Costs Disclosure and Costs Agreements Liens

Costs Disclosure Requirements

Lawyers have a monopoly over the provision of legal services
Issue of cost:

- How much lawyers charge
- How they disclose their costs to clients
- How they collect their fees

Increased requirements for cost disclosure
Disciplinary sanctions for lawyers who over charge
Ability for clients to request to view their bill
Ability of courts to set aside cost agreements between lawyers and clients

Obligation for NSW lawyers to disclose their costs: s309 Legal Profession Act 2004
-must disclose: -the basis in which they calculate costs
-the billing arrangements
-costs or estimates of the costs
s309 - Must disclose:

- basis on which they calculate costs
- The billing arrangements
- The clients rights to receive a bill and obtain a review of their costs
- Where costs cant be quantified in this way, the practitioner must provide an estimate of the likely total amount of the costs and disclose any significant increase in estimate.

s311 – Disclosure about costs must be made before or as soon as practicable after the lawyer is retained.
s312 – exception when bill is under $750 or client is also legal practitioner
s315 – disclosure must be in plain English – may be provided in another language or orally if the client is unable to read.

Cost agreement is a contract and has to meet the general law requirements of a contract

- Terms must be clear and unambiguous
- Cost agreement must be in writing
- even if contract is signed by client – can still have disciplinary proceedings for overcharging.

Law society of NSW v Foreman
Fairness and reasonableness of costs affected by factors such as:

1) Size of the firm
2) Resources available to the firm
3) Value lawyers place no their skill and expertise
4) Urgency of the clients needs

Fee Scales can provide an appropriate objective starting point as to whether fees charged are reasonable.
Evidence of fees charges by other lawyers in the jurisdiction are relevant in these disputes

s328 – list of factors that determine if costs are fair and reasonable. Includes:

- Whether lawyer complied with legislation or professional rules
- Any cost disclosures made

- Any relevant advertisements as to the lawyers costs/skills
- The retainer and its scope
- Complexity of the matter
- Quality of the work done
- Place/circumstances of work
- Time within which work was done
- Any other relevant matter

Billing arrangements used in Australia

1) The billable hour
   - lawyers time-bill on an hourly rate using pro-rata 6 minute units (1/10th of hour)
   - Usually charged on a scale according to the level of expertise of the lawyer or staff member doing the work
   - Blended hourly rate (alternative) – where the same flat rate is charged regardless of which employee performs a task → easier from an administrative level but might result in inexperienced staff doing the bulk of the work for a client to maximise the profit for the firm
   - The effect of the billable hour on staff morale – that sort of pressure to charge for a particular number of units can lead to unnecessary stress and depression.

2) Contingency fees – fee arrangements where there is an agreement to pay the lawyer contingent upon a particular event (usually success at litigation)

   - 3 Types of contingency fee arrangements:

   a. Speculative fees (no win no pay) – are dependent on winning the case
      Advantage – to the client is there is little/no upfront costs so they might be able to access a lawyer who they couldn't otherwise afford.
      Disadvantage – increases the risk to the law firm (can't afford to take on cases that they might not win)

   b. Uplift fee arrangements – entitle the lawyer to receive an addition to their usual fees on uplift or success fee if the matter is successfully concluded.
      Disadvantage – lawyers might be tempted to settle at the earliest possible time to maximise their fees for the least amount of work
      -lawyer must insert into the contract an entitlement to specified fees if the client rejects a fair and reasonable settlement offer (s324 – cant enter into an uplift fee arrangement in a claim for damages).
      -conditional cost arrangement – s 232 of Legal Profession Act:
      - Cannot make arrangement in criminal matters because a fee might undermine the requirement of complete candour to the court for defence lawyers if the payment of their fee relied on their success in court
      - Cant charge these fees in a family law matter – public policy not wanting lawyers to discourage the dissolution of marriages or discourage attempts a reconciliation in order to secure a fee

   c. Percentage – where lawyers receive a % of the award or judgement
      Torts law of maintenance and champity.

   - Maintenance involves the procurement by direct or indirect financial assistance of another person to institute or carry on or defend civil proceedings without lawful justification.
   - Champity – form of maintenance in which a share of the proceeds of litigation is stipulated for as a consideration for any assistance
   - Tort of champity – based on the public interest in ensuring that vulnerable litigants

are protected from opportunistic exploitation (designed to discourage ambulance chasing).

3) Fixed/Flat fee / capped fees – allow the client and lawyer to make an agreement on a fixed fee for a specified service

- Most commonly used in relation to real estate matter and preparation of wills
- Fixed fees for Conveyancing are common
- Disadvantage: could lead to inflexibility in the services provided by the lawyer
  - conflict of interest could arise where the lawyer prefers their own interest in doing as little work as possible for a fixed fee and clients interest in getting a good service from the lawyer.
- Capping fees at a particular rate – lawyer agrees not to exceed a ceiling level of fees which might vary according to the type of work being undertaken.

Disbursements – expenses incurred in the course of running a matter (stamp duty, taxes, bank fees, administrative office expenses, report fess etc) and include expert witness fees (doctor, psychologist, engineer or financial expert) and special legal consultants such as a barrister in a trial => these costs can be passed onto a client in addition to time billed as professional fees.

Party/Party costs – costs awarded to a person by the court if they win their case. Assessed by court according to a sliding scale (significantly less than solicitor/client costs).
Solicitor/Client costs – what their lawyer charges them

If a client wins an action then they might be awarded costs (discretionary)
Costs follow the event – general law position that a successful party has a reasonable expectation of being awarded costs against the unsuccessful party.

Purpose of cost order – to compensate the person in who's favour it is made – not to punish the person against who the order is made
-some courts (family and civil and administrative tribunal) do not aware costs other than in exceptional circumstances
-Difference between party/party cost and solicitor/client costs

If client believes costs are too unreasonable

- Can have a cost assessment scheme administered by the supreme court
- Independent cost assessor determines if bill is fair and reasonable
- To have costs assessed, client needs to make an application to the manager of the cost assessment in the supreme court and pay an application fee (can be waived in cases of serious hardship)
- If amount in dispute is less that $10k then send to the OLSC – if still not happy, can be reviewed by cost panel (2 cost assessors) within 30 days.

s99 Civil Procedure Act 2005 – court can order costs against a legal practitioner in cases involving misconduct
-Court has wide power to award costs personally against solicitors

Liens

- Legal practitioner has the right to keep a clients property until the client has paid the legal practitioners fees and disbursements.
- Can be exercised at any time after practitioner has given the client the bill and the client fails