NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 41
LCDT 010/10, 008/12 and 014/15

IN THE MATTER OF	The Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982
BETWEEN	**NATIONAL STANDARDS COMMITTEE No. 1 AND THE AUCKLAND STANDARDS COMMITTEE No. 1** Applicant
AND	**FRANCISC CATALIN DELIU** of Auckland, Lawyer

CHAIR
Ms M Scholtens QC

MEMBERS OF TRIBUNAL
Ms S Hughes QC
Ms J Gray
Mr W Smith
Mr P Shaw

HEARING at Auckland

DATE 25 November 2016

DATE OF DECISION 22 December 2016

APPEARANCES
Mr P Morgan QC for the Standards Committees
Mr F Deliu in Person

DECISION OF THE TRIBUNAL ON PENALTY
IN LCDT 010/10, 008/12 AND 014/15

INTRODUCTION

[1] In three decisions of 15 September 2016 this Tribunal found the following nine charges proved against the practitioner:

(a) Six charges of professional misconduct, comprising one under s 112(1)(a) of the Law Practitioner's Act 1982 (the 1982 Act), and five under s 7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 (the 2006 Act) relating to a series of allegations about the Honourable Justice Harrison and the Chief High Court Judge the Honourable Justice Randerson (LCDT 008/12, [2016] NZLCDT 26);

(b) Two charges, one of unprofessional conduct under the 1982 Act, and one of unsatisfactory conduct under the 2006 Act in relation to a series of actions which were found to be incompetent and/or negligent over 6 items of litigation (LCDT 014/15, [2016] NZLCDT 27);

(c) One charge of conduct unbecoming a practitioner by virtue of his interrupting and disrupting a Complaints Committee meeting, such that it had to be adjourned (LCDT 010/10, [2016] NZLCDT 25).

[2] The Standards Committees seek that the practitioner be struck off the roll pursuant to s 242(1)(c) of the Lawyers and Conveyancers Act 2006. The practitioner submits that strike off is not open on the facts, nor is suspension warranted or appropriate. He considers that a penalty involving censure, a fine and appropriate costs would meet the public interest concerns around the offending.

[3] We are dealing with all charges in this reserved decision.

[4] The guiding principles are to be found primarily in the decisions referred to us by counsel for the Standards Committees and by the practitioner of *Hart,*[1] *Dorbu,*[2] *Parlane,*[3] and *Daniels.*[4]

[5] We note that both striking off and suspension require a unanimous decision of the Tribunal,[5] and that if the purposes of imposing sanctions can be achieved short of striking off, then the lesser alternative should be adopted as the proportionate response.[6]

[6] The practitioner emphasises that the Tribunal must form the view that the practitioner is not a fit and proper person to be a practitioner as at the time of imposing the sanction of striking off. The question is not whether he met that test some time ago, but whether he meets it today**.**

[7] Significant to our deliberations is *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal.*[7] For misconduct similar to that the subject of the Judges charges, this Tribunal struck Mr Orlov off the roll. He appealed and the Full Court of the High Court decided that penalty was disproportionate. It did not impose a substitute penalty because it considered that, given Mr Orlov had been struck off for seven months by that time, no further penalty was warranted.

SERIOUSNESS OF THE CONDUCT

[8] The conduct of the practitioner is detailed in the three decisions of the Tribunal of 15 September 2016.

LCDT 008/12, [2016] NZLCDT 26 (The Judge's Charges)

[9] The practitioner made a series of allegations about the Honourable Justice Harrison that were false and made without sufficient foundation in documents from July 2008 to April 2009. They were made in letters to the Judicial Conduct

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[1] *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] 3 NZLR *103.*
[2] *Dorbu v New Zealand Law Society* [2012] NZAR 481.
[3] *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No 2)* HC Auckland CIV-2010-419-1209, 20 December 2010.
[4] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[5] Lawyers and Conveyancers Act 2006 s 244(2).
[6] *Daniels v Complaints Committee 2 of the Wellington District Law Society* at [22].
[7] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] NZLR 606.

Commissioner, in a letter to the Chief High Court Judge, in an application to the High Court for blanket recusal of the Judge from all cases involving himself and his colleague Mr Orlov and in an application for leave to appeal to the Supreme Court against a costs decision of the Judge.

[10] He accused the Judge variously of breaching his judicial oath, being out of control, repeatedly abusing his powers, being partial, discriminatory, acting with mala fides, maliciously, spitefully and of being racist. His language was intemperate and abusive.

[11] In May 2010 he made allegations that were false and without sufficient foundation against the Honourable Justice Randerson, the Chief High Court Judge, accusing him, in further intemperate and abusive terms, of attempting to obstruct the course of justice, using his judicial office in gross abuse of taxpayer money for an improper motive, breaching his judicial oath and of judicial corruption.

[12] These six offences were "speech" offences. They involved excessive, disgraceful and baseless attacks on Judges made in provocative and intemperate language, and for the purpose of protecting the practitioner's own interests. The accusations included allegations of discrimination and racism by the Judges towards both counsel and clients, and corruption in carrying out their duties. They were repeated over the years while these disciplinary matters staggered to a hearing,[8] and were not resiled from until the penalty hearing some eight years later.

[13] Unlike Mr Orlov, this practitioner had never appeared in front of Justice Harrison when he made his first complaint to the Judicial Conduct Commissioner. It seems he decided from discussions with Mr Orlov that Justice Harrison could be a threat to his emerging legal career and so attack was the best form of defence.

[14] We found that the practitioner's complaints against Justice Harrison were not proper complaints at all. They were merely an effort by the practitioner to protect himself, as he saw it, from Justice Harrison when Justice Harrison was simply demanding competent counsel. When that conduct was exposed by Justice Randerson the response of the practitioner was to attack Justice Randerson and to

[8] Refer discussion on delay in LCDT 014/15 [2016] NZLCDT 27 and chronology at Appendix B.

do so in a disgraceful way, again to protect himself from the consequences of his own misconduct.[9]

[15] We were most concerned with the allegation of racism against Justice Harrison, because it asserts that His Honour is, in the execution of his duty, acting corruptly by sentencing foreign offenders more harshly. Of course if there were some foundation for the claim, then it would be the right thing to do to draw it to the attention of the Head of Bench or Judicial Complaints Commissioner. But there was not a shred of evidence to support this assertion. We were surprised and concerned that the practitioner could have thought that there was any suggestion of racism in the judgments he provided at the time as evidence of his claims.

LCDT 014/15, [2016] NZLCDT 27 (The incompetence charges)

[16] The 'incompetence charges' arose from litigation files where the practitioner acted for various parties over 2008 and 2009, straddling the 1982 and 2006 Acts. The practitioner was found to have engaged in unprofessional conduct in relation to the earlier set of matters, and the lesser unsatisfactory conduct in relation to the later set of matters.

Unprofessional conduct (negligence/incompetence)

[17] In relation to actions under the 1982 Act, unprofessional conduct, being negligent or incompetent conduct in his professional capacity (a pattern of behaviour of such a degree and/or so frequent as to reflect upon his fitness to practice and/or as to bring the legal profession into disrepute) was found proved. There were five examples of incompetent workmanship from one case and seven from another, over a very short time span.

[18] Importantly these included the unsubstantiated claims made in the *RL* recusal application against Justice Harrison, alleging discrimination based on a dislike of counsel based on counsel's nationality, and of apparent racism against Maori. The allegations were made in Court as opposed to the confidential processes of the

[9] LCDT 008/12, [2016] NZLCDT 26, at [210]-[211].

Judicial Conduct Commissioner. They were public assertions under the cloak of the privilege of the courtroom. The Judge had to deal with them in a public judgment.[10]

[19] These were similar to matters which were the subject of previous charges and occurred at the same time, although this language, made in a court document, was not the subject of a charge in LCDT 008/12. While there was only one such particular in this set of charges, it can be seen as further example of the behaviour that is covered by the Judges' charges.

[20] Other matters were:

(a) Making an untenable argument that the parents should have care of their children in the *RL* case (incompetent);

(b) The application to remove the litigation guardian in *RL* (incompetent);

(c) The "misconceived and hyperbolic" submission in *RL* (by itself – lapse of judgment, but combined with other like conduct, incompetent);

(d) *ANZA* irregular applications – he said he just signed the documents – the Tribunal indicated concern with this (incompetence).

Unsatisfactory conduct

[21] Unsatisfactory conduct (conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer) was found proved in relation to actions under the 2006 Act.

[22] Twenty-one particulars were alleged over five cases, between August 2008 to February 2009. Twenty were found proved.

[23] These included:

(a) Incompetence in drafting pleadings, applications and submissions;

[10] LCDT 014/15, [2016] NZLCDT 27, at [170].

(b) preparedness to put irrelevant and inadmissible evidence before the court;

(c) a concerning number of meritless or irrelevant points taken, not serving the clients' interests, exposing them to further costs, and leading to wasted court time;

(d) concerning frequency over a limited time period.

[24] There was a clear pattern of incompetent actions over a confined period. In one case, his clients were refused costs they would have been entitled to and in two others they were exposed to, or had to pay, increased costs.[11] While they were historic matters, the practitioner's failure to acknowledge them as falling short of appropriate conduct was troubling.

LCDT 010/10, [2016] NZLCDT 25 (The interruption of meeting charge)

[25] On 14 October 2008 the practitioner attended, uninvited, a Complaints Committee meeting when acting as counsel for a colleague and refused to leave when requested. He and his client interrupted, shouted at and made demands of the Committee to such an extent that they caused the meeting to be adjourned. This was found to be conduct unbecoming a practitioner.

[26] While this may not seem particularly serious, we do not consider it to be behaviour by lawyers that can be tolerated, particularly in the context of the disciplinary process. The disciplinary work of the Law Society relies on good people to give generously of their time and involve themselves in the task of holding their peers to account. The practitioner caused or contributed to the meeting, held in part to discuss disciplinary action against his client, being so disrupted that it was unable to proceed. Some of its attendees who were called by the practitioner to give evidence told the Tribunal they felt very uncomfortable, one personally felt threatened.

[11] LCDT 014/15, [2016] NZLCDT 27, particulars 3.01, 3.12, 3.19.

MATTERS RELEVANT TO PENALTY

Previous offending

[27] Counsel for the Standards Committees drew the Tribunal's attention to a recent finding of unsatisfactory conduct against the practitioner.

[28] The determination by the Wellington Standards Committee No. 1 of 26 July 2016 found the practitioner to have engaged in unsatisfactory conduct pursuant to s 152(2)(b) of the 2006 Act, being conduct that was not so gross, wilful or reckless as to amount to misconduct, but that occurred at a time when he was providing regulated services and was conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[29] The conduct involved correspondence to lawyers and persons associated with the New Zealand Law Society. The correspondence was related to disciplinary matters and, in particular, the New Zealand Law Society's unsuccessful application to the High Court in 2014 to have the practitioner struck off or suspended (rather than go through the Tribunal process). The focus of the charge was the language used in the correspondence. The practitioner had variously labelled the recipients as being "crooked, biased, discriminating, bent, debauched, iniquitous, perfidious, rotten, shady, treacherous, unscrupulous, unethical, cowards, untrustworthy, malicious thugs, simpletons, buffoons, inbred, incompetent, cretinous and venal".[12] Some was made in threatening terms.

[30] Unsurprisingly the Committee found that his conduct breached his obligations under rules 10 and 10.1 of the Lawyers (Conduct and Client Care) Rules 2008 "by a significant margin".[13] It found the language to be unprofessional, disrespectful, unnecessarily aggressive and rude, and going well beyond the right to free expression in the context.[14] The conduct was sufficiently serious and repeated to warrant the finding of unsatisfactory conduct.

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[12] Notice of Determination of Wellington Standards Committee 1 dated 26 July 2016, at [29].
[13] These rules require a lawyer to promote and maintain proper standards of professionalism in his or her dealings, and to treat other lawyers with respect and courtesy.
[14] Notice of Determination of Wellington Standards Committee 1 dated 26 July 2016, at [23] and [27]-[28].

[31] The starting point for a fine was $1,000 for each breach, being $8,000 total. The practitioner was given credit for reflecting on his behaviour, for offering apologies and for providing his assurance that he no longer corresponds in those terms. His previous good record and the effect of the proceedings were also taken into account. The practitioner was fined $7,500.00 and ordered to pay costs of $2,000.00.

[32] The practitioner has applied to the Legal Complaints Review Officer ("LCRO") for review of the decision. This has yet to be heard.

[33] The practitioner refers to the fact that he has no prior disciplinary record. In relation to this recent finding, he simply indicates it was of a recent nature and is basically about "him sending rude emails", for which he did apologise, which he said was in keeping with his new approach.

[34] We consider that he downplayed the nature of the emails and the significance of a further unsatisfactory conduct finding. We saw no evidence of the practitioner having taken steps to implement his new approach before the recent complaints were determined.

The practitioner's insight into his offending

[35] Ordinarily a practitioner faced with charges such as these could have been expected to have recognised wrongdoing, modified his behaviour, apologised where appropriate and undertaken some mentoring from another practitioner or practitioners to ensure his conduct did not repeat. This especially so after findings by the Judicial Conduct Commissioner were made on his complaints and the decision of the Full Court of the High Court in *Orlov* on 21 August 2014 upholding the Tribunal's finding on many of the same arguments as the practitioner chose to run in this Tribunal.

[36] The practitioner raises rehabilitation as an important part of the overall assessment. He notes that he has shown considerable insight into these matters and expressed a willingness to change his behaviour.

[37] Counsel for the Committees submitted that the practitioner has demonstrated no insight into his offending whatever. He pointed to the pattern of conduct proven in the charges, the practitioner's conduct in relation to this Tribunal where he has done

everything in his power to avoid having these matters heard on the merits, and his insistence at the hearings in 2015 and 2016 that he had done nothing wrong, even to the point of maintaining as true his allegations against Justice Harrison and Justice Randerson.

[38] We agree. In particular, it is appalling that the unfounded allegations against the Judges were maintained until the penalty hearing, some eight years. This lack of insight was of concern to the Tribunal, and was reflected in a number of observations throughout the decisions:

(a) In LCDT 010/10, that the practitioner's submission of lack of due process, with its outrageous allegations about the actions of those involved in the process, was not borne out by the facts – people were just doing their jobs;[15]

(b) In LCDT 008/12, that he did not recognise those involved were simply looking to ensure the fair administration of justice for everyone involved;[16]

(c) And further, allegations made about Justice Randerson conspiring with Justice Harrison indicated he appeared incapable of recognising the almost absurd reasoning underlying the links he was making;[17]

(d) We expressed our concern that, after all that has happened since 2008, the practitioner still appeared unable to accept that his performance as an officer of the Court in the initial three cases was not appropriate, and that the same fate would likely befall any lawyer who behaved in the same way;[18]

(e) In LCDT 014/15, [2016] NZLCDT 27, we observed: that the practitioner's understanding of the relevant decision as confirmatory of the Judge's bias against him, was concerning. It was plain that the concerns expressed were about the conduct of the practitioner and its

[15] LCDT 010/10, [2016] NZLCDT 25, at [57] and [58].
[16] LCDT 008/12, [2016] NZLCDT 26, at [195], [198] and [199].
[17] Ibid, at [205].
[18] Ibid, at [216].

impact on the client's interests, and at times the proper functioning of the court;[19]

(f) We noted in relation to another matter that his exculpatory submissions were disappointing. He was wrong to hold the view that he was blameless and that the Judge (Cooper J) found him so.[20]

[39] We were not persuaded that the practitioner demonstrated much insight into his offending. He said he was sorry, and provided written apologies and indicated he would never repeat the behaviour. We accept that in so far as interrupting meetings is concerned, and also in terms of his approach to perceived judicial misconduct. He says that he has learned to 'tone things down', and this is encouraging. However we are not so sure about other matters which surfaced in the incompetence charges, as the practitioner has always been resistant to any suggestion of wrong judgment or approach. He has an unshakeable belief in his own competence. But his approach to the disciplinary process and to the hearings (in particular personal attacks or rudeness towards the Tribunal, witnesses and counsel), and his lack of judgment evidenced in the scope of his submissions and evidence, highlighted the concerns.

[40] That notwithstanding, we accept that his approach towards penalty was constructive, and that he recognises, albeit belatedly, that he must comport himself with circumspection and discipline in the future if he is able to continue to practise.

Risk of reoffending/historical nature of offences

[41] The practitioner urged the Tribunal to accept that there was no risk of his reoffending. The offences were historic; he had learned his lesson and now counselled others to 'tone things down'. He had had no further issue with either Judge, or indeed any other Judge and there had been no repetition of the meeting incident. We accept that. The incompetence changes were all from a time before he went into practise on his own account in mid-2009. He emphasised that he had no further complaints against him, and that none of the charges involved dishonesty.

[19] LCDT 014/15, [2016] NZLCDT 27, at [112].
[20] Ibid, at [167].

[42] He said that the offending occurred at a time when he was new to practice in New Zealand. He did not appreciate how things in New Zealand worked and that he now has a much better understanding of local mores, customs and conventions. Accordingly he was unlikely to repeat his previous behaviour.

[43] In relation to his current competency, he provided "a small sample of the many cases I conduct and win".[21] He emphasised the wrongful conduct was historical and isolated in the sense that it arose out of a particular set of circumstances that were unlikely to repeat themselves.

[44] The practitioner submits that the charges all arose out of a particular set of circumstances. However the incompetence charges overlapped in only one of the six judges' matters. Otherwise they were unrelated matters. They were, however, in the same timeframe, being when he was in practise with Mr Orlov. Whether they are likely to repeat themselves depends on the determination and ability of the practitioner to exercise self-awareness and discipline in his practice.

[45] The practitioner submits that no member of the public, definitely no client of his, has ever complained about his competency and that there is no proof that any person was harmed by it. We accept that is so in relation to an absence of client complaints. However it is not correct to say no one was harmed by the incompetent conduct, at least. There were increased costs and risks of costs to his clients as a result of the actions of the practitioner. Nor do we accept that there has 'literally been no consumer that has required protection'. His clients in the six incompetence cases were all affected to a degree as were all those involved in those cases. His performance in these cases did not reflect well on the profession.

[46] We accept that these matters are historical, subject to the caveat that we have concerns about some of his ongoing practices and judgment as evidenced in the way he defended himself, and to register that the practitioner has substantially contributed to the delay in the charges reaching a hearing.

[21] The practitioner provided a volume of 34 decisions, minutes, sentencing notes etc. from 2008 to 2016. In some he was successful, in others not. We accept that there are cases, we hope many, that he is involved in and where he has acted competently and in accordance with his professional obligations.

Character

[47] Relevant too is his good character. He is very well educated, with a doctorate and masters in law. He advises that he operates a very successful business employing local staff. He commenced Amicus Barristers Chambers in 2009, now known as Justitia Chambers. He has "four or five" lawyers on his staff, and support/administration of about 15, although he indicated this included contractors such as marketing, accounting etc. He told us that the four or five lawyers employed by chambers would not be entitled to practise if he could not.

[48] In support of his good character he provided reference letters from two solicitors who have instructed him over the past 10 years, and from an Auckland human rights barrister. There were three letters from Amicus Law, and seven from his staff, being employed lawyers and legal executives or assistants. He also emphasised the nature of his work being to service the immigrant community especially the Chinese and Indian communities. His reputation with his clients is very positive and he provided references in support.[22] He deposed that he had acted for "literally thousands" of clients without any problems arising. He also deposed as to doing pro bono human rights work.

[49] We place some weight on his character. There is no doubt that he has carried out a successful practice over the ensuing years.

Cooperation with the disciplinary process

[50] The practitioner submits that he has always cooperated with the disciplinary process. He has never ignored the allegations against him or otherwise sought to avoid answering them. He does not accept he should be categorised as a Hart, Parlane or Orlov, all of whom were found to have not. He claims that he simply asserted his innocence and vigorously defended himself.

[51] The practitioner has indeed defended himself vigorously. However it is going too far to say that he cooperated with the disciplinary system. If he was not overtly obstructive, then he did not meet his obligations to cooperate, as noted in the

[22] He provided one reference from 2016 plus a thank you email, one from 2015, one from 2014, seven from 2012, fifteen from 2010 and three undated.

decisions. He did not facilitate access to court files, and sought to benefit from the difficulties caused by the multiplicity of proceedings, and the adjournment of his judicial review part-heard, which occurred in light of the Supreme Court's indication that the Tribunal should hear the charges first. He did not respond to the competence charges other than to say there was insufficient information for them to be found proved which paucity of information was itself a consequence, in large part, his doing as he denied access to the files. He has taken many points as far as he can, as set out in the Tribunal's decision on the incompetence charges and can be seen from the chronology at Appendix B. The practitioner is of course entitled to defend himself but, as we emphasised in that decision, he is also obliged to cooperate.

[52] The practitioner argues that he only maintained that his facts were correct in the sense that, for example, Justice Harrison did certain things, i.e. ordered costs against him, issued a minute intimating another costs award against him, criticised his conduct of an appeal etc. He says these are what the High Court in *Orlov* has determined were "primary" facts.[23] None of these he says are "false or without foundation". Instead he has been found guilty of what are his "secondary" facts, i.e. that their Honours had acted vexatiously, abusively etc. The practitioner said he never claimed the secondary facts were correct because indeed he asserted they were not facts but other things:

> All I have claimed to be true is the Judges did A, B or C and I felt that meant D, E or F. I did not seek a trial to defend the secondary facts, simply that I felt they wrongly attacked me. Those are my thoughts, beliefs and perceptions but that does not mean that I am advancing them. I long ago have gotten over it, all that has remained to resolve were these proceedings.[24]

[53] The Tribunal does not agree with that analysis. Rather, the Judges did A, B or C, the practitioner felt that meant D, E or F, and in response the practitioner did or said G, H or I. It was those latter acts that constituted the misconduct. They were facts in that they were actions that he took. They were based on his understanding of and response to the primary facts but the Tribunal found they did not have any reasonable (or any) foundation in those primary facts.

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[23] *Orlov* above n 7 eg at [5].
[24] Practitioner's written submissions at [35].

[54] The practitioner vigorously defended the position that his responses were not inappropriate. He pleaded some 35 matters by way of opposition and/or affirmative defences to the Judges charges. He argued there was no case to answer. Without evidence from the Judges, his position was the Committee could not prove that what he said was false or without foundation. He sought to require the Judges to appear before the Tribunal to answer his questions to demonstrate that their actions were founded in racism and discrimination.

[55] The practitioner declares that he has now got past the issues. Even so, in one paragraph he speaks of his positive and constructive relationships with the judiciary and in the next he indicates he no longer bothers making allegations of wrongdoing by judges because he believes there is no real judicial accountability in New Zealand so why waste time, money and effort in a system that is not functioning as intended.[25] This undermines his assertion that his attitude has changed and he is not at risk of reoffending.

[56] At a more mundane but nevertheless important level, before this Tribunal the practitioner regularly ignored timetabling directions, made unnecessary last minute applications, sometimes not in writing or on notice, filed voluminous materials including irrelevant material when he did file, and filed further material when hearings were concluded. While these may not be infrequent events in the context of litigation, he appeared to expect the Tribunal to accommodate him beyond what is reasonable in such proceedings. He indicated that he put his clients' matters first and worked around his personal matters. He appeared to consider that a valid reason for his lapses. We perceive that he has put an enormous amount of time and resources into representing himself on this matter over the past eight years. But it has been his choice to do so, and we consider any practitioner who elects to represent themselves must apply the same professional diligence and attention to the proceedings as they would to their other work.

Remorse

[57] The practitioner indicated his contrition and remorse stating he had always been willing to apologise for whatever he had done wrong. In our view, contrition and

[25] Practitioner's written submissions at [38].

remorse were entirely absent from the practitioner's defence of the charges and have only become evident at penalty - even then he has sought to avoid penalty by seeking to recuse two tribunal members Mesdames Scholtens and Hughes, and indeed to debar the prosecutor.

[58] He submits that he repeatedly apologised for the interrupting of the meeting incident. He referred to an example in his affidavit of 10 December 2014 which read as follows:

> I confirm I never intended to interrupt or disrupt any meeting and I am certainly apologetic how this whole affair has turned out. If I could do it all over again I certainly would not enter that meeting room because I would now know (based on a later decision of the National Standards Committee that I later append) that it is not at all an ethical issue if our honourable Vice President suddenly acts like a madman and defames a fellow colleague (he is sitting in judgment of, no less). As such, I can safely undertake that I will never in the future interrupt a Standards Committee meeting or similar proceedings if for no other reason than that I have certainly learned the lesson that if one upsets those in power they will stop at nothing to get their revenge.[26]

[59] The practitioner also submitted that he was contrite and remorseful and had always been willing to apologise for whatever he may have done wrong. He referred to concluding paragraphs of the same affidavit:

> I do regret some unfortunate interactions that have occurred, but if the law is to be applied equally then I do not think I deserve any sanction because certainly none of the myriad of actors who have wrongfully attacked me have ever been truly punished. This is a deep grievance I hold and explains why I have so vigorously defended myself, what has happened just is not right, it cannot pass the smell test.
>
> I have a little boy and wife to care for and I love them more than life itself and I do not want to sacrifice their wellbeing over some grudges, no matter how longstanding, which in the grand scheme of things are ultimately trivial. If the Tribunal feels I have done something wrong I would be more than amenable to apologise as appropriate and I would respectfully seek guidance in this regard.[27]

[60] The practitioner says he never denied the facts of the meeting charge, nor did he assert that his conduct was proper. Rather he was asserting that everyone could have done better that day and so questioned why he was being singled out. He called as witnesses everyone involved in attempting to make that point.

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[26] The practitioner's affidavit of 10 December 2014, at [48].
[27] The practitioner's affidavit of 10 December 2014, at [302] and [303].

[61] He did not comprehend that as the party providing regulated services he had an obligation to behave in a professional manner. The Committee members present that day were attempting to perform their stated task and their reactions to the disruption he and his client caused were not in question. He had an ability to leave the meeting, the Committee members could not do so until the meeting was adjourned.

[62] The Tribunal indicated in the clearest of terms at the penalty hearing that it expected to see letters of apology, if indeed the practitioner was sincere in his submissions. The practitioner did then prepare and provide letters to the two Judges and to the Complaints Committee. In relation to the Judges they read:

> I write to apologise for my allegations against you that have been found by the New Zealand Lawyers and Conveyancers Tribunal to have been false or without sufficient foundation.
>
> I deeply regret having done these things and to show you that I meant no disrespect in doing so.
>
> I acknowledge that what I said about you was wrong, and am sorry and ask for your forgiveness.

In relation to the Complaints Committee the practitioner wrote:

> I write to apologise for my interrupting a meeting on 4 October 2008.
>
> I deeply regret having done that and assure you all that I meant no disrespect in doing so.
>
> I acknowledge that what I did was wrong, am sorry and ask for your forgiveness.

[63] We were very pleased to read in particular the acknowledgement that what he said and did was wrong, and his candid expression of remorse. The act of apology in providing these letters has a significant impact on our approach to penalty.

Proper channels used

[64] The practitioner submits that he never went public with his allegations against the Judges. He used the proper channels. That is a matter which was emphasised as relevant in the *Orlov* matter. That is correct to an extent and we take it into

account. However, the Tribunal notes that among the incompetence matters is the submission made to the High Court seeking recusal of Justice Harrison and which then had to be dealt with by way of a public judgment. That said, we accept it was still in the context of litigation, with its own checks compared to publication in a wider context.

No dishonesty

[65] Finally, the practitioner emphasised there was no dishonesty involved. That is true, certainly in the usual sense. However counsel for the Standards Committees submitted that given his motivation in relation to the Judge's charges was the securing of a personal advantage for himself, being to avoid having to appear before a particular Judge, and then to head off a complaint to the Law Society about that behaviour, this took the matter out of simple "speech" category and was analogous to dishonesty.

[66] We agree that the motivation puts the conduct at the severest end of the spectrum of "speech" offending that we have considered. We consider the practitioner's conduct shows a lack of integrity and probity that is very serious. The oft cited quote from *Bolton v Law Society* is relevant to our consideration:[28]

> If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking-off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the tribunal be likely to regard as appropriate any order less severe than one of suspension.

Meeting charge

[67] In relation to the meeting charge, the following further actions by the practitioner recorded in our decision are relevant to penalty. The practitioner -

(a) Denied he was providing regulated services despite authoring clear documents at the time saying otherwise, and running a 'question of

[28] [1994] 2 All ER 486 (CA).

law' defence irrespective of both the contrary facts and the law as found by the Court of Appeal in *Orlov*. While he was entitled to do so, he rarely acknowledged the authority against him.

(b) Contended Mr Orlov was at least as engaged in the disruption as him, and it was unfair that he faced charges alone. Mr Orlov was not charged because at the time it was considered that he was the client and acting out of concern for himself and so wasn't providing regulated services (before the *Orlov* decision clarifying the matter); There is some force in the fact that Mr Orlov avoided charges because of a different understanding of the meaning of 'regulated services' at that time. Nevertheless, as noted earlier, the practitioner was the one who was plainly providing regulated services and so was in a different position to Mr Orlov.

(c) Contended that failure to charge the Chair of the meeting (Mr G) with a disciplinary offence amounted to unfair and unequal treatment. We did not accept this. There was much heat in this issue. We did our best to assess the issue. However disciplinary proceedings are about the behaviour of the person charged and the implications for the purposes of the Act. They are not a suitable opportunity to make comparisons in conduct between the person before it, and the conduct of people who are not before it. The exception of course is when it comes to penalties to be imposed on the basis of facts found. That is an important distinction – the facts are found by the disciplinary body in each comparator. Like can be assessed against (almost) like and any differences identified.

(d) Contended his complaints about G and H were treated differently by the Standards Committee because of racism/discrimination. The same point is made as above. We found there was no evidence to support this complaint.

(e) Argued lack of due process/unlawful procedures by the Standards Committee in investigating and considering the complaint against him. Again, we found nothing. "The practitioner weaves a distrustful,

> suspicious, almost paranoid thread through the actions of people who, on inspection, are just doing their job."[29]

[68] Counsel for the Committees submits that the practitioner's conduct in relation to this charge demonstrates a pattern of behaviour. The practitioner seems to consider he can behave how he likes without regard to the most basic obligations when acting for a client**.**

[69] We agree. The members of the Committee were unable to continue their meeting due to the behaviour of the practitioner and his client. The practitioner cannot reduce the level of his culpability by referring to the reactive behaviour of others.

[70] We also considered his broader allegations of blackmail against the previous prosecutor, Mr Pyke under this charge – ie that Mr Pyke sought to improperly coerce him into withdrawing his civil claim against the Law Society and was guilty of blackmail for threatening to proceed with the incompetence charges, notwithstanding his view that they lacked merit. The practitioner had, quoted from, but did not produce the record of the meeting at which he said this occurred. Given the seriousness of the allegations, we considered various 'without prejudice' emails which showed the practitioner was attempting to use his civil case as a means to negotiate a reduction of the charges and the seriousness of them. We found his characterisation of the matter as an abuse of process on the part of the prosecutor extraordinary and not accepted.[30]

Role of lawyers

[71] As counsel for the Standards Committees submitted, lawyers have an important role to play in dispute resolution that requires professionalism and mature judgment. Disputes between clients can produce strong feelings and opinions. Lay clients depend on their lawyers for the rational and efficient conduct of a case. It is up to lawyers to bring clarity and reason to such disputes rather than confusion and heat. Costs can quickly grow and delays can compromise lives and businesses. We agree that the practitioner's proven misconduct shows that he persistently fails to focus on

[29] LCDT 010/10, [2016] NZLCDT 25, at [58].
[30] Ibid at [53]-[56].

the merits and instead slips into attacks on opponents and judicial officers. This appears to be an ingrained pattern.

[72] Lawyers must not be permitted to behave in the manner demonstrated in this case, such as by attacking Judges and disrupting processes. Acting for lay clients in the manner proven in the incompetence charges, including causing them to incur unnecessary cost, is not compliance with the fundamental obligations on lawyers under s 4 of the 2006 Act.

SIMILAR CASES

Comparison of the Judges' charges and *Orlov* charges

[73] In *Orlov,* the Full Court found that the sanction of striking off Mr Orlov for a first offence of professional misconduct which did not involve dishonesty or incompetence was disproportionate. Counsel for the Standards Committees submitted that the conduct of the practitioner was more serious than the conduct of Mr Orlov. The nature of the conduct in relation to Justice Harrison was more egregious, and there was the additional misconduct in relation to a second Judge, Justice Randerson, in the practitioner's case. Add to that the findings of negligence and/or incompetence of such a degree as to reflect on the practitioner's competence and his conduct in disrupting the Complaints Committee meeting make the two cases distinguishable.

[74] On the other hand, as discussed above, the practitioner pointed to *Orlov* as authority for the proposition that he could not properly be struck off.

[75] The practitioner submits that the *Orlov* decision assists him.

(a) These are his first convictions for this type of offence;

(b) He sought to use the proper channels – the Chief High Court Judge, the Judicial Conduct Commissioner;

(c) He accepts that his behaviour was unwise and is sorry;

(d) The risks involved in giving him another chance are not as concerning as with other types of misconduct. This misconduct does not involve dishonesty;

(e) The charges do not involve allegations of bad faith, just 'false and/or without foundation';

(f) Like *Orlov*, the authorities, both domestic and international, suggest a strike off is too severe a sanction for this kind of professional misconduct;

(g) Mr Hart's offending was quite different and directly affected clients. He also had previous convictions;

(h) Mr Parlane's underlying misconduct involved treatment of clients;

(i) The New Zealand Tribunal cases are fairly raised in support of a claim that a penalty of strike off is disproportionate and;

(j) Strike off is too severe a response to a first offence of misconduct involving speech.

[76] We have carefully examined the conduct recorded in the *Orlov* decision, and compared this to the practitioner's. We consider that the practitioner's conduct was appreciably more serious.

[77] In the High Court, five charges of professional misconduct were found proved, compared to the six in this case. The similarities and differences in timing and description are demonstrated in the following table:

Orlov Charges [Appendix to Full Court p650]	**Deliu Charges [Appendix A to LCDT 008/12]**
5 charges of professional misconduct	6 charges of professional misconduct
	1. Complaint to JCC re Harrison J on 23 and 24 July 2008.
1. Letter 6 August 2008 to Randerson CHCJ seeking that Harrison J not be allocated any of his cases.	3. Letter 5 August 2008 to Randerson CHCJ seeking that Harrison J not be allocated any of his cases.
3. The originating application of 5 September 2008 in the High Court seeking that Harrison J be permanently recused from all cases filed by Orlov and Deliu.	5. The originating application of 5 September 2008 in the High Court seeking that Harrison J be permanently recused from all cases filed by Orlov and Deliu.
5. The application for leave to appeal to the Supreme Court on the costs decision of Harrison J dated 14 October 2008.	7. The application for leave to appeal to the Supreme Court on the costs decision of Harrison J dated 14 October 2008.
7. The letter of 11 February 2009 to JCC.	

Orlov Charges [Appendix to Full Court p650]	**Deliu Charges [Appendix A to LCDT 008/12]**
6. Notice of claim in HRRT dated 13 March 2009.	
	10. The letter of 18 April 2009 to the JCC.
	12. Letter to JCC re Randerson CJHC dated 28 May 2010.

[78] The practitioner's first offence arose from a complaint to the Judicial Complaints Commissioner in July 2008. His language was more intemperate and abusive than that of Mr Orlov in his own complaint made over six months later. It included that the Judge discriminated against him and attacked him and carried out a personal vendetta against him, was not impartial, acted in bad faith, abused his power and was incompetent and should be removed.

[79] The practitioner provided his "research" of 11 judgments to support his thesis that the Judge discriminated against "foreign" counsel and favoured white "Kiwi" lawyers, and against human rights cases in favour of commercial cases. They did not do so. This showed a serious lack of judgment.

[80] This was also in the context of never having appeared before His Honour.

[81] In our decision we noted the practitioner's agreement in cross-examination that he was anticipating a "rough ride" from Justice Harrison, but that he hadn't yet had one. He was creating a paper trail because he knew the Judge was "out to get him" and would, in the future, complain about him and order costs against him. None of that had happened. Nor is there the mitigating circumstance that might explain a "measure of spleen", as for Mr Orlov.

[82] Accordingly we see this offence as more serious than any of Orlov's similar offences.

[83] In relation to the practitioner's second offence (charge 3), both he and Mr Orlov wrote to the Chief High Court Judge, a day apart.

[84] The Full Court spent some time discussing the language used in this letter, some of which it considered did not justify such serious charges or even charges at all.

[85] However some allegations did merit the serious charge, such as allegations that the Judge subjected Mr Orlov to improper persecution and discrimination, attempted to punish him for his beliefs or ethnicity or both and intentionally and maliciously caused Mr Orlov unspecified harm, and had conducted himself as a judicial officer in an atmosphere of horrific denigration and insult, with uncontrolled and unpredictable rage against Mr Orlov. The Court found at para [140] that Mr Orlov had rightly been held to account for these statements (including making unsubstantiated and unnecessary claims that the Judge was acting under the desire to punish Mr Orlov or because Mr Orlov had lived overseas or because the Judge did not like his political opinions).

[86] The charges against the practitioner were trimmed after the *Orlov* decision to exclude the less concerning language that was commented on in *Orlov*. We were left with matters such as allegations of bad faith, discrimination against the practitioner and his clients, conduct similar or identical to South African apartheid, Stalinist and other abhorrent regimes of the past etc.

[87] In this case the practitioner also provided 35 decisions which he said demonstrated disproportionate treatment. They did not.

[88] Again, this is different from Mr Orlov's approach. We say it is more concerning that the practitioner seemed to consider his assertions could be justified by the decisions, when plainly they could not be. He maintained this approach in defending the charges.

[89] Charges 3 and 5 for Mr Orlov, and 5 and 7 for the practitioner, related to two applications that both were involved with. The first to the High Court to have Justice Harrison permanently recused from their cases, and the second for leave for a leapfrog appeal to the Supreme Court from an order for costs of Justice Harrison. We do not see these as the more serious of the charges in relation to the practitioner, and are fairly equivalent to the similar Orlov charges.

[90] Mr Orlov was then subject of a charge relating to his letter to the Judicial Complaints Commissioner in February 2009.

[91] The Court considered he was out of control in terms of his capacity to make an acceptable complaint, noting the hysterical tone to the statements which pointed to an increasing frustration and sense of grievance that had got the better of him. It considered the allegations that a Judge was using his judicial office to hurt and slander a practitioner to be at the upper end of seriousness when made without any shred of foundation.

[92] Similar criticism and comment could be made about the practitioner's subsequent letter of 18 April 2009 to the Judicial Conduct Commissioner.

[93] This letter was not about the practitioner or Mr Orlov. It was a more direct claim of racism based on a series of sentencing decisions given by Justice Harrison.

[94] We considered this matter to be particularly serious because it asserted that His Honour is, in the execution of his duty, acting corruptly by sentencing foreign offenders more harshly. We reviewed the cases provided and reiterated that there was not one shred of evidence to support such an assertion. It was a false complaint, made without cause.

[95] We do not see anything similar in the *Orlov* charges. But for mitigating factors such as the audience being the Judicial Complaints Commissioner, this charge would warrant a significant penalty.

[96] A further charge proved against Mr Orlov, which did not involve the practitioner, related to his application to the Human Rights Review Tribunal, where he made a number of claims:

(a) That the Judge acted as he did because he perceived Mr Orlov's client was Russian and that Mr Orlov was a Russian lawyer;

(b) That he intended his judgment to have the effect of destroying the reputation of Mr Orlov with the full knowledge that as a Judge you

could not be liable in law for defamatory statements made in relation to Mr Orlov;

(c) That the language used in the judgment was of such an "extravagant, vicious and defamatory nature" as to be unprecedented in a judgment and demonstrates even from the weird language alone an attitude of discrimination towards Mr Orlov and/or his client; and

(d) The Judge had "maliciously denigrated" Mr Orlov in front of his judicial colleagues creating an atmosphere whereby it was difficult for Mr Orlov to appear.

[97] Again the Court focussed on the loss of judgment by Mr Orlov, but noted again that the complaint was made to an appropriate body.

[98] Finally, and only in relation to the practitioner, is the conduct surrounding his complaint to the Judicial Conduct Commissioner on 28 May 2009, relating to Chief High Court Judge Randerson, (charge 12).

[99] This separate complaint against Justice Randerson was not replicated by Mr Orlov.

[100] The allegations included that Justice Randerson attempted to obstruct the course of justice by interfering with sub judice matters, that he used his judicial office in a gross abuse of taxpayer money and was doing so for an improper motive (to protect a fellow Judge from legitimate complaints); he had put aside his judicial oath and embarked on a personal crusade to destroy the practitioner and Mr Orlov's career, and that he had committed acts of judicial corruption.

[101] We considered an unsupported allegation of judicial corruption to be very serious misconduct. We considered it possible that the complaint was made simply to protect the practitioner. We noted the Full Court considered allegations that a Judge was using his judicial office to hurt and slander a practitioner to be at the upper end of seriousness when made without any shred of foundation. We consider this to be at the upper end also.

[102] In summary, we consider that four or five of the six charges found proved against the practitioner were more serious that the five charges found proved against Mr Orlov.

[103] The Full Court in *Orlov* emphasised that the misconduct was only 'speech', but was directed at a member of the judiciary. This was important in relation to penalty:

> We do not downplay the need to protect the dignity of the judiciary and generally the integrity of the administration of justice. Public confidence should not be improperly eroded by unfounded and ill-informed attacks from within. Practitioners who conduct themselves in that way can rightly expect to be held to account. But where we differ is the level of sanction.[31]

[104] The Full Court acknowledged that it was generous to refer to the five offences as a "first offence", especially when Mr Orlov persisted with the conduct while defending the charges. However, significantly, there was no dishonesty or incompetence, which was relevant to whether strike off was a proportionate penalty. In this case, we have many "first offences", and we have repetition while defending the charges. We also have incompetence in relation to the LCDT 014/15 charges, and the lack of integrity and probity that can be seen in the motivation of the practitioner with respect to the Judges' charges.

[105] In terms of context, as in *Orlov* we give consideration to the fact that most of the complaints were within the structures of the available complaints procedures and made to the appropriate person (the Judicial Conduct Commissioner and the Chief High Court Judge, in the practitioner's case). That is not to condone the nature of those complaints. It is not consistent with a practitioners' professional duties and obligations to make the sort of complaints made in this case, in the terms they were made. Complaints against the judiciary should be made in measured terms with proper supporting information. However we agree that it is of relevance that the practitioner did not "go public" in relation to those matters, although we also note that he did not need to in order to achieve his objective. The Court noted that the court proceedings were less circumspect but were still relatively easy to manage to avoid going public.

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[31] *Orlov* above n 7 at [192].

[106] That said, we note the application to the Supreme Court, which sought to appeal both an award of costs against counsel, and the Judge's refusal to recuse himself on the costs determination, was so devoid of merit that the Court did not need to discuss the matter in its public judgment.[32] However the costs determination itself is the subject of a finding of incompetence in relation to submissions made by the practitioner (in LCDT 014/15). Those submissions involved similar assertions of racism, discrimination and incompetence but were made in the context of public litigation and were fundamental to, and recorded in, the judgment.

[107] By comparison, the Full Court was very critical of a press release issued by Mr Orlov on the eve of his Tribunal hearing. That was not a matter involving the practitioner. The Court noted that Mr Orlov accepted it was unwise.

[108] The Full Court was critical of the fact that Mr Orlov did not recognise that his conduct was causing concern and engage in the process to explain himself once charges were laid. Nor did the practitioner.

[109] The Full Court was critical of Mr Orlov having taken procedural steps at every point, as did the practitioner. It also noted that Mr Orlov did not expose himself to cross-examination on his affidavit. The latter criticism cannot be made of Mr Deliu in relation to the Judge's charges.

[110] The Court noted Mr Orlov's strong desire to assist those whose rights have been trampled. That is also demonstrated by the practitioner.

[111] The fact that the charges did not assert bad faith on the part of Mr Orlov was also relevant. The same applies to the practitioner.

[112] With reference to the authorities on speech, the court considered strike off too severe a sanction. These are discussed below.

[113] The key points in relation to penalty for Mr Orlov were:

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[32] *Deliu v New Zealand Law Society* [2012] NZSC 90.

(a) The nature of the misconduct, being speech, in the context of (mostly) complaints within the structures of the available complaints procedures and to the appropriate person;

(b) The risk of reoffending was not as concerning as with other types of misconduct. It did not involve dishonesty nor incompetence. It did not deter the court from giving Mr Orlov a second chance;

(c) First offence – striking off was too severe for a first offence re speech.

[114] The Full Court also considered that strike off was too severe a sanction in light of other speech cases.

Canadian cases – *Dore* and *Histed*

[115] It referred to the Canadian case of *Dore.*[33] Mr Dore, unhappy with his treatment in court, wrote a private letter to the presiding Judge, "in terms that were in equal measure colourful and abusive".[34] The Supreme Court described it as consisting of "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy".[35]

[116] Mr Dore was reprimanded and suspended for 21 days, an outcome upheld by the Disciplinary Council and, on judicial review, by the Superior Court of Quebec. The matter went to the Court of Appeal and then the Supreme Court but only on the question of whether the reprimand was a violation of his right to free speech. It was held that it was a reasonable and proportionate limit.

[117] The Supreme Court, and the Full Court in *Orlov*, emphasised the need to balance open, even forceful criticism of our public institutions with the need to ensure civility in the profession. In this case, the criticisms attracted disciplinary attention because they were false, and made without foundation. That they were also couched in rude and abusive language was a lesser, but still significant, point. In *Dore's* case, the Judge was himself subject to a reprimand from the Canadian Judicial Council (but the Judge's conduct was not held to justify the letter).

[33] *Dore v Barreau du Quebec* 2012 SCC 12, [2012] 1 SCR 395.
[34] *Orlov* above at n 7 at [86].
[35] *Dore* above n 33 at [61].

[118] We would not describe the conduct of Mr Dore as similar to that of the practitioner. Mr Dore was provoked to write a private letter responding to the Judge's criticisms (albeit in the terms described), which he then copied to the Chief Justice and, three weeks later, to the Canadian Judicial Council. While the terms of the complaint were certainly inappropriate, the substance was not. The conduct was much less severe than any one of the practitioner's false or without foundation complaints. It spanned a three week window, compared to the practitioner's months.

[119] The Full Court referred to the Canadian decision of *Histed*[36] where the practitioner had called the Judge a bigot, and suggested his colleagues were too right wing to sit on a case. The Full Court noted he was fined, "albeit for conduct plainly much less serious than Mr Orlov".[37]

[120] The Court noted that European Court of Human Rights cases supported a lesser level of penalty but did not see the need to discuss them.

Other New Zealand cases

[121] The Court noted the Tribunal considered its outcome to be consistent with *Hart* and *Parlane.* Both were struck off the roll. The Orlov Tribunal found the comparable aspect of Mr Hart's case was the way he also declined to properly engage with the allegations. But his actual offending was quite different and directly affected clients. He also had previous convictions. We agree that the cases are different as to their underlying offending and so of little assistance on penalty.

[122] The Full Court noted it was also referred to many examples of speech as misconduct where the outcomes have been much lower in terms of penalty. These examples were also referred to us by the practitioner, who argued in the course of the hearings that the charges brought against him were out of proportion to the treatment of other, "kiwi", lawyers.

[123] The Full Court noted that in some, no action was taken at all, and the most severe sanction was a small fine. It noted that:

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[36] *Histed v Law Society of Manitoba* 2007 MBCA 150.
[37] *Orlov* above n 7 at [199].

> … our assessment at a broad level is that none came close to the sustained misconduct involved here. … We are also not to be taken as saying the response in those cases was adequate. However, we acknowledge that we consider Mr Orlov has fairly raised them in support of a claim that his penalty is disproportionate.[38]

Hong **decision**

[124] The second decision of importance to the practitioner is the *Hong* decision.[39] He relies on the *Hong* decision and penalty for the notion that he should not even be suspended. The practitioner considered the things that Mr Hong had said about him were similar (if not worse) to what the practitioner said about the Judges.

[125] Mr Hong was a defendant in civil proceedings in which the plaintiffs were former clients. The practitioner was the barrister acting for the plaintiffs, along with junior barristers from his chambers. There was also an instructing solicitor acting for the plaintiffs.[40]

[126] Mr Hong sent two letters and an email to the solicitor for the plaintiffs. In this correspondence he:

(a) Made allegations of incompetence against the practitioner and the junior barristers;

(b) Told the solicitor to withdraw the action against him or he would file a strike out action, seek full costs against the lawyer personally, file a claim for defamation and make a complaint to the Law Society that the solicitor was incompetent; and

(c) Warned the solicitor that he had better get what he promised for the clients or they would turn against him.

[127] The practitioner made a complaint against Mr Hong to the Lawyers' Complaints Service ("LCS").

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[38] *Orlov* above n 7 at [203].
[39] *Hong v Legal Complaints Review Officer* [2016] NZHC 184.
[40] Facts are taken from the judgment of the High Court ibid.

[128] Mr Hong then sent three letters and two emails to the LCS in which he made a number of statements referring to the practitioner and the junior barristers. He also sent written submissions to the LCRO for the purpose of a review hearing in which he described some of his unorthodox practices to achieve good outcomes for clients but in doing so described his own unethical practices.

[129] These nine pieces of correspondence made up the particulars of the charge which Mr Hong faced. The LCRO found the statements to be abusive and unprofessional. A charge of serious misconduct was found subsequently proved. The disgraceful and dishonourable statements were serious in their reflection on the standing of the profession in general.

[130] On appeal the High Court agreed with the Tribunal:[41]

> The statements made by the appellant are not in accordance with the Conduct and Client Care Rules which require that a lawyer must not threaten to make an accusation against a person for any improper purpose, that a lawyer must maintain proper standards of professionalism, and that a lawyer must treat other lawyers with proper respect and courtesy.

[131] On penalty, the Tribunal considered other decisions involving similar conduct, and the overall fitness of the practitioner, in particular *A v Canterbury Westland Standards Committee No 2 of the New Zealand Law Society*[42] and *Orlov.*

[132] On appeal the Court observed that *Orlov* did not set an appropriate penalty, only stating striking off was disproportionate. The Tribunal had approached penalty on the basis that *Orlov* was the case that most closely reflected the behaviour, but was much more serious than Mr Hong's offending. The *Hong* Tribunal took the *Orlov* Court to be saying that the seven months that had passed since strike off meant seven months suspension was an appropriate penalty.

[133] The Court could find no cases of suspension for similar conduct save *Orlov* (insofar as it could be seen as such):[43]

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[41] *Hong* above n 39 at [52].
[42] *A v Canterbury Westland Standards Committee No.2 of the new Zealand Law Society* [2015] NZHC 1896.
[43] *Hong* above n 39 at [70].

> However, looking at the entirety of the situation including the appellant's subsequent behaviour I consider that the Tribunal was correct in considering that a penalty of censure would be unlikely to cause the appellant to reflect on his behaviour, save for one matter.

[134] The Tribunal set a starting point of three months suspension. It took into account that Mr Hong believed he was acting fairly, and noted the offending did not feature any dishonesty. Aggravating features included the attacks being over a significant period of time, indicating that they were not a momentary lapse. It also noted that Mr Hong's lack of insight and remorse cannot be an aggravating factor.[44] It considered but did not give much weight to previous misconduct, not being of a similar nature. Mitigating factors included the lack of dishonesty, the fact he felt provoked and the impact on his health. The High Court considered the Tribunal was generous in its allowance for mitigation.[45] Hong received two months suspension, subsequently quashed by the High Court for reasons that have no bearing on our consideration (the "save for one matter"). The balance of the penalty decision (costs of $27,000.00 and Tribunal costs of $12,331.00) was upheld.

[135] The practitioner particularly relies on the following:[46]

(a) The Tribunal took into account that Mr Hong believed that he was acting fairly. The practitioner asserts he was also.

(b) Mr Hong's conduct did not involve serious risk or damage to clients, and nor does that of the practitioner, he says.

(c) Mr Hong was not acting dishonestly, and neither, says the practitioner, was he.

[136] The practitioner also provided the penalty transcript to indicate the outrageous statements made during Mr Hong's penalty hearing before the Tribunal.

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[44] *Daniels* note 6 above, at [32].
[45] *Hong* above n 39, at [64].
[46] *Hong* above n 39.

Dr M QC

[137] The same matters drawn to the attention of the *Orlov* court were relied on by the practitioner.

[138] Dr M QC was the subject of a finding of unsatisfactory conduct by the Standards Committee for his comments in relation to an article in the National Business Review presenting arguments in favour of judicial specialisation. That finding was reversed by the LCRO on 14 April 2016 in LCRO 155/2013.

[139] The practitioner asserted, repeatedly in his defence and again in relation to penalty, that Dr M's conduct (and those of the others cited) was much worse than his. We do not agree. We consider it plain from the discussion of that conduct in the LCRO's decision, which the practitioner provided to the Tribunal, that Dr M's comments were in the context of academic articles critiquing individual judgements, but not aimed at any individual officer. His purpose in using provocative language was to stimulate and inform public debate. There were some editorial decisions which could not be attributed to Dr M. His comments were aimed at improving rather than undermining the administration of justice.

[140] This is in stark contrast to the practitioner's allegations of racism and discrimination by two Judges. The LCRO compared Dr M's statements to those of Mr Orlov, noting shortly that Mr Orlov's statements

> … go well beyond anything comparable with anything Mr M is alleged to have done. Beyond the facts that Mr M is a lawyer, and his language is at the centre of the complaint that gives rise to this review, there is little by way of direct analogy to be drawn.[47]

[141] The same applies to the practitioner's conduct.

Mr B and Dr M

[142] Mr B and Dr M made comparable complaints to the Judicial Complaints Commissioner about Justice Venning, who was the presiding judge in litigation concerning the Trinity forest investment scheme, in which the two practitioners participated. They later made further complaints and there was further

[47] LCRO 155/2013 at [81].

correspondence. The complaints alleged that the Judge had not properly disclosed his involvement in a forest Trust. They were premised on collusion and bias. The Judicial Complaints Commissioner dismissed the complaints. On judicial review of the Judicial Complaints Commissioner's decision, the High Court found the complaints were a further attempt to impugn the original decision of the Court (tax avoidance in forestry trust schemes) and thus a collateral attack on that judgment. The complaints were in substance an abuse of the complaints procedure. The High Court's decision was upheld on appeal.[48]

[143] The Standards Committee found that the complaints were brought in B and M's personal capacities, and so were conduct unconnected with the provision of legal services, and to be assessed under the related sections of the Act. Thus the conduct had to be sufficiently serious to justify a finding that the lawyers were not fit and proper persons or were otherwise unsuited to engage in practice as lawyers. The Committee considered the Judicial Complaints Commissioner was the appropriate forum for the complaints. The complaints themselves were reasoned, carefully written, temperate and made for the purpose of engaging in the Judicial Complaints Commissioner process. The Committee determined it would take no further action.

Dr M

[144] Dr M was subject to a complaint by the practitioner for allegedly scandalous remarks concerning the judiciary and/or the administration of justice in relation to Dr M's comments in a newspaper article. His subsequent replies to the National Standards Committee ("NSC") were also the subject of consideration.

[145] The NSC considered there was no breach of the Act or Rules. The comments were not unreasoned and/ or intemperate. To say the judges "didn't have the guts…" was unwise, but on the whole did not meet the threshold for further disciplinary action.

[146] Other comments made in the course of responding to the complaint did not attract penalty as they were not made in the public domain and in light of the context. However Dr M was reminded about his obligations as a lawyer. The NSC resolved not to take further action.

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[48] *Muir v Judicial Conduct Commissioner* [2013] NZHC 989; [2014] NZCA 441.

Messers G and H

[147] For the practitioner to maintain his submission that the behaviour of these two men, as complained about by him, bore any useful similarity to his conduct is another example of concerning judgment. His complaint against Mr G related to the meeting of the 10 August 2009 and had two parts. First, that Mr G, a big man, walking towards him, was perceived as threatening and therefore common law assault. Secondly that Mr G had made a "false declaration to the Police" because he had called them and complained that the practitioner was refusing to leave the premises, when in fact Mr G had invited him for tea.[49]

[148] With respect to Mr H the complaints, in summary, were an assault by being pushed in the chest by Mr H after the meeting, bias by Mr H in the investigation of a complaint into the practitioner, and breach of the practitioner's "process rights" by not allocating the file outside of Auckland.[50]

[149] The National Standards Committee determined to take no further action with respect to either complaint.

Three further examples

[150] The practitioner referred to three further examples of "lawyers who were rude [and] got slaps on the wrist".

(a) The first, lawyer B was reported as being disrespectful to a District Court Registrar. She agreed that she had made a general statement in court when she was advised that her matter had been rescheduled for a time where she was unavailable in relation to court staff. She said "… perhaps Court staff who changed the dates and times of cases without letting defence counsel know might prefer to either apply for a job (or work in) a country that doesn't have defence counsel such as North Korea". The Standards Committee found that such a statement, in the presence of someone whose appearance could be seen as being of Asian descent, was capable of being taken personally and considered to be

[49] Notice of Decision by National Standards Committee concerning Complaint C1485, 6 November 2009.
[50] Notice of Decision by National Standards Committee concerning Complaint C1484, 6 November 2009.

discriminatory in its intent. It found unsatisfactory conduct. B was reprimanded, fined $1,000.00, ordered to apologise to the registrar in writing and pay $750 costs.[51]

The facts are not analogous. The decision does however indicate the seriousness with which the disciplinary process is now treating failure to deal with those involved in the court processes with respect (court, counsel and others such as registrars).

(b) In the second example, insulting a Police prosecutor in a District Court, (different) lawyer B admitted he had, three times in succession, commented that the Police prosecutor was lying and also used two swear words. He had apologised when asked to, but it was not considered to be sincere. He maintained he immediately regretted his comments and apologised straight away – sincerely. He accepted his comments were inappropriate and abusive and said they were "in the heat of the battle". He agreed they were a breach of the ethical standards expected. He was censured for unsatisfactory conduct and fined $500, ordered to apologise in writing and pay $500 costs.

Again the facts are not analogous. It is worth noting however, that had the practitioner been able to see the inappropriateness of his conduct at an early stage, and make apology, that would have had a significant impact on penalty. The Tribunal's concern is not to punish the practitioner, but to seek to ensure that public confidence and trust in the profession and in the administration of justice is maintained.

(c) The third example, which was upheld on appeal by the High Court, involved conduct of a barrister, Mr A.[52] One finding of misconduct was for sending the solicitors for his client a draft affidavit containing offensive and scurrilous remarks against the client, amounting to an implicit and improper threat that, if not paid, then Mr A would commence proceedings for his fee and attach the affidavit in support. The second finding of misconduct related to the litigation and/or his claim for fees together with

[51] LawTalk 898, 7 October 2016, p 44.
[52] *A* above n 42.

six emails or letters he sent to other lawyers which were discourteous. Two were found to contain improper threats. Mr A was censured and ordered to pay costs of approximately $50,000.00. On appeal the Standards Committee sought suspension and the practitioner sought reduction in penalty. The court rejected suspension because it was the first offence in 30 years of practise, and he was provoked by the rude and intemperate correspondence from his client.

We consider the practitioner's conduct to be in a more serious category. The statements he made were not simply discourteous, they were false. They were intended to protect the practitioner from the consequences of Judges' concerns about his competence, in the interests of his clients. The Judges' actions were not in any way provocative.

DECISION ON PENALTY

[151] To summarise the key points:

(a) In relation to the Judges charges, given in particular the number of charges, the seriousness of the behaviour and the motivation behind it, the fact the practitioner targeted two Judges and more recently was found to have engaged in unsatisfactory conduct also involving intemperate speech, makes the conduct more serious than that of Mr Orlov by a significant margin.

(b) The conduct is much more serious than that of Mr Hong, for the reasons outlined. All the other examples are not in the ball park of the practitioner's conduct.

(c) His conduct in disrupting the meeting is added to that, and exacerbated by his approach to defending that charge. However, we do not think the practitioner will repeat that behaviour. We recognise the huge sense of grievance he took into the disciplinary process as a result of the meeting albeit the circumstances were of his own making.

(d) The incompetence charges also require recognition. The manner in which the practitioner has defended the proceedings, his involvement in multiple challenges during the course of the process, and his lack of focus on the key matters also give some cause for pause in relation to the practitioner's competence. We have significant reservations about the practitioner's judgment. He does not acknowledge those concerns, which is troubling.

(e) We give some credit for the fact the matters are historical. That said, the delay in hearing the charges rests to a large extent with the process followed by the practitioner and so we put lesser emphasis than we might otherwise on the passage of time as mitigation.

(f) We give credit for the practitioner's previous good character, his involvement in the important work of the immigrant communities, and his successful practice.

(g) Finally we note that the practitioner advised his intention to leave New Zealand after he has exhausted domestic remedies over these matters and submits that a striking off would mean that he may not be able to practise overseas in places he is admitted or may wish to be admitted. He made a plea for clemency at least on this point and we give this some weight.

[152] Striking the practitioner off, as requested by the Committees, was seriously considered by the Tribunal but the required unanimity could not be achieved. The Tribunal considered that strike off was open on the basis of the repetitive, persistent and quite outrageous conduct in relation to the Judges' charges. The totality of the conduct and the practitioner's response to the charges have called into question whether he is a fit and proper person to practise as a lawyer.

[153] However we recognise the practitioner has ability and a firm commitment to justice. We recognise any time out from his practice will be a hardship to those who depend on him. He has promised these matters will not happen again. We consider he deserves a second chance, particularly in the circumstances when the matters which have brought him before this Tribunal are largely historical. We were pleased

to see for the first time a more reflective approach from the practitioner in his penalty submissions, in particular his expressions of regret and, albeit rather last minute, letters of apology for his behaviour. We have certainly seen the practitioner's passion for what he believes is just, and are prepared to give him an opportunity to demonstrate that he understands he needs to temper that with what he refers to as "a more moderate approach".

[154] Suspension is the lesser proportionate response. We consider a reasonable period of suspension is essential to recognise the seriousness of the offending and to assure the public that the profession is concerned to maintain standards of probity and competence. It is important too to ensure the profession understands the behaviour expected of it.

[155] As in *Bolton*, we hope the experience of suspension will make the practitioner "meticulous in his future compliance with the required standards".[53]

[156] We consider the most serious charges were those which involved allegations of racism and discrimination against Justice Harrison, ostensibly supported by decisions which did nothing of the sort, and made for the purpose of protecting the practitioner from what he saw (without cause) as attacks by the Judge on his practice and reputation and where the Judge was simply and properly concerned about the competence of the practitioner. We start at 18 months suspension for these most serious matters.

[157] We add a further three months to recognise the remaining charges, with a view to the totality of the suspension appropriately reflecting the conduct overall.

[158] We then give credit in particular for the historical nature of the offences, and for good character as described earlier. In considering the overall period we take into account the significant costs that the practitioner will have to pay. This brings the period of suspension down to 15 months.

[159] We do not allow credit for first offence given the penalty for the previous matter was on the basis of first offence, and given the significant number of offences involved here.

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[53] *Bolton* above n 37 at [492].

[160] Accordingly we order that the practitioner be suspended from practise as a barrister or as a solicitor, or as both, for a period of 15 months with effect from 1 February 2017. This effective date gives the practitioner some time to make arrangements with respect to his practice.

COSTS

[161] These proceedings have been protracted and drawn out. There have been no less than 17 hearing days and the volume of material that has been presented for consideration fills seven large filing boxes. Much of that material was filed by the practitioner.

[162] One hearing was aborted as a result of the practitioner's successful application for recusal of a member of the Tribunal and it is right that we make some allowance for that when considering any award of costs.

[163] The costs in this matter are very significant. This is because of the way the practitioner conducted his defence. He has provided no information to indicate he could not pay them. We consider in the circumstances he should bear a significant proportion of these, which would otherwise fall on his fellow practitioners.

[164] We have found serious charges proven and consider it just to order that the practitioner pay a significant proportion of the Society's costs and a similar proportion of the costs of the Tribunal that will payable by the New Zealand Law Society in accordance with s 257 of the Act.

[165] The Committee's costs are $165,921.56.

[166] The Tribunal's costs are $117,426.00.

[167] Accordingly we order the practitioner to pay costs to the Standards Committee in the amount of $153,500.00, being a discount of approximately 7.5 percent.

[168] The New Zealand Law Society will reimburse the Crown for the costs of the Tribunal amounting to $117,426.00 as required by s 257 of the Act.

[169] The practitioner is to repay to the New Zealand Law Society a proportion of the s 257 Tribunal costs amounting to $108,500.00.

[170] Finally we commend Mr Morgan QC on his calm, professional and particularly helpful approach throughout, and record our thanks. We also commend Mr Morgan's predecessor Mr Pyke. Their conduct of the proceedings exemplified the duties of a prosecutor in a matter such as this.

DATED at WELLINGTON this 22nd day of December 2016

M T Scholtens QC
Chair