

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 of the New Zealand Law Society

BETWEEN

MR ROMFORD
of Auckland
Applicant

AND

MR MARLBOROUGH
of Auckland
Respondent

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

DECISION

[1] Mr Romford complained to the New Zealand Law Society in respect of the conduct of Mr Marlborough. Mr Marlborough is a public defender and was acting on Mr Romford's behalf in respect of a charge of dangerous driving. Mr Romford's complaint has three main elements:

- [a] Mr Marlborough failed to properly advise him of the fact that the Court had a discretion not to disqualify him under s 94 of the Land Transport Act;
- [b] Mr Marlborough concocted a story on which he suggested Mr Romford should found his defence;
- [c] Mr Marlborough disclosed to the police information about the conduct of Mr Romford which occurred in the course of an interview with Mr Marlborough and that information was confidential.

[2] The Auckland Standards Committee 1 considered the matter on 24 July 2009 and resolved to take no further action on the complaint. It did so on the basis that it did

not accept Mr Romford's version of events. Mr Romford sought a review of that decision.

[3] Mr Romford also raised an issue of whether it was appropriate for the secretariat of the Complaints Service to make recommendations to the Standards Committee. I will address that issue in the course of this decision.

[4] A hearing of the review was conducted on 9 December 2009. Both Mr Romford and Mr Marlborough made submissions.

Background

[5] On 15 May 2008 Mr Romford was involved in a car accident and was subsequently charged with dangerous driving. The crash was attended by police who questioned Mr Romford about the incident.

[6] Mr Marlborough was assigned to act for Mr Romford. Mr Marlborough met with Mr Romford on 9 June 2008. It is at this meeting that Mr Romford alleged that Mr Marlborough advised him that s 94 of the Land Transport Act was not available to him. Mr Romford says that it was on this basis that he pleaded not guilty. A date for a defended hearing was set for 25 September.

[7] On 23 September 2008 Mr Romford met with Mr Marlborough at his offices. It is common ground that at this time Mr Romford became heated and used intemperate language towards Mr Marlborough. Mr Marlborough was of the view that in the circumstances he could not act further and sought to have new counsel assigned by the Legal Services Agency. The agency appointed Mr XX to further represent Mr Romford. It appears that Mr Marlborough had a brief conversation with the officer in charge of the case on 25 September 2008 in which the incident with Mr Romford of 23 September was mentioned. When the matter was called Mr Marlborough sought leave to withdraw. Leave was granted and Mr XX was appointed. On that date Mr Marlborough provided the police disclosure package to Mr XX.

[8] On 26 September 2008 Constable B telephoned Mr Marlborough and a short conversation ensued as to his reasons for withdrawal.

Credibility

[9] The above survey of the background of this matter is necessarily brief as Mr Romford and Mr Marlborough disagree on many aspects of what went on in this matter. Accordingly it is necessary for me to make certain findings of fact. I note that Mr Romford's criminal record and the fact that he was convicted of interfering with a witness was before me. However, I consider it proper to put those matters to one side

when considering the veracity of Mr Romford's evidence. I will determine the issue of credibility on the basis of having heard from the parties and on the basis of the relevant documents.

[10] At the review hearing Mr Romford introduced further evidence which he purported showed that Mr Marlborough was lacking in credibility. He introduced extracts from statements of police officers. Those statements appear to have been made to the Independent Police Complaints Authority (IPCO) in response to complaints by Mr Romford about police conduct in opposing his bail application. I observe that I am able to take into account any relevant evidence or information, whether or not that evidence or information would normally be inadmissible in a court of law (s 207 Lawyers and Conveyancers Act). However, in doing so I must accord it an appropriate degree of weight according to its reliability.

[11] One issue that arose in this regard is the fact that in his statement to the IPCO Constable P says that Mr Marlborough spoke to him in the precincts of the Court and disclosed that Mr Romford had threatened to kill him. This is at odds with what actually happened at the meeting between Mr Romford and Mr Marlborough of 23 September 2008. Both parties agree that Mr Romford became upset and made some offensive remarks; however, both also agree that Mr Romford did not threaten to kill Mr Marlborough. Mr Romford argues that the statement of Constable P is evidence that Mr Marlborough lied to Constable P and as such is lacking in credibility.

[12] The discrepancy might also be explained in other ways. It appears that the statement is in response to a complaint by Mr Romford against Constable P in respect of the Police opposition to bail on the basis of the alleged threat. It is possible (though I make no finding in this regard) that Constable P was reconstructing events to tie in with the bail application which was actually made which referred to Mr Romford threatening Mr Marlborough.

[13] It is also possible that Constable P took from the conversation with Mr Marlborough that threats had been made. In his file note of 23 September which was provided to the Standards Committee and this office Mr Marlborough records that "he was very threatening towards me". It would be a small step to misconstrue that to mean that Mr Romford had actually threatened Mr Marlborough.

[14] Constable P was not available to be questioned on his statement, and that statement was not given with the present complaint in mind. In light of that it ought not be given too much weight.

[15] Mr Romford also drew my attention to a comment by detective Constable B in his statement in the IPCO matter in relation to a telephone call with Mr Marlborough. He suggested there that he thought Mr Marlborough was seeking a date of an earlier call so that he could “update his diary”. The suggestion being that Mr Marlborough might be retrospectively constructing notes of a telephone call. This is an unsupported allegation that is not part of this inquiry. It was introduced only at the hearing. I accord it no weight.

[16] Mr Romford also argued that Mr Marlborough had lied to the Standards Committee about him having an opportunity to address the Court when Mr Marlborough withdrew. In his response to the Committee of 8 May 2009 Mr Marlborough stated (at para 3.7) “the Honourable Judge addressed Mr Romford directly before I was granted leave to withdraw”. The transcript of the matter is available. It shows that Mr Romford was addressed by the Court but not until after leave to withdraw had been granted and Mr XX had assumed responsibility as counsel. Mr Marlborough is not correct to say that Mr Romford was given an opportunity to speak to the Court before he withdrew as counsel. However, it does not follow that he intentionally misled the Committee. His version of events is not wildly at variance with that of Mr Romford, and it is clear that had Mr Romford wanted to say anything to the Court about Mr Marlborough’s withdrawal it was open to him to do so, albeit just after leave had been given to withdraw.

[17] In Mr Romford’s original complaint he stated that “Mr Marlborough withdrew as my lawyer saying it was my fault, and being the defendant I wasn’t given the opportunity to say anything”. It is of note that this is also at variance with the transcript which shows Mr Marlborough stated only that “the lawyer/client relationship has ruptured irreparably”. He did not blame Mr Romford at all. Rather he remained appropriately silent on the cause for his withdrawal. Mr Romford also fails to acknowledge that after he had withdrawn the Judge spoke directly to him (although Mr Romford appears to have chosen not to answer him).

[18] The court transcript demonstrates that perfect recollection of events is unusual. I find nothing invidious about the error in Mr Marlborough's statement to the Standards Committee that Mr Romford was given an opportunity to comment on his withdrawal as counsel.

[19] I observe that Mr Romford also made submissions regarding whether Mr Marlborough had spoken to Mr XX about the availability of a defence at the time the police disclosure was handed over, when this occurred and what passed between Mr

Marlborough and Mr XX. The suggestion seems to be that Mr Marlborough relayed a “made up story” about the proposed defence to Mr XX and “tarnished” Mr XX’s view of Mr Romford. I do not consider that these matters were material. There is nothing unusual in a lawyer who is handing over a matter briefing the incoming lawyer on the salient points. The accounts of Mr XX and Mr Marlborough as to what occurred are substantially the same. In so far as Mr Romford alleged that there were discrepancies about how and when this occurred, I cannot see that they are of importance here.

Burden of proof

[20] I take account of the accusations that Mr Romford makes against Mr Marlborough. The allegation of erroneous advice could not be regarded as serious in the scale of professional wrongdoing. The accusation of breach of confidence is more serious. The allegation that Mr Marlborough concocted a story for Mr Romford to present to the Court is very serious indeed. There is no reason to consider that the provision of erroneous advice is inherently unlikely – lawyers are sometime negligent. However, where the conduct alleged amounts to serious wrongdoing it is less likely to have occurred. In general terms intentional wrongdoing is inherently less likely to have occurred than mere negligence. This was expressed by Lord Nicholls in *Re H* [1996] AC 563; [1996] 1 All ER 1 at p 586. thus:

When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

While that statement suggests that clear evidence will have to exist that serious wrongdoing occurred it is well established that in matters of professional regulation and discipline the standard of proof is balance of probabilities. In *Z v Complaints Assessment Committee* [2008] NZSC 55 25 July 2008 at para 118 the Supreme Court (Elias CJ dissenting) stated:

A flexibly applied civil standard of proof should be adopted in proceedings under the [Dental Act 1988] and other similarly constituted disciplinary proceedings in New Zealand unless there is a governing statute or other rule requiring a different standard.

[21] The burden of proof is therefore civil in nature. The onus is on Mr Romford to establish the matters he alleges. However, this must be balanced against the fact that this is a complaints system and not a court. As such it is appropriate for the Committee

or this Office to make its own inquiries and be a fact finder if in its discretion it appears proper to do so.

Creation of story

[22] Mr Romford alleges that at the meeting of 23 September 2008 Mr Marlborough “created a story to fit into the facts of the case of what the police alleged” and told Mr Romford to take notes as he would need to put it in his own words and “say it on the stand”. This amounts to an allegation that Mr Marlborough counselled Mr Romford to commit perjury. This would of itself be a criminal offence. It would also be a serious breach of r 13.10 of the Rules of Conduct and Client Care which state “A lawyer must not adduce evidence knowing it to be false”.

[23] Mr Romford says he took notes of the story Mr Marlborough told him on 23 September 2008. That story involved a dog running on the road in front of him and Mr Romford's foot becoming stuck between the accelerator and brake pedals of the car.

[24] The police traffic crash report records Mr Romford's explanation of the crash that he “swerved to avoid hitting a dog”. This is consistent with the statement of Constable P of 17 May 2008, and with his notebook records. Some issue was taken by Mr Romford as to whether he had signed that notebook to signify the accuracy of the notes, or simply to signify that he had been cautioned. I am happy to proceed on the basis that he signed on the latter basis. However, he did not dispute that the notes are the notes of Constable P that were made at the time. It is clear from this that Mr Romford did mention a dog to the police immediately after the incident.

[25] It is highly improbable that Mr Marlborough on reading the police disclosure proceeded to embellish the story and encourage Mr Romford to present falsehoods to the court. Mr Romford has offered no motive as to why such a course of conduct would be embarked upon by Mr Marlborough. Mr Marlborough vehemently denies such a course of action.

[26] It bears noting that Mr Marlborough states that the incident in his offices when Mr Romford became upset towards him was triggered when Mr Romford suggested that he contact witnesses to discourage them from giving evidence and Mr Marlborough sought to dissuade him from doing so. In any event Mr Romford did adopt a course of action that involved the attempted intimidation of witnesses and was later convicted and imprisoned for it: *Romford v Police* (21 August 2009, High Court, Auckland, Andrews J, CRI 2009-404-179). This gives credence to Mr Marlborough's version of events.

[27] I conclude that Mr Marlborough did not make up a story for Mr Romford or otherwise suggest to him that he should present falsehoods to the court.

Disclosure of confidential information

[28] It is common ground that on 23 December 2008 at a meeting with Mr Marlborough, Mr Romford became upset and spoke in an offensive manner to Mr Marlborough. Mr Marlborough's file note of that date states that "I was concerned for my personal safety" and "he was very threatening towards me". There is no reason to doubt that those are accurate reflections of Mr Marlborough's view of the situation.

[29] I observe that the issue of a possible breach of confidence was not dealt with by the Standards Committee other than to observe that Mr Romford "expressed his unhappiness with Mr Marlborough's contact with the police after their acrimonious consultation" and that Mr Marlborough explained that "while he had spoken with the police subsequent to Mr Romford's threats against him during their last meeting, he did not disclose any details". The Committee did not make any particular finding on this aspect of the complaint. However, the matter clearly formed part of the complaint in which on p 3 Mr Romford said "On 6th October I saw William Marlborough at the Manakau District Court and asked why he had talked to Constable B and said what he had said. Mr Romford denied this and said he hadn't said anything to Constable B". Mr Marlborough addressed the issue in his letter to the Standards Committee of 8 May 2009 at paras 3.8 to 3.12. The matter was also traversed at the hearing of the review. Mr Marlborough accepts that he spoke to the police but maintains that his conversations did not involve any inappropriate disclosures.

[30] In his response to the Standards Committee of 8 May 2009 Mr Marlborough accepts that he was telephoned by the police on 26 September by Constable B. He says that Constable B stated that he understood that Mr Marlborough had withdrawn due to the fact that the solicitor client relationship had broken down. Constable B then asked if Mr Romford had threatened Mr Marlborough and whether he wished to take the matter further. Mr Marlborough states that he responded "no" to both parts of the question.

[31] Constable B took notes of this conversation. Those notes record that Mr Marlborough said he withdrew due to Mr Romford "having a few words with him" but he would not elaborate. It records that Mr Marlborough said Mr Romford "has a very short fuse" and "is someone to look out for" but he did not wish to take the matter further.

[32] While Mr Marlborough's recounting of the conversation suggests a much more scant conversation, the two accounts are broadly consistent. I consider it most likely that the conversation did follow the course recorded in the notes of Constable B. I conclude this on the basis that there is not a drastic difference between them, and the notes of Constable B are a reliable contemporaneous account.

[33] Mr Marlborough did not disclose what prompted the query from Constable B as to whether a threat had been made against him. However, it appears likely that this was due to a conversation between Constable P and Mr Marlborough outside of the Court on 25 September. That conversation is evidenced by a statement of Constable P made to the IPCO and has been referred to earlier. In that statement Constable P says that Mr Marlborough approached him and "made allegations that ROMFORD had threatened him and threatened to kill him". In that statement he also says that Mr Marlborough stated Mr Romford "almost tried to attack him", "was acting very crazy, very aggressive" and Mr Marlborough "feared for his life".

[34] Mr Romford did not make the full IPCO material available. It appears, however, that those statements were made in response to an allegation by Mr Romford to the IPCO that bail had been opposed by the police maliciously or in bad faith and they must be viewed against that background.

[35] I conclude that Mr Marlborough did speak to Constable P on 25 September 2008 and disclosed the reasons why he was seeking to withdraw as counsel. I also conclude that Mr Marlborough spoke to Constable B on 26 September 2008 and similarly disclosed at least in general terms the reasons why he was withdrawing. From the accounts of those conversations, the fact that bail was opposed on the basis that Mr Romford threatened Mr Marlborough, and from the file note of Mr Marlborough I conclude that Mr Marlborough disclosed that he considered Mr Romford to be of a violent disposition and it disclosed that an incident had occurred in which Mr Romford had acted in a threatening way towards him.

[36] It appears that there was also a subsequent telephone conversation between Constable B and Mr Marlborough relating to these events on 7 October 2008. That conversation is recorded in a statement of Constable B made in response to the IPCO enquiry. The substance of most of that conversation is not of significance. It is, however, of note that Constable B stated that Mr Marlborough was "annoyed at me for including our conversation in Mr ROMFORD'S opposition to bail".

[37] Rule 8 of the Rules of Conduct and Client Care provides:

A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.

Rule 8.1 proceeds to state that the duty of confidence "continues indefinitely after the person concerned has ceased to be the lawyer's client".

[38] The first issue is whether the information was confidential. I conclude that it was. It was "acquired in the course of the professional relationship" and it was information "concerning a client". Moreover, the disclosure was detrimental to the interests of Mr Romford in so far as it appeared as a ground in the police opposition to bail (albeit one of the lesser grounds of several). Mr Romford has a legitimate basis for being aggrieved in this regard.

[39] There are a number of exceptions to the duty of confidence in Rules 8.2 and 8.4. However, I do not consider that any of those exceptions applies here. Had Mr Marlborough believed that he was at risk then it would have been appropriate to disclose that on the basis of r 8.2(b) which permits disclosure if "the lawyer reasonably believes that disclosure is necessary to prevent a serious risk to the health or safety of any person".

[40] I also recognise that it is proper to be open to other exceptions to the duty of confidence. For example, the rules do not expressly provide that a lawyer may disclose the commission of a crime within the confines of the professional relationship (such as if Mr Romford had threatened to kill Mr Marlborough). However clearly the disclosure of such conduct would be permissible either on the basis that it was not confidential due to it being so inappropriate as to fall outside of the professional relationship, or on the basis that an exception should be recognised. In the present case it is clear that Mr Romford's conduct and comments were heated and offensive. It is also accepted that Mr Marlborough felt threatened. However, that threat was removed by withdrawing as counsel and he had stated to the police that he did not wish to take the matter further. Mr Marlborough has also stated that the disclosure to the police was made at the instigation of the police and not of his initiative.

[41] It is widely accepted that when the relationship of lawyer and client comes to an end it is not appropriate for a lawyer to disclose details of why that might have occurred. Most obviously this should not be disclosed to the court or a Jury, but it is equally true of a disclosure to the police. The proper response of a lawyer who has withdrawn as counsel is to inform the relevant parties of that fact and no more.

Competent advice

[42] Mr Romford also argued that Mr Marlborough had failed to advise him of the availability of s 94 of the Land Transport Act which relates to a discretion not to disqualify a driver convicted of an offence. He says that had he been advised of the availability of that discretion he would have pleaded guilty to the charge of dangerous driving and sought the exercise of the discretion.

[43] Mr Marlborough denies this allegation and says that he gave advice that the discretion not to disqualify existed under ss 81 and 94 of the Land Transport Act.

[44] There is no independent evidence of the advice which was given in this regard. It appears that the advice that Mr Marlborough says he gave was oral advice and although Mr Marlborough says he made some notes at the meeting the advice itself was not recorded in any way. Mr Marlborough also states that the availability of the discretion was discussed briefly again at Court on 18 July 2008.

[45] In all of the circumstances I do not consider it has been established on the evidence that Mr Marlborough failed in his obligation to provide competent legal advice.

Agenda Note

[46] Mr Romford raised at the review hearing the existence of an agenda note prepared by a member of the Law Society Complaints Service for the Standards Committee. In particular Mr Romford queried whether it was appropriate for a person who was not a member of the Committee to be recommending the outcome of a complaint. Mr Romford's query is understandable. Where an employee of the Law Society makes a recommendation which is adopted there may be an appearance that the Standards Committee did not reach its own independent conclusion. I observe that the agenda note which Mr Romford refers to is not of itself objectionable. However, it necessarily frames the relevant information and focuses on some parts of the material provided to the Committee and not others. In making a recommendation it also reflects the employee's view on the merits of the complaint.

[47] I do not consider that the agenda note on the file in this matter was such as to suggest that the Standards Committee failed to properly discharge its decision making duties. However, I record that it is the function of the Standards Committee to take account of all relevant information and material in reaching its decision. That function may not be delegated.

Conclusion

[48] I have found that Mr Marlborough breached his duty of confidence to Mr Romford. I have given consideration as to whether I should exercise a discretion and

decline to make an adverse professional finding in all of the circumstances. It is acknowledged that Mr Marlborough did not act with any improper motive and indeed declined to give full details of the exchange with Mr Romford to the police. It also appears that he thought it unfortunate that the matter was included by the police in the opposition to bail. However, the fact remains that a disclosure occurred and that disclosure was detrimental to the interests of Mr Romford. The fact that Mr Romford acted objectionably in the meeting of 23 September 2008 and has been convicted of various serious offences does not deprive him of a right to absolute confidence.

[49] I conclude the Mr Marlborough breached r 8 of the Rules of Conduct and Client Care in disclosing the reasons for his withdrawal as Mr Romford's counsel to the police in this matter. Pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 this amounts to unsatisfactory conduct.

[50] I must consider what orders ought properly follow from such a finding. I take into account the circumstances surrounding this conduct such as the fact that Mr Marlborough did in fact feel threatened by Mr Romford, that the disclosures were limited in scope, and that they appear to have been largely initiated by inquiries by the police. I also note that the disclosure did have an adverse affect on the interests of Mr Romford in so far as it was one ground (of several) in the police opposition to bail. I also take into account the effect of an adverse professional finding against Mr Marlborough of itself. In light of these matters I do not consider that a fine is appropriate. It is however, proper to mark out the conduct as in breach of professional standards by censuring Mr Marlborough.

[51] It is also appropriate that costs be ordered against Mr Marlborough in light of the finding against him. Having conducted the review and heard from the parties there appears to be no reason to depart from the scale of costs set out in the Costs Orders Guidelines of this office. This was a relatively straightforward matter which was conducted by a hearing in person. Accordingly a costs order of \$1200 will be imposed.

[52] I record that I do not consider that any compensatory orders are appropriate. While the disclosure made by Mr Marlborough was used by the police in opposing bail there is no evidence that this caused any loss, compensatable or otherwise, to Mr Romford.

Decision

The application for review is upheld pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Auckland Standards Committee 1 is reversed.

Orders

Mr Marlborough is censured.

Mr Marlborough is to pay \$1200.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 15th day of December 2009

Duncan Webb
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 Romford as Applicant
- Mr Marlborough as Respondent
- The Public Defence Service as a related party
- The Auckland Standards Committee 1
- The New Zealand Law Society