

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : VOCATIONAL REGULATION

**ACT** : LEGAL PRACTICE ACT 2003 (WA)

**CITATION** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE and MORTON [2006] WASAT 172

**MEMBER** : JUSTICE M L BARKER (PRESIDENT)  
MR C RAYMOND (SENIOR MEMBER)  
BRIG A WARNER (SENIOR SESSIONAL  
MEMBER)

**HEARD** : 19 APRIL 2006

**DELIVERED** : 28 JUNE 2006

**FILE NO/S** : VR 6 of 2004  
VR 8 of 2004  
VR 9 of 2004  
VR 20 of 2004

**BETWEEN** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE  
Applicant

AND

BENJAMIN SHAWN MORTON  
Respondent

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*Catchwords:*

Professions - Legal practitioner - *Legal Practitioners Act 1893* (WA) - *Legal Practice Act 2003* (WA) - Neglect - Unprofessional conduct - Unsatisfactory conduct - Admission of conduct by practitioner - Appropriate penalties

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*Legislation:*

*Legal Practice Act 2003 (WA)*

*Legal Practitioners Act 1893 (WA)*

*Result:*

Practitioner reprimanded and fined a total of \$17 000 with costs of \$10 000

*Category:* B

**Representation:**

*Counsel:*

Applicant : Mr AS Derrick & Ms C Coombs  
Respondent : Mr J Gilmour QC & Mr SM Davies

*Solicitors:*

Applicant : Legal Practitioners Complaints Committee  
Respondent : Stables Scott

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

Kyle v Legal Practitioners Complaints Committee [1999] WASCA 115

**Case(s) also cited:**

Nil

**REASONS FOR DECISION OF THE TRIBUNAL:**

*Summary of Tribunal's decision*

1 The practitioner, who at all material times was a very junior practitioner, admitted to conduct that involved neglect, unprofessional conduct and unsatisfactory conduct. Having regard to the circumstances in which the practitioner so conducted himself and the submissions made on behalf of the Legal Practitioners Complaints Committee, the Tribunal was satisfied that a reprimand, appropriate fines and an order that the practitioner pay the Committee's costs of the proceedings were sufficient to deal with the complaint and protect the public interest.

*Issues*

2 The Legal Practitioners Complaints Committee (the Committee) initially commenced proceedings against Benjamin Shawn Morton (the practitioner) in which it made four allegations concerning the conduct of the practitioner in relation to a former client, Mr GJP (the name of the client may remain confidential for privacy reasons and he will simply be referred to in these reasons as "the client").

- In VR 6 of 2004, that the practitioner was from in or around August 2001 to May 2003 guilty of neglect and/or undue delay in the course of the practice of the law in acting for the client and guilty of unprofessional conduct by:
  - (1) non-disclosure of material matters to the client; and
  - (2) misleading the client.
- In VR 8 of 2004, that the practitioner was guilty of unprofessional conduct from in or around about November 1999 in misleading the client as to whether certain steps had been taken in pursuance of the client's instructions in a District Court action conducted by the practitioner on behalf of the client against National Mutual Insurance Limited.
- In VR 9 of 2004, that the practitioner was in or about May 2003 guilty of unprofessional conduct in misleading or attempting to mislead a fellow practitioner, John Grayden Hanly.

- In VR 20 of 2004, that the practitioner was guilty of unprofessional conduct between 11 February 2004 and 4 May 2004 or thereabouts at Perth in that he failed to respond to written enquiries made of him by the Legal Practitioners Complaints Committee within the time requested or within a reasonable time.

3 The hearing of these four allegations commenced on 19 April 2006. On 19 and 20 April 2006 the client (and Mr Hanly) gave evidence. The client was cross-examined as part of the proceedings. On the morning of 21 April 2006, counsel for the Committee advised the Tribunal that the parties - that is to say the Committee and the practitioner - had reached a resolution of the applications which was acceptable to each.

4 The resolution was reduced to writing to the following effect:

- (1) The following facts are admitted by the practitioner:
  - (a) During the period August 2001 to July 2002, the practitioner failed to perform any work on the file of the client which progressed the client's action against National Mutual Insurance Limited (the action) in accordance with the client's instructions with the expedition that would be expected of a practitioner of good repute and competence.
  - (b) The practitioner continued to act for the client after the action had been struck out on 30 July 2002 in circumstances where he failed to advise the client to seek independent legal advice as to what recourse or remedies the client may have against the practitioner's firm Eley Palmer Archer or otherwise as a result of the action having been struck out.
  - (c) Between 11 February 2004 and 4 May 2004, the practitioner failed to respond to a written inquiry made of him by the Legal Practitioners Complaints Committee in the last paragraph of the letter dated 11 February 2004 within the time requested or within a reasonable time.
  - (d) The practitioner failed to respond to emails sent to him by the client dated 24 October 2002, 7 March 2003, 3 April 2003 and 21 April 2003 by failing to advise the client as to the consequences for the client and otherwise of the action having been struck out.

- (2) By reason of the admitted facts stated in par 1(a), the practitioner was guilty of neglect in the course of the practice of the law.
- (3) By reason of the admitted facts stated in par 1(b), the practitioner was guilty of unprofessional conduct.
- (4) By reason of the admitted facts stated in par 1(c), the practitioner was guilty of unsatisfactory conduct by unprofessional conduct.
- (5) By reason of the admitted facts stated in par 1(d), the practitioner was guilty of neglect in the course of the practice of the law.
- (6) Within 56 days the practitioner pay to the Legal Practice Board a fine to be determined by the Tribunal in respect of his neglect in the course of the practice of the law as specified in par (2) above.
- (7) Within 56 days, that practitioner pay to the Legal Practice Board a fine to be determined by the Tribunal in respect of his unprofessional conduct as specified in par (3) above.
- (8) Within 56 days, the practitioner pay to the Legal Practice Board a fine to be determined by the Tribunal in respect of his unprofessional conduct as specified in par (4).
- (9) Within 56 days, the practitioner pay to the Legal Practice Board a fine to be determined by the Tribunal in respect of his neglect as specified in par (5).
- (10) The practitioner is reprimanded for neglect in the course of the conduct of the law and his unprofessional law as specified in paragraphs (2) - (5).
- (11) The practitioner pay the Committee's costs of \$10 000 to the Legal Practice Board within 56 days.
- (12) The orders are hereby published.
- (13) The proceedings in VR 8 of 2004 and VR 9 of 2004 are dismissed.

5           The issue at the hearing, following the presentation by counsel for the parties of this agreed resolution, was whether the Tribunal should make orders as proposed by the parties and, if it were appropriate to do so, what penalty outcomes are appropriate.

*Facts*

6 As noted earlier, the Tribunal heard the evidence of the client and a  
solicitor, Mr Hanley, and also had the benefit of hearing the  
cross-examination of the client and Mr Hanley by senior counsel for the  
practitioner.

7 In the circumstances, it is not necessary for the Tribunal to set out in  
any detail the facts relating to each of the initial allegations or those the  
subject of the proposed resolution. Nor is it necessary for the Tribunal to  
make particular findings having regard to all the evidence in light of the  
admissions now made by the practitioner.

8 Very shortly, the practitioner initially - as an articled clerk and a very  
junior employed solicitor with a sole practitioner, then soon after as a very  
junior partner of that same sole practitioner - became familiar with and  
acted for the client in the client's action in the District Court of Western  
Australia maintained against National Mutual Life Association Limited.

9 In September 1999, the practitioner left the small firm of which he  
had become a partner and joined AM Palmer and Associates. That firm  
became Eley Palmer Archer on 1 December 1999. The client's action  
followed him

10 From about January 2000 to July 2001, the practitioner and a fellow  
practitioner at Eley Palmer Archer, Mr Garrick John Archer, had the  
conduct of the matter and in that period the practitioner continued to  
communicate with the client.

11 In August 2001, Mr Archer left that firm. On 1 April 2002 the  
practitioner became a partner of the firm which then changed its name to  
Eley Palmer.

12 On 21 May 2002, a chamber summons was served on the practitioner  
by the solicitors acting for National Mutual seeking to strike out the action  
for want of prosecution. On 30 July, the strike out application came  
before the District Court and it was ordered that the action be struck out  
for want of prosecution and that the client pay the costs of the action.

13 It is accepted that the practitioner continued to act for the client after  
the action had been struck out on 30 July 2002 in circumstances where he  
failed to advise the client to seek independent legal advice as to what  
recourse or remedies the client may have had against the practitioner's  
firm or otherwise as a result of the action having been struck out.

14 The practitioner also failed to respond to emails sent to him by the client dated 24 October 2002, 7 March 2003, 3 April 2003 and 21 April 2003 particularly by failing to advise the client as to the consequences for the client and otherwise of the action having been struck out.

15 On 11 February 2004 and 14 February 2004, the principal legal officer of the Committee wrote to the practitioner requesting certain information and requiring a response within 14 days as to the matters raised in that correspondence. The practitioner failed to do so within the time requested or within a reasonable time.

16 The conduct admitted as a result of the proposed resolution, reflects some but not all of the allegations in the initial proceedings:

- Paragraph 1(a) reflects the allegations in VR 6 of 2004.
- Paragraph 1(b) also reflects the allegations made in VR 6 of 2004.
- Paragraph 1(c) reflects the allegation made in VR 20 of 2004.
- Paragraph 1(d) reflects to some extent the allegations made in VR 6 of 2004 but is based on the evidence heard by the Tribunal.

17 The allegations made in VR 8 and VR 9 of 2004 are not reflected in the admitted facts and conduct and they are no longer pressed by the Committee.

18 Counsel for the Committee advised the Tribunal that the Committee, in light of the evidence of the client, had formed the view that the prospects of satisfying the Tribunal of the allegations made, to the degree necessary, were remote and there were no reasonable prospects to satisfy the Tribunal of those allegations. In those circumstances the public interest would properly be served by coming to a resolution of the issues with the practitioner. Senior counsel for the practitioner confirmed the terms of the resolution reached between the parties.

19 The Tribunal explained to the parties that the Tribunal has a responsibility carefully to exercise its functions. The Tribunal, through the President, emphasised the Tribunal will not automatically accede to a proposed resolution of any proceedings in the Tribunal if it would put at risk the public interest.

20 In the circumstances, the Tribunal considered the submissions made on behalf of the parties, particularly on behalf of the Committee, and was satisfied that the resolution of the proceedings in the manner proposed was appropriate. The Tribunal accepted that in the circumstances it was appropriate for the Committee, through counsel, to indicate that in effect it does not seek to proceed on certain allegations previously made having regard to the Committee's assessment of its capacity to discharge the evidentiary burden cast upon it.

21 It remains for the Tribunal in these circumstances, to consider the question of penalty.

***The question of penalty***

22 Counsel for the Committee made it clear that the Committee did not submit that this was a case where the practitioner should be prevented from practising law by an order striking his name from the roll of practitioners or by way of suspension from practice for any period of time. This submission is reflected in the terms of the proposed orders. It is proposed that the practitioner be reprimanded for his conduct and fined in appropriate sums. Additionally, he should pay the costs of the proceedings. The Tribunal considers this form of penalty is appropriate.

23 There is no doubt that the practitioner's conduct in relation to the conduct admitted and having regard to the evidence the Tribunal heard in relation to that conduct fell below the standards expected of a practitioner of good repute and competence: *Kyle v Legal Practitioners Complaints Committee* [1999] WASCA 115.

24 Some of the matters complained of and the subject of the proposed orders - paragraphs 2, 3 and 5 - are all subject to the sanctions prescribed in the *Legal Practitioners Act 1893* (WA) (1893 Act), as that Act controlled the behaviour of legal practitioners at the material times concerned. The other conduct occurred following the commencement of the *Legal Practice Act 2003* (WA) (2003 Act), on 1 January 2004, and is affected by that Act. Under the 1893 Act, the maximum fine that can be imposed is \$10 000. Under the 2003 Act, the maximum fine that can be imposed is \$25 000. Under each Act the Tribunal able to reprimand the practitioner.

25 The Tribunal under each Act also has the power to impose conditions on a practitioner's right to practice and also to require a practitioner to take advice in relation to the management and conduct of a legal practice,

whether from the Board or person named or approved by the Board or the Law Society.

26 So far as the responsibilities of the practitioner are concerned for the conduct now admitted, that at most material times the practitioner was relatively inexperienced and found himself in a legal practice environment in which he had few peers to guide and advise him. However, in relation to the neglect conduct admitted by the practitioner in paragraph 1(a) above, he was generally under his managing partner's supervision and seems to have relied on his colleague, Mr Archer, to assist in the conduct of the matter. Nonetheless the seriousness of his neglect over a period of about 12 months - between August 2001 and July 2002 - is plain.

27 More serious, we think, was the practitioner's failure to advise the client to seek independent legal advice as to what recourse or remedies the client may have against his firm after the District Court action was struck out on 30 July 2002. This was not really a matter in respect of which any particular form of peer supervision or education or training mattered: the conduct issue should have been fully appreciated by the practitioner at the time it first occurred. Indeed, the Tribunal has formed the view that the practitioner well appreciated the considerable difficulties in which he then found himself so far as the client's interests were concerned. This is reflected by the conspicuous failure of the practitioner to respond to emails sent to him by the client in October 2002, March 2003, and April 2003 and by failing to advise the client as to the consequences for the client and otherwise of the District Court action having been struck out; and later to respond to written inquiries made of him by the Legal Practitioners Complaints Committee. The practitioner's conduct in this regard is connected with his initial failure following the striking out of the District Court action to advise the client he should take independent legal advice in the matter, a factor that should be borne in mind when the Tribunal determines penalties.

28 On behalf of the practitioner, senior counsel was able to inform the Tribunal that the practitioner has now taken steps to rehabilitate his reputation and to become a true servant of the law and serve the community by being a well qualified and extremely competent lawyer. To that end, a number of helpful references or testimonials were provided to the Tribunal which spoke to the good character and general competence in other matters of the practitioner.

29 When the practitioner appeared before the Tribunal he was 32 years of age. He was admitted to practice in Western Australia in February

1997, having graduated with a law degree from the University of Western Australia. He presently practises in West Perth as a partner of a two partner firm. He has now chosen to practice in the area of commercial law, as distinguished from the practice of litigation which is the area in which his problems arose so far as these proceedings are concerned.

30 Senior counsel for the practitioner emphasised the extent to which, from the commencement of the practitioner's legal career as an articled clerk and employed solicitor he was left largely unsupervised and did not have the kind of mentoring and personal training from a senior practitioner which the development of any competent lawyer demands.

31 As a result of his various experiences during this period in the practice of the law, the practitioner has incurred some considerable expenses, including the sum of \$100 000 which he paid to become a member of the small law firm previously mentioned. The sum of \$70 000 remains unpaid in respect of his taking up that professional opportunity.

32 Senior counsel for the practitioner also emphasised the difficult professional circumstances that had arisen in relation to the firm Eley Palmer Archer.

33 The Tribunal accepts that all of these professional experiences have, as senior counsel for the practitioner put it, resulted in the practitioner being devoid of the kind of supervision that is vital to the development of a lawyer.

34 So far as the problems with the client were concerned, senior counsel for the practitioner suggested that with greater maturity and with some greater supervision, a different outcome might well have been achieved in those dealings with the client. Unfortunately that did not happen.

35 To the extent that the practitioner was guilty of neglect and in continuing to act for the client after the District Court action had been struck out, senior counsel emphasised the significant role in the firm Eley Palmer Archer that the senior partner, Mr Eley, played at the time.

36 The Tribunal was concerned to understand what measures had been put in place, if any, to ensure that the practitioner could ensure his future competency and training. The Tribunal was advised by senior counsel that the practitioner's firm is now seeking quality assurance approval through the Law Society of Western Australia, which runs a QA programme. Additionally, the two principals of the firm focus on commercial work, not litigation.

37 As noted earlier, the Tribunal accepts that in these circumstances the following penalty outcomes are appropriate: reprimand, appropriate fines and an order that the practitioner should pay the Committee's costs of the proceedings.

***Conclusion and orders***

38 Having regard to the reasons set out above, the Tribunal makes the following orders:

- (1) The Tribunal notes the following facts are admitted by the practitioner:
  - (a) During the period August 2001 to July 2002, the practitioner failed to perform any work on the file of the client which progressed the client's action against National Mutual Insurance Limited (the action) in accordance with the client's instructions with the expedition that would be expected of a practitioner of good repute and competence.
  - (b) The practitioner continued to act for the client after the action had been struck out on 30 July 2002 in circumstances where he failed to advise the client to seek independent legal advice as to what recourse or remedies the client may have against the practitioner's firm Eley Palmer Archer or otherwise as a result of the action having been struck out.
  - (c) Between 11 February 2004 and 4 May 2004, the practitioner failed to respond to a written inquiry made of him by the Legal Practitioners Complaints Committee in the last paragraph of the letter dated 11 February 2004 within the time requested or within a reasonable time.
  - (d) The practitioner failed to respond to emails sent to him by the client dated 24 October 2002, 7 March 2003, 3 April 2003 and 21 April 2003 by failing to advise the client as to the consequences for the client and otherwise of the action having been struck out.
- (2) By reason of the admitted facts stated in par 1(a), the Tribunal finds the practitioner guilty of neglect in the course of the practice of the law.

- (3) By reason of the admitted facts stated in par 1(b), the Tribunal finds the practitioner guilty of unprofessional conduct.
- (4) By reason of the admitted facts stated in par 1(c), the Tribunal finds the practitioner guilty of unsatisfactory conduct by unprofessional conduct.
- (5) By reason of the admitted facts stated in par 1(d), the Tribunal finds the practitioner guilty of neglect in the course of the practice of the law.
- (6) The practitioner is reprimanded for neglect in the course of the conduct of the law and for his unprofessional law as specified respectively in paragraphs (2) - (5).
- (7) Within 56 days, the practitioner is to pay the Legal Practice Board a fine of \$6000 in respect of his neglect in the course of the practice of the law as specified in par (2) above.
- (8) Within 56 days, the practitioner is to pay the Legal Practice Board a fine of \$8000 in respect of his unprofessional conduct as specified in par (3) above.
- (9) Within 56 days, the practitioner is to pay the Legal Practice Board a fine of \$1000 in respect of his unprofessional conduct as specified in par (4).
- (10) Within 56 days, the practitioner is to pay to the Legal Practice Board a fine of \$2000 in respect of his neglect as specified in par (5).
- (11) The practitioner pay the Committee's costs of \$10 000 to the Legal Practice Board within 56 days.
- (12) The orders are hereby published.
- (13) The proceedings in VR 8 of 2004 and VR 9 of 2004 are dismissed.

I certify that this and the preceding [38] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**JUSTICE M L BARKER, PRESIDENT**