

Itemised bills and beneficiaries

Must lawyers provide beneficiaries with an itemised bill?

This is a guidance note for lawyers who conduct work associated with the administration of deceased estates.

Introduction

The Legal Profession Board receives a relatively high proportion of complaints about:

- lawyers who have been named as the executor in a will, or who have been appointed to administer a deceased estate ('lawyer-executors'); or,
- lawyers who are acting on behalf of an executor/administrator to assist with work associated with a deceased estate.

Many of the complaints are made by beneficiaries of the deceased. The complaints frequently relate to costs and a perceived lack of information about what the lawyer has done, why various things were done and how much this costs the estate.

The right to an itemised bill setting out a lawyer's costs in detail is the traditional way that a client gets details of the amount charged for each piece of legal work done.

- Are lawyers required to provide a beneficiary with an itemised bill?
- Are there other circumstances where lawyers doing work associated with the administration of a deceased estate should prepare an itemised bill?

Summary

If a client of the lawyer, for example, a client-executor, makes a request for an itemised bill then an itemised bill must be provided as required by section 316 of the *Legal Profession Act 2007*.

If a beneficiary makes a request for an itemised bill and the beneficiary is not the client of the lawyer and not a third party payer, there is no legislative obligation to provide an itemised account.

There are other occasions when an itemised account should be prepared in accordance with a lawyer's general law obligations:

- If a lawyer-executor wishes the beneficiaries to agree that the lawyer-executor will be paid in a manner not already provided by the will, then it may be necessary to provide beneficiaries with an itemised bill.
- The fiduciary duties of an executor may include obligations to ensure that professional fees charged to the estate are reasonable. These obligations may mean that an itemised bill should be prepared and provided to executors.

Itemised bills and beneficiaries

The legislative obligation to provide an itemised bill

The legislative obligation to provide an itemised bill is found in section 316 of the *Legal Profession Act 2007 (the Act)*.

The categories of persons or bodies who may request an itemised bill are limited to:

- Clients;
- Third party payers (a person under a legal obligation to pay all or any part of the legal costs for legal services provided to the client); and,
- A law practice that retains another law practice on behalf of the client.

The Act is silent as to whether a beneficiary may request an itemised bill without falling into one of the categories listed above.

Similarly, beneficiaries are not a category of person or body who may apply to have legal costs assessed pursuant to the Act.

The general law obligations to provide an itemised bill

It has been held that it is part of an executor's fiduciary duty to administer the estate of a deceased for the benefit of its beneficiaries to ensure that professional fees are examined in order to determine that they are properly chargeable to the estate¹.

It is therefore recommended that:

- If you are a lawyer acting on behalf of an executor/administrator you should advise your client of his or her obligation to ensure professional fees charged to the estate are appropriate and that an itemised bill can be prepared.
- If you are a lawyer-executor and you are charging the estate professional fees for your time and trouble associated with the role pursuant to an authority² to do so, should prepare an itemised account to be reviewed. The itemised account should be provided to any co-executor(s) for evaluation.

It has been held that where a lawyer-executor, who also acted as solicitor for the estate, sought the consent of the beneficiaries to charging a commission as well as legal fees, it was necessary that the following information be provided to the beneficiaries as a bare minimum:

- Particulars of the work that was done to justify the commission;
- Particulars of the basis for legal fees and disbursements;
- That the beneficiaries are entitled to have the Court assess the commission³; and,
- That independent legal advice as to the beneficiaries' position should be obtained (or insisted upon in cases of vulnerability or complexity).⁴

¹ *Re Will of Mary Irene McClung* [2006] VSC 209 at [16] and [17]

² As a general rule trustees must not profit by the trust. However, the trustee (such as an executor) may receive remuneration where it is expressly or implicitly provided for in the instrument of trust (such as the will) or where there is special agreement between the trust and beneficiaries that the trustee will be paid.

³ Beneficiaries are entitled to have any commission claimed by an executor, be they a layperson or a legal practitioner, scrutinised as part of a calling to account of an executor pursuant to s 64 Administration and Probate Act 1935.

⁴ *Walker v D'Alessandro* [2010] VSC 15 [30]

Itemised bills and beneficiaries

If you are a lawyer-executor and you propose to charge the estate in a manner that is different to that provided for in the will, it is suggested that the necessity to ensure that any consent given by beneficiaries is properly informed may require providing those beneficiaries with an itemised bill.

Pragmatic considerations

It may be advisable to provide beneficiaries with itemised accounts on request beyond the occasions where there is a legislative or general law requirement to do so. In some circumstances, this may incur an additional expense on behalf of the estate. Such expense ought be properly approved prior to incurring it. In the case of lawyers, acting on behalf of a client-executor/administrator, then this suggestion is subject to the instructions of the client and any claim for legal professional privilege.

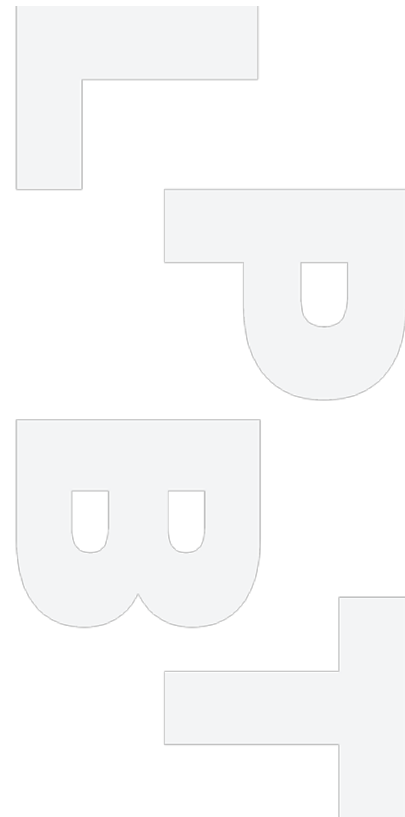
This suggestion does not intend to create a new professional standard for lawyers. The provision of an itemised account to beneficiaries may not be necessary or appropriate in all circumstances. The Board makes the suggestion because, in the Board's experience, beneficiaries who are in the dark regarding fees and money generally tend to become suspicious. Suspicion can often result in complaints or disputes generally. The Board is required to investigate the complaints it receives.⁵

⁵ Unless the complaint is summarily dismissed or withdrawn, (section 440 of the Act).

Even if provision of an itemised account does not dissuade a beneficiary from making a complaint, it is likely that the existence of an itemised account will enable the assessment and resolution of any complaint about the validity of costs to occur more quickly and with accuracy.

Irrespective of the above, practitioners have an ongoing responsibility as to the costs disclosure provisions under Division 3 of Part 3.3. of the Act and all the responsibilities arising when they are entering into or amending the retainer agreement with their client executor.

Timely provision of interim itemised bills may avoid some of the difficulties at the end of the administration.



Further information

If you have any questions or require further information, please contact the Legal Profession Board of Tasmania.

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