LCRO 102 /2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 1
BETWEEN	**Mr AI** of Auckland Applicant
AND	**Mr ZR** of Auckland Respondent

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

DECISION

Background

[1] In January 2009, the Applicant instructed the Respondent to represent him in respect of charges laid against the Applicant to be heard in the Family Violence Court.

[2] Following discussions by both the Applicant and the Respondent with the officer in charge, it was agreed that the Applicant would plead guilty to the charges on the understanding that the Police would take no further action in respect of other complaints by the Applicant's partner.

[3] On 10 March 2009, the Applicant appeared before Judge Epati at the Manukau District Court and was represented by the Respondent.

[4] A plea of guilty was entered to the charges.

[5] In his letter to the Complaints Service of the New Zealand Law Society ("NZLS") dated 18 March 2010, the Respondent states that he enquired of the Court whether a discharge without conviction would be available to the Applicant.

[6] He states further that Judge Epati replied that in order to have the Court consider a discharge without conviction, the Applicant would need to complete a non violence programme and an updated Victim Impact Report would be required, in which the complainant indicated that she consented to a discharge without conviction being entered.

[7] The matter was adjourned to 26 June 2009 to enable these matters to be attended to.

[8] Both parties proceeded on the basis that this represented the correct state of affairs, leaving the Applicant with the understanding that, providing the non violence programme was completed and the complainant did not oppose a discharge, a discharge without conviction would be the outcome at the next Court date.

[9] From the transcript of the hearing obtained by the Applicant on 8 October 2010 (i.e. after the Standards Committee decision) it is apparent that the Respondent's summary of the Court hearing is incorrect. There was no enquiry by the Respondent as to whether a discharge without conviction would be available to the Respondent.

[10] As the transcript reveals, the Respondent accepted the summary of facts (with some demur as to the details) and submitted that the assault was on the lower end of the scale. The transcript also records that he indicated that the Applicant was amenable to attending a living without violence programme.

[11] Crucially, the transcript shows that the Applicant was convicted on both charges, and remanded to 26 June 2009 for sentencing.

[12] Given the understanding that the Applicant had with regard to what would occur at the hearing on 26 June, he took the decision to appear at that hearing without representation. His expectation was that all that was required was that he show he had completed the course and the Victim Impact Report would show that the Complainant did not object to the discharge without conviction.

[13] That did not occur. Instead, he was advised by the Court, that to obtain a discharge without conviction, a formal application pursuant to s106 of the Sentencing Act 2002 was required. The matter was adjourned.

[14] The Respondent says he has diary notes recording that he met with the Applicant to discuss the position after that hearing. The Applicant says there was no such meeting, and I note that there is no record of any meeting in the Respondent's time sheets. It is logical that the parties would have met after the hearing to discuss how to approach the next hearing which I am told took place on 31 July, unless of course there was no hearing on that date.

[15] To a large extent, whether or not a meeting took place as asserted by the Respondent is irrelevant to this review.

[16] In his letter of explanation dated 18 March 2010, the Respondent states that he explained to the Applicant at that meeting that the basis of his application for a discharge without conviction was the indication given by the Judge that the Court would consider the application once he had completed the non violence course and the Victim Impact Report was favourable.

[17] The Respondent remained of the view that a formal application pursuant to s106 was not necessary, and suggested that the Applicant try again to get the Court to act on Judge Epati's indication.

[18] It must be remembered, that the transcript shows that there was no such indication given by the Judge. Unsurprisingly therefore the Applicant was again advised by the Court at the next hearing that a discharge was not available without a formal application. The matter was adjourned again to 30 October 2009.

[19] On that date, the Applicant appeared again, this time represented by the Respondent.

[20] The Respondent remained convinced that the Judge had given an indication that a discharge without conviction would be favourably considered. However, no formal application pursuant to s106 had been made at that stage.

[21] The parties appeared before Judge Rogers who noted that there was nothing on the file to show that Judge Epati had given the indication that the Respondent was submitting to be the case. She offered to adjourn the matter again, so that it could come before Judge Epati. She again referred to the need for a s106 application.

[22] The Respondent states in his letter of 18 March 2010, that both parties appeared before Judge Epati on 11 November 2009, at which time the Judge again indicated that a formal application was necessary.

[23] However, an examination of the Respondent's time records supplied to me, shows that there was no appearance on 11 November. Instead, the application for a discharge without conviction was prepared and filed on 9 November 2009 and the matter was called before Judge Epati on 13 November 2009. At that time, the matter was further adjourned to enable the application to be considered.

[24] Exhibited to the affidavit sworn by the Applicant in support of the application, was a letter purportedly written by the Applicant's employer. However, that letter had been forged by the Applicant, and he was in fact no longer employed by the purported author of the letter. Enquiries by the Police revealed the forgery, and consequently the application failed. In addition, the Applicant was charged with attempting to pervert the course of justice.

[25] The Respondent carried out some initial work in connection with this new charge, but his instructions were withdrawn in December 2009. The Respondent's time records show that his last attendance in respect of this file was on 18 December 2009.

Complaint

[26] On 7 February 2010, the Applicant lodged a complaint with the Complaints Service of NZLS.

[27] As summarised in the Standards Committee's decision, the substance of the Applicant's complaint was as follows:

- That the Respondent showed incompetence in the area of law and as a result the Applicant suffered a great disadvantage.
- The Respondent did not keep the Applicant informed and that there had been unnecessary delays in progressing this matter, which the Applicant believed were deliberate to generate more money for the Respondent.
- The Applicant believed that if the Respondent had given him adequate advice in the earlier stages, he would not have taken inappropriate steps.
- Specifically, the Applicant says he provided a forged document to the Court based on information the Respondent had given the Applicant as to what was required to support an application for a discharge without conviction.

- The Applicant believed that he had been grossly overcharged in light of the poor and/or incompetent service.

The Standards Committee Decision

[28] The Standards Committee issued its decision on 3 June 2010.

[29] As noted above, the Standards Committee's decision was made without the benefit of the Court's transcript provided to this office on 18 October 2010 by the Applicant.

[30] I am troubled by the fact that the statements made by the Respondent in his letter of 18 March 2010, and on which the Committee relied, have been shown to be incorrect when compared with the transcript, which was applied for and obtained by the Applicant. The statements made by the Respondent in that letter are quite specific:

"*I enquired of the Court whether a discharge without conviction would be available to [the Applicant.]*

"Judge Epati replied that in order to have the Court consider a discharge without conviction [the Applicant] would need to complete the programme..."

[31] Immediately before these statements, the Respondent states "The general approach of the Family Violence Court for less serious incidents is that where a non violence programme is completed, the defendant is convicted and discharged with no further penalty entered."

[32] The intention was however, to seek a discharge without conviction, something that was not, in the words of the Respondent, "the general approach of the Family Violence Court."

[33] The Committee's decision was to take no further action in respect of the complaint pursuant to the provisions of s138(2) of the Lawyers and Conveyancers Act 2006 ("the Act").

[34] Having reviewed all the submissions made by each party, the Committee came to the decision that the complaint did not raise any professional standards issues. It considered that the advice and representation was appropriate in the circumstances.

[35] It also considered that the fees rendered were fair and reasonable in the circumstances.

Application

[36] The Applicant has applied for a review of the Standards Committee's decision.

[37] In the application, he raises a number of issues. Those that are relevant to this review (and which were part of the complaint) include:

- The failure by the Respondent to seek the transcript of the hearing on 10 March 2009.
- A failure by the Respondent to recognise the need to file a formal application for discharge pursuant to s106 of the Sentencing Act 2002.
- The fees charged by the Respondent.

[38] In addition, at the LCRO hearing, the Applicant referred to the matters raised in his original complaint as identified in paragraph [27] above.

[39] Overall, I have treated this application as an application to review the Standards Committee's decision generally.

[40] The outcome sought by the Applicant is that all outstanding fees be cancelled.

Review

[41] In the course of this review, I have considered the Standards Committee's file and the correspondence from the parties with this office.

[42] Both parties attended a hearing on 3 February 2011 at which the Applicant was represented by Mr E.

[43] During the course of the hearing I requested that the Respondent supply the details of his time sheets on which the four bills rendered were based and these were provided to this office on 4 February 2011.

[44] These were referred to Mr E who responded with comments to this office on 10 February 2011.

[45] These comments were forwarded to the Respondent on the same date, but no response was required.

The Transcript

[46] As has become apparent, the failure by the Respondent to seek and obtain a transcript of the hearing on 10 March 2009, has been crucial as it would have been made clear at an early stage that the parties' understanding of the outcome of the hearing on 10 March was incorrect.

[47] The transcript provided to me, showed that a conviction was entered at that hearing, and that there was no submission made by the Respondent that his client sought a discharge without conviction.

[48] In addition, there was no indication by the Judge that a discharge without conviction would be available on completion of the relevant programme.

[49] It must be noted, that even at the time of applying for this review, the Applicant also held the view that Judge Epati had indicated at the hearing on 10 March 2009, that a discharge without conviction would be available once he had completed the Living Without Violence programme.

[50] Notwithstanding that the Applicant holds this view, the obligation to correctly record proceedings at the hearing and understand the consequences of the orders made at that time, must rest with the Respondent. He is the one with the experience and knowledge to enable him to accurately record the Judge's decision, and the implications of orders made. It would seem, that the Respondent did not even accurately record the submissions made by him to the Court. This is surprising, given that something out of the ordinary was being sought.

[51] It should have been apparent however, at the next hearing on 26 June 2009, that the understanding of both the Applicant and the Respondent was incorrect. The Applicant had made the decision that he was able to appear without representation at that hearing and there can be no criticism of him for making that decision. Both parties had the understanding that a discharge without conviction would be made as a matter of course providing he had completed the Living Without Violence programme and the Victim Impact Report was favourable.

[52] However, because the Respondent was not at the hearing of 26 June 2009, he presumably formed the view that there had been some misunderstanding by the Court and that the Applicant should try again.

[53] No evidence was presented to show that he considered that he should take any steps at that time to assist the Applicant, by inspecting the Court file or suggesting that he appear at the next hearing. He states that he did offer to prepare a written

application for a discharge without conviction for the Applicant. I do not understand this to mean a formal application pursuant to s106, and presumably, even if the offer had been accepted, the production of the written application would not have succeeded, based as it was on an incorrect understanding.

[54] It could be suggested that a diligent and competent lawyer would have realised that there was a problem at this stage and taken appropriate steps in that regard.

[55] Regardless of what steps the Respondent took at that time, it is clear that he would not have sought the transcript. The Respondent has stated in his letter of 11 August 2010 to the LCRO that his understanding was that, based on previous requests to the Court for transcripts, the Court did not hold permanent records of list appearances. His understanding was that only transcripts of hearings or trials were held. Accordingly, the Respondent did not make an application to obtain the transcript.

[56] At the LCRO hearing, the Respondent advised that at the time, he was based at his firm's Manukau office and attended that Court regularly, although primarily in the civil jurisdiction.

[57] However, he had not had cause to seek a transcript of a list appearance for some time before this matter. Court processes can change and the Respondent would not necessarily have been aware of these. Consequently, it is not unreasonable to consider that a lawyer who was pursuing his client's case with diligence, would have enquired at that stage as to whether the transcript was available to make sure that his understanding was correct.

[58] Certainly, after the Applicant had been unsuccessful for a second time, this should have presented as a step the Respondent should take.

The section 106 Application

[59] As it was, the Respondent continued to hold the view that a discharge without conviction was available to the Applicant.

[60] Given statements made by the Chief Executive Officer of the Respondent's firm in a letter to the Applicant, and by the Respondent himself to NZLS, I do wonder what this expectation was based on.

[61] By letter dated 29 January 2010, the Chief Executive Officer ("CEO") of the Respondent's firm wrote to the Applicant in response to his complaint. He advised that "following the entry of guilty plea, the Respondent enquired whether a discharge

without conviction would be available to the Applicant, instead of the usual penalty imposed by the Family Violence Court following pleas of guilty to relevantly minor incidents, being the entry of convictions and discharge without further penalty.

[62] I note that this letter was sent after an internal investigation carried out by two senior partners within the firm, which considered a report from the Respondent as part of that investigation.

[63] The Respondent stated in his letter to NZLS of 18 March 2010, that the general approach in the Family Violence Court for less serious incidents, is that where a non violence programme was completed, the defendant is convicted and discharged without any further penalty. However, he states again that he enquired of the Judge at the hearing whether a discharge without conviction would be available.

[64] A discharge without conviction was something that was not a usual outcome, and it is not unreasonable to suggest that specific submissions in this regard would need to have been made at the initial hearing. It is clear from the transcript, that no such submission was made, despite the assertions by the Respondent.

[65] The disparity between the statements made by the Respondent in his letter to the Complaints Service on 18 March 2010, and what is revealed by the transcript, is troubling, particularly as I suspect that the Committee placed some weight on these assertions.

[66] From the Respondent's own statements, it is clear that the outcome being sought was not a usual outcome. However, the Applicant made the decision to attend Court on his own at the next hearing on the understanding that a discharge without conviction would be the outcome.

[67] The Respondent asserts that the Applicant was concerned to minimise cost and was comfortable at appearing on his own behalf. Given the Applicant's expectation of what was to occur at that hearing, this is understandable.

[68] However, on the basis of the Respondent's own evidence, the outcome that would have been expected at that hearing was what he considered would have been the usual outcome i.e. no further penalty being imposed, with the conviction having already been entered.

[69] It is understandable that the Applicant did not appreciate the differences between the two. When the problem was encountered at the hearing on 26 June, the Respondent should have recognised that something was amiss and needed to be

investigated. In addition to a formal s106 application being made, some application was necessary to address the fact that a conviction had already been entered. There is no evidence that the Respondent turned his mind to this issue.

[70] Instead, the matter proceeded with two further hearings, one attended by the Applicant alone, and one (on 30 October 2009) attended with representation by the Respondent, both unsuccessful.

[71] Consequently, matters were not back on track until early November, when the Respondent finally realised the need for a formal application pursuant to s106. This is a step that should have been commenced soon after the 10 March hearing or at the latest after the 26 June hearing.

[72] The Respondent's shortcomings can therefore be summarised as follows:

- He did not make submissions indicating that his client was seeking a discharge without conviction at the hearing on 10 March 2009.
- He did not correctly record either his own submissions or the decision of the Judge at that time.
- He failed to note at the time, or upon subsequent inspection of the court file on 30 October 2009, the significance of the fact that a conviction had been entered.
- He did not make an application pursuant to s106 of the Sentencing Act 2002 until early November 2009, when one should have been lodged after the 10 March hearing or at the latest after 26 June.
- He did not make enquiries of the Court as to whether a transcript of the hearing was available relying instead on an understanding as to what the court process was, based on a response received some time before.

[73] I consider that this conduct is conduct which falls short of the standards of competence and diligence that a member of the public can expect of a reasonably competent lawyer. This constitutes unsatisfactory conduct pursuant to s12(a) of the Act.

[74] In addition, I consider that it constitutes conduct which is a breach of Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which provides that:

> "In providing regulated services to a client, 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."

[75] A breach of this Rule constitutes unsatisfactory conduct pursuant to s12(c) of the Act.

The Subsequent Charge

[76] As noted in the Background section of this decision, the Applicant swore an affidavit in support of his application for a discharge without conviction. Exhibited to that letter was a letter which purported to be from the Applicant's employer. This letter had been forged by the Applicant.

[77] The forgery was discovered by the Police and a charge of attempting to pervert the course of justice was laid against the Applicant.

[78] The Applicant was the author of his own misfortune in connection with this.

[79] I do not accept that the Respondent can in any way be considered to have any responsibility in connection with this. There was no duty on him which could require him to check the authenticity of the letter.

[80] All of the consequences flowing from the Applicant's actions in this regard lie firmly with himself.

The Bills of Costs

[81] The Respondent rendered four accounts in respect of his attendances on behalf of the Applicant.

1. Bill No. 1245856 rendered on 31 March 2009 in the sum of $1,183.95.

2. Bill No. 254412 rendered on 29 October 2009 in the sum of $486.00.

3. Bill No. 256062 rendered on 30 November 2009 in the sum of $2,845.80.

4. Bill No. 257315 rendered on 23 December 2009 in the sum of $3,006.00.

The Respondent has provided the details of the time recorded in respect of each entry and the total costs. These were referred to Mr E and the Applicant for any comments they wished to make. Comments were received from each of them on 10 February and provided to the Respondent.

[82] The Applicant's complaint, is that not all of these attendances would have been necessary if the matter had followed its proper course.

[83] It is appropriate therefore to consider each bill in detail:-

Bill No. 1

This bill related to all attendances from the date of instruction up to and including the hearing on 10 March 2009. As such, there can be no issue taken with this account.

Bill No. 2

The narration attached to this bill refers to reviewing the Court file and two telephone conversations with the applicant on 23 October 2009. These attendances would not have been necessary if the matter had followed its proper course.

Bill No. 3

This covers attendances from 29 October 2009 through to 19 November 2009, and includes all attendances relating to the preparation and filing of the s106 application. In respect of this bill, I consider that the first three entries (two on 29 October 2009 and one on 30 October 2009) would not have been necessary if matters had followed the proper course. The remainder of the attendances would have been necessary in order to seek a discharge without conviction.

Bill No. 4

All attendances recorded in this account relate to the charge of attempting to pervert the course of justice and are properly payable by the Applicant.

[84] Consequently, I consider the attendances recorded in Bill No. 2 and the first three entries on Bill No. 3 should not be chargeable to the Respondent. These total $954.

Stress and anguish

[85] The Applicant has stated that the conduct of the Respondent has caused him considerable stress and anguish and the outcome of the case has affected his employment prospects.

[86] I have no doubt, that the stress and anguish that the Applicant refers to, has in the main, been the result of the outcome of the actions taken by the Applicant resulting in the charge of perverting the course of justice and the less favourable outcome of the initial charges. None of this can be laid at the door of the Respondent and accordingly I do not intend to make any Orders in this regard.

Other Matters

[87] The Applicant's complaint included other aspects as outlined in paragraph [27] above. There is no evidence to support these allegations, and in the main, they are encompassed in the finding of unsatisfactory conduct.

Costs

[88] Where a finding has been made against a practitioner, it is appropriate that a cost order be made. Such orders are made in accordance with the LCRO Costs Orders Guidelines.

[89] I consider that the review was straightforward, and as not all of the matters complained of have been sustained, I consider that a reduction in this regard is appropriate.

[90] In all of the circumstances, I consider that a Costs Order of $900.00 is appropriate.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified in the following way:

The conduct of the Respondent in respect of the matters addressed in paragraphs [46] to [75] above constitutes unsatisfactory conduct pursuant to sections 12(a) and 12(c) of the Act.

Orders

The following orders are made:

1. Pursuant to s156(1)(f) of the Act the Respondent is to cancel bill # 254412 dated 29 October 2009 in the sum of $486.

2. Pursuant to s156(1)(e) of the Act the Respondent is to reduce the fee content of bill # 256062 dated 30 November 2009, by the sum of $468. This means that the bill now comprises

Fee	$2,016.00
GST	$ 252.00
Disbursements	$ 51.30
	$2,319.30

A certificate pursuant to s161(2) of the Act is included with this decision.

3. The Respondent is ordered to pay to the New Zealand Law Society within 30 days of the date of this decision, the sum of $900.00 in respect of costs incurred in conducting this review.

DATED this 11th day of February 2011

_____

Owen Vaughan
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr AI as the Applicant
Mr E as the Applicant's Counsel
Mr ZR as the Respondent
Mr N as an interested party
Auckland Standards Committee 1
The New Zealand Law Society