

**CONCERNING**

an application for review pursuant  
to section 193 of the Lawyers and  
Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the [Area]  
Standards Committee

**BETWEEN**

**SC**

Applicant

**AND**

**JT**

Respondent

**The names and identifying details of the parties in this decision  
have been changed.**

**DECISION**

**Introduction**

[1] Mr SC has applied for a review of a decision by the [Area] Standards Committee which, following inquiry into a complaint made by Mr JT, made an unsatisfactory conduct finding against Mr SC.

**Background**

[2] Mr JT was instructed by Ms CA. Ms CA paid a retainer of \$50,000 to Mr JT.

[3] In May 2013, Ms CA terminated her retainer with Mr JT. Mr SC was instructed.

[4] On 30 May 2013, Mr SC wrote to Mr JT making request for the return of Ms CA's files, and for an accounting of the funds received by him.

[5] Mr JT responded on 1 June 2013. In that correspondence, he provided explanation as to why he considered he was not, at that time, able to deliver the files

requested. Nor was he able to provide an accounting of the funds received, as he was waiting for the barristers he had instructed in the matter to render their accounts.

[6] Mr SC sent further correspondence to Mr JT on 4 June 2013. He advised that he did not consider that the reasons advanced by Mr JT provided adequate explanation as to why the files had not been released. Mr SC referenced what he considered to be relevant conduct rules<sup>1</sup> and expressed a view that Mr JT's approach was in breach of these rules. He advised that he expected the files and invoices to be provided immediately.

[7] At the conclusion of that correspondence, Mr SC noted:

If the documents and funds are not made available by the end of the week and you have failed to identify a proper basis on which you are entitled to retain them, we intend to make a complaint to the Law Society given our view that your refusal to return documents and funds is in breach of rule 4.4 of the CCCR.

[8] It was this final comment that prompted the filing of complaint by Mr JT.

### **The complaint and the Standards Committee decision**

[9] Mr JT lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 6 June 2013. The substance of his complaint was that:

- (a) He had provided explanation to Mr SC as to why he was unable to release files and funds immediately.
- (a) Mr SC had threatened him with a complaint in contravention of the principle expressed in *UF v OU*.<sup>2</sup>

[10] In responding to the complaint, Mr SC submitted that:

- (a) His email did not constitute an improper threat, but rather was intended to provide opportunity to Mr JT to comply with a proper request.
- (b) The matter was distinguishable from that in *UF v OU*, in that case the alleged breach having already occurred.
- (c) He had reasonable grounds to form a view that Mr JT was being deliberately obstructive.

---

<sup>1</sup> Lawyers and Conveyancers Act (Lawyers: Conduct And Client Care) Rules 2008.

<sup>2</sup> *UF v OU* LCRO 90/2011.

- (d) He had discussed the email with a senior partner prior to despatch, and had received advice from that partner to the effect that the email did not constitute an improper threat.
- (e) The purpose of the email was to allow Mr JT opportunity to comply with his obligations.
- (f) It goes too far to suggest that rule 2.7 prohibits any communication stating/implying that a complaint will be made if a practitioner follows through with a proposed course of action which is in breach of the rules.
- (g) Mr SC's email was essentially alerting Mr JT to the fact that Mr SC would file a complaint, if Mr JT breached the conduct rules.
- (h) Mr SC was informing Mr JT of his intention to make a complaint, as a result of what was, in Mr SC's view, an impending breach of Mr JT's professional obligations.
- (i) Prudent practitioners would be concerned if any mention of a possible breach of the conduct rules by another practitioner were to be construed as an implicit threat in breach of rule 2.7 or 2.10.
- (j) Practitioners should be encouraged to notify each other when they consider that there may be a breach of the conduct rules, as that assists in maintaining professional standards.

[11] The Standards Committee crystallised the issues to be considered as follows:

- (a) Did Mr SC's 4 June 2013 email breach rule 2.7 and/or rule 2.10?
- (b) Did Mr SC's 4 June 2013 email constitute unsatisfactory conduct under s 12 of the Lawyers and Conveyancers Act 2006 (the Act)?
- (c) If a finding of unsatisfactory conduct was made, what order(s) should be made under s 156 of the Act?

[12] The Standards Committee delivered its decision on 13 November 2013.

[13] The Committee determined that Mr SC had breached rules 2.7 and 2.10, and that the breaches amounted to unsatisfactory conduct under s 12(c) of the Act.

[14] In reaching that decision the Committee concluded that:

- (a) The proper purpose of the complaints process is to maintain professional standards. Any other purpose is improper (*UF v OU*).
- (b) The threat in Mr SC's email to use the complaints process was an improper purpose.
- (c) One of Mr SC's purposes in forwarding the offending email, was to endeavour to secure release of the files.
- (d) No orders were necessary under s 156 of the Act.

### **Application for review**

[15] Mr SC filed an application for review on 19 December 2013. The outcome sought is for the complaint to be dismissed.

[16] He submits that:

- (a) Indication that his client intended to lodge complaint was not made for an improper purpose, but rather with intent to ensure the maintenance of professional standards, by encouraging Mr JT to comply with his obligations, and to secure redress for his client (return of files).
- (b) The Standards Committee suggestion as to how he should have phrased his response to Mr JT constituted in his view, an implied threat that a complaint would follow.

[17] Mr WR responded on behalf of Mr JT. He submitted that:

- (a) Mr SC had failed to address the issues under review.
- (b) His submissions were in part incoherent.
- (c) Mr SC had failed to provide valid reasons for his application.
- (d) Mr SC was disputing a mixture of a finding of fact and question of law.
- (e) A Review Officer should be reluctant to interfere with the proper exercise by a Committee of its discretion.
- (f) Mr SC failed to appreciate that his behaviour was "patently inappropriate".

## Hearing

[18] A hearing proceeded on 19 May 2017.

[19] Ms MY appeared for Mr JT. She advised that Mr JT was unwell and unable to attend. She confirmed that Mr JT had instructed her that he did not seek to have the hearing adjourned, nor was she instructed to make any submissions on his behalf. Mr JT's position was that he would abide the decision of the Review Office. In light of that, Ms MY's attendance at the hearing was excused.

[20] Mr SC was represented by Mr KL.

## Nature and scope of review

[21] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>3</sup>

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[22] More recently, the High Court has described a review by this Office in the following way:<sup>4</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

---

<sup>3</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>4</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[23] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

## **Analysis**

[24] Mr KL filed written submissions at hearing, and carefully took me through each of the submissions.

[25] Before addressing those submissions, I turn briefly to aspects of the Committee decision, and the conduct rules engaged by this review.

[26] Careful reading of that decision gives indication that the Committee had sympathy for the position that Mr SC was placed in, being that his client was unable to secure her files and that a significant amount of his client's funds were unaccounted for.

[27] In determining however that a disciplinary sanction was required, the Committee concluded that the element of Mr SC's email that raised concern, was his indication that a complaint would be filed if the files were not returned.

[28] The Committee noted that Mr SC could have conveyed his view that Mr JT's retention of the files likely constituted a breach of the conduct rules, and no objection could have been taken, but it was the indication that he would invoke the complaints process if the files were not returned that rendered the conduct objectionable by shifting the conduct into the area of breaching specific conduct rules. The Committee concluded that rules 2.7 and 2.10 had been breached.

[29] Rule 2.7 provides that:

A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.

[30] Rule 2.10 provides that:

A lawyer must not use, or threaten to use, the complaints or disciplinary process for an improper purpose.

[31] Central to both rules, is the element of improper purpose.

[32] Conduct issues may arise if the threat to make accusation, or to utilise the complaints or disciplinary process, is perceived to be linked to an improper purpose.

[33] “Improper” has been defined as incorrect, unsuitable or irregular, fraudulent or otherwise wrongful.<sup>5</sup>

[34] If a lawyer has concerns that a colleague is in breach of their professional obligations, then they must pause to consider whether it is their obligation to file a complaint. If the conduct of which they have concern is, in their view, unsatisfactory, they may elect to file a complaint. If the conduct approaches conduct at the more serious end of the scale and may amount to misconduct, they must file a confidential report.<sup>6</sup>

[35] Importantly, in proscribing the circumstances in which either rule may be breached by imposing requirement that the threat to make accusation or to lay complaint must be made for improper purpose, it necessarily follows that the rules are not at risk of being breached if it is determined that the threats were made for a proper purpose.

[36] There can be no impediment to a lawyer using, or threatening to use the complaints process for a proper purpose.

[37] What constitutes a proper or improper purpose will be determined by an objective appraisal of the facts of each individual case.

[38] Whilst the Committee’s determination of unsatisfactory conduct was reached on the basis of conclusion that there had been a breach of rules 2.7 and 2.10, rule 2.10 is, in my view, of most direct relevance.

[39] In concluding that Mr SC had breached rule 2.10, the Committee observed that whilst there was much about Mr SC’s correspondence that was unobjectionable, his error was in directly linking threat of advancing complaint to request for return of the files.

[40] In imposing a disciplinary sanction, the Committee was not unsympathetic to the position that Mr SC had been put in. It noted that the situation was parlous for

---

<sup>5</sup> *Bryan A Garner Black’s Law Dictionary*, (9th ed, Thomson Reuters, St Paul, 2009) at 826

<sup>6</sup> Rules 2.8 and 2.9.

Mr SC's client. Funds were not accounted for, files were not being provided, and Mr SC had concluded that the reasons advanced for retaining the files were spurious.

[41] Significantly, the Committee's two lay members wished to have their disagreement with the Committee's finding that Mr SC had exercised a threat for an improper purpose recorded. That, combined with the Committee's decision to make no orders under s 156 of the Act, gives indication that the decision was finely balanced.

#### *Mr KL's Submissions*

##### *Proper Purpose*

[42] Mr KL argues that there is nothing inherently improper with making a "threat", the real issue is whether Mr SC's purpose in making that threat was improper.

[43] He submits that the Committee misunderstood the purpose of the complaints process, when it concluded that the proper purpose of the complaints process is to maintain professional standards, and that any other purpose was improper.<sup>7</sup>

[44] He summarises his position thus:<sup>8</sup>

Fundamentally it is submitted that, if it is not improper for a complaint to be made for the purpose of achieving a certain outcome, then it cannot be an improper purpose to threaten to make that complaint in order to seek the same outcome.

[45] Mr KL argues that it cannot be improper to tell someone that you will complain about a particular act, if it is "that very act which is the subject of the request".<sup>9</sup>

[46] He considers that using the complaints process in order to obtain a ruling on a solicitor's actions is a legitimate use of the complaints procedure. He argues that Mr SC had no ulterior motive in sending the email, his purpose was to, if necessary, use the complaints process to enforce his client's rights.

[47] He argues that it is "permissible and indeed one of the express purposes of the complaints process, for a complaint to be made with a view to obtaining a remedy for a client".<sup>10</sup>

---

<sup>7</sup> Standards Committee determination at [14](a).

<sup>8</sup> Submissions on behalf of practitioner 9 May 2017 at [15](f).

<sup>9</sup> At [17].

<sup>10</sup> At [15](a).



[48] I do not agree with Mr KL that it is an “express purpose” of the complaints process that issuing threat of making complaint is properly to be perceived as, or deployed as, a weapon in a lawyer’s arsenal.

[49] It is well established that the purpose of discipline in the legal profession is the protection of the public and the maintenance of public confidence in the legal profession as an institution central to the administration of Justice. That is consistent with ss 3 and 4 of the Act. The purpose of professional discipline is not the enforcement of a party’s perceived legal right. That point has been referred to in the past by the High Court, in the context of that Court’s jurisdiction over lawyers as officers of the court, but I consider that it applies equally to the complaints and disciplinary regime under pt 7 of the Act, including the jurisdiction of the LCRO:<sup>11</sup>

The jurisdiction is based upon the right of the Court to insist and require that its officers observe a high standard of conduct. It is a jurisdiction of a punitive and disciplinary nature and does not exist for the purpose of enforcing legal rights (*Re Grey* [1892] 2 QB 440).

[50] For that fundamental reason, the complaints process should not be used, as Mr KL contends, for the enforcement of a perceived legal right.

[51] The conduct rules are but one part of the law that govern a lawyer’s conduct, and are not exhaustive of the obligations of a practitioner.

[52] The rules serve many purposes. They provide guidance to the profession on issues of conduct and practice. They have an educative function. They provide a yardstick of the standards of conduct that both clients and members of the public can expect and require from practitioners.

[53] Viewed through the prism of those objectives, I do not consider that the rules have, as Mr KL describes, as an express purpose of providing opportunity to a lawyer to achieve a remedy or outcome for their client. The rules are not concerned with equipping practitioners with tools to achieve outcomes for their clients. They are about the maintenance of professional standards.

[54] That said, the pivotal issue in this case is the question as to whether it is permissible for a practitioner to issue a threat to make complaint, if a colleague fails to comply with a specific request made by the practitioner. Does a practitioner run the risk of running afoul of rules 2.07 and 2.10, if threat to lodge complaint is linked to demand that the recipient of the threat comply with a practitioner’s demand?

---

<sup>11</sup> *Re McDougall’s Application* [1982] 1 NZLR 141 (HC) at 142

[55] Whilst the Committee was sympathetic to Mr SC's predicament, it concluded that he had crossed the line when he linked threat of complaint to demand for return of the files.

[56] It is argument that Mr SC was endeavouring to use the complaints process to assert leverage; an approach which the Committee considered elevated the threat to one of having an improper purpose.

[57] In reaching that view, the Committee placed reliance on a decision of this Office in *UF v OU*, and in particular, the Review Officer's conclusion in that case, that the lodging of a complaint should have no ulterior motive.

[58] In that case, the Review Officer noted that:<sup>12</sup>

The lodging of a complaint should have no ulterior motive. The Conduct and Client Care Rules exist to maintain professional standards and any person is able to make a complaint about a breach of the Rules. It is one thing to draw the attention of a lawyer in a collegial way to a possible breach of the Rules. It is another to say that a complaint will be lodged unless the lawyer acts in accordance with demands made by the potential complainant (in this instance withdrawing statements that are critical of the complainant).

In other words the "purpose" of the complaints process is to maintain professional standards ...

[59] I have given careful consideration to the decision in *UF v OU*. The facts in that case are readily distinguishable from the circumstances of the present case.

[60] In *UF*, the practitioner was making demand for comments made in an affidavit filed with the Court to be withdrawn. Whilst the practitioner was concerned that allegations had been made in the affidavit which impugned his reputation, attempts to have evidence which had been put before the Court withdrawn by issuing threat of professional complaint was considered to constitute an improper purpose.

[61] There was a broader context to the allegation in *UF* than in the present case, the practitioner in that case making threat on more than one occasion to file a complaint if his requests were not complied with.

[62] Nor was it the case in *UF* that the practitioner was restricted in the options available to him to remedy the situation. The Review Officer noted that the practitioner had no need to make threat of lodging complaint with the NZLS to achieve his purpose,

---

<sup>12</sup> Above n 2, at [33]–[34].

as an application made by the practitioner to the Court had resulted in him achieving the result he sought.

[63] I am not persuaded that the cases referenced by the Review Officer in *UF* have particular relevance to this case. Those decisions involved cases where there had been threats made to make or withdraw complaints of criminal conduct, and inappropriate pressure being asserted on a client.

[64] I also note that the unsatisfactory conduct finding in *UF* was made on the basis that rule 2.7 had been breached.

[65] I have considered previous decisions from this Office which have adopted the reasoning in *UF*, and of the reliance placed by the Committee on that decision, and in particular, its conclusion that the lodging of a complaint should be for no ulterior purpose, and its reinforcement of argument that the “purpose” of the complaints process is to maintain professional standards.

[66] I am not however satisfied that the manner in which Mr SC framed his request of Mr JT, considered in context, can reasonably be described as having been advanced for an improper purpose.

[67] Mr SC does not present his request of Mr JT in the form of a stark ultimatum.

[68] He provides opportunity to Mr JT to justify the position taken. He says that complaint will be lodged if Mr JT is unable to identify a proper basis for retaining the files.

[69] There can be no suggestion that Mr SC was issuing threat of complaint in order to achieve a strategic outcome or advantage for his client. His request was essentially non-contentious, a request which could perhaps be described as administrative in nature. No suggestion of improper purpose could sensibly arise from the request itself.

[70] There appeared to be no compelling grounds advanced by Mr JT to support argument for the retention of the files, other than argument that time was needed to finalise the accounts.

[71] Any concerns Mr JT may have had that there was information on the file that could have compromised his former client’s position, and by association in ways that I am uncertain, compromised his position, could have been easily assuaged by the

simple expedient of him taking copies of the documents which were giving him concern. Mr SC had indicated that he was happy for Mr JT to take copies of any material from the file.

[72] There was nothing in Mr SC's request for the files that was in conflict with the conduct rules that direct how practitioners in Mr JT's position must deal with their former client's files on termination of a retainer.

[73] Those rules emphasise that a lawyer has no proprietary interest in a client, and reinforce the obligation on a practitioner to act on request to uplift documents without undue delay.<sup>13</sup>

[74] The interests of the client must be foremost in facilitating the transfer of the client's documents and records.<sup>14</sup>

[75] The question then returns to the issue as to whether linking threat of making complaint to a demand for compliance with a request which, if satisfied, will result in a decision not to lodge a complaint, will automatically and inevitably constitute a breach of rule 2.10, on the basis that invoking of the complaints process in this fashion, is improper.

[76] I do not consider that rule 2.10 should automatically attract that degree of rigidity in its application.

[77] In my view, there will be circumstances in which it is not improper for a practitioner to signal that a complaint may be filed, if a colleague fails to comply with a reasonable request.

[78] In my view an improper purpose in threatening to make a complaint will arise when, in making the threat, a lawyer makes a connection between the threat and an unrelated strategic advantage that the lawyer is trying to accomplish.

[79] A proper purpose would include instances where a lawyer makes a threat to complain about a colleague, but does so without purpose or intent to secure advantage. For example, a request to respond to long unanswered correspondence, coupled with a threat to complain if response is not received by a particular date, is unlikely to be a threat made for an improper purpose. No transactional advantage is

---

<sup>13</sup> Rule 4.4.

<sup>14</sup> Rule 4.4.4

being sought – merely a response to correspondence. It is a threat to complain about conduct for no other reason than the conduct potentially merits it.

[80] It is not the case that a threat to make complaint, as opposed to taking steps to lodge a complaint, must inevitably carry a hint of possible or actual impropriety.

[81] It is also unreasonable, and unrealistic, to expect that a legitimate threat of a complaint will be entirely devoid of some motive. After all, the lawyer's chief concern is the interest of his or her client. However, the threat to make complaint must not, on any objective analysis, give indication that the practitioner was using threat of complaint to achieve a strategic advantage with his or her client, or indication that the complaint is being used as leverage in the underlying matter. It is the element of leverage which is a misuse of the complaints procedures, and which makes a threat improper. The hallmark of an improper purpose is the use of a complaint to secure an advantage, rather than to ensure compliance with professional standards.

[82] There can be circumstances when indication of intention to issue complaint could be regarded as indicative of a collegial approach, a practitioner putting a colleague on notice, but providing opportunity to remedy.

[83] The distinction between this approach, and that supported by the Committee (advise that conduct issues are alive but do not link to a threat to lodge a complaint) is not overlooked, however I am persuaded that in framing rule 2.10 in such a way as to necessarily allow that a threat to issue complaint may legitimately be made for proper purpose, a threat to issue a complaint in circumstances where the threat is linked to demand will not always amount to an improper purpose.

[84] The propriety of the threat must be measured objectively, by a consideration of the facts of each individual case.

[85] Whilst I consider that there are circumstances in which a practitioner may legitimately advise that a complaint will be laid if there is failure to comply with a reasonable request made, in my view, practitioners should exercise particular care before embarking on this course.

[86] Threat of complaint should never be made for improper purpose.

[87] Every case falls to be considered on its particular facts, but what a practitioner must be careful to avoid, is suggestion that the raising of threat of complaint is advanced as a ploy to secure an advantage for a client.

[88] Before issuing any threat to lodge complaint, a practitioner must be satisfied that they are on firm ground, and that there are reasonable grounds for levelling of allegation that a colleague has been in breach of the conduct rules.

[89] It is an approach to be exercised with caution, and always with awareness that any threat to file complaint on indication of a refusal to comply with demand, can readily cross the line from reasonable request to improper demand.

[90] It must also be emphasised that a practitioner should not issue threat of complaint with undue haste. There are sound policy grounds for practitioners to adopt a cautious approach before issuing a threat to lodge a complaint. If, as Mr KL suggests, the threat of complaint was to be regarded as just another tool in the practitioner's tool-box, the complaints service could quickly become inundated with complaints about "strategic" complaints. Such an outcome could potentially impede the Complaints Services ability to meet its statutory obligation to resolve complaints expeditiously, and importantly, divert attention from a practitioner's responsibility to resolve minor disputes with colleagues in a collegial manner.

[91] Having carefully considered the approach taken by Mr SC, I do not consider that his conduct breached rules 2.7 or 2.10.

[92] Having concluded, that Mr SC had not contravened rules 2.7 or 2.10, it necessarily follows that I reverse the unsatisfactory conduct finding.

[93] Having done so, I need not address Mr KL's further submissions.

*If a breach was established, was it appropriate to make an unsatisfactory conduct finding?*

[94] If I am wrong in concluding that Mr SC had not breached the Conduct Rules, that is not the end of the matter. If a breach was established, it is necessary to consider whether the imposition of an unsatisfactory conduct finding was appropriate.

[95] A breach of the Act, if established, does not automatically attract a disciplinary sanction. In *Burgess v Tait* the Court observed that:<sup>15</sup>

The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.

---

<sup>15</sup> *Burgess v Tait* [2014] NZHC 2408 at [82].

[96] That position was affirmed in *Chapman v The Legal Complaints Review Officer* where the Court noted that:<sup>16</sup>

... it appears to me that the LCRO may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.

[97] In conducting a review, the LCRO may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.<sup>17</sup>

[98] Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.<sup>18</sup> That discretion may be exercised in circumstances where the Review Officer, having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.<sup>19</sup>

[99] I do not consider that an imposition of an unsatisfactory conduct finding is necessary or appropriate in the circumstances.

[100] Conduct rules must be interpreted and applied fairly and sensibly,<sup>20</sup> and with proper and careful attention to the protective purpose of the disciplinary jurisdiction, its consumer protection objectives, and the need to ensure consistency in the application of those rules.

[101] It is important, when considering the conduct, to give a proper consideration to the circumstances which preceded Mr SC's request of Mr JT.

[102] Whilst it is Mr SC's conduct which is under scrutiny in this review, and it is not the task of this review to draw definitive conclusions as to whether the reasons advanced by Mr JT for retaining the file had merit, Mr KL notes in his submissions that consequential upon Mr SC's client laying complaint about Mr JT's conduct, complaint that Mr JT had deposited funds received from Mr SC's client to a personal account, resulted eventually in a misconduct finding being made against Mr JT in the

---

<sup>16</sup> *Chapman v The Legal Complaints Review Officer* [2015] NZHC 1500 at [47].

<sup>17</sup> Lawyers and Conveyancers Act 2006, s 211(1)(b).

<sup>18</sup> Section 138.

<sup>19</sup> Section 138(2).

<sup>20</sup> *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].

Disciplinary Tribunal.<sup>21</sup> Mr KL notes that the Tribunal recorded in its decision that Mr JT's retention of documents had compounded the misconduct.<sup>22</sup>

[103] But it was Mr SC's response to what he could have reasonably perceived to be a provocative stance adopted by Mr JT, that requires scrutiny, and in doing so, it is important to consider Mr SC's correspondence of 4 June 2013 in its entirety, and to bring context to the final paragraph of that correspondence.

[104] What is evident from that correspondence is the measured and careful response Mr SC provides to Mr JT's indication that there would be delay in producing the files.

[105] Mr SC addresses head on, Mr JT's submission that the files were being retained because of concern Mr JT had as to whether the files contained documents which evidenced an intention on Mr JT's former client to commit an immigration fraud. Mr SC notes that the objection raised by Mr JT could be simply overcome by Mr JT retaining copies of the documents he considered relevant.

[106] Turning to the issue of his client's funds (a matter that must have been of pressing importance to his client) again Mr SC does not default to the making of forceful or insistent demand, rather he identifies the conduct rule which he considers relevant, and makes courteous request of Mr JT to clarify the basis on which Mr JT considered that he was entitled to retain documents, records and funds.

[107] Mr SC notes that as no invoices had been rendered by Mr JT, there was no legitimate basis for asserting a lien, but here again, his approach can be characterised as both courteous and constructive. Rather than make simple demand for immediate return of his client's funds, he invites Mr JT to provide invoices and confirms that his client is prepared, subject to her assessment as to the reasonableness of the invoices, to authorise deduction of funds to settle Mr JT's account.

[108] In what presents as a meticulous attempt to cover the bases, Mr SC gives his view as to the conduct rules which he perceives to be relevant, and provides a realistic time frame for Mr JT to attend to the administrative tasks that needed to be attended to in order to facilitate the release of the files. He goes so far as to advise that he would attend to uplifting the files from Mr JT's office, if Mr JT did not agree to Mr SC's proposal that the documents be couriered to him.

---

<sup>21</sup> *JT v [Area] Standards Committee No [X]* [2016] NZLCDT XX.

<sup>22</sup> At [91].



[109] The tenor and tone of this correspondence is conciliatory, measured and professional. It is singularly lacking in any hint of bombast or threat. It is sensible. It is endeavouring to resolve a problem rather than escalate it.

[110] It is from that context that Mr SC's final paragraph should properly be assessed.

[111] Placed within the context of correspondence that is clearly crafted with purpose to resolve an impasse, Mr SC's final paragraph which prompted a finding that he had "threatened to use the disciplinary process for improper purpose" presents as somewhat discordant with the careful approach adopted in the body of the correspondence.

[112] Mr KL advises that Mr SC was not insensitive to the possibility that his demand for return of the files linked as it was to indication of possibility of filing complaint, may have potential to breach the conduct rules. Mr SC sought guidance from a senior partner in his firm, and was told that framing his final paragraph in the terms he did, would not offend any of the conduct rules.

[113] Mr SC's decision to seek advice from a partner was reflective of the careful approach he was adopting.

[114] It is also important to note that whilst Mr SC gives indication of his intention to lodge a complaint if his request for return of the files is ignored, he does not cast his request in emphatic terms. Whilst he makes demand for the files to be provided, he qualifies that demand by offering further opportunity to Mr JT for him to justify the position that he had taken. His intention to issue complaint is ameliorated by the opportunity he provides to Mr JT to "identify a proper basis" for retaining the files. This is not the language of stark demand. It is an approach which reserves to Mr JT, opportunity for him to justify what, on the face of it, appeared to be an untenuous position.

[115] At the conclusion of the hearing, Mr SC was given opportunity to comment on the application. His account, consistent with that provided by Mr KL, detailed the difficulties he had faced in his attempts to retrieve his client's files. He confirmed that he had approached a senior partner and sought advice.

[116] He emphasised that he considered himself to be a practitioner who took his professional obligations seriously, and that he was concerned that an adverse conduct finding was now on his record.

[117] Significantly, he indicated that facing and responding to a professional complaint had been a salutary experience for him, and one which had given him considerable pause to reflect on the conduct rules which were at the forefront of the complaint.

[118] He was open in conceding that if an error had been made, it was a mistake he would not be making again.

### **Conclusion**

[119] I have carefully considered all of the material put before me on this review. I am not satisfied that Mr SC's actions in advising Mr JT that a complaint would be made if files were not returned, constituted a breach of rules 2.7 and 2.10.

[120] If however those breaches had been established, I am not persuaded that it is necessary to impose a disciplinary sanction.

[121] It has been oft stated that the function of the disciplinary process is protective, not punitive. No broader issues of consumer protection or public welfare are directly raised by this review, other than the admittedly important public interest in practitioners maintaining professional standards and ensuring compliance with the conduct rules. It bears repeating that the two lay members of the Committee, those members charged with bringing the perspective of the lay person to the inquiry, both recorded their disagreement with the Committee's conclusion that Mr SC's conduct had been improper.

[122] In concluding that it was unnecessary to impose a disciplinary sanction, I place particular emphasis on the following:

- (a) The need to ensure that rules are interpreted fairly and sensibly.
- (b) A careful consideration of the context in which the complaint arose.
- (c) A consideration of the full text of Mr SC's correspondence of 4 June 2013, and the extent to which that correspondence amply reflects the

even and temperate approach adopted by Mr SC to resolve the dispute with Mr JT.

- (d) The degree to which the element of demand in the 4 June correspondence is ameliorated by the offering of further opportunity to Mr JT to justify his position.
- (e) Mr SC's decision to take advice from his senior partner.
- (f) Mr SC's frank and genuine admission that he had learnt from the experience and would be acutely sensitive in the future to the ensure compliance with rule 2.10.

## **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed.

**DATED** this 30th day of June 2017

---

**R Maidment**  
**Legal Complaints Review Officer**

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr SC as the Applicant  
 Mr KL as the Representative for the Applicant  
 Mr JT as the Respondent  
 Mr WR as the Representative for the Respondent  
 Mr FX as a related person  
 [Area] Standards Committee  
 New Zealand Law Society