LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2024] NZLCRO 039

Ref: LCRO 149/2023

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**HV** Applicant
AND	**BQ** Respondent

DECISION ON PENALTY

[1] This decision follows my primary decision dated 2 April 2024 in which I found that the applicant had breached rr 3.4(a) and 13.4 of the Rules and thereby engaged in unsatisfactory conduct, gave the parties opportunity to make submissions on penalty and ordered anonymised publication of the decision.

[2] I have received no submissions from the respondent. The applicant submitted that the regulatory breaches should have no disciplinary consequence and that publication of the primary decision in any form was not warranted.

[3] The unsatisfactory conduct finding I have already made was a cumulative one but I would have made it just for the breach of r 3.4(a). The requirement to explain the basis on which fees will be charged is an important consumer protection measure.

[4] Where there is either a fee agreement or a unilateral commitment to charge fees by reference to a formula, it is even more important that an explanation be given and in a manner that complies with r 1.6 of the Rules. If the respondent had received such an

explanation, it is unlikely she would have made her fees complaint or expressed the understandings she expressed in it.

[5] The applicant emphasises that his fees were "cheap". The answer to that submission is that client care under the Rules is not assessed solely in terms of outcome and cost but also in terms of information, communication and understanding of the legal process.

[6] The applicant's breach of r 13.4 is less material. In particular, I have referred to the "chicken and egg" aspect of needing to issue proceedings in order to get defendants to a court-mandated potential settlement process. The applicant has raised the same issue in his submissions.

[7] A lawyer is obliged under r 7.1 of the Rules to take reasonable steps to ensure that a client understands the nature of the retainer. Under often-overlooked r 1.6 of the Rules, a lawyer is required to provide all information "…in a manner that is clear and not misleading given the identity and capabilities of the client and the nature of the information". Most domestic or personal clients have little or no idea about what is involved in court proceedings unless it is adequately explained to them.

[8] The applicant criticised the Committee for mis-stating his disciplinary history but has elected not to take the opportunity I expressly gave him to make submissions on its relevance. I have now read all the standards committee, LCRO and Disciplinary Tribunal decisions available to me involving the applicant. This has been most instructive.

Standards Committee decisions

[9] At standards committee level (i.e. where the standards committee decision has not been reviewed), the applicant has been disciplined on three previous occasions for breach of rr 3.4 and 3.5 of the Rules and on two previous occasions for breach of r 13.3 and/or r 13.4 of the Rules.

[10] In the most recent standards committee decision available to me, there is a remarkable similarity to the factual particulars of the present complaint. The matter involved an earthquake-related claim, referral from CRSL and no advice to the client about how fees were to be calculated.

LCRO decisions

[11] Of eight LCRO decisions I have read on applications by the applicant, only one was directly relevant in that it involved a finding of unsatisfactory conduct for breach of

r 3.4(a) of the Rules. The client service information included in the applicant's client engagement documentation in that case, which is quoted in the decision, was materially the same as his documentation in this matter.

[12] In that earlier decision, which was issued in 2020, the Review Officer recorded the applicant's acknowledgement that the information he had given the client about fees was inadequate and did not accurately reflect how fees were to be charged and paid, and came to the overall conclusion that "the applicant's fees information to [the client] was muddled, inconsistent and wrong, and did not comply with the requirements of r 3.4(a) of the Rules".

[13] On that occasion, the applicant was ordered to pay a moderate fine for several regulatory breaches including breach of client confidentiality. There was no separate component of the fine apportioned to the breach of r 3.4(a).

Disciplinary Tribunal decisions

[14] One of four decisions of the Disciplinary Tribunal involving the applicant involved earthquake-related proceedings initiated by the applicant for a client referred by CRSL. The charges included alleged breach of rr 1.6, 3.4 and 3.5 of the Rules. In relation to r 3.4, the Tribunal's focus was on the unusual circumstance of the unexpected summary termination of the funding agreement by CRSL immediately before trial. It found no breach of the rule "… for failing to advise [the complainant] on what fees he would be charged and what his liabilities might be if his agreement with CRS came to an end".

[15] The Tribunal's decision reflects the particular circumstances of that case. I do not interpret it as expressing any general principle that compliance with r 3.4 is optional depending on the circumstances or as negating the effect of the words "in writing" in the rule. The context of the Tribunal's comment was essentially one of materiality in the particular circumstances. My role is to make appropriate findings on the facts of the present complaint.

Discussion

[16] In considering penalty, I am required to consider any mitigating or aggravating factors.

[17] The number and regularity of similar disciplinary decisions broadly indicate a perfunctory or careless attitude on the applicant's part to the proper administration of

legal practice and a pattern of lack of attention to anything other than getting the legal work done as efficiently and cost-effectively as possible.

[18] I take into account as a positive factor that the applicant's approach to litigation probably provides access to the justice system for clients who would otherwise struggle ever to have their cases argued, let alone to have their day in Court. His fees have been consistently found to be demonstrably reasonable or modest. His technical competence does not appear to be an issue.

[19] I accept the applicant's submissions that any penalty imposed must take into account the nature and gravity of the conduct and that there needs to be consistency of outcome. The various findings of breach of r 3.4 are over a 10-year period. The penalty in this instance needs to reflect in some way the applicant's poor track record with complaints of a similar nature indicating an inadequate standard of client care.

[20] The disciplinary orders made in the five previous decisions at various levels that I consider to be about regulatory breaches of a similar nature have ranged between an unsatisfactory conduct finding with no fine to a fine of $4,500, in each case with costs. In the latter case, my assessment is that the level of fine was prompted more by the finding of breach of client confidentiality than by the breach of r 3.4(a).

[21] The applicant has been successful in his application for review of the more material adverse professional conduct findings made by the Committee. I have nevertheless made adverse findings on what I consider to be the less material issues. Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office.

[22] I consider this matter to have been of moderate complexity and there has been additional time involved in giving consideration to the relevance of the *Pfisterer* Court decisions and to the applicant's extensive disciplinary history (effectively at the applicant's request by reason of his submissions and criticism of the Committee).

Decision

[23] Pursuant to s 156(1)(b) of the Act, the applicant is reprimanded for what appears, on the information available to me, to be his fifth determined breach of r 3.4(a) of the Rules.

[24] Pursuant to s 156(1)(i) of the Act, the applicant is ordered to pay a fine of $3,000.00 to the New Zealand Law Society within 30 working days of this decision.

[25] Pursuant to s 210(1) of the Act, the applicant is ordered to pay costs in the sum of $1,600.00 to the New Zealand Law Society within 30 working days of this decision.

[26] Pursuant to s 215 of the Act, the order for costs below may be enforced in the civil jurisdiction of the District Court.

Publication

[27] The applicant's submissions on publication effectively ask me to reconsider paragraphs [335] and [338] of the primary decision. He submits that there is no public interest in publication of unique circumstances that are not of future benefit to the public or practitioners. I disagree. The circumstance of a lawyer acting on referral from a litigation funder is not unique. On the contrary, I understand it to be an appreciable part of the applicant's practice.

[28] I decline to reconsider the publication order. As I noted in the primary decision, the identifiability of the applicant arises from the references to the decisions in the *Pfisterer* litigation, which are necessary because of the applicant's reliance on them.

DATED this 29TH day of April 2024

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FR Goldsmith
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 HV as the Applicant
Ms BQ as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society