LCRO 186/2009

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 4
BETWEEN	**HF** of Auckland Practitioner
AND	**SZ** of Auckland Complainant

DECISION ON PUBLICATION

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

[1] The Practitioner had sought a review of a Standards Committee decision that found him guilty of unsatisfactory conduct, and in addition to imposing a fine, ordered the publication of his name in LawTalk. The matter concerned the Practitioner having taken instructions for a will and enduring powers of attorney from a client whose legal competency was in question.

[2] In March 2010 I considered the review application filed by the Practitioner and upheld the Committee's finding that there had been unsatisfactory conduct.

[3] I did not conclude my review at that time insofar as the review application also extended to the Committee's order on publication. The Practitioner's submissions accompanying his review application appeared to be incomplete and he was therefore invited to provide further submissions that particularly addressed the public interest

factor. Meanwhile I deferred reaching a decision on that part of the Practitioner's review application.

[4] I have since received and considered submissions made by and for the Practitioner which covered a number of grounds that are relevant to the making of a publication order. I have considered these, and also the submissions of the Complainant's family.

[5] The Practitioner accepted that there had been a want of judgment on his part in this case but disagreed that he posed a risk to the public. He stated that he had not discerned that the client was suffering under a mental disability at the time of their meeting, and that she appeared able to impart instructions, identify her beneficiaries and the property she wished to dispose of, and other related matters.

[6] The Complainant's family also offered their views on the matter of publication which I have taken into account. Their view was that the mental health issues would have been apparent to the Practitioner had he spent time with his client on her own, and had he questioned her in the absence of others. However, they did not wish or seek publication of the Practitioner's name, their main concern being to safeguard the interests of mentally vulnerable persons. They considered that this is a matter of professional education for all lawyers rather than being dealt with by publishing the name of one lawyer.

[7] There are two specific sections in the Lawyers and Conveyancers Act 2006 that refer to publication. An order for publication of a Practitioner's identity may be made under section 131 (f) of the Lawyers and Conveyancers Act 2006, a section that applies where a lawyer has been censured. In such case the provisions of the Lawyer: Complaints Service and Standards Committees) Regulations 2008 apply, in particular Rule 30 of the Regulations which requires the prior approval of the Executive Board of the Law Society, and also requires a Standards Committee to take into account various factors that are set out. These include the interests and privacy of the complainant, the clients of the censured person, relatives of the censured person, his or her associates, partners or employees and finally, the censured person.

[8] Section 142 also provides that a Standards Committee may direct publication of its decisions under 138, 152 156 and 157 of the Act. This is made subject to subsection (1) which requires a Standards Committee to perform its functions in accordance with natural justice. There is no specific reference to publication of the Practitioner's identity, or that a prior order of censure be in place.

[9] In making the order of publication in this case the Standards Committee did not refer to any specific section of the Lawyers and Conveyancers Act 2006.

[10] It is unlikely that section 131 (f) of the Act applied since the Practitioner was not censured, and the decision to publish the Practitioner's name was not referred to the Executive Board of the Law Society, nor did the Standards Committee comply with the procedures set out in Regulations referred to above.

[11] Assuming that the publication decision was made pursuant to section 142, then subsection (1) would require the principles of natural justice to be observed in relation to the decision. The Practitioner stated that he had no opportunity to make submissions on the matter although I observe that the Notice of Hearing sent to the Practitioner included information about possible orders that could be made, which specifically mentioned the possibility of publication, and invited submissions.

[12] I refer to previous decisions of this office which have concluded that submissions from a Practitioner in relation to publication of identity should be sought after the Practitioner has been informed of the adverse outcome. This recognises that it is not realistically possible to address issues relevant to publication with having available the adverse decision that the Committee contemplates publishing.

[13] An omission can be cured on review and in this matter I have received and considered the Practitioner's submissions in relation to the basis of the Committee's finding of unsatisfactory conduct, a finding that I have confirmed on review.

[14] The factors to be considered in relation to a decision to publish have been the subject of a number of decisions and a useful summary of the relevant principles may be found in *Krishnayya v Director of Proceedings* CIV 2007-441-631. That case extracted from previous cases (including *S v Wellington District Law Society* [2001] NZAR 465, and *F v Medical Practitioners Disciplinary Tribunal* HC AK AP21-SWO1) the principles to be considered where an application for name suppression is made in a disciplinary tribunal, which is most often underpinned by statutory provisions for open justice.

[15] These principles were stated to be as follows:

a. the public interest referred to is the interest of the public, including the members of the profession, who have a right to know about proceedings affecting a practitioner. The interests of any person includes the interests of the practitioner being disciplined;

b. The proceedings before a disciplinary tribunal are not criminal proceedings. Nor are they punitive. Their purpose is to protect the public and the profession;

c. In considering the public interest the tribunal is required to consider the extent to which publication of the proceedings would provide some degree of protection to the public or the profession. It is the public interest in that sense that must be weighed against the interests of other persons, including the appellant, when exercising the discretion whether or not to prohibit publication.

d. The exercise of the discretion should not be fettered by laying down any code or criteria, other than the general approach dictated by the statute.

e. The issue will generally be determined by considering whether the presumption in favour of publication, and all the circumstances of the case, is outweighed by the interests of the appellant or the public interest.

f. Often the answer to that question will be to consider whether the interests of the public, including the profession, will be adequately protected if a suppression order is made. In many cases the issue is whether or not the balance is in favour of protecting the public by means of publication, or against the interests of the appellant in carrying on his profession uninhibited by any adverse publicity.

[16] There is a presumption of openness in the proceedings of disciplinary tribunals which are generally open to the public. I note that Section 238 of the Lawyers and Conveyancers Act 2006 provides that hearings in the Lawyers and Conveyancers Disciplinary Tribunal are to be in public. This is subject to certain discretionary powers conferred on the tribunal, and Section 240 which provides for restrictions on publication.

[17] By contrast the proceedings of Standards Committee, and this office, are to be conducted in private and there is no automatic publication unless so directed by a Standards Committee (or this office).

[18] This means that in the present case the Standards Committee made an order for publication of the Practitioner's name in relation to proceedings that are presumptively private.

[19] Where there is a presumption in favour of publication, this may be outweighed by other factors favouring the privacy of the individual. A similar approach may be taken where there is a presumption of privacy such as is the case here. Therefore I considered whether the factors favouring publication outweighed those protecting the Practitioner's identity.

[20] Among the submissions made for the Practitioner reference was made to recent legislative amendments to Enduring Powers of Attorney which will ensure that there is no repetition of the circumstances arising in this case. I accept that the new requirements as to process make it unlikely that a lawyer will need to rely on his or her own judgement of competency in preparing such documents. These provisions do not, however, apply to a lawyer obtaining instructions for a will.

[21] I also considered the numerous submissions describing the impact of a publication order on the Practitioner's business, existing clients and employees, as well as his family. He perceives that such an order would threaten the viability of his practice and potentially lead to loss of income. He also expressed concerns about the impact of publication on his reputation adding that he had not been the subject of a previous complaint.

[22] I have reflected on all of these matters, and also sought additional advice from professionals working in areas of mental health. The information I have received has confirmed that the line between legal competency and non-competency is generally a difficult one for lawyers (and often times doctors) to discern. This is particularly so in that phase of the process of decline where an individual's mental status may be fluctuating.

[23] Issues of competency are likely to be more discerned if the lawyer creates the opportunity to talk with the client alone and without the distraction or assistance of others. Had such a practice been adopted in this case it seems very likely, from evidence given by the clients' family members, that the Practitioner would have realised that his client suffered from some impairment. In this case the client's condition was very likely disguised by the fact that she was accompanied by two of her supporters. Both were existing clients of the Practitioner and this may have contributed to establishing an environment of confidence.

[24] I also observe that despite concerns that no family member had accompanied the elderly lady, it was not suggested that there was any wrongdoing on the part of those who accompanied the client, and it appears that they did not appreciate the situation surrounding the client's competency.

[25] A significant factor in the matter of publication is the extent to which the Practitioner is perceived to pose a risk to the public. The Practitioner now has a better understanding of the risks and a better appreciation of how deceptive appearances can be. In my view the Practitioner has learned from this complaint and is unlikely to fall into the same error in the future. To that end I accept that he does not pose a risk to the public. I understand that he has taken steps to ensure that this situation cannot arise again, and I accept that this is the case.

[26] Reflecting on all of these matters, it seems to me that the matter of public safety is better served by educating law practitioners generally on the matter of taking will instructions rather than publishing the name of an individual lawyer who was found to have erred in his assessment in a given case. The way that lawyers deal with elderly clients (or any clients that are perceived to have cognitive difficulty) should best be addressed though educational opportunities that arise in CLE. I understand that such seminars have been done in the past. In the light of the recent legislative changes, and in increasing elderly population, this may be an appropriate to time to revisit this issue.

[27] Having considered all matters it is my view that the order to publish should be vacated. This decision is made pursuant to section 211(1)(a) of the Act, and concludes my review of the Practitioner's application.

[28] There has been a considerable time lapse in concluding this review. However, the Practitioner was informed some considerable time ago of the outcome of this part of the review, and the delay has largely surrounded completing the written decision. I regret the delay which is due to the significant pressures of workload of this office.

DATED this 16th day of January 2012

Hanneke Bouchier
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:

HF as the Applicant
HG as the Applicants Counsel
SZ as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society