

Obligation to disclose fees under Part 11 of the *Legal Profession Act 1987*

Members are reminded of the necessity for fee disclosures under Part 11 of the *Legal Profession Act 1987*. It has been drawn to Bar Council's attention that some members were failing to make fee disclosures as required. The consequences of failing to make disclosure may affect not only a member's ability to recover the fees charged but also their client's ability to recover costs in a party/party assessment and the instructing solicitor's ability to recover costs in a solicitor/client assessment. The consequences for each failure are discussed below:

- (i) Section 182(1) of the *Legal Profession Act 1987* states that the client/solicitor need not pay the costs unless the costs have been assessed. Section 182(2) provides that a barrister may not maintain proceedings for recovery of fees unless they have first been assessed by a costs assessor. The costs of any such assessment are payable by the barrister [s182(3)], together with the filing fee [Regulation 26(2)]. Costs assessors are paid at the rate of \$175.00 per hour. The cost of undertaking an assessment of your fees may, in many cases, make its ultimate recovery uneconomic particularly in the case of a dispute.
- (ii) The Bar Association will not render its assistance through its fee recovery service.
- (iii) Failure to provide a fee disclosure (including an estimate of the likely amount of your fees) is capable of being unsatisfactory professional conduct or professional misconduct.
- (iv) If a costs assessor considers that any conduct of the barrister involves the deliberate charging of grossly excessive amounts of costs or deliberate misrepresentations as to costs, the costs assessor is obliged to refer the matter to the Legal Services Commissioner (and each is declared by s208Q(2) to be professional misconduct).

Consequences for an instructing solicitor of a barrister's failure to disclose:

- (i) The effect of ss175(3) and 178(3) is that the solicitor is obliged to disclose to the client the costs of the barrister briefed. A barrister's failure to disclose to his/her instructing solicitor may cause the solicitor to have difficulty in recovering costs from the client. That difficulty will no doubt be translated to the barrister if he/she is the cause of it.
- (ii) It places an unnecessary and onerous administrative burden on instructing solicitors to constantly ensure that counsels' costs disclosures have been received.

1. Consequences for successful client in party/party assessment:

- (i) The opposing party in the costs assessment may request a copy of the costs disclosure by the counsel for the successful party. If none exists, it raises a serious question concerning the ability of the client to recover all or even any part of counsel's fees in the costs assessment. It leaves both the solicitor and barrister in the position of explaining to the client why there is a question over the recovery of counsel's fees when counsel may already have been paid in full!

The Bar Council understands and appreciates that many members have a long standing relationship with their instructing solicitors and may, for well motivated reasons, believe that it is unnecessary

in those circumstances to comply with the disclosure requirement. To make this assumption is however to misunderstand the requirements of the legislation and the obligation your instructing solicitor has to disclose to the client your fees. For the reasons outlined previously in this article, you will in fact be doing your solicitor a disservice if you don't make disclosure.

Members are reminded of the terms of Rule 114 (which commenced on 20 July 1997) which provides:

- (1) It would not be reasonable for a barrister to be required to make a disclosure under section 176 and sub-section 177(2) of the *Legal Profession Act 1987* when:
 - (a) the barrister has, whether or not in relation to the legal services to be provided to the client by the barrister, given to the solicitor on whose instructions the barrister is acting in writing a statement which remains current and which indicates the basis upon which the barrister charges and his or her rate or rates;
 - (b) the barrister proposes to charge and does charge for those services in accordance with that basis and rate or rates.
- (2) It would not be reasonable for a barrister to be required to make a disclosure under Section 176 and sub-section 177(2) of the *Legal Profession Act 1987* when the costs for the legal services to be provided to the client by the barrister have been fixed by statute or regulation.

Members wishing to rely on Rule 114 must ensure they make disclosure to each and every solicitor at a particular firm briefing them and that they revise their disclosure in the event that their fees increase.

Finally, there are two matters members are asked to note:

1. Some members are apparently using cost disclosures/agreements which fall short of complying with the disclosure provisions. The matters which must be disclosed to an instructing solicitor are contained in ss176(2) and 177(2) and (3) of the *Legal Profession Act 1987*. The matters which must be disclosed to a client when the barrister is directly retained are contained in ss175(2) and 177(1) and (3). In the case of direct access, members must also comply with Rule 80 of the NSW Barristers' Rules.
2. Section 207 of the Act states that a costs assessor may, by notice in writing, require the barrister or solicitor concerned, or *any other barrister*, to produce any relevant documents or may require further particulars to be furnished as to instructions given, work done or the basis on which costs were ascertained.

A barrister who fails, without reasonable excuse, to comply with a s207 Notice is guilty of professional misconduct. In the recent case of *Legal Services Commissioner v Leon Nikolaidis* (No 40 of 1997) the Tribunal found the solicitor guilty of professional misconduct within the meaning of s207(6) of the *Act* and ordered that he be publicly reprimanded and that he pay the Commissioner's costs.

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