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# Navigating Ethical Obligations in Disclosure

**ETHICS SERIES | WEDNESDAY 4 SEPTEMBER**

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# Acknowledgment of Country

We begin today by acknowledging the traditional custodians of the land where we are meeting, the Ngunnawal and Ngambri peoples. We pay respects to their Elders past, present, and emerging, and also to all Aboriginal and Torres Strait Islander peoples here today.

# Ethics

# Disclosure

## LEGAL PROFESSION ACT 2006 PART 3.2

- Regulatory regime
- Written advice
- What you're going to charge
- How you're going to charge it
- Highly prescriptive regime

# Disclosure

## KEY REQUIREMENTS OF DISCLOSURE

- First instructions rule - s263 + s271
- Disclosure as soon as reasonably practicable
- Guts of disclosure - s269
- Mandatory

# Disclosure

## TRAPS AND PITFALLS

- Failure to provide an estimate - s269
- Failure to disclose uplift fees; or an estimate of the uplift
- Failure to provide an accurate estimate
- Failure to provide updated estimates - s276
- Failure to provide disclosure as soon as reasonably practicable
- Failure to disclose Counsel's fees - s270

# Disclosure

## ESTIMATES

- Demonstrate proper thought and consideration of the likely costs on available information
- Do not rely on standard amounts/precedents
- Not so wide as to be effectively meaningless (e.g. \$10,000 - \$100,000).
- Not a quote

## LITIGIOUS MATTERS

- Must give a range that may be recovered AND may be liable for if unsuccessful s269(g)
- Must give an estimate of costs payable and costs likely to receive before settlement s273

# Disclosure

## *SETSCHNJAK V DEREK GEDDES PTY LTD [2019] QCAT 009.*

- Estimates were provided for two matters – were identical
- Not a true estimate
- No consideration of instructions, tasks to be done and costs likely to be incurred



# Ongoing Disclosure

## UPDATED ESTIMATES – s273 + s276

- Required as soon as reasonably practicable after you become aware of any substantial change to previous disclosure
- Delivery of invoices does not satisfy your ongoing disclosure obligation *Connolly Lawyers P/L v Davis* [2013 QCA 231].

# Disclosure

## DISCLOSURE OF ANOTHER LAW PRACTICE FEES

- Retaining Counsel – s270
- Counsel's rate AND an estimate

## FORM OF DISCLOSURE

- MUST be in writing – s275
- Oral disclosure does not comply with the LPA
- Urbaniak-Bak v Prail [2014] ACT Supreme Court 171

# Disclosure

## EXEMPTIONS s272

- If costs are less than \$1500
- If previous disclosure given and client has waived their right
- Sophisticated clients

# Disclosure

## EFFECT OF FAILURE TO DISCLOSE – s277

- Client needn't pay costs unless assessed
- Can't commence proceedings to recover your costs
- Client may apply for costs agreement to be set aside – reduces rates to scale s279
- Costs not required to be assessed pursuant to the costs agreement s300A
- Costs may be reduced proportionate to the seriousness of the failure

# Disclosure

## EFFECT OF FAILURE TO DISCLOSE – s277

- Can be unsatisfactory professional conduct or professional misconduct – s277(7)
- Solicitor pays for the costs of assessment – s302(2)
- A factor when deciding whether a cost agreement is fair and reasonable – s288(3)(c)

# Disclosure

## *RE BLYTH WARNING*

- Disclosure of unusual expenses – costs that may not be recovered
- Must be disclosed prior to being incurred
- Must disclose the fact they may be unrecoverable
- Interstate Counsel's fees, Counsel's cancellation fees
- Excessive expert fees

# Disclosure

## COSTS AGREEMENTS – DIV 3.2.5

- Not mandatory
- Must be in writing s282
- Must state it is an offer to enter into a costs agreement
- Must state the offer can be accepted in writing or by other conduct
- Must state the kind of conduct that will be acceptance s282(2)
- See s288 for criteria taken into account when deciding whether a costs agreement is fair and reasonable

# Whistleblowing by Solicitors



# Duties to disclose

- Legal Profession Act 2006, Legal Profession Regulations 2007, Legal Profession (Solicitors) Conduct Rules 2015
- Self report 'show-cause event' (ss 60 & 61 Legal Profession Act)
- Trust fund irregularities (s 231 Legal Profession Act)

# Other duties

- Rule 3 – Paramount duty to the Court and the administration of justice
- Rule 4 – Other fundamental ethical duties
- Rule 5 – Dishonest and disreputable conduct

# Grounds for complaint

- Chapter 4 Legal Profession Act - complaints and disciplinary processes involving lawyers
- Unsatisfactory professional conduct (s 386 Legal Profession Act)
- “... falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.”
- Professional misconduct (s 387 Legal Profession Act)
- “substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence”
- “not a fit and proper person to engage in legal practice”

# Whistleblowers take note...

- Rule 32 - Unfounded allegations
- Rule 30 - Another solicitor's or other person's error

# Complaint process

- Submit complaint electronically with your details within 3 years
- ‘Reasonable likelihood’
- Complaint will be provided to solicitor
- Dismissed, mediated, or investigated
- Withdrawal

# Final observations

- Whistleblowing as a last resort
- Give notice – but no threats or illegitimate tactics (Rule 34)
- If in doubt – contact the Society!

# Questions?



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