Legal Practitioners
Conduct Board

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FACT SHEET 9

INFORMATION FOR SOLICITORS ABOUT COSTS

The Legal Practitioners Conduct Board is required to investigate all complaints of overcharging pursuant to section 77A of the *Legal Practitioners Act, 1981*.

In the course of an investigation where costs are raised as an issue, the Board will consider practitioners' compliance with the Legal Practitioners Act, particularly sections 41 (in relation to billing and appropriation of costs) and 31 (concerning the proper handling of trust monies).

The Board will also consider compliance with the Professional Conduct Rules, particularly PCR 41 (communicating with clients about costs) and if applicable, PCR 42 (contingency fee agreements).

All practitioners practising in South Australia should comply with the Rules in conjunction with their statutory obligations under the Legal Practitioners Act.

When seeking your response to a complaint about costs, the Board may ask you to provide information concerning your compliance with the Act and Rules.

A breach of the Professional Conduct Rules may not necessarily amount to unsatisfactory or unprofessional conduct. If a practitioner does not comply with the Rules, the onus will be on the practitioner to justify his or her conduct.

For ease of reference sections 31 and 41 of the Legal Practitioners Act and Professional Conduct Rules 41 and 42 are set out in full hereunder.

Legal Practitioners Act, 1981

31—Disposition of trust money

(1) Subject to subsection (2), a legal practitioner must, as soon as practicable after receipt of any trust money in the course of practice, deposit the money in a trust account and must not withdraw or permit it to be withdrawn except as authorised by this Part.

(2) Where at or before the time that a legal practitioner receives trust money the practitioner is given a written direction by the person entitled to the money to dispose of it in a manner specified in the direction, it is lawful for the legal practitioner to act in accordance with that direction.

(3) A legal practitioner may withdraw trust money from a trust account—

(a) for payment to the person entitled to the money or in accordance with the direction of that person; and

(b) for satisfaction of a claim that the practitioner has against the person on behalf of whom the money is held for legal costs; and

(c) to satisfy the order of a court of competent jurisdiction against the person on behalf of whom the practitioner is holding the money; and

(d) if the money is subject to an instrument of trust, for making a payment in compliance with the terms of that instrument; and

(e) for dealing with any unclaimed money in accordance with the Unclaimed Moneys Act 1891; and

(f) for making payments to the Society under Part 4 for the credit of the combined trust account; and

(g) for making any other payment authorised by law.

41—Bill of costs to be delivered

(1) A person cannot bring an action for the recovery of legal costs or appropriate money in or towards satisfaction of a claim for legal costs unless a bill specifying the total amount of those costs, and describing the legal work to which the costs relate, has been delivered to the person liable to the costs either personally, or by post addressed to the person at the person's last known place of business or residence.

(2) The person liable to legal costs may at any time within six months after delivery of a bill of costs under subsection (1) request the person claiming to be entitled to the costs to provide a statement showing in detail how the amount of the costs to which the bill relates is made up.

(3) A person of whom a request is made under subsection (2) must comply with the request.
Maximum penalty: $750.

(4) Where the defendant to an action for the recovery of legal costs has made a request of the plaintiff under subsection (2), and the plaintiff has not complied with the request, the court must, at the request of the defendant, stay the action until the plaintiff has complied with the request.

Rules of Professional Conduct & Practice

41. Communication with Clients on Costs

41.1 It is a practitioner's duty to communicate effectively and promptly with clients.

41.2 Without limiting sub-rule 41.1 the practitioner shall unless it is unreasonable or inappropriate in the circumstances so to do:

(a) as soon as practicable after first taking instructions from a client provide to the client written advice as to the reasonably estimated range of costs and disbursements the client may incur by pursuing the legal activity and the method of calculation of those costs;

(b) provide to the client as soon as practicable after taking instructions written advice as tot he basis upon which the practitioner accepts the client's retainer and in particular setting out the basis upon which the practitioner intends to charge the client for the services rendered and the current rates that apply to such charges; provided that such advice will not be required where there exists an applicable prior agreement by which all work done by the solicitor for that client or all work of a certain kind is subject to an agreed charging rate;

(c) provide to the client as and when reasonably requested, a review of the estimated costs and disbursements and the reasons therefore;

(d) provide to the client prior to the settlement of a litigious matter negotiated by the practitioner, advice as to the likely minimum net amount that the client will receive should the matter be settled in accordance with the proposed settlement and should payments due from such settlement be no more than those of which the practitioner is reasonably aware at the time of the settlement.

Nothing in this rule shall oblige a practitioner to provide the required advice if the practitioner has previously provided that written advice to the client.

42. Contingency Fees

42.1 A practitioner or firm of practitioners must not enter into a costs agreement under which the amount payable, or any part of the amount payable, to the practitioner or firm of practitioners is calculated by reference to a percentage of any judgment, settlement or monetary sum to be recovered by the client.

42.2 A practitioner or firm of practitioners shall not charge fees which are unfair or unreasonable or enter into a costs agreement the terms of which are unfair or unreasonable. In considering whether the fees or the terms of a cost agreement are unfair or unreasonable regard should be had to:-

(a) the nature of the matter;

(b) the amount at stake in the matter;

(c) the jurisdiction involved;

(d) the urgency of the matter;

(e) the ability of the client to understand and appreciate the terms of the agreement;

(f) the knowledge, experience and position of the client;

(g) whether the client has received independent advice about the fees or the agreement;

(h) whether the practitioner or firm has explained to the client any difference between the costs provided for by the agreement and the costs provided for by an relevant scale and the effect thereof on what can be recovered on a costs order;

(i) whether the costs agreement is a complying contingency costs agreement as defined below. A complying contingency costs agreement which provides for a solicitor/client fee which constitutes up to double the fees to which the firm or practitioner would otherwise be entitled if those fees were charged according to the scale contained in the current applicable schedule to the rules of the Supreme Court will be regarded as prima facie fair and reasonable;

(j) the experience, reputation and ability of the lawyer or lawyers performing the services;

(k) any other relevant matter.

A complying contingency costs agreement is one:-

(a) which relates to a litigious matter other than a criminal or matrimonial matter;

(b) which is entered into either at the commencement of the practitioner's retainer from the client or after initial investigation of the matter;

(c) which provides that in the event of the action being unsuccessful the practitioner either:-

(i) will not charge the client, or

(ii) will charge the client only disbursements or some defined amount or proportion of disbursements;

(d) which relates to a matter where in the professional judgment of the practitioner the client's claim has some prospect of success but where the risk of the claim failing and of the client having to meet his or her own costs is significant;

(e) where the practitioner has before the signing of the agreement informed the client of the client's right to obtain independent legal advice and of the right to have the agreement reviewed by the Supreme Court pursuant to section 42(7) of the Legal Practitioners Act and of the right to have the fees charged reviewed by the Conduct Board under section 77A of the Legal Practitioners Act the agreement specifically records this;

(f) which:-

(i) is in writing and in plain English and sets out clearly the terms of the agreement and is signed by the client;

(ii) contains the provision that the client shall have a cooling off period of five clear business days from the signing of the contract during which he or she may, by giving notice in writing to the practitioner, terminate the contingency fee agreement.

Professional advice concerning the Professional Conduct Rules and matters relating to legal costs can be obtained from the Professional Standards Section of the Law Society of South Australia. The Director of Professional Standards is Ms Philippa Branson. Professional Standards can be contacted on (08) 8229 0229.

Fact Sheet 9
September 2010