Counsel

SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

LEGAL PRACTITIONERS CONDUCT BOARD v HAY

Judgment of the Full Court
(The Honourable Justice Prior ACJ, the Honourable Justice Bleby and the Honourable Justice Martin)

27 September 2001

PROFESSIONS AND TRADES — LAWYERS — REMOVAL OF NAME FROM ROLL

Application for removal of a practitioner from Roll of Legal Practitioners - practitioner opposes order - evidence of persistent neglect of affairs of clients and a persistent disregard of proper inquiries and demands from the Legal Practitioners Conduct Board - refusal to acknowledge or make full disclosure of previous unprofessional conduct - finding of an intention to deceive by the Legal Practitioners Disciplinary Tribunal - name of practitioner struck off the Roll of Legal Practitioners.

Legal Practitioners Act 1981 s 15, s 21, s 76, referred to.
Law Society of South Australia v Murphy (1999) 201 LSJS 456; *New South Wales Bar Association v Kalaf* [NSWSC Ct App, 11 October 1988, unreported; Jdgmt No 588 of 1986 (BC 8801429)]; *In the matter of Peter David Kerin* (1997) 195 LSJS 185; *in Re a Practitioner* (1984) 36 SASR 590 at 593, applied.

Plaintiff: LEGAL PRACTITIONERS CONDUCT BOARD **Counsel: MR A MARTIN - Solicitors: RICHARD EWART**
Defendant: STEPHEN EARLE HAY **Counsel: MR J WELLS QC - Solicitors: XENOPHON & CO**

Hearing Date/s: 10/09/2001.

File No/s: SCCIV-00-584

A1

Judgment No. [2001] SASC 322

LEGAL PRACTITIONERS CONDUCT BOARD v HAY
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Full Court: Prior ACJ, Bleby and Martin JJ

1 The defendant admitted before the Legal Practitioners Disciplinary Tribunal that he had been guilty of unprofessional conduct.

2 The Tribunal recommended that disciplinary proceedings be commenced against the practitioner in this Court. The Board seeks an order that the name of the practitioner be struck off the Roll of Legal Practitioners. The practitioner opposes that order.

3 The charges before the Tribunal followed complaints being made to the Board for and on behalf of three of the practitioner's clients. The complaints related to excessive delay and the failure of the practitioner to carry out the instructions of his clients.

4 The Board commenced its inquiries with respect to the first and second complaints in February 1998 and on 22 September of that year with respect to the third. In the course of its inquiries, the Board sent no less than 14 letters of request to the practitioner. Those requests began with five during March 1998. Further letters of request went from the Board in April, May, September and October 1998. Two further letters went in March and August 1999. The practitioner did not respond to any of those letters.

5 The Board invoked its power under s 76(3) of the *Legal Practitioners Act* 1981 and served three Notices upon the practitioner in August, September and December 1998, requiring the production of documents. The practitioner failed to respond to all three Notices. A refusal without reasonable excuse to produce a document when required to do so is an offence against the Act.

6 The Board laid a charge against the practitioner upon receipt of a complaint from the Law Society of South Australia. That charge was that the practitioner practised law whilst not holding a current practising certificate between January and September 1999. Section 21(1) of the Act prevents a person from practising unless he, she or it holds a practising certificate issued and in force under the Act.

7 With one exception, all factual matters were admitted on charges with respect to excessive delays related to three clients. The exception was an allegation made by one of the clients that the practitioner asked her to withdraw her complaint. The practitioner advised the Tribunal that he informed that client that he could not continue to act if she intended to proceed with a complaint against him.

8 The practitioner was admitted to practice in February 1983. He was a sole practitioner from 1989. His practice was largely commercially based. In 1996 he became involved in a building project in the east end of Adelaide. He was

employed as the General Manager of that project for about four years. The Tribunal was told that the practitioner set up practice on his own account again from the beginning of last year.

9 The Board particularised the delays and failures with respect to the first complaint as being that, in about August 1996, the client instructed the practitioner to attempt to evict her son from a property in which she had a life interest. The practitioner said that he could have the son evicted by Christmas 1996. This did not happen. Nothing was done by the practitioner throughout the following year. The client telephoned the practitioner on numerous occasions. When she was able to speak to him, he made promises about getting the matter attended to. In January 1998, the practitioner advised his client that he would have the matter in court by 5 January and the client's son out of her residence by 9 January.

10 The client complained to the Board on 7 February 1998. The matter had not advanced. The Board informed the practitioner of the complaint. When the practitioner saw the client she withdrew her complaint. However, the practitioner took no further steps in advancing his client's instructions.

11 With respect to the second client, the practitioner was instructed to apply for probate of the will of that client's deceased mother. A land valuer advised the practitioner, on behalf of the client that the client wanted an interest in real estate transferred to him within four weeks. The practitioner told the valuer that he could arrange the transfer within the time required by the client.

12 The land valuer provided the practitioner with further instructions and the necessary documentation. The grant of probate did not occur within the four weeks, as promised. In March 1998, the practitioner apologised to the land valuer for the delay, asking whether he was still to deal with the matter. He was told that if he could do it within four to six weeks, to do it, otherwise to give the paperwork back to enable someone else to do it. The matter was not advanced any further.

13 In January 1999, the practitioner apologised to the land valuer for the delay and asked whether the client still wanted him to "deal with probate". The client confirming that he had not instructed anyone else to pursue the matter, the practitioner offered to attend to it for no charge because of the delay. Nothing further was heard from the practitioner. The practitioner has not applied for or obtained probate of the will or taken any action to advance the client's instructions.

14 The third matter of complaint related to a deceased estate as well. In October 1997, three days after his father's death, one of the deceased's sons contacted the practitioner's office, by telephone. The practitioner arranged for an appointment for the following day. The practitioner failed to keep the

appointment. He was having coffee with a client because they "had had a win". When the practitioner finally arrived at his office to keep the appointment, he told the clients that the matter should be finalised by the end of the year as the two executors had done the work of attending on the asset holders.

15 In December 1997 the practitioner told one of the executors that the matter would be finalised by the end of January 1998. It was not. The practitioner had told the executor that he had been ill and had not progressed the matter. The executors were unsuccessful in making contact with the practitioner until July. An appointment was made. The practitioner failed to keep it. When another appointment was made, the practitioner attended and gave a personal cheque for $12000 made out to the deceased's widow. Shortly after that, he placed $10000 in the two bank accounts of the executors. One of the executors continued to pursue the practitioner. There was an occasion when the practitioner paid one of the executors a further sum of $1195 by way of a personal cheque. The Board said that it was unaware of the purpose of all of those payments.

16 Just before Christmas 1998, one of the executors attended the practitioner's office, signing a document he believed to be a probate application. On that occasion the practitioner said he would contact the executor the following Tuesday to confirm that the application was lodged. He did not do so.

17 In late February 1999, the same executor telephoned the practitioner's office and spoke to the practitioner. The practitioner then said that he was doing the mail and would ring back when he had finished. He did not ring back. As a result of that, another solicitor was instructed to act in relation to the estate.

18 The Tribunal said that the delay of the practitioner was inexcusable and excessive in each case. It saw his failure to carry out instructions, despite repeated requests from his clients, as indicating wilful disregard on the practitioner's part to comply with the standards of ethical behaviour expected of legal practitioners.

19 The Tribunal's view was that it was no answer to the charges with respect to those three clients to say, as was submitted by the practitioner's counsel, that the practitioner exhibited a head in the sand mentality. The Tribunal viewed it as a matter of great concern that the practitioner regarded his failure to observe the expected standards of ethical behaviour as inconsequential to his perceived right to practise.

20 Had the matter stopped there, one might think that the Tribunal might well have considered taking disciplinary action different from that which it recommended. However, there was the matter of the practitioner's failure to respond to three statutory notices, let alone the 14, less formal requests.

21 Then there was the matter of practising whilst not holding a practising certificate. The Tribunal was told that the practitioner appeared in court on three occasions while not holding a practising certificate. One was an appearance before a judge of this Court on behalf of the husband of a fellow practitioner and friend. The practitioner told the Tribunal that he was requested by his professional colleague to attend at the hearing on behalf of her husband, who was not a party to the proceedings then before the judge of this Court, simply to obtain a date for submissions to be made on a question of costs. It was the practitioner's evidence that as for this attendance, he did not open a file or charge for his attendance.

22 On another occasion, in the middle of 1999, the practitioner admitted to appearing in the Magistrates Court for his cousin, making submissions on a plea of guilty. Again, no charge was made for the attendance nor was a file opened. On yet another occasion, approximately two months before the hearing, the practitioner had appeared in the Magistrates Court on a Directions Hearing, when no charge was made for that attendance.

23 There can be no doubt that the attendances at court involved the practitioner practising, or holding himself out as being entitled to practise the profession of the law, whether a fee was charged for such attendances or not.

24 The practitioner also admitted to five to 10 occasions, when he was employed on the east end building project, when he provided verbal drafting advice to conveyancers, or prepared documents in conjunction with them in the course of, or incidental to his employment. Again, no charge was made. Nevertheless, the behaviour could still have constituted a breach of s 21 of the *Legal Practitioners Act*.

25 The practitioner's evidence was that those were the only occasions in which he had given legal advice whilst not holding a current practising certificate. He was unable to advance any reason why he failed to renew his certificate. The Tribunal said that practising without a certificate and, for the second time in one's career, was a serious matter, in itself.

26 The hearing before the Tribunal commenced on 12 November 1999. Counsel for the Board outlined the facts underlying the complaints. The practitioner gave evidence about those matters. During that evidence, and in subsequent evidence, he said that until the hearing was imminent he had adopted a "head-in-the-sand" attitude. It was that attitude that led him to fail to attend to the various matters that were the subject of the complaints and to fail to respond to the various requests and statutory notices from the Board. The practitioner said that shortly prior to the hearing he had read the Full Court decision of *Murphy*[1] which scared him. He described being struck off as a "horrifying

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1 *Law Society of South Australia v Murphy* (1999) 201 LSJS 456

prospect". Asked when he had come to terms with the fact that he was facing the matters before the Tribunal, the practitioner said the inevitability of the hearing date had "galvanised" his attitude in respect of what he wanted to do and where he wanted to be. The tenor of the practitioner's evidence was that he had overcome the state of avoidance and denial, which in conjunction with the turmoil of his personal circumstances, had led to his failures that were the subject of the complaints.

27 Notwithstanding an earlier order for production of files, there were files that the practitioner had failed to produce. He undertook to produce those files and the hearing was adjourned to enable that to occur and to enable the parties to indicate whether they wished the Tribunal to reconvene before making a decision. The hearing reconvened on 2 December 1999 at the instigation of the Tribunal. Upon resumption the Chairman identified two reasons why the matter had been called on. First, in a casual conversation with a senior counsel, the Chairman had become aware that the practitioner had briefed the senior counsel at a time when the practitioner did not possess a practising certificate. We leave that issue aside. As to the second matter, the Chairman identified it in the following terms:

> "The second matter is something that's just come out of the woodwork as a result of what ever information is available to us, and that is that there was apparently something involving Mr Hay before the Board on a previous occasion which we think we'd like to know about."

28 Counsel for the Board indicated that inquiries had been made and revealed nothing adverse against the practitioner. That indication was accompanied by the rider that the computer records from 1991 onwards revealed nothing adverse, but records prior to 1991 were contained in a compactus, which had fallen over leaving the files in an unsorted condition. Counsel indicated he was not sure how long it would take to sort out the compactus files. The Tribunal adjourned for five minutes and upon resumption the following exchange took place between the Chairman and counsel for the practitioner:

> "CHAIRMAN: Mr Soulio, the tribunal thinks that us having raised the matter, it is up to you whether you have any instructions on an aspect of any previous appearance before the board. If you want to take instructions on that we will let you do so.
>
> MR SOULIO: I have taken instructions during the break. Mr Hay instructs me that the only matter that he can recall is that he was once admonished for putting a trust return in late. But I think that's –
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> CHAIRMAN: By the board.

MR SOULIO: No, I think that comes from the registry. He can't recall any –

CHAIRMAN: I think if it is admonishing it is probably the board, but –

MR SOULIO: Well, that was the term he used, but that wasn't the board to his recollection.

CHAIRMAN: Not to do with a client?

MR SOULIO: No, and it is a procedural matter from the registry as I understand it and he has no recollection at all of ever having had to answer to the board for any other matter.

CHAIRMAN: Thank you. All right, we will adjourn again. If anything comes to light on it, either by our own – we think that it is a matter that the board should follow up and we hope they do so.

MR SOULIO: Can I enquire as to the source of the information, because it was indicated that information was available to the tribunal?

CHAIRMAN: It was available to one member of the tribunal.

MR SOULIO: On an informal basis.

CHAIRMAN: Yes. As a result of some previous action that took place, apparently involving a law claim. That might help your client remember, which eventuated in the law claim. Now, it may not be correct but that is the information that someone obtained.

MR SOULIO: Mr Hay did inform me during the break that he had a matter relating to a lease which became a law claim.

CHAIRMAN: That may be it.

MR SOULIO: But that didn't result in any dealing with the board, to his recollection.

CHAIRMAN: Well that is as much and as little as we know.

MR SOULIO: I didn't raise that because I didn't regard that as being in the ambit of what was being enquired about. But we will check that."

29 The hearing was adjourned on the basis that the Board would endeavour to check the compactus files for the period prior to 1991. When the hearing resumed on 27 January 2000 the Board was presented with records of the practitioner's prior involvement in disciplinary matters.

30 In March 1989 the Professional Conduct and Practice Committee wrote to the practitioner concerning a lack of a trust account audit and a period of practising in January and February 1989 without a practising certificate. The practitioner swore an affidavit stating that his failure to renew his practising certificate was caused by an oversight. When an audit was finally carried out, numerous irregularities were discovered. By letter of 27 June 1989 the Committee advised the practitioner that it viewed his failure to maintain his records in accordance with the *Legal Practitioners Act* 1981 with great concern and that further failure on his part would be likely to prompt serious action and could result in a finding of unprofessional conduct.

31 Notwithstanding that warning and the requirement that the trust account audit report for the year ending 30 June 1989 be submitted to the Registrar of the Supreme Court by 31 October 1989, the practitioner failed to comply. The Committee wrote to the practitioner on 16 November 1989 informing him of his failure and advising that his practising certificate could not be renewed until an auditor's report was submitted. The Committee wrote again to the practitioner on 15 January 1990 and 6 February 1990 when the report remained outstanding. After a change of auditor, a report dated 14 February 1990 revealed numerous irregularities. As to the practising certificate, in an affidavit of 14 February 1990 the practitioner said that he had failed to renew his practising certificate after 31 December 1989 by reason of continuing oversight.

32 By letter of 21 February 1990 the Committee sought an explanation. The practitioner responded by letter of 13 March 1990. Having referred to the pressures of part-time practice as a solicitor and other activities in which he was involved, the practitioner said the failings had been caused "because of a lack of attention to detail" on his part. He advised that all of the irregularities had been rectified and said:

> "I can only undertake to the Committee to continue to observe the regular and proper procedures for the maintenance of my trust account and my practising certificate in future."

33 On 9 May the Committee found that the practitioner had been guilty of unprofessional conduct. That finding was conveyed to him by letter of 9 May 1990. In that letter the Committee informed the practitioner that it viewed his conduct seriously and that it admonished him for that conduct. The practitioner was also advised that the finding would be recorded against him and could be raised by the Committee when penalty is considered should any further finding of unprofessional conduct arise against him.

34 The second matter arose in 1995. The essential facts are summarised in the following passage from the Tribunal's reasons:

> "The second matter was referred to the Complaints Committee by Chief Justice King by order dated 3 February 1995. The practitioner acted for a defendant company in proceedings commenced in the Supreme Court in 1990. In December 1992 orders were made transferring the proceedings to the District Court. During 1993 the client made numerous attempts to contact the practitioner by letter and telephone to ensure the company's defence was filed. In August 1994 the client was advised by a person other than the practitioner that a default judgment had been entered by the plaintiff with damages to be assessed. This had occurred on 29 July 1993. In February 1994 the practitioner took proceedings to have the default judgment set aside without advising the client or obtaining instructions.
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> Judge Birchall set aside the default judgment. This order was appealed to Justice Millhouse and a further appeal was then made to the Full Court of the Supreme Court. The practitioner did not advise his client of any of these matters. The Full Court restored the order of Judge Birchall. Incidental to that order, Chief Justice King referred the papers in the matter to the Complaints Committee."

35 In response to the complaint, the practitioner wrote a letter of 17 July 1995 identifying the complaint as having been referred to the Complaints Committee by the Supreme Court. He expressed his apologies and acknowledged that his conduct was unprofessional. He said his failures were due to the personal pressures that he was experiencing at the time. He acknowledged the admonishment by the Committee in May 1990 in respect of irregularities relating to his trust account and his Practising Certificate. Significantly, the practitioner gave the following undertaking (p 289):

> "As I have indicated I continue to feel deeply sorry about this matter. I have always wished to think of myself as a "good" practitioner. However, I openly acknowledge that a practitioner should never allow a matter to be conducted in the way in which I dealt (or failed to deal) with this matter. The only saving grace is that as a result of this matter I have learned a most valuable lesson and that if the situation was ever again to arise where a matter was to require similar attention or if personal pressures were such that I was distracted from attending to any matter then I would immediately seek assistance from a senior practitioner in order that no question of professional conduct was ever to arise again."

36 By letter of 25 October 1995 the Committee advised the practitioner of its decision that he had been guilty of unprofessional conduct and that it viewed his conduct seriously. By that letter the Committee admonished the practitioner for his conduct and confirmed that the finding would be recorded against him.

37 Against the background of those prior matters, an obvious question arose as to the honesty of the practitioner's response on 2 December 1999 when the Tribunal had inquired about any prior disciplinary matters and was told by counsel that the practitioner could only recall being admonished on one occasion for "putting a trust return in late". In addition, counsel had indicated that a matter had arisen concerning a lease, which became the subject of a law claim but did not result, according to the recollection of the practitioner, "in any dealing with the Board". On 27 January 2000 counsel for the Board submitted to the Tribunal that either the practitioner did not see what had occurred in 1995 as of sufficient consequence for him to remember it or he had, through his counsel, sought to deceive the Tribunal.

38 Counsel for the practitioner responded briefly. The hearing was adjourned to the following day to enable counsel to take detailed instructions. Upon resumption counsel said that from the outset the practitioner had raised with counsel the issue of being admonished in relation to the trust account, which was the matter to which he had referred on 2 December 1999. He said it was not the practitioner's recollection that the admonishment related to not renewing a practising certificate.

39 In support of the submissions, the practitioner was presented for cross-examination. As to the first matter involving the trust account and the practising certificate, the practitioner said that on 2 December 1999 he had a memory of being admonished in respect of the trust account, but he was uncertain as to which body had delivered the admonishment. When he gave instructions to his counsel on 2 December 1999, that was the only matter that he could recall getting into trouble for.

40 The practitioner said that on 2 December 1999 he also knew he had "buggered up another matter" involving a lease. However, on 2 December 1999 he did not remember getting into trouble in respect of that matter, for example, being admonished as he was admonished in respect of the trust account matter. In his mind he had categorised that problem as a law claims issue which was dealt with by law claims. Asked whether he had remembered on 2 December 1999 that he also had to deal with the official complaints body in respect of that matter, the practitioner responded "absolutely not". The practitioner acknowledged that at the time of the incident in 1995 he must have been aware of the fact that the Chief Justice had referred the matter to the Committee, but he did not recall that on 2 December 1999.

41 The Tribunal rejected the explanations that the practitioner gave in evidence. Specifically, the Tribunal did not accept the practitioner's claim that on 2 December 1999 he had forgotten that the first disciplinary matter involved practising without a practising certificate as well as the issue of the trust account. The Tribunal found that the practitioner "chose" not to inform the Tribunal about that matter.

42 The Tribunal also rejected the practitioner's claim that he had no recollection of dealings with the Complaints Committee in 1995.

43 The Tribunal expressed its ultimate conclusion concerning the practitioner's conduct on 2 December 1999 in the following passage:

> "7. Finally the Tribunal has formed the view that the practitioner decided to take his chance that neither the Board nor the Tribunal would unearth the information relating to his previous admissions of unprofessional conduct and when confronted with it, even then refused to acknowledge it or to make full disclosure. The Tribunal formed the view that this conduct amounted to an intention to deceive it."

44 A finding of an intention to deceive the Tribunal during sworn evidence is a particularly serious finding against a legal practitioner. Recognising this, and while expressly stating that the practitioner did not challenge the finding, senior counsel urged this Court that in view of additional evidence presented to the court that was not before the Tribunal, the court was in a better position to "identify more precisely than the Tribunal could the nature of the intent which it [the Tribunal] found."

45 The additional evidence was in the form of a report from a psychiatrist, Professor Alexander McFarlane. He saw the practitioner on 9 May 2001. Professor McFarlane concluded that the practitioner did not presently suffer from any psychiatric disorder such as a depressive or anxiety disorder. He expressed the view that during 1997, at the time of the breakdown of the practitioner's marriage, the practitioner was suffering from "some depressive symptomatology" and that he was significantly depressed on occasions. He considered that the experience of these symptoms provided a context against which the practitioner's apparent neglect of his duties could be considered.

46 Significantly, Professor McFarlane expressed the view that the practitioner has a "lifelong propensity" to minimise his reaction and distress to situations that many people perceive as being threatening or at least unsettling. Professor McFarlane described this as a "profound capacity for the avoidance of issues which would normally be perceived as threatening".

47 The professor spoke of the practitioner presenting as a confident man "surprisingly unperturbed by the possibility of probably being struck off". Professor McFarlane said that it appeared that the practitioner had a:

> "profound capacity for the avoidance of issues which would normally be perceived as threatening. In other words, (the practitioner) does not register the appropriate anxiety in circumstances that have a risk for threatening or adverse outcomes. This apparent lack of anticipatory anxiety is potentially detrimental in that (the practitioner) is not alerted to act or operate in situations where there is a highly significant circumstance on the horizon".

48 The professor's opinion was that the practitioner would benefit from psycho therapy, focussing specifically on the issues of the psychological mechanisms which the practitioner uses to deal with his anxiety. The professor said that the practitioner's capacity to distance himself from a sense of threat and to deflect concerns clearly had behavioural consequences. However, the practitioner's behaviour did not appear to be psychopathic. The professor said that the practitioner had a capacity for good relationships and for a sense of industrious commitment in other areas in his life. The development of a conscious recognition of particular issues would allow the practitioner to develop a repertoire of behaviours and strategies to minimise the potential for the recurrence of difficulties in the future.

49 Based on those views, counsel for the practitioner urged that this Court should not take the view that when the practitioner responded to the inquiries by the Tribunal on 2 December 1999 he thought to himself "I don't want the Tribunal to know about this past conduct". He said there was another intention which was more accurate in the circumstances, namely, "I don't want to know" or "I don't want to confront and deal with this information and I hope I don't have to." Counsel submitted that the latter and more accurate interpretation was an intent to deceive but of a kind brought about by the process of avoidance identified by Professor McFarlane.

50 Confronted with the statement in the report by Professor McFarlane that the practitioner was "slightly perplexed by his ability not to remember the details" of the previous disciplinary matters, counsel submitted that Professor McFarlane's analysis of the practitioner provided a clear explanation. He suggested that the practitioner had taken steps to "block out" the previous occasions and that such a state of mind was consistent with both Professor McFarlane's analysis and with the finding of the Tribunal. In particular, counsel urged that the practitioner knew "there was something more there but could not then bring to mind the details of it".

51 It is noteworthy that, while counsel indicated the practitioner was not challenging the Tribunal's finding as to the intention, his instructions did not

extend to saying that the practitioner, when confronted with the questions on 2 December 1999, remembered what had happened on previous occasions but did not wish to confront it. Counsel's instructions did not extend to accepting the implication in the finding of the Tribunal that when he was confronted by the situation on 2 December 1999, he did in fact remember the previous occasions but did not disclose them.

52 We are unable to accept the interpretation for which counsel contended. Professor McFarlane did not suggest in his report that avoidance or blocking out resulted in the practitioner genuinely being unable to recall the matters that he failed to disclose on 2 December 1999. Secondly, the evidence of the practitioner before the Tribunal does not support the position put by counsel. In making that observation we have not overlooked the possibility that, at the time he gave evidence on 2 December 1999, the practitioner did not have sufficient insight into his own condition to recognise that he may have blocked out the details of the prior disciplinary matters.

53 Having considered the material before the Tribunal, including the evidence of the practitioner and the submissions presented on his behalf, and after careful consideration of the report of Professor McFarlane and the submissions of counsel on the hearing before us, we are unable to avoid the conclusion that the practitioner intentionally attempted to mislead the Tribunal on 2 December 1999. The first disciplinary proceedings involved two periods in 1989 and 1990 during which the practitioner practised without possessing a practising certificate. The same issue arose in the course of the proceedings before the Tribunal in 1999. The Tribunal was correct in rejecting the practitioner's explanation that on 2 December 1999 he had forgotten that practising without a practising certificate was involved in the first disciplinary matter.

54 We are also of the view that the Tribunal was correct in rejecting the practitioner's evidence that on 2 December 1999 he could only remember that the other matter involved law claims and was resolved through law claims. The issue of his conduct had been referred to the Committee by the Chief Justice. The practitioner was aware of that in 1995. He went through a process of numerous communications with the Complaints Committee, including correspondence, and he had written a lengthy letter to the Complaints Committee in an endeavour to explain his failings. The admonishment delivered was the second admonishment in the practitioner's time as a legal practitioner. We agree with the Tribunal that on 2 December 1999 it is inconceivable that the practitioner did not remember that he had been the subject of a disciplinary inquiry and admonishment in respect of that matter.

55 The practitioner's propensity to avoid difficult issues may provide an explanation for his conduct before the Tribunal. On 2 December 1999 he was confronted without warning with a question as to prior disciplinary matters. The

existence of such matters would obviously have registered with him as potentially very significant to the Tribunal in its deliberations as to what disciplinary action was appropriate in respect of the matters before it. In those circumstances, it may be that the practitioner's propensity to avoid difficult issues led him to act dishonestly by attempting to mislead the Tribunal by not disclosing the matters to which we have referred notwithstanding that he remembered them. It may be, as counsel pointed out, that the practitioner's deception would inevitably be uncovered, but as the Tribunal found, the practitioner took the chance that it would not.

56 Counsel nevertheless sought to rely upon the special difficulties involved in working as a sole practitioner. Some of the particular stresses inherent in such a practice are identified in an affidavit from the Chair of the Sole Practitioners Committee of the Law Society of South Australia. She asserts that there are particular stresses for sole practitioners which not only operate on the sole practitioner cumulatively, but in a way which is much more intense than where a practitioner is a partner in a firm or otherwise has a network and a sufficient degree of support. The sole practitioner is more vulnerable to "overload". Dealing with a complaint is a matter of special difficulty for a sole practitioner lacking someone else to assist in dealing with complaints or ensuring that a response is both prompt and accurate.

57 It was submitted that the Court should consider the exercise of its powers in a way that might assist in some of the difficulties experienced by sole practitioners. This case was said to call for recognition of problems associated with sole practitioners in particular, with the matter being addressed in an amelioratory fashion by not striking off the practitioner's name. The public could be protected without losing the practitioner. He should be given the opportunity to get himself back into a condition where he could practise without putting his clients at risk. Evidence before this Court identifies the practitioner as well regarded and well respected within the profession. Supervision by a senior practitioner should be contemplated as appropriate as soon as the practitioner satisfied the Court that he could be allowed to resume his practice after undergoing treatment of the kind identified by Professor McFarlane. Thus, it was submitted, an appropriate order in this case is suspension from practice until that occurs and the Court is satisfied that the practitioner has overcome the identified avoidance and denial behaviour that was at the bottom of his professional problems.

58 Counsel referred to some authorities as treating behaviour of this kind as not automatically warranting striking off the practitioner's name.

59 In *New South Wales Bar Association v Kalaf*[2], a majority of the Court of Appeal of New South Wales refused to remove a barrister from the Roll of

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2 [NSWSC Ct App, 11 October 1988, unreported; Jdgmt No 588 of 1986 (BC 8801429)]

Barristers in a case where the barrister had not told the Solicitors Admission Board that he had previously been found to be guilty of unprofessional conduct as a barrister. There were other matters of complaint. The majority of the court suspended the barrister from practising as a barrister for one year. Kirby P identified the barrister's behaviour as lacking in candour. However, His Honour's view was that the barrister would surely have known that by including a disclosure concerning an earlier inquiry, he would set in train an investigation of the precise circumstances of the earlier inquiry. Thus the failure to disclose his guilt was not dishonest but lacking in appropriate detail and frankness. That seems to us to be a very different case from this. In our view, the practitioner's conduct in this case was one of not wanting the Tribunal to know at all, even if, at the same time, he wanted to avoid reality himself.

60 In *In the matter of Peter David Kerin*[3] this Court ordered the suspension of a practitioner found to have misled the Legal Practitioners Complaints Committee in the course of an inquiry. The practitioner was also found to have failed to advise a client to obtain independent legal advice in situations where there may have been a conflict between the client's interests and those of the practitioner. This Court ordered that the practitioner be suspended from practice for 18 months. The court concluded that the total conduct then before it did not call for the removal of the practitioner's name from the Roll of practitioners. Suspension was seen as a sufficient order to bring home to other members of the profession and the public the court's insistence on practitioners observing high standards. The court referred to the observations of King CJ in *In Re a Practitioner*[4], that the proper use of suspension is for those cases in which a 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 quality of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner.

61 The totality of circumstances before the Court in this case do not leave us with the confident view that this practitioner possesses the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner. More so, given the Tribunal's finding and our acceptance of it as to the practitioner's intention to deceive.

62 Even if the deception of the Tribunal were unintended and caused by avoidance, the deception remains significant in that, not only were there two previous occasions of a statutory reprimand for not dissimilar misconduct, but those reprimands in themselves seem to have had so little impact on the practitioner that he could not even remember the admonitions or the reasons for them. That would indicate, in the first place, an almost reckless lack of concern for the disciplinary processes of the legal profession of which he seeks to remain

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3 (1997) 195 LSJS 185
4 (1984) 36 SASR 590 at 593

part. In the second place, coupled with the primary charges then being dealt with by the Tribunal, it would indicate a failure or an inability or unwillingness to take proper or any steps to reform his ways, despite the reprimands, thereby demonstrating his unfitness to continue to be entrusted with the conduct of the affairs of his clients.

63 One might have some sympathy with an order for suspension, perhaps with conditions, if there were merely a repetition of a failure to maintain high professional standards. But the desire, for whatever reason, to conceal highly relevant information from the Tribunal indicates, in addition, a weakness of character of a disqualifying nature. This requires, if the practitioner is to practise at all in the future, that the Court be satisfied at that time that he is of good character[5]. That cannot be achieved merely by a suspension from practice and a later demonstration of compliance with any condition imposed, such as some form of treatment.

64 The only proper order is that the practitioner's name be struck off the Roll. There is evidence of persistent neglect of the affairs of clients and a persistent disregard of proper inquiries and demands from the Board together with the aggravating behaviour before the Tribunal, which resulted in the adverse finding against him of an intention to deceive[6].

65 There is no doubt that many sole practitioners lack some of the professional support systems which are more readily available to those practitioners who practise in firms. Many are subjected to stresses not experienced by those who have ready access to appropriate support. There is no evidence to suggest, however, that other members of the profession are unwilling to provide that support or that the Law Society of South Australia, as a representative of the practising profession, does not make available appropriate facilities. Those who practise as sole practitioners must learn to take advantage of those facilities. They cannot be imposed by this Court or by the Law Society.

66 We order that the name of the practitioner be struck off the Roll of Legal Practitioners.

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5 *Legal Practitioners Act* 1981, s 15(1)(a)
6 *Law Society of South Australia v Murphy* (1999) 201 LSJS 456, at 458