LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 079

Ref: LCRO 148/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**PV** Applicant
AND	**GY** Respondent

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

DECISION

Introduction

[1] Ms PV has applied for a review of a decision by the [Area] Standards Committee [X].

Background

[2] It is necessary to set out in some detail the background to the conduct complaint.

[3] Ms PV was a barrister employed by Mr KQ.

[4] On 1 February 2019, Ms PV received a legal aid assignment to act for Mr RS in respect of some driving charges that were before the court. Mr RS's partner, Ms CB, attended court for one of Mr RS's early appearances.

[5] On 9 April 2019 Mr RS was the victim of a hit and run accident. Mr RS reported the incident to the Police. In the course of disclosing details of the accident, Mr RS informed the Police that he had slapped his partner, Ms CB.

[6] The Police visited Ms CB to check on her condition. They were concerned at Ms CB's presentation and decided to take her to the [TOWN] Medical Centre to undergo a medical examination. Ms CB was later transferred to the [CITY] Public Hospital.

[7] Mr RS was charged with assault in a family relationship under s 194 of the Crimes Act 1961. Ms PV was assigned to represent Mr RS on the assault charge.

[8] Ms CB did not wish to pursue charges against her partner. She declined to make a written statement. She made request of the Police for the charges to be withdrawn.

[9] On 16 April 2019, Ms CB texted Ms PV. Ms PV says that she assumed that Mr RS had provided Ms CB with her contact details.

[10] In that text, Ms CB said this:

> Hi PV this is CB. RS's partner. I really need to speak with you about a charge that the police have made on my against RS of assault against myself. There is a lot more to this and I personally did not make a statement nor did I go to the police. I need the opportunity to have a voice regarding what happened. I've talked to victim support and they advised me to discuss it with you. I don't believe under the circumstances that he should have been charged at all. CB.

[11] Ms PV responded with the following:

> Hi CB, thank you for getting in touch. Your view is clearly important here. Because I act for RS I cannot interfere with or influence you in any way. I have contacted the Victim's Advisory Service, who you've already spoken to, and they will be in touch with you again tomorrow. They may suggest that you speak to police directly.

[12] Ms CB continued to communicate with Ms PV. On the afternoon of 16 April 2019, she sent a further text to Ms PV, saying this:

> I do want you to know that before the incident RS was run over (on purpose) by a person in a van down at [South Park] whilst on a bike ride. He was really badly injured and extremely angry. He did hit his head and he could barely walk. I do not believe he was thinking straight when he slapped me and I don't think he was thinking when he took himself to the police station. The police had to take him to the hospital to get checked. He is still in quite a lot of pain and has some pretty bad scrapes and bruises as well.

[13] On [date] 2019, Mr RS's driving matters were set down for hearing in the District Court. Ms CB was present at court to support her partner. Ms PV made a file note recording the matters that were discussed in a meeting with her client at court. The file note records that Ms CB was present during the meeting. Matters discussed at the meeting extended beyond a discussion of issues relating to Mr RS's driving charges. Ms PV's file note records that Ms CB had informed her that:

> CB said has given her views re assault charge to police as per VA but Sgt OW considers RS only confessed because he thought he'd killed CB. Told CB to email her views to police and cc me in if she wants to and only if she wants to.

[14] Mr RS appeared in court on 27 May 2019 to enter his plea to the assault charge. A not guilty plea was entered and the matter was remanded for a case review hearing on [date] 2019.

[15] On [date] 2019, Mr RS was sentenced to home detention following conviction on his driving charges. Ms PV was instructed to file an appeal. An appeal was lodged on 5 August 2019.

[16] In proceeding its investigation of the assault charge, the Police made application to the District Court for an order requiring production of Ms CB's medical records pertaining to her examination at the [Town] Medical Centre and subsequent transfer to the [City] Public Hospital.

[17] On 9 August 2019, Ms CB texted Ms PV as follows:

> Hi PV my doctor has just called me this morning to tell me the Police have requested a production order under the surveillance act 2012. For the date RS is accused of assaulting me. She wanted to know if I wanted her to do this. She said that it is for my medical records for that day. Apparently they only say there was an alleged assault. And they did not even see me the same day. They were not witness to anything but that I was a bit dazed so I was sent to the hospital for a scan. Can the Police ask for my records without my permission? I don't particularly want them accessing my notes. My doctor is trying to call AX to find out my rights but thought I should ask you because it seems that AX is quite determined to make this into something CB.

[18] On receipt of Ms CB's text, Ms PV phoned Ms CB to advise that she would look into the matter. Her communications with Ms CB on 9 August 2019, are recorded in a file note made by Ms PV on that day.

[19] In her file note Ms PV records the following:

> Confirmed CB doesn't want disclosure of records, wants to instruct me understands waiver of any conflicts must advise if conflict between her and RS arises – none at the moment. Confirms will email Dr and [City] DHB requesting not to disclose. Very concerned request is for the benefit of ex-husband Sgt DG.

[20] Ms PV says that at this point she decided to consult Mr KQ. Those discussions involved a consideration of the issues engaged by the Police application to produce medical records and a consideration as to whether Ms PV would be conflicted in representing Ms CB.

[21] Ms PV then made request of Ms CB to provide her with a copy of the production order. She forwarded an email to the Police making request, as a matter of urgency, for disclosure of the production order and supporting application.

[22] Ms PV says that she then had further discussions with Mr KQ as to whether a conflict of interest could arise if she represented Ms CB. She says that it was Mr KQ's view that there was no conflict at this stage.

[23] Ms PV says that she then phoned Mr RS to discuss matters with him. She records that Mr RS had no concerns about Ms CB dealing with Ms PV directly.

[24] On 9 August. Ms CB instructed Ms PV to represent her. Ms PV provided Ms CB with a letter of engagement. In her letter of engagement, Ms PV advised that:

(a) she was acting for Ms CB's partner on a "related criminal matter" and;

(b) that if a conflict of interest arose, Ms CB "may need to instruct another lawyer"; and

(c) if Ms CB became aware of a conflict she was to advise Ms PV immediately; and

(d) She and Mr KQ would be responsible for the general carriage of Ms CB's matter.

[25] The scope of the instructions, as recorded in the letter of engagement, was to act in opposing production of medical records to the Police.

[26] Ms PV says that prior to preparing correspondence to Ms CB's GP and the District Health Board, she had discussions with Mr KQ as to what should be included in that correspondence.

[27] Ms PV was then informed that the District Health Board had complied with the production order and disclosed information to the Police.

[28] Mr GY was the Police prosecutor responsible for managing the prosecution of the charge against Mr RS. On 15 August, Ms PV wrote to Mr GY. In that correspondence she:

(a) advised that she was acting for Ms CB and Mr RS and;

(b) confirmed that Ms CB had not laid a complaint of assault; and

(c) advised that Ms CB did not wish for the prosecution to proceed; and

(d) advised that Ms CB was concerned that information obtained by the Police would be disclosed to her ex-husband (an acting Police Officer); and

(e) indicated concern that the application for a production order was a "fishing expedition".

[29] On 22 August 2019, Mr GY responded to Ms PV. In that correspondence he provided explanation for the Police's decision to apply for a production order. He advised Ms PV that if suggestion was being made that there had been improper conduct by the Police in advancing its investigation, that it would be appropriate for her to clarify the nature of the allegation being made.

[30] Mr RS's case was set down for a case review hearing on [date] 2019.

[31] On [date] 2019, Mr GY filed a memorandum with the court. In that memorandum, Mr GY submitted that Ms PV was conflicted in acting for both Mr RS and Ms CB.

[32] At the conclusion of the [date] case review hearing, the presiding judge delivered an oral judgement which addressed, amongst other issues, the concern the prosecutor had raised that Ms PV was conflicted. The judge noted that:

(a) Ms CB had not proven to be the most co-operative of witnesses; and

(b) he could not see how a lawyer can simultaneously purport to act for a person who has been charged with a domestic assault and the person who is alleged to have been the victim of the assault; and

(c) it appeared fundamental in examining r 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, that a lawyer cannot act simultaneously for two people in a situation such as that encountered by Ms PV; and

(d) he reluctantly felt obliged to refer his decision to the Law Society; and

(e) he generally found Ms PV to be competent counsel who discharged her obligations to the court appropriately.

The complaint and the Standards Committee decision

[33] Mr GY lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 5 September 2019. The substance of his complaint was that:

(a) Ms PV was conflicted in acting for both defendant and victim in a domestic violence allegation; and

(b) Ms PV had (on behalf of the alleged victim) taken steps to try and prevent release of medical records sought by the Police under a production order.

[34] Ms PV provided response to the complaint on 6 November 2019. She submitted that:

(a) there was no conflict of interest in her acting for both Mr RS and Ms CB at the same time; and

(b) both Mr RS and Ms CB had provided their consent to her acting; and

(c) both were aware that if a conflict arose at a later date that she would have to cease acting; and

(d) there is no property in a witness; and

(e) none of the colleagues she had spoken to had encountered a case where Police had sought medical records of an alleged victim, especially in circumstances where the alleged assault was at the minor end of the scale; and

(f) the approach adopted by the Police presented as an unnecessarily intrusive way to advance its investigation; and

(g) she was concerned at the manner in which the complaint had been advanced, in that it had been raised in court with purpose to attract "the attention of a judge for the collateral purpose of stymying any action against the police for the way this investigation has been handled"; and

(h) she considered that Ms CB's concern that her former husband may have access to her personal information was not baseless; and

(i) she was aware of, and alive to the dynamics in play in family violence matters that "would often mean that there would be a conflict of interest for a lawyer acting for both a defendant and alleged victim"; but

(j) she had taken care to regularly assess whether Mr RS's and Ms CB's interests conflicted; and

(k) that degree of oversight had been carried out in consultation with her employer; and

(l) Mr KQ was aware of the circumstances at all times, and confident that there was no conflict; and

(m) Mr RS and Ms CB were satisfied that there was no conflict and continued to instruct her on that basis.

[35] Mr KQ also responded to the complaint.

[36] He submitted that:

(a) he had been involved in the decision making in respect of Ms PV representing Ms CB; and

(b) Ms PV had consulted him before any decisions were made or steps taken; and

(c) he had carefully considered how the matter could be dealt with by Ms PV to protect the interests of both parties whilst avoiding any conflict of interest;

(d) neither Mr RS nor Ms CB considered there was a conflict of interest.

[37] Mr GY in responding to invitation from the Committee to provide further submissions, advised that he wished to add nothing further to his complaint other than to record that he rejected suggestion from Ms PV that the concerns he had raised with the court were raised with purpose to stymie any action being taken against the Police for the way it had handled its investigation.

[38] In her final reply to the Committee, Ms PV directed her response more directly to the scope and application of r 6.1. She submitted that:

(a) there was no more than a negligible risk that she would be unable to discharge obligations owed to both Mr RS and Ms CB because;

(b) it was in Mr RS's interests that he not continue to be prosecuted for or convicted of the assault charge; and

(c) it would not have been prejudicial to Mr RS if the health records were not adduced in evidence against him; and

(d) it was in Ms CB's interests that her health records were not disclosed as she did not wish for her ex-partner to have access to the records; and

(e) disclosure of the records was a generally unwanted intrusion into her privacy; and

(f) Ms CB's motivation to prevent disclosure of her medical records was advanced for her own interests, independent of the interests of Mr RS; and

(g) Ms CB was not a reluctant complainant; she was not a complainant at all; and

(h) Mr RS and Ms CB were adults, free to provide instructions, and any attempt by thirds parties to claim to know what was in their best interests would be speculative and infantilising; and

(i) Police views on the general public interest in offences being investigated and prosecuted should not inform the Standards Committee on whether the individual interests of Mr RS and Ms CB were likely to conflict; and

(j) neither of the parties acted for considered that she was conflicted; and

(k) issue as to whether a more than negligible risk of conflict could arise should be determined on a case by case basis and general concerns about potential conflicts should not determine whether there was risk of conflict in this particular case; and

(l) the result of Police views being given primacy on whether a conflict exists would have a chilling effect on the ability of counsel to hold Police to scrutiny; and

(m) in the event that an adverse finding was made,[1] the Committee's finding would likely be reviewed as the matter was novel as it partly involves an allegation against counsel by Police, purporting to be in the interests of a defendant they are seeking to convict, and an individual whose medical records could only be obtained by Police without that individual's consent.

[39] The Standards Committee, when issuing its notice of hearing, identified one of the issues as being whether, in acting for Mr RS and Ms CB at the same time, Ms PV was in a position involving a conflict of interest or a potential conflict of interest.

[40] The Committee considered that an appropriate framework for determining the question as to whether there had been a conflict engaged a consideration as to:

(a) whether Ms PV was acting for more than one client on a matter; and

(b) if Ms PV was acting for more than one client, whether there was a more than negligible risk that Ms PV would not be able to discharge her obligations to both Mr RS and Ms CB; and

(c) if the risk was negligible, did Ms PV obtain prior informed consent to continue to act for both Mr RS and Ms CB?

[41] The Standards Committee delivered its decision on 5 June 2020.

[42] The Committee determined that Ms PV had breached r 6.1, that the conduct was unsatisfactory in that it fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer (s 12), and that pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act), there had been unsatisfactory conduct on the part of Ms PV.

[43] In reaching its conclusion the Committee provided a detailed account of the background to the conduct complaints, and a comprehensive analysis of the duties owed by lawyers to their clients, and in particular, a thorough examination of r 6.1, its purpose, application and effect.

[44] In my view, the Committee's analysis provides an extremely helpful example of how allegation that a lawyer has breached r 6.1 is appropriately addressed in the disciplinary jurisdiction.

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[1] This was an unusual submission for a lawyer to make to a decision-making body. It says to that body, that if a finding is made that the lawyer is unhappy with, the lawyer will appeal the decision. It is customary for lawyers to give indication of possible appeal grounds, *after* receiving the substantive decision.

[45] The Committee observed that:

(a) a central component of a lawyer's duty of loyalty to their client is the duty not to act for two clients whose interests conflict; and

(b) arising from this is the obligation of a lawyer to avoid any situation in which the duties a lawyer owes to different clients conflict; and

(c) a lawyer's fundamental obligations include the obligation to act in accordance with all fiduciary duties; and

(d) a competent practitioner must take care to ensure that even when the interests of the parties may coincide at a particular point in time, that there is not potential for the interests to diverge at a later date; and

(e) r 6.1.1 is subject to r 6.1 and therefore a lawyer may not act where the risk of conflict is more than negligible; and

(f) there is an absolute prohibition on acting when there is a more than negligible risk that there will be a conflict in the obligations owed to both clients; and

(g) the hurdle for securing informed consent is high; and

(h) it was clear that Ms PV was acting for more than one client on a matter; and

(i) the conduct rules do not provide exhaustive exposition of a practitioner's obligations; and

(j) Mr RS's and Ms CB's matters were directly related; and

(k) Ms PV owed a number of duties to both Mr RS and Ms CB; and

(l) experience teaches that in cases where domestic violence is alleged, there is ordinarily potential for a more than negligible risk of a conflict arising; and

(m) it was not required to identify conflicts that actually arose, but rather it is sufficient to identify potential conflicts; and

(n) there was, in this case, a myriad of ways in which conflicts could potentially arise; and

(o) the threshold to reach for achieving informed consent is high; and

(p) professional obligations transcend the individual client.

Application for review

[46] Ms PV filed an application for review on 13 July 2020.

[47] She submits that the Committee erred in finding that:

(a) it did not need to take into account Mr RS's actual instructions to counsel in respect of defence and was entitled to presume the defence and determine the complaint without complete evidence; and

(b) it could not receive evidence and information from Ms PV in respect of Mr RS's active criminal matter without disclosing it to Mr GY, the Police prosecutor; and

(c) there was otherwise a more than negligible risk of a conflict arising on the facts as it found them; and

(d) informed consent was not obtained from Mr RS.

[48] Ms PV contended that the Standards Committee had advised that it would not receive evidence from Ms PV, unless that information could be disclosed to the complainant prosecutor. Ms PV submits that this inhibited her from providing the Standards Committee with the full picture, and this resulted in the Standards Committee making erroneous assumptions based on incomplete information. Ms PV considered that this constituted a breach of natural justice.

[49] By way of outcome, Ms PV sought directions that the Legal Complaints Review Officer (LCRO) receive evidence that may be withheld from the complainant, and that the Standards Committee's decision be reversed.

[50] An applicant only hearing proceeded on Tuesday 18 May 2021.

Nature and scope of review

[51] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

[2] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[52] More recently, the High Court has described a review by this Office in the following way:[3]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[53] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Analysis

[54] I propose to address the submissions advanced by Ms PV under two tranches, firstly by considering her written submissions, secondly the submissions advanced on review.

Written submissions.

[55] Pivotal to Ms PV's written submissions, is argument that she was not conflicted. She puts her position in the first paragraph of her response to the Committee on

[3] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

6 November 2019, where she says, "there was no conflict of interest in her acting for both Mr RS and Ms CB at the same time".

[56] Ms PV maintained that position on review.

[57] With every respect to Ms PV, I consider that in advancing that position, she misunderstands the scope and purpose of r 6.1.

[58] Rule 6.1 provides that a lawyer must not act for more than one client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients.

[59] Consistent with the consumer protection purposes of the Act and a lawyers' fundamental obligation to protect clients' interests, r 6 requires that: [4]

> In acting for a client, a lawyer must, within the bounds of the law and [the rules], protect and promote the interests of the client to the exclusion of the interests of third parties.

[60] The principle that applies to a lawyer who acts or proposes to act for more than one client on a matter has been described as "… an obligation of the lawyer to avoid any situation in which the duties of the lawyer owed to different clients conflict".[5]

[61] In such circumstances r 6.1 contains a qualified prohibition that:

> [a] lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

[62] The threshold, "a more than negligible risk" above which the prohibition in r 6.1 applies, is very low. It has been described in a decision of this Office as circumstances where there is "no meaningful risk that the obligations owed to the parties would not be able to be discharged".[6]

[63] In circumstances where a lawyer considers that the prohibition in r 6.1 does not apply, r 6.1.1 contains a qualified permission for a lawyer to:

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[4] Section 3(1) and 4 of the Act. But see s 4(d).
[5] Duncan Webb, Katheryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd edition, LexisNexis, Wellington, 2016) at [7.1], referring to *Moody v Cox & Hyatt* [1917] 2 Ch 71 (UKCA) at 781.
[6] *Sandy v Kahn* LCRO 181/2009 (9 December 2009) at [27] and [36]. In this context, the word "negligible", which is not defined in either the Act or the Rules means, "unworthy of notice or regard; so small or insignificant as to be ignorable": *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2003) Vol 2.

> … act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.

[64] Rule 1.2 defines "informed consent" to mean:

> …. consent given by the client after the matter in respect of which the consent is sought and the material risks of and alternatives to the proposed course of action have been explained to the client and the lawyer believes, on reasonable grounds, that the client understands the issues involved.

[65] The process of obtaining informed consent under r 1.2 requires that positive steps be taken by the lawyer who must first, explain to the parties (a) the material risks to each of them of the lawyer acting for the parties and (b) the alternatives available, for example, each party instructing an independent lawyer; and secondly, believe, on reasonable grounds that the clients understand these issues. Informed consent must be given without influence, and independent from the other clients.[7]

[66] Under rule 6.1.2, even though a lawyer may have obtained the prior informed consent of all parties concerned to act:

> .. if …it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.

[67] This rule acknowledges the possibility that the interests of the clients for whom a lawyer is acting may or could diverge to the extent that by continuing to act the lawyer considers himself or herself no longer able to carry out of his or her professional obligations owed to all of the clients for whom the lawyer is acting.

[68] For example, a lawyer may (a) receive information from one client which the lawyer would be duty bound to disclose to the other client(s) (see r 7), but in doing so may breach the duty of confidence owed to the client who provided the information to the lawyer (see r 8);[8] or (b) act to protect one client's interest at the expense of another client(s) for whom the lawyer is also acting on a matter (in contravention of rr 6 and 6.1).[9]

[69] In such circumstances r 6.1.2 requires that the lawyer concerned "must immediately inform each of the clients of this fact and terminate the retainers with all of the clients."

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[7] *Sandy v Kahn*, above n 6 at [41] and [42]; see also Webb, Dalziel and Cook, above n 4 at [7.4].
[8] See *Black v Taylor* [1993] 3 NZLR 403 (CA) at 419, referred to in *Torchlight Fund No 1 LP (In Receivership) v NZ Credit Fund (GP) Ltd* [2014] NZHC 2552, [2014] NZAR 1486 at [15].
[9] See *Sandy v Kahn* at [25] and [32].

[70] Under r 6.1.3, it is only if "the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act" for one of the clients, and "no duties to the consenting clients have been or will be breached" may the lawyer act for that client.[10]

[71] Ms PV had taken instructions to represent Mr RS in respect to a charge that Mr RS had assaulted Ms CB.

[72] At first step, it is difficult to imagine any circumstance in which a lawyer can purport to act for defendant and alleged victim in an assault matter without manifest risk of potential for the lawyer becoming conflicted.

[73] I agree with the Committee that it was not for the Committee to identify instances of specific conflict that actually arose, it was sufficient to identify potential conflicts.

[74] In doing so, it is critical to recognise the particular sensitivity that inevitably attaches to those cases in which there is allegation of domestic assault.

[75] Ms PV says that she is "very aware of the dynamics in family violence matters that would mean there would be a conflict of interest for a lawyer acting for both a defendant and alleged victim", and goes on to say that she was "alive to that issue in this case, and I took care to regularly assess whether Mr RS and Ms CB's interests conflicted, in consultation with my employer Mr KQ".[11]

[76] There are two problems with this submission.

[77] Firstly, the possibility for conflict was so stark, that Ms PV should, on accepting instructions to act for Mr RS, have been acutely aware of the inherent potential dangers of her having continuing contact with Mr RS's partner.

[78] Secondly, Ms PV's intention to "regularly assess" possibility of conflict arising, ignores the responsibility she carried to decline to act in circumstances where there was a more than negligible risk of her being unable to discharge obligations owed to one or more of her clients.

[79] Ms PV was aware that Mr RS had made admission to having slapped Ms CB. She was aware that the Police, on visiting Ms CB were sufficiently concerned that they had made arrangements to take Ms CB to a doctor.

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[10] Rule 6.1.3.
[11] Ms PV, response to Complaints Service (6 November 2019) at [9].

[80] The Committee, in citing a decision of the Supreme Court, noted that "experience tells us that in these types of scenarios [domestic violence], there is ordinarily the potential for a more than a negligible risk of a conflict of interest arising". In the decision cited,[12] the Supreme Court bench noted it was not out of the ordinary, for victims of domestic violence to repudiate evidence initially provided to the Police.

[81] What underscores (but has not been directly stated by the Committee) is concern at the vulnerable position that victims of domestic violence are so unfortunately confronted with when a partner is charged with a domestic violence offence. There can be, and often is, concern that the defendant is endeavouring to dissuade the partner from giving evidence or otherwise attempting to assert pressure over the victim.

[82] Ms PV either overlooks or underestimates the extent to which Ms CB's opposition to having her medical records released, was so transparently intertwined with the interests of Mr RS. Ms PV argued for a point of distinction, in submitting that work undertaken for Ms CB in opposing production of the medical records was a civil matter, whereas Mr RS's was clearly criminal.

[83] I agree with the Committee, that the potential breach of privacy, and the criminal charge are so closely intertwined as to be considered one matter and that to place a narrow construction on the arrangements would fail to recognise the purpose of the rule and the realities of legal practice.

[84] Ms PV was immediately alerted to the possibility of conflict when directly contacted by Ms CB on 16 April 2019. Ms CB sent Ms PV a text advising that she wished to speak to Ms PV regarding the charges the Police had laid. Ms PV responded promptly with the following:

> Hi CB, thank you for getting in touch. Your view is clearly important here. Because I act for RS I cannot interfere with or influence you in any way. I have contacted the Victim's Advisory Service, who you have already spoken to, and they will be in touch with you again tomorrow. They may suggest that you speak to the Police directly.

[85] This was an entirely appropriate response from Ms PV. It was putting Ms CB on immediate notice that her role as Mr RS's counsel prevented her from, as she described it, interfering or influencing Ms CB in any way. Ms PV had, in her response, encapsulated the nub of the potential problem which could arise if she were to represent Ms CB. Ms PV could not allow herself to be put in a position where she could be seen to be interfering with or influencing Ms CB.

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[12] *Singh v R* [2011] 2 NZLR 322 (SC).

[86] It is surprising then, having immediately recognised the potential for conflict, that Ms PV, a few days later attends on Mr RS with Ms CB present, and in the course of that meeting, provides advice to Ms CB to convey her views to the Police, and to copy Ms PV into the correspondence.

[87] Ms PV submits that there is no property in a witness, and had the Police not made request for Ms CB's medical records, Ms CB would nevertheless still have been called to give evidence as a defence witness.

[88] With respect, this misses the point.

[89] Argument as to whether there is property in a witness is irrelevant to the issue as to whether Ms PV was conflicted. Ms PV was not seeking to interview Ms CB for purpose of assisting in advancing Mr RS's defence. She was representing Ms CB.

[90] Ms PV's defence to accusation that she was conflicted, relies heavily on argument that she recognised the possibility for conflict, did not see any at commencement, but cautioned her clients that if a later conflict arose, she would have to cease acting.

[91] In adopting this approach, Ms PV mistakenly shifts responsibility for identifying and notifying conflict, to her clients.

[92] The "responsibility for identifying the conflict, of course, lies with the lawyer".[13]

[93] There is a prohibition on a lawyer acting wherever there is a more than negligible risk that the lawyer may be unable to discharge his or her obligations to one or more of the clients.

[94] The Committee comprehensively addressed in its decision, the question as to whether there was a more than "negligible" risk that Ms PV would be unable to discharge obligations owed to both Mr RS to and Ms CB.

[95] I see little need to add to the Committee's analysis other than to emphasise that I agree with it. There were a myriad of possible situations arising which could have seriously compromised the interests of both clients. In my view, those risks would, for many practitioners practising in the area of criminal law, have presented as manifestly obvious.

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[13] Webb, Dalziel and Cook, above n 5 at [7.3].

[96] In the course of the review hearing, Ms PV advised that it was her view that in 99.9 per cent of cases involving a defendant and complainant, it would be inappropriate for a lawyer to represent both defendant and complainant.

[97] This was seemingly an acceptance by Ms PV of the position recorded at [72] of this decision, where I expressed the view that it is difficult to conceive of any circumstances in which a lawyer could act for both defendant and complainant in the same case, without manifest risk of the lawyer being conflicted.

[98] Invited to clarify which particular features brought the circumstances of the case into the rare percentage of cases where she considered it would be tenable for a lawyer to represent both defendant and complainant, Ms PV submitted that there was a considerable degree of synchronicity between the interests of Ms CB and Mr RS. Further, she argues that there were particular features of the case which were unusual, in that they gave cause for concern that the Police were not advancing their inquiry in good faith.

[99] The synchronicity of interests argument was relied heavily on by Ms PV in justifying her decision to represent both parties and was argument that was pivotal to the position advanced by Mr KQ in the course of his review hearing.

[100] But an apparent synchronicity of interests does not absolve a lawyer, in circumstances such as these, from the responsibility to carefully examine whether there is potential for conflict.

[101] A perceived compatibility of interests does not remotely overarch Ms PV's case with a degree of uniqueness that would transcend or override what would commonly, in cases such as these, be considered a critical need to give careful attention to conflict issues.

[102] In cases which pose potential for conflict, it is not unusual for there to be a perceived synchronicity of interests between clients. It is the apparent mutuality of interests that often seduces lawyers into accepting instructions to act for two clients on the same matter, as the lawyer's sensitivity to the potential for possible conflict is clouded by the lawyer's belief that the interests of the clients are so closely intertwined, that possibility for conflict emerging is minimal.

[103] It is self-evident, that any steps taken which would have potential to impede the prosecution case, would be seen as beneficial to Mr RS's interests.

[104] But it is significant that in providing explanation as to how Ms CB's interests were best served by opposing an application to secure medical records, Ms PV is forced to place reliance on unproven accusation that the Police would improperly use those records.

[105] In both explaining and justifying her decision to represent Ms CB, Ms PV placed considerable reliance on argument that Ms CB was the victim of some concerning Police conduct. In advancing suggestion that her client was being subjected to inappropriate pressure from the Police, Ms PV shifted the argument from an examination of the propriety of her representing a victim and defendant in a criminal assault matter, to argument that attempts to obstruct her ability to represent Ms CB, constituted a threat to a lawyer's ability to robustly examine Police conduct.

[106] Ms PV advised that she had spoken with a number of colleagues, all of whom had indicated to her that they were unaware of any case where the Police had sought to obtain the medical records of an alleged victim, by way of a production order. Ms PV goes on to suggest that this approach, in her view, presented as an unnecessarily intrusive method of investigation which "merely served to traumatise a woman police allege has already been traumatised".

[107] Ms PV suggests that the complaint had been brought by the Police prosecutor, and raised in court, with collateral purpose to attract the attention of a judge, and to "stymie" investigation into the Police handling of its investigation. Ms PV explains that she considered "Ms CB's concern that her ex-husband, who is a police officer and who she is/was engaged in care of children proceedings with, may have been able to access her personal information was not baseless".[14]

[108] These are serious allegations of a nature that it could be expected a lawyer would only make in circumstances where there was robust evidence to support the allegations.

[109] Firstly, she is submitting that a Police prosecutor's complaint to the court that she was conflicted, was not bought in good faith. She is alleging that the Police prosecutor (presumably in conjunction with unnamed colleagues) has raised the conflict issue in order to shut down inquiry into the way the Police had conducted its inquiry.

[110] Secondly, she is lending her weight to argument that her client had reasonable cause to suspect that the steps taken by the Police to obtain medical records carried ulterior purpose.

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[14] Ms PV, response to Complaints Service (6 November 2019) at [8].

[111] This is an allegation of Police engaging in improper practices. Further, it is an attempt to delegitimise a complaint, in my view properly made by a Police prosecutor, by tainting the complaint with inference that the complaint has not been brought in good faith but brought with improper purpose.

[112] Because Ms PV considered (and her view she says was supported by colleagues consulted) that it was unusual for the Police to make an application for medical records, she appears to conclude that the application made by the Police was improper. This view appears to have gained traction from her client's concern that her ex-husband would acquire access to her medical records.

[113] If it was the case that Ms PV considered that there had been improper conduct on the part of the Police, that should have reinforced the absolute need for Ms CB to be independently advised. Complaint that the Police had acted with improper purpose in seeking to obtain Ms CB's medical records, and complaint that the Police had possibly made those records available to Ms CB's former husband, should have been immediately put to the Police by way of formal complaint.

[114] At hearing, Ms PV was questioned as to whether she had raised concern that the prosecutor's conflict complaint had been raised with collateral purpose with the presiding judge. She indicated that she had not had opportunity to address the matter when it was raised in court.

[115] Allegation that a prosecutor had acted improperly, if intended to be seriously argued, could, and should, have been put to the court either in a memorandum responding to that filed by the prosecutor, or by way of formal complaint immediately following the hearing.

[116] Any person may complain to the appropriate Complaints Service about the conduct of a practitioner or former practitioner.[15]

[117] There is nothing inherently untoward in a Police prosecutor raising objection with the court that counsel may be conflicted.

[118] I think it would be a rare circumstance for a Police prosecutor to be advised by defence counsel (as Mr GY was) that counsel was acting for both defendant and alleged victim in a domestic assault matter. In those circumstance it would be not unexpected that a prosecutor would raise the possibility of conflict with the court.

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[15] Section 132(1)(a) of the Act.

[119] I also consider that it would be unusual for judges' presiding in cases engaging allegation of domestic assault to be informed that defence counsel was also acting for a victim or complainant.

[120] If Mr GY had not brought the issue of potential conflict to the attention of the court, I consider that Ms PV, as an officer of the court, would have been obligated to advise the court that she was representing Ms CB on matters that were directly related to the issues that were before the court.

[121] Ms PV's allegation there was something untoward in Mr GY bringing the issue of counsel's potential conflict to the attention of the court continued in her final submission to the Standards Committee, where she argued that a result of the Police views being given "primacy on whether a conflict exists in such matters will be a chilling effect on the ability of defence counsel to hold police to scrutiny".[16]

[122] I consider this submission to be entirely lacking in merit. It is advancing a flimsy and entirely unsubstantiated accusation of improper conduct on the part of the Police to provide a foundation for lofty argument that the laudable objective of Police being held to account by defence counsel was imperilled, as a consequence of Mr GY raising concerns that she was conflicted.

[123] It is not the Police who decide as to whether counsel is conflicted before the court.

[124] That is for the presiding judge to determine.

[125] The police views were not accorded a degree of "primacy".

[126] The issue having been brought to the judge's attention, his response was succinct and to the point, saying this "… I cannot see how a lawyer can simultaneously purport to act for a person who has been charged with a domestic assault on the person who is alleged to have been the subject of that assault".

[127] Absent from Ms PV's submissions is any indication of her having given careful reflection to the judges' comments, and his decision to refer his judgment to the Law Society. In advancing argument that the complaint raised was made with a collateral purpose, Ms PV appears to have given little attention to the fact that the judge was perturbed by indication that Ms PV was acting for defendant and alleged victim.

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[16] Ms PV, submissions (13 March 2020) at [12].

[128] It is clear from the judge's decision that he felt no joy in taking steps to refer his concerns to the Law Society, but he clearly felt compelled to do so. This reflected the gravity of the judge's concerns.

[129] If Mr GY had not lodged a complaint, I think it highly probable that the Committee would, on the back of the judge's decision, have commenced an own motion investigation.

[130] Despite Ms PV acknowledging the rarity of circumstances in which it would be appropriate for a lawyer to represent both defendant and alleged victim, she gave insufficient consideration to the requirement of r 6.1 that a lawyer not act for more than one client in a matter in circumstances where there is *more than negligible risk* that the lawyer may be unable to discharge the obligations owed to one or more of the clients.

[131] In her final submissions to the Standards Committee, Ms PV argued that she was entitled to act for both parties, as there was no more than a negligible risk that she would be unable to discharge the obligations owed to both clients because:

(a) it was in Mr RS's interests that he not be prosecuted; and

(b) it was in Ms CB's interests that her health records were not disclosed as she did not wish for her ex-partner to see them and such disclosure was a generally unwanted intrusion into Ms CB's privacy.

[132] In arguing that an apparent mutuality of interest, together with her warning to her clients to let her know if possibility of conflict arose, Ms PV overlooks that at first step, she was unable to act if there was a more than negligible risk of conflict.

[133] It cannot in my view reasonably be argued that agreeing to act for a party accused of domestic assault, and the alleged victim of the assault, presents negligible risk of conflict. Once the possibility for conflict was identified (as it clearly was), Ms PV could go no further.

[134] Ms CB was entirely within her rights to raise objection to the Police request for release of medical records. It was her right to advise that she did not wish for Mr RS to be prosecuted. It was her right to raise vigorous objection to the manner in which the Police had conducted its inquiry if she considered that the Police had acted improperly.

[135] But her interests were not properly served by having Ms PV act for her. And to suggest such is not, as Ms PV would have it, to infantilise Ms CB but rather to recognise the obligations on lawyers to avoid any situation in which the duties owed by lawyers to

their client have potential to conflict. Ms CB's concerns should have been advanced through counsel independent of Mr RS.

Review submissions

[136] Ms PV argued that her ability to provide a defence to the conduct complaint was compromised, as she was unable to provide the Committee with full account of the instructions she had received from Mr RS, as that information would, in the course of the complaint being advanced, have been disclosed to the Police. Because of this restriction, Ms PV had been unable to provide evidence of Mr RS having provided his informed consent.

[137] As a consequence of Ms PV being unable to provide full account of her client's instructions, the Standards Committee had made assumptions that were erroneous as they were based on incomplete information.

[138] This argument was not robustly advanced by Ms PV at hearing. Her primary argument returned to submission that she was not initially conflicted, that she was aware of the possibility of conflict arising and had alerted her clients to that possibility, that she had advised her clients to inform her if they considered that issues of potential conflict were emerging, and that she was concerned that the Police investigation was not being advanced in good faith.

[139] I see no merit in Ms PV's argument that her ability to provide a defence to the complaint was compromised as her obligation to preserve Mr RS's confidences prevented her from providing full explanation of the defences that would be run.

[140] The argument ignores the pivotal element of the complaint, which focused sharply on the question as to whether Ms PV had breached r 6.1, by electing to accept instructions from Ms CB.

[141] Details of the defences that were to be advanced by Mr RS were irrelevant to the question as to whether Ms PV put herself at risk of possible conflict in accepting instructions from both Mr RS and Ms CB.

[142] In any event, it was well understood that Mr RS would be defending the charge. Ms PV had advanced her argument that she considered she had acquired Mr RS's (and Ms CB's) consent to act. A fuller account of her respective clients' instructions would not, in my view, have provided explanation such as would have provided defence to complaint that Ms PV had breached r 6.1.

Conclusion

[143] Ms PV presented her argument at hearing with conviction.

[144] In steadfastly maintaining her position that it had been appropriate for her to represent both parties, Ms PV, in my view, failed to appreciate what has been described by Dr Webb in a LawTalk article as the prophylactic element of r 6.1.[17] The article describes r 6.1 in the following terms:

> Rule 6.1 certainly is an onerous rule. Probably the touch-stone for lawyers is that they can never act in a way which might harm the interests of one of their clients. The rule is often stated to be "prophylactic" in nature. It prevents lawyers acting even when there is only a risk of conflicting duties – to prevent against the risk of myopia.

[145] A lawyer cannot act for more than one client on a matter, if there is a more than negligible risk of conflict.

[146] The threshold is low.

[147] Ms PV's initial indication that she could not have any involvement with Ms CB was an immediate recognition by her, of possibility of conflict. Her response indicated, in my view, an acceptance and awareness on her part that there would be a more than negligible risk if she was to proceed.

[148] Having recognised that, she could go no further.

[149] Her explanation that she was prepared to proceed as she was comforted by the fact that she had identified concerns regarding potential conflict to both clients, and advised them to inform her if they had concerns, shifted, as has been noted, responsibility for identifying possible conflict issues to her clients when that responsibility properly rested with her.

[150] The critical point is, that having identified potential for conflict, Ms PV was obliged to go no further. The situation confronted by Ms PV could not reasonably be described as circumstances which presented a less than negligible risk of possibility that she would be unable to discharge obligations owed to one or more of her clients.

[151] Ms PV indicated at hearing that faced with similar circumstances, she would not again put herself in the position of representing parties in similar circumstances to those she confronted in representing Mr RS and Ms CB.

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[17] Duncan Webb "Don't act if there is even a risk of conflict" (28 August 2015) 872 *Lawtalk* 25.

[152] Ms PV was also emphatic that she would not have agreed to act, or continued to act for Ms CB, if her supervising employer Mr KQ, had not advised her that it was appropriate for her to do so.

[153] She advised that she had taken advice from Mr KQ on a number of occasions and that she had directly addressed with him her concerns regarding potential for conflict. She says that on each occasion the issue was raised, Mr KQ assured her that she could continue.

[154] Mr KQ confirmed that to be the case.

[155] In the course of the review application advanced by Mr KQ, he submitted that he considered that it was unreasonable for the Committee to have burdened Ms PV with an unsatisfactory conduct finding as he considered that he, as her supervising employer who had guided her throughout, was responsible for the steps taken by Ms PV.

[156] I have given careful consideration to the submission advanced by Mr KQ but am disinclined to reverse the Committee's finding.

[157] At the time Ms PV represented the parties, she had five years post admission experience. She was a duty solicitor and had sufficient experience for her to be on the cusp of progressing to a level 2 legal aid provider.

[158] I accept that but for the guidance provided by Mr KQ, she would likely have avoided having found herself in the position of being encumbered with an adverse disciplinary finding, but I consider the opportunity for possible conflict was so glaring, and the opportunity for Ms PV to find herself in breach of r 6.1 so apparent, that Ms PV must accept a degree of responsibility for her decision to proceed, when she herself had recognised at the outset that it may be problematic to do so.

The Review Decisions

[159] There was a considerable degree of overlap in the review applications advanced by Ms PV and Mr KQ.

[160] The two decisions issued by the Standards Committee were in significant part identical, the only point of distinction being that the Committee's determination engaging Mr KQ based its decision to enter an unsatisfactory conduct finding against Mr KQ on its finding that Mr KQ had advised Ms PV throughout. The Committee concluded that Mr KQ had, in essence, also represented Mr RS and Ms CB.

[161] Both Ms PV and Mr KQ agreed that it would be an artifice if the provisions which preserve the confidentiality of the parties, prevented either from reading the review decision engaging the other. Both indicated their consent to the decisions being exchanged.

Costs

[162] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Ms PV is ordered, pursuant to s 210(1) of the Act to pay costs in the sum of $1,200 to the New Zealand Law Society those costs to be paid within 30 days of the date of this order. That costs order has been reduced from what would customarily be awarded, to recognise the degree of overlap in the two review hearings conducted.

Enforcement of costs order

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

Anonymised publication

[164] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 31st day of May 2021

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R Maidment
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:

Ms PV as the Applicant
Mr GY as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society
Secretary of Justice