LCRO 212/09

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 1
BETWEEN	**MR KETTERING** of Auckland Applicant
And	**MR BIGGLESWADE** of Auckland Respondent

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

DECISION

[1] The Applicant is a barrister whose professional retainer involving two clients led the Standards Committee to conclude that the Applicant had acted in a conflict of interest in breach of Rule 6.1 of the Conduct and Client Care Rules and that there had been conduct unbecoming on the part of the Applicant.

[2] The background is that the Applicant acted for C after she was charged with assault following a complaint to the police by her partner D. In defending C the Applicant had to cross-examine D who was a police witness. The Applicant was successful in getting C off the charge.

[3] The Applicant had also acted for D in the past on unrelated charges and was scheduled to represent D on other charges involving theft and breach of bail conditions. The breach of bail charge related to an assumption by the police (an erroneous assumption as it turned out) that D was prohibited from associating with C.

[4] The Standards Committee identified the various risks that they perceived could arise when a lawyer appeared as counsel for one party on an assault charge, in which he cross examined another party for whom he also acted in relation to criminal charges. In addition to identifying a conflict of interest, the Committee perceived a risk that the lawyer may have used confidential information and/or privileged information that he had obtained as a lawyer for D, adding that the lawyer had potentially jeopardised the position of D in the proceedings that were to follow involving D.

[5] The Applicant had asked to be personally heard by the Committee in relation to the complaint, a request that the Committee had declined on the basis that it found no compelling reason why it should depart from its usual procedure of a hearing on the papers. The Applicant considered that this comprised his opportunity to have provided a clearer explanation of the circumstances to the Committee, and he considered this to be a breach of natural justice.

[6] Section 141 of the Lawyers and Conveyancers Act 2006 provides that a Standards Committee "may require" a person complained against to appear before it to make an explanation. This is a discretionary power and there is clearly no right of audience for a practitioner who is the subject of a complaint. Where a Standards Committee decides to enquire into a complaint section 153 provides for a hearing to be on the papers unless a Standards Committee otherwise directs, and further provides that a person may make written, but not oral, submissions.

[7] The Applicant has not suggested that he was unaware of the complaint or that he did not have an opportunity to respond. The Standards Committee file shows that the Applicant had been given all of the information that was considered by the Committee, given a full opportunity to answer the complaint and that his responses were received and considered by the Committee. Having reviewed all of the information it is my view that the exercise by the Committee of its discretion was not unreasonable in the circumstances. I cannot agree that the omission to which the Applicant refers amounts to a breach of natural justice. Moreover, any omissions in his response are cured by this review.

Substantive complaint

[8] The Applicant submitted that the Committee's decision, which largely rested on the conclusion that a conflict of interest existed, was erroneous. In his view there was no conflict of interest because his previous representation of D related to entirely different and unrelated proceedings. Likewise, his future representation of D involved

entirely unrelated charges which had no bearing on the assault charge faced by C. The Applicant clarified what he considered to have been a misunderstanding on the part of the Committee when it referred to charges faced by D "*arising from the same incident"*. The Applicant assumed that the Committee had in mind the breach of bail charge. He explained that this charge had been erroneous insofar as D's bail conditions did not in fact include a non-association provision prohibiting his contact with C. The Applicant therefore considered that the 'live' charges confronted by D had no relationship with the charges faced by C on this occasion, and that there were no risks to D in his being cross-examined on a matter with which he had no involvement. The Applicant emphasised that the issues for which he represented C and D were unrelated to one another, and that they were not joint offenders, or co-defenders or co-accused.

[9] The Applicant said that both C and D knew of his professional involvement with the other and that he had, furthermore, proposed to both of his clients that they obtain independent legal advice, and that both had declined and insisted that the Applicant act for them. He submitted that Rule 6.1 applied to prevent a practitioner acting for two (or more) parties in relation to the same matter, subject to the exceptions contained in that rule. One such exception was 6.1.1 which provides for a lawyer acting in potential conflict situations where the consent of the clients is obtained. The Applicant cited *Mouat v Clarke-Boyce* (1993)3 NZLR 641 in support of his submissions that the informed consent of clients can overcome an objection concerning the possibility of a conflict. In the Applicant's view there was no conflict, and if there was any conflict it was a potential and not an actual conflict, and one that the clients had waived. He added that in the event D had not in fact been compromised in any way by the Applicant's cross-examination of him. He also observed that neither of his clients was the complainant.

[10] The essence of the 'no conflict' rule is that one lawyer cannot represent the interests of two (or more) parties in the same matter where the interests of the parties are opposed. This recognises that one lawyer cannot at the same time serve the interests of two (or parties) whose interests conflict. This obligation is captured in Rule 6.1 of the Lawyers; Conducts and Client Care Rules which states:

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

[11] The Applicant relies on the fact that the retainers for each of the clients did not involve the same matter, and if there was any possibility of a risk then they had consented. He referred to Rule 6.1.1 which addresses the obligation of a lawyer acting

for two (or more) clients in relation to the same transaction. The Applicant did not attach any significance to the distinction between the references to "a matter" in Rule 6.1 and "the same transaction" in Rule 6.1.1.

[12] The Standards Committee considered that a lawyer's obligation to protect and promote the interests of his or her client *'could not be compartmentalised according to the narrow confines of an instruction*'. The Committee described the obligation as 'absolute' and not one that could be contracted out of by the parties. The Committee considered that rigorous cross-examination might be required to serve the interests of C but would not necessarily serve the interests of D if any disclosures he made to the lawyer in confidence were to be used against him. The Committee added that the lawyer might make unwitting use of a client's weakness discovered during the solicitor-client relationship.

[13] The Committee also referred to section 4(d) of the Lawyers and Conveyancers Act 2006 which sets out the fundamental obligations of lawyers to their clients as being (subject to overriding obligations to the court or under any enactment) a duty to protect the interests of a client.

[14] The Respondent (the original complainant) explained that his 'conflict of interest' concern, which had led to his bringing the matter to the attention of the New Zealand Law Society, was the risk to a witness who was himself facing criminal charges, if, through the cross-examination process, he made admissions to conduct that could lead to further charges being laid against him. He considered this to be a real risk where the witness was being cross-examined by his own lawyer.

[15] In reply the Applicant submitted that his relationship with D was not fiduciary in nature, and that his professional responsibility towards the client was confined to the specific retainers, namely to defend them in relation to the charges they confronted. In that light he considered that he did not have a responsibility to protect D from making admissions in relation to matters outside of the retainer. It is of some concern that the Applicant did not perceive that the client-lawyer relationship, however narrow the retainer, contain some fiduciary elements.

[16] The Committee had understood that the Applicant was to represent D on different charges *"arising from the same incident that gave rise to the assault charges"* against C, which may explain its reference to Rule 6.1. I accept the Applicant's explanation that his representation of the clients involved unrelated and different (albeit criminal) proceedings such that they could not be said to be the same matter. The question then is whether the Committee was wrong in its ultimate conclusion.

[17] I considered the conduct in the light of the substantive concerns of the Committee about the appropriateness of a lawyer cross-examining his own client in an adversarial context. The Committee considered that the "*potential pitfalls were obvious*" and to do so bordered on "*professional recklessness".* The Committee went on to explain what it saw as the risks:

> *"The interests of justice could not be served where a witness client might have concerns that disclosures in confidence to the lawyer might be used against him or her should unfavourable evidence be persisted with against the Lawyer's accused client or where a lawyer might unwittingly make use of a client's weakness discovered during the course of their client-lawyer relationship. A Lawyer's obligation pursuant to section 4(d) of the Lawyers and Conveyancers Act 2006 and Rule 6 of the Conduct and Client Care Rules to protect and promote the interests of his or her client to the exclusion of others could not be compartmentalised according to the narrow confines of an instruction. The obligation to do so in a litigation context was absolute and could not be contracted out by the consent of both parties."*

[18] As a matter of litigation practice in the criminal courts I accept that the Committee correctly identified the concerns that can arise in the context of criminal litigation and in relation to evidence of parties under cross-examination. Some of these have been mentioned by the Standards Committee. Other examples may include the risk that the practitioner may exploit information or knowledge he has learned or discovered about the witness during his prior representation, or alternatively may be constrained in his cross-examination of the witness to the detriment of the client he is defending.

[19] In my view the Committee was right to have concluded that the interests of C were potentially in conflict with the interests of D. Rule 6 requires a lawyer to protect and promote the interests of the client to the exclusion of the interests of third parties. The application of the rule is wider than only where parties are involved in the same transaction. Moreover, there is no reason to suppose that the reference to "on a matter" (in Rule 6.1) is intended to have the same meaning as "in respect of the same transaction" (in Rule 6.1.1). In this light the circumstances arising in *Mouat* may readily be seen in terms of Rule 6.1.1 whereas the situation now under review is not a 'same transaction' situation but rather, prohibits a lawyer from acting *"on a matter in any circumstances where there is more than a negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients."* For all of the above reasons I am of the view that the Committee was correct in its conclusion in this case.

Penalty

[20] The Committee went on to conclude that the conduct was also unacceptable measured against the standards of *"competent ethical and responsible practitioners"* (B v Medical Council [2005]3 NZLR 810, 811), constituted conduct unbecoming, and accordingly the Committee determined there had been unsatisfactory conduct on the part of the Applicant. The Committee considered that the circumstances justified a penalty of $2,000. No submissions had been sought from the Applicant concerning the matter of penalty.

[21] The Applicant sought a review of the penalty which in his view was significantly disproportionate to the fee he had earned. He felt that the penalty was unreasonably harsh because there was no precedent for the situation he confronted, and he submitted that none of the legal authorities on conflict of interest applied to criminal representation in these particular circumstances. He recalled a time when lawyers who took on legal aid work were expected to represent clients in the same proceedings. He explained that there were no guidelines from the New Zealand Law Society or other legal bodies that addressed this kind of situation. In his view the penalty of $2,000 was unfairly severe.

[22] The penalty in this case reflected the Committee's view of the seriousness of the Applicant's conduct. The function of a penalty in a professional context was recognised in Wislang v Medical Council of New Zealand [2002] NZAR 573 as being:

- to punish the practitioner;
- as a deterrent to other practitioners; and
- to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[23] In allowing for a possible fine of $15,000 the legislature has indicated that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked. This is a significant change from the position under the Law Practitioners Act 1982 where the District Disciplinary Tribunals could only impose a much more modest fine of up to $2000 (s 106(4)(a)).

[24] The circumstances indicate that the Applicant's conduct was attributable to an error in judgement when, confronted with circumstances new to him, he took such steps as appeared to him to properly safeguard his clients. It is difficult to imagine that these circumstances have not arisen before although I accept that he had not previously confronted this kind of situation. However, I take into account that the

Practitioner took the action that he considered appropriate and required in suggesting that the clients obtain separate legal advice. I also take into account that the Committee's approbation of the conduct rested to some extent on an assumption that the retainers arose from the same incident. I accept the Applicant's explanation that they did not.

[25] A large fine should not be imposed for conduct which was due to a genuine failure to appreciate the proper legal position. However lawyers ought to have a sound understanding of their professional responsibilities towards clients. There has been a breach and it should not pass unpunished. It is also important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional obligations. Taking into account all of the circumstances to which I have referred, I have decided that there is a basis for reducing the penalty to $1,200.

[26] No review was sought in relation to the order for publication of the Committee's determination which I note was to have all identifying details removed.

Costs

[27] Paragraph 3 of the Costs Guidelines of this office states:

> Where a finding of unsatisfactory conduct is made or upheld against a practitioner costs orders will usually be made against the practitioner in favour of the Society. These orders will usually relate both to the costs of the inquiry before the Standards Committee and the costs of the conduct of the review in accordance with s 210(3).

[28] In this case the Standards Committee imposed a costs order of $1,000 against the Practitioner. This is within the acceptable range and there is no basis for changing this unless the decision had been reversed.

[29] I take into account that the Practitioner has been partially successful in this review and this should be reflected in a costs order. In all of the circumstances I consider an order of $300 to be an appropriate contribution to the costs of this review which has been straightforward.

Decision

Pursuant to section 211(1) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed. The penalty order is amended to the sum of $1,200.

Costs Order

The following order is made:

The Practitioner is to pay $300.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 19th day of March 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:

Mr Kettering as the Applicant
Mr Biggleswade as the Respondent
The Auckland Standards Committee 1
The New Zealand Law Society