Costs - to pay or not to pay?

The question, it seems, which is often asked by clients in respect of their lawyers fees is "Why should I pay these costs?"

What follows is a brief examination of primary basis of costs complaints.

The current regime for costing is based on a cost disclosure system and cost agreement. This was first introduced under section 118 B of the *Legal Practitioners Act* repealed and is of course now encompassed in the provisions of the *Legal Profession Act*. Unfortunately, some clients have a perception that solicitors are generally very wealthy and have become that way by charging excessive fees which is not reflective of the work performed. Fortunately, there is little evidence to support this. It is the exception and not the rule.

In some cost complaints there are statements that had the complainant been realistically advised of cost before pursuing a course of action, they would never have embarked upon that course. However, these complaints do not always withstand investigation and are found to be either misconceived or vexatious, rather arising out of a disappointing result than out of any misconduct on the part of the practitioner.

Nevertheless, this is all a reflection on how well a client's expectations are managed by a practitioner from the onset.

It is certainly good practice to follow up any verbal advices given to a client with a written advice. Whilst this may seem a very basic principle of practice, in recent times when investigating matters and having access to practitioner files, I have observed noted absences of file notes (or in some cases no detailed file notes), nor have there been written advices following up on verbal advices. Some records taken of verbal advices are noted simply in a cryptic fashion with insufficient detail to determine the nature of the advice.

A further problematic area with respect to costs and, more particularly, cost disclosure, is that whilst cost disclosure is made by a practitioner at the commencement of the matter there is a noted failure to notify of any cost increases as the matter progresses. Other areas for concern with respect to complaints are:

a. failure to provide bills on a regular basis;

b. failure to itemize bills appropriately, and;

c. including charges for preparation of an itemized account.

The solutions to managing these issues are obvious, however, some practitioners involved in the day-to-day management of matters omit to deal with these issues. The consequence being that these minor issues may result in cost disputes which in themselves become very time consuming and may delay the payment of costs.

Whilst many of the complaints which are received by the Law Society arise out of cost disputes, the Law Society is fairly restricted in what action it can take to facilitate a resolution of such cost disputes when there has been appropriate cost disclosure to the client. However, under chapter 3 Part 3.3, Division 7 of the *Legal Profession Act*, there is provision for mediation of costs disputes.

Section 329 defines a client under the division of the *Act* as:

"Client means a person to whom or for whom legal services are or have been provided."

Jacqueline Presbury
Professional Standards & Ethics Solicitor

pa2pss@lawsocnt.asn.au

Section 329 also provides a definition of a cost dispute as:

"...a dispute between a client and an Australian legal practitioner concerning a bill, and includes a dispute over an amount claimed to be payable under a costs agreement."

This Division is specifically for the purposes of mediation of costs disputes. However, the Law Society is not the facilitator of such disputes. Under 330 (1) a complainant (provided they are a client as defined above) who has received a bill, may refer any dispute about costs to the Statutory Supervisor provided that the amount in dispute is less than $10,000. The Statutory Supervisor, of course, is the Solicitor General, Mr Michael Grant QC.

However, the Statutory Supervisor cannot compel parties to attend mediation and any agreement subsequently reached between the parties is not enforceable.

To date there have only been enquiries with the Statutory Supervisor in relation to mediation

pursuant to section 330 (1) of the *LPA*. Mr Grant QC, has facilitated mediation under s 330(1), however, it is noted that Mr Grant QC, does have the power under the legislation to delegate any of his responsibilities as Statutory Supervisor.

In addition, a Registrar may also refer a costs dispute in relation to a bill which has been rendered by a practitioner to the Statutory Supervisor for mediation but only if the amount is less than $10,000. A Registrar is defined under the *Legal Profession Act (LPA)* as being within the meaning of section 9 (1) of the *Supreme Court Act.* That is, a Registrar or an Acting Registrar must be appointed under the *Supreme Court Act.*

Pursuant to section 330 (3), a Registrar may require the client and the practitioner to enter into a process of mediation if the amount in dispute is less than $5,000. In the event that the Registrar adopts this course of action, then the Registrar must give written notice to both the client and the practitioner. This process may occur at any time prior to an application for an assessment of the whole or any part of a bill is accepted by a Registrar.

With respect to the Registrar's power contained in section 330 (3) whereby the Registrar can compel parties to mediate, this mediation is not a mediation to be referred to the Statutory Supervisor, as s 330(3) is independent of the matters for mediation by the Statutory Supervisor pursuant to s 330 (1).

It is anticipated that there will be some further developments in relation to the mediation under s 330 of the *LPA*.

Chapter 3 Part 3.3, Division 8 of the *LPA*, sets out the processes for costs assessment, and again the definition of client under this Division at section 331 has the same definition as provided for in section 329: that is, "client means a person to whom or for whom legal services are or have been provided".

A client or a third party payer may apply to a costs assessor for an assessment for the whole or any part of the legal costs payable either by the client or the third party payer. Such an application may be made notwithstanding that costs may have been wholly or partly paid. However, the proviso is that the application for a cost assessment must be made within 12 months after the bill was given, or the request for payment was made, or in the event that neither a bill was given nor a request was made the costs were paid.

There is, however, provision for an application to be made after the expiration of the 12 month period. The requirements to be met in order for such an application to be successful are set out in section 332 (6). Effectively, the Court must have regard to the delay and the reasons for the delay in considering the application before it can determine the application in favour of the applicant, thereby allowing an extended period beyond the 12 months. The decision to extend the period must be just and fair in all of the circumstances.

CONTINUING PROFESSIONAL DEVELOPMENT (CPD)

31st March 2009 is closing in.

Oh My God! Have I got the Points?!

You've got your Practising Certificate, you need to accrue your 12 CPD points, the end of the CPD year is nearing, you're not sure if you have the points, everyone is screaming at you to get this and that done, you're due in court in half an hour, your very demanding client wants to speak with you and does not want to leave a message and then the nuisance CPD Officer writes you a letter to say you're being audited. Had enough!

Here are some tips to earn your points very quickly

- Preparation and/or presenting for seminars 4 points for substantive presentation (and including preparation).

- Completion of approved specialist accreditation course in the year of your attempt 12 points

- Upcoming CPD events are advertised in the weekly Practitioner and a calendar of events is coming for CPDs for next quarter. Plan your CPD year around these events.

Confused about Competency 1 and 2?

Competency 1 includes presentations on:

- risk management,
- occupational health and safety,

Leonie Hastie

CPD Officer

Continued page 30