

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE and SEGLER [2009] WASAT 205 (S)

MEMBER : JUSTICE J A CHANEY (PRESIDENT)
JUDGE J PRITCHARD (DEPUTY PRESIDENT)
MR J MANSVELD (MEMBER)

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 21 OCTOBER 2009

**SUPPLEMENTARY
DECISION** : 11 MARCH 2010

FILE NO/S : VR 210 of 2008

BETWEEN : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Applicant

AND

MARTIN LEE SEGLER
Respondent

Catchwords:

Legal practitioners - Professional misconduct and unsatisfactory professional conduct - Solicitor encouraging client to act contrary to law - Deliberately misleading regulatory authority - Appropriate penalty

Legislation:

Builders' Registration Act 1939 (WA), s 4

Inheritance (Family and Dependants Provision) Act 1972 (WA)

Legal Profession Act 2008 (WA), s 252, s 263(2)(c), s 291, s 291(1), s 291(2), s 402, s 403, s 572

Result:

Practitioner suspended from practice for three months for professional misconduct

Practitioner suspended from practice for two months for unsatisfactory professional misconduct

Category: B

Representation:

Counsel:

Applicant : Mr M Herron and Ms P Le Miere
Respondent : Self-represented

Solicitors:

Applicant : Law Complaints Officer
Respondent : Self-represented

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

A Solicitor v Law Society (NSW) (2004) 216 CLR 253

Barristers Board v Darveniza [2000] 12 A Crim R 438

Legal Practitioners Complaints Committee and Benari [2005] WASAT 213(S)

Legal Practitioners Complaints Committee and Segler [2009] WASAT 205

Legal Practitioners Complaints Committee v Pepe [2009] WASC 39

Legal Profession Complaints Committee v Sorensen [2009] WASAT 104

Medical Board of Western Australia and Roberman [2005] WASAT 81(S)

Mijatovic v Legal Practitioners Complaints Committee (2008) 37 WAR 149

Re Maraj (a Legal Practitioner) (1995) 15 WAR 12

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 On 21 October 2009, the Tribunal published reasons for decision in respect of a complaint brought by the Legal Practitioners Complaints Committee against a solicitor, Mr Martin Lee Segler. The Tribunal made findings of professional misconduct and unsatisfactory professional conduct against Mr Segler. The parties then made written submissions as to penalty.

2 The Complaints Committee sought orders that the practitioner be reprimanded, and that his practising certificate be suspended for a period of six months, or alternatively that a fine of \$10,000 in respect of the finding of professional misconduct and \$7,500 in respect of the finding of unsatisfactory professional conduct be imposed. The Complaints Committee also sought an order for payment by the practitioner of its costs in relation to the proceedings.

3 The Tribunal considered the principles to be applied in relation to disciplinary penalties, the nature of the findings against Mr Segler and the parties' respective submissions. Having considered those matters, the Tribunal concluded that the appropriate penalty in relation to the finding of professional misconduct was that the practitioner be suspended from practice for a period of three months. In relation to the finding of unsatisfactory professional conduct, the Tribunal concluded that an appropriate range of penalties included suspension from practice or a substantial fine, but having regard to the effect on the practitioner's financial position of the suspension for professional misconduct, it concluded that a two month period of suspension in relation to the unsatisfactory professional conduct, rather than a substantial fine, was appropriate. The Tribunal ordered that the practitioner should pay the costs claimed by the Complaints Committee, which consisted only of its disbursements including counsel fees.

Introduction

4 In a decision delivered on 21 October 2009 (*Legal Practitioners Complaints Committee and Segler* [2009] WASAT 205) (the original reasons) we made findings that:

1. Between 9 November 2006 and 28 February 2007, Mr Segler was guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) (LP Act) in that

in the course of acting for Antonio Armando Vallelonga, Mr Segler advised Mr Vallelonga that he ought to carry out building projects at a time when Mr Segler knew that Mr Vallelonga was unregistered as a builder and in the knowledge that by so advising Mr Vallelonga, he was encouraging Mr Vallelonga to breach s 4 of the *Builders' Registration Act 1939* (WA); and

2. On or about 3 April 2007, Mr Segler was guilty of unsatisfactory professional conduct contrary to s 402 of the LP Act in that, upon being asked by the Legal Practitioners Complaints Committee (Complaints Committee) to provide his response to a complaint against him, Mr Segler gave a response which was deliberately misleading and designed to avoid giving a complete explanation at that time.

5 The Tribunal directed that the Complaints Committee and the practitioner file submissions on penalty, and that the question of penalty should be dealt with on the papers. The parties subsequently filed their written submissions in accordance with those directions.

The principles to be applied

6 It is well settled, and was not in dispute before us, that the object of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession, rather than punishment - *Re Maraj (a Legal Practitioner)* (1995) 15 WAR 12 at [24] - [25].

7 As the court in *Re Maraj* stated, the significance of the object in relation to the protection of the public is that, in order to protect the public and the reputation of the profession, the consequences for the practitioner may need to be more severe than they would be if the only object of the proceedings was one of punishment.

8 In *Legal Practitioners Complaints Committee v Pepe* [2009] WASC 39, Murray and Beech JJ at [12] cited with approval the judgment of Thomas JA, McMurdo P and White J in *Barristers Board v Darveniza* [2000] 12 A Crim R 438 at 446 – 447 [38] where they said:

Striking off is of course reserved for the very serious cases where the character and conduct of the practitioner is seen to be inconsistent with the privileges of further practice. Suspension is a less serious result, firstly because a limited period is specified and secondly because the right to

resume practice is then preserved without any further onus upon the practitioner to prove that he or she is now a fit and proper person to practice.

The proper use of suspension is, in my opinion, for those cases in which a legal practitioner has fallen below the high standards to be expected of such a practitioner, but not in such a way as to indicate that he lacks the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner. (In *Re A Practitioner* (1984) 36 SASR 590 at 593 per King CJ.)

- 9 A solicitor is under a duty of candour when dealing with courts and regulatory or disciplinary authorities investigating a complaint against him or her, and a breach of that duty constitutes professional misconduct which is treated very seriously: *A Solicitor v Law Society (NSW)* (2004) 216 CLR 253 at [30] and [38].

The Complaints Committee's submissions

- 10 The Complaints Committee notes that Mr Segler has previously been found guilty of unprofessional conduct on two occasions in relation to six separate offences. In 2001, the practitioner pleaded guilty to unprofessional conduct in that in 1997 he applied trust monies to payment of costs and disbursements without serving a bill of costs on the client within 14 days. He also pleaded guilty to an allegation of neglect and undue delay in relation to the same client. The practitioner was fined \$1,250, the Tribunal taking into account that he had already paid indemnity costs of \$11,000 to the client in relation to the matter.
- 11 In 2003, the practitioner was found guilty of three complaints in respect of another matter involving a failure to properly make a claim under the *Inheritance (Family and Dependants Provision) Act 1972 (WA)* between 1997 and 1999. The Tribunal ordered that the practitioner only practice as an employed solicitor for two years, and pay fines totalling \$7,500 together with costs.
- 12 On 11 May 2009, the practitioner was found guilty of unprofessional conduct in relation to a letter he sent using his professional letterhead which contained threats and inappropriate and intimidating demands in relation to legal proceedings in which he was a party. The date on which the letter was written post-dates the actions the subject of these proceedings. The practitioner was reprimanded, fined \$2,500 and ordered to pay the Complaints Committee's costs.

13 The Complaints Committee observes that, in finding the practitioner guilty of professional misconduct in these proceedings, the Tribunal:

- i) rejected the practitioner's evidence that he believed that his advice given to Mr Vallelonga was sound in law and found the practitioner did not believe his advice to be sound in law;
- ii) found the only inference reasonably open was the practitioner was well aware that if his client worked as a builder he would be in breach of the *Builders' Registration Act 1939*;
- iii) found there was no reasonable basis for the practitioner's view that prosecution action would not be taken against the client;
- iv) found the practitioner effectively encouraged his client to engage in illegal conduct as an unregistered builder in the knowledge that the potential consequences for Mr Vallelonga were serious;
- v) found the practitioner's conduct constituted a breach of r 13.1 of the Law Society of Western Australia Professional Conduct Rules and involved a substantial failure to reach or maintain a reasonable standard of competence.

14 The Complaints Committee contends that the findings establish a lack of integrity and honesty by the practitioner and that he demonstrated a lack of remorse by seeking to justify the advice which he gave. It submits that he has not shown any acknowledgement that he has failed to maintain a proper standard of professional conduct nor has he shown any comprehension or insight as to why his conduct fails to meet those standards.

15 The Complaints Committee, at [17] in its written submissions, made reference to a passage in the judgment of Beech AJA in *Mijatovic v Legal Practitioners Complaints Committee* (2008) 37 WAR 149 at [284]. The Complaints Committee submitted, in reliance on that passage, that:

In the circumstances in which the practitioner maintained the submission (that the complaint should be dismissed on the basis of Mr Vallelonga's evidence) after it was put to him that the submission was inconsistent with his own evidence and the basis upon which he had defended the

proceedings, the practitioner was on notice that any adverse finding made against him in consequence of his submission might be relied upon by the Tribunal in determining penalty.

16 The point of the submission is not entirely clear. In the cited passage in *Mijatovic*, Beech AJA said:

In my opinion, the position may be summarised as follows. In the course of making findings as to contested matters of fact, the Tribunal can consider the evidence of the various witnesses, including the practitioner, in the ordinary way. In the course of so doing, it may find that a particular witness, including a practitioner, was a dishonest witness and reject the witnesses' evidence on that basis. However, such a finding of dishonesty may not be used to determine the appropriate orders to be made in respect of the practitioner unless one of two conditions exists:

- (a) the complaint has been amended to complain of the practitioner's dishonesty in relation to the evidence; or
- (b) the way in which the proceedings were run means that the practitioner was on notice that there was a risk of a finding of dishonest evidence being made and used by the disciplinary body in determining what final order should be made, and the practitioner has an adequate opportunity to deal with the prospect of such a finding.

17 In this case, the Tribunal did not accept the evidence of Mr Vallelonga concerning Mr Segler's advice to him. That evidence was found to be unreliable in part because of its inconsistency with the practitioner's evidence, the practitioner's correspondence with the Builders' Registration Board and the manner in which the practitioner had conducted his defence. However, we do not agree that the way in which the proceedings were run put the practitioner on notice that there was a risk of a finding that preference of Mr Vallelonga's evidence over his own would be used by the Tribunal in determining the orders which should be made. Nor was he put on notice generally that rejection of his evidence, whether as dishonest or for any other reason, would be used in determining penalty. Accordingly, we do not consider that the observations of Beech AJA set out above are relevant for present purposes.

18 With respect to the finding of unsatisfactory professional conduct by giving a deliberately misleading response to the Complaints Committee, the Complaints Committee submits that the position which the practitioner sought to maintain in his evidence in the hearing demonstrates his lack of remorse, and lack of understanding of his duties and responsibilities as a

legal practitioner and of why his conduct is less than the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

- 19 The Complaints Committee submits that neither the profession nor the public can have any confidence in the integrity and honesty of the practitioner, or any confidence that he will learn to conduct himself so as to maintain the proper standards of the legal profession, unless his privilege and right to practice is temporarily withdrawn. It submits that in order to protect the public and to impress upon both the practitioner and the wider profession that his conduct constitutes a serious breach of his professional duties and obligations, a substantial period of suspension should be imposed. Alternatively, it suggests a fine of \$10,000 in respect to the finding of professional misconduct, or a fine of \$7,500 for unsatisfactory professional conduct by deliberately misleading the Complaints Committee.

The practitioner's submissions

- 20 The practitioner's first submission was to the effect that his conduct in relation to the first finding against him did not amount to professional misconduct. That submission is, of course, contrary to the finding against Mr Segler in the substantive proceedings – see [100] of the original reasons. That is not a matter to be revisited in the context of consideration of penalty in relation to the findings made.

- 21 Having noted that the object of disciplinary penalties is not to punish, but to maintain proper standards in the legal profession and the protection of the public, the practitioner made the following submissions:

2. The Respondent practitioner's error does not fall within the intent, ambit or otherwise purpose of the Tribunal's requirements in that regard. With respect to the 'protection of the public' it must be noted that the Builder's [sic] Registration Board chose not to prosecute Mr Vallelonga on the occasion that his registration was first cancelled and subsequently after the stay of that cancellation was discharged. There is no issue of 'protection of the public' arising thereby, rather the Respondent practitioner, at all times, endeavoured to communicate to Mr Vallelonga that client's dilemma and otherwise protect his livelihood. No member of the public, nor any regulatory authority, suffered any loss, inconvenience or damage in those respects.
3. In this case the Tribunal did not find there to be any issue of untrustworthiness or dishonesty on the part of the Respondent practitioner, rather the Tribunal was concerned with the issue of the

Respondent practitioner's insight in respect of his conduct by the advice he gave his client. The Respondent practitioner understands and appreciates the serious view of the Tribunal in respect of its findings and there is no likelihood whatsoever, having regard to the consequences of this exercise, of advice of that nature being repeated to his clients.

22 Those submissions are consistent with the position adopted by the practitioner at the hearing – see [69] of the original reasons. The Tribunal's conclusions in relation to the matter set out in para 2 of Mr Segler's submissions on penalty are to be found at [86] - [87] of the original reasons.

23 Finally, the practitioner submitted that the imposition of a suspension from practice would have severe implications for the practitioner. He is a sole practitioner who employs staff including his wife in an administrative capacity, a paralegal foreign law graduate and a casual reception/typist. He is the only legal practitioner in the firm. Mr Segler observes that suspension would require his clients to be referred to a range of other firms with the potential to cause adjournments of pending trials as well as stress and inconvenience to the clients. Because his wife works with him in the practice, his suspension from practice would result in no income for his family and 'would necessarily also result in the bankruptcy of both the respondent practitioner and his wife'. He submits that a suspension would represent a crushing penalty and cause damage to his practice in circumstances where the 'matter has not caused any personal loss, damage or inconvenience'.

The appropriate penalty

24 As we observed in [87] of the original reasons, lawyers have a duty to foster respect for the law and its administration. We also observed 'it is inimical to the role and function of a legal practitioner that he or she advise or encourage a client to breach the law, regardless of whether the breach might be detected or prosecuted'.

25 This is an important principle. The privileges enjoyed by legal practitioners carry with them important obligations and duties as officers of the court. Legal practitioners play a vital role in the proper administration of the law.

26 Mr Segler has been found to have effectively encouraged his client to engage in illegal conduct. The practitioner's submissions on penalty suggest that, even after findings against him, and reasons for those findings explained in some detail, he lacks insight into the unacceptable

nature of his conduct. We accept the submissions of the Complaints Committee concerning the practitioner's failure to acknowledge, or indeed to understand, the unacceptable nature of his conduct, and as to his apparent lack of remorse.

27 The protection of the public which forms a purpose of the imposition of disciplinary penalties is not confined to ascertaining whether any person suffered loss or damage as a result of the conduct. The protection of the public involves consideration of the wider question of the proper administration of the law and public interest generally. Protection of the public requires that the legal profession, and the individual lawyers within it, maintain the highest professional standards and properly serve the due administration of the law. For a lawyer to encourage a client to act illegally is a very serious matter, and as we have found, amounts to a substantial failure to maintain a reasonable standard of competence and diligence so as to amount to professional misconduct for the purposes of the LP Act, s 403.

28 In our view, a period of suspension from practice is appropriate as a penalty for the finding against Mr Segler of professional misconduct.

29 We acknowledge that this penalty will have a severe impact on Mr Segler's practice. As noted by Franklyn J in *Re Maraj*, in the passage set out above, a disciplinary penalty may need to be more severe than would be the case if the only object of the proceedings was one of punishment. Conduct by a legal practitioner which encourages a breach of the law in our view should attract a penalty which demonstrates to the public and the profession that that conduct is completely unacceptable and will attract a severe penalty. The protection of the public also requires that the offending practitioner be deterred from conduct of that nature in future. A severe penalty is required to demonstrate to Mr Segler the unacceptability of his conduct which, his submissions suggests, he continues to seek to justify.

30 We consider that a period of three months suspension is an adequate penalty. In the circumstances of the practitioner, three months' suspension from practice is likely to impose significant financial difficulty. It is sufficient, in our view, to demonstrate to the public, the profession, and the practitioner, the seriousness with which conduct of this nature will be dealt.

31 With respect to the finding of unprofessional conduct, the
Complaints Committee also submits that a period of suspension of the
practitioner's practice certificate should be imposed.

32 At [112] of the original reasons, we concluded that Mr Segler's letter
of 3 April 2007 to the Complaints Committee was deliberately
misleading. The Complaints Committee relies upon an observation of the
Tribunal in *Legal Profession Complaints Committee v Sorensen*
[2009] WASAT 104 at [21] where it was said that:

The intentional misleading of a registration authority might usually be
expected to attract a penalty not less severe than suspension of a practice
certificate.

33 As the decision in *Sorensen* demonstrates, the penalty to be imposed
in any particular case will depend upon the particular circumstances of the
case.

34 Other than to suggest that suspension should not be imposed because
of its crushing effect on him, the practitioner did not address the penalty
in relation to the finding of unsatisfactory professional conduct in
misleading the Complaints Committee. The Complaints Committee
suggested, as an alternative to suspension, a substantial fine. It may be
that, viewed in isolation, a substantial fine may have been the appropriate
disposition in relation to the finding of unsatisfactory professional
conduct, bearing in mind that the Complaints Committee did not allege
that the conduct amounted to professional misconduct. We accept that a
substantial fine, or suspension, are both within the range of possible
outcomes in relation to the finding against Mr Segler of unsatisfactory
professional conduct by misleading the Complaints Committee. Having
regard to our conclusion that suspension is appropriate for the finding of
professional misconduct, we consider that a term of suspension of
two months is appropriate in respect to the finding of misleading the
Complaints Committee. That term should commence at the same time as
the three month period of suspension imposed in respect to the
professional misconduct finding.

35 The effect of this penalty is to reflect the seriousness of the finding
against Mr Segler, but at the same time to avoid him having to pay a
substantial fine where it would appear his capacity to pay that fine is
likely to be severely limited by reason of his suspension on the other
finding.

36 The question arises as to when any suspension should commence. We are mindful that Mr Segler conducts a sole practice, and that his suspension from practice is likely to cause inconvenience, and possible prejudice, to his clients, especially those who may have impending trial dates. It is appropriate that Mr Segler have the opportunity to minimise the disruption and inconvenience to his clients. Where hearings are shortly to occur, it may not be possible for alternative representation to be arranged without adjournment of trials. Accordingly, we consider it appropriate to have the period of suspension commence 60 days from the date of these orders so that sufficient time is provided for Mr Segler to arrange other representation of his clients, or to appear for those clients if appearances are required within a short period.

Costs

37 The well-settled practice of the Tribunal is that, where disciplinary proceedings have been commenced in the public interest by a vocational regulatory body, and the vocational regulatory body has been successful in the prosecution of those proceedings, the respondent to the proceedings will ordinarily be ordered to contribute to the costs of the proceedings incurred by the vocational regulatory body - *Medical Board of Western Australia and Roberman* [2005] WASAT 81(S) at [30]; *Legal Practitioners Complaints Committee and Benari* [2005] WASAT 213(S) at [20] - [28].

38 In this case, the Complaints Committee seeks payment of its disbursements which comprise counsel fees totalling \$9,350 and filing and other fees totalling \$324, making a total of \$9,674. The Complaints Committee makes no application to recover any costs in respect of its own time and expenses in prosecuting the action.

39 The Complaints Committee submits that it has been entirely successful in the applications brought against the practitioner. It submits that the practitioner's conduct in the course of the proceedings made them longer and more expensive than they needed to be, and makes reference to the practitioner's overall lack of preparedness, his non-compliance with directions and the adjournments at his request which caused delay and expense. The submissions are well founded as the history of proceedings set out at [6] - [16] of the original reasons demonstrates.

40 In response, Mr Segler contends that the invoices rendered by counsel to the Complaints Committee and attached to the Complaints Committee's submissions do not comply with the LP Act and 'are not enforceable bills of legal costs and no order can be made in

relation thereto'. He contends that the accounts rendered do not conform with Div 7 of Pt 10 of the LP Act in that they do not incorporate the written statement and notice of rights required by that part of the Act. Presumably, the practitioner is referring to s 291 of the LP Act which requires a bill to be accompanied by a written statement setting out certain information. Section 291(2) stipulates that that requirement does not apply in relation to a 'sophisticated client'. A sophisticated client is defined to include a client who is an Australian legal practitioner - s 252 and s 263(2)(c) LP Act. The law complaints officer, to whom the accounts were rendered, must be an Australian legal practitioner – s 572, LP Act. Section 291(1) of the LP Act does not apply to the accounts rendered by counsel to the law complaints officer.

41 In any event, it is apparent that the Complaints Committee has incurred a liability, and presumably paid, the disbursements to counsel represented by a counsel's fee note. It has also incurred the disbursements for filing fees and witness summons fees paid to the Tribunal. There is no reason to depart from the usual approach in relation to the payment of costs in successful vocational regulatory proceedings. We are satisfied that the quantum of costs claimed by the Complaints Committee, limited as it is to its proper disbursements, is reasonable, and should be allowed in the amount claimed.

Orders

1. In relation to the finding that between 9 November 2006 and 28 February 2007, Mr Segler was guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) in encouraging Mr Vallelonga to breach s 4 of the *Builders Registration Act 1939* (WA), Mr Segler's local practising certificate is suspended for a period of three months to commence 60 days from the date of this order.
2. In relation to the finding that on or about 3 April 2007, Mr Segler was guilty of unsatisfactory professional conduct contrary to s 402 of the *Legal Profession Act 2008* (WA) by giving a response to the Legal Practitioners Complaints Committee that was deliberately misleading and designed to avoid giving a complete explanation at that time, Mr Segler's local practising certificate is suspended for a period of two months to commence 60 days from the date of these orders.

3. The respondent is ordered to pay the applicant's costs of the proceedings fixed in the sum of \$9,674.

I certify that this and the preceding [41] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE J A CHANEY, PRESIDENT