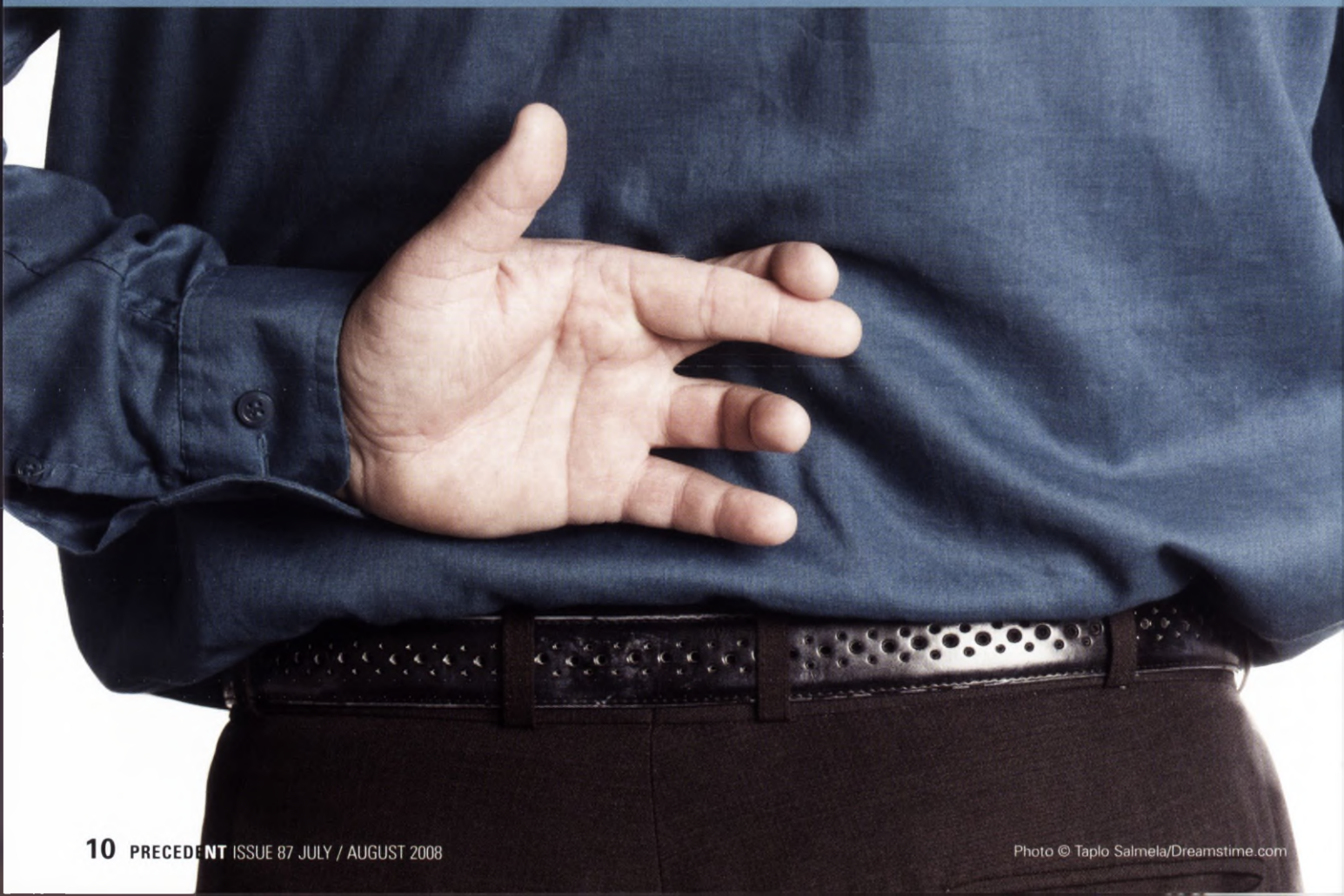
LEGAL COSTS and the DUTY of DISCLOSURE

By Maxine Evers

The retainer prescribes the relationship between legal practitioners and their clients. At the core of this contractual relationship is the lawyer's duty to disclose relevant information in order for the client to properly engage and instruct the lawyer. One of the central elements of this duty of disclosure is the obligation to fully and properly advise the client as to the lawyer's legal fees, including costs and disbursements, and third-party expenses. Properly discharging this obligation is fundamental to ethical practice.



If 2004 identified concern over the 'tyranny of the billable hour'[1] and 2007 saw disquiet with litigation expenses 'blotting the common law system',[2] then lawyers and their fees appear to be the flavour of 2008. Certainly, in NSW this year, media coverage of the legal profession and its fee structure has been ever-present. As recently as June, the media reported allegations of overcharging, by several clients in personal injury claims, against Keddies, a Sydney law firm, and two barristers briefed by the firm.

Despite the sensational headlines, the legal fraternity has been both reflective and proactive in the area of legal costs. Debate has ensued, and continues in relation to various aspects of lawyers' fees.

This article considers two recent NSW decisions concerning costs disclosure, a Queensland decision on the consequences of failing to disclose, and the statutory requirements of disclosure, including initial and ongoing disclosure and the costs associated with disclosure.

CURRENT FOCUS ON LEGAL COSTS

The courts have been active in instigating amendments to the costs structure and processes within their jurisdictions. In March of this year, the High Court, Federal Court, Family Court and Federal Magistrates Court announced the establishment of a Joint Costs Advisory Committee (JCAC). Its mandate is to investigate and recommend variations to each court's scales of costs.

In addition, Chapter 19 of the *Family Court Rules* has been amended by the *Family Law Amendment Rules* 2008 (Cth). This amendment, effective from 1 July 2008, provides that practitioner:client costs disputes relating to fresh applications, costs agreements and retainers will be determined by the relevant legal profession legislation in the state or territory where the lawyer practises.

In local court proceedings in NSW, where the claim is $20,000 or less, party:party costs cannot exceed 25 per cent of the amount claimed by the plaintiff where the defendant is successful, and 25 per cent of the judgment where the plaintiff is successful.[3]

The Victorian Law Reform Commission has also considered the issue of costs in civil litigation. In March this year, the Commission delivered the draft final report of its *Civil Justice Review* to the attorney-general. One of the main objectives of the review was to consider the factors that influence the cost of litigation in order to implement practices and procedures to reduce such costs[4].

The media has been vigilant in reporting allegations and findings of wrongful conduct by lawyers in relation to their obligations concerning legal costs. Headlines such as 'Charges, wounded bulls and other legal sophistry',[5] 'Test of will goes for broke'[6] and 'Top silk won't get his fees'[7] highlight the continuing challenge to the legal profession to defray these and similar negative messages. Members of the profession must, through their conduct, communicate the true position to the public; that is, that the vast majority of lawyers practise ethically and in their clients' interests.

> There is a continuing challenge to lawyers to defray the negative messages in the media about their obligations on legal costs.

One of the main principles of ethics underlying the current discussion is the lawyer's duty of disclosure. A key aspect of this duty includes disclosure of costs.

Elements of the duty of disclosure include making costs agreements, identifying billing methods, and ongoing communications with clients as to costs. Such elements lie at the heart of ethical legal practice: they are core components of ethical practice just as much as confidentiality, conflict of interests and legal professional privilege.

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STATUTORY DUTY OF DISCLOSURE

The main statutory requirements of the relevant legal profession legislation in the states and territories highlight the importance of full and proper disclosure of costs. The Law Council of Australia's National Legal Profession Reforms identified 'nationally consistent requirements for the disclosure of information on legal costs to clients'[8] as one of the principal areas of national reform. The National Legal Profession Model Bill 2003 states its purpose with respect to costs disclosure and assessment at Part 3.4.1 as:

'(a) to provide for law practices to make disclosures to clients regarding legal costs;
(b) to regulate the making of costs agreements in respect of legal services, including conditional costs agreements;
(c) to regulate the billing of costs for legal services; and
(d) to provide a mechanism for assessing legal costs and the setting aside of certain costs agreements.'

Costs disclosure is generally made either in a disclosure document and/or a costs agreement. Lawyers must make written disclosure of the costs to be paid by the client,[9] and may enter into a costs agreement.[10]

The legal profession legislation in the ACT, NSW, Northern Territory, Queensland, Tasmania and Victoria sets out:

(a) what information a lawyer must provide to a client; and
(b) how the client accepts the lawyer's offer of legal services in exchange for costs.

RECENT DECISIONS

Two recent NSW decisions highlight the consistent interpretation taken by the courts as to the ethical duties of lawyers with respect to fee disclosure.

In *Legal Services Commissioner v Galitsky*,[11] the Administrative Decisions Tribunal (ADT) dismissed an application by the Legal Services Commissioner (LSC) for a finding of professional misconduct against the respondent counsel. The LSC alleged that the respondent deliberately and grossly overcharged three clients in relation to fees rendered for appearing at the hearing of their cases. The matters related to injuries suffered by three members of the same family against the one defendant. The basis of the alleged overcharging was that the respondent rendered a bill for a full-day hearing to each plaintiff.

Several facts appeared to affect the decision.

First, the respondent had understood that the three matters were to be heard consecutively by an arbitrator. However, it was decided to hear the matters concurrently, with evidence in each matter being evidence in the others. Verdicts and judgments were entered in favour of each of the plaintiffs for different amounts of damages.

Secondly, the plaintiffs did not make a complaint against the respondent. The possible overcharging was referred to the LSC by the costs assessor, who conducted the party:party assessment. The referral was made under s208Q of the *Legal Profession Act* 1987 (NSW) (now s393 of the 2004 Act). The costs assessor was concerned that attendances involving the three clients were not apportioned, but were charged at the full disclosed rate.

Thirdly, the alleged overcharging came to the attention of the costs assessor through his examination of the solicitor:client bills of costs during his assessment of the party:party bills of costs. While acknowledging that he lacked sufficient information to determine whether the conduct was deliberate, the assessor – in accordance with his obligation under the legislation – referred the matter to the LSC.

In finding that there was no professional misconduct, the ADT noted that there had been no complaints by the clients, that the respondent had rendered fees in accordance with his costs agreement, and that there had been no solicitor:client assessment of costs.

Less than a week later, the NSW Supreme Court, in *Burbidge v Wolf*,[12] considered the issue of compliance with costs disclosure: in particular, the effect of failure to disclose. The facts of the case related to proceedings commenced by the plaintiff, a Queens Counsel, against a former client for outstanding fees. The defendant had instructed solicitors in a medical negligence claim. The solicitor briefed the plaintiff to appear at the hearing. The plaintiff made a form of disclosure to the solicitor; however, the court found that the disclosure did not fully conform with the requirements under the then *Legal Profession Act* 1987. The plaintiff did not disclose matters set out in s176 of the Act and regulation 45 of the *Legal Profession Regulation* 2002, including the basis of calculating costs, billing arrangements, any intended claim for interest and the client's rights to apply to have the costs assessed.

The defendant was successful in her negligence action. Her party:party costs were assessed and subsequently paid to her solicitor by the medical insurer. The party:party bill of costs included the plaintiff's fees. However, these fees were not paid in full.

The plaintiff's proceedings were based on the breach of trust arising from the defendant holding the monies paid by the insurer on trust for the plaintiff. The plaintiff submitted that, of the $370,000 paid by the insurer, a sum of $44,924.44 (his outstanding fees), was owing to him. The defendant's solicitor had paid $9,975 to the plaintiff, being

part of his fees; however, $34,949.44 remained outstanding. In the alternative, the plaintiff alleged that the defendant should pay the outstanding fees on restitutionary principles. In summary, the plaintiff claimed that his entitlement for fees fell outside the scope of the *Legal Profession Act* and that they were therefore still recoverable, despite the fact that he had failed to comply with the requirements of the Act.

The threshold question for the court was whether the proceedings were for the recovery of costs against the client. If the answer was yes, the subsequent question was whether the plaintiff had complied with the statutory requirements as to disclosure to the defendant. Justice Nicholas considered the letter of demand forwarded on behalf of the plaintiff, and the particulars set out in the amended statement of claim. He concluded that the demand and claim were for the recovery of costs for legal services, and was not a claim based on trust or restitutionary principles.

Because there was an instructing solicitor, the plaintiff did not disclose his fees, enter into a costs agreement or submit a bill of costs to the defendant. However, the statutory obligation to disclose costs for the information of the client remained, despite the fact that there was no contract between the plaintiff and defendant. The court found that, as the plaintiff had not made full and proper disclosure to his instructing solicitor, in accordance with s182(2) of the 1987 Act, he could not maintain proceedings for the recovery of costs until and unless the costs were assessed. Without a certificate of determination from a costs assessor, the defendant had no obligation to pay the plaintiff's fees.

Both of these cases received negative treatment by the media,[13] despite the fact that the decision in each was based on the statutory obligations of costs disclosure.

THE DUTY TO ADHERE TO DISCLOSURE

Beyond the duty to disclose, there is a further duty to adhere to the terms of disclosure made to a client. The Queensland Court of Appeal decision of *Legal Services Commissioner v Baker*[14] demonstrates the serious consequences of, first, failing to make full and proper disclosure and, secondly, altering the basis of disclosed costs to the benefit of the practitioner and the detriment of the client decisions.

Michael Baker had been practising as a solicitor for 30 years. The LSC was successful in establishing several charges arising from his retainer in respect of his representation of four clients. The Legal Practice Tribunal (LPT) found the solicitor guilty of professional misconduct and ordered that his name be removed from the roll of legal practitioners. The solicitor appealed these decisions.

The retainers offered by the practitioner were on the basis of 'no win no fee'; that is: 'no fee would be chargeable or charged until the litigation was brought to a successful conclusion'.[15] The allegations against the solicitor included:

(a) commencing proceedings against the client for the recovery of legal costs in a 'no win no fee' matter, where the client had been pressured to settle, and the solicitor's firm had retained the client's settlement monies as part payment of costs and then commenced proceedings for the balance of the fees;
(b) the solicitor saw the client once in July 1996, had next contacted her in October 1999 to advise that he was in a position of conflict and then, in November 2001, commenced proceedings for unpaid costs; and
(c) acting for a client in a medical negligence case, where previous solicitors had recommended the claim be discontinued due to lack of evidence and where the client was ultimately unsuccessful, on the basis that costs would be charged only on the successful outcome and subsequently rendering a bill, claiming that the client had not provided accurate information.

The court agreed with the LPT's finding that the solicitor was not entitled to charge costs and disbursements in each case.

Legal Services Commissioner v Baker is an example of a breach of ethical duties, not only in relation to disclosure, but also with regard to the conflict between the interests of client and the practitioner: namely, a practitioner preferring his own interest over those of his client. Justice McPherson agreed with the findings that the practitioner's treatment of his clients was 'shameful', in that he ignored or subordinated their interests to those of his firm or himself.[16]

DISCLOSURE AT NO COST TO CLIENT

A further significant consideration concerning disclosure and costs agreements is that the costs of compliance with the >>

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statutory costs disclosure requirements cannot be charged to the client. Nor can the costs associated with the revision of a costs estimate, a progress report in relation to costs or the preparation of a bill of costs be recovered from the client.

Unfortunately, the relevant legislative requirements are not uniform across Australia. NSW has the most comprehensive requirements. With respect to the costs of disclosing, the making of a costs agreement and the preparation of a bill of costs, s319 of the *Legal Profession Act* 2004 (NSW) provides:

'(1) Subject to the provisions of this Part, legal costs are recoverable:
  (a) in accordance with an applicable fixed costs provision, or
  (b) if paragraph (a) does not apply, under a costs agreement made in accordance with Division 5 or the corresponding provisions of a corresponding law, or
  (c) if neither paragraph (a) or (b) applies, according to the fair and reasonable value of the legal services provided.

(2) However, the following kinds of costs are not recoverable:
  (a) the costs associated with the preparation of a bill for a client,
  (b) the costs associated with the making of disclosures for the purposes of Division 3,
  (c) the costs associated with the making of a costs agreement with a client.'

NSW is the only jurisdiction that specifies that the costs associated with the making of disclosure and cost agreements are not recoverable. Some states and territories – for example, the ACT, the Northern Territory, Queensland and Victoria[17] – prohibit a law practice from charging to prepare an itemised bill.

In relation to the costs of progress reports as to legal fees, s318 of the NSW Act provides:

'(1) A law practice must give a client, on reasonable request:
  (a) a written report of the progress of the matter in which the law practice is retained, and
  (b) a written report of the legal costs incurred by the client to date, or since the last bill (if any), in the matter.

(2) A law practice may charge a client a reasonable amount for a report under subsection (1)(a) but must not charge a client for a report under subsection (1)(b).'

Similar legislation exists in the ACT, the Northern Territory, Queensland, Victoria and Tasmania.[18]

CONCLUSION

All states and territories allow a legal practitioner to enter into a costs agreement with a client. Currently, in all states, except for South Australia and Western Australia, practitioners are obliged to disclose costs to a client. (The South Australian Legal Profession Bill 2007 will also make disclosure mandatory in that state when it comes into force.)

Given the lack of uniform legislation with respect to charging a client for work relating to disclosure of costs, this area may require further reform. Such reform would be in keeping with the Law Council of Australia's model reforms; namely, to ensure that 'both clients and lawyers will have the same understanding of their rights and obligations regardless of where they live or practise in Australia'.[19]

In practice, time-based methods of billing may present challenges to lawyers in compliance with duties relating to the costs associated with disclosure. The obligation not to pass on to the client the costs associated with disclosure means careful and considered scrutiny of time records. If all work is recorded against a client's time ledger, then the task of writing that work off must be undertaken before providing the client with disclosure, including costs disclosure, costs agreements, progress reports, ongoing disclosure, fee increases and bills of costs. ■

Notes: **1** Chief Justice Spigelman, Opening of the Law Term Dinner 2004, Sydney, 2 February 2004. **2** Chief Justice Gleeson, *Some Legal Scenery*, Judicial Conference of Australia, Sydney, 5 October 2007. **3** Practice Note 2 of 2007, amended 1 June 2008 at http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf . **4** See http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Current+Projects/Civil+Justice/. **5** R Ackland, *Sydney Morning Herald*, 7 March 2008. **6** L Carty, *Sun Herald*, 27 January 2008. **7** Y Ross, The *Australian*, 15 February 2008. **8** See National Legal Profession Model Reforms at Law Council of Australia, http://www.lawcouncil.asn.au/natpractice/currentstatus.html. **9** See *Legal Profession Act* 2006 (ACT), s269; *Legal Profession Act* 2004 (NSW), s309; *Legal Profession Act* 2008 (NT), s303; *Legal Profession Act* 2007 (Qld), s308; *Legal Profession Act* 2007 (Tas), s291; *Legal Profession Act* 2004 (Vic), s3.4.9. The Legal Profession Bill 2007 (SA) sets out requirements for disclosure. **10** See *Legal Profession Act* 2006 (ACT), s282; *Legal Profession Act* 2004 (NSW), s322; *Legal Profession Act* 2008 (NT), s317; *Legal Profession Act* 2007 (Qld), s322; *Legal Practitioners Act* 1981 (SA), s42(6); *Legal Profession Act* 2007 (Tas), s306; *Legal Profession Act* 2004 (Vic), s3.4.26; *Legal Practice Act* (WA), s221. **11** [2008] NSWADT 48. **12** [2008] NSWSC 60. **13** See 5 and 7 above. **14** [2006] QCA 145. **15** [2006] QCA 145, para. 4. **16** [2006] QCA 145, para. 50. **17** *Legal Profession Act* 2006 (ACT), s292(8); *Legal Profession Act* 2008 (NT), s327; *Legal Profession Act* 2007 (Qld), s332(6); *Legal Profession Act* 2004 (Vic), s3.4.36(5). The *Legal Profession Bill* 2007 (SA) makes this provision in s279 (6). **18** *Legal Profession Act* 2006 (ACT), s278 (2); *Legal Profession Act* 2008 (NT), S312 (2); *Legal Profession Act* 2007 (Qld), s317(2); *Legal Profession Act* 2007 (Tas), s301(2); *Legal Profession Act* 2004 (Vic), s3.4.18(2). The *Legal Profession Bill* 2007 (SA) makes this provision in s264 (2). **19** Law Council of Australia, Features of the Model Reforms, http://www.lawcouncil.asn.au/natpractice/currentstatus.html.

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