

## Regulatory Guide 3

### Charging Fees in Speculative Personal Injury Matters

The Legal Services Commission has had concerns in the past and continues to have concerns about some law firms' billing practices in relation to speculative personal injury matters.<sup>1</sup> We have issued this guide to assist lawyers and law firms to comply with their professional obligations and in particular to identify the maximum fees they are entitled to charge in speculative personal injury matters.<sup>2</sup>

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

The rule was first introduced when the *Queensland Law Society Act 1952* (the QLS Act) was amended to include new sections 48IA-48IC. The QLS Act was repealed by the *Legal Profession Act 2007* (the LPA) which included a revised 50/50 rule at sections 345-347.

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.<sup>3</sup> The practitioner appealed, and judgment was given by the Court of Appeal on 23 May 2008.<sup>4</sup> 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 legislation

We have set out the relevant provisions of both the QLS Act and the LPA in full at Appendices A and B, below.

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<sup>1</sup> This regulatory guide updates and replaces an earlier document under the same heading that the Commission first published in June 2008.

<sup>2</sup> Please refer to [Regulatory Guides: An Overview \(the Overview\)](#) for further information about the regulatory guides and what we hope to achieve by publishing them. The Overview is published on the [Regulatory Guides](#) page of the Commission's website at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au). We note there that we 'hope and intend that the guides will promote adherence to high professional standards and help prevent non-compliance, especially inadvertent non-compliance by that vast majority of lawyers who want to do the right thing' but that the guides 'are not, nor can they ever be binding.' We explain that 'the Commission is responsible for promoting, monitoring and enforcing appropriate standards of conduct in the provision of legal services, not for setting them. The standards are set in laws enacted by parliaments, in the judgments of the disciplinary bodies and the courts and in the conduct rules developed by the professional bodies.' We are very clear that the guides simply 'set out the factors we take into account in exercising our regulatory responsibilities in grey areas where it is uncertain how a lawyer's professional obligations apply.' This is no more than lawyers and users of legal services are entitled to expect of a transparent and accountable regulator.

<sup>3</sup> *Legal Services Commissioner v Dempsey* [2007] QSC 270

<sup>4</sup> *Legal Services Commissioner v Dempsey* [2008] QCA 122

**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.**

We note that the LPA (like the QLS Act before it) includes a provision which enables a law practice to seek the Law Society's approval to charge more than the maximum amount allowed under the rule.<sup>5</sup>

## 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 considering the proper interpretation of sections 481-481C 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*, but does not include interest on the disbursements or expenses' (emphasis added).

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<sup>5</sup> Section 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](http://www.qls.com.au)

## The Commissioner's approach to initiating disciplinary action for breaches of the 50/50 rule

Clearly the 50/50 rule prescribes the maximum fees lawyers are entitled to charge in speculative personal injury matters. It sets a cap, not a floor. Lawyers must ensure having complied with the rule that their fees are in any event fair and reasonable

The Commissioner believes that a lawyer's conduct in charging a client fees in excess of the maximum amount they are entitled to charge under the 50/50 rule interpreted in accordance with the principles as set out above amounts (in the absence of their professional body's approval) to charging excessive legal costs and hence potentially to unsatisfactory professional conduct or professional misconduct.

The Commissioner will decide any complaint or investigation matter involving an alleged or suspected breach of the rule on its own individual merits in accordance with the Commission's *Discipline Application Guidelines*.<sup>6</sup>

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<sup>6</sup> The [Discipline Application Guidelines](#) are published on the [Policies](#) page of the Commission's website at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au).

## APPENDIX A: THE NOW REPEALED 50/50 RULE

(as set out in the *Queensland Law Society Act 1952* at section 481C)

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

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1		June 2008
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