Without Prejudice
CLIENTS AND CONDUCT
THE OFFICE OF THE LEGAL SERVICES COMMISSIONER ISSUE 49 APRIL 2010

INNOVATIVE BILLING

By Steve Mark, Legal Services Commissioner (NSW)

Over the years I have spent much time looking at and discussing with law firms the practices they use to bill clients. I have spoken to firms Australia-wide, firms in the United Kingdom, firms in Canada and firms in Northern America. I have also discussed billing practices with the relevant regulatory authorities in each jurisdiction and others involved in the billing process. In each of my discussions I have learned that billing clients, by and large, is a fluid and open process. That is, although most firms are wedded to the billable hour in some form, there are a number of firms who have thought outside the box and adopted innovative billing practices. During one of my recent discussions, for example, I was made aware of a number of new and innovative billing practices in the United States.

In Boston, there exists a law firm, known as the Shepard Law Group, that uses an "up-front pricing" model to bill their clients. The model works in the following way: The firm meets with the client and discusses the best course of action. At that initial meeting the firm advises the client of the price. If the scope of the job changes the firm will send the client a change order setting out the new scope and the price for that change. Better communication lies at the heart of the firm's model.

The Shepard Law Group is however not only notable for its "up-front pricing" model. The firm also has an internet site where clients can login and get up to date information about their case and all the work the firm is doing on their case. Access to the website is free for all clients.

Another law firm in Boston, Exemplar Law Partners, has exclusively adopted fixed-price billing. Exemplar's lawyers do not keep time sheets. Client input and feedback is a significant part of fee-setting and collection. The firm's lawyers meet with clients to discuss strategy, budget and an array of options at the onset of each matter. At the end of each engagement, the firm's lawyers and clients (whom the firm calls customers) review the service charges together. If clients have reservations about the value they received, the firm adjusts the amount owed to reflect those concerns. CEO Christopher Marston explains, "customers only pay for the value they received."

Exemplar's vision is to provide the most premiere and horizontally-integrated services in the professional services marketplace in the new paradigm of value-based pricing and to be the most desired legal employer in the nation. Exemplar has a link on its web page to "pricing," something rarely seen on other law firm websites. They have a pricing committee, designed to remove the psychological pressure of pricing. Exemplar provides a service guarantee that says:

> "We are so confident we will deliver unmatched value in the services we provide that we encourage you to determine what the value of the

INNOVATIVE BILLING *continued*

> service was worth to you. If the value was less than the price you paid, call us and together we will determine a fair price. By defining the unmet expectation or how we could have better served you, you are helping us make adjustments and improve our service."

Coffield Ungaretti & Harris is a mid size law firm with offices in both Chicago and Washington. It is like most other mid-size North American law firms except for one notable fact – the firm offers clients a written guarantee that they will receive quality service. Specifically the firm promises to communicate with clients regularly and deliver cost-effective service on a timely basis. This promise is backed by a money-back guarantee. The guarantee is worded as follows:

> "We guarantee that as a client of Ungaretti & Harris you will receive **COST-EFFECTIVE** legal services delivered in a **TIMELY** matter. We promise to **INVOLVE** you in strategic decisions and to **COMMUNICATE** with you regularly. We cannot guarantee outcomes, but we do **GUARANTEE YOUR SATISFACTION** with our **SERVICE**. If at any time Ungaretti & Harris does not perform to your satisfaction, we ask that you inform us **PROMPTLY**. We will then resolve the issue to **YOUR SATISFACTION**, even if it means reducing our legal fees."

I am also aware of another law firm that has a similar satisfaction guarantee. This law firm however goes one-step further stating that if at the conclusion of the matter the client is not happy with the bill, the client can pay the firm anything it considers fair and the firm will never sue them, but it may choose to never act for them again.

The partners of these firms assure me that there is method to their madness and, reflecting on the nature of the lawyer/client relationship it is not hard to see why. Guaranteeing service demonstrates confidence by placing both the lawyer and client on a level playing field. The client can see that the lawyer is to some extent, sharing the risk of the engagement. The guarantee also forces the firm to learn and listen to client's expectations. Secondly, at the end of the matter if the client is unhappy they will tend to pay at least part of the bill and will be less likely to make a complaint because they did not have to pay the full bill. My experience in Australia is that clients who are unhappy with the services of their law firm will not pay any part of the bill and will also lodge a complaint. Thirdly, the guarantee forces the firm to do a better job in customer selection and de-selection. The guarantee in effect allows the firm to reject problem clients. The philosophy behind the service guarantee is threefold: effective communication, good client relations and reasonable bills.

The service guarantee reminds me of another method I recently heard about from a colleague in the United States. LexThink LLC a consultancy firm to assist law practices has developed a novel way of billing clients in the form of a "You Decide Invoice." The "You Decide Invoice" states:

> *"YOU DECIDE: Your absolute satisfaction with LexThink isn't just our goal, it's the measure of our worth -- and the determination of our fee. The rules are simple: you pay us what you feel we were worth to you. You decide, no questions asked. The only rule? We want to know why you paid what you did, and how we could have done better."*

AND

> *""WHEN TO PAY: While we leave our fee in your hands, we can't leave it there forever. Please send us your payment and feedback within 21 days after you get this invoice. Please send a copy of this along with your feedback and your payment. Thank you for your business."*

On the second page the invoice allows for feedback from clients:

> *"Tell us, in as many words as you want, how we did. Think about your expectations, the result, and how it felt to work with us. Also, let us know if we can share your feedback with others -- and if we can give you credit. Attach more sheets if you need to."*

Matthew Homann, CEO of Lexthink LLC, is of the view that a better way to bill is to ask a trusted client to list all the services they'd like the law firm to provide for them. Homann suggests that the law firm provide all these services to the client for a month's time and then ask them what they're willing to pay for all the work you've done.

The innovative practices by these law firms are not isolated examples. There is a growing trend in the United States of law firms abandoning the traditional hourly billing model in favour of suitable alternatives. The fixed fee billing arrangement has for example become increasingly common in recent years. This move away from the billable hour is not just notable because it reveals that the profession is capable of change. The move is also notable because it demonstrates that the profession is willing to share some of the risk with their clients.

OBLIGATION TO PROVIDE CLIENTS WITH AN ITEMISED BILL

There is some evidence to suggest that in Australia, practitioners are now considering alternatives to the billable hour. Practitioners need to however remember that there are a number of legislative requirements for billing clients.

Section 332(1) of the *Legal Profession Act 2004 (NSW)* states that a legal practitioner may provide to his/her client a bill in the form of a "lump sum bill" or an "itemised bill." A "lump sum bill" is defined as a bill that describes the legal services to which it relates and specifies the total amount of legal services. An "itemised bill" is defined as a bill that specifies in detail how the legal costs are made up in a way that would allow them to be assessed.

The Regulations require that the following particulars must be included in an "itemised bill":

- short details of each item of work carried out on behalf of the client, including the method by which it was carried out;
- the date on which each item of work was carried out;
- the amount charged for carrying out each item of work and particulars of the time (in minutes or other units of time) engaged for carrying out each item of work and information about the person who carried on the work.

Section 332(A)(1) of the *Legal Profession Act 2004 (NSW)* states that if a bill is given by a law practice in the form of a lump sum bill, a client may request the law practice to give them an itemized bill of costs. Section 332A(2) provides that a law practice is required to comply with the request for an itemised bill within 21 days of the request.

Despite being given statutory imprimatur the OLSC receives numerous complaints about practitioners failing to provide clients with an itemised bill on request.

Legal practitioners in NSW have a statutory obligation to provide an itemised bill if requested to do so by their client. Practitioners need to be aware of this obligation and understand that a failure to provide an itemised bill can amount to unsatisfactory professional conduct.

Practitioners should also be aware that upon providing an itemised bill, a client cannot be charged for its preparation. Section 332A(6) of the Act stipulates that a client cannot be charged for preparation of an itemised bill of costs.

It is important to note that a request for an itemised bill may result in an increase in costs for the consumers of legal services.

PROTHONOTARY OF THE SUPREME COURT OF NEW SOUTH WALES V LEON NIKOLAIDIS [2010] NSWCA 73

On 12 April 2010 the New South Wales Court of Appeal handed down a decision in the matter of Prothonotary of the Supreme Court of New South Wales v Leon Nikolaidis. The Court of Appeal ordered by consent that Mr Nikolaidis' name be removed from the Roll of Legal Practitioners. The Court of Appeal also made declarations that Mr Nikolaidis is guilty of professional misconduct and is not a fit and proper person to remain on the Roll of Local Lawyers of the Supreme Court of New South Wales.

Mr Nikolaidis was convicted of making an instrument, being a letter to a client, with the intention of using it to induce another person to accept it as genuine and thereby to do an act to prejudice the client. The letter purported to be a copy of an agreement about fees. At the time the document was created, a costs assessor had been appointed by the Supreme Court to assess the contested costs. The assessor was intended to find the letter (as he did) and act on it in the assessment.

The Court of Appeal made the declarations having regard to sections 25 and 42 of the *Legal Profession Act 2004 (NSW)* which deal with the "suitability matters" for admission and for the issuing of a practising certificate. The Court noted that section 9 of the Act defines "suitability matters" to include "whether a person has been convicted of an offence ... and, if so, the nature of the offence, how long ago the offence was committed and the person's age when the offence was committed".

The Court also made the declarations based on the evidence received in the agreed the statement of facts and an affidavit of the Prothonotary. The Court stated:

> "The evidence here and the agreed facts reveal that the respondent engaged in a deliberate and planned course of action involving third parties to deceive a costs assessor appointed by the Supreme Court in order to advance his position against a former client. The remarks of the sentencing judge in relation to the criminality of the respondent were warranted. The conduct does not bear the hallmark of a one-off lapse of judgment not reflective of underlying character. The conduct reflects deeply upon the respondent. It reveals a willingness to engage in dishonest conduct and a willingness to undertake it in a planned fashion. The matter is made worse by involving a trusted employee and by the conduct being part of an attempt

INNOVATIVE BILLING *continued*

to disadvantage a former client by deceiving someone appointed by the Court to carry out a function under the Rules."

The Court of Appeal's decision can be found on the Supreme Court website at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_judgments

HAGIPANTELIS & LEGAL SERVICES COMMISSIONER OF NSW [2010] NSWCA 79

Practitioners should note that the Court of Appeal handed down judgment in this matter on 15 April 2010. The appellants, Bandeli Hagipantelis and Robert Stanley Bryden, sought a declaration from the Court of Appeal that the Administrative Decisions Tribunal had erred in their findings on a number of grounds including that clause 24 of the *Legal Profession Regulation 2005* is valid; that clause 75 of the *Workplace Compensation Regulation 2003* is not ultra vires the *Workplace Injury Management Act 1988* and *Workers Compensation Act 1987*. The appeal was dismissed with costs in a unanimous judgment.

The Court of Appeal held that that "advertising" fell within the scope of "marketing" and, accordingly, the regulation was within the regulation making power and not ultra vires. The Court also held that sections 600, 498(1)(2), 689A(1) and 724(3) all contemplate proceedings in the Tribunal in the absence of criminal proceedings. The legislative scheme does not demand a conviction as a pre-requisite.

The Court of Appeal's decision can be found on the Supreme Court website at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_judgments

RECENT PAPERS/ARTICLES/ SEMINARS

AUSTRALIAN LAWYERS ALLIANCE, QUEENSLAND STATE CONFERENCE, GOLD COAST

On 20 February 2010 the Commissioner addressed the Australian Lawyers Alliance Queensland State Conference. The address entitled, "Practice Management – Costs for the Legal Profession" covered a range of current issues including the COAG National Legal Profession Reform Project, outcomes-based regulation, costs, the concept of fair. Reasonable and proportionate in relation to costs, and COAG's proposed legislative principles for costs.

Copies of the Commissioners paper are available on the OLSC website at http://www.lawlink.nsw.gov.au/olsc

Over the last few months the Commissioner and the Assistant Commissioner (Legal) have also presented numerous ethics and professional responsibility seminars to practitioners in fulfilment of the requirements under Rule 42 of the *Legal Profession Act 2004 (NSW)*.

WITHOUT PREJUDICE VIA EMAIL

As indicated in previous issues the OLSC can send out future issues of *Without Prejudice* via email. If you would like to receive *Without Prejudice* via email please contact us at **OLSC@agd.nsw.gov.au**

Comments ? Suggestions ? Something you'd like to know more about ? Write to the editor Tahlia Gordon at **Tahlia_Gordon@agd.nsw.gov.au**

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GPO Box 4460, Sydney NSW 2001 DX 359 Sydney
Level 9, 75 Castlereagh St, Sydney 2000
Tel: 02 9377 1800 **Fax:** 02 9377 1888 **Toll Free:** 1800 242 958 www.lawlink.nsw.gov.au/olsc

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