ORDER MADE PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006 FOR PERMANENT SUPPRESSION OF NAMES AS SPECIFIED IN PARAGRAPH [125] OF THIS DECISION.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2021] NZLCDT 15

LCDT 021/20

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 4** Applicant
AND	**LYNETTE O'BOYLE** Practitioner

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Ms A Callinan

Ms N McMahon

Mr S Morris

Ms S Stuart

DATE OF HEARING 29 and 30 March 2021

HELD AT District Court, Auckland

DATE OF DECISION 29 April 2021

COUNSEL

Mr M Williams for the Auckland Standards Committee

Ms K Davenport QC for the Practitioner

DECISION OF THE TRIBUNAL RE LIABILITY

Letters to non-parties, errors, instructions

[1] Ms O'Boyle faces a charge of misconduct and an alternative charge of unsatisfactory conduct. Principally, these charges arise from concerns about the character and intent of Ms O'Boyle's letter dated 27 June 2018, sent to four recipients. Additionally, they touch on allegedly misleading representations she made to the Standards Committee.

[2] The Standards Committee submits that the letters were inappropriate and unbalanced, that they contained misstatements, and were designed to cause employment troubles for the affected persons. Ms O'Boyle's case is that she took reasonable care to get her facts right, that she had honest if mistaken beliefs, and that she was acting on instructions from her client.

[3] Ms O'Boyle denies she misled the Standards Committee. She says that the Notes of Evidence in a Family Court case corroborated some of her assertions. She argues that she always intended, when writing the term "Notes of Evidence", to refer to her own handwritten notes.

[4] In this case we must decide five main issues. Those issues, and sub-headings, are set out in the following index:

What was the context and timeline around sending the letters?

The text of the letters

[5] At the relevant time, Ms O'Boyle's client ("the client") had recently lost an interim child care case. The children in question were teenagers. The client's former partner, the complainant (in this decision called "Mr C"), was self-represented. He had told Legal Aid two material facts that jeopardised the client's legal aid grant. The client complained to the Police that Mr C may have hacked her Facebook Messenger account to obtain information which he provided to Legal Aid and the Court in the child care case. Ms O'Boyle had recently written to Mr C asking him to discover certain electronic communications relating to the alleged hacking.

[6] Against this background, Ms O'Boyle sent a letter (the original letter) to the Chief Executive of Mr C's employer, a Government Department in which Mr C holds a senior position. The letter suggested that Mr C and his partner (Ms P) had used Departmental devices to hack the client's media accounts. Ms O'Boyle copied the original letter to two other Government Departments, each with a covering letter suggesting that the

addressee may be Ms P's employer. The covering letters sought the same information about IP addresses and suggested the Government Department might be at fault. One of those addressees was, in fact, Ms P's employer.

[7] Ms O'Boyle also copied the original letter to the Privacy Commissioner.

[8] The original letter, dated 27 June 2018, on Ms O'Boyle's office letterhead, was in the following terms,[1] subject to our redactions:

> 27 June 2018
>
> XXXXX [Individual Name]
> The Chief Executive
> National Office
> Ministry of XXX
> XXXXX
> WELLINGTON
>
> Via email and post
>
> Dear [Name]
>
> **Unauthorised Access of [the client's] Social Media Account by [Mr C], Employee and other matters**
>
> 1. I act for [the client]. There has [sic] been ongoing Family Court Proceedings since 2013. These proceedings have been, at times, acrimonious and recently proceedings became very stressful for all parties when the matter came before the Court on a Without Notice basis, filed by [Mr C]. [Mr C] has been self-represented for some time and has filed two Without Notice Applications in a very short space of time. A hearing was recently held in the Whangarei Family Court on 28 and 29 May 2018.
>
> **Unauthorised Access Of Digital Media – [Mr C] – Government Property**
>
> 2. It has come to my client's attention at least 4 people have been accessing her digital media accounts. My client has downloaded the IP addresses of the persons who have been accessing her account. There have been four main IP addresses accessing [the client's] accounts. There is very strong evidence to link [Mr C], [Ms P], [Mr C's] partner, who we understand works for either the [X Department or the Y Department], and [the client's] older daughters as the persons who may have been accessing the digital media accounts. One of the IP addresses also accessed my computer.
>
> 3. It has come to [the client's] attention one or more of the IP addresses are from a Government agency. Accordingly, she requests discovery from you, as to whether any of your computers, phones or other devices [Mr C] had access to as the [Title to Mr C's Position], were used in this unauthorised

[1] Bundle, pp 17 – 18.

access of her digital media. To assist, I enclose a copy of the IP addresses which have been used to access my client's digital media accounts. These IP addresses are released to the Ministry on the strict understanding they will not be provide [sic] or released to [Mr C] or any third party without [the client's] consent. As you can appreciate my client takes the unauthorised access of her digital media very seriously.

4. I am forwarding a copy of this letter to the Privacy Commissioner because my client believes that as a matter of Public Interest employees of the Public Service who use Government devices should use those devices for appropriate use only.

5. My client has also referred the unauthorised access to the NZ Police. The investigation into the unauthorised access with respect to my computer by one of the IP addresses is ongoing. I look forward to receiving dialogue with your agency about this matter. Please note a similar letter is being sent to [Ms P's] employer requesting information.

False Information given during Court proceedings

6. My client has also instructed me to raise two matters with you which she feels very strongly about.

Past Criminal Offending of [Mr C]

7. [The client] firmly believes [Mr C] has lied to the Court and possibly to you his employer. [Mr C] gave evidence on 28 May 2018 you as his employer were aware he had faced one count of theft. Mr [C] actually faced four counts of theft in 2009. [The client] is also concerned about the veracity of [Mr C] with respect to his criminal offending and other matters. The basis for this is [Mr C] undertook a clinical psychological assessment for his sentencing on 17 December 2009. That assessment was provided to the Criminal Court so is a public document. [Mr C] told the Psychologist he had recently lost his mother and father in law and his eldest son was returning to England. None of that information was or is factually correct. [Mr C's] son is only just 11, he was 4 at the time. [Mr C's] mother is very much alive and so is [the client's] father. [The client] has a copy of that report and can provide the same if you require.

<u>Legal Aid</u>

8. [The client] is in receipt of legal aid. It has come to my client's attention. [Mr C] has contacted Legal Aid and has attempted to have [the client's] aid withdrawn. It would appear [Mr C] has used his position as a Ministry employee to gain information about [the client's] Legal Aid. [Mr C] has also used the Information that was obtained by the unauthorised access of [the client's] digital media to provide information to legal aid. The Ministry is on notice if the Ministry confirms or information comes to hand via other methods [Mr C] has used Ministry equipment to access [the client's] information then has used that information to forward to Legal Aid [XXXX] the matter will be referred to the Police.

9. My client is concerned [Mr C] has used his position as a senior manager in the Ministry [XXXX] to interfere with her Legal Aid. My client seeks copies of the emails and letters written by [Mr C] to Legal Aid by [Mr C]. [sic]

I look forward to hearing from you as a matter for urgency.

Yours sincerely

Lynette O'Boyle
Solicitor
O'Boyle Law

cc The Privacy Commissioner

[9] The covering letter sent to the Government Department that was not Ms P's employer, was in these terms[2]:

29 June 2018

[XXXXX Departmental Name]
Private Bag [XXX]
Wellington
XXX

Via Email: [xxx@xxx]

Dear Sir/Madam

Unauthorised Access of [the client's] Social Media Account by [Ms P], Employee

I act for [the client], whose digital media accounts may have been accessed without authority by [Ms P], who I believe may work for [this Department]. Please find enclosed a copy of a series of IP addresses. [Ms P] is the partner of [Mr C]. I also enclose a copy of a letter I sent to [Personal Name of CEO of Mr C's employer], who is the employer of [Mr C]. That letter provides background information. I ask that this matter be treated as a confidential matter but am enquiring if any of the IP addresses listed on this printout belong to computers, phones or laptops which belong to [X] which are in the possession of [Ms P]. If there are, I seek disclosure of those IP addresses and also why [Ms P] has accessed, in an unauthorised manner, my client's digital media and why your government agency has allowed this to happen.

I look forward to hearing from you.

Yours sincerely

Lynette O'Boyle
Solicitor
O'Boyle Law

[2] Bundle, p 74.

[10] The covering letter to the Department that did employ Ms P was in similar terms, and likewise dated 29 June 2018.[3] Each of those two letters was produced separately in Ms O'Boyle's office. We know this because the Departmental names differed in length and line breaks occurred differently. Each of the accompanying letters was identifiably signed by Ms O'Boyle.

[11] Mr C's employer replied that none of the IP addresses related to it and that Mr C had not improperly used his work devices. Ms P's employer similarly advised that none of the IP addresses related to their Department and that Ms P had not improperly used her work devices.

[12] Although, in the original letter, Ms O'Boyle asserted that Mr C "has lied to the court and possibly to you his employer" about "his criminal offending and other matters," it is common ground, now, that Mr C had told the truth at the Court hearing, namely, that although he had faced four charges in 2009 [laid on the same day, addressing four identical offences within a three-month period], he had no criminal convictions because he was discharged without conviction, and that he was granted permanent name suppression. An affidavit by a Court Registrar[4] confirms these details.

[13] In the course of responding to the Standards Committee investigation, Ms O'Boyle reiterated her version of the facts about Mr C's alleged criminality. She bolstered her stance with references to "Notes of Evidence".[5] When the Standards Committee obtained the Notes of Evidence from the Court, those Notes corroborated Mr C's veracity concerning what he had told the Court about these matters, contradicting Ms O'Boyle.

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[3] Bundle, p 110.
[4] Affidavit Crystal Whittaker 19 March 2021.
[5] Ms O'Boyle's letter 31 May 2019 (Bundle, p 70), two references to "(Notes of Evidence 28 May 2018)"; Ms O'Boyle's letter 14 June 2019 (Bundle, p 102), reference to "The Notes of Evidence (NoE)"; Ms O'Boyle's letter 15 July 2019 (Bundle, p 115), reference to "the Notes of Evidence." Additionally, although the term Notes of Evidence" is not mentioned in Ms O'Boyle's letter of 14 June 2019 (Bundle, 105), she stated to the Standards Committee that on 28 May 2018, Mr C "gave evidence that he had one conviction", a statement that was misleading in two material respects: he gave evidence that he faced four charges and that he had no convictions (discharged without conviction).

Was any text redacted?

[14] In her first affidavit,[6] Ms O'Boyle tried to persuade us that the sting of adverse material was contained to some extent by her instruction to her PA, recorded on a sticky note, to redact parts of the original letter (relating to criminal charges and employment matters) from the version of the letter to be sent to Ms P's possible employers. Absent evidence from her PA, she relied on the sticky note, the tick upon it, and her assertion that her PA was "reliable"[7] to suggest redaction had occurred.

[15] We can imagine how the original letter would have been redacted so far as criminal matters are concerned. That would arguably have resulted in paragraph 7 being obscured. We do not understand how redaction of "employment" (a one-word description) could have been achieved because there are several direct and indirect references to, or matters touching upon, employment in the original letter.

[16] At the hearing, Ms O'Boyle was directed to differences in the way numbers were written on her office "E_MAILED" stamp and the sticky note.[8] The "3/7" did not resemble other notations by her PA. Ms O'Boyle made no precise concession but conceded: "I don't know the answer to that."[9] We are persuaded that the letters were not redacted by the appearance of the document provided by Mr C which he stated had been provided to him by Ms P as the document sent to her employer. That document is in the Bundle.[10] It is like the document received by Mr C's employer in that both bear an identically positioned stamp indicating it was emailed from Ms O'Boyle's office on [Monday] 2 July 2018 at 5pm, but the significant difference is that it does not bear any "Received" stamp such as that appearing on the document sourced from Mr C's employer.[11] We find the copy of the original letter sourced from Mr C[12] was most likely that posted to Ms P's employer by ordinary mail. That explains why it bears a stamp from Ms O'Boyle's office showing when it was emailed and a

[6] At para 22.
[7] Ms O'Boyle's affidavit 21 December 2020, para 22.
[8] See NoE p 40, line 7 to p 43, line 9.
[9] NoE p 42, lines 3 – 4.
[10] Bundle, p 110.
[11] Bundle, p 17.
[12] Bundle, p 17 – 18.

stamp, probably from Ms P's employer, indicating its receipt in Wellington three days after being posted in Whangarei.

[17] In the absence of evidence from Ms O'Boyle's PA, we cannot place much reliance on what that tick indicates. Ms O'Boyle told us at the hearing that her PA had subsequently left her employ, that the relationship had broken down and, "I wouldn't ask her [to give evidence to clarify these matters] and she would probably say no."[13]

[18] Charges must be determined on the balance of probabilities.[14] We find that the copies of the original letter sent to Ms P's possible employers were not redacted.

Timeline - When were the letters sent?

[19] Ms O'Boyle was unable to produce office or email records to show when each of the four letters was sent to its addressee. In the resultant void, she offered differing versions of when, and in what relational timeframe, the original letter and covering letters were sent, namely:

- That the original letter was emailed to Mr C's employer on 2 July 2018 at 5pm as noted by the handwritten information entered into her office stamp on the face of the document.[15]

- That the original letter was emailed to Mr C's employer on 3 July 2018 by her PA as recorded by a tick and the notation "3/7" appearing on Ms O'Boyle's sticky note affixed to one of the accompanying letters.[16]

- That the original and covering letter to the Department that did not employ Ms P was sent on 3 July 2018 at 10.10am as evidenced by her PA's handwritten entry in the office stamp.[17]

[13] NoE p 43, lines 12 – p 44, line 2.
[14] Section 241 Lawyers and Conveyancers Act 2006.
[15] Bundle, p 17. Ms O'Boyle's affidavit 21 December 2020 para 20, and Exhibit G.
[16] Bundle, p 74. Ms O'Boyle's affidavit 21 December 2020, Exhibit I.
[17] Bundle, p 74. Ms O'Boyle's affidavit 21 December 2020 para [22]. NoE pp 40- 41.

- That the original and covering letter to the Department that did employ Ms P was sent a few days later when the other Department had replied to inform that Ms P was not their employee.[18]

- That the original and covering letter to the Department that did employ Ms P was sent on 3 July 2018 at 10.11am as evidenced by her PA's handwritten entry in the office stamp.[19]

[20] Adding another layer to these uncertainties, Ms O'Boyle gave evidence that the letters were only emailed and no copy was sent by ordinary post.[20] This evidence is at odds with the notation "via email and post" on the first page of the original letter.[21] Moreover, the physical appearance of office stamps on the face of the letters indicates that they were posted (after having been emailed).

[21] Among these alternative versions of when and how the letters were sent, only one issue seems material, namely: were the covering letters to the two Departments sent contemporaneously or a few days apart? Ms O'Boyle's suggestion that they were sent serially is at odds with the notations on the documents in evidence. Ms O'Boyle identified the entries in her office "E-MAILED" stamps as being characteristic of her PA whom Ms O'Boyle described in her affidavit as "a reliable EA"[22] [Executive Assistant]. The notations indicate emailing occurred, to the incorrect Department, on 3 July 2018 at 10.10am; and to the correct Department, one minute later, on 3 July 2018 at 10.11am.

[22] Accordingly, we find the letters seeking Ms P's employers were sent contemporaneously. In passing, we comment that Ms O'Boyle's process inevitably meant that the material, inevitably offensive to Ms P, let alone Mr C, was wilfully shared with at least one Government Department that had nothing to do with anyone in the client's case.

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[18] NoE p 32, lines 22 – 23; NoE p 49, lines 5 – 10; NoE p 49, line 32 to p 50, line 8; p 50, line 11 to p 52, line 8.
[19] Bundle, p 110. NoE p 50, lines 10 – 26.
[20] NoE p 60, lines 7 – 15.
[21] Bundle, p 17.
[22] Ms O'Boyle's affidavit 21 December 2020, para 22.

[23] In her affidavit of 30 March 2021, filed during this hearing, Ms O'Boyle, after checking, informs that "from documents saved on my hard drive" she can tell that the client "began to raise issues which lead [sic] to the letter of 27 June" before 18 June.[23] We find that the original letter had been in the course of composition for several days before its 27 June date. Congruent with that timeline, we find that Exhibit A to her supplementary affidavit is more probably the version of the original letter emailed to her client on [Wednesday] 27 June for approval. That emailing is indicated by her office email stamp. We therefore find Ms O'Boyle's evidence[24] that the 2 July stamp indicated when a draft of the letter was sent to her client is mistaken.

[24] Despite Ms O'Boyle's evidence to the contrary,[25] we find it probable that the original letter to Mr C's employer was emailed at 5pm on 2 July 2018.

Context in which the letters were sent

[25] Ms O'Boyle has practised law for 30 years. In recent years, she has been in sole practice, employing a PA and a part-time accounts clerk. She says her practice is busy, mainly in family law, including high conflict cases.

[26] Around the relevant time, Ms O'Boyle was stressed because her mother was terminally ill. Family duty caused Ms O'Boyle to fly to Tauranga most weekends, often leaving on Thursday or Friday, returning Monday or Tuesday.

[27] She had acted for the client since 2014. The client had formed a new relationship with a man (in this decision called "the partner"). At a time before the hearing (how long before we do not know), the client applied for a protection order against the partner. Later, presumably before the 28 May hearing, they reconciled. Mr C, who was self-represented, applied for contact with his teenage children. The client opposed. The children visited Mr C during school holidays and remained in his care. Mr C claimed the children were unsafe with the client because of risk of violence within the client's home. During the subsequent school term, the client went to

[23] Ms O'Boyle supplementary affidavit para 2.
[24] NoE p 88.
[25] NoE p 88 (entire page).

Wellington and unilaterally removed the children. Mr C obtained an urgent hearing in Whangarei to determine interim care.

[28] At the 28 May Family Court hearing, Mr C put certain photographs to the client. One (or more) depicted injuries she had suffered at the hands of the partner. He cross-examined the client about plans she had been discussing by text or similar with her friend in the UK about spiriting the children out of New Zealand, presumably to avoid or frustrate the court process.

[29] In preparation for that hearing, Ms O'Boyle planned to challenge Mr C's veracity. In her preparation she had regard to his alleged criminal offending and to statements made in a psychological report on his behalf when he appeared for sentencing. Although these were distant in time (late 2009 to January 2010) and the alleged offending was of only slight gravity, she was primed to cross-examine. One of the questions she prepared was "You say your name is suppressed, what proof do you have?"[26]

[30] Ms O'Boyle's cross-examination plans were thwarted by the judge who took the view that the primary matter on his agenda at the urgent hearing was the safety of the children. The judge interrupted Ms O'Boyle and would not allow her to follow her planned line. The judge did not permit Mr C to call Ms P, advising that he accepted their home was safe. At the hearing, the judge took control of the issue of Mr C's alleged criminality, asking some questions which we now know Mr C answered truthfully.

[31] On one point that later assumed significance in this present matter, Ms O'Boyle, in the hearing, made a mistaken note of the evidence that Mr C gave. The Notes of Evidence (or transcript) of the hearing record that in answer to the Judge's question "Were there one charge of that or more than one?" Mr C answered: "There were four charges."[27] In her handwritten notes made in Court at the time, Ms O'Boyle recorded

[26] Ms O'Boyle's affidavit, 21 December 2020, para 16 and Exhibit B.
[27] Family Court NoE p 73, lines 6 – 8; exhibit C to Ms O'Boyle's affidavit 21 December 2020.

"Were there one or more charges" and answer: "One charge."[28] Ms O'Boyle was convinced Mr C lied to the Court.

[32] The interim hearing took place on 28 May 2018. The decision was given orally on 29 May. The client lost. Ms O'Boyle filed an application for leave to appeal the interim orders. The applications for final orders were still ongoing in the Family Court.

[33] Mr C advised Legal Aid that the client had received a bequest of $70,000 and had been trading in puppies on TradeMe. The client formed the view that the only way Mr C could have obtained copies of her photographs showing her injuries, information about her plans to take the children offshore, her inheritance, and her selling puppies was by improperly accessing her Facebook Messenger account. The client formally complained to Police on 3 June 2018. Police noted the complaint as: "accesses computer system for dishonest purposes."[29]

[34] On 12 June 2018, Ms O'Boyle sent a letter[30] to the lawyer acting for the children and to Mr C. The letter noted that a directions' conference was to occur on 18 June 2018 to deal with management of the ongoing matter in the Family Court. In her letter, the latter portion of which is reproduced in this paragraph, Ms O'Boyle requested discovery from Mr C in these terms:

> I seek discovery of the following:
>
> 1. Any electronic communications which is to include, but not to be limited to emails, texts, photographs, screenshots, messages and copies of any Facebook messenger or any other electronic social media application which relates to my client, and/or the children and/or the proceedings.
>   a. Received to and from your phone, from the phones of [the client's 2 adult daughters and Ms P] for the period of 1 March 2018 to 7 June 2018;
>   b. We seek the telecommunication logs from the telecommunication company of phones, laptops and electronic devices including those of your employer. In terms of your employer, we only seek discovery of the electronic communications which relate to [the client] and/or the children and/or the proceedings; the period of this discovery is 1 March 2018 to 7 June 2018.

[28] Ms O'Boyle's affidavit 21 December 2020, Exhibit D.
[29] Ms O'Boyle's affidavit 21 December 2020, Exhibit A.
[30] The letter, produced on the final day of our hearing, bears the date 11 May 2018 but we accept that it was sent by email on 12 June 2018 at 1.24pm as noted within Ms O'Boyle's office stamp.

2. We repeat the discover [sic] request of 1a and 1b in terms of your partner, [Ms P], but where her name appears is to be substituted; [sic]
3. Any electronic communications which is to include, but not to be limited to emails, texts, photographs, screenshots, messages and copies of any Facebook messenger or any other electronic social media application or which relates to my client, and/or the children and/or the proceedings between yourself and Lawyer for Child from 19 April to 12 June 2018.
4. I set out for you the principles behind discovery.

Please note Parties are required to take active steps to preserve relevant and discoverable documents: ***Rockwell Machine Tool Co Ltd v E P Barrus (Concessionaires) Ltd*** [1968] 2 All ER 98. The protection of the Court processes is outlined in Rule 13.2 of the Rules. Rule 13.9 specifically provides that to the best of the "lawyer's" ability, he or she must ensure that discovery obligations are fully complied with by the client and must not continue to act if they know that there has been a breach by the client and the client refuses to remedy it. It is accepted you are self-represented but the rules apply to you the same as [sic]

Please advise before the directions conference if you are going to comply otherwise I will apply at the directions conference for an Order for Discovery which will include the Order be served on your employer and the employer of [Ms P].

Yours sincerely

Lynette O'Boyle
Solicitor
lynette@oboylelaw.co.nz

[35] Ms O'Boyle gave evidence about the client's level of distress. The client came into Ms O'Boyle's office on a Friday.[31] In Ms O'Boyle's view, the client was "yelling,"[32] "ranting"[33] and "frothing."[34] The client said: "It's not fair you know, he lied in Court"[35]; "He was charged, you know, he lied to his employer, I'm sick of it, I want you to deal with this"[36]; "He's taken stuff off my Facebook."[37] During our hearing, Ms O'Boyle was unable to fix when that Friday was but, having reviewed the timeline, we find it was most likely Friday 15 June 2018. That is because the following Monday, 18 June, the day of the judicial teleconference, Ms O'Boyle went to the criminal Court to check details of Mr C's criminal history. In addition, Ms O'Boyle deposed in her

[31] NoE p 27, line 2; p 28 line 1.
[32] NoE p 27, line 21.
[33] NoE p 27, line 26.
[34] NoE p 28, line 4.
[35] NoE p 27, line 16.
[36] NoE p 27, lines 18 – 19.
[37] NoE p 27, line 23.

supplementary affidavit, filed on the second day of the hearing before us, that "[the client] began to raise the issues which lead [sic] to the letter of 27 June 2018 shortly before 18 June. I can tell this from documents saved on my hard drive which record the letter as being dated 18 June 2018."[38] In our view, the timing, as we find it, seems sensibly to fit.

[36] On the following Monday, which we find to be 18 June, the client returned. In Ms O'Boyle's words, "she was adamant she wanted blood."[39] She instructed Ms O'Boyle to send a letter to his employer.[40] Ms O'Boyle described the client's demeanour as "so elevated, she had sort of got worse over the weekend."[41] In this context, Ms O'Boyle remembers "pulling out the psychological report," an action she mentioned twice in her evidence.[42] This was the psychological report filed by Mr C at his sentencing appearance in January 2010. Ms O'Boyle appears to have adopted her client's view that certain family matters stated in that report were also false.

[37] On 18 June 2018, the judicial teleconference occurred. The judge directed that a copy of the evidence transcript be provided. A psychological report was directed. As best we can glean from Ms O'Boyle's handwritten notes of that teleconference, it appears that the judge declined to make an order for discovery, apparently putting the question off for 14 days.[43]

[38] Ms O'Boyle believed Mr C lied in saying he had been given name suppression. On 18 June 2018, the same day as the judicial teleconference, she attended at the criminal counter in Whangarei Court and asked a staff member to check the criminal file. She recorded in a file note the Court where the appearances occurred and noted: "they advised 4 counts thefts no suppression order."[44] Thanks to the later affidavit of Ms Whittaker we know that the charges were not "theft" although they were approximately similar but more minor charges, and that there was an order for permanent name suppression that had not been entered into the computer system. That error, presumably by the court taker on the sentencing day in January 2010, left

[38] Ms O'Boyle's supplementary affidavit 30 March 2021, para 2.
[39] NoE p 28, line 27.
[40] NoE p 31, line 15 to p 32, line 6.
[41] NoE p 28, lines 14 – 15.
[42] NoE p 27, line 23; p 28, line 12.
[43] Ms O'Boyle's supplementary affidavit, Exhibit B.
[44] Ms O'Boyle's affidavit 21 December 2020 Exhibit E.

Mr C exposed. Had a search been undertaken of the sentencing notes or the judge's notation on the Information Sheets, that error would have been discovered.

[39] Ms O'Boyle left the Court office on 18 June, believing that Mr C had lied in Court about the number of charges in 2009 (relying on her mistaken note of his answer at the hearing) and believing he had lied about having a suppression order. Regrettably, Mr C was never asked the question that Ms O'Boyle had been primed to ask which was - what proof he had of the suppression order. In the course of this complaint, Mr C produced a letter from his counsel at the time, confirming the suppression order. The Standards Committee obtained (but have not shared for privacy reasons) the sentencing notes to like effect. Ms Whittaker's affidavit clarifies the position authoritatively.

[40] Ms O'Boyle felt the client placed great pressure on her to write a letter to Mr C's employer. She said the Family Court file "caused me huge anxiety."[45] It was a "high conflict file."[46] She said: "This is a Legal Aid file and they're exhausting,"[47] Ms O'Boyle gave evidence in these words: "I can tell you there was no malice involved. It was a situation where I just wanted to deal with that fire and move. Frankly, if I can be so blunt, when you're dealing with legal aid clients you don't care enough about the client so much."[48]

[41] As earlier stated, we find it is probable the original letter was emailed to the client on [Wednesday] 27 June to approve and was probably emailed on Monday 2 July at 5pm, and a copy posted on Tuesday 3 July to its recipients. As mentioned above, we find the covering letters to the two possible employers of Ms P were emailed on 3 July 2018 at 10.10am and 10.11am.

[42] Ms O'Boyle suggested that, whereas she had drafted the original letter, the accompanying letters for the two possible employers were created by her PA.[49] We find that hard to accept, particularly given the strong terms of the concluding sentence of those letters which threaten to hold each of those Government Departments to

[45] NoE p 48, lines 10 and 13.
[46] NoE p 48, line 11.
[47] NoE p 61, line 18.
[48] NoE p 114, lines 3 – 6.
[49] NoE p 92, lines 15 – 33.

account for allowing the alleged wrongdoing to have occurred. Ms O'Boyle chose not to ask or summons her former PA to give evidence about such matters. In any case, we find Ms O'Boyle was aware of the content of these letters because she physically signed them. They cannot have been signed by electronic signature because the signatures, although distinctively Ms O'Boyle's, each show small differences (compare Bundle, p 74 with Bundle, p 110).

[43] On 4 July 2018, the day after all the letters had issued from Ms O'Boyle's office, the Notes of Evidence from the Family Court hearing on 28 and 29 May were received in Ms O'Boyle's office in electronic form. Ms O'Boyle says she had no knowledge of their arrival, that her staff simply filed them into an electronic file and did not alert her of their receipt. Had she been aware of their presence, she could have accessed them easily at any time. Ms O'Boyle says she first realised she had the Notes of Evidence in September 2019.

[44] In due course, the children returned to the client for holiday contact. Thereafter, they remained with the client, allegedly expressing distress at the prospect of returning to their father. Because that status continued, the proposed appeal was ultimately withdrawn.

Did Ms O'Boyle take reasonable care in composing and sending the letters?

Organisation and presentation of the original letter

[45] The original letter comprises nine numbered paragraphs. In our view, the original letter is well-written in that care has recognisably been taken in its composition. Its organisation, the headings, the selection and grouping of facts and assertions, demonstrate this. Most of its two pages deal with matters extraneous to a simple request for information about a list of IP addresses. The first heading is emphatic, being of larger font, bolded, and underlined. Thus, the words "Unauthorised Access," "Social Media Account," "[Mr C]," and "Employee," stand out. By these visual emphases, the recipient is alerted that Mr C's employee status is of significant relevance within the letter.

[46] The introductory paragraph is skewed by omitting to mention that Mr C had been granted interim day to day care of the children. It suggests that Mr C is responsible for acrimony and stress of the proceedings. The remaining body of the letter is prominently divided into two major portions by underlined headings. The first such heading suggests paragraphs 2 – 7 relate to "Unauthorised Access – [Mr C] – Government Property". The second such heading suggests paragraphs 8 and 9 relate to "Legal Aid". These headings are not entirely accurate signposts.

[47] The initial, apparent reading of the letter as comprising two parts is contradicted by two italicised headings. One, just before paragraph 6, says "*False Information given during Court proceedings*". After the short paragraph 6, the suggestion of criminality is italicised as "*Past Criminal Offending of [Mr C]*".

[48] Ms O'Boyle identified two purposes to the original letter, to enquire about IP addresses and to convey views on behalf of the client to Mr C's employer[50] (although she also suggested that it was a means of complaining to the employers under the State Sector Code of Conduct).[51] We find that an enquiry about IP addresses falls within the proper scope of her role. In these proceedings, Ms O'Boyle sought to distance herself from paragraphs 6 to 9 because, in her view, paragraph 6 plainly shows these are the client's views. Paragraph 6 states: "My client has also instructed me to raise two matters with you which she feels very strongly about." Those matters were criminal offending and legal aid. Mr Williams challenged Ms O'Boyle's view that it was appropriate to include that material in a letter whose legitimate business was limited to simply seeking information relevant for the further stages of the proceedings. Essentially, Mr Williams suggested that Ms O'Boyle is culpable for adding those topics as companion topics in her letter of legitimate enquiry. A balanced view requires us to examine the letter in its parts, and as a whole.

[50] NoE p 62, lines 1 – 19.
[51] Ms O'Boyle's email 31 May 2019; Bundle, p 70; See also NoE p 55, line 24 to p 56, line 9.

Did Ms O'Boyle have "very strong evidence" upon which to impugn the complainant and his partner?

[49] Paragraphs 2, 3 and 5 of the original letter contain passages that call for scrutiny. A key proposition is Ms O'Boyle's assertion about the strength of evidence against Mr C and Ms P.

[50] What evidence did Ms O'Boyle have? We find she had these factors:

- Mr C produced photographs at the Whangarei hearing which the client thought must have been sourced from the client's Facebook Messenger account. Ms O'Boyle seemed to accept this unquestioningly.

- Mr C asked questions in Court about the client's plans to take the teenagers out of New Zealand. The client thought he must have found this out from hacking her media account.

- Mr C advised Legal Aid that the client had received a bequest of $70,000.

- Mr C had advised Legal Aid that the client sold puppies on TradeMe.

- The client's partner, an IT teacher, told Ms O'Boyle that the client's account had been hacked.

- The client provided Ms O'Boyle's PA with a list of IP addresses.[52] She told Ms O'Boyle they had been provided by an IT firm near Whangarei. The client told Ms O'Boyle that she had been told four of those addresses related to central Wellington and therefore may be from Government Departments.

- Ms O'Boyle's internet security firm advised her that an unknown person had attempted to access her office account. Despite Ms O'Boyle's affidavit evidence that "At this time my own computer had been hacked"[53], we prefer her oral evidence at the hearing[54] as being more accurate because it would have been

[52] NoE p 21, lines 12 – 18.
[53] Ms O'Boyle's affidavit 21 December 2020, para 7.
[54] NoE p 22, line 30 to p 23, line 7.

in her interests to confirm actual access if that were true. Perhaps she used the term "hacked" in her affidavit to indicate an attempt.

- Ms O'Boyle observed Ms P, sitting in the Court waiting area during the hearing on 28 May 2018, working on her laptop.

- Mr C had not replied to Ms O'Boyle's letter of 12 June 2018 seeking discovery.

[51] We infer from Ms O'Boyle's evidence that the client had fallen out with her older daughters. They too were mentioned in the original letter as possible hackers. Neither Ms O'Boyle nor the client know how Mr C obtained the photographs. In the situation then pertaining, there might have been other sources. Similarly, the knowledge about a bequest may have been common knowledge to others who may have advised Mr C. The sale of puppies on TradeMe would appear to have been readily available to any member of the public. As to these matters, the "evidence" amounts to suspicion only.

[52] Neither we nor Ms O'Boyle have any direct evidence that the client's media accounts were improperly accessed. Ms O'Boyle's information was hearsay – from the partner and then from the client's report. Whatever evidence may have been available had that trail been pursued, Ms O'Boyle had nothing more than a list of 235 IP addresses and her client's hearsay.[55] Ms O'Boyle had no direct contact with the person or persons who composed the list. Even if the client's account had been improperly accessed via four IP addresses situated in central Wellington, that is a weak basis for the strong barrage aimed at three Government Departments and escalated by her report (via a copy of the original letter) to the Privacy Commissioner.

[53] Ms O'Boyle's own account had not been accessed, despite her plainly saying so in the letter. Her internet security firm North Cloud advised her that someone had tried to get access.[56] This is materially short of her statement in the last sentence of paragraph 2 of the letter: "One of the IP addresses also accessed my computer". Her statement is false in two particulars, that her computer had been accessed and that one of the attached IP addresses was associated with that access. We find Ms O'Boyle

[55] NoE p 19, line 20.
[56] NoE p 22, line 30 to p 23, line 8.

deliberately added this sentence to build the appearance that she had "very strong evidence" of the link she was seeking.

[54] The suggestion that Ms P might have been hacking into accounts while sitting in the waiting area at Court on the day of the hearing is far-fetched and speculative even though theoretically possible. We find that it was appropriate to ask Mr C how he came by material he produced in Court. Beyond that, we think there was no prospect Ms O'Boyle could have obtained an order for discovery aimed at the Government Departments or Ms P. Her suggestion that by writing to the employers she was taking a kinder course than obtaining a "search and seizure warrant," if genuine, is misguided because she had insufficient grounds for a warrant.

[55] It follows that we find the barrage levelled at the Departments and at Ms P was misconceived and disproportionate, even in the limited area where discovery might have been appropriate. We find that the overstatements and falsehood contained in the demand for information reflect on Ms O'Boyle's professionalism. The adverse features of paragraphs 2, 3 and 5 of the original letter fall short of her duty under Rule 12 to conduct dealings with others with integrity, respect and courtesy.

Did Ms O'Boyle take reasonable care, in the original letter, when dealing with Mr C's alleged untruthfulness?

[56] Paragraph 7 of the original letter attacks Mr C's veracity. It informs Mr C's employer that he told lies in Court on 28 May 2018, that he "possibly" lied "to you his employer". This attack is amplified by paragraph 6 which describes this as a matter the client "feels strongly about". Because it comprises a hard-hitting part of her letter, and because she offers detailed grounds, we read this as implying that Ms O'Boyle supports the client or at least treats her level of concern as well-grounded. In our view, that is the natural way in which most readers would take it. The attack is further amplified by paragraph 7's third sentence: "[The client] is also concerned about the veracity of [Mr C] with respect to his criminal offending and other matters."

[57] The detailed allegations are:

- Mr C lied to Court on 28 May 2018 that he faced one count of theft in 2009 whereas he had faced four.

- Mr C possibly lied to Court on 28 May by telling the Court he had informed his employer about this matter.

- Mr C had been party to another deception of the Court in 2009 by presenting a psychological report containing false information about three persons to whom he claimed to be related: "None of that information was or is factually correct".

[58] Ms O'Boyle was mistaken as to the precise nature of the charges. We are surprised at that because she claims this information was gleaned from her enquiry with a court officer whose records should have been accurate at least as to the precise charges. That error is relatively immaterial because, although not theft, the charges were of a similar but more minor nature.

[59] Ms O'Boyle was mistaken in saying Mr C told the Court there was only one charge. She is at a loss to explain why she wrote "one" on her handwritten note in Court. She had been convinced he would lie, and although he said "four" she wrote "one". She said "Look this one charge became my reality. It became so embedded in my brain. I don't know why it became embedded in my brain."[57] Shortly thereafter, she said "sometimes you get something in your mind and it just doesn't move and you – it becomes your reality and – "[58].

[60] To Mr Williams' proposition in cross-examination that "an allegation such as this … that he in fact committed perjury has the potential to be devastating to their employment, isn't it, you accept that?" Ms O'Boyle answered, "I do."[59]

[57] NoE p 79, lines 29 – 30.
[58] NoE p 80, lines 13 – 14.
[59] NoE p 81, lines 3 – 6.

[61] The allegation that Mr C had possibly lied to his employer adds weight to the proposition that the letter was designed, not only to seek information about IP addresses, but to cause trouble for Mr C with his employer.

[62] The allegation that Mr C presented false information via a psychological report attempted to build the case that he was a liar. Ms O'Boyle detailed: "He told the psychologist he had recently lost his mother and his father-in-law and his eldest son was returning to England. … [Mr C's] son is only just 11, he was 4 at the time. [Mr C's] mother is very much alive and so is [the client's] father".

[63] Mr C's short affidavit filed in these proceedings by the Standards Committee deposes, on this matter: "I maintain that the events described in the [psychological report of 2009] occurred (including the deaths of my father and [the client's] grandmother, who was a mother-figure to me). …The "elder son" referred to in the report is [Name]. [He] is a child of [the client] from one of her previous marriages. From the age of 5, I was involved in raising [the boy] and treated him as my own son."[60] Mr C was not required for cross-examination and his evidence was therefore unchallenged.

[64] Ms O'Boyle accepted that, in relation to the "elder son," the client knew which relationship Mr C's psychologist was talking about."[61] Consequently, we find the allegation in the letter to be at best mischievous. Ms O'Boyle purported not to have thought about the psychological report in the light of referring to real relationships with real people.[62] We do not find her evidence on this point credible. In our view, she wilfully added force to her letter by including material that was substantially false, and that she knew was substantially false.

[65] Ms O'Boyle was unaware that the material about criminality was subject to an order for permanent name suppression. On this point, Ms O'Boyle did make a check from a source she expected to be reliable, the criminal clerk at the Court. Mr Williams' proposition that, knowing Mr C had said otherwise in Court meant there was a conflict of views, and that therefore she should have checked more thoroughly, is a counsel of excellence. Nevertheless, in our opinion, she took reasonable steps to assure herself

[60] Mr C's affidavit, paras 2.1 and 2.2.
[61] NoE p 11, line 19.
[62] NoE p 110, lines 20 – 33.

there was no suppression order. Accordingly, in this decision, we do not criticise her for that error.

[66] That she believed there was no suppression order did not provide Ms O'Boyle with good grounds to include references to Mr C's criminal convictions in the original letter. Although considerable emphasis was given by both counsel to Ms O'Boyle's incorrect assertions about Mr C's brushes with the criminal law, as Mr Williams stated at the outset of his case, the letters are the key to this case.[63] Ms Davenport QC concurred.[64] In particular, we focus on the character of the letters, and Ms O'Boyle's intent at the time of sending them.

Did Ms O'Boyle take reasonable care in alleging misuse of Departmental devices to interfere with Legal Aid, and in making allegations about Ms P in the covering letters?

[67] Paragraphs 8 and 9 of the original letter are expressed strongly, even to the point of levelling blame at the Department, for example: "The Ministry is on notice…[that if the client's speculation is true] the matter will be referred to the Police." The proposition: "It would appear [Mr C] has used his position as a Ministry employee" improperly to adversely affect the client's legal aid grant is, in our view, overstated. The proposition was at best speculative. This was a poor basis upon which to make stern, albeit conditional, threats against the Department.

[68] This stern mode is echoed in the covering letters sent to the other two Departments. Those letters also prominently target Ms P's position as "**Employee**" in the headnote. All the damning information alleged against Mr C was sent to them too, as an attachment. Ms P is listed as a potential wrongdoer in paragraph 2 of the original letter. Those letters ask the two addressees "why your government agency has allowed this to happen."

[69] If, as Ms O'Boyle contended, the main purpose of the letters was to elicit, from the employers of Mr C and Ms P, whether their respective Departmental devices had been used improperly in relation to the client, the letters could have been much shorter and more focused.

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[63] NoE p 2, lines 16 – 19.
[64] NoE p 3, lines 5 – 7.

[70] The letter was embellished with statements known by Ms O'Boyle to be materially false to enhance its effect in impugning the integrity of Mr C and Ms P to their respective employers.

Was the original letter sent to convey the client's complaint under the State Sector Code of Conduct?

[71] Ms O'Boyle suggested to the Standards Committee that, in the original letter, "[the client] was making a complaint Mr C was in breach of his code of conduct [the State Sector Code of Conduct]."[65] In her letter of 31 May 2019, Ms O'Boyle said "Paragraphs 6 – 9 of [the original letter] were [the client's] instructions on breaches by Mr C in the course of his employment i.e. A State Sector Brach [sic] – nothing to do with his Family Court matters."[66]

[72] In her evidence-in-chief before us, Ms O'Boyle revisited this proposition. She said: "I didn't see it as affecting his employment, I was trying to raise an issue, maybe cumbersomely, using a mechanism that I was aware of under the State Sector Act that could be dealt with."[67] When Ms Davenport QC pointed her to the fact the Code was not mentioned in the original letter, Ms O'Boyle said "I thought it did". She examined the letter and drew attention to the words "a matter of Public Interest" which appear in para 4 stating this as a reason for copying the letter to the Privacy Commissioner.[68]

[73] We recognise that where we draw adverse inferences, it is a serious matter for the practitioner. Notwithstanding that caution, we do not take this evidence at face value. If the purpose of the original letter was to complain about an alleged breach of the State Sector Code of Conduct, we would have expected that to be stated explicitly.

[74] Taking heed of the caution expressed above, we find that Ms O'Boyle's explanation of the purpose of the original letter as a complaint under the State Sector Code of Conduct to be a reconstruction devised to divert attention from its purpose, plainly intended by its content and composition, to cause trouble for Mr C and Ms P with their employers.

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[65] Ms O'Boyle's letter 31 May 2019, (Bundle, p 70, para 2).
[66] Ms O'Boyle's letter 31 May 2019 (Bundle, p 70, para 1).
[67] NoE p 55, line 24 to p 56, line 9.
[68] Bundle, p 17, para 4.

What is misconduct?

[75] Where alternative charges are laid, it is the proper course for the Tribunal to consider the principal charge first.[69] On the facts in this case, the charges of misconduct are of greater gravity than the alternatively laid charges of unsatisfactory conduct. Our view is inferentially supported by the submissions of both counsel which reflected that view. Accordingly, we consider misconduct first.

[76] Among the tests for misconduct are the following[70]:

> "(a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—
>
> (i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or
>
> (ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or
>
> …"

[77] Thus, sufficient tests for "misconduct" include conduct that would reasonably be regarded by lawyers of good standing as *disgraceful* (in the context of this case we leave aside the alternative test of "dishonourable"); or conduct that consists of *wilful* or *reckless* contravention of any provisions of the Act or … practice rules (emphasis added).

[78] As Webb et al note[71], the introductory Notes about the Lawyers: Conduct and Client Care) Rules state:

> The rules are not an exhaustive statement of the conduct expected of lawyers. They set the minimum standards that lawyers must observe and are a reference point for discipline. A charge of misconduct or unsatisfactory conduct may be brought and a conviction may be obtained despite the charge not being based on a breach of any specific rule, nor on a breach of some other rule or regulation made under the Act.

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[69] *J v Auckland Standards Committee 1* [2019] NZCA 614 at paras [37] and [38].
[70] Section 7(1)(a), Lawyers and Conveyancers Act 2006.
[71] *Ethics, Professional Responsibility and the Lawyer,* Webb, Dalziell and Cook, LexisNexis, p 110.

Thus, the criterion under s 7(a)(i) is not limited by reference to contravention of a specific rule whereas a charge under s 7(a)(ii) must refer to a breach of the Act or a rule. Nonetheless, whether coming within a rule breach or not, both categories (s 7(a)(i) and s 7(a)(ii)) relate to conduct that amounts to misconduct.

[79] Section 7(1)(a)(i) comprises a class of misconduct measured against whether lawyers of good standing would reasonably regard it as disgraceful or dishonourable.

[80] This case does not directly concern the practitioner's duty of care to the client or to the Court except it does concern her duty to exercise guidance and judgment in dealing with her client and her client's interests in the context of an inflamed family dispute. It also concerns the limits upon a lawyer's responsibilities in dealing with third parties (the employers) and with responsible use of material acquired for the purposes of acting for a client.

[81] Lawyers hold a privileged position. Entry to the profession requires the candidate to prove they are fit and proper to be admitted. Honesty is a core value because otherwise "public and judicial confidence in the proper administration of justice will … be undermined."[72]

[82] Integrity and trustworthiness are prerequisites to admission because, without these qualities, the public may lack confidence in the profession as a whole.[73] A candidate in Australia was refused admission because of a lack of "appropriate professional judgement and discretion."[74] In New Zealand, in a case regarding a valuer, "Eichelbaum CJ reviewed the concept of professional misconduct generally and noted that across all professions the key element is whether the practitioner's conduct has shown some degree of unfitness to practise."[75]

[83] Considering the term "misconduct," Webb et al observe:[76]

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[72] *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655. Quoted in *Lawyers' Professional Responsibility (5th ed.):* G E Dal Pont. Thomson Reuters, at p 6.
[73] See Dal Pont (above) at p 37.
[74] *Re Hampton* [2002] QCA 129; See Dal Pont (above), p 46.
[75] *Ethics, Professional Responsibility and the Lawyer,* Webb, Dalziell and Cook, LexisNexis, at p 108 - 109, referring to *Dentice v Valuers Registration Board* [1992] 1 NZLR 720, 724 – 725.
[76] (above) at p 107.

> The words "disgraceful" and "dishonourable" add little (other than colour) to the term "misconduct." They do, perhaps, signal a degree of seriousness that the word itself, on a dictionary definition, would not convey. However, it is clear that misconduct is a very serious professional wrongdoing. This is, of course, confirmed by the contradistinction with unsatisfactory conduct, which (at the higher end) can itself be serious, but clearly not of a degree to reflect on fitness to practise.

[84] In the Australian case of *Pillai v Messiter*,[77] Kirby J observed[78]:

> … but the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner.

[85] Kirby J's dicta was adopted by the New Zealand Court of Appeal in *Complaints Committee No 1 of the Auckland District Law Society v C* where it was held that intentionality is not a necessary ingredient of misconduct. The Court stated:

> While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct. The authorities referred to above (and referred to in the Tribunal decision) demonstrate that a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner.[79]

[86] In *Ellis v Auckland Standards Committee 5*, a case where a practitioner failed to account for moneys held, Muir J referred to *Complaints Committee No 1 of the Auckland District Law Society v C*[80], saying[81]:

> …, however, s 7(1)(a)(i) misconduct clearly captures a significant range of actions/defaults from theft and actual dishonesty through to serious negligence evidencing an indifference to or abuse of the privileges of the practitioner. And as is well recognised, s 241 does not create a hierarchy of offences[82]. The various grounds for disciplinary action are conceptually different and the full range of sanctions provided to the Tribunal by s 242 may be applied to all of these conceptually different types of conduct. A finding under s 7(1)(a)(i) does not therefore carry any presumption that the practitioner will be struck off.

[87] The s 7(1)(a)(i) test for misconduct is therefore apt for conduct that evidences an indifference to or abuse of the privileges of the practitioner. As Muir J notes, that

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[77] (1989) 16 NSWLR 197.
[78] (1989) 16 NSWLR 197, 200.
[79] [2008] 3 NZLR 105.
[80] Above.
[81] [2019] NZHC 1384 at para [74].
[82] *Lagolago v Wellington Standards Committee* 2 [2016] NZHC 2867 at [52].

does not mean a finding of misconduct will necessarily suggest strike-off, but it denotes a serious failing that surpasses mere unsatisfactory conduct. It will be more than mere negligence.

[88] The s 7(1)(a)(ii) test depends on a contravention of the rules. The contravention must be wilful or reckless. The term "wilful" denotes, among other meanings: "determined to take one's own way; obstinately self-willed or perverse; done on purpose or wittingly; purposed, deliberate, intentional; not accidental or casual."[83] "Reckless" denotes, among other meanings, "careless, heedless; careless in respect of one's actions; lacking in prudence or caution; careless in respect of some duty or task, negligent, inattentive; characterised or distinguished by (negligent carelessness or) heedless rashness."[84] Either adjective, "wilful" or "reckless," intensifies the rule contravention required to bring the conduct up to "misconduct".

[89] Mr Williams, in his opening written submissions referred to an Australian case in which an approach to wilfulness or recklessness is addressed in these terms: " [I]t will be enough if the solicitor… is shown to have been aware of the possibility of what he was doing … might be a contravention and then to have proceeded with reckless indifference as to whether it was or not."[85]

[90] In the present case we consider whether one of the Rules of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules) has been breached. Rule 11 (Proper Professional Practice) is not apposite because, although the lead rule is broadly stated, the following sub-rules identify management of a practice as the proper scope of that rule. Likewise, r 13 (Lawyers as Officers of the Court) is restricted, in its terms, to dealings of lawyers in the Court process. Within that context, r 13.8 specifically forbids an attack on a person's reputation without good cause – but that Rule is proscribed within conduct "in court or in documents filed in court proceedings" which is not precisely the case here. Although the present case flows from a Court case, the letters themselves were not directly in evidence in a Court. Similarly r 13.8.2 forbids allegations "against persons not involved in the proceeding unless they are necessary to the conduct of the litigation and reasonable steps are

[83] OED (2nd).
[84] OED (2nd).
[85] *Zaitman v Law Institute of Victoria* [1994] VIC SC 778 at [52].

taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons." But, again, the letters in question here are not discretely within a Court hearing setting.

[91] Although sub-rules of r 10 deal generally with interactions between lawyers and other lawyers, the lead r 10 is broadly stated in a way that could inferentially pertain here. Rule 10 states: "A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings." Rule 10.1 arguably narrows that by providing: "A lawyer must treat other lawyers with respect and courtesy." In the present case, the party mainly injured is self-represented, not a lawyer, so r 10 does not apply directly.

[92] Rule 12 fills that gap. Rule 12 deals with "Third parties." The head Rule provides "12 A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy". We find this is the apt rule to consider in this case. In addressing misconduct under s 7(1)(a)(ii), we must ask whether Ms O'Boyle contravened that Rule wilfully or recklessly in sending the letters the subject of these proceedings.

Is Ms O'Boyle's conduct in sending the letters, or in her subsequent communication with the Standards Committee, misconduct?

[93] We find that the idea of sending the letters was formed in a heated atmosphere. The client was angry, wanting to hurt Mr C who had won the recent case and embarrassed her by using material she thought he could only have obtained improperly. Ms O'Boyle had been thwarted in her wish to challenge Mr C's veracity in Court. We find she had worked up a head of steam about that aspect of the case. We find she was disposed to lending her assistance to cause him distress. We do not accept that Ms O'Boyle merely sent the offensive parts of the letter simply to be rid of her client's demands. We find that Ms O'Boyle was a willing participant in the potentially harmful correspondence. Ms Davenport QC made the point that we should evaluate the conduct, taking account of Ms O'Boyle's own viewpoint. The force of that submission founders where, as here, we find the wilful element, contrary to Ms O'Boyle's evidence.

[94] We find Ms O'Boyle failed to recognise that it was unwise to act on instructions given by a client who was out for "blood". She failed to distinguish between material that was better ventilated and not acted upon and material that fell within the proper scope of her role in advocating for her client's case whether by negotiation or in Court. In short, she lost grip on her proper professional role. She failed to give her client the guidance and judgment that the public can expect from a reasonably competent lawyer. This is particularly important in matters such as family law where clients can sometimes become over-heated and imprudent. Instead of remaining within her appropriate professional role, at arm's length from her client, Ms O'Boyle acted in concert with the client.

[95] We find that a significant intent in the letters was to cause trouble for Mr C and Ms P with their employers. Reading the original letter in its proper context, we do not accept that Ms O'Boyle can adequately distance herself from the allegations about Mr C's alleged criminality or the propositions that he and Ms P were likely to have misused their work devices. Those allegations were part and parcel of the accumulating force of the letters.

[96] Moreover, Ms O'Boyle knew at least that Mr C had been discharged without conviction. He had no criminal convictions. In this material respect, she glossed the information to produce a wrong and damaging inference against Mr C.

[97] Ms O'Boyle's intent is further betrayed by her embellishment of the original letter. By misrepresenting a reported attempt to access her own office computer as related to the client's concerns, even stipulating that the hacking of her computer was from one of the IP addresses on the list provided by the client, was wrong. So too was her retrieving the old psychological report to add apparent strength to a case that was based upon no more than her client's speculation. Alleging that Mr C misled the Court through the psychological report material was overblown and unbalanced.

[98] Ms O'Boyle gave oral evidence on two occasions that she had no intention of affecting employment of Mr C or Ms P. "It wasn't to affect his employment at all."[86] Later, the following passage occurred during cross-examination by Mr Williams:[87]

Q. You've told us it was on your client's instructions, but either your purpose in writing this letter to the [X Department], signed by you on your firm's letter head, what other intention was there to achieve, other than affecting Mr [C's] employment? What were you going to get out of it?
A. I wasn't –
Q. You weren't going to get anything out of it were you?
A. No, I didn't want to achieve anything. My client wanted to raise an issue that she believed.
Q. So you weren't going to achieve anything other than having an effect on Mr [C's] employment?
A. I wasn't – I wasn't, there was no intention by me, and I wouldn't, that Mr [C's] employment wasn't to be affected. What was intended was to raise my client's instructions in relation to that.

[99] When asked what she expected Mr C's employer to make of the letter, she said she expected them to "come back to me about the IP addresses and then I thought that was it. It was rather naïve I suppose."[88] When Tribunal member Ms Callinan suggested to her that in consequence Mr C would likely be subject to an inquiry at his place of work, Ms O'Boyle disclosed that she had previously worked in the public sector as a Ministry lawyer in what is now called Oranga Tamariki.[89]

[100] We find that Ms O'Boyle, from her experience, knew that her letter, in the form it was sent, was going to cause trouble for Mr C at his employment. Recognising the gravity of this finding, we find that she either wilfully intended to cause him and Ms P such harm or that she was reckless about that possible foreseeable outcome.

[101] Ms O'Boyle's lack of balance in this matter is disclosed by her stating that "there is very strong evidence to link" Mr C and Ms P to alleged wrongdoing. She had very

[86] NoE p 56, line 8.
[87] NoE p 81, line 23 to p 82, line 3.
[88] NoE p 106, lines 23 – 26.
[89] NoE p 114, lines 20 to 31.

little to go on and could not, on any balanced appreciation of the material she had, have expected to obtain any order for discovery of the breadth she sought. Although she threatened in her letter of 12 June 2018 to seek an order for discovery, she did not do so. Instead, she sent the letters to the employers.

[102] We criticise Ms O'Boyle for failing to recognise the weakness of her case regarding discovery. Even if she convinced herself (had an honest belief) in the strength of her case, her reliance on hearsay, double hearsay, unbalanced claims and embellishments, elevate her conduct to reckless conduct.

[103] We are critical of Ms O'Boyle's disseminating the material so widely. The original letter went to at least two (three if we count the Privacy Commissioner) other addressees unredacted. Her instruction to redact was careless, it was not clear how part of it was to be carried out. At least one addressee would not be Ms P's employer. The material was personal, hurtful, and damaging to the reputations of both Mr C and Ms P. In those circumstances, the scattergun approach was reckless. The sternly threatening tone of the letters was not respectful to the three Departments (against whom no evidence of any weight existed), nor was it respectful to Mr C or Ms P.

[104] In our view, a reasonably competent practitioner would have recognised that it was disrespectful to Mr C and Ms P to disseminate so much prejudicial and incorrect information to their employers (and others). A reasonably competent practitioner would have told the client that to go beyond enquiry about IP addresses was beyond the practitioner's professional role. A reasonably competent practitioner would have advised the client that they should not personally pursue this course either, although if the client personally chose to write herself, that would be the client's (unwise) choice.

[105] Mr Williams pressed Ms O'Boyle about her failing to notice when the Family Court Notes of Evidence arrived in her office on 4 July 2018. She knew that the judge had directed on 18 June that they be issued. She could have expected them within a few weeks. Although we are surprised that she did not consult them until more than a year later, we do not agree that any reasonably competent lawyer would have immediately checked them for accuracy when they arrived.

[106] Nonetheless, we are critical of Ms O'Boyle for not waiting for the Notes of Evidence to be received and not reviewing them before sending the original letter. At

the time the original letter was sent, she could have expected those Notes to be received imminently. Her allegations of perjury against Mr C and Ms P are so significant that we regard it as reckless to send the original letter without checking when it could have been done quite soon. Her reliance on her own recollection and mistaken handwritten note, in these circumstances, resulted in a breach of r 12 to treat others with respect.

[107] We have considered the letters Ms O'Boyle wrote to the Standards Committee and her subsequent claim that she always meant, by her references to the Notes of Evidence, to refer to her own handwritten notes. We do not accept Ms O'Boyle's evidence on this point. Even on a strained reading, we find it impossible to read those letters in a way that permits such a construction. The terms "Notes of Evidence" or "NoE," both of which appear in her letters, naturally references transcripts, not a lawyer's own handwritten notes. Once again, Ms O'Boyle has, in our view, attempted to construct an unlikely interpretation to save herself from the consequences of her conduct. We find she intentionally misled the Standards Committee.

[108] That is not to say Ms O'Boyle was aware that there would be a disparity between her notes and the Court's Notes of Evidence. She may have been so fixed in the rightness of her view that she could not countenance any possibility of disparity. If she had that view, it is a pity she compounded her wrongdoing by trying to divert the Standards Committee from obtaining the Notes of Evidence which, according to her submission, could not be released because of privacy. When asked by the Standards Committee, the judge released the relevant pages.

[109] We find Ms O'Boyle's conduct, in sending the original letter, in sending the two covering letters to other employers, in sending a copy of the original letter to the Privacy Commissioner and in misleading the Standards Committee by asserting the Notes of Evidence bore her out, to be "misconduct" under both s 7(1)(a)(i) and (ii) (qualifying both as "wilful," and as "reckless").

Summary of conduct findings; discussion

[110] There can be no question that, at the material times, Ms O'Boyle was providing regulated services. We find that her cumulative conduct in the following respects, would reasonably be regarded by lawyers of good standing as disgraceful:

- By sending letters that she knew could cause employment difficulties for Mr C and Ms P.

- By acceding to her client's wish to send material that was hurtful, and damaging to reputations, to the employers of Mr C and Ms P, a matter outside her proper scope as a lawyer in the client's family law case.

- By adding hurtful personal material that ought not to have been communicated, for example, asserting Mr C was a perjurer, within a letter seeking legitimate information about IP addresses.

- By asserting Mr C was a perjurer without checking the proposition against the Notes of Evidence. (This would not have resolved the name suppression error but would have eliminated all other points on which she made that assertion). This conduct is exacerbated by the gravitas associated with a lawyer's letterhead arising from the respect within which practitioners are held. Recipients are entitled to draw the inference that assertions in such a letter will not be made loosely.

- By deliberately developing an inference about the bad faith of Mr C by grossly overstating the evidential situation, by embellishing her propositions with a lie, indefensible inferences (e.g. that an attempt to access her office computer must be related to Mr C), and by recklessly representing Mr C and Ms P as likely wrongdoers who would misuse their positions and work devices. This is exacerbated by her statement to the employers that the original letter was being copied to the Privacy Commissioner, conduct that suggests Mr C and Ms P are already guilty of hacking using Departmental devices.

- By disseminating letters containing such matter to one recipient who would have no relation to the matters at issue.

- By providing negative views about Mr C and Ms P alleged wrongdoing to their employers.

[111] We find that Ms O'Boyle's repeated assertion to the Standards Committee that her stance was backed up by the Notes of Evidence was deliberately misleading. This conduct was disgraceful, both because it was misleading and because she always had the means to check the Notes (transcript). Even if she had been unaware at the time those Notes arrived from the Court, she must have known that they would have arrived by the time she was in discussion with the Standards Committee approximately a year later.

[112] In several respects concerning her conduct in the family law case and in these disciplinary proceedings, Ms O'Boyle has demonstrated a closed mind, fixity of view and position. These are concerning traits. We find that her conduct in misleading the Standards Committee is similarly conduct that would reasonably be regarded by lawyers of good standing as disgraceful.

[113] We find that in sending the letters, Ms O'Boyle wilfully contravened her duty under r 12 of the Rules to treat others with respect. The conduct was wilful in the sense that she knew it could cause harm and embarrassment. More than that, we find that she knew the foreseeable consequence of the letters would be to cause employment inquiries, at the least.

[114] We find that in sending the letters Ms O'Boyle recklessly contravened that same duty to treat Mr C and Ms P with respect. That recklessness represents in:

- Sending the letters to the addressee who did not employ Ms P.

- Making assertions about Mr C's alleged lies to the Court when a short delay would have enabled her to check the Notes of Evidence (rather than relying on her own faulty handwritten note). Given the seriousness of the allegation, she should have taken extra care to check the Notes of Evidence particularly as

there was no urgency to send the letters. The delay would not have been material to her client's case.

- Sending unredacted letters.

- Making strong, damaging assertions that were not warranted by the material available to her.

- Failing to test her own materials (e.g. identify the precise source of the long list of IP addresses; clarify from a competent source the accuracy of her assertion that a Government Department was likely implicated).

[115] These reckless contraventions of r 12 were echoed in her misrepresenting to the Standards Committee that the Notes of Evidence supported her. Ms O'Boyle failed to keep an open mind, to question her own material, and she adopted positional entrenchment.

[116] Although she was wrong in fact about Mr C's name suppression, we do not find she was reckless in that error because she did check at Court, a source she reasonably regarded as reliable.

[117] Lest we be misunderstood, we accept that lawyers can sometimes make honest mistakes. In advancing a client's point of view, advocacy requires the best case to be put. Within limits, enhancing a case can produce degrees of unbalance. What distinguishes this case is the intent to harm the opposing self-represented party in an unrelated sphere. The lie, the wilful or reckless extent of allegations and inferences, the scattergun of toxic material, the reckless failure to check material or question her own sources before going on such a strong attack support this. These features reduce the confidence of the public in the profession generally if not brought to account. As we have already noted, we regard the conduct represented in sending these letters as misconduct.

[118] In summary, we find the charge against Ms O'Boyle of misconduct proved under the three heads (conduct that would reasonably be regarded by lawyers of good standing as disgraceful; or wilful, or reckless, contravention of a rule), any one of which

is a sufficient finding. The cumulative effect of Ms O'Boyle's actions amount to a serious drop below the standards that the public, and other members of the profession, can expect.

If not, is it unsatisfactory conduct?

[119] In the alternative, Ms O'Boyle is charged with unsatisfactory conduct under s 12(a), (b) or (c) of the Act. The relevant parts of that section provide:

> 12 **Unsatisfactory conduct defined in relation to lawyers and incorporated law firms**
>
> In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—
>
> (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
>
> (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
>
> (i) conduct unbecoming a lawyer or an incorporated law firm; or
>
> (ii) unprofessional conduct; or
>
> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7);
>
> …

[120] The material already covered in this decision leads plainly to the finding, if misconduct had not been found, that her conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. In this case, the Tribunal (and Mr C) was entitled to expect Ms O'Boyle to limit herself to legitimate actions on behalf of her client. It seemed Ms O'Boyle had some insight in the extent to which she had overstepped her professional role when she indicated that what she did was "not a lawyer's role"[90] but she then suggested to the effect it may have been a civil lawyer's role.[91] That comment

[90] NoE p 108, lines 10 – 11.
[91] NoE p 108, lines 11 – 12.

revealed her lack of understanding that what she did was unprofessional as a lawyer, regardless of whether the lawyer was a family lawyer or a civil lawyer.

[121] To malign Mr C, even if it were done to placate an angry client, is not a professional task for a lawyer. We find it is unprofessional conduct both in the sense that it is outside her professional role and that it is conduct unbecoming to a lawyer. Such conduct brings the standing of the profession into disrepute.

[122] Of course, the conduct breaches rules of conduct for the same reasons as set out above, where we consequently found misconduct to be proved.

Decision

[123] We find the charge of misconduct against Ms O'Boyle to be made out.

[124] A penalty hearing is directed. A telephone conference will be convened to make directions. If Ms O'Boyle wishes to file evidence relating to penalty, that should be filed before submissions. Submissions by the Standards Committee should be filed a fortnight before Ms Davenport QC files her submissions. We anticipate a hearing of half-a-day unless counsel think otherwise.

Final suppression orders

[125] An order is made under s 240(1)(c) of the Lawyers and Conveyancers Act 2006 that the names of the complainant, his partner, their respective employers, the Department that was not the complainant's partner's employer to whom Ms O'Boyle wrote, persons referred to in the letters, Ms O'Boyle's client and her partner, the children and other family members referred to in this New Zealand Law Society file, and Ms O'Boyle's PA are all permanently suppressed.

DATED at AUCKLAND this 29th day of April 2021

Judge JG Adams
Deputy Chairperson