REGULATING THE LEGAL PROFESSION
PRACTICAL GUIDE FOR LEGAL COSTS

The Legal Profession Act 2004 came into effect on 12 December 2005 and applies to all matters where first instructions were received on or after that date.

DISCLOSURE REQUIREMENTS

COST AGREEMENTS

As a preliminary matter, it is important to note two common misconceptions regarding disclosure statements and cost agreements. A disclosure statement can, but often does not, constitute a cost agreement. For a number of reasons, it is far preferable that the disclosure statement be quite separate to the cost agreement:

- The disclosure statement has to notify the client of his right to negotiate a cost agreement. Query how this provision sits with the disclosure statement itself constituting the agreement
- It is preferable that some matters required in the disclosure statement (e.g. cost estimates) are not contractually enforceable against the practitioner as part of the cost agreement
- The terms of a disclosure statement of itself are not generally sufficient to establish a proper basis on which to charge other than scale fees
- The client may have rights under the Trade Practices Act in relation to inaccurate matters in the disclosure statement, and it is preferable that these are not available to the client in relation to a dispute about the terms of the cost agreement.

The second misconception relates to the exceptions to disclosure requirements. The fact that the disclosure exception provisions apply does not exclude the requirement for a cost agreement, if the practitioner wishes to charge on any basis other than that provided by the Act (e.g. scale or PRO).

S 3.4.19 provides three bases on which legal costs are recoverable:

1. Pursuant to a cost agreement

2. Pursuant to the relevant scale or PRO

3. If neither 1 nor 2 applies, on the fair and reasonable value of the costs, taking into account such matters as disclosures made, skill, labour and responsibility, complexity, novelty and difficulty of the matter, and the quality of the work.

If a practitioner does not want to charge on scale or PRO, the practitioner MUST have a cost agreement with the client. This is relevant to both counsel and solicitors.

The importance of a valid costs agreement cannot be emphasised enough, particularly given the ability to tax costs pursuant to cost agreement, under the Legal Profession Act.

The Cost Disclosure requirements are similar to the previous section 86 and are embodied in Division 3 of Part 3.4 of the Act. The principle changes relate to the consequences of non disclosure and the exceptions to the disclosure requirements.

The concept of third party payers has been introduced. A third party payer is:

a) Not a client;

b) Under a legal obligation to pay all or part of the client's legal costs or pursuant to that obligation has paid all or part of the client's legal costs.

There are 2 types of third party payer:

1. Associated third party payer – here the obligation is owed to the law practice to pay the costs. Examples are insurer/insured, father paying his son's legal fees.

2. Non-associated third party payer – here the legal obligation is owed to the client or another person but not the law practice. Examples are under a mortgage or other commercial agreement, or where costs are payable pursuant to a court order.

It should be noted that law practices retaining another law practice are not third party payers.

To Whom must Disclosure be Made?

Disclosure must be made to a client who is not a sophisticated client, and to associated third party payers, if the client is a sophisticated client, even if the third party payer falls within the definition of sophisticated client.

For associated third party payers, the extent of the disclosure is only to the extent relevant to the costs they are liable to pay, for example, to the costs of a counterclaim, rather than a claim, in an insurer/insured situation.

Sophisticated Clients and Exemptions from Disclosure

A "sophisticated client" is one to whom disclosure does not have to be made. Disclosure also does not have to be made in the following instances:

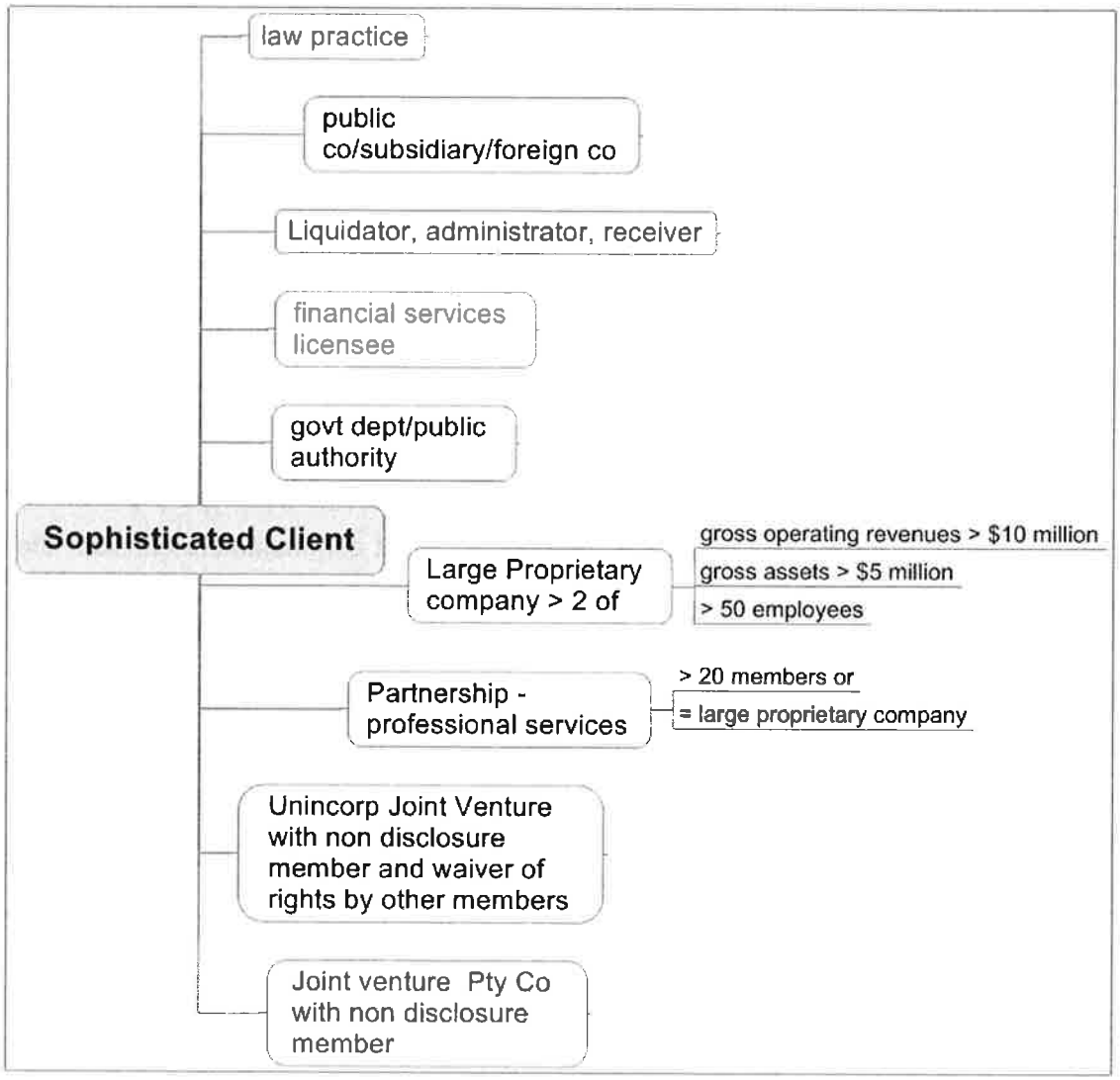
- where the costs (exclusive of GST and disbursements) will be less than $750,
- in matters the legal costs will be calculated or have been agreed as part of tender process,
- where no costs will be charged (e.g. pro bono matters).

Waiver of Further Disclosure

Where the client has received one or more disclosure statements in the previous 12 months, waiver of further disclosure can be sought. Most commentators consider the new provisions to apply by matter, not by client, so a separate waiver would need to be sought on each matter. A significant change from the previous Act is that a positive decision must be made by a principal of a law practice that no further disclosure is required, given the nature of the client and of the matter. Such decision must be made on reasonable grounds and documented on the file. If no reasonable grounds can be established, the principal may be found guilty of unsatisfactory professional conduct or misconduct. Further, the non-disclosure consequences would apply.

Sophisticated Clients

Set out below is a chart detailing the current classes of "sophisticated client".



Matters relevant to sophisticated clients

No disclosure is required if the client is a sophisticated client. However, if a practitioner proposed to charge other than on scale, a cost agreement is required.

A sophisticated client may contract out of the assessment provisions of the Act (i.e. agree that the costs are not subject to assessment by the Taxing Master.

Progress reports on status of the matter, or costs do not have to be given to sophisticated clients.

Bills sent to sophisticated clients do not have to contain a notice of the clients rights, and can be sent electronically, if the client has so requested.

A conditional agreement with a sophisticated client does not have to be in writing, or signed by the client, and there is no requirement to give advice of the right to independent advice. Nor is there any cooling off period.

If an uplift fee is proposed, there is no requirement to disclose the uplift as a percentage of the usual fee. However, the Act still provides that a conditional cost agreement must specify the amount of the uplift.

It should be noted that a law practitioner must still disclose to a sophisticated client prior to settlement of a litigious matter.

How is disclosure made?

Disclosure must be made in writing, in plain English and before, or as soon as practicable after, retainer. If a client is more familiar with a language other than English, the disclosure may be in another language. If the practitioner is aware the client is unable to read, the information must be conveyed orally, in addition to being provided in writing.

Matters to be Disclosed

In summary the matters to be disclosed are:

- Basis of calculation of costs and whether/which scale applies
- Rights
    - To negotiate a costs agreement
    - To request an itemised bill - within 30 days of receipt of lump sum bill
    - To receive a bill
    - To be notified of substantial changes to matters disclosed.
- Estimate of Legal Costs
    - Total costs OR

- Range of estimates of total costs and explanation of major variables.

The reference to "costs" includes disbursements.

- Litigious Matters
  - The range of recoverable party/party costs if successful
  - The range of payable party/party costs if unsuccessful
  - Warning that party/party costs award will only result in partial costs recovery of costs.

  If the litigation is in a jurisdiction where the general rule is that each party bears its own costs, this should be disclosed.
- Billing Intervals
- Applicable Interest Rate on overdue legal costs
- Right to progress reports
- Engagement of another Law Practice

  Where another law practice is engaged (I.e. counsel or agent), the first law practice (e.g. the solicitor), must advise the client of the following relating to that second law practice -
  - Basis of calculation of costs and whether/which scale applies
  - Estimate of likely costs either the total costs or a range of costs and explanation of the variable re same
  - Billing Intervals.
  - The advice must be given in writing and before engagement of the second law practice. In circumstances of urgency, oral disclosure of counsel/agent's fees may be made, but must be confirmed in writing as soon as practicable.
  - The first law practice is not affected by the failure of retained law practice to comply with the disclosures provisions. Obviously the consequences of failure to disclosure still impact on latter.

- Applicable Law of Jurisdiction
- Contact For Costs Enquiries
- Right to sign agreement under Corresponding Law

  This provision is relevant to a matter which may have substantial connection to another jurisdiction. The provisions of ss 3.4.3 to 3.4.8 and 3.4.9(1)(m) will need to be carefully reviewed in any matter where the client provides instructions to the Victorian office of a practitioner, regarding a matter which may have substantial connection with another jurisdiction. In that case, there must be disclosure of the client's rights to have the relevant laws of the other jurisdiction relating to cost review and disclosure apply. The disclosure provisions will have to be adapted to the particular matter, having regard to the relevant corresponding laws in the other jurisdiction relating to cost review and disclosure.

  Practitioners should also be aware these disclosure provisions may also apply where changes in circumstances in the matter result in changes in either the substantive jurisdiction, or the place where the legal services primarily will be provided.

  Practitioners with national practices will need to review these provisions very carefully to ensure proper disclosure is made.

- Disputes Avenues Available
  - Costs Review by Taxing Master
  - Setting aside cost agreement by VCAT
  - Complaint to Legal Commissioner in relation to costs < $25,000
  - Time limits applicable to taking action.
- The rate of interest and whether that rate is a specific rate of interest or a benchmark rate of interest. (see below for a discussion on restrictions regarding interest which can be charged)

Disclosure - Conditional Cost Agreements

There are further disclosure requirements where a conditional cost agreement is entered into.

- The client must be warned that disbursements may be payable by the client to the practitioner irrespective of the outcome of the case (s 3.4.9(2)(b)).

Where an uplift fee is to be charged, the practitioner must make the following disclosure before the cost agreement is entered into (s 3.4.14):

- The law practice's legal cost - (query what this means),
- The uplift fee on the basis of calculation of the uplift fee
- The reasons why the uplift fee is warranted.

Settlement of Litigious Matters

Prior to execution of a negotiated settlement, the law practice must disclose:

- Reasonable estimate of costs payable to the law firm and costs payable to another party
- Reasonable estimate of costs to be received from another party (i.e. party/party costs recoverable).

A law practice engaged by another law practice (e.g. counsel) does not have to make this disclosure if the other law practice makes the disclosure to the client. This raises the interesting possibility of counsel having to ensure that the solicitor has made the disclosure, even though counsel is not aware any settlement is being contemplated.

Ongoing Obligation (s 3.4.16)

There is an ongoing obligation to advise the client as soon as the practitioner becomes aware of a substantial change to a matter disclosed. The most common matters likely to need updating will be estimates, hourly rates charged, and changes to counsel fees. Most computerised accounting and many practice management programs have the capacity for an operator to set billing limits, which trigger warnings once that limit is reached. This trigger should be set below the estimate of costs given to the client, and

when such a warning is received, the operator must then review the estimate of costs, and of cost recovery, and advise the client accordingly (in writing).

Failure to Disclose or Update Disclosure (S 3.4.17)

The consequences of failure to disclose, or to advise the client of a substantial change to a matter disclosed are significant and the likely major impact of the new Act on practitioners.

1. The client or associated third party payer does not have to pay costs until they are reviewed by the Taxing Master.
2. The law practitioner cannot commence recovery proceedings against the client or associated third party payers unless costs have been reviewed.
3. The client or associated third party payer may apply to set aside a cost agreement
4. On a review of costs the Taxing Master may reduce the costs payable by an amount proportionate to the seriousness to the failure to disclose.
5. Failure to disclose can constitute professional misconduct or unsatisfactory professional conduct.
6. Failure to disclose is a matter to be taken into account by the Court on an application to set aside a cost agreement (s 3.4.44(b))

If disclosure has been made to one of the client or associated third party payer but not the other, the party to whom disclosure has been made can be sued and is liable to pay the costs without their review. This could lead to the scenario where the quantum of costs is being determined in two different courts. For example, if disclosure has been made to the client but not the associated third party the law practice could sue the client and questions of quantum of costs would be determined by the court in which the debt recovery proceedings are pursued. On the other hand, the third party payer could review the costs and the Taxing Master would determine the proper quantum. As we shall see, the client is likely to be joined to such a review in any event.

There is also the possibility of one party alone applying to set aside a cost agreement if they had failure to disclose to them. Query if a cost agreement which has been set

aside against one party would still be binding on the other party to whom disclosure was properly made.

The Victorian experience has been that very few practitioners are fully complying with the new disclosure requirements. The areas which are most likely to cause difficulty are:

- Failure to provide updates of estimates (or provide realistic estimates in the first place)
- Failure to provide estimates where another law practice is being engaged (i.e. counsel or agent).
- Failure to disclose prior to a negotiated settlement

Experience indicates that failure to update estimates is the principle area of client complaint. The new Act provides automatic relief to a client and the consequences of exceeding estimates are likely to have a significant effect on fee recovery.

In large and complex matters, consider seeking expert advice regarding proper estimates. Estimating legal costs, like any cost estimating such as quantity surveying, is an art. Used properly, good estimates can enhance the solicitor-client relationship, form the basis for budgeting and matter management, and the use of profitable alternative billing strategies.

Interest

A law firm is now prohibited from charging in excess of the "benchmark" rate of interest as a result of the Legal Profession Regulations 2007 made pursuant to the Legal Profession Act.

The benchmark rate of interest is the Cash Rate Target (set by the Reserve Bank) increased by 2%.

Interest is not chargeable unless the bill contains a statement that interest is payable if costs are not paid and also discloses the rate of interest. Query how practitioners will deal with this provision and whether a reference to the "Cash Rate Target increased by 2%" rather than a specific rate of interest will be allowable. Given that the Cash Rate Target could change on a regular basis, updating a specific interest rate in cost agreements, disclosure statements and notices on bills would be onerous.

A law practice may charge interest at a rate not exceeding the benchmark rate from 30 days after payment is demanded until costs have been paid or in accordance with a provision of the cost agreement.

DEALING WITH COUNSEL –

MEETING THE DISCLOSURE REQUIREMENTS

As already noted, there is an obligation to advise the client of the details of counsel's proposed fees, prior to engaging counsel. In circumstances of urgency, such disclosure can be made as soon as practicable. The disclosure must be in writing.

Further, the solicitor is obliged to keep the client advised of any changes to the matters disclosed by counsel, such as changes to the estimate or to the rate to be charged. Each time new counsel is engaged, or the scope of the retainer of counsel is varied, a new estimate of fees is required. Your file management procedures will need to be reviewed to ensure this disclosure requirement is met, and operators will need to be educated to ensure procedures are followed.

In large litigation it would be worthwhile considering an arrangement whereby the client has a cost agreement directly with counsel, which has the result of passing the disclosure obligations to counsel personally. It may also be appropriate to seek a waiver from the client from further disclosure, such waiver operating for 12 months.

When counsel is engaged, it is sensible to deliver a formal brief marked with both the agreed fee/basis of charge, and a note of the estimate given. Billing procedures may need to be adapted to include a review of the level of counsel/agency fees incurred vis-a-vis the estimate given. Certainly, the fees should not be passed onto the client if they exceed the estimate. In such a case, if appropriate, the client should be advised of the increased estimate, asked to agree to the increased fee before it is billed. Alternately, if no such agreement is forthcoming from the client, it will be necessary to review the situation with counsel.

It is also wise to remind to counsel, either on the backsheet or in the memorandum of instructions, of his obligation to keep you advised of any matters previously disclosed, in order that you, as solicitor, can comply with your disclosure obligations.

The Act provides that failure to comply with disclosure obligations by the second law practitioner will not result in the first practitioner failing to properly disclose. However, the second practitioner is still subject to the non disclosure consequences.

COST AGREEMENTS

Requirements of a cost agreement (s 3.4.26)

- Must be in writing or evidenced in writing
- May consist of a written offer which is capable of acceptance by conduct If it is a written offer it must also state:
    - that it is an offer
    - that it can be accepted in writing or by conduct
    - What type of conduct constitutes acceptance (typically this will be continuing to provide instructions, and/or payment of accounts rendered).

  It is important to note that a conditional cost agreement must be accepted in writing.
- Cannot exclude the assessment provisions of the Act unless the client is a sophisticated client
- May be between:
    - a law practice and a client/associated third parties
    - a client/associated third parties and a second law practice
    - A law practice and another law practice.

A cost agreement is enforceable like any other contract (s 3.4.30(1)). Cost agreements which contravene Division 5 are void, the consequence being that costs are only recoverable under scale, PRO or on the fair and reasonable basis and the practitioner must repay the excess of any fees paid.

Contingency fees are prohibited, and a practice entering into a contingency agreement is prevented from recovering any costs for services rendered and must repay any monies received for costs (s 3.4.31(5)).

Conditional Cost Agreements

There are further specific provisions regarding conditional cost agreements (s 3.4.27):

- Cannot relate to Criminal or Family Law matters
- Must specify what constitutes "success"
- May provide that disbursements are payable in any event
- Must be in clear plain language
- Must be signed by the client (This provision is not applicable to conditional agreements between law practices or sophisticated clients)
- Must advise the client of his right to seek independent legal advice before signing the agreement (This provision is not applicable to conditional agreements between law practices or sophisticated clients)
- Must have a cooling-off period of at least 5 clear business days. Termination of the agreement by the client within this time must be in writing. (This provision is not applicable to conditional agreements between law practices or sophisticated clients).

Additionally, as previously noted, there are particular disclosure requirements where a conditional cost agreement is entered into and where uplift fees apply.

Uplift Fees

A conditional cost agreement may provide for uplift fees.

The further specific requirements relating to uplift fees are:

- The basis of calculation of the proposed uplift must be identified separately
- In litigious matters, the percentage must not exceed 25%. By implication, there is no maximum uplift in non-litigious matters, which gives scope for alternative billing arrangements in commercial transactions

- The law practice must have a reasonable belief in the likely successful outcome of the matter.
- The cost agreement must contain an estimate of the uplift fee or a range of estimates and explanation of the variables. Given that this estimate is a term of the agreement, it would be wise to vary the agreement in writing if the estimate changes.

The specific disclosure regarding uplift fees have already been noted.

Basis of calculation of fees

Fees cannot be calculated by reference to the amount of any award or settlement or the value of any property recovered in proceedings. However, there is no prohibition on fees being calculated by reference to the value of property or any transaction. It would now be possible to have a fee calculated by reference to the value of land in a commercial transaction or the value of shares in a float. Some possible examples in litigious matter for the calculations of fees would be a variable depending of when the matter settles, a variable depending on the level of cost that have been incurred or a variable depending on the percentage of which the final costs come in below the estimates given.

Common mistakes in cost agreements

Remember – a cost agreement is simply a contract and therefore normal contractual principles regarding certainty etc apply.

Common mistakes are:

- Setting out only one hourly rate for all operators
- Having a range of hourly rates for a class of operator
- Setting out the hourly rate to be charged by partners, associates and other solicitors and to omit any hourly rates for work to be undertaken by clerks or paralegals.
- Neglecting to deal with how hourly rate is to be applied i.e. provision for charging in 6 minute units
- Beware the ten minute unit

- Neglecting to deal with how photocopies, facsimiles, telephone calls, searches etc are to be charged.
- Neglecting to make provision for engagement of counsel and other external personnel (expert witnesses etc)
- Failing to make provision for an increase in the rates – this can be particularly problematic if a matter runs over a number of years.
- If there is provision for an increase in rates, failure to comply with the notice provisions of the agreement when there actually is such an increase.
- Failing to define "success" comprehensively in a conditional agreement. What if the client refused to accept your recommendation regarding an offer of compromise? What about counterclaim, third party proceedings etc?

APPLICATIONS TO SET ASIDE COST AGREEMENTS

Application to Set Aside an Agreement

An application to set aside a cost agreement can be made by a client or an associated third party payer and is made to the VCAT. A cost agreement can be set aside if it is not fair or reasonable.

"Fairness" relates to the circumstances in which an agreement is entered into. "Reasonableness" refers to the terms of the agreement itself. The application to set aside can only be made by the client, which is inconsistent with the possibility of an agreement being made between two law practices. Whilst it is accepted that a law practice entering into an agreement with a second law practice is far more knowledgeable and capable of negotiating a proper agreement than a client, there is no capacity to set aside the agreement even if there was fraud or misrepresentation on the part of the second law practice.

In considering whether an agreement is fair, just or reasonable, the Court may take into account such matters as fraud or misrepresentation by the law practice at the time the agreement was entered into, a finding of unsatisfactory professional conduct or misconduct, and failure to make proper disclosure.

1. The circumstance of the parties before, when and after the agreement has been made. It will therefore be important that the practitioner document carefully any advice given to the client at the time the cost agreement was being negotiated and entered into.

2. Whether and how the agreement addresses how the affect on costs of matters and change to circumstances that may foreseeably arise and affect the extent and nature of legal services provide under the agreement. This potentially allows an investigation of all actions taken by the practitioner after the agreement is entered into and appears to place some onus on the practitioner to suggest changes to the cost agreement if the client's personal circumstances change. This is a particularly onerous provision.

3. Whether and how billing under the agreement addresses changed circumstances affecting the extent and nature of legal services provided under the agreement. Again, this places the practitioner under an onus to suggest changes to the cost agreement if the circumstances of the client change during the term of the cost agreement.

Application to set aside is made to VCAT where Judge Bowman is in charge of the new Legal Practice List. In considering whether an agreement is fair, just or reasonable, the Tribunal may take into account such matters as fraud or misrepresentation by the law practice at the time the agreement was entered into, a finding of unsatisfactory professional conduct or misconduct, and failure to make proper disclosure.

If an agreement is set aside, the Tribunal may make an order regarding payment of the legal costs, applying the relevant scale or PRO, or otherwise determining the fair and reasonable legal costs, in the latter instance, taking various matters
into account.

BILLING AND RECOVERY PROCEDURES

Bills of Cost

The requirements in relation to bills are:

1. May be lump sum or itemised
2. Must be signed by –
    a. a sole practitioner or another practitioner authorised by him
    b. an approved clerk or an authorised employee of same
    c. a Firm – generally, a partner who is an Australian legal practitioner (Note: there are particular provisions relating to firms consisting of both Australian legal practitioners and Australian-registered foreign lawyers)
    d. an incorporated legal practice – a legal practitioner director, or an authorised practitioner associate where there is only one practitioner/director
    e. a multi-disciplinary partnership – a legal practitioner partner, or an authorised practitioner associate where there is only one practitioner/partner
    f. a community legal centre – a supervising legal practitioner

    It will be sufficient completion of the signature provision if the covering letter accompanying the bills is signed by the appropriate person;
3. Must include or be accompanied by a statement setting out the avenues of dispute open to the client and the time limits applying. The notice of rights does not have to be included in a bill to a sophisticated client. An authorised form of notice is available on the Law Society website.
4. A bill can now be sent electronically to a sophisticated client if they so request

It is important to identify the party(ies) with whom the solicitor has contracted. It is surprising how often the retainer is with someone other than the party for whom the services are being provided. The bill must be directed to, and recovery proceeding brought against, the party who retains the solicitor.

Requests for Itemised Bills

A request for an itemized bill can be made by any person entitled to apply for a review of the bill- in other words third party payers, both associated and not associated, in addition to clients. If a sophisticated client has contracted out of the review provisions, this provision also prevents them from requesting an itemized bill;

There is no time limit on a request – which is of concern as it delivery of an itemised bill will trigger a further period of 12 months in which a client/associated third party payer can make application for an assessment of costs. Clearly, this could be used by a client in debt proceedings.

An itemized bill must be provided within 21 days of the request. This is an impractical provision; with large matter where it can take some months to prepare fully itemized bills. Failure to deliver an itemized bill in 21 days is a breach of the Act and therefore could constitute professional misconduct or unsatisfactory professional conduct.

A practitioner cannot charge for preparation of an itemized bill. In other words, in a mortgager/mortgagee situation the practitioner cannot charge for preparation of the bill.

RECOVERY TIME LIMITS

Proceedings cannot be commenced until at least 35 days after a bill has been served, save that application can be made for leave to commence proceedings sooner, if the bill has been served and the client is about the leave the jurisdiction.

If a person requests an itemised bill within 30 days after receiving a lump sum bill, recovery proceedings cannot commence until at least 35 days after service of the itemised bill (s 3.4.36).

If a notice is given of a complaint lodged with the Legal Services Commissioner, or an application for review by the Taxing Master is made, proceedings cannot be commenced (ss 3.4.41 and 4.3.2).

Review of Bill by Taxing Master

Rather than commencing recovery proceedings, a law practice can apply for a review of its costs by the Taxing Master. Such application cannot be made until at least 65 days after the bill is given, costs are paid without a bill being given, a request for payment is made or an application was made for review by another person. (It is difficult to envisage when an application would be made after an application has already been made by another person).

If it is obvious that a client will dispute the quantum of costs claimed, it may be more cost effective and timely to simply proceed directly to a review of costs, rather than commence proceedings and risk having the bill referred for review in any event. The risk of following the review process is that the law practice will generally pay the costs of review if the costs are reduced by 15% or more.

If the law practice has not complied with the disclosure requirements, the costs are not payable until the bill has been reviewed, in any event. In this instance, it would again be wise for a practitioner to seek review of its own costs, if such application has not already been made by the client.

A law practice can apply for a review by the Taxing Master of the costs of another law practice (i.e. fees of counsel/agent) within 60 days after the bill is given or, where costs are paid without a bill being given, a request for payment is made. However, such application cannot be made if there is a costs agreement between the client and the counsel/agent. In this case, the application would have to be made by the client personally.

If costs have been reviewed as the result of an application by a client, recovery proceedings will not be required, as the order taxing the costs is enforceable as an order of the court.

Recovery of Costs after Application to Set Aside Cost Agreement

If the Tribunal orders that a cost agreement is set aside, it may make orders regarding payment of the costs.

If such an order is not made, or if the cost agreement is not set aside, recovery proceedings can be commenced as soon as the application to set aside the cost agreement is finalized.

Recovery of Costs After Complaint to Legal Services Commissioner

Recovery proceedings must not be commenced after notice is received of a civil complaint (s 4.3.2). If proceedings are commenced after notice is received, such proceedings must be stayed (s 4.3.2(3)).

If the dispute is either resolved by the Commissioner or determined by the Tribunal no recovery proceedings will be required.

Otherwise, recovery proceedings cannot be commenced until the complaint is determined or dismissed and any appeal rights are exhausted (s 4.3.2).

However, an interesting position arises if the dispute is not resolved by the Commissioner, and a party fails to make application to the Tribunal under s 4.3.15. It is arguable whether failure to make application then results in the dispute being "determined or dismissed".

COST REVIEW

Division 7 of Part 3.4 of the Act deals with review of costs by the Taxing Master.

Who can Apply?

A "client" or third party payer, (whether associated or non-associated), may apply for a review of costs, but the definition of "client" in Division 7 is more extensive than the general definition of "client" in Part 3.4 and extends to the following:

- A person who has been given the bill by the law practice, or who has paid costs or is liable to pay the costs
- An executor, administrator or assignee, or the trustee of the estate of a person referred to above

Further, a law practice can apply for a review of the costs of another law practice engaged by it. However, such application cannot be made if there is a costs agreement between the client and the counsel/agent. In this case, the application would have to be made by the client personally.

An application can be made where or not the costs have been paid, and where paid an application can be made even if no bill has been delivered. This last provision is particularly relevant to non associated third party payers where it is not uncommon for cost to be deducted at settlement of a commercial transaction without a bill being delivered.

Timing of Application by clients

A party applying for review must make the application within 12 months after either the bill has been given, or the request was made or the costs were paid, where no bill or request was received. It is possible for an unsophisticated client or unsophisticated third party payer to seek leave out of time, which application will be determined, having regards to the delay, reasons for delay, and whether it is just and fair to grant the application.

Applications involving third party payers

When an application for a review involves cost payable by both client and third party payer, and the application is made by only one party, the other party may participate in

the review and is taken to be bound by review. The law practice must participate in the review and is again bound by the review.

This is particularly interesting in relation to non associated third party payers where the client will be bound by the review although there is a specific provision that a review of cost payable by a non associated third party payer does not have any affect on the solicitor-own client costs.

An application for review must be served on all relevant persons and any persons whom that Taxing Master thinks are appropriate to notify. Any person served with an application for review may participate and will be bound by that relive if the Taxing Master so determines.

An application is made to the Court of appropriate jurisdiction depending on the size of the bill.

Criteria for Review

The Taxing Master must consider whether is was reasonable to carry out the work to which the legal costs relate, whether the work was carried out in a reasonable manner, and the fairness and reasonableness of the amount charged - except to the extent that the Taxing Master is reviewing cost by reference to a cost agreement or a scale of costs. This last provision gives greater scope to utilize alternative billing practices whereby, if a fixed fee is agreed to, the Taxing Master is not to look behind that agreement and at the reasonableness of the fee.

The Taxing Master must consider any or all of the following matters:

- Compliance with the Act ;
- Any disclosures made by the law practice – in particular he will have regard to disclosure of estimate and wherever these are accurate;
- Any relevant advertisement as to cost and skills of the law practice- that would be particularly relevant in relation to advertisements such as fixed fees for conveyancing;
- Skill labour and responsibility displayed by the practitioner;
- The retainer and whether the work is within the scope of the retainer;

- The complexity, novelty or difficulty of the matter;
- The quality of the work done;
- The place and circumstances where the legal services were provided;
- The time in which the work was required to be done;
- Any other relevant matter

The ability to consider the practitioner's compliance with the disclosure requirements, and the actual disclosure made means the Taxing Master will become aware of any estimates of costs given to the client, and a significant variance from such estimate could well be grounds to reduce costs allowed.

Further, the general requirement to consider the fairness and reasonableness of the amount of legal costs in relation to the work, introduces the concept of "proportionality" to costs. In other words, a practitioner will need to be careful to ensure that the costs incurred reflect the quantum of any claim, the nature of the client and the general nature of the matter. It will be important to obtain specific written instructions, if a client instructs the practitioner to undertaken work which is not reasonable in the circumstances of the matter, and such written instructions should acknowledge that the practitioner has warned the client that the costs to be incurred are not reasonable and/or necessary.

In conducting a review of costs made by a non associated third party the Taxing Master must consider whether it was fair and reasonable for the third party to be charged the amount claimed. What will be particularly relevant here will be the disclosures made to the third party about the basis on which the cost were to be calculated and any estimates of costs. It will be necessary in commercial documentation to carefully consider the costs clause and any disclosures that are to be made

The Taxing Master must review the amount of any cost that is subject to a cost agreement by reference to the provision of the cost agreement. However there is a qualification that he is not to do so if he is satisfied the agreement does not comply with the applicable disclosure requirements, or the law practice is precluded under the cost agreements provisions of the Act from recovering the amount of costs, or the parties otherwise agree.

However, there is also a provision that the Taxing Master is not required to initiate an examination of these matters. Clearly he is able to do so and must do so on the application of a party to the review. It is clear that this now gives some scope on the review to an objecting party to raise issues regarding the propriety of a cost agreement as part of the review. This raises the difficulty that the Taxing Master does not have the power to set aside a cost agreement as this is within the jurisdiction of VCAT.

Costs of a Review

The general rule regarding costs of an application for review is:

- If the costs are reduced by 15% or more, the practitioner will pay the costs of the review
- If Taxing Master finds the practitioner has not complied with the disclosure requirements, the practitioner will pay the costs of the review

Otherwise, the other party (generally the client) will pay the costs of the review.

However, the Taxing Master has general discretion in relation to the costs of an assessment and in this regard it will be important to consider an offer of compromise if there is a danger of the general rule applying.

Disciplinary Matters

If the legal costs are reduced by 15% or more, the Taxing Master may refer the matter to the Legal Services Commissioner for investigation of disciplinary action. If the Taxing Master considers the costs to be grossly excessive, or there are matters which may amount to professional misconduct he must refer the matter.