

GUIDELINES FOR CHARGING FEES IN SPECULATIVE PERSONAL INJURY MATTERS

The charging of professional fees in speculative personal injury matters has been the subject of legislative regulation since 2003 - the so-called 50/50 rule which caps the fees a law practice can charge in these matters.

The rule first came into effect when the *Queensland Law Society Act 1952* (the QLS Act) was amended to include sections 48IA-48IC. That Act was repealed by the *Legal Profession Act 2007* and the revised rule is now found at sections 345-347 of that Act.

The Commissioner brought proceedings for declarations to determine the proper interpretation of sections 48IA-48IC of the QLS Act following complaints about a practitioner's billing practices while those provisions were in effect.

Judgment in those proceedings was given on 25 September 2007.¹ The practitioner appealed, and judgment was given by the Court of Appeal on 23 May 2008.² The Court dismissed the appeal and upheld the findings.

The Commissioner believes that the principles the Court enunciated in deciding the proper interpretation of sections 48IA-48IC of the QLS Act apply equally to sections 345-347 of the *Legal Profession Act 2007*.

The Commissioner has decided, now that the law has been settled, to issue the following guidelines to assist law practices apply the 50/50 rule and to identify the maximum fees they are entitled to charge in speculative personal injury matters.

The legislation

The decision of the Court of Appeal means, in effect, that the 50/50 rule as enunciated in the QLS Act, properly interpreted, always applied in the way the rule is enunciated more comprehensively in the *Legal Profession Act 2007*.

The rule, in brief, is that a law practice is entitled to charge a client in a speculative personal injury matter no more than half the amount to which the client is entitled under a judgement or settlement after deducting any refunds the client is required to pay and the total amount of disbursements for which the client is liable.

The relevant provisions of both the QLS Act and the *Legal Profession Act 2007* are set out in full at Appendices A and B to these Guidelines respectively. Notably, the QLS Act contained, and the *Legal Profession Act 2007* contains a provision which

¹ *Legal Services Commissioner v Dempsey* [2007] QSC 270

² *Legal Services Commissioner v Dempsey* [2008] QCA 122

enables a law practice to seek approval to charge more than the maximum amount allowed under the rule.³

Principles involved in charging disbursements under the 50/50 rule

Both the Court of first instance and Court of Appeal found that:

- Disbursements include all outlays paid from funds held in the law practice's trust account.
- It does not matter whether the source of those funds is a litigation lender or the client personally.
- Disbursements also include amounts paid by the law practice on the client's behalf and which must be reimbursed to the law practice.
- Disbursements do not however include interest charged by a litigation lender.
- The maximum amount of fees the law practice can charge under the rule includes GST.
- The maximum amount applies regardless of a provision in a client agreement or costs agreement obliging the client to pay GST.

The Courts were of course considering the proper interpretation of sections 48I-481C of the QLS Act. Notably, the 50/50 rule as now formulated in section 347 of the *Legal Profession Act 2007* provides, in addition, that:

- disbursements comprise 'the total amount of disbursements or expenses for which the client is liable if that liability is incurred by or on behalf of the client either by the law practice or on the advice or recommendation of the law practice... for the purpose of investigating or progressing the client's claim, *regardless of how or by whom those disbursements or expenses are paid.*'

The Commissioner believes that a practitioner's conduct in charging a client fees in excess of the maximum amount a law firm is entitled to charge under the 50/50 rule interpreted in accordance with the principles set out above amounts in the absence of approval to charging excessive costs.

Practitioners will be aware that the *Legal Profession Act 2007* provides at section 420 that 'charging excessive costs in connection with the practice of law' is conduct 'capable of constituting unsatisfactory professional conduct or professional misconduct'.

³ Section 48IC(2) of the QLS Act, and sections 347(2)-(3) of the *Legal Profession Act 2007*. Solicitors and law firms must seek the approval of the Queensland Law Society (and barristers must seek the approval of the Bar Association). The QLS has issued Guidelines setting out the factors it takes into account in deciding any such applications and published them on its website at www.qls.com.au

The Commissioner takes the opportunity to remind practitioners that the 50/50 rule merely prescribes the maximum fees they are entitled to charge in speculative personal injury matters and they must ensure having complied with the rule that their fees are in any event fair and reasonable.

The Commissioner's approach to initiating disciplinary proceedings for breaches of the 50/50 rule, past and future

The Commissioner will decide each matter on its own individual merits in accordance with the Commission's *Prosecution Guidelines*⁴ but, as a general rule, in the absence of any demonstrable fraud or dishonesty, the Commissioner:

- will be disinclined to initiate disciplinary proceedings in relation to breaches presently being investigated or considered by the Commissioner provided the law practices concerned review their files and refund clients any amounts charged in breach of the legislation since 6 November 2003 (the date the relevant provisions of the QLS Act came into effect), together with interest at the rate prescribed on default judgments (currently 10%);
- will be disinclined to initiate disciplinary proceedings in relation to breaches which occurred *before* 23 May 2008 (the date of the Court of Appeal's decision), provided the law practices concerned can demonstrate that they have, prior to the alleged breaches coming to the Commissioner's attention, reviewed their files and refunded clients any amounts charged in breach of the legislation since 6 November 2003 together with interest as outlined above; and
- will have no such disinclination and will initiate disciplinary proceedings in relation to breaches which occur *after* 23 May 2008.

In short, the Commissioner expects law practices to review their billing practices to ensure they don't bill their clients more than the amounts they are entitled to charge under the relevant legislation and, if they have charged for and been paid more than the amounts allowed, to refund their clients for any such amounts charged to them after 6 November 2003 including interest at the rate prescribed on default judgments.

APPENDIX A: THE NOW REPEALED 50/50 RULE

(as set out in the *Queensland Law Society Act 1952* at section 48IC)

The maximum amount of fees that a practitioner or firm may charge and recover from a client for work done in relation to a speculative personal injury claim must not be more than the amount worked out using the formula –

⁴ The Commission's *Prosecution Guidelines* are published on its website at www.lsc.qld.gov.au

$$[E - (R + D)] \times 0.5$$

where—

E means the amount to which the client is entitled under a judgment or settlement.

R means the total amount the client must, under an Act, or a law of the Commonwealth or another jurisdiction, or otherwise, refund on receipt of the amount to which the client is entitled under the judgment or settlement.

D means the total amount of disbursements the client must pay, or reimburse, to the practitioner or firm in relation to the speculative personal injury claim.

APPENDIX B: THE CURRENT 50/50 RULE

(as set out in the *Legal Profession Act 2007* at section 347)

The maximum amount of legal costs (inclusive of GST) that a law practice may charge and recover from a client for work done in relation to a speculative personal injury claim must be worked out under the costs agreement with the client for the claim or this Act but in no case can those legal costs be more than the amount worked out using the formula –

$$[E - (R + D)] \times 0.5$$

where –

E means the amount to which the client is entitled under a judgment or settlement, including an amount the client is entitled to receive for costs under the judgment or settlement.

R means the total amount the client must, under an Act, a law of the Commonwealth or another jurisdiction, or otherwise, refund on receipt of the amount to which the client is entitled under the judgment or settlement.

D means the total amount of disbursements or expenses for which the client is liable if that liability is incurred by or on behalf of the client either by the law practice or on the advice or recommendation of the law practice, in obtaining goods or services (other than legal services from that law practice) for the purpose of investigating or progressing the client's claim, regardless of how or by whom those disbursements or expenses are paid, but does not include interest on the disbursements or expenses.

Examples for D—

1 The disbursements or expenses may be paid by the client direct or through a law practice or by a person funding the client for those disbursements or expenses.

2 If a client obtains a loan to fund the payment of disbursements and expenses on the firm's recommendation and pays for medical and expert reports direct to the provider, the expenses fall within D (but the interest payable by the client on those expenses do not).