costs: Welsh v Hole 1 Doug 238. If the person liable to pay refuses, after notice, to pay the costs of the solicitor, the*

solicitor may obtain a rule of Court directing that the amount of his costs be paid to him and not to the client; and payment by the judgment debtor to the client after notice of the solicitor's claim is no answer to an application for such a rule: Read v Dupper [1795] EngR 4137; 6 TR 361; Ormerod v Tate [1801] EngR 256; 1 East 464; Ross v Buxton 42 Ch D 190. Further, if the client and a judgment debtor make a collusive arrangement for the purpose of defeating the solicitor's right, the Court will enforce that right against the judgment debtor notwithstanding the arrangement and notwithstanding that no notice of the solicitor's claim had been given to the judgment debtor prior to the arrangement: Ross v Buxton .

27. In *Twigg v Keady* [1996] FamCA 115; (1996) 135 FLR 257 at 290 Kay J said, of a solicitor's lien:

> *"In the words of Jordan CJ, I accept that in practice the solicitor has always been treated as possessing equitable rights in the judgment independently of any declaration of those rights, and that the court's assistance is invoked not to create the rights but to enforce them..."*

28. In *Firth v Centrelink* (2002) 55 NSWLR 451, Campbell J (as his Honour then was) considered the nature of a solicitor's lien over money recovered for the solicitor's client and helpfully set out the following propositions at [35]:

> (a) The solicitor's right exists over money recovered through obtaining judgment in litigation, and also over money recovered through the settlement of litigation: *Carew Counsel Pty Ltd v French* [2002] VSCA 1 at [33]; *Roam Australia Pty Ltd v Telstra Corp Ltd* [1997] FCA 980, Lehane J, 22 September 1997, unreported at 4.
>
> (b) The solicitor's right exists over both the amount of a judgment in favour of the client, and the amount of an order for costs in favour of the client: *In The Estate of Fuld (No 4)* [1968] P 727 at 736; *Twigg v Keady* [1996] FamCA 115; (1996) 135 FLR 257 at 266 - 267 per Finn J; *In Re Blake; Clutterbuck v Bradford* [1945] Ch 61 (a case concerning a statutory charging order rather than a lien arising in equity's exclusive jurisdiction, but dependent on the same principle as the equitable right - see para 44 below).

(c) *It exists over money which is in the possession of the solicitor, and also over money which is in court* (*In Re Meter Cabs* [1911] 2 Ch 557 at 562) and money which is owed to the client but not paid into court (*In The Estate of Fuld* (No 4) [1968] P 727; *Re de Groot* [2001] 2 Qd R 359 at 375) (my emphasis)

(d) The solicitor need not be still acting for the client at the time that the money was recovered: *In The Estate of Fuld* (No 4) [1968] P727; *Kelso v McCulloch* (Supreme Court of NSW, Young J, 24 October 1994 unreported); *Twigg v Keady* [1996] FamCA 115; (1996) 135 FLR 257 at 289 per Kay J; *Roam Australia Pty Ltd v Telstra Corp Ltd* [1997] FCA 980, Lehane J, 22 September 1997, unreported at 4

(e) For the right to arise it must be shown that there is a sufficient causal link between solicitor's exertions and the recovery of the fund of money: *Roam Australia Pty Ltd v Telstra Corp Ltd* [1997] FCA 980, Lehane J, 22 September 1997, unreported at 4 - 5; *Carew Counsel Pty Ltd v French* [2002] VSCA 1 at [33].

(f) The quantum of money for which the solicitor has the equitable right is the amount which is properly owing to the solicitor by the client, whether that amount be ascertained by taxation of a bill of costs, or assessment, or pursuant to a costs agreement: *Roam Australia Pty Ltd v Telstra Corp Ltd* [1997] FCA 980 (Lehane J, 22 September 1997, unreported at 4). In relation to those situations where taxation is necessary to ascertain the quantum owing to the solicitor, the solicitor's right exists in the fund prior to the occurrence of the taxation (*Johns v Cassel* (1993) 6 BPR 13,134 at 3,136 per Hodgson J; *Twigg v Keady* [1996] FamCA 115; (1996) 135 FLR 257 at 289 per Kay J; *In The Estate of Fuld (No 4)* [1968] P 727 at 740; *Roam Australia Pty ltd v Telstra Corp Ltd* [1997] FCA 980 (Lehane J, 22 September 1997, unreported at 6).

(g) *The solicitor's equitable right exists before the court is asked to intervene to protect it; it "arises immediately upon the recovery of monies through the exertions of the solicitor": Carew Counsel Pty Ltd v French [2002] VSCA 1 at [33]; if the lien is over the proceeds of an order for costs, it comes into existence at the time of making of that order for cost* : *Phillipa Power & Associates v Primrose Couper Cronin Rudkin* [1997] 2 Qd R 266; *Kison v*

Papasian [1994] SASC 4476; (1994) 61 SASR 567. If the lien is over the proceeds of a settlement, it arises when the settlement agreement is entered into: *Re de Groot* [2001] 2 Qd R 359 at 368. *(These statements concern when the lien comes into existence as an item of present property - they are not concerned with the ability of the solicitor to deal with the rights under the lien as future property before the fund is in existence.)* (my emphasis)

(h) The right of the solicitor is one which the solicitor can enforce against the client, entitling the solicitor to an injunction to prevent the payment of the fund to the client without notice to the solicitor until such time as the quantum of the solicitor's entitlement to be paid from the fund is ascertained: *In The Estate of Fuld* (No 4) [1968] P 727. If the quantum of the solicitor's entitlement has been ascertained, the solicitor is entitled to an order that the amount of his entitlement be paid to him from the fund, notwithstanding opposition from the client: *Leamey v Heath* [2001] NSWSC 1095 (Campbell J, 22 November 2001, unreported).

(i) The right can also be enforced against people other than the client, in certain circumstances. When the money recovered takes the form of a debt owed to the client, which has been assigned, the right of the solicitor will prevail over the rights of an assignee of the debt, save where the assignee is a bona fide purchaser for value without notice: *Re de Groot* [2001] 2 Qd R 359. (If the assignee is a bona fide purchaser for value without notice, it may be that priorities between the solicitor's right and the right of the assignee are to be determined in accordance with the rule in *Dearle v Hall* , (see Meagher, Gummow & Lehane, Equity Doctrines and Remedies, 3rd edition, at [819] ff) or it may be that the court considers who, of the solicitor and the assignee, has the superior equity - *Re de Groot* [2001] 2 Qd R 359 at 368 - 376 - but it is not necessary for me to consider that matter further.)

(j) If the client is a company which goes into liquidation, the solicitor is entitled, in relation to costs arising from work done before the start of the liquidation, to claim the full amount of the costs from the fund and is not required to prove in the liquidation: *In Re Born; Curnock v Born* [1900] 2 Ch 433; *In Re Meter Cabs* [1911] 2 Ch 557. This has the same practical effect as enforcing the right

against the other creditors of the company. The solicitor's lien attaches to property recovered through his exertions, even if the actual recovery occurs after the client goes into liquidation: *North West Construction Co Pty Ltd (In Liquidation) v Marian* [1965] WAR 205 at 211.

(k) Likewise, if the client is a natural person who becomes bankrupt, the solicitor is not required to prove in the bankruptcy for the amount of costs incurred but can recover the costs from the debt which is the result of his efforts: *Guy v Churchill* (1887) 35 Ch D 489; *Worrell v Power & Power* [1993] FCA 551; (1993) 46 FCR 214. The trustee in bankruptcy takes that debt subject to the equitable right of the solicitor to be paid his costs, and if the amount of the solicitor's costs exceeds the value of the debt, the debt does not vest in the trustee in bankruptcy at all; if the client is discharged from bankruptcy he can sue to enforce the debt as it never was property divisible among the creditors, and any amount that the client then receives is also subject to the solicitor's lien: *Kison v Papasian* [1994] SASC 4476; (1994) 61 SASR 567

(l) If the client is the liquidator of a company in liquidation, the solicitor's lien over property recovered through his exertions is to be satisfied before the statutory order of priorities for distribution of the property of the corporation comes into effect: *Jeffcott Holdings Ltd (in liq) v Paior* [1995] SASC 5260; (1995) 18 ACSR 213

(m) If the money recovered is held in the solicitor's trust account, and the solicitor is served with a garnishee notice, issued to enforce a debt which the client owes to another person, the garnishee notice is not effective to attach the money in the trust account, to the extent that the solicitor has a lien over it: *Phillipa Power & Associates v Primrose Couper Cronin Rudkin* [1997] 2 Qd R 266. Likewise, if the money recovered is held by a third party, and a garnishee notice is served on that third party, the solicitor's lien prevails over the garnishee notice: *Dallow v Garold; Ex parte Adams* (1884) 14 QB D 543.

29. The key points are:

a. Did you act for the client?

b. What was your level of involvement in the litigation?
c. Can you establish a causal link between the work done by you and the ultimate outcome for the client?
d. It is important that if you intend to rely upon the Lien, **give notice** and **give it fast!**

30. What if a client goes and settles a case in which you were involved?

31. The Full Court of Queens Bench in *Brunsdon v Allard* [1859] EngR 693; (1859) 2 El&El 18 where parties each having obtained judgments in cross-actions against the other, compromised the action despite the opposition of the attorney of one of them. The Court consisting of Lord Campbell CJ, Whightman, Erle and Crompton JJ unanimously refused to intervene. In the words of Lord Campbell CJ at page 26:

> *Although an attorney has a lien for his costs and, when his client has recovered judgment in an action, may apply the fruits of the action in payment of the sum which is due to him, that does not prevent the parties to the action from coming to a compromise, the result of which is that the attorney loses his lien, provided that the arrangement is not a mere juggle between the parties, entered into by them in collusion to deprive the attorney of his costs.*

32. Erle J at page 27 made the following comment:

> *The attorney's right however certainly goes to this extent, that, if a conspiracy between the plaintiff and defendant, to defraud the attorney of the costs, is clearly made out, the court will interfere to prevent it.*

33. Crompton J in the same case said the following at page 28:

> *Each party is, for that purpose, dominus litis; and the court will not interfere with any fair settlement that they may come to, although it will probably restrain them from carrying out a collusive arrangement made on purpose to defraud the attorney of either.*

34. The remarks of their Lordships would indicate that the Court will only intervene if collusion has been shown to exist. This position has been adopted in Family Court of Australia (see *Gadens Ridgeway v Paroulakis & Ors; Paroulakis* (1992) FLC 92-311). One would expect a Court exercising equitable jurisdiction to prevent the unconscionable conduct of a former client.

Security for fees

35. This is not a dissertation as to the different types of security a solicitor can take for his or her fees. The possibilities are numerous and go beyond the scope of this paper.

36. Typically, a solicitor would likely seek to secure their fees against the beneficial interest of a client's interest in real property are family law matters. It is not uncommon to have a client who is, for want of a better phrase, asset rich and cash poor. A keen-eyed solicitor would be able to perform an assessment of the matter, provide a fee estimate (in compliance with the UL) and prepare a costs agreement accordingly.

37. Section 23C(1) of the *Conveyancing Act 1919* (NSW) requires that a disposition of an interest in land must be in writing. It goes without saying there are exceptions to that requirement.

38. A solicitor is presumptively in a relationship of undue influence with his or her client, which the solicitor may rebut with evidence that the client provided fully informed consent. When considering the scope of the solicitor's fiduciary duty to the client, it is relevant to consider how the solicitor came to be in possession of information that the client had property that could be the subject of a charge. If the solicitor came into possession of that information through acting for the client, using that information to take security and lodge a caveat may be in breach of the solicitor's fiduciary duty.[1]

39. In *Malouf v Constantinou* [2017] NSWSC 923, the solicitor's costs agreement included a charge over all of the client's current and future property in very similar terms to the security provisions in the costs agreements. The solicitor had also entered into a deed

[1] *Gilles v La Rosa* [2018] NSWSC 920 at [39] per Emmett AJA.

of charge with the client and with the clients' parents (as guarantors) in respect of the client's property and two properties owned by the client's parents. The solicitor had become aware of the specific properties owned by the client and his parents in the course of taking preliminary instructions concerning the family law proceedings in which the solicitor was to be retained to act for the client. Parker J held that, in those circumstances, the solicitor was in a position of conflict between his own interest in obtaining security for his fees and his obligation to act in his client's best interests. His Honour therefore accepted the concession made on behalf of the solicitor that the fiduciary relationship of solicitor and client obliged the solicitor to provide an explanation of the terms of the costs agreement, deed of charge and other related documents to the client before the client entered into those documents: see [2017] NSWSC 923 at [94]–[101].[2]

40. Parker J expressly refrained from considering whether a solicitor stipulating for security in other circumstances is in a position of fiduciary conflict: [2017] NSWSC 923 at [102]. However, his Honour referred to *dicta* of Windeyer AJ in *M J Leonard Pty Ltd v Bristrol Custodians Ltd (in liq)* [2013] NSWSC 1734 at [52]–[53] to the effect that a fiduciary conflict arises whenever a solicitor seeks security from the client, even at the inception of a retainer.[3]

41. Section 206 of the UL provides as follows:

> *A law practice may take reasonable security from a client for legal costs (including security for the payment of interest on unpaid legal costs) and may refuse or cease to act for a client who does not provide reasonable security.*

42. Parker J in *Malouf* took the view that section 206 of the UL removed the previous disability of general law on a solicitor taking security, and to do so only where the security is "reasonable" but did not affect the operation of other equitable doctrines such as conflict and undue influence.[4]

[2] *Price v ACN 627 087 030 Pty Ltd trading as Yates Beaggi Lawyers* [2020] NSWSC 584 at [54] per Williams J.
[3] *Price v ACN 627 087 030 Pty Ltd trading as Yates Beaggi Lawyers* [2020] NSWSC 584 at [55] per Williams J.
[4] *Malouf v Constantinou* [2017] NSWSC 923 at [172] per Parker J.

43. The lessons to be learnt from *Malouf* are as follows:

    a. Explain to the client (and any guarantors) the nature of the charging provision – in particular the consequences if the client defaults under his or her obligations under the costs agreement.

    b. Recommend that the client (and any guarantors) obtain independent legal advice and explain why such advice is necessary.

    c. Ensure that the security is reasonable in all of the circumstances of the case.

    d. Have a separate document containing the relevant security provisions.

44. If your charging provisions are struck down, it goes without saying you lose your security. I should hasten to add that if your costs agreement is set aside in the assessment process **it does not mean** that your costs agreement is set aside should you seek relief as part of any judicial process. The assessment process is an administrative function not judicial.

Fee Recovery

45. The client has failed to meet your fees, what are your options? See paragraph 5 above! No, definitely no.

46. Firstly, ensure that you have complied with your obligations under the UL (and any other relevant provisions). Make sure that your bills comply with section 192 of the UL:

    > *A law practice must ensure that a bill includes or is accompanied by a written statement setting out—*
    > *(a) the avenues that are open to the client in the event of a dispute in relation to legal costs; and*
    > *(b) any time limits that apply to the taking of any action referred to in paragraph (a).*

47. Consider the inclusion of the following text:

> *(a) A client may apply to have his or her legal costs assessed by a costs assessor in the event of a dispute. For NSW, the application is made to the Manager, Costs Assessment. The application must usually be made within 12 months after the bill is given to the client.*
>
> *(b) A client who complains about a lawyer or law practice to the designated local regulatory authority (for NSW, the Legal Services Commissioner) may include a costs dispute in the complaint. The time limit is usually 60 days after the costs become payable or 30 days after the law practice complies with a duly made request for an itemised bill.*

48. Secondly, when are your fees due and payable and are you entitled to terminate the costs agreement? If so, have you terminated your costs agreement in accordance with that agreement. This can be a real problem for the solicitor acting for a client in a family law matter where payment is at the end of the matter. The solicitor in *Malouf* encountered this very problem:

    a. The client was required to pay the costs and expenses incurred up to the date of termination, but none of those clauses specified that the payment was to become due immediately. [5]
    b. In the light of the clear stipulation that the fees were deferred to the end as part of the "main object" of the contractual arrangements, no such acceleration arises by implication.[6]
    c. The solicitor failed to provide reasonable notice of his termination of the retainer.[7]

[5] *Malouf v Constantinou* [2017] NSWSC 923 at [56] per Parker J.
[6] *Malouf v Constantinou* [2017] NSWSC 923 at [56] per Parker J.
[7] *Malouf v Constantinou* [2017] NSWSC 923 at [216] per Parker J.

d. Due to the security provisions in his agreement being unenforceable and liable to be set aside, the purported termination was a repudiatory breach of his obligations under the retainer.[8]

49. Thirdly, are there funds sitting in your trust account which you draw upon to meet your funds in whole or in part. Fingers crossed! However, before you go to withdraw those funds from trust:

a. You must have regard to section 144 of the UL and rule 42 of the Uniform Rules;

b. What is the nature of the authority that you have to withdraw those funds?

i. The NSW Law Society standard terms and conditions contains the following provision:

> *You authorise us to receive directly into our trust account any judgment or settlement amount, or money received from any source in furtherance of your work, and to pay our professional fees, internal expenses and disbursements in accordance with the provisions of Rule 42 of the Uniform General Rules. A trust statement will be forwarded to you upon completion of the matter.*

ii. I recently represented a law firm which relied upon an executed costs agreement to create the authority to withdraw funds from its trust account to meet its fees and disbursements. Regrettably, whilst the UL (and the general law of contract) permits an agreement to be formed based on conduct, the law firm did not have an executed version of the agreement. Whilst this does not create a question of whether a client is liable to you, one would think that this may draw the ire of the Office of

[8] *Malouf v Constantinou* [2017] NSWSC 923 at [217] per Parker J.

the Legal Services Commissioner – especially should you choose litigation over assessment.

c. If you do not hold a trust account, there are escrow services available such as the NAB Escrow Service. By way of disclosure, I hold no shares in NAB nor have any other financial or pecuniary interest in NAB nor have I received any commission, fee or benefit in providing the NAB Escrow Service as an example.

50. Fourthly, what about lodging a caveat? Do you have a reasonable basis for lodging a caveat? I need not remind readers that there can be professional and economic consequences of lodging a caveat against a client's interest in real property without a proper basis for doing so.

51. Fifthly, you could try and negotiate with the client and come to arrangement. There might be a variety of reasons for taking a non-litigious route such as preserving the relationship, risk aversion or there might be "issues" surrounding "conduct" which may affect your ability to recover.

Litigation or Assessment

52. To assess or to litigate, that is the question. Whether 'tis nobler in the mind to suffer …

53. I hate to say it but 500 years later, Shakespeare's words ring true.

54. Should you choose to proceed down the assessment path:

a. **Beware** of the limitation period imposed by section 198(3) of the UL:

*(3) An application under this section must be made within **12 months** after—*

(a) the bill was given to, or the request for payment was made to, the client, third party payer or other law practice; or

(b) the legal costs were paid if neither a bill nor a request was made.

(emphasis added)

b. The prevailing view is that section 198(4) of the UL provides no panacea for a law practice to make an application out of time.

c. If you have a commercial or government entity as a client:

    i. By reason of section 170 of the UL, the costs assessment process is not available to those clients.
    ii. It is unsure whether the costs assessment process is available to a law practice making an application for assessment.
    iii. You have (subject to the aforementioned limitations referred to in paragraph 14 above) a degree of freedom to contract with those entities and should document your dealings with those clients.

55. Should you choose the litigation path:

a. Beware the angry client! A client may try and raise a defence and cross-claim in an effort to impugn your conduct (for example, overcharging, negligence, overcharging, breach of fiduciary duty, overcharging, failure to comply with the UL, overcharging, over servicing) and avoid liability.

b. Before commencing proceedings, you should ask yourself the following three questions:

    i. Do I have a valid costs agreement?
    ii. Have I complied with my disclosure obligations?
    iii. Have I complied with my billing obligations?

c. If you cannot answer all three of the above questions in the affirmative, the failure to comply with the disclosure and billing obligations under the UL will prevent you commencing recovery proceedings and restrict you to the costs assessment route.

d. Once you have answered the abovementioned questions in the affirmative AND you have exhausted all other avenues of recovery, there are two further matters for your consideration:

    i. The old maxim about representing yourself; and
    ii. The Chorley exception is no longer considered good law in Australia.

        1. The High Court in *Bell Lawyers Pty Ltd v Pentelow* (2019) 372 ALR 555 abolished the Chorley exception so you will not be able to recover your own costs in representing yourself. Consider this problem, if you are a solicitor representing yourself in probate or family provision proceedings (due to you being the executor of the estate), I respectfully suggest that you are caught by the *Bell* case.

        2. What if the work was done by employee solicitors and other staff within the firm? The Victorian Court of Appeal in *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* [2020] VSCA 15 held those fees **are not** recoverable by reason of *Bell*. Whilst I cannot find a NSW based decision referring to *United Petroleum*, it is certainly persuasive given that we have a "uniform law".

        3. That being said, the NSW Court of Appeal in *Coshott v Commonwealth Bank of Australia* [2020] NSWCA 279 quoted the following from *Bell*:

            a. The joint judgment in *Bell* said at [50]:
            A decision by this Court that the Chorley exception is not part of the common law of Australia would not disturb the well-established understanding in relation to in-house lawyers employed by governments and others, that where such a solicitor appears in proceedings to represent his or her employer the employer is entitled to

recover costs in circumstances where an ordinary party would be so entitled by way of indemnity.

b. Gageler J was to similar effect as the plurality, explaining at [68]:

Recovery of costs by a party using an employed solicitor predated introduction of the Chorley exception. The better view, explained in a number of cases to which the Supreme Court of New Zealand appears not to have been referred, is that recovery of costs by a party using an employed solicitor is an application of the general principle rather than an exception to it. The general rule is engaged on the basis that the costs of using the employed solicitor are still awarded as indemnity for professional legal costs actually incurred in the conduct of litigation by the employer who is a party to the litigation, albeit that those professional legal costs are incurred in the form of an overhead and are therefore not reflected in a severable liability. [Citations omitted.]

56. What about a statutory demand notice? You should ask yourself the same questions raised in paragraph 55 above. You should also consider whether there is a genuine dispute as to debt or potential offsetting claim.

Closing Words

57. From my experience, whether in my own practice or acting for law firms in the recovery of fees or enforcement of securities, the lessons to be learnt are:

a. to make sure you have complied with your obligations from the onset of your relationship with the client; and
b. to make it clear what you expect from your client from the beginning.

58. As lawyers we have to appreciate that we hold a special position of influence in society. Equity recognises the fiduciary relationship between us and the client. For decades, the government has passed legislation and create regulations with the overriding goal of protecting the client. Whenever we issue a costs agreement or bill our clients, we should always bear that in mind.

Luke T. Fermanis
Edmund Barton Chambers
Ph: (02) 9220 6100
Email: luke.fermanis@ebc44.com

23 March 2021

Some Law

Legal Profession Uniform Law (NSW)

s144 Withdrawal of trust money

1) A law practice must not withdraw trust money from a general trust account otherwise than by cheque or electronic funds transfer.
   Civil penalty: 50 penalty units.
2) A law practice may do any of the following, in relation to trust money held in the practice's general trust account or controlled money account—
   a) exercise a lien, including a general retaining lien, for the amount of legal costs reasonably due and owing by the person to the law practice, where the law practice is otherwise entitled to do so;
   b) withdraw money for payment to the law practice's account for legal costs owing to the practice if the relevant procedures or requirements specified in the Uniform Rules for the purposes of this Division are complied with;
   c) deal with the balance as unclaimed money, after—
      i) deducting any legal costs properly owing to the practice; and
      ii) exhausting any other means of distributing it in accordance with the client's instructions.

s170 Commercial or government clients

1) This Part does not apply to—
   a) a commercial or government client; or
   b) a third party payer who would be a commercial or government client if the third party payer were a client of the law practice concerned—

   but this section and sections 181(1), (7) and (8), 182, 183 and 185(3), (4) and (5) do apply to a commercial or government client referred to in paragraph (a) or a third party payer referred to in paragraph (b).
2) For the purposes of this Law, a ***commercial or government client*** is a client of a law practice where the client is—
   a) a law practice; or
   b) one of the following entities defined or referred to in the Corporations Act—

i) a public company, a subsidiary of a public company, a large proprietary company, a foreign company, a subsidiary of a foreign company or a registered Australian body;
ii) a liquidator, administrator or receiver;
iii) a financial services licensee;
iv) a proprietary company, if formed for the purpose of carrying out a joint venture and if any shareholder of the company is a person to whom disclosure of costs is not required;
v) a subsidiary of a large proprietary company, but only if the composition of the subsidiary's board is taken to be controlled by the large proprietary company as provided by subsection (3); or

c) an unincorporated group of participants in a joint venture, if one or more members of the group are persons to whom disclosure of costs is not required and one or more members of the group are not any such persons and if all of the members of the group who are not such persons have indicated that they waive their right to disclosure; or
d) a partnership that carries on the business of providing professional services if the partnership consists of more than 20 members or if the partnership would be a large proprietary company (within the meaning of the Corporations Act) if it were a company; or
e) a body or person incorporated in a place outside Australia; or
f) a person who has agreed to the payment of costs on a basis that is the result of a tender process; or
g) a government authority in Australia or in a foreign country; or
h) a person specified in, or of a class specified in, the Uniform Rules.

3) For the purposes of subsection (2)(b)(v), the composition of the subsidiary's board is taken to be controlled by the large proprietary company if the large proprietary company, by exercising a power exercisable (whether with or without the consent or concurrence of any other person) by it, can appoint or remove all, or the majority, of the directors of the subsidiary.
4) For the purposes of subsection (3), the large proprietary company is taken to have power to make an appointment referred to in that subsection if—

a) a person cannot be appointed as a director of the subsidiary without the exercise by the large proprietary company of such a power in the person's favour; or
b) a person's appointment as a director of the subsidiary follows necessarily from the person being a director or other officer of the large proprietary company.

s174 Disclosure obligations of law practice regarding clients

1) **Main disclosure requirement** A law practice—
    a) 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 in the matter and an estimate of the total legal costs; and
    b) must, when or as soon as practicable after there is any significant change to anything previously disclosed under this subsection, provide the client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client—

    together with the information referred to in subsection (2)
2) **Additional information to be provided** Information provided under—
    a) subsection (1)(a) must include information about the client's rights—
        i) to negotiate a costs agreement with the law practice; and
        ii) to negotiate the billing method (for example, by reference to timing or task); and
        iii) to receive a bill from the law practice and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised; and
        iv) to seek the assistance of the designated local regulatory authority in the event of a dispute about legal costs; or
    b) subsection (1)(b) must include a sufficient and reasonable amount of information about the impact of the change on the legal costs that will be payable to allow the client to make informed decisions about the future conduct of the matter.

3) **Client's consent and understanding** If a disclosure is made under subsection (1), the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

4) **Exception for legal costs below lower threshold** A disclosure is not required to be made under subsection (1) if the total legal costs in the matter (excluding GST and disbursements) are not likely to exceed the amount specified in the Uniform Rules for the purposes of this subsection (the ***lower threshold***), but the law practice may nevertheless choose to provide the client with the uniform standard disclosure form referred to in subsection (5).

5) **Alternative disclosure for legal costs below higher threshold** If the total legal costs in a matter (excluding GST and disbursements) are not likely to exceed the amount specified in the Uniform Rules for the purposes of this subsection (the ***higher threshold***), the law practice may, instead of making a disclosure under subsection (1), make a disclosure under this subsection by providing the client with the uniform standard disclosure form prescribed by the Uniform Rules for the purposes of this subsection.

5A) To avoid doubt, the uniform standard disclosure form prescribed by the Uniform Rules for the purposes of subsection (5) may require the disclosure of GST or disbursements or both.

6) **Disclosure to be written** A disclosure under this section must be made in writing, but the requirement for writing does not affect the law practice's obligations under subsection (3).

7) **Change in amount of total costs—where previously below lower threshold** If the law practice has not made a disclosure, whether under subsection (1) or (5), because the total legal costs in the matter are not likely to exceed the lower threshold, the law practice must, when or as soon as practicable after the law practice becomes aware (or ought reasonably become aware) that the total legal costs (excluding GST and disbursements) are likely to exceed the lower threshold—

    a) inform the client in writing of that expectation; and

    b) make the disclosure required by subsection (1) or (if applicable) subsection (5).

8) **Change in amount of total costs—where previously below higher threshold** If the law practice has not made a disclosure under subsection (1) but has made a disclosure under subsection (5) because the total legal costs in the matter are not likely to exceed the higher threshold, the law practice must, when or as soon as practicable after the law practice becomes aware (or ought reasonably become aware) that the total legal costs (excluding GST and disbursements) are likely to exceed the higher threshold—
    a) inform the client in writing of that expectation; and
    b) make the disclosure required by subsection (1).
9) (Repealed)

s175 Disclosure obligations if another law practice is to be retained

1) If a law practice (the ***first law practice***) intends to retain another law practice (the ***second law practice***) on behalf of a client, the first law practice must disclose to the client the details specified in section 174(1) in relation to the second law practice, in addition to any information required to be disclosed to the client under section 174.
2) If a law practice (the ***first law practice***) retains or intends to retain another law practice (the ***second law practice***) on behalf of a client, the second law practice is not required to make a disclosure to the client under section 174, but must disclose to the first law practice the information necessary for the first law practice to comply with subsection (1).
3) This section does not apply if the first law practice ceases to act for the client in the matter when the second law practice is retained.

Legal Profession Uniform General Rules 2015

r42 Withdrawal of trust money for payment of legal costs

1) This rule prescribes, for the purposes of Division 2 of Part 4.2 of the Uniform Law (see section 144(2)(b) of that Law), the procedure for the withdrawal of trust money held in a general trust account or controlled money account of a law practice for payment of legal costs owing to the law practice by the person for whom the trust money was paid into the account.

2) The trust money may be withdrawn in accordance with the procedure set out in any applicable subrule of this rule.

3) The law practice may withdraw the trust money if the law practice has given the person a bill relating to the money and referring to the proposed withdrawal, and—

    a) if the person does not, at the end of the period of 7 business days after the person was given the bill, object to the amount specified in the bill, or

    b) if the person objects to the amount specified in the bill within the period of 7 business days after being given the bill but has not referred the matter to the designated local regulatory authority or for costs assessment, and the period of 30 days after the later of the following dates has expired—

        i) the date on which the person was given the bill,

        ii) the date on which the person received an itemised bill following a request made in accordance with section 187 of the Uniform Law, or

    c) if the money otherwise becomes legally payable.

4) The law practice may withdraw the trust money (whether or not the law practice has given the person a bill relating to the money)—

    a) if the money is withdrawn in accordance with instructions that have been received by the law practice and that authorise the withdrawal, and

    b) if, before effecting the withdrawal, the law practice gives or sends to the person—

        i) a request for payment, referring to the proposed withdrawal, or

        ii) a written notice of withdrawal.

    Note. See also subrule (7), which relates to subrule (4).

5) The law practice may withdraw the trust money—

    a) if the money is owed to the law practice by way of reimbursement of money already paid by the law practice on behalf of the person, and

    b) if, before effecting the withdrawal, the law practice gives or sends to the person—

        i) a request for payment, referring to the proposed withdrawal, or

        ii) a written notice of withdrawal.

Note. See also subrule (8), which relates to subrule (5).

6) If the law practice has given the person who is a commercial or government client a bill specifying the amount payable by the person for legal costs, the law practice may withdraw the money so long as—
    a) the money is withdrawn in accordance with a costs agreement between the law practice and the person, and
    b) the costs agreement complies with the legislation under which it is made and authorises the withdrawal, and
    c) before effecting the withdrawal, the law practice gives or sends to the person a request for payment, referring to the proposed withdrawal.
7) In relation to subrule (4)—
    a) if the authorisation referred to in subrule (4)(a) authorises withdrawal of part only of the money—
        i) the law practice may withdraw the money to that extent only, and
        ii) if the law practice has given the person a bill relating to the money as referred to in subrule (3)(a)—subrule (3)(b)(i) and (ii) are taken to apply to the remaining part of the amount specified in the bill, and
    b) instructions referred to in subrule (4)—
        i) if given in writing, must be kept as a permanent record, or
        ii) if not given in writing, must be confirmed in writing either before, or not later than 5 working days after, the law practice effects the withdrawal and a copy must be kept as a permanent record.
8) For the purposes of subrule (5), money is taken to have been paid by the law practice on behalf of the person when the relevant account of the law practice has been debited.

Note. Rule 73 provides for the giving of bills.

Schedule 1 Forms

Form 1 Standard costs disclosure form for clients—solicitors and other law practices (except barristers)

The standard costs disclosure Form 1 can be used when your professional fee is not likely to be more than $3000 (before adding GST and disbursements).

Date provided to client—

Law practice details

Name—				Contact—	
Address—				Phone—	
				Mobile (Optional)—	
State/Territory—		Postcode—		Email (Optional)—	

Client details

Name—				Phone—	
Address—				Mobile (Optional)—	
State/Territory—		Postcode—		Email (Optional)—	

What we will do for you

How much we estimate you will need to pay

Estimated total cost of our legal services (excl. GST)—	$	The basis for calculating costs
Estimated amount for disbursements (excl. GST)—	$	Further Details—
Estimated total cost of barrister or other law practice (excl. GST)—	$	
[Attach information from the second law practice]		
GST—	$	
Estimated full amount you will need to pay (incl. GST):	$	

This is an estimate only. We will inform you if anything happens that significantly changes this estimate. If our professional fee is likely to be more than $3000 (before GST and disbursements are added) we will provide you with a full disclosure of costs in writing.

Your rights include to—

‣ Ask for an explanation of this form ‣ Negotiate a costs agreement ‣ Negotiate the billing method (eg timing or task) ‣ Request a written progress report of costs incurred ‣ Receive a

written bill for work done ▸ Request an itemised bill ▸ Contact your local regulatory authority.

Form 2 Standard costs disclosure form for clients—barristers being briefed directly by a client

The standard costs disclosure Form 2 can be used when your professional fee is not likely to be more than $3000 (before adding GST and disbursements).

Date provided to client—

Barrister details

Name—				Phone—	
Address—				Mobile (Optional)—	
State/Territory—		Postcode—		Email (Optional)—	

Client details

Name—				Phone—	
Address—				Mobile (Optional)—	
State/Territory—		Postcode—		Email (Optional)—	

What I will do for you

How much I estimate you will need to pay

Estimated total cost of my legal services (excl. GST)—	$	The basis for calculating costs
Estimated amount for disbursements (excl. GST)—	$	Further Details—
GST—	$	
Estimated full amount you will need to pay (incl. GST):	$	
You may also need to pay other costs such as court fees.		

This is an estimate only. I will inform you if anything happens that significantly changes this estimate. If my professional fee is likely to be more than $3000 (before GST and disbursements are added) I will provide you with a full disclosure of costs in writing.

Your rights include to—

▸ Ask for an explanation of this form ▸ Negotiate a costs agreement ▸ Negotiate the billing method (eg timing or task) ▸ Request a written progress report of costs incurred ▸ Receive a written bill for work done ▸ Request an itemised bill ▸ Contact your local regulatory authority.