



Queensland Public Interest Law  
Clearing House Incorporated

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# You *and your* Lawyer

**A GUIDE ABOUT THE  
CLIENT/LAWYER  
RELATIONSHIP, HOW TO  
RESOLVE DISPUTES AND  
TAKING ACTION AGAINST  
YOUR LAWYER.**

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### **About QPILCH**

QPILCH is an independent, not-for-profit incorporated association bringing together private law firms, barristers, community legal centres, law schools, legal professional associations, corporate legal units and government legal units to provide free and low cost legal services to people who cannot afford private legal assistance or obtain legal aid.

QPILCH was established in June 2001 as an initiative of the legal profession and commenced services in January 2002.

QPILCH is a member of the Queensland Association of Independent Legal Services, affiliated with the National Association of Community Legal Centres, and is a member of the PILCH network.

For more information about QPILCH services, please see the QPILCH website at [www.qpilch.org.au](http://www.qpilch.org.au) under Services.

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# INTRODUCTION

## Why has QPILCH written this booklet?

The proper regulation of the legal profession to prevent, identify and punish unacceptable behaviour is, in the view of QPILCH, a public interest issue worthy of special attention.

Of the more than 7500 lawyers in Queensland, the vast majority are competent, honest, hard working and skilled. But the law is complex and to err is human. As in all areas of human activity, mistakes are made. Competent and honest lawyers will act quickly to rectify their mistakes and there are mechanisms to ensure that a client's loss is minimised. For example, lawyers are insured against such mistakes.

However, as in all areas of life, there are a small number of lawyers who are not honest or competent or who lack the inter-personal skills to deal with their clients. Complaints about lawyers sometimes say more about the solicitor/client relationship than about the lawyers' competence.

The public rightly expects standards of the profession to be high. And lawyers themselves recognise that the profession of law, being so integrated with the administration of justice, demands the highest standards of practice.

## What is the purpose of this booklet?

This guide is aimed at helping consumers of legal services, the client, to understand a lawyer's role, work with their lawyer, avoid potential pitfalls, and assist them through the complaints process should a problem arise.

Most clients need a lawyer when they don't know what to do, have a problem, are in trouble or in pain, or most often because they have a transaction to complete and they expect a lawyer to know what to do. Yet they have no experience in dealing with a lawyer and so do not know what to expect of their lawyer or what a lawyer does.

But the law is complex, the facts can be unclear, and the other party can be obstructionist making a problem difficult to solve. If the matter involves litigation, going to court can involve considerable physical and emotional effort.

So lawyers, in private practice, legal aid or a community legal service, have an important role in the community, helping clients when they need it (often in traumatic circumstances), and helping them navigate the courts, other institutions, and government regulations. Because of this unique role, lawyers' standards must be high and they are subject therefore to scrutiny and procedures for dealing with unsatisfactory conduct. This guide also outlines what can be expected of your solicitor and what to do if these standards are not met.

## Terms used in this booklet

**Bill of costs, costs statement, account** – the lawyer's account for payment by the client for professional fees and outlays or disbursements.

**Client confidentiality** – the obligation that a lawyer has to keep, subject to some exceptions, a client's information secret. This duty stems from the special relationship of trust between a lawyer and client.

**Common law** – Law made by judges in deciding cases.

**Complainant** – a person who makes a complaint to the Legal Services Commission or other regulatory body.

**Conditional costs agreement** – also known as a **speculative fee agreement** or a **“no win no fee” agreement** – a costs agreement which specifies that professional fees, and sometimes outlays, only have to be paid if the client's case is successful.

**Conflict of interest** – this occurs when the interests of the client are different from those of the lawyer. For example, where a lawyer's obligations to different clients clash or a lawyer's own interests prevents them from providing a client with impartial advice or assistance. Lawyers are under an

obligation to avoid conflicts of interest as they tend to inhibit the ability of the lawyer to best serve their client.

**Contingency fee agreement** – a costs agreement where fees are calculated by reference to the amount of any award or settlement, or the value of any property that may be recovered in the proceedings. Contingency fee agreements are prohibited in Queensland.

**Costs agreement** – also known as a **client agreement** – a written agreement between a lawyer and their client specifying the work to be formed and how fees and outlays will be calculated.

**Costs assessment** – a process to determine how much legal costs should be paid, either between the client and their solicitor or between parties to a litigation.

**Costs – party and party costs** – the cost liability between parties to a court action, in other words, the costs (fees and outlays) that a court may order the unsuccessful party to pay to the successful party. Party and party costs also used to refer to a type of costs assessment, now known as the “standard basis of assessment”.

**Costs – solicitor and client costs** – the cost liability between a client and their solicitor, in other words, the costs (fees and outlays) that a client must pay his or her lawyer for work done. Solicitor and client costs also used to refer to a type of costs assessment, now known as the “indemnity basis of assessment”.

**Defendant** – a person or organisation who defends legal action in a court.

**Disbursements** – outlays paid by a lawyer in relation to the conduct of a case. For example, photocopying, fax charges and travel expenses.

**Disciplinary body** – the Legal Practice Committee or the Legal Practice Tribunal.

**Disclosure** – a pre-trial process in which parties to litigation are required to provide the other side with access to all documents relevant to the case.

**Fiduciary** – a fiduciary relationship is one based on trust and loyalty. Such a relationship gives rise to a set of fiduciary duties on the person who has the balance of power in the relationship. The relationship between a lawyer and client is a fiduciary one.

**Incorporated legal practice** – a corporation that engages in legal practice in Queensland, but not if the only legal services the corporation provides are in-house legal services or the services that are not legally required to be provided by an Australian legal practitioner. Also, community legal services and Aboriginal and Torres Strait Islander legal services (ATSILS) are not incorporated legal practices.

**Itemised bill** – a lawyer’s account for professional fees and outlays that describes each item of work or expense, the date it occurred, the individual who performed it or the recipient of the expense and the amount incurred.

**Law practice** – a law practice is an Australian lawyer who is a sole practitioner, a law firm, an incorporated legal practice or a multi-disciplinary partnership. A community legal centre is a law practice.

**Lawyer** – refers to a person who has obtained suitable legal training (such as a university degree) and has been admitted as a legal practitioner in accordance with certain rules. Lawyers are commonly referred to as solicitors and barristers.

**Legal practitioner** – see *Lawyer*.

**Legal professional privilege** – a rule of law which protects communications between a lawyer and client from disclosure. Privilege can be waived by the client, or disclosure can be ordered by a court or statute in certain circumstances.

**Lien** – refers to the right a solicitor has to retain the client’s file until all fees and outlays owed to the solicitor by the client have been paid. The lien extends to money held in trust but only to the extent of the client’s debt. The money must be retained in trust until the solicitor is entitled to it. A lien is also a general term that applies to many situations where a creditor has a right over a debtor’s property.

**Litigation** – the conduct of a legal matter before the court.

**Multi-disciplinary partnership** – a partnership between 1 or more Australian legal practitioners and 1 or more other non-lawyers whose business includes the provision of legal services within Queensland as well as other services.

**Plaintiff** – a person or organisation who commences legal action in a court.

**Pro bono** – means “for the public good”. If a lawyer does work on a pro bono basis, then they are doing it free of charge or at a reduced fee.

**Professional fees** – fees charged by a lawyer for their time in carrying out legal work.

**Professional misconduct** – the conduct of a lawyer which substantially or consistently falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian lawyer. Professional misconduct also encompasses conduct that would justify a finding that a lawyer is not a fit and proper person to engage in legal practice.

**Retainer** – used to describe the contract between a lawyer and client for the provision of legal services.

**Scale of fees** or **scale of costs** – tables in the court rules which set out the standard fees to be charged for specific work performed within the court’s jurisdiction.

**Speculative fee agreement** – see *Conditional costs agreement*.

**Trust account – trust funds – monies held in trust** – all legal firms are required to have a trust account, a special bank account that holds only the money belonging to their clients. A client’s money cannot be mixed with the lawyer’s own funds or paid from the trust account without the specific authority of the client or in other limited special circumstances. Even monies that have been received by a solicitor for future outlays on behalf of the client must be held in trust. Trust accounts are regularly audited by the Queensland Law Society. Improper dealings with a trust account are viewed seriously and can amount to a criminal offence. Barristers do not have a trust account and cannot hold money on trust.

**Unsatisfactory professional conduct** – the conduct of a lawyer which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. The penalties for unsatisfactory professional conduct are less severe than the penalties for *professional misconduct* depending on the nature and severity of the conduct.

**Uplift fee - success fee** – a premium charged by a lawyer in the event the matter is successful. This should be specified in the costs agreement or included in a lump sum amount.

## Abbreviations

BAQ	Bar Association of Queensland
BR	Legal Profession (Barristers) Rule 2007 (Qld)
LPA	<i>Legal Profession Act 2007</i> (Qld)
LPR	<i>Legal Profession Regulation 2007</i> (Qld)
LSC	Legal Services Commission
QLS	Queensland Law Society
SR	Legal Profession (Solicitors) Rule 2007 (Qld)
s	section
UCPR	Uniform Civil Procedure Rules 2000 (Qld)

## Applicable law

The primary piece of legislation regulating the client/lawyer relationship, complaints and the discipline of lawyers is the *Legal Profession Act 2007* (Qld) (**LPA**). The LPA replaced and repealed the *Queensland Law Society Act 1952* (Qld) and *Legal Profession Act 2004* (Qld) on 1 July 2007.

In addition, the Legal Profession Regulation, Legal Profession (Solicitors) Rule 2007 and Legal Profession (Barristers) Rule 2007 replaced then existing regulations and rules on 1 July 2007.

Unless otherwise stated, this booklet does not consider the law in existence prior to 1 July 2007.

## SECTION 1: THE CLIENT/LAWYER RELATIONSHIP

### Role and duties of lawyers

#### What does a lawyer do?

The role of a lawyer is to inform, advise, assist and represent their client, using their specialist legal knowledge and skills. It is their role to inform their client what the law is, how it applies to their circumstances, their rights and obligations, and the best way to deal with their case. A lawyer's role is also to assist the client to **understand** these issues. Armed with this information, assistance and advice, the client is better able to give proper instructions and the lawyer is better able to represent their client's interests. It is also the role of the lawyer to communicate with their client in a way that takes account of the client's knowledge and sophistication.

Most people only see a lawyer once or twice in their lifetime, usually with the more routine events in life – to make a will or to buy a home. But sometimes they have a problem that needs fixing – family problems, broken contracts, or an accident resulting in property loss or injury. A lawyer is best placed to protect a person's interests and to guide them through both the routine and more complicated problems that life presents.

However, not all problems can be fixed by a lawyer. Some problems are in themselves unfixable – a person who has been injured cannot always obtain compensation, a relationship that has irretrievably broken down cannot be patched up, or another party to a contract cannot be made to honour their bargain, especially if the terms of the agreement are unclear.

In some cases, even though a client has been injured or suffered loss, they do not have a “cause of action”, a legal pathway to the courts. Lawyers know these pathways which are found in common law or statute. Actions in negligence, contract and trespass are examples. If there is no cause of action, a lawyer cannot help a client commence court proceedings because it is an abuse of court process to bring proceedings which have no legal foundation. In some cases, courts can award costs against the lawyer for doing so.

So a lawyer's job is often to help someone salvage the best from a situation that is complex and traumatic. They use their skills and experience to protect their client's interests and to get the best possible result for their client, but they cannot do so at the expense of their own integrity and legal responsibilities. A lawyer is not just a mouthpiece for their client, they must exercise independent judgment. They cannot do what a client wants if it is unethical. In short, it is sometimes said that a lawyer's role is to tell their clients what they need to know, not what they want to hear.

#### What is the difference between a solicitor and a barrister?

In Queensland, a lawyer can be either a solicitor or a barrister.

A **solicitor** provides legal advice, drafts documents, negotiates with the other side and conducts litigation. This work may relate to non-litigious matters, such as leasing or contracts, or may relate to litigious matters, that is, matters which have been, or may be, commenced in a court or tribunal. Traditionally, a solicitor does not appear on behalf of a client before a court or tribunal, however, this is an emerging role.

A **barrister** is the person you normally see speaking at a court or tribunal on behalf of a party. Barristers may also provide opinions, draft documents and perform negotiations. Generally, a barrister acts on instructions from a solicitor and does not have direct contact with the client. In that case, a client will have both a solicitor and a barrister. A client may instruct a barrister directly, however, barristers are constrained by what they can do for the client by their ethical rules. For example, a barrister cannot sign court proceedings on behalf of a client or serve court documents.

#### What are a lawyer's professional and ethical responsibilities?

Lawyers have statutory and professional responsibilities to the courts and their clients that have developed over time to assist the administration of justice and to protect the interests of their clients. A

breach of these duties may result in disciplinary action being taken against the lawyer by the Legal Services Commission or give rise to a claim in negligence. There might also be implications for court ordered costs between parties (party and party costs) or between a solicitor and their client (solicitor and client costs), to compensate for a lawyer's unethical behaviour.

These professional responsibilities or "ethical rules" arise from a number of sources, including:

- *Legal Profession Act 2007* (Qld)
- *Legal Profession Regulation 2007* (Qld)
- Principles established by common law
- The Legal Profession (Barristers) Rule 2007 (Qld) (**BR**) and the Legal Profession (Solicitors) Rule 2007 (Qld) (**SR**)
- Determinations of disciplinary bodies such as Legal Practice Tribunal and the Legal Practice Committee, and their predecessors
- Guidelines made by the BAQ, QLS or LSC.

However, it should be remembered that many of the fundamental rules are not written down and reflect generally accepted standards of honesty, integrity, excellence and fairness.

The following are some of a lawyer's professional responsibilities, which are commonly divided into duties to the court and duties to the client. Please note that this is not an exhaustive list.

### ***Duty to the court***

As an 'officer of the Supreme Court', lawyers have a duty to the courts to act with candour, competency and honesty. This duty means that a lawyer:

- must not knowingly mislead the Court;
- must not falsify documents;
- must not act as a mere mouthpiece of the client (or instructing solicitor) and must exercise their own independent judgment, after consideration of the client's (and the instructing solicitor's) wishes;
- must not commence frivolous or vexatious claims, in other words, the lawyer should ensure that allegations are capable of being supported by the evidence or that proceedings are not started for an ulterior purpose.

Therefore, while lawyers must act on the instructions of their clients, they must also act in accordance with their duties to the court. For example, a lawyer cannot mislead a court even if a client instructs them to.

Where there is a conflict between a lawyer's duty to the court and to their client, their overriding duty is to the court. Lawyers who mislead a court can be guilty of misconduct or even a criminal offence.

### ***Duty to the client***

Lawyers must advance and protect their client's interests to the best of their abilities (Rule 16, BR; Rule 12, SR), subject to their duty not to break the law and their duty to the court.

The special relationship between a lawyer and their client is known as a **fiduciary relationship**, one of trust and loyalty. This relationship means that a lawyer:

- should avoid conflicts of interest, either between multiple clients or between the lawyer and their client. For example, a lawyer must not agree to act for another person in opposition to an existing or former client;
- should not use the relationship for personal gain, except for a reasonable professional fee;
- if they are a solicitor, must not breach trust account rules (including those set out in the LPA and LPR) and must not misappropriate or misuse trust funds;

- must inform the client of everything the lawyer knows concerning the client's affairs.

If a lawyer intends to act in a conflict of interest situation or will personally benefit from the relationship, then they are under an obligation to fully disclose the conflict or personal gain and obtain the fully informed consent of the client.

A lawyer also has a duty to keep a client's confidential information obtained by the lawyer confidential. This is to encourage full and frank disclosure by the client to their lawyer.

In terms of standards of service, a lawyer has a duty to act honestly and fairly and with competence and diligence. This translates to the following responsibilities, many more of which are set out expressly in the SR and BR:

- to exercise reasonable care and skill in acting for a client;
- to give honest advice to the client even if it is against the client's interests;
- to assist the client to understand the issues and to fully inform them of their rights, obligations and possible courses of conduct, including alternatives to litigation;
- to complete work on behalf of the client with reasonable promptness;
- not to take steps or perform work in such a manner as to unnecessarily increase costs to the client;
- to keep the client fully informed of all significant developments in the client's matter.

A lawyer should not take on work for a client that is beyond their experience or capacity. If the work is beyond the lawyer's experience it can be potentially negligent to accept the client's instructions and may also be unethical. The lawyer has a responsibility to inform the client of his or her lack of experience and inform the client of another lawyer with the required experience and expertise. Similarly, if a lawyer cannot perform the work with reasonable promptness, then they should not accept the work or they should at least inform the client of the delay so that the client may make a fully informed decision of what action to take next.

While these duties sound and are important, it comes down to good communication such as explaining to the client what work is essential to do the job, how much the work will cost, keeping the client informed of progress and informing the client if there are any necessary variations from the work required and estimated costs.

### ***Other duties***

A lawyer also has duties to their opponents. These include:

- a lawyer must not knowingly make a false statement to their opponent in relation to the case;
- as a general rule, a lawyer should only deal with the opponent's lawyer and not with the opponent directly, unless the opponent is self-represented.

Ethical conduct also includes etiquette in dealing with other lawyers, the courts, and the wider community. For example, it is etiquette for a lawyer to return the phone calls of other lawyers promptly. However, failure to do so is unlikely to lead to disciplinary action unless it causes significant undue delay or additional costs.

### **Role and responsibilities of the client**

The primary role of the client is to give their lawyer all the information they have relevant to their case. Only through full disclosure can a lawyer properly represent a client to the best of their ability.

The best safeguard against miscommunication is for clients and lawyers to establish an open and honest line of communication that underpins a trusting relationship. For example, if the case involves litigation, the client should ask their likely prospects of success, the likely outcome if they win, how they will be charged and what is the best estimate of the likely cost, how the matter is to progress and is progressing, and the time it will likely take. However, a lawyer cannot predict all stages of litigious

matters, so cannot necessarily estimate all the likely costs. The estimate of the costs in the client costs agreement is just that – an estimate – and does not bind the lawyer.

While some lawyers provide regular bills so a client can see how work and costs are progressing, when this does not occur, it is in the client's interest to prompt their lawyer about costs.

You should be prepared when you see your lawyer. Your lawyer will be assisted if you provide him or her with documents that are relevant to your case. In all your dealings, your costs will be reduced if you keep to the relevant issues. Your lawyer will keep you on track by asking questions that will help you to confine your comments to the issues that you **want** to resolve and to the issues you **can** resolve using the law.

Importantly though, you can watch for mistakes and fill the gaps. The client usually knows the facts of their matter better than anyone.

If you feel unsure or insecure about what your lawyer is doing or how they are doing it, and asking your lawyer does not clarify the situation, you should seek assistance from the Queensland Law Society or the Legal Services Commission (see inside back cover for contact details).

## Entering the client/lawyer relationship

As soon as you ask, or “instruct”, a lawyer to do something in relation to a matter, then you have started the client/lawyer relationship. Generally, a lawyer should seek to confirm their client's instructions in writing: Rule 2.2, SR.

When you engage a lawyer, the normal practice is to enter into a written client agreement with that lawyer. This forms a binding contract which establishes and controls the relationship between the client and their lawyer, subject to other requirements imposed by law.

**Prior to 1 July 2007**, solicitor-client agreements and the obligation to pay legal fees were governed by the *Queensland Law Society Act 1952 (QLS Act)*. Section 48 set out the requirements for a valid client agreement, which included the need for a written agreement specifying the work to be performed by the lawyer and the fees and costs payable by the client for that work.

The QLS Act was repealed on 1 July 2007 and replaced by the *Legal Profession Act 2007 (LPA)*. The LPA no longer refers to client agreements, but rather requires “costs agreements” and imposes “disclosure obligations” on the lawyer. These are set out in more detail below and apply equally to solicitors and directly instructed barristers.

## Costs agreements

A costs agreement sets out the obligation on the client to pay their solicitor for work done. A valid costs agreement may be enforced or challenged in a court in the same way as any other contract (s 326, LPA).

A costs agreement must be written or evidenced in writing. For example, a costs agreement may comprise of a written offer by the lawyer which is accepted by conduct (s 322, LPA). However, conditional costs agreements must be in writing (see *Additional requirements for conditional costs agreements* at p 11 below).

It is wise to take the client agreement away and read it carefully before you sign and return it to your lawyer.

## Disclosure obligations

Either before or as soon as practicable after being first instructed, your lawyer must tell you in writing in clear plain language:

- how costs will be calculated – this could be a lump sum amount or calculated according to a scale of fees or on the basis of an agreed hourly rate and expected disbursements;
- if reasonably practicable, an estimate of the total legal costs, or if not reasonably practicable, a range of estimates of the total legal costs, with an explanation of the major variables that might effect the final amount;

- when and how often you will be billed;
- the interest rate that will be charged to overdue amounts;
- if the matter is in court, an estimate of costs you might be able to recover if successful, an estimate of costs you might be ordered to pay if unsuccessful and a statement that even if costs are awarded to the client, they will not necessarily cover the whole of the client’s legal costs;
- the percentage rate of any “uplift fee” and the reasons why this fee would be warranted, for example, if the case drags on for a number of years;
- details of the person you may contact to discuss legal costs;
- a Form 1 notice entitled “Form of disclosure of costs to clients”, or notice to a similar effect advising that you have the right to:
  - negotiate a costs agreement with the lawyer
  - receive a bill of costs from the lawyer
  - request an itemised bill of costs after the client receives a lump sum bill from the lawyer
  - request written reports about the progress of the client’s matter and the costs incurred in the client’s matter
  - apply for costs to be assessed within 12 months if the client are unhappy with the lawyer’s costs
  - apply to the Supreme Court for the costs agreement to be set aside
  - accept or reject any offer the lawyer makes for an interstate costs law to apply to your matter
  - notify the lawyer that the client requires an interstate costs law to apply to the matter.

These requirements are known as “disclosure obligations” and would usually form part of the costs agreement. These and additional obligations are set out in sections 308 to 318 of the LPA.

A lawyer is **not** required to make the above written disclosures if the total cost of the matter, excluding disbursements and GST, is not likely to exceed \$1500 (s 311, LPA and reg 80, LPR). In addition, a lawyer is not required to make written disclosures if they are acting on a pro bono basis (s 311, LPA) or if the work is urgent (s 735, LPA).

If a lawyer fails to comply with their disclosure obligations, then:

- The client need not pay any legal costs unless they have been assessed (see *(d) Costs assessment* at page 19 below) (s 316(1), LPA).
- The amount of costs to be paid by a client on assessment may be reduced depending on the seriousness of the failure (s 316(4), LPA).
- The client may apply to have the costs agreement set aside (see *(e) Setting the costs agreement aside* at page 21 below) (s 316(3), LPA).
- It may amount to professional misconduct or unsatisfactory professional conduct. (s 316(7), LPA).

### Additional requirements for conditional costs agreements

A conditional costs agreement is one which specifies that legal costs have to be paid **only if** your case is successful. This is also known as a “no win, no fee” or “speculative fee” agreement. For further information about speculative fee agreements, see *Speculative fee agreements* at page 13 below.

You cannot enter a conditional costs agreement in criminal or family law matters.

The above disclosure obligations still apply to conditional costs agreements. However, in addition, conditional costs agreement must be signed by the client and must contain the following:

- set out the circumstances that constitute a successful outcome;
- state that the client has been informed of the client's right to seek independent legal advice before entering into the agreement
- specify a cooling off period of at least 5 days during which time the client may terminate the agreement by written notice; and
- an estimate of any uplift fee (s 323 and s 324, LPA).

A failure to comply with these additional requirements will mean that the agreement is void (see below).

A conditional costs agreement may provide that the client pay for disbursements, as distinct from professional fees, irrespective of the outcome of the case. This should also be notified to the client (s 308(4)(b), LPA).

Contingency fee agreements, where fees are calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in the proceeding, are prohibited (s 325, LPA).

### Additional requirements for barristers, incorporated legal practices and multi-disciplinary partnerships

There are further disclosure requirements required of barristers under the Barristers Rules, Rule 83.

Incorporated legal practices and multi-disciplinary partnerships which provide services other than legal services are subject to additional disclosure requirements under s 123 and s 152 of the LPA.

### Void costs agreements and setting aside costs agreements

A costs agreement which is not written or evidenced in writing, or does not comply with the additional requirements for conditional costs agreements, is void. Also, contingency fee agreements and costs agreements which attempt to provide that legal costs are not subject to a costs assessment are void (s 327, LPA).

A lawyer cannot recover their costs under a void cost agreement, but may still be able to recover their costs under s 319 (b) and (c) of the LPA (see *How much can your lawyer charge?* at page 13 below). A lawyer may **never** recover fees under a contingency fee agreement. (s 327(5), LPA).

A client can also apply to the Supreme Court that the costs agreement be set aside on the basis that it is not fair or reasonable (s 328, LPA). Please see *(e) Setting the costs agreement aside* at page 21 below for more information.

### What if there is no costs agreement?

A lawyer may still recover their costs in the absence of a costs agreement under s 319(b) and (c) of the LPA (see *How much can your lawyer charge?* at page 13 below).

### Ongoing duties

Once a client has retained a lawyer, there are a number of ongoing duties on the lawyer including:

- to notify in writing any substantial change to matters already disclosed as soon as is reasonably practicable after the law practice becomes aware of that change (s 315, LPA);
- to provide bills in accordance with the terms of the costs agreement;
- to provide written progress reports on the matter upon reasonable request of the client - the law firm may charge the client a reasonable amount for such a report (s 317, LPA);
- to provide written reports of the legal costs incurred by the client to date or since the last bill upon reasonable request of the client (s 317, LPA);

- if the lawyer negotiates a settlement of a litigious matter, then before the settlement is finalised, the lawyer must provide the client with a reasonable estimate of legal costs the client will be liable for if the matter is settled (s 312, LPA).

## Legal fees and costs

A lawyer's bill of costs will comprise of professional fees (labour) and disbursements (outlays such as photocopying costs). Unless otherwise stated, a reference to legal fees or costs in this booklet is a reference to both professional fees and disbursements.

In terms of fee payment, there is arguably no justifiable reason for the provision of legal services to be treated differently to any other contract for service – you can negotiate the cost of services with your lawyer in the same way you can negotiate the cost of a new car, and you should only have to pay for what the solicitor agreed to do at the amount or rate you agreed to pay. The costs agreement provides the basis upon which lawyers may recover their fees.

### How much can your lawyer charge?

Under s 319 of the LPA, the maximum amount of legal costs your lawyer can recover from you is:

- (a) the amount or rate specified in the costs agreement, which can be a lump sum amount, according to the relevant court scale, or at an hourly rate, or
- (b) if there is no agreement, in accordance with an applicable scale of costs (see page 14 below), or
- (c) if there is no scale of costs, according to the fair and reasonable value of the legal services provided.

For an **outlay or disbursement**, a lawyer should only charge the client the actual amount paid out on the client's behalf, unless with the client's informed consent to charge more. To obtain the client's informed consent, the law practice must disclose to the client in writing the amount of the proposed markup at the time the client retains the lawyer and ensure that the disclosure is not "buried in the fine print". These principles are outlined in full in the *Legal Services Commission's Guidelines – Charging Outlays and Disbursements*, first published on 1 June 2006, at Appendix 1 to the Legal Profession (Solicitors) Rule 2007 (Qld) (SR). The guidelines were developed in response to law practices improperly charging practice overheads as outlays or describing items such as "client registration fees", "file opening fees" and "archive fees" as outlays. An outlay, such as postage, photocopying and facsimiles, should not be billed unless they are capable of being accurately costed. If not, then they should be billed as professional fees in accordance with the costs agreement. Although the guidelines do not form part of the SR, a breach of the guidelines may result in disciplinary action by the LSC against the lawyer.

**Interest** may be charged if provided for by the costs agreement, but must not be charged if the costs agreement does not state that interest is payable and the rate of interest (s 321, LPA). A lawyer cannot charge interest which is more than the percentage stated by the Reserve Bank of Australia as the Cash Rate Target on the date the lawyer's bill was issued (Reg 82, LPR). This rate can be found at [http://www.rba.gov.au/statistics/cashrate\\_target.html](http://www.rba.gov.au/statistics/cashrate_target.html).

### *Speculative fee agreements*

Speculative fee agreements, or conditional costs agreements, are used more often in personal injuries cases but can arise whenever a court can award damages and costs to the winning party and when a lawyer considers that the client has good prospects of success. The lawyer will agree to do the legal work and defer payment of fees until the matter concludes successfully, claiming their fees from the client from awarded or agreed costs and damages.

In speculative **personal injuries** cases, lawyers can only charge for professional fees up to 50% of the award less outlays and statutory charges, unless they receive permission to charge more by the Queensland Law Society or Bar Association (s 347, LPA).

A lawyer can also charge an **uplift** or **success fee** or premium as a percentage of their fees to be paid in the event that the matter is successful. This should be specified in the costs agreement or included in a

lump sum amount. An uplift fee in a conditional costs agreement cannot exceed 25% of the legal costs, excluding disbursements, otherwise payable. (s 324(4), LPA). If it does, or if the conditional cost agreement does not separately identify the basis of calculation of the uplift fee or does not provide an estimate of the uplift fee, then the lawyer will not be able to recover any part of the uplift fee (s 327(4), LPA).

Disputes can arise when:

- the client does not win and is not aware they would become liable for the other party's costs
- the client is charged apparently excessive fees
- the client is unhappy with the 'settlement'
- the award is small and the costs component is a significant part of the award
- the client agreement is terminated and the lawyer will not hand over the file without payment of their fees incurred to date.

These circumstances often arise because there has been insufficient communication between the solicitor and client about the possible outcomes of the case and because the costs agreement has not provided sufficient information for the client.

A legal firm will only enter this kind of agreement if it believes that a person has a chance of success so the firm will have the greatest chance of recovering its costs. The firm will make this assessment before signing the costs agreement.

A client should carefully read a conditional costs agreement, particularly the proposed fee structure. Speculative fee agreements must still outline the cost of professional fees which will be charged on successful completion of a matter, either as an hourly rate, a lump sum or according to scale. These fees will commonly be higher than normal fee arrangements to account for the lawyer's risk in speculative cases and the loss of benefit of the fees by reason of deferred payment.

Sometimes lawyers will bear all the disbursement costs until the end of the case. The client may then be required to pay disbursements, win or lose. Interest can be charged on disbursements paid by the firm. In other cases, lawyers will 'spec' their professional fees only, and require the client to pay for any disbursements up front or as they arise. These arrangements should all be specified in the costs agreement.

### ***If the relationship ends early***

If the client/lawyer relationship ends before the work has been completed, then the liability on the client to pay legal costs will depend on the terms of the retainer and who terminated the contract. If the client terminated the agreement, then they are likely to be liable for professional fees and outlays incurred to date. On the other hand, a lawyer who terminates under a no win no fee agreement may be unable to recover their fees given the client has not technically "had a win".

If a client terminates a conditional costs agreement within the cooling off period that is specified in the agreement, then the lawyer can only ask for payment for legal services performed before termination of the agreement which were performed upon the instruction and with the knowledge of the client. The lawyer will not be able to recover the uplift fee, if any (s 323(5), LPA).

### **Scale of costs**

Court scales of fees or costs are provided in the schedules to the *Uniform Civil Procedure Rules 1999* for the Supreme Court, District Court and Magistrates Court. The scales are simply a table setting out standard professional fees for particular work done.

Scales of costs are used to calculate the fees payable by a client to their lawyer when there is no costs agreement, and also to calculate the costs payable by one party to another if costs are ordered in a court action.

## **Ending the client/lawyer relationship**

### **Termination at the end of the retainer**

The solicitor/client relationship normally continues until the solicitor has completed the legal services that they have been retained for. However, circumstances may arise where you may want to end this relationship early or change solicitors.

### **Changing your solicitor and early termination**

#### ***Termination by the client***

A client may change their solicitor or terminate the relationship with their current solicitor at any time.

If the client terminates the agreement, the firm can hold onto the client's file until all costs are paid or until satisfactory security for their payment has been obtained (Rule 23.3, SR). This is lawful given that the solicitor's "lien", or right to retain the client's file and trust money, endures until payment of the lawyer's costs, with the result that the solicitor cannot be compelled to produce or hand over the client's file. Although this practice is lawful, it often leads to problems for clients who are without means.

If all fees have been paid, then the lawyer must handover the file to the client or, if so directed, deliver to the new lawyer all the relevant documents to which the client is entitled and any information which is necessary for the proper conduct of the matter (Rule 23, SR).

#### ***Termination by the solicitor***

A solicitor can only terminate the agreement:

- in accordance with the terms of the costs agreement;
- if the client agrees; or
- for just cause and on reasonable notice to the client (Rule 6, SR).

An example of just cause is where a client will not or cannot provide instructions or refuses to accept the solicitor's legal advice, making the solicitor's position untenable.

If the solicitor is legally aided, then they may also terminate the relationship if legal aid is withdrawn and the client cannot pay for the solicitor's ongoing legal fees. Termination must be by reasonable written notice to the client (Rule 6.3, SR).

Where the solicitor terminates the agreement, they may still claim a lien over the client's documents until outstanding costs have been paid by the client (Rule 7.3, SR). If, however, the documents are essential for ongoing court proceedings, the firm must, upon direction of the client, hand over the file to the client's new solicitor, provided the new solicitor:

- holds it subject to the first solicitor's lien and provides reasonable security for the payment of the first solicitor's costs; or
- enters into an agreement with the client and first solicitor to ensure payment of the first solicitor's costs on completion of the proceedings.

Where there is no new solicitor, the solicitor must give the relevant documents to the client upon receiving satisfactory security for unpaid costs (Rules 7.4 and 23.4, SR).

### **Client documents**

A lawyer has a responsibility to retain the client's file, securely and confidentially, for 6 years after termination of the retainer (Rule 7.2, SR). You are entitled to a copy of your file during this time, provided you have paid all costs owing to your solicitor.

If a client requests their file, they are entitled to:

- All documents sent to the solicitor by the client, which the solicitor holds as agent for the client, unless property in the documents was intended to pass to the solicitor;
- All documents created by the solicitor for the benefit of the client;
- All documents sent to the solicitor by a third party in the course of the solicitor's retainer for or on behalf of the client, or for the purpose of the client's matter;
- File notes of conversations with a third party in relation to the matter (see Rule 7.5, SR).

These documents are considered to be the client's property.

However, a solicitor may retain:

- All documents prepared for the solicitor's benefit and which have not been charged to the client;
- All documents sent to the solicitor by the client where the client intended the ownership of them to pass to the solicitor, for example, letters and instructions from the client.

### What if the law firm changes ownership?

The contract between a law practice and a client imposes duties and obligations on the parties to that contract. Accordingly, when a law firm is sold, whether a client of the old law firm becomes a client of the new firm will depend upon:

- whether it is appropriate for the existing solicitor to terminate the agreement. While clients can terminate at any time, lawyers can only do so in certain circumstances (see *Termination by the solicitor* at p 15 above);
- whether the new solicitor has the expertise to deal with the file. As the new solicitor has an obligation to act in the best interests of their client, they should consider whether they have the competence to act for the client;
- whether the client has consented to the transfer.

Reasonable notice must be given by the former solicitor to the client whose files are being transferred and written consent should be obtained from the client. A new costs agreement should then be entered into between the lawyer taking over the matter and the client. Any transfer of money in trust should only occur with written consent from the client (see Rule 24, SR).

## SECTION 2: HOW TO RESOLVE DISPUTES

If both parties are fully aware of what the other wants and expects, then there is less chance of dissatisfaction and more chance of a successful relationship. Ideally, lawyers should confirm the client's instructions in writing, in some detail, to avoid misunderstandings. A good relationship between a lawyer and their client is usually the key to the client achieving the outcome they seek.

Problems often arise due to what the client sees as overcharging by the lawyer. A client who provides lengthy instructions and expects detailed and lengthy explanations by the lawyer will naturally incur greater costs. Sometimes, because of the emotional circumstances that brought the client to the lawyer in the first place, the question of costs is not properly confronted until a problem arises or other expectations are not discussed and the matter ends with the client less than satisfied. Some client agreements set out the required work very briefly, providing room for later dispute.

If the parties cannot communicate or if there is mistrust, then it is advisable to find another lawyer. If it is too late for that, then you may be able to resolve the dispute informally, or with the assistance of an impartial third party.

### How can a dispute be resolved informally?

The first thing you should do if you have a problem with your lawyer is to talk to your lawyer about it. It may just be an error, the lawyer may agree to reduce the fees charged, or it may be a misunderstanding that can be resolved by discussion. As mentioned earlier, many problems arise simply because of a failure of communication between the lawyer and the client.

Firms with several practitioners will often provide in the costs agreement the name of another partner or someone else in the firm you can talk to in the event you have a disagreement with your solicitor. Again, it is often to your advantage to talk to this person to try to resolve the problem informally.

The Legal Services Commission (**LSC**) or the Client Relations Centre (**CRC**) of the Queensland Law Society can also talk to your lawyer for you to try to resolve your concerns informally. See the back cover of this booklet for contact details.

The CRC specialises in assisting solicitors and clients who have a communication problem, when there is a costs dispute, when the client believes the solicitor is not attentive or is not diligent, and in resolving lien questions. When a problem arises, you or your solicitor can ask the CRC to intervene, and it is best to do this as soon as the problem arises. Staff members of the CRC are specially trained in dispute resolution. This service is free and confidential. The CRC has a success rate of around 95 per cent and so is an important early step in preventing problems from escalating and re-establishing a mutually satisfactory relationship between you and your lawyer.

However, the LSC and CRC have no power to determine whether a bill is fair and reasonable, and cannot intervene if the solicitor and client have already commenced court proceedings to resolve their dispute.

### Disputes over legal fees

A common source of dispute between lawyer and client is over the fees charged by the lawyer.

While some lawyers do overcharge, or at least do not warn their client that the bill will be higher than estimated, sometimes the dispute arises simply because a client does not understand what a lawyer must do or has done to assist them. Some firms charge on a monthly basis, but not all firms do, and so the client can be faced with a bill for all the work done at the end of the matter, and this can trigger or crystallise the client's dissatisfaction.

The maximum amount a lawyer can charge you was outlined in *How much can your lawyer charge?* at page 13 above.

#### (a) Initial steps

A law firm cannot commence court action against you for recovery of their legal costs until they have given you a bill, whether or not there is a costs agreement. Your lawyer should have told you in writing

at the beginning of your relationship when and how often you would be billed as part of their disclosure obligations (see page 10 above).

A bill should be accompanied by a written notice setting out your rights if you are not happy with the bill, namely, your right:

- to request an itemised bill;
- to discuss your concerns with the lawyer;
- to have the costs assessed;
- to apply to the Supreme Court to have the costs agreement set aside (s 331, LPA).

If you have not been given this notice, then you have not properly been given the bill and your lawyer cannot pursue you for unpaid legal fees. (Please note however that the time limit for requesting a costs assessment begins to run from the time the law firm requests payment. See page 20 below.)

Once you have received a bill (including the notice of your rights), you have 30 days in which to pay it. After 30 days, your lawyer can sue you for any unpaid fees, unless you have requested an itemised bill (see below).

If you are unhappy with the bill, your first step should always be to talk to your lawyer about it. The costs agreement should specify who you can talk to about your legal costs.

### (b) Requesting an itemised bill

A bill often only summarises the work completed by a lawyer and provides a lump sum amount. If you receive a bill like this, you can request an itemised bill which lists in detail each item of work that has been done and the amount charged for each item. This may help clarify exactly what costs are in dispute or whether there is a dispute at all.

Ask for an itemised bill quickly to avoid the possibility of incurring additional legal fees if your solicitor commences proceedings against you for not having paid. In any event, ask for the itemised bill **within 30 days** of receiving the lump sum bill, otherwise the lawyer may commence legal proceedings to recover unpaid legal fees.

A law practice must comply with any request for an itemised bill within 28 days (s 332, LPA). A law practice is not entitled to charge the client for the preparation of an itemised bill (s 332(6), LPA), but it is possible that the total amount of the bill may increase once each piece of work is itemised.

You can complain to the Legal Services Commission if an itemised bill is not provided as requested.

Where the costs agreement provides for fees as an estimated lump sum, an itemised bill does not have to be provided. This is because while it is difficult to estimate a lump sum for an action, it has definite benefits for the client. It carries with it a risk to the solicitor that if the estimate is too low, the solicitor is bound by it and will have to make up any shortfall, and it provides some certainty for the client – you know what you are up for from the beginning. A lump sum bill can still be challenged by the client by having it assessed if they consider it is excessive (see the next section).

If you have only received a lump sum bill and have asked for an itemised bill within 30 days of receiving the bill, then the lawyer must wait for at least 30 days after they have issued the itemised bill before commencing legal action to recover their costs (s 329 and s 332, LPA).

### (c) Costs mediation

If you are still unhappy with your bill, then you may be able to resolve your dispute through mediation with the assistance of an independent facilitator.

The Department of Justice and Attorney-General provides mediation services for free to the public. See the back inside cover of this publication for contact details.

The Queensland Law Society has a register of approved mediators which can be searched on their website at:

[www.qls.com.au/content/lwp/wcm/connect/QLS/You+%26+Your+Solicitor/Find+a+Solicitor/Find+an+Approved+Mediator](http://www.qls.com.au/content/lwp/wcm/connect/QLS/You+%26+Your+Solicitor/Find+a+Solicitor/Find+an+Approved+Mediator).

As stated above, you can also contact the LSC or the Client Relations Centre of the Queensland Law Society for assistance in resolving the dispute informally. Remember though that the LSC and CRC have no power to determine whether a bill is fair and reasonable. However, if a complaint is made to the LSC, which the LSC decides to investigate (see page 22 below), then they have the power under the LPA to engage an expert to report on the reasonableness of the lawyer's bill of costs, which can then be used in disciplinary action against the lawyer (s 443(1)(b), LPA).

Even if mediation is agreed to, this does not suspend timeframes in relation to applying for a costs assessment, applying to have the costs agreement set aside or other formal avenues of dispute resolution. It is therefore important to act quickly to ensure these rights are not lost.

#### (d) Costs assessment

Costs may also be assessed at the end of litigation in order to determine how much the losing party needs to pay the winning party for their legal fees (**party and party costs**). This procedure, which is set out in Chapter 17A of the UCPR, is different to the procedure followed when solicitor and client costs are being assessed. The following information only relates to the assessment of solicitor and client costs.

If you are still unhappy with your lawyer's bill, then you can have your costs assessed. A costs assessment is a process in which the court approves an independent costs assessor to consider the bill and your objections to it. The costs assessor will decide what you should have to pay your lawyer in the circumstances of the case.

The law practice may also apply for a costs assessment, for example, where they have not complied with their disclosure obligations and they need a costs assessment to recover their costs (s 337, LPA).

An application for a costs assessment suspends any right of the law practice to commence legal proceedings to recover their legal costs until the costs assessment has been completed (s 338, LPA).

You and your lawyer can agree on who should be the costs assessor, or if you cannot agree, then the court can appoint an assessor for you. A list of approved assessors is available on the courts website at: <http://www.courts.qld.gov.au/3285.htm> (see link to the right hand side).

You can apply for an assessment of the whole or any part of the legal costs, before or after they have been paid.

#### ***How are costs assessed?***

As stated above, s 319 of the LPA provides that the lawyer is entitled to recover legal costs:

- under the costs agreement, or
- if there is no agreement, in accordance with an applicable scale of costs, or
- if there is no scale of costs and no costs agreement, according to the fair and reasonable value of the legal services provided (see *How much can your lawyer charge?* at page 13 above).

The costs assessor must make their assessment by reference to the costs agreement unless the agreement has been set aside by the Supreme Court, the costs agreement does not comply in a material respect with the disclosure obligations, the costs agreement is void or the parties otherwise agree (s 340, LPA).

In conducting a costs assessment, the costs assessor must consider:

- whether or not it was reasonable to carry out the work to which the legal costs relate; and
- whether or not the work was carried out in a reasonable way; and
- the fairness and reasonableness of the amount of legal costs in relation to the work (s 341, LPA).

Section 341(2) of the LPA provides a non-exhaustive list of matters the costs assessor may have regard to including: the lawyer's compliance with the LPA, any advertisement as to the law practice's costs, the scope of the retainer, the complexity, novelty or difficulty of the matter, the quality of the work done and the time within which the work was required to be done. For example, a costs assessment may be reduced if the lawyer has failed to comply with their disclosure obligations, depending on the seriousness of that failure (see also s 316(4), LPA).

### ***Costs of assessment***

The costs assessor will also decide who pays the costs of the costs assessment, such as, the filing fee and the costs assessor's fees. This is separate to the legal costs being assessed.

Unless the costs assessor orders otherwise, if on assessment the legal costs are reduced by 15% or more, the lawyer will be liable for the costs of the costs assessment. Similarly, the lawyer will be liable for the costs of the assessment if the lawyer failed to comply with their disclosure obligations.

Otherwise, the client will be liable for the costs of the assessment (s 342, LPA).

### ***When must I apply for a costs assessment?***

An application for a costs assessment must be made within 12 months of receiving the bill or the date the request for payment was made or, if no bill or request was made, within 12 months after the costs were paid.

You can still apply for costs to be assessed outside of this time limit if the Court (or the assessor) is satisfied with your reasons for the delay (s 335, LPA).

An application for a costs assessment can be made even if recovery proceedings have already started. In those circumstances the application is made as part of the recovery proceedings (Rule 743B, UCPR).

### ***Which court do I apply to?***

If the bill does not exceed \$50,000 - Magistrates Court.

If the bill exceeds \$50,000 but does not exceed \$250,000 - District Court.

If the bill exceeds \$250,000 - Supreme Court.

These limits are due to change soon. Please see the courts website on <http://www.courts.qld.gov.au/> for more information.

### ***How do I apply for a costs assessment?***

An application for a costs assessment is made by filing a Form 60 with the relevant court. This form is available on the courts website at <http://www.courts.qld.gov.au/107.htm>. The filing fee is that applied to all originating application. As at 20 August 2009 that fee for an individual (or a group of individuals) is \$482 in the Supreme Court, \$465 in the District Court and \$79 in the Magistrates Court. These fees are set out in schedules to the *Uniform Civil Procedure (Fees) Regulation 1999* (Qld). If however the application is made in the course of recovery proceedings, then this is not an originating application and no filing fee applies.

You may be able to apply to the Court for a waiver of filing fees if you are experiencing financial hardship (Rule 971, UCPR). For more information, see the Court's website at <http://www.courts.qld.gov.au/2446.htm>.

An application for a costs assessment should be accompanied with a copy of the itemised bill. If there is no itemised bill, the applicant must provide the best information they can as to the costs to be assessed.

Within 7 days of filing the application, the applicant must serve a copy on, as appropriate, the **law practice**, the **client** and any third party payer (that is, any person who is not a client but is or was under a legal obligation to pay for at least some of the costs for legal services provided to the client, such as a trustee or executor). These are the **parties** to the costs assessment.

If a costs assessor has already been agreed, then the parties may apply for a consent order that the particular costs assessor be appointed to carry out the costs assessment (Rule 743E, UCPR).

If no costs assessor has been agreed, then either party may apply to the court registrar for an appointment by the registrar of a costs assessor or apply to the court for directions (Rule 743F, UCPR).

The costs assessor appointed decides the procedure to be followed on assessment: Rule 720, UCPR.

At the end of the costs assessment, the costs assessor certifies who pays how much to whom, including the legal costs which were assessed and the costs of the assessment. The **certificate of assessment** must be filed with the relevant court within 14 days after the end of the assessment and a copy must be given to each of the parties (Rule 737, UCPR).

Once the certificate has been lodged, any party to the assessment can apply to have the matter relisted for judgment, having regard to the certificate. This may be appropriate if there are issues still in dispute between the parties, or if one of the parties specifically wants an enforceable court order in place (Rule 743H, UCPR).

For further information about costs assessment procedure, see Rules 743 to 743S of the UCPR.

### ***Appealing a costs assessment***

A party to the costs assessment may ask in writing for reasons for the assessor's decision within 14 days after receiving the certificate of assessment. The costs assessor must respond to the request within 21 days by giving written reasons to each party to the costs assessment and also giving a copy to the court registry. The party requesting reasons will be liable to pay the costs assessor's reasonable costs for preparing the reasons (Rule 738, UCPR).

A party dissatisfied with the certificate of assessment may apply to the court to review the decision within 14 days of receiving the certificate of assessment, or if reasons have been requested, within 14 days of receiving reasons (Rule 742, UCPR).

### **(e) Setting the costs agreement aside**

You can also apply to the Supreme Court for the costs agreement to be set aside on the basis that it is not fair or reasonable (s 328, LPA). The court considers matters such as whether the client was induced into the agreement by fraud or misrepresentation, any unsatisfactory conduct or professional misconduct of the lawyer, and whether the required disclosures were made to the client.

The limitation period for bringing an action in contract is 6 years from the date the cause of action arose under the *Limitation of Actions Act 1974* (Qld).

If the court sets aside the costs agreement, it may then make an order as it considers appropriate in relation to the payment of legal costs. This could mean calculating legal costs by applying the relevant scale of costs, or determining the fair and reasonable legal costs for the work carried out. This amount cannot be more than what the law practice would have been entitled to recover under the costs agreement.

Any application to the Supreme Court to have a costs agreement set aside is a serious matter and you may be ordered to pay the other party's legal costs in defending the action if you are unsuccessful. Legal advice should be obtained before pursuing this option.

## SECTION 3: TAKING ACTION AGAINST YOUR LAWYER

If the above steps fail to resolve your dispute with your lawyer, you may wish to initiate more formal action against your lawyer. This could include:

- (a) Making a complaint to the Legal Services Commission about unsatisfactory professional conduct and professional misconduct;
- (b) Making a claim against the Fidelity Guarantee Fund, a fund administered by the Queensland Law Society to restore money to clients whose funds held in a trust account by a lawyer are defrauded or dishonestly dealt with by the lawyer;
- (c) Making a court claim in negligence. Both barristers and solicitors are required to hold professional indemnity insurance, meaning that a claimant will be assured of compensation for financial or other loss which is caused by the lawyer's negligence.

These mechanisms are discussed in more detail below.

Claims on the fidelity fund and on professional indemnity insurance can only be activated when the claim relates to a lawyer's legal practice. Problems have arisen where the lawyer has been involved in activities which are beyond legal practice, that is, where the lawyer is engaged not as a lawyer but in another capacity, such as a financial advisor. In such cases, the fidelity fund and claims on professional indemnity insurance are not available to clients who have suffered loss.

In such cases, clients have two options. Firstly, they can complain to the police if they believe that the solicitor has acted unlawfully. If the solicitor is convicted of a criminal offence, the client can seek criminal compensation. Alternatively, clients can take a civil action against the lawyer's personal assets. However, usually by this time, the solicitor has few assets by which to personally satisfy the claim.

### Making a complaint to the Legal Services Commission

The body primarily responsible for dealing with complaints about lawyers is the Legal Services Commission (**LSC**). Further information is available on the LSC's website at <http://www.lsc.qld.gov.au>.

Lodging a complaint does not affect any other legal remedies a person may have against a legal practitioner (s 463, LPA).

### What types of complaint does the LSC deal with?

How the LSC deals with a complaint depends upon whether it is a **consumer** or **conduct complaint**. The LSC is concerned with conduct complaints and will generally dismiss consumer complaints or refer them to mediation.

#### *What is a consumer complaint?*

A consumer complaint is one about the conduct of a lawyer that does not involve an issue of unsatisfactory professional conduct or professional misconduct. For example, a consumer complaint could be about delay, discourtesy or failure to communicate.

#### *What is a conduct complaint?*

A conduct complaint is about the conduct of a lawyer which may amount to unsatisfactory professional conduct or professional misconduct. A conduct complaint may also be about the conduct of a law practice employee (a non-lawyer) which involves misconduct.

**Unsatisfactory professional conduct** is any conduct associated with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner (s 418, LPA).

**Professional misconduct** includes:

- (a) unsatisfactory professional conduct by an Australian legal practitioner if the conduct involves a substantial or consistent failure to reach or to maintain a reasonable standard of competence and diligence;
- (b) conduct by an Australian legal practitioner (whether or not occurring in relation to the practice of law) that would justify a finding that the practitioner is not a fit and proper person to engage in legal practice (s 419, LPA).

In determining whether an Australian legal practitioner is not a fit and proper person to engage in legal practice, regard may be had to the **suitability matters** that would be considered if the practitioner were an applicant for admission to the legal profession. These are listed at s 9 of the LPA. They include: whether the person is currently of good fame and character, whether the person is or has been an insolvent under administration, whether the person has been convicted of an offence, whether the person has engaged in legal practice in contravention of the LPA or corresponding law, whether the person has been subject to disciplinary action in relation to any profession or occupation, and whether the person is unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner.

However, a finding of professional misconduct does not necessarily require a conclusion that the practitioner is unfit to practice.

***Examples of unsatisfactory professional conduct or professional misconduct***

Section 420 of the LPA gives some examples of what conduct can constitute unsatisfactory professional conduct or professional misconduct:

- (a) conduct consisting of a contravention of a relevant law;
- (b) charging excessive legal costs in connection with the practice of law;
- (c) conduct for which a court has convicted the lawyer of:
  - (i) a serious offence; or
  - (ii) a tax offence; or
  - (iii) an offence involving dishonesty;
- (d) conduct of a lawyer as or in becoming an insolvent under administration;
- (e) conduct of a lawyer in becoming disqualified from managing or being involved in the management of any corporation under the *Corporations Act*;
- (f) conduct of a lawyer in failing to comply with an order of a disciplinary body made under the LPA or of a corresponding disciplinary body in another jurisdiction;
- (g) conduct of a lawyer in failing to comply with a compensation order made under the LPA or corresponding law.

A prime example of professional misconduct is improper dealing with a trust account. It involves a substantial departure from what may reasonably be expected of conscientious practitioners.

To constitute a disciplinary offence, it is not necessary for the complainant to have sustained actual loss. So an improper dealing with a trust account, even if the complainant's funds have been restored, can still amount to professional misconduct.

***What personal conduct of a solicitor is sufficiently serious to be characterised as professional misconduct?***

Professional misconduct need **not** be conduct undertaken in connection with legal practice. So a lawyer who is convicted of a serious offence, such as stealing or assault may be guilty of professional misconduct. Such conduct includes conduct that suggests an individual is not of good fame and character, for example, dishonesty.

In *A Solicitor v Council of the Law Society of New South Wales* [2004] HCA 1, a case considered **before** the 2007 legislation, the High Court held that a sexual assault by a solicitor on his step children was a breach of trust but that the nature and circumstances of the breach were so remote from professional practice that it did not constitute professional misconduct. So under previous legislation, for personal misconduct to constitute professional misconduct, the act must have occurred in, or been closely related to, the course of legal practice.

However, under the 2007 Act, the need for a substantial connection between the personal conduct and the practice of law disappears. The case referred to above would likely have been decided differently today.

In another case, an applicant was refused admission because they did not disclose to the admission board a past incident of academic plagiarism. While the act of plagiarism may not have necessarily resulted in any disciplinary breach, the failure to disclose it did.

Findings of professional misconduct on the basis of personal misconduct will not necessarily mean that a lawyer is unfit to practice as a lawyer. On the other hand, even when actions do not involve professional misconduct, the lawyer's behaviour may demonstrate attributes that lead to the conclusion that the he or she is not a fit and proper person to practise.

## Making a complaint to the LSC

### *Who can make a complaint?*

A complaint can be made by any person. The person making the complaint is known as the "complainant" (s 429, LPA).

### *Who can a complaint be made against?*

A complaint can be made against any Australian legal practitioner – this includes solicitors and barristers. Complaints can also be made about non-lawyer employees of legal practices (s 429, LPA).

It does not matter if the legal practitioner or employee is no longer practising in the profession or holds a current practising certificate.

The LSC has jurisdiction to investigate conduct occurring wholly within Queensland, whether or not the legal practitioner resides or usually practices outside of Queensland. If the conduct did not occur in Queensland, the LSC will still have jurisdiction to deal with the complaint:

- If the conduct occurred partly in Queensland and partly in another jurisdiction – with the consent of the corresponding authority of each of the other jurisdictions, or with the practitioner and complainant's agreement;
- If the complaint is about a local legal practitioner (that is, one practicing in Queensland) and the conduct occurs within Australia but outside of Queensland – with the consent of the corresponding authority of the jurisdiction in which the conduct occurred, or with the practitioner and complainant's agreement;
- If the complaint is about a local legal practitioner and the conduct occurs entirely or partly outside of Australia (s 423, LPA).

### *When must a complaint be made?*

A complaint should be made to the LSC within **three years** of the conduct occurring. This is calculated by adding three years from the last date that the conduct occurred. It does not matter if the conduct occurred before or after the commencement of the LPA 2007 (s 423, LPA).

If the conduct occurred more than three years ago, the commissioner may:

- (a) refer the complaint to mediation; or
- (b) dismiss the complaint.

Old complaints will be dismissed unless the Commission decides that the extent and reasons for the delay are such that it remains just and fair to deal with the complaint, **or** the conduct complained of

amounts to professional misconduct (or misconduct, if an employee) and it is in the public interest to deal with the complaint (s 430, LPA).

If the complaint is dismissed, the LSC must give an information notice to the complainant about the decision.

### ***How to lodge a complaint?***

A complaint must be in writing and identify the complainant, the person against whom the complaint is made and the alleged conduct subject of the complaint. Anonymous complaints will not be accepted. You can make a complaint using the form on the LSC website:

<http://www.lsc.qld.gov.au/30.htm#eeeeee>.

### **Investigation by the LSC**

Each complaint is initially assessed to determine how it should be best dealt with. Only **conduct complaints** (see page 22 above) will be investigated, either by the LSC or under referral to the Queensland Law Society or Bar Association of Queensland (s 435 and s 436, LPA).

**Consumer complaints** may be referred to mediation or dismissed (s 441, LPA).

A complaint that is both a consumer complaint and a conduct complaint may be referred to mediation as well as being investigated, whether after or during mediation (s 442, LPA).

### ***Interactions with the complainant***

The LSC may ask the complainant to:

- provide further information about the complaint.
- sign a statutory declaration verifying the complaint, or any further information, although this is rare. (It is an offence to knowingly provide false information in a statutory declaration).
- waive legal professional privilege or the benefit of a duty of confidentiality. This means that the complainant cannot later in a court refuse to disclose communications between you and your lawyer on the basis of legal professional privilege. Again, this is rarely required (s 431, LPA).

The LSC must keep the complainant informed about the way the complaint is dealt with. This includes:

- giving the complainant a notice of receipt of the complaint;
- a copy of any discipline application made because of the complaint;
- a written notice of the date set down for starting the hearing for a discipline application;
- written notice of a decision of a disciplinary body relating to the complaint (s 451, LPA).

### ***Interactions with the lawyer under investigation***

Once the LSC (or the QLS or Bar Association, as appropriate) has had time to consider the complaint, they must give written notice to the person under investigation that the complaint has been made, the nature of the complaint, the identity of the complainant and the action that has already been taken (s 437, LPA). Such notice need not be given if it is likely to prejudice the investigation by the LSC or by the police, prejudice court proceedings or place the complainant or other person at risk of intimidation or harassment.

The person under investigation may make written submissions to the LSC or other relevant body in response to the complaint or investigation, within the timeframe stipulated by the written notice (s 438, LPA).

The person under investigation may also be required to provide a full explanation of the matter being investigated, appear before the investigating body, or produce documents in the person's custody, possession or control. Failure to comply with such a request may result in the lawyer being charged with professional misconduct, unless a reasonable excuse exists (s 443, LPA).

### ***Summary dismissal***

Under s 432 of the LPA, the LSC may dismiss a complaint without completing an investigation for one or more of the following reasons:

- The complainant has not complied with a request made by the LSC, such as a request for more information;
- The complaint is not a conduct complaint or relates to conduct outside of Queensland that the LSC cannot investigate;
- The commissioner considers that the complaint is frivolous or lacking in substance;
- The conduct complained about has already been dealt with or dismissed. This includes complaints made under previous legislation such as the *Legal Profession Act 2004* (Qld) or to the Bar Association;
- The name of the legal practitioner has already been removed from the roll (the practitioner can no longer practice as a lawyer).

The LSC may also dismiss a complaint if it forms the view that the complaint requires no further investigation

A complaint dismissed on the basis that the complainant has not complied with a request made by the LSC does not prevent a complainant from making a fresh application (s 432, LPA).

### ***Delays***

The commissioner must deal with complaints as efficiently and expeditiously as practicable (s 450, LPA).

However, the LSC may delay in dealing with a complaint if:

- the complainant requests the delay and the LSC considers the request reasonable;
- the practitioner is already under investigation in this or another jurisdiction and the practitioner's name may be removed from the local or interstate practitioner's roll;
- the complaint will be dealt with in another way; or
- the LSC considers that it is in the public interest to delay dealing with the complaint (s 434, LPA).

### **Application to a disciplinary body**

If after investigation the LSC is satisfied that there "is a reasonable likelihood" that a disciplinary body will find the lawyer guilty of either unsatisfactory professional conduct or professional misconduct, the LSC may initiate disciplinary proceedings to the Legal Practice Committee or the Legal Practice Tribunal.

If the LSC dismisses the complaint for want of the above circumstances, or because it is in the public interest to do so, they must give written notice to the complainant of its decision (s 448, LPA).

### ***Application to the Legal Practice Committee***

The LSC may apply to the Committee for an order against an Australian Legal Practitioner or against a law practice employee. The Legal Practice Committee hears less serious charges than the Legal Practice Tribunal and in disciplinary matters is constituted by a 3-member panel: the Chairperson or Deputy Chairperson, a solicitor or a barrister (depending on whether the complaint is about a solicitor or barrister) and a lay member.

If satisfied that a **lawyer** is guilty of unsatisfactory professional conduct, the Committee may make one or more of the following orders:

- an order publicly (or privately) reprimanding the practitioner;
- an order that the practitioner pay a penalty of not more than \$10,000 (see below);

- a compensation order (see below)
- an order regarding the lawyer's continued practice, for example, subject to conditions or subject to periodic inspection by the relevant regulatory authority.

Such an order may include an order that the lawyer pay expenses associated with the above orders.

If satisfied that a **law practice employee** is guilty of misconduct, then the Committee may order that all law practices in Queensland must, for a period of not more than 5 years, not employ the employee or employ the employee subject to conditions (s 458, LPA).

### ***Application to the Legal Practice Tribunal***

The Tribunal hears applications against legal practitioners **only** in relation to serious charges (or a mix of serious and less serious charges). It is constituted by a Supreme Court judge.

If satisfied that the lawyer is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may make one or more of the following orders:

- an order recommending that the name of the practitioner be removed from the local or interstate roll;
- an order that the practitioner's local practising certificate be cancelled or suspended for a stated period or recommending that their interstate practising certificate be cancelled or suspended;
- an order imposing conditions on the lawyer's local practising certificate for a stated period or recommending that conditions be imposed on the lawyer's interstate practising certificate;
- an order publicly (or privately) reprimanding the practitioner;
- an order that no law practice in Queensland may, for a period of not more than 5 years, employ or continue to employ the practitioner in a law practice;
- an order that the Australian legal practitioner pay a penalty of not more than \$100,000 (see below);
- a compensation order to the complainant for the monetary loss suffered (see below);
- an order that the practitioner undertakes and completes a stated course of further legal education;
- an order regarding the lawyer's continued practice, for example, subject to conditions or subject to periodic inspection by the relevant regulatory authority.

An order of the Tribunal may include an order that the lawyer pay expenses associated with the above orders (s 456, LPA).

### ***Payment of costs***

A person found guilty by the Committee or Tribunal may be ordered to pay costs of the disciplinary proceeding, including the costs of the LSC and the complainant, unless exceptional circumstances exist.

Even if the person is not found guilty, they may still be ordered to pay costs if the disciplinary body is satisfied that the principal reason why the proceeding was started was the person's failure to cooperate or there is some other reason warranting the making of the order.

The LSC may also be ordered to pay costs if there are special circumstances (s 462, LPA).

### ***Penalty orders***

If ordered, the penalty is paid to a special fund administered by the Attorney-General for community services.

### ***Compensation orders***

An order for compensation may be:

- (a) An order that the lawyer cannot recover or must repay an amount that the lawyer charged the complainant for legal services;
- (b) An order discharging a lien possessed by a lawyer in relation to a stated document or class of documents;
- (c) An order that a law practice carry out stated work for a stated person without a fee or for a stated fee;
- (d) An order that a lawyer pay the complainant an amount by way of compensation for money lost as a result of the unsatisfactory professional conduct or professional misconduct of the legal practitioner or the misconduct of a law practice employee (s 464, LPA).

A disciplinary body can only make a (d) type order if the complainant has actually suffered financial loss and the complainant has not otherwise been compensated, such as by court ordered compensation or by compensation from the Fidelity Guarantee Fund (s 465, LPA). The amount awarded by the disciplinary tribunal must be taken into account by any other proceeding in relation to the same loss (s 467, LPA).

A (d) type order is limited to a maximum of \$7,500, unless agreed by the complainant and law practice (s 466, LPA).

### ***Appeals***

An appeal from the decision of the Committee may be made by the LSC or the practitioner to the Tribunal. If the Committee's decision has been filed with the Supreme Court, then an appeal is to the Court of Appeal with that court's permission.

An appeal from the decision of the Tribunal may be made to the Court of Appeal by the LSC, the practitioner or the Attorney-General.

An appeal should be commenced within 28 days of the disciplinary body's decision (ss 468-470, LPA).

### **Making a claim for loss from the Fidelity Guarantee Fund**

Where a client suffers loss of money or property held on trust by a law practice in the course of legal practice, through the dishonesty or fraudulent dealing of the law practice, then a claim can be made for the loss from the Fidelity Guarantee Fund. Every practising solicitor pays a yearly contribution to the Fidelity Guarantee Fund, which is managed by the QLS.

If a payment is made from the Fidelity Guarantee Fund, your rights in bringing an action against the law practice in relation to that loss are "subrogated" to the QLS, who can then commence recovery action against the law practice. This means you will no longer have any right to pursue a claim against the law practice on your own behalf.

### **When can a claim against the fund be made?**

A person who suffers financial loss because of a **default** of a law practice, arising from the act or omission of **one or more associates of the practice**, where the **relevant jurisdiction is Queensland**, may make a claim against the fund about the default (s 374, LPA).

Claims to the Fidelity Fund cannot be made in relation to the defaults of barristers, but can be made in relation to community legal services.

### ***What is a default?***

A default means:

- (a) a failure of the law practice to pay or deliver trust money or trust property, received in the course of legal practice, due to dishonesty; or

(b) a fraudulent dealing with trust property due to dishonesty (s 356, LPA).

It does not matter where the default happened, provided that the relevant jurisdiction is Queensland (see below).

#### ***Who is an associate of a law practice?***

An associate of a law practice is defined in detail under s 7(1) of the LPA, but essentially covers:

- any Australian lawyer who is a sole-practitioner, partner, director, employee or consultant of a legal practice; or
- any non-Australian lawyer who is a partner of a law practice;
- any non-lawyer who is an agent or employee of a law practice or a partner in a multi-disciplinary partnership.

#### ***When is Queensland the relevant jurisdiction?***

Queensland is the relevant jurisdiction where:

- if, at the time of the default, the trust money was held in an Australian trust account and the associate, either alone or with someone else, was authorised to withdraw money from that account - Queensland was the law applying to that trust account; or
- if the above does not apply, if the trust money was received in Australia, or the trust money was received outside of Australia and paid into an Australian trust account – Queensland is the associate's home jurisdiction:
- if the trust property was received in Australia, or the trust property was received outside of Australia and brought into Australia – Queensland is the associate's home jurisdiction (s 371, LPA).

If the default arises from a dishonest omission by the lawyer, then that omission is taken to have happened on the date the act not performed ought reasonably to have been performed (s 358, LPA). If that date cannot be decided then it may be provided for under the Legal Profession Regulation.

#### **Defaults relating to financial services or investments**

Section 373 of the LPA provides that the fund **does not apply** to defaults in relation to money or property that is entrusted to or held by the law practice for or in connection with:

- a financial service provided by the practice (or associate) in circumstances where the practice (or associate):
  - is required to hold an Australian financial services licence (whether or not a licence is held at any relevant time), or
  - provides the service as a representative of another person who carries on a financial services business (whether or not they are an authorised representative); or
- a managed investment scheme, or mortgage financing, undertaken by the practice; or
- an investment purpose, unless the **funds are entrusted in the ordinary course of legal practice** (see below) (s 373, LPA).

Accordingly, money entrusted to a practitioner for the purpose of investment in a mortgage advance arranged by the law practice is not covered by the fund. In those circumstances, the money is not entrusted to the law practice in the ordinary course of legal practice as the arrangement of mortgage advance transactions is not part of normal practice as a solicitor, even if the solicitor regularly arranges such deals.

This has caused problems for some clients who have been unable to claim for losses resulting from these sorts of transactions. It can be difficult for clients to see the distinction when their lawyer changes hats from lawyer to mortgage broker.

It should be noted that under Rule 38 of the Solicitors' Rules, a solicitor must not conduct a managed investment scheme or engage in mortgage financing, even if the lawyer holds an Australian financial services licence.

### ***Funds entrusted in the ordinary course of legal practice***

Funds and property entrusted to a law practice for an investment purpose are still protected if:

- (a) the money or property was entrusted to or held by the practice—
  - (i) in the ordinary course of legal practice; and
  - (ii) primarily in connection with the provision of legal services to or at the direction of the client; and
- (b) the investment is or is to be made—
  - (i) in the ordinary course of legal practice; and
  - (ii) for the ancillary purpose of keeping or enhancing the value of the money or property pending completion of the matter or further stages of the matter or pending payment or delivery of the money or property to or at the direction of the client (s 373(2), LPA).

If a client, independent of the law practice, enters into an arrangement with a third party to lend money to that third party and instructs the law practice to act for the client in documenting the loan and registering the mortgage in respect of the loan, any money entrusted to the law practice in this transaction is entrusted in the ordinary course of legal practice and is subject to fund protection.

The difference between this transaction and the transaction referred to earlier is that the law practice arranged the mortgage in the first transaction (that is, introduced the parties to each other) whereas in the second transaction the law practice did not arrange the mortgage; it merely carried out traditional legal work – the documentation of the transaction and registration of relevant documents.

Another example of an investment that is covered by the fund is the investment of the proceeds from the sale of the matrimonial home in a family law matter, pending the parties reaching agreement or a court order of how the proceeds are to be disbursed. In this case the proceeds from the sale of the home are entrusted to the law practice in the ordinary course of legal practice.

### **Making a claim against the Fidelity Guarantee Fund**

If you consider that you have a claim against the Fidelity Guarantee Fund, it is best to get legal advice. You can get initial legal advice from a community legal centre (see contacts on the inside back cover).

#### ***How to make a complaint***

The first step is to contact the QLS's Trust Accounts Investigation Section **immediately**. The contact details are on the inside back cover of this booklet. The QLS will be able to provide a claim form.

#### ***When must a claim be made?***

A claim against the Fidelity Fund must be made within **six months** of the time when the claimant becomes aware of the default or further period allowed by the QLS. A claimant may appeal a refusal of the QLS to allow a further period for the claim to the Supreme Court (s 375, LPA).

The QLS may also decide to advertise, in the newspaper or on the internet, a default by a law practice and seek information about the default and/or invite claims in relation to the default. If such an advertisement is made, then a claim against the fund must be made by the date fixed by the notice or else within a further period allowed by the QLS or within the period allowed by the Supreme Court. A complaint made within the timeframe specified by a notice will be accepted, even though the usual 6 month timeframe has passed (s 376 and s 377, LPA).

## Decisions on claims

Once a claim has been made, the QLS will investigate the claim in much the same way it investigates claims referred to it by the LSC. If the QLS considers that the claim is unlikely to be decided within a year, then the QLS must give the claimant written notice of the reasons for the delay.

The QLS may make advance payments from the fund to the claimant before a decision has been made if it is satisfied that the claim is likely to be allowed and payment is warranted to alleviate hardship (s 380, LPA). If the claim is later disallowed or the amount payable is less than the amount advanced, then the QLS may seek to recover the advance paid as a debt due to the fund (s 380, LPA).

The QLS is responsible for making a decision on the claim and may wholly or partly allow it, or disallow it. If the claim is allowed, the QLS must state the amount that is payable from the fund (s 381, LPA). The claimant is entitled to written notice of the QLS's decision (s 390, LPA).

The maximum amount payable from the fund must not exceed the financial loss suffered by the claimant (s 382, LPA). This does not include costs or interest the QLS may award from the fidelity fund, the costs being to cover the Claimant's reasonable legal costs in making and proving the claim (s 383 and s 384, LPA). Payments from the Fidelity Guarantee Fund are capped at \$200,000 for a single claim and \$2M in relation to a single law practice (Reg 84, LPR).

The QLS may wholly or partly disallow the claim, or reduce the amount payable, if the claimant knowingly assisted or contributed to the act or omission giving rise to the claim, the claimant's negligence contributed to the loss, the claimant unreasonably refused to cooperate with the QLS, the claimant unreasonably failed to mitigate his or her loss or due to some other fault of the claimant (s 381, LPA). The amount payable may also be reduced if the claimant is entitled to other benefits for the same loss (s 385, LPA). The claimant may also be required to pay back the Fidelity Guarantee Fund if he or she later receives payment from another source in relation to the same loss (s 388, LPA).

An appeal from a decision of the QLS may be made by the claimant to the Supreme Court within 30 days of receiving the information notice of the decision (s 392, LPA).

If the QLS believes that the fund is likely to be insufficient to meet the fund's liabilities, then it may postpone payments from the fund or make partial payments only. Such a decision is not subject to appeal or review (s 397).

Upon payment of a claim from the Fidelity Guarantee Fund, the rights and remedies of the claimant against the law practice for the default pass to the QLS. Any money recovered by the QLS from the law practice must be paid back into the Fidelity Guarantee Fund (s 386, LPA).

## Making a claim in negligence

For consumer complaints (see *What is a consumer complaint?* at page 22 above), complaints where the loss suffered is greater than what the Legal Services Committee or Tribunal can award (see

Compensation orders at page 28 above) or complaints where no claim lies to the Fidelity Guarantee Fund, you may need to apply to a court for a claim in negligence in order to recover your loss.

In a negligence claim by a client against his or her former solicitor, the client is the plaintiff and the solicitor is the defendant.

### What is negligence?

Put simply, a claim in negligence arises under common law when damage has been caused by a person due to their carelessness.

Not all complaints against a solicitor amount to a claim in negligence. In order to succeed in a claim of negligence, you need to prove the following 5 elements:

1. there must be a legal duty of care owed by the defendant to the plaintiff
2. there must be a breach of the duty by the defendant
3. the breach must have caused the injury or loss
4. the link between the breach and the injury must not be too remote, and
5. there must be actual damage to the plaintiff in the form of loss of money or property or physical or psychological injury.

#### ***Duty of Care***

A defendant will not be held liable for negligence unless they owed the plaintiff a duty to take reasonable care to avoid causing them damage or loss. It must have been reasonably foreseeable that the conduct of the defendant would be likely to cause loss or damage to a class of persons to which the plaintiff belongs.

This element of negligence is likely to be satisfied, as it is generally accepted that a solicitor owes a duty of care to their client. This requires the lawyer to observe the standard of care of the ordinary skilled and reasonably careful practitioner.

#### ***Breach of Duty***

It must be proved that the defendant breached the duty owed to the plaintiff by failing to take reasonable care. The court will ask whether a reasonable person in the defendant's position would have foreseen that their conduct might cause injury to the plaintiff. The court will then look at what a reasonable person would or would not have done in the circumstances.

For example, a diligent solicitor should be aware of relevant statutory time limits. If a solicitor fails to inform a client about a statutory limitation period and the client is prevented from taking legal action, then the solicitor would have likely breached their duty to the client.

#### ***Causation***

The issue here is whether the defendant's negligence was the cause of the injury or damage that the plaintiff suffered.

In the above example, the client must prove that the solicitor's failure to notify the client of the limitation period **caused** their loss.

#### ***Remoteness***

A plaintiff will not be able to recover damages if the injury or damage suffered was too remote a consequence of the defendant's negligence.

#### ***Damage***

The loss or injury suffered by the claimant must be quantifiable and attributable to the breach of duty. For example, if the lawyer is able to rectify the situation by applying to extend the limitation period, the client would not have suffered a quantifiable loss.

Satisfaction of these last four elements will be determined on the facts and circumstances of each case.

## Examples of negligence

Other examples of negligence include:

- failure to supervise the payment of monies from the solicitor's trust account and carelessness in dealing with trust monies
- failure to keep a client informed of their affairs
- failure to protect and account for a client's security documentation.

## Barristers' immunity

The High Court of Australia has affirmed the principle that barristers are not liable in negligence for actions undertaken in the course of court advocacy.

In the case of *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, the majority of the High Court held that barristers' immunity from civil negligence claims is essential in ensuring finality in litigation. The Court maintained that a claim against a barrister would involve either a direct or indirect challenge to the outcome of the earlier proceeding, and could undermine the efficiency of the judicial system. Importantly though, it was accepted by members of the Court that barristers' immunity has limited scope. It does not extend to matters such as:

- failing to advise a client of the availability of possible actions against third parties;
- failing to advise a client to commence proceedings in a particular jurisdiction; or
- the negligent compromise of an appeal leading to the loss of benefits gained at first instance.

## Commencing a claim in negligence

A successful claim in negligence may result in an order that your lawyer compensate you for damage suffered, an order that your solicitor do or not do something to help remedy the situation or any other order that the court considers appropriate. Professional indemnity insurance should ensure that compensation orders will be paid out, even if the defendant himself or herself has little money.

However, going to court should be a carefully measured decision. It is likely to be a long and expensive process and can be extremely stressful. There is also the risk of having to pay the legal costs of the defendant should you lose.

If you consider that you have a claim against a solicitor in negligence, it is best to get legal advice because it is difficult to conduct a civil claim in the courts on your own. You can get initial legal advice from a community legal centre (see inside back cover).

## TIPS FOR DEALING WITH YOUR LAWYER

From Great Expectations: A lawyer-client handbook produced by the Canadian Bar Association (<http://www.cba.org/cba/PracticeLink/pdf/greatexp.pdf>).

1. **Be honest with your lawyer.** Dealing with the unexpected — something you have kept hidden from your lawyer — can be costly.
2. **Ask questions if you don't understand something your lawyer says.** This is not a time to be shy or afraid of sounding uninformed. You need to understand the information and advice your lawyer gives you, so that you can make decisions and instruct your lawyer on what you want to do.
3. **Be clear about what you expect your lawyer to do for you.** Don't make the mistake of talking about "A," when you are hoping for "B."
4. **Make sure your lawyer is right for you.** You need to be able to communicate easily with your lawyer, to feel comfortable asking questions and to feel confident that you can work together to accomplish your goals.
5. **Make a list of questions you have or information you want to give your lawyer before you call or meet.** By being prepared, you can make the best use of your time and make sure you don't forget anything. Limiting the number and length of phone calls to your lawyer can save you money.
6. **Discuss money with your lawyer.** You need to have a clear idea of how much your lawyer's services will cost and what factors will affect the total cost. Ask what you can do to keep fees and other costs down.
7. **Check carefully the costs agreement (and the disclosure obligations) your lawyer sends you.** If you are not sure of something in the letter or it does not say what you want, don't wait to talk to your lawyer about it. You both need to be clear on what your lawyer will be doing for you.
8. **Talk to your lawyer when you have a problem with the service you are receiving or a concern about your case.** Problems cannot be solved if you keep them to yourself. If something is bothering or upsetting you, tell your lawyer.
9. **Review the bill you receive right away.** If you believe it reflects the agreement you made with your lawyer, pay it according to your agreement. If you have concerns about it, discuss it with your lawyer immediately. If you and your lawyer cannot reach an agreement, look into assessment or mediation without delay.
10. **Be realistic about what a lawyer can do for you.** Lawyers have legal knowledge and expertise that can help you with legal problems. They cannot move mountains, magically return your life to what it was like before the accident or make the spouse you are divorcing a different person.

## CONTACTS

### Legal Services Commission

Street Level 25  
307 Queen Street  
Brisbane Qld 4000

Postal PO Box 10310  
Brisbane Adelaide Street Qld 4000

Telephone 3406 7737 (Brisbane)  
1300 655 754 (outside Brisbane—cost  
of a local call)  
133 677 (if you require the use of the  
National Relay Service)  
131 450 (if you require a  
translator/interpreter)

Facsimile (07) 3406 7749

Email [lsc@lsc.qld.gov.au](mailto:lsc@lsc.qld.gov.au)

Website [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)

### Client Relations Centre of the Queensland Law Society

Street 179 Ann Street  
Brisbane Qld 4000

Postal GPO Box 1785  
Brisbane Qld 4001

Telephone (07) 3842 5843  
(07) 3842 5908 - Trust Accounts  
Investigation Section

Facsimile (07) 3842 5999

Email [info@qls.com.au](mailto:info@qls.com.au)

Website [www.qls.com.au](http://www.qls.com.au)

### Supreme Court of Queensland Civil Registry - Brisbane

Street Law Courts Complex  
304 George Street  
Brisbane Qld 4000

Postal PO Box 15167  
City East Qld 4002

Telephone (07) 3247 4313  
(07) 3247 4314

Facsimile (07) 3247 5316

Email [courtinfo@justice.qld.gov.au](mailto:courtinfo@justice.qld.gov.au)

Website [www.courts.qld.gov.au](http://www.courts.qld.gov.au)

### Department of Justice and Attorney- General – Dispute resolution branch

Street Level 1  
Brisbane Magistrates Court  
363 George Street  
Brisbane QLD 4000

Postal GPO Box 149  
Brisbane QLD 4001

Telephone 07 3239 6269  
1800 017 288 (toll free outside  
Brisbane)

Fax 07 3239 6284

Website [www.justice.qld.gov.au/18.htm](http://www.justice.qld.gov.au/18.htm)

### Bar Association of Queensland

Street and postal Level 5 Inns of Court  
107 North Quay  
Brisbane Qld 4000

Telephone (07) 3238 5100

Facsimile (07) 3236 1180

Email [qldb@qldb.asn.au](mailto:qldb@qldb.asn.au)

Website [www.qldb.asn.au](http://www.qldb.asn.au)

### Community Legal Centres

For a list of **community legal centres in Queensland**,  
see [www.qails.org.au](http://www.qails.org.au)

For a list of **community legal centres in Australia**  
(including Queensland) see  
[www.naclc.org.au/directory](http://www.naclc.org.au/directory)

### QPILCH

#### Public Interest Referral Scheme Queensland Law Society Pro Bono Scheme Bar Association Pro Bono Scheme

Postal PO Box 3631  
South Brisbane BC Qld 4169

Telephone (07) 3846 6317

Facsimile (07) 3846 6311

Email [services@qpilch.org.au](mailto:services@qpilch.org.au)

Website [www.qpilch.org.au](http://www.qpilch.org.au)

#### Self-Representation Civil Law Service

As above except:

Facsimile (07) 3211 2278

Email [selfrepsadmin@qpilch.org.au](mailto:selfrepsadmin@qpilch.org.au)