LCRO 188/2013

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	**AQ** Applicant
AND	**UD** Respondent

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

DECISION

Introduction

[1] Mrs AQ seeks to review the Standards Committee decision to take no further action in relation to her complaint against Mr UD. Mr UD was counsel for Mrs AQ in a High Court appeal hearing.

Background

[2] Mrs AQ and Mr B are the parents of C. They were involved in Family Court proceedings in relation to C's care. The pivotal issue was whether or not Mr B had sexually abused his daughter or whether for any other reason he was not a suitable person to have the unsupervised care of his daughter during weekends. The Family Court found that Mr B had not abused C and there was no real or unacceptable risk that he would do so in the future.

[3] Mrs AQ instructed Mr UD to appeal the Family Court judgment. Mr UD had not acted for Mrs AQ in the Family Court proceedings. The High Court reached similar conclusion to the Family Court, and held that there was no evidence of C having been abused by her father. The High Court amended the parenting order to allow C's father

to have unsupervised access, after a period of supervised contact. The High Court remitted the matter back to the Family Court for it to reconsider whether the parenting order providing for Mrs AQ to have the primary day-to-day care of C remained appropriate.

[4] Prior to the Family Court reconsidering the parenting order Mrs AQ and C, together with other family members, left New Zealand for an undisclosed location.

[5] After leaving New Zealand Mrs AQ lodged complaints with the Lawyers Complaints Service against Mr UD, lawyer for Mr B and counsel for the child. The Standards Committee elected to take no further action in relation to all three complaints. Mrs AQ sought a review of all three of the Standards Committee's decisions. This decision addresses the complaint against Mr UD.

The complaint and the Standards Committee decision

[6] Mrs AQ outlined 13 grounds of complaint against Mr UD. Mrs AQ submitted that:

(a) Mr UD failed to act in a timely manner by:

(1) Filing the appeal on the last possible day and filing the application for stay of the Family Court orders and various submissions and applications late; and

(2) Not returning calls or emails from Mr and Mrs AQ within an appropriate time.

(b) Failed to admit DVD evidence in the prescribed manner for the High Court.

(c) Mr UD's representation fell short of the standard of competence and diligence of a reasonably competent lawyer in that he:

(1) Failed to follow Mrs AQ's instructions.

(2) Failed to admit all relevant evidence.

(3) Failed to argue the appeal on the agreed basis.

(4) Failed to prepare Ms CR adequately as an expert witness.

(5) Failed to cross-examine witnesses competently.

(6) Failed to adequately prepare Mr and Mrs AQ for the appeal.

(7) Failed to follow instruction when cross-examining.

(8) Failed to act in Mrs AQ's best interests by giving poor advice.

(9) Failed to adequately prepare closing submissions.

(10) Made inappropriate comment to the Court which undermined the case.

(d) Billed excessively.

(e) Used threatening behaviour in communications with Mrs AQ and her mother Mrs DS.

[7] The Standards Committee identified a number of areas where it considered that Mr UD could have managed the case better. It concluded that he should have filed an application for stay of the Family Court orders and attempted to obtain an urgent order before 19 February 2011. The Committee noted that he had filed submissions in relation to the admission of new evidence a day late and filed pre-hearing documents outside the required timeframe. He did not inform Ms CR about the code of conduct for expert witnesses and made a comment to High Court which he should not have made. Communication between Mr UD and Mrs AQ was not as good as it might have been.

[8] The Committee concluded however that Mr UD's conduct, when considered in the round, did not amount to unsatisfactory conduct. The Committee noted that it was unlikely that any lawyer could have achieved an outcome that Mrs AQ would have been completely satisfied with. It considered that Mr UD's offer to discuss a reduction of his account to address any concerns about his performance was an acceptable means by which the concerns could be addressed, and elected to take no further action.

Review application

[9] Mrs AQ disagrees with the Standards Committee decision and requests a review of all aspects of its finding other than those relating to her complaints outlined in (d) and (e) of [6] above. She does not consider that the explanations the Committee has advanced by way of explanation for those aspects of Mr UD's conduct which it considered could be reasonably criticised, are valid. She believes that the cumulative

effect of the conduct concerns which were upheld justify a finding of unsatisfactory conduct.

[10] The issue I must consider is whether Mr UD's conduct when representing Mrs AQ fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. The particular issues I need to address are:

(a) Did Mr UD fail to act in a timely manner?

(b) Did Mr UD's conduct fall short of the required standard of competence when he elected to wait until the beginning of the appeal hearing before seeking leave to produce the DVD evidence?

(c) Did Mr UD's representation in preparing for and conducting the hearing fall short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer or constitute conduct that would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming or unprofessional conduct.

Role of the LCRO

[11] 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 judgment for that of the Standards Committee, without good reason.[1]

Review on the papers

[12] With the consent of both parties this review has been conducted on the papers pursuant to s 206 of the Lawyers and Conveyancers Act 2006 (the Act). This section allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[13] It is the task of this Office to review decisions of the Standards Committee. There is no jurisdiction to consider any matters that have not been previously considered and decided by the Standards Committee.

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[14] It is not uncommon for a party filing a review application to raise new issues which were not initially put before the Committee for consideration, and to some limited extent this has occurred in this case. Mrs AQ has, in the process of providing further information, expanded the scope of her complaint to include issues involving a request for legal files that she made under the Privacy Act 1993. This matter was not part of the original complaint. Mrs AQ filed a complaint with the Officer of the Privacy Commissioner in relation to that matter. It would be inappropriate for me to deal with the additional issues regarding the production of documents that Mrs AQ now raises.

[15] In respect to other new matters that are raised there is a considerable degree of overlap in the complaints and rather than adopting an unnecessarily restrictive and technical approach, I consider it appropriate to address all of the other issues raised by Mrs AQ in her review application. I am confident that in adopting this approach there is no possibility of any prejudice to Mr UD as his correspondence and response to the Complaints Service in particular provide comprehensive answer to the issues raised in Mrs AQ's application.

Preliminary comments- The disciplinary process and Court proceedings

[16] It is important to note at the outset, that it is not the function of the professional disciplinary complaints process, to provide a forum for parties to relitigate their case. I accept that Mrs AQ is genuine in her conviction that both the Family and High Court judgments were wrong, but the option open to parties who disagree with a court judgment, is to pursue challenge to that decision through the appeal process.

[17] Nor is it appropriate, for a LCRO to endeavour to second-guess every decision that a lawyer has made in the course of that lawyer conducting litigation.[2]

[18] When conducting a case, there will be many occasions when a lawyer is called on to make tactical and strategic decisions, and many of those decisions have to be made quickly.

Failing to act in a timely manner by late and last minute filing of applications and submissions

[19] The factual basis of what documents were filed and when, is not in dispute. The relevant chronology is:

[2] *Auckland Standards Committee 3 v Castles* [2013] NZLCDT 53 at [177].

- The Family Court judgment was released on 22 December 2010 making the final day of the appeal period 10 February 2011.
- Mr UD received a copy of the Family Court judgment on 23 December 2010 and forwarded it to Mr and Mrs AQ the following day.
- Mr UD did not file the notice of appeal until 10 February 2011 the last day of the appeal period.
- The application for an injunction to stay the parenting order was not filed until 17 February 2011.
- The first date on which Mr B was to have the unsupervised care of his daughter was 19 February 2011.
- The Canterbury earthquake occurred on 22 February 2011.
- Orders were made on the application for stay on 31 March 2011.
- The filing of submissions in support of Mrs AQ's application to adduce fresh evidence for the appeal were filed one day late on 29 July 2011.
- Mr UD had to obtain an extension from the Court for the date for filing submissions and supporting documents. The submissions for the appellant were filed two hours outside of the extended timetable allowed by the Court.

[20] Mrs AQ describes Mr UD's behaviour in filing documents at the last minute or late as reckless and negligent and says this constitutes serious misconduct. She also contends that Mr UD's delay caused unnecessary risk that new evidence would not be accepted or that the case would not progress. She says that unnecessary delay caused her significant distress. She submits that the late application for a stay resulted in her breaching the provisions of the parenting order and the pre-existing warrants available to enforce custody being executed on 19 February 2011. She says that this soured her relationship with the [City] Police.

[21] Mr UD accepts that there was a delay in filing the application for a stay. He notes however that the proceedings were complex and that he did not obtain a copy of the Family Court judgment until 23 December 2010, just before the Christmas break. He notes that the Family Court judgment was some 120 pages and took considerable time to review. Mrs AQ's file from her previous lawyer was voluminous and contained

a significant amount of information that needed to be read and considered before drafting the appeal and associated applications.

[22] Mr UD advises that even if he had filed the application for a stay with the other appeal documents it was most unlikely the application would have been dealt with prior to the Christchurch earthquake on 22 February 2011. The delay between 22 February and 31 March when the stay application was resolved can be attributed to the earthquake. He notes that Mrs AQ was not sanctioned in respect of any breaches of the Family Court orders that occurred between 19 February and 31 March.

[23] Mr UD had no access to his chambers following the earthquake on 22 February and was unable to access any of his practice materials for almost one year. As a consequence he had to obtain copies of the pleadings from the Court and other counsel. He was out of the country from 3 August to 9 September attending a family wedding in [Country]. Mr UD acknowledges this extended absence from his office had placed him under pressure in preparing for the appeal.

[24] The Standards Committee accepted that whilst lawyers are obliged to ensure compliance with court orders it is not uncommon for documents to be filed outside of the time frames directed by the court. While delays are regrettable they are usually accommodated, as they were in this case, by the court and other counsel. The Standards Committee noted that Mrs AQ had suffered no prejudice as a result of the delays.

[25] The Standards Committee concluded that there were occasions when Mr UD could and should have acted in a timelier manner, but considered that his conduct, when considered cumulatively, did not amount to unsatisfactory conduct.

[26] I agree with the Standards Committee’s conclusion. Given the length of the Family Court judgment and the amount of other material Mr UD needed to consider when drafting the appeal and accompanying documents it is understandable that Mr UD had difficulty meeting the time frames for filing.

[27] Whilst the application for a stay should have been filed more promptly, there is no evidence to support argument that Mrs AQ’s appeal was prejudiced by delay. I do not accept Mrs AQ’s submissions that Mr UD’s late filing of the application for a stay was directly responsible for the sanctions imposed by the High Court for breaching the parenting order. Similar conditions were attached to the Family Court order and the

bond required was not increased. [Judge] makes no mention of the breach of the parenting order on 19 February 2011 in his decision.

[28] All documents filed were accepted and the lack of timeliness in preparing and filing documents did not delay the hearing date. I also accept that the delay in obtaining a stay was likely to have been materially affected by the Christchurch earthquake. Even if the stay application had been filed with the notice of appeal it is unlikely it would have been resolved in the 12 days before the earthquake.

Failing to act in a timely manner by not responding to phone calls and emails

[29] Mrs AQ complains that Mr UD frequently failed to respond to emails and telephone calls. She says that he was hard to get hold of and slow to respond. There is little specific information provided in support of this complaint other than in relation to a brief period from late January to early February 2011. During that period, several calls and emails from Mr and Mrs AQ were not responded to. During this time Mr UD was absent from his office. He responded to Mrs AQ on his return on 9 February 2011 and provided explanation for the delay in responding.

[30] I agree with the Standards Committee's comments that while lawyers should strive to provide their best service, it is not always possible to meet their clients' expectations. While Mr UD could on occasions have provided more prompt response to Mrs AQ, the delays that did occur were not in my view of sufficient gravity to merit the imposition of a disciplinary sanction.

Failure to admit evidence in the prescribed manner

[31] C attended a supervised access visit with Mr B on 1 October 2011. The visit took place under the supervision of a Court appointed supervisor. Mr AQ took a covert video recording of Mr B, C and the Court appointed supervisor during the contact visit. While there is some dispute about dates, Mr UD's records indicate that he was told about the covert recording in a telephone call on 18 October 2011 and that the video was delivered and shown to him on 23 October 2011. At that time the hearing was scheduled to commence on 31 October 2011. On 26 October 2011 the hearing was adjourned to 14 November 2011.

[32] Mrs AQ describes the DVD evidence as "a smoking gun" and also as "the best of chance of winning the appeal and getting C safe". She considered that the video recording of the contact session disclosed damning and compelling evidence to support argument that Mr B presented a serious risk to C. She was also convinced

that the evidence indicated that the Court appointed supervisor had provided inadequate supervision during the contact visit.

[33] Both counsel for C and Mr B viewed the DVD during the course of the High Court hearing.

[34] Mr UD advised the Standards Committee that when he received the DVD he was presented with a dilemma. On the one hand, he was anxious that if he presented the DVD to the Court immediately, his client could be perceived to be endeavouring to sabotage the contact arrangements. On the other he anticipated the risk of having the evidence ruled inadmissible if he delayed making application for admission of the evidence. He also had concerns as to the likely admissibility of the DVD given the covert circumstances in which it was recorded and had to make an assessment as to whether there was possibility that the circumstances in which the recording was made, could reflect badly on Mrs AQ.

[35] After considering the matter Mr UD says that he advised Mrs AQ that he would delay making an application to admit the DVD until the appeal hearing commenced. Mrs AQ disputes that the issue was discussed with her. On the first day of the appeal hearing Mr UD applied to introduce the DVD into evidence. The Judge declined the application and expressed concern that the attempt to introduce evidence at late notice could be perceived as an attempt to ambush Mr B. Nor was the Judge persuaded by argument that earlier production of the evidence may have jeopardised contact visits. The Judge noted that as the recording was made covertly without the knowledge of Mr B or the Court appointed supervisor it might be an illegal recording in breach of Mr B's right to privacy or in breach of the Family Court orders. However he did not reach any firm conclusion on those possibilities.

[36] Mrs AQ believes that Mr UD was remiss in electing to defer making the application to admit the DVD until the beginning of the hearing. She submits that the law is clear and that it is common practice for parents who have covertly recorded access visits to have those recordings admitted as evidence, particularly when the recordings are made in a public place. Mrs AQ denies that she instructed Mr UD not to admit the recording prior to the commencement of the hearing because of her concerns regarding an impending access visit.

[37] The documentary record indicates that Mr and Mrs AQ expressed concerns for C's safety if Mr B was made aware of the covert recording. Mr UD responded by advising Mr and Mrs AQ that he had not yet advised the other counsel or parties

involved in the appeal that the recording existed and that he would be delaying making an application to the Court.

[38] I accept that Mrs AQ did not instruct Mr UD not to seek admission of the DVD prior to the commencement of the hearing. However she was aware that Mr UD was not going to apply to have it produced in advance of the hearing. Mrs AQ says that this advice did not go far enough and that Mr UD should have advised her there was virtually no possibility of the evidence being admitted if the application was left until the beginning of the appeal hearing.

[39] Mr UD made a tactical decision to delay seeking to admit the DVD in evidence, until the commencement of the trial. There were sound and understandable reasons for him to adopt the position he did. He had an opportunity to view the DVD. He had not formed the view that the evidence carried the impact or force that Mrs AQ considered it did. He was mindful of the problems that inevitably arise when a party seeks to adduce evidence which has been covertly obtained. There was no guarantee that an early application to admit the DVD into evidence would have been successful. He made a tactical decision, and it was not an unreasonable decision for him to have made at the time.

[40] Prior to making a decision on whether to admit the DVD, [Judge] provided an opportunity for counsel to view the DVD. Counsel did not consider that the DVD evidenced the behaviours that Mrs AQ maintained it did. Counsel for the child advised the Judge that she did not consider it gave rise to any particular concern. That was significant. Counsel for the child, entrusted with the sole responsibility of protecting the child's interests and free from the influence of either father or mother, advised the Court that her view was that the DVD did not raise issues of concern. It is customary for counsel for children to adopt a conservative approach in the face of any evidence which may give concern that their client, the child, is at any possible risk. I think it probable that the Judge would have placed considerable weight on the views of the child's lawyer.

[41] Mrs AQ's broader allegation that the failure to have the DVD admitted into the evidence before the High Court, significantly compromised the child's safety is speculative, and argument which demands acquiescence to Mrs AQ's submission that the DVD evidence was persuasive and convincing.

[42] I accept that Mr UD should however have given more detailed advice to Mrs AQ about the advantages and disadvantages of seeking to produce the DVD at the

beginning of the appeal. However given the difficult position he faced I agree with the Standards Committee decision that he has not committed any breach of his professional obligations in electing to refrain from dealing with the admission of the DVD evidence until the beginning of the hearing.

Was Mr UD's representation in preparing for and during the hearing competent?

[43] Mrs AQ is critical of Mr UD's conduct in relation to both his preparation for the hearing and conducting the hearing. In particular she says:

(a) Mr UD failed to produce significant evidence.

(b) His cross-examination of key witnesses was inadequate.

(c) He failed to follow Mrs AQ's instructions in relation to questions asked.

(d) Mr UD did not adequately prepare Ms CR, C's counsellor, as an expert witness.

(e) Mr UD failed to adequately prepare Mr and Mrs AQ for the appeal.

(f) Mr UD gave up on the case.

(g) His closing submissions were poorly prepared and rambling.

Other evidence

[44] Mrs AQ maintains that Mr UD failed to admit a total of six pieces of new evidence in addition to the DVD referred to earlier. These included audio recordings of C, photographs of bruising and a covert recording of a Child, Youth and Family (CYF) interview with C. Mr UD says that he was not instructed to produce the audio recordings. In any event he contends it was a reasonable decision not to produce this evidence given the manner in which it was recorded and the fact that the recording did not go to the heart of the issue. The photographs of bruising had little if any evidential value. Mr UD believed that this evidence would not have assisted Mrs AQ.

[45] Mr UD's decision not to produce the evidence was not unreasonable. As counsel he was entitled to exercise his independent judgement as to whether or not to produce evidence. I agree with the Standards Committee conclusion that Mr UD's decision not to produce this evidence was one that was open to him and that he committed no professional breach in this regard.

Mr UD's cross-examination was incompetent

[46] Mrs AQ says that Mr UD's cross-examination was incompetent because he failed to ask witnesses critical questions. In particular she is critical that Mr UD did not question the CYF social worker and two of the Court appointed supervisors about what Mrs AQ considered to be contradictory and untruthful statements made by those persons.

[47] It is an exercise fraught with obvious difficulties, for a LCRO, in the course of conducting a review, to endeavour to analyse the ebb and flow of a High Court trial with a view to forming realistic and fair conclusion as to whether a lawyer has properly conducted his cross examination. A lawyer can seriously prejudice his client's case by asking inappropriate questions of a witness, or by endeavouring to bludgeon a witness into admissions that a witness is never going to make. It is also important to bear in mind that the process of the court is at all times under the control and supervision of the presiding Judge, and that Judges have little tolerance for cross examination that is unfocused or borders on the oppressive.

[48] Mr UD maintains that he cross-examined all witnesses thoroughly and competently within the obvious confines of what is appropriate cross-examination. Cross-examination is employed to advance a client's case and the extent to which it is employed requires judgement. As noted by the Standards Committee posing questions can often achieve no purpose except to give the witness a chance to restate or supplement previous evidence, both of which can damage a client's case.

[49] The Standards Committee concluded that Mr UD was not obliged to ask every question Mrs AQ required him to put to every witness and that it may not have assisted her case to do so. It further noted that although Mrs AQ considered the professionals were untruthful, it was unlikely that any cross-examination would have yielded any admission of this.

[50] The Standards Committee concluded that despite Mrs AQ's dissatisfaction, there was no basis to conclude that Mr UD's cross-examination was incompetent, and I have had no evidence put before me on review, which would persuade me to take a different view to the Committee.

Failure to prepare Ms CR as an expert witness

[51] Mrs AQ notes that [Judge] was critical of the fact that Ms CR, her daughter's counsellor, was not prepared as an expert witness. Mr UD says that he presented Ms CR as a witness of fact and not as an expert witness.

[52] I am not prepared, within the scope of this review, to speculate as to what may or may not have been the consequences of Mr UD electing to adopt the approach he did with a particular witness. Nor am I prepared to speculate as to whether the Presiding Judge would have given more weight to the witness's evidence if Mr UD had presented her to the Court in the guise of an expert witness.

[53] I note however that the Committee observed that Ms CR had been engaged by Mrs AQ to provide counselling support for C, and I agree with the Committee that Ms CR's role as counsellor for C, with the consequential duties of privacy and likely partiality for C which inevitably arose from that relationship, may well have been incompatible with the role of an independent expert witness.

[54] The Standards Committee concluded that Mr UD should have provided Mrs CR with a copy of the code of conduct but concluded Mrs AQ was unlikely to be prejudiced by his failure to do so. I agree with that conclusion.

[55] I do not accept Mrs AQ's submission that the Presiding Judge failed to give weight to Ms CR's evidence because she was not adequately prepared as an expert witness. His criticism related more to the nature of her evidence and its lack of independence. As noted by the Standards Committee this would likely have been the case whether or not she had been shown the code of conduct.

Failure to prepare Mr and Mrs AQ before the appeal

[56] Mrs AQ contends that Mr UD failed to adequately prepare her and her husband for the hearing. Mr UD rejects allegation that no efforts were made to prepare his clients. He says he provided his clients with copies of their affidavits and asked them to carefully re-read them before giving evidence. He says that he gave advice to Mr and Mrs AQ about the need to ensure that they understood any questions that were put to them and the importance if necessary, of seeking clarification before responding to questions that they did not understand. He also informed them that they must answer questions honestly and to the best of their recollection. He was unsure about what further advice or preparation was expected of him.

[57] The Standards Committee noted that a witness is required to give their evidence truthfully and that lawyers are not entitled to train a witness or put words into their mouth. It accordingly considered that Mr UD's advice was appropriate and he was under no obligation to do any more than he did.

[58] Preparing witness briefs, providing opportunity to the witness to read the brief and to discuss the brief, advising witnesses of their obligations to tell the truth and avoiding temptation to coach witnesses, fulfils, in my view, a lawyer's obligations in respect to preparing witnesses for trial.

Failure to prepare and adequately present final submissions

[59] Mrs AQ argued that Mr UD's closing submissions were ill-prepared, rambling and too brief. Mr UD's view was that detailed submissions addressing the fundamental ground and basis of the appeal would not have achieved a useful purpose and that his submissions were directed towards the most advantageous outcome that his clients could expect. He considered the best outcome that could be achieved was for the case to be referred back to the Family Court. That outcome was achieved. I am not persuaded that Mrs AQ would have considered that to be a best outcome, as the directions to refer back to the Family Court were clearly made in contemplation that the Family Court was to be directed to consider whether the existing parenting order which provided that Mrs AQ would have responsibility for C's day-to-day care, remained appropriate.

[60] The Standards Committee did not uphold Mrs AQ's complaint in relation to the closing submissions and considered that Mr UD was entitled to exercise judgement in narrowing his submissions to key points.

[61] I agree with the Committee, but importantly, reiterate that it is beyond the scope of the review process, to endeavour to examine every decision made by a practitioner in the course of conducting litigation, with a view to determining the adequacy or otherwise of the decisions made.[3]

[62] Mr UD was required to tailor his submissions to suit the circumstances of the case as he perceived them to be. It is proper and appropriate for a practitioner to modify his closing submissions, if he had formed the view that submissions he had intended to advance were unlikely to be well received by the Court. If a practitioner has gleaned that the court requires closing submissions to be focused on a particular

[3] Above n 2.

issue, then the practitioner is obliged to tailor his submissions accordingly. Clearly in this case, Mr UD had arrived at the view that the Court was giving indication that it had not been particularly attracted to the pivotal arguments advanced by Mr UD's clients. In those circumstances, it is not surprising that Mr UD elected to frame his final submissions to the Court in succinct form.

Inappropriate comment to the Court

[63] Mrs AQ complains that on day four of the appeal Mr UD said to the Court "although my clients probably don't want to hear this, I no longer believe they have grounds for appeal".

[64] Mr UD accepts he made a statement to that effect to the Judge. He also accepts that it was an inappropriate comment to make. He noted that he retracted the statement following an adjournment and continued with his submissions.

[65] The Standards Committee agreed that Mr UD should not have made the statement he did but in the circumstances of the case did not consider it amounted to a professional breach. They noted that by that stage in the appeal Mr and Mrs AQ were expecting Mr UD to advance an argument that was no longer sustainable. Mr UD was not under an obligation to do this. They noted that it was difficult to articulate the abandonment of an unarguable point in a way that is satisfactory to the client.

[66] The Standards Committee also considered that the comment was likely to have reflected the extreme pressure associated with the difficulties of the case and the conflict between Mr UD's duty to the Court and to his client. The Committee noted that Mr UD's statement was not referred to in the judgment and [Judge] did not rely on it in support of his reasons for dismissing the appeal. In those circumstances it was unlikely to have any impact on the result.

[67] I have given particular attention to this aspect of the complaints.

[68] I disagree with the Committee's view of Mr UD's conduct. The comment was, in my view, an inappropriate comment to make to the Court, and a comment that must engage consideration as to whether the imposition of a disciplinary sanction is appropriate. Mr UD may well have justifiably felt that the tide had turned and that his client had minimal prospects of success, but his obligation was to continue to advance his client's position to the best of his ability. It may have been a lost cause, but it was his client's cause, and he was required to promote it.

[69] This is not to say that he was obliged to advance implausible or improper submission. But his duties and obligations as an officer of the court are not compromised by continuing to advance his client's position in circumstances when he considered that the merits of the appeal had slipped away.

[70] It is not unusual or uncommon for a client's case to be subjected to significant attack during the course of a trial, and for the foundations of the case to be eroded. That is the nature of the adversarial process.

[71] If Mr UD had come to the view during the course of the trial, that his client's position was hopeless, a number of options were open to him. He could, for example, have sought a brief adjournment and taken the opportunity to discuss his concerns with his client and recommended that the appeal be abandoned. If, as would have likely been the case, his client was resolutely opposed to suggestion of abandonment, he nevertheless would have fulfilled his obligations to keep his clients informed and made them aware of the significant hurdles he considered they faced.

[72] On being advised that Mr UD had formed the view that the appeal had little chance of success, the Judge ordered a brief adjournment, following which Mr UD retracted his statement and continued with his submissions.

[73] I do not agree with the conclusions the Standards Committee reached when considering the impact of Mr UD's admission.

[74] The Committee acknowledged, as did Mr UD, that the comment was inappropriate and should not have been made. In determining whether the comment amounted to a professional breach, the Committee concluded that the context in which the comments were made ameliorated against a finding of a professional breach. Specifically, the Committee concluded that at the point in the hearing when the comments were made, Mr UD would have concluded that the Judge had formed an adverse view on the merits of the appeal. Further, the Committee speculated that Mr UD was being required by his client to advance a position which was no longer tenable. Finally, the Committee notes that the Judge did not refer to Mr UD's comments in his judgment, and that no reliance was placed on the comments in the decision's reasoning.

[75] The fact that Mr UD had formed the view that the appeal had little chance of success, did not, in the absence of instructions from his client, justify his decision to convey that lack of confidence to the Court.

[76] That admission would have severely compromised his client's confidence in his ability to advocate their position.

[77] Indication from the Court that his client's arguments were not being well received could not justify the making of comments which so materially undermined the very foundation of his client's case.

[78] Whilst Mr UD retracted the comment, it is difficult to see how the impact of the comment, once made, could be stepped back from.

[79] Nor do I agree that the Judge's failure to comment on Mr UD's submission has particular significance. Whilst I accept that the Judge's decision would have been arrived at after the Judge had given careful consideration to the evidence, indication from counsel for the appellants on the fourth day of a five day appeal hearing that counsel had formed the view that the appeal lacked merit, was a damaging admission, irrespective of the weight of evidence.

[80] Importantly, there must be an examination as to the effect of the comment on Mr UD's clients, and a consideration as to whether he, in making the comment, breached any obligations to his clients.

[81] Rule 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) provides that a lawyer must, within the bounds of the law and the Rules, protect and promote the interests of the client to the exclusion of the interests of third parties. Whilst the overriding duty of a lawyer acting in litigation is to the court concerned, subject to that proviso, a lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer (Rule 13).

[82] Rule 13.5.4 provides that a lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue. Mr UD, in expressing his personal views on the merits of the appellant's case, in the manner he did, was expressing a personal opinion to the court on a material, indeed fundamental, issue.

[83] A breach of rule 13.5.4 is established, such as to merit a finding of unsatisfactory conduct under s 12(c) of the Act.

[84] I have also given careful consideration as to whether Mr UD's decision to advise the Court that he had formed the view (a view he acknowledges his clients would not want to hear) that the appeal lacked merit, constitutes conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[4]

[85] It has frequently been emphasised that a pivotal element of the disciplinary regime established under the Act, is its focus on consumer protection.

[86] Importantly, an assessment as to whether a practitioner's conduct is deemed to be unsatisfactory under s 12(a) of the Act is to be measured by reference to whether the conduct fell short of what a member of the public (not a practitioner) would consider to be the standard of competence and diligence of a reasonably competent lawyer.

[87] In giving careful consideration to the comment made, I arrive at the view that a member of the public would likely, in the circumstances, have considered that Mr UD's admission to the Court of his lack of confidence in his client's position, in the course of the hearing, made without advice to or instructions from his client, was conduct that fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Conclusion

[88] Mrs AQ's complaints against Mr UD were wide ranging. In significant part, those complaints engage criticism of Mr UD's management of the appeal hearing, and decisions made by him during the course of the hearing. I am in agreement with the Committee that viewed in context, the majority of the complaints made in respect to Mr UD's conduct, cannot properly form the basis for the grounding of a conduct complaint.

[89] However, I do consider that Mr UD's comment to the Court indicating a lack of confidence in his client's case, was a significant breach which establishes grounds for a finding of unsatisfactory conduct under s 12(a) and 12(c) of the Act. Accordingly, I find the practitioner's conduct to amount to 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, and pursuant to s 12(a) and is conduct in breach of rule 13.5.4 pursuant to 12(c) of the Act I find the practitioner guilty of unsatisfactory conduct in relation to one element of the complaint.

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[4] Lawyers and Conveyancers Act 2006, s 12(a).

[90] Having concluded that a finding of unsatisfactory conduct is appropriate, I turn to the issue of penalty.

[91] I consider that a finding of unsatisfactory conduct, in the circumstances of this case, is a sufficient disciplinary sanction in itself, and that there is no need for imposition of further penalty.

Costs

[92] Where a finding of unsatisfactory conduct is made or upheld against a lawyer on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case. I consider this case has been of average complexity, and the Costs Orders Guidelines of this Office indicate that in such cases an order of $1,200 would usually be made. I take into account that the Standards Committee decision has been reversed on one complaint, and upheld on others. I consider a costs order of $800 to be appropriate.

Decision

[93] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified as follows:

(a) In relation to complaint that the practitioner breached his professional obligations by advising the Court that he had no confidence in the merits of the appeal, I find the practitioner'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 lawyer (s 12(a)), and thereby guilty of unsatisfactory conduct. The decision of the Standards Committee is reversed.

(b) A finding of unsatisfactory conduct in respect to the conduct described in [93] (a) is also supported by the finding of a breach of rule 13.5.4 (s 12 (c)).

(c) In respect to all other matters, the decision of the Standards Committee is confirmed.

Orders

[94] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 the practitioner is to pay costs in the sum of $800 in relation to the review. Costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision

DATED this 10th day of August 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:

Mrs AQ as the Applicant
Mr UD as the Respondent
Standards Committee
The New Zealand Law Society