THE NAME OF THE PRACTITIONER, HER CLIENT, OTHER LAWYERS REFERRED TO IN THESE PROCEEDINGS AND THE PRACTITIONER'S PRESENT EMPLOYER ARE NOT TO BE PUBLISHED. THESE ORDERS ARE MADE PURSUANT TO S 240 LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 35
LCDT 017/22

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 3** Applicant
AND	**Ms W** Respondent

DEPUTY CHAIR
Dr J G Adams

MEMBERS OF TRIBUNAL
Hon P Heath KC
Mr S Hunter KC
Ms M Noble
Ms S Stuart

HEARING 2 August 2023

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 17 August 2023

COUNSEL
Ms N Town for the Standards Committee
Mr A Gilchrist for the Respondent Practitioner

DECISION OF THE TRIBUNAL ON PENALTY

Diminished responsibility for deceptive behaviour

[1] Where a practitioner tells lies to a client to conceal the practitioner's inaction, that breach of trust will usually warrant a lengthy period of suspension, if not strike-off. In this case, the Standards Committee sought a period of 18 months to two years suspension based on an inference of dishonest intent to deceive. We do not consider that the practitioner's conduct should be characterised in that way. This introductory section introduces the main reasons why.

[2] We see this case as one in which the practitioner was confronted by a number of physiological, mental health and psychological episodes which, in combination, explain (but do not excuse) the conduct in which she engaged. It is clear that she had diminished responsibility for her actions as a result of the cumulative effect of those events on her.

[3] Although traversing a period of 18 months, her misconduct relates to only one file; and the misconduct is in abrupt contrast with her two decades of responsible practice, not to mention many positive contributions to her profession. Put simply, her misconduct does not fit with all other conduct of the practitioner. It does not square with our assessment of her as a person and as a practitioner. She is a relatively senior practitioner who has no previous disciplinary history.

[4] Once firmly confronted with her wrongdoing, she promptly made peace with her former client; she refunded all fees, and further compensated the client with an agreed sum of $75,000. Her then counsel explained the reasons that led to the misconduct in a ten-page letter on 6 September 2021.[1] Shortly thereafter (on 23 September 2021),

[1] Bundle, pp 107-117.

the client's new lawyer wrote to the Lawyers Complaints Service,[2] recording the resolution between client and practitioner, and stating: "Having seen [the practitioner's] response to the Law Society and given the financial settlement, our client is no longer interested in pursuing the complaint." We infer that, once fully informed, the client recognised, and was moved by, her predicament, in coming to that stance. The letter of 23 September 2021 notes, and inferentially emphasises, the response to the Law Society before the financial settlement, in explaining why the client moved to a merciful position.

[5] Her avoidant behaviour was irrational in that it could never have resolved the issues that she sought to avoid. Apart from temporarily concealing shortcomings, the misconduct did not advance her interests. We accept that, even though she cannot avoid all responsibility, she was not totally rational in these panicky behaviours. From her evidence, we consider she remains in denial, insofar as she cannot bring herself to believe that she lied both to her client and opposing solicitors about reasons for delays in dealing with the proceeding. Nevertheless, we consider that a conclusion that she acted in an irrational manner out of an increasing level of panic fits better with the established facts than one of calculated, strategic dishonesty, as advanced by the Standards Committee.

[6] Because an adequate record of our decision necessarily involves disclosure of personal material about the practitioner, and because we do not assess her as a significant future risk to the general public, we prohibit publication of her name and that of her client and legal firms involved with the file the subject of the charges. By approaching the case in this way, we hope to provide a salutary reminder to members of the profession about the impact of undue stress on the way in which they undertake their business.

The charges

[7] The practitioner admitted two charges of professional misconduct as conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable.[3]

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[2] Bundle, p 657.
[3] Section 7(1)(a)(i) Lawyers and Conveyancers Act 2006.

[8] The Standards Committee pleaded three separate legs to the first charge, each leg sufficient on its own. Two of those legs were admitted, namely that she accepted direct instructions[4] and that she failed to act in a timely and competent manner.[5] The practitioner entered a solicitor's name on the record but enquiries by the Standards Committee establish that no solicitor was aware of the proceedings. The practitioner had acted for the client previously. On other matters, for other clients, she had proper instructions from solicitors. Her failure to have an instructing solicitor in this case contributed to the circumstances of risk for her client. Her failure to create a proper structure for the matter placed her, too, at the risk that became manifest in this case. She became a weak and aberrant link in the management of the matter.

[9] The leg we reject in the first charge is the allegation that she breached an undertaking.[6] In the course of the High Court proceedings, the practitioner drafted a memorandum of consent to timetable orders that expressed her obligation to comply with a filing date as an undertaking. We find that the use of the term "undertakes" did not, read in context, impose on her a solemn duty to the court beyond the ordinary terms of a timetable order. We find she was not subject to an undertaking of the kind referenced in r 10 of the Rules.

[10] The second charge involved nine false statements made by the practitioner to her client and to the opposing lawyers between August 2019 and February 2021. The practitioner had accepted instructions to pursue a civil claim for alleged negligent building design. Her false statements masked some ineptitudes in the documents she filed, provided plausible but untrue reasons for delays – these including reports of fictitious court actions (directions and teleconference). To her client, she suggested faults on the part of the court and the opposing lawyers; to the opposing lawyers, she suggested health issues for her clients were causing delays in her finalising documents, especially an amended statement of claim to cure defects in the pleadings.

[11] Details of the false statements are:

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[4] A breach of r 14.4 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules).
[5] A breach of r 3, exacerbated by her failures to disclose information to her client and keep it informed about progress.
[6] Which would have been a breach of r 10.3.

(a) On 9 August 2019, the practitioner referred to the Statement of Claim and Notice of Proceedings as being “filed” in an email to her client when that was not the case (and they would not be filed until 21 August 2019).

(b) On 13 November and 9 December 2019, the practitioner advised her client that the court had granted the defendants’ extensions (when this had not occurred).

(c) On 17 December 2019 and 18 February 2020, the practitioner advised the defendant’s lawyers that the Second Amended Statement of Claim (SASOC) was delayed due to her client’s ill health (which was untrue, as she had not yet provided the SASOC to the client).

(d) On 1 April 2020, the practitioner advised her client that the first defendant was late in filing their statement of defence (which was false as she had not yet filed the SASOC).

(e) On 23 March and 11 May 2020, the practitioner advised her client that Covid had suspended the timetabling for the matter (which was false as she had not yet filed the SASOC).

(f) On 24 June and 8 July 2020, the practitioner advised her client that there was a teleconference on the matter and that a number of directions had been made (neither of which were true).

(g) On 12 August 2020, the practitioner failed to advise her client that the statement of defence she had sent from the second defendant had been filed on 3 October 2019 was to be replaced once the SASOC was filed.

(h) On 23 November 2020 and 15 February 2021, the practitioner advised her client that she had sought new timetabling directions from the court (which was untrue as she had not).

(i) On 24 February and 26 February 2021, the practitioner advised the defendants’ lawyers that the SASOC had previously been filed but

misplaced by the court (which was false as it was only filed for the first time on 24 February 2021).

[12] We find that the practitioner knew the statements were false at the times she made them. If there were no basis for a merciful approach, they would amount to a gross breach of her duty to her client and her duty of candour to other parties in the proceeding.

Reasons for the practitioner's diminished responsibility

[13] The practitioner is married, with one child. She hoped to have a second child but experienced difficulty achieving and sustaining pregnancies. Aware that she was approaching the end of her child-bearing opportunity, she became increasingly anxious about her fertility. She engaged in specialist fertility treatment from 2014. She was prescribed potent endocrine stimulants, particularly through the period in 2019 when her professional misconduct occurred.

[14] Specialist Adult Psychiatrist Dr Campbell Emmerton comments:

> Amid fragile expectations and the medically induced state of physiological stress she achieved early pregnancies, however a series of miscarriages ensued. Each loss of pregnancy compounded the emotional upheaval for [her] and her husband, while she maintained legal practice and broader engagements with consistent commitment. She felt unable to disclose these personal upheavals to colleagues, while fulfilling professional and community tasks.[7]

[15] In November 2019, her remaining fertilized ovum were destroyed as they had not reached maturity. She describes her emotional state as "grief-stricken and distraught."[8] In all, she experienced eight miscarriages. In the period April 2014 to August 2020, she experienced five miscarriages, three of them after 10 weeks of pregnancy. Her last two miscarriages occurred on 12 April 2020 and 24 August 2020.

[16] Dr Ratcliffe, psychologist, with a background in treating stress-related disorders, provided a "professional opinion on the effects on [the practitioner] of the combination of IVF hormones, miscarriages and grief throughout the [relevant time]." Dr Ratcliffe saw the practitioner on four occasions and had an additional in-depth telephone call

[7] Dr Emmerton opinion 31 May 2023.
[8] Practitioner's affidavit 2 March 2023, at [22].

with her. The practitioner reported the effects of the IVF drugs during "the actual IVF period from August 2019" as "intense: she experienced high anxiety, she had heart palpitations, she was constantly nauseous and she was highly fatigued. She said she experienced memory fog, she could not concentrate or think clearly, and found herself starting tasks and not finishing them. She said she was stressed during this time but she tried to keep her stress levels down because she knew stress was not helpful for conception."[9]

[17] Like Dr Emmerton, Dr Ratcliffe noted the compounding grief effects of continued miscarriages. She reports the practitioner "said she spiralled into depression and grief. She said she couldn't sleep or even talk about the failure of the IVF, her brain felt fogged constantly, she was distracted and anxious and she felt numb. She said the fertility drugs remain in the system for 12 months…" The practitioner told her: "she realizes she should have sought help in late 2019 but felt she ought to be able to manage by herself."[10]

[18] In September 2021, Dr Ratcliffe employed a formal tool (Beck Depression Inventory) to establish that the practitioner was severely depressed.

[19] Dr Ratcliffe noted the following in moving to conclude her report.

> Infertility and fertility treatment are stressful conditions in themselves. In addition to this the drugs used in the treatment of infertility affect the hormonal balance of the body and have the potential for a wide variety of side effects with anxiety-type symptoms such as nausea, headaches, insomnia and mood swings being recorded.
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> [The practitioner]'s account of her symptoms over the period she was undergoing IVF and over the period she was coming to terms with the fact that IVF had failed for her are also consistent with what is known of those experiencing stress and depression and would have exacerbated any side effects from her IVF medication Anxiety, heart palpitations, nausea, fatigue, insomnia and in particular, concentration and memory problems are inevitable consequences of a high level of stress. The chemicals released during stress have a number of profound effects on the brain. The most salient of these in [the practitioner]'s case is to make it difficult to think clearly and to remember. Some of the stress chemicals interfere with neural transmission, the passage of information through the brain, making it harder for the brain to operate and process the information it receives.

[9] Ratcliffe report 22 November 2021, p 4.
[10] See above n 9, pp 4 and 5.

> Thinking and memory are in part chemical processes. The brain is a network of cells and fibres and information passes from the body of a cell down the fibre. The fibres of one cell do not reach the next, a gap known as the synapse exists between the end of one fibre and the body of the next cell. In order to pass over this gap and continue the process of thinking and memory the nerve fibre releases a chemical known as a neurotransmitter which allows the nerve impulse to be picked up by receptors on the next cell and allows the passage of information to continue. Some of the stress chemicals stop the release of the neurotransmitters. Stage fright is a familiar example of forgetfulness caused by stress. At lower levels of stress, poor concentration, forgetfulness, difficulty making decisions and "brain fog" are common.
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> [The practitioner]'s thinking and memory would also have been impacted by her two miscarriages over the period she forgot to attend to the [client's] cases.
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> The hormonal response of the body after a miscarriage is the same as after a full term delivery: mood swings, difficulty concentrating and sleeping, fatigue, appetite and energy level decreases are common for women.

[20] While by no means a perfect analogy, the criminal law itself[11] recognises the effect on the mental health of a woman of not having fully recovered from the effect of giving birth to a child – the position must be (at least) equally so when a woman has gone through IVF treatment for some five years between 2014 and 2019 and suffers five miscarriages, three of them after 10 weeks of pregnancy. It is not surprising that the practitioner's ability to process legal work on a rational basis was affected by those considerations.

[21] Our assessment of the practitioner is that she has typically demanded high standards of herself. She has held senior positions in legal firms, undertaking responsible work with approbation by clients. Like a person with hypothermia, she attempted to soldier on, not seeking help when she was very unwell, not even alerting those around her of her plight.

[22] The practitioner was also (at the same time) labouring under three additional sources of stress. First, she home-schooled her daughter during the Covid period. Second, her husband's business failed during the Covid period. Third, her grandmother died overseas during the Covid periods, and she was unable to see her grandmother or take part in ordinary family grieving processes. We assess these

[11] Crimes Act, s 178: Infanticide; See also *R v Wright* [2001] 3 NZLR 22 (CA) as to discussion of comparable diminished responsibility in manslaughter of a child, and resultant impact on sentences.

additional three stressors as particularly hard for the practitioner on account of her personality.

[23] Although the misconduct calls for condemnation, we regard this as an appropriate case to extend a merciful approach. Her misconduct was not borne out of a desire to harm the client, nor to advance her own interests beyond the immediate embarrassment of accepting she had been failing in her work. When finally forced to the point (her client having instructed new lawyers), she did everything she could to make things right for the client. This was at considerable expense to her personally, including financially, compounded by the failure of her husband's business during the Covid period. We take note of her former client's attitude. It, too, was moved by her personal circumstances, once they were shared, and they had experienced her services in prior, happier circumstances. Her readiness to compensate the client speaks to her basic integrity. In all, we regard this chapter as having been the exception, produced by overwhelming stress, rather than the disclosure of a basic flaw in her professionalism.

Name suppression

[24] The Tribunal prefers to work within a climate of open justice. It encourages the community to have confidence in our regulatory work if practitioner names are routinely published. Nevertheless, s 240 Lawyers and Conveyancers Act 2006 permits us to order non-publication where we are "of the opinion that it is proper to do so."

[25] In this case, it would be inappropriate to publish the detail of the practitioner's medical and stress-related matters. She is entitled to the dignity of privacy. On the other hand, there are important messages for the profession and the public in this case. So we can be free to provide a full record of our reasons, we choose to order non-publication of her name.

[26] As is routine, we also direct that the names of her client, other lawyers referred to in these proceedings, and her present employer, shall likewise not be published.

[27] We assess that there is negligible risk to the public if her name is not published. We have found her underlying character and practice to be and to have been satisfactory. What occurred in this matter was an exception, unlikely ever to be

repeated. It stood out against her other work, her general reputation, and her record of service (mentoring, education) to the profession. Moreover, she has taken every step we could recommend, to make her practice safe. She has given up practice as a barrister; she has taken employment at reduced hours as an in-house lawyer; she has undertaken counselling. She was frank about these proceedings with her employer. Her employer is well satisfied with her work and her ethical behaviour. There is no further step we could recommend, to position her more safely for continuing practice. She consents to an order that she should not practise on her own account without permission.

[28] We agreed to postpone the start of any period of suspension to enable her employer to make practical arrangements so that she may retain her employment subject to observation of the period of suspension.

Lessons for the profession

[29] There are valuable lessons for the profession in this case. One is the wisdom of complying with the intervention rules, requiring a solicitor (except where excepted by the rules). Had she done so, the practitioner would probably have been called to account long before this matter reached the state it did. It is apparent that she had no similar problems in her other files, in all of which she had instructing solicitors properly engaged. Another lesson is the need for lawyers to recognise when they are not coping, and to call for assistance (whether from a colleague or other professional), and to ensure the client is always informed and advised.

Penalty

[30] In this case, despite the desperation we recognise in the narrative, the misleading conduct extended over a long period, and it requires condemnation. The misleading falsehoods had an apparent measure of coherence and consistency which adds to their pernicious nature.

[31] The characteristics of coherence and consistency in the misleading messages suggest a calculated degree of deliberation but we are unable to reconcile that view with other features of this case. Our assessment of the practitioner's performance elsewhere, and her contributions to her profession, are strong contra-indicators. So,

too, are her responses and dealings with the client at the end, matters that were acknowledged by the client whose lens is important to acknowledge in considering the matter overall. The ultimate futility of the conduct strongly suggests it was not "calculated" in a strategic sense: no person with the mental acuity of the practitioner would ever have designed a course fraught with such futility – the conduct speaks of panic rather than calculation, despite the repetitions. As noted earlier, the main stressors in this case can be compared with those giving rise to the recognition of diminished responsibility through the provision, for example, of infanticide in criminal law. This is an apt comparator when we take note, as we do, of Dr Ratcliffe's evidence that "the hormonal response of the body after miscarriage is the same as after a full-term delivery."

[32] When we consider what happened in the light of physiological and mental ill-health, we are inclined to take a merciful view on penalty. This does not mean a permissive approach, but the response must not only match the misconduct but must also conform to our assessment of the practitioner and our assessment of negligible risk to the public. In addition, we commend the exemplary steps she has taken to adjust her practice in appropriate ways.

[33] No two cases are identical. This case presents more facets than most. We do not disagree with the Standards Committee proposition that this behaviour, absent mitigating features, would attract suspension of 18 months to two years. In some cases, too, the presenting misconduct is the revealed tip of an iceberg of poor professionalism. That is not the case here.

[34] The case of *Valu-Pome'e*[12] resulted in strike-off but the practitioner's engagement with the disciplinary process was a factor in that severity. *Cooper*[13] involved dishonesty to the court, and resulted in 18 months suspension. *Claver*[14] and *Lester*[15] both involved multiple defaults. *Claver* ended with 12 months suspension whereas *Lester*, who misled one client about progress on a file, avoided suspension and was fined $7500 and censured.

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[12] *Auckland Standards Committee 1 v Valu-Pome'e* [2014] NZLCDT 87.
[13] *Cooper v Waikato Bay of Plenty Standards Committee No 2* [2015] NZHC 2352.
[14] *Otago Standards Committee v Claver* [2019] NZLCDT 8.
[15] *Wellington Standards Committee 1 v Lester* [2015] NZLCDT 23.

[35] Mr Gilchrist explained his submission about intentionality in a nuanced way. We accept that the practitioner's misleading statements were made while she was very unwell, and that it is wrong to treat them as calculated or determined in the clearest form of such descriptors. We accept his comparison with *Anderson*[16] where medical information led to compassionate treatment of a statement in an affidavit that, although literally correct, was misleading. That case resulted in a $5000 fine and a contribution of one half to the Law Society costs.

[36] In the course of submissions, Tribunal member Hunter referred counsel to *Latton*[17] where a practitioner who misled a client about actions on a file, received leniency owing to a medical feature that contributed to his behaviour. Despite a prior disciplinary history, he was dealt with by one month's suspension, a fine, and certain other orders.

[37] We repeat: no two cases are identical. We take the view that those cases where medical factors and compassion affected the outcome: *Lester*[18], *Anderson*[19], *Latton*[20]: are sounder guides in the present case. There is a need to mark the conduct in order to meet public expectations of denunciation, and to send a firm message to the profession. Beyond the order restricting her from practising on her own account unless permitted, we see no need for other orders to protect the public.

Orders

[38] We make the following orders:

1. The practitioner is suspended from practice for a period of two months commencing on 1 October 2023 (ss 242(1)(e) and 244).

2. The practitioner shall not practice on her own account unless authorised by the Disciplinary Tribunal to do so (s 242(1)(g)).

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[16] *Auckland Standards Committee 3 v Anderson* [2022] NZLCDT 25.
[17] *Auckland Standards Committee 1 v Latton* [2017] NZLCDT 14.
[18] See above n 14.
[19] See above n 15.
[20] See above n 16.

3. The practitioner is censured in the terms set out in Appendix 1 to this decision.

4. The practitioner shall pay the Standards Committee costs of $12,890 (s 249).

5. The New Zealand Law Society shall pay the Tribunal costs in the sum of $3713 (s 257).

6. The practitioner shall reimburse the New Zealand Law Society for the Tribunal costs payable under s 257 which are certified in the sum of $3713 (s 249).

7. The name of the practitioner, her client, other lawyers referred to in these proceedings and the practitioner's present employer are not to be published (s 240).

DATED at AUCKLAND this 17th day of August 2023

Dr J G Adams
Deputy Chair

Appendix 1

Censure

Ms W, you are hereby censured for having misled both your client, and a colleague acting for the other side in a proceeding, in order to conceal, for a time, your failure to progress the case appropriately. You are additionally censured for your failure to ensure a solicitor was properly engaged to ensure a proper professional structure for the proceeding. Despite contextual matters that call for sympathy, it was always your responsibility to ensure the client was properly served and, in this duty, you failed. This censure represents a permanent mark on your professional record.