

# Without Prejudice

C L I E N T S   A N D   C O N D U C T

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NSW Legal Services Commissioner  
Steve Mark.

## A welcome return of *Without Prejudice*

*Without Prejudice* is a key communication vehicle to the legal profession and the community and as such we announce a return to our former bi-monthly publication schedule.

*Without Prejudice* will take a break over the traditional legal holiday period and will return for five anticipated issues in 2003; late February, late April, late June, late August and late October.

We have been exceedingly busy over the preceding 12 months and provide you with an update in this issue on some of those developments.

Happy reading!

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## Breaches on new advertising restrictions could lead to professional misconduct

New restrictions on the ways solicitors or barristers can advertise for personal injury services came into effect when the *Legal Profession Amendment (Advertising) Regulation 2002* commenced on 1 April this year, inserting a new Part 7B (clauses 68A, B and C) into the *Legal Profession Regulation 1994*.

The Regulation attempts to balance the right of people to *find* a legal practitioner for their personal injury needs while eliminating exaggerated touting by the legal profession.

The Regulation means that a legal practitioner must not advertise for personal injury services except by means of a statement setting out only the name and contact details and the legal practitioner's areas of speciality in certain allowable publications and electronic mediums. The Regulation seems to prohibit advertisements offering "no win, no fee", as well as advertisements which unrealistically raise people's hopes, or offer financial gain above any regard to a person's genuine need for compensation.

A breach of the Regulation could be professional misconduct which would invoke Part 10 of the *Legal Profession Act 1987* and the jurisdiction of the Office of the Legal Services Commissioner (OLSC).

The definition of personal injury is not exhaustive and includes death, pre-natal injury, psychological or psychiatric injury, and disease.

In light of the purpose of the Regulation, the OLSC considers that the Dusts Diseases, Workers Compensation and Victim's Compensation jurisdictions would fall within the ambit of "personal injury", in addition to straightforward personal injury matters. However, given that the definition of personal injury is broad, it could be argued that other jurisdictions would be included.

### Determining if advertising contravenes the Regulation

#### What can be advertised?

Advertisements published prior to the commencement of the Regulation are not affected by it.

The following issues should be considered when assessing whether a particular advertisement is allowed under the Regulation:

- Does the advertisement comprise only the name and contact details of the legal practitioner and area(s) of speciality? (for example "personal injury"; "dust diseases"; "motor accidents" and "medical negligence"). If the advertisement provides more information than this, consideration needs to be given to whether the additional information breaches clause 68C of the Regulation.

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## Online register aims to help consumers make informed choices

A soon-to-be proclaimed amendment to the *Legal Profession Act 1987* could eventually become a national resource for consumers in making informed decisions when it comes to choosing practitioners.

The Legal Profession Amendment (*National Competition Policy Review*) Act amends the *Legal Profession Act* and will empower the Legal Services Commissioner to establish a public disciplinary register online of disciplinary action taken against legal practitioners in NSW.



Finalisation of information exchange protocols between regulatory agencies, also anticipated soon, could see the disciplinary register widened in the future to include disciplinary action taken against practitioners in other Australian jurisdictions.

The Register will include decisions of the Legal Services Division of the Administrative Decisions Tribunal, the Supreme Court of NSW as well as those made by the Law Society of NSW, the Bar Association of NSW and the Legal Services Commissioner.

The Register will include decisions made in relation to the removal of a practising certificate under the bankruptcy, tax offence and indictable offence disclosure provisions.

It will also list legal practitioners who failed to meet statutory obligations where there is the potential for suspension or cancellation of practising certificates.

## Information exchange protocols to facilitate clarity and cooperation in a national legal services market

The ways in which complaints are handled in relation to practitioners who have crossed state boundaries and are in jurisdictions other than their home one, will soon be clarified when information exchange protocols between regulatory agencies are adopted.

The Legal Services Commissioner has been working with relevant bodies since 1997 to develop protocols governing the exchange of information and complaint handling processes in the emerging national legal services market.

One aspect of the national legal services market, which has been under development by the Standing Committee of Attorneys General and the Law Council of Australia over the

last six years, is the introduction of a 'drivers licence' approach to practising certificates.

Under the plans, a practitioner with a valid legal practising certificate in Australian or New Zealand jurisdictions will be able to practice in any of the other jurisdictions.

Legal Services Commissioner Steve Mark says the protocols will clarify the complex issue of determining how complaints should be handled when the practitioner is practising outside their home jurisdiction.

He says the protocols are also necessary for the registering of practitioners for professional indemnity, fidelity fund purposes and trust account regulation.

## Help on the way for incorporated practices

The Office of the Legal Services Commissioner will soon be appointing a Systems Assessment Officer (SAO) to work with incorporated legal practices to ensure systems, procedures and practices comply with the relevant legislation.

The Act allowing legal practices to incorporate came into effect in June 2001 and with it came new powers for the Legal Services Commissioner to regulate incorporated legal practices including multi-disciplinary practices. Although such powers are not yet operational, the OLSC has been working since June last year on developing procedures for the investigation, review and audit of incorporated legal practices for compliance with the *Legal Profession Act 1987* and the Regulations.

Commissioner Steve Mark, says the Systems Assessment Officer will be particularly interested in the responsibilities of solicitor directors in incorporated legal practices. They will have the task of ensuring that the legal services provided by the practice and the

implementation and maintenance of management systems for the provision of those services comply with the requirements of the *Legal Profession Act 1987*.

Some of the specific issues the Systems Assessment Officer will be looking at will include the cost disclosure procedures of the practice, methods to avoid conflict of interest, event diaries, supervision of legal and non-legal staff and approaches taken to ensure good communication between the practice and its clients.

The Legal Services Commissioner has been working with the College of Law, the Law Society of NSW and the overseeing body to the Gateway to Best Practice Program, the QL Board, on standards, education and certification issues for best practice results for legal practitioners in the context of incorporation.

The Commissioner says this project will play an integral role in the work to be undertaken by the newly established Systems Assessment Officer at the OLSC.

## Breaches on new advertising restrictions could lead to professional misconduct (continued from page 1)



*No more exaggerated touting.*

- Was the advertisement published in an “allowable publication”? Namely:
  - printed publications such as newspapers, magazines, journals, periodicals or directories, or electronic versions of one of the above-listed printed publications which is available on the Internet, *provided* that publication is maintained or published independently of the legal practitioner, such as on-line newspapers, on-line journals and the yellow pages directory website;
  - an electronic version of a directory or data base which is available on the Internet, *provided* that publication is maintained or published independently of the legal practitioner, such as electronic directories of legal practitioners maintained by the Law Society or the Bar Association;
  - placed on, under or over a building, vehicle or place which can be seen publicly, or distributed at such places; and
  - on a receipt or betting record.

A total ban on advertising for personal injury services on radio or television is imposed by the Regulation.

A legal practitioner who engages an agent or third party to publish an advertisement may be caught by the Regulation depending on whether the legal practitioner was sufficiently connected with the publication of the advertisement.

Advertising for personal injury services in, on, or around hospitals is also prohibited under the Regulation. It would appear however, that advertising for legal services (other than personal injury services) in, on, or around a hospital would not be in breach of the Regulation.

### **What cannot be advertised?**

An advertisement for personal injury may breach the Regulation in circumstances where the advertisement may reasonably be thought to be intended, or is likely to encourage or induce a person to make a claim for compensation or damages relating to a personal injury, or to use the services of a barrister or solicitor in connection with making a claim for compensation or damages relating to a personal injury.

### **What could be thought of as encouraging or inducing a person?**

Advertising is, inherently, an encouragement to use an advertised service. Accordingly, when determining whether a particular advertisement breaches the Regulation, something more than merely attracting clients is required. When assessing whether the advertisement may reasonably be thought to be intended, or is likely to encourage or induce a person, consideration should be given to the following questions:

- Does the advertisement entice a person to approach a legal practitioner or make a claim by touting to take care of their matter at no cost? For example “no win,

no fee” or “all costs of litigation met by us – you only pay if successful”. If the answer is yes, then the advertisement could be said to be encouraging people to make a claim. Comments such as “come and see us”, or “no obligation free appointment” *of their own* do not appear contrary to the spirit of the Regulation;

- Does the advertisement create false expectations in the minds of people such that it baits a person who would not otherwise make a claim? For example, advertisements which unrealistically raise a person’s expectations about their personal injury matter by claiming that the legal practitioner or firm has a high success rate with such cases and suggests that every case has the same chance of success, or if the advertisement offers to complete a personal injury matter in an unrealistically short space of time;
- Does the advertisement appeal to a person’s sense of financial gain, rather than their genuine need for compensation? For example, comments such as “regardless of the type of injury you have suffered, you may be entitled to a pay-out for your personal injury”, “we can help you realise your right to be compensated”, “convert your injuries into cash” or “personal injuries entitle you to make a claim for compensation in NSW”, could be caught by the Regulation.

The examples set out above are not definitive. The Regulation prohibits advertising which encourages, or may encourage, a person to make a claim for a personal injury. Accordingly, each advertisement must be assessed individually.

### **For inquiries or questions on how the Legal Profession Amendment (Advertising) Regulation 2002 impacts on you,**

contact the Law Society of NSW on 02 9926 0333 or the Bar Association on 02 9232 4055.

# Civil Liability Act 2002 brings tighter controls and realistic approaches

The *Civil Liability Act 2002* changes the law relating to civil actions for damages as well as the professional responsibilities of legal practitioners in such actions.

## Changes to civil actions

The Act alters the way personal injury matters can be run, and restricts the damages which may be recovered. The restrictions came into play on 20 March 2002 (irrespective of when the injury occurred). The Act will not affect proceedings commenced before that date, nor proceedings in which an award was made before that date. The Crown is also exempt in certain circumstances.

Generally speaking, the Act affects the damages which can be recovered in personal injury matters, although certain intentional acts, motor vehicle accidents and workers compensation matters are excluded. Specifically, the Act limits the amounts that can be recovered:

- for non-economic loss (a sliding scale operates to set the damages amounts for non-economic loss, depending on the severity of the injury, to a maximum of \$350,000);
- for economic loss due to loss of earnings or earning capacity, or loss of expectation to a maximum of three times the average weekly wage in NSW; and
- for future economic loss, the amount must be discounted by five per cent.

## Legal practitioner's costs

In personal injury matters, where the award is less than \$100,000, a legal

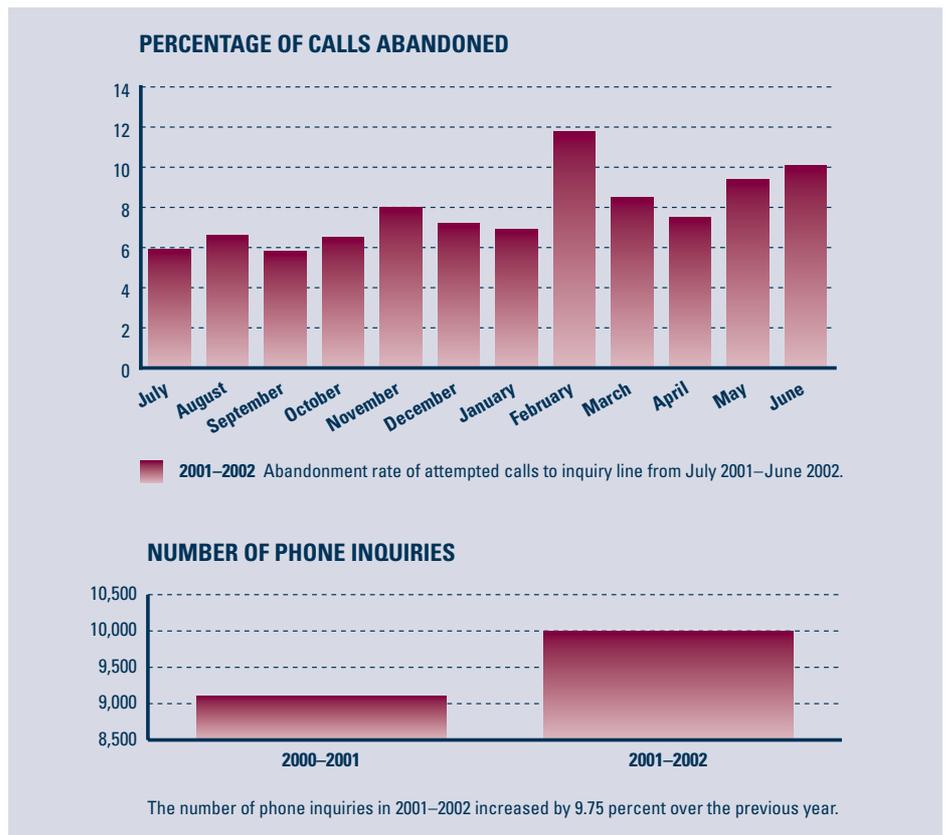
practitioner's costs are limited to 20 per cent of the amount recovered or \$10,000 (whichever is the greater) of the amount recovered or claimed. These amounts include Counsel's fees but excludes disbursements.

It is possible to contract out of these fee caps, but only in relation to solicitor client costs and only if there has been adherence to requirements for disclosure.

A party which refuses an offer of compromise (which is not less favourable than the eventual outcome) may be ordered to pay that party's costs.

## Reasonable prospects of success

A legal practitioner must certify that there is a reasonable prospect of success in all their civil litigation matters. A practitioner who runs litigation which is found to be "without reasonable prospects of success" may be found guilty of unsatisfactory professional conduct or professional misconduct and costs orders can be made against the practitioner. Prospects for success must be assessed by the practitioner on the basis of provable facts and on a reasonably arguable view of the law. The Act provides no principles (other than the terms of the Act) to guide a practitioner in making the assessment.



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