

Billing Checklist for Barristers

This checklist sets out some commonly encountered requirements relating to barristers' billing practices under Part 4.3 of the *Legal Profession Uniform Law (NSW) (UL)*, the *Legal Profession Uniform General Rules 2015 (UGR)*, the *Legal Profession Uniform Law Application Act 2014 (NSW) (AA)* and the *Legal Profession Uniform Law Application Regulation 2015 (NSW) (AR)* applicable from 1 July 2015.

Links:

UL: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+16a+2014+cd+0+N>

UGR (as made): <http://www.legislation.nsw.gov.au/sessionalview/sessional/sr/2015-246.pdf>

AA: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+16+2014+cd+0+N>

AR (as made): <http://www.legislation.nsw.gov.au/maintop/epub>

Currency: Last revised, 26 June 2015.

TRANSITION TO UNIFORM LAW

1. UL Pt 4.3 – and the section of this checklist headed 'Form, Content and Service of the Bill' – apply only to matters in which the client first instructed the barrister's instructing solicitor on or after 30 June 2015 and to direct access matters where the client first instructed the barrister after that date. Old law matters – where the solicitor was first instructed before 1 July 2015 or the direct access client first instructed the barrister before that date – are still governed by the *Legal Profession Act 2004* Pt 3.2 to the exclusion of UL Pt 4.3. (UL Sch 4 cl 18.)
2. Barristers need to distinguish between matters governed by UL Pt 4.3 and old law matters. Billing stationery and boilerplate text for new bills in old law matters should follow the old format. If this is thought impracticable, an alternative temporary approach in all bills is to include as *Note A* the mandatory UL notifications and as *Note B* the mandatory old law notifications, both preceded by an introductory form of words such as:

Note A applies where the client first instructed the solicitor after 30 June 2015 or, in a direct access case, where the client first instructed the barrister after that date. *Note B* applies otherwise.
3. The rules affecting payment in advance are not part of UL Pt 4.3. There is no long-tail transitional rule. Compliance is required for old law matters as well as new ones. See para 19 below.

PRELIMINARY MATTERS: TIME RECORDING

4. **Time recording** Most barristers bill on a time costing basis. Anyone who bills on this basis should keep contemporaneous daily records of time spent, the nature of the work done, and the brief to which the work relates. There is no set form. The barrister may, for example, keep a day book or an Excel spreadsheet, or may use proprietary accounting software with time recording features. The important thing, both in fairness to the client and solicitor and for the protection of the barrister, is to keep a reliable record sufficient to support the creation of an itemised bill.

FORM, CONTENT AND SERVICE OF THE BILL

5. **Content and detail of bill** The bill must be either an itemised bill or a lump sum bill (UL s 186). An itemised bill ‘specifies in detail how the legal costs are made up in a way so as to allow costs to be assessed’; a lump sum bill ‘describes the legal services to which it relates and specifies the total amount of the legal costs’ (UGR cl 5). The traditional form of Barristers’ bills has generally been accepted as sufficient for assessment. Although not repeated in the new legislation, the *Legal Profession Regulation 2005* (NSW) cl 111B(2) may provide useful guidance. It required the following particulars, set out in generally chronological order:
 - (a) short details of each item of work carried out on behalf of the client, including the method by which it was carried out (whether by letter, telephone, perusal, drafting, conference, teleconference or otherwise) if not otherwise apparent,
 - (b) the date on which each item of work was carried out,
 - (c) the amount charged for each item of work or for items of work carried out on a particular day, and particulars of the basis for calculating the amount charged.
6. UGR 74 contemplates that an itemised may exceed an earlier lump sum bill. The excess is only recoverable after assessment or binding determination and only if the biller gave appropriate written warning at the time of the lump sum bill. The warning is only appropriate in a lump sum bill. Most barristers’ bills are itemised and should not contain the warning. If giving a lump sum bill, consider the following wording: ‘If an itemised bill is requested, the total amount of the legal costs specified in that bill may be higher than the amount specified in the present lump sum bill.’
7. **Signature** The bill (or an attached or enclosed letter) must be signed by the barrister or sufficiently designate the barrister as ‘responsible principal’ (UL s 188).
8. **Statement of clients’ rights** UL s 192 requires a billing law practice to ‘ensure that a bill includes or is accompanied by a written statement setting out— (a) the avenues that are open to the client in the event of a dispute in relation to legal costs; and (b) any time limits that apply to the taking of any action referred to in paragraph (a).’ There is no prescribed form. The legislation may fairly be criticised for imposing a positive legal obligation in only the vaguest of terms.
9. Barristers’ bills are usually directed to solicitors, not clients, but the legislation is not interested in statements of instructing solicitors’ rights. Assuming that a s 192 statement is required in a bill to an instructing solicitor, consider the following wording:

A client may apply to have his or her legal costs assessed by a costs assessor in the event of a dispute. For NSW, the application is made to the Manager, Costs Assessment. The application must usually be made within 12 months after the bill is given to the client.
10. It is not clear whether Parliament expects lawyers to include in every bill a reference to the complaints procedure under UL Pt 5.2 (relevant if a ‘complaint about a lawyer’ includes a ‘costs dispute’ – see s 269) and the somewhat complex time limits that apply (s 272). Consider the following wording:

A client who complains about a lawyer or law practice to the designated local regulatory authority (for NSW, the Legal Services Commissioner) may include a costs dispute in the complaint. The time limit is usually 60 days after the costs become payable or 30 days after the law practice complies with a duly made request for an itemised bill.
11. **Interest** If interest is to be claimed, the bill must include ‘a statement that interest is payable and of the rate of interest’ (UL s 195(3)). Interest cannot be charged above the rate prescribed under s 195(4), presently the RBA cash rate target plus 2 percentage points (UGR 75). The rate for a particular bill is fixed at the date when the bill is issued. Subsequent changes in the cash rate target have no effect. The Act does not say whether

the bill must state the rate as a numeric value, or whether a descriptive statement is sufficient. Consider the following wording, which throws everything in:

Interest is payable on unpaid legal costs at the rate prescribed under the *Legal Profession Uniform Law (NSW)* s 195(4), being the Reserve Bank of Australia cash rate target at the date of issue of the bill plus 2 percentage points. The s 195(4) rate is currently [**numeric rate at date of issue**]% per annum.

12. **Method of service of bills** UL requires compliance with UGR. UGR does not prescribe a method for giving a bill to a solicitor. For bills given to a client, see UGR 73.
13. **Requirement before suing** A barrister cannot sue for fees without first giving a bill that complies with UL and UGR and then waits 30 days (UL s 194). If the recipient of a lump sum bill requests an itemised bill within 30 days after the legal costs become payable, the barrister must comply with the request within 21 days and cannot sue until 30 days after that person receives the itemised bill (ss 187, 194); this can be avoided by always giving itemised bills.
14. **Requirements if proceeding to assessment** A better way to recover fees is often to apply for assessment. See AA s 68 and AR cl 32, 33, 34(2). There is no express waiting time, although the application must contain a statement that there is 'no reasonable prospect of settlement of the matter by mediation' (AR 32(3)).

GST TAX INVOICES AND ADJUSTMENT NOTES

15. **Requirement for tax invoice** GST legislation imposes form and content requirements to qualify a document as a tax invoice. A barrister's bill does not have to be a tax invoice, but Commonwealth law requires a tax invoice to be given for a taxable supply within 28 days of request. Most barristers find it convenient to give all bills in tax invoice form.
16. **Tax invoice** The following items are based on the usual requirements for a supplier-created tax invoice for barrister's services over \$1,000 under the *A New Tax System (Goods and Services Tax) Act 1999 (GST Act)*, s. 29-70. The invoice should usually set out the following:
 - a) the barrister's identity and ABN
 - b) the recipient's identity or ABN (this refers to the recipient of the supply, not the recipient of the bill; for certainty, both client and solicitor should be identified –the client is the recipient, and the solicitor has the obligation to pay)
 - c) what is supplied, including its quantity (if applicable) and price
 - d) the extent to which each supply to which the document relates is a taxable supply
 - e) the date of issue of the invoice
 - f) the amount of GST (if any) payable in relation to each supply to which the document relates
 - g) a clear indication that the document is intended to be a tax invoice
17. **Adjustment note** If a barrister has to issue an adjustment note, it must comply with s. 29-75 of the GST Act and contain certain information. See GSTR 2013/2 [12] at <http://law.ato.gov.au/atolaw/view.htm?DocID=GST/GSTR20132/NAT/ATO/00001>.

PAYMENT IN ADVANCE

18. **Payment in advance** Payments in advance are deemed to be trust money under UL s 129. A law practice is forbidden to receive trust money unless a principal holds a practising certificate that authorises such receipt or the law practice is so authorised

under the Uniform Rules (UL s 150); on this basis, barristers are generally forbidden to receive trust money. A qualified exception is allowed in the case of payments in advance under UL 133 if the barrister complies with AR 15. Anyone intending to rely on the exception should study AR 15 in detail. Broadly, it is only available in direct access situations – it cannot apply if there is an instructing solicitor, even one without a trust account. It is more stringent than the *Legal Profession Regulation 2005* cl 106A. The Barrister must inter alia:

- maintain a sole-purpose ‘trust money account’ with no overdraft, offset or credit linkage, deposit promptly, and keep the payment in the account until billed etc;
 - notify the account to Bar Association within 14 days of opening the account;
 - issue detailed receipts and keep copies (7 years / end of matter); and
 - appoint a qualified examiner, undergo annual examinations, and submit examination reports to Bar Council (21 days).
19. **Transitional** The trust money provisions are outside UL Pt 4.3. They apply from 1 July 2015, subject to a special transitional rule in AR 16. That rule prescribes two things:
- a) Until 1 October 2015, ‘trust money may be received and held by a barrister on account of legal costs for legal services in advance of the provision by the barrister of the legal services, in the circumstances set out in clause 106A of the *Legal Profession Regulation 2005*, as in force immediately before its repeal, if the barrister held trust money in an account that complied with that clause immediately before the repeal of that clause.’
 - b) Any barrister who ‘held’ trust money under LPR cl 106A must notify the Bar Association of the account in which the money was held as soon as practicable after 1 July 2015.

BILLING BOILERPLATE

The wording presented for consideration at various points under the heading ‘Form, Content and Service of the Bill’ is collected and repeated here for convenient reference, together with the limitation of liability notice applicable to Association members:

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

Interest is payable on unpaid legal costs at the rate prescribed under the *Legal Profession Uniform Law (NSW)* s 195(4), being the Reserve Bank of Australia cash rate target at the date of issue of the bill plus 2 percentage points. The s 195(4) rate is currently **[numeric rate at date of issue]**% per annum.

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