LCRO 207/2014

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Provincial] Standards Committee
BETWEEN	**DH** Applicant
AND	**EJ** Respondent

DECISION

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

Introduction

[1] Mr DH has applied for a review of a decision dated 29 August 2014 by the [Provincial] Standards Committee, in which the Committee found five breaches of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, and that his conduct was unsatisfactory pursuant to s 12(b) and (c) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] The Committee censured Mr DH, ordered him to pay a fine of $2,000, and $500 in costs and expenses to the New Zealand Law Society (NZLS).

Background

[3] Mr DH acted for a defendant in a criminal matter. Ms EJ had conduct of the file as police prosecutor. In the course of representing his client, Mr DH sent an email to Ms EJ, and Court staff, the substance of which said:

> Hi All

> I act for [client]. He is going to plead guilty to all charges. Currently the CRH date is 9 June.
>
> Please bring the date forward to a Judge List day (preferably not one when Judge [TC] is in town – see attachment). I will be seeking a PSR.

[4] Mr DH attached an image of a monkey.

[5] Ms EJ forwarded the email to the NZLS expressing her concern that his email appeared to be "judge-shopping", and was unprofessional for having attached the monkey image. Ms EJ said she was unhappy that her name was associated with his email.

Standards Committee

[6] The Standards Committee considered Ms EJ's complaint and Mr DH's response. The Committee's concerns were that Mr DH had attempted to "judge shop", had undermined the dignity of the judiciary, and failed to treat others involved in Court processes with respect.[1] The Committee also considered whether Mr DH had published something which was calculated to bring a judge into contempt, and whether, by his conduct, he had fallen short of proper standards of professionalism.[2]

[7] Mr DH responded to the complaint saying he did not intend to infer Judge [TC] was a monkey. He explained that his interactions with Ms EJ's predecessor had been humorous, and had included the exchange of animal pictures, initiated by Ms EJ's predecessor. He said his email was a light-hearted attempt to bring some levity to their work. He says the idea behind sending the picture was as a "cheeky humorous token supporting my suggestion (on instructions from my client), to put the case in a Judge's List when Judge [TC] is not sitting". Mr DH says he respects the judiciary, has no reason to ridicule Judge [TC], and denies any suggestion of judge-shopping.

[8] The Committee found that Mr DH had attempted to judge-shop, and did not accept his explanation for sending the picture. It considered that Mr DH had not conducted his professional dealings with integrity, respect and courtesy, had not promoted and maintained proper standards of professionalism, had undermined the processes of the Court, was contemptuous of the judiciary, and had undermined its dignity.

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[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 13.2 and 13.2.1.
[2] Rules 10 and 12.

[9] The Committee concluded Mr DH's conduct was unsatisfactory by the standards of lawyers of good standing,[3] and that he had breached practice rules made under the Act.[4] The Committee imposed orders under s 156(1) of the Act, censuring Mr DH, ordering him to pay a fine of $2,000, and costs of $500 to NZLS.

[10] Mr DH applied for a review of the decision and orders.

Review Application

[11] In his review application, Mr DH says the Committee's decision was unfair, unjust and incorrect. He alleges members of the Committee were biased against him, and says they are all part of the same close-knit community. He says the evidence does not support the decision reached, and the Committee's reasoning is flawed. Mr DH repeats that he was not shopping for any particular judge, but indicated a preference for someone other than Judge [TC] because "he is known for harsh sentencing of certain types of offending".[5]

[12] Mr DH accepts that, on reflection, he could have attached a different picture "that could not have been misconstrued", and refers to his practice of drawing smiley faces on notes he hands up to registrars in Court.[6] Mr DH says he has appeared before Judge [TC] many times, and has no reason to be disrespectful towards him.

[13] Mr DH emphasises his view that the picture was intended to be a "cheeky humorous token", and says the penalties imposed are manifestly excessive.

Role of the LCRO

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

Scope of Review

[15] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a Standards Committee or an investigator, and seek and receive evidence. The statutory power of review is much

[3] Lawyers and Conveyancers Act, s 12(b).
[4] Section 12(c).
[5] Application for review (24 September 2014) at [16].
[6] At [17].

broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review Hearing

[16] Mr DH attended a review hearing in Auckland on 9 March 2015. Ms EJ was not required to attend and the review hearing proceeded in her absence.

Review Issue

[17] Any concern about bias is met by the independence of this process of review, as are Mr DH's concerns about what he sees as deficiencies in the Committee's reasoning.

[18] To some extent, Mr DH's intentions when he sent the picture are irrelevant, because the focus of the Committee's inquiry, and of this review, is on his actions.

[19] I note Mr DH's acceptance, with the benefit of reflection, that the email and picture could have been misconstrued, and his evidence that he intended no disrespect towards the Judge. I also note his concerns about the impacts the decision has had on him, which he considers are disproportionate. However, those consequences are not matters that can be addressed in the process of this review.

[20] The focus of this review is twofold: whether the decision was open to the Committee, and if it was, whether the penalties imposed are a proportionate response.

Discussion

Judge Shopping

[21] The Committee considered the allegation that by requesting his client's case not be called before a particular judge, Mr DH had been "judge shopping". Judge-shopping is not identified in the Act, or in any of the rules made under it, as giving rise to any particular disciplinary concern. It is therefore necessary to evaluate the alleged conduct against the purposes of the Act, and fundamental obligations of lawyers, to ascertain whether it is conduct that should be discouraged through the disciplinary framework of the Act.

[22] The Act's purposes and fundamental obligations of lawyers are set out at ss 3 and 4 of the Act and relevantly say:

> (1) The purposes of this Act are –
>
> (a) to maintain public confidence in the provision of legal services…;
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> (b) to protect the consumers of legal services…;
>
> (c) to recognise the status of the legal profession….

And

> Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:
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> (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
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> …
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> (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[23] As a lawyer, Mr DH was in a position of privilege in his interactions with the prosecutor and Court staff. Lawyers play an essential role in the administration of justice and upholding the rule of law. Lawyers' duties to the Court override the interests of their clients. Mr DH says he was following his client's instructions by requesting a Court date when a particular judge was not sitting. He says he was not shopping for a particular judge.

[24] While I can accept his evidence on those points, it would not constitute a defence to an allegation that his professional conduct was deficient. The question is whether judge-shopping by a lawyer raises a professional conduct issue. Instinctively the answer is yes, but it is helpful to consider the New Zealand Courts' comments on the subject.

[25] The High Court mentioned "judge shopping" in *Deliu v National Standards Committee*,[7] where, in relation to a recusal and cost application, Thomas J said:[8]

> It is important that judges sit on cases which they are able to hear and do not simply recuse themselves whenever an objection arises. This is to avoid the possibility of deliberate judge shopping which may have an equally strong affect on the appearance of justice.

[7] *Deliu v National Standards Committee* [2015] NZHC 67.
[8] At [10].

[26] The practice of judge-shopping was also mentioned by the High Court in *Solicitor General v Siemer*[9] in relation to articles published by Mr Siemer criticising the Solicitor-General and his office:[10]

> [38] Looked at objectively it would be surprising if the Solicitor General did not find the articles offensive at the least. The applicant submits that this cannot be enough. In the context of recusal of a judge it would enable a litigant to "judge shop"…
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> [39] The point the applicant makes about "judge shopping" is discussed [in an English case] where criticism of the judiciary or a particular judge was not sufficient ground for recusal. There it was said:
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> > …. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases…

[27] In addition to comments by the Courts, judge shopping was mentioned by the Law Commission when it considered the efficiency of Courts' criminal pre-trial processes in its 2005 report, which says:[11]

> Management of courts in metropolitan areas has proven more difficult than provincially, for reasons that are slightly more complex than the large volume of cases to which the problem is often attributed. Because of the volume, there is also anonymity, meaning that one is unlikely to have to take personal responsibility for failure in the way that would occur in a smaller centre. This applies to both counsel and judicial behaviour. For example:
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> - In the Auckland region, where an under-performing counsel is interacting with multiple prosecutors, and appearing before lots of different judges, perhaps in more than one court, it takes longer for that person's pattern of poor behaviour to be identified, and it is difficult if not impossible to coordinate a consistent response to it.
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> - In a provincial court with only one or two judges, a judge who contributes to an inefficient practice experiences the consequences of that directly; in a metropolitan court the consequences are shared amongst many judges, and responsibility for them is difficult to pin down. If one judge in the city attempts to change his or her practice with a view to efficiency it is unlikely to produce benefits without collective action by the rest: it simply encourages judge-shopping by counsel to avoid the inconvenience for themselves and their clients of having to change behaviour.

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[9] *Solicitor-General v Siemer* HC Wellington CIV-2010-404-8559 13 May 2011.
[10] At [38]-[39].

[11] Law Commission *Criminal Pre-trial Processes: Justice Through Efficiency* [NZLC R89, 2005) at [15].

And:[12]

> Pre-trial processes must be nationally consistent, because:
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> - justice should be dispensed equally, with differences in process and outcome justified only by the different circumstances of each case; and
> - if there is one common procedure, there will be fewer unnecessary adjournments due to mistake or judge-shopping, thus reducing the number of events that courts must manage.

And:[13]

> The Ministry of Justice reported a perception that the practice of voluntary appearances is being used by some defendants, with or without the knowledge of their counsel, as a means of "judge shopping". If the judge rostered on the day of their appearance is not to their liking, they fail to appear and then put in a voluntary appearance when another judge, perceived as likely to be more sympathetic to their interests, is sitting. We have no evidence as to the extent of this practice. However, if it is happening at all, it is clearly undesirable.

[28] The relevant part of Mr DH's email said "[p]lease bring the date forward to a Judge List day (preferably not one when Judge [TC] is in town…". Sending an email in those terms to the police prosecutor, and to Court registry staff, in the course of acting in a criminal proceeding indicates poor judgement on Mr DH's part. He was in a situation where his duty to the Court overrode his client's interests.

[29] By his conduct, Mr DH laid himself open to complaint. Objectively viewed, his email can be interpreted as an attempt at judge-shopping by exclusion. The Courts have identified judge-shopping as undesirable, and the Law Commission has identified it as being inconsistent with a lawyer's obligation to facilitate the administration of justice. Mr DH's attempt at judge-shopping was inconsistent with his duty as an officer of the Court because, whether he intended to or not, he impugned the integrity of the judicial officer concerned.

[30] Considered in the context of comments referred to above made by the Courts and in the Law Commission's report, Mr DH's request for a hearing date when a particular judge is not sitting would not help to maintain public confidence in the provision of legal services, or protect consumers of legal services, because it served to undermine the legal system within which Mr DH was providing legal services.

[31] Mr DH's privileged status as a lawyer meant he was in a position to attempt to manipulate the system, albeit he says on his client's instructions, by seeking to exclude a particular judge from considering his client's matter. Mr DH's conduct was inconsistent with the purposes of the Act, and with the fundamental obligations of a

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[12] At [58].
[13] At [403].

lawyer to uphold the rule of law and to facilitate the administration of justice in New Zealand.

[32] On the basis of the evidence before it, it was open to the Committee to conclude that Mr DH was "judge shopping". Given the discussion referred to above, judge shopping is to be discouraged. The practice is discouraged, in this case, by a finding that it constitutes unsatisfactory conduct pursuant to s 12 of the Act. That finding could be made under s 12(b) or (c), because his conduct demonstrates a lack of professionalism, integrity, respect and courtesy, undermines the process of the Court and the dignity of the judiciary, and shows a lack of respect for Court processes, any of which would be regarded by lawyers of good standing as unacceptable, or are breaches of practice rules made under the Act.[14]

[33] The judge-shopping aspect of the decision is therefore confirmed on review.

Monkey Picture

[34] On reflection, Mr DH accepts that his email attaching the monkey picture was open to more than one possible interpretation, and could be misconstrued. Although Mr DH says he intended no disrespect, the Committee did not consider his explanation plausible. The Committee's view was that the words "… (Preferably not when Judge [TC] is in town – see attachment)" were capable of only one interpretation: that Mr DH was likening the Judge to a monkey. The Committee felt there was no other reasonable inference available.

[35] I can accept there may be more than one possible plausible interpretation, but the risk Mr DH took was that the email might be received by someone who could interpret it in a way he had not intended. While Mr DH may have been able to share a light-hearted jest with Ms EJ's predecessor, he knew Ms EJ, not her predecessor, was the recipient of his email. In the circumstances, he took a risk that did not pay off, and was completely unnecessary.

[36] Mr DH likening the Judge to a monkey was a construction that was open to the Committee. Having adopted that interpretation, it is not unreasonable for the Committee to have concluded that Mr DH's conduct was unsatisfactory. While collegiality in the practise of law is to be encouraged, a prudent lawyer will exercise judgement before jesting. On this occasion, Mr DH misjudged his audience and has

[14] Above n 1, rr 13.2,13.2.1, 10 and 12.

been called to account for his conduct. It was not unreasonable for the Committee to have concluded that his conduct on this occasion was unsatisfactory.

[37] In the circumstances, that aspect of the decision is also confirmed.

Penalties

[38] The Committee's view was that Mr DH's conduct fell within the definition of unsatisfactory conduct by the standard of lawyers of good standing[15] or by being in breach of the Conduct and Client Care Rules,[16] so it imposed a censure and fine of $2,000.

[39] Mr DH's view is that those penalties were a disproportionately harsh response to his conduct.

[40] The functions of penalty in a professional context were recognised in *Wislang v Medical Council of New Zealand*[17] as being:[18]

(a) to punish the practitioner;

(b) as a deterrent to other practitioners; and

(c) to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[41] Given the objections set out above to judge-shopping, and Mr DH's lack of judgement in linking the Judge to the monkey picture, the censure imposed fulfils all three functions of penalty, as does the imposition of a fine.

[42] The maximum fine a Committee can order under s 156(1)(i) of the Act is $15,000. A fine of $2,000 recognises both unsatisfactory aspects of Mr DH's conduct. His conduct is not of the most serious kind, but is deserving of punishment. A fine of $2,000 is not disproportionate, and there is no other reason to amend the amount.

[43] In the circumstances, the censure and fine of $2,000 are confirmed on review.

[44] I note for completeness that the order to pay costs and expenses is not a penalty. The costs order is also reasonable, modest and confirmed.

Outcome

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[15] Above n 3, s 12(b).
[16] Section 12(c).
[17] *Wislang v Medical Council of New Zealand* [2002] NZAR 573.
[18] At [21].

[45] The Committee's decision and orders made under s 156 of the Act are confirmed.

Costs

[46] A LCRO has a wide discretion to consider costs pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines.

[47] Mr DH's application for review has been unsuccessful. In the circumstances it is appropriate that he be ordered to contribute to the costs of carrying out this review, which are otherwise paid by all lawyers in New Zealand.

[48] The Guideline amount for a straight forward hearing in person is $1,200.

[49] Mr DH is ordered to pay costs of $1,200 towards the costs of this review.

Decision

[1] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed.

[2] Pursuant to s 210(1) of the Act, Mr DH is ordered to pay costs of $1,200 on review.

DATED this 13th day of April 2015

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D Thresher
Legal Complaints Review Officer

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

Mr DH as the Applicant
Ms EJ as the Respondent
[Provincial] Standards Committee
New Zealand Law Society