SUPREME COURT OF SOUTH AUSTRALIA

(Full Court: Civil)

LEGAL PRACTITIONERS CONDUCT BOARD v DARYL WHARFF

[2012] SASCFC 116

Judgment of The Full Court
(The Honourable Chief Justice Kourakis, The Honourable Justice Blue and The Honourable Justice Stanley)

5 October 2012

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT - IMPROPER DEALINGS

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

Application to strike off practitioner's name from Roll of Legal Practitioners – practitioner communicated directly with opposing parties without the consent of their solicitors – failure to pay fees to counsel and a local solicitor engaged by the practitioner – failure to hand over documents belonging to a former client in contravention of orders made by the Court – failure to comply with the requirements of a trust account inspector in breach of s 35(3) of the Legal Practitioners Act 1981 (SA) – failure to co-operate with the Board in seven investigations, including in one case in breach of s 76(4b) of the Act - practitioner has not held a practicing certificate since 2005 and does not oppose the application.

Held: practitioner guilty of a substantial and recurrent failure to meet the requisite professional standard of conduct - name of the practitioner struck off the Roll of Legal Practitioners.

Legal Practitioners Act 1981 (SA) s 5, s 34, s 35, s 76, s 82, s 89, referred to.
Law Society of South Australia v Jordan [1998] SASC 6809; (1998) 198 LSJS 434; *Legal Practitioners Conduct Board v Kerin* [2006] SASC 393; *Legal Practitioners Conduct Board v Santini* [2007] SASC 52; *Legal Practitioners Conduct Board v Trueman* [2003] SASC 58, applied.

Plaintiff: LEGAL PRACTITIONERS CONDUCT BOARD Counsel: MR S HENCHLIFFE - Solicitor: LEGAL PRACTITIONERS CONDUCT BOARD
Defendant: DARYL WHARFF No Attendance
Hearing Date/s: 05/09/2012
File No/s: SCCIV-11-1658

Dimos v Hanos [2001] VSC 173; *Jones v Jones* (1847) 5 Notes of Cases in the Eccelsiastical and Maritime Courts 134; *Law Society of New South Wales v Graham* [2007] NSWADT 67; *Law Society of New South Wales v McCarthy* [2002] NSWADT 58; *Legal Practitioners Conduct Board v Morel* [2004] SASC 168; (2004) 88 SASR 401; *Re A Practitioner* (1984) 36 SASR 590; *Re Margetson & Jones* [1897] 2 Ch 314; *Re Pursley* [1995] 4 LPDR 5; *Re Robb* (1996) 134 FLR 294; *Rohdes v Fielder, Jones and Harrisons* [1918-19] All ER 846, considered.

LEGAL PRACTITIONERS CONDUCT BOARD v DARYL WHARFF [2012] SASCFC 116

Full Court: Kourakis CJ, Blue and Stanley JJ

THE COURT:

1 In this matter, the Legal Practitioners Conduct Board seeks an order that the name of the defendant, Daryl Wharff, be struck off the Roll of Legal Practitioners pursuant to section 89(2)(b) of the *Legal Practitioners Act 1981* (SA) ("the Act"). This follows a recommendation by the Legal Practitioners Disciplinary Tribunal pursuant to sections 82(6)(a)(v) and 89(1) of the Act that disciplinary proceedings be commenced against the practitioner in this Court. The practitioner did not appear at the hearing of the matter.

The charges

2 The charges laid by the Board against the practitioner and found by the Tribunal to constitute unprofessional conduct can be summarised as follows:

1. communicating directly with opposing parties without the consent of their solicitors;

2. failing and refusing to pay fees to counsel and an interstate solicitor engaged by the practitioner;

3. failing to hand over documents belonging to a former client in contravention of orders made by this Court;

4. failing to comply with the requirements of a trust account inspector in breach of section 35(3) of the Act;

5. failing to co-operate with the Board in seven investigations, including in one case in breach of section 76(4b) of the Act.

The practitioner

3 The practitioner is 47 years of age. In May 1994, he was admitted as a practitioner of the Court. Following his admission, he worked as an employed solicitor at Hynd & Co for four years as well as for three other firms for shorter periods.

4 In April 2001, the practitioner commenced practice on his own account, practicing principally from his home, initially at Wayville and then at Prospect, and using an office in the city for communication and administrative facilities.

5 In June 2003, the practitioner moved to Streaky Bay and started to wind down his legal practice. By December 2003, he had completely ceased legal practice and has not practiced law since that time. He has not held a practicing certificate since June 2005.

6 Since 2004, the practitioner has been in receipt of a disability pension. In 2005/2006, he undertook clerical work on placement at the Education Department organised by the Commonwealth Rehabilitation Service. He has not been employed since that time.

7 The practitioner swore an affidavit in these proceedings in November 2011 saying that he did not intend to defend the Board's claim and did not intend to resume legal practice.

Communication with opposing parties represented by solicitors

8 In June 2001, the practitioner was acting for a client in a dispute with Mr and Mrs Murray, who were represented by Cater and Blumer. Between June and December 2001, he sent directly to Mr Murray copies of 22 letters addressed to his solicitors Cater and Blumer. In August 2001, the practitioner telephoned Mr Murray, who informed him that Cater and Blumer were still acting for him, but the practitioner nevertheless engaged in a substantive conversation concerning the matter with Mr Murray for 45 minutes.

9 On 20 December 2001, the practitioner spoke to a solicitor from Cater and Blumer, indicating that he intended to telephone Mr Murray. The solicitor instructed him not to do so. Nevertheless, the practitioner telephoned Mr Murray that evening and spoke to him concerning the matter. The next day, he sent directly to Mr Murray a copy of a letter addressed to Cater and Blumer and sent two further such letters thereafter.

10 In March 2002, the practitioner was acting for a client in a dispute with Marshall Thompson Homes, who were represented by Lynch Meyer. After speaking to a solicitor from Lynch Meyer, the practitioner telephoned an officer of Marshall Thompson Homes in relation to the matter. He sent directly to that officer copies of three letters addressed to Lynch Meyer over the course of the next week.

11 It is unethical and improper for a legal practitioner to communicate with an opposing party whom he or she knows to be represented by another legal practitioner in the matter without the latter's consent.[1]

12 The rationale for this principle includes protecting the opposing party against the solicitation of information by the opposing legal practitioner contrary

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[1] *Jones v Jones* (1847) 5 Notes of Cases in the Ecclesiastical and Maritime Courts 134 at 140; *Re Margetson & Jones* [1897] 2 Ch 314 at 318 – 319 per Kekewich J; *Re Pursley* [1995] 4 LPDR 5 at 24 per Hunt, Plotke and Megma.

to that party's interests, as well as preventing the undermining of the other party's trust and confidence in his or her own legal practitioner.[2]

13 The practitioner's breach of his ethical obligations was particularly serious because it extended over 10 months, involved 30 separate communications, and after December 2001 the practitioner persisted in making direct communication notwithstanding having been instructed by the opposing legal practitioner from Cater and Blumer not to do so.

14 Each of Cater and Blumer and Lynch Meyer complained to the Board. In May 2002, the Board published Cater and Blumer's complaint to the practitioner and requested a response within 14 days. Despite several reminders, the practitioner did not provide a response until October 2002, and he provided only a partial response. In January 2003, the Board published the complaint by Lynch Meyer to the practitioner and requested a response within 14 days. Despite further reminders, the practitioner did not provide his response to the Lynch Meyer complaint, or his full response to the Cater and Blumer complaint, until March 2004.

Failure and refusal to pay barrister's and agent's fees

15 In December 2001, the practitioner engaged Mr Hamwood, a barrister, to appear in the Family Court in Brisbane. On 12 December, Mr Hamwood rendered an account for $1,980. The practitioner never paid that account or any part of it.

16 In late 2001 or early 2002, the practitioner instructed Mr McKell, a solicitor, to act as his agent in two matters in New South Wales. Mr McKell rendered accounts which the practitioner never paid. On 21 March 2002, the practitioner spoke and wrote to Mr McKell. He said that he would pay the outstanding costs by the end of March. On that basis, Mr McKell undertook further work in one of the matters, but the practitioner failed to make any payment.

17 Each of Mr Hamwood and Mr McKell complained to the Board. In December 2002, the Board published their complaints to the practitioner and sought a response within 14 days. Despite several reminders, the practitioner did not respond to the complaint by Mr Hamwood until March 2003, when he gave a limited response and sought two weeks in which to provide a more substantive response. Despite further reminders, he did not provide the more substantive response in relation to Mr Hamwood or his response in relation to Mr McKell until March and April 2004.

18 A solicitor who engages a barrister or solicitor agent undertakes a personal liability, either in honour or in contract as the case may be, to pay the barrister's

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[2] *Re Pursley* [1995] 4 LPDR 5 at 24 per Hunt, Plotke and Megma; *Dimos v Hanos* [2001] VSC 173 at [41]-[59] per Gillard J.

or agent's fees, unless otherwise agreed.[3] Where a legal practitioner undertakes such a personal liability, it is unethical to ignore his or her obligation, and hence a wilful or persistent refusal or failure to pay fees can amount to unprofessional conduct.[4]

19 The practitioner not only failed to meet his professional obligation to pay Mr Hamwood and Mr McKell, but he compounded his failure by failing to respond satisfactorily to communications from the complainants and the Board. It is evident that there was no bona fide dispute concerning the practitioner's liability to pay the fees because his counsel submitted to the Tribunal that the only reasons the fees were not paid was because he did not have the financial resources to pay them. However, the fees were incurred within the first 12 months of the practitioner's practice on his own account, he continued to practice thereafter for over a year without paying the fees, he did not advance to the complainants or the Board while he was practising an inability to pay the fees as his reason for not having paid them, and he had induced Mr McKell to continue to act on the basis of a promise to pay the fees within 10 days.

Failure to deliver up client documents

20 Before June 2002, the practitioner had been acting for Mr and Mrs Talbot in various matters. In June 2002, the Talbots instructed Lynch Meyer to act in lieu of the practitioner. Lynch Meyer wrote to the practitioner requesting him to deliver up the files and records relating to the Talbots' matters. Despite two reminders, the practitioner did not deliver the files and records.

21 Lynch Meyer complained to the Board, which published the complaint to the practitioner in July and requested a response within seven days. The practitioner provided no substantive response.

22 In September, the Talbots instituted proceedings in this Court seeking orders that the practitioner deliver up the files and records. The proceedings were served upon the practitioner.

23 The practitioner engaged a solicitor to act for him in those proceedings, and the solicitor attended on a directions hearing before Master Bowen Pain. However, the practitioner did not file any answering affidavit and there was no attendance on his behalf when the matter came on for hearing on 1 November.

24 On 1 November, Master Bowen Pain made an order by way of injunction requiring the practitioner to deliver up specified files and records within 10 days.

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3 *Rhodes v Fielder, Jones and Harrison* [1918-19] All ER 846 at 847 per Lush J (Sanke J agreeing); *Re Robb* (1996) 134 FLR 294 at 310 per Myles CJ, Gallop and Higgins JJ.

4 *Rhodes v Fielder, Jones and Harrisons* [1918-19] All ER 846 at 847 per Lush J (Sanke J agreeing); *Law Society of New South Wales v McCarthy* [2002] NSWADT 58 at [46] per Malloy, Robinson QC and Kirk; *Law Society of New South Wales v Graham* [2007] NSWADT 67 at [29] per Karpin ADCJ, Pheils and Fitzgerald.

25 It appears that the practitioner may have attempted to file an application to set aside the order on 22 November, but in any event he did not file any supporting affidavit or take any further action to set aside the order. Nor did he seek a stay of the order pending any application to set it aside. The practitioner took no steps to comply with the order.

26 In March 2003, the Talbots filed an application that the practitioner be dealt with for contempt of Court in failing to comply with the order made by Master Bowen Pain on 1 November. The application was listed for hearing before Justice Debelle on 21 March 2003.

27 On 21 March, the practitioner delivered to Lynch Meyer some of the files and records the subject of the 1 November order, but not all of them.

28 After several hearings, during which the practitioner gave evidence, on 7 July 2003 Justice Debelle made orders that the practitioner deliver to Lynch Meyer all documents and computer files in his possession relating to the affairs of the Talbots within 14 and 21 days respectively. On 23 July, the practitioner delivered eight boxes of materials and documents to Lynch Meyer.

29 In June 2005, in response to a notice issued by the Board, the practitioner delivered to the Board further documents which were still in his possession relating to the affairs of the Talbots. Those documents included documents which had been the subject of the order made by Master Bowen Pain on 1 November 2002, namely an adjustment statement concerning, and correspondence with other parties to, the sale of a shopping centre by the Talbots.

30 In September 2003, Justice Debelle delivered judgment on costs in the proceedings brought by the Talbots against the practitioner in which he awarded costs after 12 November 2002 on a solicitor and client basis. He made a finding that the practitioner had not fully complied with the orders of the Court.

31 It is clear that the practitioner was in contempt of the order made by Master Bowen Pain between 12 November 2002 and 21 March 2003. Based upon the finding by Justice Debelle, a finding by the Tribunal and the allegations made by the Board which were not denied by the practitioner, it is also clear that, although the practitioner partially complied with the order on 21 March 2003, he continued to be in contempt of the order until 23 July 2003.

32 While it emerged in June 2005 that there were additional documents within the scope of the orders made by Master Bowen Pain in November 2002 and Justice Debelle in July 2003 which were not produced by the practitioner until August 2005, there is no basis to make a finding that this was other than by oversight.

33 The fact remains that the practitioner was in contempt of Court for over eight months. While he may have applied to set aside Master Bowen Pain's

order on 22 November 2002, he only did this after he was already in contempt, he did not pursue the application, and in any event he did not seek any stay of the order.

34 In February 2004, the Board wrote to the practitioner in effect reviving its request for a response to the allegations made by the Talbots. Despite the Board's indicating a preliminary view that the practitioner was guilty of unprofessional conduct in failing to cooperate, the practitioner did not respond to the complaint until the end of April 2004.

Failure to comply with requirements of trust account inspector

35 In June 2001, an inspector appointed by the Law Society pursuant to section 34 of the Act to examine trust account records wrote to the practitioner requiring him to make available his trust account records for inspection.

36 The practitioner rescheduled or failed to attend three appointments for that purpose in July, August and September 2001. In October 2001, the practitioner made available some of his trust account records, but then cancelled or failed to attend further appointments to complete the inspection in May, July, November and December 2002.

37 In September 2002, the trust account inspector wrote to the practitioner requiring specific information. Despite reminders, the practitioner did not provide that information until July 2003, when he provided most of the information, and November 2003 when he provided the balance.

38 The inspection and audit of trust accounts is an important aspect of the regulation and supervision by the Court of legal practitioners who receive trust monies from clients.

Failure to cooperate with the Board in its investigations

39 The practitioner failed to cooperate fully or expeditiously with the Board in seven investigations into allegations of unprofessional conduct.

40 The essence of the practitioner's failure to cooperate with the Board in relation to the complaints by Cater and Blumer, Lynch Meyer, Mr Hamwood, Mr McKell and the Talbots is set out above.

41 In addition, in April 2002, the Board published to the practitioner a complaint received from a client alleging inappropriate comments and poor handling of her matter. Despite several reminders, the practitioner did not provide a response until November 2002, when he provided a partial response to the complaint and foreshadowed the balance of his response later that day. In December 2002, the Board issued a formal notice to the practitioner pursuant to section 76(4a) of the Act requiring a detailed report in relation to the complaint by 17 January 2003. The practitioner did not comply with that notice. The

practitioner ultimately responded to part of the notice in February 2003 and to the balance in August 2004.

42 In January 2004, the Board published to the practitioner a complaint by another client of the practitioner. Despite several reminders, he did not respond until August 2004.

43 The Board performs an important function pursuant to Part 6 of the Act in investigating the conduct of legal practitioners. Practitioners have a professional duty to cooperate with the Board in its investigations.

44 In the *Law Society of South Australia v Jordan,*[5] Doyle CJ (Millhouse and Nyland JJ agreeing) said:

> A practitioner whose conduct is the subject of an inquiry by the Board has a duty to assist the Board in its enquiries. That does not mean that the solicitor must disregard his own interests. But it does mean that there is an obligation upon the solicitor to respond to reasonable requests for information, particularly when one takes into account the fact that often the solicitor will have a better knowledge and understanding of the matter, the subject of the complaint, than will the client who complains. In the present case, Mr Jordan fell a long way short of meeting his obligation. By his conduct Mr Jordan has delayed, and to some extent frustrated the Board in its attempts to deal satisfactorily with the complaints made to it. I consider that his conduct manifests a plain disregard, over a sustained period, of his professional obligations when dealing with the Board ...

Proceedings before the Tribunal

45 In March 2004, the Board laid charges in the Tribunal of unprofessional conduct against the practitioner. In November 2006, the practitioner commenced judicial review proceedings in this Court against the Board and Tribunal in relation to the charges. The judicial review proceedings related to issues of procedural fairness as opposed to the merits of the charges.

46 In July 2007, in an endeavour to avoid the issues raised by the judicial review proceedings, the Board made a fresh determination to lay charges and laid fresh charges to the same effect in the Tribunal against the practitioner. In September, the practitioner applied to the Tribunal for a stay or dismissal of the new charges because they covered the same subject matter as the original charges. In December 2007, the Tribunal dismissed that application.

47 In December 2007, the practitioner commenced judicial review proceedings in this Court in respect of the new charges. In October 2009, those proceedings were dismissed.

48 In December 2009, the Tribunal held a directions hearing. The practitioner filed an application challenging its jurisdiction to hear the charges. After several directions hearings, on August 2010 the practitioner abandoned the challenge and accepted that the Tribunal had jurisdiction to hear the charges.

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[5] [1998] SASC 6809 at [45]; (1998) 198 LSJS 434 at 476.

49 The substantive hearing of the charges proceeded before the Tribunal on 7 December 2010, 23 February and 28 March 2011. Ultimately, the practitioner admitted each of the facts specified in the charges and did not adduce any evidence concerning those facts. The practitioner did not himself give evidence, but did adduce evidence from Dr Gehan and tendered various documents.

50 On 7 September 2011, the Tribunal delivered a Report with Findings and Reasons. The Tribunal found that the practitioner engaged in unprofessional conduct in each respect as charged.

Unprofessional conduct

51 The term "unprofessional conduct" is defined by section 5 of the Act relevantly to mean:

> any conduct in the course of, or in connection with, practice by the legal practitioner that involves a substantial or recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute.

52 By his direct communications with the clients of Cater and Blumer and Lynch Meyer, the practitioner engaged in improper conduct which failed to meet the standard observed by competent legal practitioners of good repute. Due to the nature and extent of those direct communications over 10 months and his persistence in making them after being warned by Cater and Blumer, the practitioner's conduct involved both a substantial and a recurrent failure to meet the requisite standard of conduct and thereby comprised unprofessional conduct.

53 By his conduct in failing and refusing to pay the fees incurred with Mr Hamwood and Mr McKell, the practitioner engaged in improper conduct which failed to meet the standard observed by competent legal practitioners of good repute. Due to the nature and extent of his conduct, it involved both a substantial and a recurrent failure to meet the requisite standard and thereby comprised unprofessional conduct.

54 The practitioner's failure to deliver up the Talbots' files and records in itself comprised improper conduct which failed to meet the standard observed by competent legal practitioners of good repute. This was followed by his deliberate conduct in contempt of the order made by Master Bowen Pain in November 2002 for several months in failing to deliver up any files or records. Contempt of court comprises extremely serious unprofessional conduct by a practitioner. In this case, it extended over several months, arose directly out of the practitioner's relationship with his former clients, the Talbots, and was at the expense and to the prejudice of those former clients.

55 The repeated and persistent failure of the practitioner to cooperate fully in the inspection by the trust account inspector comprised a substantial and recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute. It thereby comprises unprofessional conduct. In

addition, the failure of the practitioner, without reasonable excuse, to comply with the requirements of the inspector comprised an offence pursuant to section 35(3) of the Act.

56 Over a combined period of two years from August 2002 to August 2004, the practitioner breached his professional duty by failing to cooperate with the Board in relation to seven investigations into alleged unprofessional conduct. In addition, the practitioner contravened section 76(4b) of the Act between January 2003 and August 2004. This conduct collectively comprised a substantial and recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute and thereby unprofessional conduct within the meaning of the Act.

57 A number of reports by the practitioner's psychiatrist, Dr Gehan, were tendered before the Tribunal. In addition, Dr Gehan gave oral evidence.

58 The practitioner was referred by his general practitioner to Dr Gehan in August 2004. Dr Gehan took a history from the practitioner. The practitioner told him that he had been diagnosed as suffering from depression while at university in about 1996 and had been prescribed anti-anxiety and anti-depression medication at that time. In November 2002, the practitioner suffered chronic tooth pain and was prescribed strong analgesics, which in turn caused complications. In February 2004, the practitioner abruptly ceased his anti-anxiety medication, which resulted in a seizure and hospitalisation.

59 Dr Gehan diagnosed the practitioner as suffering from depression and an anxiety disorder as well as a personality disorder encompassing obsessive compulsiveness and persistent procrastination. Dr Gehan expressed the opinion that, over the period since he commenced treating the practitioner in 2004, the practitioner has not been fit to practice law and it is unlikely that he will in future be fit to practice on his own account. He expressed the opinion that the final resolution of the disciplinary proceeding may lead to an improvement in the practitioner's medical condition.

60 The fact that a legal practitioner is suffering from depression or other mental illness is a factor which may be taken into account. However, conduct extending over several years cannot be ignored merely because the practitioner was suffering depression, especially while the practitioner continued to conduct legal practice and on his own account. Moreover, the nature of much of the unprofessional conduct engaged in by the practitioner involved active steps rather than mere omissions. In *Legal Practitioners Conduct Board v Kerin*,[6] White J (Duggan J agreeing) said:

> I agree that this circumstance does extenuate the practitioner's conduct to some extent. However, I do not regard it as being appropriate to attach much weight to this factor in this case. Practitioners are expected to maintain high standards of conduct even in times

[6] [2006] SASC 393; (2006) 24 LSJS 371 at [44] per White J (Duggan J agreeing).

of personal stress. Again the fact that the conduct occurred over such a long period is relevant. It is not a case in which a single error of judgment can be attributed to a moment of stress.

Appropriate orders

61 The Board contends that, in all of the circumstances, the name of the practitioner should be struck off the Roll of Legal Practitioners.

62 The practitioner's unprofessional conduct began within two months of his commencement of legal practice on his own account. It continued in one form or another throughout the period over which he practised law for the next two and a half years until the end of 2003. When the Board laid charges against him in March 2004, the practitioner did not acknowledge the impropriety of his conduct. Rather, for six years, the practitioner mounted various collateral challenges to the charges and to the jurisdiction of the Tribunal. Ultimately, in 2010, the practitioner acknowledged the jurisdiction of the Tribunal and accepted each of the facts alleged against him.

63 It is apparent that the practitioner's personality and psychiatric condition have been substantial contributing factors towards his conduct. So long as he continues to suffer similar levels of disability caused by his personality disorder and psychiatric condition, he is and will remain unfit to practice as a legal practitioner. This is reflected in the fact that he has not practiced law since the end of 2003 and has not held a practicing certificate since June 2005.

64 Dr Gehan is not confident that the practitioner will in future be fit to practice law and in any event has expressed the opinion that he would not be fit to practice law on his own account.

65 In matters of this nature, this Court acts predominately in the public interest and for the protection of the public.[7] In the circumstances, the only orders which could be contemplated are either an order suspending the practitioner's right to practise until further order or an order striking off his name from the Roll of Practitioners.

66 This Court has held that, in circumstances such as the present, the Court should order that the name of the practitioner be removed from the Roll of Practitioners rather than imposing an indefinite suspension.[8]

67 In *Legal Practitioners Conduct Board v Trueman,*[9] Doyle CJ (Duggan and Gray J agreeing) said:

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[7] *Legal Practitioners Conduct Board v Santini* [2007] SASC 52 at [30] per Doyle CJ (Duggan J and David J agreeing) and the cases there cited.

[8] In *Re A Practitioner* (1984) 36 SASR 590 at 593 per King CJ (Zelling J and Jacobs J agreeing); *Legal Practitioners Conduct Board v Trueman* [2003] SASC 58 at [17]-[24] per Doyle CJ (Duggan J and Gray J agreeing); *Legal Practitioners Conduct Board v Morel* [2004] SASC 168; (2004) 88 SASR 401 at [62]-[66] per Bleby J and Gray J (Perry J agreeing); *Legal Practitioners Conduct Board v Santini* [2007] SASC 52 [27]-[34] per Doyle CJ (Duggan J and David J agreeing).

> I should add that it does not follow that an order for the striking off of a practitioner's name should be made as a matter of course whenever unprofessional conduct is attributable to a significant degree to a psychiatric disorder or to some mental disturbance. What is significant about the present case is that the evidence demonstrates that Mr Trueman has suffered from a significant disorder for a long time. He has not yet recovered from it. That disorder has played a part in him committing many acts of unprofessional conduct over a lengthy period. The unprofessional conduct cannot be regarded as occasional or isolated lapses of behaviour by a practitioner who has otherwise coped with his disorder or condition. Nor can the unprofessional conduct be regarded as unlikely to be repeated if all goes well. Nor can the disorder be treated as of a temporary or episodic nature, reasonably likely to be capable of management if properly treated and properly approached by the practitioner. The evidence shows that Mr Trueman has been unable to cope with his condition, and that it has led him into a sustained and significant pattern of unprofessional conduct.

68 In *Legal Practitioners Conduction Board v Santini,*[10] Doyle CJ (Duggan J and David J agreeing) said:

> The Court's responsibility is to the public. It is clear that Mr Santini is not fit to practise. It is questionable whether that will change. The conduct of which Mr Santini has been found guilty cannot be described as a temporary aberration. There is no basis for thinking that his personality problem will be resolved in the near future, and one cannot be confident that it will be resolved at all.
>
> In those circumstances suspension of the right to practise until further order is not appropriate. That might be appropriate if the conduct, which indicated Mr Santini's unfitness, was due to a temporary aberration or to a personality problem that was clearly temporary and likely to be resolved in the near future. That is not the case: cf *In Re a Practitioner* (1984) 36 SASR 590 at 593; *Morel* at [62].
>
> In those circumstances, as his unprofessional conduct demonstrates that he is unfit to remain a member of the legal profession, the only course open to this Court is to make an order that his name be removed from the Roll of Practitioners and I would so order.

69 The practitioner has not held a practising certificate for over 7 years, has not practised law for over 8 years and has sworn an affidavit in which he stated that he does not intend to return to the practice of the law. Taking this into account in conjunction with the nature and extent of the unprofessional conduct and the fact that the practitioner did not appear to oppose the order sought by the Board, the only appropriate order is that the name of the practitioner be struck off the Roll of Practitioners. We so order.

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[9] [2003] SASC 58 at [23] per Doyle CJ (Duggan J and Gray J agreeing).

[10] [2007] SASC 52 [32]-[34] per Doyle CJ (Duggan J and David J agreeing).