LCRO 214/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Standards Committee]
BETWEEN	**BD** Applicant
AND	**CE on behalf of GI & HJ** Respondent

DECISION

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

Introduction

[1] BD has sought a review of the Standards Committee decision ordering publication of his name, following findings that he had been guilty of unsatisfactory conduct.

Background

[2] On 26 September 2011 a police prosecutor made a complaint to the New Zealand Law Society Complaints Service that BD, while acting as counsel for a defendant in a defended criminal hearing, failed to carry out his duties to his client, and to the Court, in a professional manner.

[3] Shortly thereafter, a further complaint was lodged by the police prosecutor. The substance of this complaint, similar to the first, was an allegation that BD had failed, when acting as defence counsel, to manage a criminal hearing in a competent manner.

[4] In decisions delivered on 23 April 2012 and 3 May 2012, the Standards Committee determined that BD had failed to meet the standard of competency and diligence expected of a reasonably competent lawyer. Findings of unsatisfactory conduct followed.

[5] BD was censured, fined and ordered to pay costs to the New Zealand Law Society.

[6] Following the release of the decisions, the Standards Committee invited the parties to make submissions on the issue of publication. Neither party elected to make submissions on the publication issue.

[7] The Committee issued its publication decision on 26 July 2012. The Committee directed, pursuant to s 142(2) of the Lawyers and Conveyancers Act 2006 (the Act) that both of its determinations be published, and that BD be identified as the practitioner who was subject of the complaints.

[8] It is clear from the Committee's decision that the significant factor in its decision to support publication was the perceived protection that publication would provide to the public and the consumers of legal services:[1]

> The Committee had cognisance of the fact that the practitioner had not previously been found to have breached professional standards and of the likely adverse impact that would result in publication of the practitioner's name, given that he practises on his own account without partners in a small suburban practice, mostly involved in criminal work. However, it concluded that these factors did not outweigh communicating to the public the fact that the practitioner's conduct has been found wanting so that they could make an informed choice as to who was to represent them in criminal proceedings.

Application for review

[9] BD accepts the Committee's substantive decisions in respect to both complaints, but applies to review the Committee's decision to order publication of his name.

[10] He submits that:

- At the time of the hearings from which the complaint regarding his performance arose, he was suffering from the affects of severe concussion.
- Medical problems had significantly impeded his ability to competently manage the court hearings.
- His failings were the direct result of accidental trauma rather than incompetence.
- He has not been the subject of any previous complaints to the Law Society.
- The presumption in favour of publication is outweighed by the nature of BD's circumstances, particularly his health problems.

[1] Standards Committee decision dated 26 July 2012 at [2].

- BD's case falls within an extraordinary category, which merits a suppression order being made.
- The impact of publication would have a disproportionately harmful consequence.

[11] The complainants did not seek to be heard on the review.

Role of the LCRO on Review

[12] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Standards Committee, without good reason.[2]

Publication

[13] Publication of an adverse disciplinary finding will inevitably have significant consequences for a practitioner.

[14] A Committee may direct publication of a practitioner's name, with the prior approval of the executive board of the New Zealand Law Society:[3]

> Under reg 30 the identity of a censured person may not be published unless the prior approval of the NZLS board has been obtained and the public interest and the impact of publication on the privacy interests of the complainant, other parties and the censured person had been taken into account. These requirements, designed to constrain the name publication decision-making process, reflect not only the private consideration of the complaint by the Standards Committee but also the significance of name publication for the censured person. For a lawyer, name publication will inevitably be considered a significant, if not the significant, element of the penalty imposed by a Standards Committee, especially when it is recognised that the lawyer will be able to continue in practice after the decision is made.

[15] The LCRO Publication Guidelines record that there is no particular presumption for or against publication of identifying details where a practitioner is found to have breached professional standards. In determining whether it is in the public interest to publish a decision with identifying details of the practitioner, the LCRO will take into account:

(a) the extent to which publication would provide protection to the public including consumers of legal and conveyancing services;

(b) the extent to which publication will enhance public confidence in the provision of legal and conveyancing services;

(c) the impact of publication on the interests and privacy of-

i) the complainant;

ii) the practitioner;

iii) any other person.

(d) the seriousness of any professional breaches; and

(e) whether the practitioner has previously been found to have breached professional standards.

[16] The factors to be considered in relation to a decision to publish have been the subject of a number of decisions and a useful summary of the relevant principles may be found in *Krishnayya v Director of Proceedings.*[4] That case extracted from previous cases (including *S v Wellington District Law Society,*[5] and *F v Medical Practitioners Disciplinary Tribunal*)[6] the principles to be considered where an application for name suppression is made in a disciplinary tribunal, which is most often underpinned by statutory provisions for open justice.

[17] These principles were stated to be as follows:[7]

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

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

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

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[2] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].
[3] *New Zealand Law Society v B* [2013] NZCA 156 [2013] NZAR 970 at [54].
[4] *Krishnayya v Director of Proceedings* HC Napier, CIV-2007-441-631, 16 October 2007.
[5] *S v Wellington District Law Society* [2001] NZAR 465 (HC).
[6] *F v Medical Practitioners Disciplinary Tribunal* HC Auckland AP21-SW01, 5 December 2001.
[7] Above n 6 at [90].

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

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

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

[18] Hearings in the Lawyers and Conveyancers Disciplinary Tribunal are held in public. There is a presumption of openness in the proceedings of disciplinary tribunals which are generally open to the public.

[19] Proceedings of Standards Committees, and of this Office, are conducted in private, and there is no automatic publication of a practitioner's name, unless the Committee (or this Office) specifically directs that to be the case.

[20] Where there is a presumption in favour of publication, this may be outweighed by other factors favouring the privacy of the individual. Conversely, where there is a presumption of privacy, it is necessary to consider any factors which favour a decision to publish, rather than a decision to protect the identity of the practitioner.[8]

[21] It is a balancing exercise. Whilst the Guidelines and the cases provide useful assistance, each case must be considered on its particular facts.

Analysis

[22] Whilst BD raises a number of arguments in support of his case for suppression, the most important of these by some distance, is his contention that his professional failings on two occasions were precipitated in large part by an undiagnosed medical condition which significantly compromised his ability to provide competent representation to his clients.

[8] *HF v SZ* LCRO 186/2009 16 January 2012 at [19].

[23] It is argued for BD that the "behaviour that gave rise to the two complaints arose because of circumstances entirely outside his control, and that this outweighs the public right to know".[9]

[24] That argument is, in my view, a challenging one. It demands, if accepted, acquiescence to the propositions that:

(a) A lawyer, conducting defended hearings in the criminal court over a period of time can remain oblivious to the fact that his professional performance is so substandard as to attract criticism both from the bench and from police prosecutors.

(b) A lawyer may remain oblivious to a medical condition that is significantly impeding his capacity to competently fulfil his professional duties.

[25] I accept however, that the nature of a particular illness may on occasions remain concealed.

[26] The role of a defence lawyer is a challenging one. A retentive memory, ability to follow and counter argument, easy recourse to the relevant law which underpins the case, capacity to identify weaknesses in the prosecution argument and to establish grounds for a sustainable defence, are the everyday tools of the defence lawyer. Faced with significant and immediate deterioration in the ability to marshal those skills, it could be expected that a lawyer would be promptly alerted that something was seriously amiss.

[27] This is not a case where BD submits that he had suffered a medical event which contributed to a gradual diminution of mental capacity over a period of time and which had gone unnoticed, rather he submits that he has been the victim of a single trauma, which has resulted immediately in a significant degree of incapacitation.

[28] It is necessary to briefly examine the events subsequent to the accident, and in particular the medical evidence advanced by BD.

[29] On 29 August 2011 BD, whilst appearing in court, fell and struck his head on a bench. The accident was a serious one and persons present at the Court at the time expressed concerns for his welfare. After concluding his commitments to the Court, BD sought medical attention at an accident and emergency care centre.

[30] Soon after he visited his doctor and was advised to take time off work. He attended follow up consultations.

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[9] Von Dadelszen Submissions (26 November 2012) at [2.11].

[31] The conduct which formed the basis of the two complaints arose from court hearings which took place on 6 and 19 September 2011.

[32] BD was continuing to receive medical treatment from his doctor in February 2012, and attended a specialist neurologist in July 2012. In his report dated 31 July 2012, the neurologist noted that "the symptoms he (BD) had particularly in the first month are consistent with the effects of a head injury and there is no evidence clinically or on his scan for any other cause for these symptoms".[10]

[33] BD's counsel instructed Dr KM, a specialist psychiatrist, to complete a further assessment in November 2012. Dr KM's brief was to provide expert evidence on possible psychological consequences resulting from the injury BD suffered in August 2011.[11]

[34] DR KM concluded that it was her professional opinion that BD's failure to maintain appropriate standards of practice in the Courts in September 2011 could be directly attributable to the injury he suffered on 29 August 2011. She considered that BD's post injury symptoms were "clinically recognisable and fully documented in medical literature as sequelae to traumatic brain injury".[12]

[35] The complaints upheld by the Committee in relation to BD's management of the two criminal hearings were that:

(a) He failed to challenge a complainant's evidence.

(b) He elicited information in the course of cross examination that was detrimental to his client.

(c) He failed to advise a witness to obtain independent counsel.

[36] Of the three breaches, all of which are significant, I consider BD's failure to ensure that a proposed witness obtain independent advice to be the most serious. The affidavit prepared by BD had potential to expose the deponent to the risk of serious criminal charge.

[37] BD prepared an affidavit from the witness, and forwarded that affidavit to the Police together with a memorandum, on 20 July 2011. Those documents were prepared some weeks prior to the accident.

[38] In my view, that does undermine to a degree, BD's argument that his failure to appreciate the consequences of allowing a witness supportive to his client's case to

[10] Dr RV Medical Report (31 July 2012).
[11] Dr KM Medical Report (21 November 2012).

provide evidence to the Court was attributable either wholly or in part to his medical condition. I accept that BD's capacity to manage the consequences of his initial error, may have been impeded by the time the matter arrived at Court.

[39] I place little reliance on Dr KM's report. Her report is completed some time after the event, and understandably relies in large part on BD's self-reporting. I am not wholly persuaded by her conclusion that BD's failure to maintain appropriate standards of practice can be directly attributable to the injury suffered.

[40] But I do not entirely discard BD's argument that medical issues affected his performance. I am persuaded that the incident was serious, and the medical reports immediately obtained, and secured over successive months, confirm that BD was suffering symptoms which would have materially affected his capacity to work, and likely have adversely affected his judgement.

[41] The hearings took place in reasonably proximate time to the injury and clearly at the time that BD was experiencing health problems and under medical care.

[42] The medical evidence provided by BD at review, which the Committee did not have access to, gives indication that the accident suffered by BD could have led to a degree of impairment in his cognitive function, and had related effects which would likely have impacted on his ability to work productively.

[43] In reaching that view I place particular reliance on BD's doctor's reports.

[44] *In Auckland Standards Committee No. 5 v Ian Mellett*, the Disciplinary Tribunal considered the weight to given to argument that a practitioner's state of health had contributed to the offending conduct, and noted that it largely accepted submission that "the presence of the practitioner's illness cannot provide a complete avoidance of responsibility, although it is extremely relevant in determining proper penalty and protective orders".[13]

[45] I have reflected carefully on these matters. I place some weight on the medical argument but would not have been prepared to overturn the Committee's decision on that argument alone.

[46] There are other factors to consider.

[47] It is three years since the complaints were made. BD has carried the burden of unresolved complaint for a lengthy time.

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[12] Above n 11 at [7].
[13] Auckland Standards Committee No. 5 v Mellet [2014] NZLCDT46 at [46].

[48] Delay in resolution cannot in itself provide an escape route for lawyers who are the subject of disciplinary proceedings. The critical obligation to ensure that the interests of the public are protected would be damaged if delay in reaching resolution trumped the need to provide protection to the public.

[49] It is reasonable however, when there has been significant delay, to examine the practitioner's conduct subsequent to the complaints being made, and in particular to establish what, if any, steps the practitioner has taken to address the concerns which arose from the complaint enquiry.

[50] BD acknowledged that his conduct was unsatisfactory. He accepted that at the outset and did not challenge the Committee's substantive findings.

[51] He advises that he would have wished to make submissions to the Committee on the publication issue but did not feel well enough to do so. I accept his evidence in that regard.

[52] Importantly, BD has sought assistance from experienced colleagues and has put together a network which has provided and continues to provide him with wrap around support.

[53] He advises that he meets regularly with colleagues who have taken on mentoring roles. He has made significant changes in his practice and has, he says, been acutely aware of the need to ensure that that he does not take on work that he is not able to competently manage.

[54] He has been open with his colleagues regarding the complaints.

[55] He instructs that he has had no complaints made against him since these complaints were dealt with by the Committee. As previously noted, he had had no complaints prior to these matters.

[56] BD argues that publication will have a significant impact on his practice. He submits that the consequences of publication will be particularly severe as he practices in a provincial area, which has a relatively small and close-knit legal community.

[57] I accept that there is potential for a publication decision to have greater impact on a lawyer who practices in such a community, but I do not agree that special weight should be placed on the issue of locality.

[58] The argument that the consequences of publication may have disproportionate consequences form part of the broader consideration that must be undertaken when

addressing the requirement of the Publication Guidelines to consider the impact of publication on the interests and privacy of the practitioner.

Conclusion

[59] I am, by a fine margin, persuaded that the orders to publish should be vacated.

[60] Having reflected on all matters, it seems to me that the matter of public safety has been addressed by the steps that have been taken by BD, and in particular, the involvement of a number of practitioners who have indicated a willingness to assist BD and to provide continuing informal oversight of his practice.

Decision

The orders made for publication of the Standards Committee determinations of complaints 4911 and 4912 are vacated. This order is made pursuant to s 211 (1)(a) of the Lawyers and Conveyancers Act 2006.

DATED this 28th day of November 2014

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R Maidment
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:

BD as the Applicant
CE as the Respondent
Standards Committee
The New Zealand Law Society
Secretary for Justice