LCRO 180/2015

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [XX] Standards Committee
BETWEEN	**OX** Applicant
AND	**[XX] STANDARDS COMMITTEE** Respondent

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

DECISION

Introduction

[1] Mr OX has applied for a review of a decision by the [XX] Standards Committee dated 27 August 2015, in which the Committee decided there had been unsatisfactory conduct on the part of Mr OX, and postponed the making of penalty orders pursuant to s 156 of the Lawyers and Conveyancers Act 2006 (the Act) pending receipt of submissions from Mr OX.

[2] The Committee noted it was considering imposing orders pursuant to s 156(1)(l) and (m). The purpose of both of those subsections is to compel a practitioner to take steps to improve his or her professional practice with the benefit of advice from another practitioner or practitioners, and by receiving professional training and education.

[3] Mr OX says the Committee made orders, including setting up a professional mentoring and reporting arrangement between him and a senior lawyer in the region.

At the review hearing Mr OX assured me those arrangements would remain in place voluntarily if the unsatisfactory conduct findings made against him were to be reversed on review, in which case the statutory basis of orders made pursuant to s 156(1) would fall away.

Background

[4] Mr OX has been in practice as a barrister sole for a number of years. He says that until relatively recently,[1] he has never received formal professional mentoring or supervision. However, by his own efforts, working his way up from part time work as a rostered duty solicitor, he has been able to attain approval as a category 2 legal aid provider.

[5] In October 2014 the Legal Services Agency (LSA) presented Mr OX with the opportunity to represent a defendant charged with category 2 criminal offences. Mr OX says that he told LSA he considered the assignment was "above his pay grade", by which he meant that he believed conduct of the matter was beyond his skills. Nonetheless, he accepted the assignment, albeit he says with misgivings, and was assigned as counsel.

[6] Mr OX says that category 2 criminal legal aid provider status enables him to conduct matters where the accused could be sentenced to a term of imprisonment of 10 years or less. Mr OX says he considers the length of the possible term of imprisonment is not always a fair reflection of the complexity of the matter. Such, he says, is the case with the matter in which the Judge issued the minute that resulted in the Committee commencing an enquiry into Mr OX's conduct, and making the decision that is the subject of this review.

[7] Mr OX explained that when the LSA offers a legal aid assignment to a lawyer, the lawyer has 24 hours in which to refuse the assignment and to provide a reason. Mr OX suggests his long term livelihood would be at risk if he were to refuse to accept legal aid assignments without good reason. If a lawyer does not refuse the assignment within 24 hours, Mr OX says LSA deems the lawyer to have accepted it. As there is a roster of legal aid providers, the lawyer who does not refuse within 24 hours loses his place on the roster to the next lawyer in the queue.

[1] As a result of the decision that is under review.

[8] Mr OX says there are currently about eight lawyers on the [Town] roster, and there were fewer back in 2014. He says he earns his living by doing legally aided work, and that LSA keeps a record of a lawyer's refusals. Mr OX says he has declined several appointments on the basis of a conflict of interest, but the matter that is at the centre of the present review is the only appointment he has been reluctant to accept based on its complexity and his ability to properly provide the regulated services required by the assignment.

[9] Mr OX says he experienced periods of self-doubt over the months of the retainer, but those dissipated as he became increasingly familiar with his client's matter and the legal issues he identified as arising from that. Mr OX describes something of an uphill struggle in his preparations for the jury trial. He sought help from a colleague, Mr CK, who assisted pro bono.

[10] Mr OX says he assumed conduct of the criminal matter from privately instructed counsel. Charges had been laid in respect of matters alleged to have occurred in the South Island and most of the disclosure was available. Mr OX said at the review hearing that the first thing he did on being instructed was to ask his client, who was at that time living in the North Island, to record his detailed instructions in respect of each of the charges in writing. Mr OX says his client did so, and sent him comprehensive written instructions by email.

[11] Mr OX refers to a number of telephone conversations with his client over several months when he took further instructions and provided advice, prior to the two weeks before the trial was due to commence. As I understand it, Mr OX had by then provided written advice to his client in relation to the charges, and on plea. Mr OX says he met with his client over the first of the two weeks before trial, and took further detailed instructions. He says his ability to take further instructions was compromised by his client being in custody for the final week before trial commenced.

[12] Mr OX says that by the time the trial commenced he had prepared detailed cross examination trails with respect to every element of each of the charges for each of the prosecution witnesses. He says by then he knew the prosecution's and his client's case inside out.

[13] Mr OX and his colleague appeared and conducted the jury trial. The Judge discharged the jury part way through the trial because he said he had concerns around whether the defendant was having a fair trial. In a minute of 20 October the trial Judge

expressed his concerns about the way Mr OX had presented the defence case in the following way:

> [3] The trial commenced on 16 October, 2014. In the course of the following two days I became concerned about the presentation of the defence case. Mr OX, for the defendant, presented as being underprepared. For example, he could not find papers to refer to witnesses, and on a number of occasions, told witnesses that he would "come back" to that issue, but did not do so. It was also noted that when answers were given by a witness that were not favourable or as expected Mr OX audibly sighed and similar sounds were made when I addressed him. Mr OX repeatedly called his client by the wrong name in front of the jury. I was also concerned that the defence case was not being fully put to the Crown witnesses. My concerns were compounded when, on a number of occasions, junior counsel proceeded to take instructions from the defendant "on the fly." It raised, in my mind, the real possibility that a full brief of evidence from the defendant had not be [sic] obtained.
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> [4] I also had increasing concerns that Mr OX did not fully appreciate the elements of the charges. The first Crown witness (a complainant), was referred to the Contracts Enforcement Act 1956.[2] This was the first of many occasions when I asked the jury to retire so I could raise matters with defence counsel. The enforceability of any agreement between the defendant and the complainant was not, and is not, an issue in this trial. Furthermore, defence seemed to be adopting a line of questioning which suggested that as the complainant had received his money back this was an answer to the allegation.
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> [5] In addition to these matters I raised with Mr OX his desire to place documents before the jury which, on the face of them, did not appear to assist the defendant's position. At least one witness was referred to some accounting documents which were undated and unsigned.
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> [6] Finally, late on Friday, Mr OX, who suffers from a heart condition, left the courtroom during the evidence of a Crown witness. Shortly thereafter, I was given a message by the registrar that Mr OX was outside feeling unwell. I took a further adjournment. It transpired that Mr OX had suffered the onset of an angina attack and had taken medication
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> [7] Over the course of the weekend I reflected on these matters. My obligation as trial judge is to ensure a fair trial; in particular, to ensure that the defendant receives a fair trial.
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> [8] This morning I saw counsel in chambers. I expressed my concerns and came to the view that the jury should be discharged because I was not satisfied that the trial was fair to the defendant and by reason of my concerns that Mr OX was not up to the standard required to lead the defence. In my assessment the issues which had arisen already were likely to result in a successful appeal on the basis of counsel competence in the event the defendant was found guilty.
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> [9] During the course of my meeting with counsel in chambers Mr OX advised that the defendant had expressed concern over the running of his defence and had (to use Mr OX's words) indicated that he would "sack" counsel

[2] The transcript of the first prosecution witness' evidence at the trial that I have seen on review does not make express reference to the Contracts Enforcement Act 1956 (CEA). I note cross examination by Mr OX of the first prosecution witness over the requirement that agreements over the sale and purchase of land in New Zealand must be recorded in writing. There were also discussion with the bench at that point so I take it the CEA was referred to in the course of those discussions with the bench.

> and asked junior counsel to continue. In turn, that would cause problems for the junior counsel as the current Crown witness is or has been a client of his firm.
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> [10] The jury has now been discharged and I have remanded [JS] in custody until 10 November 2014 for his trial to start afresh during that session.
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> [11] In my view, senior counsel needs to be appointed as a matter of urgency to represent Mr JS. It would be appropriate, in my view, for Mr OX to be appointed junior counsel. First, he has knowledge of the issues in this trial and that would assist new counsel. Secondly, Mr OX would have the benefit of working with experienced trial counsel which will assist in his professional development.

[14] The Judge referred his minute to the LSA, and a copy made its way to the New Zealand Law Society (NZLS) which referred it to the [XX] Standards Committee for its consideration.

Own Motion Inquiry – s 130(c)

[15] The Committee commenced an own motion enquiry pursuant to s 130(c) of the Act, and Mr OX was provided with an opportunity to respond to the concerns raised by the Judge.

[16] Mr OX referred to difficulties in his relationship with the Judge arising from his role as counsel, and to issues he has had with other judges. He referred to the Judge's expectation that the trial would be completed expeditiously, suggesting it was cut short to suit the Judge's convenience, rather than because of any shortcoming on Mr OX's part. He explained the volume and complexity of the materials on the trial file, and difficulties he had had in his client's instructions before trial commenced.

[17] Mr OX says he carefully prepared cross examination for each of the Crown witnesses, which in some cases was lengthy. Mr OX addressed each of the concerns raised in the minute. In essence, he refutes the allegations, says all of the concerns would have been addressed if he had been allowed to complete the trial, and explains his sighing as a product of ill-health.

[18] Mr OX implies uneven treatment by the Judge as between prosecution and defence, and says that he did the best he could with the knowledge and skill he had at the time. Mr OX says he has learned a lot of valuable lessons from the jury trial experience, and considers himself a better lawyer for that. He produced copies of letters, two from the defendant whose trial was aborted. In one the client expresses his gratitude for Mr OX's "loyalty and dedication" and says his decision to replace Mr OX

was not a reflection on his abilities. In the other letter, the client expresses concerns about the Judge's conduct of the trial, and asks whether the Judge can be recused. Letters from other clients dissatisfied with their treatment at the Judge's hands were also produced.

[19] A copy of the trial transcript was provided. The Committee appointed Mr AY, a barrister, as an investigator pursuant to s 144 of the Act, and reg 33 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008. The terms of reference included Mr AY giving a view on whether there were reasonable grounds to suspect that Mr OX had breached the Act or rules, pursuant to s 146(2)(b) of the Act. Mr AY made enquiries and provided a report.

[20] Mr OX was represented and produced evidence, but declined to be interviewed by Mr AY, offering instead to respond in writing to written queries. Mr OX's lawyer raised procedural objections and provided a detailed critique of Mr AY's process, and the substance of his report.

Mr AY's report

[21] Mr AY set out the process, he had followed, who he had and had not spoken to, and dealt with the matters raised in the minute. He noted that new counsel, Mr BD, had adopted a different approach to Mr OX, electing judge alone trial and arguing jurisdiction. Mr AY recorded the prosecutor's views, including that the complexity of the matter was beyond Mr OX's experience, he had difficulties with the production of exhibits, court etiquette and professionalism, and referred to the sighing. Mr OX's acceptance of his inexperience and various other criticisms was noted, as were the other aspects of his response. No medical evidence appears to have been provided to Mr AY.

[22] Mr AY concluded that Mr OX's unpreparedness and disrespect of court etiquette were unexplained. Mr OX's lawyer's response to the Judge's concern that he had not prepared a brief of evidence for his client was described as untenable, and the failure to prepare a brief, at an early stage, given the complexity of the matters was "unfathomable". Mr AY's view was that a brief was essential. Mr AY considered Mr OX's acceptance of the assignment was problematic, and that a high level of inexperience and need for mentoring were demonstrated. He considered Mr OX's "impudence to the Court borders on disrespect", and that Mr OX would be assisted by

appearing with senior counsel as an assistant before undertaking further jury trials alone.

Mr OX's Response

[23] Mr OX, through counsel, responded, saying Mr AY had gone beyond his brief by offering a remedy and making findings, and had not provided reasonable grounds to suspect a breach of the Act or rules. Curiously, counsel submitted that matters had not been put to Mr OX for his response, thus denying Mr OX natural justice. I say curiously, because the Committee's stated purpose in putting Mr AY's report to Mr OX was to enable him to make comment. Mr OX's lawyer highlighted matters he considered Mr AY had overlooked, including a failure to take into account criticisms of the Judge, practical realities involved in conducting jury trials in general, and the realities of this particular jury trial.

[24] Counsel also provided a copy of a High Court appeal in a Dog Control Act matter attesting to Mr OX's competency in that matter. I mention only that there is little meaningful comparison to be made between an appeal by way of submission and argument to the High Court and conduct of a category 2 jury trial involving cross examination of a number of witnesses. That is the area of practice in which the problems arose for Mr OX. No concern has been raised about his competence more generally.

[25] The Committee then sent Mr OX a notice of hearing dated 9 June 2015, inviting him to reply to the issues raised, namely:

(a) Accepting the assignment from the Ministry of Justice lacking the necessary competence to do so;

(b) Lack of preparation;

(c) Lack of brief of evidence from the accused;

(d) Not representing the accused at the level expected of a reasonably competent practitioner;

(e) Discourtesy to the Court.

[26] Counsel for Mr OX questioned the constitution of the Committee, and criticised Mr AY's report for a lack of thoroughness and insufficient detail such that the Committee could not carry out a hearing without breaching natural justice. Counsel's concerns were set out in some detail in defence of Mr OX, much of which repeated the concerns he had raised earlier over the report. He highlights what Mr OX had done, and argued the report is generally unreliable.

[27] Counsel submits Mr OX misunderstood what was meant by a brief of evidence in the criminal context, and highlights the difficulties in determining how the trial might have played out, given its early curtailment. Counsel submits the report is not a solid foundation for an adverse finding, and says that Mr AY failed to fulfil his brief because he did not express a view on whether there were reasonable grounds to suspect a breach of the Act or rules.

[28] Counsel criticises the Judge for acting in his own self-interest as the motivation for drafting the minute. It is said that Mr OX was considering his remedies against the Judge.

[29] The Committee considered all of the materials and concluded there was unsatisfactory conduct on the part of Mr OX in that his conduct fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner because:

(a) The assignment was beyond his abilities, he was conscious of that at the time, but allowed himself to be persuaded to continue, despite his further misgivings. His failure to stand down and ask that fresh counsel be assigned fell below the standard expected by s 12(a) of the Act;

(b) He failed to prepare a brief of his client's evidence, which also fell below the standard set by s 12(a) of the Act.

[30] The Committee took no further action on the other issues.

[31] Mr OX objected to the decision, and applied for a review.

Application for Review

[32] Mr OX asks that the Committee's determination be reversed on the grounds that:

(a) The investigation was procedurally flawed, the report incomplete and Mr OX was not given the opportunity to respond to particular allegations;

(b) No enquiry was made of the Judge as to his motivations, which is said to be a "major procedural error", because the Committee did not accept the Judge's "accusations";

(c) The Committee applied the wrong test, or failed to apply any test in deciding whether he was correct to accept the assignment. Mr OX says the test is subjective not objective, and the Committee should have applied the "reasonable man on the Clapham omnibus test", which would exonerate his decision to continue with the assignment;

(d) Mr OX does not accept that he was obliged to prepare a written brief of evidence for the accused. He says:

> I agree that to properly represent a client counsel must be fully conversant with the clients position and defence in relation to the charges faced I do not agree that in criminal matters this requires a written document that is supposed to be the verbatim evidence of the client should they take the witness stand. There was before the committee compelling evidence to show that I was fully instructed and conversant with the clients defence to each and every charge … the committee in its comments says "defence counsel has to be in a position to put the defendants version of it events to prosecution witnesses in cross examination." … It is my submission that I was able to do exactly what the committee says I should have been able to do.

[33] Mr OX provided a number of attachments, including materials that had been before the Committee, and a letter from his client confirming he was fully instructed on the defence, and had precise knowledge and notes on what was to have been said in his defence, and the questions to be put in cross examination.

Submissions by Committee

[34] Through counsel, the Committee presented written submissions dated 1 December 2015. In particular, counsel submits:

(a) The Committee concluded Mr OX should not have continued with the legal aid assignment once it became objectively apparent to him that it was beyond his ability. Counsel links that conduct to the standard in s 12(a) of the Act, the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. That was the standard according to which Mr OX's conduct in continuing with the assignment was found to have been unsatisfactory.

(b) The second unsatisfactory conduct finding related to Mr OX's failure to prepare a written brief of evidence, which the Committee also considered to have fallen below the standard set by s 12(a).

[35] Reference is made to the three conduct related issues where no adverse findings were made: Mr OX's preparedness for trial, his representation and whether he was discourteous to the Court.

[36] The Committee does not accept the procedural defects alleged. The level of consultation with Mr OX and his lawyer was said to be appropriate, and to comply with natural justice requirements to submit the issues to him, and invite him to respond in a properly informed manner. Counsel relies on the opportunity provided to Mr OX by him being served with the notice of own motion enquiry, opportunity to respond to the investigator's report and the opportunity to respond to the notice of hearing. Counsel correctly highlights the contents of the notice of hearing which set out the issues on which submissions were sought, and provided, and in respect of which the Committee made determinations.

[37] As to the investigator's report, counsel highlights the opportunities provided to Mr OX to participate in its preparation. He was invited, with his lawyer, to meet with Mr AY, but declined. The report was provided to his lawyer shortly after it was provided to the Committee. His lawyer was invited to comment on it twice, and did so. Counsel submits the report was relevant, the Committee considered it, but it was not conclusive of the determination. The Committee is said to have considered all of the information,

taken into account that which was relevant, and disregarded that which was not. Counsel submits the decision reflects that.

[38] The Committee is said to have taken into account relevant matters, namely:

(a) Mr OX's competence;

(b) Whether Mr OX had a duty to refuse the legal aid assignment from the start or part way through;

(c) Whether, as a matter of proper practice for a criminal defence lawyer in the circumstances of this case, Mr OX should have prepared a brief of his client's evidence;

(d) On being satisfied that he was under such a duty, whether or not he did in fact prepare a brief of evidence; and

(e) Whether Mr OX's conduct was professionally culpable at any level recognised by the Act.

[39] Counsel submits that those were the relevant matters considered by the Committee and determined on the basis of evidence, with reference to submissions. The determination is said to have been reached after a procedurally proper investigation in which the rules of natural justice were followed.

[40] As to the motives behind the Judge's minute, counsel refers to suggested bias against Mr OX's client, and against Mr OX personally, and the Judge's purported rush to depart the court room for personal reasons. Counsel describes these allegations as allegations of judicial misconduct, if proven, and says they are irrelevant to the determination. Counsel submits that "there was no reason for the respondent to enquire into the judge's motives even if it had been possible and proper to do so, which it was not".

[41] Counsel submits that:

> The key issue was whether Mr OX was irresponsible in continuing with the legal aid assignment when he knew or should have known that he did not possess the level of competency to run a case of this complexity. His acknowledgement about that was recorded in his initial response to the enquiry.

[42] As to the "appropriate test" concerning Mr OX accepting the legal aid assignment, counsel submits the test is objective, and a subjective test:

> would fail to protect the public and would mean that a lawyer could do whatever was appropriate on his or her own view of the matter.

[43] Counsel submits the Committee applied the correct standard, s 12(a) of the Act, which relates to the standard of competence and diligence a member of the public is entitled to expect of a reasonably competent lawyer. Counsel submits the Committee could also have applied the objective standard provided by s 12(b) which relates to conduct that would be regarded by lawyers of good standing, in this case "criminal defence lawyers approved for legal aid", as being unacceptable.

[44] Counsel submits the standard prescribed under the Act is objective, given the consumer protection purpose of the Act. The interests being protected are described as those of the legally aided client and the Legal Services Commissioner. Counsel submits the Committee properly applied the correct standard in respect of both findings of unsatisfactory conduct.

Nature and Scope of Review

[45] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
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> The Review Officer has broad powers to conduct his or 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. These powers extend to "any review" …
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> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

[46] More recently, the High Court has described a review by this Office in the following way:[4]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[47] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision and the information made available in the course of this review; and

(b) Provide an independent opinion based on those materials.

Review Hearing

[48] Mr OX attended an applicant only review hearing in [Town] on 19 September 2016. The Committee was not required to attend or be represented, and the hearing proceeded in the Committee's absence with its consent.

Analysis of review grounds

First Review Ground

[49] The first review ground represents a critique of the own motion inquiry process. Mr OX's position is that his opportunity to participate has been stifled.

[50] It is not correct for Mr OX to say he was not given the opportunity to respond to particular allegations. Mr OX had ample opportunity in the course of the complaint process to address the Committee's concerns. He could have obtained and provided yet further evidence, or made enquiries, if he had wanted to, to address the deficiencies he perceived in the investigator's process.

[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[51] I do not consider Mr OX's client's decision not to waive his privilege compromised Mr OX's ability to respond to the criticisms made of his conduct in that regard to the Committee. In any event, issues around the brief have been fully canvassed on review and are discussed in the Analysis section below.

[52] There is no general criticism of Mr OX's competence. The basis of the Committee's first adverse finding is that in this case against his own better judgement, colloquially put, Mr OX bit off more than he could chew. There is some evidence to suggest that he found the experience quite stressful, which would not be surprising in the least in the circumstances Mr OX describes. He also says he learned a great deal from the experience which has resulted in him being a better lawyer.

[53] Mr OX has been offered the opportunity through this process of review to address the decision, the submissions put by the Committee with respect to the process and substance of its decision, and to add anything else he considers relevant to his conduct.

[54] If there were any defect in the Committee's process, which there does not appear to me to have been, Mr OX has had ample opportunity to redress that in the course of this review. Committees are not required to conduct hearings with the parties present. Parties are expected to present all relevant materials. Mr OX, on advice, appears to have minimised his interaction with the investigator. I observe only that he might have been better served by engaging more fully with the investigation part of the process.

[55] In any event, I have taken into account everything that is available to me in the course of conducting this review, including what Mr OX has said in the course of the review hearing. The general question is whether Mr OX's conduct fell below any of the standards prescribed by s 12 of the Act. That broad issue is refined and addressed in the Analysis section below.

Second Review Ground

[56] The second ground of review is that the Committee was wrong not to have enquired into the Judge's motivations for discharging the jury so there could be a fresh trial. I unreservedly accept the submission put by counsel for the Committee on this point. There was no reason for the Committee to enquire into the Judge's motives "even if it had been possible and proper to do so, which it was not".

[57] It ill-becomes lawyers to point the finger at judges in an attempt to detract from the lawyer's own conduct. It is also disturbing that a lawyer would seek to garner support from other clients who have been dissatisfied with the outcome of their matters so as to undermine the Judge as Mr OX has done. There are proper processes by which to bring appeals, reviews and allegations of misfeasance in judicial office. The allegations Mr OX makes are serious, and cannot be considered by a Standards Committee, or this Office, at first instance.

[58] The second ground of review will therefore receive no further attention in the course of this review.

Third Review Ground

[59] The third ground of review relates to the test the Committee applied. The Committee, and this Office, are constituted under the Act. The Act prescribes the professional standards of unsatisfactory conduct at s 12, and misconduct at s 7. The application of those tests is discussed under the Analysis section below.

Fourth and Fifth Review Grounds

[60] Mr OX does not accept that he was obliged to prepare a written brief of evidence for the accused. He says he could do what he was professionally obliged to do without one.

[61] It appears to me there may be some ambiguity over what the Judge, Mr OX, Mr AY and the Committee mean by a "brief". To the extent it has relevance, that issue is addressed under the Analysis section below.

Review Issues

[62] There are two issues on review:

(a) Whether Mr OX should have accepted the assignment;

(b) Whether the evidence supports a finding that Mr OX's conduct of the trial fell below a proper professional standard.

[63] For the reasons discussed below, Mr OX should not have accepted the assignment. The finding that Mr OX's conduct was unsatisfactory in that respect is confirmed on review but amended to reflect the standard in s 12(b) of the Act. That finding supports the conclusion reached with respect to the second issue. There is sufficient evidence of conduct by Mr OX in providing regulated services to find that his conduct fell short of the standard of competence that would be regarded by lawyers of good standing as being acceptable also pursuant to s 12(b) of the Act.

Analysis

[64] The professional standards of unsatisfactory conduct are defined in s 12 of the Act in the following ways:

> In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means–
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> (a) conduct of the lawyer ... that occurs at a time when he ... is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
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> (b) conduct of the lawyer ... that occurs at a time when he ... is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
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> (i) conduct unbecoming a lawyer or an incorporated law firm; or
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> (ii) unprofessional conduct; or
>
> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer ..., or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); ...

[65] The application of the standards is guided by the purposes of the Act, which are:

> (a) To maintain public confidence in the provision of legal services ...
>
> (b) To protect consumers of legal services ...; and
>
> (c) To recognise the status of the legal profession ...

[66] It is also relevant to note that the fundamental obligations of lawyers include higher ideals like upholding the rule of law, facilitating the administration of justice, and being independent in providing regulated services to clients.[5] Lawyers must be free from compromising influences when providing services to clients,[6] must not act if the lawyer's interests come into conflict with the client's,[7] and must follow the rules that apply when conflicts arise.[8]

[67] Mr OX's conduct is considered on review with that statutory and regulatory background in mind.

Accepting the legal aid assignment

[68] The first question is whether Mr OX should have accepted the legal aid assignment.

[69] In its purest sense, acceptance of a retainer is a precursor to the provision of regulated services. However, accepting or rejecting a legal aid assignment is incidental to the provision of legal services in the reserved areas of work, and cannot be said to be unconnected to the provision of regulated services. On that basis Mr OX's conduct occurred at a time he was providing regulated services.

[70] The Committee considered that by accepting the assignment, Mr OX's conduct fell below the s 12(a) standard of diligence and competence a member of the public is entitled to expect of a reasonably competent lawyer.

[71] It emerged through discussion at the review hearing that Mr OX accepts there are good reasons to say he should not have accepted the assignment. However, he makes the point that his acceptance of the assignment was a matter for his judgement:

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[5] Lawyers and Conveyancers Act 2006, s 4.
[6] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 5.
[7] Rule 5.4.
[8] Rule 5.4.1.

he could be wrong, but he is human and can err. He is not sure whether he would accept another assignment that tested him to, or beyond, the limits of his competence.

[72] I have carefully considered all of the arguments Mr OX puts forward in support of his position. In my view it comes down to this.

[73] Only Mr OX could predict with any degree of certainty whether he was up to the task offered to him by LSA. If he considered he was not competent to accept the assignment because it was not within his field of practice, he had good grounds to refuse to accept the assignment, and could not be criticised by LSA for having done so. He had seen enough information to have formed a view.

[74] He could have refused the assignment.

[75] Although he had misgivings about his ability to provide regulated services to an appropriate standard, Mr OX says he accepted the assignment. His reasons included that it would assist him to develop his skills, he could earn some money, he could protect his contract with legal aid. He did not say that he accepted the assignment because he considered it was in his client's best interests for him to do so.

[76] Lawyers should not be encouraged to accept legal aid assignments out of personal interest. The fundamental obligation to facilitate the administration of justice, obligations to the Court and to clients must come first.

[77] LSA cannot know whether a lawyer may have good grounds to refuse to accept instructions under legal aid. That is a matter for the lawyer to disclose to LSA if he or she considers it appropriate to refuse an assignment. It cannot be the case that a lawyer's legal aid contract might be at risk if that lawyer declines assignments for good cause.

[78] Good cause to decline a retainer on professional grounds includes the instructions falling outside the lawyer's normal field of practice or instructions that could require a lawyer to breach any professional obligation.[9] A lawyer is professionally obliged to provide regulated services to a client competently and consistent with the duty to take reasonable care.[10] Those are minimum standards. The rules are not an exhaustive statement of the conduct expected of lawyers. They are a reference point

[9] Rule 4.2.1.
[10] Rule 3.

for discipline and are based on the fundamental obligations of lawyers set out in s 4 of the Act.

[79] In the circumstances, Mr OX should have refused the assignment.

[80] That being the case, the next question is whether Mr OX's conduct in accepting the assignment fell below any of the standards defined in s 12.

[81] The Committee considered accepting the assignment fell below the standard of competence and diligence set by s 12(a).

[82] Mr OX should not have accepted the assignment knowing it was probably beyond his competence. He had good grounds to refuse the assignment. He accepted it because it best served his own interests rather than those of his client. However diligently he applied himself, there was no assurance of his competence. I disagree though that s 12(a) is the appropriate standard.

[83] Applying section 12(b), it could readily be said that lawyers of good standing would regard it as unprofessional and unacceptable for Mr OX to have accepted the assignment knowing it was probably beyond his competence. This review is determined on that basis.

[84] This aspect of the Committee's determination is modified to reflect that. The determination that there has been unsatisfactory conduct on the part of Mr OX by accepting the legal aid assignment knowing it was probably beyond his competence was conduct that occurred at a time when Mr OX was providing regulated services and is conduct that would be regarded by lawyers of good standing as being unprofessional and unacceptable.

The Trial

[85] The majority of the Committee's decision reflects the evidential difficulty presented by the trial being brought to a premature end. As far as it went, Mr OX's performance at trial was met with mixed reviews. The Judge's concerns are recorded in his minute. Some of his concerns did not mature into tangible consequences because the defence did not face the ultimate test. That presents some difficulties because it is not possible to predict how the trial would have played out. However, the

Judge's view was that there were already enough problems to have provided grounds for appeal based on counsel competence.

[86] The Judge presiding over the trial was well placed to have formed and given a view on Mr OX's competence in conducting the defence. Although, by his argument that he is the scapegoat for the Judge's self-interest, Mr OX seeks to undermine the integrity of the decision to dismiss the jury and set the matter down for a new trial, the Judge's view carries significant weight. However, it is not the only source of evidence.

[87] The investigator liaised with the two Crown prosecutors who had been present at the trial. One of them declined to comment, deferring to his senior. The senior prosecutor did not disagree with the comments in the Judge's minute, mentioning Mr OX incorrectly producing "documents unhelpful to the defence … as exhibits through Crown witnesses", and the client apparently "directing the trial rather than Counsel running the case". He said he had taken Mr OX's "sighing" as an expression of his exasperation[11] with judicial rulings.

[88] Although Mr OX says he was initially not convinced of his own abilities, he claims to have overcome his misgivings by the time the trial eventuated. He says he had a plan for his client's defence, he was working through the plan and the plan was a good defence. The sighing, he says, is related to angina and was not a display of discourtesy to the Court.

[89] Mr OX's colleague, Mr CK, was supportive as was the accused. No criticism of Mr OX's competence is made by them. I am not convinced in either case that the views expressed are wholly objective, which affects their weight. Whatever the reason for Mr OX's sighing, it is important for counsel to be alert to how a jury will perceive their presentation because that can affect the outcome at trial. It is not unreasonable for jury members to expect professionalism from counsel. Audible sighing is likely to affect jurors' perceptions.

[90] That aside, although the transcript has been provided, I am conscious that it is not the role of the disciplinary process to second guess every move that counsel makes in the conduct of a hearing. However, the transcript bears out the key concerns noted in the minute, and which gave rise to the Judge's concern that Mr OX's conduct of the defence affected the fairness of the trial.

[11] Report AY to LCS (20 April 2015).

[91] The Judge, the senior Crown prosecutor, the investigator and the Committee, which includes other experienced lawyers, formed the view that Mr OX was out of his depth. The focus on his obligation to prepare a brief was but one aspect of the concerns raised. The lawyer who assumed conduct of the matter from Mr OX is said to have noted "a brief of evidence from the defendant was not on the file" and that "the absence of a defendant's witness brief compromised defence counsel's performance".

[92] It is difficult to say whether a member of the public would have any expectation specifically about the preparation of a brief. However, based on the evidence of the Judge, as well as the senior prosecutor, the investigator and the lawyer members of the Committee, who must be taken to be of good standing, there are grounds to say that Mr OX's failure to prepare a brief stands out as a failing that they regarded as being unacceptable according to the standard in s 12(b).

[93] In reality, it may not always be possible or necessary to prepare a written brief, or to have a client sign and date that. Expediency and cost might be factors that weigh against preparing a written brief in some circumstances, but those are far less likely to apply to the type of complex criminal matter in which Mr OX was instructed over a period of some months. There is no compelling reason for Mr OX not to have prepared a brief, and there are good reasons for him to have done so, beyond whether he was fully instructed and had a comprehensive knowledge of his client's case.

[94] Mr OX was not the first counsel instructed. He was assigned as counsel after charges had been laid, the prosecution had largely completed disclosure and when his client ran out of money to pay his previous lawyer. Mr OX says the first thing he asked his client to do was to record his instructions in respect of each of the charges, and he did so in quite some detail. Mr OX says he was mindful of those instructions in assessing whether there were any internal inconsistencies in his client's evidence, and between the prosecution case as disclosure emerged. Mr OX says that based on his client's instructions he provided advice on plea in relation to each of the charges, and his analysis and assessment of all the evidence. However, Mr OX accepts he did not prepare a formal written brief signed by his client and put forward a number of explanations for not having done so, all of which I have carefully considered.

[95] Concerns around the preparation of the brief focus on the method by which lawyers customarily capture evidence. Evidence is the currency of the Court. Capturing a client's version of the events on which the charges are based, even before full disclosure is provided, can have advantages. For one thing it helps to inform the

lawyer if evidence is being concocted to meet the prosecution case. No lawyer should be a party to the falsification of evidence.

[96] Whether instructions in the form of a written brief or otherwise are disclosed outside the bounds of the relationship between lawyer and client in the criminal process, is only part of the picture. However, I note the investigator's report records Mr CK saying that the defendant was going to take the stand as the only defence witness. The client may well have been assisted by having a comprehensive written brief available for his own reference while giving evidence.

[97] The fact that Mr OX's client appears to have been unconcerned about the way in which Mr OX prepared for and conducted his defence would not prevent him from mounting an appeal based on counsel competence if he had been found guilty, or from making a negligence claim. Mr OX could not have acted. Fresh counsel would have been obliged to point out any grounds that could be relied on in support of the defendant's claims, regardless of where Mr OX's interests might lay. Mr BD's comments to the investigator indicate the defence was not best served by the lack of a written brief.

[98] Any conflict over whether Mr OX had acted according to his client's instructions, or in his best interests, and what those instructions or interests were, would best be resolved by reference to a signed and dated brief. Mr OX could have protected his own interests while minimising or avoiding any risk that in protecting himself, he might abuse the confidence and trust that sat at the heart of his relationship with his client, by preparing a brief based on his client's instructions and having his client sign and date it.

[99] So while I have not been referred to any immutable rule, there are good reasons in favour of documenting a client's instructions in a written brief. While emails and notes are helpful, they are not a hallmark of professionalism in preparing for the jury trial in which Mr OX was assigned as counsel.

[100] There is evidence that supports a determination that Mr OX's preparation for and conduct of the trial, fell below a proper professional standard beyond the failure to prepare a brief. Weighing the views expressed by the Judge, the senior prosecutor, Mr BD and the investigator against the evidence and submissions put for Mr OX, it is more likely than not that the deficiencies in Mr OX's conduct of the aborted jury trial

collectively, fell below the standard of professionalism that would be regarded by lawyers of good standing as being acceptable.

[101] It is particularly important where an accused's liberty is at risk that minimum standards are met and preferably exceeded. Only lawyers have the status to appear as an advocate for any other person before a New Zealand court. That work is an area reserved to lawyers under the Act. If Mr OX had heeded to his own misgivings at the outset, the unfortunate series of events that followed could have been avoided. Mr OX's preparation for and conduct of the defence was conduct that occurred at a time he was providing regulated services and is conduct that would be, and was, regarded by lawyers of good standing as being unprofessional and unacceptable.

[102] The second determination of unsatisfactory conduct is modified accordingly to record that there has been unsatisfactory conduct on the part of Mr OX pursuant to s 12(b) of the Act.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision is modified to record that there has been unsatisfactory conduct on Mr OX's part pursuant to s 12(b) in:

(a) Accepting an assignment that he knew was beyond his competence was conduct of Mr OX that occurred at a time when he was providing regulated services and is conduct that would be regarded by lawyers of good standing as being unprofessional and unacceptable; and

(b) Mr OX's preparation for and conduct of the defence was conduct that occurred at a time when he was providing regulated services and is conduct that would be regarded by lawyers of good standing as being unprofessional and unacceptable. .

DATED this 4th day of October 2016

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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 OX as the Applicant
[XX] Standards Committee
Mr KZ as the Representative of the Respondent
The New Zealand Law Society
Secretary for Justice