LCRO 51/2014

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	**ZA** Applicant
AND	**OL** Respondent

DECISION

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

Introduction

[1] Mr [ZA] has applied for review of a decision by the [XX] Standards Committee dated 18 February 2014 in which the Committee decided to take no further action on Mr [ZA]'s complaint about Mr [OL]'s conduct, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). The Committee formed the view that all aspects of the subject matter of the complaint were trivial. It reasoned that rules relating to court proceedings may not apply to complaints, but if they do, Mr [OL]'s conduct may be authorised by rule 13.5.3.

Background

[2] Mr [OL] is a former partner of, and consultant to, [The Law Firm] (the firm). Mr [YB] is a partner of the firm.

[3] In early December 2012 Mr [ZA]'s chambers sent an authority to act for Ms [RI] to the firm, and sought to uplift Ms [RI]'s file from Mr [YB]. Mr [YB] did not pass on Ms [RI]'s materials as promptly as Mr [ZA] expected. There was tension.

[4] Mr [OL] drafted an office memo dated 7 December 2012, addressed to the firm, recording in three pages his observations of the firm's litigation team which included Mr [YB] and his assistant Ms [QJ] on 6 and 7 December 2012, (the memo).

[5] In the course and wake of the uplift, complaints were laid to the New Zealand Law Society (NZLS), first by Mr [ZA], then by Mr [YB] (complaint file 6952), then again by Mr [ZA], each articulating concerns about the other's professional conduct.

[6] The complaints processes unfolded, and in response to a notice of hearing, issued by the Standards Committee in complaint file 6952, Mr [OL] provided the Complaints Service with a two-page submission dated 30 September 2013 on behalf of Mr [YB] (Mr [OL]'s submission). Mr [OL] submitted that Mr [YB] relied on the facts set out in his letter to NZLS of 6 June 2013, and made no submission as to whether Mr [ZA] should face charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[7] In the event that the Committee were to make a finding of unsatisfactory conduct, Mr [OL] submitted the Committee might direct Mr [ZA] to apologise and retract comments he is said to have made to Mr [YB] and his assistant, Ms [QJ]. In general, Mr [OL] submitted the Committee should otherwise impose penalty orders pursuant to s 156 as it saw fit. Paragraph 4 of Mr [OL]'s submission says:

> As to the possibility of the publication of [ZA]'s name and the facts of the case, if there is a finding of unsatisfactory conduct: it is submitted that is a matter for the Committee. However, it is further submitted that, at least in the view of this counsel, who is a senior member of the legal profession, such discourtesies are to be discouraged, and publication of [ZA]'s name in this context may tend to that effect

[8] On 25 October 2013 Mr [ZA] sent an email to NZLS saying he wished to lodge a formal complaint against Mr [OL].

Complaint

[9] Mr [ZA]'s complaint says:

> … Mr [OL] is acting as counsel for a Mr [YB] in a disciplinary complaint that practitioner has lodged against me. The matter is set for a [Day Month Year] hearing, and Mr [OL] lodged submissions on behalf of his client, which I ATTACH as **1 & 2**.
>
> There are first two related issues raised:

- In paragraph 4 he expresses his personal views which is contrary to Appendix "A", R 13.5.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008: "[a] lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey, or appear to convey the lawyer's personal opinion on the merits of that evidence or issue." Thus, his factual expression in this fashion was improper.

- Legally, he also was incompetent in making submissions without the relevant authority that applied, being Appendix "B", r 30(2) of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008. To accept a brief to make submissions on potential penalty against a colleague, and not have the sufficient knowledge base any area of law to know there is a specific framework in place that deals with publication is, in my submission, improper, especially as there is high profile litigation on this point that has gone to the superior courts for years, *New Zealand Law Society v B* [2013] NZAR 970 (CA).

The combination of this has caused me prejudice in that the Committee is being asked to improperly consider evidence from the bar and also misled as to the correct legal analysis to apply. This has the clear potential of denying me a fair hearing. Additionally, I have had to unnecessarily waste time and effort to make a further submission as to why ¶ 4 is improper and should not be read. It is especially of concern that a senior counsel would be unaware of these basic rules and regulations.

Finally, he is a witness in the matter in dispute, and as such should not have taken the brief as counsel, rr 13.5, 13.5.1, inter alia refer. I attach as **3, 4 & 5** proof of his status as a pertinent witness in the form of a file note made. A large part of the complaint against me that I distressed Mr [YB] and/or his secretary. Mr [OL] has given first-hand evidence of that. Additionally, his file note is used as contemporaneous evidence in the complaint against me. He has thus tendered both viva voce as it were and documentary evidence in the file and thus should not be acting as advocate…

[10] The attachments were copies of Mr [OL]'s submission; rules 13.5–13.5.4; regulation 30, and the memo.

Practitioner's response

[11] Mr [OL] responded on 5 November 2013, saying:

…

2. In relation to the first issue raised by [ZA], relating to the writer conveying a personal opinion on his submissions:

   2.1 One would have thought [ZA] might merely have objected and left the Committee to deal with the matter one way or the other.

   2.2 Instead, he has raised a Law Society complaint as against the writer and, in doing so, appears to have constituted the writer a litigant in person in all of this. As such, the writer comments that

> such a course of conduct serves only to reinforce the writer's comments in paragraph 4 of the submission.
>
> 3. In relation to [ZA]'s second point about Rule 30(2) of the Regulations, it would appear to the writer that the paragraph for comment addresses the public interest; it being for [ZA], no doubt, to address items (2)(a) to (e).
>
> 4. Finally, in terms of the writer giving evidence from the bar, [ZA] is of course entitled to object, and the Committee is entitled to address such an objection as it sees fit.

Mr [ZA]'s response

[12] On 20 November 2013 Mr [ZA] responded by email. Under the heading "Personal Views" Mr [ZA] said that Mr [OL] had not addressed the allegations he had made.

[13] Mr [ZA] says a failure to address the substance of an allegation that Mr [OL] had expressed his personal views at paragraph 4 of his submissions equates to a refusal to meaningfully participate in the complaints process. Mr [ZA] relies on *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee (2))* HC Hamilton CIV-2010–419–1209, 20 December 2010, *Hart v Auckland Standards Committee of New Zealand Law Society* [2013] NZHC 83 and *Auckland Standards Committee No 1 v Hart* [2012] NZLCDT 26, which Mr [ZA] says are "all authority that practitioners under investigation must be cooperative with the regulatory mechanisms".

[14] Mr [ZA] said Mr [OL]'s failure to address one of the main allegations in his complaint was improper, and leads to the inevitable inference that Mr [OL] "must be taken to concede that he has a case to answer such that the matter should proceed to a hearing".

[15] Under the heading "Lack of Due Diligence" Mr [ZA] says Mr [OL] had provided no evidence or other indication that he was actually aware of the regulation, and therefore "competent". Mr [ZA] expressed the view that "it would be very peculiar indeed for a senior practitioner to not cite a relevant regulation", and says that "must be taken to mean that he accepts he failed to properly put forward his client's submissions". Mr [ZA] considers that allegation should also proceed to hearing.

[16] Under the subheading "Evidence from the Bar", Mr [ZA] says Mr [OL] did not address the ground of complaint, so must be taken to accept it. In the circumstances, Mr [ZA] considers that aspect of the matter should also proceed to a hearing.

Standards Committee Decision

[17] The Committee considered the parties' correspondence and supporting materials, summarising the complaint as alleged contraventions of rules 13.5, 13.5.1, 13.5.4, and incompetence. The Committee considered whether the conduct fell under rule 13.5, and whether the conduct of itself warranted further disciplinary action.

[18] As to rule 13.5, the Committee observed that rule may cover only conduct in court proceedings, but that if it did apply to the complaint process, rule 13.5.3 provides for an exception where a lawyer acts for him or herself, or for a member of the practice whose actions are in issue.

[19] In any event, the Committee decided that further disciplinary consideration was not warranted because the subject matter of the complaint was trivial.

[20] As mentioned above, the Committee decided further action on Mr [ZA]'s complaint was unnecessary or inappropriate.

[21] Mr [ZA] objected to the Committee's decision, and has applied for a review.

Application for review

[22] On 7 March 2014 Mr [ZA] applied for a review on the following grounds:

a. The Committee erred in law in determining that "proceedings" did not include law society complaints when the Court of Appeal has already rejected that argument in *Teletax Consultants Ltd v Williams* [1989] NZLR 698 (CA) at Annexure "A".

b. The Committee erred in law determining that the Respondent giving his personal views in evidence from the bar was trivial because the ethical rule in question (and more importantly, policy behind it) is for the purpose of maintaining lawyer independence and objectivity which cannot be trivial, see e.g. *Orlov v National Standards Committee No.1* [2014] NZ HC 257 at Annexure "B";

c. The Committee erred in fact in determining that the Respondent giving his personal views in evidence from the bar was trivial because I was ultimately found to have committed unsatisfactory conduct against his client, which was potentially partly based on this irrelevant consideration, thus manifestly prejudicing me;

d. The Committee made a mistake in fact in determining that Mr [YB] (a principal) and the Respondent (a consultant), were in a de jure partnership, thus wrongly invoking Rule 13.5.3.

[23] Mr [ZA] asks that the decision be reversed, or remitted to a differently constituted Committee for reconsideration or for this Office to make a "de novo decision as to the ethics or otherwise of Mr [OL]'s actions".

Review Hearing

[24] Mr [ZA] attended an applicant only review hearing on 23 October 2015. Mr [OL] was not required to attend and the review hearing proceeded in his absence.

Recusal Application

[25] At the review hearing Mr [ZA] requested an adjournment and asked that I recuse myself from conducting this, and three other, review hearings also conducted on [Day Month Year]. The adjournment and recusal applications were declined. The request for an adjournment was declined because this hearing was one of four, and administrative convenience favoured continuing with the review hearings. There was no prejudice to Mr [ZA] at the time from continuing with the review hearing because I expressly left it open to him to refresh his application for my recusal, with assistance from independent counsel if he so wished, which was one of the main reasons he wanted the hearings adjourned.

[26] The recusal application was declined because Mr [ZA] failed to make out grounds pursuant to the test in *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72. Although Mr [ZA] has generally requested that I have no further involvement in the conduct of any review involving him as a party, and has applied for my recusal from the three related review applications, he has not identified this application for review as an LCRO file in respect of which he wishes to apply for my recusal. In the circumstances there is no extant recusal application to be dealt with in relation to this application for review, and no reason for me to recuse myself.

Nature and Scope of Review

[27] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … 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.
>
> 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" …
>
> … 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.

[28] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

[29] 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

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

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1 [redacted]

2 [redacted]

Analysis of review grounds

[30] Before engaging in a detailed analysis of the review grounds it is relevant to note s 151(1) of the Act which says:

> A Standards Committee may receive in evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not the statement, document, information, or matter would be admissible in a court of law.

[31] Concerns over the contents of Mr [OL]'s submissions therefore appear misplaced in the context of the Standards Committee process. However, in an endeavour to avoid an "unrequited sense of grievance",[3] what follows responds to the reasons why Mr [ZA] has requested this review, and to the substance of the complaint.

First and Fourth Review Grounds

[32] Mr [ZA]'s first concern is that the Committee erred in law in determining that "proceedings" did not include law society complaints. Mr [ZA] relies on the Court of Appeal decision in *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA) as authority for his position. Mr [ZA] may or may not be right, but this Office does not determine questions of law.

[33] I note, however, that the first review ground misquotes the decision. The Committee did not say that rule 13.5 et seq did not include law society complaints. The Committee said those rules "may not apply to complaints", and "may only apply to court proceedings". There may or may not be room for that view, but I note that *Teletax* predates the Act by some years.

[34] In any event, on the basis that Mr [OL]'s conduct in the complaint process under the Act may be regulated by rule 13.5 et seq as asserted by Mr [ZA] in his complaint, the Committee formed the view that Mr [OL] would be relieved of the operation of the rule because of the exception provided by rule 13.5.3.

[35] Rule 13.5.3 says:

> A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the

[3] At [32].

> court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.

[36] The fourth review ground also relates to rule 13.5.3, asserting that the Committee made a mistake of fact in determining that Mr [YB] (a principal) and the respondent (a consultant), were in a de jure partnership, thus wrongly invoking rule 13.5.3.

[37] The first point in addressing that ground is that Mr [ZA] referred to rules "13.5, 13.5.1 et alia" in his complaint. It is therefore difficult to see how it could be argued that the Committee invoked rule 13.5.3.

[38] Second, I have been unable to identify any mention of a partnership between Mr [OL] and Mr [YB] in the decision.

[39] Third, rule 13.5.3 does not refer to partnerships. It refers to members of the same "practice" which encompasses a broader range of relationships.

[40] Mr [YB]'s and Mr [OL]'s names both appear on the firm's letterhead, Mr [YB] as a partner, Mr [OL] as a consultant. Assuming for the purposes of this review, as the Committee assumed in addressing the complaint, that rules 13.5 et seq may apply, it may be that rule 13.5.3 would apply to lawyers in a similar position to Mr [YB] and Mr [OL] apparently as members of the same practice, regardless of the business model under which the practice operates.

[41] The circumstances give rise to no cogent reason to hypothesise further over the issues raised by the first and fourth review grounds on review.

Second Review Ground

[42] The second review ground is that the Committee erred in law determining that it was trivial for Mr [OL] to have given his personal views in evidence from the bar. Mr [ZA] relies on the policy and purpose of maintaining lawyer independence and objectivity behind rule 13.5, which Mr [ZA] says placing reliance on *Orlov,* cannot be trivial.

[43] There is so little meaningful comparison to be drawn between Mr [OL]'s conduct and the conduct under consideration in *Orlov* that reasoning by analogy is unsafe.

[44] The real question is whether Mr [OL]'s submissions give rise to an issue that warrants a disciplinary response. That question is addressed in greater detail in the Discussion section below. It is also relevant to note the breadth of material a Committee may consider under s 151 when determining this review ground, and the discretion that section accords to a Committee.

Third Review Ground

[45] The third ground for review alleges the Committee made an error of fact. It is implicit in that ground that the error was material. Mr [ZA] says the materiality relates to the complaint Mr [YB] made that resulted in a finding by the Committee that Mr [ZA]'s conduct had been unsatisfactory in his dealings with Mr [YB] over matters relating to the uplift request. Mr [ZA] says that an adverse disciplinary outcome is prejudicial to him, and in that regard I note the High Court's comment that:[4]

> In professional discipline cases I simply note that the interests at stake, namely professional reputations, can reasonably be expected to be keenly felt by the participants.

[46] It is open to a committee to form a view that the subject matter of a complaint is trivial, and to decide to take no action or no further action on a complaint on that basis pursuant to s 138(1)(b). Given the wide range of conduct that comes before committees, and the collective nature of the decision making that takes place in that environment, it is not difficult to see how that view could have been formed of the complaint made in this case. One does not have to look very hard at the materials to conclude that Mr [OL]'s conduct falls a long way short of the more serious types of conduct that come before Committees and this Office.

[47] Equally it is difficult to envisage anyone, particularly a lawyer, who would want their keenly felt interests to be dismissed as trivial. However, it is not Mr [ZA]'s interests that are under consideration in this review application: it is Mr [OL]'s interests

[4] At [9].

that are at stake because it is Mr [OL]'s conduct that is the subject of the complaint. Mr [ZA]'s interests are addressed elsewhere.[5]

[48] The focus of this application for review is on Mr [OL]'s conduct, and whether that warrants a disciplinary response.

Discussion

[49] There is no dispute that Mr [OL] filed submissions on behalf of Mr [YB] in respect of NZLS complaint file 6952.

[50] Mr [OL]'s submissions included a submission in support of publication of Mr [ZA]'s name that was based on Mr [OL]'s personal opinion "that at least in the view of this counsel, … such discourtesies are to be discouraged". There is nothing objectionable in the general thrust of that submission: that discourtesy between practitioners is to be discouraged. It could be put on a more positive basis: that courtesy between practitioners is to be encouraged. Respect and courtesy are required by rule 10.1. Whether in fact Mr [ZA] had been disrespectful or discourteous towards Mr [YB] was a question of fact and degree for the Committee to determine. Mr [OL] expressly left the facts for the Committee to determine based on the evidence.[6]

[51] It would be meaningless to say that Mr [OL] could have phrased his submissions differently: of course he could. Mr [OL] also qualified himself as "a senior member of the legal profession". There can have been no reason for him to have done that other than to lend weight to his submission. Weight is for a decision-maker to assess.

[52] That is not to say the submission had the desired effect on the Committee, or that Mr [OL] led the Committee astray in any way. His name was on the firm's letterhead along with Mr [YB]'s for all to see, including members of the Committee. There was no subterfuge: the connection between the two men is difficult to overlook.

[53] Along with the complaint and Mr [OL]'s submission Mr [ZA] provided a copy of the memo. It is not clear how Mr [ZA] obtained a copy of the memo, which appears to be a document that is private to the firm. However, obtain it he did. He then passed it

[5] LCRO [redacted] (Unpublished).
[6] Submissions [OL] to NZLS (30 September 2013) at [1].

on to NZLS in support of his complaint. No claims to privilege or confidentiality have been made on review.

[54] The purpose of the memo was "to record Mr [OL]'s observations of stress levels of the litigation team" at the firm on [Days Month Year]. It is clear from the memo that there is a reasonably close professional relationship between Mr [OL] and Mr [YB]. It is also clear that Mr [OL] had formed a fairly dim view of Mr [ZA]'s conduct towards Ms [QJ] and Mr [YB], and lamented his perception of a progressive net loss of collegiality between lawyers over his years in practice.

[55] In the circumstances, should Mr [OL] have put his view to the Committee in his submissions?

[56] Perhaps. Perhaps not.

[57] Does the fact that he put a view warrant a disciplinary response?

[58] The Committee's view, constituted as it is of lawyers and a lay person, was that it does not. Whether the Committee considered any part of Mr [OL]'s submissions were of assistance to it in determining the complaint is a matter for its discretion pursuant to s 151.

[59] Mr [ZA] thinks Mr [OL]'s conduct warrants a disciplinary response because he thinks it had consequences for him in Mr [YB]'s complaint about his conduct. That conclusion relies on too many unsupported links in a complex chain of causality.

[60] Mr [OL] could have kept out of it. He did not. He stood up for his colleague. That was the collegial thing to do, but did his conduct fall below a proper professional standard?

[61] Section 151 expressly allows a Committee a wide discretion over the evidence it receives. Committees can consider statements, documents, information, or any matter. The important point for the Committee is the focus on that which assists it "to deal effectively with the matters before it". Committees are not bound by the rules of evidence in the same way that courts of law are. There is often no clear distinction between evidence and submission in the complaint processes, or for that matter, on

review. The circumstances are not such as to warrant a finding that Mr [OL]'s conduct was unsatisfactory.

[62] There is no real substance to the concerns Mr [ZA] raised in the course of the complaints process over Mr [OL]'s cooperation, or what might be inferred from a failure to respond. It is difficult to envisage what more Mr [OL] could usefully have added. The conduct was documented and uncontested. Mr [OL]'s submissions speak for themselves. Reliance on *Parlane* and *Hart* casts the net too wide.

[63] I have considered all of the materials available, including the parties' responses to the Committee, and am satisfied nothing arises from the materials that warrants further comment on review. Further action is not necessary or appropriate.

[64] While Mr [ZA] may feel the consequences to him cannot be described as trivial, the focus of the disciplinary inquiry is on the conduct, not its consequences. Mr [OL]'s conduct, the subject matter of the complaint, is best categorised as possibly among the most minor of slips, if indeed it is a slip at all. In the circumstances my view, like that of the Committee, is that the subject matter of the complaint is trivial. That is another good reason to take no further action on the complaint.

Decision

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

DATED this 2nd day of September 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 [ZA] as the Applicant
Mr [OL] as the Respondent
Ms [VE] as a related party as per section 213
[XX] Standards Committee
The New Zealand Law Society