

# THE FACULTY OF ADVOCATES DISCIPLINARY RULES 2015

(Ref: 2019/04)

## **Decision of the Complaints Committee on Penalty**

**in the matter of the Complaint by Steven Elliott**

**regarding**

**Andrew Smith KC**

- [1]. The Complaints Committee, as previously constituted in this matter, convened again on 4 July 2024, for the purpose of hearing oral representations made on behalf of the Member in relation to penalty, under and in terms of rule 27 of the Faculty of Advocates Disciplinary Rules (“the 2015 Rules”). Following the hearing, the Committee thereafter considered whether, in the light of its decision dated 20 May 2024 and further to rule 26 of the 2015 Rules, it was appropriate to impose a penalty and, if so, what that penalty should be.
- [2]. The Member was not present but was represented by Peter Gray KC and Giles Reid, Advocate, together with their instructing solicitors, CMS of Saltire Court, Edinburgh. The Complaints Committee was presented with an Inventory of Documents, which included the Member’s disciplinary record and various testimonials that had been intimated to the Dean’s Secretariat in the afternoon of 3 July 2024.
- [3]. Mr Gray KC made a submission on behalf of the Member that was contained in a written submission dated 4 July 2024, copies of which were provided to the Complaints Committee. He submitted that the Member was a highly respected member of the Faculty of Advocates, who took his professional responsibilities seriously. The Committee was also advised that whilst the Member was devastated by the outcome of the proceedings, the Member continues to deny that he had behaved inappropriately in any way. He set out the Member’s professional background and experience. Under reference to the various testimonials produced by CMS the previous day, he submitted that the Member had consistently shown to have conducted himself with decency, care and compassion, including accepting various *pro bono* instructions in which he had achieved success for his clients. He drew

attention to the Member's actions in supporting the welfare of a colleague. He submitted that the conduct for which the Member had been "found guilty" was "wholly out of character"<sup>1</sup>. The finding of professional misconduct was said to be, in itself, significant punishment. The Complaints Committee was invited to weigh the "extreme length of these proceedings and the inevitable stress and distress occasioned to Mr Smith as a consequence"<sup>2</sup>, in the assessment of an appropriate disposal. In his submission Mr Gray KC also advised that the Member was now, in the light of the decision of the Complaints Committee, uncertain as to whether it was appropriate for him to continue to offer support to one particular colleague, mindful that a withdrawal of support might lead to adverse consequences for that individual<sup>3</sup>.

- [4]. The Complaints Committee has taken into account the submission made by Mr Gray KC on behalf of the Member and all the documentation produced, including numerous testimonials as to the potential effect of its decision upon others. The Complaints Committee noted the Member's appreciation that its decision may have significant impact on the manner in which he conducts himself going forward. However, specific to the issue raised in paragraph 18 of Mr Gray's written submissions, it is not for the Complaints Committee to give any direction to the Member as to how he should proceed in respect of particular circumstances that are not the subject of any allegation contained in the complaint before the Committee. It is open to the Member to seek advice from the Faculty's Office Bearers as to how he should manage potential conflicts of interest if he has concerns that the determination of the Complaints Committee raises such a risk.
- [5]. The Complaints Committee is not directed to have regard to any formal guidance by the Faculty in the assessment of whether to impose a penalty following a finding of professional misconduct. The Complaints Committee approaches its task bearing in mind that the regulation of any profession has at its heart the need to protect the public and uphold the public interest. The Complaints Committee has had regard to the fact that these objectives are reflected in the relevant professional guidance contained in the Faculty's Guide to the Professional Conduct of Advocate<sup>4</sup>, together with guidance on the importance of the duties of independence; free from all other influences, and not acting in any sense as agent of the Member's client. In the assessment of whether the imposition of a penalty is appropriate, and if so what penalty

<sup>1</sup> Paragraph 19 of the written Outline Submission lodged by Mr Gray KC

<sup>2</sup> *Ibid* paragraph 22

<sup>3</sup> *Ibid* paragraph 18

<sup>4</sup> Paragraphs [12] to [15] of the Decision of the Complaints Committee dated 20 May 2024

to impose, the task of the Complaints Committee is to look forward in the light of the past conduct.

- [6]. The imposition of any penalty should be determined having regard to the need to protect those who might be harmed by offending conduct and the need to maintain public confidence in the profession and, in this case, the Faculty of Advocates as the regulator. It is the reputation of the profession that is of importance and maintaining professional standards, although a penalty may additionally have a punitive effect. Furthermore, in reaching its decision the Complaints Committee was mindful that it should act proportionately, balancing the interests of the Member with those of the public. Ultimately, the decision on any penalty is a matter for the judgement of the Complaints Committee.
- [7]. The Complaints Committee recalled, as an aggravating factor, that it had found the Member's professional misconduct to have been repeated<sup>5</sup>.
- [8]. In mitigation, the Complaints Committee noted that the professional misconduct, although repeated, arose out of the same factual background. There was no evidence that the Member had benefitted financially from his conduct, either from the receipt of fees or broader commercial gain. The Complaints Committee recalls that allegations related to close personal (not financial ) involvement in the business affairs of Mr Worbey and Mr Farrell, and in respect of which there were ongoing judicial proceedings in which the Member was representing them.
- [9]. The Complaints Committee also had regard to the general good character of the Member. One past, and somewhat historic, disciplinary concern relating to the speed of response to instructions was considered by the Complaints Committee not to undermine an otherwise unblemished disciplinary history. The Complaints Committee also had regard to the testimonials produced. Whilst the testimonials were received too late to be verified, they consistently demonstrated an individual with good intention, willing to assist to the best of his ability and on a *pro bono* basis, members of the public who might have otherwise been deprived of legal representation in time consuming and complex cases, and also, professional colleagues. Many of the testimonials were offered by former clients of the Member. The Complaints Committee bore in mind that in considering the public interest in the light of the particular circumstances identified in Issues 5, 10 and 14 of the complaint that a broader perspective was necessary.

<sup>5</sup> Paragraphs [35] and [36] of the Decision of the Complaints Committee dated 20 May 2024

- [10]. The Complaints Committee did, however, note that it was stated in one of the testimonials that the Member had personally travelled to Strasbourg to submit papers on behalf of his client to the European Court of Human Rights. Bearing in mind the concern of the Complaints Committee resulting in its finding of professional misconduct - the obscuring of the division between counsel and agent - that testimonial undermined the submission made on behalf of the Member that the conduct found proved was wholly out of character. The Complaints Committee was satisfied that the circumstances of concern before it - occurring on more than one occasion as set out in the Complaints Committee's earlier decision and cross-referenced in paragraph [7] above - were indeed not out of character as submitted by Mr Gray KC.
- [11]. The Complaints Committee also had regard to the time the disciplinary proceedings had been pending. The original complaint made against the Member was made in March 2018. In March 2019 the Scottish Legal Complaints Commission ("SLCC") accepted four aspects of a complaint communicated to it. Court proceedings at the instance of the Member challenging the SLCC's decision concluded in April 2020, reducing the number of specific complaints for consideration by the Faculty to the three complaints considered by the Complaints Committee. Following sundry procedure and investigations, including affording the Member and the Complainer the opportunity to make representations, the Complaints Committee met in February 2021 and in a lengthy interim decision dated 30 April 2021 remitted various matters to the Investigating Committee. In February 2023, the Investigating Committee reported to the Complaints Committee. The Complaints Committee met on five occasions thereafter to consider the report of the Investigating Committee and comments thereon by the Member and the Complainer, before issuing its determination on 20 May 2024. The Complaints Committee recognises that the present proceedings are unprecedented in terms of the length of time they have taken but have had regard to the complexity of the issues raised and the need to properly investigate the facts. The Complaints Committee acknowledge that the passage of time will have been a prolonged salutary period for the Member.
- [12]. The Complaints Committee also took into account that the Member continued to deny any misconduct. Admitting misconduct is not a condition precedent to establishing whether the Member understands the gravity of his conduct and the likelihood of repetition. However, there was little, if anything, in the submission made on behalf of the Member to demonstrate an appreciation of either matter. The submission that the Member was deeply concerned and gravely disappointed at the decision and was devastated by the outcome, does not unequivocally inform the Complaints Committee as to the likelihood of future harm and repetition. Taken together, the written submissions and

supporting documents lodged on behalf of the Member do not disclose an appreciation as to the significance of a failure to ensure absolute independence from his clients' business objectives and the importance of not merging the role of Counsel with that of agent.

- [13]. The Complaints Committee considered first whether to impose no penalty. Having regard to the seriousness of its findings, including of professional misconduct on more than one occasion, and the absence of confidence that there was no material risk of repetition, it determined that this was not a case where a finding of professional misconduct was alone sufficient to maintain professional standards for the purposes of ensuring the confidence of the public in the process of justice and Members of the Faculty.
- [14]. The Complaints Committee next considered whether a written direction, with or without conditions, would be an appropriate and proportionate penalty. The Complaints Committee determined that marking the seriousness of the findings and the need to uphold proper standards of conduct would not be adequately met by a direction without censure of some sort, as provided for in other sub-paragraphs of rule 26.
- [15]. The Complaints Committee turned to consider a verbal admonishment. The Complaints Committee determined that marking the seriousness of the findings and the need to uphold proper standards of conduct would not be adequately met by a disposal of such an incidental nature.
- [16]. Considering next whether written reprimand would be appropriate and proportionate, the Complaints Committee determined that the seriousness of its findings and the need to uphold proper standards of conduct required to be marked by a condemnation greater than a reprimand.
- [17]. The Complaints Committee determined that a severe written censure had the capacity to mark the seriousness of the Member's professional misconduct and act as an effective deterrent against the likelihood of repetition. In reaching that view the Complaints Committee was of opinion that the Member had, in his conduct, been well intended but unprofessional, despite his seniority, as to the professional requirement to maintain, for the benefit of the profession generally, a distinction between counsel and agent. The reference in some of the testimonials to conduct that could be considered to demonstrate a similar lack of understanding of professional boundaries in other instances, justified the Complaints Committee in concluding that to minimise the risk of repetition a strong condemnation was required.

- [18]. As a check on its view that a severe written censure would be a proportionate response, the Complaints Committee considered whether a greater penalty might not be more appropriate. As the Member had not charged fees for his services, and the complaint was initiated not by his clients but by his clients' opponent in litigation, an order for cancellation or repayment of fees or for a compensation payment to be paid were not considered to be effective or an appropriate means of maintaining professional standards and the public interest.
- [19]. The Complaints Committee also gave careful consideration as to whether a fine, not exceeding £7,500, was required to mark the seriousness of the Member's misconduct. A financial penalty would underscore in a material manner for the Member the disapproval of his conduct. However, the Complaints Committee determined that the finding of professional misconduct is likely to have a significant impact on the Member's professional aspirations and opportunities. Of itself, it may result in financial loss greater than any penalty the Complaints Committee can impose. A fine of such magnitude was, in the view of the Complaints Committee no more likely to prevent repetition than a severe written censure, which would send a clear message as to where professional boundaries lie.
- [20]. A suspension from practice, not exceeding one year, was considered not to be proportionate in the light of the Member's regulatory history and the absence of any bad faith in his conduct.

### *Disposal*

- [21]. The Complaints Committee therefore unanimously agreed to impose an overall penalty in respect of issues 5, 10 and 14 to direct that a severe written censure be issued to the Member

*"Ailsa M Wilson, KC"*

**Chair of the Complaints Committee**  
**19 July 2024.**

### **Right of appeal and handling complaints**

In terms of rules 34 and 35 of the 2015 Rules, the Member may, with leave of the Complaints Committee appeal this Determination to the Disciplinary Tribunal. Any

application to the Complaints Committee for leave must be made in writing the Dean's Secretariat, stating the grounds upon which it is sought, within 14 days of the date on which the email containing the final disposal of the complaint was sent, or the date of any letter containing the final disposal was sent by recorded delivery.

The address for any application for leave to appeal is:

Dean's Secretariat  
Faculty of Advocates  
Advocates Library  
Parliament House  
Edinburgh  
EH1 1RF

Should either party be dissatisfied with the manner in which this complaint has been dealt with, they have a period of 6 months of the date of this decision to refer the matter to the Scottish Legal Complaints Commission, whose contact details are as follows:

Scottish Legal Complaints Commission  
12-13 St Andrew Square  
Edinburgh  
EH2 2AF

Tel: 0131 201 2130  
Fax: 0131 201 2131