LCRO 63/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee
BETWEEN	**CK** Applicant
AND	**AUCKLAND STANDARDS COMMITTEE** Respondent

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

DECISION

[1] The Practitioner, CK, acted for a legally aided appellant, EA, in an appeal against his conviction and sentence. The Standards Committee found the Practitioner guilty of unsatisfactory conduct pursuant to s 12(a) of the Lawyers and Conveyancers Act 2006 (the Act), after concluding his "...[actions] fell short of the standard of competence and diligence expected of a reasonably competent lawyer".[1] This decision reflected criticisms of the Practitioner by [Judge] in the Court of Appeal

[2] The Standards Committee imposed a number of orders pursuant to s 156(1) of the Act. One such order was that the Practitioner be censured pursuant to s 156(1)(b) of the Act. A further order was made pursuant to subsection (1)(n) that the Practitioner pay costs to the New Zealand Law Society (NZLS) of $1,200.

[3] Turning to the matter of publication, the Committee stated it was "mindful of the following considerations"[2] and referred to a number of cases that had dealt with the factors relevant to the issue of publication. The Committee further noted that the Court of Appeal decision was available to the public. Taking these factors into account, the Committee decided that the full facts and names of the parties should be published.

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[1] Standards Committee Determination (8 March 2011) at [18].
[2] Above n1 at [24].

Review Application

[4] The Practitioner sought a review of the Committee's decision. Submissions were forwarded by CL for the Practitioner, and by DZ for the NZLS, with further submissions sent subsequently for the NZLS by DY.

[5] The review application was confined to the matter of the censure and the order for publication. While this made it unnecessary for the scope of review to be wider than was sought, it is within the responsibility of this Office when receiving a review application to review all aspects of the way that a Standards Committee dealt with a decision. This requires some discussion about the background.

Background

[6] The Committee commenced an "own motion" enquiry which had its genesis in comments made by the Court of Appeal when the Practitioner acted for EA (who was legally aided) in an appeal of his sentence. Dismissing the appeal, on behalf of the Court, [the Judge was critical of the way the appeal was prepared and advanced. On the evidence provided, the case was without merit]:

[7] The Court's decision was issued on [date], and the file indicated that the Practitioner promptly informed the Legal Services Agency (LSA) about the matter, which led to the Practitioner being issued, on [date], with a "First Notice with Conditions".

[8] On 29 June 2010 the Practitioner received a letter from the Professional Standards Department of the NZLS informing him that an own motion investigation was considered by the Standards Committee at its 18 June 2010 meeting, and invited the Practitioner to forward submissions in respect of a Notice of Hearing attached to its correspondence. The Standards Committee file contained a copy of the Court of Appeal decision. The following day the Practitioner responded with submissions, which included copies of his correspondence with the LSA.

[9] In early September the Standards Committee resolved to set the matter down for a hearing on the papers and invited further submissions from the Practitioner. Submissions were forwarded by CL on behalf of the Practitioner.

Standards Committee Decision

[10] The issues under the Committee's consideration were:

(i) Whether the Court's dissatisfaction in connection with the manner that the appeal had been prepared and advanced amounted to unsatisfactory conduct; and

(ii) Whether the Practitioner discharged his professional duties in accordance with standards expected in Court.

[11] The Standards Committee traversed submissions made for the Practitioner by CL, but were not persuaded by those submissions, and found that the Practitioner's preparation of the appeal "...fell short of the standard of competence and diligence expected of a reasonably competent lawyer".[3]

[12] In addition, the Committee "...unanimously found that [the Practitioner] did not discharge his professional duties in accordance with the standards expected of the Court".[4] The Committee referred to Rule 13 of the Conduct and Client Care Rules[5] (the Rules) which provides that an overriding duty of a lawyer acting in litigation is to the Court concerned. The Committee concluded that the Practitioner had not discharged his overriding duty to the Court.

[13] Accordingly, the Committee determined that there had been unsatisfactory conduct on the Practitioner's part. The Committee was satisfied on the facts and circumstances that the matter called for an order of censure and taking into account the time spent on inquiring, and the costs of and incidental to both the inquiry and the hearing, the Committee considered that the Practitioner should be ordered to pay $1,200 towards costs and expenses.

[14] The Committee also ordered that the Practitioner's name be published in LawTalk and the New Zealand Law Society websites.

Scope of Review

[15] Having considered all of the information on the file, and the nature of the Court's concerns, I have not considered it necessary to extend this review beyond the parameters sought by the Practitioner, which concern the orders of censure and

[3] Above n1 at [16].
[4] Above n1 at [17].
[5] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

publication. This means that I agreed that there was a proper basis for the Standards Committee finding of unsatisfactory conduct pursuant to s 12 of the Act.

[16] The above background is nevertheless relevant to the remainder of the discussion concerning the orders made by the Committee which are the subject of this review. These are dealt with below.

Order of Publication

[17] Submissions in support of the review application were made by CL who particularly noted that the order to publish had been made by the Standards Committee in contravention of a procedural step that is mandatory before such an order can be made. He noted the failure of the Standards Committee to comply with Regulation 30 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[18] Regulation 30 deals with the publication of the identity of a lawyer as follows:

> (1) If a Standards Committee makes a censure order pursuant to section 156(1)(b) of the Act, the Committee may, with the prior approval of the Board, direct publication of the identity of the person who is the subject of the censure order.
>
> (2) When deciding whether to publish the identity of the person who is the subject of a censure order, the Standards Committee and the Board must take into account the public interest, and, if appropriate, the impact of publication on the interests and privacy of –
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> (a) the complainant; and
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> (b) clients of the censured person; and
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> (c) relatives of the censured person; and
>
> (d) partners, employers, and associates of the censured person; and
>
> (e) the censured person.

[19] CL referred to the Committee's omission to have obtained the prior approval of the Board in respect of the publication decision. He referred to the High Court decision of *B v Auckland Standards Committee 1 of the New Zealand Law Society*[6] which held

[6] *B v Auckland Standards Committee 1 of the New Zealand Law Society* HC Auckland CIV 2010-404-8451 9 September 2011.

that no order for publication could be made by a Standards Committee without the Board's prior approval. At paragraph 10 of his submissions CL wrote "[i]t is common ground that, in [the Practitioner's] case, the prior approval of the Board was not sought. It follows that the order for publication has to be quashed."[7]

[20] I agree. *B v Auckland Standards Committee 1* makes abundantly clear that a publication order requires the prior approval of the Board (referring to the executive board of the NZLS), and it must follow that failure by the Standards Committee to obtain the Board's prior approval invalidates the order (in this case no approval at all was sought).

[21] Submissions made for the NZLS did not contest this, but outlined the practical difficulties achieving compliance with the statutory procedures. Even though there is agreement that the decision to publish must be quashed for want of compliance with regulation 30(1), I consider it relevant to the larger questions involving procedure to include some comment in response to the NZLS submissions, while recognising that these are not matters that are directly relevant to this review.

Submissions Concerning Proposal for an Expeditious Procedure for Obtaining Board Approval

[22] Early submissions proposed that s 131(f) of the Act and Regulation 30 apply only where an order of censure was the only order made by a Committee, and would not be relevant where multiple orders were made under s 156 of the Act in respect of the same conduct issue. I have not commented on these submissions which appear to have been superseded by subsequent submissions confirming the NZLS's acceptance that the prior approval of the Board is required.

[23] The later submissions raised the matter of the practical difficulties arising in a multi-step process to achieve this. For the NZLS DY outlined the various steps and stages involved in these processes, and raised an overriding question of how this would meet the obligation of expeditiousness required by the Act. His submissions explored the distinction between "deciding" and "directing", and proposed that the purposes of the Act would be met if a Standards Committee were to make any publication direction "subject to" the approval of the Board, and avoid the two-step approach of a Committee and the Board separately determining such a question. Attention was also drawn to the factors relevant to such a decision which is outlined (above) in Regulation 30(2). In essence the position of the NZLS is that the added

[7] Submissions from CL to LCRO (18 July 2013) at [10].

delay and complexity of a two-step approach achieves nothing, and that the purposive interpretation ought to permit a Standards Committee to make a publication direction subject only to the Board approving it.

[24] Starting with Regulation 30, which requires that Standards Committee's publication orders must have the "prior approval" of the Board, the following comment is offered for the consideration of the regulatory service as a direct and practical way in which this can be achieved.

[25] Assuming that a Standards Committee has followed all proper procedural steps in arriving at its decision to publish, it would appear to be open to the Committee to then complete, in written form, a "Provisional Decision", which it then forwards to the Board. This provisional decision would comprise a fully reasoned determination, and include an order for publication along the lines of, "...the Committee, having obtained the approval of the Board, directs that the lawyer's name be published...etc." In this form the decision does not yet have the status of a Determination.

[26] Should the Board approve the decision to publish, the Committee's determination could then be readily signed out after removal of the word "provisional", and the Convenor's signature added. Should the Board decline to give its approval, the publication part of the determination may be readily deleted.

[27] This is simple and direct, and has the advantage of placing before the Board all information relevant to the factors that the Board is required to take into account in granting its approval (as set out in Regulation 30), and would avoid the necessity of a two-step involvement by the Standards Committee.

[28] This proposal, or a variation of it, would appear to satisfy the procedural requirements of the Act and regulations. I leave it with the NZLS to consider this further.

[29] To complete this discussion, I will add that it is not open to a Standards Committee to issue its decision, and later seek the approval of the Board. Once issued, a Standards Committee becomes *functus officio* and cannot thereafter take steps to remedy any procedural defects that exist.

[30] However, a Standards Committee decision that contains a procedural defect can, on review, be quashed by this Office and be redirected back to the Committee for remedial action pursuant to s 209 of the Act.

Next Step

[31] Returning to the review, the next question is what step should be taken following the quashing of the Committee's order of publication. A number of options are open to this Office, one of which is to redirect the matter back to the Standards Committee under s 209 of the Act. This step would be taken if, in the course of this review, it appeared that there was a proper basis for a publication order to be made. That is also a matter that falls within the scope of review.

[32] CL submitted that the review should begin with consideration of the order of censure. At paragraph 13 of his submissions, he wrote, "[g]iven that it is common ground that the order for publication must be reversed, the first inquiry is whether the order of censure is necessary given the finding of unsatisfactory conduct."[8] This appears to suggest that the adverse finding alone is a sufficient penalty, without the necessity of any orders.

[33] The Committee considered it appropriate to impose orders under s 156, and therefore CL's submission requires consideration of the basis of the Standards Committee's decision.

Considerations

[34] I have considered all of the information and submissions made by and for the Practitioner. The submissions traversed the background circumstances that led to the criticisms of the Practitioner by the Court of Appeal, and I note that the explanations failed to satisfy the Standards Committee which found professional failures on the part of the Practitioner in two respects. One was a failure to provide a standard of service that could be expected of a reasonably competent lawyer; the other was a breach of duty to the Court.

[35] The background circumstances were that the Practitioner's client, EA, sought an appeal on the ground that he had entered a 'guilty' plea on the basis of a sentencing indication for all offences of [number] years, and that the Court had imposed a [number] year sentence, plus [number] for an additional offence.

[36] Notwithstanding the Court of Appeal's criticism, the Practitioner (through CL) had submitted to the Standards Committee that he was bound by his client's instructions and had a duty to put forward his client's best case. He also noted that the prosecutor who appeared at the sentencing had sworn an affidavit that the sentencing indicator was [number] years, which accorded with his client's recollection, even though it did not

[8] Above n8.

conform to the Judge's note in the trial sheet which the Practitioner had been told by his client was wrong. The prosecutor subsequently corrected the earlier error (apparently having found a file note) and it appears that the Practitioner had not been advised of this until close to the appeal hearing. The Practitioner noted that the Court of Appeal's decision had not mentioned the (prosecutor's) error but had mentioned the prosecutor's contemporaneous file note showing a sentencing indictor of [number] years.

[37] There is nothing to indicate that the Practitioner had (or had sought) a copy of the original sentencing indicators (which of itself may raise another issue) but the Practitioner referred to EA's position as being that the Judge's note in the trial record sheet (recording a sentencing indicator of [number] years) was in error. The Practitioner considered that EA's affidavit reflected his instructions that he had understood that all charges were to be part of the same sentencing indication, and he had understood that the starting point was [number] years.

[38] EA's affidavit was subjected to a direct challenge by the Court of Appeal, on the basis of the overwhelming evidence that the sentencing indication was [number] years, and that this did not cover all of the offending.

[39] In responding to that challenge, the Practitioner submitted that the appellant had misheard the Judge. This was soundly criticised by his Honour [text removed],[9] adding that the contents of the affidavit did not support (the Practitioner's) argument because (a) the appellant had not claimed to have misheard the Judge, and (b) had known that the sentencing indicator did not cover all of the offending. His Honour also criticised the appellant's assertions that there had been a miscarriage of justice, describing his affidavit as "[word] deficient".[10]

[40] A further criticism was that at the very least the Practitioner ought to have obtained an affidavit from the appellant's lawyer, EB, on these matters. In a [word] paragraph his Honour recorded the Court's dissatisfaction with the manner in which the appeal had been undertaken by the Practitioner.[11]

[41] The Practitioner's explanation (to the Standards Committee) was that his submission (concerning the appellant having misheard the trial Judge) had been made spontaneously following an unexpected challenge by the Court seeking to "pin down

[9] Above n3 at [17].
[10] Above n3 at [19].
[11] Above n3.

the appellant's real contention as to the alleged error".[12] The Practitioner's answer was that he thought at the time that his submission was consistent with his client's affidavit.

[42] CL submitted:[13]

> ...that sort of error during oral argument can be made by competent counsel under the pressure of interrogation from the bench: it is an insufficient basis, in my respectful submission, to constitute proof that [the Practitioner] fell below the requisite standard.

He said the preparation of the affidavit was tailored to ensure that it was the appellant's expression of what he wanted to say to the Court, but added that the Practitioner now accepts that his submission ought to have been tailored more specifically to his client's affidavit. The Practitioner also perceived the Court's criticism intended to set a benchmark by which matters of this ilk should be addressed by counsel in the future.

[43] The Practitioner considered that no part of his conduct of the case affected the fundamental obligation to uphold the rule of law or avoided the facilitation of the administration of justice in New Zealand. The Practitioner submitted that the Standards Committee erred in finding that there had been a breach of Rule 13, this being the main focus of his submissions.

[44] A lawyer's duty to the Court is the highest duty owed by a lawyer. The nature of the obligation is set out in Chapter 13 of the Rules:

> The overriding duty of a lawyer acting in litigation is to the Court concerned. Subject to this, the lawyer has a duty to act in the best interest of his or her client without regard for the personal interests of the lawyer.
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> 13.1 A lawyer has an absolute duty of honesty to the Court and must not mislead or deceived the Court.

[45] The Practitioner submitted there was a difference between the Court expressing dissatisfaction in the way that it did, and the suggestion that he had breached any rule of law, ethical obligation or contractual obligation. He noted that the expression was one about standards that the Court itself expects. Those standards are additional to legal, ethical and contractual obligations.

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[12] Submissions from CL to NZLS (22 October 2010) at 2.
[13] Above n13 at 3.

[46] There is no doubt that a lawyer's duty to the Court is paramount, requiring absolute honesty, and a finding against a lawyer for breach of this Rule is serious. The Rule requires absolute honesty of a lawyer. The Rule is breached if a lawyer misleads or deceives the court.

[47] Examining the Practitioner's conduct in terms of a lawyer's duty to the Court, I have some difficulty in this case in finding that the Practitioner could be said to have breached his duty of honesty to the Court. Whether the appellant's assertion about the sentencing indicator was, or was not, correct was an issue of fact for the Court to determine. The Practitioner was bound by his client's instructions and the contents of his affidavit, and it was not his role to thereby judge the issue that was before the Court of Appeal. It is not clear how the Practitioner could be blamed for the assertions of the appellant who had stated in his affidavit that he had "understood"[14] certain things to be the case.

[48] Despite the surprise of the Court's challenge the Practitioner's response might have been framed with greater care and precision. However, it seems to me that the Practitioner's submission that the appellant had misheard the Judge was not necessarily inconsistent with, nor so far removed from, the proposition that the appellant had misunderstood the Judge.

[49] I also considered the further criticism made by the Court, namely that the Practitioner had not obtained an affidavit from the appellant's (trial) lawyer. It is difficult to find any basis for criticism here. There was no obligation on the Practitioner to obtain such an affidavit, nor explain why none was sought.

[50] It is undoubtedly open to the Court to challenge any submission by a lawyer. However, a careful reading of the Court's comments (particularly that contained in the closing paragraph of the appeal judgment) makes clear that the criticism was aimed at the Practitioner's standard of advocacy, recording the Court's dissatisfaction with the manner in which the appeal was prepared and advanced, being without merit and plainly unsustainable on the affidavit evidence tendered. It was clear from the nature of [Judge]'s comments that the real concern related to the standard or quality of advocacy practiced by the Practitioner, which was considered to fall below the standard expected from a lawyer appearing in the Court of Appeal. Materially and significantly there was no suggestion that the Practitioner had misled or deceived the Court.

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[14] Affidavit of EA to Court of Appeal (23 March 2010).

[51] I also noted that the Committee's comments in relation to its finding under s 13, which referred to the Practitioner having failed to discharge his professional duties in accordance with the standards expected of the Court. Again there is no suggestion that the Committee found that the Practitioner had misled or deceived the Court, as opposed to not meeting the Court's expectations about expected standards of advocacy practised in the Court of Appeal.

[52] This caused me to question the correctness of the Standards Committee finding that Rule 13 had been breached. Given the seriousness of a breach of this kind, there needs to be a sound basis before such a finding is made. While the standard of professionalism was found wanting, I do not see that there is a proper basis for finding that the Practitioner was in breach of Rule 13. The Standards Committee may have been influenced by the unequivocal language used by the Court, but it ought to have carefully scrutinised exactly what the criticism related to. Having carefully considered the information I conclude that the Standards Committee erred in finding that the Practitioner had breached Rule 13.

Standard of Professional Services

[53] While finding that the Committee erred in concluding that the Practitioner had breached Rule 13, I accept as correct its decision that the Practitioner's professional services fell below the standard expected of a lawyer. The duty of lawyers is to provide a standard of professional services that is competent and diligent.

[54] I have independently considered whether the services provided by the Practitioner failed to meet the accepted standard expected of competence and diligence, but also taken into account the criticism of his Honour, and the fact that the Practitioner accepts that he could have done better.

[55] The Practitioner explained the circumstances in which his client's affidavit was prepared, stating it was not for counsel to put words into the appellant's mouth, and it was imperative that counsel's first duty to the Court is to ensure that the affidavit is in the appellant's words. The Practitioner acted on the instruction given to him by his client who asserted a [number] years sentencing indication, which also reflected the erroneous affidavit of the prosecutor, and also asserted his understanding that the sentence covered all charges. The Practitioner prepared the appeal on that basis without further checking. While the evidence clearly showed that the sentencing indications could not possibly have covered all charges faced by the appellant but, the Practitioner submitted "[n]one of that detracts from the appellant's error that he

believed that the indication was for [number] years and covered all charges. The appellant was plainly wrong."[15]

[56] The criticism of the Practitioner's performance by the Court of Appeal was connected with a failure to have adequately scrutinised his client's evidence. The Practitioner appears not to have obtained a copy of the sentencing indicators which were central to his client's appeal, and had sought no further instructions from his client after being informed that the affidavit of Crown counsel (concerning the [number] years) was erroneous. A significant criticism is that the Practitioner proceeded with the appeal on the grounds originally filed when new information had come to light that affected his client's position. The Practitioner himself acknowledges he could have done better and accepts that there is a proper basis for the "unsatisfactory conduct" finding.[16]

[57] I agree with this, and the Standards Committee decision of unsatisfactory conduct will be confirmed on the grounds of s 12(a) alone.

The Order of Censure

[58] Given that the unsatisfactory conduct will be confirmed, but not on the basis of a breach of Rule 13, the next matter to be considered is the order of censure. CL submitted that an adverse finding was appropriate but that the conduct did not reach the threshold for an order of censure.

[59] A censure marks out conduct of a serious nature, and is not an order that is frequently imposed. The High Court in *B v Auckland Standards Committee 1*[17] noted that a censure will convey a greater degree of condemnation than a reprimand. There, the Court recognised that "[t]he distinction between a censure and reprimand is well recognised"[18] making reference to Black's Law Dictionary and concluding that to censure a practitioner is to harshly criticise his or her conduct. The Court noted that:[19]

> It is the means by which the Committee can most strongly express its condemnation of what a practitioner has done, backed up, if it sees fit, with a fine and remedial orders. It is understandable that when such a response is justified, the legislature should have provided for publication of the practitioner's name,

[15] Letter from CK to LSA (31 May 2010) at [11].
[16] Above n1.
[17] Above n7.
[18] Above n7 at [37].
[19] Above n7 at [38].

> subject to compliance with rules governing the basis on which a decision to publish should be made.

[60] It is not apparent from its decision whether the order of censure related to any specific part of the Practitioner's conduct. The Standards Committee referred to both the Practitioner's preparation of the appeal falling short of the standard of competence and diligence expected of a reasonably competent lawyer, and his having failed to discharge his professional duties in accordance with the standards expected of the Court.

[61] Strong condemnation would be appropriate where there has been a serious professional failing, which would almost certainly include a breach of Rule 13. I have already concluded that the Committee erred in finding that there had been a breach of Rule 13, and given that this is the most serious of professional failings, it may be reasonably assumed that this was a material factor in the imposition of the order of censure. What is left is a finding that the Practitioner fell below an expected standard of professional services for one who practices advocacy in the Court of Appeal.

[62] CL submitted that a censure was a serious mark upon the Practitioner's reputation and record and unnecessary in the circumstances of this case. He argued that no prior conduct matters had arisen to indicate that there was a broader issue of competence, and he submitted that the censure order was both unnecessary and manifestly excessive.

[63] Without intending to set any parameters around what sort of conduct might justify an order of censure, I accept CL's submission of, "[w]ith respect, the facts of this matter and the reasoning of the Committee in censuring him, do not support the sternness of their approach."[20] While accepting that the Practitioner's standard of professional service was unsatisfactory, it is my view that the particular circumstances of this case did not justify the order of censure.

[64] That does not dispose of the matter because there is the further question of whether there should be an order of reprimand. This is relevant for the reason that a reprimand could equally support an order of publication. That much is clear from *The New Zealand Law Society v B*[21] (Court of Appeal) which concluded that for the purpose of supporting a publication order, an order of censure or reprimand are interchangeable.

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[20] Above n8 at [20].
[21] *The New Zealand Law Society v B* CA663/2011; [2013] NZCA 156; [2013] NZAR 970.

[65] The next question therefore is whether the Practitioner's failure justifies an order of reprimand. I have carefully considered the circumstances and I am persuaded by the following submission of CL in concluding that there is not a sufficient basis for a reprimand:[22]

> It is important that lawyers conducting Appeals on behalf of convicted persons who are in prison are not chilled by the prospect of findings of unsatisfactory conduct based on criticisms by Judges of the Court of Appeal (who may take a sanguine view of the merits of an appeal). The duty of a defence lawyer (Rule 13.13) is to protect his or her client as far as possible from being convicted (or in the case of an appeal to do what they can to overturn a conviction based on the instructions to hand). The Court of Appeal is not an easy forum in which to appear. Particularly when lawyers are acting for convicted persons who, as in [EA's] case, have a criminal history, the job is very difficult.

Publication – Observations

[66] The result of my review is that there is an insufficient basis for an order of censure or an order of reprimand. In the absence of either order there can be no order of publication.

[67] It is nevertheless necessary to make two observations about the Committee's decision in this case with respect of the publication (in addition to the Regulation 30 omission).

[68] The first is that there is no indication that the Standards Committee provided to the Practitioner a draft copy of its decision before seeking his submissions on publication. What the file shows is that the s 152 notice was sent to the Practitioner, informing him of the Committee's own motion enquiry and seeking his submissions on the alleged conduct as well as orders that might be made, including an order of publication.

[69] Previous decisions of this Office have clarified that a two-step approach is required when a Committee is contemplating an order of publication. In particular, the Practitioner is entitled to receive the Committee's decision before he is invited to make submissions, so that submissions may be tailored to the findings of the Committee. This approach was confirmed in *B v Auckland Standards Committee 1* (High Court). It

[22] Above n8 at [19].

may be that this step was taken (this is not evident from the Standards Committee file) but if not, this would be a procedural defect.

[70] The second matter of concern is the absence of reasons for deciding to make an order of publication. In its decision the Committee set out the relevant factors, and made reference to a number of cases (the majority involving disciplinary tribunals where there is an open forum and a presumption of openness), but took no further steps to explain why it considered the Practitioner's name ought to be disclosed with reference to the applicable factors. Any decision to publish needs to explain what aspects of the lawyer's conduct is considered to meet the relevant factors and justify publication of the lawyer's name.

[71] Had the Board been requested to approve the Committee's decision to publish in this case, the Board would likely have had difficulty discerning the grounds for that decision.

[72] These observations are intended to alert the Standards Committee to necessary procedural steps that need to be taken before any decision can be made on publication.

Costs

[73] No costs order shall be made in respect of this review for the reason that the Practitioner did not seek a review of the unsatisfactory conduct finding, and he has been successful in respect of the grounds he sought to have quashed.

Overall outcome:

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:-

(i) The decision of the Standards Committee is confirmed as to the finding that there has been unsatisfactory conduct on the part of the Practitioner pursuant to s 12 of the Act.

(ii) The finding that the Practitioner breached Rule 13 is quashed;

(iii) The order of censure is quashed;

(iv) The order of publication is quashed; and

(v) The costs order is amended. The Practitioner shall pay $500 in respect of costs and expenses pursuant to s 156(1)(n).

DATED this 11th day of October 2013

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Hanneke Bouchier
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:

CK as the Applicant
CL as the Representative for the Applicant
The Auckland Standards Committee
DY as the Representative for the Respondent
The New Zealand Law Society
Secretary for Justice