LEGAL PROFESSION COMPLAINTS COMMITTEE

COSTS COMPLAINTS

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Costs related complaints are the largest category of complaints to the Committee. In light of the costs of litigation and the current financial climate, this is expected to continue.

The new costs regime under Part 10 of the Legal Profession Act 2008 (the new Act) is very prescriptive and practitioners are urged to familiarise themselves with the relevant provisions to ensure compliance.

The case of D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198 at 214 sets out the general principles when assessing whether a practitioner has engaged in excessive or unreasonable overcharging. This involves determining what would in the particular circumstances be a reasonable sum to charge, which involves considering multiple factors, including:

a. the amount at which the costs in question was or would likely be taxed;
b. the difficulty of the case;
c. the novelty or complexity of the legal issues presented;
d. the experience of the practitioner;
e. the quality of the work;
f. the amount of time spent by the practitioner on the matter;
g. the responsibility involved;
h. the amount or value of the subject matter in issue; and
i. any costs agreement entered into.

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).

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"*.

Section 301 of the new Act sets out the matters a taxing officer must or may consider when conducting an assessment of legal costs (the word "assessment" now replacing "taxation"). 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.

Under Part 13 of the new Act titled “Complaints and Discipline” the classification of conduct which attracts sanction has changed to unsatisfactory professional conduct and professional misconduct (*Sections 402 and 403*).

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.

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.

The following costs related complaints have led to disciplinary action against practitioners under the previous legislation, 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:

1. Costs disclosure - Failing to provide any costs disclosure to the client at the outset of the retainer; failing to make adequate disclosure.

The expected standards of conduct by way of appropriate costs disclosure have been set out in *Rule 18* 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. Note that failure by a law practice to comply with the costs disclosure requirements is capable of constituting unsatisfactory professional conduct or professional misconduct (*Section 268*).

2. Itemised accounts – failing to advise clients of their right to request an itemised account; failing to comply with a request for one; undue delay in providing one; charging a fee for preparing one or advising the client that there is a fee payable; 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.

   The requirement to notify the client of the right to an itemised account, and the obligation of practitioners to provide one at no cost and within 21 days of such a request being made, is set out in the new Act (*Sections 260 and 292*).

3. Taxation – Failing to advise a client of the right to request taxation of the account; failing to comply with a client's request to lodge a bill for taxation, undue delay in doing so; issuing proceedings for recovery of costs, or threatening legal action, when the practitioner hasn't complied with the client's request that the bill be itemised or taxed.

   Note *Sections 289 and 292* 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.

   Section 291 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:

a. costs assessment under *Division 8*;

b. applying to set aside the costs agreement under *Section 288*; and

c. making a complaint to the Complaints Committee (*under Part 13*).

The new costs assessment regime is set out in Division 8 of Part 10 of the new Act. Note that the client has 12 months from receipt of the bill to request assessment.

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

Under *Section 269* 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.

5. Rendering a bill which doesn't comply with the relevant costs scale in the absence of a costs agreement permitting the charge outside scale.

6. Rendering a bill which is not in accordance with the terms of the 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.

7. Charging for work which it was necessary to perform by reason of the practitioners own neglect or undue delay in the client matter or by reason of the conduct of an employee of the firm.

8. 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.

9. Charging for legal work which was performed without instructions or after the client terminated the instructions.

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

11. Charging interest when not entitled to do so (note *Section 273* of the new Act).

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

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

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

14. Other matters of concern expressed by the Committee in the costs area have been:
    a. Issuing a bill to a client for barristers fees when the barrister was briefed without the client's informed consent.
    b. Rendering a bill several months or years after the matter in which they acted has concluded.
    c. Informing clients at the outset of instructions that they would not be required to pay legal fees until their matter is concluded, but not informing them that they would have to pay for disbursements, nor that these would be substantial.
    d. 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.

Avoiding costs complaints

1. Ensure that you comply with the new legislative requirements. The sections referred to above deal with only some of the requirements.

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

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

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

4. Keep clients fully informed of any variation to costs estimates which are provided and explain the reasons for this. Note Section 267 which requires disclosure of any substantial change to anything included in a disclosure already made.

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

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

7. 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 the circumstances. Check for overservicing, duplications of work or other inappropriate charges. Consider whether the time spent was

appropriate for the task and whether the work was necessary and within the terms of the retainer.

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 over servicing, 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).

8. 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.

9. 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.