HOW TO MINIMISE BILLING COMPLAINTS

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The purpose of this paper is to highlight:

- Some billing complaints which have been of concern to the Committee over the years;

- Some billing provisions of the Legal Profession Act 2008 ("the new Act") which practitioners need to be aware of; and

- Some practical suggestions on how complaints from clients about bills might be minimised.

A general overview of overcharging

1. The case of D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198 at 214-215 sets out the general principles when assessing whether a practitioner has engaged in excessive or unreasonable overcharging. These are that:
    a. The inquiry into what amounts to grossly excessive charging would ordinarily involve first, a determination of what, in the particular circumstances, would be a reasonable sum to charge;

    b. Determining what would, in the circumstances be such a reasonable sum will often turn on multiple factors, including:
        i. the amount at which the costs in question was or would likely be taxed;
        ii. the difficulty of the case;
        iii. the novelty or complexity of the legal issues presented;
        iv. the experience of the practitioner;

v. the quality of the work;
vi. the amount of time spent by the practitioner on the matter;
vii. the responsibility involved;
viii. the amount or value of the subject matter in issue; and
ix. any costs agreement entered into.

2. These what may be called *"D'Alessandro factors"* have been applied in various cases, including fairly recently a decision of the State Administrative Tribunal, Legal Practitioners Complaints Committee v Mijatovic (2007) WASAT 111 (and on appeal Mijatovic v Legal Practitioners Complaints Committee (2008) WASCA 115).

3. *Rule 17.4* of the Professional Conduct Rules of Western Australia reflects these general principles. It provides that:

> *"A practitioner may only charge costs which are no more than is reasonable for the practitioner's services having regard to the complexity of the matter, the time and skill involved, any scale of costs that might be applicable and any agreement as to costs between the practitioner and the client"*.

4. The new Act comes into effect on 1 March 2009. Under it the Legal Practice Board ("the Board") has the statutory responsibility for making Legal Profession Rules with respect to any aspect of legal practice, including expected standards of conduct by legal practitioners (*Sections 576 and 577*). The Board is in the course of formulating these Rules and these will replace the Law Society's Rules in due course.

5. *Part 10* of the new Act, titled "Costs Disclosure and Assessment" is the costs section of the Act.

6. *Section 301* sets out the matters a taxing officer must or may consider when conducting an assessment of legal costs (the word "assessment" now replacing "taxation"). These incorporate the D'Alessandro factors. The matters the taxing officer must consider are:

a. Whether or not it was reasonable to carry out the work;
b. Whether or not the work was carried out in a reasonable manner; and

c. The fairness and reasonableness of the amount of legal costs, except to the extent that *Section 302* (costs agreements) or *Section 303* (relevant costs determinations) applies.

In considering what is a fair and reasonable amount the taxing officer may have regard to any or all of the following:

a. Whether the law practice or practitioner acting on its behalf has complied with the Act;
b. Any costs disclosure made to the client under *Division 3*;
c. Any relevant advertisement as to the practice's costs and skills;
d. The skill, labour and responsibility displayed by the legal practitioner responsible for the matter;
e. The retainer and whether the work was done within the scope of the retainer;
f. The complexity, novelty or difficulty or the matter;
g. The quality of the work done;
h. The place where, and circumstances in which, the legal services were provided;
i. The time within which the work was required to be done; and
j. Any other relevant matter.

7. Under the new Act the classification of conduct which attracts sanction has changed to unsatisfactory professional conduct and professional misconduct (*Sections 402 and 403*).

8. *Section 404* provides that charging excessive legal costs in connection with the practice of law is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

9. Practitioners should be aware of *Section 307* which provides that if, on a costs assessment, the taxing officer considers that the legal costs charged by a legal practice are grossly excessive the taxing officer must refer the matter to the Complaints Committee to consider whether disciplinary action should be taken against the practitioner. Further, if the taxing officer considers that the costs assessment raises any other matter that may amount to unsatisfactory professional conduct or professional misconduct it may refer the matter to the Complaints Committee to consider.

Bills attracting overcharging complaints

10. The following complaints have led to disciplinary action against practitioners, either by way of the exercise by the Committee of its summary jurisdiction power, or by referral of the matter to the State Administrative Tribunal:

11 Costs disclosure - Failing to provide any costs disclosure to the client at the outset of the retainer.

11.1 Failing to make adequate costs disclosure to the client.

11.2 A complaint of this kind may be that a low estimate of fees was provided at the commencement of the retainer and, relying on that, the client instructed the practitioner to act. That estimate was not revised and the client subsequently received a bill in an amount much higher than the estimate that had been provided. The client, understandably, complains to the Committee of overcharging.

11.3 Failing to adequately inform the client about costs as required by Family Law Rule 19.03, failing to provide the client with adequate notification of costs at each court event as required by Family Law Rule 19.04(1) and (2) and failing to provide copies of the costs notifications to the court and/or the other party as required by Family Law Rule 19.04(3).

11.4 The expected standards of conduct by way of appropriate costs disclosure have been set out in *Rule 16A* of the Professional Conduct Rules of the Law Society of Western Australia. These are now replaced by the statutory costs disclosure requirements under *Division 3 of Part 10* of the new Act.

11.5 The costs disclosure requirements are highly prescriptive and require the closest attention by practitioners. They include a statutory obligation to disclose to a client any substantial change to anything included in a disclosure already made, as soon as is reasonable and practicable after the law practice becomes aware of that change (*Section 267*).

11.6 The costs disclosure must be written and expressed in clear plain language (*Section 266*). Failure by a law practice to comply with the costs disclosure requirements is capable of constituting unsatisfactory professional conduct or professional misconduct (*Section 267*).

12. Itemised accounts - Failing to advise the client of his/her right to request an itemised account.

12.1 This has been a statutory requirement under the current Legal Practice Act 2003 and its predecessor the Legal Practitioners Act. The requirement to notify clients of this right continues under the new Act. It forms part of the initial costs disclosure requirement (*Section 260*).

12.2 Failing to comply with the client's request for an itemised account; undue delay in complying with such a request.

12.3 Under the new Act, a client who receives a lump sum bill may request an itemised bill. The practice is then required to provide such an itemised bill within 21 days and it is not entitled to charge for its preparation (*Section 292*).

13. Taxation - Failing to advise a client of the right to request taxation of the account.

13.1 *Section 291* of the new Act provides that a bill must include or be accompanied by a written statement informing the client of the avenues that are open to the client if he/she disputes the bill and any time limits that apply to those avenues, namely:

1. costs assessment under *Division 8*;
2. applying to set aside the costs agreement under *Section 288*; and
3. making a complaint to the Complaints Committee (*under Part 13*).

13.2 Failing to comply with a client's request to lodge a bill for taxation, alternatively undue delay in doing so.

13.3 Under the new Act the client has 12 months from receipt of the bill to request assessment of the account (*Section 295*).

14. Issuing proceedings against a client for recovery of the amount of an account in circumstances where the practitioner has not complied with the client's request that the account be itemised and/or taxed.

    Note Sections 289 and 292 of the new Act which provide that a law practice must not commence legal proceedings to recover legal costs until at least 30 days after the law practice has given a lump sum bill, or an itemised bill, to a person.

15. Undue delay in providing a bill of costs to a client who has requested same.

16. Charging a fee for preparing an itemised account or advising the client that there will be a fee payable.

    Section 292(6) provides that a law practice isn't entitled to charge the person for preparation of an itemised bill which has been requested.

17. Threatening legal action to recover costs in reliance on a lump sum account, whilst knowing that the client has requested the practitioner provide an itemised account.

    Under *Section 269* of the new Act a law practice must give a client, on reasonable request a written report of the legal costs incurred by the client to date, or since the last bill (if any), in the matter, and must not charge a client for such a report.

18. Rendering a bill which does not comply with the relevant costs scale, in the absence of a written costs agreement permitting charges outside scale.

19. Rendering a bill which is not in accordance with the terms of a costs agreement entered into between the client and the practitioner.

    Costs agreements are dealt with under *Division 6 of Part 10* of the new Act. They are still required to be written or evidenced in writing. The Act includes different kinds of agreements and the respective requirements of each.

20. Entering into a costs agreement which breaches Section 27A of the Motor Vehicle (Third Party Insurance) Act 1943 (WA). This provides that when acting on a claim for damages for personal injury arising from a motor vehicle accident, you cannot

enter into an agreement which provides for any greater reward than is provided for in any legal costs determination that is in force.

21. Charging the client fees incurred by reason of a practitioner's neglect and/or undue delay in complying with court milestones in relation to the client's court action, for example, charging the client for work performed arising from rectifying matters caused by the practitioner's delay or neglect.

21.1 Demanding and receiving costs in respect of a matter where the legal work was required by reason of the conduct of an employee of the firm. The relevant practitioner demanded costs and for the client to enter into a written agreement in circumstances where the client faced those costs as a consequence of his firm's failure to bring a matter to the attention of the defendant and the court.

22. Rendering an account in excess of an agreed fixed fee, then threatening to cease acting if the client didn't agree to pay the additional fee.

23. Charging for legal work which was performed without instructions, for example, work performed after the client terminated instructions or before the client instructed the practitioner to commence a legal action.

23.1 In one case a practitioner had accepted a retainer from the complainants for settlement of a purchase yet to arise under an option to purchase a lease. He was not retained except for settlement of the purchase. When the practitioner terminated the retainer in circumstances of a conflict of interest the option to purchase had not been exercised and the retainer had therefore not commenced. The practitioner billed the complainants for work he had done without a retainer. When the complainants asked for an itemised account this was provided in an increased amount.

24. Seeking to have a client acknowledge that the client is obliged to pay and/or pay the practitioner's fees, in circumstances where:

(a) the fees were not in accordance with the costs agreement entered into between the client and the practitioner; and

(b) the practitioner's firm was acting for another person, whose interests conflicted with the clients and had caused the practitioner to cease acting for the client.

25. Ceasing to act for a client without good cause or the client's consent and shortly thereafter improperly rendering an account to the client.

For example, a practitioner caused a letter to be sent to his firm's client, stating that his firm would cease acting, and threatening to withhold the firm's services at two trials, unless a payment into trust on account of legal costs was made or the firm was the recipient of a grant of Legal Aid. The practitioner knew or ought to have known that the retainer which then existed between the client and his firm, in respect of each of two traffic matters, was in the nature of an entire contract, under which no immediate right to require payment of his legal costs existed prior to the matters going to trial.

26. A practitioner writing to a client's former practitioner improperly coupling a demand that the practitioner waive his fees charged to a former client with a threat to make a complaint to the Legal Practice Board, if he did not do so.

27. Charging interest on outstanding accounts in the absence of an entitlement to do so.

Note *Section 273* of the new Act which provides that a law practice may charge interest if the costs are unpaid 30 days or more after the practice has rendered a bill, or in accordance with a costs agreement, but only if the bill contains a statement that interest is payable and the rate of that interest. The rate must not exceed the rate prescribed by the regulations.

28. Obtaining money for professional fees from a client over and above a Legal Aid Commission grant for the same matter in breach of *Section 41* of the Legal Aid Commission Act 1976.

29. Charging the client for an attendance at the client's home at which it was alleged the practitioner drank a significant amount of alcohol.

29.1 Being invited to a social function by a client and charging for legal work purportedly performed at the function (LPCC v Mijatovic, Supra).

30. Charging fees in great disproportion to the sum in dispute ($350) which was the subject of the retainer in circumstances where the practitioner had failed to inform the client that this would be the case.

31. Other matters of complaint in respect of billings, which have led to the Committee publishing an article in the Law Society's Brief Magazine are:

31.1 Issuing a bill to a client for barrister's fees when the barrister was briefed without the client's informed consent. Sometimes the client had not known that the barrister had been briefed until a bill arrived from the practitioner. Before a practitioner briefs a barrister the client needs to agree and must be given the information necessary to make an informed decision. How much detailed information needs to be given ultimately depends on the circumstances. The client must be informed about the basis of the barrister's charges, the scope of the brief, and any other relevant information that is needed so that the client can be properly informed before giving those instructions (Brief Magazine November 2007).

31.2 Rendering a bill for a consultation to a client who had attended for a consultation following an advertisement placed by the practitioner advertising a *"first appointment free"*. To avoid misleading consumers, advertisements that offer a first appointment free should clearly spell out the terms and conditions of the offer. The Committee's view is that where a practitioner doesn't clarify the terms or conditions of the advertised offer of a free consultation, or gives undue prominence in an advertisement to that offer without linking it adequately to the terms or conditions, may be misleading or deceptive and may amount to unsatisfactory conduct (Brief Magazine February 1998 and September 2006).

31.3 Practitioners rendering bills several months or years after the matter in which they acted has concluded. Generally, a final bill should be sent to clients within 30 days of the matter being concluded, where possible. In substantial or complex matters or matters awaiting party/party taxation, a different approach may be appropriate. However, it would rarely be appropriate to issue an account more than six months after the matter has concluded, and three months should be the outmost limit. It is

unsatisfactory if delay in sending an account conveys to the client the impression that no fees (or no further fees) are payable (Brief Magazine November 2003).

31.4 The Committee received a number of complaints from clients alleging that they were informed by their practitioner at the outset of instructions that they would not be required to pay legal fees until their matter was concluded, but were not told that they would have to pay for disbursements, nor that these would be substantial. The Committee expressed the view that this may be misleading and could constitute unsatisfactory conduct. It recommended that practitioners give such advice in writing to avoid any possible misunderstandings (Brief Magazine November 1997).

32. Practitioners are referred to an article published by the Law Society in Brief Magazine in February 2009 which summarises three different overcharging matters which were referred by the Committee to the State Administrative Tribunal and determined in 2008. The orders, made by consent, are published in full on the Tribunal website under its Orders section.

Minimising billing complaints

33. Ensure that you comply with the new legislative requirements under *Part 10* of the new Act. The sections referred to above deal with only some of the requirements.

34. Better communication on fees will reduce the potential for complaints about them. Make sure clients fully understand the fee arrangements.

35. The Committee is of the view that practitioners should not charge clients legal fees for dealing with administrative matters. This is particularly so in the case of client queries on accounts.

36. Comply promptly with client requests for itemised accounts and assessment/taxation of accounts.

37. Keep clients fully informed of any variation to costs estimates which are provided and explain the reasons for this.

38. Obtain the client's informed consent before you incur large expenses such as briefing counsel.

39. Adequately detail your bill so the client can understand why the bill is in the amount charged.

40. Irrevocable authorities – the Committee's view is that, in circumstances where a client requires access to a file being held pursuant to a solicitor's lien and disputes the amount of the outstanding account, it may raise evidence of possible unsatisfactory conduct for the practitioner to demand, as a precondition to relinquishing his lien over the file, an irrevocable authority to pay the whole of a disputed account. Rather, in such situations the Committee would consider it reasonable for the practitioner to release the complainant's file on an undertaking by the complainant and/or his solicitor to pay the practitioner's costs as taxed.

41. Check the bills before they are sent to the client, to ensure that they not only comply with legislative requirements but are appropriate in all circumstances. Check for over servicing, duplications of work or other inappropriate charges.

In Law Society of New South Wales v Foreman (1994) 34 NSWLR 408 at 422 Kirby P commented that:

> *"no amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary overservicing, excessive time charges and overcharging where it goes beyond the bounds of professional propriety. Time charges have a distinct potential to result in overcharging".*

Note that *Section 290* provides that a bill must be signed on behalf of the law practice by a legal practitioner or an employee of the practice (signing the letter enclosing the bill is sufficient compliance).

42. If there is an error in a bill which is sent out, acknowledge it and rectify it at the earliest opportunity. For example, it may be that a bill is prepared under the misapprehension that the client has entered into a costs agreement.

43. Be open and amenable to concerns expressed by clients in respect of bills rendered by the firm. If the account is properly explained to the client, the client's concerns may well be addressed. Alternatively, the client may raise a very reasonable complaint in respect of an aspect of the bill which the practitioner might review and, upon consideration, amend the bill.