LCRO 205/2011

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Manawatu Standards Committee
BETWEEN	**MR GJ** of [North Island] Applicant
AND	**MR TW** Of [North Island] Respondent

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

DECISION

[1] This is a matter that involves two lawyers. Following a complaint made by Mr TW (the Respondent) the Standards Committee made findings of unsatisfactory conduct against Mr GJ (the Applicant), having determined that he had breached rules 10.1, 10.2 and 12 of the Rules of Conduct and Client Care.

[2] Pursuant to Section 156 of the Lawyers and Conveyancers Act 2006 the Committee ordered that the Applicant be censured, that he was to provide a written apology to the Respondent (to be approved by the Committee), and to pay a fine of $8,000.00 to the New Zealand Law Society. He was also ordered to pay costs of $1,000.00.

[3] The Applicant exercised his right to have that decision reviewed, both as to the substantive decision and the monetary orders. Her particularly objected to the $8,000 fine.

[4] The background was that the Applicant had written directly to the Respondent's client, B. The letter opened with, "*We are writing to you directly as we have no confidence in your lawyer passing on correspondence to you*." In the following paragraphs the Applicant accused B of harassment, duress, slavery and illegally introducing new terms into an agreement. The letter was written in the context of the Applicant representing his client, C who had consulted the Applicant at the Community Law Centre. She held many grievances against B who was her former de facto partner.

[5] In defending his action the Applicant had informed the Standards Committee that he was unaware that B was represented by the Respondent in his personal capacity, and that in any event the urgency of the matter justified him having directly written to B. He also felt that the circumstances of his client's grievance justified the allegations against B as raised in the letter.

[6] A review hearing was held on 17 November 2011, attended by the Applicant, and also by the Respondent and a support person who was another solicitor from his law firm.

[7] I indicated from the outset, that I would deal with the review application in two separate parts; the first dealing with the substantive decision of the Standards Committee, and the second dealing with the Standards Committee's orders.

[8] At the hearing the Applicant reiterated the view that he was unaware B was represented by the Respondent in his personal capacity, his client, C, having informed the Applicant that her previous lawyer had not heard back from the Respondent. At the time he wrote to B the Applicant had not received C's file from her former lawyer, and claimed to be acting on the instructions of his client. I put it to the Applicant that it was no answer to an alleged breach of a professional rule that the client had instructed the action.

[9] The fact the Applicant's letter made reference to B's lawyer suggested that he was aware that B was in fact represented, and this alone would give rise to the prohibition imposed by Rule 10.1, and notwithstanding that he may not have been certain that it was the Respondent who was acting for B, that he could have made enquiry (of the Respondent) who he knew represented B or his company. The circumstances were strongly indicative that B was represented by a lawyer, and I put it to the Applicant that this raised an obligation on him to have made some enquiry if he was in doubt.

[10] The Applicant argued that there was in any event urgency in this case which justified the direct contact with B, and that his communication fell within the exceptions of Rule 10.2.1 which creates an exception to the prohibition where the matter is urgent and it is not possible to contact the person's lawyer or an appropriate member of that lawyers practice. He stated that the matters of which the client had complained were, in his view, very serious and were causing her considerable distress.

[11] On questioning the Applicant it became clear that the matters concerning his client had been continuing for more than two months, that she was not in any immediate danger or risk, and had refused the options proposed by the Applicant of contacting the police or seeking a restraining order. I could find no proper basis to support the argument for "urgency" such the exemption applied in this case as there was nothing so urgent that could not have waited for a few days, sufficient for the Applicant to have made enquiry from the Respondent as to whether or not he was representing B in his personal capacity.

[12] Having concluded that the circumstances did not give rise to the application of the exemption, I nevertheless noted that in any event the Rule 10.2.1 requires a lawyer to act fairly towards the other lawyers client at all times and to promptly notify the other lawyer of the details of the communication. In the light of the Applicant's explanation I also considered the tone and content of his letter. He said that C had consulted him in matters involving abuse and he was of the view that his letter appropriately reflected B's conduct towards his client. The matter of B's conduct may well have been the reason why C consulted the Applicant, but do not justify the tone and allegations contained in the letter.

[13] In reflecting on the conduct it seemed to me that the Applicant had taken on, in an exceedingly personal way, the emotional burdens and grievances of his client, and had aligned himself with her cause to a degree that had caused him to lose perspective on the matter, as well as his professional role. In failing to discern the distinctions between his professional role and obligations the Applicant appeared to have lost sight of his collegial obligations (to the Respondent), his professional obligations (to his client), as well as his obligations towards third parties under the Rules. This was evident not only from the nature of the letter written by the Applicant to B, but also in defending his actions, and restating these views at the review hearing.

[14] I put these observations to the Applicant in the context of the professional obligations of a lawyer in both collegial and advocacy roles and invited his response. In the course of the discussion that followed the Applicant realised that he had indeed

confused matters and lost sight of his professional role and obligations. He acknowledged that he had indeed lost perspective and aligned himself with his client's cause, admitting that his outrage at the conduct described to him by his client had led to the letter he had written. Overall the discussion led to his better understanding about the reasons why he found himself being required to answer a complaint in the disciplinary forum. The review hearing provided an opportunity to address the nature of professional responsibilities and I am satisfied that the discussion provided a helpful insight into these matters.

[15] However, lawyers are expected to be familiar with their professional obligations and although further information that arose in the course of the review hearing opened up some insights in the background, the outcome was that I informed the Applicant that I could find no proper basis for taking a different view to that taken by the Standards Committee concerning his breaches of the Rules of Conduct and Client Care.

Monetary Orders

[16] The second part of the Applicant's review application relates to the orders made by the Standards Committee. Section 156 of the Lawyers and Conveyancers Act sets out the various orders that a Standards Committee may make following a finding of unsatisfactory conduct. The Applicant particularly objected to the monetary orders. He considered the $8,000 fine to be excessive and that the costs order of $1,000.00 was also excessive and imposed severe hardship on him.

Fine

[17] By Section 156 (1)(i) a lawyer may be ordered to pay a fine to the New Zealand Law Society, not exceeding the sum of $15,000.00. The Applicant considered the $8,000.00 fine wholly disproportionate to any wrong doing. He said that his financial circumstances made the payment of such a fine prohibitive. He explained that he is in receipt of a sickness benefit which relates to major injuries he suffered in October 2008 when he was severely beaten and robbed and *'left for dead*'. He said that he completed his treatment only in August of this year.

[18] In the present case the fine imposed by the Standards Committee was over half of the maximum penalty available for any professional failing. In my view this penalty was excessive. I have not overlooked that the matter of penalty is within the discretion of a Standards Committee, but the review process extends to reviewing the exercise of a discretionary power.

[19] The large fine may have reflected the Standards Committee's perception that the Applicant's attitude was "off-hand and unprofessional", comments which are well supported, but notwithstanding these observations the fine as imposed is significantly out of step with fines imposed for similar or equivalent professional failings which I observe are generally in the region of $1,200 and $1,500.

[20] On review, account may be taken of matters arising in the course of the review which may well have impacted on a fine decided by a fully informed Standards Committee. A penalty may properly take into account all circumstances that appear to be relevant, and reflect the degree of acknowledgement by the wrongdoer of the error and his or her acceptance that the conduct fell below the acceptable standards, and any remedial steps that the wrongdoer is willing to take.

[21] The information provided by the Applicant (at the hearing) about his background and general circumstances, while intended to support a plea for some leniency, left a clear impression that the trauma he has suffered has had a broad and profound impact on him which may, on this occasion, have impacted on the way he had handled the case for his client. The further enquiry afforded by the review process in this case brought to light matters that were pertinent to the Applicant's conduct but which the procedures of Standards Committees are not designed to uncover.

[22] Justice requires that account be taken of all matters that are relevant to the imposition of a fine. I have considered the wider circumstances from which the conduct arose, the insights gained by the Applicant in the course of the review process, and that his comprehension of complaint issues led to his making an unreserved apology to the Respondent at the hearing.

[23] The Committee had ordered that the Applicant provide a written apology to the Respondent. I also discussed with him the matter of his conduct towards B. The Applicant agreed that it was appropriate that he should also apologise to B and he confirmed his willingness to prepare a written apology to B.

[24] Neither the Standards Committee nor this office could have compelled the Applicant to make a written apology to B. The fact that he was willing to do so, and has since done this, reflects both his better comprehension of his professional obligations, his actions, and his regret, as well as his willingness to remedy the wrongoing.

[25] The overall outcome of the review was that the Applicant agreed that he would furnish written apologies to both the Respondent and to B, that the apologies would be made in generous terms and reflect his acknowledgement of the wrongdoing, and that

the content of those letters required my advance approval. He agreed that this was an appropriate action for him to take, and he has since forwarded to me both of the letters of apology which I confirmed as appropriate to send to the Respondent. I received confirmation that this was done.

[26] In reviewing the fine in the light of the above, and taking all matters into account I consider it appropriate that the fine should be in the sum of $500. I am aware that this is a significant reduction of the Committee's fine, but much less so when considered in the light of what I have indicated as an appropriate range for a fine.

[27] The circumstances surrounding this matter are unusual but do not signal a departure from principles that are generally relevant to the imposition of a fine. I observe that it would be unusual to take into account in a general way, additional matters arising in the course of a review that could have been put before the Standards Committee. However, there is nothing in the Committee file that could have indicated to the Applicant that the Committee was considering imposing such a hefty fine and it is not surprising that no submissions were provided by the Applicant that may have been relevant. It is likely in my view that a fully informed Standards Committee would have taken into account factors to which I have referred in this decision in setting an appropriate penalty.

[28] I also record that the Respondent was satisfied that the apologies would make good on the matters that he had brought to the Standards Committee's attention.

Costs

[29] The Applicant also sought review of the costs order. Costs orders may take into account a lawyer's ability to pay; (*Kaye v District Law Society* [1998]1 NZLR, 151, 152. I have considered the Applicants financial circumstances in this case. I understand that he works at the Citizens Advice Bureau part time. He said that the monetary orders represent nearly half of his annual income. I accept that the Applicant's financial; means are limited and that any significant fine would cause an unreasonable hardship.

[30] The Standards Committee ordered the Applicant to pay costs of $1,000.00. The Applicant had no opportunity to inform the Standards Committee of his financial circumstances and in my view it would have been appropriate to have taken these factors into account in setting a costs order. Accordingly, in the light of the Applicant's financial circumstances the costs will be reduced to $250.00.

[31] I have also considered whether a costs order would appropriate for the review. The LCRO guidelines provide that an unsuccessful Applicant could expect to be ordered to pay costs in the sum of $1,200.00 where the review involves a hearing with the parties. In this case the review application was fully justified in relation to the fine imposed by the Standards Committee. While the review application also extended to the substantive finding, that ground was readily surrendered with the Applicant's acceptance that his actions were wrong. In all of the circumstances I consider that the Applicant should make a contribution of $50 to the costs of the review.

Decision

Pursuant to section 211(1)(a) the Standards Committee decision is confirmed in all respects except as to the monetary orders.

Orders

Pursuant to section 156 of the Lawyers and Conveyancers Act the Practitioner is ordered to:

(a) pay a fine of $500.00 to the New Zealand Law Society.

(b) pay costs of $250.00 to the New Zealand Law Society.

Pursuant to section 210(3) of the Lawyers and Conveyancers Act the Applicant is also ordered to pay $50.00 to the New Zealand Law Society as a contribution to the costs of the LCRO office for the review.

DATED this 14th day of December 2011

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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:

GJ as the Applicant
TW as the Respondent
The Manawatu Standards Committee