

Solicitors' obligations relating to legal costs

29 MARCH 2021

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1

CONTEXT

Topic: Solicitors' obligations relating to legal costs
(*Tips on how to avoid working for free*)

Purpose: Avoid professional misconduct / unsatisfactory conduct
Avoid dispute with your client
Protect your entitlement to be paid your fees

2

Sydney solicitor struck off for 'gross overcharging'



By Michaela Whitbourn
Updated February 6, 2017 –
4:47pm, first published February 5, 2017
– 10:40am

Save Share A A A

A Sydney solicitor who 'milked' clients for excessive fees and misappropriated trust funds has been struck off the roll of lawyers, in a damning end to his legal career.

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Solicitor fined, reprimanded \$10k for 'gross overcharging'

By Michaela Whitbourn | 11 September 2016



Lawyers forced to repay \$700,000 to socialite after costly divorce

By Michaela Whitbourn
February 16, 2016 – 12:00pm

Save Share A A A

A leading law firm has been told to repay nearly \$700,000 in legal fees charged to a Sydney socialite during a lengthy and expensive divorce settlement involving tens of millions in assets.

The woman successfully challenged the costs of \$3.8 million collected by Miers McKay lawyers, including \$2.2 million in professional costs and \$1.6 million in disbursements, ready for payment.

The woman and her ex-husband, a prominent businessman, cannot be identified for legal reasons.

Broken based sole practitioner has been found guilty of professional misconduct, reprimanded and fined for overcharging

3

SCOPE

1. Overarching Rules and Requirements
2. Disclosure Obligations
3. Costs Agreements
4. Billing
5. Cost Assessment
6. Case Study – *Beling v Hanna* (Legal Practice) [2019] VCAT 1327

Part 4.3 of the Legal Profession Uniform Law
(Schedule 1 to the *Legal Profession Uniform Law Application Act 2014* (Vic))

4

1. Overarching Rules

Division 1 of Part 4.3

- Objectives
- Legal costs must be 'fair and reasonable'
- Duty to avoid increased legal costs

5

Objectives of Part 4.3

Section 169

- To ensure that clients are able to make informed choices about their legal options and the costs associated with pursuing those options.
- To provide that law practices must not charge more than fair and reasonable amounts for legal costs.
- To provide a framework for assessment of legal costs.

6

Fair and reasonable

Section 172(1)

- A law practice must charge costs that are no more than fair and reasonable in all the circumstances and that in particular are:
 - (a) proportionately and reasonably incurred; and
 - (b) proportionate and reasonable in amount.

7

Relevant considerations

Section 172(2)

- Level of skill, experience, specialisation and seniority of lawyers concerned.
- Level of complexity, novelty or difficulty of issues involved.
- Extent to which matter involved a matter of public interest.
- Labour and responsibility involved.
- Circumstances (eg. urgency, time spent, number and importance of docs).
- Quality of the work done.
- Retainer and instructions (express or implied) given in the matter.

8

Agreement = prima facie

Section 172(4)

A costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable if:

- (a) the provisions of Division 3 relating to costs disclosure have been complied with; and
- (b) the costs agreement does not contravene, and was not entered into in contravention of, any provision of Division 4.

9

Duty to avoid increased costs

Section 173

- A law practice must not act in a way that unnecessarily results in increased legal costs payable by a client.
- A law practice must act reasonably to avoid unnecessary delay resulting in increased legal costs.

10

2. Disclosure Obligations

Division 3 of Part 4.3

- The 'Main Disclosure Requirement'
- Additional Information
- Exemptions
- Other Law Practices
- Third Party Payers
- Settlement of litigious matters
- Non compliance

11

Main Disclosure Requirement

Section 174(1)

- **When?** As soon as practicable after instructions are initially given in a matter.
- **What?** Provide client with information disclosing the basis on which legal costs will be calculated and an estimate of the total legal costs.
- **When?** As soon as practicable after there is any significant change to anything previously disclosed.
- **What?** Provide client with information disclosing the change, including information about any significant change to the legal costs that will be payable by the client.

(This must include sufficient and reasonable amount of information about the impact of the change on legal costs to allow the client to make informed decisions about the future conduct of the matter)

12

Additional information

Section 174(2)

Disclosure must include information about the client's rights:

- To negotiate a costs agreement.
- To negotiate the billing method (eg. by reference to timing or task)
- To receive a bill and to request an itemised bill after receiving a bill that is not itemised or is only partially itemised.
- To seek the assistance of the Victorian Legal Services Commissioner in the event of a dispute about legal costs.

13

Consent and Understanding

Section 174(6)

The disclosure must be made in writing.

Section 174(3)

You must take all reasonable steps to satisfy yourself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

14

Commercial / Gov Exempt

Section 170

- Another law practice.
- Certain companies - public (inc subsidiary), large proprietary and foreign.
- Liquidator, administrator, receiver.
- Joint venture entity/group where shareholders aren't entitled to disclosure.
- Professional services partnership with >20 partners.
- Person or entity incorporated outside Australia.
- Costs agreement arising out of a tender process.
- Government authority in Australia or foreign country.

15

Threshold Exemptions

- **Lower Threshold** - (s.174(4))

Disclosure not required if total legal costs in the matter (excluding GST and disbursements) are not likely to exceed **\$750**.

- **Higher Threshold** – (s. 174(5))

Prescribed disclosure form available (Form 1 in Schedule 1 to Legal Profession Uniform General Rules 2015) if total legal costs in the matter (excluding GST and disbursements) are not likely to exceed **\$3,000**.

16

Other Law Practices

Section 175

- First law practice must make disclosure to client in relation to the second law practice.
- Second law practice must disclose necessary information to first law practice to enable compliance with disclosure obligations.
- Second law practice not required to make disclosure directly to client.
- The above does not apply if first law practice ceases to act when the second law practice is retained.

17

Third Party Payers

Definitions (section 171)

- Person is not the client but is under a legal obligation to pay all or any part of legal costs.
- **'Associated' Third Party Payer** – legal obligation owed to law practice.
- **'Non-Associated' Third Party Payer** – legal obligation not owed to law practice.

Disclosure Obligations (section 176)

- **What?** Same disclosure in writing as to client but only to extent relevant to Associated 3PP and that relate to costs payable by Associated 3PP.
- **When?** At time of disclosure to client, or if only afterwards becomes aware of Associated 3PP, then as soon as practicable after becoming aware.

18

Litigation Settlement

Section 177

If you negotiate settlement of a litigious matter, must disclose prior to settlement being executed:

- reasonable estimate of the amount of legal costs payable by client if matter is settled (including any legal costs of another party that client is to pay); and
- reasonable estimate of any contributions towards those costs likely to be received from another party.

19

Non-compliance

Section 178

- Costs agreement (if any) is void.
- Client or Associated 3PP not required to pay legal costs until assessed or any costs dispute determined.
- You must not commence or maintain proceedings for recovery of any legal costs until assessed or any costs dispute determined.
- Unsatisfactory professional conduct / professional misconduct.

20

Disclosure Obligations



21

3. Costs Agreements

Division 4 of Part 4.3

General rules (sections 179, 180, 184)

- Client has right to require and negotiate a costs agreement.
- Can be between client, law practice, second law practice, Associated 3PP.
- Must be in writing or evidenced in writing.
- May be accepted by conduct (unless conditional costs agreement).
- Must not exclude entitlement to seek costs assessment.
- Enforceable as a contract.

22

Conditional Costs Agreement

Section 181

Costs agreement conditional on successful outcome permitted if it:

- is in writing and plain language;
- sets out circumstances constituting 'successful outcome';
- is signed by the client;
- includes a statement that client the client has been informed of rights to seek independent legal advice before entering into the agreement;
- contains cooling-off period of at least 5 clear business days;
- not related to criminal law or family law proceedings.

23

Uplift Fees

Section 182

Conditional costs agreement with uplift fee permitted if:

- in the case of a litigious matter, the law practice has reasonable belief that a successful outcome is reasonably likely **and** uplift fee is not greater than 25% of legal costs (excluding disbursements);
- fee agreement identifies basis on which uplift fee is to be calculated;
- fee agreement includes estimate of amount of the uplift fee.

Section 183

Contingency fees prohibited (where legal costs calculated by reference to amount of award or settlement or value of property recovered).

24

Non-compliance

Section 185

- Costs agreement is void.
- You are not entitled to recover any amount in excess of the amount entitled if agreement was not void, and must repay any excess amount received.

Conditional costs agreements / uplift fees / contingency fees

- Unsatisfactory professional conduct / professional misconduct.
- Civil penalty provisions (100 penalty units)

25

Security for legal costs

Section 206

- You may take reasonable security for a client for legal costs (including security for the payment of interest on unpaid legal costs) and may refuse or cease to act for a client who does not provide reasonable security.

26

4. Billing

Division 5 of Part 4.3

- Bill can be lump sum or itemised.
- If lump sum, client / Associated 3PP may request itemised bill within 30 days after the costs become payable.
- Law practice must comply within 21 days after date of request.
- Request for itemised bill by a person only partly responsible for fees may only be made in respect of that part.
- Bill (or cover letter) must include avenues open to client in the event of a dispute in relation to legal costs **and** any time limits to taking such action.
- You must not charge for preparing or giving a bill.

27

Billing

Interim Bills and Progress Reports

- You may issue interim bills covering only part of the agreed services.
- On reasonable request, without charge and within a reasonable period, you must give client a written report of legal costs incurred to date, or since last bill (if any).

Unpaid Legal Costs (Division 6)

You must not commence legal proceeding to recover costs:

- unless a bill has been given that complies with the Law; and
- until any costs dispute is resolved; or
- 30 days after the bill (inc. itemised if requested) has been given.

5. Costs Assessment

Division 7 of Part 4.3

- Applies to all legal costs payable on solicitor-client basis.
- Client / Associated 3PP / law practice may apply to the Costs Court for an assessment.
- Application must be made within 12 months after bill / request for payment.
- Application out of time will still be considered if 'just and fair'.
- Non-Associated 3PP must, on written request, be given sufficient information to allow consideration of whether to make an application.
- Costs Court can also give notice to any other relevant person.

Relevant factors

Issues for determination (s.199):

- Whether or not a valid costs agreement exists; and
- Whether legal costs are fair and reasonable (and if not) determine the amount (if any) to be payable.

Relevant factors (s.200):

- Compliance with the Law.
- Any disclosures made (inc whether reasonably practicable to disclose estimate of total costs at outset instead of just hourly rates).
- Any relevant advertisement as to costs or skills.
- Any other relevant matter.

Costs of assessment

Section 204

- Costs of the assessment to be determined by the Costs Court.
- Costs payable by law practice (unless not otherwise fair and reasonable) if:
 - law practice failed to comply with Division 3 disclosure requirements; or
 - costs have been reduced by 15% or more.

31

Agreement / Billing / Assessment



32

Case Study

Beling v Hanna (Legal Practice) [2019] VCAT 1327

- Related disciplinary proceeding (*Victorian Legal Services Commissioner v Beling* [2017] VCAT 1022).
- Conditional Costs Agreement (Federal Magistrates' Court) signed by client.
- Payment schedule of 10 instalment dates for \$5k each.
- Payment of \$50k on 'successful outcome', being an award greater than \$50k.
- Client paid \$8,954.55 in fees.
- After solicitor ceased to act, client settled matter for \$52k.
- Solicitor claimed further \$42,600 in fees.
- Client disputes costs (Division 7 of *Legal Profession Act 2004*) and counterclaims for refund of half fees already paid (\$4,477.27).

33

Case Study

Beling v Hanna (Legal Practice) [2019] VCAT 1327

- Deputy President Lulham (6 September 2019).
- Failure to comply with Division 3 disclosure requirements = costs agreement void.
- Costs agreement unenforceable anyway due to drafting.
- Costs not payable until costs dispute resolved = client entitled to refund of half fees already paid.

34

Key Takeaways

1. Valid costs agreement is prima facie evidence of fair and reasonable costs.
2. Update costs agreement information as required.
3. Provide specific written advice re costs prior to executing settlement agreements.
4. Compliance with Division 3 disclosure requirements is critical to ensure costs agreement is not made void.
5. Issue bills promptly and regularly.

35
