

THE COSTS OF LEGAL SERVICES

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I COSTS UNDER THE *LEGAL PROFESSION ACT 1987* (NSW)

The *Legal Profession Act 1987* (NSW) ('Act'), which repealed the *Legal Practitioners Act 1898* (NSW), regulates the admission and practice of barristers and solicitors in NSW.

Prior to the commencement of the Act, unless the practitioner and the client contracted otherwise, costs were in the main regulated by scale. A scale was formerly provided for all aspects of conveyancing work and (to this day) for work carried out for a client in obtaining a grant of probate of a Will or Letters of Administration of the estate of a deceased person. The Supreme Court of NSW formerly provided a scale of costs in respect of work carried out in that Court. So too did the District Court and the State Compensation Court. Insofar as legal services provided to a client were not covered by a scale, they were liable to be billed in accordance with sch 2 to the *Conveyancing Act 1919* (NSW). Much that was contained in sch 2 was akin to the existing Supreme Court scale.

Part 11 of the Act (ss 173–208V) deals with legal fees and other costs. Under the Act, a bill of costs means a bill of costs for providing legal services and includes a Memorandum of Fees. Costs include barristers' and solicitors' fees as well as other items that may be charged by barristers and solicitors such as expenses and disbursements. Disbursements in the true sense means money paid on behalf of the client to a third party.¹ Disbursements properly called have to be distinguished from general office overheads that cannot be identified as being paid or outlaid on behalf of a particular client.²

If outlays include incidental expenses incurred by the practitioner which contain a profit element (for example, photocopying charges) they cannot be correctly classified as a disbursement.

Division 2 of Part 11 of the Act (ss 175–83) deals with disclosure of matters relating to costs. Given that with one or two exceptions, scales were abolished in respect to legal services, disclosure of matters relating to costs was considered

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1 *Browne v Barber* (1913) 2 KB 515, 553, 573.

2 *Rutter v Sheridan* (1958) 2 AER 13.

mandatory. It is perhaps worthy of comment that prior to 1 July 1994 the hourly rate for any legal practitioner, regardless of years admitted and experience, as prescribed both by the Supreme Court scale and sch 2, was \$140. That amount was liable to be increased by allowance for care, skill and consideration, which varied between 3.5 per cent and 15 per cent.³

From the standpoint of the client, the legal services provided should:

- solve the client's problems;
- be delivered in timely fashion;
- be provided for a fee that reflects true value to the client;
- recognise that the justification for the existence of lawyers is to serve clients and to solve their problems; and
- ensure a high level of communication as between lawyer and client.

In dealing with practitioner/client costs, ss 175 and 177 of the Act oblige practitioners to disclose to clients the basis for calculation of costs and the estimated amount of those costs respectively.

Section 175 of the Act requires a legal practitioner to disclose to a client, *inter alia*:⁴

- the amount of the costs, if known;
- if the amount of the costs is not known, the basis of calculating the costs;
- the billing arrangements;
- the client's rights under the Act in relation to a review of costs;
- the client's rights under the Act to receive a bill of costs; and
- the costs of any other barrister or solicitor whose services are retained on behalf of the client.

Section 177 of the Act requires that a barrister or solicitor disclose to a client:⁵

- an estimate of the likely amount of the costs of legal services to be provided; and
- any significant increase in that estimate.

Further, when providing to a client a bill of costs, cl 45 of the *Legal Profession Regulation 2002* (NSW) prescribes particulars which are to be included in the bill of costs.

If the total amount of costs charged is the amount calculated on the basis set out in a costs agreement, or as disclosed to the client, the bill of costs is to include:⁶

- a description of the legal service provided;
- the total amount of the costs charged;
- any intended claim for interest under s 190 of the Act if the costs are not paid (including the rate of interest);
- a statement:

3 *Southern Cross Exploration NL v Fire and All Risks Insurance Co Ltd* (Unreported, Supreme Court of New South Wales, Wadell J, 14 April 1986).

4 *Legal Profession Act 1987* (NSW) s 175(2).

5 *Legal Profession Act 1987* (NSW) ss 177(1), (2).

6 *Legal Profession Regulation 2002* (NSW) cl 45.

- in a case where the bill of costs is given to a client – that the client may apply to have the costs assessed under Part 11 of the Act, but that if the costs have been wholly or partly paid, the application must be made within 12 months after the client is given the bill of costs; or
- in a case where the bill of costs is given by a barrister or solicitor who was retained by another barrister or solicitor to act on behalf of a client and the bill of costs is given to that other barrister or solicitor – that the barrister or solicitor who is given the bill of costs may apply to have the costs assessed under Part 11 of the Act within 30 days after the bill of costs is given; and
- a reference to the relevant costs agreement or disclosure document.

If the practitioner has neither made disclosure nor entered into a costs agreement with the client as required by the Act, the bill of costs must also include in addition:

- the work done in providing the legal service;
- the period over which that work was done;
- the identity of the persons who did that work (including the position of the persons, for example, partner, associate);
- the basis on which the costs have been calculated and charged (whether on a lump sum basis, an hourly rate basis, an item of work basis, a part of proceedings basis or other basis); and
- the facts relied on to justify the costs charged by reference to the above, the practitioner's skill, labour and responsibility, the complexity, novelty or difficulty of the matter, the quality of the work done and any other relevant matter.

It would seem to follow that if the practitioner has complied with ss 175, 177 and cl 45, then in an ideal world the client should be able to satisfy him or herself with the fairness and reasonableness of the practitioner's fees and charges.

It is also probably fair to say that most of the provisions of the Act which apply to disclosure and bills of costs in NSW, have presently been adopted in most part by the proposed Legal Profession Model Laws Project which is to be applied nationally.

II CONSUMER COMPLAINTS ABOUT LEGAL COSTS

It is fair to say that there are obviously occasions when the client thinks the practitioner has overcharged. There are three avenues from which instances of overcharging can be reliably sourced. First, in NSW a complaint with respect to a legal practitioner can be lodged with the Office of the Legal Services Commissioner ('OLSC'). Second, such a complaint can be lodged with the Law Society of NSW. Third, the client can lodge with the Supreme Court of NSW an application for assessment of the practitioner's costs.

It is respectfully submitted that on available information from those three sources, overcharging is very much the exception rather than the rule. The

Annual Report of the OLSC for the year ending 30 June 2003 reveals that in that year the OLSC received 2768 written complaints: 20.3 per cent were about costs related issues; 10 per cent related to overcharging; 6.2 per cent related to general costs' complaints/queries, and 4.1 per cent to disclosure.⁷

The OLSC says that any one complaint can involve up to five issues, including the already nominated categories relating to costs so that actual complaints about costs are higher than documented in their *Annual Report*.

For the year ending 30 June 2003, the Law Society of NSW received 18 complaints about overcharging, 7 complaints about no cost disclosure and 4 complaints about failure to provide a detailed account.⁸

Finally, the Supreme Court of NSW in the same year received 193 applications by clients seeking assessment of a practitioner's costs.⁹

If, for example, each lawyer in private practice published three bills a week, the solicitors of NSW would publish about 2.5 million bills a year. Statistically, at least, it seems reasonable to conclude, as I have said, that whilst there are instances of overcharging in the big picture it could hardly be regarded as widespread.

Whilst I do remain a member of the Legal Fees Review Panel, I am not permitted to publicise information presently provided to the Panel since it is of a confidential nature. That is to say, particular matters, such as failure to disclose (properly or at all), failure to provide or update estimates, and overcharging will be addressed by the Panel and appropriately commented on as part of the task of that Panel.

III TIME-BASED BILLING

The 'billable hour' has been the focus of much publicity and comment. It has been the subject of papers presented at legal conferences the world over. One of the adjuncts of the billable hour is the raising of charges on a minimum unit of time basis. Indeed, if such a basis is not disclosed by the practitioner, authority suggests that the practitioner is only entitled to recover charges in accordance with the time actually elapsed.¹⁰

During the course of his address at the Opening of Law Term Dinner earlier this year, the Chief Justice of the Supreme Court of NSW, The Hon JJ Spigelman said '[i]t is difficult to justify a system in which inefficiency is rewarded with higher remuneration'.¹¹

7 OLSC, *Annual Report 2002–2003* (2003) 26 < [http://www.lawlink.nsw.gov.au/olsc1.nsf/files/OLSC02-03_AnnRep.pdf/\\$FILE/OLSC02-03_AnnRep.pdf](http://www.lawlink.nsw.gov.au/olsc1.nsf/files/OLSC02-03_AnnRep.pdf/$FILE/OLSC02-03_AnnRep.pdf)> at 6 July 2004.

8 Statistics obtained from the Professional Standards Department of the Law Society of NSW.

9 Statistics obtained from the Costs Assessment Section, Supreme Court of NSW.

10 *Moray v Lane* (Unreported, Supreme Court of New South Wales, Allen J, 26 February 1994).

11 The Hon J J Spigelman, Chief Justice of the Supreme Court of NSW, 'Opening of the Law Term 2004' (Speech delivered at the Opening of the Law Term Dinner, Sydney, 2 February 2004) <http://www.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/Spigelman_040202> at 6 July 2004.

I believe most members of the legal profession, if not all, would agree with that statement.

Chief Justice Spigelman has had enshrined in the Supreme Court Rules his aim to facilitate the just, quick, and cheap resolution of the real issues in civil proceedings.¹² As his Honour has said, '[t]he Supreme Court has fixed delays and is now concerned to create a proportionate relationship between costs and what is at stake'.¹³

That said, it must always be remembered that in presenting the cases of their clients in any jurisdiction, practitioners must comply with the rules and practice notes of those jurisdictions and they must take care and use all of their skill to ensure that no stone is left unturned in the presentation of their client's case to a court or tribunal.

The billable hour is not only adopted by legal practitioners but by accountants and, usually expert witnesses. Whether value billing is to be preferred is perhaps an argument for another day. The arguments in favour of value billing have merit. The problem is how to devise a scheme of value billing instead of time costing. In areas of work where lump-sum costs can be provided to the client, it may be possible to provide value billing. I accept that time costing may work injustice. That said, time costing is a valuable tool of management: to know the time and costs expended in the work undertaken. To impose those costs automatically to the client may work injustice in that, as the Chief Justice has said, it can reward inefficient work.

It should be possible, even in litigation, to provide the client in advance with a value costing method. This information could be used to provide an estimate and an undertaking since the estimate will not vary by more than a given percentage without good reason, such as the occurrence of an understandably unforeseen event. The difficulty is that in litigious matters one would be required to basically foresee what the other side might do. Value costing is certainly easily applied to non-contentious work by solicitors who are competent in their field.

One would simply hope that proper attention by practitioners to the requirements of Division 2 of Part 11 of the Act would mutually benefit the client and the practitioner. It seems to me that in the main that must be, given the statistics I have quoted in this article. Indeed, if I may again quote Chief Justice Spigelman, '[o]nly a handful of members of the profession exploit their position by providing services that either do not need to be provided at all or provide them in a more luxurious manner than is appropriate'.¹⁴

I endorse his Honour's view.

12 *Supreme Court Rules 1970* (NSW) Pt 1, r 1(3).

13 Chief Justice Spigelman, above n 11.

14 *Ibid.*