

**NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2020] NZLCDT 5

LCDT 016/19

**IN THE MATTER**

of the Lawyers and Conveyancers  
Act 2006

**BETWEEN**

**AUCKLAND STANDARDS  
COMMITTEE 5**

Applicant

**AND**

**BOON GUNN HONG**

Respondent

**CHAIR**

Judge BJ Kendall (retired)

**MEMBERS**

Ms J Gray

Mr G McKenzie

Prof D Scott

Ms S Stuart

**DATE OF HEARING** 12 and 13 December 2019

**HELD AT** Specialist Courts and Tribunals Centre, Auckland

**DATE OF DECISION** 10 February 2020

**COUNSEL**

Mr P Collins for the applicant

The respondent in person

**DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS  
DISCIPLINARY TRIBUNAL CONCERNING LIABILITY**

***Introduction***

[1] The applicant has filed three charges against the respondent. Charge One relates to conduct that occurred before 1 August 2008 and is brought under s 351(1) of the Lawyers and Conveyancers Act 2006 (the Act). He was also charged in the alternative with conduct unbecoming or negligence or incompetence in his professional capacity. Charges Two and Three are framed as misconduct under ss 7(1)(a)(i) and/or (ii) and 241(a) of the Act. There are alternative charges of unsatisfactory conduct or further of negligence or incompetence.

[2] Particulars of the charges are attached as Appendix 1.

[3] The charges are summarised in the opening submissions of the applicant as arising out of Mr Hong's relationship with his client D K, J D and the CL Trust. The charges span the period of the former and present legislation. They are concerned with:

- (a) Mr Hong's personal financial dealings with his clients.
- (b) The exploitation of his status as their lawyer to personally acquire an interest in a property his clients were intending to purchase when he began acting for them.
- (c) The complete absence of any attention by Mr Hong to his professional responsibilities including:
  - (i) his apparent lack of awareness that he was even facing any professional issues at all;
  - (ii) the abandonment of basic notions of client protection; and
  - (iii) his lack of awareness about the need for his clients to be independently advised.

***Factual Background***

[4] From 2001 until 2010 Mr Hong was Mr K's lawyer acting for him personally and for his business interests.

[5] The CL Trust (CLT) which was Mr K's family trust was settled by deed dated 30 October 2001. The deed was prepared by Mr Hong. Along with J D he was the independent trustee as defined in the Trust Deed. He remained so until he was replaced by his trustee company, BGH Trusteeship Limited, on 13 June 2007.

[6] On 27 September 2005 CLT entered into an agreement to purchase a property at X Road, Z. Mr Hong acted for CLT. CLT paid a deposit of \$40,000 directly to the vendors. Settlement of the purchase was delayed because of a caveat by another intending purchaser and later because of issues with the vendors.

[7] The competing purchaser's caveat was discharged following litigation in June 2006. In the meantime, CLT had agreed to purchase a property for the family home in M. Against that background, Mr Hong offered to become personally involved in the completion of the X Road purchase. Mr K and Ms D describe that as a joint venture proposal. Mr Hong denies that statement but does not deny his personal involvement in financing the X Road purchase and the events that led to his status as sole legal owner of that property.

[8] The balance of the purchase funds for the property were paid to the vendor's solicitor on 1 August 2006 but the transfer of title to the property did not take place for another two years namely 31 July 2008. Mr Hong provided \$585,000 to the purchase personally or through a company under his control, Orano Developments Limited. CLT paid a further \$50,000 to Mr Hong on 11 February 2009.

[9] Title was not taken in the name of the trustees of CLT, but Mr Hong effected the transfer to Ms D and himself personally as the registered proprietors recorded on the title.

[10] On 6 August 2008, Mr Hong effected a transfer of title to the sole name of his trust company BGH Trusteeship Limited. He did so without advice or explanation to his clients.

[11] There were two subsequent transfers; from BGH Trusteeship Limited to Nominees and Trustees Limited (another of Mr Hong's companies) on 4 August 2011, and then from that company to Mr Hong personally on 12 December 2012. He remains the sole legal owner of the property which is subject to a caveat by Mr K.

[12] Mr Hong became Mr K's landlord and, in 2014, he took steps to evict Mr K and his family. He was unsuccessful.

[13] Ms D and Mr K separated in late 2012. Mr K replaced her as a trustee of CLT on 16 August 2017. BGH Trusteeship Limited remained a trustee at that time.

[14] Mr Hong has not denied the facts of this case.

### ***Consideration of the charges***

**Charge One: engaging in a transaction personally with clients contrary to Rules 1.03, 1.04 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors (RPC).**

**The relevant rules relating to each charge are attached as Appendix 2.**

[15] This charge relates to conduct that occurred before 1 August 2008 and is brought under s 351(1) of the Lawyers and Conveyancers Act 2006 (the Act).

[16] The allegation is that Mr Hong's actions in providing the funds to complete the purchase of the X Road property were in breach of Rule 1.03 of the RPC because he acted for and continued to act for his clients in circumstances where there was a conflict of interest between his personal interests on one hand and the interests of his clients on the other hand.

[17] It is alleged that he breached Rule 1.04 of the RPC because he acted for more than one party in the same transaction, namely himself and his clients, without the informed consent of his clients.

[18] It is further alleged that Mr Hong breached Rule 1.07 of the RPC because there was a conflict or likely conflict between his interest and his clients' interest; and

- (a) he failed to advise his clients about the conflict or potential conflict;
- (b) he failed to advise the clients to take independent advice; and
- (c) he continued to act in circumstances where so acting was, or was likely, to be to the disadvantage of his clients.

[19] This charge is centred around the provision of \$585,000 by Mr Hong personally to his clients to enable them to settle the purchase of the X Road property.

[20] Mr Hong admitted that he personally advanced “*funds to assist the Ks to settle the Z Property on 1<sup>st</sup> August 2006 of about \$590,274.68*”.<sup>1</sup> In doing so, it is indisputable that Rules 1.03 and 1.04 became immediately applicable. There is no evidence that Mr Hong advised his clients about conflict of interest or advised them to take independent advice.

[21] Mr Hong’s defence to this charge and to charges two and three is that the RPC and the CCR<sup>2</sup> rules are not applicable to him and to the circumstances of his making personal funds available to his clients. He set out his reasons as being:

- (a) He stepped in to assist the Ks and had nothing to gain by doing so.
- (b) His assistance to the Ks was on a Conscience to Conscience basis which did not involve a conflict of interest.
- (c) His advance to the Ks was part of his **Benevolence on the Conscience Loan Fund** which he had established to assist longstanding clients who found themselves in financial difficulty.
- (d) That his advance to the Ks was on the basis that:
  - (i) they would reimburse him the interest that he would have been earning on his funds on term deposit;

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<sup>1</sup> Paragraph [50] of affidavit of B Hong sworn 1 October 2019.

<sup>2</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

- (ii) that he would take an assignment of the Z property until repayment of the advance;
- (iii) that the Z property would be sold in the event of failure to repay the advance and that he was to control the sale.

[22] Mr Hong was cross-examined by Mr Collins for the Committee. He confirmed his position that he had done nothing professionally wrong when he personally took title to the property and borrowed money against it. He answered that, having acquainted himself with the relevant rules, he had not infringed any of the rules of professional conduct whether they were the old rules or the current conduct and client care rules.

[23] Mr Hong repeated that he had no duty to the Ks because he was helping them out of conscience.

[24] He said that his conscience fund was an adjunct to his legal practice to help longstanding clients who would benefit from his assistance. The clients had to be good people as judged by him. Then the need for assistance had to be related to a matter that came up in his legal practice.

[25] It was his requirement that his clients who received assistance from his conscience fund had “To do right by you and pay not just interest but also a bonus”.<sup>3</sup>

### **Charge Two: Breach of the Conduct and Client Care Rules (CCR).**

[26] This charge alleges breaches of Rules 5, 5.1 and 5.2 which relate to the requirement that a lawyer, while acting for his clients, must be independent and free from compromising influences. There is the requirement that the relationship between lawyer and client is one of confidence and trust that must never be abused and that the lawyer must at all times exercise his professional judgement solely for the benefit of his client.

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<sup>3</sup> See Notes of Evidence at pages 37, 40 and 41.

[27] The argument in respect of the alleged breaches of these rules is that Mr Hong lacked any conceivable notion of independence and abandoned professional standards when he dealt with the X Road property as if it was his own. This continued when he acted in the transfers of the property and received a further substantial payment of \$50,000 all of which occurred after 1 August 2008.

[28] Breaches of Rules 5.4, 5.4.2, 5.4.3, are also alleged against Mr Hong. These rules relate to the requirement that a lawyer must not act for a client in a matter in which he has an interest unless the matter is not contentious, and the interests of the lawyer and client correspond in every respect. There is the further requirement that the lawyer must not enter into any financial, business, or property transaction or relationship with a client if there is a possibility of the relationship and trust between lawyer and client being compromised.

[29] The argument in respect of the alleged breaches of these rules is as follows:

- (a) The breach of Rule 5.4 by Mr Hong continuing to act in his dealings with the X Road property by which he gained sole control of the property to the detriment of the K interests.
- (b) He breached Rule 5.4.2 when he acquired an interest in the X Road property because of his personal loan such that his interest as a lawyer and that of his client did not correspond in all respects.
- (c) The breach of Rule 5.4.3 arose by reason of Mr Hong transferring the X Road property into the sole ownership of BGH Trusteeship Limited and when he received \$50,000 from CLT. The allegation is that these transactions were to the detriment of the K interests and should be seen as being undertaken in their own right and not only as a continuation of a relationship entered into earlier.

[30] There is the further allegation that Mr Hong breached Rule 5.4.4. That rule requires that a client must be advised of the right to receive independent advice in respect of any matter where the lawyer enters into a financial, business, or property transaction or relationship with his client. There is the further requirement that the

client must be advised that, should a conflict arise, the lawyer must cease to act for the client on the matter and, without the client's informed consent, on any other matters.

[31] Mr Hong has accepted that he did not advise the Ks of their right to receive independent advice.

[32] The next allegation under this charge is that Mr Hong was a party to the transactions as defined by Rule 5.4.5. He was the sole director and shareholder of BGH Trusteeship Limited and Nominees and Trustees Limited. He was personally the final transferee of the X Road property. It is accordingly alleged that Mr Hong is personally deemed to be a party to all those transactions.

[33] The final allegation under this charge is that Mr Hong has acted in breach of Rules 6 and 6.1 which relate to acting for more than one client on a matter. Rule 6 requires a lawyer to protect and promote the interests of the client to the exclusion of the interests of third parties. Rule 6.1 provides that a lawyer must not act for more than one client where there is more than a negligible risk that the lawyer may be unable to discharge the obligations owed to one or more clients. It is argued that Mr Hong, having acted for himself and the interests of the Ks after 31 July 2008, created a more than negligible risk that he would be unable to discharge the obligations he owed to the Ks. The evidence discloses that there was no informed consent.

[34] Mr Hong has denied this charge. He has repeated his reasons for doing so which are recorded at paragraph [21] of this decision.

**Charge Three: procurement of a personal advantage to the detriment of his clients contrary to s 4(d) of the Act.**

[35] The allegation against Mr Hong in respect of this charge is that he was in breach of one of the fundamental duties of a lawyer which, in this case, was to protect the interests of his clients. He failed to do so by procuring a personal advantage for himself. The Committee has instanced that Mr Hong became personally the owner of the Z property as a result of the consecutive transfers of title referred to. The Committee went on to say that Mr Hong acquired the property without the informed



consent and thus was in breach of the fundamental duty created by s 4(d) of the Act to protect the interest of his clients.

[36] Mr Hong has not denied the facts alleged in this charge. He has denied the charge and has repeated his reasons for doing so as set out in paragraph [21] of this decision.

### ***Discussion***

[37] Mr Hong has, by his response to charges and throughout his evidence, resolutely maintained that the relevant rules do not apply to him in this matter albeit that he has acknowledged that his personal loan to the Ks was an “adjunct to his legal practice”.

[38] Mr Hong cannot be correct. He is a lawyer of many years standing. He is required to know and observe the rules relating to professional conduct. He has acknowledged becoming aware of them but continues to maintain that they are not applicable to him. Notwithstanding that his reasons for his actions stem from a “conscience” point of view, his refusal to accept that the rules apply to his conduct in this case is obdurate. As counsel for the Committee has submitted Mr Hong has:

- (a) Displayed a disregard for any professional issues arising from his dealings with the Ks.
- (b) Lacked appreciation of any kind of need for his clients to receive independent advice.
- (c) Assumed ownership and control of the property in question without regard to the professional issues that he was required to address.

[39] Given the admission of facts by Mr Hong and the resolute stand that he has taken to these proceedings, we have not found it necessary to address in detail all the particulars that have been put before us.

[40] We find that the charges are proved. Charge One has reached the level of misconduct in his professional capacity under s 112(1)(a) of the Law Practitioners Act

1982. We make findings of misconduct under s 7(1)(a)(i) & (ii) in respect of Charges Two and Three. Mr Hong's conduct fell well short of the standards required of him as a practitioner at the time.

[41] A date for the hearing of penalty is to be set. The Committee's submissions in support are to be filed 10 working days before the date set for hearing. Mr Hong's submissions in reply are to be filed five working days before the date set for the hearing.

**DATED** at AUCKLAND this 10<sup>th</sup> day of February 2020

BJ Kendall  
Chairperson

### Charges

Auckland Standards Committee 5 charges the practitioner with:

**Charge One: engaging in transaction personally with clients contrary to Rules 1.03, 1.04, and 1.07 of the *Rules of Professional Conduct for Barristers and Solicitors (RPC)* – charge concerning events occurring before 1 August 2008, brought under s.351(1) of the *Lawyers and Conveyancers Act 2006* (“the Act”)**

Misconduct in his professional capacity; or, in the alternative

Conduct unbecoming; or, in the further alternative

Negligence or incompetence in his professional capacity, of such a degree as to reflect on his fitness to practice as a solicitor or as to tend to bring the profession into disrepute.

#### **Particulars**

1. These charges use the following defined terms in addition to those already noted:
  - (a) CL Trust is “the Trust”;
  - (b) The Deed by which the Trust was settled, on 30 October 2001, is “the Deed”;
  - (c) The trustees for the time being of the Trust are “the Trustees”;
  - (d) D K, J D, and the Trustees are collectively “the Clients”; and
  - (e) The property located at X Road, Z, is “the Z property”.
2. At all times relevant to this and the subsequent charges, the practitioner acted for the Clients in connection with:
  - (a) The preparation and execution of the Deed and the associated advice concerning the establishment of the Trust and a change of trustee; and
  - (b) From September 2005, in the provision of advisory and transactional services concerning the intended acquisition and ownership of the Z property by the Trustees, or the acquisition or ownership of an interest in the Z property by the Trustees.
3. With reference to clause 6(g) of the Deed, the practitioner was the Professional Trustee of the Trust. By Deed dated 13 July 2007, he resigned as Professional Trustee and a company under his direction and control, BGH Trusteeship Ltd, was appointed in his place as Professional Trustee.
4. On 27 September 2005 the Trustees entered into an agreement to purchase the Z property from the then registered proprietor, S K, for \$630,000. The contract was subsequently made unconditional for a purchase price of \$645,000.

5. The purchase of the Z property by the Trustees was initially intended to settle on 4 November 2005 but settlement was delayed indefinitely for reasons relating to purported competing interests and adverse caveats.
6. In April or May 2006, while the settlement of the purchase of the Z property was delayed, the practitioner made a proposal to D K, on behalf of the Clients, which was intended to enable the Trust to:
  - (a) Purchase another property; and
  - (b) Retain an interest in the Z property once it became possible to settle the purchase of that property.
7. The proposal was described by the practitioner as a “joint venture” and it was accepted by the Clients. The terms were:
  - (a) The practitioner would provide all funds necessary to settle the purchase of the Z property once settlement was possible;
  - (b) An offer of finance to the Trust from Westpac Bank, originally intended for the purchase of the Z property, was to be applied to the purchase of the other property;
  - (c) The Z property would be settled under the joint ownership of the Trust and the practitioner personally or an entity under his control. Ownership was to be in equal shares between the two parties;
  - (d) An earlier cash contribution of \$45,000 paid to the vendor by the Trust toward the purchase of the Z property would be made available to the Trust to be applied to the purchase of the other property; and
  - (e) Once the Z property was under the joint ownership of the Trust and the practitioner it would either be sold for a profit on the then rising market or held to earn rental income. The joint owners would share equally in any income and in any capital gain when it was sold.
8. The settlement of the purchase of the Z property occurred on or shortly before 31 July 2008, on which date it was transferred to the joint ownership of J D in her capacity as a trustee of the Trust and to the practitioner in his personal capacity.
9. At no time during the events described in Particulars 4 – 8 did the practitioner advise the Clients to take independent legal advice in circumstances where he was intending to become involved personally in the acquisition and ownership of the Z property.
10. The practitioner’s actions described in Particulars 4 – 9 were contrary to:
  - (a) Rule 1.03 RPC, because he acted and continued to act for the Clients in circumstances where there was a conflict of interest between his personal interests on one hand and the interests of the Clients on the other hand;
  - (b) Rule 1.04 RPC, because he acted for more than one party in the same transaction – himself and the Clients – without the informed consent of the Clients; and
  - (c) Rule 1.07 RPC, because there was a conflict or likely conflict between his interests and the interests of the Clients and:
    - (i) He failed to advise the Clients about the conflict or potential conflict;

- (ii) He failed to advise the Clients to take independent advice; and
- (iii) He continued acting in circumstances where so acting was or was likely to be to the disadvantage of the Clients.

**Charge Two: acting in transfers of Z property after 31 July 2008 for own benefit, contrary to Rules 5, 5.1, 5.2, 5.4, 5.4.2, 5.4.3, 5.4.4, 5.4.5, 6 and 6.1 of the *Conduct and Client Care Rules (CCCR)***

Misconduct pursuant to ss 7(1)(a)(i) and/or (ii) and 241(a) of the Act; or, in the alternative

Unsatisfactory conduct that was not so gross, willful, or reckless as to amount to misconduct, pursuant to ss 12(a)(b) and/or (c) and s.241(b) of the Act; or, in the further alternative

Negligence or incompetence of such a degree as to reflect on his fitness to practice or as to bring his profession into disrepute, pursuant to s.241(c) of the Act.

**Particulars**

1. Particulars 1 – 9 to Charge One are repeated for relevant background.
2. After the transfer of the Z property on 31 July 2008, the practitioner acted for the transferor and the transferee in each of the following transfers of that property:
  - (a) On 6 August 2008, from J D and the practitioner to the sole ownership of a company controlled by the practitioner, BGH Trusteeship Ltd;
  - (b) On 4 August 2011, from BGH Trusteeship Ltd to another company controlled by the practitioner, Nominees & Trustees Ltd; and
  - (c) On 12 December 2012, from Nominees & Trustees Ltd to the practitioner personally. He also acted in the registration of a mortgage to ASB Bank Ltd on that occasion.
3. The practitioner continued to be in a lawyer and client relationship with the Clients until the relationship between them broke down irretrievably, when the practitioner took steps to evict D K from the Z property in October 2014. Prior to that time:
  - (a) D K had paid rent, or a payment equivalent to rent, by regular deposits into the practitioner's trust account; and
  - (b) In an email to J D on 26 October 2010 the practitioner referred to his preference "*... for you guys to repay me and own the property, which was the objective of my stepping in to help you guys settle the purchase when you guys could not do so*" and "*Ever since these funds of mine have been tied up, I have been unable to help my other clients in financial difficulties*";
  - (c) D K understood that the "joint venture" arrangement offered by the practitioner and accepted by the Clients in April or May 2006, described at Particular 7 to Charge One, still applied.
4. In the circumstances of the three transfers described at Particular 2(a) – (c) to this charge, the practitioner did not:
  - (a) Advise the Clients about the reasons for the transfer on 6 August 2008 to BGH Trusteeship Ltd other than to tell D K that he should "trust him";

- (b) Advise the clients about or explain the nature of conflicting interests and duties that existed between him and the clients; or
  - (c) Advise the Clients to obtain independent legal advice.
5. In acting as the solicitor in the transfers listed in Particulars 2(a) – (c) to this charge, while also acting for the Clients, the practitioner breached Rules 5, 5.1, 5.2, 5.4, 5.4.2, 5.4.3, 5.4.4, 6 and 6.1 of the CCCR:
- (a) He lacked independence and was subject to compromising influences when he was acting for the Clients because of his personal interest in the acquisition and ownership of the Z property, contrary to Rule 5;
  - (b) The relationship between the practitioner and the Clients was one of confidence and trust which the practitioner abused, contrary to Rule 5.1;
  - (c) The practitioner’s professional judgment was not at all times exercised within the bounds of the law and of his professional obligations solely for the benefit of the Clients, contrary to Rule 5.2;
  - (d) The practitioner acted and continued to act for the Clients when there was a conflict or a risk of a conflict between his own interests and the interests of the Clients, contrary to Rule 5.4;
  - (e) He acted for the Clients in transactions in which he had an interest and in respect of which his interests and the interests of the Clients did not correspond in all respects, contrary to Rule 5.4.2;
  - (f) He acted for the Clients in circumstances where there was a possibility that the relationship of confidence and trust he had with the Clients would be compromised, contrary to Rule 5.4.3;
  - (g) He failed to advise the Clients of their right to receive independent legal advice, contrary to Rule 5.4.4;
  - (h) He acted for the Clients in circumstances where he did not protect and promote their interests to the exclusion of his own interests, contrary to Rule 6; and
  - (i) He acted for the Clients and for himself in circumstances where there was a more than negligible risk that he would be unable to discharge the obligations he owed to the Clients, contrary to Rule 6.1.

**Charge Three: procuring a personal advantage to the detriment of his clients contrary to s.4(d) of the Act**

Misconduct pursuant to ss 7(1)(a)(i) and/or (ii) of the Act; or, in the alternative

Unsatisfactory conduct that is not so gross, willful, or reckless as to amount to misconduct, pursuant to ss 12(a)(b) and/or (c) and s.241(b) of the Act; or, in the further alternative

Negligence or incompetence of such a degree as to reflect on his fitness to practice or as to bring his profession into disrepute, pursuant to s.241(c) of the Act.

**Particulars**

1. Particulars 1 – 9 to Charge One and Particulars 1 – 4 to Charge Two are repeated as relevant background
2. The practitioner became the owner personally of the Z property as a result of the consecutive transfers described in Particular 8 to Charge One and Particulars 2(a) – (c) to Charge Two.
3. In the circumstances since 1 August 2008, he procured the Z property from the Clients without their informed consent and in breach of his fundamental duty under s.4(d) of the Act to protect the interests of the Clients.

**Rules of Professional Conduct for Barristers and Solicitors (with commentary)  
Charge One; events occurring before 1 August 2008**

**1.03 Rule**

**A practitioner must not act or continue to act for any person where there is a conflict of interest between the practitioner on the one hand, and an existing or prospective client on the other hand.**

Commentary

- (1) The rule is based on the premise that a person who occupies a position of trust must not permit his or her personal interests to conflict with the interests of those whom it is that person's duty to protect.
- (2) The rule is intended to protect a client in situations where the interest or position of the practitioner would or could make the practitioner's professional judgement less responsive to the interests of the client.
- (3) The existence of a personal interest of a practitioner should be disclosed to the client or prospective client irrespective of a perceived lack of conflict. The practitioner should consider carefully whether a personal interest is directly or indirectly in conflict with the interests of the client, and refuse to act if there is any such direct or indirect conflict.
- (4) A practitioner may not enter any financial, business or property transaction with a client if there is a possibility of the fiduciary relationship between practitioner and client being open to abuse. This applies even if the practitioner does not propose to act for the client in the particular transaction.
- (5) It is impossible to detail all the situations, which arise where a practitioner should not act or where independent representation or advice must necessarily be obtained under this rule. One example would be where a practitioner borrows money from a client other than a client whose normal business is lending money. It is not then enough to offer independent advice to the client. The solicitor must sever the relationship of solicitor and client in that matter and ensure that the person concerned receives independent and competent advice. If the client refuses to take independent advice, the transaction should not proceed.
- (6) The rule will usually apply to any interest or dealing through the practitioner's family or relatives or any company, trust, partnership, or other body, in which the practitioner has or exerts a material measure of control or influence. It will also include interests, which are not personal in the strict sense but representative in character such as directorships and trusteeships.
- (7) In the context of this rule the word "client" must be given an extended meaning. It will, for example, ordinarily include any company, trust, or other body in which the client has a significant interest or exercises a material measure of control.
- (8) See also Solicitors Trust Account Regulations 1998, Reg.6. [Reproduced below]

Commentary

- (1) A conflict of interest does not exist between parties simply because the practitioner is acting for more than one of them.
- (2) A practitioner should exercise careful professional judgement to ensure that a conflict of interest does not exist and is not likely to arise.
- (3) It is difficult to guard against conflicts of interest through clients being represented by different practitioners in the same firm. There is danger that information may be imparted by one client to practitioner in the firm to which the firm should not have access, having regard to the interest of another client who is represented by a different practitioner in that firm. Firms should establish systems to prevent such events occurring.



- (4) A potential conflict of interest is a situation, which without care, could well lead a practitioner into a breach of fiduciary duty.

**NOTE:** As a corollary to this rule, there is likely to be a conflict in a practitioner acting for an authority, a tribunal, statutory body, parliamentary committee, or other related body, and also appearing for a party before any such body.

[Reg 6, Solicitors Trust Account Regulations 1998]

**6. Restriction on certain transactions involving money of solicitors' clients**

- (1) A solicitor acting in that capacity must not cause or permit money of any client of the solicitor or the solicitor's firm to be lent, or credit to be otherwise provided by a client, to any of the following persons:
- (a) The solicitor:
  - (b) Any parent, sibling, child, or spouse of the solicitor:
  - (c) Any body corporate, partnership, or trust if the principal financial benefit or the effective control is vested directly or indirectly in any of the persons referred to in paragraphs (a) and (b).
- (2) Despite subclause (1), a solicitor may cause or permit money of a client to be lent, or credit to be otherwise provided, to any of the persons referred to in paragraphs (a) to (c) of that subclause if—
- (a) The client obtains legal advice and representation in respect of that loan, or provision of credit, from an independent solicitor; or
  - (b) The client is a financial institution that normally instructs borrowers' solicitors to prepare loan or credit or security documentation in respect of loans made or credit provided by that client.
- (3) A solicitor acting in that capacity must not cause or permit any rent, interest, instalments, or debts due to a client of the solicitor or the solicitor's firm to be collected by any person, other than the solicitor's firm, referred to in paragraph (b) or paragraph (c) of subclause (1).
- (4) Nothing in this regulation prevents the operation of a solicitor's nominee company.

**1.04 Rule**

**A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of both or all parties.**

**Commentary**

- (1) A conflict of interest does not exist between parties simply because the practitioner is acting for more than one of them.
- (2) A practitioner should exercise careful professional judgement to ensure that a conflict of interest does not exist and is not likely to arise.
- (3) It is difficult to guard against conflicts of interest through clients being represented by different practitioners in the same firm. There is a danger that information may be imparted by one client to a practitioner in the firm to which the firm should not have access, having regard to the interest of another client who is represented by a different practitioner in that firm. Firms should establish systems to prevent such events occurring.
- (4) A potential conflict of interest is a situation, which without care, could well lead a practitioner into a breach of fiduciary duty.

**1.07 Rule**

1. **In the event of a conflict or likely conflict of interest among clients, a practitioner shall forthwith take the following steps:**
  - (i) **advise all clients involved of the areas of conflict or potential conflict;**
  - (ii) **advise the clients involved that they should take independent advice, and arrange such advice if required;**
  - (iii) **decline to act further for any party in the matter where so acting would or would be likely to disadvantage any of the clients involved.**
2. **Once a situation of the type described in paragraph 1.07(1)(iii) arises, it is not acceptable for practitioners in the same firm to continue to act for more than one client in a transaction, even though a notional barrier known as a Chinese Wall may be or may have been constructed. Such a device does not overcome a conflict situation.**

## Commentary

- (1) Practitioners are referred for further guidance to *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 (CA) and *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC).
- (2) In taking the steps under paragraph 1(i) of this rule practitioners should note the duties under Rule 1.08 and under the Privacy Act 1993.
- (3) Practitioners are referred to *Re A*; High Court Auckland, AP59 – SW01; 19.12.01; Fisher, Williams, Harrison JJ, in which the full court held (at paragraph 43) that a conflict of interest arises in any situation where the interests of the two clients become opposed, and that the risk of disclosure is an immaterial factor.

## **Conduct and Client Care Rules**

### **Charge Two**

#### **Chapter 5**

#### **Independence**

- 5 A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.

**Independent judgement and advice**

- 5.1 The relationship between lawyer and client is one of confidence and trust that must never be abused.
- 5.2 The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.
- 5.3 A lawyer must at all times exercise independent professional judgement on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.

**Conflicting interests**

- 5.4 A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.
  - 5.4.1 Where a lawyer has an interest that touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists.
  - 5.4.2 A lawyer must not act for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects.

- 5.4.3 A lawyer must not enter into any financial, business, or property transaction or relationship with a client if there is a possibility of the relationship of confidence and trust between lawyer and client being compromised.
- 5.4.4 A lawyer who enters into any financial, business, or property transaction or relationship with a client must advise the client of the right to receive independent advice in respect of the matter and explain to the client that should a conflict of interest arise the lawyer must cease to act for the client on the matter and, without the client's informed consent, on any other matters. This rule 5.4.4 does not apply where—
- (a) the client and the lawyer have a close personal relationship; or
  - (b) the transaction is a contract for the supply by the client of goods or services in the normal course of the client's business; or
  - (c) a lawyer subscribes for or otherwise acquires shares in a listed company for which the lawyer's practice acts.
- 5.4.5 In this rule, a lawyer is deemed to be a party to a transaction if the transaction is between entities that are related to the lawyer by control (including a trusteeship, directorship, or the holding of a power of attorney) or ownership (including a shareholding), or between parties with whom the lawyer or client has a close personal relationship.

## **Chapter 6**

### **Client interests**

- 6 In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

#### **Conflicting duties**

- 6.1 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.