

**PERMANENT SUPPRESSION OF THE NAME OF THE PRACTITIONER AND
OTHER AS OUTLINED IN PARAGRAPH [79] AND ORDER NO. 6 IN
PARAGRAPH [80] PURSUANT TO S 240 OF THE LAWYERS AND
CONVEYANCERS ACT 2006.**

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2022] NZLCDT 8
LCDT 003/21

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**NATIONAL STANDARDS
COMMITTEE 2**
Applicant

AND

MR Y
Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr S Hunter QC

Ms M Noble

Ms S Sage

Prof D Scott

HEARING 3 February 2022

DATE OF SUBMISSIONS ON FINAL NAME SUPPRESSION 10 February 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 24 February 2022

COUNSEL

Ms E Mok for the Standards Committee

Mr W Pyke for the Practitioner

**DECISION OF THE TRIBUNAL ON FINAL NAME SUPPRESSION
AND GIVING REASONS FOR PENALTY ORDERS**

Introduction

[1] This decision considers the penalty to be imposed on a practitioner who has admitted misconduct of two kinds, particularised under one charge.

[2] The first misconduct arose as a result of Mr Y engaging in an intimate relationship with someone who had become a client.

[3] The second, and more serious misconduct, arose because when a complaint was made about the above conduct, Mr Y misled the Standards Committee by denying the existence of the relationship, thereby leading to a dismissal of the complaint.

[4] Responsibly, in the course of the hearing before us Mr Y's counsel conceded the conduct did reach the level of misconduct.¹

[5] The hearing therefore focused on the proportionate penalty, and in particular whether a suspension from practice, was necessary to mark the seriousness of the misconduct. We reached a view, at the hearing, that suspension was necessary, and that having regard to the various factors to be articulated in our decision to follow, four months was a proper period for such suspension.

[6] Some time for handing over his practice was allowed, and the suspension is to start on 1 March 2022. We reserved our reasons and this decision contains those reasons.

[7] An application was also made for final name suppression. This was reserved for further submissions to be made by the Standards Committee. In addition, Mr Gay, a member of the press, who was present (remotely) at the hearing was also granted time for filing submissions on the question of name suppression. Such submissions were to be filed by 10 February 2022.

¹ Previously Mr Y had admitted only at the level of "unsatisfactory conduct".

Matters to be Considered

[8] In determining a proportionate penalty, the Tribunal first determines the level of seriousness of the misconduct.²

[9] Aggravating and mitigating factors are then taken into account. Where available, similar cases are considered, so as to achieve consistency and predictability of outcome.

[10] Further penalty principles such as deterrence, denunciation, rehabilitation, compensation, and the “least restrictive outcome”,³ are also weighed. These are considered against the framework of the purposes of the legislation, namely the protection of the public as consumers of legal services, and the upholding of professional standards in order to maintain public confidence in their provision.

[11] The Tribunal will also take account of the overall context of the conduct, and the practitioner’s approach to the disciplinary process, in making an assessment whether he is a fit and proper person to continue in practice as a lawyer.

Background

[12] Mr Y is a recovering alcoholic. In mid-2018 he had faced up to this and sought treatment and support at a local clinic. He says his drinking had begun to “spiral seriously”.

[13] At the time he was not only a busy practitioner but was facing the end of a relationship as well as Family Court proceedings in relation to the care arrangements for his children.

[14] With the support of his law partners, he took leave to engage with a local clinic (Clinic D). The director and part-owner of the clinic is Ms T who is a registered psychotherapy practitioner with some 10 years of experience. The treatment commenced with a full assessment which was carried out by Ms T, following which another therapist worked with Mr Y. By August of that year, it was apparent that Mr Y needed residential treatment because he was simply not making the gains he

² *Hart v Auckland Standards Committee 1* [2013] NZHC 83, [2013] 3 NZLR 103.

³ *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] NZAR 639, at [22].

had hoped with the assistance of the clinic. He had not managed to curb his drinking and more intensive help was needed. He was discharged from Clinic D and enrolled in a residential treatment at Capri Clinic where he undertook a 21-day residential programme.

[15] This residential treatment was more successful, and Mr Y achieved sobriety for some time. In his self-reporting letter to the New Zealand Law Society of February 2020, Mr Y described himself as having had one lapse only in the previous 17 months of sobriety.

[16] Following his residential treatment, and to support his sobriety, Mr Y fully engaged with AA, attending at least two meetings per week. These meetings were held at the premises of Clinic D, which was also Ms T's own home. She was frequently the chairperson and was the host and during the following 12 months a strong friendship grew between Mr Y and Ms T.

[17] In time Mr Y began to chair groups and says that he considered that Ms T became "... *the single biggest influence in my maintaining sobriety. Her knowledge and support took me safely through the post-rehab phase ... I trusted her advice and respected her opinion and guidance*".

[18] It is also clear that Mr Y became closely connected to the support group and network formed by these regular meetings.

[19] Ms T, who had been separated from her husband for approximately two years, was aware that Mr Y was a lawyer. In November 2018 she discussed with Mr Y her "unresolved separation and property division issues". She was unrepresented and asked that Mr Y and his firm represent her.

[20] The nature of the work was more suited to Mr Y's partner, so although the direct communication was primarily between lawyer (Mr Y) and client (Ms T) directly, it was overseen by Mr Y's partner who assisted with his knowledge, strategy and expertise, including vetting communications.

[21] It was in about February 2019 that the relationship between Ms T and Mr Y became more intimate and in mid-March 2019 a sexual relationship developed.

[22] In late April a letter was received from Ms T's husband's lawyers suggesting that Mr Y ought not to be involved in representing Ms T because he was seen as an active client of her clinic. Mr Y says he in fact was not, he was attending AA meetings and STEPS group at the clinic. However, it was decided that the file would pass to the partner who had been overseeing it, and Mr Y would remain very much in the background from that point.

[23] Thus, the period during which he had an intimate relationship with the client while representing her in a family related matter, was a relatively brief one. The relationship between Ms T and Mr Y continued until early September 2019.

[24] On 18 June 2019 the Law Society advised Mr Y that Ms T's husband had made a complaint about the nature of their relationship and an alleged conflict of interest between Mr Y as lawyer and a client of the clinic. Mr T remained a director and shareholder of the clinic also.

[25] Mr Y wrote to the Complaints Service on 21 June denying the allegations made by Mr T. He stated that Ms T was a "*personal friend as part of a small but close group of people I associate with as part of the ... AA community.*" He pointed out that he had been discharged from the clinic in August 2018 and attended meetings at the clinic's premises which were under the auspices of AA which did not affiliate itself with any particular group, including the clinic.

[26] Mr Y "doubled down" in responding to the Complaints Service on 11 July 2019 following an assertion by Mr T that he had been untruthful in his response to the complaint. He said he did not accept any such assertion.

[27] In his affidavit to the Tribunal, Mr Y acknowledged that his relationship with Ms T had "*... crossed the line into a professionally impermissible sexual relationship*".

[28] However, Mr Y went on to describe that in denying the complaint he had not only had fears for his own professional situation, but also because of the risks of exposure for Ms T, who was clearly in breach of her professional codes with the two organisations with which she was registered.⁴ Mr Y described his concerns of the

⁴ The Drug and Alcohol Practitioners Association of Aotearoa and the Psychotherapist Board of Aotearoa New Zealand.

“*serious financial and professional consequences for her and (her clinic)*” should the relationship be confirmed.

[29] Under cross-examination, Mr Y went somewhat further in his evidence to confirm that he had come under considerable pressure (from Ms T) not to disclose their relationship or he would lose the relationship and the therapeutic community on which he was so dependent.

[30] Mr Y was very clear about his error in his evidence to the Tribunal:⁵

“I acknowledge to this Tribunal that I ought to have frankly and honestly faced up to the issue when the complaint was made. I have made matters worse by not being immediately truthful and I deeply regret this. I responded as I did as I felt overwhelmed by the dual personal and professional losses that faced me. I panicked and, instead of admitting (Mr T’s) allegation about the intimate relationship, I tried to cover it up. I am ashamed of my conduct.”

[31] In oral evidence Mr Y confirmed that his fears were realised when, at the time the relationship came to its end, and when Ms T found out that later, Mr Y was seeing another person, she directed him not to return to the support groups from which he had derived so much strength - at that stage he had been sober for 15 and a half months. He says that within four weeks of being cut off in this way he had relapsed and since has not recovered to the extent of such lengthy periods of sobriety.

[32] From the above description, it can be seen that there were complex and multiple reasons which led to the very unwise conduct, the consequences of which Mr Y now faces.

[33] In February 2020 Ms T told the partner who had been handling her affairs of her relationship with Mr Y. Mr Y and the partner immediately took advice and took steps to make a self-report to the Complaints Service acknowledging the misinformation that had been provided by Mr Y in 2019.

[34] Mr Y’s self-report was detailed and remorseful. It was followed by a fulsome apology to Ms T’s husband and to the Standards Committee.

⁵ Affidavit of Mr Y, sworn 17 March 2021, para [16].

The Practitioner's Current Health and Arrangements for Management of his Practice

[35] In April 2021 Mr Y suffered a further serious relapse and entered residential treatment once again at The Retreat, a facility operated by the Salvation Army. He has now re-established support networks and a wellness plan. He is also regularly consulting a psychologist who has provided a report to the Court. This report sets out further background to Mr Y's alcohol problems and related conditions including [redacted].

[36] Mr Y is fortunate in that he has a strong support network of colleagues also, including his attorney, [redacted], his former partner, who attended the hearing as a support person and other senior practitioners in the area all of whom speak highly of the practitioner's abilities as a lawyer. We refer further to these references under the heading of mitigation but we are satisfied that there is no evidence that Mr Y has allowed his occasional relapses to impact on his professional standards and when he has felt himself "going off the rails" it is clear he has reached out to close colleagues to support him in implementing arrangements for his practice to continue to be conducted.

Seriousness of Misconduct

[37] Rule 5.7.1 of the Lawyers Conduct and Client Care Rules states:

Personal relationships

5.7 A lawyer must not enter into an intimate personal relationship with a client where to do so would or could be inconsistent with the trust and confidence reposed by the client.

5.7.1 A lawyer must not enter into an intimate personal relationship with a client where the lawyer is representing the client in any domestic relations matter.

[38] The Tribunal has no difficulty applying this Rule to the situation where a lawyer represents a client in a relationship property dispute with a former spouse or partner. Clearly that must fall under the definition of "domestic relations" where a purposive (and therefore protective) reading of the Rule is applied.

[39] The policy behind it is clear. It is well understood that many clients, in the wake of a relationship breakdown can frequently be in emotional turmoil, or sad and anxious and therefore vulnerable. As such the normal power imbalance, where the lawyer is at an advantage by virtue of knowledge, experience and perhaps status, is exaggerated further.

[40] However, in the present case that template can simply not be applied. Since the lawyer and client also had, and continued to have, a therapeutic relationship, with the client in the role of therapist, we would see the practitioner in this situation as equally vulnerable. The prior professional relationship between himself and Ms T and her support of him, which he saw as absolutely essential to him in the treatment of and recovery from his addiction, was also highly problematic, but the professional lapse in that aspect of the relationship is not his.

[41] We say no more about that because Ms T has not been part of the proceedings and has not had the opportunity of providing her perspective. However, the Standards Committee clearly accept this because counsel accepted in her submissions, that this was not a situation of “*gross breach of trust or power imbalance*” such as had existed in either the *Daniels* or *Horsley* matters.⁶

[42] However, power imbalance is not the only reason for this Rule being in place. The further reason is that it is so important, particularly in disputes where emotions might be running high, for the practitioner representing the client to retain objectivity and independence in giving advice to a client. A relationship of this sort can clearly compromise such objectivity.

[43] Engaging the supervision of his partner, and in handing over the file a matter of weeks after the intimate relationship began, does, in our view reduce the seriousness of this behaviour.

[44] Had this been the only area of concern the Tribunal would have been considering much less significant consequences.

⁶ *Daniels* see above n 3; *Canterbury Westlands Standards Committee v Horsley* [2014] NZLCDT 47.

[45] However, as earlier indicated, the seriousness of the overall conduct is increased markedly by the practitioner's dishonesty in his dealings with his professional body.

[46] Professional disciplinary processes are in place, not only to uphold standards but also to protect the public. As such it is absolutely essential that all lawyers approach investigations with the utmost candour and responsiveness.⁷ From these comments it can be seen that in order to maintain public confidence in professional standards, any failure to act with less than full integrity towards one's professional body during the investigation of a complaint is likely to be seen as misconduct.

[47] We have acknowledged above that there were complex and multiple reasons leading to Mr Y's 2019 response to the Complaints Service. Mr Y's untrue and dishonest statements to his professional body nevertheless constitute significant misconduct.

Aggravating Features

[48] We accept the submission of counsel for the Standards Committee that the second denial of the relationship to the Standards Committee, which occurred in July, following the June letter is an aggravating feature. Mr Y had the opportunity of rethinking his position, but it would seem that his personal circumstances remained the same, namely his dependence upon Ms T and the general support network she represented, was his primary focus as he continued to manage his sobriety.

Mitigating Features

[49] Mr Y can certainly claim credit for an almost 20-year unblemished career as a lawyer. He has provided letters of support from practitioners with whom he regularly interacts. All of these speak highly of his abilities as a lawyer, his courteous interactions and diligent work on behalf of his clients.

[50] We accept the submission made by Mr Y's counsel that this professional misconduct is entirely out of character.

⁷ *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No. 2)* HC HAM CIV-2010-219-209, Cooper J, 20 December 2010.

[51] Mr Y also relies on the strenuous efforts he has undertaken and continues to undertake to maintain his sobriety and continue in his recovery from alcoholism. The reports he has provided from treatment facilities attended and the psychologist with whom he is working, Mr Sullivan, testify to his earnest efforts in this regard.

[52] We accept that the nature of his illness and the particular stage of his recovery and dependence on the support of those around him, and in particular Ms T, led him to him to make the two serious errors (the relationship and dishonesty with the Standards Committee) under consideration.

[53] We consider that this is a case where we can accept the genuineness of the practitioner's remorse and regret and we record that his apology to both the original complainant and the Standards Committee was a fulsome and genuine one. Mr Y's counsel has invited us to endorse that apology in the formal orders which we will make. This was overlooked by us when making the formal orders, but is included in the final orders recorded at the end of this decision.

Finally, we regard as a strong mitigating feature, albeit a delayed one, the self-report of the practitioner to the Standards Committee, fully setting out the circumstances of his misleading information and taking responsibility for it.

[54] We consider it important to mark this conduct, as distinct from those practitioners who do not take responsibility, or only do so at the hearing, rather than facing up to their professional body, in the knowledge that serious consequences will undoubtedly follow.

Similar Cases

[55] Ms Mok, for the Standards Committee, provided the Tribunal with a number of cases, including those involving practitioners who had had intimate relationships with clients. At the most serious end are the *Daniels* and *Horsley* cases.⁸ Both of these cases resulted in suspension of the practitioner from practice for the maximum of three years.

⁸ *Daniels* see above n 3; *Horsley* see above n 6.

[56] In Mr Horsley's case there was the similar aggravating feature of initially misleading the Standards Committee.

[57] However, we consider these cases to be much more serious than the present case, involving as they did lengthy and developing relationships with particularly vulnerable clients. We have already set out our reasons as to why we do not consider that sort of power imbalance existed in this case.

[58] *Trogenza*⁹ was also referred to us as a case involving dishonesty towards the Standards Committee; however this error was quickly rectified by the practitioner and is at a lower level than the present matter.

[59] The *Paulson Wilson*¹⁰ case was also referred to us, involving as it did elements of dishonesty and a developing intimate relationship with a prisoner. That case we regard as more serious than the present case because of the deception worked on prison authorities thus undermining the privileged position of lawyers who visit clients in correctional institutions. That practitioner was young and inexperienced and was suspended for 12 months.

Application of Penalty Principles

[60] We refer to the penalty principles set out in paragraph [10] above. Of these, the most clearly engaged are the need for general deterrence and denunciation of the practitioner's conduct. Secondly, there is the need to consider rehabilitation, particularly in the face of the practitioner suffering from an illness such as alcoholism.

[61] It is accepted that there is no need for a public protective element in any period of suspension to be undertaken, given the practitioner's own steps towards recovery from his illness and his frank recognition of his errors in respect of the client relationship.

[62] He is regarded as a competent and well-functioning practitioner whose services are valuable to his clients and the public generally.

⁹ *Auckland Standards Committee 1 v Trogenza* NZLCDT [2016] 31.

¹⁰ *National Standards Committee No. 2 v Paulson Wilson* NZLCDT [2021] 16.

[63] The Standards Committee submits that the starting point in fixing penalty ought to be a 12 month suspension but that the Tribunal may well see it as appropriate to reduce such a period given the pressures on the practitioner at the time of the conduct and the mitigating features, which were accepted by the Standards Committee.

[64] We accept that suspension has a broader purpose than public protection, including the ability of the public to observe an effective and proportionate disciplinary response. Suspension can also provide the opportunity for reflection and rehabilitation.

Decision

[65] We consider that nothing short of a period of suspension will properly mark the disapproval of the practitioner's deceptive conduct towards his professional body and the injury that caused to the initial complainant.

[66] Having regard to the unusual circumstances of the relationship, and the influence that had on the practitioner's poor decision-making, we considered that period could be restricted to four months.

[67] That is a significant time for a practitioner to be absent from practice, and the ability to earn a living, but also recognises the responsibility that the practitioner took by self-reporting his conduct.

Final Name Suppression

[68] Section 240 of the Act provides:

240 Restrictions on publication

- (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:
 - (a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:
 - (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:

- (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.
- (2) Unless it is reversed or modified in respect of its currency by the High Court on appeal under section 253, an order made under subsection (1) continues in force until such time as may be specified in the order, or, if no time is specified, until the Disciplinary Tribunal, in its discretion, revokes it on the application of any party to the proceedings in which the order was made or any other person.
- (2A) Subsections (1)(c) and (2) are subject to subsection (4).
- (3) Subsection (1)(c) does not apply to, or in respect of,—
 - (a) any communications by or between any or all of the following:
 - (i) the Council of the New Zealand Law Society:
 - (ii) the Council of the New Zealand Society of Conveyancers:
 - (iii) an officer of either of the societies specified in subparagraphs (i) and (ii):
 - (iv) an employee of either of the societies specified in subparagraphs (i) and (ii):
 - (v) a Standards Committee:
 - (vi) an employee of a Standards Committee:
 - (vii) the Legal Complaints Review Officer:
 - (viii) the Disciplinary Tribunal:
 - (b) the publication pursuant to section 256 of a notice in the Gazette.
- (4) For the purposes of exercising the Disciplinary Tribunal's powers under subsections (1)(c) and (2) to make or revoke, before the start of the hearing of the charge, an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person, the quorum at any sitting of the Disciplinary Tribunal or a division of the Disciplinary Tribunal is, despite section 235(1), the 3-member quorum specified in section 235(5).

[69] Mr Pyke submitted that because the practitioner works in a small, relatively tight professional setting that the reputational damage caused by the disclosure of what are quite personal facets of the misconduct outweigh the public need to know his name.

[70] The impact on Mr Y's recovery is also a serious concern. There is the further concern that naming the practitioner might identify the original complainant. In addition, Mr Y has children who might also be adversely affected by any publicity, which could potentially be somewhat salacious.

[71] Given his high standards of professionalism within his own practice and the recognised absence of the need to protect the public from him, it is submitted that this is one of the unusual situations where identifying the lawyer is not necessary.

[72] Further submissions were received from the Standards Committee, which helpfully set out the legal principles. Having regard to the potential impact of disclosure of the lawyer's name on his rehabilitation, it stated it would abide the decision of the Tribunal.

[73] Counsel for the Standards Committee emphasised the need for names and identifying details of Mr and Ms T to be suppressed.

[74] Submissions were received on behalf of Stuff Ltd. Responsibly, it was accepted that this was a situation where private material disclosed in affidavits, reports and oral evidence was not necessary to inform the public.

[75] However, it was submitted that the circumstances of the offending itself ought to be published, in order for the decision to convey meaningful information. We accept that submission. The nature of the relationship, and Mr Y's response to the complaint are of central significance to the decision.

[76] We also accept the submission that without these circumstances being disclosed the significant penalty principle of general deterrence would be undermined.

[77] There is no dispute that the medical and personal information beyond disclosing alcoholism is not necessary for the public to understand the decision.

[78] We consider that this is one of those unusual cases where the interests of the lawyer and his family, particularly in relation to his rehabilitation, outweigh those of the public in knowing his name. We consider this poses no risk to the community and that the purposes of the professional disciplinary regime can be achieved notwithstanding some restrictions on publication.

[79] The name and identifying details of Mr Y, Ms T and Mr T are suppressed. In addition, any reference to medical or therapeutic information in any of the material held by the Tribunal is also suppressed, including Mr Y's personal history set out in his psychologist's report.

Orders

[80] We confirm the orders made on 3 February as follows:

1. The practitioner is suspended from practice for a period of four months, commencing 1 March 2022, pursuant to s 242(1)(e) and s 244.
2. An order, pursuant to ss 156(1)(c) and 242, that the practitioner formally apologise to the complainant, by the forwarding of the apology provided in 2020.
3. The practitioner is to pay the costs of the Standards Committee, in the sum of \$8,962, pursuant to s 249.
4. The s 257 costs of the Tribunal are to be paid by the New Zealand Law Society. These are certified in the sum of \$4,247.
5. The practitioner is to reimburse the s 257 costs to the New Zealand Law Society, pursuant to s 249.
6. There is a suppression order made under s 240, suppressing the name and any identifying details of the practitioner, and of Mr and Ms T respectively. The order also suppresses any medical or psychological information in the evidence, file or the decision.
7. Counsel are to provide the Tribunal with proposed redactions within seven days of the release of this decision to them in an unredacted form. The decision will not be published until the Chairperson has approved a redacted version.

DATED at AUCKLAND this 24th day of February 2022

Judge DF Clarkson
Chairperson