LCRO 199/2009

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Canterbury Westland Standards Committee
BETWEEN	**MS MANSFIELD** of South Island Applicant
AND	**MR SOUTHWELL** of South Island Respondent

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

DECISION

[1] Ms Mansfield (the Applicant) applied for a review of a Standards Committee's decision declining to uphold her complaints against Mr Southwell (the Practitioner). The Practitioner acted for her former business partner, T, in respect of a business restructuring, and subsequently enforcing personal securities given by the Applicant for advances given by T. The Practitioner had previously acted for the Applicant is several matters. The Applicant and T had been former partners in the business and personal sense. The complaints mainly involved allegations by the Applicant against the Practitioner of conflict of interest and perverting the course of justice.

[2] After filing the complaints the Applicant and the Practitioner agreed to participate in mediation but this proved unsuccessful and the Standards Committee resolved to conduct an investigation pursuant to section 152(2) of the Lawyers and Conveyancers Act (the Act), and in respect of all 8 complaints. At the conclusion of its investigation the Committee determined to take no further action.

Reasons for review.

[3] The Applicant sought a review because she believed that the Standards Committee had not investigated the allegations of conflict of interest. She also alleged that the Practitioner had assisted in perverting the course of justice which she considered had led to her being made bankrupt.

[4] Review hearing took place on 30 April 2010, and was attended by the Applicant and her counsel and also other persons in support. Also attending were the Practitioner and his counsel.

Review

[5] It is not necessary to set out in full detail the somewhat complex background to the complaints. Given that the Applicant considered that her complaints had not been fully considered, this review has examined the principle issues that underpinned the complaints. The following timelines provides a framework in which these matters may be considered.

1999	LACL incorporated. Engaged in the business of breeding animals on a rural property (Callender property). *Practitioner was not involved in these transactions.*
2000	Partnership formed between the Applicant and T, (equal shares). Partnership purchased the Callender property. (Above lease to LACL continued). *Practitioner acted in the formation of the partnership and purchase of the property.*
2000	Practitioner draws a will for the Applicant. Amends the Will in 2003.
2003	Practitioner provides employment-related advice (to the Applicant) concerning an LACL employee.
2000-2004	The Applicant managed the business. T contributed money to pay for improvements – to both the business and to the property. *Except in one instance where employment advice given, no evidence of the Practitioner's involvement in relation to the business operations by the Applicant or the financial advances made by T to either the partnership property or to LACL.*

2004-2005 Ongoing financial losses of LACL led T to take steps to separate the business interests owed by himself and the Applicant. This resulted in a restructuring agreement that was considered (at that time at any rate) to be favourable to the Applicant, and involved the creation of a new company (LASL) owned solely by the Applicant, which took over the LACL business and related assets, and also the lease. The Applicant provided personal guarantees in respect of loans made by T, and she continued to operate the business. *Practitioner acted for T in the restructuring and prepared documents recording agreement. Practitioner also formed the Applicant's company, LASL, on the instructions of T.*

2006 The business failed to succeed. T enforced the securities against the Applicant. *Practitioner assisted T with enforcement, including seizure of goods and chattels*.

Complaints

[6] Out of the above background arose a number of complaints against the Practitioner. These may be considered in two main categories. The first category is based on the Applicant's contention that the Practitioner was disqualified from acting for T and against her in any capacity. She cited conflict of interest on his part, and that he possessed confidential information about her (arising from having previously acted for her) that prohibited him from acting against her.

Applicable standards

[7] I observe that all aspects of the conduct complained of pre-date the commencement of the Lawyers and Conveyancers Act 2006, which came into force on 1 August 2008. As such the applicable rules are those which applied under the Law Practitioners Act 1982 (now repealed). By virtue of section 351(1) of the Act such complaints may be considered by a Standards Committee only where the conduct complained of could have led to proceedings of a disciplinary nature against the Practitioner under the former Law Practitioners Act.

[8] The applicable standards are those contained in the Law Practitioners Act 1982 and the Rules of Professional Conduct for Barristers and Solicitors, both of which have since been replaced. The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the

Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

> of sufficient gravity to be termed ‘reprehensible’ (or ‘inexcusable’, ‘disgraceful’ or ‘deplorable’ or ‘dishonourable’) or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be breached. That standard is that:

> the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[9] The Standards Committee concluded that the conduct complained was not of such a nature as to justify disciplinary action and therefore declined to consider the matter further.

Review

Conflict of interest complaint

[10] A “conflict of interest” arises when a Practitioner is acting for two or more individuals in relation to the same transaction whose interests conflict or may conflict. This recognises that a lawyer cannot discharge his professional duty to two clients whose interests conflicted. The rule governing a lawyer’s responsibilities in such circumstances was set out in Rule 1.07 of the former Rules of Professional Conduct for Barristers and Solicitors (now replaced by Chapter 5 of the Lawyers: Rules of Conduct and Client Care 2008). The rules clearly sets out the actions that a lawyer is required to take, which involves informing the clients of the conflict, recommending that they seek independent legal advice and declining to act if in doing so one party is or could be disadvantaged.

[11] The Applicant alleged that the Practitioner pressed her into signing agreements and that he was aware that she had received no independent legal advice prior to signing documents that he knew were against her interests, and that as her former lawyer he had a conflict in acting for his client T and against her in relation to the restructuring agreements.

[12] The Practitioner denied that he owed any duty to the Applicant in relation to the transaction, stating that she was represented by another law firm which had possession of all of the information concerning the restructuring proposal and had advised the Applicant.

[13] The evidence shows that the Practitioner acted for T in the restructuring. On the file were copies of his correspondence with lawyers acting for the Applicant. However, I noted that the Practitioner had acted in the formation of LASL, a company solely owned by the Applicant and which was formed as part of the restructuring. The evidence shows that the company was formed on the instructions of T. This would appear to be somewhat unusual where a Practitioner is claiming that he did not act for an individual, but this does not appear to have come about as a result of instructions given by the Applicant, but rather as a result of T driving the restructuring under which the Applicant would take over the business operations under a new corporate structure. I also noted that it was through T's intervention that the Applicant was, in early 2004, referred to another lawyer for the purpose of obtaining independent legal advice in relation to the restructuring proposals, and the original proposals for restructuring options had been forwarded by T to that lawyers acting for the Applicant who in turn provided advice to the Applicant. The Practitioner's involvement was with the lawyer acting for the Applicant. There is no evidence that he provided any advice to her at any time.

[14] The evidence on the file shows that the Practitioner made it clear in a number of ways to the Applicant that he acted for T only, and that he did not act for her. This is demonstrated by the fact that he corresponded with legal and accounting professionals who represented the Applicant's interests. For example, there was evidence of exchanges of correspondence from April 2004 and in the following months between the Practitioner and the lawyer acting for the Applicant. A November 2004 letter sent by the Practitioner to the other lawyer included the details of the restructuring proposal, including the financial details, and a December 2004 letter sent by the Applicant's lawyer advised the Practitioner they he would respond as soon as he had obtained his client's instructions. What advice she received is not explained. There is evidence on

the file that the Applicant went to the Practitioner's office on or about 2 March 2005, accompanied by her accountant, intending to sign the documents, and that this was deferred pending some minor alterations, with a plan to return the following week to sign. This negates the Applicant's submission that the Practitioner *'realised all along she did not have independent legal advice'.*

[15] The Applicant attended the Practitioner's office again on 9 March 2005 to sign the documents, this time unaccompanied. The Practitioner took the step of preparing a "*Waiver of independent legal advice*" which was signed by the Applicant and by which she expressly acknowledged that she had been advised to seek independent legal advice concerning the agreements, confirmed her understanding that the Practitioner did not represent her interests, and that she did not wish to seek independent legal advice. This is clear evidence that the Practitioner did not have a role in representing the Applicant, and evidence that she did not look to him to protect her interests.

[16] I further noted on the file that when T wrote to the Applicant in May 2006 terminating the Agreements there was further correspondence on the file which suggested that same lawyer as before still acted for the Applicant, who wrote informing the Practitioner, *"In the meantime we confirm the write has been instructed by* (the Applicant) *to supervise her interests and we are currently perusing and checking all relevant correspondence, agreements, property titles, etc.",* and asking the Practitioner to forward all correspondence to his office, although later that year another law firm appears to have become involved when the Applicant sought to resist actions being taken by T.

[17] In the context of the activity surrounding the restructuring discussions, the evidence shows that the Practitioner acted only for T, and not the Applicant in the restructuring arrangements and related financing. The Applicant was represented by another lawyer and an accountant in respect of the substantive arrangements, and there was nothing to show that the Applicant sought the Practitioner's advice or relied on him to protect her interest. Rather the converse is true, and I see no reason to suppose that the Applicant did not understand the significance of the waiver she signed at the Practitioner's office. In this context I accept that the Practitioner's involvement in forming the company to be owned by the Applicant may be considered as implementing the terms of an agreement reached. The Practitioner took all reasonable steps to make it clear to the Applicant that he was not acting for her, and that he represented only T's interests. It is difficult to see how much more explicit the Practitioner could have been in relation to this matter. If the Applicant elected to not

keep in contact with her lawyers in March 2005 at time of signing the documents, I can see no basis for transferring to the Practitioner any responsibility for protecting her interests. There is no basis for upholding this complaint.

[18] Given my conclusion, it is not necessary to consider the Practitioner‘s role in acting on T’s instructions with regard to enforcing the securities given by the Applicant. The Applicant’s complaint that the Practitioner had been involved in or responsible for destruction of her property, including destruction of a computer and killing her animals, was considered by the Standards Committee who could find no basis for further enquiry. I refer again to the standard of conduct that gives rise to the jurisdiction of a Standards Committee to consider a complaint. The Practitioner was acting on his client’s instructions, and appears to have been duly authorised to enforce the securities that the Applicant had given. These events were clearly stressful for the Applicant but I am required to consider these matters objectively and within a disciplinary forum. No information has been provided that shows that the Practitioner’s actions could be considered professionally reprehensible. No additional information has been provided to warrant further enquiry into these complaints.

Acting against a former client

[19] The Applicant’s contention that the Practitioner had a conflict of interest was also advanced by the further contention that the Practitioner was disqualified from acting against her because he had acted for her previously, and that he possessed information or knowledge about her that he had acquired by virtue of work he had done for her in the past, and that this knowledge disqualified him from subsequently acting against her.

[20] The Practitioner’s response was that previous work for the Applicant was limited to matters that were unrelated to the restructuring. He denied having any particular confidential information that would have disqualified him from acting for T.

[21] This complaint proceeds from a view that the Practitioner was “acting against” the Applicant when acting for T in the restructuring. If it is based on an assumption that the aim of the restructuring was to set the Applicant up for a failure that would lead to benefits for T, this is unlikely to be supported by an objective assessment of the restructuring proposals. There is no evidence that the Applicant was dissuaded from accepting the proposal either by her lawyer, or by the accountant who appeared to have considered that the terms were favourable to the Applicant.

[22] Rule 1.05 of the Rules of Professional Conduct for Barristers and Solicitors provided that a lawyer was prohibited from acting against a former client when

> ".... through prior knowledge of the former client of his or her affairs which maybe relevant to the matter, to so act would be or would have the potential to be to the detriment of the former client."

The rule reflected that while there is not generally an ongoing duty of loyalty on the part of a lawyer to a former client, there is an ongoing duty of confidence. The duty extends not only to not disclosing the confidential information, but also to not using that information to the detriment of the former client, or the benefit of another party. The rule is most often cited where a former lawyer is engaged in active litigation against a former client.

[23] The rule is also indicative of the professional duty not to use confidential information to the detriment of a former client more generally. That more general obligation is affirmed by r 8.7 of the Rules of Conduct and Client Care which provides that "A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer". The fact that it is a professional duty of a lawyer to respect confidences obtained in other contexts is also affirmed by r 8.8 of the Rules of Conduct and Client Care which provide that

> A lawyer must not breach or risk breaching a duty of confidence owed by the lawyer that has arisen outside a lawyer–client relationship, whether to benefit the lawyer, a client, or otherwise.

I note that those rules were not in force at the time that the Practitioner engaged in the conduct complained of, however, they are indicative of the applicable professional standards.

[24] Counsel for the Applicant cited *Black v Taylor* [1993]3 NZLR 403 (CA) where a court intervened to prevent a lawyer, who had acted for certain individuals, from acting against them in court proceedings because of the possibility that the lawyer might misuse information gained in the former relationship about the individual's "weaknesses fears and reactions." The Court was there considering whether a lawyer could represent a party which would involve that lawyer cross-examining a former client in court. That case recognises that disqualifying information may include general insights obtained by a practitioner into a former client's strengths and weaknesses. It is clear however that there must exist a sufficient relationship between the general

matters that the Practitioner had acted on, and the subsequent matters in which the Practitioner is involved in acting against the former client.

[25] I therefore considered this as a complaint alleging that the Practitioner's representation of T was calculated to obtain an advantage for his client. This assumes that there was a conflict between the parties and that the Practitioner was possessed of confidential information or knowledge that could be used against his former client and to the advantage of T, such as disqualified him from acting for T.

[26] I previously concluded that the Applicant was independently advised by another lawyer (and an accountant) in relation to the restructuring, and also noted that the terms of the proposed restructuring were not considered to be unreasonable. The Applicant did not raise any concerns then of the kind that have been raised since, there being no evidence that she objected to the Practitioner acting for T at that time, or that she objected to being represented by another lawyer. Her concerns arose subsequently when, acting on the instructions of T, the Practitioner became involved in taking possession of certain property that was covered by guarantees given by the Applicant at the earlier time, when she had been represented by other professionals.

[27] The submissions made by and for the Applicant argued that the Practitioner's involvement with the Applicant on prior occasions disqualified him from having acted for T in a restructuring plan that the Practitioner knew from confidential knowledge about her, would be detrimental to the Applicant. There are clearly difficulties given the retrospective nature of the complaint, but in any event I have considered what evidence exists to support the fundamental contention that the Practitioner was disqualified then from acting against the Applicant.

[28] The Practitioner acted for the Applicant in earlier years, and I accept that this was more extensive that the Practitioner acknowledged when taking into account the Practitioner's involvement in matters in which the Applicant had an interest. The Practitioner's prior professional involvement included his attendances in drafting Wills and providing some employment advice to the Applicant concerning an employee of LACL. He also formed the H partnership, and acted in the partnership's purchase of the Callender property. (The additional complaint relating to the Callender purchase occurred prior to 1 August 2002, this marking the 6 years cut off imposed by section 351(2)(b)(i) of the Act. I therefore have not considered that complaint.) However, a lawyer's prior involvement with a client, regardless of distance in time, may be relevant for the purpose of considering whether the Practitioner acquired confidential information about the Applicant that would later disqualify him from acting against her.

[29] I have considered the submission that the Practitioner was the 'partnership lawyer', that the Applicant's role in that partnership was not minimal (a 50/50 partnership), and that the Practitioner ought not to have acted against her when the partnership had a falling out. The evidence indicated that other than owning the property which it leased to LACL, the partnership was not active as a business entity, and that the restructuring was not about the partnership falling out, but rather that the business conducted by LACL was failing under the Applicant's management.

[30] No evidence was provided as to what specific information within the Practitioner's knowledge disqualified him from acting for T in the restructuring. Rather, the information that the Applicant relied on appeared to be a general impression that the Practitioner would have gained about her lack of business acumen, and that he would have known that she had limited understanding of business matters such as the restructuring proposal, and had little prospect of successfully running the business after the restructuring. The "acting against" element appears to reside in the Applicant's overall contention that the entire restructuring proposal was set up in contemplation of her failure, with the aim of depriving her of her property and transferring it to T.

[31] I have carefully considered the evidence, the submissions made by the Applicant's counsel and also the principles set out in *Black v Taylor.* and counsel's various submissions concerning the risks involved in a lawyer's use or disclosure of confidential information. That case may have limited application where there no court proceedings are involved, but it is not inconceivable that lawyer might be possessed of confidential information about a former client that would bar him from acting for another client who may be advantaged by use of that knowledge. If that happened one might expect that an objection would arise at an early stage.

[32] No evidence has been provided about just what confidential information the Practitioner had about the Applicant that was used, or could have been used, against her such that ought to have disqualified him from representing T in relation to the restructuring. It is this transaction that is material to the complaint because it provides the foundation for the later involvement of the Practitioner in assisting his client to enforce the guarantees. I have already noted that the Applicant raised no objection to the Practitioner acting for T in relation to the restructuring at the time it occurred, which took many months, indeed almost a year. None of the Practitioner's prior services to the Applicant appeared to have involved the business operations of LACL under the management of the Applicant. The circumstances that I have considered in relation to his part of the complaint do not indicate any basis upon which it could be upheld.

Allegation about use of the law for improper purpose/perverting course of justice

[33] The second review issue related to the Practitioner's involvement in correspondence on his client's behalf, wherein as part of the agreement, T required the Applicant's daughter to withdraw certain criminal allegations that the daughter had made to the police.

[34] There were two items of correspondence involved. The first was a letter dated 4 July 2007 written by the Practitioner and sent to the Applicant's solicitor. There was evidence to show that the letter had resulted from a discussion between the Practitioner and the Applicant's lawyer. The Practitioner had written,

> *"It would appear that we are getting close to agreeing to terms of settlement in this matter. Please accordingly confirm that your client is prepared to proceed on the following basis*:
>
> 1. *Your client's daughter* (name) *is to withdraw her complaints against* (T) *to the police and* (T) *is to withdraw his complaint against* (the daughter) *to the police. Confirmation of the withdrawal of the complaints is to be provided by each side.* (the daughter) *and* (T) *are to agree not to pursue any such complaints at any time in the future."*

The letter itemises other aspects of the settlement, and concludes with:

> "*Could you please confirm as soon as possible that your client agrees to these terms of settlement. We can then begin taking steps to arrange for a refinancing of the property."*

[35] In a subsequent letter dated 18 July 2007, the Practitioner again wrote to the Applicant's solicitor as follows.

> "*We refer to your 9 July letter 2007.*
>
> *We find your comments in paragraph 2.2 of your letter, somewhat surprising given that previously you had not raised any concerns about the proposal. In our telephone discussion of 4 July you had advised that* (the daughter) *had withdrawn the complaint as at 2.00pm on 3 July. Against that background we find it surprising that you should now say that you are neither in a position to confirm or deny whether such a complaint has been withdrawn. As far as (*T) *is concerned, confirmation or withdrawal of the complaint is an essential term of any settlement with* (the Applicant)."

At the foot of the letter was written,

> *"Perhaps you would care to remind* (the Applicant) *that the terms of settlement being offered by* (T) *are extremely favourable. From our understanding of the position it would seem that if* (the Applicant*) does not accept this proposal then she will inevitably be bankrupted*."

[36] The Practitioner's explanation to the Standards Committee was that in writing the letters, he was acting upon the client's instructions, and he later submitted that he "*was simply recording what had already been agreed between the clients*." In considering this complaint the Standards Committee noted that it was improper for a lawyer to use the withdrawal of criminal complaint as leverage in negotiation of civil disputes. The Committee noted that such behaviour could be the subject of criminal charges, and that it was no defence for a lawyer to say that he/she was simply acting on instructions. Referred was made to Rule 2.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008, which states:

> A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interest, or occupation.

[37] The Committee went on to consider whether the Practitioner was using the withdrawal of the criminal complaint as part of negotiations or simply recording what, he said, the parties have agreed. The Committee accepted that the Practitioner was simply recording in writing what he said had been agreed, and in the circumstances decided, pursuant to section 152(2)(c) of the Act, to take no further action.

[38] The Applicant disagreed with the Committee's conclusion that the Practitioner was simply recording an agreement already struck. She alleged that the Practitioner assisted his client to attempting to pervert the course of justice.

[39] A preliminary observation is that the conduct occurred in 2007 and before the existence of Rule 2.3. The equivalent rule under the former Rules of Professional Conduct for Barristers and Solicitors is Rule 7.04 which required a practitioner to make all reasonable efforts to ensure that legal processes are used for their proper purposes only and that their use is not likely to cause unnecessary embarrassment, distress or inconvenience to another person's reputation, interests or occupation.

[40] It was not suggested that the Practitioner himself proposed the particular term as part of the financial settlement. Evidence on the file, and given at the hearing, indicated that the daughter's complaint against T involved serious allegations of a sexual nature. Any involvement by a lawyer to pervert the course of justice is a criminal act, and also attracts disciplinary sanction.

[41] The review question is whether the letters written by the Practitioner are evidence of the Practitioner assisting T in securing the withdrawal of serious criminal allegation against T, amount to a breach of a professional duty and is sufficient as to invoke disciplinary sanction. The content of the letters need to be carefully scrutinised, as do the Practitioner's responses, and considered in context. The 4 July 2007 letter commences with *"It would appear that we are getting close to agreeing to terms of settlement in the matter. Please accordingly confirm that your client is prepared to proceed on the following basis..."* By this letter the Practitioner was seeking confirmation of the terms, and this does not, in my view, evidence terms of an existing agreement, but rather, seeks confirmation of proposals which have been forwarded with view to settlement. This is reinforced by the 18 July letter in which the Practitioner emphasises that the withdrawal of the criminal complaint is an essential term of the agreement for his client, which if not agreed to, will likely lead to the Applicant being bankrupted. The second letter refers to a prior telephone discussion on this issue, pointing to a discussion between the Practitioner (on his client's behalf) and the Applicant's lawyer that withdrawal of the complaint is an essential part of any settlement proposal. The Practitioner reminds the Applicant's lawyer that the terms are "*extremely favourable*" to the Applicant provided that the Applicant's daughter agrees to withdraw her criminal complaints and to agree to not pursue them in the future.

[42] I cannot agree that the Practitioner's correspondence reflected terms already settled and I therefore find myself in disagreement with the Committee's interpretation. It is my view that the letters clearly demonstrate the Practitioner's involvement in assisting his client to avoid a serious criminal complaint. I have no difficulty in concluding that in this matter the Practitioner contravened his professional obligation by his involvement in assisting his client to pervert the course of justice. By his correspondence the Practitioner sent a clear message that his client's generous settlement offer to the Applicant depended on her daughter withdrawing a serious criminal complaint. In addition, while the Practitioner did not himself threaten the Applicant with bankruptcy (in contravention of Rule 7.05) he conveyed what he understood to be his client's intention to bankrupt the Applicant if she did not agree to the client's terms. In conveying his client's threat to bankrupt the Applicant if she failed

to comply with terms T considered essential to an agreement, the Practitioner assisted his client's efforts to pervert the course of justice, this being a further violation of his obligation under Rule 7.04.

[43] The breach is sufficiently serious in my view to amount to 'conduct unbecoming' a barrister or solicitor' pursuant to section 106 of the Law Practitioners Act. It therefore reaches the threshold required by section 351 of the Lawyers and Conveyancers Act 2006, and allows a finding of unsatisfactory conduct to be made under section 12 of the Lawyers and Conveyancers Act 2006. Accordingly I find the Practitioner's conduct to amount to conduct unbecoming barrister or solicitor, and pursuant to section 12 of the Act I find the Practitioner guilty of unsatisfactory conduct in relation to this complaint.

Penalty

[44] The range of penalties that may be imposed in relation to this finding are those set out in section 106 (4) (a)-(j) of the Law Practitioners Act 1982. The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

a. to punish the practitioner;

b. as a deterrent to other practitioners; and

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

[45] All of these matters are relevant in the present case. The conduct of the Practitioner was wholly at odds with his professional obligations under Rule 7.04. Even if the conduct was simply an error of judgement it was a very serious one.

[46] I observe that my jurisdiction to impose a fine is limited to $2,000 under the Law Practitioners Act. This may be compared with the more recent Act which provides for a penalty of $15,000 at the most serious level. I also take into account the seriousness of the breach, that the Practitioner's conduct involved both advancing the unlawful proposal for his client as well and conveying the client's threat if the proposal was not agreed to, and that it also inappropriately involved the Applicant's daughter who had no connection with the proposed financial settlement. In my view the Practitioner's conduct is at the higher end of offending. In all of the circumstances I consider a fine of $1,700 appropriate.

Censure

[47] Pursuant to section 106 (4)(b) the Practitioner is censured.

Costs

[48] Where a finding of unsatisfactory conduct is made or upheld against a lawyer on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case. I consider that this case has been of average complexity, and the Costs Orders Guidelines of this office indicate that in such cases an order of $1800 would usually be made. I also take into account that the Standards Committee decision has been reversed on one complaint and upheld on others. I consider a costs order of $1,000 to be appropriate.

Decision

Pursuant to section 211(1)(a) of the Act the decision of the Standards Committee is modified as follows

(a) In relation to the complaint that the Practitioner breached Rule 7.04 of the Rules of Professional Conduct for Barristers and Solicitors, I find the Practitioner guilty of conduct unbecoming and thereby guilty of unsatisfactory conduct. The decision of the Standards Committee is reversed.

(b) The complaints alleging breach of Rules 1.07 and 1.04 of the Rules of Professional Conduct for Barristers and Solicitors are not upheld and the decision of the Standards Committee is upheld in relation to these complaints.

Orders

- Pursuant to section 106(4) (b) of the Law Practitioners Act the Practitioner is censured.
- Pursuant to section 106(4)(a) of the Law Practitioners Act the Practitioner is fined $1,700. This sum is to be paid to the New Zealand Law Society within 30 days of the date of this decision.
- Pursuant to section 210 of the Lawyers and Conveyancers Act 2006 the Practitioner is to pay costs in the sum of $1,000 in relation to the review. This is to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 08th day of September 2010

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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:

Ms Mansfield as the Applicant
Mr Zebra as the Applicant's representative
Mr Southwell as the Respondent
Mr Banff as the Respondent's representative
The Canterbury Westland Standards Committee
The New Zealand Law Society