

Without Prejudice

CLIENTS AND CONDUCT

THE OFFICE OF THE LEGAL SERVICES COMMISSIONER

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THE CONCEPT OF PROPORTIONALITY & THE COST OF JUSTICE

By Steve Mark, Legal Services Commissioner (NSW)

Earlier this year the NSW Attorney General announced new laws which give judges the power to limit legal costs in cases involving disputes over wills. The new laws require the court to refer all family provision claims to mediation, except in special circumstances and empower judges to cut costs by determining simple cases without a hearing. The *Succession Amendment (Family Provision) Act 2008* which commenced on 1 March also give judges the power to curb the use of expensive expert witnesses, costly medical reports and unnecessary valuations. The object of the legislation, according to the NSW Attorney General, is to control lawyers who charge excessive fees for simple estate disputes. At the heart of the legislation lies the concept of proportionality and represents in effect another warning to practitioners that proportionality should be central to fair and reasonable costs.

The concept of proportionality is a substantive principle of justice in the adversarial system and to this end has been given legislative effect. Section 60 of the *Civil Procedure Act 2005 (NSW)* for example, provides that “in any proceedings, the practice and procedure of the courts should be implemented with the object of resolving issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.” Basically, the principle requires that the procedures and their costs be

measured against the complexity of the issues, the value of the subject matter and the nature of the claim involved.

However, the doctrine does not only relate to the practice and procedure of the courts, it also relates to costs. The doctrine of proportionality is embodied in the determination by an independent costs assessor of the Supreme Court who is able to have regard to inter alia, “the complexity, novelty or difficulty of the matter” and “the outcome of the matter” in determining whether costs are “fair and reasonable.” It is my view in making

this determination a cost assessor should examine the costs charged in the matter against the amount ordered by the courts.

Despite being given legislative imprimatur it appears that the concept of proportionality is not being applied by either the courts or the profession effectively. This is particularly true in the area of personal injury litigation. My Office has received a number of complaints in which a client alleges he/she has been charged excessive costs compared to the actual amount awarded. In one matter for example, a complainant was charged

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\$52,000 for a matter that settled for \$80,000 inclusive of costs on the first day of court. In another matter, a complainant was charged in excess of \$30,000 for a simple matter of recovering \$4,000 in lost wages. There is also the problem that often the courts will make an award or settle a matter "plus costs." The effect of such an order can be illusive to a plaintiff who is unaware of the amount of the costs being claimed.

One of the main reasons why the concept of proportionality may not be being applied effectively is because the concept as interpreted by the legislation is limited. The problem is that the legislation does not actually allow an examination of the costs charged compared to the amount ordered. The concept of proportionality is only

alluded to in much of the legislation, not stipulated as a matter of fact. Apart from the Civil Procedure Act, in NSW there is only one piece of legislation that positively stipulates proportionality. Sections 339 of the *Legal Profession Act 2004* provide for maximum fees of \$10,000 in personal injuries cases where the claim is for an amount less than \$100,000 and where there is no costs agreement in place. There is however no limitation of costs in NSW for awards greater than \$100,000. There is also the problem that there are no charging limits in most matters. Since the deregulation of costs in NSW in 1994 there are very few areas where scales of costs or ceilings of costs are imposed.

In my view these problems could be overcome, at least in part, by limiting the

fees chargeable in such matters to an exact amount being a maximum of 50% of the net amount recovered. This limitation was successfully introduced in Queensland in 2003. The Queensland legislation provides that a practitioner's fees must not exceed half of what remains of the judgement amount after the subtraction of compulsory refunds and disbursements. The rule is colloquially known as the "50/50 Rule" and is presently embodied in sections 345-347 of the Queensland *Legal Profession Act 2007*. The 50/50 rule is novel because it provides an exact and certain maximum quantification of chargeable costs.

Perhaps it is now time to consider applying the Queensland approach to all litigious matters.

ISO RE-CERTIFICATION

The OLSC achieved re-certification to *ISO 9001: 2000* in April 2009 with the support of all management and staff. The OLSC originally gained certification to *ISO 9001: 2000* in 2005-2006, to ensure there was a formal external recognition of the OLSC as a professional, efficient and well-managed entity with evidence of our commitment to continuous improvement.

SAI Global conducted a Triennial Recertification Audit of the OLSC's Quality Management System on 17 April 2009.

The OLSC is committed to improving the quality of the services we offer. Our aim is to use a philosophy of continuous improvement, concentrating on areas of identified concern and required minimum standards. In line with our role, vision,

mission, and values, the OLSC has set a number of objectives to ensure continuous improvement.

These objectives include:

- To deliver our existing services in a consistent, reliable fashion while meeting and exceeding our stakeholders' needs;
- To ensure the core processes run smoothly and efficiently with minimal non-compliance whilst ensuring maximum customer satisfaction and maximum staff morale;
- To align the Quality Management System to the OLSC's Business Plan, which uses project methodology each year to set new projects to form its business plan to improve areas

identified in performance monitoring and other new business initiatives;

- To observe centralised Human Resources, Information Technology, Asset Management and all other policies and procedures of the AGD;
- To maintain the OLSC Quality Systems Manual, incorporating policies, working procedures, flow charts and general administrative requirements, together with standard documents and forms to ensure accessibility and currency of information provided; and
- To maintain ISO 9001 certification.

RECENT PAPERS/ARTICLES

ETHICS FOR LAWYERS, CENTRE FOR CONTINUING LEGAL EDUCATION, FACULTY OF LAW, UNSW

On Tuesday 18 August the Legal Services Commissioner presented a CLE seminar on "Ethics For Lawyers." The Commissioner discussed a number of issues including the ethical considerations for costs, identifying and dealing with ethical dilemmas and conflicts of interests. The Commissioner also discussed emerging ethical dilemmas for legal practitioners such as determining when it is appropriate to look behind a client's instructions and secondly, billing practices and the principle of proportionality.

5th ANNUAL PUBLIC SECTOR IN-HOUSE COUNSEL CONFERENCE, CANBERRA

On 28 August the Legal Services Commissioner presented a paper at the 5th Annual Public Sector In-House Counsel Conference. The title of the paper was "*Conflicts of Interest: Challenges for the Government Lawyer.*" The Commissioner analysed the ethical duties of legal practitioners in Australia and the regulatory framework applicable to in-house and government practitioners. The Commissioner noted the differences in the regulatory framework and questioned why in-house counsel and government lawyers are not required to hold a practising certificate. The Commissioner also discussed the model litigant policy and questioned why the policy is only applicable to government lawyers. The Commissioner argued that the

regulatory framework that is applicable to private lawyers should also be applicable to public lawyers and in house counsel and the regulatory framework that is applicable to public lawyers such as the Model Litigant Policy should also be applicable to private lawyers and in-house counsel.

36th AUSTRALIAN LEGAL CONVENTION

On 18 September the Commissioner presented a paper at the 36th Australian Legal Convention in Perth. The focus of the paper was ethics in litigation and court proceedings. The paper discussed four case studies each of which outlines particular ethical dilemma's for legal practitioners in litigation and court proceedings. The case studies included the ethics of courtesy, the ethics of candour, the ethics of following client instructions and the ethics of court process. The Commissioner argued that good ethical practice in litigation and court proceedings involves rules and moral activism. That is legal practitioners who follow the rules and apply morally reflective-decision making will stand a good chance of avoiding a complaint.

YOUNG LAWYERS – CLE SEMINAR

On 22 September 2009 the Commissioner presented a CLE Seminar for Young Lawyers at the Law Society of NSW. The Commissioner presented a paper entitled "Lawyers Ethics – Values or Rules Based?" The Commissioner discussed the traditional ethical duties of legal practitioners and how these duties are being challenged as a result of incorporation.

LEGALWISE SEMINAR

On 22 September 2009 the Commissioner delivered a paper for a mandatory CLE being run by Legalwise Seminars. The Commissioner discussed two arising ethical dilemma's faced by legal practitioners today – billing and supervision. The Commissioner argued that as a result of the change in structure of the global legal services market greater emphasis is being placed on profit in lieu of professionalism. The Commissioner argued that the emphasis on profit has placed increasing demands on some practitioners to ignore the ethics of billing and adopt unethical billing practices. The Commissioner argued that the emphasis on profit has impacted adversely on managerial issues. The Commissioner proposed several legislative amendments that could possibly solve these problems.

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

2009 CONFERENCE OF REGULATORY OFFICERS (CORO)

On 16-17 September the Commissioner and the Assistant Commissioner (Legal) attended the 2009 Conference of Regulatory Officers (CORO) in Perth. The theme of the 2009 Conference was "Finding a Balance." Once again the Conference featured a number of distinguished speakers and regulators from England and Wales and Canada contributing to the program. There were four keynote addresses.

The first keynote address was by The Hon. Chief Justice Wayne Martin of the Supreme Court of Western Australia who discussed the future of regulating the legal profession. The Chief Justice questioned whether the profession was over-regulated. The second keynote address was by the Federal Attorney-General, Robert McClelland. The third keynote address was by Chris Kenney, Chief Executive, Legal Services Board of England and Wales who discussed legal regulation in the United Kingdom. Gordon Turriff QC, President Law Society of British Columbia presented the fourth keynote address on self-governance as a necessary condition of constitutionally-mandated lawyer independence in British Columbia. In addition to the keynote addresses the conference also featured panel discussions on alternative business structures and national legal profession reform.

INQUIRY LINE SURVEY RESULTS

In March this year the OLSC sent out 786 survey forms to callers on the OLSC Inquiry Line who indicated their interest in being part of the OLSC feedback loop. Of these 786 surveys sent, 16 were returned to sender (2.04%), with 150 surveys completed and sent back to the OLSC for analysis (19.48%).

Once again the results were extremely positive and indicate that OLSC Inquiry Line staff are performing well. The most notable statistics included as follows:

- (i) Seventy eight percent (78%) of callers responding they would recommend the OLSC to a friend/ relative;
- (ii) Just over eighty three percent (83.3%) of respondents agreed that 'staff explained clearly how they could assist the caller';
- (iii) Just over eighty five percent (85.3%) of respondents agreed that 'Staff handling the call treated the caller in a courteous and professional manner';
- (iv) Just over 87.3% of respondents agreed that 'The staff representative treated the caller with respect';
- (v) Seventy four percent (74%) of respondents saying they were satisfied with the level of assistance they received; and
- (vi) Just over eighty two percent (82.7%) of respondents agreed that "they felt their call was answered promptly."

These figures are a credit to all who work on the Inquiry Line.

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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