

**CITATION:** *Legal Services Commissioner v Devery*  
[2011] QCAT 390

**PARTIES:** Legal Services Commissioner  
(Applicant)  
v  
Julie Theresa Devery  
(Respondent)

**APPLICATION NUMBER:** OCR312-10

**MATTER TYPE:** Occupational regulation matters

**HEARING DATE:** On the papers, 26 July 2011

**HEARD AT:** Brisbane

**DECISION OF:** **Justice Alan Wilson, President**  
Assisted by:  
**Mr K Horsley**  
(Practitioner Panel Member)  
**Dr S Dann**  
(Lay Panel Member)

**DELIVERED ON:** 16 August 2011

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

1. That the respondent be publicly reprimanded.
2. That the respondent pay a penalty of \$2,500 within 90 days.
3. That, in the event that the respondent applies for a practising certificate under the *Legal Profession Act 2007* it is restricted to an employee level for one year from the date of application.
4. That the respondent pay the applicant's costs fixed in the amount of \$1,500 within 90 days.

**CATCHWORDS:** PROFESSIONS AND TRADES – LAWYERS  
– COMPLAINTS AND DISCIPLINE –  
DISCIPLINARY PROCEEDINGS –  
PROFESSIONAL MISCONDUCT OR  
UNSATISFACTORY PROFESSIONAL  
CONDUCT – where the respondent faces  
five charges including: failing to act

competently and diligently for a clients in litigation; failing to respond to correspondence about litigation from a client, or informing a client of correspondence from the opponent's solicitor advising that bankruptcy proceedings would issue against the client; failing to comply with written notices from the Commissioner requesting explanations for her conduct; and, failing to make a payment to a medical practitioner whom she had engaged to give evidence on behalf of a client – whether the respondent's actions amount to professional misconduct or unsatisfactory professional conduct – appropriate penalty

*Legal Profession Act 2007*, ss 418, 419, 443  
*Legal Profession (Solicitors) Rule 2007*, rr 1, 2

*Legal Services Commissioner v Smith* [2011] QCAT 126, cited

#### **APPEARANCES and REPRESENTATION (if any):**

This matter was heard and determined on the papers with the consent of the parties pursuant to s 32 of *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act). The Tribunal met to consider written submissions from the parties on 26 July 2011.

#### **REASONS FOR DECISION**

- [1] Ms Devery was admitted as a solicitor on 12 March 1984. She has not previously been the subject of any disciplinary action.
- [2] The Commissioner has brought five charges against her. The first and second assert that in 2009 she failed to act competently and diligently for one of her clients in litigation, and that she failed to give her file to her client, or the client's new solicitors, despite requests to do so.
- [3] In the litigation orders had been made against her client in February 2009 that she pay the other party various sums amounting to more than \$30,000. Ms Devery failed to respond to correspondence about the litigation from the client. Nor did she tell the client about correspondence from the opponent's solicitor advising that bankruptcy proceedings would issue against the client. Later, the client was served with a bankruptcy notice.
- [4] In late February 2009 the client paid all Ms Devery's fees in full and asked for her files. This was followed up by the client's new solicitors in April 2009 but she did not give up the files. Eventually the Law Society took possession of them in August.

- [5] The third and fifth charges assert that she failed to comply with written notices from the Commissioner requesting explanations for her conduct. The client complained to the Commission in May 2009 and it wrote to Ms Devery requesting her explanation within a specified period, but she did not reply in that time.
- [6] The fourth charge is that she failed to make a payment to a medical practitioner whom she had engaged to give evidence on behalf of a client. Money was paid to her by Legal Aid Queensland to reimburse the doctor, which she did not pass on.
- [7] Ms Devery has filed an affidavit and a response in which she effectively admits all of these charges, and their particulars.
- [8] The *Legal Profession Act 2007* defines two classes of conduct which may lead to the discipline and sanctioning of lawyers: *unsatisfactory professional conduct* (s 418) and *professional misconduct* (s 419). The former includes conduct happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
- [9] *Professional misconduct* includes *unsatisfactory professional conduct* to a degree involving a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence, and conduct (whether in connection with the practice of law, or otherwise) that would justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- [10] The third and fifth charges, involving failure to comply with written notices, are automatically categorised under the legislation as *professional misconduct*. s 443. Here, Ms Devery's continuing failure to cooperate with investigations demonstrated a clear disregard of her obligations under the Act.
- [11] The events giving rise to the first two charges involve a failure to maintain reasonable standards of competence and diligence while representing a client. Under the *Legal Profession (Solicitors) Rule 2007*, rr 1 and 2, a solicitor is required to act with competence and diligence in the service of the client and, indeed, should only accept instructions when the solicitor reasonably expects to service the client with competence and diligence and attend to the work with reasonable promptness.
- [12] In a recent instance of this kind of neglect, *Legal Services Commissioner v Smith* [2011] QCAT 126, the solicitor faced three charges involving a want of diligence, and consequent delay, in the conduct of matters for three clients. The first concerned a claim for damages for a client who was injured in a motor vehicle accident. Initially the solicitor acted to advance the client's claim for about three years but then nothing happened for a year and, later, there was another period of inactivity of almost two years during which the practitioner also failed to respond to communications from the client. The second charge also involved intermittent periods of activity in a matter but, at other times, inaction when the file went to sleep.

The third charge involved a client's dispute with an insurance company which was hardly advanced at all.

- [13] The Tribunal held that the practitioner's conduct properly satisfied the definition of *unsatisfactory professional conduct* and he was publicly reprimanded, and ordered to pay a fine of \$2,000.
- [14] The Commissioner, in written submissions here, contends that Ms Devery's conduct is more serious because her lack of action exposed the client to dire consequences, and because of her persistence in failing to respond to the client's requests, and those of her new solicitors, for the file. The Commissioner also contends that the fourth charge should be categorised as *unsatisfactory professional conduct* because it involves a failure to honour undertakings.
- [15] Ms Devery's affidavit and submissions do not contest the Commissioner's contentions. She says that during the period in which these events occurred her practice was very quiet and she was having a 'rough time financially'. She has a dependent teenage son and a husband with little or no income, and has been forced to sell her home. Receivers were appointed to the practice in which she was operating, for herself, when these offences occurred and she has lately been working as an employed clerk with a law firm.
- [16] In many of the cases involving charges of this kind the lawyer is, at the time of offending, adversely affected by unhappy personal or financial circumstances, or some combination of them. It is, perhaps, a counsel of perfection to expect lawyers trying to work under those sorts of pressures to function at their best but it will be a very rare case in which this kind of adversity constitutes a legitimate excuse. This is another case in which the solicitor's unfortunate circumstances go some way to explaining, but provide no justification for, her failures.
- [17] That said the Tribunal is minded to accept the Commissioner's submission that the conduct is not so serious as to be categorised (save in respect of the failure to respond to notices, where it is automatic) as *professional misconduct*. The failures are regrettable, and to be condemned, but fall short of the more serious category – in particular, they cannot fairly be described as 'substantial or consistent'. Neither do they suggest Ms Devery is not a fit and proper person to engage in legal practice. For these reasons, the Tribunal concludes that accounts 1, 2 and 4 constitute *unsatisfactory professional conduct*.
- [18] The Commissioner submits and the Tribunal accepts that deterrence, both personal and general, and the protection of the public will be satisfactorily achieved in this case by the imposition of a public reprimand and a fine and, with Ms Devery's acceptance, a limitation on her ability to work as a principal for one year. She has also agreed to pay the Commission's costs, fixed at \$1,500. It is said, for the Commission, that the fine should fall in the range \$2,000-\$5,000. This is, as the discussion earlier showed, a slightly worse case than *Smith* and a fine of \$2,500 is appropriate. Because of Ms Devery's straitened financial circumstances, she should be allowed three months to pay the fine and costs.