NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 48
LCDT 009/13

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **WELLINGTON STANDARDS COMMITTEE No. 2**
Applicant

AND **CHARL BENNO HIRSCHFELD**
of Auckland, Barrister

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr W Chapman
Ms J Gray
Mr K Raureti
Mr P Shaw

HEARING at Auckland

DATE OF HEARING 23 and 28 July 2014

DATE OF DECISION 15 August 2014

APPEARANCES
Mr C Gudsell QC and Ms C Paterson for the Standards Committee
Mr R Harrison QC for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

(Decision as to Penalty)

[1] In June 2009, Charl Hirschfeld sent an invoice to the complainant, the Legal Services Agency (LSA), purportedly in respect of services he had carried out for his client. This invoice, and 16 others, proved to be incorrect in a number of material respects. This decision concerns the penalty to be imposed on Mr Hirschfeld as a consequence of these admitted errors.

[2] Mr Hirschfeld, a practitioner of 30 years experience, who has had an unblemished career until now, has pleaded guilty to 12 charges of *negligence such as would tend to bring the profession into disrepute.* That is an alarming number of charges but arises because the 12 charges, as framed, relate to 12 different clients to whom he was assigned counsel and in respect of whom incorrect invoices were rendered. The types of errors fall broadly into three categories:

1. Claiming for the payment at the practitioner's own rate for hearings attended not by him personally but by another practitioner who was not identified as a secondary listed provider and, on some occasions, was not yet a listed provider at all.

2. Claiming for appearances on dates where no hearings had been held. These errors transpired to have been incorrectly dated hearings, rather than hearings which did not occur.

3. Claiming for payment prior to actual assignment having taken place, in some instances when another listed provider was still assigned counsel.

[3] The Standards Committee submit that these failures amount to "gross negligence" and that the Tribunal should respond to the seriousness of the conduct by suspending the lawyer for 2 to 3 years. They also seek reimbursement of their costs in the prosecution, of almost $152,000.

[4] Mr Hirschfeld submits that this negligence is at the lower end of the scale and that the consequences of the investigation and prosecution, with the attendant publicity have already been severe. He urges the Tribunal to impose a Censure and a modest contribution to the Tribunal's costs.

[5] Proportionality will be assessed both in relation to the level of seriousness of the conduct and as to the disciplinary consequences.

Issues

1. Where on the spectrum of negligent behaviour does this conduct sit?
2. What, if any aggravating features exist?
3. What, if any mitigating features exist?
4. Is deterrence a relevant element to penalty assessment, and if so, in what sense?
5. Does the public require protection from this lawyer?
6. In the final assessment, is suspension necessary to reflect a proportionate response to this conduct?
7. How should costs of the prosecution and hearing be apportioned?

Background

[6] Mr Hirschfeld was a listed provider with the Legal Services Agency ("LSA") from 2000 when the Agency was formed until he terminated his contract with them on 30 December 2010. He was, for the period in question, the lead provider for Jamaica Chambers from which he and 8 other barristers practised.

[7] He agrees he understood his obligations as a listed provider as set out in the relevant material.[1]

[8] In 2004 an audit of Mr Hirschfeld's practice including invoicing, file management and other matters was carried out by an experienced practitioner at the request of the LSA. The report provided to LSA was approving of the standard of work and compliance with obligations to LSA.

[1] Legal Services Act 2000, or his contract for services with the LSA together with the LSA's assignment policy.

[9] A further audit was begun in 2008 by another experienced practitioner. Visits to the chambers took place between October 2008 and May 2009 (that is just before the first of the invoices which are the subject of these charges). The second audit report was provided on 6 October 2009 and once again was largely complimentary. The auditor did refer to some deficiencies in the capturing of time in that there was no electronic system. Although the practitioner's current practices were recorded as *"… satisfactory particularly given the nature of the work and practical difficulties which arise in recording time except for the timing of the compilation of the records …*" it was recommended that *"… an electronic system of recording time 'on the day' with narrations*" be adopted.

[10] Unfortunately that suggestion was not immediately taken up and this has provided some of the background to the difficulties now faced between LSA and the practitioner, ultimately leading to these charges.

[11] That is because the invoices for criminal legal aid assignments were based on a number of sources from which the practitioner's personal assistant compiled an invoice.[2] After that, the practitioner would discuss the draft account with his personal assistant, making any necessary amendments, then sign and submit to LSA.

[12] In outlining the method of construction of invoices, Mr Hirschfeld has been clear that this was explanatory only and not put forward as an excuse for the errors, which he acknowledged immediately in his formal Response to the charges.

> "Neither these particular invoices nor any of the legal aid invoices the subject of the charge were in fact completed by me personally. However, I fully accept that I signed them off and am professionally responsible for their content."[3]

Nature of the Errors

[13] In relation to the 12 clients whose legal aid assignment invoices formed the basis for each charge; there were various errors in the practitioner's billing for the attendances. In some he claimed for appearing when he had in fact instructed an

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[2] "The formulation of an invoice for my criminal matters was based on timesheets which I kept, emails, file notes, correspondence, electronic and hard copy diaries, documentation relating to Court (submissions, applications, discovery, etc.), chambers appointments and any other record relevant, for instance the records which my personal assistant kept, mostly electronic. …". Practitioner, first affidavit, paragraph 97.

[3] Practitioner first affidavit paragraph 88.

agent to appear, including the Duty Solicitor in the relevant Court on that day. We would regard this behaviour as being most serious of the oversights (because he did not have to pay for the Duty Solicitor's attendances).

[14] On other occasions Mr Hirschfeld claimed an appearance, having sent a junior barrister (fully briefed) from his chambers to make the appearance on his behalf, but had failed to name that practitioner in his invoicing as "listed provider B" as required.

[15] In some instances the invoice claimed for an appearance for the practitioner when in fact the previous assigned counsel had made the appearance. The change of assignment occurred because the client had elected trial by jury, and the originally assigned counsel was not listed as a provider who could carry out work at that level so either recommended that Mr Hirschfeld take over, or the client had requested that he or she be represented by Mr Hirschfeld. In those cases the responsibility was on both practitioners to promptly advise the LSA of the need for a reassignment to the more senior practitioner, namely Mr Hirschfeld. On the occasions claimed in the charges (and admitted by Mr Hirschfeld) this was not done promptly by either counsel and resulted in an inaccurate claim being made by Mr Hirschfeld and a double payment made by the LSA who clearly had no means of cross referencing claims for one client from different counsel. It is notable that full responsibility appeared to have been laid at the feet of Mr Hirschfeld rather than the practitioner who was handing over the assignment, against whom no action has been taken.

[16] In some instances where the appearance was delegated to a junior who did not at that time have provider status, the practitioner was not entitled to claim any payment whatsoever.

[17] At times when the practitioner claimed for his own hourly rate rather than the secondary provider's rate, the difference was between $143 per hour and $105 per hour.

[18] The total overcharging across the 17 invoices (which covered 32 hearings) was agreed (by conclusion of the submissions) to be $1,368.

[19] The evidence as to quantum was provided by a well-qualified defence witness, Ms Lauaki. Ms Patel, the witness for the (complainant) LSA, disputed this figure. However, in her six affidavits she did not provide any alternate figure.

[20] Instead, she made a point of stating the total gross fee paid to the practitioner during the currency of his contract to be "… over $17,277,000". The practitioner did not dispute this figure, but noted it covered other counsel who were paid from this fund, and also included very large disbursements for expert witness reports and travel and other expenses.

[21] While it is a somewhat misleading figure, we do consider that it gives some context to the earlier (clear) audits, and to the level of invoicing carried out by the practitioner.

[22] For completeness, we record that all 12 charges were originally laid as "Misconduct", but that this alternative was withdrawn on the plea of guilty to Negligence, that lesser alternative having been laid some 8 months after the original charges.

Issue 1. How serious was the negligence?

[23] Mr Gudsell QC reminded us of the deficits in the invoicing, which were only discovered after an investigation by LSA and which reflected errors covering almost a year. He then divided the aspects of negligence into two categories: 1. negligent invoicing practices; and 2. invoices in contravention of specific requirements of the LSA contract and assignment policy.

[24] In relation to the latter, we do not propose to comment greatly on those areas of complaints, since it is clear from the decision of the Standards Committee that those matters were not regarded by the Standards Committee as forming a proper basis for charges.[4] Thus, we do not consider it ought to form part of the negligence charge itself.

[25] It could be argued that the further defaults of the practitioner, in this category, ought to be taken into account as aggravating features, and they will be addressed under that heading.

[26] In dealing with the negligent invoicing practices themselves, Mr Gudsell reminded us that the practitioner invoiced for appearances prior to his assignment, resulting in a double payment by the Agency. In some instances the Standards Committee submits that the practitioner "*has not provided any satisfactory explanation"*, in others, that it does not accept his explanation for these claims.

[27] The behaviour was characterised as "grossly negligent". One of Mr Hirschfeld's explanations was criticised as conflating *"… the distinct concepts of 'assignment' and instructions".* Clearly that is an error but it is, in the Tribunal's view, likely to be a fairly common error among practitioners, particularly if there is a gap between the client seeking to instruct and an assignment being confirmed.

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[4] Specifically two out of the four LSA complaints were as follows:

> "Breaches of s.69(1) of the Legal Services Act 2000 and Clause 4.11 of the contract which relate to ensuring persons providing legal services are listed to do that work."

And

> "Breaches of the Agencies assignment policy relating to prior approval for delegation of work, and to flat fee billing of disbursements in breach of the disbursements policy."

The Committee's determination in relation to the first of these complaints (Complaint 1) was:

> "The Committee noted that the services provided by other lawyers in assisting Mr Hirschfeld were provided on a pro bono basis. The provision of free legal services under supervision does not constitute a breach of any professional standard and no further action would be taken on this complaint pursuant to s.152(2)(c) of the Lawyers and Conveyancers Act 2006 ("the Act")."

And in relation to the second matter (Complaint 3) the Standards Committee finding was as follows:

> "The alleged breaches of the Agency's assignment policy are an administrative matter for the Agency rather than a matter coming within the Society's jurisdiction to consider a lawyer's professional conduct. There was no evidence that the disbursements charge were unreasonable or that they did not reflect the actual allocation of costs. No further action was therefore to be taken on the complaint pursuant to section 152(2)(c) of (the Act) …"

[28] Criticism was also made of the practitioner's conduct in not alerting the LSA to the need for reassignment. This also was referred to as "grossly negligent" despite the fact that the original assigned counsel was not facing any disciplinary charges as a result of his failure to so notify the LSA. For Mr Hirschfeld, Mr Harrison QC acknowledged that this was unsatisfactory practice; as such it had formed part of the basis for the guilty plea. However, he noted the discrepant treatment of the two lawyers responsible.

[29] Furthermore, Mr Harrison pointed out that Mr Hirschfeld had been completely unaware of the double-charging allegations until the third (December) affidavit of Ms Patel. Indeed it was this new information which caused the Standards Committee to add additional particulars and led to an adjournment of the 5 day December 2013 hearing. Because of the last minute nature of the further evidence and amended application the Tribunal awarded costs of $10,000 in favour of the practitioner who had fully prepared for a lengthy hearing.

[30] As to the incorrect hearing dates, as far as we were able to discern the practitioner did not claim for any non-existent hearing dates but rather gave incorrect dates which he explained as typographical errors. It was submitted on behalf of the Standards Committee that these *errors "… are grossly negligent, stemming from highly inadequate record keeping and practice administration".* Mr Harrison reminded the Tribunal that the Standards Committee had originally asserted that the practitioner had claimed for nonexistent hearings, but that this claim was now reduced to a complaint that the dates of hearing were listed incorrectly. What had initially appeared as possibly sinister was simply a date error with no harm done to the LSA and in turn the taxpayer.

[31] The next category of negligence relates to those invoices in which the practitioner claimed for appearances which were in fact carried out by other practitioners. This error was also admitted from the outset by the practitioner, however in respect of this category of conduct he also pleaded "custom and practice" of other criminal legal aid barristers. We shall refer later to this plea. In relation to these invoices which wrongly stated an appearance by Mr Hirschfeld when another person had appeared, Mr Gudsell submitted that it reflected *"an inherently flawed invoicing system".* Further he contended *"this is not mere slippage, administrative*

error, or following standard practices of other claimants. It is unexplained negligence of a gross kind."

[32] Quite properly Mr Gudsell reminded the Tribunal that the legal aid regime is based on LSA being able to trust practitioners to submit accurate invoices for payment.

[33] Mr Gudsell refers to the timesheets having accompanied the practitioner's invoices showing an appearance by him when in fact another practitioner had attended. He submitted that this was a *"seriously aggravating factor …".* Mr Gudsell further contended *"at no time has the practitioner sought to offer any explanation for his administrative systems".* We have referred to the lawyer's evidence as to billing[5], which does provide an explanation. We accept that the method used was clearly unreliable, given that it has allowed the lawyer to make the errors admitted.

[34] Somewhat surprisingly, having withdrawn the misconduct charge in favour of a negligence charge to which the practitioner pleaded, Mr Gudsell then went on to submit to the Tribunal that "*this is not just a legal aid issue … it is about honesty and integrity".* This submission would appear to go beyond the agreed Summary of Facts.

Mr Harrison, submitted that from the outset the Standards Committee case was "one sided and unbalanced". Mr Harrison confirmed there had been a great deal of time and effort put into the Summary of Facts and he was concerned to then hear the references to "gross negligence" and "recklessness", following the withdrawal of misconduct charges.

[35] In summary, Mr Harrison said his client accepted that *"… his overall conduct during the period in question, viewed cumulatively, can properly be characterised as involving negligence in a professional capacity in terms of s 241(c) of the Act".* However he wished the Tribunal to view his culpability as extending *"no further than being negligent".* Mr Harrison said his client at all times *"… acted in good faith in the (reasonable) belief that he was entitled so to act, and thus without any dishonesty on his part."*

[5] See footnote 2.

[36] Mr Harrison addressed the issue of "custom and practice". His client had called evidence from 17 barristers, some as to character, and many as to the practice of invoicing for an agent's appearance at the lead provider's rate. The affidavits also included one from Ms Lauaki who was referred to in paragraph [19] above, a former LSA employee.

[37] In the end, the Summary of Facts did not refer to this issue, nor was the evidence of these numerous barristers required to be tested. Mr Harrison submitted that the evidence on oath of senior practitioners ought not to be ignored.

[38] Certainly there is a wealth of material in the evidence, indicating that there were at times inconsistent practices and confusing messages emanating from the LSA to practitioners.

[39] We accept that the legal aid billing system relies on trust in the lawyers rendering accounts. We would not wish to endorse anything less than honesty and accuracy in billing practices.

Proportionality

[40] Before considering the conduct overall, there must be a consideration of proportionality with the practitioner's overall billing history. We have referred to the two previous audits of the lawyer's billing practices, which must account for a large proportion of the $17 million figure adverted to by Ms Patel. Mr Gudsell submitted that no weight should be given to such clear past audits - he referred to them as having "neutral value". He further submitted that there should be no threshold test as to what error rate could be seen as negligence, in other words, no mistake was tolerable.

[41] Given the relatively small number of invoices under consideration, comparatively, and the low "overpayment" figure, we were concerned as to the paucity of evidence of a broader picture. No such figures were contained within the evidence or even the Summary of Facts, and the low level of overcharging agreed ($1,368) appeared to have been "skimmed over", despite the enormous effort which has been put into preparation and documentation of this case. An analysis of the fees rendered to the Standards Committee for Senior and Junior counsel would

indicate that in the region of 800 hours was spent in preparation. In those circumstances, we find that omission disappointing.

[42] In submissions as to penalty, having noted the Tribunal's concern that there appeared to be issues as to proportionality which might impact on the level of culpability, the practitioner provided a schedule of billing over the period in question.

[43] The period is somewhat unusual in that it includes the deadline for the filing of claims under the Treaty of Waitangi Act 1975 and thus a "bubble" in the level of charging of any practitioner in this area. There was also a gap in the period, however the practitioner put before us some 13 months of billing which at least gave some picture of the number of invoices, relating to the Chambers' Treaty caseload. There were 1,263 invoices rendered between April 2009 and June 2010 (with the figures for December 2009 and January 2010 missing). The total billing was a little under $3 million.

[44] Against that the Standards Committee provided us with further information stating that, within the relevant period, some 65 invoices had been received for criminal legal aid assignments, relating to 43 clients. The total amount billed for criminal legal aid over this period was $295,000. That, perhaps, better puts in perspective the $1,368 of negligent charging, although only reflects a small fraction of the practitioner's overall billing for the period.

[45] We reject the contention of the Standards Committee that only these 65 invoices are a relevant comparison for the 17 erroneous ones. The lawyer raised over 1,300 invoices for that period, and many thousands over the previous audited periods. Even taking the limited figures of $1,368 of $295,000, it must be recognised that this is a very small error rate. It does not justify the description given by Mr Gudsell of "an inherently flawed invoicing system".

[46] Although there were a number of different forms of errors made by Mr Hirschfeld, mostly they arose from his method of time recording and invoicing. There is no evidence to suggest any deliberate pattern of cheating the system or any other intentional wrongdoing.

[47] We reject the "no threshold" argument advanced. It cannot be correct in circumstances where the Tribunal must analyse behaviour on a continuum of culpability or seriousness of conduct. In doing so, we must employ some perspective. That is why proportionality is important.

[48] Proportionality also goes to motivation and assessment of honesty - why would a lawyer who had rendered gross fees to LSA of $17 million attempt to cheat the system for $1,368?

[49] We find the level of negligence to be at the lower end of the scale. It comes nowhere near the "gross negligence" alleged.

[50] This view is confirmed by a consideration of some other cases where negligence has been considered, such as *Stirling*[6]*, Slack*[7]*, Comeskey*[8]*, Fendall*[9] *and W*[10]*.*

Issue 2. Aggravating features

1. Other defaults

[51] Some considerable time was devoted by Mr Gudsell to the contravention of the LSA's assignment policy, the contract and the Legal Services Act. We have already indicated that we do not consider that these ought to be regarded as a separate category of negligence; they involve such matters as allowing delegation of "non minor matters", for example, an appearance at a pre depositions conference or on an entry of plea and in one case an appearance on a sentencing matter. Mr Gudsell submitted that it did not matter that the practitioner had supporting evidence from numerous lawyer witnesses as to the very thorough briefing involved when he asked another practitioner to appear on his behalf, rather that it was the mere breach of the policy which was the issue.

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[6] *Auckland Standards Committee v Stirling* [2010] NZLCDT 4.
[7] *Auckland Standards Committee No. 2 v Slack* [2012] NZLCDT 40.
[8] *Auckland Standards Committee v Comeskey* [2010] NZLCDT 19.
[9] *Auckland Standards Committee No. 1 v Fendall* [2012] NZHC 1825.
[10] *W v Auckland Standards Committee* [2012] NZCA 401.

[52] Having regard to the number of untested affidavits from other practitioners in particular those Juniors who have benefited from Mr Hirschfeld's tutelage we are satisfied that it was Mr Hirschfeld's firm practice to ensure any Junior counsel appearing for him was fully briefed in order that the client's interests were well served. We note that there have been no complaints about service to clients.

[53] Mr Gudsell submitted that the Tribunal ought to regard the practitioner's behaviour as "flagrantly" disregarding the requirements of the LSA and warranting a clear deterrent message.

[54] Mr Harrison submitted that the lack of approval and delegation issues were side matters found to be "administrative matters for the Agency" by the Standards Committee in its determination. While we accept that submission in respect of the conduct referred to above,[11] we do consider that claiming for non-listed providers was more serious.

[55] There were instances of delegation to non-listed providers in about 25 percent of the 32 hearings under consideration in the charges. We consider this was significantly careless and ought to be regarded as an aggravating feature of the overall negligence.

2. Alleged failure to admit wrongdoing

[56] Mr Gudsell submitted that the practitioner displayed "*a significant lack of transparency"* and *"throughout the Tribunal disciplinary process….has failed to acknowledge any wrongdoing at all".*

[57] Mr Harrison referred to his client's frank admission of the errors in his first affidavit and his apology, which was tendered to the Tribunal during brief evidence from the practitioner. He submitted that there had been no attempt to hide the fact that non approved providers were being delegated work, by Mr Hirschfeld, because he referred to the cases in which they had appeared when he supported the application of Ms K, to be a listed provider. By entering his plea, counsel accepted that Mr Hirschfeld now agreed his belief as to charging was unacceptable.

[11] See footnote 4.

[58] Rather than failing to accept the factual errors, Mr Harrison pointed out that from the outset Mr Hirschfeld had accepted the invoices to be incorrect, had openly set out his invoicing practice (as quoted above) and had taken steps to ascertain how the errors had occurred by making direct inquiries of Courts himself. Mr Harrison submitted it was an unfair of the Standards Committee to characterise Mr Hirschfeld's response as lacking in frankness or remorse. To the submission made by Mr Gudsell that the practitioner did not provide direct access to his files, Mr Harrison responded that given that the practitioner accepted the errors there was no need to provide the files. Furthermore neither the LSA or the Standards Committee, both of whom had investigatory powers, sought to obtain the files from the practitioner.

[59] We consider that the Standards Committee assertions are indicative of a lack of balance, and we reject them. We have quoted from Mr Hirschfeld's first affidavit at paragraph [12] in this regard.

Issue 3. Mitigating features

1. Previous good character and contribution to the profession

[60] We were told that Mr Hirschfeld considered himself as having an obligation to provide mentoring, in the manner of a formal pupilage, more common in the United Kingdom than in New Zealand. A number of practitioners have sworn affidavits to set out the considerable benefits they have obtained from Mr Hirschfeld's mentoring. Thus, it was submitted that he has contributed to his profession significantly by carrying out this role. There were also a number of references as to his character, honesty and high professional standards.

[61] We were reminded by Mr Harrison that Mr Hirschfeld has been a practitioner for some 30 years and has been admitted in a number of different jurisdictions. He seeks credit for 30 years of what his counsel describes as "exemplary practice". This is the first disciplinary matter brought against him. Mr Gudsell conceded that this is a mitigatory factor, as was Mr Hirschfeld's relinquishing of his LSA contract when the investigation began in December 2010.

[62] We accept that any practitioner bringing 30 years of previously positive contribution to his profession is entitled to claim some credit.

2. Adverse consequences for Mr Hirschfeld

[63] Mr Harrison told the Tribunal that there have been devastating adverse consequences of this investigation and prosecution. In late 2010 Mr Hirschfeld surrendered his legal aid provider status, which effectively ended his practice as it then existed and caused him to have to close the Chambers, of which he was head. We were told that the practitioner *"… suffered an extreme emotional reaction to the investigation and complaints and became seriously depressed for some time".* The investigation has taken many years to reach this hearing, during which he regards his previously "spotless" professional reputation as very seriously damaged, particularly given that there was significant publicity to the investigation. His marriage has broken down and his family's previously sound financial situation has been destroyed. His former family home has been sold to pay the legal fees of his previous counsel.

[64] In April this year the adjourned hearing had to be further adjourned following what is described as a "stress induced" heart attack suffered by the practitioner. He is still recovering from that heart attack and is only able to work part-time.

[65] These consequences have been so serious that we must take account of them as having had a punitive consequence before any penalty is imposed by the Tribunal.

3. Restitution

[66] Mr Harrison indicated the practitioner was prepared to make restitution of $1,368 but that the figure had not, until the hearing, been confirmed by the Standards Committee and that the LSA no longer existed as an entity and thus it was unclear to whom such payment ought to be made.

[67] We consider he ought to make such restitution.

4. Guilty Plea

[68] Mr Gudsell submitted that the pleas to the negligence charges have come at a very late state in the proceedings. It should be noted that these proceedings had been on foot for almost eight months before the alternative charges of negligence

were sought to be added by the Standards Committee and thus provided a platform for the plea, which ultimately occurred a few days prior to the scheduled hearing. Although there was some talk of the lesser charge being available in November 2013, it is not clear that the pre-assignment/double charging allegations were on foot then, and how that might have affected those discussions.

[69] Mr Hirschfeld has saved the Standards Committee and the Tribunal at least 4 days of hearing by his plea, and deserves some credit for that, as well as for the acceptance of responsibility the plea signifies.

Issue 4. Need for Deterrence

[70] Mr Harrison submitted that the practitioner had frankly acknowledged his wrongdoing and has suffered such enormous consequences, that he ought not to be further penalised beyond a censure and some contribution towards the Tribunal costs. He was said to be in no need of further deterrence.

[71] We accept that there is no need for specific deterrence for this lawyer. These proceedings have had a salutary effect on him.

[72] General deterrence is another matter. Thus it is important to deter other lawyers from casual or sloppy billing practices where public, or private, money is involved. The *Daniels*[12] decision addressed the issue of deterrence, in relation to suspension as a means of upholding "*proper professional standards….and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners."*

[73] We consider that is achieved by other less intrusive penalties and indeed by the very fact of this prosecution. We note the "least restrictive intervention" principle, articulated in the *Daniels* decision.[13]

[12] *Daniels v Complaints Committee of the Wellington District Law Society* [2011] NZLR 850 at paragraph [24].
[13] At paragraph [22].

Issue 5. Does the public require protection from this lawyer?

[74] Mr Gudsell submitted that Mr Hirschfeld ought to be suspended from practice for a period of two to three years referring to the extent of his negligence combined with his "*discursive response to the investigation*" which it was submitted reflected "*seriously and detrimentally on his fitness to practice*".

[75] Mr Harrison submitted that there was no evidence that Mr Hirschfeld's negligence had caused harm to any client. We accept this submission, but note that the taxpayer is $1,368 out of pocket.

[76] We are very clear that this is a practitioner with high professional standards who has, according to all the evidence before us, served his clients well in the past. We do not consider him to pose any risk to the public.

Issue 6. Is suspension appropriate?

[77] As to the issue of seriousness and appropriate penalty Mr Harrison referred us to the decisions of *Fendall*[14] and *Comeskey*[15]. While recognising that Ms Fendall had perhaps been fortunate in escaping suspension, Mr Harrison said in any event that matter could be distinguished on the basis of greater seriousness. Ms Fendall had pleaded guilty to a charge of misconduct rather than negligence and the offending in question covered a period of two-and-a-half-years, involved some $17,500 and followed previous warnings as to her behaviour. We accept that submission.

[78] In relation to the *Comeskey* decision Mr Harrison again submitted that this ought to be distinguished (nine months suspension having been imposed) on the basis that there were other serious misconduct charges, such as misleading the Court of Appeal and failures to a client.

[79] In Mr Hirschfeld's case, Mr Harrison emphasised, only one aspect of his practice, that is his invoicing, was under scrutiny.

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[14] See footnote 9.
[15] See footnote 8.

[80] Mr Gudsell characterised the behaviour as “gross negligence”, without the features of genuine remorse or contrition which had been present in the *Fendall* matter. He referred to the *Comeskey* decision to support his submission for a 2-3 years suspension.

[81] The proportionality of the penalty response to this conduct was emphasised by counsel for Mr Hirschfeld, when the overpayment only involved $1,368 and there was no evidence of harm to a client. It was submitted that in these circumstances suspension would be disproportionate even without the mitigating features.

[82] We have reached the very firm view that suspension is not required to satisfy the purposes of penalty and the objects of the Lawyers and Conveyancers Act 2006 (the Act). Those purposes invoke protection of the public and the maintenance of the reputation of the legal profession, to ensure public confidence in the provision of legal services.

[83] Our determination reflects our finding as to the level of culpability, that is, relatively low level negligence, and has regard to the aggravating and mitigating features, particularly the adverse consequences suffered by Mr Hirschfeld as a result of these proceedings.

Issue 7. Costs

[84] Mr Gudsell sought the costs of himself and Junior counsel for the Standards Committee in the sum of $151,892 (including approximately $30,000 for the Junior). He pointed to the meticulous investigation which had occurred within the LSA and the changing picture which had emerged as a result. In addition, he submitted that the practitioner be required to reimburse the Tribunal costs which were estimated to be in the region of $32,000.

[85] Any contribution to the Standards Committee costs is strongly opposed by Mr Harrison. He has submitted to us that this case was “overcharged” at misconduct and over prosecuted. He pointed to the six affidavits from the Standards Committee primary witness with increasing supporting paperwork finally culminating in three Eastlight folders of exhibits and a large bundle of affidavits. It is Mr Harrison’s

submission that this resulted from a failure to focus on the central issue which was charging out Agency work at the provider's own (higher) rate.

[86] Mr Harrison took particular exception to a charge for work from late November to early December, claimed in the schedule of costs, of almost $22,000. Mr Harrison submitted this was particularly egregious since it was related to the late application to amend charges which in turn led to an adjournment of the December hearing and a "wasted costs" order made in favour of the practitioner. We accept that submission.

[87] We accept the submission that there was a lack of focus in the prosecution. A great deal of time has been spent on ancillary matters which the Standards Committee specifically determined were not to be the subject of charges.

[88] We also accept the "overcharging" assertion. Whilst this was a serious matter, there should always have been alternative charges pleaded. We consider the entire structure (12 charges) and conduct of the prosecution to have been "over-engineered", having regard to the quantum of overcharging established ($1,368). This was in the end a penalty hearing only, based on a lengthy, negotiated Summary of Facts, (which was very repetitive, as were many of the charges).

[89] We compare the prosecution costs in cases of far greater complexity – *Castles*[16] *$110,000 costs* in that case there were far greater complexities and categories of misconduct, it was heard over 8 days and the Tribunal costs were almost double the present matter; *Comeskey*[17] *$44,000* - this case was also more complex and was a similar length of hearing with the present case; *Daniels*[18] *$40,000* - this was much more complex, defended hearing; *Orlov*[19] *$96.900, (including $9,400 for a Junior)* - this was a significantly more difficult and complex case to conduct, with numerous interlocutory applications; *Hart*[20] *$116,429* - this was also more complex legally and factually, with a number of interlocutory matters and significant expert evidence. By comparison, the costs in this matter would appear to be out of step and unreasonably high.

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[16] *Auckland Standards Committee No. 3 v Castles* [2014] NZLCDT 8.
[17] See footnote 8.
[18] See footnote 12.
[19] *National Standards Committee v Orlov* [2013] NZLCDT 52.
[20] *Auckland Standards Committee No. 1 v Hart* [2012] NZLCDT 26.

[90] We have some sympathy for the position of the Standards Committee, faced with a complaint by the LSA. The LSA investigation had begun in June 2010, just a few months after the release of the "Bazley Report"[21], in November 2009. That report was strongly critical of lawyers and of what might be termed "territorial disputes" between LSA and the NZLS in enforcing lapses in standards. In the Preface to the report, the Chairperson, Dame Margaret Bazley, had this to say:

> *"While there are very good lawyers in the legal aid system, there is also a small but significant proportion of very bad lawyers who are bringing themselves and their profession into disrepute. The behaviour I have been told about in the course of this review is simply appalling and I am surprised that the legal profession has allowed the situation to go on as long as it has…"*
>
> And later:
>
> *"A strong and united stance needs to be taken by the New Zealand Law Society as the regulator of lawyers and the Legal Services Agency as the purchaser of legal services".*

While we make no comment on the report, we concede that the Standards Committee may well have considered a strong stance in its prosecution was justified. We do not consider this lawyer fits the category referred to by the author of the Report.

[91] We accept that the practitioner also filed many affidavits. However, this was at the stage when he was facing misconduct charges only, the lesser charges having been added later.

[92] The practitioner's financial circumstances are described as "dire" and we recognise that any award of costs against him would have to be the subject of some instalment order.

[93] In all of the circumstances we propose to order a contribution by Mr Hirschfeld to the Standards Committee costs in the sum of $20,000, and a reimbursement to the New Zealand Law Society ("NZLS") of 50 percent of the Tribunal's costs '

[21] "Transforming the Legal Aid System: Final Report and Recommendations", Ministry of Justice, November 2009.

ORDERS

1. Mr Hirschfeld is Censured for his conduct.

2. Mr Hirschfeld is to make repayment of the $1,368, to the NZLS, on behalf of the complainant, s 156(1)(e) and (g).

3. Mr Hirschfeld will contribute to the costs of the Standards Committee in the sum of $20,000, s 249.

4. The NZLS is to meet the full Tribunal costs, in the sum of $32,377, s 257.

5. Mr Hirschfeld will reimburse the New Zealand Law Society for half the certified costs of the Tribunal, s 249, namely $16,188.

DATED at AUCKLAND this 15th day of August 2014

Judge D F Clarkson
Chair