PERMANENT NON-PUBLICATION ORDERS IN PLACE FOR THE NAMES OF THE CLIENTS, THE CHIEF EXECUTIVE OFFICER OF THE MORE DISADVANTAGED CLIENT AND DETAILS OF PERSONAL HEALTH AND CIRCUMSTANCES OF THE RESPONDENT. THESE ORDERS ARE MADE PURSUANT TO S 240 LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 53
LCDT 005/23

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **CENTRAL STANDARDS COMMITTEE 3**
Applicant

AND **LIZANDRA MICHELLE BAILEY**
Respondent

CHAIR
Dr J Adams

MEMBERS OF TRIBUNAL
Mr S Hunter KC
Ms K King
Ms M Noble
Ms P Walker MNZM

HEARING 22 November 2023

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 5 December 2023

COUNSEL
Mr M Hodge for the Standards Committee
Mr T Pasley for the Respondent Practitioner

DECISION OF TRIBUNAL ON PENALTY

Nightmare web of client conflict

[1] This is a cautionary tale about a competent lawyer who got enmeshed in the nightmare web of client conflict. It is a grim tale, leading inexorably to regrets and self-doubt. A common tale, it starts so easily. Both parties want the same outcome so what could go wrong? In this case it went wrong and got worse. And worse.

[2] We would like to warn practitioners against sleepwalking into this nightmare. Rule 6.1 (and sub-rules 6.1.1. to 6.1.3)[1] are too easily overlooked or misunderstood. Because of its importance, and for ready reference, we include the text of rule 6 (in its entirety) as an Appendix to this decision (Appendix 1).

[3] The rules can be misunderstood because they *are not a blanket prohibition against* acting for more than one client in a matter. This can be interpreted as *permission* to act. But permission should not be taken as encouragement, and that permission is restricted to limited circumstances. The rules permit acting for more than one client in a matter **only where the risk** (that the lawyer may be unable to discharge the obligations owed to one or more of the clients) **is negligible**, **and** where **the informed consent of all parties** is obtained. The threshold above which the prohibition in rule 6.1 applies is "a more than negligible risk". That threshold is very low[2]. In most cases where there is a risk of conflict, the lawyer **must not act for more than 1 client on a matter**.

[4] Rule 6.1.2 anticipates the situation where the risk is assessed as negligible but issues nevertheless arise. If the risk is negligible and informed consent is obtained, but it later becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[2] *MC v QK2* LCRO 123/2019 and LCRO 124/2019.

immediately inform each of the clients and **terminate the retainers with all** of the clients. Exiting the engagements may be disappointing and even frustrating for the lawyer and perhaps one or more of the clients, but the exit must nevertheless be effective and complete.

[5] Rule 6.1.3 creates a limited exception that allows a lawyer to continue to act for **1 client** provided that the other clients concerned, **after receiving independent legal advice** (not merely being offered it), give their **informed consent** and **no duties to the consenting clients have been or will be breached**.

[6] In the present case, Ms Bailey, although experienced, competent, and otherwise conscientious, misunderstood the rules and compounded her errors by failing to withdraw completely when conflict arose. Because of that, she came close to being suspended from practise. Suspension was a live issue for us, but we determined instead to impose the maximum fine. Our reasons for that decision, and a fuller narrative of how things went wrong, follow.

[7] We shall address these issues:

- What is the charge?
- How did Ms Bailey breach the rules?
- What is the gravity of her breaches?
- What is the appropriate penalty?

What is the charge?

[8] Ms Bailey and counsel settled the form of the charge which she admitted in advance of the hearing. This allowed counsel to focus their submissions on the narrow area within which they agreed, and we concur, our penalty orders could be made. Apart from censure, fine and costs, our effective choice lay between a short period of suspension or a fine.

[9] The charge was laid under s 241(c)[3]. We find that Ms Bailey, as she admitted, was guilty of negligence or incompetence in her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on her fitness to practise or as to bring her profession into disrepute. The generalised terms of the charge are a bit of a mouthful. They don't give much of an idea about what went wrong. So, we move to specifics.

How did Ms Bailey breach the rules?

[10] Ms Bailey is an experienced lawyer dealing with franchising agreements. She had an excellent reputation, no prior disciplinary history, and had never been involved in litigation. She was a partner in a firm. An established franchisor had been a major client for 25 years.

[11] Her major client entered into agreements with franchisees and reviewed those arrangements from time to time. Generally, these transactions appeared to be routine. The major client sometimes suggested she act for the other party. The major client sometimes suggested to the other party that she act for them. Often, she did.

[12] We shall call the major client "A" and the franchisee "B". A suggested to B that it engage A's lawyer, Ms Bailey, to act for B in relation to a lease renewal and rent review (2014/2015). B instructed her. Ms Bailey, who was also acting for A in the renewal matter, failed to obtain both A's and B's informed consent pursuant to rule 6.1.1. She compounded this failure in late 2015 to early 2016 when, acting for both in relation to arrears for third party fees, she failed to obtain the informed consent of both A and B under rule 6.1.1. Informed consent is defined in the rules as:

> consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved.

[13] We agree with the Standards Committee that Ms Bailey should have advised B of several matters for it to give informed consent to her acting for A and B in the renewal and fees matters. These included: that she had a long professional relationship with A who was her client, and whose best interests she had to promote; why she

[3] Lawyers and Conveyancers Act 2006 (LCA).

considered there was no more than a negligible risk of conflict; what would happen if conflict arose (i.e. the effect of rules 6.1.2. and 6.1.3); and ensure that B understood the import of these matters when it consented to her acting for B as well as for A.

[14] An actual conflict did not arise until April 2018. Ms Bailey concedes that the interests of A and B were not aligned regarding a variation of the franchise agreement between A and B. A proposed some new terms. From the earlier transactions, Ms Bailey had a relationship with B's director. Acting for A, she sent B's director the Deed of Variation together with a recommendation that he seek independent legal advice. However, her recommendation was equivocal because she added that she had been advised he didn't want independent advice and she sent a waiver of independent legal advice for him to sign. Which he did. He signed and returned the Deed. She acted for both parties.

[15] Although B signed a waiver document, Ms Bailey accepts it fell short of what rule 6.1.1 requires in terms of informed consent. However even if proper informed consent had been obtained from A and B, this was not a matter where rules 6.1 and 6.1.1 would permit her to act for both. The low bar had been easily surpassed and there was more than a negligible risk that Ms Bailey would not be able to discharge her obligations to A or B. Accordingly, B's interests were placed at risk. To some extent A's interests were placed at risk. Ms Bailey was required to immediately inform both parties and terminate both retainers. She did not. If she had proposed to continue acting for A, a muti-step process would be triggered. B would require independent advice (as that term is defined in the rules) regarding Ms Bailey acting for A in the conflict matter. And only if that advice was accepted, and no other duties breached, could B then give informed consent under rule 6.1.3 for Ms Bailey to continue to act for A. This did not occur.

[16] In April 2019, Ms Bailey acted again for A and B on a dispute with a third party about their charges. She sought consent from both parties but she did not address matters necessary to obtain "informed" consent from A and B. B's director consented to her acting for B on a basis that A was "copied in." Ms Bailey failed to clarify this and proceeded to act for both.

[17] In September 2020, A purported to terminate the franchise agreement with B. B filed High Court proceedings. In support of its application for an interim injunction,

B's director swore an affidavit referring to the circumstances in which he was presented with the Deed of Variation in 2018, and referring to a telephone conversation he says he had with Ms Bailey.

[18] The blurred obligations were further smudged because the firm in which Ms Bailey was a partner acted as solicitor on the record for A in the injunction proceedings. Rule 6.2 spreads the reach of rule 6.1 beyond the individual lawyer. In circumstances where Ms Bailey, a partner in the firm, was conflicted, the firm should not have acted. Ms Bailey compounded her breach to B by attempting to appear in court as second counsel for A. Unsurprisingly, B's counsel objected.

[19] Ms Bailey further compounded her breach to B by swearing an affidavit disputing evidence given by B's director. Whatever the truth of the matter, Ms Bailey was bound by confidentiality to B, her former client. She was not at liberty to choose to act for either party. Under rule 6.1.2 her duty was plainly to terminate both retainers. Even where facts were at large between the parties, she could not volunteer evidence where it was in breach of her duty of confidentiality. In the context of the litigation, her affidavit was contentious. Awkward as it was for her, her duty was to stand on the sideline, mute. From B's point of view, its former lawyer was actively engaged against it. This is the very thing that rules 6.1 to 6.3 guard against. That Ms Bailey, unused to litigation, asked advice from her partners, who supported her in swearing the affidavit, is a mitigating factor, although she admits gallantly that she is responsible for her own actions.

[20] Ms Bailey could not let go of the matter. She emailed B's lawyer to advise that all emails were to be sent to her as well as to counsel involved in the proceedings for A. In November 2021, she represented A in a mediation between the parties. In September 2022, she sought to attend a settlement conference between the parties as representative of A.

[21] How does it seem, in overview? Ms Bailey, competent and untroubled, acted for two parties, as she had often done, failing to ensure party B was properly confronted with the risk, and the consequences if the risk materialised into actual conflict. When conflict emerged, she failed to act as required by the rules – which require termination of both retainers – but, instead, she chose to align herself with her longstanding client. She tried to act as counsel, swore a contentious affidavit, continued to be involved in

the dispute, even acting as counsel at mediation, and later seeking to appear at a settlement conference.

[22] Anyone can make a mistake. What seemed a negligible risk may surface as a real dispute. Ms Bailey's failure to terminate both retainers, her ongoing engagement in the proceedings, and the duration of that engagement, exacerbate her initial errors.

What is the gravity of her breaches?

[23] A lawyer is like an extension of the client. B and B's director were justifiably aggrieved to find their former lawyer lined up against them in important litigation. The situation turned into one where their professional helper switched sides. The outflow was a complete breach of the support and confidentiality that a client is entitled to expect of their lawyer. Clients should be able to trust their lawyer and expect ongoing fidelity. That was unavailable here.

[24] Even if the conflict was not predicted, when it occurred, the lawyer's duties are clear. But Ms Bailey ignored the precise fallback instruction of rule 6.1.2 and continued acting for one client. This exacerbates her wrongdoing considerably.

[25] We find that her breaches were grave. The long duration of the breaches reflect poorly on the profession.

What is the appropriate penalty?

[26] Mr Hodge advanced the Standards Committee case fairly when he observed that the penalty must fit the profile of the practitioner.[4] We agree with his submission that suspension is engaged as a potential outcome. Relevant precedents demonstrate that. But we agree, too, with his submission that suspension is not the only inevitable outcome here. A substantial fine is also within range.

[27] And, as Mr Hodge further notes, we are obliged to impose the least restrictive orders that will properly reflect the gravity of the matter and reflect the several things we must incorporate in considering our penalty response. These include adjustments for aggravating and mitigating factors, relativity to other cases, and considerations of

[4] *Auckland Standards Committee 4 v Kennelly* [2022] NZLCDT 46.

the character of the practitioner. As it happens, three members of this Tribunal panel also sat on the *Jacobsen*[5] case.

[28] Ms Bailey taking what turned out to be indifferent advice from her litigation partners about swearing the affidavit is mitigatory. So too, is their acting in litigation in a matter where their partner, and therefore they, were conflicted, which smudged the boundaries for Ms Bailey. But none of that excuses the duration of Ms Bailey's failure to recognise where her duty lay. That duration, well over 18 months, is a significant aggravating factor.

[29] The Standards Committee does not suggest that Ms Bailey's conduct caused or aggravated the matters at issue in the High Court proceedings between the clients. We are not aware that her conduct caused financial damage to either client.

[30] Both counsel referenced the same three recent precedents. In each of them, suspension was imposed.

[31] *Morahan*[6] was the worst case. The practitioner had acted for husband and wife. He was a trustee in a family trust. He acted against the interests of the wife, swore a misleading affidavit and behaved poorly in response to the charges. He had prior disciplinary history, including matters raising similar issues. He was suspended for four months. There was inferential ongoing risk to the public because of the pattern of his offending.

[32] *Jacobsen*[7] was a worse case than the present because, although the practitioner commenced a rescue package to avoid her mother losing a loved holiday home, the practitioner failed to protect her mother's interests, as she'd promised, and structured arrangements so she obtained personal benefit. Her mother suffered no financial loss. The practitioner had no prior disciplinary history and was remorseful. She admitted two charges of misconduct and was found guilty of a defended third charge but her defence was understandable and not aggravating conduct. There was no ongoing risk to the public. She was suspended for ten weeks.

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[5] *Waikato Bay of Plenty Standards Committee v Jacobsen* [2021] NZLCDT 18 (liability); and [2021] NZLCDT 28 (penalty).
[6] *Wellington Standards Committee 2 v Morahan* [2017] NLZCDT 34.
[7] *Waikato Bay of Plenty Standards Committee v Jacobsen* [2021] NZLCDT 28.

[33] In *Monckton,*[8] the practitioner made a well-intentioned but misguided transfer of trust property that advantaged one beneficiary. It created a mess that was expensive to sort out. There was little risk to the public. The practitioner was ordered to contribute $10,000 to their costs and was suspended for one month.

[34] Compared with those cases, Ms Bailey has no prior disciplinary history. Her conduct was not undertaken for improper personal gain. Although slow to acknowledge, or perhaps appreciate, her wrongdoing, she has fulsomely acknowledged it now. Her conduct of her case has been exemplary. Her conscientious response narrowed the ambit of the hearing. She has admitted what she should and has not tried to exculpate herself. Her character is unimpaired.

[35] It is obvious to us that she fully understands her defaults, and that she has been miserable about it. This is not a case where suspension can be justified by requiring the practitioner to consider their default. She has done that work already and, in a teaching situation, has shared her remorse as a lesson to other practitioners. She is contrite. We assess the future risk to the public as low.

[36] Ms Bailey is not typical of many who appear in the Tribunal because she has a well-earned reputation for competence and she is generally conscientious. She had a blind spot in respect of rule 6.1 to 6.1.3. It must have been a challenging experience for her, to have this matter to answer to. We would like to minimise that risk for others, too.

[37] Where Ms Bailey has fallen short includes, not only her failure to appreciate the risk, or to handle it according to her duty under the rules, but also letting the conflict (and her engagement) drag on for such a long time. Although her breach is grave, going to the heart of the lawyer-client relationship, it is an isolated case, albeit drawn-out.

[38] We have considered the need to send a firm message to the public and to the profession. We are concerned that recognising the potential for conflicts and managing them when they arise are risk areas for the profession. We wish to raise the profile of this matter for the better guidance of lawyers and for the safety of clients. We

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[8] *Waikato Bay of Plenty Standards Committee 1 v Monckton* [2014] NZLCDT 51.

wish to make an example of this case. That said, we do not have a need to be undeservedly harsh to Ms Bailey herself whose conduct, this aberrant saga aside, has been conscientious and competent.

[39] We do not usually reveal our out of court discussions, but we've agreed to share that, in this case, we each considered and weighed the possibility of a short period of suspension (perhaps one or two months). As our discussions developed, it became clear that we may not reach unanimity about suspension, but would all support a fine of the maximum, $15,000, as a mark of the gravity of the matter.

Non-publication

[40] We made permanent non-publication orders under s 240 in respect of the following: names of the clients; the name of the CEO of the more disadvantaged client; details of personal health and circumstances of Ms Bailey.

Penalty

[41] No claim is advanced for client compensation.

[42] Although Ms Bailey indicated in her affidavit that she was willing to apologise to her more disadvantaged client, an offer that was confirmed by Mr Pasley in the hearing, we do not make a formal order. That is because the clients are still involved in litigation, and we cannot assess whether an apology at this time might affect those proceedings. We expect her to apologise in due course but there is no order to that effect. The more disadvantaged client was present throughout our hearing and will have heard this discussion.

[43] We indicated our penalty orders, after having deliberated, at the hearing.

Orders

[44] The orders made at the hearing are as follows:

1. Censure (pursuant to s 156(1)(b) LCA).

Ms Bailey, you have admitted a charge of negligence or incompetence in your professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on your fitness to practise or as to bring the profession into disrepute (s 241(c) LCA). In a first engagement you failed to ensure two clients gave properly informed consent to your acting for both; in a later engagement by the same clients you accepted instructions to act for two clients where there was more than a negligible risk of their having conflicting interests; when conflict arose, you failed to terminate both retainers; you attempted to intervene in their proceedings; you filed a contentious affidavit that breached client confidentiality; you continued your involvement in the matter, demonstrating partiality to one of the clients. These compounding breaches of rules 6.1 to 6.1.3 resulted in a tangle for your clients and reflect poorly on professional legal services. For these breaches, you are formally censured.

2. Ms Bailey to pay to the New Zealand Law Society a fine of $15,000 (pursuant s 156(1)(i) LCA).

3. Ms Bailey to pay costs to the Standards Committee of $19,900 (pursuant s 249 LCA).

4. The New Zealand Law Society to pay the Tribunal costs which are certified at $3,449 (pursuant s 257 LCA).

5. Ms Bailey to reimburse the New Zealand Law Society for the Tribunal s 257 costs in the sum of $3,449 (pursuant s 249 LCA).

DATED at AUCKLAND this 5th day of December 2023

Dr JG Adams
Deputy Chair

Appendix 1

Chapter 6[9]
Client interests

6 In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

Conflicting duties

6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.

6.1.2 Despite rule 6.1.1, if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.

6.1.3 Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have been or will be breached.

6.2 Rule 6.1 applies with any necessary modifications whenever lawyers who are members of the same practice act for more than 1 party.

6.3 An information barrier within a practice does not affect the application of, nor the obligation to comply with, rule 6.1 or 6.2.

Conflicting office

6.4 A lawyer must not act in any matter where, by virtue of membership of a public authority by the lawyer, a member of the lawyer's practice, or a member of the lawyer's family,—

(a) a significant risk of a conflict exists; or

(b) it may reasonably be concluded that the lawyer or his or her practice are able to make use of the membership to the advantage of the client; or

(c) the lawyer's ability to advise the client properly and independently is compromised.

[9] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.