

GUIDELINES FOR CHARGING OUTLAYS AND DISBURSEMENTSⁱ

The Legal Services Commissioner and the Queensland Law Society have agreed a common position regarding billing practices in relation to outlays and disbursements after having considered a number of circumstances in which law practices charged more for outlays and disbursements than the amounts they actually expended.

We believe that a law practice is not entitled to charge a client for the practice's overheads as if they were outlays or disbursements.ⁱⁱ The words 'outlay' and 'disbursement' in ordinary speech refer to amounts that have actually been paid out on a client's behalf to some other person or entity.

It has come to our attention, however, that some law practices are charging undisclosed mark ups or surcharges on the actual amounts they have paid out as outlays or disbursements.

It has come to our attention also that some law practices are charging their clients and describing as outlays, or disbursements, items including the following: client registration fees, file opening fees, archive fees, file retrieval fees, file closing fees, in-house stamping administration fees, Citec administration fees, contributions to professional indemnity insurance, bank charges (as distinct from bank cheque fees) and settlement fees (when there is no agent). Similarly, some law practices are charging their clients stationery, printing and email charges and describing them as outlays or disbursements.

Neither undisclosed mark ups nor surcharges nor any of the above or other like charges are outlays or disbursements, and in our view it is misleading and arguably dishonest to describe them as such.

Some items including postage and petties / sundries, photocopying and facsimiles have traditionally been billed to clients as outlays or disbursements when the actual cost to the clients either hasn't or can't be accurately identified. In our view, such items should only be billed to clients as outlays or disbursements if they are capable of and have been accurately costed. If not, they may be billed to clients under the heading 'professional fees' provided the amounts are agreed with or adequately disclosed to clients prior to or at the time the clients retain the law practice to act on their behalf.

Principles involved in charging outlays and disbursements

We believe that:

- without the client's informed consentⁱⁱⁱ, a law practice is only entitled to charge and recover as an outlay, or disbursement, the actual amount paid out on the client's behalf.
- to obtain a client's informed consent to charge more than the amount actually paid out on the client's behalf, a law practice:

- must disclose to the client the amount of the proposed mark up or surcharge in either dollar terms or as a percentage of the actual amount; and
- make that disclosure to the client in plain English and in writing prior to or at the time the client retains the practitioner; and
- ensure the disclosure isn't 'buried in the fine print'. It may take the form, where there is no client agreement, of a notice designed specifically for the purpose or, where there is a client agreement or contract relating to the provision of the legal services in question, of a discrete schedule or annexure to the agreement or contract.

Principles involved when services are provided by an associated or related entity

Similarly, we believe that:

- a law practice is not entitled to charge or recover as an outlay or disbursement amounts paid to the practice's service company, or an entity in which one or more of the partners of the law practice has an interest, whether direct or indirect, unless the law practice:
 - discloses to the client its interest in the service company or entity; and
 - discloses the actual amount paid out on the client's behalf to a third party and the amount of the fees, mark up, or surcharge proposed to be paid to the service company or entity in excess of that actual amount, either in dollar terms or as a percentage of the actual amount paid out on behalf of the client; and
 - makes those disclosures to the client in plain English in writing prior to or at the time the client retains the practitioner; and
 - ensures the disclosures aren't 'buried in the fine print'. They may take the form, where there is no client agreement, of a notice designed specifically for the purpose or, where there is a client agreement or contract relating to the provision of the legal services in question, of a discrete schedule or annexure to the agreement or contract.

The Commissioner's approach to initiating disciplinary proceedings for breaches of these principles

The Commissioner and the Society having agreed these principles, it remained for the Commissioner to decide how to deal with breaches, past and future.

The Commissioner will decide each matter on its own individual merits in accordance with the Commission's *Prosecution Guidelines*^{iv} but, as a general rule, in the absence of any demonstrable fraud or dishonesty, the Commissioner:

- will be disinclined to initiate disciplinary proceedings in relation to breaches presently being considered by the Commissioner and the Society provided the law practices concerned review their files and refund clients any undisclosed mark ups or surcharges or other charges in excess of the amounts actually paid by the law practice or an associated or related entity on behalf of the clients and that were charged to the clients after 1 July 2004;
- will be disinclined to initiate disciplinary proceedings in relation to breaches which occurred *before* the publication of these guidelines^v provided the law practices concerned can demonstrate that they have, prior to the alleged breaches coming to the Commissioner's or the Society's attention, reviewed their files and refunded clients any undisclosed mark ups or surcharges or other charges in excess of the amounts actually paid by the law practice or an associated or related entity on behalf of the clients and that were charged after 1 July 2004; and
- will have no such disinclination and will initiate disciplinary proceedings in relation to breaches which occur *after* the publication of these guidelines.

In short, the Commissioner expects law practices to review their billing practices to ensure they don't bill their clients more for outlays or disbursements than the amounts they or an associated or related entity actually pay out and, if they have charged for and been paid more than the amounts they actually paid out, to refund their clients for any such amounts charged to them after 1 July 2004. The Commissioner does not however expect law practices to review their past bills to identify and refund any postage and petties / sundries, photocopying and facsimiles charged to clients in excess of the actual amounts paid out.

ⁱ these guidelines are a slightly expanded version of the guidelines that were published in the June edition of the Queensland Law Society's publication, *Proctor*.

ⁱⁱ see *Equuscorp Pty Ltd v Wilmoth Field Warne (No 4)* [2006] VSC 28 Byrne J, with particular reference to disbursements at paragraphs 53-58.

ⁱⁱⁱ see GE Dal Pont, *Lawyers Professional Responsibility*, 3rd edition, at pp.142-144.

^{iv} the Commission's *Prosecution Guidelines* are published on its website at www.lsc.qld.gov.au

^v the Commission published the guidelines on 1 June 2006 to coincide with their publication in *Proctor*. Additionally, the President of the Law Society wrote to the principals of all Queensland law firms on 29 May 2006 to draw their attention to the forthcoming article in *Proctor* and the Society intends to draw them to the attention of its members more generally in its weekly publication, *QLS Update*, on 6 June 2006.