JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
STREAM	:	VOCATIONAL REGULATION
ACT	:	LEGAL PROFESSION ACT 2008 (WA)
CITATION	:	LEGAL PROFESSION COMPLAINTS COMMITTEE and SEGLER [2010] WASAT 135 (S)
MEMBER	:	JUDGE J ECKERT (DEPUTY PRESIDENT) MR D R PARRY (SENIOR MEMBER) MR G POTTER (SENIOR SESSIONAL MEMBER)
HEARD	:	DETERMINED ON THE DOCUMENTS
DELIVERED	:	30 SEPTEMBER 2010
SUPPLEMENTARY DECISION	:	14 DECEMBER 2010
FILE NO/S	:	VR 199 of 2009
BETWEEN	:	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND MARTIN LEE SEGLER Respondent

Catchwords:

Legal practitioners - Professional misconduct - Unsatisfactory professional conduct - Penalty - Suing for recovery of disbursement (counsel's fees) without serving bill for disbursement - Letter containing improper threats and inappropriate demands - Knowingly misleading the court - Failure to lodge statement of defence - Failure to notify client that practitioner had ceased to act

for client - Whether report should be transmitted to Supreme Court (full bench) with a recommendation that the practitioner be removed from the Roll of Practitioners - Whether practitioner is not a fit and proper person to practice law - Practitioner's disciplinary history - Suspensions from practice, reprimand and fines imposed

Legislation:

Builders' Registration Act 1939 (WA)
Criminal Code Act 1995 (Cth), s 474.17(1)
Inheritance (Family and Dependents Provision) Act 1972 (WA)
Legal Practice Act 2003 (WA), s 230, s 230(1), s 232(3), s 237(1)
Legal Profession Act 2008 (WA), s 438(1), s 438(2), s 438(2)(b), s 438(2)(b), s 438(4), s 439(a), s 441
State Administrative Tribunal Act 2004 (WA), s 60(2), s 87(2)

Result:

The practitioner's local practicing certificate is suspended from 15 December 2010 to 14 February 2011 inclusive and the practitioner must pay fines totalling $7,500 to the Legal Practice Board and costs in the sum of $8,000 to the Legal Profession Complaints Committee by 13 February 2011

Category: B

Representation:

Counsel:

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

Solicitors:

Applicant	:	Law Complaints Officer
Respondent	:	Self-represented

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

Legal Practitioners Complaints Committee and Segler [2009] WASAT 205
Legal Practitioners Complaints Committee and Segler [2009] WASAT 205 (S)
Legal Practitioners Complaints Committee and Segler [2009] WASAT 91
Legal Practitioners Complaints Committee and Segler [2009] WASAT 91 (S)
Legal Practitioners Complaints Committee and Vogt [2009] WASAT 125
Legal Profession Complaints Committee and Segler [2010] WASAT 135
Legal Profession Complaints Committee v Brennan [2010] WASC 198
Medical Board of Western Australia and Roberman [2005] WASAT 81 (S)
Re Maraj (a Legal Practitioner) (1995) 15 WAR 12
Vogt v Legal Practitioners Complaints Committee [2009] WASCA 202

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The Tribunal found that a legal practitioner, Mr Martin Lee Segler, is guilty of unsatisfactory professional conduct in three respects and is guilty of professional misconduct in three respects. The Tribunal made orders for the determination of penalty entirely on the documents pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA).

2 The Legal Profession Complaints Committee contended that the practitioner is not a fit and proper person to practice law and sought an order pursuant to s 438(2) of the *Legal Profession Act 2008* (WA) for the Tribunal to make and transmit a report on its findings to the Supreme Court (full bench) with a recommendation that the respondent be removed from the Roll of Practitioners.

3 The Tribunal was not satisfied that the practitioner is not a fit and proper person to remain a member of the legal profession. The Tribunal determined that the protection of the public in their dealing with lawyers and the maintenance of proper standards in the legal profession requires that the practitioner be suspended from legal practice for two months on account of one finding of professional misconduct and for one month on account of another finding of professional misconduct (with the suspensions to operate concurrently) be reprimanded on account of the third finding of professional misconduct and pay fines totalling $7,500 on account of the third finding of professional misconduct and the three findings of unsatisfactory professional conduct. The practitioner was also ordered to pay the Legal Profession Complaints Committee's costs in the sum of $8,000.

Introduction

4 On 30 September 2010, the Tribunal found, pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) (LP Act), that a legal practitioner, Mr Martin Segler (practitioner), was guilty of three counts of unsatisfactory professional conduct and three counts of professional misconduct: ***Legal Profession Complaints Committee and Segler*** [2010] WASAT 135 (original reasons). The Tribunal found that the practitioner was guilty of unsatisfactory professional conduct:

- by suing a client, DC (first client), for recovery of a disbursement (counsel's fees) without having served on the first client a bill for the disbursement and failing

to discontinue those proceedings, contrary to s 230(1) of the *Legal Practice Act 2003* (WA) (2003 Act);

- by failing to comply with a written request dated 18 January 2008 from the first client's new solicitor to lodge four bills of costs dated 10 January 2008 with a taxing officer, contrary to s 237(1) of the 2003 Act; and

- by failing to advise a client, NC (second client), the first client's son, that the practitioner had received an itemised bill of costs from the second client's former solicitors and to seek the second client's instructions as to whether the practitioner should serve a notice of intention to have the bill taxed within 30 days of service of the itemised bill, that is, on or before 5 October 2007.

5 The Tribunal found that the practitioner was guilty of professional misconduct:

- by sending a letter containing improper threats and inappropriate demands to the first client;

- in order to advance his own interests, by knowingly and intentionally misleading Magistrate Musk on 11 January 2008 during the hearing of an ex parte application filed by and on behalf of the practitioner for an interim violence restraining order against the first client, by asserting that the first client had a criminal record, when that was not the case; and

- by failing to file a statement of defence in a proceeding brought against the second client by his former solicitors by 27 December 2007, to inform the second client that he had not filed a statement of defence by 27 December 2007, or at all, to inform the second client that his former solicitors were entitled to apply for default judgment without further notice, and to serve a copy of a notice of change of address for service that the practitioner had filed with the Magistrates Court in the proceeding on the second client or to inform the second client that he had ceased to act for him.

6 The Tribunal directed that the Legal Profession Complaints Committee (LPCC) and the practitioner file submissions on penalty,

and that the issue of penalty should be determined entirely on the documents pursuant to s 60(2) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act). The LPCC filed its submissions on penalty and costs on 20 October 2010. The practitioner sought to file his submissions as to penalty and costs by email on 11 November 2010 and subsequently did so in hard copy on 1 December 2010.

7 Section 438(2) of the LP Act states as follows:

> If, after it has completed a hearing in relation to a referral under this Part in respect of an Australian legal practitioner, the State Administrative Tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the Tribunal may -
>
> (a) make and transmit a report on the finding to the Supreme Court (full bench); or
>
> (b) make any one or more of the orders specified in section[s] 439, 440 and 441.

8 Section 438(4) of the LP Act states as follows:

> Where appropriate, a report forwarded under subsection (2)(a) may include either or both of the following -
>
> (a) a record of the evidence taken at the hearing;
>
> (b) a recommendation that the name of the practitioner be removed from the local roll.

Principles to be applied

9 In ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 205 (S), the Tribunal summarised relevant principles at [6] - [8] as follows:

> 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].
>
> 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.

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.)

10 In ***Re Maraj (a Legal Practitioner)*** (1995) 15 WAR 12 at 25, Malcolm CJ, with whom Kennedy J and Franklyn J each agreed at 25, said 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. It is clear from … the authorities which have been repeatedly followed in this Court that when the question is whether a practitioner should be struck off the roll the only question is whether the practitioner is a fit and proper person to remain a member of the legal profession: see *Re Davis* (1947) 75 CLR 409 and 416 per Latham CJ; and *Ziems v Protonotary of Supreme Court (NSW)* (1957) CLR 279.

11 Similarly, in ***Legal Profession Complaints Committee v Brennan*** [2010] WASC 198 at [11], Martin CJ, with whom Murray J and Hall J agreed at [20] and [21], respectively, said the following:

> Where an application is made for an order removing a practitioner's name from the Roll, the critical question to be addressed by the court is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner (*Ziems [v Protonotary of the Supreme Court of New South Wales]* [1957] HCA 46; (1957) 97 CLR 279, 297 - 298, *A Solicitor v Law Society (NSW)* [2004] HCA 1; (2004) 216 CLR 253, [15] and [*Legal Practitioners Complaints Committee v] Thorpe*, 43). Fitness to practice law requires that the practitioner must command the personal confidence of his or her clients, fellow practitioners and judges (*Thorpe* at [43]; *In re Davis* [1947] HCA 53; (1947) 75 CLR 409, 420).

12 In ***Legal Practitioners Complaints Committee and Vogt*** [2009] WASAT 125, the Tribunal said, at [68]:

> We consider that the protection of the public, the protection of the reputation of the legal profession and the maintenance of proper standards in the legal profession require that the usual professional disciplinary consequences of intending to mislead the court should be, as a minimum, suspension from legal practice.

13 On appeal from this discussion in ***Vogt v Legal Practitioners Complaints Committee*** [2009] WASCA 202, the Court of Appeal held, at [70], as follows:

> As we have observed, it is a matter of the utmost seriousness for a practitioner intentionally to mislead a court. The effective administration of the justice system and public confidence in the system depends upon the absolute and unconditional discharge by practitioners of their duty and honesty and candour to the court. It is a duty so fundamental that factors such as relative inexperience and lack of supervision do not weigh so heavily in the mitigation as they might in other situations. A deliberate departure from the duty must attract a substantial penalty. We consider that in the circumstances of this case the penalty of three months suspension imposed by the Tribunal was appropriate.

The parties' submissions on penalty

14 The LPCC submitted that the practitioner is not a fit and proper person to practice law, because he lacks 'the qualities of character, honesty and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner'. In the circumstances, as found in the original reasons, 'where the practitioner has intentionally misled the court in order to advance his own interests, and where he gave evidence that he did not know whether the client had a criminal record, yet maintained at the hearing his conduct was justified, shows the practitioner is not a fit and proper person to engage in legal practice'.

15 The LPCC emphasised 'the practitioner's disciplinary history' which includes the following adverse findings:

- in 2001, the practitioner acknowledged that he was guilty of unprofessional conduct in that in 1997 he applied trust monies to payment of costs and disbursements and did not, within 14 days thereafter, serve on the client a bill of costs claiming that trust monies had been applied towards the payment of those costs;

- at the same time, in 2001, the practitioner acknowledged that he was guilty of neglect and undue delay in relation to the same client. The Legal Practitioners Disciplinary Tribunal accepted that the breaches were serious but in view of matters personal to the practitioner and the fact that he had already paid indemnity costs of $11,000 to the client (incurred by having to seek an extension of the time to make a claim under the *Inheritance (Family and Dependents Provision) Act 1972* (WA)) caused by the practitioner's failure to make a claim in time), imposed only moderate fines totalling $1,250;

- in 2003, the practitioner was found guilty of three complaints in respect of another matter involving the failure to properly make a claim under the *Inheritance (Family and Dependents Provision) Act 1972* (WA) between 1997 and 1999. There were two complaints of undue delay and one count of gross overcharging. By way of penalty, the Legal Practitioners Disciplinary Tribunal ordered that the practitioner only practice as an employed solicitor for two years and pay fines totalling $7,500 together with costs;

- on 11 May 2009, the practitioner was found guilty of unprofessional conduct in relation to a letter he sent on 29 November 2007 in his personal capacity, but using his professional letterhead, which contained threats and inappropriate and intimidating demands, in relation to legal proceedings in which the practitioner was a party: ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 91. In supplementary reasons delivered on 2 July 2009, the Tribunal reprimanded the practitioner, fined him $2,500 and ordered him to pay costs;

- on 21 October 2009, the Tribunal found the practitioner guilty of unprofessional conduct and unsatisfactory professional conduct: ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 205. The finding of professional misconduct arose from the practitioner acting for a client between November 2006 and February 2007 in which he advised the client to carry out building projects at a time when the practitioner knew that the client was unregistered as a builder and in the

knowledge that, by so advising, he was encouraging the client to breach s 4 of the *Builders' Registration Act 1939* (WA). Further, the Tribunal found that the practitioner was guilty of unsatisfactory professional conduct by, upon being asked by the LPCC to provide his response to a complaint against him, the practitioner giving a response that was deliberately misleading and designed to avoid giving a complete explanation. In supplementary reasons delivered on 11 March 2010, a penalty of three months suspension was imposed in relation to the finding of professional misconduct and a penalty of two months suspension for the finding of unsatisfactory conduct. The periods of suspension were ordered to be served concurrently: ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 205 (S).

16 The LPCC emphasised that, in the Tribunal's reasons in relation to penalty in respect of the latter two matters, the Tribunal expressed concerns that the practitioner demonstrated a lack of insight, understanding and remorse for his conduct. The LPCC submitted that the practitioner's evidence and conduct at the hearing in this case 'demonstrated a lack of insight into and a failure to understand his duty to the court of candour, honesty and fairness' and that 'by continuing to maintain that his behaviour was justified [the practitioner showed that] there can be no confidence in the future in the honesty and reliability of the practitioner's dealings with and submissions to a court'.

17 The LPCC also submitted that, in light of the findings in ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 91 in relation to a similar complaint concerning a letter containing threats and inappropriate and intimidating demands, 'it is clear the practitioner has not learned anything about the proper standards of behaviour required of legal practitioners or gained any insight into or understanding of why his behaviour falls far short of the required standards'.

18 The LPCC also submitted that, in light of the findings of professional misconduct in this case and the practitioner's disciplinary history, imposition of fines 'is an insufficient penalty for the purposes of protecting the public and maintaining proper standards in the legal profession'.

19 The LPCC therefore requested the Tribunal to make and transmit a report on the Tribunal's findings to the Supreme Court (full bench) pursuant to s 438(2)(a) of the LP Act with a recommendation that the name of the practitioner be removed from the local roll. The LPCC concluded its submissions as follows:

> There is a risk given the practitioner's disciplinary history, which has elements of repetition, his continuing lack of insight, understanding and remorse, and importantly, his failure to learn from the past disciplinary proceedings, the practitioner will continue to fail to maintain proper standards in the legal profession. There is the need to protect the public by preventing the practitioner from continuing in practice.
>
> The findings of unprofessional conduct and unsatisfactory professional conduct, both in these proceedings and in the earlier proceedings, require an order that the practitioner be removed from the Roll of Practitioners.

20 The practitioner prefaced his submissions 'by expressing to the Tribunal my unreserved contrition for the findings of professional misconduct made against me in this and other matters that have been prosecuted by the [LPCC]'. The practitioner said that he has 'now had adequate opportunity to reflect upon such misconduct and am truly sorry for the offence, insult and inconvenience to all concerned and aggrieved thereby and sincerely regret the deleterious effect my indiscretions have had to the integrity of the legal profession in this State'. The practitioner said that he now appreciates 'that no member of the public is deserving of the disrespectful treatment I was responsible for, and certainly not by a legal practitioner entrusted by them'.

21 The practitioner also said the following:

> My mistakes were unquestionably serious errors of judgment on my part only, for which my family and I have already paid a significant price consequent upon the obligatory closure of my sole practice on 10 May earlier this year [in consequence of the penalty of suspension from practice for three months imposed by the Tribunal in *Legal Practitioners Complaints Committee and Segler* [2009] WASAT 205 (S)]. I now have no livelihood, having devoted my entire career of over 30 years to only the practice of law. The publication of my misfeasance, has had the effect of severely restricting any opportunity of my gainful employment in any related field of endeavour. My past, indelibly misplaced, arrogance has been replaced by deep humility. …
>
> I believe that I have learned much by my mistakes, in particular the necessity of distancing personal anger and frustration from professional communications. For the most part of 30 years I have managed that integral task. I now am cognisant of the importance of maintaining

> the esteem of the legal profession no matter what has aggravated my personal perception of an unfortunate situation.
>
> The authorities to which Counsel for the [LPCC] has referred are beyond issue, however[,] I have not been convicted of [a] criminal offence and the punishment that he submits is now appropriate is, with respect, manifestly excessive, if not oppressive[,] in all the circumstances of my case.

The appropriate penalty

22 We do not consider that, in the circumstances of this case, the findings of unsatisfactory professional conduct and professional misconduct in the original reasons, and having regard to the practitioner's disciplinary history, demonstrate that the practitioner is not a fit and proper person to remain a member of the legal profession. The most serious aspect of the professional misconduct found by the Tribunal involved misleading Magistrate Musk on 11 January 2008 during the hearing of the practitioner's application for an interim violence restraining order against the first client. As we said at [70] of the original reasons:

> Courts and tribunals necessarily place great reliance and trust on legal practitioners. Legal practitioners occupy a privileged position in the administration of justice. When, in this case, the practitioner announced to Magistrate Musk that he was a member of the legal profession, Magistrate Musk was entitled to expect absolute truthfulness and full candour from the practitioner.

23 While we observed, at [71], that it 'did not negate the practitioner's fundamental obligation of complete truthfulness and absolute candour in his dealing with the Court', the fact that the practitioner was in genuine fear for his safety, owing to the grossly abusive messages and threats that were made by the first client over the telephone, is a relevant circumstance in determining the appropriate penalty in relation to this finding. As we found at [21], the first client left a number of grossly abusive and threatening messages on the practitioner's voice mail. Among other things, the first client called the practitioner a 'Jewish cunt' and threatened to 'fuck [him] over'. The first client referred to the practitioner's wife as, among other things, a 'slut' or 'whore'. The first client also said that he intended to go to the practitioner's office to retrieve his files. The practitioner and his wife heard these abusive and threatening messages while they were driving home and they drove directly to Fremantle Police Station to report the incident to Police. The Police advised the practitioner to seek an interim violence restraining order against the first client and the practitioner proceeded to do so

the next morning. The practitioner also obtained bodyguard services from a security firm.

24 In relation to the LPCC's submission that there are 'elements of repetition', particularly with respect to the finding of professional misconduct by sending a letter containing improper threats and inappropriate and threatening demands to the first client, the letter in question was sent within six weeks of the letter that was the subject of the finding of unprofessional conduct in ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 91. The finding of unprofessional conduct was made about 18 months after the two letters were written and sent.

25 The Tribunal also considers that the practitioner has, finally, demonstrated insight, understanding and remorse for his conduct. In particular, we accept that he has 'learned much by [his] mistakes, in particular the necessity of distancing personal anger and frustration from professional communications'.

26 The Tribunal considers that, in order to protect the public and in order to maintain proper standards in the legal profession, the proper disciplinary consequences of its findings are as follows.

Unsatisfactory professional conduct by breach of s 230(1) of the 2003 Act

27 As we said at [43] of the original reasons, the practitioner's contravention of s 230(1) of the 2003 Act could be, at least initially, characterised as merely a 'technical breach', because the first client had expressly agreed to counsel's fee of $2,000 and the practitioner had provided the first client with a copy of counsel's memorandum of fees prior to filing the summons. Had the practitioner's unsatisfactory professional conduct in this respect consisted of nothing more, the appropriate penalty would have been a reprimand or a nominal fine.

28 However, as we explained at [44] - [46] of the original reasons, the practitioner compounded the unsatisfactory professional conduct by:

- failing to discontinue the proceeding when his obligation under s 230(1) of the 2003 Act was brought to his attention by the first client's new solicitor on 18 January 2008;
- failing to discontinue the proceeding after he received payment for the counsel's fee on 18 February 2008; and

- failing to discontinue the proceeding when, on 1 April 2008, the first client's new solicitor advised the practitioner that the proceeding had been noted by various credit agencies and could affect the first client's credit rating.

29 As we noted at [46] of the original reasons, the practitioner failed to discontinue the proceeding for 10 months after the terms of s 230(1) of the 2003 Act were brought to his attention, for nine months after the amount in question was paid to him, and for seven months after the first client's new solicitor advised of the potential effect on the first client's credit rating and requested the immediate discontinuance of the proceeding. We consider that, in these circumstances, the appropriate penalty for the practitioner's unsatisfactory professional conduct by breach of s 230(1) of the 2003 Act is the payment of a fine of $2,000.

Unsatisfactory professional conduct by breach of s 237(1) of the 2003 Act

30 As we found at [50] of the original reasons, on 18 January 2008, the first client's new solicitor served on the practitioner a written notice of intention to have four bills for professional fees issued by the practitioner on 10 January 2008 taxed for the purposes of s 232(3) of the 2003 Act. Consequently, s 237(1) of the 2003 Act obligated the practitioner to lodge the four bills of costs with a taxing officer by 18 February 2008. In a letter to the first client's new solicitor on 1 February 2008, the practitioner said that he would lodge the four bills of costs with a taxing officer the following week. However, despite that assurance, and in breach of s 237(1) of the 2003 Act, the practitioner failed to lodge the bills of costs with a taxing officer by 18 February 2008, or at any subsequent time.

31 We consider that the appropriate penalty for the practitioner's unsatisfactory professional conduct in this respect is the payment of a fine of $1,500.

Unsatisfactory professional conduct by failing to obtain the second client's instructions as to whether to have a bill of costs taxed

32 As we found at [76] of the original reasons, on or about 3 September 2007, a firm that had previously acted for the second client sent the practitioner an itemised bill of costs dated 3 September 2007, for $19,431.50, addressed to the second client at his father's address. On 21 August 2007, the practitioner had advised that firm that the second

client demanded 'that you present to me an itemised bill of his costs in relation to this action for taxation … '.

33 Section 232(3) of the 2003 Act provided that a person charged with a bill of costs that contained detailed items could serve on the legal practitioner, within 30 days from the service of the itemised bill, a written notice of intention to have the bill taxed. However, the practitioner failed to advise the second client that he had received the itemised bill or to seek instructions from the second client as to whether to serve on the firm a written notice of intention to have the bill taxed, within 30 days of the service of the itemised bill, that is, on or before 5 October 2007. The practitioner's unsatisfactory professional conduct denied the second client the opportunity to have the bill taxed.

34 We consider that the appropriate penalty for the practitioner's unsatisfactory professional conduct in this respect is the payment of a fine of $1,500.

Professional misconduct by sending a letter containing improper threats and inappropriate demands to the first client

35 The relevant part of the letter in question, dated 10 January 2008, is set out at [53] of the original reasons. At [56] - [58] of the original reasons, we found that the threats and demands made by the practitioner in the letter were improper for three reasons.

36 As the LPCC pointed out in its submissions in relation to penalty, the Tribunal's finding of professional misconduct in this respect is similar to the finding of unprofessional conduct in ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 91 involving a letter sent by the practitioner containing threats and inappropriate and intimidating demands. However, it is not a fair criticism of the practitioner to say that, because of the similarity between his professional misconduct in this case and his unprofessional conduct in sending the letter the subject of the earlier proceeding, he has 'not learned anything about the proper standards of behaviour required of legal practitioners or gained any insight into or understanding of why his behaviour falls far short of the required standards'. As noted earlier, the letter in this case was sent within six weeks of the letter the subject of the earlier proceeding. The Tribunal's decision in relation to the earlier letter was given about 18 months after the events in question.

37 Furthermore, it is apparent from the practitioner's submissions in relation to penalty that he has, finally, begun to understand why

his behaviour constitutes professional misconduct and is unacceptable. As the practitioner said, he now appreciates 'that no member of the public is deserving of the disrespectful treatment I was responsible for, and certainly not by a legal practitioner entrusted by them'. As a result of his mistakes, the practitioner has learned 'in particular the necessity of distancing personal anger and frustration from professional communications'.

38 Consistently with the penalty decision made in ***Legal Practitioners Complaints Committee and Segler*** [2009] WASAT 91 (S) in relation to the earlier, similar, letter, the appropriate penalty for the practitioner's professional misconduct by sending a letter containing improper threats and inappropriate demands to the first client in this case is a reprimand and the payment of a fine of $2,500.

Professional misconduct by knowingly and intentionally misleading the court

39 As noted earlier 'the usual professional disciplinary consequences of intending to mislead a court should be, as a minimum, suspension from legal practice': ***Legal Practitioners Complaints Committee and Vogt*** [2009] WASAT 125 at [68]. In this case, as we found at [71] of the original reasons, 'the practitioner … knew that the first client did not have a criminal record and knowingly and intentionally misled the Court that the first client did have a criminal record'. The practitioner did so in order to advance his own interests in obtaining an interim violence restraining order against the first client. A suspension from legal practice is warranted as a penalty for this serious professional misconduct.

40 However, while the circumstances leading to the practitioner's professional misconduct do not 'negate the practitioner's fundamental obligation of complete truthfulness and absolute candour in his dealings with the Court' (original reasons at [71]), and do not in any way excuse his conduct, they at least provide some context to the professional misconduct which is relevant to penalty. The first client left a number of grossly abusive and threatening messages on the practitioner's voicemail. The practitioner had a genuine fear for his safety and obtained bodyguard services from a security firm. The first client was subsequently convicted of having used a carriage service in a way that is menacing, harassing or offensive, contrary to s 474.17(1) of the *Criminal Code Act 1995* (Cth) by having left the messages on the practitioner's voicemail. Late on 10 January 2008, the Police advised the practitioner to seek an interim violence restraining order against the first client as a result of the

messages. The following morning, the practitioner sought and obtained the interim violence restraining order against the first client and, in the process, intentionally misled Magistrate Musk that the first client had a criminal record.

41 Absent the grossly abusive and threatening messages, the appropriate penalty for the practitioner having misled the court would have been a three month suspension from practice. However, we consider that, in the circumstances, a suspension of two months from practice is the appropriate penalty.

Professional misconduct by failing to file a defence and to inform the second client that the practitioner had ceased to act for him

42 As we found at [80] of the original reasons, on 6 December 2007, prior to his departure for an overseas holiday, the practitioner completed a notice of intention to defend a proceeding brought against the second client by his former solicitors for professional fees. While the practitioner was overseas, the Magistrates Court issued a document to the practitioner advising that the second client had to file and serve a statement of defence by 27 December 2007. The practitioner was overseas until early January 2008. As we found at [81] of the original reasons, shortly after the practitioner's return from his overseas holiday, he exchanged correspondence with the first client in relation to the payment of the counsel's fee, received the abusive and threatening telephone messages from the first client, and sought and obtained the interim violence restraining order from the Magistrates Court on 11 January 2008. On the next working day, Monday 14 January 2008, the practitioner filed a notice of change of address for service in the Magistrates Court proceeding against the second client, in which the practitioner advised that the address for service of the second client was thereafter the address of the first client. However, the practitioner did not serve the notice of change of address for service on the second client, nor did he advise the second client, the first client or the first client's new solicitors of the fact that the practitioner had ceased to act. As we found at [82] of the original reasons, on 13 March 2008, the second client's former solicitors obtained default judgment against the second client in the proceeding. On 31 March 2008, the second client paid the default judgment to avoid enforcement procedures.

43 The failure of the practitioner to file and serve a statement of defence and to advise the second client that the practitioner had ceased to act

for him led to the entry of the default judgment against the second client's interests. As we found at [88] of the original reasons:

> … in circumstances where the practitioner had received the abusive and threatening telephone messages from the first client late on 10 January 2008, and where all instructions in relation to the matter on behalf of the second client had been given to the practitioner by the first client, we do not consider that the practitioner's failure to obtain the consent of the second client to cease to act for him was relevantly either unsatisfactory professional conduct or professional misconduct. Having regard to the circumstances, it is understandable that the practitioner would wish to cease to act on behalf of either the second client or the first client. However, the practitioner was required to serve the notice of change of address for service on the second client or, at the very least, to give notice to the second client that the practitioner had ceased to act on behalf of the second client. …

44 We consider that the appropriate penalty for the practitioner's professional misconduct by failing to file a statement of defence on behalf of the second client, failing to inform the second client that he had not filed a statement of defence, failing to inform the second client that his former solicitors were entitled to apply for default judgment without further notice, and failing to serve a copy of the notice of change of address for service on the second client or to inform him that the practitioner had ceased to act for him, is a suspension from practice for a period of one month.

Conclusion

45 The Tribunal does not consider that its findings of unsatisfactory professional conduct and professional misconduct against the practitioner, individually or collectively and having regard to the practitioner's disciplinary history, indicates that the practitioner is not a fit and proper person to be a legal practitioner. However, the Tribunal considers that the maintenance of proper standards in the legal profession and the protection of the public in their dealings with lawyers requires the imposition of the following penalties under s 438(2)(b), s 439(a) and s 441 of the LP Act:

- the payment of a fine of $2,000 to the Legal Practice Board for unsatisfactory professional conduct by the practitioner by suing the first client for recovery of a disbursement (counsel's fees) without having served on the first client a bill for the disbursement and failure to discontinue those proceedings, contrary to s 230(1) of the 2003 Act;

- the payment of a fine of $1,500 to the Legal Practice Board for unsatisfactory professional conduct by the practitioner by failing to comply with a written request dated 18 January 2008 from the first client's solicitor to lodge four bills of costs dated 10 January 2008 with a taxing officer, contrary to s 237(1) of the 2003 Act;

- the payment of a fine of $1,500 to the Legal Practice Board for unsatisfactory professional conduct by the practitioner by failing to advise the second client that the practitioner had received an itemised bill of costs, and to seek the second client's instructions as to whether the practitioner should serve on the law firm that had served the itemised bill of costs a written notice of intention to have the bill taxed within 30 days of service of the itemised bill, that is, on or before 5 October 2007;

- the reprimand of the practitioner and the payment of a fine of $2,500 to the Legal Practice Board for professional misconduct by the practitioner by sending a letter containing improper threats and inappropriate demands to the first client;

- the suspension of the practitioner's local practising certificate for a period of two months for professional misconduct by the practitioner by, in order to advance his own interests, knowingly and intentionally misleading Magistrate Musk on 11 January 2008 during the hearing of an ex parte application filed by and on behalf of the practitioner for an interim violence restraining order against the first client, by asserting that the first client had a criminal record when that was not the case; and

- the suspension of the practitioner's local practising certificate for a period of one month for professional misconduct by the practitioner by, in relation to the second client, failing to file a statement of defence by 27 December 2007, or at all, to inform the second client that the plaintiff law firm was entitled to apply for default judgment without further notice, and to serve a copy of the notice of change of address for service on the second client or to inform the second client that the practitioner had ceased to act for him.

46 As the practitioner is not currently working as a lawyer, the period of suspension of his local practising certificate should commence from the day after the publication of these reasons. Both terms of suspension should commence at the same time, as the practitioner's instructions in relation to both the first client and the second client were received from the first client and the factual background to both counts of professional misconduct contains common elements.

Costs

47 The LPCC sought an order pursuant to s 87(2) of the SAT Act that the practitioner should pay the LPCC's professional costs in the sum of $8,000. The practitioner did not contest the reasonableness of this sum, but submitted that he is unemployed, remains in poor health and is, as such, impecunious.

48 The Tribunal's practice in disciplinary proceedings is that, normally, a vocational regulatory body that has been successful in vocational regulatory proceedings should receive an order for the payment of its costs: ***Medical Board of Western Australia and Roberman*** [2005] WASAT 81 (S) at [30]. There is no reason, in the circumstances of this case, to depart from the Tribunal's usual practice in relation to costs. The quantum of costs sought is reasonable in the circumstances.

Orders

49 The Tribunal makes the following orders:

1. In relation to the finding that, between 14 January 2008 and November 2008, Martin Lee Segler was guilty of unsatisfactory professional conduct contrary to the *Legal Profession Act 2008* (WA) by contravening the *Legal Practice Act 2003* (WA) by suing his client, DC, for recovery of a disbursement (counsel's fees) without having served on his client a bill for the disbursement and by failing to discontinue those proceedings, contrary to s 230(1) of the *Legal Practice Act 2003* (WA), Mr Segler must pay a fine of $2,000 to the Legal Practice Board on or before 13 February 2011.

2. In relation to the finding that, between 18 January 2008 and 1 April 2009, Martin Lee Segler was guilty of unsatisfactory professional conduct contrary to the *Legal Profession Act 2008* (WA) by contravening the

Legal Practice Act 2003 (WA) by failing to comply with a written request dated 18 January 2008 from DC's new solicitor to lodge four bills of costs dated 10 January 2008 with a taxing officer, contrary to s 237(1) of the *Legal Practice Act 2003* (WA), Mr Segler must pay a fine of $1,500 to the Legal Practice Board on or before 13 February 2011.

3. In relation to the finding that, between September 2007 and January 2008, in the conduct of instructions from his client, NC, concerning payment of the legal fees of Mendelawitz Morton, Martin Lee Segler was guilty of unsatisfactory professional conduct by failing to advise NC that the practitioner had received an itemised bill of costs and to seek NC's instructions as to whether the practitioner should serve on Mendelawitz Morton a written notice of intention to have the bill taxed within 30 days of service of the bill, that is, on or before 5 October 2007, Mr Segler must pay a fine of $1,500 to the Legal Practice Board on or before 13 February 2011.

4. In relation to the finding that, on 10 January 2008, Martin Lee Segler was guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by sending a letter containing improper threats and inappropriate demands to his client, DC, Mr Segler:

   (a) be reprimanded; and

   (b) must pay a fine of $2,500 to the Legal Practice Board on or before 13 February 2011.

5. In relation to the finding that, on 11 January 2008, Martin Lee Segler was guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) by, in order to advance his own interests, knowingly and intentionally misleading Magistrate Musk during the hearing of an ex parte application filed by and on behalf of the practitioner for an interim violence restraining order against DC by asserting that DC had a criminal record when that was not the case and when the practitioner knew it was not the case, Mr Segler's local

practising certificate is suspended for a period of two months to commence on 14 December 2010.

6. In relation to the finding that, between September 2007 and March 2008, Martin Lee Segler was guilty of professional misconduct contrary to the *Legal Profession Act 2008* (WA) in the conduct of instructions from his client, NC, concerning payment of the legal fees of Mendelawitz Morton, by:

   (a) failing to file a statement of defence by 27 December 2007;

   (b) failing to notify NC that he had not filed a statement of defence by 27 December 2007, or at all;

   (c) failing to inform NC that Mendelawitz Morton was entitled to apply for default judgment without further notice to him; and

   (d) failing to serve a copy of the notice of change of address for service on NC or to inform NC that Martin Lee Segler had ceased to act for him,

   Mr Segler's local practising certificate is suspended for a period of one month to commence on 14 December 2010.

7. The respondent is ordered to pay the applicant's costs of the proceeding fixed in the sum of $8,000 by 13 February 2011.

I certify that this and the preceding [49] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUDGE J ECKERT, DEPUTY PRESIDENT