‘How much trouble do you go to?’
This is a question lawyers frequently ask when calculating and estimating legal fees and costs.

While the most obvious starting point is what the client requires, our approach must also take into account what the law requires. Our reality is that the legal profession remains highly regulated.

Legal Profession Act 2007

Section 308 requires disclosure of costs to clients (subject to relevant exemptions) including:

1. (c) An estimate of the total legal costs if reasonably practicable or, if that is not reasonably practicable, a range of estimates of the legal costs and an explanation of major variables that will affect the calculation of those costs; and

   (f) if the matter is a litigious matter, an estimate of:
      (i) the range of costs that may be recovered if the client is successful in the litigation; and
      (ii) the range of costs the client may be ordered to pay if the client is unsuccessful . . .

Overlaid on this is the point mentioned already, namely what the client requires. In addition, there are questions of lawyers’ duties and ethics; also consider “the solicitors’ advantage” as enunciated by Justice Marnie of the New South Wales Court of Appeal in Végheley v Law Society of New South Wales, in which his Honour observed: “Solicitors are informed or are in a position to inform themselves of what work may be required and what are fair and reasonable charges. They are in that sense in a position of advantage and trust is placed in them. Clients are entitled to be protected against the abuse of that advantage.”

Clearly, in each engagement, it is the right thing to do to provide an estimate of costs calculated to the best of the lawyer’s ability.

In the sense of practice building and relationship enhancement, it is also good business.

Successful practitioners will undoubtedly be conscious of and alert to the need to fairly and practically inform clients of legal costs as part of presenting their value proposition.

By the hour?

A further dimension to this issue emerges in the current “hot topic” about the so called “death of the billable hour”.

The reality is that many alternative billing methods, and therefore bases for estimating of costs, are available to and used by practitioners. Indeed, many of those have been around for a very long time already. Making some lawyers’ dreams come true by getting rid of timesheets and time recording is a different subject altogether and may be just a little naive.

Some alternatives, such as fixed fees, have obvious advantages for both the lawyer and the client, so long as the fairness can be perceived in the price offered. There is an excellent discussion about alternative billing methods in the QLS ‘Guide to Costs, Billing and Profitability’ (available from qls.com.au but currently being updated). The guide identifies the pros and cons in a variety of cases.

Many practices have developed sufficiently efficient and flexible systems to offer low-rate conveyancing and still run profitable practices doing that sort of work. The same methodologies for fixing fees are being applied by many firms to a range of other work.

However, it is one thing to have repeat processes or predictable transaction work which gives the practice reliable data on which to quantify future costs and to provide fixed fees. The scope and range of work for which a fixed fee can be sensibly quoted is another question.

Where a clear scope of work is provided by a sophisticated client, such as via in-house lawyers, the prospect of agreeing a fixed fee may also be realistic. But even in that case it is likely that the practitioner will undertake a calculation based on likely hours and numbers of practitioners to be engaged in the transaction or project.

There are, perhaps, some overly simplistic assumptions underpinning some of the current debate about hourly rates and the billable hour, although the goal of separating revenue and rewards for success from operating costs is good business. Simply covering operating costs by a mark-up per hour is safe (especially for the provider) but there is obviously considerable scope for abuse if open-ended hourly rates are the sole basis for the calculation of fees.

Obvious among the checks and balances is the legislation all lawyers must respond to, which builds in various protections, such as requiring estimates, and mandating client rights to costs assessments, itemised accounts and the like (depending on the circumstances) as well as market forces where more sophisticated clients are likely to buy legal services based on the reputation of lawyers for not only getting the job done, but offering good value.

And there is a further reality check in that internal systems in law firms are, or should be, highly tuned towards client satisfaction and service. That will involve a reasonable level of self-regulation so that time recording does not necessarily mean time billing, but provides a management tool to identify inputs as part of the consideration to determine fair fees for the work performed, all things considered (including what was at stake and the results achieved).

Time recording

In most cases, accurate records (such as time recording) are the best assurance to both the client and the lawyer that what is charged for is fair. There may be some miracle solutions arrived at by a legal genius who defies normal costing, but most work bears measurement for cost purposes.

Even in a fixed-fee transaction it is simply good business to know your costs of production. Future estimates can be made more accurately and confidently when there is an accurate body of data about the work or types of transactions. Abandoning time records will not allow for that to happen, or enable Lawyers to know (with reasonable reliability) when work is profitable, or which of several jobs was profitable and which was not.

Estimating legal fees

There are many major variables affecting the calculation of fees and costs. These include but are not limited to:

(a) Whether the law is certain or not
(b) The scope and complexity of the work
(c) The number of documents to be reviewed

Estimating and agreeing fees remains a contentious issue for many practices.

Robert Gallagher offers a helpful perspective.

Fee estimates and cost management
(e) The number and seniority of lawyers working on the matter
(f) The amount of time involved
(g) The emergence of unusual or unforeseen issues
(h) Delays by and demands from other parties
(i) The need to engage external resources, and
(j) Where instructions or the range of issues change or are increased.

Further, any estimate must be given subject to the instructions and information available at the time the estimate is requested.

Then there are the many imponderables which may emerge subsequently or affect the ability to give the estimate, even if some of them are already on the horizon. In litigation these include:

(a) The number of parties involved and their attitude to the dispute and its resolution
(b) What facts are in issue
(c) Whether liability is admitted on any or all issues, or not
(d) Whether the matter settles or proceeds to trial, or there is an appeal
(e) Whether there are interlocutory disputes and if so, the extent and nature (and number) of them and the outcomes
(f) Whether experts are required to give evidence and if so, whether they agree or not on certain issues
(g) The evidence required and the witnesses who have to be dealt with, and
(h) How offers to settle are dealt with.

Taking the last point, it would hardly be realistic to structure a fee arrangement which discourages the solicitor from negotiating a settlement because of the imperative to stick to a fee estimate which did not allow for protracted and difficult negotiations which may well, nevertheless, result in a successful settlement.

**Challenges in quoting and pricing services**

Below is the text from a letter I recently received from a consultant (not a lawyer) when I asked for a fee estimate. Unlike lawyers, in most other fields of professional or industry expertise the service providers are not regulated on matters such as their fees and charges.

The content is worth noting:

"Dear Robert,

In relation to probable fees, I have absolutely no idea! I only charge on an hourly basis. "In a recent matter with a conclave, it took 55 hours to settle the joint report, but the one before that took only 6 hours. Both seemed to be of much the same complexity but personalities of the experts and other things come into play quite significantly."

Notwithstanding that a lawyer may make similar observations, we are regulated to the point that we have to provide estimates.

The task will obviously vary according to the relationship. In one-off dealings, there is the inevitable difficulty in giving the client a sufficient education in the task at hand to enable the client to give adequate instructions on which the lawyer can rely when pricing the work.

Added to that is the constant reality that the full scope may not be apparent (to either the client or the professional) at the outset.

So the “billable hour” controversy arises in a perfectly natural way. The client, while concerned with the consequences of how the professional’s time is used, in the end really is buying results. Although only rarely will clients say price does not matter, in the end it is the results that matter more.

So there is something of a circular argument. The professional needs to find out what clients really want in order to provide the education, offer available options, make his or her recommendation and then act on the instructions received.

Even then, projects or litigation may well run very differently to what was put forward, creating a range of further issues, particularly with a client with whom the professional may have had only a limited, or no, prior relationship.

**Judicial guidance**

Taking all that on board it is worth considering how the courts have approached the issue of estimates. The commentary perhaps most on point emerges from Jezer Construction Group Pty Ltd v Conomos [2004] QSC440 heard by Justice Fryberg. His Honour was dealing with the question of estimates under the previous Queensland legislation where the “penalty” for getting a key part of the costs agreement wrong was that the whole agreement may be void.

In that case some estimates were provided and, in respect of the estimates payable to another party if the litigation was unsuccessful, the estimate was in these terms:

“Approximately 65% of the total professional fees and costs that you yourself have incurred with us at that point in time for the respective matter.”

In his commentary, his Honour was less than flattering about the quality of the drafting and the level of consideration that went into that estimate. He also noted that the percentage provision was provided notwithstanding that the client’s affairs involved litigation at the time over a variety of courts and tribunals rather than being limited to a particular proceeding.

In response to a submission that the reference to “65% of the total professional fees and costs” was too vague his Honour held:

“The provision of a wrong estimate, and it can only be an estimate, does not produce the result that the estimate ceased to be an estimate. For the applicants it was submitted that this estimate was so vague and so plainly and widely wrong that it did not merit the description estimate, but I do not agree. It may well be that the estimate, in fact in overall terms at least, was not a bad one. The material does not really demonstrate that one way or another. In any event, it seems to me that mere inaccuracy, even substantial inaccuracy in the estimate, does not mean that there is no estimate for the purposes of this section.”

**Comments**

Time-based charging is a relatively recent development in the legal profession in which fixed or scale fees and retainers were commonplace a generation ago. Hourly rates and time recording are now the primary ingredients and we are likely to live with the “billable hour” for a long time to come, even as practitioners and our clients increasingly wish to revisit some other pricing models.

Lawyers may well dream of the day when we are less regulated as a profession and, also when we have less paperwork to do such as the recording of time. Clients faced with the great uncertainties involved in many legal issues will treasure certainty on legal costs, if offered to them. However, even “ideal” outcomes need to be carefully arrived at.

Accurate recording of work done is the surest means to decipher what is fair both to the practitioner and to the client in any given situation. It also provides decent evidence for pricing future services, as well as for any independent party having to look at what is fair and reasonable (for example, on a costs assessment).

In meeting regulatory obligations, practitioners can take some comfort from Justice Fryberg’s words about getting estimates wrong.

But that should not become a recipe for sloppiness and lack of care. Professional obligations and business imperatives should still ensure that practitioners pay appropriate attention to pricing their services and, when estimates are required, to making sure that their estimates are reasonable and appropriate. Perhaps just as importantly, initial estimates should be reviewed during the transaction or case, and clients should receive the benefit of regular communication about likely costs, particularly if estimates are likely to be exceeded.

Lawyers should be open to sensible consideration of pricing models to suit the clients they serve and the types of work they perform. The discussion of alternative pricing models in the QLS’ ‘Guide to Costs, Billing and Profitability’ is commended to practitioners.