

LCRO 363/2013

CONCERNING

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

AND

CONCERNING

a determination of the Standards
Committee

BETWEEN

KF

Applicant

AND

STANDARDS COMMITTEE

Respondent

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

DECISION

Background

[1] On 29 April 2013 the matter of *Ministry of Agriculture and Fisheries v SH* was set down for a two day hearing at the [District] District Court. Mr KF acted for Mr SH who did not appear when the matter was called.

[2] The Judge allowed Mr KF an opportunity to leave Court to locate Mr SH. When Mr KF returned, he advised the Court that he had been unable to locate Mr SH and could not be certain that he had informed him of the hearing date. The Judge gave Mr KF the opportunity to consult his file. After checking the file Mr KF was unable to confirm whether or not he had informed Mr SH of the two-day fixture. He subsequently informed the Court that Mr SH was overseas in [Country].

[3] The presiding Judge issued a minute noting that it was “of considerable concern that Mr KF, as an Officer of the Court, could not confirm whether or not he had told the defendant of the date. The consequence of not telling the defendant the date and the

defendant not turning up is that the hearing needed to be abandoned and recommenced on a fresh hearing date”.¹

[4] The Judge directed that the minute be forwarded to the Law Society, who subsequently resolved to commence an own motion investigation pursuant to s 130(c) of the Lawyers and Conveyancers Act 2006 (the Act).

The Standards Committee inquiry and decision

[5] The Complaints Service wrote to Mr KF on 21 June 2013, advising that an own motion investigation was proceeding. Mr KF was advised that at issue was the question as to whether Mr KF had advised his client of the trial date.

[6] Mr KF was invited to provide submissions in response by 5 July 2013.

[7] No response was received from Mr KF. The complaints service wrote further to Mr KF on 22 July 2013, making request of him to provide response by 6 August 2013.

[8] On 29 August 2013, Mr KF was advised that the Standards Committee had resolved to set the matter down for hearing on the papers. Mr KF was given a further opportunity to provide response, that response to be provided by 5 p.m. on 12 September 2013.

[9] On 12 September 2013, at 4:57 p.m., Mr KF forwarded an email to the complaints service, making request for an extension of time for filing of submissions. Immediate response was provided to that request. Mr KF was asked to provide reasons for the extension sought, and urged to respond promptly, so that his submissions could be considered. No reply was received from Mr KF.

[10] The Committee delivered its decision on 30 October 2013. The Committee determined that:

- There had been unsatisfactory conduct on the part of Mr KF in causing the trial to be abandoned.
- Mr KF’s conduct fell short of the standard expected of a reasonably competent lawyer.

[11] The Committee made the following orders:

- (a) Mr KF be censured pursuant to s 156(1)(b) of the Act.

¹ Minute of Judge AD (29 April 2013) at [25].

- (b) Mr KF pay a fine of \$3,000 pursuant to s 156(1)(i).
- (c) Mr KF pay costs to the New Zealand Law Society in the sum of \$1,200 pursuant to s 156(1)(n).

[12] The Committee decided that it was appropriate to defer making any publication orders and sought submissions from the parties on publication. The decision recorded that submissions in relation to publication were to be made within 14 working days of the determination date. There was no evidence on the file that an order had been issued in respect to publication, and Mr KF advised that he had no knowledge of any publication decision being issued. The issue of publication does not form part of this review.

Application for Review

[13] Mr KF filed an application for review on 12 December 2013. On receipt of that application Mr KF was provided with a copy of the Guidelines for Review, which relevantly advise applicants that they are to identify in their application, any error or errors that they consider the Standards Committee has made. Each application is to include a clear statement of the reasons for seeking a review.

[14] In his review application Mr KF provided no reasons for his application but stated he would file a “full submission in due course”.

[15] Several requests were made of Mr KF to provide submissions in support of his application, but no response was received to those requests.

[16] On 18 December 2014, a minute was issued from this Office noting that despite repeated correspondence, Mr KF had failed to provide submissions in support of his review application.

[17] Three review applications involving Mr KF were scheduled for hearing on the same day.

[18] It was considered an efficient use of time resources, and of obvious advantage to Mr KF, if all three matters could be heard on the one day.

[19] Mr KF’s response to the disciplinary process followed a familiar pattern with all three review applications filed. Each application filed gives notice that he will file formal submissions in due course. On each application, repeated request is made of Mr KF to clarify the grounds on which he is seeking to review the Committee’s decision. On each

application, Mr KF fails to respond to those requests, culminating in minutes issuing from this Office directing that the matters are to be set down for hearing.

[20] It is unhelpful for a practitioner to file a review application, but fail to identify any grounds on which the Committee's decision is being challenged.

[21] In response to enquiry as to why he had failed to provide submissions as requested, he advised that he was uncertain as to the nature of the submissions that he was required to file.

[22] Mr KF's indication on lodging his application that he was proposing to file full submissions in due course, sits somewhat incongruously alongside argument that he was unaware as to the nature of the submissions that would be filed in support of an application for review.

[23] The LCRO did not initiate a request for submissions from Mr KF, rather it was responding to his indication that he was intending to file submissions which would presumably clarify the basis on which he was seeking to challenge the Committee's decision.

[24] I make observation on these matters to emphasise that it is not, in my view, appropriate for parties to file an application for review without clarifying the grounds on which they raise objection to the Standards Committee decision.

[25] In preparing for hearing it is important that the LCRO has an understanding of the issues an applicant proposes to traverse.

[26] At hearing, Mr KF produced a copy of correspondence addressed to the Complaints Service dated 2 August 2013. That correspondence may not have arrived on the Committee's file.

[27] In any event, I will consider Mr KF's submissions of 2 August 2013, as I am able to do. A Review Officer, in exercising his powers of review, is able to look at matters afresh, and consider any relevant information.

Hearing

[28] An applicant only hearing proceeded on 29 April 2015.

Analysis

[29] The background to the complaint is straightforward. Mr KF acted for a defendant who was to appear in the [District] Court on 29 April 2013. The matter had been allocated a two-day fixture. Mr KF's client failed to appear. The trial could not proceed.

[30] Mr KF advanced initial submission that the problems rested with the presiding Judge.

[31] The problem was, in Mr KF's view, prompted in large part by the Judge's failure to understand the issues, her lack of competency, and her lack of experience in presiding over the busy [District] Court. Those comments present as intemperate.

[32] In significant part, Mr KF's defence to the complaint relies on argument that the presiding Judge made enquiry of him which he was required to answer honestly, and in doing so the Judge perceived his conduct to be inappropriate, when it was not.

[33] Mr KF submits that the Judge questioned him in the following terms, "Did you tell them face-to-face of when they needed to appear in court?." Mr KF says that he could not recall directly advising his client "face-to-face" of the impending court date, and accordingly could not confirm that to be the case. But he submits that his client was aware of the date for the hearing, and that his client had been present in court when the hearing date had been allocated.

[34] Mr KF complains that the Judge adopted a belligerent attitude when pursuing her line of enquiry and emphasises that he was providing honest response when he told the Judge that he could not honestly recall if he had told his client of the hearing date.

[35] In his written submissions, Mr KF noted that he had thoroughly prepared for the hearing. He had attended on his client on a number of occasions and had traversed all aspects of the case with him. Mr KF stressed that whilst he had no clear recollection of standing in front of his client and reinforcing the date of the hearing, he had no doubts that his client was aware of the date.

[36] Mr KF advises that in the days leading up to the hearing, he made several attempts to contact his client. These efforts included calling at his client's home on two occasions. He was unable to make contact.

[37] At the review hearing Mr KF indicated that he was "quite sure" that he had informed his client of the hearing date. In his written submissions drafted in August

2013, he concedes that he “cannot exclude absolutely that there was no breakdown in communication between Mr SH and I on the hearing date”.²

[38] Mr KF suggests that some responsibility for the problem rests with the Court. He submits that the Court had an obligation to advise his client of the hearing date.

[39] Mr KF argues that the Committee erred in reaching conclusion that his conduct constituted unsatisfactory conduct. He submits his conduct, when subjected to close scrutiny, could not by any reasonable assessment be seen to be conduct that fell below that which could be reasonably expected of a competent lawyer.

[40] I am not persuaded by that submission.

[41] Mr KF was provided with an opportunity to check his file to confirm whether he had informed his client of the fixture date. He had no record of having advised his client of the date his client was required to attend Court.

[42] Court time is a precious commodity. Criticisms have long been made of unacceptable delay in having cases heard, and the attendant cost to parties, both financially and emotionally, of having their cases remain unresolved for unacceptable periods of time.

[43] The instigation of rigorous case management, the use of the call over system, the processes established for tracking and monitoring files as they progress through the Court system are all attempts to ensure that cases are ready to proceed when a trial date is allocated.

[44] Lawyers have a critical role in that process, and it is so fundamental as to present as trite, that lawyers have a responsibility to ensure that their clients are well aware of Court dates, and cognisant of the need to turn up at Court.

[45] It would be common practice for lawyers to record in writing to their clients, the date the client was required to attend at Court. Mr KF was unable to provide evidence that his client had been advised in that fashion. He placed reliance on the considerable work he had done on the file including several attendances on his client, and his confident belief that his client was aware of the hearing date.

[46] That approach falls short of what could be expected of a reasonably competent lawyer.

² Submissions KF to NZLS (2 August 2013) at 6.

[47] Nor am I persuaded by argument that Mr KF was so disconcerted by the manner in which the Judge pursued her line of questioning that he was unable to adequately respond to the Judge's question as to whether he had directly advised his client of the date of the court hearing.

[48] Mr KF contends that he was not able to provide direct answer to the Judge's inquiry as to whether he had advised his client "face-to-face", but is insistent that his client was aware of the date.

[49] In his written submissions Mr KF recalls that he spoke with his client in early 2013, at which time his client made inquiry as to whether he was able to travel to [Country]. As there were no restrictions on his client's ability to travel, Mr KF advises that he told his client's wife, in the presence of his client, that his client was free to travel, but emphasised that he must be available for Court. Mr KF says that he has a clear recollection of advising his client in those terms. His reluctance to confirm to the Judge that there was face- to-face dialogue with his client in which he addressed his client's obligation to appear at court on a specific date is inexplicable.

[50] It presents as a relatively straightforward matter for Mr KF to have confirmed to the Judge that the date of hearing was discussed in the course of conversations with his client, and that his client was well aware of when he was expected to attend Court. His inability to report to the Court in those clear terms does reinforce that Mr KF had failed to adequately meet an important obligation of a trial lawyer, which is to ensure that their client understands when they are required to attend Court.

[51] The question is, when all the circumstances are taken into account, whether the conduct of Mr KF was such as to be conduct that would be considered to fall short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, or conduct that would be regarded by lawyers of good standing as being unacceptable whether as conduct unbecoming a lawyer or unprofessional conduct.

[52] The Committee considered that the conduct fell short of the standard expected of a reasonably competent lawyer. I have given careful consideration to the submissions advanced by Mr KF and have looked at the matter afresh as I am required to do. I agree with the Committee's view of the conduct.

[53] The application for review is declined.

Costs

[54] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

[55] Taking into account the Costs Guidelines of this Office, Mr KF is ordered to contribute the sum of \$1,200 to the costs of the review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

[56] The order for costs is made pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006.

Decision

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

DATED this 27th day of May 2015

R Maidment
Legal Complaints Review Officer

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

KF as the Applicant
Standards Committee as the Respondent
IV as a related person as per section 213
The New Zealand Law Society
Secretary for Justice