Legalwise Seminars

CPD Mandatory Core Areas: An Expert Guide to Legal Costing

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Costs Disclosure before Settlement: Ethics and Professional Negligence

I probably should have no need to remind you of what your obligations are in respect of costs disclosure as these obligations have been around since the implementation of the Legal Profession Act (the Act) in 2007 and indeed in a similar way since the Legal profession Act of 2004.

However, for those of you who are recently admitted to practice and for those who have been in hiding for the last few years, I draw your attention to the relevant sections.

Disclosure obligations

The basic obligations are contained in s.308 and provide that a law practice must disclose certain things to a client in respect of costs.

These include:

- the basis of how legal costs will be calculated,
- the right of the client to negotiate a cost agreement,
- to receive a bill,
- to request an itemised account,
- to receive progress reports,
- to have the cost assessed and
- the right to have the cost agreement set aside.

These issues are set out in more detail in other sections of the Act.

In addition, there is a positive obligation on the law practice to provide an estimate of the total legal cost or at least a range of the possible costs.

As well, there is an obligation to provide information as to:

- when bills will be issued,
- an interest rate that will be applied to overdue accounts,
- the person at the law practice (or elsewhere) to raise concerns about costs,
- details of any uplift fees that might apply in a conditional costs agreement,
- the costs that might be recovered from the other side in a litigious matter and
- the costs that may be payable to the other party if the action is unsuccessful.

These last two aspects will be looked at in more detail later on.

Section 308 is quite lengthy and covers quite a bit of territory, so if you are not familiar with it or may not have looked at it for some time, I would recommend taking the time to go through it and to see what it involves and consider how your law practice complies.

Section 309 deals with what disclosure is required if another law practice such as town agents or counsel are engaged.

The circumstances of how that other law practice are retained will determine what information is to be disclosed and to whom.

Usually this situation involves engaging counsel. This requires counsel making disclosure to the law practice rather than to the client of the law practice.

Of course any disclosure made by counsel should also be provided to the client by the law practice as part of the general obligation of costs disclosure and in particular ongoing disclosure.

How and when costs disclosure should take place is dealt with by section 310.

This provides that the disclosure must be in writing before or as soon as practicable after the law practice is retained. What that means will obviously depend on the particular circumstances of each matter.

Section 311 deals with the exceptions for disclosure. These include where the total legal costs, excluding disbursements and exclusive of GST will be under $1500.00 or where the client is otherwise a sophisticated client. This is the amount set by regulation and has changed from when the current act came into force when it was set at $750.00.

As the main issue of today's topic is the disclosure of costs before settlement of a litigious matter, it is likely that by the time you have got to that stage of the matter the costs will have exceeded the disclosure threshold.

As a side note, I understand that there have been discussions in New South Wales and Victoria about increasing this threshold to $5000.00. This is something that the profession in Queensland would broadly support.

Jumping ahead a little, you need to be very aware of the need to make ongoing disclosure pursuant to section 315.

This issue is perhaps one of the most common to be seen by the Commission from complaints about costs.

Practitioners are required to make disclosure in writing of any substantial change to any previous disclosure made. This disclosure needs to be made as soon as is reasonably practicable after the law practice becomes aware of the change.

Too often the Commission sees instances where practitioners have made full and proper disclosure at the commencement of the matter but fail to provide timely updates, if at all, as the matter progresses.

Nothing upsets clients more than being told that their matter will cost $10,000.00 only to get at the end a bill for $40,000.00.

Clearly, in those circumstances, there has been a failure to provide ongoing disclosure and such a failure may have consequences for you to recover your costs.

Each matter is different of course and each has a life of its own. However, assuming that the matter, especially if it is litigation, proceeds over a period of a number of months or maybe years, then there should be no reason why disclosure cannot be made at regular intervals along the way.

This is especially so where bills are issued at the end of each month or as part of a regular billing cycle.

Please note that while the sending of these bills may advise the client as to what the costs incurred to date are, they do not satisfy the obligation under s.308 to advise what the future costs may be.

Practitioners can easily remedy this issue by getting into the habit of providing a future costs update at the time of sending the bill for the past work done.

This then covers most situations and avoids any possible arguments as to what is meant by “substantial”.

Of course circumstances may arise where an urgent matter requires lots of work done in a short period of time. Efforts should be made to inform the client with what the likely costs are going to be.

The Legal Profession Act imposes other obligations on practitioners in respect of disclosure.

Generally, and this will be expanded on later, section 312 provides an obligation to make additional disclosure prior to the settlement of litigious matters.

In addition if a costs agreement is a speculative one, such as may relate to a personal injury claim, and the costs agreement contains a provision for the inclusion of uplift fees then there is a further obligation on the law practice to disclose in writing before the agreement is entered into an estimate of the legal costs, how the uplift fee will be calculated and the reasons why the uplift fee is warranted.

How is costs disclosure to be provided?

Section 314 of the LPA says that it must be in writing, expressed in clear plain language (which I guess is an attempt to make sure that it is not bogged down in legalese) and can be in another language if the client is more familiar with that.

Further allowance needs to be made for clients who may be illiterate.

So, having set out what the obligations are in respect of costs disclosure, what then are the legislative consequences for any failure to comply?

Section 316 sets out in some detail what may happen in those circumstances.

Please note that the failure to disclose is put in terms of a failure to provide “anything” which is required under Division 3 of Chapter 3 of the LPA. So essentially, anything contained in sections 308 onwards.

The consequences for failing to comply include:

- That the client need not pay the costs claimed until they have been assessed under division 7. This is the general division applying to costs assessments.
- That a law practice may not maintain proceedings for the recovery of cost until they have been assessed.
- That the client or third party payer may apply under section 328 for the costs agreement, if there is one, to be set aside.
- That a cost assessor carrying out an assessment of cost may reduce the costs in a way that is proportionate to the seriousness of the failure to disclose. This might be an issue that could be directed the other presenters today who no doubt have had experience with these sort of issues.
- That the failure by a law practice to comply is capable of amounting to unsatisfactory professional conduct or professional misconduct on the part of the practitioner involved in the failure.

Just on that point it should be noted that the disclosure obligation lies with the law practice but the disciplinary consequences lie with the actual practitioner. This is because the LPA only provides for disciplinary proceedings to be commenced against individuals and not law firms.

The LPA defines “law practice” to include a sole practitioner, a law firm, an ILP or a MDP.

Which brings us to the main topic of this paper, namely whether a failure to make disclosure before settlement of litigious matters should be seen as ethical issue (or otherwise a disciplinary issue) or should it just be seen as a failure or negligence on the part of the practitioner.

Section 312 provides:

312 Additional disclosure—settlement of litigious matters

(1) If a law practice negotiates the settlement of a litigious matter on behalf of a client, before the settlement is executed, the law practice must disclose the following to the client—

(a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled, including any legal costs of another party that the client is to pay;

(b) a reasonable estimate of any contributions towards those costs likely to be received from another party.

(2) However, a regulation may provide for matters relevant to subsection (1) when there is more than 1 law practice acting on behalf of a client.

So it is clear that there are a number of specific matters set to in (a) and (b) that need to be addressed when making disclosure under this section.

With reference to section 312 the information required to be provided is relatively limited:

- What are the costs to date on a solicitor and own client basis?
- What may be the possible costs payable to the other side?
- What may be the possible costs received from the other side?

Some of these amounts may not be able to be provided with a great degree of certainty especially in circumstances where matters are yet to be negotiated fully or resolved.

The obvious intention of the section is to give to the client as much information as possible so that they have as much information as possible before making any major decision.

You should also note subsection 2 which applies in situations where there is more than 1 law practice involved, which is not uncommon in personal injury matters.

The relevant section of the Legal Profession Regulations is section 71.

Essentially, this provides that if the law practice which is negotiating the settlement may ask any other law practice which may have been previously involved to provide the necessary information needed for disclosure. The law practice to which the request is directed must comply with the request.

This is relatively straight forward when the matter is not a speculative personal injury claim but becomes somewhat more complicated when section 347 of the LPA is taken into account.

For those not familiar with this section this is otherwise known as the 50/50 rule and applies to speculative personal injury claims.

Essentially this provides that the maximum amount a law practice may charge and recover from such a matter is limited to 50% percent of the balance, once any statutory refunds are deducted and once all of the disbursements incurred on behalf of the client are taken into account. This includes counsel's fees.

The difficulty that the Commission sees with these sorts of matters is that law firm A, if requested to provide details as to what their costs are, can only provide a costs figure based on all of the work done prior to law firm B taking over the matter.

As the costs of both firms are subject to the 50/50 rule, an accurate amount cannot be determined until an actual settlement amount has been negotiated.

Whilst there are no set rules about this, it is the general expectation that the firms will split the costs in a way proportionate to the amount of work done.

While this may seem simple in theory, in practice it can lead to lengthy negotiations or even court applications.

The obligation then on the party making disclosure in these circumstances would be to fully canvas with the client all of the variables and options, to at least demonstrate that a real attempt was made to comply with the section.

However what if you do not comply?

As previously noted section 316(7) of the LPA provides that a failure by a law practice to comply with the disclosure obligations is "capable" of constituting unsatisfactory professional conduct or professional misconduct on the part of the practitioner involved in the failure.

The operative word here is "capable".

In other words, a failure to comply may be a conduct issue, but it is not a deemed failure unlike some other sections of the LPA such as section 443(3) which provides that non-compliance with a notice issued pursuant to that section will be deemed professional misconduct.

Clearly, the facts and circumstances of each individual matter need to be taken into account.

Degrees of non-compliance have to be considered. Obviously, minor breaches as opposed to substantial failures will be viewed differently. The frequency of any non-compliance will also be taken into account.

Just on that point and for those who are directors of an ILP, I draw your attention to section 117 of the LPA.

This provides:

117 Incorporated legal practice must have legal practitioner director

(1) An incorporated legal practice is required to have at least 1 legal practitioner director.

(2) Each legal practitioner director of an incorporated legal practice is, for the purposes of this Act, responsible for the management of the legal services provided in this jurisdiction by the practice.

(3) Each legal practitioner director of an incorporated legal practice must ensure that appropriate management systems are implemented and kept to enable the provision of legal services by the practice—

(a) under the professional obligations of Australian legal practitioners and other obligations imposed under this Act; and

(b) so that the obligations of the Australian legal practitioners who are officers or employees of the practice are not affected by other officers or employees of the practice.

(4) If it ought reasonably to be apparent to a legal practitioner director of an incorporated legal practice that the provision of legal services by the practice will result in breaches of the professional obligations of an Australian legal practitioner or other obligations imposed under this Act, the director must take all reasonable action available to the director to ensure that—

(a) the breaches do not happen; and
(b) if a breach has happened—appropriate remedial action is taken in relation to the breach.

In particular you should note the provision of subsection 3 and 4.

In addition section 118 provides:

118 Obligations of legal practitioner director relating to misconduct

(1) Each of the following is capable of constituting unsatisfactory professional conduct or professional misconduct by a legal practitioner director—

(a) unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner employed by the incorporated legal practice;

(b) conduct of another director, not being an Australian legal practitioner, of the incorporated legal practice that adversely affects the provision of legal services by the practice;

(c) the unsuitability of another director, not being an Australian legal practitioner, of the incorporated legal practice to be a director of a corporation that provides legal services.

(2) A legal practitioner director is not guilty of unsatisfactory professional conduct or professional misconduct under subsection (1) if the director establishes that he or she took all reasonable steps to ensure the following as the case requires—

(a) Australian legal practitioners employed by the incorporated legal practice did not engage in conduct or misconduct mentioned in subsection (1)(a);

(b) directors, other than Australian legal practitioners, of the incorporated legal practice did not engage in conduct mentioned in subsection (1)(b);

(c) unsuitable directors, not being Australian legal practitioners, of the incorporated legal practice were not appointed or holding office as mentioned in subsection (1)(c).

(3) A legal practitioner director of an incorporated legal practice must ensure that all reasonable action available to the legal practitioner director is taken to deal with any unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner employed by the practice.

Now I am not telling you this to frighten you, however it needs to be known that the responsibility on ILP directors is significant.

Having said that, the Commission has not yet prosecuted a practitioner under that particular section.

While not common the Commission has taken disciplinary action against practitioners for non-compliance with the costs disclosure obligations.

In *LSC v Hannant [2016] QCAT 30* the practitioner was found to have committed unsatisfactory professional conduct in failing to provide any costs disclosure in respect of a family law matter, including failing to provide a cost agreement. Although a figure had been verbally referred to at the commencement of the matter, the actual costs ended up about 4 times that initial figure.

While there was no suggestion of deliberate intent, dishonesty or overcharging the Tribunal imposed a public reprimand and a fine of $750.00.

Somewhat interestingly, in one of the few successful examples of where a compensation order has been made, the Tribunal ordered that in the circumstances where no steps had been taken to have the costs assessed arising from the non-compliance, it was appropriate for the law practice to pay back to the client the sum of $3503.83 that it was holding in its trust account on account of costs.

There are other matters pending in QCAT involving aspects of a failure to comply with costs disclosure however to my recollection Hannant is the only one where it has been the sole issue decided. However, it should also be noted that the discipline application originally contained 3 other conduct issues which were subsequently not proceeded with.

Having regard to the quite detailed remedies available for clients under section 316 for where there has been a failure to make disclosure, including in respect of section 312, it is likely that the Commission would be more inclined to refer complainants to the remedies under section 316, rather than actually commence disciplinary proceedings in circumstances where the non-disclosure is the sole conduct issue.

Of course each case will be looked at on its merits and decisions made accordingly.

It must also be noted that any decision made by the Commissioner in respect of conduct capable of amounting to unsatisfactory professional conduct or professional misconduct is based on whether there is a reasonable likelihood of a disciplinary body making a finding that the conduct in question (the failure to make proper disclosure) amounts to unsatisfactory professional conduct or professional misconduct.

In addition consideration has to be given to the public interest factors. For those of you interested in the issues taken into account these are set out in the Disciplinary guidelines which can be found on the Commission's website at https://www.lsc.qld.gov.au/publications/policies .

Whatever decisions are made by the Commissioner in respect of a failure to comply with the costs disclosure obligations will not have any impact of any potential right of a client to bring a claim for negligence arising out of the same set of facts.

The Commission does not deal with negligence. Claims of negligence are matters for the civil courts not the legal profession disciplinary regime.

That said the Commission does investigate claims of a lack of competence and diligence. This issue has been considered in some recent disciplinary decisions.

In the decision of *LSC v Bone*[1]. In that case, the Tribunal commented:

> "Both ss 418 and 420 of the LPA contain flexible tests, such that not every error which a practitioner may make will constitute unsatisfactory professional conduct. Decided cases suggest, rather, that a finding of that kind will usually involve repeated errors or a significant departure from accepted standards of competence."

In that case, a technical breach of a professional rule (where the substance of the rule had been carried out) was found not to amount to "unsatisfactory professional conduct".

In *LSC v Laylee and Another [2016] QCAT 237* the Tribunal observed that instances of unethical conduct will always be capable of amounting to unsatisfactory professional conduct whether they are singular or numerous.

However, when the conduct is an assertion of a lack of competence and diligence there must be serious or repeated instances that can give rise to the conclusion of serious incompetence and ignorance or indifference of basic rules and rudimentary requirements. In other words the falling short required by s.418 of the Act must be substantial and very obvious.

Having regard to those decisions it seems that the failure to comply with the disclosure obligations would need to be fairly substantial or significant before any adverse finding was made by a disciplinary body.

The reality for any unhappy client who believed that the practitioner's conduct in failing to make proper disclosure resulted in them suffering a loss is that even if a successful disciplinary application was brought the maximum amount of financial compensation allowable for pecuniary loss under the LPA pursuant to section 465 is $7500.00.

Please note however that there is no similar limitation that applies in respect of legal costs.

Of course no such limitations apply in respect of a claim for negligence through the civil courts.

Summary

Ensure your costs agreements and ongoing disclosure mechanisms comply with the Act and remember to always provide ongoing and updated costs disclosure whenever appropriate.

Case studies

LSC v Challen [2019] QCAT 273.

LSC v Slipper [2019] QCAT 146.

LSC V Jackson [2017] QCAT 207.

Paroz v Clifford Gouldson Lawyers [2012] QDC 151.

[1] [2013] QCAT 550.