

LAWTALK ARTICLE

FEE BENCHMARKING – AUGUST 2007

Until its abolition in the early 1980's, the existence of the New Zealand Law Society's ad valorem scale of charges obviated the need for much discussion amongst practitioners as to what constituted an appropriate fee in a particular instance.

With the abolition of the scale, that lack of dialogue continued, albeit for very different reasons. The new landscape was under-pinned by two firmly held fears. The first was that because most members of the profession were untrained and unskilled in sales and marketing techniques, the broadly held view was that the only way to compete with one another was on price. Therefore, pricing practises became an issue of commercial sensitivity and were unlikely to be shared or openly discussed lest a competitor steal a march on you.

The second fear was that the Commerce Act effectively acted as a complete prohibition on any discussion amongst lawyers about what constituted a fair and reasonable fee. This was unfortunate as that is not in my view the effect of the Commerce Act at all. The two principle tenets of the Act particularly pertaining to this issue are a prohibition on practises which substantially lessen competition and price fixing. It seems to me quite feasible to have information available to practitioners about other firms and regions costing practises and have an intelligent debate about it without transgressing either of those prohibitions.

Regardless of what fee benchmarking occurs or what discussions and debates take place, practitioners will always be free to and will in fact always charge whatever they consider appropriate. Such variations, which are to be encouraged can be attributable to a variety of factors including the level of skill and experience of the particular practitioner or the firm in general, geographical differences in charging practise, the practitioner's perception of their own professional self-worth, the practitioner's perception of the extent to which they have or have not added additional value over and above the performance of the minimum requirements on a particular task etc.

In the absence of a scale or universally accepted formulaic approach to setting a fee, the business of determining an appropriate fee will always be highly subjective. There is copious New Zealand authority for the notion that determining a fair and reasonable fee *"...is an exercise in assessment, an*

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an arithmetical calculation..." (Property and Reversionary
Statutory of State for the Environment [1975] 2 All ER 436 at 441

Per Donaldson J) and JBL Consolidated Limited (In Receivership) (High Court Auckland M 1950/80, 20 August 1982).

That said, extreme variations must be regarded as undesirable and yet such variations remain prevalent. Indeed, in the 22 years that I have been a Law Society Cost Reviser and the 5 years that I have been working with firms on a consultancy basis in this area, I have noticed little if any discernible improvement in these vagaries. When presented with identical fact scenarios to cost in isolation of one another, variations of over 100% between partners in the same firm are the norm.

I recently consulted nine colleagues throughout the country on an identical fact scenario. They are amongst the most experienced practitioners in their field. It was a particularly challenging fact scenario to cost because of the amount of money involved and not the sort of transaction that would occur on a regular basis. The recommended fee range that came back from these colleagues was \$15,000 to \$85,000. It is difficult to see how the interests of either lawyers or clients are well served when that sort of fee polarity is evident even amongst experts in their particular field.

For the same reason, and despite the committed and conscientious efforts of long-suffering cost revisers throughout the country, the cost revision regime currently set out in Part VIII of the Law Practitioners Act 1982 is fundamentally flawed. The reason is that there has never been any formal training of cost revisers in a structured national sense, there has never been any benchmarking work done on fees and therefore all cost revisers bring their own charging practises and prejudices to the table when undertaking a cost revision. This must do little to instil confidence in either practitioners or the public if a given cost reviser may come up with a fee of anywhere between \$15,000 or \$85,000 depending on the luck of the draw.

There is a further imperative looming which makes it essential for work to be done on benchmarking in the fee area. Under the Lawyers and Conveyancers Act 2006, the New Zealand Law Society is obliged to produce practice rules governing the conduct of certain aspects of the profession. These include Rules of Conduct and Client Care. In February of this year, Professor Duncan Webb prepared a comprehensive paper for the Board of the New Zealand Law Society's consideration entitled "*Discussion Draft: Rules of Conduct and Client Care for Lawyers*". In one respect nothing has changed materially. As has always been the case, "*a lawyer may enter into a fee agreement only on terms*

may charge a client no more than a fee which is fair and
and to the interests of both client and lawyer”.

What has changed is that the range of matters to be considered in determining what is a fair and reasonable fee has been expanded. Significantly, one of the additions to the list is “...*the fee customarily charged in the locality for similar legal services*”. My own view is that the inclusion of such criteria is dangerous. While it is well intentioned and on the face of it, innocuous enough, it is predicated on the assumption that the levels of service and skill brought to bear by lawyers throughout the country is homogenous and consistent. I would suggest that there wouldn't be a lawyer or member of the public who would hold that view.

There are firms that have successfully built practices around a Warehouse-like ‘pack'em, rack'em & stack'em’ approach with high volume, no frills and low margins. There are others who might classify themselves as boutique with high value work carried out for handful of high value clients. They are both entirely legitimate business models and it is wrong to suggest that comparison of one with the other is helpful in determining an appropriate fee.

The public want, indeed demand, variety across every aspect of their consumption. Legal services are no exception and that is what we should be offering - choice.

If however the criteria of fees customarily charged in the locality for similar legal services is to be retained, it begs the question, what is being charged in the locality? As I have already alluded to, there is a dearth of reliable information in this regard. Most firms keep their fee charges close to their chests and such information that does exist, is likely to be anecdotal and unreliable.

It seems appropriate therefore for some work to begin in the fee benchmarking arena. The New Zealand Law Society's Rural Transactions Conference shortly to be held in Christchurch and Hamilton in October seems the ideal opportunity to launch this work. All practitioners throughout the country who are engaged in rural property work are strongly encouraged to participate in this survey. The greater the participation levels, the greater the statistical validity of the results.

I do stress that this is neither an attempt at anti-competitive conduct by the profession, nor an attempt at price-fixing. For the reasons that I have already outlined, there should be variation but



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to understand where the fee continuum begins and ends and
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