Show me the money: cost disclosure requirements

By Josephine Stone, Professional Standards and Ethics Solicitor.

The main area of complaint by consumers of legal services is that of costs. There is a common and widespread belief that "lawyers" cost too much. This complaint is rarely expressed in the terms that the litigation itself or court process cost too much. The Law Society receives many complaints and enquiries based on the belief that the lawyers have 'overcharged'.

In the case of Law Society v Foreman (1994) 34 NSWLR 408 the client received a bill for $500,000 following his divorce, prompting the complaint to the Law Society. Kirby J observed (at page 422):

> *"Little wonder the legal profession and its methods of charging are coming under close parliamentary, media and public scrutiny. Something appears to be seriously wrong in the organisation of provision of legal services.... when charges of this order can be contemplated, still less made....If such costs, in which was substantially a single matrimonial property case between a married couple, are truly reasonable, there must be something seriously wrong in the assessment of reasonableness within the legal profession which this court should resolutely correct."*

Since then the national model laws project has resulted in various states and territories adopting, or working towards adopting, extensive disclosure requirements. The aim is to ensure that all practitioners across Australia have the same obligations, and clients the same entitlements, regarding basic information about legal costs: what they mean; how they will be calculated; what things can be charged for; how often the client can/will be billed.

The provisions are designed to minimise disputes and, where practitioners are observing the requirements, it seems to be working. From a complaints point of view the difficulties lie in the fact that some practitioners do not seem to be aware of their statutory obligations regarding costs disclosure and have not embraced the long term benefit of "being up front" about how much their services are going to cost the client.

DISCLOSURE REQUIREMENTS

The national model costs disclosure requirements came into force in the Northern Territory on 1 June 2004, with the addition of Part X - Costs to the Legal Practitioners Act.

Section 118B provides:

(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 the costs of the work to be undertaken.

(2) The written 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 disbursement (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 the litigation (based on a successful and unsuccessful outcome) 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.

(4) A legal practitioner who undertakes work of a

professional nature for a person must, if money or a benefit may be paid to the person as a result of an offer of settlement, inform the person of the minimum amount or benefit that the person will receive if the matter is settled in accordance with the offer.

(5) This section does not apply if –

(a) the costs are less than the prescribed amount;

(b) the person for whom the work is undertaken is –

(i) the Territory or the Commonwealth of Australia or an authority of the Territory or the Commonwealth; or

(ii) a prescribed person;

(c) the person for whom the work is undertaken is a client of the legal practitioner or the legal practitioner's firm and the person has received a written statement of costs under this section within the previous 12 months;

(d) it is not practical, in the circumstances of the matter, for the legal practitioner to comply with this section;

(e) the legal practitioner can not reasonably comply with this section due to the urgency of the matter; or

(f) the legal practitioner is a Counsel exempted (including by an exemption subject to conditions, limitations or qualifications) from compliance with this section by the Regulations.

The Regulations provide that

- "costs" do not include disbursements,
- the prescribed amount is $1000,
- "prescribed person" includes an interstate or local practitioner and an incorporated legal practice, and
- "prescribed proceedings" are proceedings under the Adoption of Children Act, Community Welfare Act or Crimes (Victims Assistance) Act.

The term "first instructs" in ss.1 is not defined in the Act. Guidance may be taken from section 306 of the NSW Legal Profession Act 2004 which defines the term thus: "A client first instructs a law practice in relation to a matter in a particular jurisdiction if the client first provides instructions to the law practice in relation to the matter at an office of the law practice in that jurisdiction, whether in person or by post, telephone, fax, email or other form of communication".

Nor is the term "as soon as practicable" defined but commonsense should prevail. What is practicable will depend on the individual circumstance of the case but prudence would suggest that the term be read strictly.

COSTS RECOVERY

Failure to observe the costs disclosure requirements may result in the client not being liable to pay the costs, or the practitioner being unable to sue for recovery of costs. Failure to make appropriate disclosure may also result in disciplinary proceedings.

Sections 119 to 128 replace the old common law position and determine what and when costs may be recovered. In summary, these provisions provide that practitioners may not commence proceedings to recover costs unless:

1. They have delivered to the client an itemized statement of costs and disbursements or a lump sum statement but in either case a statement which has been signed by a partner of the firm;
2. Where an itemized account has been delivered, a period of one month has expired;
3. Where the lump sum statement was delivered, a period of one month has expired, unless the recipient requests an itemized account in which case the period is extended until one month after the delivery of the itemised account.

Of course, the client may within one month of the statement's delivery refer the matter to The Master for taxation, irrespective of whether the costs or disbursements have been paid.

One of the matters the Master "shall" take in to account for the purposes of taxation is whether the Law Society has recommended as appropriate a specified amount: ss. 123(3).

COSTS AGREEMENTS

The costs provisions specifically allow for costs agreements which are basically contracts determining costs. Where a costs agreement has been made then sections 118B to 128 do not apply. Costs agreements must be in writing and specify the amount of costs (excluding disbursements) payable or that the costs will be ascertainable in accordance with the agreement.

The agreement is only enforceable if it has been signed by the person liable to pay the costs: s129. A practitioner cannot recover more than the amount agreed or ascertainable in the agreement.

Conditional costs agreement can provide for the payment of a "contingency" fee, i.e. a premium payable in the event the matter is successful. The premium can be a specified percentage of the costs, or a separately stated amount or the relevant percentage of costs as determined by taxation. It cannot be determined as a percentage of the award or settlement figure to which the client may be entitled.

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Again, the term "successful" is not defined and must be treated with some caution. Cases where the fees significantly outweigh the amount of any award or settlement may not be construed as "successful".

Conditional costs agreements cannot relate to criminal proceedings, Family Law proceedings or "prescribed" proceedings (see above).

The conditional costs agreement must be in writing and contain certain disclosures. For a full list of the requirements see section 129E.

REVIEW OF AGREEMENTS

Section 129H enables the Law Society as well as the Court to review a costs agreement. If the Law Society or Court is satisfied that the agreement is "not fair and reasonable" it may order that the amount payable under the Agreement be reduced or declare the agreement not binding on the parties.

In the latter case it may make any other orders necessary to restore the parties to the position in which they would have been if the agreement had not been made.

OTHER MATTERS

There are practitioners who, in their communications with clients, still use the term "costs" somewhat loosely, leading to a misapprehension on the part of the client that the term includes disbursements.

The terms "costs", "disbursements" and "outlays" are technical terms and should be explained precisely.

Costs are the professional fees charged by the practitioner for time spent on the client's matter.

Disbursements are actual charges incurred on behalf of the client for the express purpose of pursuing the client's matter, such as expert reports, title searches, courier expenses.

Outlays are those charges incurred by the firm as a business which only indirectly impact on the client's matter, such as registration fees, file opening fees, archival fees, use of research tools.

The disclosure requirements of the Legal Practitioners Act mean that all these types of charges must be explained to the client, otherwise they may not be payable by the client.

Unfortunately, some practitioners are still using the terms "quote" and "estimate" interchangeably, which has led to a number of complaints to the Society.

A quote is a fixed price and once agreed between practitioner and client cannot be deviated from without the client's consent. An estimate is an educated guess, based on the type of matter, complexity and any other relevant factor which may need to be updated regularly as the matter progresses. It should be noted that the Act imposes an ongoing obligation to keep the client regularly informed of costs and disbursements: s.118B(3).

Practitioners who use the terms indiscriminately may well be restricted to the "quote" rather than the "estimate".

The Legal Profession Act 2006 will not come in to effect until 1 April 2007. It will replace the Legal Practitioners Act 1979. However, the costs disclosure requirements will remain.

Further articles will focus on the new trust account requirements which will be much more onerous than the current provisions.

Regional law association speaks out on Fiji

LAWASIA, the Law Association for Asia and the Pacific, has strongly condemned the actions of the Fiji's military in seizing executive power from the elected government. It has described the actions taken by Commodore Bainimarama as "a gross assault on the rule of law, which is unacceptable in a democratic country".

LAWASIA President Mr Mah Weng Kwai of Malaysia said "We add our voice to others from both inside and outside Fiji in calling for an immediate return to rule of law through restoration of power to the elected government, for an immediate return of troops to barracks and for military leaders to use legal means to resolve their differences with the government."

In a recent statement, LAWASIA noted its support for the right of the Fiji people to be governed by a lawfully elected government as provided for under its constitution.

"As a regional organisation of lawyers, we endorse the views of our member organisation, the Fiji Law Society, that the constitution is supreme law in Fiji and any attempts to abrogate it cannot be supported," said Mr Mah.

LAWASIA represents the peak legal bodies of 24 countries of the Asia Pacific region.