THE COST OF JUSTICE OR JUSTICE IN COSTS – THE EXPERIENCE OF THE OLSC IN HANDLING COSTS COMPLAINTS

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I INTRODUCTION

The Office of the Legal Services Commissioner ('OLSC'), established in 1994, is the first port-of-call for all complaints against legal practitioners in NSW. Complaints concerning costs are, along with complaints about negligence and poor communication, the largest group of complaints received by the OLSC.

While we are often able to resolve these complaints through informal mediation, many are referred to the Supreme Court Costs Assessment Scheme or, in extreme circumstances, treated as disciplinary matters where prosecutions may ensue against the legal practitioner.

In this article I would like to explore some of the reasons behind complaints concerning costs. I will then look at the ramifications of hourly billing and finally some of the alternatives to the billable hour.

II PSYCHOLOGY OF COMPLAINTS

My twenty years of experience handling complaints has given me an understanding of what I call the 'complaint hurdle'. This is the barrier which must be overcome by an individual to actually complain about an issue that grieves them.

We know from many studies that somewhere in the vicinity of only one in 20 people who feel aggrieved about an issue ever *actually* complain.[1] Why is this? Do people fail to complain because it is too difficult? Do they just 'shrug it off' and move on to a new legal service provider? Do they believe that there is no point in complaining because the odds are stacked against them since the power is held by the other party? Do they believe that the powers of complaint handling agencies are insufficient or ineffective?

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1 American Express, SOCAP Study of Complaint Handling in Australia, *Report 1: Consumer Complaint Behaviour in Australia* (1994).

One thing seems clear, to overcome the complaint hurdle, complainants have to 'puff themselves up' and become strident. While this is perfectly understandable, at times the degree of a complainant's stridency can be extraordinary.

In my previous role as the President of the Anti Discrimination Board ('ADB') I received many complaints of high sensitivity and of great personal impact. Those about race discrimination, HIV/AIDS discrimination, or sexual harassment often resulted in the complainant becoming quite vociferous in the pursuit of their complaint. However, when compared with the degree, of angst, anger and frustration exhibited by consumers who lodge complaints against the legal profession, the level of stridency exhibited by those at the ADB was significantly lower. Why is this?

III JUSTICE VERSUS LAW

People seeking the services of a legal practitioner are almost always engaged in a search for justice. Rarely do they consider the concept of 'justice' deeply. It is simply what they believe they deserve. They also think of justice as being synonymous with outcome: did I get the kids from the marriage? Was the estate distributed appropriately? Did I get the settlement that I deserve? Did I stay out of gaol?

Accordingly, people who approach legal practitioners seek justice, but what they get is the law. If a client does not have the distinction between his or her expectations of justice and what the legal process can offer explained by their legal practitioner, then he or she is highly likely to complain at the end of the process. This is particularly the case where he or she is not made aware that the 'outcome' he or she is seeking is usually provided by a third party: a judge, an arbitrator, or a registrar – rather than by the lawyer themselves.

When they fail to get the outcome they seek, the complainant believes that 'there is no justice'. For them this is a much greater concern than the simple failure of obtaining their objective. The fabric of society that they have grown up to believe in so strongly has been torn. In many instances, this results in the 'victim' jumping on the nearest and largest 'white charger' and embarking on an enterprise to restore justice to the world.

IV COMMUNICATION

Anecdotal evidence suggests that most of the complaints about overcharging are inextricably linked to complaints about poor communication. Many costs complaints are received by the OLSC after the completion of the matter, and when the client has lost their case. Evidence suggests that when the client has been well-informed of the processes involved, and has received regular information about the status of their matter and the costs that are accumulating,

they are far less likely to complain, even when they are unsuccessful in their action.

Again, anecdotal information and my experience at the OLSC show that many lawyers are uncomfortable communicating with their client about these issues, and even more so about how the lawyer will be charging the client for the work performed.

Indeed, the vast majority of the complaints received at the OLSC are really about poor communication, or failure of communication, between the practitioner and the client.

V PRIMARY ISSUES OF COMPLAINT

The statistics recorded for the OLSC *Annual Report 2002–2003*[2] during the period ending 30 June 2003 show there were 2768 written complaints lodged with the OLSC.[3] Approximately 75 per cent of these complaints were handled by the OLSC, with the remainder referred to the Law Society of NSW and the NSW Bar Association for investigation.[4]

Of these 2768 individual complaints,[5]

- 20.3 per cent were about cost-related issues;
- 10 per cent related to overcharging;
- 6.2 per cent related to general cost complaints/queries; and
- 4.1 per cent were about disclosure of costs.

In addition to the written complaints, more than 21.1 percent of 9840 phone calls handled by the OLSC involved complaints about costs and overcharging.[6]

VI SECONDARY ISSUES OF COMPLAINT

All complaints can contain up to five different issues. When these additional issues are included, the proportion of complaints that raise cost-related issues (as a proportion of all issues raised) increases. In summary:

- Cost is therefore by far the largest category of complaint. Included in the complaints received were 980 complaints about costs. That equates to 35.4 per cent of all issues raised by complainants.[7]
- Of these, 50 per cent (that is, 482 complaints) concerned overcharging, 30 per cent (that is, 300) concerned general cost issues and 20 per cent (that is, 198) were about improper costs disclosure.

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2 Office of the Legal Services Commissioner, *Annual Report 2002–2003* (2003) <http://www.lawlink.nsw.gov.au/olsc1.nsf/files/OLSC02-03_AnnRep.pdf/$FILE/OLSC02-03_AnnRep.pdf> at 6 July 2004.

3 Ibid 27.

4 Ibid 28.

5 Ibid 26.

6 Ibid 24.

7 Ibid 24, 26.

- 91 per cent of costs complaints were about solicitors, 7 per cent about barristers and the remaining 2 per cent about conveyancers and other practitioner types.[8]
- Family/defacto complaints, which comprised 17 per cent, had the highest number of cost related issues.[9]

VII UNDERREPORTING OF COSTS ISSUES

The initial complaint may not identify costs as being an issue of concern, but when clients are dissatisfied with a lawyer's service they are almost invariably dissatisfied with the costs. Complainants will often make allegations of failure to communicate, negligence and incompetency in circumstances where they feel the services were not commensurate with the price charged. Cost related complaints are, therefore, greatly underreported.

Our experience suggests that the number of complaints that raise a cost related issue is 80 per cent. This is far higher than that documented in the Annual Report.

VIII TIME-BASED CHARGING AND OTHER ALTERNATIVES

At the opening of the Law Term Dinner earlier this year, Chief Justice Spigelman raised a concern that the billable hour rewards inefficiency and penalises the quick and efficient practitioner.[10]

The billable hour seems to have grown out of the increased commercialisation of legal practices. The old scales of fees have been abolished due to concerns about their anti-competitive nature. A need, thereafter, arose for some degree of guidance for clients in relation to legal work, particularly litigation, whose complexity often makes estimates difficult; hence, the rise of the use of the hourly rate. Nevertheless, the billable hour has many detractors.

Critics suggest that clients are becoming increasingly concerned about an inherent potential for inefficiency being rewarded through this process. The OLSC fields complaints from clients concerned about paying for the time that their practitioner takes to re-familiarise themselves with their case, or who research areas of law unfamiliar to them. Hourly billing can also penalise a professional and productive lawyer who is able to complete a matter in less time than his or her less efficient counterpart.

Concerns have been expressed that the drive to increase profits creates a significant potential for practitioners to engage in unethical billing practices. Solicitors employed in firms have expressed feelings of frustration, alienation

8 Ibid.

9 Ibid.

10 The Hon J J Spigelman, Chief Justice of the Supreme Court of NSW, 'Opening of the Law Term 2004' (Speech delivered at the Opening of the Law Term Dinner, Sydney, 2 February 2004) <http://www.lawlink.nsw.gov.au/sc%5Csc.nsf/pages/ Spigelman_040202> at 6 July 2004.

and oppression at requirements to meet targets of up to 2500 billable hours per year.[11]

There are many practical and viable alternatives to the billable hour available to legal practitioners. The fixed, or flat, fee can provide a client with predicability, while encouraging the practitioner to provide an efficient service. However, it can also limit complexity and result in tension where the fixed fee results in a sum less than it costs a practitioner to provide the service required.

Contingency fees (the fee as a percentage of the verdict), while popular in the United States and growing in popularity in the United Kingdom, are still unlawful in Australia. Despite this, more and more, lawyers gauge their estimates by not only considering the complexity of a matter, but also by looking at the size of the potential result.

Capping fees, formal or informal bidding in tendering processes, and task based billing may all be used; although, their utility is somewhat limited for legal practitioners in NSW as they lack legislative support or authority.

IX THE OLSC'S PREFERRED APPROACH

From the experience obtained at handling the many complaints we receive, coupled with discussions with many practitioners and consumers of legal services, the OLSC has concluded that an approach to costing which might be called value billing, or 'flexible fixed-fee billing', can offer practitioners a valuable tool in both setting the costs of their service, and building better relationships with their clients.

Value billing is based on establishing strong communication with the client and acknowledging the importance of this relationship, which is in the interests of both parties. It is not about negotiating a discount, but about billing work based on the value of that work to the client and the practitioner.

The first stage in a value billing process would require the practitioner to talk to the client and gauge their expectations about a particular legal matter. In a sense the practitioner should be asking 'what do you hope to achieve through this process?'.

Exploring the client's hopes and expected outcomes is not only a means of providing a reality check on what is available but can also reveal the value to the client of achieving their particular objective.

In addition, early discussion about the potential complexity of a matter gives the practitioner an opportunity to provide the client with an understanding of the work the practitioner will be doing and its inherent value.

It would be wise, at this stage of the process, to develop an 'engagement agreement', in which the method of communication between the client and the practitioner is outlined. This can include details about who will be handling the

11 Deborah Rhode and William Ross, *The Honest Hour: The Ethics of Time-Based Billing by Lawyers* (1996).

matter, how they can be contacted, and when telephone calls will be returned and letters replied to. This is all part of developing a relationship of trust.

Through these discussions, concerning the value to the client and the practitioner of the work being undertaken, a fee can be negotiated. This fee would be comprised of an estimation and a fixed amount. It is suggested that the fee be negotiated, and then specific points, or stages, in the handling of the matter be identified. At each point the practitioner and the client will revisit the fee to determine whether it is still meeting the needs of both parties. These points or stages will give the client an opportunity to make a commercial decision as to whether the matter is likely to cost more than they can expect to win. This will also give the practitioner an opportunity, in appropriate matters, to suggest that the complexity of a case has increased, due to unforeseen circumstances, and therefore the fee needs to be revisited.

While this suggested arrangement is based on some simple, or even simplistic, concepts, its main thrust is to encourage practitioners to enter into positive dialogue with their clients about costs associated with the value of their work and the case, rather than simply being based on an hourly rate.

From the perspective of the OLSC any process which encourages good communication, particularly in the area of costs, would be beneficial to both practitioners and clients. Most importantly, it would reduce the number of complaints received about these matters by our Office.