New Zealand Law Society
Te Kāhui Ture o Aotearoa

Penalty Guidelines for Lawyers Standards Committees

1. Introduction

1.1 This guidance has been prepared by the New Zealand Law Society (**Law Society**) to assist Lawyers Standards Committees (**Standards Committees**) when making decisions under Part 7 of the Lawyers and Conveyancers Act 2006 (**LCA**), in particular when making decisions on what orders to make following a finding of unsatisfactory conduct against a practitioner. These are commonly referred to as penalty decisions.

1.2 A wide range of Standards Committee decisions on penalty were reviewed in the preparation of this guidance, as well as decisions made by the Legal Complaints Review Officer (**LCRO**) and the Lawyers and Conveyancers Disciplinary Tribunal (**Disciplinary Tribunal**). This revealed a high degree of variability in decisionmaking on penalty. This is largely to be expected. Decisionmaking on penalty in the disciplinary context is a different exercise than the criminal sentencing process, and involves different considerations. There are no guideline sentencing judgments to be found in case law under the LCA, let alone penalties fixed by the LCA that must be imposed for certain types of disciplinary offending. Personal factors, which may count in favour of or against a practitioner, typically carry more weight in the disciplinary context than occurs in the criminal justice system.

1.3 Nevertheless, consistency of decision-making in respect of penalties under the LCA is an important objective that has been recognised in case law. The purpose of this guidance is to assist Standards Committees achieve a greater degree of consistency in decision-making on penalty. The guidance primarily seeks to achieve this by reference to the principles and approach to penalty decision-making that should be followed, and also provides indicative penalty ranges for particular types of conduct.

1.4 It must be stressed that Standards Committees must impose the penalty that they consider, in their assessment, is appropriate to meet all the particular facts and circumstances of each individual case that they decide. Nothing in this guidance is intended to limit or inhibit the decision-making powers of Standards Committees under the LCA.

2. General principles regarding liability decisionmaking

2.1 This section of the guidance addresses the different determinations available to Standards Committees under the LCA following receipt of a complaint or own motion referral relating to a practitioner's conduct. It addresses the applicable principles to each relevant kind of decision that may be made by a Standards Committee, and the approach to liability decision-making.

Determinations available to Standards Committees

2.2 On receiving a complaint, a Standards Committee may:

(a) inquire into the complaint;

(b) give a direction under s 143 of the LCA that the parties explore the possibility of resolving the complaint (or issues raised by the complaint) by negotiation, conciliation, or mediation; or

(c) decide to take no action on the complaint under one or more of the grounds set out in s 138 of the LCA.

2.3 At any time after receiving a complaint and before making a determination under s 152(2), a Standards Committee may determine to take no further action on a complaint, in its discretion, having regard to the factors set out in s 138. These factors include: whether the length of time that has elapsed since the alleged conduct took place would make investigating the complaint no longer practicable or desirable; whether the complaint is trivial, frivolous or vexatious, or not made in good faith; where there are alternative remedies available which would be reasonable for the complainant to pursue; or if the Standards Committee considers any further action on the complaint is unnecessary or inappropriate having regard to all the circumstances of the case.

2.4 After inquiring into and conducting a hearing on a complaint or a matter that is the subject of an own motion inquiry, a Standards Committee may make one or more of the determinations in s 152(2) of the LCA. These are as follows:

(a) A determination that the complaint or matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal (LCA, s 152(2)(a));

(b) A determination of unsatisfactory conduct in respect of a current or former practitioner, incorporated firm, or employee of a practitioner or incorporated firm (LCA, s 152(2)(b)). Following a finding of unsatisfactory conduct, penalty orders may be made under s 156 of the LCA;

(c) A determination that no further action be taken in respect of the complaint or matter, or any issue involved in the complaint or matter (LCA, s 152(2)(c)).

2.5 For example, in a complaint raising multiple allegations, a Standards Committee may consider that some of the issues raised warrant referral to the Disciplinary Tribunal, but that no further action should be taken on other issues raised by the complaint. The Disciplinary Tribunal may make findings of unsatisfactory conduct, as well as findings of misconduct and serious negligence or incompetence, whereas a Standards Committee may only make a finding of unsatisfactory conduct. Accordingly, if a complaint raises issues that warrant referral to the Disciplinary Tribunal, but some of the issues involved are low-level in nature and only consist of unsatisfactory conduct, it will generally be desirable for all the issues involved in the complaint to be referred to the Disciplinary Tribunal where the issues relate to the same transaction or course of conduct, or relate to the practitioner's competence or negligence, rather than carving out the relevant issues and dealing with them through separate processes.

Approach to decision-making

2.6 Before making a determination in respect of a complaint or matter, a Standards Committee should take into account all of the evidence and information available to it. In particular, any response or submissions provided by the complainant and/or the practitioner should be taken into account, consistent with the rules of natural justice.[1]

2.7 When assessing the issues involved in a complaint or own motion referral, the Standards Committee should first give consideration to whether or not the Committee considers that there is sufficient evidence in respect of each of the factual allegations that are the subject of the complaint or matter.

2.8 If there is insufficient evidence in respect of an allegation, no further action should be taken in respect of the allegation.

2.9 If there is a sufficient evidential basis for any or all of the factual allegations, the Committee should then give consideration to whether the relevant conduct gives rise to a conduct issue that warrants a disciplinary response, and the type of response that is warranted (that is, whether the matter should be referred to the Disciplinary Tribunal, whether the conduct constitutes unsatisfactory conduct, or whether no further action should be taken).

2.10 In considering whether a disciplinary response is required, the Standards Committee should have regard to whether the practitioner's conduct may potentially engage:

(a) Any of the provisions of the LCA, in particular the definitions of misconduct and unsatisfactory conduct (but also the fundamental obligations of lawyers in s 4 of the LCA, and the specific trust account provisions in ss 110 to 116 of the LCA); and/or

(b) Any regulations or rules issued under the LCA, for example, the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules of Conduct and Client Care**) and the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (**Trust Accounting Regulations**).

2.11 Even if the conduct does not breach a specific provision of the LCA or regulation or rule, the conduct may still involve a conduct issue and warrant a disciplinary response. A finding of unsatisfactory conduct may be made despite there not being a breach of any specific rule or a breach of any other rule or regulation made under the LCA.[2] For example, the Rules of Conduct and Client Care are not an exhaustive statement of the conduct expected of lawyers. They set the minimum standards that lawyers must observe and are a reference point for discipline. Accordingly, if the lawyer engages in "conduct unbecoming of a lawyer" at a time when he or she is providing regulated services, even if none of the specific conduct rules in the Rules of Conduct and Client Care are engaged it would be open to a Standards Committee to determine that the lawyer has engaged in unsatisfactory conduct under s 12(b) of the LCA.

2.12 In assessing the determination that should be made under s 152(2), a Standards Committee should consider the nature and gravity of the practitioner's conduct, with reference to the particular features of the conduct engaged in by the practitioner. Factors such as the following should each be considered in assessing the nature and gravity of the conduct: whether there are multiple breaches of a rule (or findings of unsatisfactory conduct) or a number of different rule breaches; the nature of the rule or professional obligation breached and its importance; whether or not the conduct was repeated or prolonged; the culpability of the practitioner (i.e. was the conduct intentional, reckless, negligent, or the result of a genuine mistake); the impact of the conduct (in particular, any harm or loss caused by the conduct, or the risk of harm or loss); the motivation for the conduct (for example, personal gain) and/or whether dishonesty was involved; the existence of any breach or abuse of trust; whether the complainant was vulnerable; and the context in which the conduct occurred. These factors are not exhaustive.

1 Lawyers and Conveyancers Act 2006, s 142(1).

2 See generally *A Lawyer v New Zealand Law Society* [2021] NZCA 47 at [16].

2.13 Culpability is an important factor in this part of the assessment. For example, if a Standards Committee considers that there is *prima facie* evidence that a practitioner has engaged in a wilful or reckless breach of the LCA or any regulations or rules issued under the LCA, which would constitute misconduct under s 7(1)(a)(ii) of the LCA, then referral to the Tribunal will be appropriate. The Standards Committee may not make findings of misconduct itself. If, however, the breach has not been wilful or reckless, but there has nonetheless been a breach or the LCA, or any regulations or rules issued under the LCA, and the Committee considers that the conduct warrants a disciplinary response, then the Committee may make a finding of unsatisfactory conduct in respect of the practitioner. Similarly, if a Standards Committee considers that there is *prima facie* evidence that the practitioner has engaged in dishonest behaviour, which would be conduct that potentially constitutes misconduct under s 7(1)(a)(i) (conduct which would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable), then referral to the Tribunal will generally be appropriate.[3]

Referral to the Disciplinary Tribunal

2.14 There is no "threshold test" in terms of when a Standards Committee may determine that a matter should be referred to the Disciplinary Tribunal under s 152(2)(a) of the LCA, although typically this will occur in cases involving more serious conduct potentially amounting to misconduct, given the more restrictive penalty orders available to the Disciplinary Tribunal compared to Standards Committees.[4] As noted, only the Disciplinary Tribunal may make findings of misconduct (pursuant to ss 7, 9 and 11 of the LCA) and findings of serious negligence or incompetence (pursuant to s 241(c) of the LCA) in respect of a practitioner.

2.15 Standards Committees may only make a finding of unsatisfactory conduct in respect of a practitioner (pursuant to s 12 of the LCA). The Disciplinary Tribunal may also make findings of unsatisfactory conduct, and may make any of the penalty orders available to Standards Committees (ss 241(b) and 242(1)(a)), in addition to more serious penalty orders such as suspension and strike off.

2.16 If a Standards Committee considers that a practitioner's conduct would, if found proved, constitute misconduct, then referral to the Disciplinary Tribunal will be appropriate. The Standards Committee needs only be satisfied that the conduct in question, if proven, is capable of constituting misconduct.[5] It is not the Committee's function to determine whether the conduct in question is in fact misconduct. The Committee is also not required to reach the view that the appropriate outcome would be suspension or strike off before referring a matter to the Disciplinary Tribunal.[6]

2.17 However, the Committee is also not required to find that the issues involved in a complaint or matter are of sufficient gravity or seriousness to warrant referral to the Disciplinary Tribunal before making a determination under s 152(2)(a). For example, referral to the Disciplinary Tribunal may also be considered appropriate in cases where complaints "involve complex issues of law or fact" or are "likely to result in a significant precedent" relating to professional standards.[7]

2.18 A Standards Committee is not required to give reasons for its referral of a matter to the Disciplinary Tribunal, in contrast to where it makes a determination finding unsatisfactory

3 Professional misconduct is not confined to cases of dishonesty. In *Auckland District Law Society v C* [2008] 3 NZLR 105 (HC), the High Court confirmed that professional misconduct does not solely consist of "intentional wrongdoing"; rather "a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner". See *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 for further discussion on the definition of professional misconduct in a disciplinary context.

4 *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [53].

5 *Orlov v New Zealand Law Society* [2013] NZCA 230.

6 *Orlov v New Zealand Law Society* [2013] NZCA 230.

7 *Orlov v New Zealand Law Society* [2013] NZCA 230 at [54(h)].

conduct under s 152(2)(b), or a determination to take no further action under s 152(2)(c).[8]

Findings of unsatisfactory conduct

2.19 "Unsatisfactory conduct" in relation to a practitioner is defined in s 12 of the LCA, and includes conduct of a practitioner that:

(a) occurs at a time the lawyer is providing regulated services, and falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer (s 12(a));[9] or

(b) occurs at a time the lawyer is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable (including conduct unbecoming a lawyer and unprofessional conduct) (s 12(b)); or

(c) consists of a breach of the LCA or any regulations or practice rules under the LCA relating to the provision of regulated services (and which is not a breach amounting to misconduct under s 7 of the LCA) (s 12(c)); or

(d) involves a failure to comply with a condition or restriction on the lawyer's practising certificate (which is not a failure amounting to misconduct under s 7 of the LCA) (s 12(d)).

2.20 The standard of proof to be applied by a Standards Committee is the civil standard of balance of probabilities. The level of evidence required to establish the relevant allegation is to be flexibly applied in light of the seriousness of the alleged act or conduct and the potential consequences to the practitioner if proved.[10] In Z *v Dental Complaints Assessment Committee*, the Supreme Court commented on this as follows:

> Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities.

2.21 Accordingly, in order to make a finding of unsatisfactory conduct, a Standards Committee must:

(a) First, be satisfied on the balance of probabilities (i.e., that it is more likely than not), that the factual allegation or allegations which are the subject of the complaint or matter are proved;[11] and

(b) Second, that the relevant conduct, if found proved, meets the definition of unsatisfactory conduct as defined in s 12 of the LCA, and is conduct that warrants a disciplinary response.

2.22 Where a Standards Committee considers that there has been a breach of the LCA or any rules or regulations made under the LCA, it is open to the Committee to make a finding of unsatisfactory conduct under s 152(2)(b). Following a finding of unsatisfactory conduct, a Standards Committee may make one or more of the penalty orders set out in s 156 of the LCA.

---

8 *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] NZHC 83.

9 The requirement for falling short of the standard of competence and diligence is disjunctive, meaning a practitioner does not need to be both incompetent and dilatory. See *Fitzgibbon v Council of New South Wales Bar Association* [2011] NSWCA 165 at [16]: "Parliament cannot have considered that either diligent incompetence or dilatory competence was satisfactory professional conduct". See also *Parmenter v Legal Complaints Review Officer* [2021] NZHC 2025 at [35]–[38].

10 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1. See also *S v New Zealand Law Society (Auckland Standards Committee Number 2)* HC Auckland CIV 2011–404–3044 at [17].

11 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1. The civil standard of proof applies to disciplinary proceedings.

2.23 However, that is not an inevitable outcome – in a particular case a Standards Committee may consider that, although there is evidence of conduct that may amount to a breach of the applicable requirements in the LCA or any rules or regulations made under the LCA, the appropriate determination is to take no further action.[12] In other words, not every breach will warrant disciplinary action. The Standards Committee should exercise judgement about the appropriate determination to make having regard to a number of factors, including the factors identified in s 138 of the LCA. For example, if the breach is minor in nature and/or the subject of the complaint is trivial, a Standards Committee may determine to take no further action in a particular case. A consideration of all of the circumstances of the case is required.

Decision to take no further action

2.24 As noted, a Standards Committee may make a decision to take no further action on a complaint under s 138(1) (before a hearing has been conducted by the Committee) or under s 152(2)(c) of the LCA (if a hearing has been conducted). If any of the factors identified in s 138(1) apply, the Committee may determine to take no further action under s 152(2)(c) even if it has already inquired into and held a hearing about the complaint or matter. For example, it may not become sufficiently clear until after a complaint has been inquired into and a hearing held that the complaint is vexatious or frivolous.

2.25 In addition, if having considered all the evidence and information available to it, a Standards Committee considers that there is insufficient evidence to support the allegations involved in a complaint or matter, it may determine to take no further action on the complaint or matter. Similarly, even if a Standards Committee considers that there is sufficient evidence to support the facts alleged in the complaint, it may find that the relevant conduct does not involve a breach of the LCA or any of the regulations or practice rules under the LCA, such that the appropriate response is to take no further action.

Relevance of personal factors at liability stage

2.26 As noted above, when determining whether a disciplinary response is warranted, a Standards Committee should assess the nature and gravity of the conduct. When carrying out this analysis, the focus should be on the conduct itself and the particular features of that conduct. Personal factors relating to the practitioner concerned (for example, steps taken to rectify the conduct, accepting responsibility for the conduct, expressions of insight and remorse, an unblemished disciplinary history, relative inexperience in the profession) should not be taken into account at this stage of the analysis, other than to the extent that they inform the Committee's assessment of whether a relevant disciplinary test for unsatisfactory conduct or for referral to the Disciplinary Tribunal has been met. For example, the inexperience of the practitioner may be a factor that points towards a breach of the applicable rule or regulation having been an unintentional breach.

2.27 The only other circumstance in which personal factors are relevant at the liability stage is where the Standards Committee determines, in its discretion, that no further action should be taken on a complaint or matter (whether under s 138 or under s 152(2)(c) taking into account the s 138 factors). In making such a determination, a Standards Committee should take into account all of the circumstances of the conduct and the practitioner, including any personal factors relating to the practitioner. For example, where the conduct was low-level in terms of seriousness and occurred in circumstances where there were strong mitigating circumstances relating to the practitioner personally, a Standards Committee might determine that it is appropriate that no further action should be taken in all the circumstances of the case.[13]

12 *Keene v Legal Complaints Review Officer* [2019] NZCA 559.

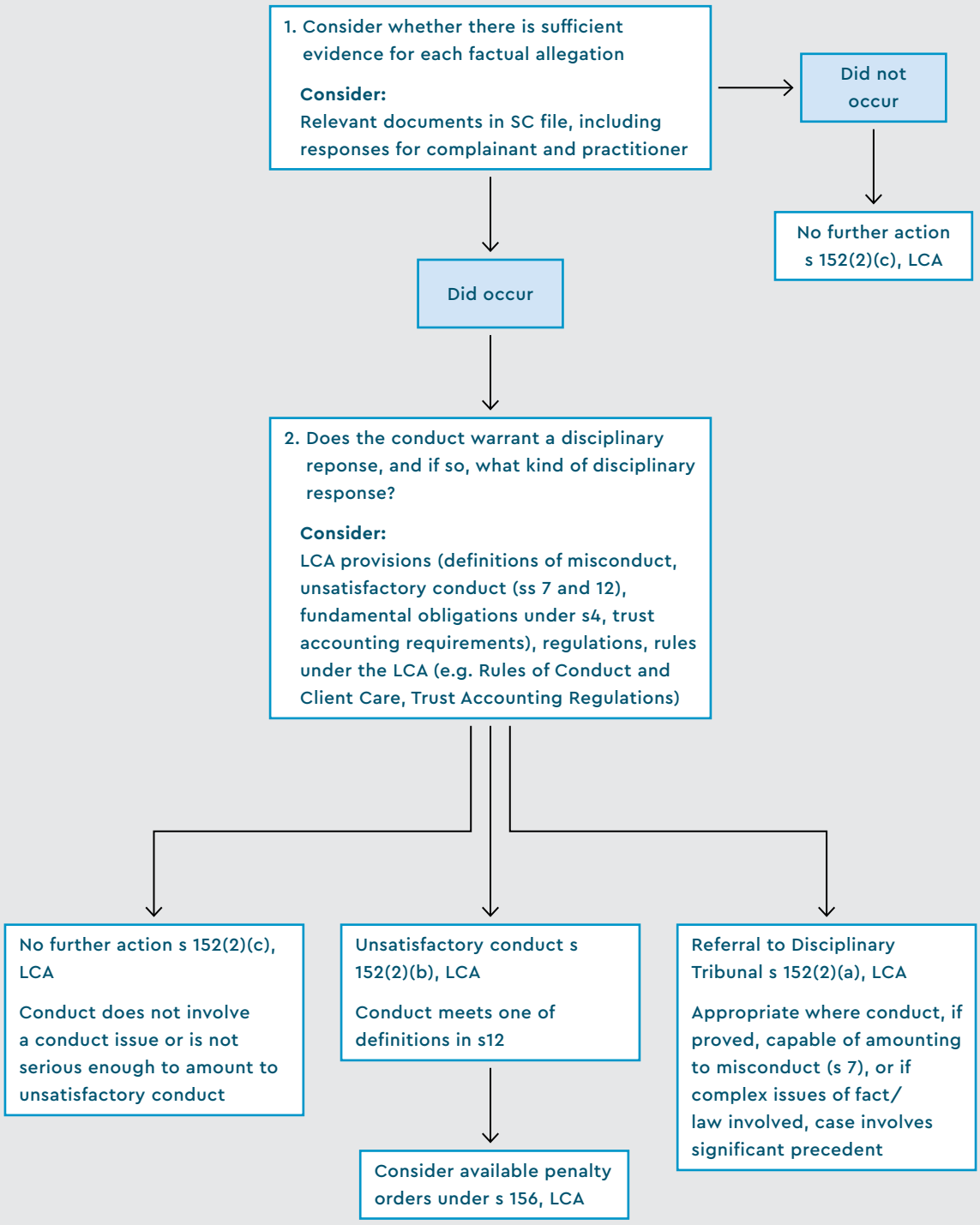
13 Similarly, if other factors under s 138 apply, and the breach is low level, a finding of no further action may be made. For example, if there has been a considerable period of time between the date of the conduct and the complaint, or where the complainant does not desire any action to be taken.

2.28 Personal factors relating to a practitioner are otherwise relevant to the penalty stage of a Standards Committee's decision-making, not the liability stage. This was confirmed in the recent LCRO decision of *NZLS v AP*[14]. In that decision the LCRO discussed the issue of considering mitigating circumstances and culpability at the same time. It stated:

> *[175] "... I have concluded that the proper approach is to return the matter to the Committee, with directions as to a re-assessment of the conduct issues.*
>
> *[176] This is not because I consider that the spectre of misconduct has been raised by Mr AP's conduct, and the Committee is the proper body to prosecute that before the Tribunal.*
>
> *[177] I deliberately refrain from expressing a view about Mr AP's conduct, one way or the other. Quite apart from anything else, the evidential analysis is incomplete.*
>
> *[178] My concern is that the Committee has been influenced by irrelevant considerations when assessing Mr AP's conduct. It conflated issues of mitigation unconnected with the conduct itself, when assessing culpability.*

14 [2022] NZLCRO 001

Approach to liability decision-making



Note: At any stage after a complaint is received and before the hearing is conducted, no further action may be taken if one or more factors under s 138. LCA apply.

3. General penalty principles

3.1 This section of the guidance addresses the penalty orders available to Standards Committees, the principles and purposes of disciplinary proceedings, and general principles applicable to decision-making in terms of penalty orders.

3.2 The aim of the guidance is to assist in ensuring a greater degree of consistency amongst the decisions of different Standards Committees in respect of penalty orders. While the approach to penalty orders in this context is more flexible than in sentencing in criminal proceedings (where there is established precedent and sentencing bands in respect of different kinds of offending), with greater scope to have regard to the individual circumstances of each case and the practitioner concerned, a greater degree of consistency is desirable both in the approach to decisions on penalty orders and across the penalty orders imposed. This will help to ensure that similar, comparable kinds of conduct are approached on a similar basis, allowing for greater transparency and predictability in decision-making, and in turn promoting confidence in the decisions of Standards Committees.

Orders available

3.3 If a Standards Committee determines that a practitioner has engaged in unsatisfactory conduct under s 152(2)(b), it may make any of the orders under s 156 of the LCA. These are as follows:

(a) An order that all or some of the terms of an agreed settlement between the practitioner and the complainant are to have effect, by consent, as all or part of a final determination of the complaint;

(b) An order censuring or reprimanding a practitioner;

(c) An order requiring the practitioner to apologise;

(d) An order requiring the practitioner to pay compensation to any person that has suffered loss by reason of any act or omission of the practitioner. The maximum compensation payable is $25,000;

(e) An order requiring the practitioner to reduce or cancel his or her fees for any work which is the subject of the disciplinary proceedings (including an order for refund of fees already paid);

(f) An order requiring the practitioner to rectify an error or omission at the practitioner's own expense;

(g) An order to pay the NZLS a fine not exceeding $15,000;

(h) An order requiring the practitioner to make his or her practice available for inspection;

(i) An order requiring the practitioner to take advice on the management of his or her practice;

(j) An order requiring the practitioner to undergo practical training or education;

(k) An order requiring the practitioner to pay costs and expenses incidental to the inquiry or investigation, and any hearing conducted, by the Standards Committee;

(l) An order requiring the practitioner to pay the complainant any costs or expenses incurred by the complainant in respect of the inquiry, investigation, or hearing by the Standards Committee.

3.4 A Standards Committee may make any combination of the above orders if it considers the orders are appropriate to meet the principles and purposes of disciplinary proceedings (which are addressed below). For example, a Standards Committee might impose a fine on a practitioner in order to deter the practitioner (and others in the profession) from engaging in similar conduct

in the future, so as to ensure the maintenance of professional standards.[15] At the same time, in addition to imposing a fine, a Standards Committee might also seek to impose a requirement for the practitioner to undergo further practical training or education to assist with the practitioner's rehabilitation (thereby mitigating the risk of the practitioner engaging in similar conduct in the future, ensuring public protection). An order for censure or reprimand may be considered appropriate to mark the Standards Committee's disapproval of a practitioner's conduct. Orders requiring a practitioner to take advice on the management of his or her practice and to make the practice available for inspection are also examples of orders with a particular rehabilitative focus (whilst also helping ensure public protection and the maintenance of professional standards going forward).

3.5 The other orders set out above primarily aim to rectify harm or loss caused to persons affected by a practitioner's conduct. For example, an order requiring a practitioner to reduce his or her fees or cancel them may be considered appropriate where a practitioner has failed to act with reasonable diligence and care when providing regulated services to a client. An order for rectification or compensation may be warranted to require a practitioner to take specific steps to address the particular harm or loss caused to a client, or to provide monetary compensation to address harm or loss that the practitioner has caused an individual through their conduct.

3.6 Other more restrictive penalty orders, such as orders that a practitioner not practise on his or her own account, that a practitioner is suspended from practice for up to 36 months, and striking a practitioner off the roll of barristers and solicitors, are only available to the Disciplinary Tribunal under s 242 of the LCA.

3.7 Any orders made by the Standards Committee may be on such terms and conditions as the Standards Committee sees fit: LCA, s 156(3). For example, in imposing an order requiring the practitioner to undergo practical training, the Committee may require the completion of the training within a prescribed timeframe from the date of the Committee's decision. Similarly, a Committee may require a practitioner to take advice on the management of his or her practice in a particular area and for a prescribed timeframe.

3.8 The Standards Committee may, in its discretion, also decide that no penalty orders are necessary following a finding of unsatisfactory conduct to ensure the principles and purposes of disciplinary proceedings are met. For example, if the conduct was relatively minor in terms of seriousness, and there are a number of mitigating factors personal to the practitioner, a Standards Committee may determine that no penalty orders are warranted in the circumstances.

Principles and purposes of disciplinary proceedings

3.9 It is well established that the primary purposes of disciplinary proceedings are to protect the public and to maintain professional standards through deterrence (both in terms of the individual practitioner and the profession generally).[16] This is consistent with the purposes of the LCA, namely to maintain public confidence in the provision of legal services, to protect the consumers of legal services, and to recognise the status of the legal profession.[17] To achieve these purposes, the LCA provides for a "responsive regulatory regime in relation to lawyers" in Part 7 of the LCA,[18] as well as stating the fundamental obligations with which lawyers must comply in providing regulated services, in the public interest.[19]

15 The LCRO in *DL v [City] Standards Committee* [X] [2017] NZLCRO 17 observed that the imposition of a fine fulfilled the functions of deterrence, reflecting professional and public opprobrium of the conduct, and punishment.

16 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]; *Auckland Standards Committee 1 v Fendall* [2012] NZHC 1825, (2012) 21 PRNZ 279 at [36].

17 LCA, s 3(1).

18 LCA, s 3(2)(b).

19 LCA, s 3(2)(d). See also s 4.

3.10 The aim of disciplinary proceedings is not to punish a practitioner, though orders may have a punitive effect. As the Supreme Court held in Z *v Dental Complaints Assessment Committee:*

> ...the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned.

3.11 In this way, the purpose of disciplinary proceedings differs from the purpose of criminal proceedings, which involve a punitive function.[20] The core function of the criminal justice system is to ascertain if a defendant has committed a crime, and if so to impose "due punishment".[21] Public protection is less of a core focus in criminal proceedings, in contrast to disciplinary proceedings.[22] As a consequence, while disciplinary proceedings may follow on from criminal proceedings (for example, referral to the Disciplinary Tribunal following a practitioner's conviction for criminal offending),[23] the focus of the disciplinary proceedings will be to ensure appropriate professional standards are maintained, including seeking to address any risk to the public going forward.

3.12 Writing for the majority of the full Court of Appeal in *Auckland District Law Society v B,* Gault J observed the following in respect of the disciplinary processes provided for in the LCA:[24]

> These provisions lay down a scheme for regulation of legal practice in New Zealand by institutions of the profession in the public interest... The overall purpose of the scheme is the protection of the public, and the maintenance of the integrity of a profession central to the administration of justice. This is done through close regulation of the manner of legal practice...
>
> At the second stage the tribunal concerned hears the charge or charges and determines whether the practitioner is guilty. If so, the tribunal will then determine an appropriate penalty... The procedure accordingly takes on an adversarial aspect but it is not of a criminal character and the principal purpose of this stage, like the first, remains that of protection of the public interest...

3.13 A full bench of the High Court further observed in Daniels v Complaints Committee 2 of the Wellington District Law Society that:[25]

> The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not treat lightly serious breaches of standards.

3.14 In other words, penalty orders imposed by professional disciplinary bodies (whether Standards Committees or the Disciplinary Tribunal) perform an important function in ensuring public confidence in the profession. Accordingly, penalty orders should be sufficient to mark the gravity of the relevant conduct.

3.15 In *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand,* the High Court discussed the principles and purposes which were relevant to the assessment of penalty orders in

20 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97] and [127].

21 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

22 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [128].

23 Lawyers and Conveyancers Act 2006, s 241(d). The conviction must be for an offence punishable by imprisonment and reflect on the practitioner's fitness to practise or tend to bring the profession into disrepute.

24 *Auckland District Law Society v B* [2002] 1 NZLR 721 (CA) at [84]–[86].

25 *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 at [34].

a professional disciplinary context, which may be summarised as follows:[26]

(a) To protect the public, which includes deterring others from offending in a similar way;

(b) To set professional standards;

(c) Penalties have a punitive function, both directly (such as a fine) and as a by-product of sanctions imposed (though this is not the main purpose of penalty orders);

(d) Rehabilitation of practitioners, where appropriate;

(e) To impose penalties that are comparable to those imposed in similar circumstances;

(f) To reserve the maximum penalties for the worst offending;

(g) To impose the least restrictive penalty that can reasonably be imposed in the circumstances; and

(h) To assess whether the penalty is a fair, reasonable and proportionate one in all the circumstances.

3.16 While Standards Committees should aim to impose penalty orders that are comparable to those imposed in previous cases for similar conduct, each case must ultimately turn on its own facts. In particular, the imposition of penalty orders in an individual case should be tailored to reflect the Committee's assessment of the nature and gravity of the particular conduct, and the personal circumstances of the practitioner.

Approach to determining penalty orders

3.17 In assessing the appropriate penalty, the Standards Committee should first assess the nature and gravity of the conduct, having regard to the aggravating and mitigating factors of the conduct. This will assist the Standards Committee in determining the appropriate starting point in terms of penalty orders to reflect the nature and gravity of the relevant conduct, and before there are any adjustments needed for personal factors relating to the practitioner.

3.18 Factors such as the following should each be considered in assessing the nature and gravity of the conduct: whether there are multiple breaches of a rule (or findings of unsatisfactory conduct) or a number of different rule breaches; the nature of the rule or professional obligation breached and its importance; whether or not the conduct was repeated or prolonged; the culpability of the practitioner (i.e. was the conduct intentional, reckless, negligent, or the result of an honest and genuine mistake); the impact of the conduct (in particular, any harm or loss caused by the conduct, or the risk of harm or loss); the motivation for the conduct (for example, personal gain) and/or whether dishonesty was involved; the existence of any breach or abuse of trust; whether the complainant was vulnerable; and the context in which the conduct occurred. These factors are not exhaustive.

3.19 Factors relating to the practitioner's personal circumstances should not be taken into account at this stage of the analysis – the focus in setting the appropriate starting point should be on the nature and gravity of the relevant conduct.

3.20 If, for example, the Standards Committee is contemplating imposing a fine, then the applicable starting points might be as follows, depending on the Standards Committee's assessment of the nature and gravity of the relevant conduct:

(a) Conduct which is of a low-level nature in terms of seriousness (in comparison to other cases involving similar conduct) – starting point of a fine in the range of $1,000 to $3,000;

26 *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354. Roberts has been cited with approval in a number of different disciplinary contexts. For example, it was cited with approval in the context of legal practitioners by the Court of Appeal in *Morahan v Wellington Standards Committee 2* [2019] NZCA 221.

(b) Conduct which is moderately serious – starting point of a fine in the range of $4,000 to $7,000;

(c) Conduct in the upper range of seriousness – starting point of a fine in the range of $7,000 to $15,000.

3.21 The highest fine a Standards Committee may impose is $15,000. Such a fine should be reserved for the most serious examples of unsatisfactory conduct.

3.22 Only after assessing the nature and gravity of the conduct and identifying the appropriate starting point in terms of penalty orders should the Standards Committee then proceed to consider any aggravating and/or mitigating factors personal to the practitioner which might warrant an adjustment to the penalty orders.

3.23 Personal aggravating factors may consist, for example, of previous disciplinary history on the part of the practitioner. If a practitioner has previous disciplinary history, the Standards Committee should consider factors such as: the nature and gravity of the previous conduct; whether there are similarities between the previous conduct and the conduct being considered by the Standards Committee; the extent of the previous history and how recent it is; and the nature of the penalty orders imposed (if any) on previous occasions. If, for example, the practitioner has a number of previous disciplinary findings of a similar nature, and only low-level fines were imposed on previous occasions, the Standards Committee may determine that a higher fine and/or the imposition of other penalty orders, such as a censure, is appropriate to ensure the principles and purposes of disciplinary proceedings are met.

3.24 In *Morahan v Wellington Standards Committee 2,* in the context of discussing the purposes underlying penalty orders imposed by professional disciplinary bodies, the Court of Appeal considered that the Disciplinary Tribunal:[27]

> … must be entitled to take into account a wide range of matters when determining what penalty is appropriate in any particular case. Those matters might include the practitioner's prior good conduct, as well as the extent to which the findings in relation to liability reflect a demonstrated ongoing pattern of professional misconduct.

3.25 The Court of Appeal further held that, when assessing penalty, disciplinary bodies may consider the prior history of the practitioner, even though that conduct has not resulted in disciplinary proceedings being brought or determined against them, provided there is evidence in support of the prior conduct. As noted, those matters may disentitle a practitioner to credit for prior good conduct, but may also demonstrate an ongoing pattern of professional misconduct which is deserving of a more serious penalty.

3.26 Personal mitigating factors may include (but are not limited to): a practitioner's lack of previous disciplinary history and/or other evidence of good character (for example, contributions to the community and/or the profession); a practitioner's relative inexperience; acceptance of responsibility for the conduct and/or insight displayed into the relevant conduct; if the practitioner has apologised to the complainant and/or displayed remorse for his or her conduct; steps taken to rectify the impact of the practitioner's conduct (for example, reducing or refunding legal fees paid to the practitioner by the complainant); if the practitioner has co-operated in the course of the disciplinary process; and, any rehabilitative steps already undertaken by the practitioner (for example, undertaking further training or education, taking steps to implement

27 *Morahan v Wellington Standards Committee 2* [2019] NZCA 221 at [40]–[45]. In *Morahan*, the Disciplinary Tribunal had been prevented by s 351 of the Lawyers and Conveyancers Act 2006 from considering liability in respect of conduct that had occurred prior to 1 August 2002, and which formed part of a continuing course of conduct, the latter part of which was before the Disciplinary Tribunal on the question of liability. However, having found against the practitioner on liability post 1 August 2002, the Disciplinary Tribunal, the High Court, and the Court of Appeal considered that the conduct that had occurred prior to 1 August 2022 was nonetheless relevant to the issue of penalty.

measures that will ensure the practitioner does not engage in similar conduct again).[28]

3.27 Other factors relating to the circumstances surrounding the conduct may also be relevant to the penalty orders imposed. For example, if the complaint relates to conduct which is historical in nature, or if the practitioner was experiencing personal difficulties at the time of the relevant conduct and this has contributed to the relevant conduct.[29] However, care must be taken to not give undue weight to factors of this kind if the nature of the relevant conduct is of a serious nature, for example, if the conduct has been intentional or prolonged, or the professional obligations breached were fundamental to ensuring the protection of consumers of legal services.

3.28 If a practitioner takes steps to actively defend the allegations in a complaint or own motion investigation, but a Standards Committee determines that the practitioner is guilty of unsatisfactory conduct, then the practitioner's actions in defending the allegations should not be regarded as an aggravating factor.[30] Rather, this constitutes the absence of a personal mitigating factor. Similarly, the absence of personal mitigating factors such as remorse or insight about the relevant conduct is not aggravating *per se,* but may nevertheless be taken into account in considering the appropriate penalty orders, as such factors may be relevant to issues such as fitness to practise and good character.[31]

3.29 However, a practitioner's conduct in the course of a disciplinary process may be considered as an aggravating factor relevant to penalty in two separate ways:

(a) First, practitioners have obligations to the disciplinary bodies that investigate them – public confidence in the legal profession depends upon the premise that practitioners will co-operate fully in the disciplinary process – and deliberate obstruction and misuse of processes for delay are aggravating matters which can be highly relevant to the issue of penalty (particularly the likely efficacy of available penalty options);[32] and

(b) Second, misleading the prosecuting and/or the disciplinary body and blaming/attacking the conduct of others (for instance the complainant) in the course of the disciplinary proceeding – including maintaining a fabricated version of events in the face of incontrovertible evidence – may be considered as an aggravating factor relevant to the penalty orders to be imposed.[33]

---

28 *New Zealand Law Society v Stanley* [2020] NZSC 83, [2020] 1 NZLR 50, per the minority of Winkelmann CJ and Glazebrook J at [118]. See also the comments made by the majority of William Young, O'Regan and Ellen France JJ on rehabilitation, admission to the roll and disciplinary proceedings at [45], [49], [54(e)], [80]–[81] and [84]–[85].

29 However, see *Sisson v Standards Committee 2 of the Canterbury-Westland Branch of the New Zealand Law Society Complaints Service* [2014] NZCA 424. The Court of Appeal upheld a decision of the Disciplinary Tribunal to strike Ms Sisson off, where the Tribunal had considered that Ms Sisson's personal difficulties could not outweigh the necessity of protecting the public, and that a practitioner must either withstand personal pressures or step aside from practice. The Tribunal and the Court of Appeal also considered that personal difficulties, which tend to manifest in dishonesty and breaches of the Rules of Conduct and Client Care, may justify a more significant penalty to uphold the purpose of consumer protection (Ms Sisson tended to resort to dishonesty when placed under pressure).

30 *Daniels v Complaints Committee 2 of the Wellington District Law Society* at [28]. However, see *Sisson v Standards Committee 2 of the Canterbury-Westland Branch of the New Zealand Law Society Complaints Service* [2014] NZCA 424.

31 *Daniels* at [29].

32 *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103 at [220]–[224].

33 *Sisson v Standards Committee 2 of the Canterbury-Westland Branch of the New Zealand Law Society Complaints Service* [2014] NZCA 424. Ms Sisson faced allegations of dishonesty and breach of trust relating to deducting fees from funds held on trust for her client without approval from her client or the Legal Services Agency who had approved the client for legal aid. Ms Sisson had then claimed to the Standards Committee and the Disciplinary Tribunal that an agreement existed between herself and her client to deduct those fees, without supporting evidence of any kind and in the face of significant evidence to the contrary.

3.30 Both of the above matters will reflect on a practitioner's ability to conduct themselves in conformity with their legal and ethical obligations. The obligation to uphold the rule of law and to facilitate the administration of justice (including when responding to disciplinary processes) is one of the fundamental obligations of lawyers under the LCA.[34]

3.31 Ultimately, the weight to be given to personal aggravating and/or mitigating factors is a matter for the Standards Committee. The key question is whether the relevant penalty orders which the Standards Committee ultimately sees fit to impose are sufficient to mark the gravity of the relevant conduct, and are adequate to meet the principles and purposes of disciplinary proceedings.

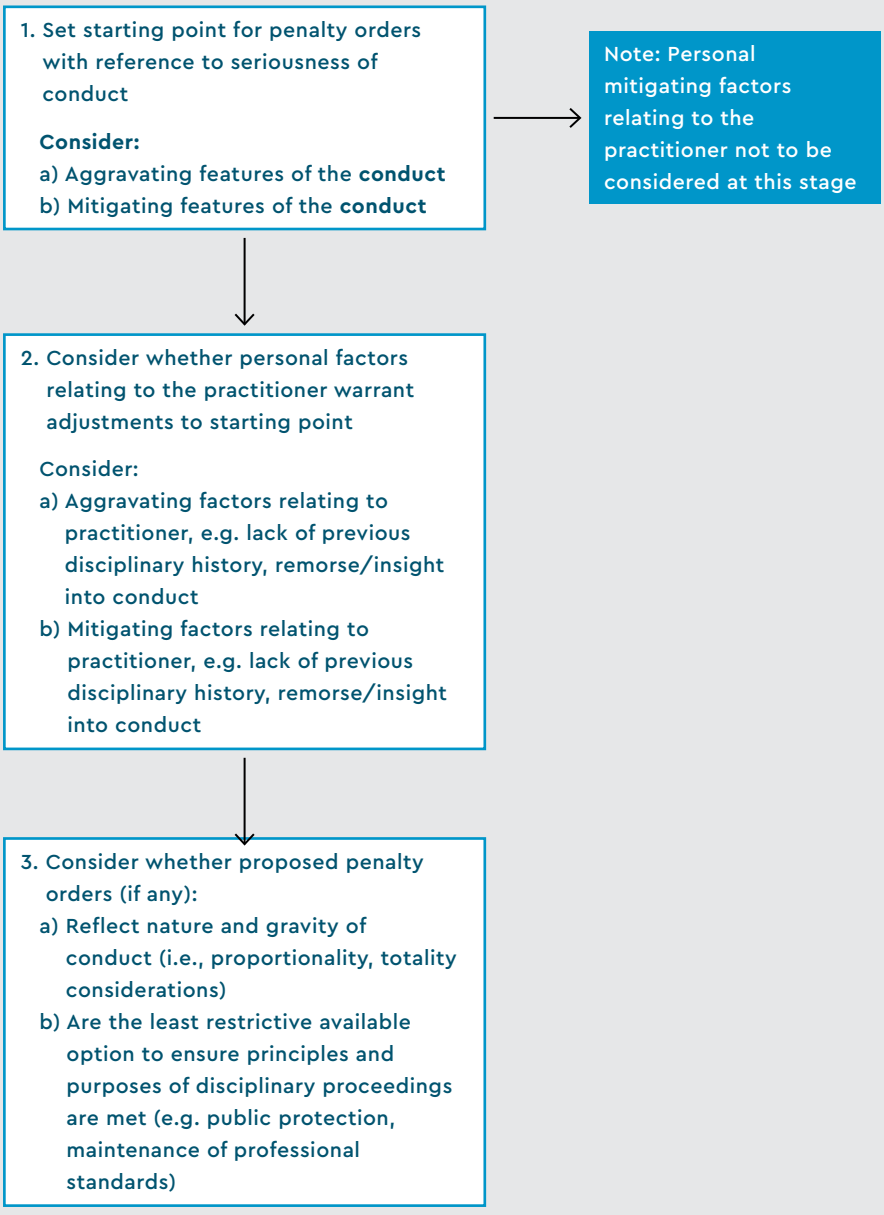
3.32 Totality is also an important consideration when multiple findings of unsatisfactory conduct are made. Consistent with the principle of proportionality, if a Standards Committee makes more than one finding of unsatisfactory conduct, care should be taken to ensure that the aggregate fine or overall penalty orders are proportionate to the total gravity of the practitioner's overall conduct. As noted above, the penalty orders imposed should be the least restrictive penalty available to ensure the purposes and principles of disciplinary proceedings are met.

Need for reasons

3.33 A Standards Committee's decision on orders should set out the reasons why the Committee has determined to impose the relevant orders (if any). The starting point adopted by the Standards Committee (and any aggravating/mitigating factors identified relating to the conduct) should be identified in the decision. The applicable aggravating and mitigating factors relating to the practitioner, and any adjustments to the starting point to reflect such factors, should also be identified. Finally, the decision should identify why the orders imposed by the Standards Committee (if any) have been imposed, with references to the principles and purposes of disciplinary proceedings.

34 LCA, s 4(a). See also rr 2 and 2.2 of the Rules of Conduct and Client Care.

Approach to penalty decision-making following finding of unsatisfactory conduct



4. Specific rules relating to rule of law, administration of justice (threats, improper purposes)

4.1 The obligation to uphold the rule of law and to facilitate the administration of justice is one of the fundamental obligations of lawyers under s 4(a) of the LCA and r 2 of the Rules of Conduct and Client Care. In addition to the rules relating to certifications in rr 2.5 and 2.6 (dealt with in the following section of the guidance), chapter 2 of the Rules of Conduct and Client Care prescribes other rules which aim to ensure the rule of law and the administration of justice are upheld. These include the following obligations:

(a) The overriding duty of lawyers as officers of the court: r 2.1;

(b) The requirement to not obstruct, prevent, pervert, or defeat the course of justice: r 2.2;

(c) The obligation to use legal processes only for proper purposes – specifically not to cause unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation: r 2.3. The footnote to this rule provides examples of conduct that will breach this rule, for example, issuing a statutory demand without making inquiries as to whether a debt is bona fide disputed, effecting service of documents in an embarrassing manner, and lodging a caveat on a title to land without making proper inquiries about whether there is a "caveatable interest" on the client's part to be protected;

(d) The obligation not to assist in fraud or crime, including by knowingly assisting in the concealment of fraud or crime: r 2.4;

(e) The obligation not to threaten to make an accusation against a person, or to disclose something about a person, for any improper purpose: r 2.7;

(f) The obligation to not use, or threaten to use, the complaints or disciplinary process for an improper purpose: r 2.10.[35]

4.2 The need to facilitate the administration of justice also extends to lawyers having responsibilities to co-operate and engage with the disciplinary regime provided for under the LCA, for example co-operating with Standards Committees following the lodging of a complaint against a practitioner.[36]

4.3 Factors that may be relevant to the assessment of the nature and gravity of conduct of the kinds set out above include: the nature and extent of the conduct (including whether the conduct was "one-off", repeated or prolonged); the culpability of the practitioner (i.e., whether conduct was intentional, reckless, negligent, inadvertent); whether the conduct was accompanied by other unprofessional conduct (for example, where the content/tone of the communications failed to comply with the lawyer's obligation to act with respect and courtesy towards others); the impact of the conduct, for example whether there was any impact on court proceedings or implications for the practitioner's client.

4.4 Given the fundamental nature of the obligations in the above categories, a disciplinary response will typically be required to conduct involving a breach of these obligations. If the breach involved the practitioner knowingly (i.e., intentionally) or recklessly breaching their obligations, then

35 See also the subrules to r 2.10, which relate to retaliatory conduct in response to the filing of a complaint.

36 See *Auckland Standards Committee 2 v Name Suppressed* [2018] NZLCDT 9, citing *Parlane v NZLS (Waikato/Bay of Plenty Standards Committee 2)* HC Hamilton, CIV-2010–419- 1209, December 2010; *Hart v The Auckland Standards Committee 1* [2013] NZHC 83; [2013] 3 NZLR 103.

referral to the Disciplinary Tribunal will generally be the appropriate outcome.[37] A deliberate breach of rr 2.2 or 2.4 is conduct that may constitute criminal offending,[38] and so is inherently conduct in a more serious category of cases.

4.5 Different examples of conduct which has engaged these rules, ranging in seriousness, are set out as follows:

(a) For conduct involving a one-off and/or inadvertent breach of the lawyer's obligations, where there have been no material consequences as a result of the practitioner's actions, censure and/or a starting point of a low-level fine in the range of $1,000 to $3,000 will typically be warranted. For example:[39]

(i) In *KD v MX,*[40] a practitioner acting for a client in a Hague Convention dispute emailed the school where the client and her former partner's children attended, encouraging the school to prevent the former partner (who had guardianship rights) from removing the children from school and alleging that the father was psychologically abusive. The practitioner contacted the school in good faith, so as to advance her client's interests, and this occurred in accordance with the client's instructions. There was no practical impact on the former partner, as the school declined the practitioner's request (though the correspondence caused him embarrassment and distress). The LCRO, on review, substituted a finding of unsatisfactory conduct, censured the practitioner (so as to encourage her to take care in sending correspondence of a similar nature in future) and ordered that she apologise to the former partner.

(ii) In *AD v FR and OR,*[41] the LCRO substituted a fine of $2,000 following a finding of unsatisfactory conduct. The practitioner, on behalf of his client, wrote to real estate agents involved in a transaction for the sale and purchase of a property regarding the agents' failure to disclose issues with the property before sale. The practitioner, in the context of a request for financial compensation, stated that his client had grounds to file a complaint with the Real Estate Agents Authority. The agents filed a complaint with the Law Society about the correspondence shortly after it was received. It was determined that the threat to file a complaint with the regulator had been invoked as leverage to achieve a particular outcome (namely financial compensation), meaning that the threat was improper.

(b) For conduct involving a moderately serious breach of the lawyer's obligations (for example, a one-off breach of the lawyer's obligations which has had an impact, in circumstances where the breach is not intentional/reckless), a fine with a starting point in the vicinity of $4,000 to $7,000, combined with censure, may be appropriate. For example, in *QZ v UJ,*[42] the LCRO upheld a penalty of censure and a fine of $5,000 for a practitioner who, in the context of settlement discussions in an employment matter, threatened to disclose details of previous

37 See for example *Canterbury Westland Standards Committee 2 of the New Zealand Law Society v Eichelbaum* [2014] NZLCDT 68, where the inclusion of inflammatory content about Mr N in a draft affidavit, which was tantamount to a threat to expose damaging information about Mr N, was held to constitute misconduct. The lawyer's purpose in sending the draft was to attempt to achieve a resolution (i.e., payment of fees) without the need to file proceedings. See also *National Standards Committee v Denham* [2017] NZLCDT 10, where a practitioner was suspended for three years following a finding of misconduct for bringing a vexatious and malicious private prosecution against her former husband.

38 See for example Crimes Act 1961, s 116.

39 See also *HTO v AG* [2017] NZLCRO 65, where a $1,000 fine was imposed for a low-level finding of unsatisfactory conduct, following a practitioner threatening to make a report about an Internet Service Provider (ISP) to the Police Commissioner. The practitioner subsequently advised that his primary intention had been to inform the ISP of the possible legal issues arising from its actions. The practitioner apologised for any "unfortunate misunderstanding" if the ISP had taken the relevant fax as a threat.

40 *KD v MX* [2021] NZLCRO 20.

41 *AD v FR* [2018] NZLCRO 81.

42 *QZ v UJ* [2018] NZLCRO 132.

allegations of sexual harassment by his client, and made reference to adverse media attention. It was found that the settlement reached was influenced by the practitioner's threat, and that the practitioner had used the threat to leverage settlement. The practitioner had no previous disciplinary history, was remorseful for his actions, and acknowledged he should have taken greater care in his drafting of the relevant correspondence.

(c) For high-end unsatisfactory conduct, a fine with a starting point in the range of $7,000 to the maximum fine available, combined with an order for censure, should be considered. For example, where the conduct (while not intentional/reckless) is prolonged/repeated or involved a high degree of unprofessionalism and/or negligence, and/or where there have been significant consequences as a result of the practitioner's conduct.

5. Providing incorrect or false certifications, issues with administrations of oaths and declarations

5.1 Lawyers have particular obligations which apply when they are required to certify the truth of matters. Under r 2.5 of the Rules of Conduct and Client Care, a lawyer must not certify the truth of any matter to any person unless the lawyer believes on reasonable grounds that the matter certified is true after having taken appropriate steps to ensure the accuracy of the certification. If a lawyer discovers at any stage that a certification that they have provided has become inaccurate or incomplete to a material extent, the lawyer must immediately take reasonable steps to correct the certificate under r 2.6. Examples of situations where a certification is required include:

(a) Where a property relationship agreement is entered into under ss 21, 21A or 21B of the Property (Relationships) Act 1975, a lawyer is required to certify that he/she /they has explained the effect and implications of the agreement to the relevant party;

(b) Where trust account supervisors provide certificates of compliance to the New Zealand Law Society regarding the operation of trust accounts under the Trust Accounting Regulations;

(c) When lodging e-dealing transactions with Land Information New Zealand in accordance with the Land Transfer Act 2017.

5.2 The obligations in rr 2.5 and 2.6 are distinct from a lawyer's obligations when administering an oath or declaration (as set out in r 4.6 of the Rules), as the lawyer is required to take appropriate steps to ensure the truth and accuracy of the matters contained in the certificate. In contrast, under r 4.6.4, a lawyer administering an oath or taking a declaration is not responsible for the contents of the document sworn or declared and is not obliged to read it. However, where there is good reason for the lawyer to believe the matters sworn or declared are false, the lawyer must not administer an oath or take a declaration, otherwise he or she will be in breach of r 4.6.3.

5.3 Factors that may be relevant to the assessment of the nature and the gravity of breaches of these obligations are as follows:

(a) The context in which the certificate was made, and the nature of the certificate. For example, certifications in the context of the e-dealing system have been emphasised to be integral to the integrity of, and public confidence in, the e-dealing system, particularly given this occurs when lawyers are lodging e-dealing instruments with Land Information New Zealand, including involving transfers of land. Contrast, for example, a certification that a lawyer had witnessed a client signing a form, when this had not in fact occurred (but where the client has signed the relevant form);

(b) The number of incorrect or false certificates provided;

(c) Whether actual harm or loss was caused by the breach (or there was a risk of harm or loss);

(d) Whether or not any steps were taken to ensure the accuracy of the certification;

(e) Whether any steps were taken to rectify any incorrect or false certificate and, if so, when any such steps were taken;

(f) The culpability of the practitioner (i.e., whether the breach was intentional, reckless or the result of negligence or an honest and genuine mistake).

5.4 In cases involving a breach of r 4.6 and its subrules, key factors will likely be similar to those above, including the culpability of the practitioner, and the extent of the "red flags" that ought to have put the practitioner on notice of the fact the matters sworn or declared were false, and the impact of the breach (if any).

5.5 A Standards Committee also has the power to direct that the Registrar General of Land be notified of a determination relating to a practitioner under ss 152(2)(a) (reference to the Disciplinary Tribunal) and 152(2)(b) (finding of unsatisfactory conduct) pursuant to s 159 of the LCA, which may

be relevant to cases involving false certifications in the e-dealing context.

5.6 Because certifications made by lawyers are statements that are intended for third parties to rely on as accurate, it is important that lawyers ensure the accuracy of the information contained in certificates they provide, so as to ensure public confidence in the integrity of the profession. This means that a disciplinary response will be appropriate in most, if not all, cases where there has been a breach of rr 2.5 and/or 2.6.

(a) For cases involving a lawyer intentionally or recklessly breaching his or her obligations under these rules, referral to the Tribunal will likely be appropriate, particularly where there were other aggravating factors of the conduct, such as harm as a result of the lawyer's actions and/or a complete failure by the lawyer to take any steps to ensure the accuracy of the certification. See for example *Auckland Standards Committee 2 v Sharma,* where the practitioner engaged in misconduct for filing two false certificates in order to purchase a commercial property. The practitioner was found to have engaged in deliberate dishonesty for his own personal gain. The practitioner had previous disciplinary history. Notwithstanding the practitioner's personal mitigating circumstances, the Disciplinary Tribunal determined that strike off was the appropriate outcome.[43]

(b) For cases where there is repeated negligent certification a finding of high-level unsatisfactory conduct may be warranted. For example, in *GR v [Area] Standards Committee,*[44] the practitioner, who had a number of years' experience, falsely certified in both easement and caveat instruments lodged with LINZ that he was authorised to act for a grantee, when this was not correct. There was no evidence in support of the accuracy of the certification on either occasion. There was no harm caused by the false certification. The lawyer also failed to respond to requests for evidence in support of the certification. The LCRO upheld the orders made by the Standards Committee imposing an order for censure and a fine of $6,000. A copy of the decision was also provided to the Registrar-General of Land in accordance with s 159 of the LCA. It is suggested that a starting point for a fine in response to conduct at this level of seriousness should be set above the $6,000 level.

(c) For cases where there has been a mistaken or inadvertent breach of rr 2.5 and/or 2.6, and the error involved was not one which was material, a finding of unsatisfactory conduct at the lower end of the spectrum is still appropriate, warranting the imposition of a low-level fine and/or further training (e.g., where the error is due to a lack of knowledge, competence related, or attributable to inexperience). For example, in *Wellington Standards Committee 2 v Austin,*[45] the practitioner was found guilty of unsatisfactory conduct for certifying a duplicate declaration of death. The error involved was not one which could have affected the integrity of the land registration process, as the substantive information contained in the declaration (i.e., that the individual in question was deceased) was correct. Further the practitioner had information confirming this at the time he provided the certification. The Tribunal also took into account that, at the relevant time, the practitioner had believed that he was simply replacing a properly executed document. The practitioner had no previous disciplinary history, and other personal mitigating factors applied. The Tribunal censured the practitioner and imposed a fine of $3,000.

43 *Auckland Standards Committee 2 v Sharma* [2015] NZLCDT 12. See also Auckland Standards Committee 5 v Hylan [2014] NZLCDT 31.

44 *GR v [Area] Standards Committee* [2020] NZLCRO 42.

45 *Wellington Standards Committee 2 v Austin* [2016] NZLCDT 33.

6. Requirement to act competently and with reasonable care

6.1 The duty to act competently has been described as one of the "most fundamental of a lawyer's duties, without which "a lawyer's work might be more hindrance than help".[46] This is reflected in s 4(c) of the LCA, which provides that every lawyer who provides regulated services must, in the course of his or her practice, comply with the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients. The duty to act competently is reflected in the preface to the Rules of Conduct and Client Care, as well as in r 3, which states that, in providing regulated services to a client, "a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care".

6.2 The duty is also expressly reflected in one of the categories of unsatisfactory conduct in s 12(a) of the LCA, which provides that a lawyer will have engaged in unsatisfactory conduct if, at a time the lawyer was providing regulated services, he or she engages in conduct that "falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer". In this way, the duty is not concerned with the need to provide a "high level of service to clients", but is "in reality, a duty not to be incompetent … aimed at ensuring minimum standards of service".[47] Whether or not a lawyer has met the requisite minimum standards of services is to be determined "objectively".[48] There is a distinction between a duty to exercise competence and reasonable diligence and a duty to be correct:[49]

> A lawyer is not under a duty to be right all the time. A lawyer has a duty to exercise reasonable care and competence. Lawyers are often faced with finely balanced problems. The fact that a decision they make turns out to be wrong does not in itself mean that they have been negligent or that the lawyer is guilty of unsatisfactory conduct as defined in s 12(a) of the Act.

6.3 Basic notions of competence include the requirement that the client is provided sufficient information to give informed instructions.[50] Many of the other rules in the Rules of Conduct and Client Care are concerned with the need for clients to be kept informed and apprised of key developments, and for this to occur in a "timely way". For example, r 3.2 requires lawyers to respond to inquiries from the client in a timely manner, and r 3.3 requires the client to be informed of material and unexpected delays in a matter. Further, chapter 7 is also concerned with ensuring prompt disclosure and communication of information to clients. Specific obligations also apply in the context of litigation, for example, the requirement to obtain informed instructions from clients on significant decisions in respect of the conduct of litigation in r 13.3.

6.4 Where a lawyer has displayed significant negligence and incompetence, then this may be the basis of a finding of a specific charge under s 241(c) of the LCA. Specifically, where a lawyer has engaged in negligence or incompetence in the lawyer's professional capacity, where the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring the profession into disrepute. Only the Disciplinary Tribunal may find a charge of serious negligence or incompetence under s 241(c).

---

46 D Webb *Ethics, Professional Responsibility and the Lawyer* at [11.1], cited in QL v DW [2019] NZLCRO 114.

47 D Webb *Ethics, Professional Responsibility and the Lawyer* at [11.3], cited in QL v DW [2019] NZLCRO 114.

48 *QL v DW* [2019] NZLCRO 114 at [70], citing D Webb, K Dalziel and K Cook Ethics, *Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [11.3].

49 *RF v CN* LCRO 254/2012, 3 November 2016 at [54]. See also *VW v EX* [2021] NZLCRO 59, citing Webb, where the LCRO noted at [84] that: "A glaring mistake by a lawyer, shown to have been palpably wrong, may lead to a finding the lawyer did not act competently, or even result in a negligence claim by the lawyer's client. But if the error of judgment, or mistake in the law concerns an "unclear, or complex" issue or point, the lawyer concerned "cannot be said to be incompetent". And further at [85]: "Similarly, it does not necessarily follow that because a Court disagrees with a lawyer's argument or position, that the lawyer did not act competently in bringing the argument."

50 *Sandman v McKay* [2019] NZSC 41 at [80].

6.5 From a review of cases before Standards Committees, the LCRO and the Disciplinary Tribunal, the following factors have typically been taken into account in assessing the nature and gravity of a practitioner's conduct in the context of negligence or incompetence:

(a) The nature and seriousness of the relevant error(s), and the context in which the error(s) occurred. "Substantive" errors are typically considered as more serious that "procedural" or process errors;

(b) The extent of the negligence or incompetence, and how many errors were involved;

(c) Whether the relevant conduct was prolonged or repeated;

(d) Any adverse impact or harm caused by the lawyer's conduct and/or the level of risk posed by the relevant conduct;

(e) The relative experience of the practitioner. Is the conduct the result of inexperience or a lack of proper supervision? If so, this may mitigate the level of culpability of the practitioner concerned;

(f) Any steps taken to rectify the error(s) and/or to improve the lawyer's practice.

6.6 Where the lawyer's conduct has resulted from a lawyer's lack of understanding or knowledge of a particular area, orders for further training or education may be appropriate (in addition to a fine) to assist with the lawyer's rehabilitation and to mitigate the risk of the lawyer engaging in similar conduct in the future (LCA, s 156(1)(m)). Orders requiring the lawyer to take advice in relation to the management of his or her practice may also be appropriate in such circumstances (LCA, s 156(1)(l)).

6.7 Where a lawyer's negligence or incompetence have led to adverse consequences for a client, and steps have not yet been taken to address these, orders requiring the lawyer to rectify, at his or her own expense, any error or omission (or the consequences of any error or omission) are commonly made (LCA, s 156,(1)(h)), as are orders requiring the lawyer to reduce or cancel his or her legal fees (LCA, s 156(1)(d)). Orders for compensation are also sometimes made in this context, where a client has suffered loss "by reason of any act or omission" of the lawyer (LCA, s 156(1)(d)).

6.8 Where a lawyer has made a one-off error which has not resulted in particularly adverse consequences for the client, and where the error is not a significant one, a fine in the vicinity of $1,000 to $2,000 has typically been considered appropriate. A fine of $1,000 was considered appropriate in the case of a lawyer requesting an extension to a due diligence condition, and doing nothing further after the extension was given, and in another case where the lawyer failed to update a client about a hearing date, despite follow-up requests for information by the client.

6.9 Where there have been multiple errors, or an error of a more serious nature, fines of a higher level in the range of $3,000 to $5,000 have generally been imposed. For example, in one case where the lawyer's wrong advice had the potential to cause significant harm to the client, a fine of $3,000 was imposed by the Standards Committee, together with an order requiring the refund of the lawyer's fees. Fines of $4,000 and $5,000 were imposed for a failure to register a property transaction and a failure to comply with the terms of a will respectively.

6.10 Fines at the upper end of the spectrum (i.e. fines up to $15,000) should be reserved for negligence or incompetence of the most serious kind (not amounting to conduct which would amount to serious negligence or incompetence engaging the threshold test in s 241(a) of the LCA). Typically, this will consist of conduct comprising multiple errors, where the errors are material and have resulted in harm to the client or where the conduct has been repeated or prolonged, and where the errors cannot be attributed to inexperience. For example, in one case before the Standards Committee, a fine of $15,000 was imposed where the lawyer's services were of no assistance to the client and put the client in a worse financial position because they were ordered to pay the other party's indemnity costs in the Tenancy Tribunal. The lawyer's advice was wrong, and the lawyer had also failed to supervise the lawyer's employees. The lawyer had a significant adverse disciplinary history.

6.11 As outlined in the general principles section of this guidance, penalty decisions in the professional disciplinary context are inherently case specific. Nowhere is this more true than in the area of lawyer negligence or incompetence, where the context, facts and circumstances of the relevant conduct can vary so widely. The following cases are provided to assist Standards Committees, but it is not suggested that they represent a discernible pattern of banding or categorisation of negligence of incompetence cases.

(a) In *LK v NM,* the practitioner was acting for a client who was seeking to recover a debt from another party.[51] The practitioner failed to appear or arrange cover for a Court hearing. Following the hearing, the Court struck out a judgment in favour of the client and discharged a charging order that had been obtained to secure the judgment, also awarding substantial costs against the client. On review, the LCRO found that the lawyer's failure to provide appropriate oversight of the client's file, amounted to unsatisfactory conduct under s 12(a). The fine that had been imposed by the Standards Committee was increased by $1,000 to reflect this finding, and a censure was also imposed. See also:

(i) *UT v HB,*[52] where the practitioner failed to confirm the client's instructions for the preparation of a new will ($1,000 fine);

(ii) *PC v FM,*[53] where the practitioner failed to provide advice and assistance in respect of a lease, in particular failing to ensure the client understood what was needed for the lease ($1,500 fine);

(iii) *RY v P AN,*[54] where the practitioner failed to take proper care in drafting a term in a sale and purchase agreement, and failed to consult the client properly before confirming the agreement ($1,000 fine);

(iv) *ID v KZ,*[55] where a practitioner failed to serve documents in time on judgment creditors ($1,000 fine);

(v) *DM v TN,*[56] where the practitioner failed to progress his client's personal grievance claim in a timely manner, creating a delay of around one year (in the context of ongoing delays) ($1,500 fine);

(vi) *IJ v KL,*[57] where the practitioner failed to provide the client with clear, competent, and timely advice about a costs offer ($2,000 fine);

(vii) *LH v SR,*[58] where the practitioner failed to respond to client enquiries and delayed preparing a will ($2,000 fine); and

(viii) *QL v DW,*[59] where the practitioner failed to provide competent relationship property division calculations that the client could understand, and failed to consult with the client about the calculations ($2,000 fine).

(b) In *UT v LE,* the practitioner failed to provide an engagement letter to the client, failed to provide clear, competent advice and failed to consult the client in regards to the retainer in a relationship property matter.[60] The LCRO upheld a penalty of a $4,000 fine, and substituted an order for compensation for an order requiring the practitioner to cancel his fee and refund the funds to the client. See also:

51 *LK v NM* [2018] NZLCRO 32.
52 *UT v HB* [2019] NZLCRO 89.
53 *PC v FM* [2019] NZLCRO 105.
54 *RY v P AN* [2018] NZLCRO 83.
55 *ID v KZ* [2018] NZLCRO 57.
56 *DM v TN* [2021] NZLCRO 49 (9 April 2021).
57 *IJ v KL* [2017] NZLCRO 8.
58 *LH v SR* [2019] NZLCRO 27.
59 *QL v DW* [2019] NZLCRO 114.
60 *UT v LE* [2018] NZLCRO 130.

(i) *HK v CN*, where a censure and a $3,000 fine were imposed for a lawyer's failure to provide a client advice about the implications of conditions in sales and purchase agreements to which the client was a party, and for failure to provide adequate supervision;[61]

(ii) *Zhao v Sun,*[62] where the practitioner failed to advise his clients of a notice of lapse of caveat, resulting in them not being able to take advice as to whether or not they should take action to sustain the caveat or should allow it to lapse ($4,000 fine);

(iii) *CA v XU,*[63] where the practitioner was fined $5,000 for asserting that his client had an interest in property owned by another party, when this was not the case. The client was an unsecured creditor of the company owned by the other party and had no remedies against the property in the event of default.

(c) In *DV v LS,* in addition to failing to competently supervise two employees, the practitioner failed to advise a client about the importance of service requirements and failed to ensure the prompt service of negligence proceedings after the proceedings had been filed.[64] The practitioner's firm refunded the client's legal fees. The LCRO considered that the practitioner's conduct had involved serious lapses, and noted that the practitioner was experienced in the relevant area of law. The practitioner's conduct had also meant that the client had paid for unnecessary legal services. A fine of $8,500 was substituted. The practitioner was also required to pay compensation to the client. See also *AJ v AK,*[65] where a fine of $7,500 was upheld in respect of the practitioner's failure to act on instructions to seek clarifying orders following a Court judgment in a relationship property matter. The practitioner retained funds in his trust account (arising from sale proceeds) for around four years against his client's instructions to sort out the ownership of those funds.

(d) In *Auckland Standards Committee v van der Zanden,* the Disciplinary Tribunal found the practitioner guilty of serious negligence or incompetence under s 241(c) for preparing and filing materially incorrect and misleading affidavit evidence with the Court of Appeal (in the context of a criminal appeal alleging prosecutorial misconduct).[66] The practitioner had incorrectly maintained that the prosecution had reneged on a plea deal (meaning that the same errors were repeated), despite the practitioner not having checked the relevant file before providing sworn evidence, and despite being aware of an email which went against his position. The Court of Appeal had been temporarily misled as a result of the practitioner's actions. In finding that the conduct was towards the "high end of the negligence continuum", the Disciplinary Tribunal took into account that the practitioner's approach had been seriously flawed, the need for Courts to be able to rely on sworn evidence, particularly in the case of lawyers (as officers of the Court), and that his errors were not attributable to his relative inexperience alone. Further, the conduct had been repeated. The Disciplinary Tribunal ordered a three-month suspension, censure and mentoring (noting that the lack of oversight had somewhat contributed to the practitioner's actions). See further:

(i) *National Standards Committee 1 v Young,*[67] where a two and a half year suspension was imposed following the practitioner (who had previous disciplinary history) being found guilty of serious negligence and incompetence and unsatisfactory conduct, relating to his conduct in Family Court proceedings for a client;

61 *HK v CN* [2019] NZLCRO 66.

62 *Zhao v Sun* [2020] NZLCRO 63.

63 *CA v XU* [2011] NZLCRO 32.

64 *DV v LS* [2018] NZLCRO 137.

65 *AJ v AK* [2018] NZLCRO 15.

66 *Auckland Standards Committee v van der Zanden* [2014] NZLCDT 21.

67 *National Standards Committee 1 v Young* [2020] NZLCDT 20; *National Standards Committee 1 v Young* [2020] NZLCDT 30.

(ii) *Southland Standards Committee v W,*[68] where a 12-month suspension was imposed following the practitioner pleading guilty to serious negligence or incompetence in the context of various criminal matters (persistent failure to properly prepare in representing clients, failing to attend court when required, persistent lack of adequate knowledge of law and procedure in criminal matters, to the detriment of clients, persistent lack of response to client requirements to an unacceptable degree);

(iii) *Auckland Standards Committee 2 v Dangen,*[69] where a two-month suspension was imposed in respect of a practitioner who swore three affidavits which were inaccurate, charged significant fees for attendances without authorisation from the Court, and advanced a loan to a family member of the protected person without authority.

68 *Southland Standards Committee v W* [2013] NZLCDT 28.

69 *Auckland Standards Committee No 2 v Dangen* [2019] NZLCDT 22.

7. Provision of client care information

7.1 Under r 1.6 of the Rules of Conduct and Client Care, all information a lawyer is required to provide to a client must be provided in a manner that is clear and not misleading "given the identity and capabilities of the client, and the nature of the information". Specifically, lawyers are required to provide clients with the client care and service information specified in rr 3.4, 3.4A, 3.5, or 3.5A of the Rules of Conduct and Client Care in writing prior to undertaking significant work under a retainer. This information is typically provided in client engagement letters. Information is required on the principal aspects of client services, namely: (a) the basis on which fees will be charged, and when payment of fees is to be made; (b) the professional indemnity arrangements of the lawyer's practice; (c) the coverage provided by the Lawyers' Fidelity Fund; and (d) the procedures in the lawyer's practice for the handling of client complaints (including information on the Law Society's complaints service). The lawyer must also provide a copy of the client care and service information set out in the preface to the Rules of Conduct and Client Care, and detail the name and status of the persons with responsibility for the work, as well as noting any provision in the retainer limiting or excluding liability.

7.2 While the requirement to provide the necessary client care and service information is important, and reflects the consumer protection principles underpinning the LCA,[70] breaches of the above rules will generally amount to unsatisfactory conduct at the lower end of the spectrum of seriousness (in circumstances where a disciplinary response is considered appropriate, having regard to the nature and circumstances of the case). As a consequence, for cases involving a one-off breach of the above rules (with no other conduct issues), a fine in the vicinity of $1,000 to $2,000 will typically be the appropriate penalty.[71] However, each case will necessarily turn on its own facts. For example, in the recent case of *DP v FJ*, the LCRO determined that a fine of $3,500 was appropriate in response to the practitioner's failure to provide clear information to his client about fees and other aspects of his services, contrary to rr 1.6 and 3.4(a) (and which amounted to unsatisfactory conduct).[72] The breach of these rules was considered to be relatively serious, as the practitioner's conduct meant that he and his client (for whom English was a second language) had "diametrically opposite views" about the basis on which fees would be charged. The practitioner, who had previous disciplinary history, was also required to take advice on aspects of his practice management systems.

7.3 Factors relevant to assessing the nature and gravity of conduct of this kind will likely include: the number and extent of the breaches; whether the conduct was intentional, reckless, negligent or inadvertent; the nature of the information that the practitioner has failed to provide, and its importance, and/or the extent to which the information provided is misleading; if the required information is provided following the undertaking of significant work on the retainer, when this occurred; the impact of the breach (if any), for example if the failure to provide the required information at the outset of the retainer contributes to issues in the lawyer-client relationship (for example, relating to fees/charging).

70 See *McGuire v Manawatu Standards Committee* [2016] NZHC 1052, where the Court observed that the policy behind requirements for letters of engagement is to fully inform clients of important matters, including fee levels, fee payment arrangements, indemnity insurance, fidelity fund arrangements and complaints mechanisms.

71 See for example *AB v RP* [2020] NZLCRO 220; DP v FJ [2021] NZLCRO 099. See also the discussion in *BL v JC* [2018] NZLCRO 140, where no further action was taken in respect of a failure to provide an engagement letter until one week after work had been undertaken on the retainer.

72 *DP v FJ* [2021] NZLCRO 99.

8. Duties around retainers

8.1 Lawyers have specific duties around entering into and terminating retainers with clients. The "cab-rank" principle is reflected in rr 4 and 4.1, which provide that lawyers, as professional persons, must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client where those instructions are within the lawyer's field of practice.

8.2 Where a lawyer declines instructions, the lawyer must give reasonable assistance to the person concerned to find another lawyer: r 4.1.3. Once engaged, lawyers have a duty to complete the regulated services required under the retainer, unless the retainer is ended: r 4.2. Clients have a broad ability to terminate a lawyer's retainer in a variety of circumstances (see r 4.3); lawyers, in contrast, may only terminate a retainer with a client for good cause, as specified in r 4.2.1. For example, there are only limited circumstances where a lawyer may terminate a retainer where the client has failed to make satisfactory arrangements to pay the lawyer's costs: r 4.2.3.[73] As when refusing instructions, a lawyer who terminates a retainer with good cause must provide the client reasonable assistance to find another lawyer: r 4.2.4. Terminating a retainer with a client without good cause or failing to assist a client to find another lawyer are both issues which may warrant disciplinary action, given the difficulties and inconvenience that can arise for clients when this kind of conduct occurs.

8.3 Upon termination of a lawyer's retainer, the lawyer also has a specific duty to act on any written request to uplift any documents held on the former client's behalf under r 4.4.1. Failing to provide copies of client files, or failing to do so without undue delay, following the termination of a retainer is a common conduct issue giving rise to complaints against lawyers. The obligation to provide client files on request under r 4.4.1 is subject only to any lien that the former lawyer may claim.[74]

8.4 While the duties concerning retainers are important to ensuring public confidence in the profession and consumer protection, breaches of these kinds of obligations will typically fall at the lower end of the spectrum of seriousness. In previous cases involving conduct of this kind, the penalty orders imposed following a finding of unsatisfactory conduct generally range from no penalty orders being ordered (on the basis that the adverse finding against the practitioner is sufficient to meet the principles and purposes of disciplinary proceedings) through to censure or reprimand, and/or the payment of a fine up to $3,000.

8.5 Factors which will be relevant to assessing the nature and gravity of the relevant conduct may include:

(a) The nature of, and circumstances surrounding, the conduct;

(b) The extent of the breach, for example, were there significant delays in providing the client files or was the delay not significant? Was any refusal of instructions or termination of the retainer without good cause accompanied by a failure to provide reasonable assistance to find another lawyer? Was the conduct accompanied by a lack of professionalism or a failure to adequately communicate, or was it otherwise unreasonable?

(c) The practitioner's culpability, i.e. was the breach deliberate, reckless, or inadvertent?

(d) Any harm caused, for example, was there any distress, inconvenience or cost to the client caused due to the practitioner's actions?[75]

---

73 Objectionable conduct by a client towards a lawyer or a person associated with the lawyer's practice, such as bullying, discrimination or harassment, is now good cause for a lawyer to terminate a retainer, following the implementation of the 2021 amendments to the Rules of Conduct and Client Care.

74 See footnotes to rr 4.4 and 4.5.

75 See for example *TC v DM* [2019] NZLCRO 53, where the LCRO had regard to the fact that the practitioner, who was acting in a property transaction, had terminated the retainer without good cause close to the date of settlement, having completed significant work on the transaction. The LCRO likened the inconvenience, distress and cost caused as something that "cannot be underestimated", and as "analogous to a litigation lawyer withdrawing their services shortly before a trial is due to commence".

8.6 Cases where one or more of the above factors is present (for example, where the practitioner's conduct has had an adverse impact on the client's interests beyond the inevitable inconvenience and/or cost associated with conduct of this kind, where the practitioner was also acting unprofessionally/unreasonably, and/or where the relevant breach was serious because of its nature or because it occurred over a prolonged period) will typically warrant the imposition of at least a censure or reprimand and/or a low-level fine to mark the gravity of the practitioner's conduct. The following cases are illustrative of the kinds of penalty orders imposed in respect of conduct of this kind:

(a) For conduct at the lower end of the scale of seriousness, see:

(i) *TA v UD,*[76] where the practitioner terminated a retainer relating to the resolution of a property dispute without good cause. The practitioner claimed that he had a high volume of work which meant he was unable to continue acting, but had failed to inform the client of this despite having the opportunity to do so on earlier occasions. The LCRO considered that the finding of unsatisfactory conduct was sufficient in and of itself without any penalty orders being made.

(ii) *RB v ZB,*[77] where a lawyer failed to release a client's files for eight weeks after the lawyer's retainer was terminated. No penalty orders were considered necessary; the finding of unsatisfactory conduct was considered sufficient by itself.

(iii) *EW v BL,*[78] where a practitioner who terminated a retainer without good cause when acting in the potential sale of a business was fined $500 and ordered to reduce her fee. The fact that there was some confusion arising because the client was taking advice from two different lawyers at the same time and issues over the payment of one of the practitioner's invoices were taken into account as mitigating factors.

(iv) *T v G,*[79] where a $600 fine was imposed after a lawyer terminated a retainer without good cause. The breach was inadvertent, as the lawyer mistakenly was of the view that there was no retainer until a grant of legal aid had been secured.

(b) For conduct of a moderately serious nature, see the following cases:

(i) *HI v JK,*[80] where the practitioner failed to properly inform a client he was acting for in a criminal proceeding that he had terminated the retainer. The practitioner failed to make it clear to the client that the practitioner would not be representing him at an upcoming court hearing. The practitioner also did not take any steps to assist the client to engage another lawyer. The client was "not an easy client to manage", but the practitioner's conduct had the potential to cause the client significant distress. On review, the LCRO ordered that the practitioner cancel his fee and refund the funds paid to the client. See similarly *Linton v Keswick,* where a censure was imposed and an order made for the practitioner to reduce his fees after he terminated a retainer without good cause (due to concerns about payment of fees) on the eve of two court hearings, causing the client distress.[81]

(ii) *ZA v YB,*[82] where the practitioner failed to provide a will, deed and other documents upon termination of the retainer. The failure to provide the documents meant that the client was unable to apply for probate. The practitioner was wrongly of the view that a lien could be claimed over the documents. A fine of $1,000 was imposed, together with

76 *TA v UD* [2019] NZLCRO 124.

77 *RB v ZB* [2017] NZLCRO 30.

78 *EW v BL* [2020] NZLCRO 102.

79 *T v G (costs)* [2009] NZLCRO 27; T v G [2009] NZLCRO 12.

80 *HI v JK* [2020] NZLCRO 141.

81 *Linton v Keswick* [2009] NZLCRO 40.

82 *ZA v YB [*2019] NZLCRO 1.

an order requiring the provision of the documents. See similarly *LH v SR,* also involving a failure to release a will following termination of the retainer, resulting in a $1,000 fine and an order requiring release of the document.[83]

(iii) *Otago Standards Committee v Saunderson-Warner,*[84] where the practitioner was found guilty of unsatisfactory conduct for terminating a retainer relating to the recovery of a debt without good cause. The practitioner persuaded herself, incorrectly, that the retainer had concluded. The Tribunal noted its concern with how the practitioner had treated the complainants, which reflected poorly on the profession. The practitioner was censured, ordered to apologise to the complainants, and ordered to pay compensation to the complainants.

(c) For conduct of a serious nature, see *QZ v FZB,* where the practitioner inappropriately invoiced a former client for fees for work carried out when he was no longer acting for the client, and then failed to hand over trust documents to the client's new lawyers for a month, asserting a lien over the documents without justification.[85] The practitioner was fined $3,000 and ordered to cancel the relevant invoice.

83 *LH v SR* [2019] NZLCRO 27.

84 *Otago Standards Committee v Saunderson-Warner* [2013] NZLCDT 15; *Otago Standards Committee v Saunderson-Warner* [2013] NZLCDT 24.

85 *QZ v FZB* [2019] NZLCRO 137.

9. Conflicts of interest

9.1 Lawyers have a fundamental obligation to protect the interests of their clients.[86] They have fundamental obligations to act in accordance with all fiduciary duties and duties of care owed to their client,[87] and a duty to be independent when providing regulated services to clients.[88] If a lawyer has a personal interest in a matter and acts in accordance with his or her self-interest to the disadvantage of the client concerned, that is contrary to the fiduciary character of the lawyer/client relationship, which relies on trust and confidence.[89] As a consequence, lawyers have strict obligations not to act in circumstances where there is a risk their personal interests may come into conflict with their clients' interests, potentially compromising the lawyer's ability to provide objective and independent advice and to act in the client's best interests.

9.2 Chapter 5 of the Rules of Conduct and Client Care sets out the requirements for lawyers to ensure their independence when providing regulated services. Rule 5 reinforces that a lawyer must be "independent and free from compromising influences or loyalties when providing services to his or her clients." Further, the professional judgement of a lawyer must be exercised solely for the benefit of the client, and must exercise that judgement independently and objectively (rr 5.2 and 5.3).

9.3 Rule 5.4 sets out the key requirements where a lawyer's personal interests touch on a matter: a lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act. Related to this is the requirement for lawyers to disclose if they have any personal interest in a matter to their clients: r 5.4.1. There are also restrictions on lawyers entering into financial, business or property transactions where there is a risk of the relationship of trust and confidence between the lawyer and client being compromised (rr 5.4.2, 5.4.3, 5.4.4, 5.5). Where the lawyer has a close personal relationship[90] with a third party involved in a matter, the lawyer must ensure that this relationship does not compromise the lawyer's ability to discharge his or her duties to the client concerned (r 5.6).

9.4 Lawyers are also prohibited from entering into intimate personal relationships with clients where this would be inconsistent with the trust and confidence reposed by the client (r 5.7).[91] Breaches of this requirement are inherently serious (given the invariable power imbalance, and implications for the lawyer's independence and objectivity) and will typically be capable of constituting misconduct, warranting referral to the Disciplinary Tribunal. Penalties of suspension and strike off have regularly been imposed in response to this kind of misconduct.[92] Factors such as the nature and extent of the relationship, the context in which the relationship occurred (for example, if the lawyer is acting in a criminal or relationship property matter), the time over which the relationship occurred, any particular vulnerability of the client, and whether there was any harm to the client or impact on the lawyer's provision of regulated services, will be relevant in assessing the nature and gravity of conduct of this kind.

9.5 The remaining rules in Chapter 5 aim to ensure that lawyers' independence and objectivity is not otherwise compromised in specific scenarios – for example, in respect of gifts (r 5.8), collateral

86 LCA, s 4(d).

87 LCA, s 4(c).

88 LCA, s 4(b).

89 See r 5.1.

90 This is defined in r 1.2 as including, but not being limited to, "the relationships of parents and children, siblings, spouses, civil union partners, and the relationship between persons living together as partners on a domestic basis".

91 Such relationships are prohibited where the lawyer is acting in any "domestic relations" matter for a client: r 5.7.1.

92 See for example *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) (three-year suspension for sexual relationship with client who lawyer was acting for in domestic violence matters); *Canterbury Westland Standards Committee v Horsley* [2014] NZLCDT 47 (two-year suspension for sexual relationship with client for whom practitioner had previously acted for in Youth Court matters).

rewards (r 5.9), and when drafting instruments which may benefit the lawyer (r 5.10).

9.6 Factors which should be taken into account when assessing the nature and gravity of a practitioner's conduct where there is an actual or potential conflict of interest include the following:

(a) The nature and extent of the conflict, and the surrounding circumstances. For example, have regard to factors such as: the number of conflicts and how significant these were; how long the lawyer continued to act when conflicted; whether there was an actual or potential conflict; whether there were any red flags that ought to have alerted the lawyer to the conflict, whether the conflict was obvious; whether the lawyer disclosed their personal involvement or interest to the client;

(b) Whether the lawyer's conduct in acting when conflicted personally benefited the lawyer and/or disadvantaged the client in some way;

(c) The practitioner's culpability, i.e., was the practitioner's conduct intentional, reckless, negligent or inadvertent? Was the conduct motivated by dishonesty/personal gain?

(d) Any particular vulnerability on the part of the client;

(e) Any steps taken after the conflict was identified to rectify the situation.

9.7 Given the fundamental nature of the obligations outlined above, where a lawyer has breached these obligations and acted when personally conflicted, a disciplinary response will generally be required. Where the conduct involved the practitioner acting dishonestly, deliberately or with reckless disregard for his or her professional obligations, this will typically be conduct capable of constituting misconduct, and should therefore be referred to the Disciplinary Tribunal.[93] For cases falling short of misconduct and amounting to unsatisfactory conduct, the penalty orders imposed will vary depending on the nature and gravity of the conduct, and depending on the personal aggravating and mitigating factors relating to the practitioner.

9.8 The following cases illustrate the kinds of penalty orders imposed in respect of conduct at varying levels of seriousness:

(a) Where the conduct was inadvertent or involved a one-off error or failing, and the lawyer's conduct has not had adverse consequences for the client concerned, then a fine at the lower end of the scale (less than $3,000) may be appropriate. For example, see *TS Trust v WK,* where fines of $1,500 were imposed in respect of lawyers involved in a matter where a client signed irrevocable instructions containing undertakings, indemnities, and waivers by the client in favour of the lawyers' firm, to allow for the payment of outstanding legal fees.[94] This was to be in exchange for the firm acting in the sale of a property that was the subject of relationship property proceedings. The client was not referred for independent legal advice.

(b) For conduct of a moderately serious nature, see *Halse, where the practitioner was found guilty of unsatisfactory conduct by the Disciplinary Tribunal.*[95] A fine of $5,000 was imposed. The practitioner had facilitated the loan of his clients' funds to another client and that client's business entities. The practitioner had contributed his own funds to the loans. The practitioner failed to alert the borrower client to the fact he was a personal contributor to the

93 See for example *Auckland Standards Committees 2 & 3 v Mason* [2019] NZLCDT 5, where the practitioner was involved in a property transaction with a vulnerable and elderly client in which he personally benefited. The practice acted for both parties in the transaction, which was on significantly disadvantageous terms to the client. A period of 15 months' suspension was imposed. See also *Hong v Auckland Standards Committee 5* [2020] NZHC 1599, where the practitioner provided financial assistance to clients to assist them to purchase a property, and then later transferred the title to himself and attempted to evict the clients. The practitioner was struck off.

94 *TS Trust v WK* [2018] NZLCRO 44.

95 *Auckland Standards Committee 2 v Halse* [2021] NZLCDT 7.

loans (albeit his contribution was relatively small). The practitioner's lack of disclosure did not ultimately prejudice the practitioner's client.

(c) For conduct at the more serious end at the spectrum of unsatisfactory conduct, warranting a higher level of fine as a starting point (from $7,000 to the maximum level of fine), see the following cases:

(i) In *NH v Singh*,[96] the practitioner acted for clients in a loan transaction where he had a personal interest in the transaction. The practitioner had not adequately disclosed the scope of his personal interest to the client involved. He was also a beneficiary of a company involved in the transaction. The LCRO considered that the practitioner's conduct in taking steps to register securities over properties in which the clients had interests was "tainted" by his conflicts of interest, and there was a risk of the clients defaulting on the loan. The conduct had occurred over a prolonged period. But for the fact that the practitioner had disclosed the full extent of his personal involvement voluntarily, the LCRO would have increased the fine imposed by the Standards Committee given the serious nature of the relevant breaches. The Standards Committee's orders censuring the practitioner, requiring an apology and further education, and imposing a $5,000 fine were upheld on review. The LCRO's comments suggest a fine of at least $7,000 would have been available to reflect the gravity of the conduct.

(ii) *YJ v GK*,[97] where the practitioner was fined $7,500 after not only acting for various clients whose interests diverged in breach of r 6.1, but also was personally involved in a proposed development, meaning that there was a "double conflict". The practitioner failed to explain all the material risks involved to one client, and continued acting despite the divergence in interests for those involved.

96 *NH v Singh* [2014] NZLCRO 37.

97 *YJ v GK* [2021] NZLCRO 56.

10. Conflicts of duty

10.1 Lawyers have fundamental obligations to act in accordance with all fiduciary duties and duties of care owed to their client, and also to protect the interests of his or her clients (subject only to their overriding duties as officers of the Court).[98] The professional conduct rules concerning conflicting duties, located in chapter 6 of the Rules of Conduct and Client Care, are aimed at ensuring that lawyers do not compromise the duties owed to their clients by acting for more than one client in a matter. The rules are triggered where there is a more than "negligible risk" that the lawyer may be unable to discharge their obligations to both clients (see in particular r 6.1). The low threshold of "negligible risk" emphasises the importance of ensuring that lawyers do not act in matters where there is even the potential for a conflict of duties to arise.[99]

10.2 While a lawyer may act for more than one client in a matter where there is less than a negligible risk of conflict (subject to the clients providing prior informed consent for this arrangement) (r 6.1.1),[100] if it becomes apparent at any stage that the lawyer cannot properly discharge their obligations to each client, the lawyer must cease to act (r 6.1.2).[101] Rules 6.2 and 6.3 make it clear that information barriers will not be sufficient to mitigate the risk involved where a lawyer or practice is acting for more than one client; r 6.1 applies whenever lawyers who are members of the same practice act for more than one party, notwithstanding the use of information barriers.

10.3 Where a lawyer acts for more than one client in breach of r 6.1, then this is conduct that may warrant a disciplinary response. Conflicts of *duty* are typically regarded as inherently serious conduct issues, albeit not as serious as where the lawyer is personally conflicted, giving rise to a conflict of *interest.* A conflict of duty gives rise to the risk that a client's interests may not be adequately protected and promoted in circumstances where the lawyer is conflicted when acting for more than one party in a matter. For example, the duty to keep client information confidential and the duty to keep the client informed of all relevant matters can come into conflict in circumstances where the clients' respective interests are not aligned. Similarly, where the clients' interests diverge, acting in one client's interests can result in the practitioner not acting in the other clients' interests. Accordingly, given the inherently seriousness of acting when conflicted, where breaches of r 6.1 are established, a disciplinary response will generally be required.

10.4 The following factors may be relevant in assessing the nature and gravity of breaches of r 6.1 and its subrules:

(a) The nature and extent of the conflict, and the surrounding circumstances. For example, have regard to factors such as: the number of conflicts and how significant these were; whether there was prior *informed consent for the lawyer to act for each client;*[102] how long the lawyer continued to act when conflicted; whether there was an actual or potential conflict; whether there were any red flags that ought to have alerted the lawyer to the conflict, whether the conflict was obvious; whether the lawyer was acting for more than one client or whether it was different members of the same practice;

98 LCA, ss 4(c) and (d). See also RCCC, r 6.

99 See generally the comments of the Court of Appeal in *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 (CA) at 90 regarding the essential principle of undivided loyalty to one's client.

100 "Informed consent" is expressly defined in the interpretation section of the Rules of Conduct and Client Care (r 1.2) 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". In particular, the implications of acting if conflicted must be explained to the parties.

101 The practitioner may continue to act for one party upon termination of the retainer, but only if the other party provides his or her informed consent after receiving independent legal advice. See also the obligations of lawyers when acting against former clients in r 8.7.1.

102 Noting, however, that prior informed consent will not be sufficient to excuse acting for more than one party in circumstances where there is a more than negligible risk that the practitioner cannot discharge his or her professional obligations for both parties.

(b) Whether the lawyer's conduct in acting when conflicted has adversely impacted one or more clients, for example where the conflict has meant the lawyer has not discharged their professional obligations to a client and disadvantaged the client in some way;

(c) The practitioner's culpability, i.e., was the practitioner's conduct intentional, reckless, negligent or inadvertent?

(d) Any particular vulnerability on the part of one or more of the clients;

(e) Any steps taken after the conflict was identified to rectify the situation, e.g., was the process set out in r 6.1 followed?

10.5 In cases where the lawyer's conduct did not result in the lawyer failing to discharge his or her professional obligations to one or more clients, and the conflict was not obvious at the outset of the engagement or the breach was otherwise low-level, a censure and/or a low-level fine (i.e., with a starting point less than $3,000) will typically be appropriate. Fines with a higher starting point (i.e., above $3,000) will typically be appropriate where the risk of conflict was stark or there were red flags which ought to have alerted the lawyer to the issues involved, and where the conflict has undermined the lawyer's ability to discharge his or her obligations to one or more clients or had adverse consequences for one or more of the parties.

10.6 In a number of previous cases, orders for further training or education have also been made where the practitioner's conduct is attributable to a lack of knowledge and understanding of the conflict provisions in the Rules of Conduct and Client Care. Such orders serve a rehabilitative purpose, but also assist in ensuring protection of the public going forward by mitigating the risk of the practitioner engaging in similar conduct in the future.

10.7 An example of a case at the lower level of seriousness is *DL v SJ*.[103] In that case, the practitioner's firm acted for an estate and the party challenging the estate.[104] The practitioner gave substantive strategic advice to the beneficiaries contrary to the interests of the estate. While another member of the firm acted for the estate, r 6.1 was still engaged and the practitioner should not have provided any advice about the potential rights and claims available. The practitioner's advice, ultimately, however, did not lead to any harm or loss. The breach appeared to have been inadvertent. The practitioner had an unblemished disciplinary history, which was taken into account. A fine of $1,000 was imposed by the LCRO.

10.8 For cases of a moderate level of seriousness (warranting moderate fines, with a starting point in the range of $3,000 to $7,000), see:[105]

(a) *CA v XU,* where the LCRO imposed a $5,500 fine following a finding of unsatisfactory conduct for competence and conflict-related breaches.[106] The practitioner acted for a wife and her ex-husband in respect of a property transaction. The transaction was on terms that were disadvantageous to the wife, and the property was sold for less than valuation, among other issues. Prior *informed* consent was not obtained to act for both parties in the transaction. The practitioner also provided

103 See also *RN v QW* [2016] NZLCRO 54 ($2,000 fine for acting when conflicted in transaction, in circumstances where it was important for the lender to have sufficient security for the loan, no actual loss sustained by the client); *HM v NL* [2018] NZLCRO 127 ($2,000 fine for acting when conflicted in property transaction, failed to turn mind to obvious risk of conflict from outset, no loss sustained by clients); *AB v DE and GH* [2017] NZLCRO 90 ($1,000 fine for acting for more than one client in transaction for short period even after dispute arose which should have alerted to conflict); *HC v Dash* [2020] NZLCRO 8 (censure and $2,000 fine, acting for more than one family member in property transaction, potential for conflict manifest at outset, should have declined to act).

104 *DL v SJ* [2017] NZLCRO 104.

105 See also *YCH v TSR* [2020] NZLCRO 184 ($3,000 fine for acting for estate and for beneficiary of estate in boundary adjustment matter, actions resulted in additional costs for estate); *QT v UF* [2018] NZLCRO 78 ($4,500 fine for acting in a clear conflict of interest situation, also failed to provide competent advice, some delays before complain made and no previous disciplinary findings).

106 *CA v XU* [2011] NZLCRO 32.

the wife incorrect advice about her retaining an interest in the property after it was sold. The LCRO considered that the wife's interests had been "poorly served".

(b) *Canterbury Westland Standards Committee v A Practitioner,* where the Disciplinary Tribunal found the practitioner guilty of unsatisfactory conduct for acting for three parties in a transaction when conflicted (an estate, the purchasers of a property, and a bank).[107] The practitioner had continued to act despite the bank raising the issue of conflict. No harm resulted from the practitioner's actions. While there was no dishonesty, the practitioner had failed to recognise the nature and extent of the conflict. The practitioner was censured and fined $3,000.

(c) *SD v TM,* where the practitioner was censured and fined $3,000.[108] The practitioner was acting for two parties in a matter involving the sale of shares by one director of a business who wished to depart the business. The parties had clearly divergent interests. The practitioner failed to appreciate the conflict and its implications. The practitioner failed to ensure one of the parties was informed of important matters relating to the transaction (due to that information being confidential to the other party). The LCRO noted that: "The tension between a lawyer's professional duty to keep a client informed, and the duty to keep a client's information confidential, serves to illustrate the dilemma for a lawyer who acts for more than one client on a matter when prohibited by r 6.1 from doing so." The practitioner continued to act, and the issue of independent advice was only raised subsequently by one of the parties.

10.9 For cases at the upper end of the scale (warranting fines with starting points from $7,000 to the maximum fine available), see:

(a) *Sandy v Khan*, where the practitioner was fined $7,000 for acting for both parties in the sale of a travel agency business following a finding of unsatisfactory conduct for breach of r 6.1.[109] The practitioner did not explain the risks involved in acting for both parties in the matter at any stage. The substantive negotiations had not concluded when the practitioner was engaged, and the practitioner's role was therefore not confined to the transactional aspects of the matter. The parties' interests were directly in conflict on certain matters, which ought to have been a red flag for the practitioner from the outset that he could not act for both – the conflict was "glaringly obvious". The practitioner continued to act for both parties up to the point where letters of termination and demand were exchanged and litigation was threatened. The sale did not proceed, and one of the clients incurred additional costs as a result of the practitioner's conduct. The practitioner's conduct caused one client considerable stress and anxiety. It did not appear that the practitioner understood his professional obligations, but nor did his actions appear to be deliberate or motivated by self-interest. Further, while there had been adverse consequences for one of the clients, these were not "catastrophic".

(b) *Canterbury-Westland Standards Committee 1 v Whitcombe,* where the practitioner pleaded guilty to a charge of serious negligence for acting in a sale of a property for both parties when conflicted.[110] The practitioner failed to recommend that the parties take independent legal advice and did not ensure an independent valuation occurred. The conflict was clear, and there were deficits in the sale and purchase agreement, meaning it was disadvantageous to the vendor. The practitioner had not acted for personal gain, but had acted hastily and, in doing so, had been highly negligent. The practitioner was given credit for his unblemished disciplinary history, and his acceptance of the charges. Although the Disciplinary Tribunal considered imposing a period of suspension, ultimately a censure and a fine of $10,000 was determined to be sufficient to meet the principles and purposes of disciplinary proceedings, as there were no ongoing public protection concerns. The Disciplinary Tribunal noted its concern about a number of cases before Standards Committees involving serious conflicts which had only been found to amount to unsatisfactory conduct.[111]

107 *Canterbury Westland Standards Committee v A Practitioner* [2015] NZLCDT 44.

108 *SD v TM* [2019] NZLCRO 9.

109 *Sandy v Khan (orders)* [2009] NZLCRO 73.

110 *Canterbury-Westland Standards Committee 1 v Whitcombe* [2019] NZLCDT 37.

111 At [38] and [39].

11. Obligation of confidentiality

11.1 The duty of confidence between lawyers and their clients exists due to the fiduciary nature of the lawyer-client relationship, and also as a result of the express professional obligations imposed on lawyers.[112] Specifically, a lawyer has an express duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship: r 8.[113] While there are exceptions to this obligation (as identified in rr 8.2 and 8.4 of the Rules of Conduct and Client Care), any required or permitted disclosure must only be to an appropriate person, and only to the extent reasonably necessary for the required purpose. Further, a lawyer must not use a client's confidential information for the benefit of any other person, or for the benefit of the lawyer: r 8.7.

11.2 Because of the confidential information to which lawyers are privy as part of the lawyer-client relationship, lawyers are required not to act for a client against a former client of the lawyer where the practice or a lawyer in the practice holds information confidential to the former client, where disclosure would be likely to affect the interests of the former client adversely, where there is a more negligible risk of disclosure of the confidential information, and where the fiduciary obligation owed to the former client would be undermined: r 8.7.1. The use of information barriers may be effective to prevent a breach of this requirement: r 8.7.2. The need for the protection of confidential information in family law and criminal matters in particular has previously been emphasised by the Courts.[114] There are examples of lawyers breaching their professional obligations and being found guilty of unsatisfactory conduct under these rules even in circumstances where the confidential information relating to the former client has not been disclosed. That is because the requirement not to act in the circumstances outlined in r 8.7.1 is mandatory, reflecting the importance of lawyers' professional obligations in this regard.

11.3 Factors which may be relevant to the assessment of the nature and gravity of breaches of the above obligations include:

(a) The nature of the confidential information and its sensitivity, and the context in which it was disclosed (if at all). For example, was it obtained in the context of a family law or criminal matter?

(b) The extent of the breach of confidentiality, if any. If disclosure occurred, was this a "one-off occurrence or was the information disclosed on multiple occasions? Was the conduct prolonged?

(c) The impact or harm of any disclosure of confidential information on the client or former client;

(d) The purpose for which the confidential information was used (if at all), i.e. was it used by the lawyer to obtain a benefit or tactical advantage for the lawyer or another person?

(e) The culpability of the practitioner, i.e. was the breach intentional, reckless, negligent or inadvertent?

11.4 Given the importance of the above obligations, fines of at least $3,000 will typically be appropriate where confidential information relating to a client or a former client is disclosed, even in

112 See *HK v TX* [2019] NZLCRO 71, citing D Webb, K Dalziel and K Cook Ethics, *professional responsibility and the lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 150.

113 This includes information such as knowledge of a client's personality or approach to litigation, and knowledge of a client's businesses: see *SM v HW* [2019] NZLCRO 39 at [101], citing *Torchlight Fund No 1 LP (in rec) v NZ Credit Fund (GP) 1 Ltd* [2014] NZHC 2552, [2014] NZAR 1486. This is known as the "getting to know you" principle. See also the footnote to r 8, which states that information acquired in the course of the professional relationship that may be widely known or a matter of public record (such as the address of the client, criminal convictions, or discharged bankruptcy) will nevertheless be confidential information.

114 See *SM v HW* [2019] NZLCRO 39, citing *GBR Investment Ltd v Keung* HC Christchurch CIV-2009–409–1486, 19 March 2010.

circumstances where the disclosure was inadvertent.[115] Higher fines will typically be warranted where the practitioner's conduct was prolonged, had an adverse impact on the client or former client, and/or where the breach involved a higher degree of culpability on the practitioner's part. Where the breach of confidence is deliberate or reckless and/or repeated, the information is highly sensitive, and/or the disclosure is intended to benefit the practitioner or another person (other than the client) or has had adverse consequences for the client, the conduct is likely to be capable of constituting misconduct, warranting referral to the Disciplinary Tribunal.

11.5 The following cases are illustrative:

(a) In *RV v IP,*[116] the practitioner disclosed his clients' preferred purchase price for their property to a prospective purchaser. The breach appears to have been inadvertent. No particular harm resulted from the breach (aside from the betrayal of the clients' confidence). The practitioner was found guilty of unsatisfactory conduct and fined $3,000, which was upheld by the LCRO on review. See also *UG v WN,*[117] where the practitioner acted for a client in the purchase of a property, and then acted for the subsequent purchasers of the property. The practitioner relied on her knowledge relating to objections to the title of the property from acting for the client in the first transaction (though the information was available as a matter of public record), and raised issues with the title for the purchasers, to their benefit. The practitioner was fined $2,500.

(b) In *TP v ZN,* the practitioner disclosed his former client's confidential instructions about settlement of ongoing proceedings in a memorandum filed with the Court seeking leave to withdraw.[118] The practitioner's most recent instructions from the client did not indicate that the proceedings had settled, and the practitioner was aware the client had changed her mind. The LCRO found that the practitioner was required to keep the client's instructions as to settlement (including her change in mind) confidential, and his memorandum had gone further than was required to provide the Court with an update as to the proceedings. A fine of $4,500 was imposed. See also *WE v VF,*[119] where the practitioner inadvertently acted in a private prosecution against a former client, who he had acted for on legal aid in related criminal proceedings some years prior. The Standards Committee's fine of $10,000 was substituted with a fine of $3,500 by the LCRO.[120] No information confidential to the former client was relied on by the practitioner for the purposes of the private prosecution (though the information he had been privy to, consisting of disclosure from the Police, was highly confidential). The breach was inadvertent, as the practitioner could not recall acting for the former client. The LCRO considered that the practitioner ought to have made further enquiries with Legal Aid when the issue was first raised with him.

(c) In *EA v NP,* an initial fine of $5,000 was substituted for a compensation order in the same amount to the practitioner's client, following the practitioner disclosing a copy of the client's will to her husband (also a client of the practitioner) without the client's instructions.[121] The disclosure was inadvertent. The will contained highly confidential information to the client, including making provision for a child she had given up for adoption. The disclosure caused emotional and psychological distress to the client. Following the incident, steps were taken to minimise the risk of similar incidents in the future, the practitioner accepted

115 See in contrast, however, *LQ v VN* [2012] NZLCRO 37, where a reprimand was the only order imposed following a practitioner's conduct in inadvertently disclosing the fact of the client's application for a protection order to her family (in an effort to recoup his fees); and, *Romford v Marlborough* [2009] NZLCRO 58, where the practitioner disclosed the fact his client had made threats to him to the Police, information which ended up in a Police opposition to bail, resulting in a censure.

116 *RV v IP* [2016] NZLCRO 42.

117 *UG v WN* [2018] NZLCRO 73.

118 *TP v ZN* [2020] NZLCRO 167.

119 *WE v VF* [2019] NZLCRO 68.

120 A fine of $10,000 was initially imposed by the Standards Committee, which did not accept the practitioner's response that he could not recall acting for the former client.

121 *EA v NR* [2016] NZLCRO 63.

responsibility for the breach, and she also apologised. On review, the LCRO increased the amount of the compensation order to $6,000. The reason for the substitution of the fine for the compensation order is unclear, but appears to have been to enable the client to be appropriately compensated for the harm caused by the disclosure.

(d) *Auckland Standards Committee 3 v Castles* provides an example of breach of confidence at the upper end of the spectrum of seriousness.[122] The practitioner was found guilty of two charges of misconduct for disclosing information confidential to his clients, without their authority, to their brother-in-law (amongst other disciplinary findings). The practitioner was acting for the clients in respect of civil proceedings relating to the purchase of a home which turned out to be a leaky building. The clients were forced to approach their friends and family to assist them financially with the ongoing costs of the litigation, including the practitioner's legal fees. The practitioner disclosed highly confidential and sensitive personal information relating to one of the client's health and mental stability to the brother-in-law multiple times throughout a meeting with the brother-in-law. The clients' approval had not been sought for the meeting with the brother-in-law, during which the practitioner was seeking the extension of a loan previously provided by the brother-in-law to assist with the funding of the litigation. The Disciplinary Tribunal concluded that the disclosure of the confidential information was unauthorised and improper, and was part of the practitioner's attempt to secure the extension of the loan, in circumstances where the practitioner was likely to benefit financially. The Disciplinary Tribunal considered that penalty or strike-off was warranted in respect of these charges, so as to ensure public protection, and in light of the practitioner's lack of insight into the gravity of his conduct.[123]

122 *Auckland Standards Committee 3 v Castles* [2013] NZLCDT 53.

123 *Auckland Standards Committee v Castles* [2014] NZLCDT 8.

12. Fee-related conduct issues

12.1 Fee-related complaints are one of the most common types of complaint made about lawyers to the Law Society. Lawyers' primary obligations in regards to their fees are outlined in the preface and chapter 9 of the Rules of Conduct and Client Care.

12.2 Not every fee-related complaint will require a disciplinary response via a formal determination of a Standards Committee under s 152 of the LCA (whether that determination is one of no further action,[124] unsatisfactory conduct, or referral to the Disciplinary Tribunal). Fee disputes may often be appropriately resolved by alternative dispute resolution processes, such as mediation, or via agreement of the parties.[125] This section of the guidance deals solely with cases where a formal determination is required by a Standards Committee, for whatever reason, on a fee-related complaint.

12.3 Not only are lawyers required to charge a fee that is "fair and reasonable" (rr 9 and 9.1), but they also have a duty to ensure clients are informed about how and when they will be billed. Rule 9.4 requires lawyers to provide a client an estimate of fees on request, and to inform the client if the fee estimate is likely to be exceeded. Rule 9.5 also requires lawyers to inform clients if they may be eligible for legal aid. Fees may not be debited from trust account funds in advance unless authorised by the client (r 9.3, regs 9 and 10 of the Trust Account Regulations), and a final account must be rendered "within a reasonable time of concluding the matter" (r 9.6). Specific requirements also apply to conditional fee agreements and fee sharing arrangements.[126]

12.4 Lawyers also have particular obligations in respect of the fees of third parties, such as the payment of experts. Under r 12.2, where a lawyer instructs a third party on behalf of a client to render services, in the absence of an arrangement to the contrary, the lawyer is "personally responsible for the payment of the third party's fees, costs, and expenses".[127] Further, when a lawyer, when acting in a professional capacity, instructs another lawyer, the lawyer must pay the other lawyer's account promptly and in full (unless otherwise agreed or where a valid dispute is raised): r 10.12. Where obligations of this kind are breached, where there are no significant aggravating factors present (for example, the breach is not repeated or prolonged, where the lawyer's culpability is low level), orders for rectification or compensation will typically be appropriate.[128] Orders for reprimand, written apologies, and censure may also be warranted to mark the lawyer's breach of his or her professional obligations.[129] Other penalty orders, such as a fine, may be called for where there are aggravating factors present.

Overcharging and excessive fees

12.5 Rule 9.1 sets out the factors to be taken into account in determining the reasonableness of a fee charged by a lawyer in respect of any service, for example, the time and labour expended, the skill required to perform the services properly, the importance of the matter to the client and the results achieved, and the urgency and circumstances in which the matter is undertaken.

124 See also LCA, s 138.

125 See an article relating to specialist Standards Committees for fee-related complaints here: *https://www.lawsociety.org.nz/news/lawtalk/issue-927/specialist-standards-committee-for-fee-related-complaints/*. This is provided for in s 143 of the LCA, and is also one of the functions of Standards Committees under s 130(b) of the LCA.

126 See RCCC, rr 9.8–9.15; LCA, ss 333–335. See for example *FE v SH* [2015] NZLCRO 67.

127 See for example *HR v OW* [2015] NZLCRO 25; *HR v OW* [2015] NZLCRO 58, where the practitioners involved were ordered to apologise to an expert engaged for the inconvenience caused by their conduct. The practitioner failed to negotiate an agreement with the expert over his fees before he carried out their instructions over a period of seven months.

128 LCA, ss 156(1)(d) and (h).

129 Such orders have been imposed in several previous cases upheld by the LCRO. See for example: *IG v PC* [2018] NZLCRO 68 (order for rectification considered but not able to be confirmed due to procedural issues on review, no other orders made aside from costs); AS v DV [2014] NZLCRO 40 (orders for rectification, censure, costs); *Newbury v Windsor* [2009] NZLCRO 35 (compensation agreed, costs ordered).

If a lawyer charges a fee that is not fair and reasonable, contrary to r 9 of the RCCC, this may constitute unsatisfactory conduct under s 12(c) of the LCA.

12.6 "Gross" overcharging is defined as a specific category of misconduct under s 7(1)(a)(iv) of the LCA. Where charges are grossly excessive, "it is indicative that the lawyer in question knew that he or she was not entitled to the amount claimed or at the least was reckless as to whether they were entitled to the amount claimed".[130] For a fee to meet this threshold, "it must bear no rational relationship with what would have been within the band of a fair and reasonable fee".[131]

12.7 If a lawyer charges an excessive fee which is not fair and reasonable, or engages in gross overcharging, this will be conduct that may require a disciplinary response. The requirements around lawyers' fees have a consumer protection purpose. Clients are in a vulnerable position compared to lawyers, as clients are not necessarily in a position to know what legal work must be done and what charges are therefore fair and reasonable.[132] Whether overcharging constitutes a conduct issue that warrants a disciplinary response in a particular case, and if so, whether the conduct amounts to unsatisfactory conduct or misconduct, will depend on the nature and extent of the overcharging, and the surrounding circumstances of each case. The factors in r 9.1 should not be applied in a formulaic way, so there will be a range within which a fee may be considered to be fair and reasonable.[133] Accordingly, "it must be able to be stated with certainty that there has been overcharging by a lawyer before a finding of unsatisfactory conduct is made on the basis of a breach of r 9".[134]

12.8 Consideration was given to this issue in *AL v ZK*.[135] In that case, the LCRO observed that sometimes a determination to take no further action would be appropriate in cases involving a dispute over the reasonableness of fees charges. For example, where the amount involved is relatively small and where there is "simply a difference of view about the amount that is fair and reasonable", and where the lawyer remedies the issue by reducing his or her fees.[136] The LCRO further observed that, in determining whether or not to make an adverse finding against a practitioner, a Standards Committee should consider whether such a finding would be "disproportionate" to the relevant conduct.[137] Accordingly, the overcharging will typically need to be significant, and at a level that is "beyond tolerable limits suggesting only a minor adjustment", in order for a disciplinary finding to be warranted.[138]

12.9 Relevantly, complaints relating to bills and costs may only be dealt with by a Standards Committee if the bill of costs was rendered less than two years prior to the date of the complaint and the bill relates to fees more than $2,000 (exclusive of goods and services tax), except in special circumstances justifying consideration of the complaint.[139] This requirement helps to ensure that Standards Committees are not considering minor, trivial or vexatious complaints relating to fees.

130 *Client J v Lawyer* A LCRO 31/2009, 30 April 2009 at [22], cited in *Auckland Standards Committee 3 v Castles* [2013] NZLCDT 53.

131 *Client J v Lawyer* A LCRO 31/2009, 30 April 2009 at [24]. Under the previous legislation, the Law Practitioners Act 1982, only complaints of gross overcharging could justify the commencement of proceedings of a disciplinary nature.

132 *Veghelyi v Law Society of New South Wales* [1995] NSWCA 483.

133 *MY v BJ* [2019] NZLCRO 24 at [52]. See also *Re Veron* (1986) 84 WN (NSW) 136; *D'Alessandro v LPCC* (1995) 15 WAR 198: *De Pardo v LPCC* [2000] FCA 335; (2000) 170 ALR 709, where the Courts emphasised the need for a holistic assessment of the fees charged, rather than an unduly narrow focus on individual items of cost. Likewise, there should not be undue focus on time recording, to the exclusion of other factors: *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83; [2013] 3 NZLR 103.

134 *MY v BJ* [2019] NZLCRO 24 at [52].

135 *AL v ZK* LCRO 182/2012, 19 March 2014.

136 *AL v ZK* LCRO 182/2012, 19 March 2014 at [17]. Such issues may also be dealt with by way of early alternative dispute resolution methods available under s 143 of the LCA.

137 At [21].

138 At [21], citing the Practice Note issued by the Law Society to Standards Committees.

139 Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 29.

12.10 Factors which have been determined to be relevant to assessing the nature and gravity of fee-related conduct issues, in particular overcharging, in previous cases include the following:

(a) The nature and extent of the overcharging, having regard to the fee charged and the services provided (and the other reasonable fee factors in r 9.1);

(b) The presence of any communication issues in respect of charging practices. For example, if a lawyer has charged excessive fees and has also failed to communicate the basis on which fees were to be charged at the outset of the engagement;

(c) If the client is particularly vulnerable for any reason (beyond the vulnerability inherent in the lawyer-client relationship), for example due to their limited financial circumstances;

(d) If the lawyer's conduct has had detrimental financial consequences for the client concerned;

(e) Whether the conduct was repeated or prolonged;

(f) The practitioner's level of culpability. Was the conduct dishonest (i.e. intended to personally benefit the practitioner, exploitative), deliberate, reckless, or negligent/inadvertent?

(g) Whether the practitioner has taken steps to voluntarily repay any excessive fees charged.[140]

12.11 Unless a practitioner has already taken steps to reduce his or her fee or repay a client, following a disciplinary finding being made for charging excessive fees or gross overcharging, orders requiring the reduction, refund and/or cancellation of fees charged are frequently made in this context (LCA, ss 156(1)(e), (f) and (g)). Whether additional orders are needed beyond this to meet the principles and purposes of disciplinary proceedings (for example, a censure or fine) will necessarily depend on the nature and gravity of the relevant conduct, and any relevant personal factors, such as a previous history of fee-related conduct issues. Such orders are usually reserved for cases involving the presence of aggravating features relating to the conduct and/or to the practitioner. The amount of any fine imposed, if considered necessary, will depend on the nature and seriousness of any aggravating factors. For example, repeated or prolonged instances of overcharging in respect of a vulnerable client, involving high levels of excessive fees and a failure to inform the client of the basis on which fees would be charged), might warrant a fine with a starting point at the upper end of the available range (i.e. $7,000 and above), whereas a fine with a lesser starting point will typically be warranted where only one or two aggravating factors are present.

12.12 The following cases are illustrative in demonstrating the different penalty orders that have been imposed in cases involving overcharging, ranging from cases of a low level of seriousness to cases at the upper end of the spectrum, involving misconduct for gross overcharging:[141]

(a) In *KS v WX, the practitioner overcharged a client in an invoice by including attendances dating back some years prior, and also failed to repay funds held in his trust account for the credit of the client.*[142] The practitioner was ordered to reduce his fees from $16,845 (plus GST and

140 If steps of this kind have been taken, this will not necessarily mean a disciplinary response is not required, but it may nevertheless be a factor that will be relevant to the penalty orders made. See for example *BI v CW* [2013] NZLCRO 48 (12 September 2013), where the practitioner was found guilty of unsatisfactory conduct for charging a fee that was not fair and reasonable. On review, the LCRO determined that the censure ordered by the Committee was not warranted, having regard to the practitioner's voluntary offers to reduce the fee charged significantly (by around $13,000), and the steps taken when the issue was first raised (for example, having a peer review the fee charged). The LCRO noted that the finding of unsatisfactory conduct was still warranted, notwithstanding these offers, "to avoid the perception that adverse findings in fee complaints can be avoided by agreeing to a reduced figure".

141 Other cases involving fee-related conduct issues include failing to advise a client of eligibility for legal aid, *NS v ET* [2019] NZLCRO 35; deducting fees without client authority, *AB v RP* [2020] NZLCRO 220; failing to render a final account within a reasonable time, *NR v YB* [2021] NZLCRO 101 and *YK v GS* [2017] NZLCRO 82; failing to provide adequate information about work carried out for which an invoice was rendered, *Lukas v BW* [2019] NZLCRO 141.

142 *KS v WX* [2018] NZLCRO 60.

disbursements) to $11,400 (plus GST and disbursements), and to release the funds held in his trust account to the client. A censure was considered appropriate to reinforce that the practitioner's conduct had fallen short of acceptable standards. A fine ordered by the Standards Committee was reversed by the LCRO. See also:

(i) *Fishguard v Walsall,* where the practitioner was ordered to reduce his fees charged to a client by $4,000 in a criminal matter after being found guilty of unsatisfactory conduct for failing to advise the client that the fees incurred had exceeded the estimate provided.[143]

(ii) *AB v CD,*[144] where a $1,000 fine was imposed in respect of a practitioner who had charged the client for work not arising out of the retainer, after the retainer had concluded. Orders for compensation and requiring the practitioner to reduce her fees were also made.

(b) In *EL v SV,* the practitioner was fined $2,000 by the Standards Committee for charging a fee to an estate that was excessive in a number of respects, and constituted "significant" overcharging.[145] The work carried out was duplicative of work on other files, and there had been a lack of substantive work carried out. The practitioner had previous disciplinary history. The $2,000 fine was upheld by the LCRO on review, and the practitioner was required to reduce his fees and refund the sum of $30,271.25 to the estate. The LCRO noted that a starting point of a fine of $4,000 would have been appropriate, but considered a fine of $2,000 was adequate, taking into account the practitioner's personal mitigating circumstances.

(c) In *IA v CMR,* the practitioner was found to have engaged in "high end" unsatisfactory conduct for failing to provide the necessary client care information, agreeing to his clients paying their son's legal fees without communicating with them directly or recommending that they seek independent advice, and charging them legal fees which were not fair and reasonable.[146] The practitioner had previously been struck off the roll by the Disciplinary Tribunal. Orders for censure, and requiring the practitioner to pay a fine of $15,000 and to cancel and refund his fees (in the sum of $107,000) were upheld by the LCRO on review.

(d) In *Auckland Standards Committee v Fendall,* the practitioner pleaded guilty to misconduct following an investigation by the Legal Services Agency into her invoices for legal aid and youth advocacy attendances.[147] In total, the Legal Services Agency had been overcharged by $13,243.50 and the Ministry of Justice had been overcharged by $4,123. Issues were identified several times with the practitioner's invoicing practices (for example, double billing for attendances, billing for attendances where an agent had appeared). Although she repaid the fees on each occasion when these issues were identified, the issues persisted. The Disciplinary Tribunal determined that the practitioner's actions had not been dishonest, but considered she had been "extremely negligent" by failing to take proper care despite the issues with her practices being brought to her attention. The Tribunal considered that this indicated an indifference on the practitioner's part to ensuring the charges were appropriate. That being said, the errors were relatively low level in the context of the practitioner's busy practice. The practitioner had also repaid the fees and accepted responsibility for the conduct. The Tribunal censured the practitioner and ordered that she contribute to costs. No fine was imposed due to the practitioner's significant loss of income as a result of her conduct. No monitoring or mentoring was considered necessary, as the practitioner was unlikely to engage in similar conduct in the future. Similarly, see *Wellington Standards Committee 2 v Hirschfeld,* where orders for censure and repayment of fees was ordered in respect of seriously negligent overcharging in legal aid matters over the course of a year.[148]

143 *Fishguard v Walsall* [2009] NZLCRO 71.

144 *AB v CD* LCRO 228/2014, 27 October 2016.

145 *EL v SV* [2021] NZLCRO 43.

146 *IA v CMR (Deceased)* [2017] NZLCRO 71.

147 *Auckland Standards Committee v Fendall* [2012] NZLCDT 1.

148 *Wellington Standards Committee 2 v Hirschfeld* [2014] NZLCDT 48.

(e) In *Auckland Standards Committee 3 v Castles,* the practitioner grossly overcharged clients for acting in leaky building related civil proceedings.[149] The practitioner charged a total of $1,002,828.78, when a reasonable fee would have been in the vicinity of $462,000. The Disciplinary Tribunal considered that the practitioner's charging was so excessive that a competent, ethical and reasonable practitioner would regard it as "disgraceful, deplorable or repugnant".[150] The practitioner's conduct had also involved misleading the Standards Committee and representing non-chargeable time to appear as a discount to his clients in a manner which was also "utterly misleading".[151] The impact of the practitioner's conduct rendered the clients "virtually destitute", and they were considered to be vulnerable due to their precarious personal finances.[152] The practitioner had also failed to advise the clients at the outset of the likely financial outcome of the proceedings, if successful, compared to the legal costs likely to be required. The practitioner had an extensive previous history for overcharging, and his conduct also delayed the proceedings before the Tribunal, despite his awareness that one of the complainants was suffering from a terminal illness. The practitioner was ordered to apologise, and was struck off the roll of barristers and solicitors. He was also ordered to reduce his fees significantly, to pay costs and to pay compensation to the clients. See also:

(i) *Southland Standards Committee v McFie,* where the practitioner was struck off the roll for misappropriating client funds in the sum of $237,014.24 and grossly overcharging the same client $42,147, a vulnerable elderly client with a disability.[153]

(ii) *Auckland Standards Committee 1 v Hart,* where the practitioner was struck off the roll for gross and "exploitative" overcharging of a vulnerable client facing serious criminal charges, among other things ($35,000, when a reasonable fee would have been less than $24,000), against the background of an extensive disciplinary history.[154]

149 *Auckland Standards Committee 3 v Castles* [2013] NZLCDT 53; *Auckland Standards Committee 3 v Castles* [2014] NZLCDT 8.

150 At [174].

151 *Auckland Standards Committee 3 v Castles* [2014] NZLCDT 8 at [12].

152 At [175].

153 *Southland Standards Committee v McFie* [2017] NZLCDT 2.

154 *Auckland Standards Committee 1 v Hart* [2012] NZLCDT 20; *Auckland Standards Committee 1 v Hart* [2012] NZLCDT 26. The Tribunal's decision was upheld by a Full Court of the High Court in [2013] NZHC 83, [2013] 3 NZLR 103.

13. Breaches of trust accounting requirements

13.1 Lawyers have specific professional obligations in respect of trust accounts and client funds under the LCA and the Trust Accounting Regulations. The Disciplinary Tribunal has previously held that "the honest and diligent operation of the trust account is one of the most basic obligations of a legal practitioner. All clients must be able to be absolutely confident that their funds will not be used for improper purposes, and particularly not for the personal benefit of the lawyer under whom they have entrusted their affairs."[155]

13.2 Sections 110 to 114 of the LCA set out the key obligations on the part of practitioners relating to their conduct in respect of trust accounts. In particular, s 110 sets out a practitioner's obligation to pay funds received on behalf of a client into a bank account of the practitioner or the practitioner's firm, and to hold those funds exclusively for the client, to be used only as the client directs. Practitioners are also required to account for trust funds to clients (s 111), and are required to keep records in respect of trust accounts (s 112).

13.3 The Trust Accounting Regulations set out more specific, but no less important, requirements for lawyers in respect of trust accounts. Many of the requirements in the regulations are intended to ensure the protection of funds held in lawyers' trust accounts. For example, requirements relating to the need for trust accounts not to be overdrawn (reg 6), the restriction on use of trust accounts for personal transactions of the lawyer (reg 8) and the need for client authority before trust accounts are debited with any fees of the practice or transfers or payments are made from a client's trust money (regs 9 and 12(6)). The need for proper and accurate records to be kept, so as to enable inspection and auditing of trust accounts, and for trust account supervisors to provide reports to the Law Society as to their practice's compliance with the trust accounting requirements, are also important obligations, as these help to ensure proper oversight of trust accounts operated by lawyers.

13.4 The need for strict compliance with the trust accounting requirements in the LCA and the Trust Account Regulations has been emphasised in a number of previous cases before the LCRO and the Disciplinary Tribunal.[156] Breaches of these requirements are generally regarded as inherently serious given the trust placed in lawyers holding funds for their clients to ensure the funds are held and applied in accordance with the trust accounting requirements. The Trust Account Regulations "exist to protect the public such that a robust and transparent regulatory framework is needed to protect the funds of the public".[157] Because lawyers hold a position of privilege and trust when handling client funds, "there must be strict observance with the conditions on which they do so, in order to maintain the confidence of the public in the profession as a whole".[158]

13.5 The following factors (identified in previous cases involving breaches of the trust accounting requirements) should be considered when assessing the nature and gravity of breaches of these obligations:

(a) The nature of the requirements breached, and the extent of the breaches. For example, a breach of a "substantive" requirement with a specific public protection focus (such as breaches of s 110, acting without authority or instruction with respect to trust funds, issues posing risk to trust funds or the sanctity of the trust account) will generally be more serious than breaches of a "process" or procedural requirement (for example, failing to keep records up to date, failing to reconcile trust ledgers, failing to keep trust receipts in the form required);

(b) Culpability of the practitioner – Was the breach of the requirements intentional, reckless, negligent, or the result of an inadvertent error or mistake?

155 *Auckland Standards Committee 2 v Atken* [2019] NZLCDT 36 at [13], cited in *Professional Responsibility in New Zealand* at [19.1.1].

156 See for example *Bolton v Law Society* [1994] 2 All ER 486 at p 490; *Auckland Standards Committee 1 v Hackshaw* [2016] NZLCDT 18 at [13]–[14]; *Fletcher v Eden Refuge Trust* [2012] NZCA 124 at [74].

157 *Wellington Standards Committee 2 v Jones* [2014] NZLCDT 52 at [9].

158 *Auckland Standards Committee 5 of the New Zealand Law Society v Holmes* [2011] NZLCDT 31 at [24].

(c) Was the conduct motivated by personal gain on the part of the practitioner, or did the conduct otherwise involve fraud/dishonesty?

(d) Actual harm or loss to client or client funds put at risk;

(e) Whether the conduct involves any misrepresentation as to compliance with the trust accounting requirements (for example, false certifications to the Law Society). This may aggravate the seriousness of the conduct, even where the certification was inadvertent, given the important role of certifications in ensuring the integrity of the Law Society's regulation of trust accounts, and given an inaccurate certification may mean that non-compliance with trust accounting requirements is not promptly discovered;

(f) Amount of funds involved, for example, if the amount of funds overdrawn is minor or inconsequential, the breach will be less serious in nature. Conversely, if the amount of funds overdrawn is significant, the conduct is likely to be more serious, given the associated increase in risk to client funds. Similarly, if a lawyer fails to ensure client funds earn interest over a relatively short period (for example, for a month), and the interest not earned would be small, then the breach will be more low-level in terms of seriousness.

(g) Time over which conduct occurred, i.e., were the breaches of the relevant requirements a one-off or isolated set of breaches, or was the conduct prolonged?

(h) Previous instances of non-compliance with trust accounting provisions, whether practitioner on notice of need for improvements to trust accounting practices (for example, as a result of previous reviews, inspections, or audits by the Inspectorate);

(i) Experience of the practitioner i.e., was the practitioner inexperienced in the position of trust account supervisor or an experienced practitioner who would be expected to have knowledge of the systems that should be in place?

13.6 Given the inherently serious nature of breaches of the trust accounting requirements, where the relevant conduct involved a breach of any of the provisions of the LCA or the Trust Accounting Regulations, unless the conduct involved a minor, "process" related breach and there are strong mitigating personal circumstances relating to the practitioner, a stern disciplinary response will generally be required to a breach of these requirements, so as to ensure public confidence in the profession is maintained. For example, where the breach was relatively minor, and the practitioner has taken prompt steps to implement measures to improve their trust accounting processes and to rectify the conduct, undertaken further training in trust accounting requirements and/or voluntarily taken advice on the conduct of their practice in this area, then a finding of unsatisfactory conduct may be made, with modest or no further orders considered necessary. The LCRO has previously held that there "is limited room to exercise a discretion when breaches [of the Trust Account Regulations and the LCA] occur, and that "by not adopting a reasonably stringent response to breaches when they occur, the effectiveness of the protections which the Regulations and the Act were designed to achieve, is lessened."[159]

13.7 As will be evident from the above factors, however, conduct of this kind varies markedly in terms of seriousness depending on the circumstances of the individual breach, and the appropriate penalty orders will accordingly vary. For example:

(a) Unsatisfactory conduct at the lower end of the scale – One off instances of non-compliance with specific requirements in the Trust Account Regulations, relating to breaches of a more "process" related nature (i.e., for example, failing to provide a final account of client funds, failing to report as required, failing to ensure trust accounts reconciled), will likely warrant a starting point of a low-level fine between $1,000 and $3,000. See for example *NR v YB,*[160] where a $1,000 fine was substituted on review by the LCRO in respect of a practitioner's failure to render a final account to a client within a reasonable time. See also *CL v [City] Standards*

159 *Law Firm A v Standards Committee* LCRO 319/2012.

160 *NR v YB* [2021] NZLCRO 101.

Committee [X],[161] where a fine of $2,500 was upheld by the LCRO in circumstances where a trust account was (inadvertently) overdrawn for a period of several months and where the practitioner failed to ensure her practice's trust account records were kept up-to-date. An order was also made requiring the practitioner to take appropriate advice from a trust account consultant.

(b) Unsatisfactory conduct that is moderately serious in nature – For a one-off breach of a "substantive" requirement, where the breach was inadvertent or negligent; or, for multiple/repeated breaches of specific requirements, where the breaches were inadvertent or negligent, a starting point of a moderate fine in the vicinity of $4,000 to $7,000 will generally be warranted. See for example *AB v RP,*[162] where the practitioner debited client fees from the trust account without authority and failed to provide an invoice. The practitioner also failed to provide an engagement letter. A fine of $3,000 was upheld by the LCRO, though the LCRO noted that a higher level of fine was available in respect of the debiting of the fees, which was a breach of a fundamental rule. The LCRO noted that, although the case involved a one-off breach, the practitioner ought to have been aware of the applicable requirements given his level of experience. See further *XB v A North Island Standards Committee,*[163] where a penalty of censure and a $5,000 fine was upheld by the LCRO on review for breaches of ss 110 and 112 of the LCA and breaches of reg 11 of the Trust Accounting Regulations.

(c) High level unsatisfactory conduct – For multiple breaches of the requirements, repeated over time, and involving breaches of more serious requirements, and/or where there is a risk to/loss of funds, or previous notice to the practitioner to improve their practices, a starting point of a high-level fine, in the range of $7,000 to $15,000, will be appropriate. Orders for further training or requiring the practitioner to make their practice available for inspection may also be appropriate.

(d) Referral to the Disciplinary Tribunal will generally be appropriate in cases where there is theft or misuse of trust funds (with strike-off typically being considered the necessary outcome in such circumstances),[164] or where there are multiple/prolonged breaches of the applicable requirements and the breaches are intentional, reckless, or involve serious negligence or serious incompetence, and/or where the conduct involved false certifications to the Law Society. For example, in *Auckland Standards Committee 5 v Low*,[165] the practitioner was found to have engaged in misconduct for various breaches of the trust accounting requirements spanning a number of years, including: failing to keep proper records; overdrawing trust account ledgers for 74 clients; failing to report to clients on 64 dormant balances; failing to adequately protect electronic systems and passwords, thus enabling a staff member to misappropriate client funds; and, advising clients that she had professional indemnity insurance without specifying this did not meet minimum standards prescribed by the Law Society. The conduct involved false representations being made to the Law Society. There was no loss to clients, and there were significant mitigating factors (both personal and that contributed to the conduct). The practitioner was censured, fined $8,000, required to undergo further training, and required to have external oversight of her trust account. The Disciplinary Tribunal observed that the practitioner was fortunate to have avoided suspension.

161 *CL v [City] Standards Committee [X]* [2019] NZLCRO 56.

162 *AB v RP* [2020] NZLCRO 220.

163 *XB v A North Island Standards Committee* [2013] NZLCRO 30.

164 See for example *Auckland Standards Committee v Witehira* [2012] NZLCDT 5 and *Auckland Standards Committee 2 v Aitken* [2020] NZLCDT 13, where client funds were misappropriated, and the practitioner was struck off the roll.

165 *Auckland Standards Committee 5 v Low [2018]* NZLCDT 7. See also *Auckland Standards Committee 4 v Appleby* [2014] NZLCDT 34; *Wellington Standards Committee 2 v Jones* [2014] NZLCDT 52.

14. Unprofessional conduct, other conduct unbecoming

14.1 A number of the Rules of Conduct and Client Care relate to ensuring professional standards of conduct are maintained by lawyers in the course of their practice. These rules help to ensure that confidence in the legal profession by consumers of legal services and the wider public is upheld. Chapter 10 of the Rules outlines the professional standards expected of lawyers generally – r 10 specifically requires lawyers to "promote and maintain professional standards". Further, r 10.1 requires lawyers, when acting in a professional capacity, to treat all persons with respect and courtesy, while the newly inserted r 10.2 requires lawyers not to engage in conduct that tends to bring the profession into disrepute.[166]

14.2 There are also other rules aimed at ensuring the maintenance of professional standards in specific contexts. Rule 3.1 expressly requires lawyers to treat clients with courtesy and respect, and to not act in a discriminatory manner. Lawyers are also expressly required to treat self-represented persons with integrity, respect and courtesy under r 12. Specific rules also apply to contacting another lawyer's client (r 10.4) and contacting prospective clients (r 10.4). Rule 10.14 requires lawyers to deal respectfully with the Law Society, the regulator of the profession, reflecting the need to ensure public confidence in the complaints and disciplinary processes under the LCA are maintained.[167] Finally, under r 13.2.1, lawyers must treat others involved in court processes with respect.

14.3 Engaging in unprofessional conduct, or conduct unbecoming of a lawyer,[168] are types of unsatisfactory conduct recognised under s 12(b) of the LCA (conduct of a lawyer when providing regulated services that would be regarded by lawyers of good standing as unacceptable). A breach of one of the above conduct rules (not amounting to misconduct) may also amount to unsatisfactory conduct under s 12(c). Conduct of this kind may consist of acts (for example, sending offensive or insulting communications, or acting in an unprofessional manner), omissions (for example, failing to respond to inquiries or failing to communicate matters when required in a timely fashion), or a combination of both. In terms of written communications, not every "strongly worded" or "ill-received" communication will warrant a disciplinary response – where a statement is truthful and professionally communicated, this will not constitute a conduct issue even where the statement was hurtful to the subject.[169] In contrast, "[o]verwrought opinion, misplaced hyperbole, or a desire to intimidate, sully or defame have no place in communications from lawyers, whether directed to colleagues or to members of the public. The line between candour and slander is sometimes fine; a lawyer is better advised to err on the side of courtesy".[170]

14.4 In assessing the nature and gravity of conduct of this kind, Standards Committees should take into account the following factors:

(a) The nature and extent of the relevant conduct, including whether the conduct was a "one-off" incident, or was repeated or prolonged;

166 The conduct does not in fact have to have brought the profession into disrepute. It is sufficient to show the tendency of the conduct to do so, measured against the standards and impressions of a reasonable person who is fully informed of the relevant issues: *Davidson v Auckland Standards Committee 3* [2013] NZHC 2315 [2013] NZAR 1519 at [34]–[36] and *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401, [2012] NZAR 1071 at [45].

167 See D Webb Professional Responsibility in New Zealand (online ed) at [11.100], citing *Parlane v New Zealand Law Society (Bay of Plenty Standards Committee 2)* HC Hamilton CIV-2010–419–1209, 20 December 2010. See also *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103 at [108]–[109]; *Hong v Auckland Standards Committee 5* [2020] NZHC 744.

168 Conduct "unbecoming" is conduct that would not be considered acceptable according to the standards of "competent, ethical and responsible practitioners": *B v Medical Council* [2005] 3 NZLR 810 (HC), 811.

169 *Law Society of Upper Canada v Kay* 2006 ONLSHP 58 at [19]. See for example *IB v KZ Ltd* [2018] NZLCRO 54, where no further action was taken in respect of a practitioner's comment that he would "destroy" a witness during cross-examination in an upcoming trial.

170 *Law Society of Upper Canada v Kay* 2006 ONLSHP 58.

(b) The circumstances surrounding the conduct, the context in which the conduct occurred and the subject of the conduct. Unprofessional conduct directed towards clients and self-represented persons is typically regarded more seriously than conduct towards other lawyers, given the position of power and responsibility lawyers occupy towards individuals in this category, and given lawyers' fiduciary obligations to their clients;

(c) The practitioner's culpability, for example, was the conduct deliberate or motivated by ill-will or malice, reckless, negligent or inadvertent?

(d) The impact of the practitioner's conduct, if any, on any other person;

(e) The practitioner's level of experience, for example, if the practitioner is inexperienced/lacked oversight, this may have been a factor which contributed to the relevant conduct;

(f) Any steps taken to rectify the conduct, for example, whether the practitioner has apologised.

14.5 In cases involving one-off instances of unprofessional communications, penalty orders such as an order to apologise, reprimand or censure, and/or a low-level fine (for example, in the range of $1,000 to $3,000) will typically be appropriate. If the lawyer's conduct was prolonged, sustained or repeated, or if the communication was highly offensive/insulting, higher levels of fine will typically be appropriate (for example, in the range of $4,000 to $7,000). Fines of $8,000 and above should be reserved for more egregious cases of unsatisfactory conduct at the upper end of the spectrum of seriousness.

14.6 For example:

(a) *HC v DL* provides an example of a case at the lower end of the spectrum of seriousness.[171] The practitioner was acting in a property transaction. A contractual dispute arose. The practitioner sent an email to the lawyer acting for the other party to the transaction stating that the lawyer's advice on the subject was "negligent". The lawyer's client and the real estate agent were copied into the correspondence. The LCRO considered that the censure and $2,000 fine imposed by the Standards Committee were appropriate given the disrespectful and discourteous nature of the suggestion that the lawyer was negligent, and given others were copied in on the correspondence. See also *AN v TC,* where an experienced practitioner wrote inflammatory emails to a lawyer acting for the opposing party in a relationship property matter impugning the lawyer's competence, resulting in a censure;[172] and *TB v KP,* where the practitioner was censured for sending a letter making unsubstantiated threats regarding the lodgement of a caveat.[173]

(b) *CP v EH* provides an example of conduct of a more serious nature, towards the upper end of the spectrum.[174] In that case, the practitioner was censured and fined $7,500. The practitioner sent his client a number of emails over a sustained period containing insulting and unprofessional language, designed to coerce the client to pay his fees. The overall tenor of the communications was "personal, petulant and almost vindictive", and appeared to have been "calculated to wound". The client was particularly vulnerable, given the lawyer was acting for her in a relationship property matter. The LCRO considered that the practitioner's concern over his fees did not in any way justify his conduct.

(c) In *Schlooz,* the practitioner was found guilty of misconduct for engaging in a sustained pattern of sending abusive and profane emails to a self-represented litigant over an extended period.[175] The correspondence included threats, and exhibited an attitude of misogyny. The practitioner's conduct also persisted despite the complainant making it clear the emails were

171 *HC v DL* [2020] NZLCRO 2.

172 *AN v TC* [2015] NZLCRO 43.

173 *TB v KP* [2017] NZLCRO 9.

174 *CP v EH* [2013] NZLCRO 56.

175 *ASC 4 v Schlooz* [2021] NZLCDT 12. This was upheld on appeal to the High Court: *ASC 4 v Schlooz* [2021] NZHC 2185.

unacceptable and should stop. The practitioner was censured and suspended for four months by the Disciplinary Tribunal.

14.7 There are a myriad of other kinds of unacceptable conduct that may warrant a disciplinary response, and the penalty orders imposed have varied. Other kinds of conduct which have fallen afoul of proper professional standards include the following: inappropriately confronting the father of a victim in a court foyer when the practitioner was acting for the defendant in a criminal trial (censure);[176] failing to file documents with the Court as directed, resulting in a matter proceeding to a formal proof hearing ($500 fine);[177] failing to advise another lawyer in a property matter that the lawyer's client was no longer required at settlement ($1,500 fine);[178] serving sensitive court documents in an inappropriate way (order to apologise);[179] failing to comply with disciplinary orders previously made by the LCRO requiring the reduction of the lawyers' legal fees ($3,500 fine);[180] disparaging legal aid providers in order to engage a client in a criminal matter (in circumstances where the client already had a legal aid provider (censure);[181] contacting clients directly with no reasonable excuse about compliance with a court order (no penalty orders, finding of unsatisfactory conduct);[182] proposing to communicate directly with another lawyer's client and taking improper steps to have complaints about him withdrawn ($5,000 fine);[183] and repeatedly failing to respond to correspondence from a liquidator of a company (no penalty orders, finding of unsatisfactory conduct).[184]

176 *JD v RU* [2012] NZLCRO 27.
177 *NP v DC* [2018] NZLCRO 141.
178 *AA v BB* [2019] NZLCRO 136.
179 *KY v DZ* [2016] NZLCRO 58.
180 *YL and QR v TR* [2017] NZLCRO 93.
181 *KW v LQ* [2020] NZLCRO 195.
182 *NP v DC* [2018] NZLCRO 141.
183 *MR v GB* [2019] NZLCRO 41.
184 *KO v RT* [2018] NZLCRO 34.

15. Bullying, discrimination, and harassment

15.1 The newly enacted r 10.3 of the Rules of Conduct and Client Care aims to outline and clarify the standards of behaviour expected of lawyers when engaging with clients, colleagues, and others. Specifically, lawyers must not engage in conduct that amounts to bullying, discrimination, harassment generally, racial or sexual harassment, or violence.[185] By ensuring proper standards of professionalism are upheld, r 10.3 not only helps to ensure that public confidence in the legal profession is maintained, but it also is reflective of a wider expectation of the need for a change in culture in the legal profession as a whole.[186] The rule also makes it clear that engaging in conduct of this kind may result in disciplinary proceedings being commenced. In other words, engaging in unprofessional and inappropriate behaviour of this kind may amount to a conduct issue warranting a disciplinary response.

15.2 Rule 10.3 is supplemented by the new reporting requirements which require law practices to notify the Law Society within 14 days if a lawyer is issued a written warning or dismissed for bullying, discrimination, or harassment (r 11.4). Law practices will also have to notify the Law Society if a lawyer leaves the practice before an investigation into the above kinds of conduct is completed (r 11.4.1). The reporting requirements thus help to ensure a greater degree of transparency and oversight over practitioners who have engaged in behaviour of this kind.

15.3 Because of the inherent seriousness of conduct of this kind, a disciplinary response will generally be required. Serious cases of bullying, discrimination and harassment are likely to be capable of amounting to misconduct (whether under ss 7(1)(a)(i), 7(1)(a)(ii) or 7(1)(b)), and therefore warrant referral to the Disciplinary Tribunal (LCA, s 152(2)(a)). For example, where any of the following factors are present (particularly if more than one factor applies), careful consideration should be given to whether the matter should be referred to the Disciplinary Tribunal:

(a) Where the conduct was prolonged, repeated, or indicative of a pattern of behaviour;

(b) Where the conduct was premeditated, deliberate, or displayed a reckless disregard for the lawyer's professional obligations;

(c) Where the conduct involved a power imbalance and/or abuse of trust. For example, due to the seniority of the practitioner and/or their position of responsibility in respect to the subject of the behaviour (e.g., if the practitioner was the subject's supervisor) or at their practice, and/or any particular vulnerability on the part of the subject;

(d) Where the conduct has caused physical, emotional and/or psychological harm to the subject of the behaviour;

(e) Where the conduct involved unprofessional and/or inappropriate physical or overt sexual contact.

15.4 Cases involving less serious instances of such conduct, where established, may constitute unsatisfactory conduct and accordingly may be dealt with by Standards Committees (LCA, s 152(2)(b)).[187] For example, cases involving one-off incidents where the relevant conduct is not prolonged

185 These terms are defined in the interpretation section in the Rules of Conduct and Client Care: r 1.2.

186 The Law Society's Workplace Environment Survey found that nearly one in every five lawyers have been sexually harassed in a legal working environment (31 per cent of women and 5 per cent of men). 40 per cent of women lawyers and 55 per cent of young women lawyers had been sexually harassed in the last five years. Around 21 per cent of lawyers had been bullied in the preceding six months, and these numbers rose to 35 per cent and 34 per cent for Pasifika and Māori lawyers, respectively. See results of the survey summarised in Colmar Brunton *Legal Workplace Environment Survey* (May 2018).

187 See the discussion of the Disciplinary Tribunal in the recent case of *National Standards Committee 1 v Gardner-Hopkins* [2021] NZLCDT 21 regarding the distinction between "professional" and "personal" misconduct in this context. In that case, the Disciplinary Tribunal held that inappropriate sexual conduct towards junior law clerks at a firm social function was not conduct unconnected with the provision of legal services. Accordingly, the conduct was professional conduct, captured by s 7(1)(a). See also *Deliu v National Standards Committee* [2017] NZHC 2318; *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606; *Young v National Standards Committee* [2019] NZHC 2268.

or sustained, or repeated incidents involving low-level conduct, for example inappropriate remarks, where the lawyer's conduct was not deliberate or reckless.

15.5 Personal mitigating factors relating to the practitioner should not be taken into account in assessing the nature and gravity of the conduct. Such factors become relevant to the assessment at the penalty phase (whether by a Standards Committee or the Disciplinary Tribunal).

15.6 If a finding of unsatisfactory conduct is made in respect of a practitioner, orders such as a requirement to apologise, imposing a censure or reprimand and/or requiring the payment of a fine may be appropriate. Orders for further training or education and compensatory orders may also be warranted. The starting point for the level of any fine will necessarily depend on an assessment of the nature and gravity of the relevant conduct: for conduct at the lower end of the spectrum of seriousness, a fine in the range of $1,000 to $3,000; for moderately serious conduct, a fine in the vicinity of $4,000 to $7,000; for conduct at the upper end of the spectrum of seriousness, a fine in the range of $8,000 to $15,000.

15.7 There was previously limited case law to draw on in this area, and what case law there was was not that helpful given the increased recognition of the prevalence and pernicious effects of bullying, discrimination, and harassment in the legal profession and elsewhere.

15.8 However, the Tribunal recently issued its decision in *NSC 1 v Gardner-Hopkins*[188]. In that decision the Tribunal imposed a penalty of two years suspension for sexual harassment spread over two events, involving multiple complainants. This penalty is currently under appeal.

15.9 In one previous case before a Standards Committee involving repeated sexual harassment at two different law firms (but with no physical contact), a $3,000 fine was imposed. A more serious penalty may have been justified, but the practitioner had accepted responsibility for his conduct, had no previous disciplinary history, had taken steps to address the conduct, and had cooperated during the disciplinary process. In another case, a $5,000 fine was imposed following inappropriate sexual contact by the practitioner at a professional function. The incident was one-off, and the practitioner immediately apologised. The practitioner had no prior disciplinary history.

15.10 In the case of *Schlooz*[189], the High Court confirmed the Tribunal's decision to suspend the practitioner for four months. The practitioner, who was acting for a friend in relation to disputes flowing from a relationship break up, had, over the course of a year, sent very offensive emails to the other party, who was self-represented.

15.11 Cases in other comparable disciplinary contexts provide an illustration of the kinds of disciplinary orders that have been made in response to conduct in this category. The decisions underline that consideration of the appropriate penalty orders should be carried out *after* an assessment of liability – suspension or cancellation does not invariably follow a finding of misconduct. For example:

(a) In *Complaints Assessment Committee 403 v Licensee B,* the licensee, a real estate agent, was found guilty of misconduct (disgraceful conduct) for engaging in ongoing sexual harassment and bullying of a colleague, his personal assistant.[190] The conduct included the licensee making offensive and unwelcome personal and sexual comments and sexual jokes and gestures. The conduct continued despite the complainant informing the agency of the licensee's conduct. The licensee took some responsibility for his actions, though he minimised the seriousness of his conduct. The licensee voluntarily ceased working as a real estate agent while disciplinary proceedings were ongoing. The licensee was relatively inexperienced, and had no prior disciplinary history. Although the Real Estate Agents Disciplinary Tribunal considered

188 [2022] NZLCDT 2

189 *Auckland Standards Committee 4 v John Paul Timothy Schlooz* [2021] 404–854 [2021] NZHC 2185

190 [2017] NZREADT 21.

imposing a period of suspension, ultimately censure and a $10,000 fine were ordered.[191]

(b) In *Hume,* the licensee made violent threats (including threats to kill) against principals of the agency where he worked, and assaulted one of the principals by pushing him backwards.[192] The licensee had previous disciplinary history. The Disciplinary Tribunal considered that cancellation was the only appropriate outcome to ensure the protection of consumers of real estate services and to promote public confidence in the industry.[193]

(c) In *Professional Conduct Committee v Adolf,* the practitioner, a radiologist, was found guilty of misconduct for behaving in a sexually inappropriate manner towards a cleaner at the unit on one occasion.[194] The practitioner asked her personal questions, grabbed her hand, asked her to give him a massage repeatedly, and then closed the door to his room so the two of them were isolated inside. The practitioner had the cleaner sit on the bed and lie on her stomach, and barred her attempts to leave the room. He also grabbed her as she attempted to leave the room and attempted to hug her, before asking for her name and number and kissing her on the forehead. The Health Practitioners Disciplinary Tribunal considered that the practitioner's conduct was opportunistic and had involved him taking advantage of a vulnerable victim. The practitioner had failed to acknowledge any wrongdoing. The Tribunal considered a suspension would have been appropriate, but for the fact the practitioner had relocated overseas. A fine of $5,000 was imposed, together with a censure. Conditions were also imposed if the practitioner returned to New Zealand. See also *Rabih*, where a registered dentist was suspended for three months after making advances to a salesperson, including making physical contact and overt sexual contact;[195] and, *Mlilo*, where the practitioner, a nurse, was subject to extended supervision over his practice for two years after he inappropriately texted a patient and attempted to kiss and hug a co-worker.[196]

(d) In *Professional Conduct Committee v Dy,*[197] the practitioner, a nurse, was found guilty of various charges of professional misconduct, which included allegations of bullying, intimidation, sexual harassment, and misleading conduct over a two-year period. The practitioner told subordinate female staff that he "had control over their lives" and put pressure on them to comply with his advances, otherwise they would be fired or their residency would be revoked. Multiple complainants were involved. The practitioner's registration was cancelled and he was censured. The Health Practitioners Disciplinary Tribunal considered that the conduct was premeditated and calculated, and that the complainants were vulnerable. The practitioner's conduct caused them distress and humiliation. Not only did members of the public need protection but so too did the practitioner's colleagues.

191 See also *CAC 10027 v Brankin* [2013] NZREADT 32, where the licensee harassed a colleague, including accessing her private emails and restricting her hours. The Tribunal was only able to order a fine of $750. An order for $10,000 in compensation was also ordered.

192 *CAC 10054 v Hume* [2013] NZREADT 91.

193 See also *CAC v Tucker* [2017] NZREADT 4, where the licensee's registration was cancelled and he was fined following his conduct in sending correspondence with derogatory and offensive content to his former agency, sending packages containing faeces and broken glass, and leaving offensive messages. The penalty of cancellation was upheld on appeal to the High Court: [2017] NZHC 1894.

194 *PCC v Adolf* 1086/MRT19/463P, 10 March 2020.

195 *PCC v Rabih* [2014] NZHPDT 638 (11 August 2014). This penalty was upheld on appeal in *Rabih v A Professional Conduct Committee of the Dental Council* [2015] NZHC 1110.

196 *Mlilo* [2012] NZHPDT 453 (15 May 2012).

197 *PCC v Dy* 963-Nur17–401P, 7 May 2018.

16. Misleading or deceptive conduct

16.1 Rule 10.9 (formerly r 11.1) of the Rules of Conduct and Client Care provides that lawyers must not engage in conduct that is misleading or deceptive, or likely to mislead or deceive anyone on any aspect of the lawyer's practice.[198] The footnote to the rule provides that case law under s 9 of the Fair Trading Act 1986, which is identical in wording, can provide guidance for the legal test for when conduct will breach this rule. The leading case in that context is the Supreme Court's decision in *Red Corp v Ellis*, which provides as follows:[199]

> The question to be answered is whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical person, there has been a breach of s 9."

16.2 Not every instance of misleading or deceptive conduct will warrant a disciplinary response; an inadvertent error about a minor matter will not typically necessitate a disciplinary response.[200] In a number of cases before the LCRO, for example, while findings have been made that practitioners have breached r 11.1 (as it then was), findings of unsatisfactory conduct have not been made where the conduct is low-level in terms of seriousness.[201]

16.3 Factors relevant to assessing the gravity of conduct of this kind include:

(a) The nature of the relevant conduct, and the circumstances surrounding it (for example, the nature and relative importance of the misrepresentation, the context in which a misrepresentation occurred, who the conduct was directed at);

(b) Whether the conduct was "one-off", or was repeated or prolonged/sustained;

(c) The practitioner's culpability, i.e. was the practitioner acting dishonestly or intentionally, recklessly, negligently or inadvertently/honestly mistaken? What was the practitioner's motive or purpose?

(d) Whether the practitioner's conduct in fact misled or deceived, or whether there was reliance on any misrepresentation;[202]

(e) Any steps taken to rectify/apologise for the relevant conduct and, if so, the circumstances in which this occurred.

---

198 In recent cases, for example *Otago Standards Committee v Claver* [2019] NZLCDT 8 and *Auckland Standards Committee 2 v Burcher* [2018] NZLCDT 42, the Disciplinary Tribunal has found breaches of this rule where the misleading / deceptive conduct has occurred in the course of the lawyer's practice, but is not directed at matters such as a lawyer's practising certificate status, expertise in particular areas of the law, existence of association, affiliation or endorsement, or fee charging practices. The rule is not directed, however, at misleading the Court, which is the subject of separate rules in chapter 13 of the Rules of Conduct and Client Care.

199 *Red Eagle Corp v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28] referred to in *Waikato Bay of Plenty Standards Committee 1 v Jacobsen* [2021] NZLCDT 18 at [16].

200 See for example the Disciplinary Tribunal's observations in *Auckland Standards Committee 2 v Burcher* [2018] NZLCDT 37. See also *LE v VV* [2012] NZLCRO 40 at [25].

201 See for example *JJ v SS* [2021] NZLCRO 52 (misleading comment to purchaser that sum of money required to complete settlement, when this was not required); *HN v JJ Lawyers* [2018] NZLCRO 50 (allowing individual to operate out of practice despite fact not a lawyer, created misleading impression individual part of practice); *AP v RE* [2014] NZLCRO 33 (providing an undertaking in a conveyancing matter which the practitioner was not in a position to fulfil); *VU v AP* [2013] NZLCRO 61 (practitioner misrepresenting that he had been instructed by an immigration client, when he had not been instructed).

202 There is no requirement for the conduct to have in fact misled or deceived, but this will be a relevant factor in assessing the gravity of the conduct.

16.4 Where the conduct was low level in terms of seriousness, for example where there was a one-off misrepresentation (not a mere error) that was the result of an honest mistake/negligence, penalty orders such as a reprimand or censure and/or a low-level fine (for example, in the vicinity of $1,000) will likely be the appropriate outcome. For moderate breaches, for example where the practitioner's conduct has resulted in someone in fact being misled or deceived, a higher level of fine may be the appropriate starting point (for example, in the vicinity of $3,000). Fines with a starting point from $7,000 to the maximum available fine should be reserved for conduct at the upper end of the spectrum of seriousness, for example repeated or prolonged misleading or deceptive conduct involving carelessness/negligence, and where someone has in fact been misled or deceived. Where there was an intent to mislead or deceive (or dishonesty), or the practitioner was reckless as to his or her obligations, the conduct may be capable of constituting misconduct, and consideration should be given to referring the matter to the Disciplinary Tribunal.

16.5 The following cases provide an example of the range of penalty orders that may be imposed depending on the nature and gravity of the relevant conduct (and having regard to any applicable personal factors relevant to the issue of penalty):

(a) For conduct at the lower end of the scale (warranting the imposition of a censure/reprimand and/or a low level fine), see *RQ v VU.*[203] The practitioner misled the complainant that he had not prepared the wills for both of her parents, after she requested a copy of the wills. The practitioner was fined $1,000 and ordered to pay compensation for emotional distress. See also *Auckland Standards Committee 2 v Burcher,* where the practitioner was found guilty of unsatisfactory conduct by the Disciplinary Tribunal for misleading a lawyer (appointed by the Law Society) overseeing the wind-down of the practice's nominee company about the status of a conveyancing transaction.[204] The practitioner apologised, and the Disciplinary Tribunal had regard to the tumultuous state of affairs at the practice which had also contributed to the lawyer being misled. The practitioner was censured.

(b) *CL v Standards Committee* provides an example of moderately serious conduct in this category.[205] The practitioner was the trust account supervisor. The firm's billing practices were not transparent. Office expenses were being inflated before being charged as disbursements – meaning that a fee was effectively being charged within the disbursement. There were also instances of accounts being overdrawn and trust account records not being kept up to date. The practitioner was fined $2,500. See also *NH v Singh,* where the practitioner was censured and fined $5,000 for not only acting when personally conflicted, but also for misleading clients in respect of the source of funds and the identity of the lender (effectively himself).[206] See similarly *Canterbury Westland Standards Committee 3 v Currie,*[207] where the practitioner was incorrectly charging LINZ disbursements to clients in a manner which was misleading. The practitioner accepted engaging in unsatisfactory conduct, and ceased the practice when confronted. He was censured, ordered to refund clients with an explanatory apology, and also required to undergo practical training.

(c) For cases towards the upper end of the scale, see *Auckland Standards Committee 1 v Latton.*[208] The practitioner admitted a charge of misconduct for failing to send a *Calderbank* letter, misleading the client to believe he had sent the letter and then backdating the letter when he sent it. The practitioner subsequently tried to explain the deceit as a misunderstanding between himself and the instructing solicitor. The practitioner had previously engaged in similar conduct. The practitioner had since apologised to the client and the instructing solicitor. The Disciplinary Tribunal considered the misconduct was at the lower end of the scale of seriousness (for a charge of misconduct), and considered the practitioner had shown insight into his conduct. The practitioner was suspended for one month, fined $7,000 and censured. The practitioner also undertook to undergo mentoring.

203 *RQ v VU* [2018] NZLCRO 33. While a specific breach of r 11.1 was not found, the focus being on rr 10 and 12, the conduct was characterised as misleading.

204 *Auckland Standards Committee 2 v Burcher* [2018] NZLCDT 42.

205 *CL v Standards Committee* LCRO 114/2018.

206 *NH v Singh* [2014] NZLCRO 37.

207 *Canterbury Westland Standards Committee 3 v Currie* [2015] NZLCDT 15.

208 *Auckland Standards Committee 1 v Latton* [2017] NZLCDT 14.

17. Duties as officers of the Court

17.1 While lawyers have an obligation to protect their clients' interests, this is subject to lawyers' overriding duties of honesty and candour to the Court, and the duty to uphold the rule of law and to facilitate the administration of justice.[209] As observed by the LCRO in *NM v Area Standards Committee X:* "The relationship between Court and lawyer involves, at its heart, the Court's expectation that it may rely without demur on every word that a lawyer utters or writes. Were it unable to do so, the administration of justice would crumble for uncertainty".[210] Lawyers' duty of candour and honesty arises whenever a lawyer drafts and files a document with the Court to consider, and whenever appearing before the Court, whether as a witness or as counsel.[211] As a result, lawyers must "eschew statements or conduct that are half-truths, or otherwise leave the court with an incorrect impression".[212]

17.2 Chapter 13 of the Rules of Conduct and Client Care sets out the key obligations of lawyers as officers of the Court. Under r 13 the overriding duty of a lawyer acting in litigation is to the court concerned. Further, under r 13.1, lawyers have an "absolute" duty of honesty to the Court and must not mislead or deceive the Court. Lawyers also have specific obligations to ensure that court processes and the dignity of the judiciary are not undermined (r 13.2). For example, failing to comply with an undertaking to the Court or making disparaging comments against members of the judiciary may be conduct warranting a disciplinary response. Lawyers also have other specific duties related to their duties as officers of the Court, for example, the requirement to not attack a person's reputation without good cause (r 13.8), the need to ensure discovery obligations are complied with (r 13.9), and obligations around the presentation of evidence in court (r 13.10).[213] Lawyers' duty to the Court also includes a requirement to put all relevant and significant law known to the lawyer before the Court, whether this material supports the client's case or not (13.11).

17.3 Because of the fundamental nature of these obligations, unless a practitioner's breach is negligent (without rising to the level of serious negligence or incompetence reflecting on fitness to practise), then the case will generally warrant referral to the Disciplinary Tribunal. For this reason, there have been limited cases involving breaches of this kind before Standards Committees and the LCRO. In the majority of these cases, breaches in this category have typically attracted censure and/or fines of at least $2,000, with higher fines being reserved for conduct which has had an adverse impact on Court processes. The fact that this kind of conduct may warrant a disciplinary response, even if inadvertent, reflects the importance of these obligations, and the need for strict adherence so as to ensure public confidence in the legal system and the administration of justice.

17.4 The following factors may be taken into account in assessing the nature and gravity of a practitioner's conduct in breaching his or her duty of fidelity to the Court:

(a) The nature and extent of the breach, i.e. the number of misrepresentations, the significance of the misrepresentation in the context of the proceedings, whether there was a positive misrepresentation or whether the practitioner misled by omission/created a misleading impression;

---

209 LCA, ss 4(a) and (d).

210 *NM v [Area] Standards Committee [X]* [2018] NZLCRO 92 at [111].

211 At [112]. See for example rr 13.5, 13.6 and 13.7, which relate to lawyers needing to maintain independence in litigation, and their obligations when giving evidence as a witness. See for example *CS v VN* [2017] NZLCRO 110, where the practitioner was censured and fined $2,000 for failing to maintain independence in litigation; and *SW v RD* [2015] NZLCRO 61, where the practitioner was reprimanded and fined $1,000 for failing to maintain independence in litigation. The LCRO in *CS* noted the importance of the Court being able to rely on a practitioner not acting in his or her own self-interest.

212 At [116].

213 See for example *FH v GJ* [2015] NZLCRO 53, where the practitioner was censured and fined $3,500 (reduced from a starting point of $5,000) for preparing a pleading claiming the tort of deceit without a sufficient evidential foundation for the claim. The practitioner had taken no appropriate steps to ensure there were reasonable grounds for making the allegation.

(b) Whether or not there has been reliance on the misrepresentation, for example whether the Court has in fact been misled or deceived, and any consequential impact on the proceedings;

(c) The practitioner's culpability, i.e. was the practitioner's conduct motivated by ill-motive or bad faith, intentional, reckless, negligent or inadvertent? Some "moral lapse" will be required for a disciplinary response to be required, a one-off minor error (for example, a failure to cite a correct rule) will not generally warrant a disciplinary response. If the conduct was attributable to negligence, if there were "red flags" as to the accuracy of the information being presented, but the practitioner proceeded regardless, this will typically aggravate the seriousness of the practitioner's conduct;

(d) Whether the position was corrected and, if so, the circumstances surrounding this.

17.5 For example, in *NM v Area Standards Committee X,*[214] the practitioner failed to ensure that the presiding Judge was in possession of all the facts relating to his membership of an organisation when he was giving evidence at a court hearing. The evidence was relevant to an issue before the Court. The practitioner was censured and fined $3,000. Similarly, in *LK v XY,* the practitioner failed to present an account of a dispute accurately in an affidavit filed with the Court, creating a misleading portrayal.[215] The practitioner was also found to have breached rr 6.1 and 10. The practitioner was censured and fined $2,000. Further, in respect of conduct described as not "inadvertent" or attributable to error, "but nor is it at the highest end of offending", the practitioner in *AM v ZM was fined $2,500 for filing submissions with the Court which did not accurately represent the state of affairs known to the practitioner, and created a misleading impression.*[216] The Court was not in fact misled, and there was no intent to ultimately mislead the Court on the part of the practitioner.

17.6 Contrast *Auckland Standards Committee v van der Zanden,* at the higher end of the spectrum of seriousness, where the practitioner was suspended by the Disciplinary Tribunal for three months (following a finding of serious negligence or incompetence) for repeatedly filing incorrect affidavit evidence, temporarily resulting in the Court being misled.[217] See also *National Standards Committee v Poananga,* where the practitioner was struck off for repeatedly filing misleading and forged documentation with the Waitangi Tribunal, including misrepresenting that the practitioner was acting for a client when representation was an issue in the proceedings.[218]

17.7 For cases involving criticism of the judiciary (without a reasonable factual basis), factors such as the nature of the comments made and the extent to which these were unprofessional, the forum in which the comments were made, the practitioner's purpose or motive in making the comments, and whether the comments risked undermining the confidence of the public in the judiciary, will be relevant to assessing the nature and gravity of the conduct. Similarly, in cases involving conduct that risks undermining court processes, whether the conduct has had an adverse impact on court processes will be a relevant consideration in assessing the gravity of the conduct. Higher levels of fine will generally be appropriate where the practitioner's conduct has had adverse consequences on court processes, and where the practitioner's conduct was serious and/or repeated.

17.8 For example, in *CR v TN,*[219] the practitioner personally commenced proceedings for abuse of process and defamation against the lawyers acting for an opposing party in a legal proceeding involving the practitioner's client. Despite the seriousness of the allegations being made, the practitioner failed to pursue the claim diligently, failing to comply with court orders and directions on a number of occasions. The LCRO considered that the practitioner's actions were unprofessional and undermined court processes. The penalty orders imposed by the Standards Committee censuring the practitioner and fining him $2,000 were upheld on review (though the

214 *NM v [Area] Standards Committee [X]* [2018] NZLCRO 92.

215 *LK v XZ* [2021] NZLCRO 66.

216 *AM v ZM* [2011] NZLCRO 10.

217 *Auckland Standards Committee v van der Zanden* [2014] NZLCDT 21.

218 *National Standards Committee v Poananga* [2012] NZLCDT 12.

219 *CR v TN* [2016] NZLCRO 62.

LCRO's assessment of the breach as "egregious" implies that a higher level of fine would not have been outside the available range). The case of *GN v IG* provides an example of a case at the upper end of the spectrum of seriousness.[220] The practitioner was holding funds in his trust account which were the subject of High Court proceedings. After the High Court hearing, but before the Court's reserved judgment was issued, the practitioner reinvested the funds. This resulted in the funds being unavailable for distribution, frustrating the effect of the Court's orders and undermining Court processes. Although the practitioner did not intentionally undermine Court processes, his actions, described as "careless" were considered to fall at the higher end of the scale of seriousness. The practitioner was censured and fined $7,000.

17.9 Cases involving criticism of the judiciary include *Cooper v Standards Committee X*.[221] The practitioner commented to a news outlet, which later reported his comments, that the outcome in a criminal case involving his former client had "quite a lot to do with the Judge hearing the case. Unfortunately for [the client], he ran into Judge TR". The Standards Committee considered that the practitioner's comments had been unprofessional, and that the practitioner should have raised issues with the Judge's conduct through other channels. The practitioner had also failed to comply with trust accounting requirements. A fine of $5,000 was imposed to reflect the gravity of the conduct, together with a censure, both of which were upheld on review (with the LCRO commenting that a higher fine would have been available, but for the operation of the totality principle). For cases at the uppermost end of the spectrum of seriousness, see: *Deliu,* findings of misconduct for repeated statements criticising two Judges without any truth or proper foundation, sent to various recipients and in documents filed with the Courts, resulting in a 15-month suspension;[222] *Orlov,* findings of misconduct following repeated offensive assertions and comments about a Judge, sent to various parties, initially resulting in strike off but overturned on appeal.[223]

220 *GN v IG* [2018] NZLCRO 19.

221 *Cooper v Standards Committee [X]* [2015] NZLCRO 24.

222 *National Standards Committee 1 v Deliu* [2016] NZLCDT 41. This was upheld on appeal to the High Court in *Deliu v National Standards Committee* [2017] NZHC 2318.

223 *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606. By the time of the appeal, the practitioner had been struck off for eight months, resulting in an effective eight-month period of suspension when the order was quashed on appeal.

18. Obligations of barristers

18.1 Chapter 14 of the Rules of Conduct and Client Care sets out the particular duties of lawyers practising as barristers. Lawyers practising as a barrister sole must not, among other things, practise as a solicitor, carry out the transactional aspects of conveyancing, undertake real estate agency work, act as attorney in respect of a client's affairs, or receive or hold money or valuable property for or on behalf of another person: r 14.2. Subject to the exceptions in r 14.5, a barrister sole must not accept instructions to act directly for another person other than from an instructing lawyer: r 14.4. This is known as the intervention rule. Barristers must keep their instructing lawyer reasonably informed of the progress of the brief: r 14.15.

18.2 Breaches of the intervention rule are typically regarded as conduct issues at the lower end of the spectrum of seriousness. In previous cases, orders such as a reprimand or censure, or low level fines in the range of $500 to $2,000 have been imposed for breaches of this rule (where the breaches have been considered serious enough to warrant a disciplinary response). Higher fines and other penalty orders are generally reserved for cases where the conduct involves the receipt or handling of client funds and/or the presence of other conduct issues.

(a) In *BG v NH,* a barrister accepted instructions directly from a client and took funds in advance.[224] The barrister was aware of the requirement for an instructing solicitor, but breached the intervention rule regardless. A fine of $500 was considered appropriate. See also:

(i) *GB v PW,* where a $750 fine was imposed in respect of a barrister who received client funds directly, as well as failing to lodge documents and who delayed taking steps to obtain a protection order;[225]

(ii) *WC v AU,* where a reprimand was ordered in respect of a practitioner who breached the intervention rule and filed a bail application when he had not yet been assigned the matter by legal aid or appointed to act on a private retainer;[226]

(iii) *DA v EB,* where a barrister sole was censured and ordered to pay a $1,000 fine for operating a trust account and handling client funds, due to his ignorance of the applicable requirements.[227]

(b) In *UC v SO,* a barrister acted for a client on a criminal matter.[228] No engagement letter was provided. The barrister received the funds for the work to be carried out in advance directly from the client in a carpark. The funds did not appear to have been paid into a trust account. A fine of $2,000 was substituted by the LCRO on review. Given the breach in relation to handling of client funds this fine should be seen as at the low end of the available range.

(c) In *Cooper v Standards Committee [X],* a barrister sole received client funds directly into his practice account, and also failed to provide clients with engagement letters.[229] The practitioner had previous disciplinary history and had been suspended from practice by the Disciplinary Tribunal. The practitioner breached various trust accounting requirements, meaning there was inadequate protection for client funds. This automatically took the conduct into a more serious category, resulting in a censure and the imposition of a $5,000 fine. The practitioner also repeatedly failed to attend multiple Court hearings, sought multiple adjournments without a proper basis, and breached his duties to the Court. This resulted in a further fine of $5,000.

224 *BG v NH* [2020] NZLCRO 72.
225 *GB v PW* [2014] NZLCRO 28.
226 *WC v AU* [2013] NZLCRO 28.
227 *DA v EB* [2014] NZLCRO 72.
228 *UC v SO* [2020] NZLCRO.
229 *Cooper v Standards Committee [X]* [2015] NZLCRO 24

(d) The case of *Morahan* provides an example of a breach of the intervention rule involving a more serious set of circumstances.[230] The practitioner knowingly breached the intervention rule when acting in Family Court proceedings. The practitioner also misled the Court about the extent of the involvement of another solicitor in the proceedings, who he claimed was his instructing solicitor. The Disciplinary Tribunal found the practitioner guilty of two charges of misconduct, and suspended him from practice for three months. The practitioner had previous adverse disciplinary history. The Tribunal's decision was upheld on appeal to the High Court.[231] The Court noted that, while breach of the intervention rule of itself is not necessarily a "particularly grave offence, consciously electing to breach the rule is rather more serious and misleading the Court is very serious indeed".[232] The practitioner's conduct in this regard was "akin to wilful dishonesty".[233] See also *Wellington Standards Committee v Skagen,* which also involved breaches of the intervention rule, among other conduct issues.[234]

230 *Auckland Standards Committee 4 v Morahan* [2015] NZLCDT 29; *Auckland Standards Committee 4 v Morahan* [2015] NZLCDT 35.

231 *Morahan v Auckland Standards Committee 4* [2015] NZHC 2886.

232 At [72].

233 At [72].

234 *Wellington Standards Committee v Skagen* [2014] NZLCDT 82; *Skagen v Wellington Standards Committee* [2016] NZHC 1772.

19. Penalty Guidelines – Summary Table

Rules	Factors to consider	Lower level	Moderate level	Higher level	Referral to Disciplinary Tribunal
Rules relating to rule of law, administration of justice **(Rules 2.1, 2.2, 2.3, 2.4, 2.7 and 2.10)** **(see section 4 of the Penalty Guidelines, page 18)**	Nature and extent of conduct Culpability of the practitioner Whether other conduct was involved Impact of the conduct	One-off inadvertent breach Censure may also be appropriate No material consequences Example: • threat to file a complaint with real estate authority ($2,000 fine)	Not intentional or reckless One-off breach which has an impact Censure may also be appropriate Example: • lawyer threatened to disclose previous allegations of sexual harassment in context of settlement discussions for employement matter ($5,000 fine)	Conduct is prolonged/repeated; or Involved a high degree of unprofessionalism and /or negligence; or Significant consequences could have resulted	Intentional or reckless breach Deliberate breaches of rr2.2 or 2.4 may constitute criminal offending so is inherently more serious conduct
Providing incorrect or false certifications, issues with administration of oaths and declarations (Rule 2.5, 2.6) **(see section 5 of the Penalty Guidelines, page 21)**	Context in which the certificate is given Number of incorrect or false certificates Whether any loss or harm arose Whether steps were taken to ensure accuracy Whether any steps were taken to rectify any false certificate The culpability of the practitioner	Most breaches of Rule 2.5 or 2.6 should result in a disciplinary response Mistaken or inadvertent breach with little consequence (training orders also relevant) Example: • lawyer certified duplicate declaration of death, had no effect on land registration process (censure, $3,000 fine)		Repeated negligent certification Example: • experienced practitioner falsely certified in easement and caveat instruments lodged with LINZ that he was authorised to act for a grantee ($6,000 fine)	Intentional or reckless breach Aggravating factors: harm resulting or complete failure to take any steps to ensure accuracy Example: • lawyer filed 2 false certificates in order to purchase a property (struck off)

Rules	Factors to consider	Lower level	Moderate level	Higher level	Referral to Disciplinary Tribunal
Requirements to act competently and with reasonable care (Rule 3) **(see section 6 of the Penalty Guidelines, page 22)**	No duty to be right and in reality these rules are a means of ensuring minimum standards of service Nature and seriousness of the errors and context Extent of negligence/ incompetence Whether the conduct was prolonged or repeated Any adverse harm or impact Relative experience of the practitioner Any steps take to rectify the error or improve the lawyer's practice In addition to fines: • Orders for training/ education may be appropriate • Orders to take advice in relation to the management of the practice may also be used • Orders for rectification or reduction/cancellation of fees may also be appropriate • Compensation orders may also be appropriate	One-off error with no particular adverse consequence. Examples: • failing to confirm instructions for a will ($1,000 fine) • failing to advise a client on the requirements for a lease ($1,500 fine) • failing to serve documents on time ($1,000 fine) • failing to request an extension to due diligence condition and doing nothing further after the extension was given ($1,000 fine) • failing to take proper care in drafting terms in sale and purchase agreement and failed to consult properly with client ($1,000 fine) • failing to respond to client inqiries and delayed preparing a wll ($2,000 fine)	Multiple errors or an error of a more serious nature such as potential for significant consequences Examples: • failing to provide advice of lapse of caveat ($4,000 fine); • asserting client had an interest in property when this was not true ($5,000 fine) • failure to register a property transaction ($4,000 fine)	Multiple errors where the errors are material Conduct repeated and prolonged Errors cannot be attributed to inexperience Examples: • failure to supervise plus failed to advise client about important service requirements and failed to ensure prompt service of documents ($8,500 fine plus compensation); • failing to act on instructions to seek clarifying orders following a judgment in a relationship property matter ($7,500 fine)	Repeated conduct; and Errors not attributable to inexperience Serious consequences such as the Court being misled by the conduct Persistent failure to prepare Failure to appear Persistent lack of adequate knowledge of law and procedure Significant negligence and incompetence may be the basis for a specific charge under s241(c) Example: • lawyer pleaded guilty to serious negligence or incompetence in criminal matters including a persistent failure to properly prepare, failing to attend court matters, inadequate knowledge of law and procedure to clients' detriment (12 month suspension)
Provision of client care information (Rules 3.4, 3.4A, 3.5, 3.5A) **(see section 7 of the Penalty Guidelines, page 28)**	Number and extent of breaches Whether the conduct was intentional, reckless, negligent or inadvertent The nature of the information which was not provided and extent to which information provided was misleading Timing of the information vs the time at which significant work was undertaken Impact of the breach	One-off breaches Aggravating factors can justify higher fines such as where the lack of understanding can result in a client misunderstanding the basis upon which they would be charged	Example: • Failure to provide clear information to client and aspects of services when client (for whom English was a second language) has "diametrically opposute views" about basis for fees ($3,500 fines)		

Rules	Factors to consider	Lower level	Moderate level	Higher level	Referral to Disciplinary Tribunal
Duties around retainers (Rules 4, 4.1, 4.2, 4.3) **(see section 8 of the Penalty Guidelines, page 29)**	Nature and circumstances of the conduct Extent of the breach Culpability of the practitioner Any harm caused	Adverse impact beyond inconvenience Practitioner acting unreasonably/ unprofessionally The breach occurred over a prolonged period Examples: • not releasing file for 8 weeks after termination of retainer (UC, no orders) • termination of retainer without cause ($500 fine and order to reduce fee) • termination of retainer without cause due to mistake that retainer did not commence until legal aid secured ($600 fine)	Aggravating factors such as terminating a retainer and not advising the client and not assisting in engaging a new lawyer Potential for consequences such as not releasing documents to enable probate to be progressed Examples: • failure to properly inform client he was acting for in a criminal proceeding that he had terminated the retainer, no steps taken to assist the client to engage a new lawyer (fee was cancelled and refunded)	Examples: • lawyer inappropriately invoiced a former client for fees carried out when he was no longer the client, and failed to turn over trust documents to new lawyers for a month, asserting a lien with no justification (fine of $3,000 and cancellation of invoice)	
Conflicts of interest (Chapter 5) **(see section 9 of the Penalty Guidelines, page 32)**	Nature and extent of the conflict Whether the lawyer's conduct personally benefited the lawyer or disadvantaged the client The practitioner's culpability Any particular vulnerability of the client Any steps taken to rectify the situation	One-off error or failing No adverse consequences Examples: • failure to advise client to obtain independent advice where the client gave undertakings, indemnities, waivers in favour of the lawyer's firm to allow for payment of outstanding fees in exchange for the lawyer acting on the property sale in relationship property matter ($1,500 fine)	Personal interest in the transaction and failed to advise the client – no prejudice to the client Examples: • lawyer facilitated loan of client funds to another client and their business entities but also contributed personal funds to the loan without disclosing to the borrower that he was contributing ($5,000 fine)	Personal interest in the transaction plus no adequate disclosure. Risk of impact on the client Aggravating factors such as personal involvement and acting for more than one client with diverging interests – "double conflict") Examples: • lawyer acted for clients in loan transaction where he had a personal interest, did not disclose the scope of the personal interest, conduct was over a prolonged period ($5,000 fine, LCRO comment suggested that up to $7,000 fine may have been available to reflect the gravity of the matter) • lawyer acted for various clients whose interests diverged plus he was personally involved ($7,500 fine)	Dishonesty involved or deliberate or reckless disregard for obligations

Rules	Factors to consider	Lower level	Moderate level	Higher level	Referral to Disciplinary Tribunal
Conflicts of duty (Chapter 6) **(see section 10 of the Penalty Guidelines, page 35)**	Nature and extent of conflict Whether the conduct adversely impacted one or more of the clients Culpabilty of the practitioner Any particular vulnerability of the client Any steps taken to rectify the situation Orders for training or education may be appropriate for these matters	Conflict did not result in lawyer failing to discharge obligations to the client(s) Conflict not obvious at the outset Example: • firm acting for an estate and the party challenging the estate – but no harm resulted, appeared inadvertent ($1,000 fine)	Conflict was stark Red flags should have alerted the lawyer Conflict undermined the lawyer's ability to discharge obligations One or more clients had adverse consequences Examples: • acting for husband and wife, wife was disadvantaged, no prior informed consent, incorrect advice to wife ($5,500 fine) • acting for 3 parties on a transaction, continued to act despite conflict being raised by the bank -no harm resulted ($3,000 fine plus censure) • acting for 2 parties in sale of shares in business, lawyer failed to ensure one party was informed of important matters due to confindetiality of that information to the other party (censure plus $3,000 fine)	Glaring conflict Significant consequences as a result of conflict – including stress and anxiety Example: • acting for both parties in sale of business, parties' interests in direct conflict – conflict was obvious, lawyer continued to act when letters of demand were exchanged and litigation was threatened, one of the parties incurred significant cost (fine of $7,000)	Clear conflict Failure to recommend parties take independent advice and get independent valuation Defects in documentation and disadvantageous to one of the parties Negligence, serious lack of care Example: • lawyer acted for both parties on the sale of a property without recommending independent advice or an independent valuation, there were deficits in the ASAP so disadvantageous to vendor. The DT considered the practitioner acted hastily and was negligent (UC and $10,000 fine, but DT considered a period of suspension)
Confidentiality (Chapter 8) **(see section 11 of the Penalty Guidelines, page 38)**	Nature of the information and degree of sensitivity Extent of the breach – one off, multiple, prolonged Impact or harm from disclosure Purpose for which the information was used/ was it for personal gain Culpability of the practitioner	Any disclosure should be UC and fines of at least $3,000 for any breach, even where inadvertent Examples: • lawyer disclosed preferred purchase price of property to a prospective purchaser. Breach was inadvertent and no harm resulted ($3,000 fine) • lawyer acted for client on purchase of property and then acted for subsquent purchasers of the property; she used knowledge relating to objections to the title from acting on the first transaction ($2,500 fine)	Conduct is prolonged Disclosure had an adverse impact on the client Higher degree of culpability Examples: • lawyer disclosed former client's instructions about settlement of proceedings in memorandum to the Court seeking to withdraw. ($4,500 fine) • lawyer acted in a private prosecution of a former client (SC ordered $10,000 fine but LCRO reduced the fine to $3,500 as it accepted the breach was inadvertent) • lawyer inadvertently disclosed copy of client's will to her husband without instructions, disclosure caused emotional and psychological damage (compensation of $5,000)		Deliberate or reckless disclosure Disclosure was for benefit of practitioner or other person Disclosure information of highly confidential and sensitive information Examples: • lawyer disclosed sensitive health information regarding a client without approval to their family member in order to secure an extension of a loan for fund litigation. Lawyer benefitting financially and the DT considered there were public protection concerns (struck off)

Rules	Factors to consider	Lower level	Moderate level	Higher level	Referral to Disciplinary Tribunal
Fee-related conduct issues (Chapter 9) **(see section 12 of the Penalty Guidelines, page 41)**	Fee disputes may often be resolved by ADR processes Nature and extent of the overcharging Communication issues in respect of charging practices Whether the client is vulnerable Whether the conduct had detrimental financial consequences Whether the conduct was prolonged or repeated Culpability of the practitioner Any steps taken to voluntarily repay excessive fees Orders are likely to involve fee reductions, refund and cancellation of invoices	To impose a fine as well as make a finding of UC and order to refund etc, it would require one or two aggravating factors in addition to overcharging, such as charging for work not arising from the retainer, quality of the work and duplication of work, or overcharging a vulnerable client. Example: • fees were excessive in a number of respects and constituted significant overcharging, there was duplication on other files and lack of substantive work ($2,000 fine);		Not providing client care information Ongoing issues with billing practices (such as double billing) Repeated or prolonged instances of overcharging in respect of a vulnerable client Example: • failing to provide client care information, agreeing to have parents pay their son's legal fees without advising them to seek independent advice, and charging excessive fees – (censure, $15,000 fine, fees cancelled and refunded)	Gross overcharging Extreme negligence over billing practices Indifference by the practitioner as to whether the invoicing was reasonable Overcharging had significant impact on the client Failure to advise client of cost vs benefit of the work Example: • lawyer charged fees over twice the amount considered reasonable and at a level considered "disgraceful, deplorable or repugnant". There were misleading representations made regarding discounts, the clients were vulnerable and had not been advised at the outset of the likely financial outcome (struck off, significant reduction of fees ordered plus costs and compensation)
Breaches of trust accounting requirements **(see section 13 of the Penalty Guidelines, page 46)**	Nature of the requirements breached and the extent of them Culpability of the practitioner Any personal gain to the lawyer Harm or loss to a client The involvement of any misrepresentation Amount of any funds involved Period over which the conduct occurred Previous incidences of non-compliance of trust accounting provisions Experience of the practitioner	Any breach (other than minor process breach) should be UC as there is a need for strict compliance One-off non-compliance for process related matters Example: • trust account indvertently overdrawn for several months and trust account records not up-to-date ($2,500 fine)	One off breach of a substantive requirement Inadvertent or negligent Multiple/repeated breaches of specific requirements Examples: • lawyer debited fees without authority and no invoice or letter of engagement ($3,000 fine, LCRO noted that the debiting of fees was a breach of a fundamantal rule and should attract a higher starting fine) • breach of ss110 and 112 of LCA and Reg 11 of the TAR ($5,000 fine)	Multiple breaches of requirements repeated over time Breaches of more serious requirements Risk of loss of funds There has been previous notice to the practitioner	Theft or misuse of trust funds Multiple/prolonged breaches of requirements Breaches are intentional, reckless, or involve serious negligence False certifications to the NZLS

Rules	Factors to consider	Lower level	Moderate level	Higher level	Referral to Disciplinary Tribunal
Unprofessional conduct, other conduct unbecoming (Rule 10, 3.1, 12, 10.4, 10.10, 13.2.1) **(See section 14 of the Penalty Guidelines, page 49)**	Nature and extent of the conduct Circumstances surrounding the conduct Culpability of the practitioner Impact of the practitioner's conduct Level of experience of the practitioner Any steps taken to rectify the conduct	One-off instances of unprofessional communications Examples: • stating that another lawyer's advice was negligent (censure and $2,000 fine); • writing inflammatory emails impugning the other lawyer's competence (censure) • confronting the father of a victim in a court foyer (censure) • failing to file documents as directed by the Court • serving documents in an inappropriate way ($500 fine)	Prolonged, sustained or repeated Communication was highly offensive/ insulting Examples: • proposing to communicate directly with another lawyer's client and taking improper steps to have complaints about him withdrawn ($5,000 fine) • failing to comply with disciplinary orders previously made requiring the reduction of a fee ($3,500 fine)	Sending multiple emails containing insulting and unprofessional / abusive language Example: • lawyer sent client emails over a sustained period that were insulting and unprofessional, in order to coerce payment of fees (censure, $7,500 fine)	Pattern of abuse over an extended period including threats Example: • lawyer found guilty of misconduct for a sustained pattern of abusive and profane emails to a self-represented litigant that were threating a misogynistic (censure, 4 month suspension)
Bullying, Discrimination and Harassment (Rule 10.3) **(See section 15 of the Penalty Guidelines, page 52)**	If one or more of the following exist consideration to be given to referral to the DT: • Whether the conduct was prolonged, repeated or indicative of a pattern of behaviour • Was the conduct premeditated, deliberate or displayed a reckless regard for obligations • Did conduct involve significant power imbalance/ abuse of trust • Did the conduct cause physical, emotional or psychological harm • Did conduct involve unprofessional and /or inappropriate physical or overt sexual conduct Mitigating factors should not be taken into account in assessing the nature or gravity of conduct but may be relevant to penalty	One-off incident where the conduct is not prolonged or sustained Repeated incidents of low level conduct (such as inappropriate remarks) where conduct not deliberate or reckless			Serious cases of bullying, discrimination or harassment including: • prolonged or repeated conduct • conduct is premeditated, deliberate or displayed reackless disreagrd for professional obligations • where there is a power imbalance and /or abuse of trust • conduct has caused harm to the person • unprofessional and /or inappropriate physical or overt sexual contact Examples: • lawyer found to have engaged in sexual harassment over 2 events with multiple complainants (2 year suspension – under appeal) • practitioner sent very offensive emails to the other party (4 month suspension)

Rules	Factors to consider	Lower level	Moderate level	Higher level	Referral to Disciplinary Tribunal
Misleading or deceptive conduct (rule 10.9) **(See section 16 of the Penalty Guidelines, page 54)**	Nature of the conduct and the circumstances Prolonged or one-off Culpability of the practitioner Did the conduct in fact mislead or deceive Any steps taken to rectify/ apologise for the conduct	One-off misrepresentation which is not a mere error Honest mistake or negligence Examples: • lawyer misled complainant as to whether he had prepared wills for parents ($1,000 fine)	Someone is deceived as a result of the lawyer's conduct Examples: • invoicing was misleading so that a fee was charged as a disbursement ($2,500 fine) • lawyer misled parties to a transaction regarding the source of funding ($5,000 fine). Also acted while conflicted	Repeated or prolonged conduct Carelessness/negligence Someone was deceived	Intent to deceive or dishonesty Reckless as to lawyer's obligations Example: • failing to send a settlement letter and misleading the client to believe it had been sent (1 month suspension, $7,000 fine and censure)
Duties as officers of the Court (Chapter 13) **(See section 17 of the Penalty Guidelines, page 57)**	In relation to fidelity to the Court: • Nature and extent of the breach • Whether there has been reliance on the misrepresentation • Culpability of the practitioner • Whether the position was corrected In relation to comments about the judiciary: • Nature of the comments and extent to which unprofessional • Whether the comments risked undermining confidence of the public In relation to the conduct which risks undermining Court processes: • Whether the conduct had an adverse effect on court processes	Negligent One off events Limited impact on Court processes Examples: • lawyer failed to ensure that Judge had all relevant information when he was giving evidence in Court (censure, $3,000 fine) • lawyer failed to present an accurate account of a dispute in an affidavit ($2,500 fine)	Criticism of the judiciary Example: • practitioner's comments to a news outlet about a judge unprofessional and should have raised issues with the judge's conduct through other channels (practitioner also failed to comply with trust accounting requirements) (censure and $5,000 fine)	Lack of care Unprofessional Example: • lawyer holding funds in trust account which were the subject of proceedings, after hearing but before judgment issued the lawyer reinvested the funds and the funds were not available for distribution which frustrated the Court's orders and undermined the Court process ($7,000 fine)	Unless the breach is negligent (and not amounting to serious negligence) any breach will generally warrant referral Examples: • repeatedly filing incorrect affidavit evidence • repeated criticism of the judiciary • offensive assertions and comments about a Judge, sent to various parties
Obligations of Barristers (Chapter 14) **(See section 18 of the Penalty Guidelines, page 60)**		Breaches of intervention rule generally at lower end Example: • barrister accepted instructions direct from client and took funds in advance ($500 fine) • barrister operated a trust account and handled client funds due to ignorance of the requirements (censure, $1,000 fine)	Conduct involves receipt or handling of client funds and other conduct issues Example: • barrister received funds into his account, failed to provide letters of engagement, there were breaches of trust account requirements and inadequate protection of client funds (censure, $5000 fine)		Intentional breaches Example: • lawyer knowingly breached intervention rule and misled the Court about the involvement of a solicitor which was akin to dishonesty (3 month suspension)

* This table is a summary of the penalty guidelines and provides some examples from the last three years. The examples are not exhaustive and the blank fields are not indicative of there being no cases relating to that category.