NAMES OF COMPLAINANTS AND CLIENTS NOT TO BE PUBLISHED AS PER THE ORDER RECORDED AT PARAGRAPH [41], PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 31

LCDT 028/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 4** Applicant
AND	**PATRICK KENNELLY** Respondent

DEPUTY CHAIR

Dr J G Adams

MEMBERS OF TRIBUNAL

Mr S Hunter QC

Ms K King

Ms M Noble

Prof D Scott

HEARING 24 August 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 1 September 2022

COUNSEL

Mr P Davey for the Standards Committee

Mr M Atkinson for the Respondent Practitioner

DECISION OF THE TRIBUNAL RE LIABILITY

[1] Mr Kennelly faces two charges arising from completely different matters. One concerns the adequacy of an apology he had been ordered to make, the other concerns tardy distribution of an estate. In each case, if the charge is made out, we must determine the gravity of his conduct (misconduct or otherwise).

[2] The issues we must consider are:

- Did the apology letter comply sufficiently with the order?
- Should the charge about tardy distribution be struck out as an abuse of process?
- In each case, does the gravity amount to misconduct, or a lesser standard?

Was the apology compliant?

[3] Mr Kennelly's affidavit, his oral evidence, and relevant correspondence show that the context within which the apology was ordered was inflamed. The complainant, Mr P, was never a client of Mr Kennelly. Over a period of five years, his successive complaints greatly upset Mr Kennelly who said it "took over my life."

[4] The original complaint arose from an error. Mr Kennelly acted for an elderly woman to bring protection order proceedings against her son, Mr P. Mr Kennelly's error was to include, as an applicant, the client's husband (Mr P's father) whose capacity was in doubt. The client's husband was never a client of Mr Kennelly. Although a protection order was subsequently made solely for the client, the husband's name also appeared on the order drafted by the court. Mr Kennelly arranged for the order to be served on Mr P. Mr P complained.

[5] Because of what his client and others had told him, Mr Kennelly says he was "caused [ ] to strongly dislike Mr P as a person."[1] In correspondence with the Standards Committee and the Legal Complaints Review Officer (LCRO), Mr Kennelly expressed views about Mr P some of which Mr Kennelly now accepts were "discourteous."[2] Mr P was exposed to the force of Mr Kennelly's written views. For example, on 27 May 2016, Mr Kennelly wrote to the Lawyers Complaints Service in these terms:

> I think Mr P needs to recognise that his complaint is nothing more than an attempt to deflect from his own poor behaviour. All that is required is for him to look in the mirror and see looking back at him the face of a man (not a real man) who assaulted his 83 year old mother on her evidence, at least twice. And there unfortunately is the problem.

Mr Kennelly wrote to the LCRO on 15 February 2017 in an email that contained the following[3]:

> Mr P is a person who assaulted his mother and has spent his father's money. He is like a Dog with a Bone!
>
> I acted on the request of his mother with the knowledge that his father was being manipulated as he continues to be by Mr P.
>
> …
>
> This guy is a classic bully, manipulator, liar and a narcissist.
>
> …
>
> What should have been of note to the Complaints Committee is that before he filed anything with the Family Court he filed a complaint against me in a misguided attempt to intimidate and bully me. Given I have never been bullied in my life and those that know me well know exactly how much I detest and despise bullies and would have advised anyone contemplating that course not to go down that path.
>
> I have seen the pain and the hurt he has caused his family and he has absolutely no conscience about doing whatever he can to hurt his mother.
>
> …
>
> He is completely self-obsessed with being right and really has no interest in the truth.
>
> He was lucky to get a Complaint Committee full of lawyers, none of whom have any judgment, to fine me.
>
> …
>
> He should have just let it go but if the Legal Complaints Review Office cannot see exactly what we are dealing with then "bring it on".

[1] Kennelly affidavit 4 May 2022, at [10].
[2] Kennelly affidavit 4 May 2022, at [12].
[3] Bundle of Documents Accompanying the Submissions of Counsel at p 4.

[6] Although, at the hearing, Mr Kennelly accepted that he knew that Mr P sought an apology, he was taken aback when the LCRO ordered one. The relevant portion of the LCRO decision[4] states:

> [60] Mr Kennelly is ordered to apologise to Mr P for his part in causing Mr P distress arising from the Protection Order incorrectly recording J as an applicant, and for his disrespectful and discourteous correspondence in the complaint and review processes. The wording of the apology will be left to Mr Kennelly to determine. The date by which the apology is to be made is one month from the date of this decision. The reason for the extended period is to give Mr Kennelly the opportunity to reflect on his conduct and to show some remorse in the wording of the apology.

[7] Mr Kennelly's letter dated 30 August 2019 reads:

> 30 August 2019
>
> C P
> c/- LCRO
> **Auckland**
>
> **APOLOGY AS DIRECTED BY THE LCRO**
>
> As you are aware the Legal Complaints Review Officer ("LCRO") issued a decision, directing me to issue an apology to you C P, dated the 31st July 2019.
>
> Both before and during the decision making process I outlined in detail my version of events.
>
> To my surprise the Legal Complaint Review Officer issued a decision which required me to reflect on my conduct and to issue that apology.
>
> As a person subject to any decision making process under The Lawyers & Conveyancers Act 2006, I may judicially review any decision, if I am dissatisfied with the decision or do not agree with aspects of that decision. I have considered the Act and the Judicial Review process, at some length and have sought guidance from Counsel in relation to not only the lengthy delay with Judicial Review proceedings but the stress and anxiety that goes with any such application.
>
> By a very close margin I have elected to ignore the legal and factual matters within the decision, which conflict with my version of events and the advice I have received and have determined that whilst justice is a good thing, finality is better.
>
> Accordingly I am therefore in the complex and discombobulating position of having to comply with that decision. That state of affairs, I am left in, is however something that I can accept.
>
> I also have to respect the institution that is the LCRO after all I am a Barrister and Solicitor of the High Court of New Zealand and am therefore subject to all

[4] 31 July 2019 Bundle, p 029.

> the joys and burdens that flow from such a position. I believe in the institution and the system that created it.
>
> As directed by the Legal Complaints Review Officer ("LCRO") I have reflected on my conduct.
>
> That has been a joyous and pleasurable opportunity and I thank the Legal Complaints Review Officer for allowing me the opportunity for quiet contemplation to reflect on my conduct.
>
> I say that not in tongue in cheek but in all honesty as it is very rare for a busy suburban practitioner to take time out from assisting clients and striving to add value in a complex legal, political, social and economic climate to reflect on one's conduct in an historical matter.
>
> The second aspect of the LCRO decision was after cogitating on my conduct, to issue an apology to C P.
>
> I therefore am without fear or hindrance and comforted by the institutions that as a practitioner I not only respect but follow freely, apologise to C P in accordance with the direction of the LCRO decision dated 31 July 2019.
>
> Yours sincerely
>
> **Patrick Kennelly**

[8] In accordance with the order, he forwarded his letter to the LCRO who, perhaps regrettably, sent it on to Mr P. Mr P complained about the inadequacy of the apology. The Standards Committee referred this matter to the Tribunal.

[9] Mr Atkinson made submissions questioning the appropriateness of forced apology and questioning the value of an insincere apology. He queried whether an ordered apology might encroach on rights of freedom of expression under the New Zealand Bill of Rights Act. The short answer to those submissions is that this is not an appeal or review of the LCRO decision. In any case, the order was lawful.[5]

[10] The letter comprises 12 paragraphs. It expresses Mr Kennelly's internal conflict in being forced to apologise when he thinks that is unjust. He bolsters his position by indicating he has sought legal counsel about a challenge to the LCRO decision. The tenor of the letter, read against the long-standing conflict between he and Mr P, contains a (perhaps thinly veiled) complaint about his task. He is grudgingly obliged to complete it to achieve finality. Most of the letter dwells on his sense of unfairness;

[5] Sections 156(1)(c) and 221 of the Lawyers and Conveyancers Act 2006.

it is much more about him than Mr P. The remote gesture towards words of apology is minimal.

[11] We cannot accept Mr Kennelly's evidence that his letter was sincere. For example, we find that the words "This has been a joyous and pleasurable opportunity" can only be read, in context of the letter itself, as ironic. Those words follow his expression of dissatisfaction with the decision, his sense of injustice, his description of his position as "complex and discombobulating." Nor do we accept Mr Atkinson's submission that it was an intimate letter which carried added value because it disclosed Mr Kennelly's personal reflections. Mr Kennelly was not ordered to share his feelings of discomfort with Mr P.

[12] Mr Kennelly was required to apologise in a letter of his own composition. He was expected to acknowledge wrongdoing and express remorse. He was given a period of time for reflection so the letter could be composed after he had time to govern his passions.

[13] We have been assisted by materials provided by counsel about apologies. These include Francesca Bartlett's[6] essay *The Role of Apologies in Professional Discipline*[7]; the decision of the Canadian Supreme Court in *Doré v Barreau du Quebec*[8]; *Burns v Radio 2UE Sydney Pty Ltd & Ors (No2)*[9]; and Robyn Carroll's essay *Apologies as a Legal Remedy.*[10] Examining the nature and utility of a compulsory apology leads to fascinating philosophical considerations much of which is beyond the scope of our task. What is useful is to consider the purpose of the s 156(1)(c)[11] power to order a practitioner to apologise.

[14] The performative nature of apology, in the present case, must serve the purposes of the Lawyers and Conveyancers Act (the Act) and the associated Conduct and Client Care Rules. At stake is the reputation of the legal profession which is a necessary adjunct to maintaining public confidence in the profession's services.[12] Associated with that, courteous dealings are required so that the status of the

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[6] TC Beirne School of Law, University of Queensland, Australia.
[7] Legal Ethics, Vol 14, Part 1, 49 – 72.
[8] *Doré v Barreau du Quebec* [2012] 1 RCS 395 (decision of court delivered by Abella J).
[9] *Burns v Radio 2UE Sydney Pty Ltd & Ors (No2)* [2005] NSWADT 24.
[10] 35 Sydney Law Review 317 (June, 2013).
[11] Lawyers and Conveyancers Act 2006.
[12] Section 3(1)(a) of the Act.

profession is sustained.[13] This is echoed and reinforced in Rule 11(b).[14] Further, Rule 10.1 states:" A lawyer must, when acting in a professional capacity, treat all persons with respect and courtesy." This mandatory provision is not limited to clients. Rule 10.2 states: "A lawyer must not engage in conduct that tends to bring the profession into disrepute."

[15] In the Canadian case of *Doré v Barreau du Quebec*[15] a lawyer wrote an intemperate letter of complaint to a judge. Although the judge's behaviour was inappropriate, the Supreme Court held that the Bar Council was justified in reprimanding the lawyer, notwithstanding rights to freedom of expression. The lawyer had representative duties which required him to express his concerns in a manner fitting with his status as a member of the Bar. The Supreme Court's decision observes:[16]

> [68] Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.
>
> [69] A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.

[16] Although Mr Atkinson suggested that a private apology (as here) differs from a public apology, we see little material difference apart from the obvious one that the audience to a private apology is much smaller. Like Mr Doré, Mr Kennelly can be expected (and required) to rise above his personal animosity in composing and delivering his letter of apology. In line with the Rules, especially Rule 12 which requires

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[13] Section 3(1)(c) of the Act.
[14] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[15] See above n 8.
[16] See above n 8.

a lawyer to conduct dealings with others with integrity, respect, and courtesy, his performance represents the reputational interests of the profession.

[17] The purpose of the apology was to bring the long-running animosity to conclusion by an appropriate acknowledgement of his wrong-doing, an expression of remorse, and an apology. We accept that the order cannot of itself change Mr Kennelly's attitude to Mr P but the statutory power to order an apology reflects that an apology has value. It has formal value; it models reparation of (in this case) a situation that had remained inflamed at least in part by Mr Kennelly's ongoing intemperate denigration of Mr P.

[18] Without being prescriptive, an appropriate apology might have been along these lines: "I acknowledge that I made an error in including your father's name in the application. That led to circumstances which caused you hurt. I acknowledge that in the complaints process I have been discourteous to you. I should not have done so. I am sorry for these shortcomings on my part. I apologise for them."

[19] Mr Kennelly's letter inferentially insulted the LCRO. It pretended to perform an apology but the total performance enacted a different purpose. It contained no acknowledgment specifying what he had done wrong. There was no expression of remorse. The dominant message of the text informed Mr P about Mr Kennelly's sense of grievance. Rather than salving any wound suffered by Mr P, the letter added insult to injury.

[20] Mr Kennelly is capable of straightforward apology when he chooses. Examples are his short, appropriate apologies[17] to the beneficiaries of the estate (in relation to the subsequent charge). By contrast, the letter to Mr P is addressed, not to "Mr P" but to C P (first name and family name without the courtesy of "Mr"). The flourish of "without fear or hindrance" mocks the purport of apology.

[21] Mr Kennelly's issue with Mr P arose out of his provision of regulated services to Mr P's mother. We find this matter arose "at a time when he was providing regulated

[17] Bundle pp 143 – 145.

services" as that expression is understood in disciplinary matters. His conduct was not "unconnected with the provision of regulated services."[18]

[22] We find that the letter fails to comply with the order. It is no apology at all, in reality. Mr Kennelly had a month within which to compose his letter. We find he acted wilfully in crafting a letter that mocks the order, inferentially insults the LCRO, and is purposefully designed to convey no remorse, and designed to withhold any measure of vindication or resolution to Mr P.

[23] We find that this conduct would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable. It amounts to a wilful contravention of Rule 2.3 by using a legal process (the complaints process) for an improper purpose, namely, to score another point against the complainant. It thereby constitutes a misuse of the disciplinary process, contravening Rule 2.10. Its tone victimises Mr P. As noted above, it contravenes Rule 10. It also contravenes Rule 12 because Mr Kennelly was acting in a professional capacity but failed to conduct his dealing with the LCRO and with Mr P "with integrity, respect, and courtesy."

[24] We find the charge is proven as misconduct. We do not need to consider the lesser range.

Should the charge about tardy distribution be struck out?

[25] Mr Kennelly was sole executor of the PP estate.[19] There were three adult beneficiaries. PP died in June 2013. Probate was granted in August 2013.

[26] In August 2014, Mr Kennelly paid out $270,000 to each of the three adult beneficiaries. A balance of $16,241.27 was retained "for tax and accounting fees." That balance was invested on interest bearing deposit along with funds for the care of a pet of the deceased. Quarterly interest was paid into Mr Kennelly's trust account and added to the interest bearing deposit.

[18] *Orlov v NZLCDT* [2015] 2 NZLR 606.
[19] The PP estate is unrelated to Mr P, the complainant in the first charge.

[27] Two principal tasks remained. One was to transfer certain shares into the names of the beneficiaries as specific bequests pursuant to the will, the other was to finalise tax and distribute the remainder.

[28] In June 2018, a beneficiary complained that the shares had not yet been transferred. In February 2019, the Standards Committee determined that the complaint was vindicated, saying they "considered this situation to be completely unacceptable." Mr Kennelly was fined and ordered to transfer the shares within three months. He did not comply. The beneficiary complained about his failure in October 2019. Mr Kennelly did not respond to requests from the Standards Committee. The Standards Committee addressed the complaint in February 2020 and set it down for hearing on 24 June 2020. The day prior, 23 June 2020, Mr Kennelly reported that he had been in contact with two of the three beneficiaries. The Standards Committee adjourned the hearing to September 2020 by which time Mr Kennelly had transferred the shares to two beneficiaries but was still awaiting documentation for the beneficiary in Australia.

[29] The Standards Committee found unsatisfactory conduct, fined Mr Kennelly, ordered him to pay costs and ordered him to apologise to the beneficiaries for failing to transfer the shares in accordance with the will.

[30] In June 2020, the complainant beneficiary realised that there were the funds still held in the interest bearing deposit. That led to the current charge.

[31] For Mr Kennelly, Mr Atkinson argued the charge should be dismissed because of res judicata, issue estoppel or abuse of process. Although the discrete failure in relation to the funds in the interest bearing deposit had not featured in the earlier determination, the submission suggests the issue should have then been available, the practitioner's default is of the same kind, and it is tantamount to double jeopardy to charge him in relation to the undistributed funds separately.

[32] In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd,*[20] describing the term res judicata as a label that tends to distract attention from the contents of the bottle, Lord Sumption identified six kinds of res judicata. The first three do not seem apposite in this case. Picking up Lord Sumption's fourth kind, the present case is not one where

[20] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] 4 All E R 715 (Sup Ct) at [17].

the earlier Standards Committee decision decided a point that is common to the present one although it is certainly similar, relating to tardiness of distribution of specific bequests in the same estate. Is it one where (Lord Sumption's fifth kind) a matter is raised in later proceedings that should have been raised earlier?[21] Lord Sumption's final kind recognises the more general rule against abusive proceedings. We discuss these avenues below.

[33] The earlier decision of the Standards Committee dealt with Mr Kennelly's failure to comply in a timely manner with the terms of the will but focused on the shares as specific bequests. That is because the shares were the subject of that complaint. The Standards Committee was not then aware of the default in relation to the funds. Should it have been? Mr Kennelly appears to blame the beneficiaries or the Standards Committee for failure to notice the additional default.

[34] The beneficiaries were adults. They had received a substantial payout and a statement which noted the retention of funds for tax and accounting fees. Mr Kennelly, as sole executor, should have dealt with those matters in a timely manner. Instead, having put the funds in interest bearing deposit, he seems to have taken no further notice of them. The beneficiaries were entitled to expect him to do what was proper. We do not impose upon them a burden of acquainting themselves with the requisite processes and harrying Mr Kennelly as lawyer and sole executor to do what he should have done. He did not send them annual reports.

[35] Aspects of Mr Kennelly's trust account attracted Law Society attention. Law Society inspections centred on dormant balances in his trust account. The trust account for the PP estate did not attract the inspector's attention because it was not dormant. Every quarter, interest was paid into it. Therefore, it seemed like a healthy active account. For Mr Kennelly to blame the Law Society for his dilemma because the inspector did not interrogate the interest bearing deposit is not balanced. He cannot fob off responsibility for his default in that manner. His suggestion that the beneficiaries or the Law Society should share responsibility for his defaults does him no credit.

[21] In *Johnson v Gore Wood & Co* [2001] 1 All E R 481 (HL) it was observed that the fact that a claim could have been raised in an earlier process did not, of itself, mean it should have been raised there.

[36] It might be hoped that when a practitioner is brought to book for dilatory performance of one duty in an estate, the practitioner would look to the estate management overall and bring all aspects to finality. Had Mr Kennelly done so, this complaint would not have arisen. Had the funds come to attention at the time of the earlier charge, it should have been dealt with then. That it did not come, even to Mr Kennelly's attention then, provides good reason for refusing to regard this charge as an abuse of process. Mr Kennelly's own ongoing passivity led to the complaint. It appears that he might never have got to disburse these funds were it not for the complaint. Thus, it arises as a discrete, ongoing default that required additional complaint to resolve.

[37] In these circumstances, we do not regard this charge as a duplication. The current charge was that Mr Kennelly failed to finalise the administration of the estate in a timely fashion. The earlier decision of the Standards Committee dealt with Mr Kennelly's failure to comply in a timely manner with the terms of the will. We do not regard it as a matter where Mr Kennelly has already undergone a process that dealt with it. That it is similar to the previous issue is a matter that brings discredit on Mr Kennelly, not on the Standards Committee.

[38] Mr Kennelly held special responsibility and power as sole executor. His delay of over seven years in distributing the final sum of money is simply unacceptable. The default is exacerbated by his failure to be prompted by the earlier complaint. In respect of that earlier complaint, he was tardy in giving effect to the order. It appears that his attention to his obligations, even when specifically directed by order, has been at least uncaring both as to his responsibilities as executor and as to his obligations to the beneficiaries themselves.

[39] We find that the years of delay, especially after an earlier prompt should have alerted him, is conduct that would reasonably be regarded by lawyers of good standing as disgraceful. His conduct breaches Rule 3 which provides that "in providing regulated services to a client [in this case, the estate personified by himself as executor], a lawyer must always act competently and in a timely manner…"

[40] We find this charge is proven at the level of misconduct.

Suppression

[41] We make an order pursuant to s 240 of the Act, for permanent suppression of the names of the complainants and clients, in respect of both charges.

Directions

[42] This matter should be set down for a penalty hearing. We direct the Standards Committee to file any affidavits and submissions by 28 September; Mr Kennelly shall file any affidavits and submissions by 21 October. Unless counsel submit otherwise, a half day hearing shall be set down on or after 28 October 2022.

DATED at AUCKLAND this 1st day of September 2022

Dr JG Adams
Deputy Chairperson