LCRO 111/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Standards Committee
BETWEEN	**EV** Applicant
AND	**IG** Respondent

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

DECISION

Introduction

[1] This is an application by Mr EV for a review of a decision of the Standards Committee dated 11 March 2013. In that decision the Standards Committee determined to take no further action on Mr EV's complaint against Mr IG, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] During November 2012 Mr IG, a practitioner, was appearing in court as a defendant to face charges of careless driving and driving with excess blood alcohol. Media reporters were present. After his appearance before a Judge, in which the case was adjourned, he left the courtroom and made his way to an adjacent courtroom where he was appearing as counsel for a client.

[3] Between the two courtrooms a reporter asked Mr IG some questions and he is alleged to have answered that he neither practised law in New Zealand nor lived here.[1]

[4] After he left the second courtroom the same reporter asked him further questions and according to that reporter Mr IG did not say whether he would defend the charges he was facing and would not comment on his earlier denial that he practised law in New Zealand.

Complaint

[5] The following day Mr EV sent an email to the New Zealand Law Society Complaints Service (NZLS), attaching the [News Media X]'s account of the previous day's events. In the email Mr EV noted his concerns that Mr IG "may … have engaged in criminal offending" and may also "have misled the Court and/or been dishonest to the media about his status as a (lawyer)…".

[6] Mr EV invited the NZLS to inquire further of the court, the media and Mr IG, for explanations about what took place. Finally Mr EV asserted that it "hurts the profession" when lawyers appear in the dock, and when this is coupled with being "less than fully candid to the Court and/or lying to the media in the halls of justice about their status", it raises the spectre of a *Bolton*-type disciplinary response.[2]

Mr IG's response

[7] The complaint was forwarded to Mr IG and summarised as follows:[3]

- That he had been charged with careless operation of a vehicle and drink-driving.
- That he may have misled the court and/or been dishonest to the media about his practising status.

[8] Mr IG responded by asserting that "the report by the reporter was misleading". He said that when he left the courtroom in which he had appeared as a defendant, when asked a question by the reporter he told him to "get lost". Mr IG said that the same reporter spoke to him after he left the courtroom in which he was appearing as counsel, and once again Mr IG told him to "get lost". Mr IG denied saying that he did not practise in [City] and emphasised in his response to the NZLS that he has been in practice for 28 years.

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[1] [Reporter] "[Article Title]" [News Media X] (online ed, [City], 20 November 2012).
[2] *Bolton v Law Society* [1994] 2 All ER 486.
[3] Letter NZLS to Mr IG (26 November 2012).

Further comment from Mr EV

[9] Mr EV was given a copy of Mr IG's response. He invited the NZLS to contact the reporter directly to assist with resolving the conflict over what was said. He provided a lengthy extract from *Bolton v Law Society* to support his submission that a Standards Committee ought to "properly investigate whether [Mr IG] has misled the media (and/or the Court) as to his status as an officer".[4]

Initial Standards Committee meeting

[10] On 12 December 2012 the Standards Committee met to consider the complaint. It had before it the initial complaint and the [News Media X] extract, together with Mr IG's response. It does not appear to have had Mr EV's email dated 6 December 2012.

[11] The Standards Committee resolved to inquire into the complaint pursuant to s 137(1)(a) of the Act. Part of that was a request that the NZLS contact the reporter and "make inquiries".

[12] Those inquiries took the form of a letter to the reporter dated 15 January 2013. The questions asked of him were:

- Confirmation of his understanding that Mr IG had made the comments attributed to him by the reporter in his article.
- Corroboration of that understanding, if it existed.

[13] The reporter's emailed response to the NZLS said simply that "[the news service] stands by the report…".[5] This was provided to both Mr EV and Mr IG.

[14] Mr EV noted the unresolved conflict between the reporter and Mr IG and suggested that the best place for that to be resolved was at a disciplinary hearing before the Lawyers and Conveyancers Disciplinary Tribunal. Mr EV's reasoning was that if the reporter's version was to be preferred then this raised the spectre of *Bolton* dishonesty by Mr IG, aggravated by the fact that it took place "in the confines of the courtroom".[6]

[4] Email EV to NZLS (6 December 2012).
[5] Email to NZLS (25 January 2013).
[6] Email EV to NZLS (30 January 2013).

Intervening event

[15] On 30 January 2013 Mr IG reappeared in the [City] District Court and pleaded guilty to the charge of driving with excess blood alcohol. The Police withdrew the careless driving charge. Mr IG's blood alcohol reading was 144mg of alcohol per 100ml of blood (the limit being 80/100). He was fined $1,050 together with costs and expenses, and disqualified from driving for six months (which is the minimum period of disqualification able to be imposed).

[16] As part of its investigation the Standards Committee obtained copies of the information and the summary of facts from the [City] District Court. These were provided to the parties.

[17] The events giving rise to the charges initially faced by Mr IG occurred just after 2 pm on Sunday 15 July 2012 and the facts included a claim that he had crossed the centre line and collided with an oncoming vehicle; hit a second vehicle and continued on the wrong side of the road. His explanation for the blood alcohol level was the consumption of one beer that day, on top of alcohol consumed the night before.

[18] I observe that the penalty imposed by the Court is at the minimum level for an offence of this nature. I note that the summary of facts describes Mr IG as having previously appeared before the Court, although Mr IG contends that was an error.[7]

[19] Mr EV argued the fact that the police summary of facts recorded that Mr IG had previously appeared before the Court should be taken into account in the disciplinary proceedings. In the face of Mr IG's denial of having previously appeared before the court, and no other evidence to clarify the accuracy or otherwise of the police summary, I do not consider it appropriate to give any weight to argument that an alleged previous court appearance (the reasons unknown) should be taken into account.

[20] A report of this appearance was posted on the [News Media Y] website. It was noticed by the NZLS, and added to Mr EV's complaint file. The parties were informed of this.

Mr IG's further comments

[21] In an undated letter sent by Mr IG to the NZLS but stamped as having been received on 11 February 2013, Mr IG "still strongly" denied "the allegation" and noted

[7] Letter IG to NZLS (18 February 2013).

that the journey from court 5 (where he appeared as a defendant) to court 3 (where he appeared as counsel) took "about five seconds" and that he "didn't talk to the reporter".

[22] Mr IG wrote further to the NZLS on 18 February stating that apart from the conviction the subject of the investigation, he had no other convictions. He also asserted that the blood alcohol reading was a combination of alcohol consumed the night before he was apprehended, together with a beer consumed on the same day.

Final comments from Mr EV

[23] Mr EV was provided with the letters sent by Mr IG. He simply noted that the crux of the complaint "stems really from the dishonesty allegation which obviously has two sides and of which there is nothing further [he] could proffer". He described as "immaterial" Mr IG's explanation for the offending in the light of the guilty plea and conviction.

Standards Committee processes

[24] The Standards Committee conducted its hearing on the papers, and decided to take no further action on it pursuant to s 138(2) of the Act. Section 137 of the Act allows a Standards Committee to take no further action on a complaint pursuant to s 138 of the Act, as an alternative to inquiring into a complaint. A Standards Committee may dismiss a complaint at the early pre-inquiry stage if having regard to all the circumstances of the case, the Standards Committee considers that further action is unnecessary or inappropriate.

Issue summarised by the Committee

[25] The Standards Committee met to consider the complaint and on 11 March 2013 released its decision on that complaint.

[26] The issue identified by the Committee was:

- On each of the matters of the complaint, was the alleged conduct sufficient to warrant further disciplinary action?[8]

Drink-driving conviction

[27] The Standards Committee noted that this was Mr IG's first conviction for an offence of this type. For that reason the Standards Committee considered that "a conviction of this type on its own was not usually capable in the professional disciplinary setting of reaching the threshold required for further action". It commented

[8] Standards Committee decision at [3].

that a "history of driving with excess breath alcohol and/or some other surrounding circumstance would usually be necessary to warrant further disciplinary action".[9] For those reasons the Standards Committee did not consider that further action was necessary or appropriate.

Misleading the Court and/or being dishonest to the media

[28] As earlier noted, there was a conflict between the recollections of the reporter and Mr IG as to what passed between them when Mr IG appeared in Court in November 2012, on the two occasions on which they spoke. On the one hand, the reporter claims that initially Mr IG said he did not practise law or live in New Zealand; subsequently he did not say whether he would defend the charges or explain why he had denied practising law in New Zealand. The [News Media X] report of this account refers to Mr IG having appeared initially as a defendant in courtroom 5; then "half an hour later" as counsel representing a client in the same courtroom.

[29] On the other hand Mr IG's account was that he appeared as a defendant on the driving charges in courtroom 5 and then left there to go to courtroom 3 to appear for a client. Between the two courtrooms he was spoken to by a reporter to whom he said "get lost". He appeared as counsel in courtroom 3 and when he left a further approach was made by the reporter, which met a similar response from Mr IG.

[30] The Standards Committee noted that when asked to confirm what had been said, the reporter said that the news service "stands by" what the reporter had reported.

[31] As the Standards Committee noted, Mr EV characterised this as potentially *Bolton* dishonesty, with the conflict in the accounts best resolved by evidence before the Tribunal.

[32] The Standards Committee considered that because of the conflict apparent in the written accounts of both Mr IG and the reporter, it could not be satisfied on the balance of probabilities as to what had occurred. It went further and said that even if the reporter's account was to be preferred, the exchange was brief and had occurred as Mr IG was going from one courtroom to another, and was thus not capable of reaching the threshold required for further disciplinary action.[10]

Misleading the Court

[33] Mr EV's complaint that Mr IG had "misled the Court" was that Mr IG had lied to a journalist in "the confines of the courtroom".

[9] At [7].
[10] At [18].

[34] The Standards Committee acknowledged that an allegation of misleading the Court, if proved, "was a serious matter".[11]

[35] Nevertheless the Standards Committee "could find no evidence, let alone evidence of any weight, that Mr IG had misled the Court".[12] As with the other issues of complaint, the Standards Committee did not consider that further action was either necessary or appropriate.

Role of the LCRO

[36] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Standards Committee, without good reason.[13]

Review

[37] Mr EV advances four essential grounds in support of his review, as follows:

- The Standards Committee was wrong to resolve a factual dispute on the papers when the appropriate forum was the Tribunal.
- The Standards Committee failed to take into account *Bolton's* emphasis on honesty and integrity, in circumstances where Mr IG was publicly speaking "in the Courthouse about [his] status".
- The Standards Committee failed to take into account the reporter's evidence.
- The Standards Committee failed to apply the Tribunal's decision in *Hawke's Bay Standards Committee v Beacham*[14] or otherwise take into account various decisions of the Courts condemning drinking and driving as a serious social issue in New Zealand.

[38] To this Mr EV added further comment in an email to the LCRO dated 4 November 2013, as follows:

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[11] At [20].
[12] At [22].
[13] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].
[14] *Hawke's Bay Standards Committee v Beacham* [2012] NZLCDT 29.

- As Mr IG was appearing for a client on the day that he was also appearing as a defendant, and in the same court building, the issue of whether he was providing regulated services "at the time" is a live issue.

- The Tribunal's decision in *Beacham* concerned a lawyer who had accumulated three drink-driving offences (amongst others), and this gave rise to a finding of misconduct; there is no principled reason why a single conviction for the same offence should not give rise to the lesser finding of unsatisfactory conduct.

[39] Mr IG advised the LCRO registry by telephone that for the purposes of the review he relied upon the submissions he made to the Standards Committee. Although invited to do so he has not commented on Mr EV's subsequent comments, set out in his email of 4 November 2013.

[40] For his part Mr EV requested to be heard in person in support of the review. That hearing took place on 11 August 2015.

Submissions

[41] Mr EV attended an applicant only hearing on 11 August 2015. In significant part, his submissions traversed and on occasions amplified, arguments advanced in his written submissions.

[42] In as much as his submissions summarised his arguments, Mr EV submitted at hearing that:

- The Standards Committee was in a position to make a finding of fact but failed to do so.

- The Standards Committee failed to give reasons for its decision.

- The conduct involved in one drink-driving offence was sufficient in itself to attract a disciplinary sanction.

- There is no principled reason as to why disciplinary sanctions should be imposed for three drink-driving offences, and not for one.

- Publication of the details of Mr IG's defence was an aggravating factor.

- Dishonesty cannot be trifling.

- The conduct occurred within the precincts of a court building, which should materially influence an assessment as to whether Mr IG could be seen to have been engaged in providing regulated services at the relevant time.

- A finding of unsatisfactory conduct can be arrived at in circumstances where a practitioner is not providing regulated services.

- The Disciplinary Tribunal would provide a more appropriate forum to determine the contested evidence of the credibility of the parties.

Discussion

[43] I have had the benefit of hearing from Mr EV in person and considering the submissions he made, as well as having considered the material that was provided to the Standards Committee by both lawyers.

[44] There were two parts to Mr EV's complaint. The first was that Mr IG's conviction for driving with excess blood alcohol should attract a disciplinary sanction including a finding of unsatisfactory conduct. The second was that the alleged conversation that took place between Mr IG and the reporter as Mr IG was walking to a courtroom to represent a client, revealed that Mr IG had been untruthful. The reporter alleges that Mr IG said that he neither lived nor practised law in New Zealand. Mr IG has denied this.

Excess blood alcohol conviction

[45] Offences of drinking and driving are serious. Mr IG has been convicted and punished by the Court for driving with an excess blood alcohol level.

[46] The issue for me is whether the fact of this conviction ought to attract a disciplinary response. In simple terms that can be a finding of unsatisfactory conduct[15] coupled with an appropriate penalty by either a Standards Committee or this Office on review, or the more serious finding of misconduct by the Tribunal[16] coupled with an appropriate penalty. However the test for each differs according to whether regulated services were being provided at the time of the alleged conduct. Therefore in connection with each of the issues of complaint raised by Mr EV, I must consider whether Mr IG was providing regulated services at the time that he drove, and at the time he spoke to the reporter.

[15] Lawyers and Conveyancers Act 2006, s 12.
[16] Section 7.

Regulated services

[47] "Regulated services" is comprehensively defined in the Act. It includes "legal work" carried out by a lawyer for any other person. Legal work includes work in connection with proceedings or anticipated proceedings, giving legal advice in other matters, preparing legal documents and things incidental to the above.[17]

[48] There is no real mystery about the definition, and in a vast majority of cases it will be a straightforward application of that definition to the conduct that has been complained about, with an obvious answer. There will be some cases on the margins where the answer is not as clear, but in every case the analysis will begin with an examination of the facts.

Drink-driving conviction

[49] This offence was committed at 2 pm on a Sunday. Mr IG did not indicate where he had been, or where he was going. He said that he had consumed one bottle of beer not long before driving, and had consumed, I infer, much more alcohol on the previous Saturday evening.

[50] Mr EV has not seriously argued that at the time Mr IG drove and was stopped and tested, he was carrying out regulated services. In the absence of any evidence to say that he was, a reasonable inference for me to draw from the facts is that Mr IG was not providing regulated services at the relevant time. This occurred early on a Sunday afternoon. Although that fact is not determinative of the issue, when combined with the lack of any other evidence pointing to otherwise I conclude that Mr IG was not providing regulated services at the time he was stopped and tested.

Courthouse incident

[51] The first of the two exchanges occurred after Mr IG had left the court in which he was appearing as a defendant. It occurred in the court building whilst he was on his way to represent a client in a different courtroom. The second exchange occurred after Mr IG had completed that and was leaving the courtroom. At first blush it could be said that when he spoke to the reporter Mr IG had ceased to be a defendant and was now involved in the process of representing his client – going to and leaving a courtroom in which his client was required to appear. However, in each case the exchanges related to an event that had occurred whilst Mr IG was not providing regulated services – i.e. when he was appearing as a defendant in a criminal prosecution.

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[17] Sections 6 and 7.

[52] I regard that as an important part of the factual matrix. The exchanges were incidental to and not part of the purpose for which Mr IG was going to and from the courtroom to represent his client. They would have taken place whether or not Mr IG was going to another courtroom or leaving the building. There must be a nexus between the conduct complained of and the lawyer's role at the time.

[53] Applying those facts to the definition of regulated services, I am satisfied that Mr IG was not providing those services at the time of the two exchanges. The circumstances as a whole must be looked at: although Mr IG was going to and from a courtroom to appear for a client, he was being asked about something unconnected with that, involving an appearance that he had earlier made as a defendant, and for which he was required to appear.

Disciplinary response

[54] Having held that Mr IG was not providing regulated services on either occasion, the tests for a disciplinary response are as follows:

- Misconduct: that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.[18]
- Unsatisfactory conduct: that the lawyer has contravened the Act or any regulations or practice rules made there under or of any other act relating to the provision of regulated services.[19]

[55] As earlier indicated, only the Tribunal may make a finding of misconduct. The route to the Tribunal is either via a Standards Committee[20] or this Office.[21]

Excess blood alcohol conviction

[56] Mr EV has argued that *Beacham* may be seen as authority for the proposition that a single conviction for drinking and driving ought to attract a finding of unsatisfactory conduct. To the extent that Mr EV submits that it ought not to attract a finding of misconduct, I agree with him.

[57] I therefore turn to consider whether Mr IG's conviction amounts to unsatisfactory conduct pursuant to s 12(c) of the Act.

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[18] Section 7(1)(b)(ii).
[19] Section 12(c).
[20] Section 152(2)(a).
[21] Sections 211(1)(b) and 212.

Breach of the Act or of any regulations or practice rules made under it

[58] Section 4 of the Act sets out "fundamental obligations of lawyers" as follows:

> Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:
>
> (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
> (b) the obligation to be independent in providing regulated services to his or her clients:
> (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
> (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[59] Relevant to this particular matter is s 4(a) – the obligation to uphold the rule of law. However, s 4 would only seem to apply in circumstances where the lawyer is providing regulated services.[22]

[60] Rule 2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) contains a similar obligation to "uphold the rule of law".

[61] Put another way – lawyers must show respect for and observance of the law.

[62] Rule 1.4 sets out categories of conduct for which lawyers may be disciplined. Relevant to this case is r 1.4(d) which identifies:[23]

> [being convicted] of an offence punishable by imprisonment where the conviction reflects on the lawyer's fitness to practise, or tends to bring the legal profession into disrepute.

[63] On the face of it therefore, a conviction for driving with excess breath alcohol engages the provisions of s 4 of the Act, r 1.4 and r 2 of the Rules. Therefore, is a disciplinary outcome required?

[64] In *Ziems v Prothonotory of the Supreme Court of New South Wales*[24] the High Court of Australia noted that:

> … it will generally be agreed that there are many kinds of conduct deserving of disapproval, and many kinds of conviction of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.

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[22] The section refers to a lawyer "who provides regulated services" rather than to a lawyer "who is providing regulated services" so the issue is not altogether clear.
[23] Section 241(d).
[24] *Ziems v Prothonotory of the Supreme Court of New South Wales* [1957] HCA 46; 97 CLR 279 at 298.

[65] Although that case was dealing with issues of striking off, it nevertheless recognises that in every case a balancing exercise is called for. The Standards Committee commented that:[25]

> … a conviction of this type on its own was not usually capable in the professional disciplinary setting of reaching the threshold required for further action. A history of driving with excess breath alcohol and/or some other surrounding circumstance would usually be necessary to warrant further disciplinary action.

[66] In *Bolton v The Law Society* the English Court of Appeal made an observation similar to that made by the High Court of Australia in *Ziems*, and added that the balancing exercise was to be made "… by the Tribunal as an informed and expert body, on all the facts of the case".[26]

[67] By its very nature, a Standards Committee in the New Zealand disciplinary setting is an "informed and expert body". Its judgment, after having undertaken that balancing exercise, ought not lightly to be interfered with.

[68] Mr IG has been convicted of an offence punishable by imprisonment. Does this reflect on his fitness to practice or tend to bring the legal profession into disrepute?[27] Similarly, does his failure to observe the law mean that he should be disciplined?[28]

[69] Mr EV submits that it is not adopting a principled approach to argue that an assessment of the disciplinary consequences for a practitioner who has been convicted of drink-driving, should be arrived at by reference to the number of convictions the practitioner has incurred. Drink-driving is an offence of such significance, that a disciplinary response should follow for any practitioner convicted of the offence.

[70] I am not oblivious to the submission advanced by Mr EV and agree that a conviction for drink-driving is a serious matter, but I do not agree that the approach proposed by him, which invokes a strict liability approach to disciplinary matters, is a correct one.

[71] Conduct complaints must be considered in context. Few would disagree that the judgement that is brought to considering conduct complaints must take into account a number of factors including, but not limited to, the context in which the complaint arose, the impact of the conduct, the offender's circumstances, and the gravity of the conduct.

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[25] Above n 8 at [7].
[26] *Bolton v The Law Society* [1994] 2 All ER 486 at 491.
[27] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 1.4(d).
[28] Lawyers and Conveyancers Act 2006, s 4 and above n 26, r 2.

[72] This Office has considered complaint against a practitioner of previously unblemished record who had been convicted of a drink-driving charge. In LCRO 33/2013 it was noted that:[29]

> The Tribunal has dealt with a number of cases over the years in which lawyers have been convicted of drink-driving and/or alcohol related offences.[30] In each case however the lawyer concerned has had a history of similar offending, or has been imprisoned for a single but extremely serious alcohol related offence.[31.] Disciplinary outcomes have ranged from short periods of suspension to striking off.
>
> A single offence, without aggravating features, committed for the first time by a practitioner with an otherwise unblemished record over many years, is clearly in a different category.

[73] The Court's response to such offending is highly relevant and in Mr IG's case he appears to have been penalised at the lower end of the scale. Those are all important considerations when carrying out the required balancing exercise to determine whether a disciplinary response is called for.

[74] Mr IG has been in practice for 28 years, and has no other convictions. I do not consider that this isolated lapse reflects on his fitness to practice. Nor in my view does it indicate any disregard for the rule of law. Similarly I do not believe that Mr IG's conviction has brought the legal profession as a whole into disrepute.

[75] At one level, it could be argued that a conviction for a not inconsequential offence such as drink-driving, must carry possibility of the conviction reflecting poorly on the profession, particularly when a cornerstone of a lawyer's obligations is to uphold the law.

[76] But it is, in my view, to take a simplistic and unrealistically narrow view to argue that an incident such as this is inevitably going to attract a level of public opprobrium such as to justify a conclusion that an entire profession is brought into disrepute.

[77] The extent to which the sensibilities of the public are capable of being offended, can be easily overstated. In my view, it is probable that those members of the public who were inclined to take a critical view of the conduct would likely focus that criticism on Mr IG as an individual, rather than leaping to conclusion that the general reputation of the profession had been tarnished to the extent that the profession as a whole had been brought into disrepute.

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[29] LCRO 33/2013 at [47]-[48].
[30] See e.g. *Canterbury-Westland Standards Committee v Taffs* [2013] NZLCDT 13, *Auckland Standards Committee 1 v Ravelich* [2011] NZLCDT 11, *Waikato Bay of Plenty District Law Society v Baledrokadroka* [2002] NZAR 197.
[31] *WDLS v Leishman* NZLPDT, April 2003 (excess breath alcohol causing death; two years imprisonment in Western Australia).

[78] I agree with the Standards Committee's decision to take no further action in connection with this issue of complaint. It did so under s 138(2) of the Act, on the basis that any further action was neither necessary nor appropriate.

Misleading the Court

[79] Mr EV has argued that misleading the court involves not only conduct occurring in a courtroom, but also things said and done by a lawyer as s/he makes their way to the court. That is an interesting argument, but not one that I need to decide. The particular allegation is that Mr IG appears to have lied to a reporter.

[80] The Standards Committee concluded that there was insufficient evidence upon which to base a finding that the reported conversations occurred. Mr IG has denied saying what had been alleged, and said that his response on both occasions was to tell the reporter to "get lost". He infers that by having practised as a lawyer in New Zealand for 28 years, he would hardly tell a reporter that he neither lived nor practised law here.

[81] Mr EV argues that it was not appropriate for the Standards Committee to have endeavoured to resolve the conflict on the papers; that the parties should have been subjected to cross-examination and that this should have occurred before the Tribunal. Further, he submits that the Standards Committee failed to provide reasons for its decision.

[82] I do not agree that in every case in which a Standards Committee is confronted by a conflict in evidence, it needs to resolve that conflict by either conducting an oral hearing or referring a matter to the Tribunal so that it can hear the evidence and make the finding.

[83] There will be instances when a Standards Committee will want to take one of those courses, but as Parliament has determined that the default position for a Standards Committee is to conduct its hearings on the papers, instances where that is departed from ought to be rare.

[84] Here, the Standards Committee was confronted with an emphatic denial by Mr IG, and a brief comment by the reporter that the newspaper "stood by what it reported". It is to be noted that the report in the [News Media X] was incorrect in one important point: it reported that Mr IG appeared as defendant and then as counsel in the same courtroom – whereas it would appear that Mr IG appeared initially in courtroom 5, and then as counsel in courtroom 3.

[85] I further note that the reporter did not appear to regard Mr IG's comments (as he heard them) as requiring a complaint to the NZLS.

[86] The Standards Committee was left in a position where it had two conflicting accounts of what was said and could not be satisfied on the balance of probabilities that Mr IG had said that which had been reported. It obtained the views of both Mr IG and the reporter and concluded that it could not take the matter any further. It was entitled to come to that view. There is no indication that the Standards Committee failed to bring a proper consideration to the complaint.

[87] It is a matter of common occurrence for decision making bodies to be presented with conflicting versions of events, and little other evidence to assist them in arriving at a view as to which version is to be preferred. In those circumstances, the decision maker has little option but to conclude that it is not possible to make a definitive finding. The process by which the Committee arrived at the view that it was unable to determine the credibility issues, was a precise reflection of the reasons for its decision.

[88] Given that outcome there was no need for the Standards Committee to go further and consider whether the comments would have reached a disciplinary threshold, had they been made as asserted by the reporter. It was enough for the Standards Committee to have concluded, as it did, that the evidence was insufficient one way or the other.

[89] Mr EV was invited to clarify how he considered that the Disciplinary Tribunal would be better placed to resolve the conflict. He noted that a tribunal hearing would provide opportunity for the parties to be cross examined, and that the members of the Disciplinary Tribunal would have an opportunity to scrutinise the demeanour of the witnesses, and form their views as to credibility.

[90] There will no doubt be occasions when there is a background of contested facts that accompany allegation of serious conduct breaches where it is appropriate for a matter to be referred to the Disciplinary Tribunal with expectation that the Tribunal may have better opportunity to get to the nub of the matter, but in this instance it is debatable whether significant progress could be made by referring the matter to the Tribunal. Mr IG is unlikely to resile from his recollection of events, nor would there be reasonable expectation that the court reporter would advance a different view. The factual matrix does not present to be of sufficient complexity to allow opportunity for cross examination on an array of ancillary matters, which could perhaps allow opportunity for deficiencies or weaknesses to be exposed in either of the parties' arguments.

[91] Nor is there indication of a likelihood of any additional evidence being available for the Tribunal to consider, certainly there has been no suggestion of any third party coming forward to corroborate either of the parties' recollection of the conversations.

[92] In my view, it is unlikely that the Disciplinary Tribunal would be able to progress the matter further, and reference to its jurisdiction may do no more than impose unnecessary burden on its resources.

[93] It was my sense that Mr EV advanced his application from a genuine conviction that Mr IG's conduct required a disciplinary response. However, after giving careful consideration to all the material before me, I see no grounds to depart from the Committee's decision to take no further action on the complaint.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed as to the finding that the conduct did not reach the threshold required for further disciplinary action.

DATED this 8th day of September 2015

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R Maidment
Legal Complaints Review Officer

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

Mr EV as the Applicant
Mr IG as the Respondent
The Standards Committee
The New Zealand Law Society