[2005] WASAT 213

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTICE ACT 2003 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and BENARI [2005] WASAT 213
MEMBER	**:**	JUSTICE M L BARKER (PRESIDENT) MS D DEAN (MEMBER) MR M ODES QC (SENIOR SESSIONAL MEMBER)
HEARD	**:**	7 JUNE 2005
DELIVERED	**:**	19 AUGUST 2005
FILE NO/S	**:**	VR 18 of 2004
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND JOHN CONNOR BENARI Respondent

Catchwords:

Legal practice - Legal practitioner –Standards of professional conduct - Legal Practice Act 1893 (WA), s 29A – "Unprofessional conduct" - Whether practitioner failed to adequately to supervise senior law clerk – Whether practitioner charges a unreasonable fee - Whether practitioner constructively represented law clerk as a lawyer

Legislation:

Interpretation Act 1984 (WA), s 37(1)
Legal Practice Act 2003 (WA), s 3, s 162, s 164, s 175
Legal Practitioners Act 1893 (WA), s 25, 29A
State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004 (WA)
State Administrative Tribunal Act 2004 (WA)

Result:

Practitioner found guilty on one complaint of neglect in failing to supervise his law clerk adequately and one complaint of unprofessional conduct in over charging his client. The practitioner found not guilty on complaint of constructively misrepresenting his law clerk as a lawyer

Category: B

Representation:

Counsel:

Applicant	:	Mr A R Beech SC
Respondent	:	Mr M R Hall

Solicitors:

Applicant	:	Legal Practitioners Complaints Committee
Respondent	:	Benari & Co

Case(s) referred to in decision(s):

D'Alessando and D'Angelo v Bouloudas (1994) 10 WAR 191
D'Alessandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198
De Pardo v Legal Practitioners Complaints Committee (2000) 170 ALR 709 (Fed C of A)
De Pardo v Legal Practitioners Complaints Committee [2003] WASCA 274
Kyle v Legal Practitioners Complaints Committee (1999) 21 WAR 56
Pryles & Defteros v Green [1999] WASC 34

Case(s) also cited:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The Legal Practitioners Complaints Committee brought three professional disciplinary complaints against John Connor Benari (the practitioner).

2 Each of the complaints related to the manner in which a particular client's matter had been handled by the practitioner, who was at material times a sole practitioner.

3 At no material time had the client consulted with the practitioner or had any direct dealings with the practitioner. The file had been handled by the practitioner's law clerk. When the practitioner's instructions were eventually terminated by the client, the practitioner issued the client with an account for the work done, including a "loading" for his alleged involvement in the conduct of the file.

4 The Tribunal found the practitioner guilty of neglect in the course of practice of the law between December 2001 and December 2003 for inadequately supervising his law clerk in the conduct of the matter.

5 The Tribunal also found the practitioner guilty of unprofessional conduct in over-charging the client for the time spent by the law clerk at the rate of $240 per hour, plus GST, which was grossly in excess of the amount he was permitted to charge. The Tribunal found that the practitioner was not entitled to any "loading" of the account for his involvement in the file.

6 The Tribunal found the practitioner not guilty of a complaint that he had constructively misrepresented his law clerk as a lawyer.

7 The Tribunal noted that there was no suggestion that the client had been wrongly advised in relation to the matter.

The nature of the disciplinary proceedings

8 The *Legal Practice Act 2003* (WA) (the 2003 Act) currently regulates legal practice in the State of Western Australia. It came into operation on 1 April 2004. Part 12 deals with complaints and discipline. Section 162 establishes the Legal Practitioners Complaints Committee. By s 164, the functions of the Complaints Committee include to supervise the conduct of legal practitioners and the practice of the law, to receive complaints under s 175, to inquire into such complaints for the purpose of

determining whether it may constitute unsatisfactory conduct, and, if it considers it appropriate to do so, to institute professional disciplinary proceedings against a legal practitioner before the State Administrative Tribunal.

9 The making of complaints is controlled by s 175 of the 2003 Act. A complaint may be made by the Attorney General, the Legal Practice Board, the Executive Director of the Law Society when authorised by the Council of the Society to do so, any legal practitioner or "any other person who has had a direct personal interest in the matters alleged in the complaint".

10 The expression "unsatisfactory conduct" is defined by s 3 of the 2003 Act to include –

> "(a) unprofessional conduct on the part of a legal practitioner, whether occurring before or after admission as a legal practitioner;
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> (b) illegal conduct on the part of a legal practitioner, whether occurring before or after admission as a legal practitioner;
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> (c) neglect, or undue delay, in the course of legal practice;
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> (d) a contravention of this Act, the regulations or the rules; and
>
> (e) conduct occurring in connection with legal practice that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner."

11 Prior to the 2003 Act coming into operation, matters of complaint and discipline concerning legal practitioners were regulated by the *Legal Practitioners Act 1893* (WA) (the 1893 Act). At material times, on and after 18 December 2001 and in 2002 and 2003, by the 1893 Act s 25 the Complaints Committee existed with the function of receiving complaints from the same range of persons mentioned in the 2003 Act. By the 1893 Act s 25(c) the Complaints Committee also had the function to inquire into a complaint to determine whether "(i) conduct on the part of a practitioner; or (ii) matters relating to the practice of the law" complained of, may constitute "illegal or unprofessional conduct, or neglect, or undue delay in the course of the practice of the law".

12 The Complaints Committee under the 1893 Act s 25(1)(f) was also empowered "to institute (i) professional disciplinary proceedings against a practitioner before the [Legal Practitioners Disciplinary] Tribunal" established by the 1893 Act at material times. By the 1893 Act s 29A the Disciplinary Tribunal at material times had "jurisdiction to make a finding that a practitioner has been guilty of –

> illegal conduct;
>
> unprofessional conduct; or
>
> neglect, or undue delay, in the course of the practice of the law.

13 With the coming into operation of the State Administrative Tribunal on 1 January 2004 pursuant to the *State Administrative Act 2004* (WA) and the *State Administrative Tribunal (Conferral of Jurisdiction) Act 2004* (WA), the Disciplinary Tribunal was abolished and proceedings that had been commenced in the Disciplinary Tribunal, including proceedings that had been partly or fully heard but not determined in the Disciplinary Tribunal, were transferred to the State Administrative Tribunal pursuant to *State Administrative Tribunal Act 2004* s 167(4)(a) and (b).

14 As at 1 January 2005, professional disciplinary proceedings had been commenced by the Complaints Committee against the practitioner (Mr Benari) in the Disciplinary Tribunal in proceedings numbered VR 18A, VR 18B and VR 18C of 2004. As a result of the commencement of the legislation setting up the State Administrative Tribunal, these proceedings were transferred to the State Administrative Tribunal.

The complaints made against the practitioner

15 The proceedings comprised three separate complaints against the practitioner arising from the complaint of one Mr R (client). They related to the alleged conduct of the practitioner in the period from about 18 December 2001 to December 2003. As a result, the standards of professional conduct referred to in the 1893 Act apply; s 29A prescribed the relevant professional standards by which the practitioner's conduct complained of, was to be measured. The Committee was entitled to institute the proceedings alleging breach of the standard of conduct referred to in the 1893, by virtue of the *Interpretation Act 1984* (WA) s 37(1). The standard of conduct of "unsatisfactory conduct" as defined in the 2003 Act only applies to the conduct of a legal practitioner that occurs after the commencement of the 2003 Act.

16 There are three related complaints made by the Complaints Committee against the practitioner, namely that:

> "(1) the practitioner … was guilty of neglect in the course of the practice of the law, of the file of his client … between in or around December 2001 and December 2003;
>
> (2) the practitioner … was guilty of unprofessional conduct in charging his client for the time spent by the practitioner's clerk at the rate of $240 per hour, and otherwise as particularised [in the reference lodged against the practitioner], which rates were grossly in excess of the amount he was permitted to charge;
>
> (3) the practitioner … was guilty of unprofessional conduct by constructively misrepresenting [by conducting his legal practice in such a way as to convey or permit to be conveyed the impression] to his client … , that his clerk was a lawyer."

17 These three complaints were heard by the Tribunal at the same time on 7 June 2005.

The facts alleged by the Complaints Committee

18 In making the complaints against the practitioner the Complaints Committee allege a number of facts, many of which were not in contention at the hearing of the proceedings.

19 It was common ground that:

> "(1) [a]t all material times the practitioner was a sole practitioner practising in the name of Benari & Co and employed Mrs [EP] as a Law Clerk;
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> (2) [i]n December 2001 the client instructed Benari & Co to advise and act for him in relation to a personal injury he suffered at work on 4 May 2001;
>
> (3) [a]t the initial conference on or about 18 December 2001, Mrs [EP] provided initial advice to the client as to what claims may be available [and that, at that point, the practitioner had not himself seen or advised the client];

(4) [t]he only advice provided at any stage by Benari & Co to the client was advice provided verbally by Mrs [EP]."

20 It is not relevant to the complaint that the law clerk's full name be used and her privacy may be respected by referring to her as Mrs EP.

21 The Committee alleged that "the only contact the client had with Benari & Co was by personal or telephone attendances with Mrs [EP] or through letters from Benari & Co signed Benari & Co per [Mrs EP]".

22 The Committee further alleged that the practitioner's only involvement in the file was his general instruction in relation to all files that Mrs EP dealt with to raise with him any queries that she had if they arose. It was further alleged that the practitioner did not answer any queries from Mrs EP in this case.

23 It was common ground that the client terminated the practitioner's instructions in December 2003.

24 When the instructions were terminated the practitioner rendered an account to the client on 5 January 2004 (which was incorrectly dated 5 January 2003).

25 The Committee allege that the practitioner charged the client for Mrs EP's time at the rate of –

(1) $240 per hour for attendances and telephone attendances; and

(2) for writing letters, $30 per short letter, $50 per one-page letter and $70 per long letter.

26 In these circumstances the Complaints Committee allege that:

(1) during the period of the retainer the practitioner neglected to, adequately or at all:

(a) assess the client's factual and legal situation;

(b) provide advice to the client;

(c) act in relation to the client's instructions or file; or

(d) supervise the file;

(2) the practitioner's conduct in charging the client outside the workers compensation scales set by the *Workers Compensation and Rehabilitation Act* 1981 (WA) and the

Legal Practitioners (Workers' Compensation) (Conciliation Proceedings, Review Proceedings and Compensation Magistrate's Court) Determinations 2000 and (from 1 March 2003) 2003, constituted gross overcharging and amounted to unprofessional conduct; and

(3) in effect, by permitting Mrs EP to deal with the client from the outset and tender advice, and by charging Mrs EP's time in the manner that he did in the account rendered, the practitioner was guilty of unprofessional conduct by constructively misrepresenting by conducting his legal practice in such a way as to convey or permit to be conveyed the impression to his client that his clerk was a lawyer.

The evidence called by the Complaints Committee

27 At the hearing before the Tribunal the evidence relied upon by the Complaints Committee in support of the complaints made against the practitioner constituted written documents and witness statements tendered (without objection) by senior counsel for the Complaints Committee.

28 The first exhibit was a witness statement made by the client's father. He explained that he rang Benari & Co to make a legal appointment. He said words to the effect that he wanted to make an appointment to see a solicitor to discuss a worker's compensation claim and was given the appointment date of 18 December 2001, but at that time did not know who the appointment was with. He attended the appointment on 18 December 2001 with his son, the client. When they arrived they were told the appointment was with Mrs EP. He "assumed" she was a lawyer employed by Mr Benari. He said that over the course of the client's workers compensation claim he telephoned Mrs EP on a couple of occasions to discuss various aspects of the claim with her. On no occasion did Mrs EP advise him that she was not a solicitor, and on no occasion did he ever speak to Mr Benari. The practitioner chose not to cross examine this witness.

29 The second exhibit was a witness statement made by the client. In essence, he corroborated his father's evidence. He said that when he arrived at the offices of Benari & Co on 18 December 2001, he found his appointment was with Mrs EP. He also "assumed" she was a lawyer employed by Mr Benari. At the initial meeting with Mrs EP he told her the circumstances of his accident and his injury. He told her he wanted

advice about whether to make a common law claim or pursue "a redemption case". He said Mrs EP advised him that he should not pursue a common law claim as this would be too hard for him to win. He said that Mrs EP said she would act for him to pursue a redemption claim. He thought that a redemption claim would allow him to get compensation for his injuries from his former employer. The client also said that, at the meeting, his father asked about Benari & Co's fees and Mrs EP told them that the first consultation would be free and their other fees would depend on whether Benari & Co won a redemption case for him. If they did not, there would be no charge.

30 The client said that over the next year the only contact he had with Benari & Co was by letters from Mrs EP or telephone conversations when he would phone her. He said that on some occasions his mother and father telephoned and spoke to Mrs EP.

31 The client said on 31 January 2003 he went to Benari & Co for the second time and had another meeting with Mrs EP. They discussed his case generally. Mrs EP suggested he should go back to see a particular doctor so they could obtain another report from him to help his case. He did see the doctor as suggested. The client said he later received a letter from Mrs EP saying that the workers compensation insurer had written to her stating that a redemption offer was not available to him and wanting to know whether he wanted what was called "a second schedule offer". Following this, the client's father telephoned Mrs EP to ask why a redemption offer was not applicable. The client said his father told Mrs EP that the client did not want to finalise his claim with a second schedule payment as he was still having medical problems.

32 The client said the next thing to happen was that he received a letter from Benari & Co saying that the workers compensation insurer was going to close their file on him. He said his father was upset about this so his father contacted Mrs EP and she told him that if they wanted to stop the file from being closed, it would be necessary to contact the doctor to request another written report for the client.

33 The client said Benari & Co then sent him an account which he disputed because he had been told he would not have to pay any fees if he did not receive a redemption payout.

34 The client said that during the entire period of his instructing Benari & Co he did not meet Mr Benari or speak to him. All the letters he

received from Benari & Co were from Mrs EP. He said that over all this time he continued to "assume" that Mrs EP was a lawyer.

35 The third exhibit tendered by the Committee was a book of documents. It included all correspondence between the Complaints Committee and the practitioner, the practitioner's file concerning the client's matter, including medical reports and correspondence.

The evidence called by the practitioner

36 The practitioner advised the Tribunal through counsel that he intended to give evidence in the proceedings but also to call Mrs EP to deal with matters raised. Over the caution of senior counsel for the Complaints Committee that the practitioner should give his evidence first and call Mrs EP later, and that if necessary the Complaints Committee would invite the Tribunal to draw any appropriate inferences from the practitioner not taking this course, the practitioner first called Mrs EP to give evidence.

37 Mrs EP supplied a witness statement, which she adopted and became the fourth exhibit in the proceedings. She explained she was a "senior law clerk" employed by Benari & Co and had, in all, been a law clerk for 16 years. She had "accumulated experience in common law and personal injuries, including workers compensation, and civil litigation in the Magistrates, District and Supreme Courts". Mrs EP said that she had a Bachelor of Arts degree from the University of Western Australia and had studied law for one year at the University. Prior to working for Benari & Co she had worked as a law clerk with other law firms.

38 Mrs EP said her duties with Benari & Co saw her:

39 (a) interviewing clients;

40 (b) drafting civil process and assisting in the conduct of litigation;

(c) attending upon chambers in all civil jurisdictions;

(d) attending re trial conferences in the Magistrates Court;

(e) attending upon examinations in aid of execution in Magistrates Court proceedings;

(f) attending upon judgement summonses in the Magistrates Court;

(g) sending standard letters;

(h) taking and making telephone calls;

(i) assisting in office administration.

41 Mrs EP said in addition to these duties she had been specifically trained by the practitioner in the area of general insurance liability claims and, in particular, in workers compensation matters in which she was "well versed" in negotiating with insurance companies in this area for the purpose of effecting redemptions and second schedule entitlements under the workers compensation legislation. She said she had attended numerous conciliation hearings at Work Cover not only for Benari & Co's clients, but also for other solicitors, as solicitors are excluded from that process.

42 In relation to the client's case Mrs EP said that she had the day to day management of the file, had appointments with the client, answered his and his parents telephone enquiries and communicated with him by way of letter.

43 Mrs EP said she also carried out instructions which were to manage the client's workers compensation claim and she later attempted to negotiate the redemption of his workers compensation claim with the workers compensation insurer.

44 Mrs EP said that during the time she worked on the client's file she discussed with the practitioner the following matters:-

the issue of common law liability;

the content of medical reports;

the request for further medical reports;

a second schedule entitlement;

redemption issues;

issues concerning the client when he became difficult.

45 Mrs EP further stated that:

> "Anything out of the ordinary I would take to Mr Benari and discuss with him. However it was a protocol that all issues of liability and settlements had to be discussed with Mr Benari."

46 Mrs EP said that at no stage did she ever hold herself out to be a solicitor or tell the client that she was a solicitor. She said that had the client asked her whether or not she was a solicitor she would certainly have advised him of her status. She said she can't be accountable for the

client's assumptions, but she diligently carried out his instructions and advised him properly and did not believe that there was any neglect on her part in her involvement in his case. Mrs EP also made it clear that she did not render the account to the client. This was done by the practitioner. As for the charging out of her time, this was a matter for the practitioner and not her.

47 Mrs EP was cross examined by senior counsel for the Complaints Committee. She agreed that at material times as a law clerk with Benari & Co she was "running" quite a number of files given to her by the practitioner, probably more than 100 at the relevant time. She confirmed that in order to prepare an account one needed to peruse the file as the firm did not then have computer records of time expended on a file. She explained, however, that she did not render the accounts and they were done by another person in the firm at the request of the practitioner. So far as the recording of her time on particular attendances and work done on the client's file, Mrs EP confirmed the duration of matters she attended to.

48 Mrs EP agreed that she did not record any discussions that she had with Mr Benari on the client's file. She stated: "I did not record those, but we did have discussions. We had a lot of protocols in place. In particular, weekly meetings about files and also discussions on files from time to time that I didn't record."

49 Mrs EP said that she was aware that the practitioner "dictated some letters on the matter and rendered the account".

50 Of the 100 or more files that Mrs EP handled at the material time she said that most given to her were debt recovery files, they weren't all personal injury files. This meant that many of them were quite simple.

51 When pressed about recalling specific conversations about particular aspects of the client's file with the practitioner, Mrs EP replied: "Yes. I do."

52 Mrs EP explained that she often had the practitioner sit in on consultation and difficult cases, but acknowledged that that did not happen in the case of the client.

53 Mrs EP was also asked about her statement that "[p]rior to any conciliation hearing [she] discusses various aspects of the case with [the practitioner]". She acknowledged however that the client's case did not reach the conciliation stage so that did not occur.

54 Mrs EP was also asked about her statement that "[a]ny out of the ordinary correspondence would be settled by Mr Benari". She explained that "we have a lot of standard correspondence that Mr Benari has prepared and that are on the system when requesting a report or various things, but anything out of the ordinary of course, Mr Benari would settle that". She accepted however that there wasn't "any out of the ordinary correspondence" in the client's matter and there were "only fairly standard letters". However, she said "Mr Benari did do three letters on the matter". She thought two or three letters he did were towards the end of the matter when the file was being closed, and one while the file was still in progress, but added: "… as you will see from the file, the letters are fairly standard when requesting reports, etc".

55 When pressed about what the letter was that Mr Benari wrote before the file was closed towards the end of the matter, Mrs EP stated: "I can't recall off hand, but I do recall that there was a letter that I had some difficulties with." She could not recall whether that was a letter at the stage when the workers compensations insurer had stated they would not offer a redemption. She acknowledged however, that was when the difficulty had arisen with the file. When asked whether that difficulty with the file had led her to speak to the practitioner about the letter, Mrs EP said she couldn't "recall whether there was a letter done then [or] when it was done". She did recall, however, she was having some troubles getting a further report from a doctor.

56 Senior counsel for the Complaints Committee also asked Mrs EP about the initial consultation when she gave advice about the availability of a common law claim or other claims. She said it was agreed at the initial meeting that a common law claim was not available. She said that later she did discuss with Mr Benari the issue of common law and showed him [the] reports that came from the doctor that were provided by the client. Mrs EP said she did recall having a discussion and was not merely relying on the protocol which suggested they would normally have a discussion about the files she was handling.

57 Mrs EP was tested about the extent of her recollection and was asked when she was first asked whether she could recall discussions with Mr Benari on the client's file. She answered that "it would have been last year: It was when the initial complaint came in that I had a meeting with Mr Benari … well, we basically went through the points raised in the initial complaint and we went through the file and discussed those issues".

58 In re-examination, counsel for the practitioner asked Mrs EP whether there was "any reason why she would remember this particular file in any event". She said "she remembered it because … towards the end of the file there was some difficulties with the client and they became a little bit difficult as to what they wanted and a little bit unreasonable and I had a lot more meetings with Mr Benari about the matter then - - than normally. I mean, normally, I would have - - normally, I have a weekly meeting, but I recall on - - I had to speak to him on two or three occasions in one week about the same - - same file which is [the client's] file".

59 The practitioner then gave evidence. He relied on a witness statement and was then cross examined about the matters in issue. The practitioner's witness statement provided little information except to say that he practised on his own account and had been admitted to practice as a barrister and solicitor on 3 May 1977. He had been practising on his own account since 1 January 1980. The practitioner confirmed he employed Mrs EP as a law clerk and had trained her in most facets of civil litigation and personal injuries work including workers compensation. The practitioner said that he had read Mrs EP's statement and incorporated it into his statement. He referred to the fact that Mrs EP was a law clerk with considerable experience and competence. The practitioner otherwise referred to his statement of issues, facts and contentions filed in the proceedings and dated 27 May 2005.

60 The practitioner added that the client's file was handled competently, given the supervision required, and was done in a professional manner.

61 The practitioner denied that by engaging Mrs EP in relation to the conduct of the client's matter his conduct constituted neglect as alleged or at all or that it constituted unprofessional conduct.

62 As to the question of over-charging, the practitioner said that in addition to the work done by Mrs EP, the hourly rates charged reflected the input of the practitioner in relation to the client's file. He said that amounts charged to the client were lawful and reasonable in the circumstances.

63 The practitioner also denied the allegation of constructive misrepresentation concerning Mrs EP and that his conduct constituted unprofessional conduct.

64 When the practitioner was cross examined he explained that Mrs EP was the only law clerk engaged by him but that there were secretaries who also did other clerical work.

65 In relation to the account that he had issued he explained that he had another employee cost the file. She collated the record of the file, broke it down to component parts to do the costing based on the firm's standard rate charges.

66 The practitioner confirmed that in this process no discrimination was made, for example, between a letter, telephone attendance or appointment made or done by him or Mrs EP. He was then asked whether standard fees referred to in the account sent out, charged for the work done regardless of whether it was done by him or Mrs EP. He answered:

> "No. This is standard in relation to letters. If I could just go through the account. Standard in relation to letters. They're our standard charge-out rates. [$]30 for a short - - one page, [$]50 - - one plus more pages, [$]70. Perusals that's a standard - - that's a standard charge, $6 per page. Telephone attendances, that's a standard charge for me."

67 As to appointments, the practitioner explained that he would charge out his time at $300 per hour plus GST, however for certain sorts of operations he didn't charge that much. He confirmed that in 2002 his charge-out rate was $300 per hour, plus GST. On reflection he said it could have either been $285 or $300, plus GST.

68 In relation to the work done on the client's file, the practitioner agreed that most of the work was done by Mrs EP. He added: "There are certain letters which I have dictated". In this regard the practitioner said that he went through the book of documents tendered in evidence and "identified certain letters that I dictated, but because its - - because it's [Mrs EP's] work, the letters just would have gone out as per usual with [her] reference but my - - my letters - - I think there was one earlier on and there's about two towards the end …".

69 The practitioner said he could identify the letters that he recalled dictating, whether or not those letters had his initials or Mrs EP's initials on them. He said there was a request for a report from the medical practitioner which was about a page and a half long, "which was one of my own". He said that would have been the letter in the book dated 20 March 2003. Senior counsel drew his attention to a document at page 102 of the book. The practitioner reiterated that he had dictated the last few letters on the file and thought that there was an earlier one too. He said the letter covering the account was his. The practitioner said the document numbered 86 in the book was his. He agreed it was a letter in

the last two letters category. He then said it was not document 86 but a document at page 124. He then said no, that wasn't his, that was Mrs EP's.

70 The practitioner then said that the letter covering the account, at page 92 of the book dated 5 January, was his. He also agreed that there were letters written on the file after he had written the letter of January enclosing the account that were not before the Tribunal.

71 Senior counsel asked the practitioner about the earlier letter of 20 March which he had identified as his. The practitioner agreed that this was a standard request letter to a treating doctor. He agreed it was a generic letter, but said it was an important letter. He said that it was something that he prepared himself, put in the machine, put in the computer "and when these letters are sent, I've got to pay attention to them, because there - - as I said, they generate a report which can be very expensive to the client and they've to canvass the issues concerned specifically". However, he agreed that he would not have dictated that letter as it was a standard request letter and that Mrs EP would have produced it. He said however he would have "checked" this letter.

72 When the practitioner was asked whether he had earlier said that he had recalled "dictating" the letter he said that he didn't specifically dictate this one necessarily but dictated the style of letter to go into the precedent bank on the computer.

73 In relation to questions of costs the practitioner also acknowledged that he had charged out a telephone conversation involving one of his legal secretaries at the rate of $240 per hour, plus GST or $4 per minute.

74 He also agreed that two appointments which were charged out at $4 per minute before GST which in both cases were attended by Mrs EP and no one else from his firm.

75 In explanation as to why these apparently high rates had been charged for work done in relation to Mr R's file by a legal secretary and Mrs EP, the practitioner explained: "What I have done in relation to this account is I have put a loading in for my own involvement with respect to the file." He further explained:

> "I've loaded this to [$]240 an hour to take into account my involvement in the file, my meetings with [Mrs EP], my perusal of [the doctor's] reports, my general assistance and supervision of the file."

76 The practitioner agreed however that the services were provided by Mrs EP and not by him.

77 The practitioner also agreed that a rate of $264 per hour (including GST) was "a rate around about and not much below an appropriate rate for a senior practitioner", and said that "most practitioners around that time were charging around [$]280 to [$]300 per hour". He also agreed that at the material time in June 2002 the Supreme Court scale for practitioners was no more than $270 inclusive of GST, and went up to just over $310 after that time.

78 The practitioner also agreed, if one wanted to use this analogy, that for the "first five months of 2002, the rate that was applied to [the account he sent to the client] was very close to the maximum permitted for a senior practitioner in a Supreme Court matter".

79 The practitioner was then asked by senior counsel for the Complaints Committee: "Well, would you agreed that the rate of $264 per hour applied to time spent by [Mrs EP] was substantially in excess of what was reasonable?" The practitioner responded: "Yes. I agree that that's the case." He further accepted that to justify the amount it was necessary for him to display some involvement in the conduct of the file.

80 The practitioner also agreed that before his attempts in the Tribunal at the hearing to spell out, in some detail, what it was he had actually done on the client's file, he had not done so. His letters to the complaints officer did not provide any relevant detail.

81 The practitioner explained that in responding to the Committee's enquiries about the extent of his work in the matter he had not gone into any detail about the extent of his supervision of Mrs EP's work. He said he had made a deliberate decision to do this "… on the basis that I felt that if the Complaints Committee were going to try me by way of inquisition, then they would just have to prove their case against me."

82 When asked whether he had wished to avoid going into any detail, the practitioner again said that when it became clear that the Complaints Committee were going to pursue him he was not prepared to particularise his position until the hearing.

83 When cross examined about the allegation of holding out Mrs EP as a lawyer, the practitioner explained how law clerks are used in law firms both large and small. He referred to large legal firms operating with "highly trained law clerks doing lots of conveyancing work". In the case

of his firm he said he was "quite proud of the results we get on behalf of our clients in the workers compensation jurisdiction". He explained that Mrs EP "was specifically trained in workers compensation matters, because lawyers were not allowed to appear in the jurisdiction without leave at review stage, which meant that in any case coming up for initial application to conciliation, lawyers were not allowed - - [they] had no right of appearance". Accordingly, he explained that "Mrs [EP] was specifically trained in that regard". A "highly skilled law clerk" in his view was extremely helpful in the conduct of practice in this area of the law. Her ability to appear in review matters in workers compensation was a particular advantage.

84 The practitioner conceded that a person consulting a law firm about a workers compensation matter is entitled to know whether the person they are dealing with is a lawyer or a clerk. He said, however, Mrs EP was not mentioned in the letterhead of his firm as he is the only solicitor on the letterhead.

85 In re-examination, counsel for the practitioner drew the practitioner's attention to a document at page 119 of the book of documents and the practitioner said that "[he had] dictated that letter" and that was "one of the [letters he] was trying to find … [earlier] in the book". This was a letter that had arisen after the time of the difficulty when the client's expectations had not been met.

86 The practitioner confirmed that he had weekly meetings with Mrs EP as a matter of regular procedure. That didn't necessarily mean that a particular client's file would be discussed every week. Only if there were matters to discuss would that happen.

87 In response to some further questions from the President of the Tribunal, the practitioner said that if he wasn't putting a loading on the account reflecting his involvement, he would have expected to charge out Mrs EP's time at $160 per hour. He considered this to be an appropriate rate for an experienced law clerk. The practitioner further said that he did not provide Mrs EP with any instructions as how she should introduce herself when meeting a client in the firm's premises for the first time. He said it was a "developmental thing". The practitioner explained that Mrs EP's "initial employment with [him] was as a law clerk just specialising with small common law actions". When workers compensation came along he trained her in that. He did not have a protocol of how she should introduce herself to clients. He explained that Mrs EP was "excellent at her job" and he had "confidence in her".

Tribunal's findings as to factual matters

88 While there are three separate complaints against the practitioner concerning the manner in which he conducted legal practice, they revolve around the same set of facts.

89 There is no real dispute that the practitioner permitted a system of work whereby his law clerk, Mrs EP, on occasions saw prospective clients of the firm. In this case Mrs EP, the law clerk, saw Mr R, the prospective client, and his father. She took instructions, provided advice about the availability of a common law claim for injuries the client had suffered at work, as well his rights under workers compensation law. She indicated that she did not think the common law claim could succeed but that there might be rights under workers compensation law. Thereafter Mrs EP handled the file on behalf of the practitioner.

90 At no time did the practitioner see the client, or his parents; nor did the practitioner speak with the client or his parents. The practitioner sent out an account after the client's instructions to the firm were terminated. It was not initially intended that there would be a fee if the client's claim proved to be unsuccessful. But obviously, in circumstances where the client decided to terminate instructions, the practitioner decided to take another view of the matter. When the practitioner decided to charge he had the file costed out by another employee of his firm. Each attendance, telephone attendance, letter etc was noted and charged for. The rates charged out were rates well in excess of what should have been charged for if the work had been done by a legal secretary/clerical employee or an experienced law clerk and not by a legal practitioner. As to the work done by an experienced law clerk, on the practitioner's own evidence, the most that should have been charged was $160 per hour. The rates actually charged here were $240 per hour plus GST. This is much closer to the rate of a senior legal practitioner involved in commercial litigation in the Supreme Court at relevant times.

91 The question then, as the practitioner acknowledged, was whether the practitioner had any relevant involvement in the conduct of Mr R's file that justified him "loading" the law clerks' usual fee in the manner that he did.

92 In relation to the question of additional work done by the practitioner to justify the loading, the Tribunal is not satisfied on the evidence that the practitioner did anything material over and above the work done by Mrs EP. On the evidence, the only time that the practitioner really became involved in the matter in any material way, was when difficulties

arose been the client and the firm and Mrs EP brought the difficulties to the attention of the practitioner. At that point the practitioner reviewed the matter, confirmed the appropriateness of the work done and advice given by Mrs EP, and eventually sent out the account for the work done to the client.

93 While in the course of giving evidence both Mrs EP and the practitioner believed that there was at least one letter at material times that had been "dictated" by the practitioner, Mrs EP could not actually recall which letter that was, and the practitioner, when he had the opportunity to identify particular correspondence he had dictated, was unable clearly to do so. The only such documents that he could identify with any precision, were those effectively after the event when he wrote to the client and sent out the account.

94 On all the evidence the Tribunal is simply not satisfied that the practitioner had any active involvement in the work done on the file, although he remained generally responsible for the supervision of Mrs EP in relation to her work on the file and generally in relation to the conduct of the matter.

95 The Tribunal also finds that there is nothing in the evidence to suggest that the practitioner actively held Mrs EP out as a lawyer. However, the question raised by the references is whether he may be said constructively to have held her out as a lawyer and so misrepresented the status of his employee to the client. As a matter of fact, the Tribunal does not think that any constructive representation to this effect can be drawn in all the circumstances.

Unprofessional conduct

96 The test of what amounts to unprofessional conduct is well established. It may be summarised as conduct that would be reasonably regarded as disgraceful or dishonourable by a practitioner of good repute and competence, or conduct that, to a substantial degree, fell short of the standards of professional conduct observed or approved by members of the professiona of good repute and competence: ***Kyle v Legal Practitioners Complaints Committee*** (1999) 21 WAR 56 at 71 – 72 [61].

97 The obligations of a practitioner to supervise work performed by clerks within his or her firm were discussed by Malcolm CJ in ***D'Alessando and D'Angelo v Bouloudas*** (1994) 10 WAR 191 at 211 – 213. The following propositions may be derived from the Chief Justice's reasons:

(1) the obligation of the practitioner to supervise and employ a clerk is imposed in order to ensure that the client receives an appropriate standard of advice and service;

(2) failure to adequately supervise the work of the clerk may constitute unprofessional conduct;

(3) the nature and extent of the obligation to supervise will depend upon the particular circumstances in which the solicitor's practice is conducted;

(4) 'the level of supervision required will vary according to the level of competence and experience of the clerk, but it must remain supervision and not amount to complete delegation;

(5) the supervising solicitor should settle and sign all of the clerk's letters (except formal letters);

(6) there should be in place a system by which each file relating to a matter to which the clerk has the conduct is reviewed by the solicitors at appropriate periodic intervals;

(7) proofing witnesses and discovery and inspection of documents must be carried out under the direction of and specifically reviewed by the supervising solicitor;

(8) so called general supervision which relies on the clerk bringing any difficulty to the attention of the solicitor would not be sufficient.

98 The rendering of grossly excessive fees for legal services may amount to unprofessional conduct: ***D'Alessandro v Legal Practitioners Complaints Committee*** (1995) 15 WAR 198 at 214; ***De Pardo v Legal Practitioners Complaints Committee*** [2003] WASCA 274 at [5]. Factors relevant to determining what a reasonable fee were discussed in ***D'Alessandro v Legal Practitioners Complaints Committee*** (supra) at 214.

99 It is not necessary in every complaint of unprofessional conduct by grossly excessive charging, to determine what a reasonable charge would have been in the circumstances, if the amount actually charged was grossly excessive: ***De Pardo v Legal Practitioners Complaints Committee*** [2003] WASCA 274 at [18] – [20]*;* ***De Pardo v Legal Practitioners Complaints Committee*** (2000) 170 ALR 709 (Fed C of A) at 725 – 726 [44]–[46].

100 Where there is no applicable scale imposed by way of determination under the relevant legislation controlling a legal practitioner, guidance may be derived, by way of analogy, on an appropriate scale which is substantially similar in nature and responsibility to the business which is the subject of the bill: ***Pryles & Defteros v Green*** [1999] WASC 34 at [27].

Findings in relation to the first complaint

101 As to the first complaint, that the practitioner was guilty of neglect in the course of the practice of the law of the file of his client between in or around December 2001 and December 2003, the burden of the complaint is that the practitioner failed to supervise his law clerk in the performance of her work in a material sense.

102 The Tribunal is of the view that this allegation has been made out. The material facts show that, from the time the prospective client attended at the practitioner's firm to obtain legal advice about his rights to damages or workers compensation, when he was referred to the law clerk and she advised him and handled his file, until late in the piece, the practitioner had no active role in the conduct of the file.

103 At the first conversation it was the law clerk who advised the client that he would not have a common law claim in respect of his work related injuries but might be able to pursue compensation in another form. The practitioner's confirmation of this advice was not sought.

104 In effect, the law clerk was permitted to act as a practitioner might with either no or inadequate supervision. The practitioner should have had in place a proper system that ensured his actual involvement or supervision of all files handled by the law clerk from the time of the initial consultation with the client. He failed to do so.

105 At material times, the law clerk acted without any direct supervision from the practitioner. It was not until the client was informed that the workers compensation insurers were not prepared to pay out any significant sum on account of compensation, save for amounts referred to in the second schedule of the workers compensation legislation, and the client became "difficult" (some two years later) that the client's affairs were in any material way referred to the practitioner.

106 The practitioner's case was that, his law clerk was very experienced had worked with other law firms, and following further training from him, very competent in handling workers compensation matters. She dealt

with a range of insurers. They knew her and she knew them. She was very competent in what she did. It followed, in the practitioner's submission, that close supervision was not required.

107 The Tribunal considers that much of this may be so, but the law clerk is not a legal practitioner. The practitioner more or less delegated to her the function of seeing clients in the first instance, imparting legal advice to them, opening a file and then acting on their behalf thereafter. Only if anything "out of the ordinary" arose would the law clerk refer a file to the practitioner.

108 In the Tribunal's view the degree of automony given or allowed by the practitioner to the law clerk in this particular case was inappropriate and inadequate. While the law clerk met with the practitioner weekly, according to an established protocol put in place by the practitioner, to discuss files she was handling, she would only raise matters at those weekly meetings on which she thought she needed guidance.

Findings in relation to the second complaint

109 As to the second complaint, that the practitioner charged unreasonable fees, the Tribunal considers this complaint has been made out.

110 It is the Tribunal's view, whether one adopts by analogy the 2002/2003 rates published under the *Workers Compensation and Rehabilitation Act 1981* (WA) or the Supreme Court scales, the charge rate used of some $264 inclusive of GST, was grossly over the rate.

111 The practitioner agreed that if it weren't for the additional work he claimed he had done on the file, the amount charged would have been unreasonably high for a law clerk. On the practitioner's own assessment, a law clerk on the Supreme Court scale at the material time might have justified an hourly rate of $160 inclusive of GST.

112 It is not necessary for the Tribunal to find whether the workers compensation costs analogy is the correct one. The Tribunal considers that on whatever scale one measures, the practitioner grossly overcharged the client.

113 We do not believe that the practitioner is able to point to any particular work that he did that would justify a "loading" of the law clerk's work to the extent that he has claimed it.

114 Indeed, as we have found, the evidence suggests that up until the client became dissatisfied with the advice he was receiving later in the piece, the law clerk handled the file from the beginning to the end. She deposed that she did not have any particular reason to seek the guidance or supervision of the practitioner until that time. The practitioner's claim that he dictated a letter to a medical practitioner was soon disavowed by him. The practitioner recognised only one letter (in the course of re-examination) that he wrote.

115 The practitioner's claim that he had in effect been reading all of the medical reports on the file, lacks substance. There were not that many medical reports and having regard to the sequence of activity revealed by the practitioner's file, he was simply not involved in the conduct of the file at material times to the extent he implied.

Findings in relation to the third complaint

116 As to the third complaint, that the practitioner constructively represented that the legal clerk was a legal practitioner, as noted earlier, the Tribunal is not satisfied that the practitioner constructively represented the law clerk to be a lawyer.

117 There is much to be said for the view that good practice requires a legal practitioner who engages a law clerk to see one of his clients, to ensure the client is informed that he or she is not a legal practitioner, but is working under the supervision of the legal practitioner. This should be an aspect of the system of supervision of the clerk. However, the fact that the law clerk in this particular case did not reveal to the client the fact that she was only a law clerk does not, in itself, provide the necessary foundation for the constructive representation asserted on behalf of the Complaints Committee. Counsel for the Committee contended that the failure by the clerk to disclose her status was, without more, sufficient to render the practitioner liable for constructive misrepresentation; that the liability of the practitioner on this basis is akin to a vicarious responsibility.

118 The Tribunal is unable to accept this proposition because of the far-reaching consequences it entails. In addition to the heavy penalties which may be imposed under the Act, a conviction can, and more often than not does, cause serious damage to the reputation of the legal practitioner concerned. To hold a practitioner responsible for what a clerk may or may not have told a client merely because of the relationship of principal and employee, could, without more, render every partner in a large firm

without knowledge of the representation liable for the very consequences which it is sought to be imposed in the instant case.

119 If the submission made on behalf of the Committee were correct, a principal would similarly be liable to conviction if a clerk were to represent positively to a client without the knowledge of the practitioner that he/she was a qualified lawyer. A conviction of a practitioner for unprofessional conduct in such circumstances could, in our view, never have been contemplated by the legislature for the reasons stated above.

120 In our view any representation as to her status which may have been made to the client in this case was that of the clerk which cannot, without more, be sheeted home to the practitioner. In the absence of any evidence that the practitioner was aware, aided, abetted or condoned the making of the representation (assuming that a failure to disclose her status constituted a representation by Mrs EP to the client) the third allegation cannot succeed.

121 Counsel for the Committee submitted that the fact that the law clerk, after the initial interview with the client, wrote letters on behalf of the firm that she signed in her own name without indicating her professional status, added to the matrix of facts from which the constructive representation could be drawn.

122 However, the Tribunal is not satisfied that these letters necessarily represented anything to the client, following the first interview. Most of the correspondence, apart from some to the client, was with insurance companies or medical practitioners or the like. Indeed, on the evidence received by the Tribunal there is some possibility that the insurance companies, at least, would have appreciated the law clerk was indeed a law clerk and not a practitioner, by reason of prior dealings with her.

123 In the end, the Tribunal considers that something more was required to show that by the conduct of his practice the practitioner constructively represented the law clerk as a legal practitioner.

124 However, as we have stated, we think that good legal practice requires a law firm or a sole practitioner who engages a law clerk and authorises the clerk on occasion to see a client, to instruct those clerks to make their status clear and in addition to disclosing to the client that they work under the direct supervision of a particular practitioner, the practitioner must of course also ensure there is a proper system of supervision in place. If the primary disclosure is made to a client, the client may object or demand to see a legal practitioner.

Conclusions

(1) As to the complaint that the practitioner was guilty of neglect in the course of the practice of the law of the file of his client between in or around December 2001 and December 2003, the Tribunal finds the practitioner guilty.

(2) As to the complaint that the practitioner was guilty of unprofessional conduct in charging his client for the time spent by the practitioner's clerk at the rate of $240 per hour plus GST, which was grossly in excess of the amount he was permitted to charge, the Tribunal finds the practitioner guilty.

(3) As to the complaint that the practitioner was guilty of unprofessional conduct by constructively misrepresenting by conducting his legal practice in such a way as to convey or permit to be conveyed the impression to his client that his clerk was a lawyer, the Tribunal finds the practitioner not guilty.

125 The Tribunal will now hear from the parties as to penalty in light of these findings.

I certify that this and the preceding [125] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE M L BARKER, PRESIDENT