Guidance Statement No. 2 – Ongoing Costs Disclosure (Published 5 May 2015)*

1. Introduction

1.1. Who should read this Guidance Statement?

This Guidance Statement is for solicitors and law practices.

1.2. What is the issue?

This Guidance Statement addresses the obligation to make ongoing costs disclosure as required by s 315 of the Legal Profession Act 2007 (the Act). Division 3 of Part 3.4 of the Act prescribes a number of costs disclosures that must be made by a law practice to a client or associated third party payer.

One of the practitioner's fundamental obligations is to act in the best interest of a client in any matter in which the practitioner represents the client (**Rule 4.1.1** ASCR).[1] Part of this obligation involves providing clear and timely advice to assist a client to understand relevant legal issues and to make informed choices (**Rule 7.1** ASCR). The obligation imposed by section s 315 of the Act to make ongoing costs disclosure may be seen as part of these ethical duties.

The Act imposes obligations as to initial disclosure pursuant to ss 308, 309(1), 312 and 313. Those sections are prescriptive as to what is required to be disclosed. There is then a continuing obligation to disclose under s 315. Section 315 provides:

> **Ongoing obligation to disclose**
>
> A law practice must, in writing, disclose to a client any substantial change to anything included in a disclosure already made under this division as soon as is reasonably practicable after the law practice becomes aware of that change.

This Guidance Statement is concerned with the scope of this obligation.

Section 311 of the Act provides that disclosure is not required in certain circumstances. An important exception is that provided by s 311(1)(a) which provides that if the total legal costs in the matter, excluding disbursements, are unlikely to exceed $1,500 exclusive of GST, then disclosure will not be required in accordance with ss 308 or 309(1) of the Act.[2] Exceptions to the disclosure obligations under ss 308 or 309(1) also exist under s 311(1) in the case of certain types of clients (such as public or foreign companies), for pro bono work and in other circumstances.

[1] *Australian Solicitors Conduct Rules 2012.*
[2] The relevant amount is fixed by s 80 of the *Legal Profession Regulation 2007*. At the date of publication of this Guidance Statement the relevant amount is $1500.

1.3. Status of this Guidance Statement

This Guidance Statement is issued by the Queensland Law Society (QLS) Ethics Centre for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of the note and following the guidance it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct.

This Guidance Statement is endorsed by the QLS Ethics Committee as representing a standard of good practice.

2. Legal and ethical principles

2.1. What is ongoing costs disclosure?

The disclosure obligations set out above continue throughout the life of a retainer to the extent required by s 315. The most likely matter requiring reappraisal and further disclosure is the estimate of professional costs.

Section 315 imposes an obligation of further disclosure when something that has been the subject of initial costs disclosure (as required by ss 308, 309 or 312) has been the subject of substantial change. The disclosure required by this section must be made as soon as reasonably practicable after the law practice becomes aware of the change. For example, an initial estimate has been the subject of substantial change due to the client requiring additional work to complete a specified stage in the engagement.

Where there was no initial obligation to disclose (as required by ss 308, 309 or 312) then there is no obligation pursuant to s 315 to make further disclosure.[3]

The effect of the failure to make ongoing disclosure is the same as for a failure to make initial disclosure; namely, that the client or associated third party payer need not pay the legal costs unless they have been assessed under Division 7 of Part 3.4 of the Act. Further, where a law practice has not made the required ongoing disclosure to the client or an associated third party payer, the law practice may not maintain proceedings against the client or associated third party payer for recovery of legal costs unless the costs have been assessed under Division 7.

The obligation to make ongoing disclosure applies to all types of matters. If the duty of continuing disclosure under s 315 applies, there are no other exceptions.

2.2. What triggers an obligation to make further costs disclosure?

The obligation to make further, ongoing disclosure is triggered upon a *substantial* change to anything included in a disclosure already made. Therefore, it applies not only to the general costs disclosure matters at s 308 but also to those required by s 309 and s 312 (respectively, the legal costs of another law practice retained and settlement of litigious matters) and any previous disclosures made under s 315.

The obligation applies to disclosures to clients and to associated third party payers.

[3] When a law practice becomes aware that the total legal costs are likely to exceed $1500, the law practice must disclose the matters required under ss 308 or 309 to the client as soon as practicable.

The meaning of the word “substantial” in s 315 has not been the subject of any judicial consideration. However, the ordinary meaning of the word suggests that a change which is essential, material or important will trigger the obligation to make disclosure of it. It is important to bear in mind that it is a substantial change to something which has been the subject of disclosure under ss 308, 309 or 312 which triggers the obligation under s 315.

In practice, it will almost always be a substantial change to:

a. the estimate or range of estimates of total legal costs and the explanation of the major variables affecting that (s 308(1)(c));

b. (in a litigious matter) the range of costs that may be recovered if the client is successful or which the client may be ordered to pay if unsuccessful (ss 308(1)(f) and 308(4));

c. the likely costs of a barrister retained in relation to the matter, to the extent that the barrister makes a further disclosure (s 309); and

d. the estimate of legal costs payable by the client if a litigious matter is settled (s 312),

that triggers the obligation to make further disclosure under s 315.

Difficulties often arise in “no win no fee” matters or matters where the law practice agrees to defer rendering any invoices for legal costs until the conclusion of the matter (not uncommon in family law property and maintenance matters). In those circumstances, the law practice may not be able to readily compare the amount of the legal costs actually billed to the client with the estimate given when initial disclosure was made. Practitioners should be astute to have in place a system or other means by which work in progress is periodically reviewed against the initial disclosure and where it appears that the legal costs which will be invoiced at the conclusion of the matter or upon a successful outcome in a “no win no fee” matter are likely to substantially exceed those the subject of the initial disclosure, ongoing costs disclosure pursuant to s 315 must be made. Most modern legal costs software permits a practitioner to record the estimate made at the commencement of the matter and to set a “WIP alert” or “WIP alarm” when work in progress recorded on the system exceeds or approaches the initial estimate.

It is recommended that practitioners ensure that the file, costs agreement and estimates provided are reviewed upon:

a. a matter reaching a milestone in its progress (e.g. completion of disclosure in a litigious matter, the completion of due diligence); and/or

b. a substantial change in the facts or instructions; and/or

c. an invoice being rendered.

An estimate may then be made of the costs anticipated to complete the matter, which can be compared with the estimate made when initial disclosure was provided. Any substantial change will require further disclosure under s 315.

Given the consequences of a failure to make disclosure required by s 315, it is suggested that prudence – and good practice in any event – requires that practitioners err on the side of caution; if in doubt, make the further disclosure.

2.3. When must ongoing disclosure be made?

Ongoing disclosure of any substantial change must be made as soon as is reasonably practicable after the law practice becomes aware of that change (s 315). The phrase "as soon as practicable after" appears in s 310 in connection with the time at which initial costs disclosure pursuant to ss 308 and 309 is required to be made.

The content of the obligation in this respect is derived from the context in which the obligation arises. There must first be an awareness in the law practice of a substantial change to something which was the subject of an initial disclosure. The ongoing disclosure must be made in writing and in clear plain language. What is reasonably practicable will depend upon:

a. the nature and extent of the change; and

b. the subject matter of the further disclosure; for example, if the substantial change is to the estimate of legal costs (s 308(1)(c)) brought about by a significant change to the nature and extent of the work required to be done in connection with the retainer, the period which is reasonably practicable will be longer than for a substantial change which is capable of easy and quick explanation.

It would be prudent and good practice in any event for the ongoing costs disclosure to be made as soon as possible. By definition, the change to be communicated is a substantial one of which the law practice is already aware. The client should be promptly informed of the substantial change and the reason or reasons for it.

The word "aware" in s 315 is unambiguous. It is synonymous with "actually knows" and nothing indicates that it means "should be aware". The provision does not require the disclosure of that which is unknown.[4]

2.4. How to make ongoing disclosure

Ongoing disclosure under s 315 must be made in the same manner as is required for initial disclosure. Therefore, ongoing disclosure must be made in writing and must be expressed in clear plain language (see s 314).

It is recommended that ongoing disclosure provided under s 315:

a. identify that which has caused the further disclosure to be made;

b. inform the client or associated third party payer of the reasons why that is considered substantial; and

c. contain and update as to each of the required disclosures by reference to the matters the subject of the initial disclosures.

The obligation to give ongoing disclosure in relation to costs estimates is *not* met by providing a periodic invoice. The obligation under s 315 relates to costs *to be incurred*, not ongoing periodic invoices of costs already incurred.

2.5. Consequences of a failure to make disclosure (initial or ongoing)

The effect of failing to make disclosure as required by Division 3 Part 3.4 of the Act is that:

[4] *Leneham v Legal Services Commissioner* [2017] QCA 137 [62].

a. the client or the associated third party payer need not pay legal costs unless they have been assessed under Division 7 i.e. according to the fair and reasonable value of the legal services provided (see ss 316(1) and 341 of the Act);

b. the law practice may not maintain proceedings against the client or the associated third party payer for the recovery of legal costs unless the costs have been assessed under Division 7 (see s 316(2));

c. the assessment of the relevant legal costs may be reduced by an amount considered by the costs assessor to be proportionate to the seriousness of the failure to disclose (s 316(4)); and

d. the failure is capable of constituting unsatisfactory professional conduct or professional misconduct (s 316(7)).

Even if a disclosure has not been made, when and as it should have been, the situation can to some extent be retrieved by making a full disclosure - that is, by correcting the position and bringing disclosure up to a compliant standard at the earliest opportunity.

Such late correction of an earlier inadequate disclosure has the consequence that costs for the period prior to full disclosure being made are to be assessed according to what is fair and reasonable and with the risk of a reduction. With the making of proper (if late) disclosure, non-compliance for the purpose of legal costs charged thereafter ceases to be an issue. Practitioners are only limited in respect of the recovery of their costs prior to the date of compliance. An agreement between the solicitor and client or solicitor and associated third party payer having purported effect to make retrospective disclosure to the date of commencement of the retainer, will be ineffective to protect the practitioner from the effects of ss 316 and 341.

In its terms, s 316 gives the client or associated third party payer a choice where ongoing (or initial) disclosure has not been made as required by Division 3 – to pay the legal costs or to require that they be assessed under Division 7. A question arises as to whether or not it is impermissible or unethical for a law practice to render an invoice for legal costs in circumstances where required costs disclosure (initial or ongoing) has not been made. That the Act does not expressly prohibit an invoice for such legal costs being rendered suggests that it is not impermissible nor unethical to do so.

However, where it is clear that there has been a failure to make a required (initial or) ongoing cost disclosure, it is suggested that an effective way to engage directly with the client or associated third party payer about this is to do so at the time the invoice is rendered. One way to address the issue presented in those circumstances is to inform the client or associated third party payer directly of the failure and the consequences thereof; importantly, that the client or associated third party payer need not but may pay the legal costs the subject of the invoice unless they are assessed pursuant to Division 7.

3. More Information

Solicitors are referred to the *QLS Costs Guide 2014* edition for further information as to costs disclosure generally.

For further assistance please contact an Ethics Solicitor in the QLS Ethics Centre on 07 3842 5843 or ethics@qls.com.au

*Revised 25 July 2017