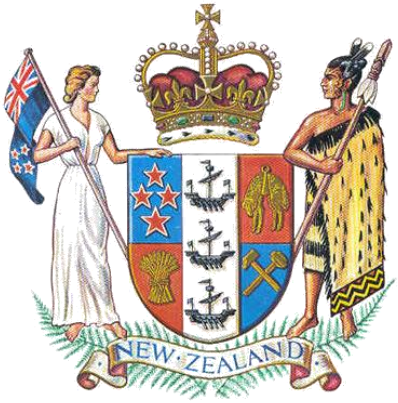

Report of the

LEGAL COMPLAINTS REVIEW OFFICER

For the 12 months ended 30 June 2011

Presented to the House of Representatives pursuant to Section 223 of the Lawyers and Conveyancers Act 2006

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OVERVIEW OF YEAR 2010/2011

This is the third annual report of the Legal Complaints Review Officer (LCRO). At this three year mark it is useful to reflect on the evolution of this office thus far in fulfilling its statutory role in the lawyers' disciplinary regime.

The role of the LCRO is as an independent reviewer of decisions made by the Standards Committees on complaints against lawyers and conveyancers. As an overall observation, the pathways and procedures for the review process are now well established. The LCRO Procedural Guidelines are published on the LCRO website and a copy is also sent to all parties who are involved in a review. LCRO support staff are well able to answer questions and explain any variations to those procedures in particular cases.

Patterns in the activity of this office are becoming more discernable such that some observations can be made about the categories of complaints as well complainants. More detailed discussion is included in this Report. There has been an increasing awareness of the distinction between consumer-related complaints and those which are confined to only disciplinary issues without a consumer element involved. The disciplinary machinery established by the Lawyers and Conveyancers Act 2006 (the Act) combines consumer and non-consumer issues in the disciplinary regime. However, complaints that largely involve consumer elements give rise to resolution opportunities between a lawyer and complainant that do not usually arise where the complaint involves no direct consumer concern. The Act itself provides opportunities for parties to resolve their differences. This reporting year has seen an increase in the pursuit of these opportunities, and has seen a material success rate that has also alleviated the workload involved in the writing of review decisions.

There has been a discernable increase in numbers of review applications such that the main challenge to the office during this reporting period has been the pressure on the office due to increasing workloads, with no legislative provision for additional LCRO appointments. The LCRO function is of a judicial nature and with the absence of any provision for delegation, together with the Act currently restricting LCRO appointments to an LCRO and Deputy LCRO, there have been significant pressures to deal with review applications in a timely manner. Steps are currently underway to amend the Third Schedule of the Lawyers and Conveyancers Act to make provision for the appointment of a further LCRO. This involves a lengthy process but is expected to be concluded prior to the next reporting period.

Delays have been managed as well as possible by the LCRO support staff whose experience and knowledge of the processes of this office have been of invaluable assistance in managing these delays, by giving parties a realistic expectation of timeframes and keeping them informed of progress. During this period priority has nevertheless been given to (a) applications for review of a Standards Committee decision to prosecute, and (b) where a complaint (and the following review application) has resulted in the halting of current court proceedings issued by a lawyer for recovery of debt.

Managing the increased workload has required action in several directions. In addition to the legislative amendment referred to above, steps have been taken to explore avenues for reducing the number of review applications being made. This exercise has involved identifying the more common reasons for review applications and providing feedback to the New Zealand Law Society Complaints Service. Most involve procedural matters (e.g failure to provide reasons, or adequate reasons) and the feedback loop has led to improvements and has had some impact on numbers of review applications. This exercise continues.

Other opportunities for operational improvements by the Complaints Service have also been identified in the course of the LCRO review processes, these have been pursued directly with the New Zealand Law Society. The ancillary functions of the LCRO include liaising with the New Zealand Law Society in relation to the operations of Standards Committees, which provides the platform for identifying and facilitating improvements. Particularly of note has been the absence of uniformity in the decision making processes, and outcomes, of the many Standards Committees throughout New Zealand. The lower volumes of complaint-related activity undertaken by smaller regional centres have necessarily reflected the reduced opportunities for developing their processes. These, and other matters, have been raised with the New Zealand Law Society in the course of the year, which has seen active dialogue between this office and the New Zealand Law Society.

The opportunity for direct feedback to the Standards Committees has arisen as a result of the LCRO's attendance at the annual training day for Standards Committees. This was considered by both the LCRO and those attending the training, to be a useful exchange and it has been agreed that the LCRO will be a regular participant in that annual event. All of the exercises are expected to have a positive downstream impact on the work load of this office.

Also in this reporting period the LCRO conducted its first prosecution.

Hanneke Bouchier
Legal Complaints Review Officer

NATURE OF OFFICE

The LCRO provides independent oversight of the treatment of complaints by the Standards Committees which are administered by the New Zealand Law Society and the New Zealand Society of Conveyancers. The LCRO is appointed by the Minister of Justice after consultation with the New Zealand Law Society and the New Zealand Society of Conveyancers. The LCRO cannot be a lawyer or a conveyancing practitioner (section 190).

The primary function of the LCRO is to review determinations of Standards Committees. Additionally the LCRO is to provide advice to the Minister of Justice, New Zealand Law Society and the New Zealand Society of Conveyancers in respect of any issue which relates to the manner in which complaints are received and dealt with.

The New Zealand Society of Conveyancers is of a modest size and to date no applications for review from its Standards Committee have been received. As such this report relates primarily to applications for review from lawyers' Standards Committees.

In the reporting year Ms Hanneke Bouchier was appointed as the Legal Complaints Review Officer (from Acting LCRO). Mr Owen Vaughan was appointed as the Deputy Legal Complaints Review Officer.

The Ministry of Justice also hosts a website for the LCRO (http://www.justice.govt.nz/tribunals/legal-complaints-review-officer). That website includes information on the role of the LCRO, how to apply for a review, procedural guidelines, and full copies of a selection of decisions which may be of interest.

STATUTORY REPORTING

Section 224 of the Act requires the following information to be provided in the Annual Report of the LCRO.

Number of Applications for Review

296 applications for review were made to the LCRO during the 12 month period of 1 July 2010 to 30 June 2011. This is an increase of 59 applications from the previous reporting period which equates to an increase of 20%.

Categories of Applications for Review

- 282 of the applications received sought reviews in relation to a Standards Committee decision on a complaint made, pursuant to section 194 of the Act.
- 1 application for review required the LCRO to exercise the duties and powers of the Lay Observer pursuant to section 355 of the Act.
- 10 of the applications for review sought reviews of determinations from Standards Committees following own motion inquires pursuant to section 195 of the Act.
- 3 applications received were made in relation to intervening with the power of the Standards Committee to investigate a complaint. These applications were subsequently withdrawn.

- Of the 296 applications for review, 5 were in relation to decisions of Standards Committee's to refer the matter to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. Previous decisions of this Office (refer LCRO 133/2009, LCRO 121/2010) clarified that this Office has a limited right of review for prosecutorial decisions.

Completion of Reviews

Between 1 July 2010 and 30 June 2011, 172 reviews have been completed[1]. Of these 172 concluded matters, 86 related to reviews filed in the previous reporting period.

Reviews Outstanding

Of the 296 applications filed in this reporting period, 212 remained current as at 30 June 2011. Eight files remain current which were filed in the previous reporting period.

Timeliness of Completed Reviews

Approximately 9% of completed reviews were dealt with in three months or less, 80% were completed between three and nine months and the remaining 11% were completed in ten months or more.

Results of Review Applications

Review applications are considered successful or partly successful if the Standards Committee decision is reversed, modified or referred back to the Standards Committee for reconsideration. A reversal of a Standards Committee decision usually results in the LCRO substituting that decision for their own following inquires or an investigation. In some occasions, the vacation of a Standards Committee decision can result in the matter being referred back to Standards Committee to consider afresh. These constitute a fully successful review application. A partly successful review can occur when the LCRO modifies some aspect of a Standards Committee decision or when a matter is referred back to a Standards Committee for consideration of a specific aspect of the complaint.

- 21% of those reviews completed were either successful or partly successful.
- Of these, on 26 occasions the LCRO substituted or modified the Standards Committee decision for their own.
- The LCRO referred 11 matters back to the Standards Committee to reconsider.

An unsuccessful review application is if the Standards Committee decision is upheld, or if there is want of jurisdiction to consider the complaint.

- 63% of applications were unsuccessful. This comprised of 105 that were declined (or a slight amendment only), and 3 instances where there was no jurisdiction to consider the application.

Of the 172 reviews completed, nine applications were withdrawn during the course of the review. A review can only be withdrawn with the consent of the LCRO. 10 reviews were settled by way of agreement between the parties through negotiation, conciliation or mediation. These were facilitated by the LCRO in the course of the review hearing. Although in one case a referral was made to an external mediator at no cost to the parties.

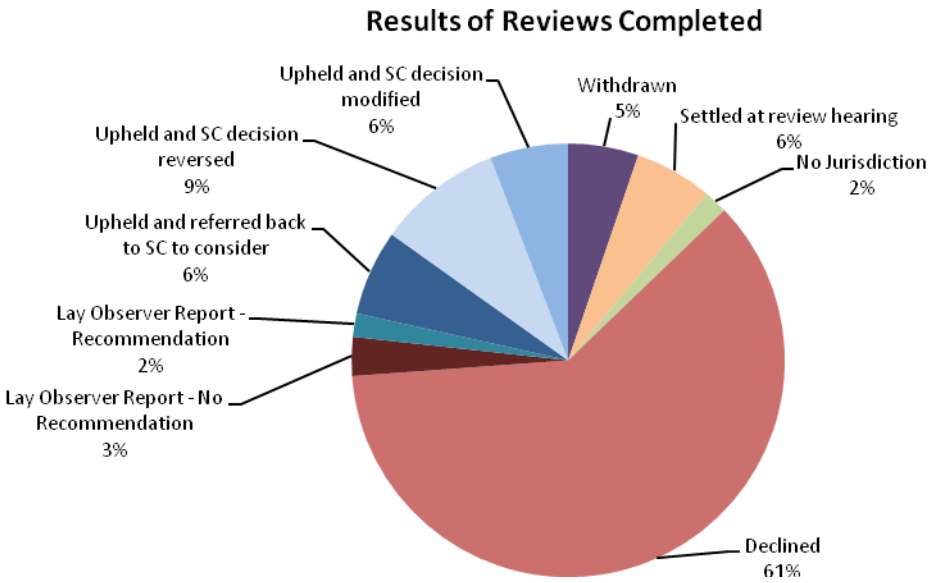
- Withdrawals and settlements account for 11% of the review applications.

The remaining 5% were attributed to the eight Lay Observer reports.[2]

[1] This refers to actual numbers of completed review without taking into account when the review applications were filed.

[2] Further analysis of the Lay Observer report function is detailed later in this report.

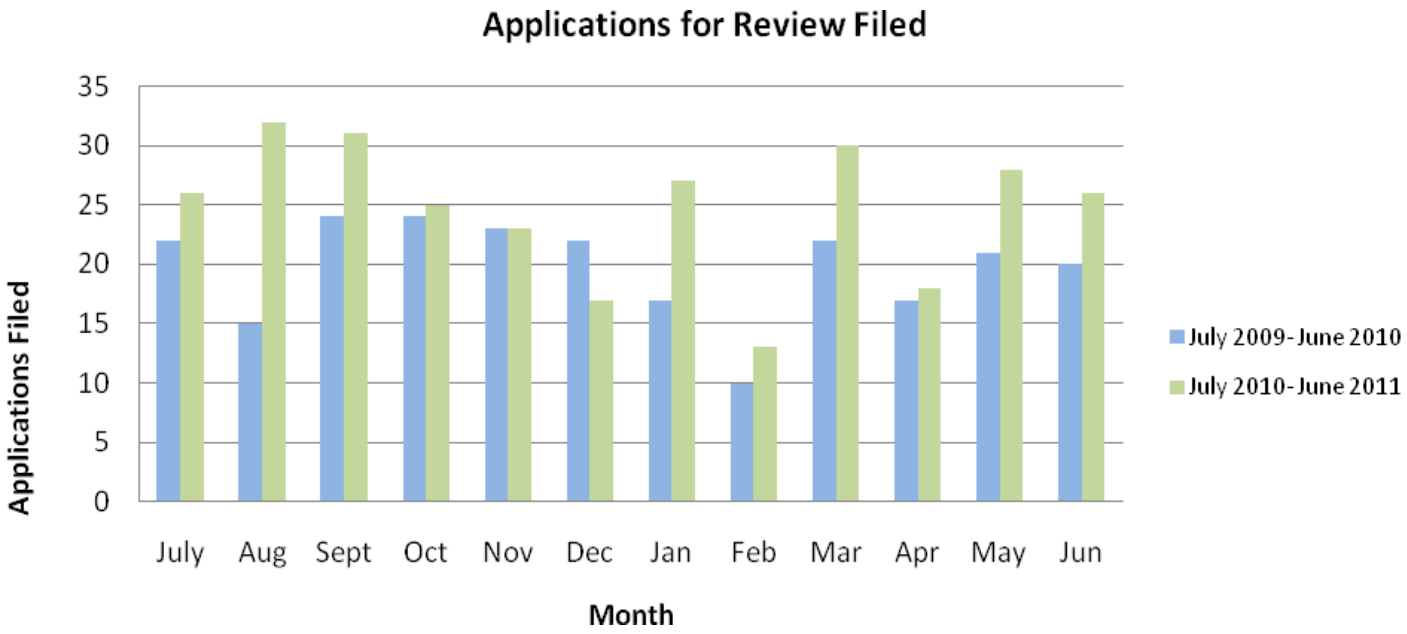
Pursuant to Section 212 of the Act, the LCRO may frame an appropriate charge and lay it before the Disciplinary Tribunal. There was one instance where the LCRO referred a matter for prosecution. This was the first LCRO decision to prosecute.



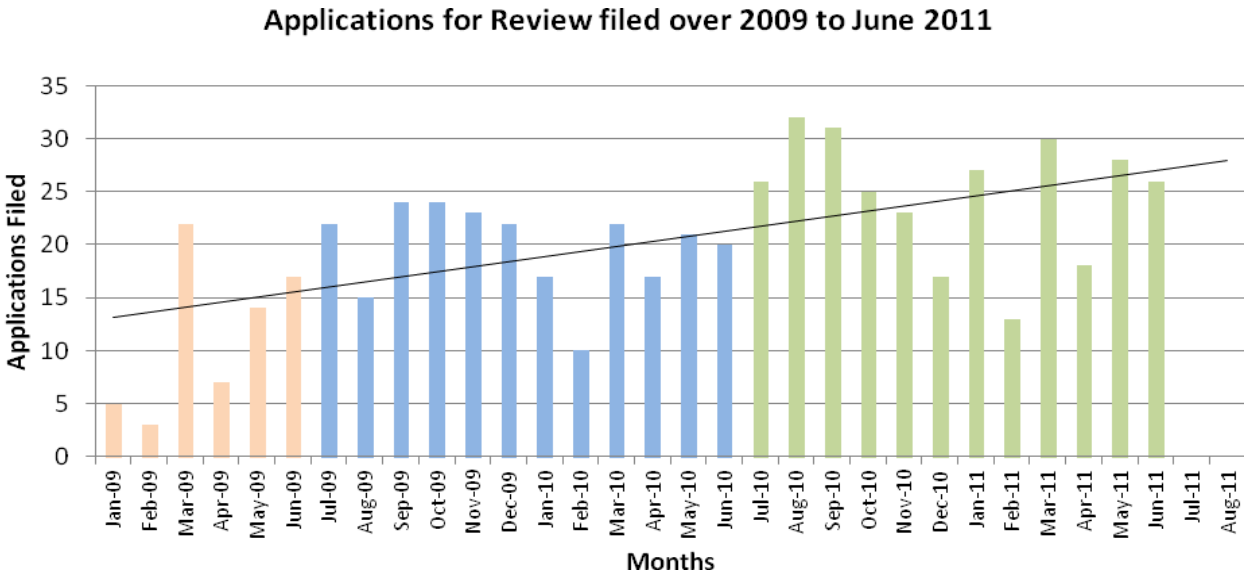
WIDER ANALYSIS

Case Volumes

296 applications for review were filed in this reporting period. This is an increase of 20% from the last reporting period. There were approximately 24 applications for review filed per month. The following graph illustrates the total number of applications filed for each month (inclusive of Lay Observer matters).



Clear trends have emerged over the last three reporting periods. The following graph illustrates the cyclical nature of the filings per month. The trend line highlights the steady increase in review applications filed. The last 3 months of this review period has seen an increase of 24% on the same period for the previous reporting year. Using this information as a guide, a projection can be made that in the ensuing year approximately 367 applications for review will be made.



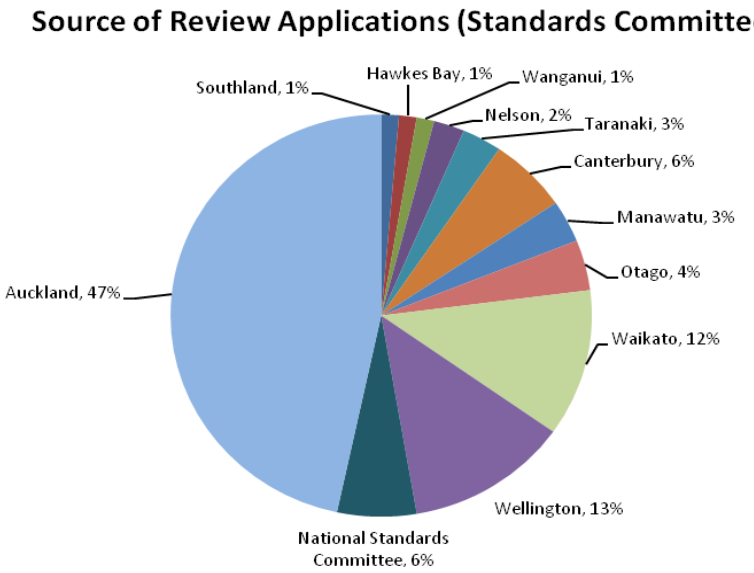
Source of Applications

All applications received related to decisions involving lawyers. No applications for review were received involving conveyancers.

The following diagram illustrates the percentage and locations of the source for applications for review[3]. The majority (47%) of applications came from Auckland. Based on information obtained from the New Zealand Law Society, there were 11,678 lawyers registered as at 30 June 2011 and of these, 43% were registered in Auckland. It is to be expected that the majority of applications for review came from Auckland where there is the largest population of lawyers and clients.

The diagram shows the location of the various regional locations of Standards Committees. A current Practice Note provides that all complaints are to be considered by the local standards committee, subject to certain circumstances outlined in the Note. In addition to regional committees there is a National Standards Committee which undertakes investigations in certain circumstances as defined in the Note.

[3] The National Standards Committee only hears matters that the Board of the New Zealand Law Society have resolved should be heard by an independent Standards Committee.



Rate of Review Applications

Information received from the New Zealand Law Society, indicated that Standards Committees disposed of 1403 complaints in the current reporting period. In the same reporting period this office received 296 review applications. This suggests that 21% of all Standards Committee decisions proceed to a review.[4] This is a 4% increase on the same figures from the previous reporting period.

Applicants

Of the 296 review applications filed, 208 were filed by consumers and 88 were filed by lawyers. 70% of these applications filed were made by the original complainant who was dissatisfied with the Standards Committee decision on their complaints.[5]

43% of review applications were filed by consumers and concerned complaints made against their own lawyer; 53% of applications were filed by individuals who were not the lawyer's client (most often concerned complaints against the lawyer acting on the opposite side of the transaction). The remaining 6% relate to applications that were made in relation to decisions made by Standards Committees following an own motion inquiry. Of note, 12% of applications filed, were by a lawyer against another lawyer.

Approximately 66% of review applications filed involved conduct related issues, 9% were related to fees charged, and the remainder related to both conduct and fees.

Lay Observer Reviews

Applications to the Lay Observer have significantly decreased since the last reporting period, with only one application received by the LCRO this period. No time limit exists for a Lay Observer review application to be submitted, and it is a possibility that applications will be made in the future. It is anticipated that these applications will become a rarity.

[4] Given that there is a 30 working day time frame for filing a review application, no exact match can be made between Standards Committee determinations and review applications for any given period of time.
[5] The person who made the initial complaint to the New Zealand Law Society

Jurisdictional Issues

Three applications for review were not considered for jurisdictional reasons mainly resulting from a failure to comply with procedural requirements. In particular, applications to the LCRO for review must be made on a prescribed form, with a prescribed ($30.67) fee and within a strict 30 working day time limit. Section 139(2) of the Lawyers and Conveyancers Act requires that every Notice of Decision must include information about the right of review. The LCRO has determined that the legislation requires strict compliance with such formalities and that because the statute confers no discretion there is no jurisdiction to relax the requirements or extend the time for making an application.

In general where an application is sought to be made out of time the Applicant will be informed of this by the registry staff, and have the opportunity of electing to withdraw and receiving a refund of their application fee. In some cases applicants nevertheless wish to have the question of jurisdiction determined by the LCRO. Decisions issued on this point have been published on our website.

OPERATIONAL MATTERS

The LCRO is obliged to conduct reviews with as little formality and technicality, and as much expedition as possible as is consistent with the Act, a proper consideration of the review and the principals of natural justice.

Hearings

The majority of reviews included a review hearing at the direction of the LCRO; such hearings are conducted in the presence of both parties. Parties are entitled to have legal representation and although this is not done in the majority of cases, it is more often the lawyer rather than the consumer who is represented by counsel. Parties may also bring a support person.

In cases where the LCRO has assessed that the Respondent has fully addressed and responded to all of the issues and there appears to be no further information to be obtained from them, the LCRO may direct that an Applicant-only hearing be scheduled where this has been requested by the applicant. This procedure may be used where the LCRO has assessed that the review could be conducted 'on the papers' (see below) but where the review applicant seeks to be personally heard on the application.

Applicant-only hearings do not require the attendance of the Respondent who is advised that he or she may attend if they elect to do so. Any hearing involving one party does not prevent further enquiry by the LCRO. The nature of the hearing processes is inquisitorial. The hearing procedures are set out in the Guidelines which are on the LCRO website.

In this current reporting period 86 reviews were conducted by way of a hearing in person. This included directions conferences by phone. Of the 86 hearings, 36 review hearings were dealt with outside of Auckland.[6]

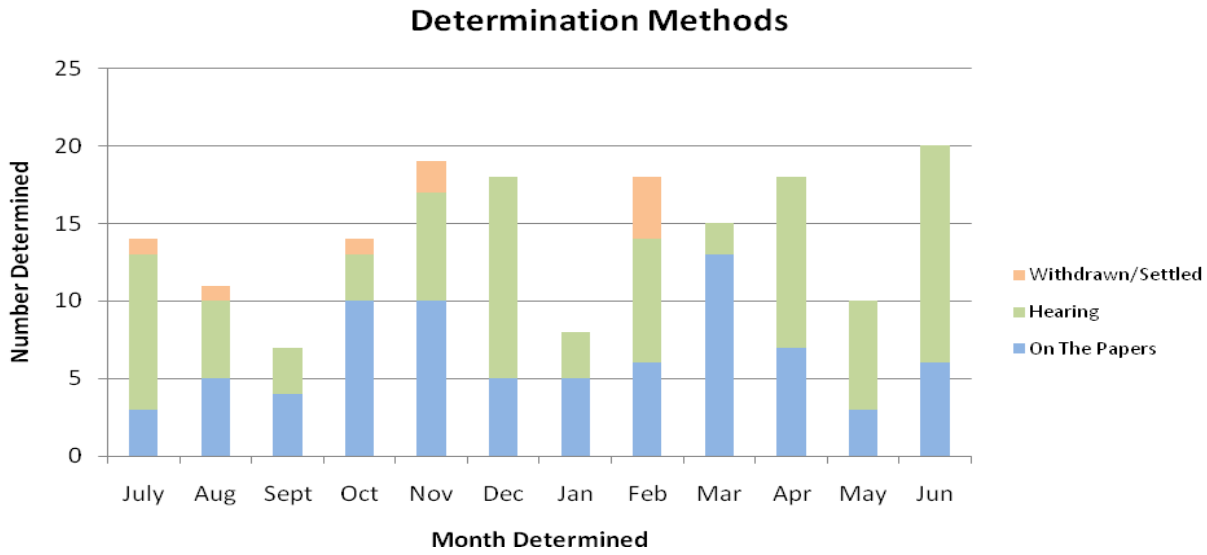
Review on the Papers

Where the LCRO is of the view that the matter can be adequately determined in the absence of the parties, the parties are invited to consent to a review on the papers. Parties are not obliged to consent, however, and have a right to be heard in person on a review. 77 of the determined reviews were conducted on the papers.

[6] Please note that the travel time associated with hearings outside of Auckland is not included in this figure.

Withdrawn/Settled Reviews

The remaining nine reviews were those which were withdrawn or settled prior to a hearing or decision having been issued. Where an Applicant seeks to withdraw from his or her review application, the consent of the LCRO is required. Such consent is usually granted where no public interest issues are involved.



Costs, Fines and Compensation Orders

The LCRO has the power to impose costs and has issued a guideline in respect of how that power will be exercised. The Guideline is available on the LCRO website.

Where a finding is made against a lawyer or conveyancing practitioner, that practitioner will be expected to pay a contribution towards the costs of conducting the review. Costs orders totalling $22,475 were made against Practitioners. Costs are payable to the New Zealand Law Society.

In addition to the costs for the review, practitioners were fined a total of $23,950, the largest being a fine of $12,000. These amounts are payable to the New Zealand Law Society and are taken into account when annual levies are set.

The LCRO has indicated that in general, costs will not be awarded between parties unless exceptional circumstances exist. There was one inter-party costs award made against a lay applicant of $625.

Other monetary orders related to compensatory orders (payable to a party who has suffered loss as a result of a lawyer's professional failure), and were made where the LCRO considered it appropriate. In the reporting year these totalled $9,200.

Publication of Decisions

The LCRO has continued to adopt the approach that in general, decisions will be published in a manner that does not identify individuals. Decisions issued by the LCRO are routinely published on the LCRO website for interest and educational purposes with all names and identifying details removed.

Where an adverse finding has been made against a practitioner that the LCRO considers should be published with identifying details, the LCRO Guidelines set out the procedures that will be followed by the LCRO. [7]

Alternative Dispute Resolution

The Lawyers and Conveyancers Act provides for a review to be postponed for the parties to explore the possibility of resolving the issues by negotiation, conciliation or mediation. Where appropriate these options are offered to the parties.

Where parties embark on a private mediation resulting in a settlement, and then seek to withdraw their review application, the LCRO's consent is required.

Opportunities also arise from time to time in the course of a review hearing during which one or both parties indicate a willingness to explore resolution at that time. Where the parties reach a resolution in such cases, with or without the assistance of the LCRO, the terms of the agreed settlement may be declared by the LCRO, with the parties' consent, to be a final determination of some or all issues involved in the review. This opportunity often arises where the review issues revolve around legal fees. Any agreed settlement between the parties may result in either a full or partial settlement of the review issues, but this does not prevent the LCRO from nevertheless issuing a decision should that be considered appropriate.

In total there were 10 matters which resulted in settlements. On one occasion the parties consented to the appointment of an external mediator with whose assistance the matter was resolved.

MINISTER OF JUSTICE

The function of the LCRO includes providing advice to the Minister of Justice on any issue identified in the course of carrying out the review. In this reporting period there have been no specific areas of concern that required dialogue with the Minister.

The main area of concern for this office in this reporting year as previously stated, has revolved around the work pressures resulting from inadequate staffing, in particular the legislative provision that restricts the number of LCROs. Steps are currently in motion to amend the Act and this is expected to be concluded before the next reporting period. The urgent need to resolve this matter cannot be overstated.

The LCRO is also obliged to provide a report to the Minister of Justice in relation to the discharge of the function of Lay Observer, previously set out in section 97(7) of the Law Practitioners Act 1982. This obligation arises by virtue of Section 355 of the Lawyers and Conveyancers Act which confers on the LCRO all of the duties and powers of a Lay Observer under the Law Practitioners Act as if that Act had not been repealed. This includes providing an annual report to the Minister.

Pursuant to that obligation, it is noted that one new review application was received which related to a Lay Observer review. Eight lay observer reviews were completed during this reporting period, seven of which were filed in the previous reporting period. There were two instances where the earlier decision had already been reviewed by a Lay Observer, and in such cases the LCRO explained to the Applicant the reasons why no further steps were open to him or her to pursue the complaint further. Where it appeared that no Lay Observer review had been requested, or where such a

[7] The Publication Guidelines of the LCRO are separate from those of the Standards Committee. A decision by a Standards Committee to publish a lawyers name may be the subject of a review application.

request had been made but not completed, the review was undertaken by the LCRO pursuant to the exercise of the functions and powers conferred by Section 97 of the Law Practitioners Act 1982.

In this reporting period three cases resulted in a recommendation being made by the LCRO, for the Standards Committee, acting as a Complaints Committee, to commence an enquiry into matters that had been previously overlooked.

The LCRO's role as Lay Observer is to undertake reviews of decisions made by Complaints Committees under the Law Practitioners Act 1982 (repealed). In this role the LCRO is confined to exercising the powers and functions of a Lay Observer as set out in section 97 of the Law Practitioners Act 1982. This essentially restricts the review to the manner in which a Complaints Committee had dealt with the complaint, and does not allow a review of a Committee's decision on the merits of the complaint. This would not however prevent an examination of whether the evidence before the Committee reasonably supported the final decision made.

NEW ZEALAND LAW SOCIETY

The office of the LCRO interfaces with the New Zealand Law Society mainly in two ways. One arises by virtue of sections 124(g) and 125(g) of the Lawyers and Conveyancers Act. This requires the New Zealand Law Society and the Society of Conveyancers to provide to the LCRO copies of any complaints that are made about the operations of the Complaints Service of the respective societies. These complaints are viewed by the LCRO and should they indicate any particular matter that requires attention that matter would be raised by the LCRO with the Society. These complaints do not result in a formal investigation by the LCRO although the LCRO may, where necessary, seek further information from the New Zealand Law Society. Where any issues arise from such complaints, the practice is that the LCRO will liaise with the New Zealand Law Society. There is usually no direct communication between the LCRO and the complainant.

In this reporting period there have been six such complaints forwarded to this office. None have required any further attention by this office. In some cases the complaint concerned the decisions of the Standards Committee. These decisions carried a right of review (the appropriate way to challenge the decision) which was not exercised, and there were no further opportunities to have the outcome reviewed. In two instances the complainant's poor understanding of the statutory obligation imposed by the Act led them to expect that a full investigation of their complaint would follow. Explanations of the reporting function and the role of the LCRO were provided to the complainants in these cases and following dialogue with this Office, the New Zealand Law Society now provides a full explanation about the process to individuals who lodge such complaints.

The second interface between the LCRO and the New Zealand Law Society arises through regular (usually quarterly) meetings which provide the forum for discussion of a variety of issues arising in the work of the Complaints Service and the LCRO. Opportunities for improvements are identified and discussed, and it particularly provides an opportunity for the LCRO to provide feedback to the New Zealand Law Society on observations that are made in the course of reviews in relation to Standards Committee decisions.

Among the topics covered in the reporting year was the matter of Standards Committee's providing reasons for decisions, this being a 'problem area' frequently identified as a basis for reviews. This has led to discernable improvements. Matters of an operational nature are included as they arise from LCRO reviews which identify issues that required clarification or attention by the New Zealand Law Society for its Standards Committees.

EXTRA CURRICULAR/OUTREACH

In this reporting year the LCRO took up the opportunity (during a personal vacation) to meet with personnel and administrators involved in the legal disciplinary processes in the UK. This included an opportunity to meet up with Baroness Dianne Hayter, Chair of the Consumer Panel of the Bar Standards Board (since resigned) who generously gave her time to discuss her role as consumer adviser to the Legal Services Board. There was a further meeting at the offices of the Legal Services Board in London, with General Counsel and a senior administrator, who provided an overview of their roles in the regulatory framework.

The significant distinguishing features between the regulatory frameworks of the UK and of NZ make any comparison of little value. The UK reforms in 2005 resulted in the bringing under one regulatory umbrella (the Legal Services Board) a large number of organisations involved in the provision of legal services by lawyers (separated as lawyers and solicitors) and non-lawyers, intended to extend to the promotion of public and consumer interests, and also the governance of the various professional bodies. The consumer complaints are handled by a Legal Ombudsman and there is also consumer input to the Legal Services Board. The Act provides for disciplinary matters to be largely dealt with by the professional bodies.

The LCRO also attended the 14th Annual AIJA Tribunals Conference in Melbourne in June 2011, which also provided an opportunity to liaise with tribunal members working in a variety of Australian jurisdictions. This provided a useful opportunity for exchanging information on procedures affecting a range of tribunals. Australia also maintains separate pathways for consumer and disciplinary matters.

The LCRO and Deputy LCRO attended the annual Standards Committee training day held by the New Zealand Law Society, and had the opportunity to provide feedback to Committee members. This is the only opportunity for direct contact between the LCRO and Standards Committee Chairs, and following very positive comments it is proposed that the LCRO becomes a regular attendee.

FINANCIAL MATTERS

The LCRO is administered by the Ministry of Justice and funded though a levy imposed on the New Zealand Law Society and New Zealand Society of Conveyancers pursuant to section 217 of the Act. The societies recoup their levy through levies on their own members. The LCRO levy on the Societies for the 2010/11 year was $22.00 (incl GST). All levies were received from both societies.

Revenue Received

- LCRO Filing fees: $ 7,520.92
- LCRO levies: $ 240,041.00 (incl GST)

2011-2012 Levies

The levy for 2011/12 is still being negotiated with the Societies, but the same process as previous years has been used, namely that the Ministry, New Zealand Law Society and the New Zealand Society of Conveyancers consult together near the end of each financial year to determine whether the levies set were actual and realistic. The estimated annual amount is adjusted in accordance with a recalculation based on a range of income and expenditure criteria that include:

- actual income;

- actual costs of function;
- budgeted amounts;
- filing fees received;
- interest received from the Trust Account; and
- costs awarded.

As a result of the above process a new levy is set at by dividing the amount of estimated costs by the number of practicing certificates issued by each society.

By section 222 of the Act, the Ministry of Justice is required to report in its own Annual Report in respect of funds received and expended in meeting the cost to the Crown of the performance of the functions of the Legal Complaints Review Officer.[8]

CASES OF INTEREST

The four decisions included in this report are representative of the two main facets identified in the Act. These decisions encompass the consumer focus of the legislation and the disciplinary/conduct related matters. These four cases are all represent successful reviews. They are not a proportional representation of decisions issued by the LCRO but constitute the 21% of successful reviews. A full selection of decisions issued by the LCROs can be accessed on the website.

AL v ZO on behalf of ZN [9]

[1] AL (the Practitioner) was a staff employee in a law firm that specialised in conveyancing. AL acted for ZN in the sale of his house. Some time after settlement ZN's step daughter (ZO) filed a complaint against the Practitioner. The Auckland Standards Committee No 2 upheld the complaint against AL, finding him guilty of conduct unbecoming which amounted to unsatisfactory conduct as defined in Section 12 (c) of the Lawyers and Conveyancers Act 2006 (the Act). The Committee imposed a number of orders pursuant to Section 156 (1) of the Act. These included payment of a fine in the sum of $1,500.00, and costs of an amount of $750.00. The Applicant was also ordered to rectify the error identified by the Standards Committee, which in this case required the Practitioner to pay to ZN the amount of $20,000 that had been retained at settlement of the sale.

[2] The Practitioner sought a review of that decision because he disagreed with the Standards Committee's interpretation of the events. Accordingly he also challenged the orders made against him.

Background

[3] The Practitioner had received on his desk a Sale and Purchase Agreement which showed the law firm as acting for both vendor and purchaser. He had had no prior contact with either of the clients. At no time did the Practitioner meet the vendor, ZN, who was at that time residing in Europe. ZN's house was already vacant and arrangements were made for the purchasers to rent the house as tenants until settlement, a period of about a month. The Practitioner said (and I accept) that he had no involvement in the rental arrangements which were made by the real estate agent and the parties. The rent was, however, paid into the trust account of the law firm where he was employed.

[4] About ten days before settlement was due to take place the purchasers discovered that there was no legal access to the property. This was discovered when the purchasers' surveyor undertook some survey work

[8] The Ministry of Justice Annual Report also outlines the Trust Account information along with the actual costs of the LCRO office. A copy of the Ministry's Annual Report can be accessed from www.justice.govt.nz/publications

[9] LCRO 24/2010, Issued 27 August 2010

on the property. They informed the Practitioner about the problem and the Practitioner emailed this information to ZN on 19 June 2008. (All communications between the Practitioner and ZN occurred by telephone or email). I note at this point that this defect was not discoverable by a normal search of the Certificate of Title, and it also appears that the property had been bought and sold a number of times since its sub-division by the neighbours, and at no prior time had this problem been uncovered.

[5] ZN responded the following day (also 19 June 2008 in Europe- the day before settlement in NZ) and informed the Applicant he knew nothing of the matter and it had not been mentioned by solicitors when he purchased the property. The email ended with "*Keep me informed and let me know what I should do, I have a good relationship with the* (next door neighbours)*"*.

[6] The email appears to have been received by the Applicant on 20 June (NZ time), being settlement day. The Practitioner replied suggesting two possible ways of resolving the problem; either the purchaser was to put in a new access in the front of the property, or the next door neighbours were to grant a right of easement over part of their land being approached upon. He added that *"both of these options will involve some expense and obviously need to be discussed between myself and* (the purchaser)*. ... In order that we can complete settlement today and repay your mortgage to the bank we have suggested to* (the purchaser) *that we will settle on the basis that we will retain the sum of $20,000.00 in our Trust account on an interest bearing deposit until the matter is resolved...*". (The purchaser) *is obtaining more information about the cost of a new access and will be in touch over the weekend. In the meantime we believe it is in everyone's best interest to settle today and work on a resolution. We have advised* (the purchaser) *not to approach* (the neighbours) *direct until he has discussed things with you*." There was no further communication between the Practitioner and ZN before settlement took place. The sum of $20,000.00 was retained from the purchase price, and placed in the trust account of the law firm on an interest bearing deposit. There were some telephone exchanges between the Practitioner and ZN in the following days, but it seems that no mention was made of the retention monies. There were also a few emails were exchanged later in June 2008 between the Practitioner and ZN concerning the access.

[7] There was no progress on sorting out the access issue over the next four months and at the end of October 2008 the Practitioner was copied into an email sent by ZN's step-daughter, ZO, to the local Council enquiring into the access issues. On 13 February 2009 the Practitioner received a letter from another law firm acting for ZN, seeking information about the terms upon which the $20,000.00 was held in Trust, and what progress the purchasers had made with regards to resolving the access, and any other relevant information.

Complaints

[8] Complaints about the Practitioner were eventually filed by ZO on behalf of ZN, driven by her dissatisfaction with the Practitioner's response (or lack of response) to those enquiries. The main two complaints were (a) unauthorised withholding of $20,000, and (b) conflict of interest. The outcome sought was payment of the $20,000 to ZN, and compensation for the legal fees paid to the law firm engaged to recover the money.

Standards Committee decision

[9] The Standards Committee's investigation particularly focused on the question of authorisation for the retention. The Committee found that due to the specific timing of the emails and the international clock, that the email (concerning the proposed retention) had been sent by the Practitioner at a time where the vendor would likely have been asleep in Europe, and concluded that the vendor would not have read the email until the morning, some hours after settlement was in fact completed in New Zealand. On that basis, the Standards Committee concluded that the Practitioner had retained the $20,000.00 without instructions and had no authority to have done so. The Committee noted that this had occurred at a time when the Law Practitioners Act 1982 was still in force and that the conduct contravened section 89 of that Act. The Committee further noted that the unauthorised retention constituted ongoing conduct and thereafter breached section 110(1)(b) of the Act. The Committee was satisfied that the breach constituted unsatisfactory conduct as defined by section 12 of the Act. I have referred to the orders made by the Committee pursuant to section 156(1) of the Act which included a fine and a penalty.

[10] The Standards Committee also ordered the Practitioner to *'rectify his error by paying the amount of $20,000.00 plus all interest earned on it to* (the vendor) *forthwith*.' The order was made pursuant to subsection 156(1)(h), by which a practitioner can be ordered to rectify, at his or her own expense, any error or omission.

Review

[11] A review hearing was held on 5 August 2010. The Practitioner attended with his Counsel. Although the review hearing date had been agreed by both parties, ZO, who opposed the review application, did not appear. Her legal representative helpfully made an appearance on her behalf.

[12] A material difficulty in this review is that I have not had the benefit of any direct contact with ZN who, ZO advised, suffers from Alzheimer's and would find communication difficult. The complaint, as noted, was made by, ZO, who is the step-daughter of ZN. There are necessarily limitations in undertaking an investigation where the direct evidence of an affected party is not available.

[13] At the start of the review hearing I was informed that the $20,000 retention money had in fact been paid to ZN on 4 March 2010. As this post-dated the Standards Committee decision, the payment appears to have been made pursuant to the Standards Committee's order. There appeared to have been some confusion on the part of the Applicant who may have understood the order as a compensatory one. I noted that the order had been made pursuant to section 156(1) (h) and was remedial in nature, and that the order appeared to have been satisfied by virtue of fact that payment had been made. Counsel for the Respondent agreed with this interpretation. In the circumstances it seemed unnecessary to give any further consideration to this particular aspect of the review application.

[14] However, further comment about this order is made under the heading of "Further discussion" at the end of this decision.

[15] The main issue for the review was whether the Standards Committee was correct to have found the Practitioner was guilty of unsatisfactory conduct based on its conclusion that he had retained monies without the authority of the vendor, ZN. The Practitioner disagreed with the way the Committee had interpreted the events. In his view ZN had agreed to the retention, if not before, then subsequent to the settlement. The following is an explanation of the events as he saw them.

[16] The Practitioner said that the vendor had been most anxious to complete the purchase and particularly to ensure that the mortgage was repaid so as to stop interest running. When the access problem was discovered ZN had asked him about the options available in circumstances of the access problem. He said that ZN's determination to settle the transaction was a dominant factor in his mind in proposing a solution that would allow settlement to proceed in the circumstances. He said that after emailing the proposal to ZN, he received no further comment about the matter. A few days after settlement (on 25 June 2008) the Practitioner sent to ZN full details of the settlement, which would have shown the retention. The Practitioner also relied on the several telephone calls he had with ZN after the settlement when no mention was made by ZN about the retained monies. The Practitioner took that as ZN's agreement with the action he had taken, if not in advance then confirmed subsequently. The Practitioner saw his proposal as benefitting ZN who was able to achieve settlement of the sale, and repay the mortgage despite the access objection. The Practitioner's Counsel submitted that the access issue was a defect going to the title, and would, despite the late notification, have entitled the purchaser to defer settlement, or cancel the contract if the defect could not be cured. In any event I note that the Practitioner considered the arrangement benefitted ZN. He thought he had done ZN a favour.

[17] The Practitioner also explained that he had understood that ZN would progress the resolution of the access issue and liaise with the next door neighbours (who had originally done the subdivision) with whom ZN had an established relationship. He understood that ZN had instructed him not to contact the neighbour. He added that he had not in any event received any instructions to sort out the access issue and that if such an instruction had been given, this matter would have had to be referred elsewhere. There was some evidence suggesting that the vendor had understood or may have assumed that the matter was being progressed by the Practitioner. Ultimately the matter came to a head primarily because no progress had been made towards resolving the access problem and a final accounting of the retention money.

Considerations

[18] I noted earlier that the Standards Committee's enquiry mainly focused on the question of whether the Practitioner had authority for retaining the money. The Committee concluded (rightly in my view) that no prior consent had been given. However, there are other factors that are relevant to the enquiry. I accept the Practitioner's evidence that no objection to the retention was raised by ZN in their subsequent telephone discussions while clearly aware that the money had been retained. The circumstances indicate that ZN was anxious to have the sale settled. He had been informed about the access problem prior to the settlement. It was arguably open to ZN to have telephoned the Practitioner to discuss the issue, and equally arguable that his response indicated that he was willing to leave the solution in the hands of his lawyer, the Practitioner. The action taken by the Practitioner was not later questioned by ZN, which the Practitioner took and indicative of ZN's agreement with the action taken, albeit after the fact. From a practical point of view it is not unreasonable to take into account the reality of the circumstances confronted by a lawyer when any subsequent enquiry is undertaken. The circumstances suggest that it was unlikely that settlement would have taken place without some arrangements, which would likely have included retention of some part of the purchase money.

[19] I have also considered that no steps were taken by ZN following settlement (or on his behalf by ZO) concerning the retention. The Practitioner said that queries about the access were not raised until just before Christmas 2008, but ZO disputed this, referring to 'numerous requests had been made' to the Practitioner to which he did not respond. The evidence on the file shows that there were a few exchanges between the Practitioner and ZN in late June 2008. On the file is a copy of an email sent by ZN on 26 June 2008 asking the Practitioner how ownership of the land in question could be established. The Practitioner recalled having telephoned ZO but there is no file note of that call.

[20] The next communication on file is a 29 October 2008 email sent by ZN's partner to the real estate agent. This mentioned the $20,000 retention (although notably not with any criticism) asking him to contact the Practitioner concerning progress on the access matter. This was forwarded to the Practitioner the next day. Also on the file is a copy of an email sent by ZO directly to the local Council, a copy having been forwarded to the Practitioner. The email is dated 31 October 2008 and requesting information from the Council about access. These few communications all concerned the progress on sorting out the access; none raised any concerns about the retained monies.

[21] The formulation of a complaint alleging unauthorised retention appears to have arisen somewhat later, and after another law firm was instructed and requested information from the Practitioner, which included an enquiry about his authority for having retained the money. The specific complaint against the Practitioner concerning unauthorised retention become formulated in that context.

[22] I have already noted the Standards Committee's focus on the authority for the retention. However, the evidence suggests that the fundamental problem was the Practitioner's failure to have recognised and dealt with the conflict of interest that had arisen, and that this ought to have been the focus of the Committee's enquiry. A conflict clearly arose between the interests of the vendor and of the purchaser as soon as it was discovered that there was a problem with the access. The conflict 'event' (discovery of the access problem) arose about 10 days prior to the scheduled settlement. The Practitioner ought then to have recognised that a conflict existed, and taken steps to ensure that the interests of both parties were protected. There was sufficient time to have arranged for the parties to have obtained independent legal advice as to their positions, and to have reached a basis for settlement.

[23] There is no evidence to indicate that the Practitioner took any steps to manage the conflict of interest as required under the applicable rules. Rule 1.07 of the Rules of Professional Conduct for Barristers and Solicitors (under the Law Practitioners Act 1982) sets out the action that a lawyer must take in the event of a conflict, or a likely conflict of interest among clients. (Equivalent provisions are found in Chapter 6 of the Conduct and Client Care Rules 2008). The conflict rule requires a lawyer to advise each of the clients that a conflict exists, advise each client to take independent legal advice, and to arrange such advice if necessary, and to decline to act for any party where so acting would, or would be likely to disadvantage any of the clients involved. The Practitioner took none of these steps.

[24] Of some concern was that it was not apparent at the review that the Practitioner perceived or accepted that that a conflict existed, which was somewhat surprising given that the Practitioner appears to be a reasonably experienced lawyer. He explained that he was a staff solicitor and it was not uncommon for the law firm to act for both vendor and purchaser, and there was no policy in the firm concerning this. I have no information about the firm policy concerning managing conflict, and the Practitioner stated that he was unaware of any such policy in the firm. However, the rules of professional conduct apply to every lawyer independently of a firm's policy and a breach of the rules governing professional conduct is not answered by the existence or absence of any policy or instructions of an employer. That is to say, every lawyer is responsible, personally, for his own professional conduct, and for complying with the relevant rules of professional conduct.

[25] Counsel for the Respondent, referring to the conflict issue, submitted that ZN had had no opportunity to have received independent advice as to his interests in relation to settlement options. It was submitted that had such an opportunity arisen, any agreement concerning settlement arrangements would very likely have set out a clear provisions for how the issue should be resolved. I agree. While there may have been no different outcome as regards retaining part of the purchase money, it is likely that independent legal advice prior to settlement would have led to an agreement surrounding terms and conditions for a retention, and would very likely have included a process for resolving the access issue (and finalising the payments). ZN was entitled to have received independent legal advice on this matter. The evidence suggested that the uncertainty surrounding the resolution of the access issue was essentially the cause of ZN's initial dissatisfaction. This directly resulted from the Practitioner's failure to have managed the conflict of interest, and ultimately led to the complaints against the Practitioner involving the authority for the retained monies.

[26] I appreciate that I have taken a somewhat different approach to that taken by the Standards Committee. Yet even allowing for an argument that ZN had retrospectively approved the retention, this does not overcome the problem that arose from the Practitioner's failure to have managed the conflict in accordance with the rules of professional conduct. None of the confusion about how the access should be finally resolved would have arisen if the conflict had been properly managed, and this responsibility fell squarely on the Practitioner. This case is instructive as demonstrating the reasons for the conflict rules.

[27] While I have concluded that the Practitioner's omissions are based on grounds different from that found by the Standards Committee, the Practitioner's failure to have properly dealt with the conflict issue was serious and in the circumstances there is no reason to disturb the Standards Committee's finding of unsatisfactory conduct, or the orders concerning the fine the costs.

Costs

[28] The Practitioner has been unsuccessful in overturning the Standards Committee decision, and in accordance with the Costs Guideline of this office, it is appropriate that he contributes to the costs of the review. This was a hearing in person and relatively straight forward. I also take into account that the reasons for the Practitioner's challenge to the basis of the Committee's decision were to some extent successful. In the circumstances I consider a costs order of $400.00 is appropriate. Accordingly, the Practitioner is ordered to pay the sum of $400 to the New Zealand Law Society within 30 days of the date of this decision.

Further discussion

[29] Noted earlier was the order made by the Standards Committee requiring the Practitioner to rectify the error by paying the $20,000 plus accrued interest into ZN's account. Two observations need to be made in relation to this order. The first is that no consideration appears to have been given to whether it was within the Practitioner's power to carry out the order. It was disclosed at the review hearing that the Practitioner had been a staff solicitor. It also appears that his employment was terminated as a result of the complaint. Given the money was retained in the firm's Trust Account it is not obvious how it could have been carried out by the Practitioner in the circumstances. The question is academic in this case since the firm carried out the Committee's order. However, it does raise the important issue of implementation in relation to orders that may be imposed by a Standards Committee on a lawyer.

[30] The further observation is that no consideration appears to have been given to any third party who may have claimed an interest in that fund. I have in mind the purchasers in this case, who agreed to settle on

the basis that the money would be retained to cover any costs for remedying the access problem. Without the retention (or some other arrangement) it may reasonably be supposed that they would not have agreed to settle the purchase. The result of the Committee's order is that a fund that was withheld for the benefit of the purchaser to cover the vendor's potential liability, has now been returned to the vendor, leaving the purchaser without any security for the rectification of the access issue. When a Standards Committee is considering imposing a remedial order, it needs to give consideration to how that order may affect the legitimate interest of any other party. There is nothing in this case to indicate that the Committee took into account, or sought the views of, any third party who might be affected by that order.

AM v ZM[10]

[1] The New Zealand Law Society received and investigated a complaint by Mrs AM (the Applicant) against Ms ZM (the Practitioner) and decided that no further action would be taken in respect thereof.

[2] ZM acted for AM's husband in property relationship proceedings. ZM made an application for interim maintenance. This was declined by the Court. AM was of the view that the Court's decision to not grant her application was because the Practitioner had provided misleading information to the Court.

The complaint

[3] The complaint was that the Practitioner had deceived or misled the Court in her submissions of 7 July [200Z], filed in opposing the Applicant's application for interim maintenance. The Practitioner had submitted that her client (the husband) was meeting all relationship debt. The Applicant said this information was not correct, and that the Practitioner knew it was not correct. The Applicant contends that the Practitioner breached Rule 13.1 of the Lawyers: Conduct and Client Care Rules 2008 which states:

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

[4] The Standards Committee noted that the Applicant was represented by her own counsel throughout, and that there had been a right of reply in the Courtroom to the Practitioner's submissions. The Committee recorded that the Practitioner's response had been forwarded to the Applicant for comment and that the Applicant's response was also considered.

[5] In declining to uphold the complaint, the Committee expressed the view that the Applicant had the right to take legal advice on matters currently before the Court, including the appropriate legal steps available to challenge the information before the Court. In the Committee's view this did not prevent the Practitioner from acting in the best interests of her client.

[6] The Standards Committee declined to uphold the complaint pursuant to Section 138(2) of the Lawyers and Conveyancers Act 2006. This confers upon a Standards Committee a discretionary power to take no further action on a complaint if, in the opinion of the Standards Committee, it is unnecessary or inappropriate to do so.

Review application

[7] The Applicant sought a review of the Committee's decision because in her view the Committee had failed to examine the Practitioner's actions and to consider whether the submissions were misleading. She considered the complaint was not answered by reference to actions she or her counsel took or could have taken, but that the Practitioner's conduct should be assessed independently of such matters and in its own terms.

[8] A review hearing was held on 1 December 2010, attended by both parties. The Practitioner was accompanied by Counsel. The Applicant was accompanied by a support person. The Applicant reiterated the

[10] LCRO 48/2010, issued February 2011

substance of her complaints, and presented a document setting out the basis of her complaints and the compensation that she sought. Submissions were also made by the Practitioner and her Counsel.

Background

[9] The Applicant and her husband separated in [200X]. The relationship assets (not yet divided) include the family home and adjoining land, commercial properties (one is rented by her husband's business), and a [holiday bach]. Other assets are not material to this complaint and need not be mentioned. The commercial properties collectively had a reasonably small mortgage, but the bach had a large outstanding mortgage of some [$] which is an interest-only loan. The family home was mortgage-free.

[10] During the marriage the debt on the three commercial properties was met by the rental income which was paid into a joint [bank] account from which was paid the mortgage interest, rates, GST, and other outgoings. The other significant debt (for the purposes of the complaint) related to a mortgage on the bach. The pre-separation arrangement, which continued for a time after separation, was that the interest was paid from the husband's business income directed through the S account; he also met outgoings on the family home while the Applicant occupied the family home.

[11] During the latter part of [200Y] (or perhaps even earlier) disagreements between the Applicant and her husband impacted on these financial arrangements. Some of the financial activity is recorded in the correspondence exchanged between the Practitioner and the Applicant's lawyer. The pivotal letters are dated 26 November [200Y], 18 March [200Z], 9 April [200Z], and 7 May [200Z] and record the following activity.

[12] The first of these sent by the Practitioner enclosed the rates demand (Council and ARC), and called on the Applicant to pay these as she occupied the house, but confirmed that the husband would meet the then outstanding rates on the bach. The second of the letters, also sent by the Practitioner, added that Applicant should also be responsible for payment of house and contents insurance, and a subsequent letter enclosed a copy of the rates demand. There was no evidence to show that the husband paid rates on the matrimonial home from the second half of [200Y].

[13] The third letter (also by the Practitioner) concerned rental money that had been transferred (by the husband) from the jointly held rent account to the S account to pay the bach mortgage. The Practitioner wrote, *"My client arranged for a rental payment to be transferred directly into the (bach) account to ensure the status quo until all matters had been dealt with by the Court."* The remainder of the letter noted that the husband had continued to pay other outgoings on the bach.

[14] The fourth letter was sent by the Applicant's lawyer and included specific details about the income and outgoings from the rental properties, which included information about the mortgage payments for the bach being met from the rental income of the commercial properties, and not from the personal income of the Practitioner's client.

[15] The above letters between the solicitors provided a record of financial transactions concerning the parties' property.

[16] In addition to the above there was also a letter sent by the husband to the Applicant's lawyer in 200Z (and cc'd to the Practitioner) wherein the husband confirmed that part of the income from rental property had been diverted to paying the bach mortgage.

[17] The Applicant filed an application for interim maintenance in July [200Z]. Her application was opposed by the husband, on whose behalf the Practitioner prepared a notice of opposition. The Practitioner filed her submissions in the Court along with the husband's affidavit. The particular paragraphs in the Practitioner's submissions that became the basis of the Applicant's complaint to the New Zealand Law Society were:

> [c] That the respondent has assumed responsibility for payment of, without contribution from the applicant, since separation until June [200Y], all of the relationship debts and mortgages which total [$]."

...

[e] The respondent has paid outgoings since separation without contribution from the applicant on the family home, bach and sections.

[j] The parties have been separated for more than two years now, and during that time the respondent has paid the relationship debt without contribution from the applicant. The applicant has not had to contribute towards the outgoings in respect of any of the relationship property including the family home. The respondent has only recently suggested that the applicant should make some contribution to the family home, and has requested that the applicant pay the rates on the property at … as well as the section. To date the respondent has met these payments himself but cannot continue to do so."

[18] The husband's affidavit filed with the Practitioner's submissions had stated, in paragraph 5, "*Not all the rental payments were changed to the* (bach) *account, just sufficient to ensure the continued payment of the mortgage". ...* "*It is required to meet relationship property mortgage commitments*".

[19] The Applicant asserted that the above submissions of the Practitioner were untrue insofar as the respondent (her husband) had not solely borne either all relationship debt, or outgoings, without contribution from her. She contended that the Practitioner knew her submissions to the Court were untrue and she accused the Practitioner of deceiving or misleading the Court, in breach of her professional obligations as an officer of the Court.

Practitioner's response

[20] The Practitioner considered that the complaint was without foundation. Her response to the Standards Committee related to background information, and mainly focused on the fact that her submissions had been made available in advance to the Applicant's counsel, that the Applicant had been represented by her own lawyer who had the opportunity of addressing these matters in the Court.

[21] At the review that Practitioner, and in response to my observation that the evidence on the file appeared in part to be inconsistent with her submissions to the Court, the Practitioner explained that she was acting on instruction of her client, and referred to her submissions being prefaced with the words, "*The Respondent asserts that ....."*. She also referred to an earlier affidavit of her client which she considered supported her submissions.

[22] The Practitioner added submissions concerning the Applicant's conduct in relation to the parties' accounts, explained that this was an interim maintenance application and the parties were obliged to provide information to the court directly relevant to that matter which did not require information concerning income that was not 'received' by the parties, such as rental incomes. The Practitioner noted that neither her client, nor the Applicant, had included in their financial information statements, reference to rents as income. The Practitioner reiterated her earlier submissions that the Applicant was legally represented and was at liberty to present such evidence to the Court as she considered appropriate to contest the Practitioner's submissions.

Considerations

[23] This review requires consideration of whether the Standards Committee's decision to take no further action properly dealt with the complaint made by the Applicant. The Committee had approached the matter with a focus on the Applicant having a remedy within the Court system to address any erroneous information placed before the Court by counsel. That is, the Committee did not separately consider the question of whether the Practitioner had misled the Court.

[24] I accept, as correct, the Applicant's position that the Practitioner's conduct should be examined in terms of the applicable professional standards, and independently of any other legal avenue open to the Applicant, such as an appeal. If that were not so, then any complaint that a practitioner had misled the court could be answered by reference to the opportunity to challenge submissions that arise in the course of the proceeding before the Court and thereby relieve a practitioner from being subjected to disciplinary examination in regard to the complaint. On that basis it is appropriate that the Practitioner's conduct be considered.

[25] The parties separated in June [200X]. The Practitioner's submissions to the Court are dated 7 July [200Z]. The submissions were stated to be 'assertions' by the husband that he had (a) from separation until June [200Y] assumed responsibility for payment of all relationship debt and mortgages which total [$], (b) paid without contribution by the Applicant outgoings on the family home, bach and sections, (c) during the period since separation has paid the relationship debt without contribution from the Applicant, and (d) that only recently was it suggested that the Applicant should contribute to the rates on the family home.

[26] On the basis of the information provided I noted that the Practitioner's submissions were not supported by the evidence of either the correspondence or the husband's affidavit that accompanied his opposition to the application which was to that extent inconsistent with the assertions made by the Practitioner on his behalf. The Practitioner had referred to the husband's affidavit of 8 April [200Z], but it is not clear how that is relevant to the later affidavit accompanying an application filed in July, and recording the Practitioner as his lawyer.

[27] The Practitioner's submissions to the Court referred to payments made by the husband "*from separation until June [200Y]*". If it was intended to distinguish these from payments made after that time, this is disguised by the Practitioner's subsequent submission in paragraph 26 [j] which stated that *"during the period since separation* (the husband) *has paid the relationship debt without contribution from the Applicant*". The clear impression given by the Practitioner's submissions was that the husband was paying all of the relationship debt and no contribution was being made by the Applicant. This was not correct.

[28] The largest discrepancy between the Practitioner's submissions and the evidence related to the payment of the mortgage interest on the bach. Interest had previously been paid from the husband's income, but after April 200Z the Practitioner's own correspondence recorded that the bach debt was paid from the (jointly owned) rental income. The Practitioner's submissions to the Court were not correct on the basis of evidence in the Practitioner's possession.

[29] In relation to the payment of outgoings, the discrepancy between the Practitioner's submissions and the evidence related to outgoings (rates and insurance) on the family home and adjoining land. Correspondence sent by the Practitioner required these costs to be paid by the Applicant. The Practitioner's submissions to the Court had asserted that the Applicant had not paid any of the rates. While this may have been correct, in the context of the Practitioner's submissions this conveyed the impression that the husband was making these payments when, according to the Applicant (and not disputed by the Practitioner), he had paid none of the rates on the family home after 1 July [200Y]. Nor was it reasonable for the Practitioner to have submitted to the Court that "*only recently"* was the Applicant required to meet these outgoings, when the Practitioner herself had conveyed such demands on her client's behalf some eight months earlier.

[30] The evidence (of the Practitioner's own correspondence and her client's letters and affidavit) contradicted the submissions made by the Practitioner to the Court, and given the Practitioner's direct involvement in the correspondence concerning financial arrangements it is difficult to find any reasonable explanation for the submissions she made.

Issues of Professional Conduct

[31] The proper administration of justice requires Courts to be able to rely on what a lawyer says and does. To deliberately deceive the court is a major disciplinary matter. This is reflected in the obligation of 'absolute honesty' to the Court as set out in Rule 13 of the Lawyers: Rules of Conduct and Client Care. The Applicant contended that the Practitioner intentionally deceived the Court and breached Rule 13.1 of the Rules of Conduct and Client Care.

[32] The Practitioner denied any intention to mislead the Court, taking the view that the Applicant was legally represented and was at liberty to present such evidence to the Court as she considered appropriate to contest the Practitioner's submissions, or correct anything that she considered to be erroneous.

[33] The extent and nature of the professional role of lawyers has been the subject of judicial commentary. *Kyle* v *Legal Practitioners' Complaints Committee* (1999) 21 WAR 56 involved disciplinary proceedings against an Australian practitioner charged with attempting to mislead the court. The adverse finding against the Practitioner was unsuccessfully appealed. The appellant sought to argue that the case against him was flawed

in that the Complaints Committee (and the Tribunal) found that there was an attempt to deliberately mislead the Court, but had at the same time accepted that there was neither deceit nor dishonesty. The core of that submission was the proposition that an attempt deliberately to mislead involves an indispensible ingredient of an intent to deceive. The Supreme Court of Western Australia did not accept this argument on that basis, having noted that the lawyer's intention was that the incorrect information he had (deliberately) conveyed to the Court would indeed be corrected by a witness that would be called and that the true position would be revealed to the Court during the trial. The Court took the view that the Tribunal's conclusion concerning the lawyer's intention was qualified as relating only to the intention that the Court would receive the correct information.

[34] The Court agreed that the misleading may only have been temporary, but it was nevertheless a conscious and deliberate strategy on the lawyer's part to advance as true information that he knew was not true. The Court found that the Tribunal had accepted that the lawyer did not act with the object of ultimately deceiving the Court and in particular was not seeking by deceit or dishonesty to secure a decision from the Court on a false factual basis. It was in that context that the Tribunal concluded that the lawyer's action 'did not involve deceit or dishonesty', but the lawyer's course of action was nonetheless deliberate and intended.

[35] Addressing the appellant's argument that there could be no misleading of the court as the misleading conduct did not go to a material issue in the case, the Court concluded that a charge of "attempting to mislead the Court" was appropriate. While the Court considered the appellant's explanation that he did not intend that the Court be ultimately misled insofar as his incorrect information would be corrected by a witness, the Court was not persuaded that a subsequent correction by a witness could negate the wrongdoing. The Judge wrote,

> "While we accept that the practitioner anticipated that ultimately the correct position would have been made known to the court, that is not sufficient to exculpate him from having committed a failure of his duty to the Court ..."

[36] In *Re Gruzman* (1968)70 SR (N.S.W.) 316, the issue before the Court of Appeal involved a question of the professional conduct of a barrister who had obtained Court approval of a certain costs application. The issue was whether the barrister had deliberately withheld information from the Court relevant to that order. The complaint against the lawyer was not upheld in that case but in the course of the decision the Court of Appeal made several 'general observations' about the duty of a barrister in litigation, which at page 323 stated:

> "Frankness should be one of the main attributes of a barrister. It is his duty to not keep back from the court any information which ought to be before it, and he must in no way mislead the court by stating facts that are untrue, or mislead the judge as to the true facts, or knowingly permit a client to attempt to deceive the court. How far a barrister may go on behalf of his client is a question too difficult to be capable of abstract definition, but when concrete cases arise one can see for oneself whether what he has done is fair nor not."

[37] *Re Thom* (1918) 80 WN (NSW) 968 concerned a case involving 'half truths' which were considered to have created an incorrect impression, when a barrister drafted an affidavit for his client in a way that had the deponent 'declining to admit' certain matters that the deponent and the lawyer knew to be the case. The Court considered the conduct of the lawyer in the preparation of the affidavit was "deserving of censure". The evidence that was 'not admitted' concerned information that was material to the matter before the Court. The Chief Justice stated, at 75:

> "... the Tribunal dealing with such a case was entitled to be put in a position of having the actual facts before it, and unfortunately the reasons given on the application to the Judge for the preparation of the affidavits in its present objectionable form indicated that there was a conscious withholding of information which a tribunal in such a case would be desirous of knowing in order to do justice to all parties."

Application of professional rules

[38] Rule 13.1 of the Rules of Conduct and Client Care impose an absolute duty of honesty to the Court and to not mislead or deceive the Court.

[39] I have concluded that in this case the Practitioner intentionally placed before the Court submissions that did not accurately reflect the state of affairs known to the Practitioner at that time concerning debt servicing and that the submissions also created a misleading impression about the payment of outgoings. All of the information concerning relationship debt and outgoings was in the possession of the Practitioner at the time she prepared her submissions.

[40] However, I have also noted that the outcome of Court's decision on the Applicant's interim maintenance application did not ultimately rely on the husband's financial situation, the Court having concluded that the Applicant had sufficient means of her own such that she did not qualify for the order. In this light it could not be said that the Practitioner in fact mislead or deceived the Court. It was nevertheless material to the matter before the Court and may, in other circumstances, have been relevant to its decision.

[41] The Practitioner's view was that any erroneous impression that the Judge gained from her submission could have been corrected by the Applicant or her lawyer. If it is accepted that the Practitioner relied on the Applicant and her counsel to correct any erroneous information, then *Kyle* demonstrates that this does not exonerate a lawyer's conduct. In that case the fact that the lawyer did not intend the Court to be deceived by the submissions (and indeed had relied on the true state of affairs coming to light by means of witness evidence) did not detract from a finding that the lawyer had intentionally placed before the Court information known to the lawyer to be incorrect. The finding that the lawyer had attempted to mislead the Court therefore stood. Case law also establishes that the duty of honesty extends to an impression/s that may be conveyed to the Court by means of submissions of a lawyer.

[42] I also considered whether there had been a breach of the absolute duty of honesty to the Court. Having concluded that the Practitioner intentionally placed before the Court information that was erroneous and known to be erroneous, there is a proper basis for a finding and that there has been breach of the duty of honesty to the Court in this case. In these circumstances there is a proper basis for an adverse finding against the Practitioner.

[43] By way of further observation, I was informed that an interim maintenance application is largely determined on the basis of counsels' submissions to the Court and the affidavit evidence of the parties. It is instructive to note that despite other evidence before the Court the Judge nevertheless observed that as from the time of separation the husband had been paying all relationship debt without contribution by the Applicant, that the Applicant had not been required to contribute to the outgoings in respect of any of the relationship property including the family home, and that 'only recently' had it been suggested that the Applicant pay rates on the family home, which costs had been paid by the husband "to date". These observations were wrong, and clearly reflected the misleading submissions of the Practitioner. This also demonstrates the importance of the rule of absolute honesty to the Court.

[44] Having considered all the information, and all of the relevant circumstances, I conclude that the submissions filed in the Court by the Practitioner were misleading. However, I do not find that the Practitioner intended that the Court should be ultimately deceived, and furthermore, that the objectionable parts of the Practitioner's submissions were not material to the Court's decision.

[45] I am not required to link an adverse finding to any particular rule. It is sufficient to conclude that the Practitioner's conduct meets the definition of "unsatisfactory conduct" within the threshold set by section 12 of the Lawyers and Conveyancers Act. Sections 12(a) and (b) of the Lawyers and Conveyancers Act define as 'unsatisfactory', conduct that falls short of the standard of diligence and competence that a member of the public is entitled to expect of a reasonably competent lawyer, or that would be regarded by lawyers of good standing as being unacceptable. Both of these sections are applicable in this case, as is the obligation of fidelity to the Court as set out in Rule 13.1. For all of the reasons above, I find the Practitioner's conduct to have been unsatisfactory. The Standards Committee decision will be reversed.

Compensation

[46] The Applicant sought significant compensation, contending that 'but for' the Practitioner's misleading submissions the Court would have granted the interim maintenance order. It is clear that the Court declined to grant the order sought by the Applicant for the reason that she did not qualify for the interim maintenance as she has sufficient means of her own. I am obliged to accept the basis of the decision as correct, regardless of whether or not the Applicant agrees with it. On the basis that the husband's outgoings were not material to the outcome of the application it could not be said that the erroneous information contained in the Practitioner's submissions deceived or misled the Court if that information was ultimately not relevant to the final decision. A compensation order may be made where there is evidence that the wrong doing of the Practitioner had led to a loss suffered by the complainant. In this case the Applicant has not shown that she has suffered a financial loss as a result of the Practitioner's actions or omissions. No compensation order can be made.

[47] The Applicant also sought compensation for emotional distress. This is a category of compensation that has been awarded by this Tribunal in the past, albeit to a limited extent. I have carefully considered all of the information which clearly shows that the parties have been, and continue to be, involved in protracted and highly litigious Court proceedings. I do not doubt that the Applicant has endured, and continues to experience, significant stress, that is the nature of such proceedings, but she has suffered no loss by reason of the Practitioner's submissions, and I can see no proper basis for any compensation. The Applicant has her own counsel to advance her case and in the larger circumstances of the matter I am unable to find any proper basis for an award for compensation for emotional distress on this ground.

Penalties

[48] The Practitioner has been found guilty of unsatisfactory conduct and it is appropriate that punishment should follow. By s 211(1)(b) of the Lawyers and Conveyancers Act (the Act) I am able to make any orders that could have been made by a Standards Committee. A range of orders may be made pursuant to section 156 of the Act. It is important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional obligations in this manner. I consider that the most appropriate way to fulfil the functions of a penalty in this context is by a fine.

[49] By s 156(1)(i) of the Act a fine of up to $15,000 may be imposed when unsatisfactory conduct is found. (This is a significant change from the position under the Law Practitioners Act 1982 where the District Disciplinary Tribunals could only impose a much more modest fine of up to $2000 (s 106(4)(a)). In allowing for a possible fine of $15,000 the legislature has indicated that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked. However, for a fine of that magnitude to be imposed it is clear that some serious wrongdoing must have occurred.

[50] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

a. to punish the practitioner;

b. as a deterrent to other practitioners; and

c. to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[51] In cases where unsatisfactory conduct is found as a result of a breach of applicable rules (whether the Rules of Conduct and Client Care, regulations or the Act) and a fine is appropriate, a fine of $1,000 would be a proper starting place in the absence of other factors. I take into account the facts elicited in the course of the review itself. I observe that the Practitioner's conduct could not described as inadvertent or attributable to error, but nor is it at the highest end of offending.

[52] Taking into account all of the above matters the Practitioner is ordered to pay a fine of $2,500 pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006. That fine is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

Costs

[53] Where a finding has been made against a practitioner is it appropriate that a costs order in respect of the expense of conducting the review be made against them. In making this costs order I take into account the Costs Guidelines published by this office. Applying those guidelines, a costs order will be made against the Practitioner in the sum of $1,200.

Decision

Pursuant to Section 211(1)(a) of the Lawyers and Conveyancers Act, the Standards Committee decision is reversed.

Orders

The following orders are made

[a] The Practitioner is fined the sum of $2,500, such sum to be paid to the New Zealand Law Society within 30 days of this decision.

[c] The Practitioner is ordered to pay costs in the sum of $1,200, this sum to be paid to the New Zealand Law Society within 30 days of this decision.

CO v XG[11]

The review applicant was dissatisfied with the decision of the Standards Committee, particularly with regard to the costs charged by the lawyer who was also an Executor of the will of Applicant's late mother.

Other aspects of the Applicant's complaint related to a lack of communication by the lawyer with the Applicant and beneficiaries of the Estate as well as an allegation by the Applicant that the lawyer (and his co-executor) had sold a property belonging to the Applicant's late parents at an undervalue.

The Applicant sought reimbursement of at least $100,000 of the fees charged by the lawyer.

The lawyer had acted for the Applicant's parents for a number of years and he, together with another, were appointed Executors of the will of the Applicant's mother.

The Respondent learned of the death of the Applicant's mother on 22 February 2008, when he received a letter from a firm of lawyers acting for the Applicant's brother.

That firm advised that their client was concerned that his parent's estate had been dissipated by other members of the family, and in particular the Applicant's sister. They advised that their client, and the Applicant, required a full investigation of the activities of their sister.

The Applicant acknowledged in his complaint that the family was not harmonious and that there were difficulties in the Estate.

The lawyer and other members of his firm undertook extensive investigations to inquire into the activities of the Applicant's sister, and in particular her use of powers of attorney granted to her by her parents. The investigations revealed anomalies in the sister's dealings with the parents' assets and it was evident that a significant amount had been misappropriated to her own use.

However, the investigations by the lawyer were unable to be concluded due to a lack of co-operation from the Applicant's sister.

The end result of the investigations was that the Applicant's sister renounced her entitlement to any share of the Estate, but she was not brought to any full accounting due to a lack of evidence.

The other fact of significance is that the major asset of the Estate was a residential property in which one of the Applicant's siblings was living. As part of the administration of the Estate this property was to be sold and

[11] LCRO 99/2010, issued November 2010

the lawyer undertook this task together with his co-Trustee, with little assistance from the beneficiaries of the Estate. The sale was effected in a very difficult market and in circumstances where there were concerns that the market would continue to deteriorate.

In the course of the investigation of the complaint, a Costs Assessor was appointed to review the Respondent's bills of costs. In his report he concluded that the Respondent's charges were not "beyond the bounds of reasonableness in the circumstances of this particular Estate administration".

The Standards Committee noted that the majority of issues related to conduct and costs prior to 1 August 2008, and in light of that, the Committee was required to consider s.351 of the Lawyers and Conveyancers Act 2006 which only permitted complaints about conduct if the alleged conduct was such that proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982.

With regard to the complaint regarding costs, the Committee noted that only gross or dishonest overcharging would have justified the commencement of proceedings of a disciplinary nature under the Law Practitioners Act.

Having due consideration to the Costs Assessor's views that the charges were not beyond the bounds of reasonableness, the Committee was of the view that there was no evidence of gross or dishonest overcharging and that the high threshold provisions of s.351(1) of the Act had not been met.

The Committee also formed the view that there were no allegations in relation to conduct that would (the Act uses the word "could") have resulted in the commencement of proceedings of a disciplinary nature under the Law Practitioners Act.

The resolution of the Standards Committee was to decline jurisdiction concerning any of the matters relating to costs or conduct that occurred prior to 1 August 2008, pursuant to s.351(1) of the Act, and with regard to the invoice issued after 1 August 2008, the Committee did not consider that the charges were unreasonable.

The Committee therefore resolved to take no further action in respect of the complaint pursuant to the provisions of s.138(2) of the Act.

The issue of major significance in connection was the level of the lawyer's bills.

During the course of administration of the Estate, the Respondent issued fourteen bills of costs totalling $161,067.92 inclusive of GST and disbursements.

Contrary to the Standards Committee decision, four of these invoices were dated post 1 August 2008:

01.08.08	$928.57
30.09.08	$5,174.91
20.10.08	$10,320.99
25.03.09	$10,748.63
Total	**$27,173.10**

The costs assessor was instructed to undertake an assessment of the fourteen bills of costs rendered by the Respondent in total.

His attention was drawn to the fact that any bills issued prior to 1 August 2008 were subject to the provisions of s.351(1) of the Act. Whether or not the bills reached the threshold required by s.351(1) was a decision to be made by the Standards Committee. The role of the Costs Assessor was to give his or her opinion as to whether or not the bills charged represent a fair and reasonable charge.

Given the lack of direction in that regard, there was the potential for the Costs Assessor to approach his task under some misapprehension as to his role.

The letter of instructions then went on to outline the duties of a Costs Assessor and who was instructed to:

"(1) Review the lawyer's file and costing records;

(2) Request such further information from the complainant or the lawyer as may be necessary for the purpose of your assessment;

(3) Contact the complainant and the lawyer to discuss the complaint and the lawyer's response to it and, if you consider it necessary or appropriate to do so, meet with the parties either jointly or separately;

(4) Prepare a report for the Standards Committee which should include

(a) Your comments on the fee itself and whether you consider it is a fair and reasonable fee for the services provided in terms of Rule 9 of the Rules of Conduct and Client Care for lawyers;

(b) If you are of the view that the fee is not fair and reasonable, you should specify what you consider to be a fair and reasonable fee, or, if you regard it inappropriate to do so, express a range within which you would consider a fee to be fair and reasonable;

(c) Your comments about any other matter arising out of your inquiry which might assist the Standards Committee in reaching a properly informed decision about the costs complaints."

The letter of instructions did not specifically draw the attention of the Costs Assessor to the fact that there were four bills of costs which postdated 1 August 2008, and although the Assessor's function is no different in respect of these costs the LCRO noted variations in the factors to be taken into account in respect of pre and post 1 August 2008 accounts.

A review of the Standards Committee file did not indicate to the LCRO that the Costs Assessor was provided with any further notes or information. However, the LCRO noted the extensive notes prepared by the Complaints Service for the benefit of Costs Assessors.

The notes for Costs Assessors provided by the Society contain a useful 4-stage analysis for application by costs assessors, and the LCRO recorded that in full:

[1] Establish whether or not the work claimed to be done was actually done.

[2] Analyse whether the work needed to be done and whether the work was done at the right level – administration of a simple estate can be done at a legal executive level rather than at partner level. If the bill is rendered by a sole practitioner he or she is not necessarily entitled to charge their normal rate for mechanical work.

[3] Assess whether on a time and attendance basis a fair hourly rate has been struck. This will depend on your own knowledge of equivalent hourly rates for lawyers of a similar level and the costs of running a practice in your local district. Any fees agreements should be taken into account.

[4] Having looked at the time recording (or other basis of assessing a fair fee) then determine whether or not the fee is fair and reasonable in all the circumstances."

This last stage was particularly relevant to the current matter.

The LCRO also reviewed a paper by a lawyer who has developed considerable expertise in the area of costing and is consulted widely by the profession. The paper produced by him for costs assessors was extremely pertinent to the current matter and it is appropriate that I paraphrase from his paper in some detail.

"[The Client Care Rules] have not altered the fundamental tenet that a lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer, and having regard to the reasonable fee factors".

"There is nothing in the new rules and, specifically, nothing in Chapter 9 to indicate that the reasonable fee factors lists are intended to be exhaustive. The old principles of charging under the Rules of Professional Conduct for Barristers and Solicitors made it clear that practitioners were to take

into account all relevant factors "including" those listed in the Rules. The clear inference was that there may be other relevant factors. "

"It follows therefore that a detailed analysis of each of the fee factors is necessary to determine what weighting should be applied to each of those factors and, indeed, any other factors advanced by the practitioner and the complainant in support of their respective arguments".

"Since the advent of hourly rates and time recording, the profession has fallen into the trap of attaching a degree of primacy to 'time and labour expended' often accompanied by the subjugation, or even total disregard, for any other costing criteria that might be relevant."

"There is no shortage of judicial comment about the dangers of over reliance on hourly rates and time records in determining a fair and reasonable fee".

"Assessors should keep in mind the fact that costs assessment is as much an art as it is science. We also need to recognise that we bring our own experiences and prejudices to the task. We need to remain cognisant of the fact that a fee that we may charge may or may not be appropriate in other circumstances. There is no one correct fee. The contextual basis of the fee must be considered along with reasonable fee factors and other relevant considerations."

"The following judicial admonitions provide further helpful beacons of guidance:

(a) The business of determining a reasonable fee "is an exercise in assessment, an exercise in balanced judgment, not an arithmetical calculation".

Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment [1975] 2 All ER 436.

(b) If the overall fee is a reasonable one, then, for my part, I would not be overly anxious about criticisms of minor items en route to that end decision.

Richardson D v Donkervoort (Tauranga High Court, AP 28/90/8, April 1991, Fisher J.

(c) This view has been consistently endorsed as recently as the decision of Priestly J in Chean & Lovett v Kensington Swan (CIV 2006-404-1047), requiring practitioners (and presumably Costs Assessors) "to take a step back and look at a fee in the round".

The factors to be taken into consideration when assessing a fair and reasonable fee are contained in Rule 3.01 of the Rules of Professional Conduct for Barristers and Solicitors and are as follows:

(a) The skill, specialised knowledge and responsibility required;

(b) the importance of the matter to the client and the results achieved;

(c) the urgency and circumstances in which the business is transacted;

(d) the value or amount of any property or money involved;

(e) the complexity of the matter and the difficulty or novelty of the questions involved;

(f) the number and importance of the documents prepared or perused;

(g) the time and labour expended;

(h) the reasonable costs of running a practice.

The Costs Assessor delivered his report to the Law Society and his recommendations were contained in five paragraphs:

(a) An observation that while the assets of the Estate were not large, they were difficult to ascertain, there were a number of meetings with the beneficiaries, and that there was correspondence with a solicitor instructed by the [Applicant] and his brother with regard to concerns held by them as to dissipation of the Estate by a sibling.

(b) An acceptance of the charge-out rates by the [Respondent], and other members of the [Respondent's] firm who were involved with the file;

(c) An observation that there was no co-operation from the family members, so that more had to be done by the [Respondent];

(d) An observation of additional requirements relating to the sale of the property;

(e) A conclusion that he did not consider the fees charged to be "beyond the bounds of reasonableness in the circumstances of this particular estate administration."

It was noted by the LCRO that there was no specific consideration by the Costs Assessor of any of the factors contained in the Rules of Professional Conduct for Barristers and Solicitors.

In addition, and most importantly, there was no evidence that the Assessor stood back and made an overall assessment of the fee based on the various factors as recommended in paper and directed by various judicial comments.

Of some significance was a letter from another firm of lawyers who had been consulted by the lawyer's co-executor who clearly had sufficient concerns about the costs being charged. Several issues were raised by that firm which they considered should have been taken into account in a review of the bills of costs:-

- An observation that the assets of the Estate comprised the family home worth approximately $290,000, some investments of approximately $36,000 together with some land in Western Samoa left to the eldest son.

- A suggestion that the investigations carried out with regard to the actions of the sister may have been more cost-effectively carried out by a forensic accountant, and that such an investigation might have more credibility should Court proceedings be necessary.

- An observation as to what he considered would constitute a fair charge for obtaining probate (one quarter of the amount charged by the [Respondent]).

- A suggestion that the charging provisions of the will may not allow for the full extent of charges made by the [Respondent].

- An observation that there seemed to be unnecessary attendances.

The LCRO observed that opinions from other members of the lawyer's firm had been commissioned on various occasions, which in some cases appear to be the lawyer seeking advice from other members of his firm as to what his obligations and duties as an Executor were. The LCRO considered that while these may have been directed to informing the co-executor of his duties, one of the benefits of having a solicitor as an Executor is that co-executors can be assisted and guided in that regard without them needing to have the same detailed advice and instruction that may be necessary where lay people are appointed alone.

The LCRO did note that the lawyer had expressed concerns about costs on a number of occasions to his co-executor and to some of the beneficiaries. The point was that it may have been more cost-effective for those investigations to have been carried out by other persons.

Overall, the LCRO expressed serious concerns about the report by the Costs Assessor in that

- it concentrated solely on the time recorded and the rates charged by the lawyer and his colleagues,

- it did not examine whether the work undertaken needed to be done, or was done at the right level; and

- there had not been an exercise undertaken by the Assessor which considers all of the factors and then at the end of the day, takes a step back and considers the fee in the round.

For those reasons the LCRO considered it appropriate to return the matter to the Standards Committee for it to reconsider in the light of his observations, and if necessary, obtain a report from another Costs Assessor.

Another matter of concern to the LCRO, is that the letter from the co-executor's lawyers, contained specific directions on behalf of the co-executor that "no current or future bills were to be paid out of the Estate funds without [the Co-executor's] approval." This was repeated in another section of the letter.

The lawyer responded to that letter by noting that "as we have advised [the co-executor] and as each bill of costs records, we will be deducting from the net proceeds of sale after payment of all outstanding accounts, all outstanding fees and disbursements".

The Applicant only became aware of the letter after lodging his complaint, and consequently it did not form part of his original complaint. In addition, the letter was not sent on his behalf. He had however referred to it in the course of correspondence with the Standards Committee.

The LCRO considered that there was an indication here that the lawyer may have breached the Trust Account Rules in deducting costs without consent in breach of s.110 of the Act, in the face of specific directions that fees were not to be debited to the account. This overrides the provisions of Rule 9 of the Trust Account Regulations and the LCRO referred to Abbot v Macclesfield LCRO 40/2009. The LCRO observed that the Committee did not seem to have addressed this.

The Applicant had also complained that he was not kept informed by the lawyer and in particular that he had received no correspondence from the lawyer in the year preceding his complaint.

The LCRO noted that the Applicant was not an Executor of the Estate and consequently there was no requirement for the Respondent to correspond and report comprehensively to the Applicant. Nevertheless, given that the Applicant was a beneficiary of the Estate and the lawyer had a general duty of care to the beneficiaries to properly administer the Estate, it was both pragmatic and prudent for the lawyer to keep the beneficiaries fully informed.

With regard to the sale of the property, whilst it would have been prudent for the lawyer to obtain the consent of the various beneficiaries to the sale, he made the decision in the circumstances to accept the offer made. The decision was ultimately one for the Executors to make.

Whether or not a better price could have been achieved could only ever be a matter of conjecture, and given the condition of the property, the length of time that it had been on the market, the advice being received as to the future of the property market, the lack of assistance from other family members, and all of the other circumstances in which the decision was made, the Respondent and his co-executor made the decision as Executors and accepted the offer on the table.

The LCRO considered that this aspect of the complaint was more properly addressed to the lawyer as a Trustee, as opposed to solicitor. This was not to say that the lawyer has no professional obligations in this regard, but the LCRO was satisfied that there were no grounds for professional misconduct charges being brought against the lawyer in this regard

The LCRO's decision was to reverse the decision of the Standards Committee and direct it to reconsider the complaint generally with specific reference to –

(a) The Cost Assessor's Report; and

(b) deducting fees without authority.

CA v XU[12]

The Applicant was finding it difficult to meet the mortgage payments on her property and after discussing the matter with her ex-husband, it was agreed that his company would purchase the property.

[12] LCRO 196/2010, issued June 2011

A valuation was commissioned and the price was agreed at $240,000. An Agreement for the Sale and Purchase of the property was prepared by the ex husband which was unconditional, and provided for settlement on 1 February 2011

After approaching his bank for funding, the applicant's ex husband was advised that the bank would only advance $150,000 towards the purchase.

Discussions took place between them in which it was agreed that the Applicant would leave the sum of $90,000 owing to be paid four years after the settlement date. The bank subsequently required this to be amended to five years.

The Applicant was not experienced in property dealing and gave no thought as to what provisions should be made to secure the outstanding balance, or what other terms should be provided for.

Either on, or shortly before, 12 January 2009, the husband telephoned his lawyer to instruct him to act on the transaction He advised the lawyer that he was to act for both parties to minimise costs.

The lawyer advised his client of the difficulties he faced acting for both parties, and that he would need to speak to his client's former wife to ascertain what her feelings on the matter were.

He subsequently contacted the Applicant by telephone and was advised by her that he was to act for both parties as she did not want to incur legal costs. These were to be paid by the ex husband.

The lawyer prepared a document entitled "Deed of Indemnity" which included an acknowledgement by both parties that they had been given an opportunity to seek independent legal advice, but had chosen voluntarily not to do so.

The document recorded that both parties agreed to fully indemnify the lawyer's firm from any costs or damages incurred by the firm as a consequence of the lawyer acting in accordance with his instructions, i.e., for both parties.

Although the Applicant did not recall it, it would seem that she called at the Respondent's office on 12 January 2009 for the purpose of signing this document, and also to sign a letter which the Respondent had prepared addressed to her ex husband's bank. That letter contained an acknowledgement by her that following settlement of the sale, she would still be owed $90,000 by the purchaser. She further undertook to the Bank that she would not seek repayment of this money for a period of five years following settlement, and in addition, agreed not to seek any interest payments for that period.

At that time also, the Respondent handed to the Applicant a letter which recorded the proposed terms of the sale. It also included the following statements:

> We have been instructed that we are to act for all parties in this transaction and as such [the lawyer's firm] is seeking to have a Deed of Indemnity signed by the respective parties. This acknowledges that we are to act for you all, that you are all aware that this is the case and that should there be a falling out along the line, we will be indemnified for any costs claimed because we acted on instruction from yourselves. It is important that you note that you are informed that you have the right to consult an independent practitioner and in signing the indemnity you acknowledge that you waive this right.

The lawyer then prepared a variation to the Agreement to incorporate the new provisions, including the vendor finance provision

On 22 January 2009, the applicant's former husband telephoned her and asked her to attend at the lawyer's office for the purpose of signing documents. This was at the end of the day, and she attended at the office around 5 p.m. Her recall is that she was asked to sign both the Deed of Indemnity and the variation of the Agreement at that stage.

Both the Applicant and the lawyer agreed that the lawyer read the documents through to her, following which she signed them. The meeting was between 15 to 20 minutes long.

The transaction proceeded and title to the property was transferred to the purchaser.

In or around March 2010, it was suggested to the Applicant that, contrary to her belief, she had no interest in the property. This prompted the Applicant to seek advice from another solicitor, who attempted unsuccessfully to register a caveat against the title to the property.

A complaint was lodged with the Complaints Service of the New Zealand Law Society on behalf of the Applicant. The letter of complaint alleged breaches of Rules 3.4 (failure to provide client information), Rule 6.1 (acting for more than one client where there is more than a negligible risk that the lawyer will be unable to discharge the obligations owed to all clients) and, Rule 3 (lawyer to act competently and to take reasonable care).

The Complaints Service acknowledged the complaint and requested that the applicant clarify whether she had suffered any losses as a result of the alleged conflict of interest

Her lawyer responded by noting that the only quantifiable loss was the potential for the loss of money left in the property by way of vendor finance.

He noted that the purpose of the complaint was primarily a disciplinary one. He advised that his client felts very strongly that she was taken advantage of and that had the lawyer complied with the rules, she would not be in the position that she found herself in. He observed that if there was the appropriate authority, his client preferred that she be paid out the $90,000

After considering the complaint, the Standards Committee determined that no further action would be taken by reason of section 138(1)(f) of the Lawyers and Conveyancers Act 2006. That section provided that the Standards Committee may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee there was an adequate remedy … that it would be reasonable for the person aggrieved to exercise.

The Standards Committee noted that:

> The complainant believes that the practitioner should pay the complainant the outstanding $90,000 and take whatever steps are necessary to recover that amount from the purchaser. Not only is the money sought greatly in excess of the jurisdiction of the Standards Committee but the Complaints Service is clearly not the appropriate forum for adjudicating on the moneys and obtaining an order for repayment.

In response to a subsequent inquiry the applicant's lawyer as to whether the Standards Committee decision was "limited to the reparation side of the complaint" or whether "the disciplinary side of the complaint has also been dismissed" the Committee confirmed that the "Standards Committee decision was to dismiss complaints in respect of conduct and reparation."

The Applicant applied for a review of that decision.

In conducting this review, the following issues fell to be considered:

1. The failure to provide Client Information (Rules 3.4.and 3.5)
2. The conflict of interest (Rule 6.1)
3. The advice provided (Rule 3)

In his responses to the Complaints Service, the lawyer made much of the fact that the Applicant had already signed the Agreement for Sale and Purchase before he was instructed and that his role and obligations were limited by that fact. However, at the time he was instructed by ex husband, the Agreement was to be varied. Consequently, the Respondent had every opportunity (and an obligation) to advise the Applicant fully on the terms of the proposed variation before she committed to them.

Client Information

Rule 3.4 of the Client Care Rules requires a lawyer to "in advance, provide a client with information in writing on the principle aspects of client service …". Rule 3.5 provides that a lawyer must, prior to undertaking significant work under a retainer, provide his or her client with certain information in writing, which includes the client care and service information set out in the preface to the Rules.

The client information is commonly provided with a letter of engagement. The lawyer had provided a letter of engagement to the ex husband with which was enclosed the information required to be provided the Rules.

However he acknowledged that he had not provided the Applicant with the necessary client information.

The LCRO noted that a breach of the Client Care Rules constituted unsatisfactory conduct by reason of 12(c) of the Lawyers and Conveyancers Act 2006.

The conflict of interest

On receiving instructions that he was to act for both parties, the lawyer readily recognised that there was a conflict of interest. He advised the applicant's former husband that he would need to discuss the matter with the Applicant. In his letter to the Law Society dated 10 June 2010, he advises that

> I made contact with [the applicant] via telephone and discussed the matter and whether she was happy for us to act for her in her capacity as vendor. She stated that this is what she intended as she did not want to incur any costs. I explained that this meant we could be acting in a situation in which there could be a conflict of interests.

The lawyer also advised her that he would require to have a Deed of Indemnity executed by both her and her former husband which was to record that he "had offered them the advice that they should seek independent legal advice because of the possible conflict of interest but that they voluntarily refused to obtain such advice."

The lawyer advised that at the time the Deed of Indemnity was signed by the Applicant, he had read it over to her in full prior to her doing so. The Applicant acknowledges that this was the case, but states that she did not fully understand what the document meant.

The question to be considered by the LCRO was whether this was a situation where Rule 6.1 of the Client Care Rules applied which prevents a lawyer acting for "more than one client on a matter in any circumstances where there is more than a negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients." If that were the case, the Respondent should have declined to act.

The LCRO referred to the decision of *Clark Boyce v Mouat*, [1993] 3 NZLR 641(PC). on the basis of which it would be difficult to say that the Respondent was prevented from acting for the Applicant.

However, the LCRO observed that that the Client Care Rules post-dates that decision, and therefore that decision is modified to the extent provided in the Client Care Rules. He went on to note that Rule 1.04 of the Rules of Professional Conflict in force at the time, provided that *"A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties."* Rule 6.1 of the Client Care Rules is expressed differently, and provides that *"A lawyer must not act for more than 1 client on a matter in any circumstances where there is more than a negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients."* Those "obligations" must be the obligations provided in the Rules and elsewhere and in this case would include an obligation to advise the Applicant to seek security for the funds to be advanced to the purchaser, and/or to require that the advance be supported by a personal guarantee former husband. The lawyer had not offered this advice in either respect.

The LCRO noted that Rule 6.1 therefore establishes a stricter test than the previous Rule 1.04 and as established by *Clark Boyce v Mouat* in that Rule 6.1 now provides that if the advice is to be compromised, then the lawyer should not act for more than one party.

In this case, if the Applicant had been advised of the risks that she was exposed to with this transaction, then she may very well have decided not to proceed. Whether that would have disadvantaged her former husband or not was a matter on which one could only speculate. There was certainly an advantage to the Applicant in that her former husband was helping her out of a difficult financial position. However, the revised sale terms were definitely advantageous to her former husband and the purchase price was some $16,000 below the value of the property as assessed by a December 2008 valuation.

On balance the LCRO came to the view, that this was a situation where Rule 6.1 did apply and that the Respondent was unable to discharge his obligations to both parties.

Informed Consent

The next question to be considered was, whether, having formed the view that it was possible to discharge his obligations to both parties, the lawyer obtained the "informed consent" of both parties, and particularly of the Applicant. Rule 6.1.1 of the Client Care Rules provides that "subject to the above, a lawyer may act for more than one party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained."

The lawyer advised that when he obtained the Applicant's signature to the Deed of Indemnity, he would have read it over to her before she signed it. The Applicant acknowledged that.

The question was whether reading over the document to the Applicant was adequate to satisfy the requirement that her consent constituted an "informed consent".

The lawyer had not previously acted for the Applicant. He did not know therefore what level of comprehension she had in respect of the proposed transaction. The LCRO considered that before it could be considered that consent is truly an "informed consent" the person being asked to consent must have an appreciation of the issues, and what protections he or she is being deprived of.

The document that she was asked to sign was headed "Deed of Indemnity" although it did include an acknowledgement by the parties that they had "been given the opportunity to instruct another law practitioner and seek independent legal advice on the matter". However, the focus of the document was on the indemnity provided to the lawyer's firm. The LCRO considered therefore that the importance of the waiver of independent advice had been minimised.

The LCRO referred to a number of comments made by Dr Webb in his text *Ethics, Professional Responsibility and the Lawyers (second edition)*

> "…It bears emphasising that a formulaic consent procedure will not suffice to show that the client understood the existence, nature and possible consequences of the conflict of duties the lawyer faced.[13]
>
> …
>
> In ensuring the consent to the concurrent retainer is real, the lawyer must be alert to the possibility that some improper pressure has been brought to bear on one client to consent to the conflict of duty existing. It is incumbent on the lawyer to take all reasonable steps to ensure any consent is given free of compromising influences. … It has been noted that in some cases where a solicitor is acting for more than one party "the involvement of a solicitor has too often been a formality or merely served to reinforce [one party's] wishes and undermine any scope for the [other party] to exercise an independent judgment whether to comply".[14] ….
>
> …
>
> Any consent to a lawyer continuing to act in the face of a conflict of interest must be given freely and the client must be made fully aware of the consequences of such consent. It must be more than a mere giving of an opportunity to seek independent advice. It will be necessary

[23] *Taylor v Schofield Peterson* [1999] 3 NZLR 434.
[26] *Royal Bank of Scotland v Etridge* [2001] 3 WLR 1021, 1060; [2001] 4 All ER 449, 487.

> to positively advise the parties to seek independent advice.[15] The person giving the consent must be of full capacity and capable of understanding the problems of a conflict of interest. In particular, it is important that the client understand that this may mean the lawyer will not be able to fully disclose all information relevant to the matter in hand to the client or be unable to advise effectively on matters which affect the other client's interests. It was held in the Privy Council that Mouat met this test and was fully informed and had firmly declined the offer of independent advice.

In the present circumstances, it followed that unless the Applicant was given some indication of the way in which she was being disadvantaged by the deal she had agreed to, it is questionable whether her consent could be considered to be "informed".

In this regard, the comment by Dr Webb that "…a mere formulaic consent procedure will not suffice" was considered particularly relevant. Reading the document through to the Applicant would not have been enough to ensure that she appreciated the consequences of consenting to the lawyer acting for both parties.

He also referred to the case of *Taylor v Schofield Peterson [1999] 3 NZLR 434*, in which Hammond J set out the requirements which must be met for a solicitor to act in a conflict of interest situation. These were to

- recognise a conflict of interest, or a real possibility of one;
- explain to the client what that conflict is;
- further explain to the client the ramifications of that conflict (for instance, it may be that she could not give advice which ordinarily she would have given);
- ensure that the client has a proper appreciation of the conflict and its implications; and
- obtain the informed consent of that client.

The LCRO considered that the approach taken by the lawyer in the case in question was very similar to the approach taken by the solicitor in the case referred to by Hammond J. He advised that he read through the Deed of Indemnity to the applicant but it would not seem that he provided any of the additional information or took any of the additional steps outlined by Hammond J. Indeed, given the beliefs held by the lawyer's as to the Applicant's position, he would have been unable to provide the degree of information required by that decision as he did not himself have a correct understanding of the Applicant's position.

The LCRO came to the view that the steps taken by the lawyer were insufficient for him to be able to say that he had obtained the Applicant's "informed consent" as required by Rule 6.1.1.

The Lawyer's advice

Having determined to act for both parties, and obtained their consent to do so, the lawyer then had a duty to provide full and adequate advice to both parties. The LCRO noted that this was not a situation where the lawyer was prevented from disclosing information to the Applicant by reason of the fact that it would have been detrimental to the interests of her former husband, unless t meant that she then declined to continue with the sale. If that was the case, then that would surely have been a situation where Rule 6.1 would apply.

The LCRO referred to the definition of unsatisfactory conduct in s12(a) of the Lawyers and Conveyancers Act as being conduct of the lawyer that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. Rule 3 also provides that "a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care."

[34] *Taylor v Schofield Peterson* [1999] 3 NZLR 434.

At the review hearing, the Applicant stated that she left the lawyer's office on 22 January 2009, believing that she retained an interest in the property. She believed that she had rights to the property should the purchaser fail to pay. It is also clear that she did not differentiate between her former husband, and his company

At the review hearing, the lawyer continued to assert that the Applicant retained an interest in the property. He advised that he used the words "interest in the property" in their ordinary sense, and not in any legal sense, but he did not contend that used in this way, the words had a different meaning from that understood by the Applicant. He stated that in his view she retained an equitable interest in the property. Consequently, whether he advised the Applicant that this was the case or not, the Applicant's understanding does not differ from that which the lawyer put forward at the hearing.

The LCRO noted that the Applicant did not retain any interest, legal or equitable, in the property. That was borne out by the fact that her solicitors had endeavoured to lodge a caveat against the title to the property on her behalf, either as unpaid vendor, or pursuant to an equitable interest. In both cases, the caveat has been rejected from registration by the Registrar of Lands.

The LCRO recorded that all that the Applicant had was a debt due to her by her former husband's company.

When asked what he considered the Applicant's remedies were should the company default in payment, the lawyer replied that she could sue the company or its Director on the basis that he had signed a resolution authorising the company to enter into the variation of the agreement, and that therefore as Director and shareholder, he was personally liable for the company debt.

The LCRO recorded his view that unless a director has provided a personal guarantee in support of a company debt, there is no personal liability merely because the Director has signed a resolution authorising the company to enter into the debt.

He noted that it is common practice where a lender advances money to a company, its directors are required to provide a personal guarantee in respect of such loans. The time at which this should have been provided for, was when the agreement was varied to provide for the vendor finance. This document was prepared by the lawyer.

That was also the time for the lawyer to explore with the parties the provision of security for the funds to be advanced to the company whether by way of a second mortgage or an agreement to mortgage. The Respondent had a duty to explore options for security over other properties owned by the purchaser. Instead, it seems that he took instructions from the former husband that there was to be no security, and treated this as an instruction from the Applicant, without satisfying himself that she fully comprehended the consequences of what she was agreeing to.

The LCRO observed that on the basis of the views expressed by the lawyer at the hearing and the advice provided to the Applicant, there would seem to be some gaps in the state of the Respondent's knowledge that he should take steps to rectify.

In summary, the LCRO came to the view that the Standards Committee focused its attention on the suggestion that the best outcome for the Applicant would be for the Standards Committee to order that the lawyer pay the applicant the $90,000 owed to her and therefore determined to take no further action pursuant to section 138(1)(f) of the Lawyers and Conveyancers Act.

In so doing, the Committee had overlooked the fact that the lawyer's conduct was such as to reveal some serious shortcomings of a professional nature which needed to be addressed.

The LCRO came to the view that the Respondent has breached Rules 3, 3.4, 3.5, 6.1 and 6.1.1 of the Client Care Rules. These breaches automatically resulted in a finding of unsatisfactory conduct by reason of section 12 (c) of the Lawyers and Conveyancers Act.

He also considered that the Respondent's conduct was such as to constitute unsatisfactory conduct by reason of section 12(a) of the Act.

In discussing penalty, the LCRO noted previous decisions by the Standards Committees and other LCROs relating to the failure to provide client care information, where no penalties have been imposed, or the practitioner has been censured. Each of the instances considered contained circumstances which mitigated against any further penalty, such as the fact that the Rules had only been recently implemented, or that there was confusion over who the lawyer was acting for. The LCRO could find no such mitigating factors in this case. Having taken the decision to act for the Applicant, the lawyer did not provide her with the required client care information in breach of Rules 3.4 and 3.5. He considered that an appropriate penalty was the imposition of a fine, and imposed a fine of $400 as well as censuring the lawyer pursuant to s 156(1)(b).

With regard to the apparent gaps in the lawyer's knowledge the LCRO referred to section 156(1)(m) of the Act which allows for the imposition of an order that a practitioner undergo practical training or education. However, the LCRO considered this to be somewhat difficult to impose, and recorded that it was to be hoped that this complaint was sufficient to prompt the Respondent to acknowledge the apparent gaps in his knowledge and to attend appropriate seminars or courses voluntarily to rectify those gaps.

The imposition of a fine was then considered and the function of a penalty in a professional context discussed with reference to the decision in *Wislang v Medical Council of New Zealand* [2002] NZAR 573. This was to punish the practitioner, as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct to mark out the conduct as unacceptable and to deter other practitioners from failing to pay due regard to their professional obligations.

The LCRO considered that deterrence in the present circumstances had little part if any to play but that there needed to be some recognition that the Applicant had been poorly served by the lawyer to reflect a measure of disapproval that the applicant should be placed in this situation she was in through the lawyer's shortcomings. A fine of $5,000 was imposed together with costs of $1,200 in accordance with the LCRO costs orders guidelines.