Common complaints (and how to avoid them): Part 1

Situations surrounding a client's complaint to the Law Society can vary enormously but the grounds of complaint are generally limited to the following areas:

1. delays;
2. overcharging;
3. failure to provide accounts;
4. failure to communicate/lack of communication;
5. acting without instructions/failure to follow instructions;
6. misrepresentation; or
7. negligence/incompetence.

The two most common complaints are that of delay (usually accompanied by lack of communication) and overcharging. These two grounds of complaint often appear together. It seems that a client is more likely to complain about costs and allege overcharging when the matter has taken a long time to investigate or complete.

Common complaints about costs are outlined below.

* **The cost of photocopies and faxes.** Most solicitors provide bulk amounts for these items and unless stipulated in the Costs Agreement the client is unable to calculate the amount per page.

* **There is a different hourly rate charged by different practitioners who work on the file.** The different rates charged by partners, senior and junior practitioners should be specified in the statement or Costs Agreement. If the rate changes (eg because of a Court Scale increase), the client should be advised immediately in writing, presuming the Costs Agreement allows for such a change.

* **The practitioner seen by the client at the initial consultation does not do all the work on the file.** It should be explained to the client that from time to time it will be necessary for another practitioner to assume conduct of the file, either because the usual practitioner is away on leave or because it is cheaper for the client for some of the work to be undertaken by a less senior practitioner. The number of times the file is passed on to a new solicitor should be kept to a minimum. It is disconcerting for a client to have a new name on the bottom of every letter sent.

* **The client is paying for the junior practitioner to be supervised by the senior practitioner.** In effect, paying for two practitioners to do the same work rather than one. The client should not be charged for any period spent by the senior practitioner in supervising the junior practitioner, such period in effect being the junior's learning process. In addition, if the junior or less proficient practitioner takes a longer time to perform a task than a senior or more proficient practitioner, the client should be charged for what is reasonable in the circumstances, not the actual time that is spent.

* **Costs have already been transferred from Trust to Office accounts before the bill is sent.** Particularly where the bill is dated several days prior the covering letter. Clients often feel they have been deprived of the right to dispute an account because the account has already been paid by monies transferred from Trust.

* **The client is charged "per unit" rather than the actual time spent on the matter.** This especially applies to phone calls. For example, a two minute phone call has been charged at the six minute unit rate. Explain that the Scale allows for this.

* **The client is charged for amendments to documents and letters,** often necessitated by the error of the solicitor/firm (eg typos or drafting which relates to style rather than content), or where the client has been charged for a second letter enclosing a copy of a document which was omitted from an earlier letter. Mistakes made by the firm should not be charged to the client.

* **The client is given a "quote" as to costs which is subsequently exceeded.** When the client asks, "How much will this cost me?" the solicitor should make it plain that with a quotation the price is fixed whereas with an estimate it is no more than an indication of the likely charge. The difference between these two terms can cause great confusion so it is better not to use either term. Do not forget to mention whether GST is included. Interim billing is better than an estimate of costs because it can be more accurate, has to be paid and concentrates the mind of the client.

* **The client is charged for a disbursement which they consider they could have obtained at a cheaper rate.** It may be appropriate in some cases to give the client the option to organise the requisite event, particularly where you have a client who has contacts in the appropriate industry.

* **The client didn't get the result they expected, therefore they should not be charged, or charged as much, for the file.** This mostly occurs when there has been a long (and expensive) investigative period and the result is a recommendation to discontinue the matter. The issue is one of communication rather than costs. The client should be advised at the beginning of the file as well as regularly throughout the life of the file of the costs. Again, interim billing may assist. It may also be appropriate to involve the client in the investigative process by giving them specific "jobs" to undertake. It will not only cost the client less but will occupy their attention.

* **The practitioner did not provide an account when requested.** Failure to do so may constitute a breach of Professional Conduct Rule 6.3. Generally, the client is entitled to receive an account upon request and

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The judicial system and its limits cont...

violent offenders behind bars and inflicts punishment by deprivation of liberty, loved ones and home. It is extremely limited in having an impact on crime levels.

One of the great problems in this area is the debate itself, how it is generated, by whom and for what reason.

This often ill-informed debate sometimes leads to the development of new laws. To date, the judicial system has had little role in the debate, however the media plays a central role. The media must be brought to task by the community regarding its agenda when reporting law and order issues. It's very apparent that in the reporting of criminal matters "good news" is "no news".

The debate about these issues is further compromised by the sophistication of spin generated by politicians. The relationship between the media, with its unstated agendas, and the politicians is crucial to establishing what information is fed to the community.

The fundamental convention of judicial independence and general legal and judicial conservatism means that the Judiciary has had little input into the law and order debate. This increases its inability to contribute to and effectively grapple with the causes of crime in society and specifically in Aboriginal communities.

That's not to say that the Territory's judiciary has not developed impressive jurisprudence over the last fifty years, via sentencing to accommodate the "Aboriginal" factor in the cases before them. Judges have taken into account Aboriginal customary law, particular community's views on punishment, or even explaining why offences were committed.①

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matter of professional conduct.

Some General Tips

At the first consultation take the time to explain your firm's costing charges and practices to the client. It will invariably save time later.

Use a Costs Agreement. It should specify the above matters. Do not assume the client will understand everything contained in the Costs Agreement. Keep the language simple. If you do not use a Costs Agreement at least have a standard document which explains the basis on which you bill.

Sometime in early 2004 the Legal Practitioners Amendment (Costs and Advertising) Act 2003 will come into effect and will require the following:

118B.

(1) As soon as practicable after a legal practitioner accepts instructions to undertake work of a professional nature for a person, the legal practitioner must provide the person with a written statement of costs for the work to be undertaken.

(2) The statement must contain the following:

(a) the basis on which the costs, including disbursements, will be calculated and whether the costs will be calculated in accordance with a fee scale prescribed under a law in force in the Territory;

(b) details of proposed billing intervals;

(c) a statement informing the person of his or her rights under section 120 and of any other rights to dispute a statement of costs and disbursements (including those rights agreed between the legal practitioner and the person) and any other processes that are available to the person to have a statement of costs and disbursements reviewed;

(d) if the work to be undertaken could involve litigation – details of the variables in and costs of litigation (based on successful and unsuccessful outcomes) and details of party-party costs that may be payable in addition to the costs otherwise payable by the person.

(3) A legal practitioner must, while he or she is undertaking work of a professional nature for a person, ensure that the person is regularly informed of the costs and disbursements payable by the person for the work.

Section 120 refers to the taxation of costs by application to the Master. You do not need to advise the client of the mechanics of how they go about disputing the bill, merely that they have the right to do so. The Law Society has pamphlets which explain the process.

Although not specified in s118B you should also seek agreement from the client, in writing, when the accounts are to be paid (eg immediately upon receipt, one month after receipt or at the conclusion of the file). This is not only important to the financial viability of your firm but also focuses the mind of the client. It not only lets them know how much the file is costing but also what you are doing on the file. It allows them to make a decision about whether they can afford to continue.

Section 129A of the LPA(C& A) Act also provides for the existence of Conditional Costs Agreements which do not attract the attention of s120 (unless the Conditional Costs Agreement allows for the payment of a premium under s129B). However, under the amendments both the Cost Agreements under s129 and Conditional Costs Agreements under s129A will be reviewable by the Law Society as well as the Court on the grounds of "fair and reasonable". The decision of the Law Society is appealable to the Court as a re-hearing.

The second part of this article will appear in the January edition of *Balance* and will deal with the complaint of delay. Please feel free to comment on any of the issues raised in this article.

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