

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

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MANCINI v LEGAL PRACTITIONERS CONDUCT BOARD

[2014] SASCFC 31

Judgment of The Full Court

(The Honourable Justice Gray, The Honourable Justice Sulan and The Honourable Justice Bampton)

4 April 2014

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - DISCIPLINARY PROCEEDINGS - GENERALLY

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PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - DISCIPLINARY PROCEEDINGS - SOUTH AUSTRALIA - PROCEEDINGS IN TRIBUNALS

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - DISCIPLINARY PROCEEDINGS - SOUTH AUSTRALIA - APPEALS

Appeal by a practitioner against orders made by the Legal Practitioners Disciplinary Tribunal. The practitioner was charged with unprofessional conduct pursuant to section 82(2) of the Legal Practitioners Act 1981 (SA). The unprofessional conduct was alleged to involve a course of conduct concerning the making of false and misleading statements to an expert psychologist retained by the practitioner and the failure of the practitioner to pay accounts of the psychologist. The Tribunal found the practitioner guilty of unprofessional conduct as charged. When determining penalty, the majority of the Tribunal determined that a period of suspension would be appropriate.

Whether the penalty imposed was manifestly excessive. Whether the Tribunal placed inappropriate weight on the practitioner's history concerning disciplinary matters. Whether the Tribunal did not have proper regard to the effect of the suspension order on the practitioner's practice. Whether the Tribunal inappropriately took the view that the practitioner was less than frank with the Tribunal. Whether the Tribunal did not have

Appellant: GEORGE MANCINI Counsel: MR W BOUCAUT SC - Solicitor: COSTS LAW SA
Respondent: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MS F NELSON QC - Solicitor: LEGAL PRACTITIONERS CONDUCT BOARD

Hearing Date/s: 12/03/2014

File No/s: SCCIV-13-1659

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proper regard to the practitioner's poor health and failed to give due weight to the practitioner's exemplary service to the legal profession.

During the hearing of the appeal, the practitioner had further findings of unprofessional conduct made against him in two further disciplinary proceedings. Each proceeding was referred to this Court to determine penalty.

Held:

(1) Protection of the public interest includes ensuring that the professional standards of legal practice are maintained and are seen to be maintained.

(2) In deciding penalty it was both necessary and proper for the Tribunal to have regard to the practitioner's disciplinary history.

(3) A general degree of frankness and cooperation with the Board is a fundamental obligation of any legal practitioner.

(4) Even if the practitioner's poor health provided an explanation for some of the conduct that occurred it does not alter the characterisation of his conduct, nor does it mitigate the seriousness of the conduct. The departure from the required standard is persistent and the explanation offered is of insufficient weight.

(5) The effect of a suspension is a factor which is relevant when considering what course of action should be adopted. The unprofessional conduct of the practitioner is serious and should be the subject of censure. There would be little to be gained from suspension. The practitioner is to be subjected to an order for supervision for a period of three years.

Legal Practitioners Act 1981 (SA) s 82(2) and s 86, referred to.

The Law Society of South Australia v Murphy (1999) 201 LSJS 456; *The Law Society of South Australia v Jordan* (1998) 198 LSJS 434; *Legal Practitioners Conduct Board v Hay* (2001) 83 SASR 454; *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467; *Legal Practitioners Conduct Board v Jones* [2009] SASC 347; *Legal Practitioners Conduct Board v Clisby* [2012] SASCF 43, considered.

MANCINI v LEGAL PRACTITIONERS CONDUCT BOARD
[2014] SASCF 31

Full Court: Gray, Sulan and Bampton JJ

THE COURT.

1 This is an appeal by a practitioner against orders made by the Legal Practitioners Disciplinary Tribunal. Two further disciplinary proceedings have been referred to this Court.

2 The practitioner, George Mancini, was charged with unprofessional conduct pursuant to section 82(2) of the *Legal Practitioners Act 1981* (SA). It was alleged that the practitioner engaged in a course of conduct between 28 April 2009 and 31 January 2012 which included the making of false and misleading statements to an expert psychologist retained by the practitioner and his failure to pay accounts of the psychologist.

3 The facts were admitted save and except that the practitioner did not admit that he should reasonably have known as at a relevant time that he held no monies in trust on account of one of his clients. The practitioner characterised his conduct as merely unsatisfactory and denied that the conduct was unprofessional.

4 The Tribunal made detailed findings in respect of the facts and circumstances giving rise to each charge and concluded:

The practitioner's conduct in dealing with [the psychologist], his failure to correct misleading statements made to [the psychologist], and his failure to promptly pay [the psychologist's] accounts is conduct which involves a substantial departure from the standard of conduct observed by a competent legal practitioner of good repute.

The Tribunal then addressed the practitioner's conduct towards the Board and the Tribunal and observed:

Further, for the reasons set out above, the practitioner did not answer the Board's inquiry with frankness and candour. To blame others for the non-payment of [the psychologist's] account, by failing to acknowledge both that his statements to [the psychologist] were misleading and that he should have paid the accounts promptly in the absence of an agreement with [the psychologist] for an extension of time to pay whilst he sought to recover the monies from clients or legal aid is a very serious departure from the standard of conduct observed by competent legal practitioners of good repute.

Whilst the practitioner gave evidence before this Tribunal that he should have done things in a much better and timely way, neither in his reply nor in his evidence before the Tribunal did he admit that [the psychologist's] accounts should have been promptly paid by him in circumstances where he had no money in trust or where legal aid funding was

not forthcoming. The practitioner gave evidence that his firm had the capacity to pay [the psychologist's] account.

- 5 On 19 April 2013, the Tribunal found the practitioner guilty of unprofessional conduct as charged:

The Tribunal finds that the practitioner's conduct with respect to retaining [the psychologist] was misleading and his conduct in failing to pay [the psychologist's] accounts until such time as he was charged by the Conduct Board is very serious and involves a substantial or recurrent failure to meet the standards of conduct to be observed by a competent legal practitioner of good repute.

...

For the reasons set out in this report, the Tribunal finds that the charge against the practitioner for unprofessional conduct pursuant to Section 82 of the Act is made out and, accordingly, makes that finding.

[Footnotes omitted.]

The practitioner did not challenge the finding that his conduct was misleading nor that he failed to pay the accounts. During the course of the appeal, the practitioner indicated that he no longer challenged the findings of unprofessional conduct.

- 6 When determining penalty, the Tribunal concluded:

The Tribunal has no hesitation in determining that a reprimand is not appropriate. The conduct is serious and represents an abrogation of the practitioner's responsibilities. There is a disturbing pattern of conduct found to be Unprofessional Conduct.

By the same token, the Tribunal considers that a suspension combined with a fine would be oppressive.

The Tribunal is conscious of the fact the practitioner is now a sole practitioner, and of his contribution to the profession. Nonetheless, the practitioner has abrogated his professional responsibilities.

The majority of the Tribunal, the chairperson and member J Clarke agree on penalty but member P McEwin has published a different view on penalty.

In the circumstances, taking into account the nature of the conduct and the past findings of unprofessional conduct, the Tribunal will order that the legal practitioner's practising certificate be suspended for a period of two months. The Tribunal will hear submissions from the parties as to when the period of suspension should commence.

The Tribunal will also order that the practitioner pay the Board's costs of and incidental to the prosecution, certified fit for senior counsel.

The dissenting member of the Tribunal would have imposed a fine of \$9,500.00, rather than ordering suspension.

- 7 The practitioner requested that the suspension be served in two separate one-month periods. The Board did not oppose this request and an order was made which suspended the practitioner during the months of January and June 2014. This order was then stayed pending the determination of this appeal.

The Appeal

- 8 The practitioner's appeal is brought pursuant to section 86 of the *Legal Practitioners Act*. Section 86(3) concerns the right of appeal against a decision of the Tribunal and empowers the Supreme Court, *inter alia*, to affirm, vary, quash or reverse the decision appealed from, remit the matter of the appeal to the Tribunal for further consideration or re-hearing and make any further orders the case requires. The operation of the orders made by the Tribunal has been suspended pursuant to section 87.

- 9 The practitioner was admitted in 1978 and first practised with a suburban firm. Following overseas travel the practitioner returned to South Australia and worked as an employed solicitor and then on his own account as well as working as a *locum*. In 1988 he joined the Northern Territory Crown Solicitor's Office as a senior litigation solicitor. He returned to South Australia and worked first at the Legal Services Commission and then in 1991 as a sole practitioner, practising under the name George Mancini & Co.

- 10 The practitioner developed an extensive criminal practice with the majority of his clients being legally aided. During the period April 2009 to January 2012, he had the conduct of some 300 files.

- 11 The practitioner submitted that the penalty imposed was manifestly excessive. He contended that the Tribunal placed inappropriate weight on the need for the public to be protected, placed inappropriate weight on the practitioner's history concerning disciplinary matters, did not have proper regard to the effect of the suspension order on the practitioner's practice, inappropriately took the view that the practitioner was less than frank with the Board and the Tribunal, did not have proper regard to the practitioner's poor health and failed to give due weight to the practitioner's exemplary service to the legal profession. It is convenient to consider each of these matters before addressing the overarching complaint that the penalty was manifestly excessive.

- 12 The Board submitted that the penalty arrived at by the Tribunal of a two month suspension was both proportionate and of sufficient deterrent value to achieve the desired effect. The Board drew attention to the fact that the practitioner had been reprimanded or admonished on four previous occasions and contended that a further reprimand would be unlikely to achieve anything.

- 13 On the hearing of the appeal, the practitioner abandoned his complaint that the Tribunal failed to have any regard to the fact that the practitioner's conduct

did not have any impact on the public and did not raise the issue of the protection of the public. This was an appropriate abandonment. The practitioner's conduct did have impact upon the public. The issue of protection of the public did arise.

14 The Tribunal was correct to conclude that the protection of the public is not limited to situations where clients suffer loss or damage in a financial or personal sense and that an independent expert or a member of the public approached by a legal practitioner is entitled to assume that services requested would be paid for promptly unless otherwise agreed. Protection of the public interest includes ensuring that the professional standards of legal practice are maintained and are seen to be maintained.¹

15 In 1989, the practitioner was found by the Complaints Committee to have misled a client. The practitioner advised the client that his worker's compensation action had been struck out due to the client's non-attendance at Court. The true position was that the action had been struck out because the practitioner failed to attend at Court. The practitioner was admonished by letter. The practitioner was further admonished by the Committee in 1992 for unprofessional conduct in respect of four matters each involving the common allegation of serious delay and the lack of communication by the practitioner with his client. In 1995, the practitioner was found guilty of unprofessional conduct. He had failed to respond to repeated telephone calls from a client over a three month period and then had failed to make contact the client over a period of more than 12 months. The practitioner was admonished by letter.

16 In 2011, the practitioner engaged in unsatisfactory conduct by failing to complete work for a client, failing to communicate adequately with the client and failing to promptly return papers upon termination of instructions. The practitioner was reprimanded.

17 The Board investigated three other matters involving complaints against the practitioner but resolved that there was no unsatisfactory or unprofessional conduct on the part of the practitioner. The Board considered, however, that it was appropriate to remind the practitioner of the importance of a number of professional duties and obligations.

18 The Tribunal was correct to have regard to the practitioner's disciplinary history. The Tribunal noted that there had been prior findings of unprofessional and unsatisfactory conduct and that the practitioner had been admonished on a number of occasions. The Tribunal formed the impression that notwithstanding prior admonishments the practitioner's attitude to his professional responsibilities was "cavalier". These were appropriate matters to be addressed by the Tribunal.

¹ *Legal Practitioners Conduct Board v Jones* [2009] SASC 347, [54]; *Legal Practitioners Conduct Board v Clisby* [2012] SASFC 43, [10].

19 The Tribunal had regard to the fact that much of the practitioner's professional work was legally aided. If the practitioner is suspended then it will cause difficulties for his clients. He is effectively a sole practitioner and if suspended he could not supervise an employed solicitor. That is not to say that if suspension is the appropriate course of action, those difficulties should be a reason not to suspend. However, the effect of a suspension is a relevant factor when considering what course of action should be adopted.

20 The practitioner did not answer the Board's enquiry in relation to particular matters with frankness and candour. He took no corrective action in attending to the payment of the psychologist's accounts personally. He did not acknowledge his mistake. In relation to one matter he attempted to pass the blame to his client. The practitioner failed to acknowledge that his statements to the psychologist were misleading. Neither in his reply nor in his evidence did the practitioner admit that the accounts should have been paid promptly by him in circumstances where he had no money in trust or where legal aid was not forthcoming. Frankness and cooperation with the Board and the Tribunal is a fundamental obligation of any legal practitioner.²

21 Evidence before the Tribunal established that the practitioner had health issues. From time to time, he needed to seek medical treatment and undergo certain procedures. However, it does not appear that these involved more than day surgery and periods of short convalescence. It was suggested that the practitioner had a heightened level of anxiety particularly when he was dealing with difficult, stressful and time consuming legal proceedings. The Tribunal was aware of these matters. No basis has been shown to allow a conclusion that inappropriate weight was given to these circumstances when considering penalty.

22 It is to be recalled that in dealing with a charge of unprofessional conduct, the Tribunal and this Court act in the public interest. That is, the legislation is protective, not punitive. Even if the practitioner's poor health provided an explanation for some of the conduct that occurred it does not alter the characterisation of his conduct, nor does it mitigate the seriousness of the conduct. As was observed by Doyle CJ in *Murphy*:³

... A practitioner who is under business or other forms of pressure cannot use the existence of such pressure as an excuse for a failure to observe proper professional standards. The Court and, no doubt, the Tribunal, will readily accept that business and other pressures on practitioners may result in occasional minor departures from the required standard of conduct, and when the departure is not great and is an isolated instance, an understanding of the circumstances that led to the departure from the required standard may enable the Court to conclude that the practitioner remains fit to be a legal practitioner, notwithstanding the relevant conduct. ...

² *Legal Practitioners Conduct Board v Jones* [2010] SASCFC 51, [36].

³ *The Law Society of South Australia v Murphy* (1999) 201 LSJS 456, [27].

In the present case, the departure from the required standard was persistent and the explanation offered wholly inadequate.

23 The Tribunal had regard to the services rendered by the practitioner to the legal profession and the community when determining penalty. In that respect, the Tribunal noted that the practitioner is heavily involved in matters to do with the law outside his practice. The practitioner has been a member of the Law Society Criminal Law Committee since 1998, having held the position of Chair from 2008 to 2010 and of Co-Chair from 2010 to the present time. He is involved in the coordination and organisation of the Law Society's Annual Criminal Law Conference and was a nominee of the Law Society on a number of committees including a committee dealing with listing problems within the criminal courts. He was also involved in the Law Society's Working Party relating to the Productivity Commission's Inquiry into Access to Justice and has been involved in the work of the Law Council of Australia's Criminal Law Committee. The practitioner was the co-recipient of the Law Society's Brian Withers' Award in 2005. He is a member of the Law Society Professional Advisory Development Committee and spends approximately 20 hours per month on Law Society work. The practitioner has been a member of the South Australian Council for Civil Liberties since 2003 and held office as President from 2005 to 2010. He has a reputation for carrying out *pro bono* work and is said to take on matters that other practitioners may not elect to do. He was described as being committed to the practice of the criminal law and the development of the profession in the area of criminal practice.

24 We do not consider any of the complaints advanced by the practitioner to be of substance. The gravamen of the Tribunal's finding is that the practitioner engaged in an ongoing course of unprofessional conduct during which he made false and misleading statements and failed to pay accounts that were due and owing of a forensic psychologist over a lengthy period. It appears that the practitioner was indifferent to his obligation to meet the accounts and preferred to use the monies available to pay his own account, rather than to meet his obligations to the psychologist. We agree with the conclusion of the Tribunal that this course of unprofessional conduct was serious and that it would be inappropriate, given the practitioner's earlier instances of unprofessional and unsatisfactory conduct, to proceed by way of reprimand or admonishment.

25 On the hearing of the appeal, the Court received an affidavit in which the practitioner claimed that the order of suspension would have a catastrophic impact on his practice and on his family's personal finances. The affidavit explained the nature of his practice and the need for his attendance at all times. He claimed that a *locum* would be unable to maintain the practice during any period of suspension.

26 We have found this affidavit troubling. It suggests that the practitioner conducts his practice in a way in which an absence of any length on account of

illness or a need for holiday or for any other reason would have a catastrophic effect. This could suggest that the practitioner has not developed the necessary techniques in the conduct of his professional activities to take account of the normal exigencies of life and his probable need to be absent from the practice from time to time. When regard is had to his earlier incidences of unprofessional and unsatisfactory conduct and to the course of conduct the subject of this appeal, it is apparent that the practitioner has mismanaged his practice. It may reasonably be inferred that this mismanagement has had a part to play in his unprofessional conduct.

27 It is of the utmost importance that public confidence in the legal profession be maintained. Legal practitioners play an integral part in the administration of justice. The obligations which accompany a practitioner's position are commensurate with the responsibility involved. The duties of legal practitioners include a duty to uphold the law, a duty to the Court, a duty to clients and a more general duty to members of the public. The Court and the public demand high standards from practitioners. This is reflected in the legislative processes that regulate the admission of practitioners and govern their conduct.

28 Personal integrity is an essential attribute for a legal practitioner. Practitioners must act honestly at all times. There is an obligation of candour and frankness in dealings with clients. A practitioner whose conduct is the subject of an enquiry by the Board or the Tribunal must uphold the obligations of candour and frankness to the Board and Tribunal. A practitioner has a duty to assist any such enquiry. Attendance to these obligations is an essential part of proper professional conduct.⁴

29 Having regard to the foregoing, we do not consider a two month suspension to be the appropriate penalty. Although it is necessary for the practitioner to be publicly reprimanded and to be firmly reminded of his professional obligations, the public interest is better served by the practitioner being able to continue to practise but under strict supervision.

Costs

30 In the matter the subject of the practitioner's appeal, the Tribunal ordered that the practitioner pay the Board's costs to be agreed or taxed and certified that the matter was fit for senior counsel. On appeal, the practitioner complained of that certification. It was said that there was no real contest of fact and that the only issue related to the characterisation of the practitioner's conduct. The Board submitted that no basis had been established to suggest that the Tribunal's exercise of discretion as to costs had miscarried. It was pointed out that the practitioner's conduct was characterised, not only as unprofessional, but as

⁴ *The Law Society of South Australia v Jordan* (1998) 198 LSJS 434, 476; *Legal Practitioners Conduct Board v Hay* (2001) 83 SASR 454, [61]; *Legal Practitioners Conduct Board v Phillips* (2002) 83 SASR 467, [34].

involving a recurrent failure to meet the standards of conduct to be observed by a competent legal practitioner of good repute.

- 31 In our view, to suggest that the only issue related to the characterisation of the practitioner's conduct is simplistic. The submission fails to recognise the seriousness of the charge advanced by the Board and the important issues of the protection of the public that arose for consideration. We can discern no basis upon which the exercise of the discretion as to costs can be said to have miscarried.

Two Further Proceedings

- 32 During the course of the hearing of the practitioner's appeal, it came to the attention of the Court that the conduct of the practitioner was the subject of two further disciplinary proceedings before the Tribunal. Findings of unprofessional conduct have been made against the practitioner in both matters and the Tribunal in each proceeding has referred to this Court the determination of an appropriate penalty.

- 33 On 20 March 2014, the practitioner was found guilty on two counts of unprofessional conduct. The first finding concerned the practitioner's recurrent failure to pay a costs order of the Federal Court. This failure extended for more than a year and a half and continued notwithstanding the making of a complaint to the Conduct Board. The Tribunal concluded:

In the circumstances, it is the Board's view that his recurrent failure to pay the costs order even in the face of the a [sic] complaint to the Conduct Board by the AGS was a serious breach of his professional obligations and amounted to a substantial recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

In the circumstances, the Tribunal finds that Count 1 amounts to unprofessional conduct.

The second finding of unprofessional conduct concerned the practitioner's attempts to raise a set-off to the costs order. In that respect the Tribunal concluded:

The Practitioner's conduct in endeavoring to raise a set off that he himself knew was not applicable and in ignoring requests by the AGS that he pay the sum again showed a substantial and recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

In the circumstances the Tribunal finds that Count 2 also amounts to unprofessional conduct.

- 34 On 24 March 2014, the practitioner was found guilty on three counts of unprofessional conduct. The practitioner failed between September 2010 and August 2012 to inform his client of the true situation concerning the client's appeal, namely that a notice of appeal had not been filed and that the appeal would not proceed. During the same period the practitioner failed to deal

appropriately with trust monies in accordance with his statutory obligations and delayed unreasonably in making the client's file available to a new solicitor. The practitioner admitted that his conduct constituted unprofessional conduct.

Conclusion

35 The practitioner's unprofessional conduct, the subject of the findings of the three Tribunals, should be the subject of censure. However, this alone would not be sufficient. The public and the legal profession must understand the serious view the Court takes of the practitioner's unprofessional conduct. We have given consideration to the question of whether the practitioner should be suspended for a period of time. On balance, as discussed above, we consider that there would be little to be gained from suspension. The order of suspension imposed by the Tribunal in respect of the matter under appeal should be set aside.

36 We consider it appropriate to order that it be a condition of the practitioner's entitlement to practise the profession of the law that he do so under supervision for a period of three years. The supervisor is to be a legal practitioner approved by the Board and the expense of supervision is to be met by the practitioner. Minutes of order setting out the terms and conditions of supervision are to be prepared and forwarded to the Court for approval. The terms of supervision are to be endorsed in full on the practitioner's practising certificate.

37 In addition to the foregoing, the practitioner is to pay the costs of the proceedings in this Court to be agreed or taxed. It is noted that orders for the costs of the proceedings before the Tribunals have already been made.