

Legalwise Seminars

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COSTS, REGULATORY FAILURES AND REGULATORY FUTURES*

John Briton

Queensland Legal Services Commissioner

We get more complaints at the Legal Services Commission (LSC) about lawyers' costs and billing practices than any other single issue.¹ I want to talk with you about some of the problems we see in costs complaints arising from the practice of personal injury law and how we deal with them. I want to set that discussion in the broader context of some reflections on the regulatory landscape more generally.

COSTS: A REGULATORY FAILURE?

I have been in this job for just short of ten years now. It has had its share of challenges not least trying to work out how best to deal with complaints including costs complaints in ways which have some realistic prospect of influencing the future behaviour of not only lawyers subject to complaint but lawyers more generally.

But the job has also had its moments of realisation and clarity. One of them came about by reading an article that a Victorian barrister, Stephen Warne, was invited to write for the Australian Lawyers Alliance journal *Precedent*. It is titled *On Rapacity* and was published in Issue 110, May/June 2012. It is well worth a read.

Warne starts by saying '*I have a practice in lawyer-client disputes, and in one arm of it I deal with extraordinary instances of clients being taken for the most spectacular rides by lawyers in whom they placed unwarranted trust.*'

He proceeds to describe some examples and continues as follows: '*even making due allowance for the skewed perspective my particular practice brings, I feel that rapacity in the form of overcharging is rife; that outside of judges' extra-judicial speeches, there is little serious discussion of it; that is it not recognised within legal ethics circles as the great legal ethics issue; and that in not enforcing the obligation not to overcharge and to comply with costs disclosure obligations, the complaints investigation and disciplinary systems are a joke. Costs lawyers know all this well, but many charge a pretty penny themselves, keep their arcane law shrouded in mystery and can be shy of biting the hand that feeds them.*'

* This is a slightly edited version of the paper I delivered on the day.

¹ We publish comprehensive complaints data in our annual reports which are readily accessible on the Publications page of our website at www.lsc.qld.gov.au.

He is critical of regulators – that is to say, people like me and my counterparts elsewhere. He notes, correctly, that generally *‘nothing less than ‘gross overcharging’, which is misconduct at common law, gives rise to disciplinary charges, even though the statutory definitions of ‘professional misconduct’ in the Legal Profession Acts specifically include plain old ‘charging of excessive legal costs’.*

Warne is critical, too, of the disciplinary bodies and the courts. He says *‘judges wring their hands in horror in extra-judicial speeches to other lawyers but fail to deal with the problem... Desultory gross overcharging prosecutions are occasionally brought and fail at a higher rate than other disciplinary prosecutions. My survey of recent gross overcharging prosecutions suggests that disciplinary prosecutions tend to fail unless based on a fee of at least twice what the disciplinary tribunal decides to be a reasonable fee.’*

He is similarly critical of legislators and the professional bodies. Their failure in his view is not to have given anything like sufficient guidance in either legislation or the conduct rules as to the factors lawyers should take into account in determining their ‘reasonable’ costs, *‘leaving the unsatisfactory case law, replete with ‘I know it when I see it tests’... to fill the gaps.’*

And finally he is critical of the many lawyers who must know about *‘the outrageous practices that have become standard operating procedure’* in at least some law firms and who fail to denounce them.

Warne is describing wholesale regulatory failure and I think he is right.

It is reflected in the fact that we as regulators get more complaints about costs than another single issue but commence disproportionately few disciplinary proceedings for failure to give proper costs disclosure and/overcharging.

It is reflected in the conduct of lawyers who have failed to learn the lessons of the some of the more significant disciplinary decisions of recent times. The Chief Justice noted more than ten years ago now in *Council of the Queensland Law Society v Roche* that *‘the legal profession must realise that to maintain its perceived professionalism, its practices must be seen as appropriate to a profession and not those of a run-of-the-mill commercial enterprise. There is, in short, a large role for discretion and conservative moderation, characteristics not evident in this unfortunate case.’*²

The same lack of restraint is equally not evident in some of the disturbing billing practices we see routinely in complaints. I described these practices in the LSC’s most recent annual report and I will describe them again below.

It is reflected in the fact that the LSC as a regulator and the Queensland Law Society (QLS) as the representative body for solicitors have failed to show the requisite leadership to keep these issues at the very front and centre of the profession’s consciousness.

And it is reflected in the fact as I well know from recent experience that if you dare to raise these issues publicly to try to start a serious discussion you will have your motives impugned

² [2003] QCA 469 at [32]

and be accused of casting ‘unsubstantiated slurs’ upon the profession and of ‘empire building’.³

But Warne does see some cause for cautious optimism. He cites a number of recent cases which have developed some useful law in relation to time-costing and he refers favourably to the LSC’s (at that stage draft) regulatory guide to some of the key principles we believe should inform a lawyer’s billing practices.

Thus I want to talk to you about that guide and what we are hoping to achieve by publishing regulatory guides. I will get to that but I want first to set that discussion in the broader context of some discussion about how we approach our role more generally – and thus to look beyond regulatory failures of the past and to reflect on a possible regulatory future.

COSTS: A REGULATORY FUTURE?

The LSC has two fundamental and overlapping purposes:

- to provide users of legal services a timely, effective, fair and reasonable means of redress for complaints; and
- to promote, monitor and enforce appropriate standards of conduct in the provision of legal services.

There is nothing remarkable about this statement of our purposes. It might as well have been and largely was lifted straight out of our enabling legislation, the *Legal Profession Act 2007* (the LPA).

The LPA gives regulators three primary tools to achieve these purposes: a system for dealing with complaints (including a discretion to commence ‘own motion’ investigations) and initiating disciplinary proceedings as appropriate; a system for conducting trust account investigations (and appointing external interveners as appropriate); and a system for conducting compliance audits of law firms and in particular their management systems and supervisory arrangements.

The three functions are complementary and in a rational world would be administered under a single auspice. That would allow them to be properly coordinated and would allow the information and perspective gained in the exercise of any one of them to be readily shared and available to inform the exercise of any of the others.

But this is not a rational world. The LPA gives the LSC responsibility for receiving complaints and deciding what action if any to take on a complaint; gives the QLS responsibility for conducting trust account investigations; and gives both the LSC and the QLS responsibility for conducting compliance audits (although in reality and by agreement the LSC alone assumes this responsibility).

Furthermore, while the system for conducting compliance audits is really only the system for conducting trust account investigations writ large (because it is directed to a law firm’s compliance with all its professional obligations, not merely its obligations in relation to trust

³ The President of the Queensland Law Society wrote an Opinion Piece for the *Courier-Mail* in just these terms last November in response to the paper’s coverage of the annual report.

monies), the LPA allows us to conduct compliance audits not of all law practices but only of incorporated legal practices.

That leaves the system for dealing with complaints as our key regulatory tool. It is a fundamentally important regulatory tool which gives aggrieved consumers a means of redress for complaints but an ineffective and inefficient means of achieving our broader regulatory purpose to promote, monitor and enforce appropriate professional standards.⁴

These are important and interesting issues from a regulatory design point of view but the more relevant issue for now is that the system for dealing with complaints as it is currently designed is a very blunt instrument indeed, even as a means of giving consumers a means of redress.

It is premised at the end of the day solely on our power to commence disciplinary proceedings - and this despite the fact that the great majority of complaints describe one-off honest and minor mistakes, errors of judgment, thoughtlessness, administrative 'stuff-ups', oversights and the like which call out if they are substantiated not for a disciplinary response but simply for the lawyers subject to complaint to put things right.

Complaints like these can and should be readily resolved by the respondent lawyers giving the complainants fair and reasonable redress, including as appropriate financial redress, and doing whatever else needs to be done to make good their mistake and to prevent the same or similar mistake down the track.

We do the best we can with the powers we have available to us. We are not shy about initiating disciplinary proceedings - the public interest demands that we prosecute serious misconduct, and especially deliberate, knowing, reckless and repeat misconduct. We believe however that we best achieve our purposes by taking an educative and preventative approach whenever we reasonably can in preference to a punitive or 'gotcha' approach. We undertake our regulatory responsibilities accordingly.

Thus we dismiss large numbers of complaints which involve some unsatisfactory professional conduct which the respondent lawyers have put right on the basis that no public interest would be served in these circumstances by commencing disciplinary proceedings.⁵ It would be far preferable however and there really ought to be a way to resolve complaints of these kinds short of any implicit threat of disciplinary action.⁶

⁴ I discuss these regulatory design issues in much greater detail in *Regulating for Risk*, a paper delivered at the 2011 Conference of Regulatory Officers (CORO). The paper is published on the Publications page of the LSC's website.

⁵ Thus last year we dismissed 57% of complaints that involved a disciplinary issue on the basis that there was no reasonable likelihood a disciplinary body would make a finding of unsatisfactory professional conduct or professional misconduct; 23% on the basis that no public interest would have been served by commencing disciplinary proceedings and only 12% by commencing disciplinary proceedings.

⁶ The LPA is seriously deficient in this regard and should be amended. The problem is that the LPA gives us no powers of the kind envisaged in the proposed *Legal Profession National Law* to resolve consumer disputes by binding the parties to a fair and reasonable outcome. Thus it gives us no alternative but to treat large numbers of consumer disputes as a species of disciplinary matter. I discuss this issue at greater length in the Commissioner's Overview to our 2012-13 annual report.

But there is another and fundamentally important category of complaint which we are giving far greater attention than we have in the past and which is key to the regulatory future.

Clearly most complaints describe the respondent lawyers' conduct in the course of their dealings with the individual complainants. But what if we have reasonable grounds to believe having investigated a complaint about a lawyer's conduct in his or her dealings with the complainant that the complaint identifies not just some one-off conduct on the lawyer's part in his or her dealings with the complainant but what appears to be a standard practice in the lawyer's dealings with his or her clients more generally?

What if we have reason to believe for example that the lawyer charged the complainant costs he or she wasn't entitled to charge and further that the lawyer and the lawyer's law firm engaged in that particular billing practice as standard practice? The law firm in that eventuality will very likely have charged potentially large numbers of other clients also costs it was not entitled to charge.

We are dealing with more than a few such matters as we speak - complaints which suggest that not only the complainant but potentially large numbers of other and unsuspecting clients may have been short-changed in ways that might entitle them to refunds. We have begun to systematically commence 'own motion' investigations and, if the law firms subject to complaint are incorporated legal practices, carefully targeted compliance audits to ensure that not only the complainants but these people, too, get any redress they may be owed.

Complaints of this kind tell us that our fundamental purposes require us as regulators to direct our energies equally and perhaps with even greater priority to practices that appear to have taken hold across the profession or parts of the profession than to the conduct of individual lawyers.

Furthermore they challenge any complacent assumption that the profession can take comfort in the relatively small number of complaints about lawyers compared to the number of lawyers potentially subject to complaint. They remind us that there are many times more clients who may have been treated less than fairly and reasonably by their lawyers than there are complaints, very likely many tens of times more and perhaps even hundreds of times more, and many more lawyers who might reasonably be subject to complaint than actually are.⁷

But of course systemic malpractices can have their origins in honest mistakes and errors of judgment in much the same way as one-off misconduct. They might be founded for example on a lawyer's or law firm's honest but mistaken belief that they were entitled to claim certain costs they were not in fact entitled to claim, perhaps without ever having turned their minds to it.

⁷ Sadly complaints of this kind also highlight deficiencies in our powers of investigation in relation to 'third party' complaints and own motion investigations - deficiencies which allow lawyers and law firms subject to investigation to frustrate and even to completely stymie any effective investigation of their conduct. The LPA is seriously deficient in this regard and should be amended, once again to reflect the relevant provisions of the proposed *Legal Profession National Law*. I reflect on the issue also in the Commissioner's Overview to our 2012-13 annual report

Thus we take an educative and preventative rather than a punitive or ‘gotcha’ approach in response to this kind of complaint also whenever we reasonably can, provided of course that the lawyers subject to complaint put things right with not only the complainants but any of their other and unsuspecting clients who have been similarly impacted, and provided of course that they revise or undertaken to revise the practice the subject of the complaint.

And we undertake our regulatory responsibilities accordingly – but only as an interim measure. We go out of our way to alert the profession to systemic malpractices we uncover in the course of investigating complaints and we are not shy about commencing disciplinary proceedings in relation to matters of this kind once we’ve given lawyers the ‘heads up’. We do that in talks (like this one), in our annual reports and by publishing regulatory guides.

REGULATORY GUIDES

We have committed to publishing regulatory guides or practice notes to set out the factors we take into account in exercising our regulatory responsibilities in circumstances where there appears to be some uncertainty about how a lawyer’s professional obligations apply or they appear not to be well understood, most relevantly our responsibilities:

- to mediate consumer disputes including costs disputes between lawyers and their clients; and
- to investigate and to decide what action, if any, to take on complaints which involve a disciplinary issue - or more precisely to decide having investigated a complaint whether there is a reasonable likelihood a disciplinary body will find the conduct subject to complaint to be unsatisfactory professional conduct or professional misconduct and, if so, whether it is in the public interest to commence disciplinary proceedings.

We direct the guides primarily to the conduct of lawyers in their dealings with ‘retail’ rather than commercial clients - that is to say, in their dealings with ordinary people who purchase legal services only infrequently and mostly in relation to personal injury, criminal, family law and deceased estate matters or buying or selling a house and the like and often at a time of considerable personal difficulty.

This is because, firstly, retail clients make the vast majority of complaints we see at the LSC and they look to us for protection. Secondly and perhaps even more importantly, it is because of the ‘information asymmetry’ and comparative lack of bargaining power that characterises their dealings with their lawyers – their reliance upon and the trust they place in their lawyers to fully and frankly explain their options and likely costs and any technical terms and unusual terminology in proposed costs agreements and to bill them fairly and reasonably.⁸

⁸ See *Council of the Queensland Law Society v Roche* [2003] QCA 469; *Re Law Society of the Australian Capital Territory and Roche* (2002) 171 FLR 138; *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408; and *Veghelyi v The Law Society of New South Wales* (unreported, 4057 of 1991, October 1995). The Chief Justice in *QLS v Roche* quoted Kirby P in *Foreman* to the effect that ‘no amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety’ (page 422). He then quoted Mahoney JA in *Foreman* who said that ‘if costs agreements of this kind are to be obtained from clients, it is necessary that the solicitor obtaining them consider carefully her fiduciary and other duties, that she is conscious of the extent to which the agreements contain provisions which put her in a position of advantage and/or conflict of interest, and that she

We hope and intend that the guides will help lawyers to avoid complaints, will help promote adherence to high professional standards and help prevent non-compliance, especially inadvertent non-compliance by that vast majority of lawyers who want to do the right thing.

We hope they will be persuasive but they are not, nor can they ever be binding. The LSC is responsible for promoting, monitoring and enforcing standards of conduct in the provision of legal services, not for setting them. The standards are set in laws enacted by parliaments, in the judgments of the disciplinary bodies and the courts and in the conduct rules promulgated by the professional bodies.

Thus the guides are neither 'rules' nor an attempt to 'codify' the rules which establish a lawyer's professional obligations much less a misguided attempt to 'make law'. They simply articulate the factors we take into account in exercising our responsibilities in circumstances where it is unclear how an obligation applies or it simply not well understood.

They deal sometimes and by their very nature with matters that are untested and yet to be judicially determined. The uncertainty hardly relieves us however of our responsibility to decide what action to take, if any, on complaints of these kinds. We can't duck the issue. Our responsibilities require us to take a view, and lawyers and users of legal services alike are entitled to know what it is. This is no more than lawyers and users of legal services are entitled to expect of a transparent and accountable regulator.

We will do our very best to get it right but it is always possible that the disciplinary bodies and the courts will tell us in due course that we have got it wrong. So be it. We will amend those guides accordingly.⁹

SOME PROBLEMATIC BILLING PRACTICES

We highlighted in our most recent annual report a series of problematic billing practices we have come across in the course of investigating complaints. They are practices which we believe expose lawyers potentially to disciplinary action for charging legal costs to which they are not entitled and/or for charging excessive legal costs – and potentially also to orders requiring them to reimburse the complainants and possibly large numbers of their other and unsuspecting clients possibly large sums of money in the aggregate by way of compensation. They include:

- billing in six minute units of time 'or part thereof' and proceeding to bill clients for many such units of time over the life of a file for work that took much less than six minutes,

take care that, by explanation, independent advice or otherwise, the client exercises an independent and informed judgment in entering into them' (page 437). Mahoney JA commented to similar effect in *Veghelyi*. He noted that '*clients are, or may frequently be, in a vulnerable position vis-a-vis their solicitors. The presumption of undue influence is, I think, based in part at least upon the fact that when making decisions clients ordinarily or at least frequently place trust in their solicitors. They ordinarily are not in a position to know without investigation what work must be done and what charges are fair and reasonable. They ordinarily assume that the solicitor will only make such charges. Solicitors are, on the other hand, informed, or in a position to inform themselves, of what work may be required and what are fair and reasonable charges. They are, in that sense, in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of such an advantage.*'

⁹ For more information about what we are trying to achieve by publishing regulatory guides, how we go about developing them and, importantly, their status, see *Regulatory Guides - An Overview*. The Overview is published on the Regulatory Guides page of our website.

and perhaps no more than 30 seconds, thereby significantly inflating the lawyers' stated hourly rate;

- charging the maximum 25% uplift fee allowed under the LPA to compensate lawyers for accepting the risk that can be inherent in speculative or 'no win, no fee' matters in matters which expose the lawyer or law firm to little if any risk;
- entering into costs agreements with clients that purport to give law firms a discretion to charge care and consideration on top of the legal costs otherwise agreed without disclosing the circumstances that will trigger the exercise of that discretion and the basis on those additional costs will be calculated;
- charging a 'care and consideration' component (often of 20-30% and sometimes more, even 100%) on top of a standard hourly rate for 'run of the mill' work that involves no particular novelty, complexity or difficulty (and worse still charging both an uplift fee and a 'care and consideration' component on top of a standard hourly rate in 'run of the mill' speculative matters involving no particular risk, novelty, complexity or difficulty);
- substituting an itemised bill in a higher amount for an earlier lump sum bill when clients exercise their entitlement to request that the lump sum bill be itemised;
- charging out 'paralegals' at rates which approximate the charge out rate for lawyers; and
- charging clients 'cancellation fees' for time set aside in matters that settle early and arguably 'double-dipping' by substituting other paid work for the work that was 'cancelled'.

We have published regulatory guides which address some of these practices and we have several others in various stages of preparation - and thus we are progressively giving lawyers the 'heads up' about recurring themes we see in complaints that cause us concern.¹⁰

SOME OVERARCHING PRINCIPLES

The overarching principles that apply to a lawyer's billing practices are that **lawyers should give their clients valid costs disclosure; should ensure that any costs agreements they enter into with their clients are both fairly entered into and reasonable in their terms; and should charge no more in a matter than is fair and reasonable in all the circumstances of the matter.**¹¹

It is important in this context that lawyers know and understand that the disciplinary bodies and the courts have made it very clear that lawyers are not protected from a finding that they charged excessive legal costs on the basis simply that they billed the client consistent with their costs agreement with the client.¹² Determining the amount of a bill is always a

¹⁰ We have published a series of guides in relation to the restrictions on the advertising of personal injury services, for example, and also guides in relation to the preparation of itemised bills and to some of the key principles that apply to billing practices generally. They are all available on the Regulatory Guides page of our website. We are currently preparing further guides in relation to fixed fee billing and billing for care and consideration, and are considering in conjunction with the Bar Association of Queensland preparing a guide in relation to charging cancellation fees.

¹¹ See *Regulatory Guide 8: Billing Practices – Some Key Principles*.

¹² The Chief Justice in *QLS v Roche* (above) observed that *'the circumstance that a solicitor's right to exact certain charges is enshrined in an executed costs agreement will not necessarily protect the*

two-step process: lawyers should ask themselves firstly whether they have calculated the bill in accordance with their costs agreement with the client and secondly, even if they have, whether the costs they are claiming under the agreement may be excessive even so.

SOME ISSUES IN RELATION TO TIME-COSTED BILLING

There are at least two fundamental principles which apply to lawyers who agree with a client to calculate their legal costs on a time-costed basis:

- **they should ensure that the time they charge the client in a matter is no more than and fairly and reasonably reflects the time they actually spend on the matter; and**
- **they should ensure that they do not charge their clients the same unit of time more than once.**

It is trite to say in relation to the first of these principles that a lawyer who enters into a costs agreement with a client to bill the client according to the time the lawyer spends working for the client should not bill the client for more time than the time the lawyer actually spends working for the client. It is obvious for example that the lawyer should not charge the client for an hour's work drafting a document when in fact it took only half an hour, much less if they spent the hour working for another client in another matter altogether. That is simply fraudulent.

But the principle thus expressed is deceptively simple. Lawyers who bill their clients according to the time they spend working for their clients typically enter into costs agreements with their clients which provide that they will calculate their time in 6 minute units of time 'or part thereof' – and the problem is that these costs agreements, interpreted literally, purport to allow the lawyers to bill their clients for more time (and potentially significantly more time) than the time they actually spend working for them and thus to artificially inflate their bills.¹³

The New South Wales Court of Appeal articulated the second principle as follows:

*'where a solicitor is retained to act for multiple clients whose proceedings are heard together with evidence in one being evidence in the other [and] the clients are charged on a time-costed basis, there must be an apportionment of time spent on matters common to two or more of the proceedings... The precise mechanism of apportionment will depend on the circumstances of the case... However in all cases the apportionment must pay due regard to the principle that one unit of time may not be charged more than once.'*¹⁴

solicitor from a finding of gross overcharging.' He went on to quote Kirby P in *Foreman* (above) to the effect that *'no amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety'* (page 422). See also *D'Allesandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198.

¹³ As Stephen Warne put it in *On Rapacity* (above), *'there is nothing good about billing by units of time that are exclusively rounded up. A client who is charged \$500 per hour is entitled to deadly accuracy in time recording, and scrupulous fairness in rounding protocols.'*

¹⁴ See *Bechara v Legal Services Commissioner* [2010] NSWCA 369 at paragraphs 4-5 and 138-139.

The same reasoning applies to a situation in which, for example, a lawyer who acts for multiple clients in a class action updates them all as to the progress of the matter by sending them each a short email via a group distribution list - by sending only the one email, in effect. The principle that lawyers must not charge one unit of time more than once precludes the lawyer in this situation from charging each and every client the one unit of time it took to compose and send the email.

Some lawyers interpret the principle narrowly, to apply only where a lawyer acts for multiple clients and the benefit of his or her professional work is shared among those clients, but we believe it has broader application. It is obvious for example that a lawyer should not seek to charge each of two clients in entirely separate matters their full rate for work purportedly performed for both of them at the same time.

But consider how one or the other or perhaps both of these two principles apply to the following scenarios:

- a solicitor charges out his or her time at \$400 per hour in 6 minute units or part thereof and includes in a bill a claim for \$160 or .4 of an hour (i.e. four 6 minute units) – but the actual time the solicitor spent on the matter might be anywhere between a few seconds over 18 minutes and exactly 24 minutes - a variation potentially of just shy of 6 minutes or 25% of the amount claimed.¹⁵
- a solicitor who bills in ‘6 minute units or part thereof’ repeatedly over the life of a matter charges one unit of time for tasks which actually take much less than 6 minutes, and often less than a minute (to peruse a doctor’s invoice for the preparation of a medical report, for example, or to send a brief email). Thus the solicitor charges the client much more than (and potentially many times more than) the agreed hourly rate of \$400 per hour when the bill is measured against the total number of hours the solicitor actually spent on the matter.
- a solicitor who bills in ‘6 minute units or part thereof’ makes a telephone call to a client which takes say 2 minutes and before the 6 minutes are up makes a call to another client in another matter that takes 2 minutes. The principle that a lawyer should not charge one unit of time more than once implies in our view that the solicitor should not charge both clients the same 6 minute unit of time, but charge each client pro rata. This seems a trivial example at first blush but the small amounts of money involved can quickly add up to a substantial sum over the life of a file.
- a solicitor who purports to bill in ‘6 minutes units or part thereof’ performs a continuous series of discrete tasks but calculates his or her bill not by ‘counting’ the units of time it took to complete the series of tasks but by ‘counting’ each of the discrete tasks and charging one unit of time for performing each of those tasks - and so charges the client not for the (say) 10 minutes or 2 units of time or part thereof it actually took to read, consider and reply to a letter but 5 units of time, or effectively 30 minutes: 1 unit to read the letter; 1 unit to consider it; 1 unit to draft a reply; 1 unit to revise the draft; and 1

¹⁵ Some independent court appointed costs assessors respond to bills like the bill in this scenario with a form of ‘mathematical averaging’. They would allow the lawyer in that scenario not the claimed 24 minutes but only 21 minutes (and hence not \$160 but \$140) based on a statistical analysis to the effect that there is an ‘in built’ overcharge of 3 minutes, on average, in every claim based on multiples of 6 minute units of time or part thereof. Taxing Officers of both the Supreme Court of Queensland and the Family Court have accepted submissions premised on this analysis.

unit to send the letter. The principle that a lawyer should not charge one unit of time more than once implies in our view that the solicitor should charge only the time it took to perform the series of tasks considered as a whole.

- a solicitor flies for 2 hours to attend a meeting with an interstate client and uses the time on the plane to work on another client's file. The principle that a lawyer should not charge one unit of time more than once implies in our view that the solicitor should not charge both clients pursuant to time-costed cost agreements for the time he or she was on the plane, but at most one of them.
- a barrister charges a daily rate and charges a client his or her full daily rate for what in reality is much less than a full day's work – and, if he or she performs a part-day's work for another client over the course of the same day, charges both of them the full daily rate for the same day's work. The barrister has performed but one day's work and the principle that a lawyer should not charge one unit of time more than once implies in our view that the one day's work should be apportioned between the clients pro rata.
- a barrister charges a client a 'cancellation fee' for time previously set aside in a matter which unexpectedly settles and uses the time thus 'freed up' (a day or several days, perhaps, or even longer) to perform work for other clients and bills those other clients for that work. The principle that a lawyer should not charge one unit of time more than once implies in our view that the barrister requires a compelling justification to charge a cancellation fee in these circumstances, or any other circumstance in which he or she substitutes other paid work for the work that has been 'cancelled' (or for that matter makes no reasonable attempt to find other paid work to substitute for the work that has been 'cancelled').¹⁶

The conduct of the lawyers in each of these scenarios arguably contradicts one or the other or perhaps both of the two key principles which apply to time-costed billing. It exposes them not only to complaint and to having their costs reduced on assessment but potentially to disciplinary action for charging costs to which they are not entitled and/or charging excessive legal costs.

SOME ISSUES IN RELATION TO CARE AND CONSIDERATION

When is it fair and reasonable for a solicitor to make a charge for care and consideration in addition to a time-costed bill?

We have put this question to lawyers at various conferences and symposia over recent years. Their answers highlighted striking differences of opinion. Some lawyers defend the practice and want to debate the circumstances which might justify such a charge. Others argue that it is never acceptable because, as one of them put it, charging 'care and con' on top of a time-costed bill is 'all con and no care'.

It is worthwhile canvassing some history. The concept of care and consideration has its origins in a time when solicitors' costs were almost invariably calculated by reference to 'item-based' court scales. There were problems however with this method of calculating a solicitor's costs.

¹⁶ Importantly the same principle applies equally to solicitors who pass on a barrister's cancellation fee in these circumstances to their clients as an outlay, and who should satisfy themselves that the fee is fair and reasonable before passing it on.

One of them was that the scales made no provision for certain kinds or items of work that solicitors performed on behalf of their clients. Another was that they made no allowance for the 'degree of difficulty' or varying intellectual input solicitors brought to their work and, for example, the additional skill, knowledge, expertise and time required to prepare complex as opposed to more straightforward documents and correspondence of the same length.

The various court scales resolved these problems by allowing solicitors to claim additional costs to compensate them for work they performed that otherwise went unremunerated and the otherwise unremunerated skill and expertise they brought to the work - thus the additional costs that came to be known colloquially as 'care and conduct' or 'care and consideration'.

In due course the scales came to include criteria as to when it might be appropriate to bill this additional charge – by having regard, for example, to the complexity, difficulty or novelty of a matter; the skill, specialised knowledge and responsibility required of the solicitor; the time the solicitor spends researching questions of law and fact, etc.¹⁷

The concept of care and consideration has since found its way into time-costed billing. But there is an obvious problem: time-costed billing by its very nature already 'builds in' many of the factors that might justify a charge for care and consideration under an item-based scale.

It already builds-in the time it takes to perform the items of work that are not provided for in the scales, and similarly the 'degree of difficulty' considerations - it already and by its very nature factors in the additional time it takes to draft more novel or complex documents or correspondence or to research questions of law and fact and the like. Furthermore solicitors who bring more specialised knowledge, expertise and responsibility to the task invariably charge higher hourly rates than their more junior or less expert colleagues and competitors.

Thus charging care and consideration in addition to a time-costed bill begins to look suspiciously like double dipping (and even treble-dipping when care and consideration is added on top of an already higher than usual charge out rate). So how do we deal with complaints which query the additional charge?

Sometimes it emerges in the course of investigating these complaints that the lawyers made a charge for care and consideration in the honest but mistaken belief that they had entered into a costs agreement with the complainants which authorised them to make a charge for care and consideration when in fact the costs agreement made no provision for such a charge. Complaints like these can be readily resolved by the lawyers waiving or reimbursing the charge for care and consideration or by having their costs assessed. Typically however costs agreements include such a provision, characteristically by providing that in addition to the agreed hourly charge-out rate:

The firm may charge you, at the absolute discretion of the partners of the firm, an additional amount of up to 30% of the total legal costs otherwise payable for care and consideration in the conduct of your matter having regard to the following –

¹⁷ See for example Item 1 under the scale of costs set out in Schedules 1,2 and 3 of the (Qld) Uniform Civil Procedure Rules 1999 (the UCPR); Item 106, Schedule 3, Family Law Rules 2004; and Item 11.1, Schedule 3, Federal Court Rules 2011.

- (a) the complexity or urgency of the matter; and*
- (b) the difficulty and novelty of any question raised in the matter; and*
- (c) the skill, labour, specialised knowledge and responsibility involved in the matter on the part of the solicitor.*

There is a very real question in our view whether costs agreements couched in these or like terms meet a lawyer's costs disclosure obligations, notwithstanding that the lawyer may have given their client an estimate of the 'total legal costs otherwise payable'.

Whatever else lawyers are bound to do in entering into costs agreements with their clients, the LPA clearly expects lawyers to give their clients sufficient information to enable them to understand the quantum of the costs to which they will potentially be exposed by entering into the agreement - and it is doubtful at best that purporting to give themselves a 'discretion' to charge an additional amount of 'up to 30%' of the total legal costs otherwise payable is sufficient to meet that expectation, especially when the variables that will influence the calculation of the actual figure within that range are generally known at the outset.

There is a further question in any event, even if costs agreements couched in these or like terms satisfy a lawyer's costs disclosure obligations: are the costs the lawyers are claiming under those agreements properly chargeable even so?

The issue reduces to whether the 'skill, labour, specialised knowledge and responsibility involved in the matter on the part of the solicitor' has effectively been billed twice, once in the calculation of the solicitor's hourly charge out rate and secondly in the charge for care and consideration, and whether the matter involved sufficient 'complexity, difficulty or novelty' to justify a charge for care and consideration, whether at the percentage rate charged or at all.

These questions can only be determined on a case by case basis. Clearly, however, if the answer to the first question is 'yes' and the answer to the second question is 'no', the lawyers who have charged care and consideration are exposed potentially to disciplinary action for charging excessive legal costs and/or costs to which they are not entitled and to compensation orders requiring them to waive or reimburse the charge.

Finally some complaints raise an altogether more troubling question. Some complaints reveal after investigation that the lawyer or law firm subject to complaint has not only charged care and consideration but charged it at the same or similar rate in all or nearly all the matters they have billed without any apparent regard to the comparative 'complexity, difficulty or novelty' of each individual matter.

Lawyers in these circumstances are at a very real risk of finding themselves subject to disciplinary action for charging excessive legal costs and/or costs to which they are not entitled and to compensation orders requiring them to reimburse multiple clients potentially large sums in total.

ISSUES IN RELATION TO SPECULATIVE UPLIFTS

The LPA allows lawyers who enter into conditional (or 'no win- no fee') costs agreements with clients to charge an 'uplift fee'. It requires lawyers before they enter into an agreement with a client which involves an uplift fee to disclose to the client in writing the amount of the fee or alternatively the basis on which it will be calculated and the reason why the uplift is warranted, and it caps the uplift at 25% of the total legal costs (excluding disbursements) otherwise payable under the agreement.¹⁸

The underlying rationale, clearly, is to ensure that lawyers who enter into a no win - no fee costs agreement with a client are fairly and reasonably compensated for accepting the risk that the client will 'lose' (and hence that they, too, will 'lose' too because they will have foregone a fee). But this implies in our view that an uplift fee should be justified by and proportionate in amount to that risk.

This is a new issue on our radar. Consider the following scenarios, all of which we have seen in complaints:

- a lawyer charges a client the maximum allowable 25% uplift in a no win - no fee matter where there is little if any or at best only a moderate risk that the client will lose, or even none at all (such as when a respondent has admitted liability).
- a law firm charges its no win-no fee clients the maximum allowable 25% uplift as standard practice in all no win - no fee matters without conducting any case by case risk assessment that individual clients might lose (and, clearly, the risk in matters where liability is a live issue will be different to the risk in matters where liability is admitted);
- a law firm charges its no win - no fee clients the maximum allowable 25% uplift as standard practice and also as standard practice mitigates the risk that its clients might lose and so mitigates its own risk by defining a win in its standard form costs agreement with its clients to include any circumstance in which it recommends to a client that he or she accepts an offer.

We are wrestling with these issues as we speak but in our view the conduct of the lawyers in each of these scenarios once again exposes them not only to complaint and to having their costs reduced on assessment but potentially to disciplinary action for charging costs to which they are not entitled and/or for charging excessive legal costs.

The latter scenario in particular involves a host of nuanced and complex ethical questions arising not least from the fact that the firm has mitigated its risk by exaggerating the conflict of interest that is already inherent in the situation. Lawyers in this and like scenarios need to think very carefully about how they can best manage that conflict.

IN CONCLUSION

I reiterate that we take a remedial and preventative approach whenever we reasonably can in preference to a punitive or 'gotcha' approach. That is often all that needs to be done to give consumers a means of redress for complaints.

¹⁸ See sections 313 and 324. The term *uplift fee* is defined at section 300.

That said, the public interest demands and we are not shy about initiating disciplinary proceedings in response to more serious misconduct and especially knowing, reckless and repeat misconduct. That includes systemic malpractices of kinds we have drawn to the profession's attention in our annual reports and regulatory guides and elsewhere specifically to give lawyers the heads up.

We are determined to put costs and billing practices at the very front and centre of the profession's consciousness, as they should be. We have already commenced disciplinary action against several lawyers alleging misconduct of the kinds I have been describing and have a number of other discipline applications in various stages of preparation.

We are investigating more than a few complaints and have initiated a series of 'own motion' investigations and compliance audits pro-actively targeting every one of them. Time will tell but I suggest you watch this space.