

**LEXIS NEXIS QUEENSLAND PERSONAL INJURY LAW CONFERENCE:  
RECENT DEVELOPMENTS AND CURRENT TRENDS**

**14 November 2008**

**ETHICAL CONSIDERATIONS FOR THE PERSONAL  
INJURY LAW PRACTITIONER**

**John Briton - Legal Services Commissioner<sup>1</sup>**

You will be keenly aware as personal injury lawyers that you have found yourselves subject to increasing regulatory controls in recent years and that the Legal Services Commission is the primary regulator for two of them – the so-called 50/50 rule which caps the fees you are entitled to charge in speculative personal injury matters and the restrictions on how you can advertise your personal injury services.

Those are topical issues and I will discuss them in some detail today for that reason. I will then describe rather than discuss some other ethical hotspots we see arising in the practice of personal injury law and that on the face of it have an entirely different character – but which on closer analysis are perhaps not so different after all.

**The 50/50 rule**

The 50/50 rule was enacted in 2003 in response to a public perception, regrettably not entirely unwarranted, that people who suffered an injury could ‘win’ compensation only to win little at all - because their lawyers could take the bulk of the proceeds for their fees. Indeed one notorious former practitioner sought to claim and enforce payment of fees that would have seen his client nett worse off financially than if she had ‘lost’ her claim or made no claim at all.

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<sup>1</sup> I want to acknowledge and thank the staff of the Commission and especially Robert Brittan, David Edwards, Michael Roessler, Louise Syme and Felicity Walsh for helping write this paper and for doing the work it describes.

The rule first came into effect by way of amendment to the then *Queensland Law Society Act 1952*.<sup>2</sup> It capped the fees lawyers were entitled to charge in speculative personal injury matters at ‘*no more than half the amount to which the client is entitled under a judgement or settlement less any refunds the client is required to pay and the total amount of disbursements the client must pay, or reimburse, to the practitioner or firm.*’

I emphasize that the rule creates a ceiling not a floor. It doesn’t entitle lawyers to charge their clients half the nett proceeds, simply prohibits them from charging more than half the nett proceeds, and their fees remains subject to all the normal rules and must be demonstrably fair and reasonable.

We learned about a lawyer who contrived to get around the rule, unlawfully in our view, by arranging loans for his clients so they could pay their disbursements up front, using his trust account as the conduit. He treated both the capital and interest components of the repayments not as money ‘*the client must pay, or reimburse, to the practitioner or firm*’ but as money the client must pay or reimburse to the third party lender, albeit through his trust account. He capped his fees at half the judgment or settlement amount less refunds and less only those disbursements he paid himself, not at half the judgment or settlement amount less refunds and less the total disbursements – and so he made his ‘half’ bigger than it otherwise would have been.

That contravened the rule, in our opinion. Not only that, but he treated the GST component of his fees as a disbursement his clients had to pay him and so deducted it from his clients’ ‘share’ of the proceeds, as if the maximum fee he was entitled to charge excluded GST. That contravened the rule also, in our opinion.

The *Legal Profession Act 2007* resolves the issue by capping a lawyers’ fees at half the amount to which the client is entitled under a judgment or settlement less refunds and less ‘*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*

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*advice or recommendation of the law practice... regardless of how or by whom those disbursements or expenses are paid, but does not include interest on the disbursements or expenses.’*<sup>3</sup>

The problem remained however about the proper application of the rule under its original formulation and whether the practices we have just described were lawful – hence whether that particular lawyer and any other lawyers who applied the rule similarly had overcharged their clients. We brought proceedings in the Supreme Court for declarations as to the proper interpretation of the rule and the Court gave its judgment in September 2007.<sup>4</sup>

We were largely successful. The lawyer appealed and the Court of Appeal gave its judgment in May 2008.<sup>5</sup> It found that the 50/50 rule entitled lawyers to charge no more than half the judgment or settlement amount less any refunds the client is required to pay and less the total amount of the disbursements for which the client is liable. It found that disbursements include all outlays paid from funds held in the lawyer’s trust account, irrespective of whether the client or a lender paid those funds into the trust account, but excluded any interest charged by a lender. It found also that the maximum fee a lawyer was entitled to charge under the rule includes GST.

We promptly prepared *Guidelines for Billing Fees in Speculative Personal Injury Matters* and took some pains to bring them to the profession’s attention. We published them on the Commission’s website and in QLS publications and forwarded them in June 2008 to 239 lawyers who the Society informed us had done personal injury work since 2003.

We asked them to review their files and, if they’d applied the rule incorrectly, to refund any clients they overcharged the amount of the overcharge together with interest (at the rate prescribed on default judgments, currently 10%). We asked them to get back to us by 30 September 2008 with a report of their review including the number and amounts

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<sup>2</sup> at sections 48IA-48IC

<sup>3</sup> at sections 345-347.

<sup>4</sup> *Legal Services Commissioner v Dempsey* [2007] QSC 270

of any refunds. We said we could see no public interest in initiating disciplinary proceedings for overcharging provided they reviewed their files and put things right with any of their clients they overcharged.

The *Guidelines* make it plain however that we will take a different view towards any lawyers who fail to take the exercise seriously – who we discover down the track had overcharged their clients but not seen fit to make good their mistake by refunding them the amount of the overcharge together with interest.

The process is ongoing, but the early signs are the practices were not widespread but on the other hand not confined to the one lawyer only. We reckon we will have achieved a significant systemic outcome for consumers of legal services if the *Guidelines* do the job we hope and expect they will. We note that at the time of writing<sup>6</sup> a total of 23 law firms have reimbursed or undertaken to reimburse 114 clients a total of \$115,000.

We expect all three numbers to get bigger over coming months. Not all the practitioners and law firms we wrote to have got back to us as yet - we are following them up – and some of them who did get back to us and who acted for large numbers of clients have yet to review all their files. We will keep you posted.

### **The restrictions on the advertising of personal injury services**

The restrictions on the advertising of personal injury services came into effect on the commencement of the *Personal Injuries Proceedings Act 2002* (the Act) in response to an again not entirely unwarranted public perception that some personal injury lawyers were ‘ambulance chasing’. The Act prohibited touting at the scene of incidents where someone might have suffered an injury and at hospitals following such incidents and it imposed restrictions on the advertising of personal injury services – restrictions on what advertisements can say and where they can be published.

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<sup>5</sup> Legal Services Commissioner v Dempsey [2008] QCA 122

<sup>6</sup> 29 October 2008.

The Act had some loopholes, however, not least that the advertising restrictions applied only to lawyers and were unaccompanied by any effective enforcement provisions, and it comes as no surprise then that they were as honoured in the breach as the observance, as any cursory glance at the phone books of the time will tell you. Whatever else might be said about this sorry state of affairs it was unfair to and must have been galling for the majority of personal injury lawyers who tried to do and did the right thing.

The Act was amended to fix the loopholes with effect from on 29 May 2006 and the changes included corresponding amendments to the *Legal Profession Act 2004* (which have carried over to the *Legal Profession Act 2007*). The amendments extend the advertising restrictions to lawyers and non-lawyers alike and make the Legal Services Commission responsible for their enforcement through a simple extension to our complaints and investigation matter powers – they give us powers to receive and investigate complaints which allege that the restrictions have been breached, to initiate investigations of our own motion if the Commissioner believes an investigation should be started, and to prosecute lawyers and non-lawyers alike if the evidence after investigation establishes a reasonable likelihood an alleged breach or breaches will be proved.

Notably, the amendments give us powers to prosecute lawyers either before a disciplinary body pursuant to the *Legal Profession Act* or before a court pursuant to the Act or both.<sup>7</sup>

I note before proceeding that some personal injury lawyers have expressed the view forcefully to us that the restrictions on the advertising of personal injury services amount to an ‘indefensible infringement of the right to free speech’ and ‘a sop to the insurance industry’ and should be repealed.

They’re entitled to their view of course and to express it, but it shouldn’t go unnoticed that the right to free speech they say is breached is their right as business people to seek to maximize their profits by securing a commercial advantage over their competitors

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<sup>7</sup> section 66

through advertising. Perhaps that is a right, in a manner of speaking, but hardly a right at the core of our democratic way of life.

In any event not all lawyers find the restrictions objectionable. I note that the President of the Law Society, Megan Mahon, recently asked her members to comment. She wrote in the August edition of *Proctor* that there was only a limited response and that her impression was that while some of the larger firms practising in the area wanted the restrictions relaxed, smaller firms and especially sole practitioners wanted them further tightened. That is our impression also.

She went on to stress the importance of ensuring a level playing field in which ‘all personal injury lawyers irrespective of the size of their firms and, by extension, their advertising budgets, [are] subject to the same realistic and ethically sound rules.’

Be all that as it may, we’ve been given a job to do and we’ll do it, as fairly and reasonably as we can. That said, we interpret the restrictions strictly, and deliberately so, in order to leave the least possible room for slippage and the thin ‘end of the wedge’ arguments that would inevitably accompany any broader interpretation.

This seems to us to be the best and probably the only practical way to achieve some certainty and to keep a level playing field – to look after the majority of practitioners who do the right thing and who are rightly annoyed by and stand to be disadvantaged by the minority of their colleagues who push the boundaries.

So: when is an advertisement a personal injury advertisement; what can a personal injury advertisement say and not say; and what are we doing by way of enforcement?

**a) when is an advertisement a personal injury advertisement?**

The Act provides that ‘*a practitioner or another person... advertises personal injury services if the practitioner or person publishes or causes to be published a statement that may reasonably be thought to be intended or likely to encourage or induce a person:*

- a) [***either***] to make a claim for compensation or damages under any Act or law for a personal injury; **or**
- b) to use the services of the practitioner, or a named law practice, in connection with the making of a claim.’<sup>8</sup>

I added some emphasis because some lawyers appear not to have noticed the second limb to the definition. This is the limb that casts the net most widely. It says simply and clearly that an advertisement doesn’t have to be intended to or likely to cause or induce a person to make a claim for compensation or damages to count as a personal injury advertisement, only to use the services of a particular lawyer or law firm for the purposes of making a claim.

And that’s a much broader notion. Clearly a person who has suffered an injury might have already decided to make a claim for compensation or damages without having read or seen or been influenced by advertisements of any kind and might simply be looking around for a lawyer for the purposes of making the claim.

And that means, having regard to the fact that the whole point of advertising is to influence people who read or see an advertisement to use the advertiser’s services, that any advertisement advertising the services of a lawyer or law firm becomes a personal injury advertisement merely by announcing or suggesting or implying that the named lawyer or law firm provides personal injury services.

It’s usually pretty easy to pick out personal injury advertisements from the rest, but not always, and in those circumstances we have to make judgement calls. The most obvious example occurs when two ostensibly separate print advertisements for the same law firm appear in close proximity or even side by side on a page, one of them a personal injury advertisement and fully compliant and the other one not a personal injury advertisement but an advertisement that would clearly have been non-compliant if it were.

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<sup>8</sup> section 64 (1)

The same situation can arise with street signage, when two ostensibly separate advertisements appear on separate hoardings but in close proximity and in the same line of vision.

The question in each case is whether we're dealing with two separate and both fully compliant advertisements, one of them a personal injury advertisement and the other not, or in their full context really just the one non-compliant personal injury advertisement. We have to ask ourselves whether, taken together, the advertisements '*may reasonably be thought to be intended or likely to encourage or induce a person to use the services of the named law firm in connection with the making of a claim.*' In each of the cases that have confronted us thus far, we've decided they did.

We've also come across 'advertorials' and articles written by lawyers commenting on matters of public interest and even what appear to be news items about law firms opening new offices which appear in the same edition of a newspaper as advertisement for the lawyers and law firms. We have construed the apparently discrete pieces to be but one multi-sited advertisement, depending on their proximity, and assessed them against the restrictions accordingly.

Inevitably we will have to make judgement calls of these kinds and we repeat that we read the Act narrowly and strictly, to look after lawyers and law firms who do the right thing and to prevent them being put at a competitive disadvantage by colleagues who appear keen to push the envelope.

**b) what can personal injury advertisements say and not say?**

The Act provides that '*a practitioner or another person... must not advertise personal injury services except by the publication of a statement that:*

- a) states ***only*** the ***name*** and ***contact details*** of the practitioner or a law practice of which the practitioner is a member, together with ***information as to any area of practice or specialty*** of the practitioner or law practice; and



*b) is published by an allowable publication method.’<sup>9</sup>*

The wording of the section leaves some room for interpretation, but not much. A logo is arguably just part of a law firm name, for example, and an alpha-numeric phone number is arguably just a contact detail. Fair enough, but not if they’re a contrivance to include slogans and sales pitches that would otherwise be prohibited – statements like ‘free quotes’, ‘home visits and after hours appointments welcome’, ‘industry leaders in injury compensation’, ‘compensation doesn’t happen by accident’, ‘tough case, we’re tougher’ and the like. Slogans and sales pitches are clearly prohibited. .

Notably the definition prohibits photographs and drawings, whether they be photographs of the lawyers who are providing the services or drawings of pleasing local landscapes or even more obviously - and these are all real examples from the only recent past - photographs or drawings of ambulances and hospitals and people with various of their body parts swathed in bandages. It’s simple: photographs and drawings are not names, and nor are they contact details or information as to areas of practice or specialty.

That’s the general rule, but there are two exceptions. The Act provides that a ‘*practitioner or another person... does not contravene* [the subsection just quoted] *only because:*

*a) the practitioner or person advertises personal injury services to any person who is already a client of the practitioner or law practice* [and the Act provides that a

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<sup>9</sup> section 66(1). Notably the Act lists a series of allowable publication methods at section 65 and, by implication, because of their conspicuous omission from the list, identifies other methods of publication that are not allowed. It allows personal injury services to be advertised in printed publications, and hence in newspapers and the Yellow Pages and the like. It allows them to be exhibited in or on buildings and hence on billboards and signage and also to be displayed in printed documents that are ‘gratuitously sent or delivered to any person or thrown or left on premises or vehicles’, and hence in handbills and junk mail - but not however on billboards or signage in or on a hospital or in handbills and junk mail delivered to a hospital or left in a hospital or on any vehicle in the vicinity of a hospital.

Importantly, the Act does not allow personal injury services to be advertised on radio and television - broadcasts on radio and television are included within the meaning of *advertises personal injury services* but excluded from the meaning of *allowable publication method*. Nor does it allow ‘the public exhibition of photographs, films or other recordings of images or sound [in cinemas, for example, or on recorded telephone messages] or their exhibition to persons attending a place for the purpose of receiving professional advice, treatment or assistance.’

client includes a person who makes ‘*a genuine inquiry*’ of a law practice about a personal injury] *or to any person at the practitioner’s or law practice’s place of business... or*

*b) the practitioner or person advertises personal injury services on the Internet website of a practitioner or a law practice... if the advertisement is limited to a statement about:*

- (i) the operation of the law of negligence and a person’s legal rights under that law; and*
- (ii) the conditions under which the practitioner or law practice is prepared to provide personal injury services.’*<sup>10</sup>

So some statements which are specifically prohibited in all other forms of personal injury advertising are specifically allowed in personal injury advertising on the internet – including slogans and sales pitches like ‘free quotes’, ‘home visits and after hours appointments welcome’ and ‘no win, no fee’ and the like, all of which are statements about the conditions under which the lawyer or law firm is prepared to provide personal injury services.

It’s not open slather, however. Slogans and sales pitches like ‘compensation doesn’t happen by accident’ and ‘tough case, we’re tougher’ remain prohibited in personal injury advertisements and similarly war stories, client testimonials and statements like ‘we have a 98% success rate’ and ‘the WorkCover Act favours employers and disadvantages employees by making it difficult to obtain fair compensation for injury and by protecting employers interests’. Those are real and recent examples.

So far so good, but advertising on the internet gives rise to some nice questions, two in particular. The first question arises when a website contains a page that isn’t a personal injury advertisement but which contains content that would be prohibited if it were and which links to a page that is a personal injury advertisement.

This is the internet counterpart of the problem that arises when ostensibly separate print advertisements appear in close proximity to one another, one a personal injury

advertisement and the other not and both of them fully compliant. Are we dealing with two separate and fully compliant advertisements, one of them a personal injury advertisement and the other not, or in their full context really just the one non-compliant personal injury advertisement?

We say the latter, but as with print advertisements it's a matter of proximity. We've come up with a rule to bring some operational certainty to the issue. The rule is this: a page that contains a direct link to a page that is a personal injury advertisement counts as a personal injury advertisement and so must itself be compliant, with one exception. That is when the direct link is to a page which references personal injury only by a simple descriptive mention of personal injury law as one of the firm's areas of practice or specialty and which serves as the link to the more comprehensive personal injury advertisement.

Let me give you an example. A typical law firm home page is likely to include promotional material and photographs and brief biographies of the principal or partners. That home page is fully compliant provided it makes no reference to personal injuries or personal injury services, directly or otherwise, but we will count it as a personal injury advertisement if it includes a direct link to a page that is a personal injury advertisement. We will not however count it as a personal injury page if the only link it includes to a personal injury advertisement is a link to a page that lists the firm's areas of practice or specialty and that page – let's call it an 'areas of practice page' - does no more than list personal injury as an area of practice or speciality and the listing serves as the link to the personal injury page or pages, as in the following graphic:



<sup>10</sup> section 66 (2)

That is to say, an ‘areas of practice’ page provides an acceptable link between a page that is not a personal injury advertisement but which includes content which would be prohibited if it were and a page that includes content which makes it a personal injury advertisement. It provides an appropriate gateway to information that is otherwise restricted.

The second question goes to the issue of just when a person who visits a law firm website counts as a person making ‘*a genuine inquiry of the law practice about a personal injury.*’ Some firms deal with the issue simply by asking people who visit their websites to whether they’re making a genuine inquiry and, if they click on the ‘yes’ box, give them immediate access to ostensibly ‘clients-only’ and otherwise non-complaint personal injury advertisements.

We say devices of that kind however well intended fail to adequately differentiate people who are making genuine inquiries from people who are merely browsing, and gives people who are idly curious ready access to information the Act envisages being made only to people making a genuine inquiry.

There are ready alternatives more consistent with the Act’s fundamental purposes, including making the otherwise restricted information password protected. That is neither difficult nor unduly onerous – it may involve no more than asking people who are making a genuine inquiry to contact the firm to obtain a password, or perhaps simply to click a box to say they’re a genuine inquirer and, if they do, taking them to a page that asks them to type in their in their email address and in that way to automatically generate an email to themselves from the law firm enclosing a password.

**c) what we’re doing by way of enforcement**

We’ve set our selves the goal to as far as possible by persuasion not prosecution, and there are two aspects to that - to try to head off non-compliance if we can by issuing guidelines and, when we come across advertisements we believe are non-complaint, by giving the lawyers and law firms concerned the opportunity wherever possible and appropriate to rectify their mistake before resorting to prosecution. We’ve done

that and will continue to do that although we'll be disinclined to leniency whenever we're persuaded the non-compliance is flagrant or knowing or repeated.

We published *A Guide to Advertising Personal Injury Services* in June 2006, less than a month after we were handed the job, and took pains to bring them to the attention of the profession including by publishing them in Proctor and on our website. We followed them up in August 2006 with a separate *Guide to Advertising Personal Injury Services on the Internet* and have taken every opportunity since to talk about the guidelines publicly at continuing legal education events and seminars and workshops like the one we're at today.

We have developed a good working relationship with the Law Society in relation to these issues. We try to be cautious as the regulator not to give specific advice to lawyers and law firms when we may be called upon to form a view during the course of a subsequent investigation whether their advertisements contravene the restrictions and so we refer them when they request our advice to the Law Society as their professional body. The Client Relations Centre people understand these issues very well.

We received a handful of complaints in 2006-07, the first full year we had responsibility for enforcing the restrictions, a few of them about advertisements in local papers and one each about a billboard, a radio and a television advertisement, but we directed our energies in the main to systematically reviewing the Yellow Pages directories for the Brisbane and every other telephone district in Queensland. We had to start somewhere and that was the obvious place to do it.

We initiated just short of a hundred investigations into alleged or apparently non-compliant advertisements during that first year and another fifty or thereabouts in 2007-08, only six of which involved 'repeat offenders'. We persuaded every one of those 150 lawyers and / or law firms to bring their advertisements into line in future editions, albeit some of them reluctantly, and we achieved that result through persuasion, without having to resort even once to prosecution.

That's a good result. We note that our counterpart in New South Wales (where there are also restrictions on the advertising of personal injury services, but unhelpfully different restrictions to the restrictions we have here) has had occasion twice in recent times to initiate disciplinary proceedings and the lawyers concerned have been ordered to pay substantial financial penalties.<sup>11</sup>

That task now largely behind us, we issued revised and updated *Guidelines* just a couple of months ago, in September, and we've taken pains once again to bring them to the profession's attention – including this time by a mail-out to all personal injury practitioners and law firms. We said we're about to begin systematically reviewing lawyer and law firm websites to ensure their compliance and that we will take the same approach we've taken with print advertisements in the past – we will identify the websites we believe are problematic, inform the lawyers and law firms concerned and seek their cooperation to make the necessary modifications.

It isn't easy to describe the restrictions on the advertising of personal injury services in words alone, especially as they apply to websites. We hope to supplement the *Guidelines* in the near future by including a short movie on our website that will take viewers on a tour through the website of a fictitious law firm. It will include screen shots of both compliant and non-compliant pages and explanatory comment by way of voice-over. We hope that will prove helpful.

### **Some ethical hot spots**

We have initiated several hundreds of investigations over the past several years into apparent breaches of the 50/50 rule and the restrictions on the advertising of personal injury services. Notably only very few of them were triggered by complaints. They remind us that traditional complaints-based regimes for monitoring and enforcing standards of conduct in the legal profession cast the regulatory net too narrowly and tell us little if anything about the prevalence or distribution of misconduct in the profession.

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<sup>11</sup> See *Legal Services Commissioner v Malouf* [2007] NSWADT 215 and *Legal Services Commissioner v Keddie* [2008] NSWADT 185.

They remind us also if we needed reminding that the law is not only a profession but a business, and that lawyers sell their services for profit within commercial enterprises and have commercial as well as more narrowly professional motivations.

That's the beginning of a much longer story<sup>12</sup> but I make the point now because some of the other ethical 'hotspots' I want to raise are similarly concerned with the business of law more so than the practice of law conceived in a narrow professional sense and all of them are similarly unlikely to trigger complaints and so come to regulatory attention.

**a) looking after clients**

There is always potential for a lawyer's and a law firm's commercial interests to come into conflict with their clients interests and for lawyers and law firms to prefer their own interests to those of their clients, and in this area of law more than most. Personal injury lawyers should take particular care, and personal injury law firms should take particular care to develop and implement management systems and supervisory arrangements to:

- resist the temptation to settle prematurely – to avoid blowing out their costs beyond a fixed fee agreement, for example, or in speculative matters to secure themselves a fee at all;
- fully, effectively and objectively inform and, while they're not their client's keeper, advise their clients about the consequences of entering into litigation loans, especially when they introduce a client to a lender, and in particular to alert them to:
  - potential conflicts of interest
  - the terms or conditions of a loan including interest rates;

- any possibility they will be advanced more by way of loan than they are reasonably likely to recover at settlement or trial.

## **b) issues arising in mediation**

No doubt everyone here is well aware of the decision of the Legal Practice Tribunal decision in the Mullins case.<sup>13</sup> The facts were straightforward. The practitioner represented a seriously injured plaintiff and had given medical and other reports to the insurer's legal representatives prior to a mediation to the effect that his client's life expectancy had been reduced by 20% and that damages should be calculated on the basis that he had 16 more years of working life before him at the time of the accident. The insurer settled the claim on that basis at the mediation.

In the interim, however, after the reports were handed over and only days before the mediation, the plaintiff told the practitioner he had cancer spots on his lungs and elsewhere throughout his body. He had only just learned of these facts himself and there were no medical reports describing the cancer or the prognosis. The practitioner did not disclose the 'cancer facts' at the mediation but continued to rely on the reports he'd previously handed over and which he now knew were false or at best unreliable.

The Tribunal made the point a mediation isn't an 'honesty free zone'. It reaffirmed the principles that practitioners must not knowingly make false statements to each other in a mediation and must take the necessary steps to correct any false statement unknowingly made as soon as possible after learning the statement is false. It found that the practitioner's conduct in continuing to rely on the false reports after he learned they were false, knowing they would influence his opponent, amounted to intentional and fraudulent deception.

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<sup>12</sup> Scott Mclean and I develop the story at greater length in a paper we gave at the Third International Legal Ethics Conference in July. The paper is titled *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era* and is available on the Commission's website.

<sup>13</sup> Legal Services Commissioner v Mullins [2006] LPT 012



But let's play with the facts a little. Put your self in the practitioner's shoes and imagine that you know the cancer facts but that you hadn't already handed over a schedule of damages. Now ask yourself:

- are the medical reports you handed over a continuing representation you are now obliged to correct?
- would it be proper for you to say 'You've seen the medical reports. Make us an offer'?
- would it be proper for you simply to make a demand for \$1,000,000 without making any representations at all at the mediation? Would your silence be culpably misleading?<sup>14</sup>

Or imagine the following scenarios:

- you act for an insurer. Liability is not in issue. You believe the plaintiff's damages should be in the order of \$400,000. The plaintiff is unrepresented. Now ask yourself:
  - would it be proper for you to make a first offer of \$25,000?
  - what if the plaintiff makes a counter offer of \$75,000? Would it be proper for you to treat that offer as a negotiating position and seek to negotiate a lesser amount?
  - what if you were not the insurer's representative but the mediator. You agree with the insurer's opinion that \$400,000 would be a fair and reasonable settlement – and the plaintiff tells you in a private session that he really wants \$75,000 but would be prepared to settle for \$25,000. Would it be proper, since your job includes dealing with power imbalances, to suggest to

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<sup>14</sup> I am grateful to Ian Hanger QC for giving me permission to copy (and adapt) this scenario and the following scenario and the questions they pose from talks he has given on mediation and ethics. I am

the plaintiff that he asks for \$500,000 because, after all, mediation usually involves offers and counter offers and he could expect to be beaten down?

- you act for an insurer. The insurer's representative tells you he is prepared to offer \$200,000 but wants you to tell the plaintiff he won't settle for a cent more than \$175,000 all up.
  - would it be proper for you to accept those instructions?
  
- you act for an insurer and are going into the initial joint session of a mediation. You sit down at the mediation table and place your files on the table together with two videotapes.
  - is there anything wrong with that if you say or do nothing further?
  
  - what if the videos are simply movies you've hired to watch at home?
  
  - what if the videos are genuine, and that one of them is damaging but the other is entirely consistent with the plaintiff's case - would it be proper for you to say 'clearly you can see we've got video tape surveillance of your client. We are prepared to show you some but not all of it', and then show the first, but not the second tape?
  
  - what if it becomes apparent during the course of the mediation that the video tapes show the wrong person (the plaintiff's twin, for example) – should you disclose that fact to the plaintiff?

There would be any number of similar fact situations highlighting ethical issues that arise in mediation and they are unlikely ever to come to the regulator's attention by way of complaints. Clients in these circumstances are entirely dependent on lawyers being motivated to and doing the right thing, because it's right.

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similarly grateful to Peter Munro for his permission to copy and adapt the subsequent scenarios and the questions that attach.