

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2022] NZLCRO 156

Ref: LCRO 8/2020

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

PA

Applicant

AND

ZN

Respondent

DECISION

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

Introduction

[1] Mr PA has applied to review a determination by the [Area] Standards Committee [X] (the Committee) dated 3 December 2019, in which the Committee made a finding of unsatisfactory conduct against him.

[2] This followed an extensive complaint that Mr ZN had made about Mr PA.

[3] The Committee found that Mr PA had breached rr 2 and 13.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

Specifically, that in 2016 and 2017 he had sworn two affidavits in proceedings which were inaccurate and could potentially have misled the court.¹

[4] By way of penalty, the Committee censured Mr PA and ordered him to pay a fine of \$7,500 together with costs of \$2,500.²

Background

[5] The Committee's determination referred to the "long, complicated and ... disputed history between Mr PA, and Mr ZN".³

[6] More specifically, the Committee explained it in this way:

[6] Mr ZN has been involved in a myriad of legal disputes, on different subject matters and in different forums. The (disputed) history between Mr ZN and Mr PA has been thoroughly traversed in the complaint correspondence before this Committee, and in the various court proceedings.

[7] Nevertheless, the relevant background to the Committee's finding of unsatisfactory conduct against Mr PA, and to his review application, may be simply stated.

[8] In litigation initiated by Mr ZN against [Company A], a company owned by Mr PA and his wife (the liquidation proceedings), Mr PA swore an affidavit on 23 June 2016 (the 2016 affidavit), in which he deposed the following at paragraph [20]:

I have not acted for Mr ZN in any professional capacity as a lawyer. I have always referred his [sic] to other lawyers for the specialist legal advice that he required from the [sic] time to time.

[9] In later bankruptcy proceedings against Mr ZN, initiated by [Company A], Mr PA swore an affidavit on 18 October 2017 (the 2017 affidavit) in which he deposed at paragraph [20] (the bankruptcy proceedings):

I have no knowledge of and do not make any comment on Mr ZN's Family Court matters.

¹ Rule 2 of the Rules requires a lawyer to uphold the rule of law and facilitate the administration of justice. Rule 13.1 of the Rules creates a duty of absolute honesty to the court, and directs that a lawyer must not mislead or deceive the court.

² In its Notice of Hearing, the Committee identified a number of conduct issues arising out of Mr ZN's complaint, including Mr ZN's assertion that he had been Mr PA's client in several different matters. The conduct issues identified by the Committee included whether Mr PA had breached any fiduciary or other duties to Mr ZN. The Committee took no further action on all of those issues of complaint. Mr ZN has not applied to review those dismissals. Accordingly, this decision focuses on the findings of unsatisfactory conduct that were made against Mr PA, and which were confined to the 2016 and 2017 affidavits that he had been sworn.

³ Standards Committee determination (3 December 2019) at [6].

[10] Mr ZN's position throughout the various litigation between himself and [Company A] has been that Mr PA was his lawyer in various matters over a long period of time.

[11] In one instance, during June 2014, Mr PA filed an appeal on Mr ZN's behalf in connection with proceedings in which Mr ZN had been involved in the Family Court. Mr PA had not acted for Mr ZN in the Family Court.

[12] Mr PA terminated the appeal retainer within a matter of days after filing the appeal on Mr ZN's behalf.

Complaint

[13] In a letter to the New Zealand Law Society Lawyers Complaints Service (Complaints Service) dated 5 June 2017, Mr ZN lodged a nine-page complaint about Mr PA's conduct.⁴

[14] Relevant to the issues engaged by Mr PA's review application, Mr ZN said:

- (a) Mr PA has been paid for legal advice and representation, including in relation to 3 separate civil proceedings. He was first paid by Mr ZN on 9 April 2010.
- (b) When Mr ZN first met Mr PA, he spoke to Mr PA at length about his then Family Court matters. Mr PA gave regular advice about that.
- (c) Relationship property litigation resulted in the Family Court, in early 2014, ordering unequal division in favour of Mr ZN's former wife.
- (d) Mr PA suggested that Mr ZN appeal the decision. Mr PA asked Mr ZN to confirm that he would not hold Mr PA responsible for any negative outcome, as the work was outside Mr PA's normal field of expertise.
- (e) Mr PA then withdrew from acting in the appeal without informing Mr ZN. Eventually the appeal was heard, and Mr ZN was unsuccessful.
- (f) Mr PA and Mr ZN then fell out over a business arrangement involving two vehicles.

⁴ The date on Mr ZN's letter of complaint is incorrect and should be 4 June 2018. It was received by the Complaints Service on 5 June 2018.

- (g) In debt recovery proceedings brought by Mr ZN against [Company A] during 2016, which became the liquidation proceedings, [Company A] successfully defended the claim and avoided liquidation.
- (h) [Company A] was awarded costs in the liquidation proceedings. It sought recovery of those costs from Mr ZN.
- (i) Proceedings connected with the original debt were then commenced by Mr ZN against [Company A] (the District Court proceedings). Mr ZN was let down by his lawyer (Mr P) and once again ordered to pay costs to [Company A].
- (j) Eventually, and without Mr ZN's knowledge (he having been let down again by Mr P), the court adjudicated him bankrupt in September 2017.
- (k) Mr PA and Mr P had previously been in partnership and had bitterly fallen out with one another.
- (l) In the liquidation proceedings and the later bankruptcy proceedings Mr PA swore two affidavits, and in each said that he had never acted for Mr ZN. "This [was] an outright lie."

[15] Mr ZN supplemented his complaint with extensive supporting material.

Response

[16] Mr FY KC provided the Committee with detailed submissions in his Memorandum dated 19 February 2019.

[17] As well, Mr FY provided the Committee with a statement signed by Mr PA on 21 February 2019. Mr PA's statement specifically responded to the Committee's Notice of Hearing.

[18] Relevant to the issues on review (the 2016 in 2017 affidavits), Mr FY submitted:⁵

- (a) In relation to the 2016 affidavit, Mr PA filed it "under pressure of time."
- (b) The question of whether Mr PA had ever acted for Mr ZN, had no bearing on the issues in the [Company A] litigation.

⁵ Memorandum of submissions by Mr FY (19 February 2019) at [33] and following.

- (c) Nevertheless, Mr PA acknowledges that paragraph [20] of the 2016 affidavit “was incorrect” (to the extent acknowledged by Mr PA in his statement to the Committee).
- (d) The inaccuracy “was inadvertent” and Mr PA “had no intention of misleading the Court.”
- (e) In relation to the 2017 affidavit, nothing deposed to by Mr PA was either false or misleading.

[19] In supplementary submissions filed by Mr FY, and responding to a request from the Committee, he addressed the application of rr 2, 11.1, 13.1 and 13.10 of the Rules, to Mr PA’s conduct in relation to the 2016 and 2017 affidavits.⁶

[20] In simple terms, Mr FY’s submissions were that when Mr PA swore the affidavits, “he was not ... acting in the capacity of a ‘lawyer’ [and] he was under none of the duties in question.”

[21] In particular, r 13.1 of the Rules applies when a lawyer is acting in litigation.

Mr PA’s statement

[22] In relation to the circumstances of Mr PA swearing the 2016 affidavit, it bears setting out in full Mr PA’s description of the earlier background:

7. [Mr GP, then a practising lawyer, was acting for Mr ZN in early 2014]. In June 2014, Mr GP was suspended from legal practice. I was his nominated attorney under his practice power of attorney. In late July 2014, Mr ZN turned up at my house on the last day for filing an appeal against a Family Court judgment, which had gone against him. Mr ZN told me that Mr GP was not responding to his communications and he could not find another lawyer to help and lodge the appeal.
8. I consider that I had a legal and professional obligation to assist Mr ZN in my capacity as Mr GP’s attorney and also as a friend. However, I told Mr ZN that he would need to find new counsel from then on, due to my lack of expertise in family law. I helped Mr ZN lodge the appeal because there seemed to be no alternative. The appeal was filed in my name and provided my firm as address for service because Mr GP had been suspended and the papers could not go in his name. ... At the time I made it plain to Mr ZN that he would need to retain specialist counsel to conduct the appeal. I did not charge Mr ZN for my services.
9. ... [M]atters came to a head a mere three days after the creation and filing of the notice of appeal. ...[T]here were email exchanges between Mr ZN and me in which I confirmed to him that I had to withdraw as counsel “due to my health and your inability to follow instructions.” ...

⁶ Given that the Committee found breaches of rr 2 and 13.1 of the Rules, I will not set out Mr FY’s submissions in relation to the other rules initially identified by the Committee.

10. ... I ceased acting for Mr ZN within days of the lodging of his appeal, when there was obviously at that time no appeal hearing pending. I had also made it plain to Mr ZN that I was merely helping him out on an interim basis and would not be available to conduct the appeal owing to my lack of expertise in the area.

...

23. At the time I swore [the 2016 affidavit] the [occasion] referred to in ... paras 7 – 10 [of this statement] ... had completely slipped my mind. I was filing [the 2016 affidavit] under pressure of time resulting from Mr ZN's earlier failure properly to serve notices and proceedings on [Company A], necessitating an urgent application to the High Court to stay Mr ZN's liquidation proceedings against [Company A]. [The 2016 affidavit] outlined the position in that regard.
24. The proceedings in which I swore [the 2016 affidavit] ... were High Court proceedings between Mr ZN and [Company A], in which the precise nature of the earlier relationship or relationships between Mr ZN and me were not a relevant question.

[23] In relation to the 2017 affidavit, Mr PA said that he was responding to specific matters that had been raised by Mr ZN in his evidence. Those matters concerned Mr ZN's reference to Family Court matters in which Mr GP had been acting, and about which Mr PA said he had no knowledge.

[24] Mr PA said that for that reason it could not be said that the 2017 affidavit was either deceptive or misleading.

Standards Committee decision

[25] As indicated by me earlier in this decision, the Committee took no further action on the bulk of Mr ZN's complaints about Mr PA's conduct. Because Mr ZN has not applied to review those aspects of the Committee's determination, I do not propose to set out the Committee's summary and conclusions about those issues.

[26] Relevant to this review application, which concerns the unsatisfactory conduct findings in relation to the two affidavits sworn by Mr PA, the Committee identified the conduct issues to be determined, as follows:⁷

Issues pertaining to Mr ZN's complaint that Mr PA committed perjury, breached his absolute duty of honesty and/or misled the Court, and filed fabricated documents in court; (rr 2, 11.1, 13.1, and 13.10)

- (f) Whether Mr PA's conduct was misleading and deceptive [in relation to paragraph [20] of the 2016 affidavit];
- (g) Whether Mr PA's conduct was misleading and deceptive [in relation to paragraph [20] of the 2017 affidavit];

⁷ At [14] and [20].

- (h) Whether the nature and gravity of any of the allegations ... approach the threshold of unsatisfactory conduct or misconduct under the Act.

And:

Did Mr PA breach any duties as an officer of the court?

[27] The Committee noted the following:

[25] Ultimately, the Committee considered there was only one instance of a short period for which it could conclude with any certainty there was an agreed lawyer-client relationship between Mr PA and Mr ZN. That period was when Mr PA filed the notice of appeal and the Family Proceedings Appeal in the High Court [on 25 July 2014].

[26] Mr PA accepted that he acted for Mr ZN in that instance. He said he acted on an urgent basis as an alternate for [Mr ZN's counsel at the time]. Mr PA said he filed a notice of appeal to preserve Mr ZN's position, and did not charge for the work done. Just three days later, the retainer was terminated. Mr PA advised Mr ZN that he had to withdraw, "due to my health and your inability to follow instructions".

[28] In relation to both the 2016 and 2017 affidavits (paragraph 20 of each), the Committee said that it "considered such statements to be misleading" and that Mr PA's "initial responses to the [Complaints Service] about those affidavits [were] unsatisfactory and contradictory."⁸

[29] The Committee found that the rules engaged were rr 2 and 13.1 of the Rules.⁹

[30] In addressing Mr FY's argument that Mr PA was not acting in his capacity as a lawyer when he swore the affidavits, the Committee held that Mr PA was doing "legal work" that was "incidental to other legal work" and was thus connected with the provision of regulated services.¹⁰

[31] Nevertheless, the Committee held that Mr PA's conduct was captured by specific rules, breaches of which can amount to unsatisfactory conduct under s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) for which there is no requirement for regulated services.¹¹

[32] The Committee said the following:

[47] [A] lawyer is always an officer of the court, not only while representing a client, and is obliged to uphold the rule of law in both professional and personal capacities.

⁸ At [38].

⁹ At [39].

¹⁰ At [44].

¹¹ At [45].

[33] The Committee noted that Mr PA accepted that the comments made in the 2016 and 2017 affidavits were incorrect, but inadvertently so because it had “completely slipped [his] mind” that he had represented Mr ZN.¹²

[34] Mr PA’s comments concerned the Committee which said that “the submission of an inaccurate document to the court, which could potentially mislead the court and bring about an unjust outcome, is a very serious issue.” It considered that Mr PA “should have carefully turned his mind to [the long history between himself and Mr ZN] before swearing his affidavits” and that he had failed to do so.¹³

[35] It was the Committee’s view that there had been “a reckless disregard as to the accuracy of the information conveyed to the court” and that Mr PA had failed to facilitate the administration of justice and had failed in his duty not to mislead the court, contrary to rr 2 and 13.1 of the Rules.¹⁴

[36] The Committee held that this was unsatisfactory conduct. By way of penalty the Committee:

- (a) Censured Mr PA.
- (b) Ordered Mr PA to pay a fine of \$7,500.
- (c) Ordered Mr PA to pay costs of \$2,500.

Review Application

[37] Through his counsel Mr FY KC, Mr PA filed his application for review on 7 January 2020. In summary, Mr FY submitted:

- (a) The Committee erred in fact and law by concluding that statements in the 2016 and 2017 affidavits were misleading and/or made with a reckless disregard as to the accuracy of the information being conveyed to the court.
- (b) The Committee erred in fact in law by characterising the relevant passages of the 2016 and 2017 affidavits as a failure by Mr PA to facilitate the administration of justice, and a failure by him not to mislead the court.

¹² At [49].

¹³ At [50].

¹⁴ At [51].

- (c) The Committee erred in fact and law by holding that rr 2 and 13.1 of the Rules applied to Mr PA when swearing the affidavits in his capacity as a director of [Company A], a litigant in proceedings involving Mr ZN, in which the company was independently represented.
- (d) The Committee erred in fact and law by holding that Mr PA was (or was arguably) providing regulated services when swearing the affidavits.
- (e) The Committee erred in fact and law by concluding that Mr PA's conduct was unsatisfactory, and in relation to the penalties imposed.

[38] Mr FY attached a large number of documents to Mr PA's review application, largely comprising copies of the pleadings in the litigation between Mr ZN and [Company A].¹⁵

Response by Mr ZN

[39] In an email to the Case Manager dated 30 January 2020, Mr ZN responded to Mr PA's review application.

[40] Mr ZN was critical of the Committee's processes and its determination, expressing disappointment that the Committee did not sufficiently investigate his complaint.

[41] Mr ZN said that it was wrong for Mr PA to suggest that he had not provided legal services. He had, in fact, received money in various services in return for legal advice and representation.

Review on the papers

[42] This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Legal Complaints Review Officer to conduct the review on the basis of all information available if the Review Officer considers that the review can be adequately determined in the absence of the parties.

[43] In anticipation of that process being followed, on 4 May 2020, the parties were given an opportunity to make submissions as to whether they wished the review application to proceed by way of a hearing in person, or a hearing on the papers.

¹⁵ In later submissions (18 May 2020), Mr FY expanded upon the matters raised by him in the review application. I mean no discourtesy to Mr FY by not summarising those submissions. They expand upon but do not amend the points raised in the review application lodged in January 2020. Those points have been summarised by me at [30].

[44] The parties were advised that in the absence of any response, it would be assumed that there is no objection to the matter being determined on the papers.

[45] In an email to the Case Manager dated 7 May 2020, Mr FY indicated that, subject to the parties exchanging further written submissions about the substantive review application, Mr PA “would be content with the review being determined ‘on the papers’”.¹⁶

[46] Mr ZN has not provided any response to the Case Manager’s letter dated 4 May 2020.

[47] From the lack of a substantive response from Mr ZN, and consistent with what the parties were advised in the Case Manager’s letter dated 4 May 2020, on the basis of the information available, which I have carefully considered, I concluded that the review may be adequately determined on the papers and in the absence of the parties.

[48] The parties were advised of this by the Case Manager in a letter dated 26 June 2020.

[49] I record that I have carefully read the complaint, the Committee’s decision and the submissions filed in support of the application for review. There are no additional issues or questions in my mind that necessitate any further submission from either party.

Nature and scope of review

[50] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:¹⁷

... 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.

¹⁶ Written submissions were received from Mr FY.

¹⁷ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).

[51] In a later decision, the High Court described a review by a Review Officer in the following way:¹⁸

[2] ... A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee.

...

[19] ... A "review" of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act ... those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].

[20] ... While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.

[21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[52] Given those directions, my approach on this review has been to:

- (a) independently and objectively consider all the available evidence afresh;
- (b) consider the fairness of the substance and process of the Committee's determination;
- (c) form my own opinion about all of those matters.

Discussion

[53] Mr PA's challenge to the Committee's determination can be summarised as follows:

- (a) The relevant comments in both affidavits were not misleading or otherwise recklessly sworn by Mr PA.

¹⁸ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

- (b) Further, Mr PA had not failed to facilitate the administration of justice and had not misled the court.
- (c) When Mr PA swore the 2016 and 2017 affidavits, he did so as a director of [Company A] which was then involved in litigation with Mr ZN.
- (d) Accordingly, Mr PA was not providing regulated services.
- (e) In any event, Mr PA is not guilty of unsatisfactory conduct.

[54] It bears setting out again the relevant passages from the two affidavits:

The 2016 affidavit in the liquidation proceedings

I have not acted for Mr ZN in any professional capacity as a lawyer. I have always referred him to other lawyers for the specialist legal advice that he required from time to time.

The 2017 affidavit in the bankruptcy proceedings

I have no knowledge of and do not make any comment on Mr ZN's Family Court Matters.

[55] It also bears repeating what Mr PA has said about that evidence.

[56] As to the 2016 affidavit, in his submissions in support of Mr PA's review application Mr FY said the following:¹⁹

[19] The position in relation to [the relevant evidence from the 2016 affidavit] was ... that Mr PA was responding to entirely irrelevant complaints made by Mr ZN, based on his assertion that Mr PA had previously acted as his lawyer. In the course of swearing an affidavit in reply under pressure of time and addressing a matter which was of no relevance to the issues then before the High Court, Mr PA did no more than overlook the fact that, for a period of some three days a month short of two years earlier, he had – without charging a fee – helped Mr ZN out when an urgent need arose for Mr ZN to lodge an appeal to the High Court. This was in relation to Family Court proceedings in which Mr PA had not been, and would not thereafter be, otherwise involved.

[20] In his response to the Committee, Mr PA accepted that the first statement was unintentionally accurate by reason of that oversight. However, not only was it dealing with a peripheral issue of no relevance to the matters before the court, it was so treated by the presiding High Court judge at the time. Thus not only was there no intention to mislead the court; the court was not in fact misled. Indeed, given the Committee's focus on Mr PA's alleged duty owed to the High Court as an officer of that court, it is highly significant that the High Court, itself, plainly regarded the error (such as it was) as being of no moment.

[Footnotes omitted]

¹⁹ Mr FY's submissions (18 May 2020).

[57] In relation to the 2017 affidavit, Mr FY submitted:

[22] Mr PA's second statement was made over a year later. ...

[23] The Committee seems to have treated this as a statement to the same effect as the first statement, when quite plainly, especially viewed in proper context, it was not. ...

[24] [Summarising the context of Mr PA swearing the 2017 affidavit] ... Mr ZN had, in an affidavit sworn in support of an application by him to know his bankruptcy adjudication ... made further, completely irrelevant statements, this time about Family Court proceedings he had been involved in, and about the conduct of his (other) lawyers who had been handling those proceedings. All that Mr PA was clearly and expressly stating in response to those statements was that he had no knowledge of the particular matters to which Mr ZN was referring. That statement was not only not misleading (or reckless). It was completely true.

[Footnotes omitted]

[58] As a preliminary point, and because of the conclusion which I ultimately come to about this conduct, I do not consider it necessary for me to determine whether Mr PA was providing regulated services when he swore the two affidavits.

[59] Nevertheless, I tend to agree with the Committee's view of that issue, which is that Mr PA was, in fact, "providing regulated services" when swearing the affidavits.²⁰

[60] Despite the fact that the litigation involved a private company ostensibly operating independently of Mr PA's legal practice, and in which he was a director and shareholder with his wife, there had been a tangled web of lengthy interactions between Messrs PA and ZN going back over six years, by the time that Mr PA had sworn the 2016 affidavit in the liquidation proceedings.

[61] The association between the two men saw significant intermingling of Mr PA as lawyer, Mr PA as landlord, Mr PA as Mr ZN's client and Messrs PA and ZN in a business partnership.

[62] I have little doubt that during the six-year period between the two men first meeting and Mr PA swearing the 2016 affidavit, Mr PA gave Mr ZN legal advice about a variety of matters and on many occasions - despite the fact that at least Mr GP, and possibly a Mr BD, were also from time to time acting for Mr PA.

[63] The fact that Mr PA may not have issued any letter of engagement, or charged a fee, is completely irrelevant to the question of whether he gave legal advice.

²⁰ The Committee discussed – in my view correctly – what is meant by regulated services, at [44] of its determination.

[64] However, untangling that web is not necessary for the specific disciplinary issues that are before me.

[65] As the Committee correctly observed,²¹ lawyers in their personal lives are still expected to maintain particular ethical and professional standards.

[66] That arises in two ways and may be either unsatisfactory conduct, or the more serious misconduct.

[67] A brief explanation follows.

Misconduct in a lawyer's personal life

[68] First, it is important to note that only the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) may make a finding that a lawyer is guilty of misconduct.

[69] In connection with misconduct in a lawyer's personal life – that is to say, conduct that is unconnected with the provision of regulated services – s 7 of the Act provides:

7 Misconduct defined in relation to lawyer and incorporated law firm

(1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm, -

...

(b) Includes— ...

(ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

[70] A recent example of the Tribunal making a finding of unsatisfactory conduct against a lawyer for conduct said to be unconnected with the provision of regulated services, is *Otago Standards Committee v Quentin Duff*.²²

[71] In simple terms, the conduct in question concerned “Mr Duff’s conduct with respect to tax obligations arising in the context of his business affairs, outside his legal practice.”²³

²¹ Standards Committee determination (3 December 2019) at [45] – [48].

²² [2021] NZLCDT 25.

²³ At [1].

Unsatisfactory conduct in a lawyer's personal life

[72] A finding of unsatisfactory conduct may be made by a Standards Committee, a Review Officer or the Tribunal. It is conduct deemed to be less serious than misconduct though nevertheless deserving of a disciplinary sanction.

[73] Unsatisfactory conduct is defined in s 12 of the Act. Sections 12(a), (b) and (d) refer to conduct which occurs at a time when a lawyer is providing regulated services.

[74] Under s12(c) unsatisfactory conduct may nevertheless arise when a lawyer who is not providing regulated services at the time of the conduct in question, contravenes the Act, or any regulations or practice rules made under the Act.

[75] Support for this can be found in *CR v TN* where the Review Officer held:²⁴

[30] It would be wrong to incorporate into section 12(c) a requirement that a lawyer must be providing regulated services before that subsection applies. There can be no suggestion that the difference between ss 12(a) and (b), and s12(c) has arisen through oversight or that it is necessary to read these words in to provide meaning to the subsection. The wording of the subsection is clear, and it differs from the wording of the previous subsections.

[31] On that basis, a lawyer may be exposed to a finding of unsatisfactory conduct if his or her conduct is in breach of the Act, or any of the Rules or Regulations, even if he or she is not providing regulated services. ...

[76] Similarly, in *EA v ABO*, the Review Officer said at [31]:²⁵

... Each of the Rules are clear as to the circumstances in which it applies. In some cases there cannot be a requirement that the conduct in question take place while providing regulated services. For example, Rule 2.8 requires a lawyer to report instances of misconduct. The application of this Rule cannot be restricted to circumstances where a lawyer is providing regulated services. Other Rules are specifically prefaced with words indicating that the lawyer must be providing regulated services before the Rule is to apply – see for example Rule 3 which commences with the words “in providing regulated services to a client...”. It is important therefore to examine each Rule to determine the circumstances in which it is to apply.

Mr PA's conduct

[77] The Committee noted that Mr PA had acknowledged that the relevant paragraphs in both affidavits, were inaccurate.

[78] It is important to deal with that part of the Committee's determination, as a first point.

²⁴ *CR v TN* [2016] NZLCRO 62 (23 November 2016).

²⁵ *EA v ABO* LCRO 237/2010 (29 September 2011).

[79] Mr FY submitted that the Committee was wrong to say that Mr PA had acknowledged that the relevant evidence in both affidavits, was inaccurate.

[80] Mr FY said that Mr PA has only ever acknowledged that paragraph [20] in the 2016 affidavit was inaccurate. Mr PA maintains that all evidence in the 2017 affidavit was truthful and accurate.

2017 affidavit

[81] Mr FY said that it has always been Mr PA's position that his reference in the 2017 affidavit to knowing nothing about Mr ZN's Family Court matters was accurate, in that Mr PA was responding to evidence that Mr ZN had sworn about Family Court matters in which Mr PA had not been involved.

[82] I accept that explanation for the relevant comment in the 2017 affidavit.

[83] To be clear, and paraphrasing slightly what Mr FY has submitted, in the 2017 affidavit, Mr PA was responding specifically to evidence from Mr ZN about particular Family Court matters of which Mr PA deposed that he had no knowledge.

[84] I accept that Mr PA probably thought that the appropriate strategy in responding to Mr ZN's evidence, was in a targeted and relevant way.

[85] Nevertheless, I consider that Mr PA is being a little disingenuous in the way in which he framed his explanation for the evidence in his 2017 affidavit to the Committee, and as part of his review application.

[86] I imagine that if cross-examined about that particular evidence in his 2017 affidavit, Mr PA would have agreed that, amongst the many discussions that he and Mr ZN had over a 5 to 6 year period, there would have been references to Mr ZN's ongoing Family Court litigation; even if those references were superficial and not connected with asking for and giving advice.

[87] Added to that is Mr PA's acknowledgement that – albeit for a relatively brief period of time – he was formally on the record as Mr ZN's lawyer in an appeal from a Family Court decision in 2014.

[88] Nevertheless, I do not consider that there are any disciplinary consequences for Mr PA in relation to the 2017 affidavit, and I respectfully disagree with the Committee's conclusion about that affidavit.

2016 affidavit

[89] Mr PA has agreed that the relevant passage in his 2016 affidavit was inaccurate. He explains the inaccuracy as inadvertent and unintentional. As well, the suggestion seems to be that it was inconsequential.

[90] Having accepted that the passage in question was inaccurate, from a conduct perspective the issue becomes whether there should be a disciplinary consequence for Mr PA.

[91] At the outset I agree that the inaccuracy does not raise the spectre of misconduct under s 7 of the Act, on either the regulated services or personal conduct bases.

[92] This is because the overall circumstances of the inaccuracy were that Mr PA's representation of Mr ZN in the Family Court appeal was limited to three days. Mr PA agreed to put himself on the record so as to enable Mr ZN to have his appeal lodged in time.

[93] Moreover, there does not seem to be any suggestion that Mr PA gave Mr ZN substantive legal advice about the appeal itself. Although I consider that the two men spoke about a range of legal issues over a long period of time and that this included Mr PA giving Mr ZN legal advice, I do accept Mr PA's evidence that he trod warily when it came to family law matters. Indeed, Mr PA has never held himself out as being a specialist in family law.

[94] As indicated, the acknowledged inaccuracy raises the question of whether Mr PA should be held to account because he is a lawyer.

[95] On Mr PA's behalf, Mr FY submits that first, there has been no legislative, regulatory or rules-based breach by Mr PA.

[96] Secondly, if there has been a breach it does not warrant disciplinary response.

[97] As to the submission that there has been no breach by Mr PA, Mr FY submits that, first, Mr PA was not providing regulated services at the time he swore 2016 affidavit and so this narrows the scope of any disciplinary inquiry.

[98] Secondly, the narrowed scope of inquiry must lead to a conclusion that the conduct in question is not captured by any legislation or conduct rules.

[99] I have already indicated my tentative view that Mr PA's conduct in swearing the 2016 affidavit was connected with the provision of regulated services.

[100] My view is that Messrs PA and ZN had consciously intermingled legal, business and personal arrangements during their five-plus years of association, and to draw a line between legal and business arrangements would be not only difficult, but also something of an artifice.

[101] However, I do not consider it necessary to finally determine that issue because, in my view, Mr PA's conduct is, despite Mr FY's submissions otherwise, captured by his professional and ethical obligations as a lawyer.

[102] Mr FY's argument is, in simple terms, that the rules identified by the Committee (rr 2 and 13.1 of the Rules) all have as a prerequisite to their application, a lawyer being engaged in litigation as counsel rather than as a party.

[103] I will consider each rule, in turn.

Rule 2

[104] In relation to r 2, I do not agree with Mr FY's submissions.

[105] First, s 4(a) of the Act and r 2 of the Rules both impose the obligation on a lawyer "to uphold the rule of law and to facilitate the administration of justice".

[106] However, s 4 includes the following qualification: "every lawyer who provides regulated services must, in the course of [their] practice, comply with ... [the obligation to uphold the rule of law etc]".

[107] Rule 2 does not include that qualification.

[108] It can reasonably be assumed from this that the obligation to uphold the rule of law and facilitate the administration of justice is one which persists across regulated services and non-regulated services activities.

[109] That being said, the next question is, does the acknowledged inaccuracy in Mr PA's 2016 affidavit amount to a breach by him of his obligation under r 2 of the Rules?

[110] It is trite to observe that the obligation to be accurate and scrupulously truthful exists for every witness who gives evidence whether by affidavit or in person, regardless of their professional or other status.

[111] In my view, r 2 of the Rules explicitly codifies that obligation for a lawyer.

[112] It must be the case that the obligation to “uphold the rule of law” means that, in whatever capacity a lawyer is conducting themselves, when giving evidence before a court, that evidence must be entirely accurate (to the best of the lawyer’s ability) and truthful in every respect.

[113] The troubling aspect of Mr PA’s evidence in the 2016 affidavit, is that the relevant paragraph was an emphatic denial that he had ever acted for Mr ZN in any professional capacity as a lawyer.

[114] That affidavit was sworn by Mr PA in June 2016, a matter of some 23 months after he had filed, on Mr ZN’s behalf, a Notice of Appeal in the High Court in relation to the Family Court matter.

[115] I have difficulty accepting that Mr PA simply forgot about the 2014 Notice of Appeal.

[116] On the one hand Mr PA has said that he had no expertise in family law matters and avoided dealing with them, yet, in a period of 23 months he had forgotten about an occasion on which he took the step of putting himself on the record (albeit only briefly) in an appeal in a family law matter destined for the High Court.

[117] But, even allowing for the possibility that Mr PA had forgotten about those events when he swore the 2016 affidavit, as a witness in a matter, he had an obligation to ensure that evidence he was giving was 100% accurate to the best of his knowledge and belief.

[118] As a lawyer, r 2 of the Rules obliged him to uphold the rule of law and facilitate the administration of justice.

[119] In short, before committing himself to so emphatic a statement as having “not acted for Mr ZN in any professional capacity as a lawyer”, Mr PA had a particular obligation as a lawyer to ensure that the comment was completely accurate.

[120] I am satisfied that if Mr PA had done so, he would have recalled the events of July 2014 to mind and would have, I am quite sure, worded paragraph [20] of his 2016 affidavit to reflect exactly what had happened.

[121] I accept that the July 2014 retainer was created as a sort of administrative convenience for Mr ZN to allow him to lodge an appeal in time, and that Mr PA formally withdrew about three days later; nevertheless, it is no small matter for a lawyer to put themselves on the record in legal proceedings.

[122] The process of drafting and swearing an affidavit involves the preparation of a draft and a read-through of that draft by the witness/deponent.

[123] Perusing a draft affidavit should not be perfunctory, whatever the professional status of the witness. It provides opportunity for the witness to ensure that what they will swear to is truthful and accurate.

[124] I would expect that Mr PA retained some record of those events – a copy of correspondence to and from the court, and a copy of the Notice of Appeal.

[125] I also expect that this would have been readily retrievable if Mr PA had taken the step, which in my view it was incumbent upon him to do, of checking to make sure that he was free to swear evidence saying that he had never acted for Mr ZN in any capacity.

[126] In my view, proper attention by Mr PA to the process of drafting, finalising and swearing the 2016 affidavit would have revealed the fact that a little under two years earlier he had put himself on the record in an appeal to the High Court, from a decision of the Family Court.

[127] As indicated, it would have been a simple matter of Mr PA providing the court with an explanation of those circumstances.

[128] Whether or not the inaccurate evidence sworn to by Mr PA in the 2016 affidavit was of any consequence to the proceedings in which Mr PA was involved as a witness on behalf of [Company A], and whether or not a judge was misled by what Mr PA deposed, is not the point.

[129] The very simple point is that, by r 2 of the Rules, Mr PA was obliged to uphold the rule of law and this included making sure to the very best of his ability that the evidence he gave was 100% truthful and accurate.

[130] Mr PA did not do so and has thereby breached r 2 of the Rules in relation to the 2016 affidavit.

[131] I deal with the question of outcome, further below.

Rule 13.1

[132] In simple terms, Mr FY's argument on behalf of Mr PA is that the Committee was wrong to find that he had breached r 13.1 of the Rules, because it applies only to a lawyer who is acting in litigation.

[133] Rule 13.1 is set out as follows:

Duty of identity to court

13.1 A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.

[134] Self-evidently, the rule makes no reference to a lawyer acting in litigation.

[135] However, r 13.1 is a sub- rule of r 13. Rule 13 provides:

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 interests of his or her client without regard to the personal interests of the lawyer.

[136] Rule 13.2 (and its sub-rules) set out a lawyer's obligations to protect court processes.

[137] I think it tolerably clear that rr 13.1 and 13.2 provide meaning to the expression "the overriding duty of a lawyer acting in litigation is to the court concerned", as set out in r 13. In other words, rr 13.1 and 13.2 explain the nature of that duty.

[138] It is clear that when Mr PA swore the 2016 affidavit, he was not acting in litigation. His and his wife's company was a party to litigation and he was a witness.

[139] I respectfully disagree with the Committee's conclusion that Mr PA can be held to account under r 13.1 of the Rules, for the inaccuracy in his 2016 affidavit.

Consequence of breach of r 2 of the Rules:***Unsatisfactory conduct?***

[140] It is well understood that not every breach of a conduct rule will result in a finding of unsatisfactory conduct against a lawyer.²⁶

²⁶ See, for example, *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 and *Keene v Legal Complaints Review Officer* [2019] NZCA 559 at [23].

[141] Without wishing to be seen as laying down any principle, in a general sense, a lawyer who has breached a conduct rule might avoid a finding of unsatisfactory conduct if the breach is relatively minor, or technical in nature.

[142] An example might be a lawyer who delays issuing terms of engagement for a matter of a week or so, or a lawyer who takes a slightly longer than is reasonable to respond to a former client's uplift authority.

[143] Of course, in every case, context will inform a Standards Committee's or Review Officer's decision about whether to make a finding of unsatisfactory conduct, and that context will differ from case to case.

[144] I do not consider that Mr PA's breach of r 2 of the Rules, falls into the category of the relatively minor or the technical.

[145] It is trite to observe that a lawyer's obligation to uphold the rule of law and facilitate the administration of justice, is amongst their most fundamental.

[146] A lawyer will routinely tell a client or a witness who is about to give evidence, that their evidence must be scrupulously honest and accurate to the best of their knowledge.

[147] Accuracy, if not assured, is at least carefully and thoughtfully attempted, by the witness checking whatever information is at their disposal before they give their evidence.

[148] Mr PA failed to do so. In my view, he was diverted from his obligation by the bitter and personal nature of the dispute that had arisen between himself and Mr ZN.

[149] As indicated, this was not a minor or technical breach of the Rules; it was serious. I consider that it must be met by a finding of unsatisfactory conduct, pursuant to s 12(c) of the Act.

Penalty

[150] The Committee found that Mr PA had breached rr 2 and 13.1 of the Rules. They censured Mr PA, in order them to pay a fine of \$7,500 noting that his conduct "was at the relatively higher end of the scale of unsatisfactory conduct".²⁷

²⁷ Standards Committee determination (3 December 2019) at [54].

[151] That outcome was predicated upon the Committee's conclusion that both the 2016 and 2017 affidavits were inaccurate.

[152] To recap, my view is that the 2017 affidavit does not give rise to any disciplinary consequences for Mr PA. As well, in relation to the 2016 affidavit, my view is that r 13.1 has no application.

[153] On that basis alone, at first blush, the Committee's fine requires careful scrutiny.

[154] As to censure, I agree that this is an appropriate disciplinary response. Mr PA breached a fundamental conduct rule, through a lack of proper attention to the seriousness of what he was doing: giving evidence before the court.

[155] As to a fine, I have already indicated that I regard Mr PA's breach of r 2 as serious. I do not need to repeat those views.

[156] Nevertheless, in my opinion there are relevant factors which must be taken into account when assessing further penalty.

[157] Those factors include the following: the appeal retainer arose because Mr PA agreed to help Mr ZN who then only had one day in which to lodge his appeal; Mr PA made it clear that he would not be acting beyond taking the initial step of lodging the appeal; the retainer ended after three days; the offending paragraph in Mr PA's 2016 affidavit was not relevant to the matter then before the High Court.

[158] In the circumstances I consider that Mr PA's conduct warrants a fine of \$1,000.

[159] For the avoidance of doubt, the Committee's order that Mr PA pay costs of \$2,500, remains.

Decision

[160] Pursuant to s 211(1)(a) of the Act, the decision of the Committee is:

- (a) Reversed as to the finding that Mr PA breached rr 2 and 13.1 of the Rules in swearing the 2017 affidavit.
- (b) Reversed as to the finding that Mr PA breached r 13.1 of the Rules in swearing the 2016 affidavit.

- (c) Confirmed as to the finding that Mr PA breached r 2 of the Rules in swearing the 2016 affidavit.
- (d) Confirmed as to the imposition of a censure for Mr PA's breach of r 2 of the Rules.
- (e) Modified by reducing the fine imposed from \$7,500, to \$1,000.
- (f) Confirmed as to the order to pay the Committee's costs of \$2,500.

Costs on review

[161] When a Review Officer confirms a Committee's finding of unsatisfactory conduct, costs will be ordered in accordance with the Costs Orders Guidelines of this Office.

[162] Mr PA is ordered to pay costs in the sum of \$900 to the New Zealand Law Society by 5pm on Friday 10 February 2023, pursuant to s 210(1) of the Act.

Enforcement of costs order

[163] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court

Anonymised publication

[164] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision may be published but without any details that may directly or indirectly identify the parties, or any other person named in this decision.

DATED this 21ST day of DECEMBER 2022

R Hesketh
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 PA as the Applicant

Mr FY KC as the Applicant's Representative

Mr ZN as the Respondent

[Area] Standards Committee [X]

New Zealand Law Society