LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 20

Ref: LCRO 177/2021

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**FA** Applicant
AND	**LL** Respondent

DECISION

The names and identifying details of the parties in this decision have been changed.

Introduction

[1] Ms FA has applied to review a determination by the [Area] Standards Committee (the Committee) dated 12 October 2021, in which the Committee made a finding of unsatisfactory conduct against Ms LL, censured and fined her, ordered her to pay compensation to Ms FA and ordered her to pay costs.

[2] Ms FA's review application raises two issues: first, that the Committee failed to consider an issue of complaint that she had raised, which for convenience I will refer to as the breach of duty issue,[1] and secondly, she challenges the adequacy of the penalties imposed and the orders made by the Committee against Ms LL.

[1] More formally, the issue is whether Ms LL breached r 8.7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) by acting against Ms FA in circumstances where there was a risk of breaching the duty of confidentiality owed to her as a former client. I set out the rule more fully, later in this decision.

[3] Ms LL has not applied to review either the finding of unsatisfactory conduct, or the penalties imposed and other orders made by the Committee.

[4] The parties have agreed that I should direct the Committee to consider and determine the conflict issue. I deal with that later in my decision.

Background

[5] Ms LL is a partner in the law firm [Law Firm A] (the firm).

[6] The firm has previously acted for Ms FA as well as her partner at the time, Mr EH. The legal work, between 2016 and 2019, concerned the sale and purchase of properties, wills and powers of attorney.

[7] Ms FA and Mr EH separated in early 2020. She remained living in the family home with the couple's children.

[8] Ms FA was employed by an agency which contracted its services to two Government departments. At that time she was working from home.

[9] Mr EH instructed Ms LL to act for him in connection with relationship property and care of children issues.

[10] Ms FA instructed another firm of solicitors to act in those matters.

[11] Ms FA became concerned that Mr EH may have seen and copied confidential documents in connection with her employment, when he went to the family home in her absence.

[12] Ms FA informed her employer about her concerns.

[13] On 3 June 2020, Ms FA's employer (the employer) wrote to Ms LL seeking assurances about what had taken place, emphasising the confidential nature of the documents (the confidential documents issue).

[14] Also on 3 June 2020, Ms LL replied to the employer on Mr EH's behalf. She confirmed that Mr EH had not seen or accessed any of the confidential information. Her letter also included comments that were critical of Ms FA, as well as information about the wider relationship property and care of children issues between the couple.

[15] On 9 June 2020 Ms FA's solicitors wrote to Ms LL objecting to her acting for Mr EH against Ms FA, she having been a former client of the firm. They also raised concerns about Ms LL's letter to the employer, and asked her to withdraw the letter.

[16] Ms LL ceased acting for Mr EH, but declined to withdraw the letter that she had written to the employer.

Original complaint

[17] Ms FA complained about Ms LL's conduct, in an email to the New Zealand Law Society Complaints Service (Complaints Service) dated 25 March 2021 as follows:

(a) Ms LL had written to the employer on 3 June 2020 in terms which were highly critical of Ms FA and which also referred to wider and ongoing care of children issues.

(b) The employer put her on two weeks leave after he received LL's letter.

(c) As well as being gratuitous, Ms LL's letter was factually incorrect.

(d) Ms LL's letter contributed to Mr EH's psychological abuse of Ms FA.

Response

[18] In a letter to the Complaints Service dated 14 June 2021, Ms LL said

(a) Mr EH had not waived privilege, so she could not disclose any advice that she gave to him in connection with the confidential documents issue.

(b) She stopped acting for Mr EH on 9 July 2020.

(c) For those reasons, she was unable to withdraw the letter she had written to the employer about the confidential documents issue.

Further comment by Ms FA

[19] Commenting on Ms LL's response to her complaint, in an email to the Complaints Service dated 23 June 2021, Ms FA made the following points:

(a) She has been a client of the firm and its terms of engagement, which had been provided to her at the time, emphasise that client information will be held in strict confidence.

(b) Ms LL breached a duty of "professional responsibility" that she and the firm owed Ms FA, by acting against her.

(c) In particular, Ms LL had access to "financial information about [Ms FA] arising from [the firm's engagement] for the purchase of a property that could have (and may have) been used to the advantage of Mr EH and to [Ms FA's] disadvantage in the dispute…"

(d) This breach of professional obligations has caused Ms FA "considerable distress and cost."

(e) Ms LL's decision to stop acting for Mr EH "should be seen as a tacit acknowledgement by her that there had been a [breach of duty] and that she had breached her professional obligations to [Ms FA] in this regard."

(f) Ms LL's letter to the employer about the confidential information issue, went "well beyond a reasonable response … and [appears] designed to cause … problems in [Ms FA's] employment relations."

[20] Ms FA attached a copy of the firm's terms of engagement dated 6 June 2019, when it had acted in connection with the purchase of a property by Ms FA and Mr EH.

Notice of Hearing

[21] The Committee resolved to set Ms FA's complaint down for a hearing on the papers, and issued a Notice of Hearing to the parties dated 22 July 2021.

[22] The Notice of Hearing invited submissions in relation to:

> The issues raised by the alleged conduct itself, including:
>
> (a) whether Ms LL used legal processes for the purpose of causing unnecessary embarrassment, distress or inconvenience to Ms FA's reputation, interests or occupation, in breach of r 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules); and
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> (b) whether when acting in a professional capacity, Ms LL failed to treat Ms FA with respect and courtesy, in breach of r 10.1 of the Rules.

[23] The notice said that the Committee would consider "the above issues … individually and collectively."

Submissions

[24] Both parties provided extensive submissions to the Committee in response to its Notice of Hearing. Given the relatively narrow scope of the issues on review, it is not necessary for me to extensively summarise those submissions.

Ms LL

[25] Briefly, Ms LL denied that her letter to the employer about the confidential information issue breached either of rr 2.3 or 10.1 of the Rules. She emphasised that replying to the employer "was not the use of legal processes", it was her responding to questions that had been raised about whether Mr EH had seen or accessed confidential information in connection with its business.

[26] Moreover, Ms LL submitted that her letter had to be looked at "in light of the situation that Mr EH and [Ms FA] were in at the time". That situation was one of high anxiety and conflict, in which Mr EH considered that "slurs" had been made against him by Ms FA.

[27] Ms LL submitted that her letter to the employer provided an opportunity for Mr EH to "give [his] side of the story."

Ms FA

[28] Ms FA emphasised the effect on her of the letter that Ms LL had sent to her employer concerning the confidential information issue. She said that she was placed on leave for two weeks after her employer received the letter, as well as a further period of leave a couple of months later.

[29] Ms FA said that Ms LL's letter was "filled with false accusations". Ms LL knew what Ms FA's role entailed (working for a company contracting to two Government agencies which, because of the nature of their work, retain significant confidential information about members of the public).

[30] Ms FA said that she had "lost confidence when in meetings with my colleagues and CEO as they are all aware of Ms LL's correspondence." She also described physical effects she suffered on reading Ms LL's letter.

Standards Committee's decision

[31] Because there is no challenge to the Committee's finding of unsatisfactory conduct against Ms LL for having breached r 2.3 of the Rules, it is not necessary for me to set out the Committee's reasoning for that conclusion. Ms FA's challenge is to the penalties imposed and orders made.

[32] The Committee described Ms LL's letter in the following terms:

(a) "Ms LL's response went beyond merely providing the assurance sought by [the] employer. The … letter … attached an earlier letter (that had been sent to Ms FA's own lawyer) which outlined allegations against Ms FA and impugned her approach to the proceedings."[2]

(b) "Ms LL went well beyond providing or declining to provide the assurance requested by Ms FA's employer".[3]

(c) "Ms LL's response to Ms FA's employer was inappropriate, unnecessary and unprofessional. … [B]y including explanations and justifications for the steps [Mr EH] may have taken and expressing her personal view on Ms FA's suitability for the role in which she is employed serves no purpose other than to cause unnecessary embarrassment distress and inconvenience to Ms FA's reputation, interests and occupation."[4]

[33] In assessing the appropriate disciplinary response, the Committee acknowledged that the breakdown of any family relationship "is often a stressful and challenging time". It further held that it had "little doubt that Ms FA's distress and anxiety was exacerbated by Ms LL's correspondence, that could have no purpose other than to attack her standing in the eyes of her employer, and to cause embarrassment, distress and inconvenience." It was for this reason that the Committee concluded that Ms LL should pay compensation to Ms FA.[5]

[34] Finally, the Committee said this:[6]

> The Committee can see no evidence that Ms LL has any insight as to the inappropriateness or otherwise of her communication. Ms LL's reference to earlier exchanges of correspondence between solicitors concerning the well-being of children and occupation of the home are irrelevant to the professional response required to a reasonable request concerning protection of an employer's confidential information that may be located at an employee's home, after a relationship breakdown.

[35] The Committee:[7]

(a) censured Ms LL.

(b) Ordered her to pay compensation of $3,000 to Ms FA.

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[2] Standards Committee determination (12 October 2021) at [17].
[3] At [18].
[4] At [19].
[5] At [23] & [24].
[6] At [25].
[7] At [27] (incorrectly numbered [25] by the Committee as there is a numbering error towards the end of its determination).

(c) Ordered her to pay a fine of $5,000.

(d) Ordered her to pay costs of $1,000.

Review Application

[36] Ms FA lodged her application to review the Committee's determination, on 1 December 2021. She raised two matters:

(a) the Committee overlooked the breach of duty issue.

(b) The penalties imposed and orders made by the Committee were "not commensurate with the level of misconduct and breach of professional standards".

[37] As the parties agree to me directing the Committee to consider the breach of duty issue at first instance, I do not propose to summarise the detail of Ms FA's submissions about that issue.

[38] It suffices if I simply say that Ms FA considers that, because of her previous lawyer/client relationship with the firm, Ms LL was constrained from acting against her in the relationship property and care of children issues between her and Mr EH.

[39] As to the adequacy of the Committee's penalties and orders, Ms FA has asked for the following:

(a) a direction that Ms LL writes a letter of apology and retraction to the employer, including advising the employer of the Committee's conclusions about her breach of r 2.3 of the Rules;

(b) a direction that Ms LL undertakes professional development on emotional intelligence;

(c) an independent peer review of Ms LL's correspondence over the past two years to ascertain whether this breach reflects a pattern of behaviour;

(d) a direction that all outgoing correspondence from Ms LL must be reviewed and countersigned by a partner in the firm, for 12 months;

(e) a direction that Ms LL writes Ms FA a letter of apology retracting the allegations made in her letter to the employer;

(f) an increase in the amount of compensation ordered to $12,000 “or an amount equivalent to Ms LL’s average weekly billings, whichever is greater.”

Response on behalf of Ms LL

[40] Ms OC, counsel instructed by Ms LL, responded to the review application in a letter to the Case Manager dated 17 November 2021. Ms OC said:

(a) as to the breach of duty issue:

(i) although Ms FA raised it in commenting on Ms LL’s submissions, it was not identified by the Committee in its Notice of Hearing and Ms LL was never asked by the Committee to respond to it;

(ii) in any event, Ms FA did not identify which confidential information Ms LL might disclose;

(iii) moreover, any confidential information held by the firm relating to other retainers, was known to both Ms FA and Mr EH.

(b) as to the finding of unsatisfactory conduct on account of Ms LL’s breach of r 2.3 of the Rules:

(i) the Committee “clearly explained the basis on which it had reached that view”;

(ii) a finding of unsatisfactory conduct “is a very serious matter for a legal practitioner”;

(iii) “the gravity of the Standards Committee’s findings are reflected in the order is that it made”;

(iv) Ms OC submitted that Ms LL accepted the finding of unsatisfactory conduct and would comply with the orders made. She said that Ms LL “apologises to Ms FA for her distress.”

Review on the papers

[41] This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Review Officer to conduct the review on the basis of all information available if the Review Officer considers that the review can be adequately determined in the absence of the parties.

[42] In anticipation of that process being followed, in a letter to the parties emailed by the Case Manager on 11 January 2022, they were invited to make submissions as to whether they wished Ms FA's review application to proceed by way of a hearing in person, or a hearing on the papers.

[43] The parties were advised that a lack of any response would be taken as an indication that they had no objection to the hearing proceeding on the papers.

[44] In an email to the Case Manager dated 19 January 2022, Ms LL's counsel indicated that Ms LL had no objection to the review application being determined by me on the papers.

[45] Ms FA did not respond to the Case Manager's letter, and consistent with the indication given in that letter I conclude that she consents to her review application being dealt with on the papers.

[46] On the basis of the information available, I have concluded that the review may be adequately determined on the papers and in the absence of the parties. The Case Manager informed the parties of this in an email dated 2 February 2022.

[47] I record that having carefully read the complaint and response, the Committee's decision (including the costs assessor's report) and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party.

Nature and scope of review

[48] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:[8]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
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> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer

[8] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).

> to exercise some particular caution before substituting his or her own judgment without good reason.

[49] In a later decision, the High Court described a review by a Review Officer in the following way:[9]

> [2] … A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee.
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> …
>
> [19] … A "review" of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act … those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].
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> [20] … While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.
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> [21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[50] Given those directions, my approach on this review has been to:

(a) independently and objectively consider all the available evidence afresh;

(b) consider the fairness of the substance and process of the Committee's determination;

(c) form my own opinion about all of those matters.

Discussion

The breach of duty issue

[51] As foreshadowed by me earlier in my decision, I propose to refer this issue back to the Committee with a direction for it to be considered and determined.

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[9] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

[52] In Ms FA's first email of complaint, she said the following:

> [Another partner in the firm] and Ms LL have previously represented me as their own client (my will and property purchase). I feel this is completely unprofessional as these are both partners in the firm they should know better.

[53] As well, attached to and forming part of Ms FA's first email of complaint was a letter that her solicitors had written to Ms LL, voicing objection that she was acting against Ms FA.

[54] It is reasonably clear from her first contact with the Complaints Service, that Ms FA was expressing concern that her former lawyers had acted against her.

[55] However, when the Complaints Service forwarded a copy of Ms FA's complaint and attachments to Ms LL on 25 May 2021, it noted that:

> … at this stage the complaint may be summarised as including the following issues:
>
> - Lawyer used legal processes for an improper purpose by disclosing confidential information to opposing client's employer causing unnecessary embarrassment, distress and inconvenience.

[56] Ms LL's response to Ms FA's complaint, was brief. She seemed to have focused on whether or not Mr EH had released her from privilege to respond to the complaint.

[57] Nevertheless, it is not surprising that Ms LL did not address the breach of duty issue given the way in which the Complaints Service had framed Ms FA's complaint.

[58] Moreover, Ms FA's comments about Ms LL's response squarely raised the breach of duty issue, under the heading "Breach of privilege", at the very beginning of that response.

[59] There follows an almost full A4 page in which Ms FA referred to the fact that she was a client of the firm and had received terms of engagement. She made explicit reference to Ms LL having "access to personal information". She described the nature of that personal information.

[60] As well, it seems plain from Ms FA's comments that within a matter of weeks of her solicitors writing to Ms LL objecting to her acting for Mr EH, Ms LL stopped acting for him.

[61] The Committee then resolved to set the matter down for a hearing on the papers, and issued its Notice of Hearing in which it identified the matters to be considered

as being the disciplinary consequences of Ms LL's letter to the employer about the confidential information issue.

[62] In making submissions in response to the Notice of Hearing, again understandably neither party made reference to the breach of duty issue.

[63] Yet, as I have set out above, Ms FA provided evidence that she had been a client of the firm (correspondence and terms of engagement). She identified the breach of duty issue and gave an example of confidential information that Ms LL might have been able to use against her in the relationship property and care of children matters.

[64] In my view this clearly raised a question of whether Ms LL had breached r 8.7.1 of the Rules. For convenience, I set that out in full:

> A lawyer must not act for a client against a former client of the lawyer or of any member of the lawyer's practice where –
>
> (a) the practice or a lawyer in the practice holds information confidential to the former client; and
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> (b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and
>
> (c) there is a more than negligible risk of disclosure of the confidential information; and
>
> (d) the fiduciary obligation owed to the former client would be undermined.

[65] It will be observed from the above, that a lawyer is not prohibited from acting against a former client. The key issue is whether there is a more than negligible risk of the former client's confidential information permeating the matter in which the lawyer is acting against them.

[66] To give a very simple example: a lawyer might have acted for a client selling a residential property in a straightforward, unconditional transaction, and in which all contact was either by telephone or email and did not involve any discussions other than those directly connected with the transaction itself.

[67] Ten years later the lawyer is instructed to act against that former client in connection with an application to have that client removed as a trustee and executor of an estate.

[68] Without more, it would be difficult to mount an argument to say that in those circumstances, by acting against their former client, the lawyer is in breach of r 8.7.1 of the Rules.

[69] Of course, "confidential information" obtained during the course of a retainer is not necessarily limited to facts and figures. It can include what is often referred to as confidential information obtained by the lawyer as part of the "getting to know you principle".

[70] The learned author in *Lawyers' Professional Responsibility* put it this way:[10]

> In more general terms, Gillard J in *Yunghanns v Elfic Ltd* suggested that out of a retainer a lawyer may learn about the client's strengths, weaknesses, (lack of) honesty, reactions in crises, attitudes to litigation and settling cases, and tactics (terming these "getting to know you" factors). This led his Honour to state that "[t]he overall opinion formed by a solicitor of his client as a result of his contact may in the circumstances amount to confidential information that should not be disclosed or used against the client". If so, impressions of character, personality and attitudes may be relevant even in commercial litigation. Knowledge of a former client's modus operandi and attitudes may, it could be reasoned, prove valuable to a lawyer later opposing that client in forming strategy, cross-examination and determining whether or not to call certain witnesses.
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> [Citations omitted].

[71] I do not imagine that this principle applies only when a lawyer is acting against a former client in commercial litigation. It can equally apply in any contentious matter in which a lawyer is acting against a former client.

[72] None of this is to say that Ms LL has in fact breached r 8.7.1 of the Rules. Although Ms FA has raised this as an issue of complaint, Ms LL has not responded to it.

[73] In every complaint that a lawyer has acted against a former client, it will always be a question of fact as to whether confidential information obtained during the earlier retainer risks permeating the case against the former client.

[74] For example, I note that the matters in which the firm acted for Ms FA appeared to be transactional and not contentious. That may be a factor relevant to whether confidential information obtained in those matters had any relevance to, and thus risked featuring in, the relationship property and care of children matters.[11]

[75] I have considered whether to deal with this issue as part of Ms FA's review application. There is no question that I am able to do so, because it formed part of the material that was before the Committee and is not a fresh issue of complaint raised by the review application itself.

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[10] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [8.150]

[11] Bearing in mind of course that the test in r 8.7.1 includes the very low threshold of "more than negligible risk" of disclosure.

[76] However, by adopting that course I am depriving the parties of a first-instance inquiry by a Committee with the consequential and relatively benign review rights to this Office.

[77] If I was to deal with the breach of duty issue, that would effectively amount to a first-instance consideration of it, from which the only remedy lies in judicial review proceedings in the High Court under the Judicial Review Procedure Act 2016.

[78] Self-evidently, judicial review proceedings are costly, and procedurally and legally proscribed. As I have expressed, rights of review to this Office are far less legalistic, not to mention inexpensive.

[79] Against that background, I issued a Minute to the parties on 17 February 2022 indicating that my preliminary view about the breach of duty issue was that I ought to direct the Committee to make a first instance decision about it. I invited submissions from the parties about that.

[80] Both parties agreed with the course proposed by me, though Ms OC sought assurances that the Committee's processes would include giving Ms LL an opportunity to be heard about the breach of duty issue.

[81] As I have observed above, although this issue was raised by Ms FA as part of her complaint, Ms LL did not address it at all in her submissions to the Committee. She must, of course, be given that opportunity by the Committee.

[82] Naturally also, Ms FA must be given full opportunity to comment on any submissions made by Ms LL about the breach of duty issue.

[83] Beyond that, I make no other procedural directions in connection with the requirement for the Committee to consider and determine the breach of duty issue.

Penalty and other orders

[84] To provide context to the penalties imposed and other orders made by the Committee, it is necessary for me to set out extracts from both the employer's letter to Ms LL and her response to that letter, both dated 3 June 2020.

[85] The employer said:

> … [Ms FA] has informed me that … while she was away from the home, [Mr EH] gained access to the property, photographing various items and searching through drawers in various rooms on the property. Please note that I am not making any comment about [Mr EH's] entitlement to be on the property.

> My concern arises because [Ms FA] believes that [Mr EH] entered the room she was using as a workplace and accessed a drawer containing [business-related] information and documents. Due to the confidential and highly sensitive nature of the work [Ms FA]'s performs, she has brought this to my attention.
>
> … I am asking that you contact [Mr EH] to seek assurances to be provided to [me] that he has not accessed any of the documents relating to our business that were at the property, and has not photographed or otherwise copied any of those documents.
>
> If Mr EH does have a copy of any [of our business's] documents, would he please inform us of the documents in question and provide assurances that any and all copies of those documents have been deleted/destroyed.
>
> Please be assured that I am not seeking to become involved in the relationship property dispute … but simply to ensure the confidentiality and security of our clients' private … information.

[86] Ms LL's response included the following:

> Throughout the separation process, there has been a repeated pattern of behaviour involving unfounded allegations made by [Ms FA] in relation to [Mr EH].
>
> Due to that, [Mr EH] took a friend with him, in order to protect himself from [Mrs FA's] conduct. That person can confirm that [Mr EH] did not access any drawers containing [confidential] information and documents [relating to your business].
>
> …
>
> Prior to [Mr EH] visiting his home to uplift chattels [Ms FA] had thrown into the shed, we wrote to her solicitor, and a copy of that letter is **attached**.
>
> We are instructed that [Ms FA] introduced her children to her new partner almost immediately after separation by shifting him into the family home during lockdown without any discussion or consent from the children's guardian, and then refused access between the children and their father, when he had been the primary caregiver whilst [Ms FA] flew to [City] every week to work for you.
>
> This is not correspondence that we would ordinarily enter into, however [Ms FA] has asked you to contact us direct, and in doing so brought you into her pattern of abuse through lies and control. We would have strong concerns about [Ms FA] having any contact with clients while she continues to engage in such destructive behaviour in her private life.

[87] The letter to Ms FA's solicitor, to which Ms LL refers in her letter to the employer, would appear to have been written by her to that solicitor on 27 May 2020.

[88] It is not necessary for me to reproduce the contents of that letter. It suffices if I describe it as being written in forceful terms and includes criticisms of Ms FA's conduct. It also gives indication that a complaint might be made to the Complaints Service about that solicitor if they proceeded with an application on Ms FA's behalf for a protection order.

[89] Of itself, a lawyer–to–lawyer letter of that nature would present as being reasonably conventional (although "conventional" is not necessarily a synonym for constructive).

[90] However, it becomes a different matter when that correspondence is attached to a letter sent to a party who has made it clear that they do not wish to become involved in the relationship property matters between Ms FA and Mr EH.

[91] It is difficult to understand how Ms LL could have reasoned that it was appropriate to attach this correspondence to her letter to the employer.

[92] Ms LL is a partner in an established provincial law firm. I have no doubt that she can generally be relied upon to act with probity and to exercise skill and judgement, consistent with her duties to both the court and to her clients. I also have no doubt that she works tirelessly and fearlessly on behalf of her clients.

[93] If requested to do so, I am sure that Ms LL could provide numerous references corroborating those qualities.

[94] Nevertheless, Ms LL's letter to the employer, attaching as it did a lawyer-to-lawyer letter about issues completely unconnected with Ms FA's employment, represents a significant lapse in judgement.

[95] It is impossible to discern any ethical or professional basis for sending such a letter, let alone any legitimate strategic value that it might have in the dispute between Ms FA and Mr EH.

[96] Fearless advocacy on behalf of a client is not to be confused with unjustified and unsubstantiated attacks on the character of an employee to their employer, when that employer has made proper inquiry about a serious matter affecting their business.

[97] Indeed, I have no doubt that the employer (not to mention Ms FA herself) recognised that it was at risk of investigation by the Office of the Privacy Commissioner in connection with the potential disclosure of personal information.[12] It would compound any breach if the employer failed to take steps to ensure that it had been mitigated.

[98] Through her counsel, Ms LL accepted the Committee's finding of unsatisfactory conduct and indicated that she would comply with the orders it had made. She also apologised to Ms FA "for her distress".[13]

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[12] See generally Information Privacy Principles 5 and 11, Privacy Act 2020.
[13] Letter from Ms OC to the Case Manager (17 November 2021).

[99] Frankly, Ms LL had no other choice. Her apology, brief though it is, is no more than what can be expected in the circumstances.

[100] Ms OC properly submitted that "a finding of unsatisfactory conduct is a very serious matter for a legal practitioner", and that the gravity of the Committee's finding in the present matter has been reflected in its penalties and orders. Those orders include compensation to Ms FA for hurt and humiliation.

[101] When assessing the appropriateness of the Committee's penalties, I put to one side the orders of compensation and costs, because neither is punitive. The Committee would not, for example, have reduced the fine it imposed because it had also ordered Ms LL to pay compensation.

Fine

[102] The maximum fine that can be imposed by a Standards Committee or a Review Officer, is $15,000.[14] It is trite to observe that the maximum fine must be reserved for the most serious cases of unsatisfactory conduct.

[103] The fine of $2,000 imposed by the Committee can rightly be described as being at the low end of the scale. That being said, I acknowledge that it was accompanied by the imposition of a censure, which is a discretionary step more generally reserved for serious cases.

[104] I have given anxious consideration as to whether or not the fine imposed by the Committee, adequately reflects the seriousness of Ms LL's conduct.

[105] Rule 2.3 of the Rules recognises that there is a power imbalance between a lawyer and a non-lawyer on the other side of a matter. Based on their training and experience, lawyers are in a unique position to understand how to use the law and legal processes. Non-lawyers generally do not possess that knowledge.

[106] The use of that knowledge and skill for anything other than proper legal purposes, in circumstances where a lawyer would clearly understand that their conduct might cause unnecessary embarrassment, distress or inconvenience to another person's reputation, interests or occupation, is an abuse of the power of knowledge enjoyed by lawyers.

[107] In the present matter, there was simply no connection between the employer's lawful request, and the bulk of Ms LL's response. Her remarks about Ms FA were

[14] Lawyers and Conveyancers Act 2006, s 156(1)(i).

gratuitous and unprofessional; rightly described by the Committee as an "attack … to cause embarrassment, distress and inconvenience."[15]

[108] Ms LL could simply have said that Mr EH had instructed her that he did not see or otherwise access or photograph any confidential information in connection with Ms FA's employment.

[109] I do not consider that a fine of $2,000, even when accompanied by a censure, adequately reflects the seriousness of Ms LL's conduct. In my assessment, the starting point when considering an appropriate fine for conduct of this nature, is $4,000, even when combined with a censure.

[110] From there, appropriate consideration should be given to factors such as Ms LL's disciplinary record, and any apology.

[111] As to the former, the Committee did not refer to any previous disciplinary record so the conclusion to be drawn from that, is that Ms LL has none.

[112] As to an apology, this was not forthcoming at the Committee stage and indeed the Committee was moved to observe that it could not find any "evidence that Ms LL has any insight as to the inappropriateness or otherwise of her communication."

[113] Belatedly however, and through her counsel, Ms LL offered a brief apology.

[114] I have acknowledged above that Ms LL's lapse on this occasion was almost certainly isolated and undoubtedly uncharacteristic. Proper credit must be given for that. Limited credit can be given for Ms LL's apology, by virtue of its brevity and the delay in making it.

[115] Taking those matters into account, in my view an appropriate fine is $3,000.

[116] I also consider that the imposition of a censure is appropriate, as a tacit mark of disapproval of Ms LL's conduct.

Compensation

[117] Ms FA argues that the amount ordered by the Committee ($3,000) ought to be increased to "$12,000 or an amount equivalent to Ms LL's average weekly billings, whichever is greater."

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[15] Standards Committee determination (12 October 2021) at [23].

[118] In her review application, Ms FA submitted that the amount of compensation ordered by the Committee (together with the penalties):

> [is] insufficient to provide sufficient deterrence to [Ms LL] engaging in such misconduct in the future and not reflective of the nature and seriousness of her misconduct, which was deliberate and malicious.

[119] Ms FA appears to argue that deterrence and punishment are ingredients of compensation.

[120] With the greatest of respect to Ms FA, I do not agree that deterrence and punishment are factors to be included when assessing an award of compensation. Those principles are met by the imposition of a fine, and the level of that fine.

[121] Compensation is designed to restore a victim of wrongdoing to the position they were in before the wrongdoing – to the blunt extent that money can ever achieve that.

[122] Compensation can take two forms: the first and most common is reimbursement of any out-of-pocket expenses incurred as a direct result of the wrongdoing. In conventional terms, this is described as "economic loss".

[123] Ms FA has not identified any economic loss suffered by her as a direct and foreseeable result of Ms LL's breach of r 2.3 of the Rules, and nor is it likely that she would be able to.

[124] The second category of loss which compensation endeavours to address, is conventionally described as hurt and humiliation or, in some jurisdictions, "humiliation, loss of dignity and injury to the feelings".[16]

[125] Assessing an appropriate level of compensation for hurt and humiliation is always a difficult exercise. A reference to a tariff or a scale, such as might be the case with the level of fine to impose, is not appropriate. The approach must be subjective and must take account of the effect of a lawyer's conduct on the person seeking compensation. As I have said, the assessment is compensatory and not punitive.

[126] It is trite to observe that some people are more robust than others, and can more readily appear to shake off the effects of another's egregious behaviour. Any compensation for hurt and humiliation in those circumstances, will reflect that. The emphasis is on restoring a victim of wrongdoing.

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[16] See for example the Human Rights Act 1990 and the Privacy Act 2020.

[127] Further, comparison with awards of compensation for hurt and humiliation in other jurisdictions is not necessarily helpful or instructive – again because of the entirely subjective nature of the assessment.

[128] In fixing the sum of compensation at $3,000, the Committee was influenced by Ms FA's submissions about the effect on her and her family of Ms LL's letter to the employer.

[129] The Committee quite properly noted that Ms FA's circumstances at the time were already stressful and challenging, given the nature of the dispute between her and Mr EH.[17] However, it acknowledged that Ms LL's letter to the employer exacerbated that distress and anxiety, and was an attack "to cause embarrassment, distress and inconvenience."

[130] The Committee was undoubtedly correct to frame the compensation assessment in those terms.

[131] The maximum amount of compensation (whether economic loss, hurt and humiliation, or both) that a Standards Committee or a Review Officer may award, is $25,000.[18]

[132] I will not set out in detail Ms FA's summary of the effects on her, and on members of her family, of Ms LL's letter to the employer. These are graphically described by her in her 5 August 2021 submissions to the Standards Committee.

[133] Ms LL has not challenged Ms FA's account of those consequences. There is no reason for me to do so, either.

[134] But, as the Committee rightly noted, these were demanding and difficult times for Ms FA. Even without Ms LL's letter to the employer, I do not doubt that Ms FA's circumstances were deeply unpleasant.

[135] But, equally clearly, Ms LL's letter to the employer aggravated an already worrying and uncertain time for Ms FA. The Committee was right to address that with an award of compensation.

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[17] In her submissions to the Standards Committee, Ms FA also described the additional stress of not knowing "what was going to happen with COVID-19" (5 August 2021).
[18] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.

[136] Ms FA argues for an uplift in the compensation on grounds that this would recognise the need to punish and deter. I have already dealt with that, by pointing out that compensation does not exist for those purposes.

[137] Perhaps significantly, Ms FA has not sought an uplift on grounds that the amount ordered by the Committee does not adequately compensate her for the hurt and humiliation occasioned by Ms LL's letter to the employer.

[138] I regard that as a relevant, though not conclusive, factor when making my own assessment.

[139] Stepping back, and endeavouring to arrive at a figure which, to the blunt extent that money is able to do so, adequately compensates Ms FA for the hurt and humiliation she suffered as a result of Ms LL's letter, I agree with the Committee's assessment that the sum of $3,000 sufficiently meets that purpose.

[140] I confirm the Committee's compensation order, accordingly.

Other outcomes sought by Ms FA

[141] Ms FA seeks a raft of other orders including an apology, training, a correspondence audit and ongoing partner supervision.

[142] As to an apology, though brief and late in the piece, Ms LL has tendered one through Ms OC. This decision provides a formal record for the parties of that having been done.

[143] Ms FA justifies the need for training, audit and oversight orders on grounds that others with whom Ms LL might deal in contentious matters, should not have to endure what she has.

[144] Public confidence in the provision of legal services and consumer protection are principles which underpin the Act.[19] The disciplinary process is designed to ensure that these values are upheld and maintained.

[145] Nevertheless the disciplinary response for any breach by a lawyer of the Act, Rules or other regulatory instrument, must be proportionate. The dual requirements of public confidence and consumer protection can frequently be met without resort to extensive and wide-ranging orders.

[19] Section 3(1) of the Act.

[146] Despite the reasonably serious nature of Ms LL's breach of r 2.3 of the Rules and its effect on Ms FA, I am not persuaded that there are grounds for believing that this represents a pattern of behaviour justifying the imposition of the additional measures suggested by Ms FA.

[147] The finding of unsatisfactory conduct against Ms LL, coupled with a censure and fine and being accompanied by strong criticism by her peers on the Committee, and on review, represent a significant outcome for her.

[148] I am satisfied that those outcomes appropriately meet the needs of public confidence and consumer protection.

Decision

Breach of duty issue

[149] Pursuant to s 209 of the Act I direct the Committee to consider and determine the conduct issue of whether Ms LL, by acting against Ms FA, breached r 8.7.1 of the Rules, or any other rule or rules relating to her duty of confidentiality to Ms FA.

Breach of r 2.3 of the Rules

[150] Pursuant to s 211(1)(a) of the Act, the Committee's finding of unsatisfactory conduct by Ms McEwen for her breach of r 2.3 of the rules, is confirmed.

[151] The Committee's determination as to penalty and other orders, is:

(a) modified by increasing the fine from $2,000, to $,3000.

(b) Confirmed as to the imposition of a censure.

(c) Confirmed as to the order to pay compensation of $3,000 to Ms FA.

(d) Confirmed as to the order to pay costs to the New Zealand Law Society of $1,000.

[152] The fine, costs and compensation must be paid by Ms LL to the New Zealand Law Society within 20 working days of the date of this decision. The New Zealand Law Society will arrange for the compensation to be paid to Ms FA.

Anonymised publication

[153] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 14th day of March 2022

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R Hesketh
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms FA as the Applicant
Ms LL as the Respondent
Ms OC as counsel for the Respondent
Mr BP as a Related Person
Area Standards Committee
New Zealand Law Society