

QUEENSLAND LAW SOCIETY PERSONAL INJURIES CONFERENCE

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ETHICS AND THE PERSONAL INJURIES LAWYER: COMPLIANCE, SPIRITLESS COMPLIANCE, SKILFUL AND OTHER EVASIONS

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There is a lot that might be said under this title but I will confine myself to two issues where there are some reasonably clear rules. The first is the restriction on advertising personal injury services under the *Personal Injuries Proceedings Act 2002* (PIPA). The second is the restriction on how much lawyers can properly charge for their services in speculative personal injuries claims under the *Queensland Law Society Act 1952* currently but, from two days hence, under the *Legal Profession Act 2007* (the LPA) - the 50/50 rule.

I hasten to add given today's theme that being ethical isn't simply a matter of following the rules. An ethical lawyer won't be motivated by fear of sanction but by internalised values and critical reflection about those values and the desire and the courage to act accordingly. Sir Gerard Brennan made much the same point some years ago in a way that has a direct relevance to my topic today. He said 'if ethics were reduced to rules, a spiritless compliance would soon be replaced by skilful evasion.'ⁱⁱ

The restrictions on advertising personal injury services

PIPA restricts both the content of advertisements for personal injury services and their method of publication. PIPA in its 2002 version left a number of loopholes, however, notably that the restrictions applied only to lawyers and were unaccompanied by any effective enforcement provisions. That being the case, it comes as no surprise that the

restrictions were as honoured in the breach as the observance - certainly they were breached as a matter of routine and without any attempt to hide the fact, as a cursory glance at a phone book will tell you - and that we saw the emergence of non-lawyer 'claims harvesters' who advertised on behalf of lawyers and referred clients to them for a fee. Some of those breaches might reasonably be regarded as 'skilful evasions' but that would be too kind for others, including of course the claims harvesting.

Whatever else might be said about this sorry state of affairs, it was very unfair to and indeed must have been galling for lawyers who tried to do and who did the right thing.

The legislation was amended to fix both loopholes with effect from on 29 May last year, and the amending legislation included amendments to the *Legal Profession Act 2004*. The restrictions on advertising now apply to lawyers and non-lawyers alike and their enforcement now rests with the Legal Services Commission (the Commission) through a simple extension to our existing powers in relation to complaints and discipline.

The Commission now has power to receive and deal with complaints which allege that the restrictions have been breached, to initiate investigations of its own motion if it suspects a breach (the investigation matter power), 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 me as Commissioner power to prosecute lawyers I believe have breached the restrictions either before a disciplinary body pursuant to the LPA or before a court pursuant to PIPA or both,ⁱⁱⁱ and my powers in this regard extend to conduct that contravened PIPA but happened before the amendments commenced.^{iv}

The Commission as no doubt you know has prepared guidelines to assist practitioners and others to understand and comply with their obligations in relation to the restrictions on advertising personal injury services under PIPA and to describe my attitude to prosecuting apparent breaches. The guidelines were widely published when the legislation was amended last year, including on the Commission's website where of course they remain.

I want to take the opportunity today to remind you of the restrictions and how the Commission interprets and applies them, and to let you know what the Commission has done thus far and plans to do by way of their enforcement.

PIPA restricts both what personal injury advertisements are allowed to say and where and how they can be published, and of course those rules are premised on a definition of what it is to advertise personal injury services in the first place.

a) what personal injury advertisements are allowed to say

PIPA prohibits personal injury advertising but for ‘the publication of a statement that 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 speciality of the practitioner or law practice.’^v It says by way of specific example that ‘advertising personal injury services ‘on a ‘no win no fee’ or other speculative basis’ is not allowed.^{vi}

The rules seem clear enough, certainly on a literal interpretation. They seem very clearly to exclude photographs, for example, including photographs of the practitioner or practitioners who are named in an advertisement, or whose law practices are named in an advertisement, and even more clearly - these are both real examples - to exclude photographs or drawings of people with various of their body parts swathed in bandages and, more imaginatively again, of a pig’s hind quarters under the caption ‘so you think you don’t need legal advice?’

The rules also exclude in our view, and clearly so, all the following words, all of which have appeared in personal injury advertisements in the Yellow Pages and elsewhere in recent times and none of which are names, contact details or areas of practice or specialty:

- No win? No way!
- Cost effective

- Free quotes
- We listen and get you the best results
- Lawyers with solutions, commitment and experience
- Compensation doesn't happen by accident
- You have a right to fair compensation and we will get it for you
- Our in-house expertise ensures rapid turn around, faster results and more affordable service
- Servicing all of Queensland
- Don't go it alone
- Home visits and after hours appointments welcome
- Established over 80 years- professional service at an affordable rate
- Providing clients with quality service and peace of mind for over thirty years
- Just one call can help you feel a whole lot better
- Knowledge, understanding and personal contact
- Making the law work for you
- Industry leaders in serious injury compensation
- WorkCover claim - unsure?

The rules are not quite as clear as they appear at first blush, however, and leave some room for debate. What's in a name, for example? Does a name include a business name or a logo? And, if so, what words can be included in a business name or a logo, and what if they include words that might otherwise not be allowed? What's a contact detail? What about an alphanumeric phone number which includes a word or words that might otherwise not be allowed?

We have decided to interpret the wording of the section strictly, in a way that leaves the least possible room for skilful evasion. That seems to us to be consistent with

the Act's intentions and the best and probably the only practical way to achieve some certainty, and also to keep a level playing field - to look after practitioners who try to do the right thing.

So we say, practically and sensibly in our view, that 'the name of a law practice' extends to include its registered business name and also its logo if it has one, but not if its business name or logo is a contrivance - not if, for example, the business name or logo includes words or slogans such as 'the No Win No Fee Lawyers' or 'the Sue Now Pay Later Lawyers' or the 'the Home Visit Lawyers' or the 'We Come To You Lawyers' or some such.

Similarly, we have been persuaded, albeit reluctantly, that 'contact details' extends to include alphanumeric telephone numbers, but not if the alphanumeric number includes a word or words that would otherwise not be allowed. We say, and this is a real example, that 1300-INJURY is allowed but, and these are not real examples, that 1300-SUE-THEM or 1800-GET-EVEN are not. That is because the word 'injury' is after all consistent with an area of practice or speciality but the words 'sue them' and 'get even' are something else again.

Finally, we say, again practically and sensibly in our view, that 'an area of practice or specialty' extends to include a symbol that the practitioner is an accredited personal injury specialist and that words like the following are all allowed under the same heading:

- Personal Injury Experts
- Injury claims
- Sports Injuries
- Workers compensation experts
- WorkCover – we specialise in providing advice and representation to people with WorkCover claims

We are relaxed with this strict approach but, clearly, because the rules apply only to advertisements for personal injury services and not to advertisements for legal services more generally, it serves to raise the stakes on the definitional question - when exactly does an advertisement for legal services amount to an advertisement for personal injury services? When does it cross the line?

b) where and how advertising personal injury services is allowed

PIPA prohibits the advertising of personal injury services except by ‘an allowable publication method’^{vii} and it lists a series of allowable publication methods^{viii} and names some and by implication, because of their conspicuous omission from the list, identifies other methods of publication that are not allowed.

The rules allow 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^{ix} 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.’^x

The rules also allow personal injury advertising on websites, but effectively only on the websites of law firms and the Yellow pages and other like directories and only with some important qualifications. I don’t have time to canvass these particular rules today but the Commission has prepared *A Guide to Advertising Personal Injury Services on the Internet* which is readily accessible on our website and you can read about them there.

Importantly, the rules do not allow personal injury services to be advertised on radio and television, nor do they 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.’^{xi}

These rules cause us no particular grief in their interpretation but come with some interesting twists. What if, for example, a personal injury advertisement is caused to be published in a jurisdiction where it is allowed to be published but crosses the border to another jurisdiction where it isn’t?

This is a real possibility, especially in the internet era. Imagine that a website based in the ACT where there are no restrictions on advertising personal injury services advertises personal injury services contrary to the restrictions that apply in Queensland and the total prohibition that applies in New South Wales. Imagine further that the registered domain name holder, when told that the advertisement is unlawful in both Queensland and New South Wales, threatens to take his business off-shore, to the UK or the USA.

My counterpart Commissioner in New South Wales has commenced proceedings in the Supreme Court in that state to address exactly that situation, and we await the outcome of those proceedings with some interest.

c) what advertising personal injury services is, and isn’t

The rules governing the allowable content and methods of publication of personal injury advertisements significantly restrict how and where personal injury practitioners and law practices can properly advertise their services, and concentrate the mind on the definitional question - when exactly does an advertisement for legal services become an advertisement for personal injury services? Where is the line?

PIPA says ‘a practitioner or another person, whether or not the other person is acting for a law practice, 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 [either] to make a claim for compensation or damages under any Act or law for a personal injury [or] to use the

services of the practitioner, or a named law practice, in connection with the making of a claim.^{xii}

It is a good question just exactly what those words mean, or should be taken to mean, and there is no simple answer. All I can say is that we have decided to interpret them strictly, again in a way that leaves the least possible room for skilful evasion. That seems to us again to be the best and probably the only practical way to achieve some certainty and to keep a level playing field - to look after practitioners who try to do the right thing.

We believe accordingly that any reference to personal injury services in an advertisement, be it a reference to motor vehicle or other accidents or to worker's compensation or to slips and trips and falls or the like is sufficient to make it a personal injury advertisement.

Further, we believe that references to 'personal claims', 'insurance disputes' and the like can properly be construed as references to personal injury services even in the absence of any words like 'accident' that are suggestive of personal injury if the advertisement read as a whole and in context might nonetheless reasonably be thought to be intended to or likely to encourage or induce a person to make a claim for personal injuries or to use the services of the law practice in making such a claim.

So, to take a real example, we believe that a print advertisement which made no explicit reference to personal injury services but which included the words 'insurance disputes' and also and in particular the words 'no win no fee' that are typically associated with but not allowed in a personal injury advertisement was a personal injury advertisement because it was placed in close proximity to a separate and compliant personal injury advertisement for the same law practice and both advertisements referenced 'insurance disputes'.

We've come across several other examples in which ostensibly two advertisements for the same law practice, one of them a personal injury advertisement and the other

not and both of them fully compliant when considered separately, were in our view in the full context really just the one non-compliant personal injury advertisement. In one instance the 'two' advertisements appeared side by side on a page and in another on two separate but nearby hoardings in the same line of vision in a streetscape, and in both instances one of the 'two' advertisements was a perfectly allowable personal injury advertisement and the other was not a personal injury advertisement but contained words and / or images that would not be allowed if it were.

Those are the rules, and that's how we interpret and apply them. So what have we been doing by way of enforcement?

We've been busy, as no doubt many of you will know. We have initiated exactly one hundred investigations into alleged or apparent breaches since we were given the jurisdiction just over a year ago now. A few of them were prompted by complaints and some of them concern radio and television and billboard advertising, but the vast majority of them - eighty-one to be exact - concern advertising in the Yellow Pages and were investigations we initiated of our own motion. We had to start somewhere when we were given the jurisdiction and that was the obvious place to do it.

We have now reviewed the current Yellow Pages directories for the Brisbane and every other telephone district in Queensland and I am very pleased to be able to tell you that we have persuaded every practitioner whose advertisements we believe breached the rules to bring their advertisements into line in future editions, albeit some of them reluctantly.

This might not be readily apparent for some time yet - the Yellow Pages are published only annually, and at different times of the year for different telephone districts - but I am confident that the 2008 Yellow Pages will contain very few if any non-compliant advertisements. I hope and trust that is good news for those of you who have always done the right thing, no doubt to your considerable annoyance when you've seen what some of your colleagues have done.

I am especially pleased that we have achieved that result through persuasion, without having to resort to prosecution.

That task completed, we intend now to systematically review law practice websites to ensure their compliance also. I note in this regard that we recently dealt with a complaint about the website of one of the more prominent law firms no doubt represented here today and that we have been able to work through that issue with the partners of the firm and with the helpful involvement of the Law Society to ensure the site's compliance. That firm's cooperative problem-solving approach is a model of how matters like these should be resolved and I'm very grateful to them for that.

I have to say that I am encouraged by the cooperation of some other law firms too - and it would seem in increasing numbers – that have engaged with the Commission and the Society to trouble-shoot problems before they arise, and before committing themselves to advertisements that might be risky.

It would be a very good thing indeed if we've managed to help level out the playing field without having to issue any red cards and at the same time to have helped change the rules of the game to encourage not merely spiritless but generous compliance at the expense of more or less skilful evasion.

The restrictions on charging for personal injury services: the 50/50 rule

The traditional speculative personal injury claim is simple in concept and you will know it well. It's one in which, when clients are seeking compensation for injuries but can't afford either the disbursements that they will have to incur in seeking to prove their claims or their solicitors' professional fees or both, their solicitors agree to forgo their fees for the time being, to pay the disbursements themselves and to take the risk that their clients' claims will ultimately prove successful – in which case the clients agree to pay their professional fees and reimburse the disbursements.

It has attracted some controversy but has some obvious merits. It gives clients access to justice that they might not otherwise have, and of course, if their claim succeeds, it

gives their solicitors a fee they wouldn't otherwise get, typically their usual fee plus an 'uplift fee' by reason of the risk they carry should the case be lost.

These arrangements were always ripe for rorting. Some clients found themselves winning their case only to win very little or even nothing at all – they had little or sometimes nothing to show for it once they paid their solicitors professional fees and reimbursed them the disbursements. That was the perception in any event and I know that it was sometimes true – hence the 50/50 rule.

The rule was made by way of amendment to the *Queensland Law Society Act 1952* and came into effect in 2003. It consists of a simple formula solicitors must use to calculate the maximum fee they are entitled to charge in speculative personal injury claims – '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.'^{xiii}

We have become increasingly concerned at the Commission over the past year that some practitioners appear to be billing their clients in speculative personal injury matters in ways that are designed to circumvent the 50/50 rule, and that others appear simply to be flouting it, and with no pretence even of skilful evasion.

We are concerned for example that some practitioners appear to regard the 50/50 rule as establishing not a ceiling but a floor, and to be artificially inflating their fees to make sure they come to at least half the nett proceeds, as if that is their entitlement, regardless of the settlement amount and regardless of what their fees might otherwise come to. We have seen, for example:

- a client agreement that provided for a time-costed charge-out fee within the usual range but a speculative uplift of 40% and, on top of that, a further 20% uplift for care and consideration;
- a practitioner who told a client about the 50/50 rule but proceeded to ask, indeed to require the client to sign what purported to be a 'waiver' exempting

him from the rule, and another practitioner who billed a client considerably more than half the nett proceeds and simply failed to mention the rule;

- a number of itemised bills which have treated the GST component of the solicitors' fees as if it were a disbursement that the client should pay, or reimburse, to the solicitor, and hence subtracted it from the gross amount rather than the practitioners' share of the nett proceeds; and
- a multiplicity of timesheets which have been used for billing purposes and which at first blush at any rate appear to include units of time for all manner of activities which have little if anything to do with advancing the clients' case but a lot to do with padding the bill – those time-costed activities include, for example, numerous and seemingly unproductive 'file reviews', 'collating' that seems to have consisted merely in placing a copy of a letter on file, and preparing the solicitor's own bill.

There is potential for barristers to get in on the act, too, given that barristers' fees count as disbursements and so aren't capped in the way that solicitors' fees are. That means in theory at least that barristers can charge any fee they like, the spirit and intent of the 50/50 rule notwithstanding. We're aware of at least one matter in which a barrister charged an apparently exorbitant fee, and we need to rule out the possibility that the barrister and solicitor might have colluded to share the proceeds.

We're aware of another matter which settled for less than expected and in which it appears, after the client reimbursed the solicitor for his disbursements, that the solicitor suggested to the barrister and the barrister agreed to reduce his fee in exchange for repeat business. That might have been a perfectly acceptable commercial arrangement but the problem, so it appears, is that the solicitor kept the difference. That solicitor has some explaining to do - and maybe there is an explanation: it might have been a honest mistake, after all – and so will the barrister if we have any reason to suspect collusion.

Most of the matters I've just mentioned are under active investigation and I will say no more about them except to state the obvious - that they are matters of real concern - and

also and reassuringly that we have no reason to believe they are in any way representative.

We do have some concerns of a more systemic kind, however, and they have their origins in a new and it seems increasingly common variant of the traditional speculative personal injury action.

It's a version in which solicitors, when they find themselves with clients who are seeking compensation for injuries but can't afford either the disbursements they will have to incur to prove their claims or the solicitors' professional fees or both, either enter into loan agreements with the clients or arrange loans with a lender - sometimes an entity in which the solicitor or one or more of the partners of the firm has an interest, sometimes another and wealthier client of the firm. The loans enable the clients to pay their disbursements themselves, as it were, and up-front. The deal is that they repay the loans with interest and pay their solicitors' professional fees if and when their claims succeed.

The newer version is just as effective in giving injured workers and others access to justice they mightn't otherwise have but seems equally ripe for rorting. That's because some solicitors structure the loan arrangements so that the repayments count not as disbursements that 'the client must pay, or reimburse, to the practitioner or firm' but simply as repayments the client must pay to a third party - and so they subtract them from the client's minimum half-share of the nett proceeds after refunds and disbursements, not from the gross proceeds, and in that way claw back for themselves more than the maximum amount to which they would otherwise be entitled under the 50/50 rule.

It's a neat trick, and arguably little more than a contrivance. It's an especially neat trick when the lender is a related entity so that the solicitor or firm pockets the interest component of the repayments to boot.

Litigation lending arrangements like these raise the obvious questions arise about the rates of interest clients are required to pay and a host of other questions, too, not least the following:

- do practitioners in these circumstances have a duty to advise their clients to take independent advice, or to advise them that other practitioners take on speculative personal injury actions on more favorable terms?
- do practitioners who have a direct or indirect interest in the lending entities have a duty to disclose that interest?
- how do these lending arrangements impact the practitioners' fiduciary duties to their clients, given that they have a direct or indirect interest in maximizing their profit and hence in preferring their own interests to those of their clients?
- how does the 50/50 rule apply? Are the loan repayments disbursements within the meaning of the rule? Does the interest component of the repayments count as a disbursement within the meaning of the rule?

The *Legal Profession Act 2007* resolves some of these questions. It amends the 50/50 rule so that practitioners' fees are capped **no longer** at '*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*' **but from 1 July 2007** at '*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 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...*'^{xiv}

You need to know if you don't already that the Act including the amended 50/50 rule comes into effect on 1 July, the day after tomorrow, before you return to work on Monday morning, and that it applies '*to any request for payment made on or after the*

day [the] section commences, whether or not a client agreement was entered into before that date.^{xv}

We urged the government to make that amendment, and we are very pleased that it did, but I have to say to you that we believe the amendments simply clarify what was always the case – that disbursements properly incurred and paid directly to providers by clients themselves always were disbursements for purposes of the 50/50 rule and it was always unlawful to treat them as if they were not.

Similarly - and this goes further than the amended rule - we believe that the interest component of the repayments clients have made of loans they obtained to fund their disbursements are themselves disbursements for purposes of the 50/50 rule under its original and still current formulation, and that it was always unlawful to treat them as if they were not.

We also believe, leaving aside the proper construction of the 50/50 rule, that it is and always has been unlawful for practitioners to treat the GST component of their professional fees as if it was a disbursement that should be subtracted from the total amount to which clients are entitled under a judgement or settlement. Practitioners are responsible for meeting their GST obligations out of their own funds, not their clients.

I can tell you – this is a matter of public record – that we recently applied to the Supreme Court for declarations in respect of all three matters in response to a particular set of facts that has come to our attention, and that our application is listed for hearing in September. The application is of course premised on that particular set of facts but we expect that the Court's decision will have a more general application.

We will use our best efforts to bring the Court's decision to your attention as soon as possible after it is published, and we will enlist the Law Society's support in so doing, so that you can decide what impact, if any, it has for you and your practice, and of course we will use our best efforts to bring the matter to public attention also. Clearly, if we are right and our application is successful, even in part, the particular practitioner concerned and any other practitioners who may have acted similarly will be obliged to

make good their error and to reimburse their clients the money that is, and always was rightfully theirs.

We will take an active interest to make sure that happens and of course we will also need to consider the disciplinary ramifications, but we will cross those bridges if and when we get there.

Thank you for your attention.

ⁱ I want to acknowledge and thank the staff of the Commission and on this occasion Louise Syme and David Edwards in particular for the help and advice they gave me in preparing this paper, and of course for doing the work it describes.

ⁱⁱ Sir Gerard is quoted by Ken Crispin QC in his contribution to Parker and Sampford (editors), *Legal Ethics and Legal Practice*, Oxford, 1995, at p.176.

ⁱⁱⁱ section 66

^{iv} section 252 of the *Legal Profession Act 2004* as amended, which becomes section 426 of the *Legal Profession Act 2007*. See also the *Personal Injuries Proceedings Act 2002* (as amended) at section 85.

^v section 66

^{vi} section 66

^{vii} section 66

^{viii} section 65

^{ix} section 65

^x section 65

^{xi} broadcasts on radio and television are included within the meaning of *advertises personal injury services* at section 64 but excluded from the meaning of *allowable publication method* at section 65.

^{xii} section 64

^{xiii} *Queensland Law Society Act 1952*, section 481C

^{xiv} *Legal Profession Act 2007*, section 347(1)

^{xv} *Legal Profession Act 2007*, section 347(7)