

# ***Lawyers, Clients and the Business of Law***

**A Workshop Series hosted by Griffith Law School and  
the Legal Services Commission**

A report of the first Workshop

*Creative Practice or Profiteering?*

7 September 2006

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## 1. Introduction

The symposium series ***Lawyers, Clients and the Business of Law*** brings regulators together with practising lawyers and legal academics to discuss ethical issues arising in the course of legal practice in Queensland. The first workshop in the series - ***Creative Practice or Profiteering*** - was held on 7 September 2006 and canvassed issues relating to:

- *charging outlays / disbursements; and*
- *personal injuries proceedings, litigation lending and the 50/50 rule.*

The Legal Services Commission has become increasingly concerned about the conduct of some practitioners in these areas and has, for example, published guidelines for practitioners about charging outlays (the guidelines are available on the Commission's website, [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)). Further, the Standing Council of Attorneys-General (SCAG) has released a discussion paper on litigation lending and called for submissions. The Commission's submission was informed in part by the discussion at the symposium.

The symposium organisers encouraged attendance from a wide cross-section of the Queensland legal community. There were 50 participants including lawyers in private practice, legal academics, and members of the Commission's staff and the staff of the Queensland Law Society, the Queensland Public Interest Legal Clearing House and Legal Aid Queensland.

The organisers developed two scenarios around the workshop topics and circulated them to participants prior to the workshop in order to help focus discussion on the day. They asked four panellists – a regulator, an academic and two practitioners – to further help stimulate discussion on the day by talking briefly to the issues raised in the two scenarios from their particular points of view. The panel comprised:-

John Briton	Legal Services Commissioner
Professor Jeff Giddings (Moderator)	Griffith Law School
David Searles	Deacons
Pat Mullins	Mullins Lawyers
Associate Professor Mike Robertson	Griffith Law School

The participants broke into 6 groups following the panel presentations to discuss on the issues, share perspectives and finally to report back to whole group – and to prompt further discussion from the floor. The organisers provided all participants with a template for recording their responses to the scenarios and the themes as they saw them that emerged from the group discussion.

This report sets out the symposium program, the two scenarios that were circulated in advance, the four panel presentations, the themes that emerged from the group discussion and the responses the individual participants recorded on their templates.

## 2. Program



### ***Lawyers, Clients and the Business of Law***

**A Workshop Series hosted by Griffith Law School and the Legal Services Commission**

# Creative Practice or Profiteering?

## Program

3.30 – 4pm **Registration with coffee available**

4pm **Welcome**

Professor John Dewar, Deputy Vice-Chancellor (Academic) Griffith University

**Opening address**

The Honourable Linda Lavarch MP, Attorney-General and Minister for Justice

4.15 – 4.45 **Perspectives on contemporary topics by panel members**

- *Charging outlays/Disbursements*
- *Personal injuries proceedings, litigation lending and the 50/50 rule*

**Panel members:**

John Briton

Professor Jeff Giddings (Moderator)

David Searles

Pat Mullins

Associate Professor Mike Robertson

Legal Services Commission

Griffith Law School

Deacons

Mullins Lawyers

Griffith Law School

4.45 – 5.45 **Group discussions**

5.45 – 6.00 **Coffee break**

6.00 - 7pm **Report back and general discussion on topics**

7pm **Close**

### 3. Scenarios

#### **SCENARIO ONE: Sally, the litigation loan, and the “50/50” rule**

Sally is a partner in a small firm in suburban Brisbane.<sup>1</sup> Her practice is almost entirely personal injuries work. Clive consults Sally about a possible claim but states that he is not in a position to pay for the service. Sally determines that he has a good case and says she will “spec” the matter, explaining that she won’t charge him for her professional fees until the matter is resolved in his favour. As to outlays, such as medical reports and counsel’s fees, Sally advises Clive that there is a way to “sort this out”. She explains that she can arrange a litigation loan for \$5000 from a company called Sallymander Pty Ltd. Sally is a shareholder in the company. She asks Clive whether he would be willing to borrow \$5000 from the company to fund the outlays for medical reports and counsel’s fees. Clive says that he can’t “see a problem with that”.

Sally later sends a client agreement to Clive for signing. The document records that the matter is to be speculated for professional fees, but that the firm requires \$5,000, for outlays, to be placed in trust before work on the claim can begin. It also contains the following paragraph: “The client acknowledges that as he is not able to provide \$5,000 for estimated outlays, he will enter into a litigation loan to fund these so that his claim can be pursued”. When Clive returns to Sally’s office, she presents him with more documents including a litigation loan agreement, disclosure statement, and a direction to the lender to pay \$5000 to Sally’s trust account. Clive quickly reads all the documents and signs them. Later, when he reads copies at home, he notices that the loan carries an interest rate of 18% p.a. compounding monthly.

Clive’s claim progresses satisfactorily. Eventually, at the compulsory conference, the claim is settled for \$100,000 “all up” including costs. Clive signs a discharge, and subsequently meets with Sally to discuss her “fee calculation”:

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<sup>1</sup> Scenario edited by Michael Robertson, Griffith Law School, from detailed materials kindly supplied by David Edwards of the Legal Services Commission.

<b>Settlement</b>	<b>\$100,000</b>
<i>Less:</i>	
Refund to Centrelink	\$20,000
Refund to Medicare	\$ 1,000
Refund to WorkCover	\$ 9,000
<i>Less:</i>	
Outlays incurred	\$ 5,000
Total deductions	\$35,000
<b>Balance settlement</b>	<b>\$65,000</b>
Professional fees (50% of balance)	\$32,500
Clive's entitlement	\$32,500
<i>Less:</i>	
Repayment of litigation loan	\$ 5,000
Interest on litigation loan	\$ 2,000
GST on professional fees	\$ 3,250
Total additional deductions	\$10,250
<b>Cheque to Clive</b>	<b>\$22,250</b>

What are your views on the issue of litigation lending in these circumstances, and the way in which fees have been calculated? Please consider both of the following sets of circumstances: (a) Sally does not disclose, to Clive, her interest in the company and (b) Sally discloses her interest in the company.

### **SCENARIO TWO: Michael and his outlays**

Sylvia purchased a rural property.<sup>2</sup> She engaged the services of Michael Bachman, the conveyancing partner in a two-partner suburban practice. Michael quoted Sylvia a fee of \$243 plus outlays for the conveyance.

However, when Sylvia received the final bill the outlays were substantially greater than she had been advised. Her concerns were twofold. First, Sylvia was aware that the fee charged by the relevant local authority for a "toad clearance" notice (required under the contract) was \$15.00 and yet she had been charged \$40.00 for this search and notice. Second, she was concerned that she had been charged "agents' fees" of

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<sup>2</sup> Scenario edited by Michael Robertson, Griffith Law School, from detailed materials kindly supplied by Darielle Campbell of the Legal Services Commission.

\$75.00 for stamping the contract and transfer. Sylvia knew that her solicitor's conveyancing clerk, Candi-Lou, had undertaken this particular work. (Candi-Lou was previously a senior paralegal in a major city practice and had extensive conveyancing experience).

Sylvia took her concerns to the Legal Services Commission. A subsequent audit of the firm's files revealed that the practice of adding a surcharge for searches and agents' fees was a generic one, both in relation to conveyancing and other matters. A company called Candi-Lou Search Engines Pty Ltd would undertake searches, service of documents and filing and charge the client for this service. Candi-Lou herself worked part-time as an "operative" for the company and personally undertook searches, servicing and filing on its behalf. This arrangement was not disclosed in any client agreement. Nor was it made clear to clients that a director of Candi-Lou Search Engines Pty Ltd was the spouse of a former partner in the practice.

Michael was asked to provide an explanation for the firm's conduct. He stated that Candi-Lou had advised them that this was the standard practice at the city firm at which she previously worked, and that "everyone" was in fact doing this. He also stated that he thought the conduct was necessary to compete in the marketplace.

What are your views on the charging practices of the firm in these circumstances?



## **4. Panel Presentations**

### **John Briton, Legal Services Commissioner**

*Note: the references in this paper can be found at the very end of the symposium report*

The Commission's core business is dealing with complaints about the conduct of lawyers. That has been, is and will always remain our core business but it is a business that can only ever be conducted efficiently and effectively and indeed that at the end of the day only makes sense if it is seen in a broader consumer protection context.

So we see our role to be to promote and protect the rights of legal consumers. We see that in turn to mean that we should go about responding to complaints in such a way as to learn whatever we can from the experience, and generally to keep our eyes open and our ears close to the ground. That's because we want to use that intelligence deliberately and pro-actively to seek to improve standards of conduct within the profession and in that way to reduce the incidence of conduct that gives cause for complaint in the first place. We want as much as possible to get in before the event, in other words, and not to be confined always to mopping up afterwards.

Now of course we give some consumers priority over others and for good reason. The consumers whose rights we are most interested to promote and protect are not the wealthy and the well-connected, information rich and by and large corporate repeat users of legal services but ordinary folk. In the main they are people who use legal services only occasionally and often only when they are under considerable personal stress. These consumers more often than not find themselves at a considerable disadvantage when they suspect they've got less than a good or a fair deal, and for the obvious reason - they are poorly equipped by knowledge and experience and economic clout to represent their rights themselves.

So there are good public policy reasons why they should have first call on our services, clearly, but they are the people who complain to us in any event. They complain to us about their lawyers' conduct in family law, conveyances, deceased estates and personal injury matters in the main, and more so than for any other reason and in apparently increasing numbers about costs.<sup>i</sup>

It's true that their complaints often have more to do with the fact that their lawyers communicated with them very poorly about their costs than with overcharging as such, and that very few even of their complaints about overcharging are substantiated and result in disciplinary action. Some commentators take comfort accordingly.<sup>ii</sup>

I'm not so sure we should. That's because the people who complain to us are poorly equipped by knowledge and experience not only to represent their own interests when they believe they've got less than a good or a fair deal but even to recognise when that might be the case and hence to complain. If our experience is anything to go by, this is as likely, or even more likely to be true of when they've been duded about costs than it is of any other reason they might have to complain about lawyers, if only they knew.



I am struck by the distinction many lawyers draw in their narrative about themselves between the law as a profession and business. Some of them lament the fact that the law has become a business as if, implausibly it seems to me, it wasn't ever thus. I take them to mean that the law was never *simply* a business and, regrettably, that while lawyers used to be they are now little or no more restrained by ethical sensitivities in their pursuit of money than people in business more generally.

Chief Justice Murray Gleeson for one has spoken with concern about 'the pressure of mercantilism in the law'. He and many others including his colleagues on the bench have named one of the key pressure points - in Chief Justice Jim Spigelman's words, 'the tyranny of the billable hour'.<sup>iii</sup>

Time costing is a simple idea. It allows practitioners to say to their clients: 'this is how I will charge you - I will charge you so much per hour for my professional services including my business overheads, plus the costs I've necessarily incurred on your behalf in pursuing your matter, and that's it'.

The time costing method of billing has been widely criticized and those criticisms are well documented and I will not repeat them here.<sup>iv</sup> My primary interest as a regulator is not so much the policy issues they raise but how they express themselves in

conduct. The most obvious way they are likely to do that, as Justice Kirby has noted, comes via the 'distinct potential' for overcharging not least because as, Chief Justice Rehnquist of the United States Supreme Court observed in 1999, lawyers are bound to be tempted to exaggerate their hours.<sup>v</sup>

There is plenty of anecdotal, if not conclusive evidence that the temptations prove irresistible more often than we might like to think. It is easy to find, in fact hard to avoid, in the often very candid things that practitioners including senior practitioners have to say almost every week in lawyers' magazines and the legal affairs pages of the Friday newspapers.

There are any numbers of examples to pick from, but here are several that I've gleaned more or less at random over recent months: time costing

- creates an environment in which lawyers 'have more concern about achieving a certain billings target than about whether a particular bill for a client is reasonable or not' and in which lawyers who 'don't have expertise in a given field work on matters in that field presumably because they think that by doing so they will realize their budget'- a former managing partner of a big firm<sup>vi</sup>; and
- makes it 'physically impossible to provide personalised customer service. To the contrary, the temptation, and worse than that, the common practice... is to mask such inhumane pressure by inflating time sheets, undertaking unnecessary work, exaggerating the need to review everything during discovery, undertaking overzealous due diligence processes and other practices readers will be familiar with. In other words, we cheat and lie to make ends meet. We act dishonestly as a matter of course... Everyone does it' – another former partner of a big firm.<sup>vii</sup>

The references to 'common practice' and to the fact, apparently, that 'everyone does it' are disturbing. They may be exaggerated but they find some support in the results of empirical surveys. A recent survey of young lawyers in New South Wales, for example, was reported thus:

- 'billing pressure is pushing many young lawyers to fudge their time sheets. Only 38% of respondents said they always recorded their time accurately, citing billing pressure from senior staff'.<sup>viii</sup>

It seems, if the results were correctly reported, that 62% of young lawyers in new South Wales admit to having lied at least once in a way that effectively defrauded a client.

I'm reporting rather than asserting the criticisms of time costing, but I have to say I'm amazed given their gravity and the standing and credibility of the people making them that there seems to be so little momentum for change. Perhaps the silence reflects a certain wisdom: if as seems likely the fundamental problem is a love of money rather than simply the way we count it, then the pressures of mercantilism will survive any reforms to time costing and the tyranny to meet budget will survive too, whatever billing method we use.

In any event, the Commission's experience is that the temptations extend beyond the obvious wrongdoing of lying on time sheets and the like and take on forms that apparently quite large numbers of lawyers don't even recognise as wrongdoing or even as ethically contentious - they just don't get it.<sup>ix</sup> And of course if apparently large numbers of lawyers don't recognize the wrongdoing, then consumers are unlikely to recognize it either, and hence to complain about it.

Two practices in particular have come to the Commission's attention in recent times, both of them worrying. One is the way an indeterminate but seemingly large number of practitioners bill their clients for outlays or disbursements, often but not only in conveyances.

The other is the way some practitioners bill their clients in personal injury matters, and in particular their clients who are unable to fund their outlays themselves and for whom they therefore arrange loans.

We've illustrated the sorts of thing we have in mind in the two scenarios we've given you in your workshop materials. We hope they will generate discussion and we welcome that.

**a) billing clients for outlays**

The word 'outlay' (and similarly the word 'disbursement') refers in ordinary speech to an amount a practitioner has paid out to a third party on a client's behalf in the course of acting for them and which, accordingly, the practitioner is entitled to have the client reimburse.

It has come to our attention, however - not mind you through complaints but incidentally in the course of dealing with complaints about other matters and through the Law Society's routine audits of law practice trust accounts - that some practitioners are billing their clients for undisclosed mark-ups or surcharges on the amounts they've actually paid out.

Some are billing their clients and describing as outlays items including postage and petties, sundries, photocopying and faxes when the actual cost to the client either hasn't or perhaps even can't be accurately identified.

Some are billing their clients and describing as outlays a range of charges including client registration fees, file opening fees, archive fees, file retrieval fees, file closing fees, in-house stamping administration fees, Citec administration fees, contribution to professional indemnity insurance premium fee, bank charges (as distinct from fees actually paid to a bank), and settlement fees (when there is no agent) – some of them for services that have been provided by an undisclosed service company or other entity in which one or more of the partners of the firm has an interest.

Some obvious questions arise, including:

- what is a practitioner's duty of disclosure, and to disclose the true nature of the purported 'outlays'?
- does disclosure and presumably therefore obtaining the client's informed consent legitimize charging a client for 'outlays' of these and like kinds?
- should practitioners disclose 'outlays' paid to service companies or related entities and the nature of their interest in those companies or entities?
- what form should the disclosure take?

And of course it remains to be asked, whatever the disclosure, whether the bill is reasonable?

A range of related questions arise when practitioners generate income by making a profit on the 'outlays' they've incurred on behalf of their clients, including:

- what are the tax, including GST implications when income is disguised in this way as the reimbursement of an outlay?
- how do these arrangements impact a practitioner's fiduciary duty to his or her clients, given that practitioners have a direct or indirect interest in maximizing their profit and hence in preferring their own interests to those of their clients?

We've put our finger in this particular dyke by issuing guidelines for charging disbursements. What we're saying, in effect, is that 'we've consulted pretty widely and we think these are the principles that apply and if you disagree - well, talk to us and if we still can't agree then we'll let the disciplinary bodies decide. If we're wrong, we're wrong, and we'll amend the guidelines accordingly.'<sup>x</sup>

The principles we've enunciated are uncontroversial and in our view obvious. They are that practitioners should obtain their clients' informed consent before running up bills on their behalves, and that requires at a minimum the transparency of making a frank disclosure to the clients in plain English of the basis on which they will be charged.<sup>xi</sup>

#### **b) billing for speculative personal injury claims**

The Queensland Law Society Act 1952 was amended in 2003 'to provide for the maximum payment for a practitioner's or a firm's conduct of a speculative personal injury claim'. The amendments introduced a formula to determine the maximum fees that solicitors can lawfully bill their clients in these circumstances – the so-called 50/50 rule. It's simple. It's that a solicitor can bill a client 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'.<sup>xii</sup>

The traditional speculative personal injury claim is simple in concept. It's one in which, when a client is seeking compensation for an injury but can't afford either the disbursements they will have to incur in seeking to prove their claim or their solicitor's professional fees or both, their lawyers agree to forgo their professional fees for the time being, pay the disbursements themselves and take the risk the client's claim will ultimately prove successful - in which case the client agrees to pay the solicitor's professional fees and reimburse the disbursements.

What's in it for clients - access to justice they wouldn't otherwise have. What's in it for solicitors - their professional fee, if they win, typically their usual fee plus an 'uplift fee' by reason of the risk the case will be lost.

These arrangements are ripe for rorting, of course - hence the 50/50 rule. Some clients found themselves winning their case only to win very little or even nothing at all - they had little and sometimes nothing to show for it once they paid their solicitor's professional fees and reimbursed them the disbursements.

Some obvious questions arise, including obvious questions about the extent of the uplift. We've seen bills solicitors have sent their clients in which the 50% ceiling has become the floor, in effect, and we've seen client agreements in which solicitors set not only their own fees but their junior solicitors' and paralegals' fees at already apparently inflated rates then add 30% for 'care and consideration' and then a further uplift fee of 45% - uplift upon uplift.

That raises the obvious question of whether uplift fees should be prohibited<sup>xiii</sup> but there other good questions too:

- can, and if not, should client agreements be capable of amounting to unfair contracts?
- should there be a cooling off period?
- what is a practitioner's duty of disclosure? Does it extend to requiring clients to take independent advice?
- does the duty of disclosure extend to advising clients that other practitioners may take on speculative personal injury actions on more favorable terms – in effect, suggesting to clients that they shop around?

There is a new and it seems increasingly common variant of the traditional speculative personal injury action. It's one 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 claim or the solicitor's professional fees or both, either enter into a loan agreement with the clients or arrange loans for their clients with a lender, sometimes an entity in which the solicitor or one or more of the partners of the firm has an interest. The loan of course enables the clients to pay their disbursements themselves, as it were, and up-front. The deal is that they repay the loan with interest and pay the solicitors' professional fees from the proceeds if and when their case is successful.

The newer variant is just as effective in giving injured workers and others access to justice they mightn't otherwise have but it's equally ripe for rorting. That's because some solicitors structure the loan arrangements so that the repayments, the interest

and even the GST component of their fees 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 subtract them from the client's minimum half-share of the nett proceeds after refunds and disbursements, not from the gross proceeds. It's a neat trick when the lender is an entity in which the solicitor or a partner of the firm has an interest, and arguably little more than a contrivance to claw back for the solicitors more than the maximum half share to which they're entitled under the 50/50 rule.

The obvious question arises about interest rates. There are a host of other questions, however, including the same questions we posed just a moment ago about a practitioner's duty of disclosure: does it extend to requiring clients to take independent advice or advising them that other practitioners take on speculative personal injury actions on more favorable terms and, if the practitioner has a direct or indirect interest in the lending entity, does it extend to requiring them to disclose that interest?

There are other questions, too, including at least these:

- are solicitors entitled to take the maximum amount of fees to which they are entitled under the 50/50 rule and then charge an additional sum by way of GST on those fees?
- how does the 50/50 rule apply to these sorts of litigation lending arrangements? What costs do, or should the term 'disbursements' be taken to include and what are the tax, including GST implications?
- how do these litigation 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?

We look forward to discussing these and no doubt the many other issues that will arise during the course of the workshop.



**David Searles, Deacons**

1. The duty of a solicitor is to advance the interests of a client without the impediment of the interests of others interfering, whether those interests be that of the solicitor, another client or other person.
2. Where the interests of the solicitor or another person conflict (actually or potentially) with client interests, the solicitor must decide:
  - (1) Whether the conflict can be managed so as to advance the client's interests notwithstanding;
  - (2) Whether that is not possible and whether the taking of independent advice on the issue in question is appropriate; or
  - (3) Whether the solicitor should cease to act.
3. Full disclosure of any conflict actual or potential must be made to the client.
4. In speculative actions, the risk of a conflict of interest between the client's interests and the solicitor's interests may arise at point of negotiations for settlement, where the interests of the solicitor in getting paid are potentially in conflict with the interests of the client in deciding whether or not to accept the advice of the solicitor as to the basis of settlement. In some circumstances it may be necessary to protect the interests of the client and the solicitor by the client seeking independent advice on the settlement.
5. In conveyancing matters, it may be appropriate for the solicitor to agree a lump sum figure with the client to include professional costs and all outlays without differentiation between those components.

The Solicitor shall ensure that the account rendered to the client reflects the lump sum retainer.

**Pat Mullins, Mullins Lawyers**

My comments are confined to personal injuries proceedings and the requirements for proper disclosure about costs and arrangements for any litigation lending.

The initial engagement process with the client requires that there be full disclosure in relation to the method of charging. It seems to me there are two aspects to this. The first is to properly identify the extent of the retainer (that is, the precise nature of the instructions). The second is to outline the method of charging for the nominated work or for the various stages involved in it. From a practical point of view I think that the course of the personal injuries claim ought to be broken up into bite sized bits. If this is done, there can be a more accurate estimate of fees for each stage. Complaints about unrealistic estimates of a range of fees are quite common and I think the most practical way of avoiding them is to break up the work into its component parts. Then the requirement of giving an estimate is a lot easier.

When taking instructions in a personal injury claim the client ought to be advised about the 50/50 rule. I think that making the initial bargain with the client puts the solicitor in a difficult position. The solicitor is in very much the same position as a doctor who is advising a patient to undergo a surgical procedure. The medical profession has come up with the concept of "informed consent". I think the process of entering into a costs agreement with a client is a very similar process.

The solicitor has a fiduciary obligation to ensure the client is in a position to give "informed consent" to the arrangement. If there is a peculiarity about the method of charging, then that needs to be disclosed. A peculiarity about the method of charging would, in my view, require a solicitor to inform the client that he or she should get independent advice on that aspect of the costing arrangements before entering into the costs agreement.

The old Solicitors' Complaints Tribunal has found that a solicitor owes a fiduciary obligation to a client to disclose to the client (before perfecting the agreement) the fact of a change in charge out rates (which amounted to a common charge out rate being applied to professional as well as non-professional staff members). This is an example of the sort of disclosure about costs that I think needs to be made. It

ensures that the client is in a position to give "informed consent" to the arrangement. Where there is no "informed consent", it seems to me, that the arrangement is vulnerable to being struck down and the solicitor is vulnerable to a complaint of misconduct.

I think similar disclosure obligations arise in relation to litigation funding. The Law Council of Australia has taken a positive approach to litigation lending because it sees these arrangements are an important access to justice strategy. The fact is that there is little or no civil legal aid in this country. In those circumstances, I think the Law Council is right to promote litigation lending as a way of enhancing access to justice. That takes nothing away from the Law Council's position that Federal and State governments have an obligation to ensure proper access to justice through restoring civil legal aid.

Where a litigation lender is associated in some way, either directly or indirectly, with a law firm then the question arises whether proper disclosure of all relevant details is sufficient to meet the solicitor's obligation. I think a real question of conflict of interest arises in these situations. The solicitor is really in an invidious position, particularly toward the end of litigation when totally independent advice needs to be given in relation to the adequacy of any offers to settle. I think this is an issue you will need to consider in your discussions this evening.

Finally, I would like to share with you a principle of Roman Catholic Moral Theology, which I think may assist you in your deliberations this afternoon. That is the principle of Epikeia. This is defined as follows:

*"Epikēia is the virtue (power, skill, habit) by which Christian persons discern the inner meaning of any human law so as to intelligently obey it in the majority of cases and to reasonably violate it in the properly exceptional case".*

What this principle entails is the person not slavishly following the letter of the law, but rather looking behind the letter of the law and discerning the spirit behind the law. The person then makes that spirit his or her guiding light in moral decision making.

The approach no longer is "what can I get away with here?", but rather "what is my underlying responsibility?" I would suggest that the lawyer has the underlying obligation to deal honourably with his or her client and to ensure that when the

retainer is entered into, the client is fully informed of and consents (in an informed way) to a charging method that is fair and reasonable. The good lawyer should take as his or her guiding principle the underlying professional obligation to deal honourably with clients. That way, the lawyer will stay out of trouble. So I commend to you a study of the principle of Epikeia.

**Associate Professor Michael Robertson<sup>xiv</sup>, Griffith Law School**

**Sally and Michael and legal practitioners' choices**

*Note: the references in this paper can be found at the very end of the symposium report*

Legal practitioners must not only make decisions about their clients' best interests, but are frequently called upon to consider the limits of their own, notably in the context of the fees they charge to the very persons they are obliged through representation to favour. The two scenarios for today's discussion are, on one interpretation, about the challenge for practitioners themselves to find an appropriate balance between their clients' and their own legitimate interests.

In my few minutes I propose to make some initial observations about the purely legal aspects of these scenarios and, second, to introduce a question about the scope of today's discussion. I want to suggest that while today's discussion should obviously be about the formal law of lawyering, and whether it presently provides sufficient and desirable answers to the kinds of questions that emerge from the two scenarios, it might also consider how conscientious lawyers in the shoes of Sally and Michael might respond to the ethical dilemmas presented in these problems.

There are at least five separate issues in the two scenarios. The issue of the litigation loan bristles with legal<sup>xv</sup> and policy questions. For example, Sally's stake in the lending company obviously attracts a question of fiduciary responsibilities including conflict of interest<sup>xvi</sup> and undue influence, even if her own stake is disclosed. There is also authority for the proposition that lending to clients attracts various duties such as facilitating the provision of independent advice and suggesting the accessing of alternative funds<sup>xvii</sup> (especially, one supposes, if better interest rates are available elsewhere). One might also note that the loan in Sally's case is not strictly of the kind under consideration in the discussion paper of the Standing Committee of Attorneys-General. There, the focus is on loan agreements in which the lender "accepts the risk of paying the other party's costs if the case fails".<sup>xviii</sup>

Both Sally's application of the 50/50 rule and her charging GST on Clive's entitlement seem to raise questions of statutory interpretation. In the case of the GST, the

question is whether a proper interpretation of section 481C together with relevant sections of the goods and services legislation<sup>xxix</sup> allows Sally to deduct the GST amount in these circumstances. The other main issues for discussion are generated by Michael's practice of adding a surcharge to disbursements, and passing off the enlarged fee as the disbursement itself; and by treating work undertaken by his clerk as an agent's fee. Neither of these self-serving practices was disclosed in advance to the client. Although the LSC has recently issued guidelines addressing both of these practices,<sup>xx</sup> these instances of creative lawyering are intended to be part of today's discussion and evaluation.

In the remaining time, I want to make a few remarks about Sally's interpretation of the 50/50 rule. Unlike her interpretation of the law on the GST matter in these circumstances, it seems arguable that she has done nothing legally "wrong" by deducting Clive's loan repayments from his entitlement, rather than from the gross settlement figure.<sup>xxi</sup> I accept that there may be a different view of this, which will hopefully emerge in the discussion. But let's accept for now that this is an instance where the law is uncertain, or unclear, on this particular point, and that the rules of professional responsibility add no clarification.<sup>xxii</sup> In other words, Sally, in playing the law game<sup>xxiii</sup> in relation to the 50/50 rule, has correctly determined that she has a choice here. She has consequently chosen not to deduct the loan repayments from the gross amount, precisely because that would have reduced the amount from which she could subsequently extract her 50%.

We are all familiar with the argument that legal rules cannot always be expected to foreshadow and to pre-empt the future exercise of practitioners' choices that later appear, after the event, to be inappropriate. There is a large body of legal scholarship associated with the implications of this, and it takes many forms, including scepticism about the capacity of legal rules to control rather than to guide.<sup>xxiv</sup> For now, I want merely to observe that if it is true that the laws of legal practice do not invariably and mechanically provide clear answers to all the questions that arise in the course of client representation, it follows that legal practice, at least some of the time, invites a lawyer's deliberation. To this we might add that deliberation is also invited where the formal sources of legal authority permit, rather than require, a particular response or a choice of responses. The latter situation may aptly describe Sally's encounter with the 50/50 rule: the proper interpretation of the relevant legislation permits Sally to choose whether to deduct the loan expenses from either the gross amount, or her client's entitlement after the removal of Sally's 50%.

Following these observations, we might also want to say that a good lawyer in Sally's position should pause to consider whether the choice can, notwithstanding the permissive character of the relevant law, be justified in all the circumstances.<sup>xxv</sup> Here, I suggest, is one instance of the ethical dimension in legal practice. There are, of course, many others.<sup>xxvi</sup> The question, for now, is "what might deliberation entail, within the discretionary zone of practice in which Sally finds herself?"

One possible approach involves the careful assessment of all the interests potentially affected by the "50/50" option being considered by the practitioner. Why weigh up interests as part of a deliberative exercise? One justification, aside from the fact that this is probably what good lawyers routinely do anyway,<sup>xxvii</sup> rests on the simple fact that the lawyer's representation role is unavoidably connected with the need to respect various sets of interests.<sup>xxviii</sup> These are most notably those of the client, the court and the administration of justice more generally, and the interests of the wider community,<sup>xxix</sup> which expects that lawyers will discharge their special role according to high standards. Therefore, the objective here for Sally would be (1) to identify the various interests that present in these circumstances, and (2) to assess the likely impact (both positive and negative) of the option on each of these interests. This exercise, which at the very least signifies an engagement with the issue rather than an unreflective (and perhaps self-serving) avoidance of the invitation to deliberate, may suggest that the option being considered is potentially too costly. Without taking the analysis any further, it might readily become apparent that Sally's choice regarding the application of the 50/50 rule is a curious if not troubling one. Quite simply, she prioritises her own pecuniary interest above all the others,<sup>xxx</sup> including her client's, the profession's interest in being seen to provide access to justice on the best possible terms, and the community's interest in having lawyers who are not perceived to be greedy, and so on. So, while Sally has seemingly played the law game appropriately on the 50/50 rule, she has, on this line of thinking, failed at least one part of the deliberation test.

Might any of this really matter, except on a fuzzy philosophical level? Well, yes, it might. The legal profession may not be in a position to afford lawyers like Sally, if only because they give it a bad name. So the profession might well want to encourage its members to deliberate better. But there is another reason why Sally's arguably poor choice might matter – to Sally herself. And, here, we get back to the law game. Section 244 of the *Legal Profession Act 2004* introduces a new test for

unsatisfactory professional conduct, being a standard of practice that a “member of the public” is entitled to expect from Queensland’s lawyers. In concluding, I pose the question of whether, correctly interpreted, parliament intends through this legislation that lawyers need to deliberate more carefully about the practice choices they make – even when they think they are acting within “the law”?

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## **5. Capturing the discussion**

The two scenarios – which were written to highlight issues of concern to the Commission about the way some lawyers charge outlays and go about their personal injuries practice - were provided to the panellist and circulated to all workshop participants in advance of the seminar. The panellists were asked to stimulate discussion by reflecting on the conduct described in the scenarios from their different perspectives, The participants were asked to collect their thoughts and to reflect on the conduct in the small group discussions that followed the panel presentations.

The small groups each reported back to the full workshop, and described the issues as they saw them. The participants had the opportunity to report their own individual thoughts also, on a template form they were provided with their workshop materials. The template prompted participants as follows:

- 1. The major issues that I see being associated with the topics of outlays and disbursements are: - (for example – recording of outlays; uplifting of charges etc); and*
- 2. The major issues that I think are associated with the topics of personal injuries, litigation lending and the 50/50 rule are: - (for example – the plaintiff may have no say in the negotiations; the interests of the lender are often not protected; etc).*

The workshop report that follows summarises both the responses the organisers received from individual participants as well as the group reports. The report has been organized so as to reflect the themes that emerged from participants' responses and to indicate how many participants made the same or similar comments, and to include an overview of the responses to each of the workshop topics.

## **6. Responses to first topic - outlays and disbursements**

The major themes that emerged from those issues identified by attendees at the workshop under this first topic area are: disclosure; conflict of interest; considerations of client; financial manipulations; ethical considerations; and focus on rules. Issues are clustered under these theme headings and multiple mentions of the issue are indicated with a number in parenthesis.

### **Disclosure**

Necessity for disclosure/more disclosure/early disclosure (6)

#### *Disclosure of specifics*

Surcharge on the fee charged by the search agency actually run by the practice employee (1)

Outlays, fees and disbursements and mark-ups (7)

Connection with the search agency/interest in the search agency/ what search agency gains (3)

Costs included in professional fees/how professional fees calculated/remove mark-ups and disclose through charging as professional fees (3)

Fees and charges prior to agreement on settlement (1)

Question on whether there is an expectation that the agent's fee is disclosed in professional fees (1)

#### *Difficulties associated with disclosure*

Necessity to discuss fees and outlays with clients, while difficulty in giving "final" quote before negotiation/mediation completed over settlement (1)

**Conflict of interest**

Conflict inherent in connection between employer and organizations for lending (2)

*Specifics*

Pressure to settle because of loan taken out for litigation and need to repay (1)

Conflict of interest requires disclosure in client agreement of connection between law firm and litigation lending firm (1)

Conflict between business and fiduciary duty (1)

**Considerations of client**

Client may be induced to enter into the transaction by availability of funds or low quote of fees (2)

Access to justice helped by spec fees even though uplift may be necessary (2)

*Best interests of client*

Need to deal honourably and dispassionately with clients (1)

Independent advice (1)

Being upfront with the client as to what potential outlays will be (2)

*Informed consent*

Clients need to be able to give “informed” consent perhaps supported with independent advice

Regarding anticipated outlays and costs (particularly in conveyancing matters where reality ascertainable).

### **Financial manipulation**

Professional costs tacked onto/hidden in/dressed up as outlays (6)

#### *Quoting of fees*

Clarification of what service is included in the fee of \$243 – did Sylvia presume that all work associated with the conveyance was included eg agents fees

Whether quote for conveyancing ought to include outlays

Misleading practice – quoting low professional fees (2)

#### *Surcharges*

Surcharges/mark-ups on outlays (3)

Is surcharge justified where the search is done by a related entity (3)

Double-dipping on fees and outlays (4)

### **Ethical considerations**

Fact that other people do it is not a good excuse if it is wrong!

Need to deal honourably and dispassionately with clients

The extent of the mark-up – reasonable professional fee

(ethical dilemma) Without uplift clients would not have access to lawyers on spec – but ....

Professional fee not to be 'dressed up' as outlay (5)

Being upfront with the client as to what potential outlays will be

### **Focus on Rules**

More formalized rules

PIPA rules on advertising and 50/50 rule should be followed

Outlaw litigation lending (at least by lawyers)

Note the new guidelines from QLS and LSC indicating discipline for such practices (prospectively)

What is an outlay- need for a definition?

### **Overview of issues raised:**

The main issue arising from the discussion of outlays and disbursements goes to disclosure – the extent of disclosure and the specific information that should be disclosed (any mark-ups or surcharges, for example, and any connections between law practices and search agencies including financial arrangements). There was a strong feeling that legal practitioners should disclose their costs in detail, including how they will be calculated. There was a strong feeling, too, that any connection between a law practice and an entity that lends clients money to pay for outlays creates a conflict of interest, not least because of its potential to impact on settlement

negotiations, and must be disclosed. It brings business considerations into conflict with the fiduciary duty to a client.

Participants made repeated references to clients being induced to engage particular lawyers by their comparatively estimates of their professional fees when they bill their clients undisclosed mark-ups on their outlays, and hence the necessity to be candid with clients as to outlays. There was a view that outlays should never include mark-ups and surcharges, irrespective of disclosure, and that the scenario illustrated a form of 'double-dipping'.

Many saw ethical considerations to be the major issue - the need to deal honourably and dispassionately with clients and to be honest (in the sense of being candid) about outlays and not to dress up professional fees as outlays. Some participants attendees saw the problems being addressed by means of better and more formalised professional rules, including rules prohibiting litigation lending by lawyers.

## **7. Responses to second topic – personal injuries, litigation lending and the 50/50 rule**

The major themes that emerged from those issues identified by attendees at the workshop under this first topic area are: disclosure; financial; conflict of interest; consideration of client; ethics; and rules.

### **Disclosure**

Need for independent legal advice (2)

Full disclosure of loan agreement/terms of the agreement is necessary (5)

Big issue – inadequate disclosure – must be such as to allow consumer to make fair comparison and must be done before client agrees to settle (3)

Extra costs of adequate disclosure/explanation in low profit files – who pays?

Disclosure of practitioner's interest in/connection with lending firm (3)

Having an interest in a litigation lending firm is not best practice on the part of the practitioner

Splitting the credit provision from the service provision with full disclosure about terms of credit is preferable.

### **Conflict of interest**

The inherent conflict of interest for the practitioner who has funded the client's outlays makes it very difficult for the practitioner to properly advise their client when considering settlement offers (4)

There appears to be a conflict between the solicitor as a lender and as an advocate for the client. In particular the interest rate suggests that the lawyer could stand to make a good profit margin on the loan as well as the litigation itself. (2)

Conflict of interest for personal injury solicitors engaging in litigation lending (vulnerable client who places trust in solicitor).

Have real concern about conflict of interest with solicitor also lending money to the client; not sure fully informed consent would remedy conflict. Preferable to have lending at arm's length (3)

### **Financial**

#### *GST*

GST should not appear at all (2)

Where does the GST fit – is it an outlay/fee? (2)

GST should be built into fee (4)

#### *Who repays litigation loan?*

I think that the litigation loan should be repaid from the client's share (4)

#### *Interest*

If the loan was arms length until reasonable interest that should also be paid from this share but if internal lender and unreasonable interest perhaps the interest should be seen as a disbursement

Determine whether 'interest' for the loan is or is not a disbursement (2)

The ability to change the conduct of the matter – settling early would affect the amount of interest paid



*Outcome for client*

At least he got \$22,500, would not have otherwise (2)  
Sometimes litigation lending is cleaner

*Extent of room for adjustment in the 50/50 rule formula*

Problem largely in mislabelling costs and outlays (do clients see the difference anyway?)

Has the fee been worked specifically to fit within the formula?

Suspect calculations re outlays

Difference between formula's role in calculating professional fee and what client is actually entitled to receive - Eg \$5000 outlays should be included in formula for calculating fee. But outlays already paid for, so cheque to client should not be reduced by that amount

Solicitor's view that 50/50 rule justifies taking 50% of net recovery as a matter of course – should not automatically charge 50% (3)

Seems some creative interpretation of 50/50 rule

*Risk*

Speculation = premium

other parties fees if unsuccessful

The solicitor's actual costs in time and effort may be more than 50%

*Issues specific to the problem posed by the scenario*

There needs to be an addition of the \$5000 outlays at the end because it had been paid into the first account

itemising outlays

Need to know whether fee reflects actual work done, if no, clear overcharge situation

basis of calculation of \$32,500 for professional fees: is it reasonable and comply with the 50/50 rule as maximum 50% of net amount provided

\$5,000 deduction twice

*Basis for calculating fees*

Fundamental issue – your profit margin is in your fees

If any surcharge should be in professional costs, not disbursements

Internal service fees should be part of professional fee

But doesn't descend to disbursements in the nature of photocopying where the cost is difficult to calculate

### **Consideration of client**

*Fiduciary duties/obligations of a solicitor*

Should deal with client fairly: rate excessive

Should have advised of other lending options

Should have disclosed her interest in the company

Should have given docs to client to take away to read and get advice

How informed was client about what constituted the settlement

Adequacy of client agreement

You are in a position of power/Unequal bargaining position/You are in a position of trust/Fiduciary obligation

*Conflict*

Making a “secret profit” from the client over and above reasonable fees

(Conflict of interest – temptation to settle) But possible only avenue of justice for some clients

But personal morality or common morality probably dictates that the lawyer should act on behalf of the client rather than for him/herself

What would the public think? S244

Does that accord with common morality?

The policy objective of PIPA is to stop small claims in the interests of insurers. Lawyers cannot be blamed for this, although the effect is that clients may not find it economic to pursue claims

**Ethics**

Fiduciary duty

Litigation lending by 3<sup>rd</sup> parties is preferable to “spec” arrangements where professional fees are inflated.

Should lawyers have to say – I use contractors and add surcharges – but others may not

Epikeia – deal honourably

Can't simply be that because you disclose it, you can do it

- Though disclosed, unreasonable 15 -40%
- But even if on the face of it reasonable – say 10%, should it be done?
- Fully disclosed but shouldn't do it

ie needs to be an ethical underpinning to the conduct – LSC guideline provides for this, if reasonable sum and clearly disclosed through not strictest compliance

You are in a position of power

- Unequal bargaining position
- You are in a position of trust
- fiduciary obligation

### **Rules**

It sets up a conflict of interest which needs to be very carefully managed (by guidelines, if not regulator/legislation)

Need for more formalized rules

PIPA and discouraging small claims

If just taken as a 50% cut, is then a breach of s48(d)?

Solicitor's 'entitlement' to engage in litigation lending

QLS Act – reach agreements as to costs – fees and costs payable

### **Overview of issues raised:**

Participants saw the main issues associated with personal injuries, litigation lending and the 50/50 rule being disclosure, conflict of interest, proper consideration for clients, ethics and rules.

Many participants raised the need for loan agreements and the terms of any agreements to be fully disclosed prior to clients entering into a retainer, to enable them to compare services and to fully consider their options. They saw disclosure of connections between lenders and law firms as an important consideration also.

Some saw a conflict of interest between solicitors funding their clients' outlays and also providing advice on settlement offers – where lawyers stand to profit both from the interest on the loan as well as their professional fees. They saw the conflict of interest being heightened for personal injury lawyers who lend to their clients either directly or through related entities because of the vulnerability of the clients and their need to trust their lawyers. Some participants endorsed lending at arm's length however, and saw it as an access to justice issue.

Participants identified a number of financial issues including whether GST and interest payments on loans count as disbursements and how these questions impacted the proper application of the 50/50 rule.

They saw proper consideration for clients to oblige solicitors to deal with clients fairly by, for example, advising clients about other the lending options that may be open to them, disclosing any relationship they may have with any lenders, and ensuring clients are fully informed about and understand the financial implications of the lending arrangements on settlement. They saw the power imbalance between solicitors and their clients to be an issue.

Some participants regarded the lawyer's ethical obligations as going beyond full disclosure to include the need to deal with clients honourably - "it can't simply be that because you disclose it you can do it".

## **8. Summaries of group discussions**

Participants were asked to individually record the issues they saw being discussed in their small group. The major themes that emerged were disclosure; conflict of interest; proper consideration for clients; financial issues; ethical considerations; the need for rules and /or guidelines; and comment about the discussion itself.

### **Disclosure**

Disclosure on – when should be referred for independent advice. In some instances a loan situation will be so beneficial to the solicitor he should not become involved – therefore if an interest then conflict of interest

Need for disclosure – ethical responsibilities cannot be ignored. Duty to the client and to the administration of profit excludes profiteering.

Full and frank disclosure is absolutely necessary and the interests of the client are paramount (or should be paramount) (5)

Disclosure is the key (2)

use of agent can be ok if full disclosure and no connection

uplift acceptable to justify risk as long as full disclosure

Key issue: what is adequate disclosure - more education for solicitors on disclosure to clients (2)

### **Tension between the clients' interests and the lawyers'**

Striving for the correct balance via disclosure that is proper and gives client options to avoid transactions that are contrary to their interests

**Conflict of interest**

Conflict is the big issue. Lump sum might be the answer for fees.

litigation lending best left for unconnected litigation lenders to avoid clear conflict of interest issues that otherwise arise (3)

Conflicts of interest must be avoided (2)

Potential for conflicts of interest between client's interest and solicitors

General disapproval of personal injury solicitors engaging in litigation lending (conflict of interest) (2)

**Considerations of client/ informed consent**

Not providing option of external quote for litigation lending

Discussing costs upfront with client- eg having to repay all Centrelink/Medical/Workcover costs

Need for disclosure – ethical responsibilities cannot be ignored. Duty to the client and to the administration of profit excludes profiteering.

For informed consent, unusual or onerous provisions must be specifically discussed, not just included in the fine print

**Financial**

“outlays” must be outlays ie something actually expended

move to lump sum all up quotes the way of the future for commercial/conveyancing matters, but must be clear what is encompassed by the fee and what searches will be done within it etc

Solicitors take a risk in “spec” matters and should be able to charge some sort of premium- by maybe FIXED FEE instead? Eg they will go into overdraft instead of receiving fees as they go along

**Specific to the scenario problem**

Sally

- Double dipping the \$5000
- Whether \$5000 and/or interest should be part of ‘D’
- GST erroneously placed upon the client
- Failure to disclose whether the actually incurred \$32,500 in fees

Michael

- Should have been upfront as to what he would consider outlays to the client
- What is an outlay?
- Many of the so-called ‘agent’s fees’ are actually professional fees
- Properly incurred agents fees e.g. cost of visiting party by agent should be charged to the client – but should be particularised

**Ethical considerations/ethical practices**

Our discussion centred around the idea of the obligations of the lawyer exceeding a “black letter” law approach. While the legislation may allow a “grey area” the practitioner should not only act within the law but be seen to be acting ethically.

Tension between ethics and market for profession

Review of practices in conveyancing in relation to misdescription of professional fees as outlays

Arms length 3<sup>rd</sup> party provider – that’s ok - but internal service fee dressed up in another way is not appropriate



Cloaking the conveyancing clerk as someone conducting their own business was inappropriate – if genuine disbursements ok, but can't disguise a service by a paralegal as a disbursement.

**Comment about the discussion itself**

Productive discussion

Great – senior lawyers giving experience to new players

**Overview of issues raised:**

The participants made multiple mentions of the necessity for full and frank disclosure, and for the clients' interests to be paramount. Some groups considered that the key issue of what constituted adequate disclosure should be addressed through more and better education for solicitors. Some thought lawyers could avoid conflicts of interest by being made aware of the potential for conflicts to arise, and if litigation involving unrelated entities.

Others emphasised that lawyers, to get their clients' informed consent, should always discuss costs upfront, including the repayment of all Centrelink and Workcover costs, and should specifically discuss and document any unusual or onerous provisions rather than leaving them to the "fine print". Others emphasised that "outlays" comprise only what is actually expended on behalf of clients. Some saw lump sum fee arrangements being a way to go (provided it is clear what the lump sum does and does not include).

Some saw a lawyer's ethical responsibilities to go beyond the "black letter" of the law – the legislation might allow "grey areas" but practitioners should not only act within the law but be and be seen to be acting ethically.

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## ENDNOTES

### To John Briton's presentation:

<sup>i</sup> In the year to 30 June 2006, for example, 32% of all inquiries, 40% of all consumer disputes and 40% of all conduct matters dealt with by the Commission related to costs, but only 8% of prosecutions. The breakdown by area of law was as follows:

area of law	inquiries	consumer disputes	conduct matters	prosecutions
family law	15%	19%	18%	5%
conveyancing	15%	18%	15%	19%
personal injury	10%	10%	10%	14%
deceased estates	7%	13%	7%	4%

<sup>ii</sup> Brett Walker SC, for example, says in an scathing commentary on 'lawyers and their money' that 'regulators of the profession, it is interesting to note, have not seen evidence of any major, let alone growing, incidence of genuine complaints about overcharging. Such complaints recur, but not at rates that suggest anything like a major problem... It could be that a market moderated in these ways [by the costs disclosure regime that was introduced in recent years in New South Wales and will soon be introduced in Queensland] ... could continue to reduce the lesser prominence of overcharging than populist attacks on the profession might suggest.' He was giving the St James Ethics Centre 2005 Lawyers' Lecture, *Lawyers and Money*. The lecture was first published on [www.ethics.org.au](http://www.ethics.org.au) on 24 October 2005. He makes these comments at pp.3-4.

<sup>iii</sup> Both Chief Justices are quoted in an article in the Australian Financial Review (AFR) of 4 August 2006 under the heading *Young lawyers rebel over billable hour system*.

<sup>iv</sup> The Legal Fees Review Panel in its December 2005 report of its inquiry into legal costs in New South Wales (the Report) describes the history of the time costing method of billing and describes its attractions as its 'apparent objectivity' and 'readily understandable metrics'. The Report quotes for example a legal firm as arguing in its favour that it 'provides a readily accessible audit trail if there is a need to investigate exactly what the practitioner did to justify payment'.

The Report is highly critical of time costing, however, and summarizes the 'most common and salient criticisms' in the 'now extensive body of literature' by saying (at page 14) that:

- it 'privileges quantity over quality. It rewards best those who take longest, regardless of what they produce;
- allocates all major risk to the client;
- discourages, by not rewarding, non-chargeable uses of time such as education, community contributions, professional activities and perhaps most importantly of all, the active and detailed supervision of junior staff;
- encourages increasing billable hours targets, since this is the easiest way to boost profits without encountering client resistance;

- provides no incentive for speed or efficiency and arguably actively discourages both;
- puts the clients' interest in a swift and efficient resolution directly in opposition to the lawyer's interest in maximizing hours and therefore income; and
- is unaffected by success, and therefore not conducive to improvement and excellence.<sup>v</sup>

There are other criticisms of time costing, too, including that it:

- is one reason why the cost of justice in the courts is beyond the reach of the bulk of Australians (former High Court judge, Michael McHugh, quoted in an article in the AFR of 29 July 2006 under the heading *No time for a bad lawyer*);
- is one reason why lawyers' costs are too often out of all proportion to the amounts in dispute (the Chief Justice of New South Wales, Jim Spigelman, quoted in an article in the Australian of 21 October 2005 under the heading *Where there's a will there's a way*);
- measures the worth and standing of individual lawyers in direct proportion to their generation of revenue (Brett Walker SC, *Lawyers and Money*. 'Imagine', he says, 'if medical practitioners took the approach that professional kudos should go to the doctor who performs the most procedures for the largest fees... Why should the mercantile aim of much contemporary practice of law not be just as shocking as these imaginary false doctors?');
- causes legal firms 'to fail to live up to their promises of 'work-life' balance' (a young lawyer quoted in *Young lawyers rebel over billable hour system*) with 'significant consequences in terms of life-style and retention rates in the profession' and 'significant effects on the health, happiness and ultimately the effectiveness of lawyers, with obvious consequences for consumers and the value they receive for their hourly rates' (the NSW Legal Fees Review Panel);
- nurtures an 'extremely competitive culture' in which it is 'very difficult to build any kind of team spirit... because of the extreme competition between members of the firm' (former managing partner of Blake Dawson Waldron, John Stammers, quoted in an article in the AFR of 6 May 2005 under the heading *Big-firm veteran decides that small fits the bill*);
- nurtures workplace cultures in which 'bullying and harassment are common'- an anonymous former partner of a big firm (see *Less hellish views in-house* and the anonymous letter to the editor in response that appeared the following edition under the heading *Big firm partner breaks ranks*, *Lawyers Weekly*, Issue 266, 11 November 2005. Notably, too, the AFR in its legal affairs pages on 15 July 2005 reported the results of a survey of lawyers in Victoria that showed among other things that 'almost 70% of lawyers said that they had been humiliated through sarcasm, criticism or insults.')

<sup>v</sup> both judges are quoted in *Legal Costs in New South Wales*, at pp.5 and 15 respectively

<sup>vi</sup> *Big-firm veteran decides that small fits the bill*

<sup>vii</sup> *Big firm partner breaks ranks*

<sup>viii</sup> the survey results were reported in *Young lawyers rebel over billable hour system*

<sup>ix</sup> Elizabeth Nosworthy makes the point that many lawyers are able to cite the ethical rules and the values that underpin them but unable to recognise situations that call for their exercise – *Ethics and large law firms* in Stephen Parker and Charles Sampford (editors) *Legal Ethics and Legal Practice – Contemporary Issues*, Oxford, 1995

<sup>x</sup> the Guidelines can be found on the Policies and Guidelines page of the Commission's website at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au)

<sup>xi</sup> notably Chief Justice de Jersey observed in Roche, in referring to the NSW Court of Appeal decision in Foreman, that 'if costs agreements of this kind are to be obtained from clients it is

necessary that the solicitor obtaining them consider carefully her fiduciary duty and other duties that she be conscious of the extent to which the agreement contain provisions which her in a position of advantage and/or conflict of interest, and that she take care that by explanation, independent advice or otherwise, the client exercises an independent and informed judgement in entering into them'. Similarly, Justice Kirby observed in Foreman that 'no amount of costs agreement disclosure and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and overcharging where they go beyond the bounds of professional propriety.'

<sup>xii</sup> Queensland Law Society Act 1952 as amended, Division 2A at section 481C

<sup>xiii</sup> New South Wales has prohibited uplift fees in relation to claims for damages - see section 324 of the NSW *Legal Profession Act 2004*.

### **To Michael Robertson's presentation:**

<sup>xiv</sup> BA, LLB, LLM, LLM, PhD, Grad Cert Higher Ed; Associate Professor, Griffith Law School. Member, Queensland Law Society Ethics Committee.

<sup>xv</sup> For example, in Queensland, the torts of maintenance and champerty have not been abolished; see Standing Committee of Attorneys-General, "Litigation funding in Australia", May 2006, p. 5.

<sup>xvi</sup> See *Solicitors Handbook*, (Qld) par 9.

<sup>xvii</sup> *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204

<sup>xviii</sup> Standing Committee of Attorneys-General, "Litigation funding in Australia", May 2006, p.4.

<sup>xix</sup> Sections 9.10 and 9.40 *A New Tax System (Goods and Services Tax) Act 1999* (Cth). It seems most likely that Sally has wrongly deducted GST in these circumstances.

<sup>xx</sup> See the Guidelines on the LSC website.

<sup>xxi</sup> In other words, she has interpreted the "D" part of the relevant section to exclude from its ambit the litigation support provided to Clive, on the grounds that it was not something that the client must reimburse "to the firm". Neither, arguably, is it something that is payable "to the practitioner" given that the lender is a separate entity.

<sup>xxii</sup> Par 8.06 of the *Solicitors Handbook* might mean a different interpretation, but for various reasons it is not applicable here.

<sup>xxiii</sup> By this I mean, simply, the methodology of interpreting and applying formal principles of legal authority to given facts in reaching a legal conclusion.

<sup>xxiv</sup> The original insights developed by the American Realists are pertinent here; see for example a summarised version of this position as stated by K N Llewellyn *The Bramble Bush*, (1930) at p. 180. In the context of contemporary analysis of lawyers' professional responsibility, see, for example, A. Hutchinson, *Legal Ethics and Professional Responsibility* (1999), chapters 3 and 11; D. Nicolson and J. Webb, *Professional Legal Ethics: Critical Interrogations* (1999) at p. 278.

<sup>xxv</sup> A classic "textbook" example of a parallel situation concerns the use of zealous cross-examination, in the interests of a client, to unsettle and to create doubt about the veracity of evidence from a witness who is probably telling the truth.

<sup>xxvi</sup> Such as, for instance, in the way in which lawyers choose to interpret and communicate *facts* on behalf of their clients.

<sup>xxvii</sup> However, we do not actually know this for certain. I am not aware of any empirical evidence that examines, in detail, how it is that lawyers actually deliberate in the course of making ethical practice “judgments” in the course of their work; but see for example Mather, McEwen and Maimann, *Divorce Lawyers at Work*, (2001) chapter 9, for an account of practitioner decision-making that challenges the orthodoxy associated with “professionalism”.

<sup>xxviii</sup> This is a matter of law in some respects; eg the notion of “independence” and what that entails in *Giannarelli v Wraith* (1988) 165 CLR 543; and see the concept of “forensic judgment” in Rule 20 (and other Rules) in *Legal Profession Barristers Rule 2004* (Qld) and Law Council of Australia *Model Rules*, 2004, especially Rule 13.1. These and other examples indicate just how important it is for lawyers to be able, on occasion, to weigh their responsibilities in circumstances of competing sets of interests.

<sup>xxix</sup> There are potentially other interests, too, including but not limited to the lawyer’s own interests and the interests of other lawyers in the community in which the lawyer practises.

<sup>xxx</sup> But, apparently, not her interest in her own reputation as a practitioner who is not willing to take advantage of “grey areas”.