

Without Prejudice

CLIENTS AND CONDUCT

THE OFFICE OF THE LEGAL SERVICES COMMISSIONER

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Value Billing

Before lawyers began worshipping at the altar of the billable hour, they charged under a system by which they examined the matter's commercial value and value of the matter to the client.



This business model, which has seen a revival in the United States and parts of Europe, is commonly referred to as 'value billing'.

Over the past few years the rise in complaints about increases in legal fees have led several firms to move away from the time-honoured tradition of billing by the hour towards alternative forms of value billing such as fixed fees or task-based billing.

Value based billing is not about obtaining a discount but rather billing work based on the value to the client. Under a value billing arrangement the value of the services provided are based on the client's perception, not fact. Value billing is therefore a subjective determination of value. If a client believes he is getting value

from his lawyer's services, he is. If the client doesn't believe he is getting value, he isn't. The focus of value billing is on results, efficiency and reward, not hours billed.

The calculation of value is primarily based on the client's understanding of what services the solicitor is to provide. In order to assess the value of the service a client may take into consideration the effectiveness and efficiency of the lawyer's work, the urgency of the work, whether the advice provided by the lawyer was correct, the degree of complexity, the predictability of results and the effect of the client on exposure to loss.¹

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Commissioner's Comment
In this issue of Without Prejudice we discuss the subject of 'Value Based Costing' – also known as 'Value Billing' or 'Flexible Fixed Fees'.



The majority of complaints received in our office include some element of dissatisfaction with lawyers' costs. At the heart of these complaints is the feeling that they have not received "value for money". Not only is the current system of the billable hour one that raises concerns for clients; it can also limit the opportunities for growth for practitioners.

I am pleased that the NSW Premier has instigated the formation of the "Legal Fees Review Panel" to explore the underlying concerns about legal fees and possible solutions to the cost-related complaints we receive.

As part of the 2004 Law Week program in May, I spoke about Value Based Costing and discussed alternative methods of legal costing that might provide greater satisfaction for clients and practitioners.

Other articles in this edition discuss the new advertising regulations and current issues of interpretation and discuss the disciplinary consequences for practitioners who are reluctant to cooperate with the investigation process.

Steve Mark
Legal Services Commissioner

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“Value billing encourages the development of better relations between client and lawyer.”



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Hours and rates remain important but are not the determining factor. According to Richard Reed, Chair of the American Bar Association’s Value Billing Task Force, valuing legal services involves analysing three criteria:

- (i) responsibility – the obligation to respond or answer the client intellectually, legally, morally and ethically,
- (ii) expertise – the possession of high level substantive knowledge
- (iii) productivity – the ability to deliver favourable results.²

Value billing encourages the development of better relations between client and lawyer. The major benefit of value-based pricing is that “it forces both lawyer and client to think through and communicate the objectives of the client and the services that will be required to meet those objectives.”³ In order to implement value billing successfully both

parties should reach a reasonable written agreement.

This agreement should include factors such as communication and details of a “fixed fee” that is based on the client’s value of the matter and practitioner’s estimate of the job’s complexity. Client and practitioner can decide how communication will be handled – phone calls to be returned in a specified time, letters answered within three days and so forth. They can also negotiate the time intervals at which the practitioner will update the client on specific or significant matters relating to the case.

Having agreed on these points client and practitioner can then set time frames or stages in the matter where the value can be revisited. This allows the client to reassess the commercial value of their case and gives them the chance to re-negotiate the costs if it has become particularly complex. Value Billing offers both practitioner and

client a level of open communication that clarifies for each party the importance and expectations of their case as well as the advantage of re-assessing a matter – and its cost – throughout the duration of the case. It also reduces the likelihood of the complaints the OLSC receives so frequently – costs and lack of communication.

¹ Charles Kovess, Specialisation, value billing and successful legal practice, 66(10) Law Inst. Jnl. 895, 895 (1992).

² Richard C. Reed, “Billing Innovations: New Win-Win Ways to End Hourly Billing,” American Bar Association, Section of Law Practice Management (1996) at 121.

³ John W. Toothman Esq, “Alternative Billing: Living with the Uncorked Genie”, 7 (3) *Accounting for Law Firms* 1994.

Law Week address on Value Billing

The OLSC is always interested in the wide palette of legal issues discussed and examined during Law Week both by practitioners and the rest of the community.

This year I was invited to give an address on the alternatives to the

billable hour at the State Library. The talk, attended by practitioners and consumers alike, offered a good indication of the interest – and possible barriers! – that we’re likely to encounter as this important issue is opened for debate in the public arena.

New Advertising regulations: Update

Over the past 12 months, the OLSC received many inquiries from practitioners requesting information about the workings of the new regulatory regime in relation to the ways in which legal practitioners may advertise their services to the public. These new regulations have made significant changes to the types of advertisements that are acceptable, particularly for those practitioners who handle personal injury and workers compensation matters.

Part 14 of the Legal Profession Act 2002 (“the Regulation”) and Part 18 of the Workers Compensation Regulation 2003 both commenced on 23 May 2003. Part 18 of the Workers Compensation Regulation is to the same effect as Part 14 of the *Legal Profession Regulation 2002*. Consequently, this article will refer only to Part 14 of the *Legal Profession Regulation 2002*.

Clause 139 of the Regulation prohibits publication of an advertisement (subject to the exceptions set out in cl140 of the Regulation) by a solicitor or barrister that includes any reference to or depiction of:

- Personal Injury [or work injury];
- Any circumstance, activity or event that suggests personal injury, or the possibility of personal injury [work injury]; and
- Any connection to, or association with, personal injury [work injury] or a cause of personal injury [work injury].

The subject matter in advertisements which are proscribed turns on the concept of “personal injury”. The definition of personal injury in Cl138 of the Regulation is expressed to include “..pre-natal injury, impairment of a person’s physical or mental condition, and disease”. The Law Society website

contains a list of words and phrases which it is deemed could potentially breach the Regulation. This list however, is not exhaustive.

Clause 138 of the Regulation defines “advertisement” to mean:

“..any communication of information (whether by means of writing, or any still or moving visual image or message or audible message, or any combination of them) that advertises or otherwise promotes the availability or use of a barrister or solicitor to provide legal services, **whether or not that is its purpose or only purpose and whether or not that is its only effect**”.

It is important to note that aspects of this definition are concerned with the *effect* of the communication, as well as its purpose, and further, the promotion of the availability or use of a solicitor need not be the only effect. An advertisement is potentially in breach of the Regulation if it constitutes a communication of information that advertises or promotes the availability or use of your firm to provide legal services for personal injury. At this time the Commissioner has initiated up to 50 complaints in relation to breaches of the Regulation. Many of the complaints arise from practitioners advertising in the Yellow Pages. We

anticipate the first cases in relation to breaches of the Regulation will be heard in the Tribunal later in the year, subject to the outcome of a High Court challenge.

A case has been filed in the High Court partly on the basis that the restrictions to personal injury advertising breach the implied right to freedom of political communication in the Constitution. The case has been lodged by the Australian Plaintiff Lawyers Association, Maurice Blackburn Cashman and NSW solicitor Bob Whyburn.

The proceedings are based on a claim that the regulation restricts communication on political and governmental matters between lawyers and the public, restricts intercourse between states, is not reasonably appropriate to achieving legitimate governmental objectives and purports to operate beyond state boundaries, all of which are contrary to the freedoms guaranteed by the constitution.

Failure to provide information can have serious consequences

Section 152 of the Legal Profession Act provides that a practitioner must provide information and/or documents to the Commissioner as requested and, additionally, that the practitioner must otherwise assist in or co-operate with the investigation of a complaint.

Failure on the part of a practitioner to provide information or documents or otherwise assist, without reasonable excuse, is declared to be professional misconduct

Recently, two practitioners failed to provide documents and information as requested. The Commissioner commenced actions against them in the Legal Services Division of the Administrative Decisions Tribunal, the body charged with the hearing of allegations going to unsatisfactory professional conduct or professional misconduct.

The first matter resulted in a finding of professional misconduct against the practitioner along with a reprimand issued by the Tribunal and an order to pay the Commissioner's costs. The second matter has been heard and the Tribunal has reserved its decision. Previous matters have resulted in fines and orders to undertake special educational courses.

The Tribunal, along with the Supreme Court, has uniformly held that it is important for a practitioner to respond promptly to a request for information or documents. The basis of this obligation on the part of a practitioner is that, as an officer of the court, the practitioner has an obligation to co-operate with the Commissioner. The Commissioner has a duty to regulate the conduct of the legal profession and he can only do so if he is able to investigate and promptly resolve complaints.



Legal Fees Review



On 15 February 2004 the Premier of New South Wales announced that an expert panel, the Legal Fees Review Panel, had been established to investigate the basis of concerns in the community about legal fees and some possible solutions.

The impetus for establishing the Panel was sparked by a speech delivered at the 2004 Opening of Law Term Dinner by the Chief Justice of NSW, Jim Spigelman. Chief Justice Spigelman criticised the current legal costs system operating in New South Wales and in particular the time-honoured tradition of billing by the hour.

The Panel will comprise NSW Bar Association President, Ian Harrison SC, NSW Law Society President Gordon Salier, the Director-General of the NSW Attorney General's Department, Laurie Glanfield and the NSW Legal Services Commissioner Steve Mark. The Legal Profession Advisory Council will be assisting the Panel with their investigations.

The Panel is expected to complete its work later this year.



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