

LCRO 119/2015

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the [City] Standard Committee [X]

**BETWEEN**

**AN**

Applicant

**AND**

**DH**

Respondent

**DECISION**

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

**Introduction**

[1] Ms AN has applied for a review of a penalty decision by the [City] Standard Committee [X] in which the Committee imposed orders under s 156(1) of the Lawyers and Conveyancers Act 2006 (the Act) (the decision), having previously made a determination that Ms AN's conduct was unsatisfactory pursuant to s 12(a) of the Act in a decision dated 22 December 2014 (the conduct decision). The conduct decision is not under review, but it is necessary to look back to that to better understand the decision under review.

**The decisions**

[2] The decision records the Committee's key concerns under the heading "Background" were that:

- a. Ms AN had breached the Lawyers and Conveyancer Act Code of Conduct and Client Care in her advocacy as lawyer for Child.

- b. Ms AN was in breach of rule 2.7 in sending a letter to the complainant's lawyer threatening to report TH for perjury.

[3] As a result of those findings, it was determined that in both instances Ms AN's conduct amounted to unsatisfactory conduct in that there was a contravention of the rules and the conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner.

[4] The conduct decision says that the Committee was concerned that Ms AN's conduct was in breach of the Act and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules), as well as making reference to obligations that arose from her appointment by the Court as lawyer for the child. The reference to the "Code of Conduct and Client Care" in the decision appears therefore to be a typographical error.

[5] The Committee recorded that Ms AN's "conduct amounted to unsatisfactory conduct in that there was a contravention of the rules", and that her "conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner". Although the decisions do not say which were the relevant parts of s 12, it is implicit in them that the unsatisfactory conduct findings were made under s 12(a) and (c) which say:

In this Act, **unsatisfactory conduct**, in relation to a lawyer..., means—

- (a) conduct of the lawyer... that occurs at a time when ... she ... is providing regulated services and is 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; or
- ...
- (c) conduct consisting of a contravention of this Act, or of any ... practice rules made under this Act that apply to the lawyer ...

*Breaches in relation to advocacy as lawyer for child*

[6] The foundations of the finding that Ms AN's conduct "fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner" relate to the Committee's consideration of the key purposes of the Act set out in s 3, the fundamental obligations owed by Ms AN as a lawyer pursuant to s 4 of the Act,<sup>1</sup> the rules, and Ms AN's appointment by the Family Court to provide regulated services as lawyer for the child.

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<sup>1</sup> Standards Committee determination (22 December 2014) at [24] – [26].

[7] The Committee emphasised the link between Ms AN's appointment and the "important role [lawyer for the child plays] in the administration of justice", focusing on the fact that Ms AN was acting for the child in this case, MM. The Committee observed that it is the Court's role, not the lawyer's to "make findings covering assessment of risk", and that counsel is not "a pre-trial screen" for evidence.

[8] The decision records the Family Court Judge finding "that on this particular occasion Ms AN lost perspective and stepped outside of the ordinary adversarial stance that one might expect of lawyer for child". The Committee found Ms AN had breached her professional obligations to the Court under rules 2.1 and 2.2, which say:

- 2.1 The overriding duty of a lawyer is as an officer of the court.
- 2.2 A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice.

[9] The Committee referred to Ms AN having breached her obligations to MM under rule 3, which required her to deliver regulated services competently, consistent with the terms of the retainer, and to take reasonable care.

[10] Reference was also made to the obligations Ms AN owed to third parties pursuant to rules 12, 13.2 and 13.5. The Committee noted that Ms AN "must not act for the complainant or MM's father", and that she was under "no general professional duty" to Ms DH or MM's father. The Committee referred to the duties Ms AN owed to the Court and to MM, "to the exclusion of all others". However, the Committee made no finding that Ms AN had contravened rules 12, 13.2 or 13.5 which is where her duties to Ms DH could be said to arise.

[11] Nonetheless, for the breaches of rules 2.1, 2.2 and 3, the Committee concluded that Ms AN's conduct fell within the definition of unsatisfactory conduct set out in s 12(a) of the Act.

#### *Rule 2.7*

[12] The Committee found that Ms AN had made a threat for an improper purpose. The improper purpose apparently being to pressure Ms DH's sister TH to retract evidence, to avoid Ms AN laying a police complaint against her alleging perjury. The Committee found that conduct consisted of a contravention of rule 2.7. The rules are practice rules made under the Act. The rule applied to Ms AN. The "contravention of the rules" referred to in the decision falls within the definition of unsatisfactory conduct in s 12(c) of the Act.

#### **Background**

[13] The Court appointed Ms AN as lawyer for Ms DH's daughter, MM, who was the subject of an application for contact made by her father. MM's father's application was opposed by Ms DH, who did not consider contact with her father would be in MM's best interests. MM's instructions to Ms AN were that she wanted contact with her father, regularly and overnight, which was consistent with the outcome her father sought.

[14] Ms AN unsuccessfully endeavoured to broker agreement between MM's parents along the lines of MM's instructions. Initially Ms DH was unrepresented. She did not agree that contact between MM and her father was in MM's best interests. With negotiations reaching an impasse in December 2013, and MM's father's applications progressing towards a hearing in the Family Court on 13 February 2014, Ms DH instructed a lawyer.

[15] By 13 February 2014 Ms DH had made a complaint to NZLS which the Family Court Judge apprehended related to bias against Ms DH.<sup>2</sup> That cannot be the same complaint that was determined by the conduct decision on which the decision on review is founded because Ms DH filed that in June 2014.

[16] Ms AN says she was served with evidence from Ms DH's sister, TH shortly before the hearing was due to proceed in the Family Court in February 2014. TH's evidence troubled Ms AN because she considered it relevant to MM's safety, so she made enquiries of MM's paternal grandmother. The grandmother's version of events was inconsistent with TH's evidence. Ms AN says she formed the view that, at Ms DH's instigation, TH was lying.

[17] At the hearing on 13 February 2014 Ms AN cross-examined Ms DH and TH, and led evidence from the paternal grandmother and stepfather.

[18] The matter was adjourned part-heard from 13 February 2014 to 7 April 2014 to allow the Court to attend to issues which had expanded from MM's father's application for contact to incorporate proceedings commenced by Ms DH against MM's father under the Domestic Violence Act.

[19] On 17 February 2014 Ms AN sent an email to Ms DH's lawyer saying:

As a courtesy I'm advising you that I'm referring the matter of TH's evidence re para 5 of her affidavit to a criminal specialist with a view to perjury proceedings being commenced against TH. If Ms DH wishes to formally retract her statement on the basis that her evidence about Boxing Day contact was fabricated, then that would be an end of the matter.

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<sup>2</sup> *DH v Kimber* [2014] NZFC 1092 at [6].

[20] The Family Court hearing recommenced on 7 April 2014, and the judgment followed on 30 April 2014. The Family Court judgment was critical of Ms DH and MM's father,<sup>3</sup> but concluded TH was "essentially a truthful witness".<sup>4</sup>

[21] The Family Court judgment also referred to Ms AN's conduct of the matter on behalf of MM, describing Ms AN as having taken "a surprisingly adversarial stance, with a determined effort to unveil Ms DH as dishonest"<sup>5</sup> in her cross examination of Ms DH and TH. The Judge was also surprised that Ms AN had led evidence from the paternal grandmother and stepfather, saying usually the father's lawyer would do that.

[22] The Court observed that "Ms AN had nailed her colours to the mast", lost her "sense of balance in this particular case", and that her threat to initiate a prosecution for perjury was "well outside the bounds of propriety". The Judge considered Ms AN had "prejudiced her future effectiveness by adopting such a partisan stance", if, as the judge considered likely, fresh applications were to be filed by MM's parents in the Family Court.<sup>6</sup>

[23] The Judge also said:<sup>7</sup>

Ms AN is a valued advocate, who gives good service in the Family Court, and I see this as an isolated situation where she has lost perspective, perhaps in an effort to address earlier complaints of bias made by [the father] against MM's former lawyer.

[24] The Family Court ordered regular contact between MM and her father commencing in May 2014.

[25] In June 2014 Ms DH laid a complaint to the NZLS expanding on the comments about Ms AN in the Family Court judgment, and laying out her concerns about how Ms AN's conduct had affected her and her family.

### *The Judge's inquiry*

[26] As Ms AN was the Court appointed lawyer for the child, Ms DH's complaints were referred to the Regional Administrative Family Court Judge (Administrative Judge) for investigation. In the course of that inquiry process Ms AN acknowledged the threat to make a perjury complaint was inappropriate, saying she did not give enough thought to the implications of making the threat. She emphasised that she believed TH's evidence was false because, when she reflected on other evidence, there were inconsistencies that

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<sup>3</sup> At [45], [59], [61], [81].

<sup>4</sup> At [73].

<sup>5</sup> At [6].

<sup>6</sup> At [7]-[9].

<sup>7</sup> At [10].

gave rise to potential concerns about MM's safety in her father's care. Ms AN said once she had recognised the problem she considered she was obliged to ensure the Family Court had access to evidence relevant to the matters it would have to determine given both parents' credibility was at issue.

[27] The Administrative Judge's inquiry concluded that Ms AN "lacked perspicacity and made serious errors of judgement", but that it was an isolated incident, referring to it as "an aberration". By that stage Ms AN had withdrawn from the Lawyer for the Child panel. The Administrative Judge said he considered it "important to note that Ms AN is an experienced and valued Family lawyer", and that her withdrawal from the panel was "an unfortunate outcome". His honour imposed no sanction, leaving that to the NZLS process under the Act.

[28] I take from those comments that the Administrative Judge had no broader concerns about Ms AN's capability as lawyer for the child, and that, had Ms AN not chosen for her own reasons to withdraw from the panel, the Court would have continued to offer her lawyer for the child appointments.

*Committee's conclusions*

[29] The Committee concluded that Ms AN's conduct was inconsistent with ss 3 and 4 of Act, and that she had breached rule 2.7,<sup>8</sup> by making a threat with an improper purpose. The Committee concluded that Ms AN's conduct fell below the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent lawyer, and was therefore unsatisfactory pursuant to s 12(a) of the Act. At paragraphs [40] and [41] of the conduct decision the Committee recorded its conclusions:

...that Ms AN is in breach of her professional obligation to the court and her professional obligation of competence and meeting her duty of care. The Committee accepts the findings of both Judge [ZA] and Judge [LB] that in this particular case Ms AN lost perspective.

The committee finds that both issues amount to unsatisfactory conduct in that there is a contravention of the rules and the conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner.

[30] The Committee provided the parties with the opportunity to make submissions on the orders that should follow the findings of unsatisfactory conduct, pursuant to s 156.

*Ms AN's submissions on consequential orders - 6 October 2014*

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<sup>8</sup> Above n 1, at [34].

[31] Ms AN tendered submissions to the Committee on 6 October 2014 in response to the notice of hearing, which included reference to the following matters she sought to have taken into account if the Committee found that her conduct was unsatisfactory:

- (a) I have resigned as Lawyer for Child in all cases and will not accept any future appointments;
- (b) I am no longer accepting Family Law work, and do not intend to do so in the future;
- (c) I ask that there be no publication.

*Ms DH's submissions on orders under s 156 - 9 January 2015*

[32] Ms DH elaborated on the matters set out in her complaint, which had included inviting the Committee to impose a "substantial fine" on Ms AN:

of at least \$15,000 payable into my account for the undue hardship inflicted upon me. In addition to this I believe compensation for actual loss of \$8,751.50 would be in order so as to assist me cover my legal costs and in compensation for the pain and duress Ms AN put me through particularly during the time of the birth of my son nine months ago. As a result of this duress I suffered from depression and stress related problems at a time which should have been full of joy and happiness. My partner, [XX] incurred a considerable loss of income dealing with legal matters and assisting me deal with the stress caused by Ms AN's aggressive hostile incursion into our lives.

[33] Ms DH's submissions include reference to her request for damages to cover her legal expenses, and compensation for personal hurt and other costs. She repeated her perspective on events, including numerous examples illuminating hardships she has experienced that she attributes to Ms AN's involvement as MM's lawyer in the Family Court proceeding, and based on her supposed bias in favour of MM's father, and by inference, against her. She draws unfavourable comparisons between Ms AN and MM's previous court-appointed lawyer, revisits issues of concern to her in the Family Court proceeding, and refers to the resulting stress of "broader concerns" that she says lead her to seek professional support.

[34] Ms DH says she was "diagnosed as suffering from traumatic stress and subsequently post-traumatic stress", and received treatment. Ms DH says she and MM required medication, and describes appointments with Ms AN as "consistently stressful and non-productive". She says "Ms AN made it patently clear that she was not prepared to listen to our concerns", and says that "instead she engaged in a degree of controlled aggression in an attempt to persuade us to cave into her demands".

[35] Ms DH says that very early in that phase of the Family Court process, the “Family Court situation had left [her] mentally drained and emotionally exhausted”. She describes difficulties with her newborn child, and her concerns about what would happen to MM “if Ms AN’s demands were met”. She says it was that situation which drove her to seek legal representation, regardless of the cost. She says legal aid was not available to her, although the Court said that both parties were legally aided.<sup>9</sup> Ms DH says she considered contact between MM her father placed MM under significant risk of injury. She says her lawyer charged her legal fees at a “fraction of her normal fees”, but even so as at 9 January 2015 she still owed her lawyer over \$8,000.

[36] Ms DH attributes her partner’s significant loss of income to Ms AN’s involvement “due to stress impacting on our lives and the need to deal with this and other relevant matters”. She describes her engagement with lawyers, and the impacts on the family’s resources.

[37] Ms DH says that she suffered “emotional turmoil” as a result of Ms AN’s “belligerent approach”, and that her “traumatic stress and subsequently post-traumatic stress”, should be compensated. She says Ms AN’s behaviour impacted during the pregnancy, birth and infancy of her second child. She said she thought it was “terribly unfortunate and un-fair” that her “pregnancy and sons birth should be overshadowed by Ms AN’s hostility towards” her. She says she still felt “adversely affected as a consequence of being bombarded by so much negativity from Ms AN and the dangers she sought to expose MM to”. She refers to her experience of cross-examination by Ms AN, her experience as a victim of criminal offending, and what she perceives as an imbalance between the treatment she received at Ms AN’s hands, compared to her treatment of MM’s father.

[38] Ms DH says she experienced uncontrollable “anxiety, palpitations, and tremors” in Ms AN’s presence, but recognises that “any Family Court appearance involving a child’s safety is emotionally charged”.

[39] She is critical of Ms AN for repeatedly saying that MM’s father should be allowed “unsupervised access leading to shared custody”.

[40] Ms DH also seeks \$48,001.50 in damages, which she breaks down into “a general damages fine to be paid to [her] for estimated loss in income, reparation in time, extra expenses and the traumatic stress [she] endured”, suggesting a figure of \$9,000 “to cover general costs and expenses”, and \$30,500 personal damages in recognition of the

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<sup>9</sup> Above n 2, at [93].

pain and suffering [she] endured as a result of Ms AN providing MM's father "with additional legal representation ex gratia and at the expense of the interests of MM and by association myself".

*Ms AN's submissions on orders under s 156 - 28 January 2015*

[41] Ms AN accepted the Committee's determination that her conduct had been unsatisfactory and submitted with respect to the Committee's consideration of damages:

3. I have already been significantly punished for my Court behaviour and the writing of an email that has been taken as a threat. I was horrified to read that judgment and see so much of it dedicated to me. It completely devastated me, and I lost all confidence in myself as an advocate.
4. Following my reading of Judge [ZA's] judgment, I could not sleep or eat and was unable to continue in any Lawyer for Child capacity. Soon after, I was unable to continue in any family Law capacity. My doctor considered I was depressed and prescribed antidepressants.
5. The only legal practice I continue to do is to complete an estate that commenced in June 2014 and do a little conveyancing for family/friends. My income has been reduced by at least 85%.
6. I will not be returning to family law in any capacity. I do not anticipate trying to grow any legal practice. I remain doubtful of my ability to properly represent any litigant or child. I remain perplexed at the events of the whole case. I am deeply saddened by the events in this case and am ashamed at the loss of confidence of the judiciary in me.

*Committee's consideration*

[42] The Committee considered the parties' submissions, the conduct decision, the Family Court's comments that Ms AN's "behaviour was out of character" and that the Court viewed "Ms AN's withdrawal from the lawyer for Child panel as an unfortunate outcome".

[43] The Committee then focused on the consumer protection purposes of the Act saying:

8. Consumers of legal services need to be protected from behaviour which does not meet a lawyer's professional obligations. Given there is an overriding professional duty to the court, the fact some of this behaviour was conducted in Court needs to be addressed in penalty.
9. Further, Ms DH has shown a clear link between her legal costs and stress that she incurred as a result of Ms AN's behaviour. That needs to be recognised in this penalty decision.

[44] On that basis, the Committee made orders under s 156(1) of the Act imposing a censure, and ordered Ms AN to pay a fine of \$1,000 and costs of \$500, to NZLS. The Committee also ordered Ms AN to apologise to Ms DH and pay her compensation totalling

\$10,700. Of that, \$5,700 was to be paid to Ms DH's lawyer, and \$5,000 was to be paid to Ms DH to compensate her for the distress Ms AN's conduct had caused to her. The Committee did not direct publication of its decision.

[45] Ms AN has applied for a review.

### **Review Application**

[46] The general thrust of Ms AN's review application is that she cannot follow the Committee's reasoning. She says it is unclear from the decision what of her behaviour warrants the imposition of a censure; she seeks clarification of the basis for imposing a fine and questions the amount. She says she does not understand the logic of delivering an apology to Ms DH, and she challenges the order for compensation, saying that it lacks a proper basis.

### **Role of LCRO**

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

### **Scope of Review**

[48] The LCRO has broad powers to conduct her own investigations into lawyers' conduct, service and costs, including the power to exercise for that purpose all the powers of a standards committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

### **Review Hearing**

[49] Ms AN attended an applicant only review hearing in [City] on 16 October 2015. Ms DH was not required to attend, and the hearing proceeded in her absence.

## Review Issue

[50] It is not possible on review to alter the conduct decision, and that is not the outcome Ms AN seeks. The difficulty Ms AN has is making a logical connection between the conduct found by the Committee to be unsatisfactory, and the decision that is the subject of review.

[51] The question on review is whether there is good reason to interfere with the penalty decision.

[52] That question is answered affirmatively with respect to the orders that Ms AN apologise to Ms DH, and pay compensation to her, for the reasons discussed in greater detail below. The censure, fine and costs orders are confirmed.

## Section 156(1)

[53] The focus of this review is on the orders the Committee made under s 156 of the Act, based on its determination under s 152(2)(b) that Ms AN's conduct contravened ss 12(a) and (c). Section 156 says:

### **156 Power of Standards Committee to make orders**

- (1) If a Standards Committee makes a determination under section 152(2)(b), that Standards Committee may—
  - (a) order that all or some of the terms of an agreed settlement between the person to whom a complaint relates and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:
  - (b) make an order censuring or reprimanding the person to whom a complaint relates:
  - (c) order the person to whom a complaint relates to apologise to the complainant:
  - (d) where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner or former practitioner or an incorporated firm or former incorporated firm or an employee or former employee of a practitioner or an incorporated firm, order the practitioner or former practitioner or incorporated firm or former incorporated firm, or employee or former employee of a practitioner or an incorporated firm, to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding, as the case may require, the amount that is from time to time prescribed for the purposes of this paragraph by rules made under this Act by the New Zealand Law Society or the New Zealand Society of Conveyancers:
  - (e) order the practitioner or former practitioner or incorporated firm or former incorporated firm to reduce his, her, or its fees for any work (being work which has been done by the practitioner or former

practitioner or incorporated firm and which is the subject of the proceedings before the Standards Committee) by such amount as is specified in the order:

- (f) order the practitioner or former practitioner or incorporated firm or former incorporated firm to cancel his, her, or its fees for any work (being work which has been done by the practitioner or former practitioner or incorporated firm or former incorporated firm and which is the subject of the proceedings before the Standards Committee):
- (g) for the purpose of giving effect to any order made under paragraph (e) or paragraph (f), order the practitioner or former practitioner or incorporated firm or former incorporated firm to refund any specified sum already paid to the practitioner or former practitioner or incorporated firm or former incorporated firm:
- (h) order the practitioner or former practitioner or incorporated firm or former incorporated firm or employee or former employee of a practitioner or an incorporated firm—
  - (i) to rectify, at his or her or its own expense, any error or omission; or
  - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:
- (i) order the practitioner or former practitioner or incorporated firm or former incorporated firm, or employee or former employee of a practitioner or an incorporated firm, to pay to the New Zealand Law Society or the New Zealand Society of Conveyancers, as the case may require, a fine not exceeding \$15,000:
- (j) order the practitioner, or any related person or entity, or both to make the practitioner's practice available for inspection at such times and by such persons as are specified in the order:
- (k) order the incorporated firm to make its practice available for inspection at such times and by such persons as are specified in the order:
- (l) order the practitioner or incorporated firm to take advice in relation to the management of his, her, or its practice from such persons as are specified in the order:
- (m) order that the practitioner or any director or shareholder of the incorporated firm undergo practical training or education:
- (n) order the practitioner or former practitioner or incorporated firm or former incorporated firm, or any director or shareholder of the incorporated firm or former incorporated firm, or any employee or former employee of the practitioner or incorporated firm, to pay to the New Zealand Law Society or the New Zealand Society of Conveyancers such sum as the Standards Committee thinks fit in respect of the costs and expenses of and incidental to the inquiry or investigation made, and any hearing conducted, by the Standards Committee:
- (o) order the practitioner or former practitioner or incorporated firm or former incorporated firm, or any director or shareholder of the

incorporated firm or former incorporated firm, or any employee or former employee of the practitioner or incorporated firm, to pay to the complainant any costs or expenses incurred by the complainant in respect of the inquiry, investigation, or hearing by the Standards Committee.

- (2) In paragraphs (j) to (l) of subsection (1), **specified**, in relation to any person, means specified either by name or as the holder for the time being of any particular office or appointment.
- (3) An order under this section may be made on and subject to such terms and conditions as the Standards Committee thinks fit.
- (4) The making of an order under this section for the payment of compensation to any person does not affect the right (if any) of that person to recover damages in respect of the same loss, but any sum ordered to be paid under this section, and the effect of any order made under this section for the reduction, cancellation, or refund of fees, must be taken into account in assessing any such damages.
- (5) Where an order made under any of the provisions of paragraphs (d) to (g) of subsection (1) is binding on any practitioner, that practitioner and any person who is, in relation to that practitioner, a related person or entity are jointly and severally liable to pay any amount that is payable under the order.

[54] It will be seen from the above that the Committee, and this Office on review, have power to make a broad range of orders to fulfil different functions, including punishment, reparation, remediation and to help defray the cost of administering the disciplinary machinery of the Act, which is otherwise funded through a levy imposed on all practising New Zealand lawyers.

#### *Functions of penalty orders in a disciplinary context*

[55] Penalty orders made in a professional disciplinary context should fulfil the functions of penalty, recognised in *Wislang v Medical Council of New Zealand* as including:<sup>10</sup>

- (a) to punish the practitioner;
- (b) as a deterrent to other practitioners; and
- (c) to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

#### *Committee's Orders*

[56] The orders the Committee imposed were:

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<sup>10</sup> *Wisland v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].

- (a) Censure - s 156(1)(b);
- (b) Fine \$1,000 payable to NZLS – s 156(1)(i);
- (c) Costs \$500 payable to NZLS – s 156(1)(n);
- (d) Apology to Ms DH - s 156(1)(c); and
- (e) Compensation to Ms DH – s 156(1)(d).

*Ms AN's submissions at the review hearing*

[57] Ms AN confirmed her reliance on the submissions she had provided to the Committee, and said that although she considered she had fearlessly advocated for MM as she was professionally obliged to do, she could have done better. She says she was not responsible for Ms DH's choice to instruct a lawyer. She says there is no proper basis for an order that she pay Ms DH compensation. Ms AN resists the suggestion that an apology to Ms DH is appropriate. She indicated that her financial situation has not improved.

**Analysis**

[58] It is important to emphasise two key points. First, that MM, and not Ms DH, was Ms AN's client. Second, that while the Committee found that Ms AN had breached duties to MM and the Court,<sup>11</sup> it made no finding that Ms AN had breached any of the very limited duties she owed to Ms DH.

[59] The Committee formed the view that Ms AN had breached rule 2.7, by making a threat to have TH prosecuted for perjury, for an improper purpose, and that her conduct fell below the standard required in s 12(a). Those findings cannot be altered by this review, nor can a finding be made on review of the Committee's decision on penalty that Ms AN breached any duty she owed to Ms DH.

[60] Ms DH's view of MM's best interests was not consistent with MM's instructions to Ms AN. MM's desire for contact with her father was consistent with the outcome sought by her father in his application, and with the Family Court's view that "MM is entitled to know she is loved by both her parents, and to enjoy safe and enjoyable time with them both".<sup>12</sup> Given Ms DH's fervent opposition to contact between MM and her father, it is

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<sup>11</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 2.1, 2.2 and 3.

<sup>12</sup> Above n 2, at [82].

difficult to see how any attempt by Ms AN to assist MM could have met with Ms DH's approval. The views Ms DH expresses in her correspondence to the Committee and this Office cannot be taken as objective.

[61] The decisions relate only to Ms AN's cross examination in Court of Ms DH and TH, and to the single email she sent regarding perjury. In the circumstances, Ms DH's lengthy submissions can fairly be described as overreaching and opportunistic.

[62] Stripped to its core, the unsatisfactory conduct is first, that on Thursday 13 February 2014 Ms AN's conduct in cross examining two witnesses in the Family Court was inconsistent with Ms AN's duties to the court, the "course of justice" and MM; falling short of the proper professional standard expected of the lawyer under s 12(a); and second, that on Monday, 17 February 2014 Ms AN made a threat for an improper purpose.

[63] On that basis, it is necessary to consider whether there is any obvious difficulty with the Committee's orders.

#### *Fine*

[64] Although Ms DH considers a fine should be paid to her, s 156(1)(i) provides for any fine to be paid "to the New Zealand Law Society".

[65] Ms AN accepts that she could have done better. Whether or not that applies to her advocacy for MM, plainly the Family Court's concerns about the perjury complaint had a basis. However, there is no reason to believe that the Court had any broader concerns about Ms AN's conduct or her capability to be an effective lawyer for any other child.

[66] In the circumstances, a fine meets the functions of penalty in a disciplinary context, by way of punishment and deterrence.

[67] On the assumption that a lawyer's ability to pay a fine may be a relevant factor, beyond Ms AN's evidence is that her finances are somewhat depleted by her much reduced practice, there is no evidence that a fine of \$1,000 might be an unmanageable amount for Ms AN to pay.

[68] The fine of \$1,000 is confirmed on review.

#### *Costs*

[69] The Committee ordered Ms AN to pay costs of \$500 to NZLS pursuant to s 156(1)(n) in respect of the costs and expenses of and incidental to the enquiry. The costs order was very modest, and not out of line with costs orders made in similar circumstances. The costs of Committees' enquiries under the Act are carried by all practising lawyers in New Zealand. As adverse findings were made with respect to Ms AN's conduct, it is appropriate she contribute towards the Committee's costs.

[70] The order that Ms AN pay \$500 costs to NZLS is confirmed on review.

#### *Censure*

[71] A censure meets the function of reflecting the public's and the profession's condemnation of the practitioner's conduct. Censure is a logical, proportionate and appropriate response to the nature of the unsatisfactory conduct findings under s 12(a) and (c) for breaches of duty to the Court and MM. There is no reason to depart from that order.

[72] The order that Ms AN be censured is confirmed on review.

#### *Apology*

[73] An order to apologise is not a penalty. Apologies are conciliatory, remedial and should be directed to the person wronged.

[74] The Committee ordered Ms AN to apologise to Ms DH. As no finding of any breach of duty owed to Ms DH was made, it is difficult to understand what the Committee wanted Ms AN to apologise to Ms DH for.

[75] Although the Committee drew on the consumer protection provisions of the Act in the decision, it is difficult to see Ms DH as a consumer of Ms AN's legal services. That is particularly so because Ms DH had her own lawyer, and Ms AN owed her only very limited professional obligations, none of which she breached.

[76] An apology to Ms DH could not relate to the threat because that threat was not directed towards Ms DH, but to TH. The Committee made no finding that Ms AN had breached any duty to TH.

[77] The only other obvious targets for an apology are the Court and MM. If Ms AN wanted to apologise to the Court, she could; there is no need to make an order.

[78] As to MM, she is still a relatively young child. I cannot see how an apology by Ms AN to MM now, however heartfelt, could serve any productive purpose whatsoever. For MM, receiving a written apology from her old lawyer so long after the events, some of which she would probably have little understood at the time, is more likely to be puzzling than of assistance in any remedial sense. Given the risk that an apology is likely to achieve little but open up old wounds, I do not consider ordering Ms AN to apologise to MM would be appropriate.

[79] In the circumstances the order that Ms AN apologise to Ms DH is reversed.

### *Compensation*

[80] An order for compensation of up to \$25,000 can be made under s 156(1)(d) if it appears to the Committee, or this Office on review, that Ms DH had suffered loss “by reason of any act or omission of a practitioner”.

[81] The Committee concluded that there was a “clear link” between Ms DH’s legal costs and stress that she had incurred as a result of Ms AN’s behaviour, such that it was appropriate to order Ms AN to pay Ms DH compensation.

[82] I disagree.

[83] There would have to be very persuasive reasons, supported by a proper evidential basis, to support an order that a lawyer who has been appointed by the court to attend to the best interests of a child should pay either parent’s legal costs. No such evidence or reason exist in the present matter.

[84] By September 2013 Ms DH had been named as respondent in MM’s father’s application to the Family Court. In mid-September Ms DH decided she would not negotiate any more. Her choices were limited, but they included a decision as to whether or not she would instruct a lawyer to represent her in a process she could not avoid. Whilst I can understand Ms DH finding her situation stressful and unwelcome, compulsion is the nature of a court process.

[85] However, Ms DH’s history, and her position as respondent in the proceeding were not of Ms AN’s making; nor was her choice to engage a lawyer. The vast majority of the grudges Ms DH holds arose long before February 2014, and have nothing to do with the conduct found by the Committee to be unsatisfactory.

[86] Ms DH refers to diagnoses of trauma and post-trauma but has provided no evidence to support her claims or connect those diagnoses in any way with Ms AN’s

conduct. Any possible link between Ms AN's conduct and any loss asserted by Ms DH however that may have arisen, is simply too tenuous to form a proper basis for an order for compensation pursuant to s 156(1)(d).

[87] The order that Ms AN pay compensation to Ms DH pursuant to s 156(1)(d) of the Act is therefore reversed.

### **Outcome**

[88] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the orders that Ms AN:

- (a) Be censured, and pay a fine of \$1,000 and costs of \$500 to NZLS are confirmed;
- (b) Pay compensation and apologise to Ms DH are reversed.

**DATED** this 23<sup>rd</sup> day of December 2015

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**D Thresher**  
**Legal Complaints Review Officer**

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

Ms AN as the Applicant  
Ms DH as the Respondent  
[City] Standards Committee [X]  
The Secretary for Justice  
The New Zealand Law Society