

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the Taranaki Standards Committee

**BETWEEN**

**ID**  
of [North Island]  
Applicant

**AND**

**QW**  
of [North Island]  
Practitioner

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

**REVIEW REPORT**

**Background**

[1] The Practitioner represented the Applicant as his defence counsel in respect of criminal charges in late 1998. There was a hung jury and in the subsequent trial the Applicant was represented by other counsel.

[2] Many years later the Applicant filed complaints against the Practitioner (and counsel who later represented him in the second trial) claiming that the Practitioner ought not to have acted for him on the basis that he was conflicted. The Applicant said that he had wanted his wife to give evidence at his trial, but she was not called as a witness. He later attributed the Practitioner's failure to have called her as a witness as the result of his being conflicted.

[3] The conflict situation, as he described it, was that the Practitioner's wife, who worked in another law firm, represented the Applicant's wife in their matrimonial and related proceedings. (In that proceeding the Applicant was represented by a lawyer in the same firm as the Practitioner.) The Applicant believed that this set up a conflict of interest situation which ought to have disqualified the Practitioner from acting. He said he had not been aware of the relationship between the Practitioner acting for him, and the Practitioner's wife acting the Applicant's wife. He said his consent had neither been sought nor given.

[4] The conduct complained of had occurred prior to the commencement of the Lawyers and Conveyancers Act 2006 (the Act), and the complaint had also been filed, but not completed prior to 1 August 2008 when the Act commenced. The Standards Committee therefore took charge of the complaint under Section 356 of the Act, aware that it was acting in the role of a Complaints Committee with the powers and functions conferred by the Law Practitioners Act 1982 and its rules and regulations.

[5] The Committee noted that the essence of the Applicant's grievance was his view that the Practitioner who had represented him had a conflict of interest which he believed explained his former wife not being called as a witness in the trial. The Applicant had stated that he was unaware that the Practitioner was married to the lawyer who represented his wife in the matrimonial matters.

[6] The Standards Committee considered the Practitioner's advice that his wife had represented the Applicant's wife for about a month (from June '99 to July '99), after the wife's lawyer left the firm, and that he had informed the Applicant of the association at their first meeting. The Committee noted that the Applicant, having received a copy of the Practitioner's letter, had not denied this.

[7] The Committee further noted that the wife had indeed been called by the defence to give evidence at the depositions to assess the benefit that might be derived from having her give evidence at the trial. A perusal of the Applicant's file showed that after depositions the Crown had indicated its wish to call the wife as a witness, a proposal that the Committee noted neither the Applicant nor the Practitioner wished to occur. In the event the wife elected to exercise her right to not give evidence for the Crown.

[8] The Committee declined to uphold the complaints. It concluded that the Applicant was not correct to say that the Practitioner had failed to call the wife, when clearly the wife had been called and given evidence at the depositions. The Committee saw no connection between the decision to not call the wife as witness on the one hand, and on the other hand the Practitioner being married to the lawyer in another firm representing the Applicant's wife in a matrimonial proceeding. It accepted the Practitioner's evidence that the Applicant's election to not call the former wife as the defence witness was a tactical decision agreed to by the Applicant, it being open to him to instruct otherwise.

[9] The Committee also accepted the Practitioner's advice that the Applicant had been informed that his (the Practitioner's) wife worked for the firm representing the Applicant's wife in the matrimonial matters and been given an opportunity (and

declined) to instruct other counsel. The Practitioner had informed the Committee that he was unaware that his wife had taken over the file at the end stated when the responsible lawyer left the firm, and the Committee accepted his advice there was no Family Court proceeding extant between them.

[10] Essentially the Committee perceived no conflict arising where the criminal proceeding involving the Practitioner was unrelated to the matrimonial proceeding involving a law firm where the Practitioner's wife worked, notwithstanding that the Practitioner's wife had a short involvement with the matrimonial file at its conclusion.

### **Procedural issue**

[11] Before embarking on a discussion it is relevant to note that the Committee ought to have made its determination pursuant to section 101 of the Law Practitioners Act 1982. By virtue of Sections 353 and 356 of the Lawyers and Conveyancers Act the Standards Committee was acting as a Complaints Committee under that Act, and obliged to consider the complaint as if the Law Practitioners Act had not been repealed.

[12] A further consequence of the complaint falling under the Law Practitioners Act is that the Applicant did not have review rights as provided for by the Lawyers and Conveyancers Act. The Applicant's right of review was as is set out in the Law Practitioners Act, which created the right of review by a Lay Observer. The role of Lay Observers has since been assumed by the Legal Complaints Review Officer (section 355 of the Lawyers and Conveyancers Act) but in performing that role the LCRO assumes the powers and functions of a Lay Observer. These are significantly narrower than those conferred on the LCRO, and are confined to examining the Law Society's treatment of a complaint.

[13] Notwithstanding the above observations, the errors and oversights by the Committee have not been detrimental to the Applicant and have not, in my view, adversely impacted on the Committee's investigative process. The Applicant was also given the opportunity to be heard on his review application, and a review hearing was attended by the Applicant and his counsel, Mr IE.

### **Considerations**

[14] By his review application the Applicant essentially sought reconsideration of his initial complaint. I have examined the Committee's file and the evidence that led it to the decision it made. I also took into account submissions made at the review hearing.

[15] The Committee properly noted that the Rules of Professional Conduct for Barristers and Solicitors applied, in particular Rule 6.09 of the 2008, which states:

Rule 6.09 A Practitioner (Practitioner A) closely related to another Practitioner (Practitioner B) shall not act for a client in a matter directly adverse to a person who Practitioner A knows is represented by Practitioner B, except upon consent by the client after consultation regarding the relationship.

[16] The Standards Committee identified that the relationship complained of as being between Practitioner A (the Practitioner in firm X - acting for the Applicant) and Practitioner B (the Practitioner's wife in firm Y - acting for the Applicant's former wife). The Committee accepted that no consent had been sought or obtained.

[17] In terms of the Rule 6.09 the Practitioner A and Practitioner B were 'closely related' since they were married to one another. Their respective clients were also married to one another. However, the "matter" in which each Practitioner was acting was different. The Practitioner, as Practitioner A, was counsel in the Applicant's criminal case. His wife, as Practitioner B, represented the Applicant's former wife in matrimonial proceedings.

[18] The complaint alleging conflict was to be determined on the basis of the Practitioner having acted for the Applicant in a criminal matter, where another law firm that employed his wife as a solicitor acted for the Applicants former wife in matrimonial matters. This matrimonial file was taken over by the Practitioner's wife at a late stage in that matter, having been largely concluded by the time of the criminal charge.

[19] To be in breach of the above Rule the Committee rightly concluded that the Practitioner would need to be acting in a matter that was directly adverse to the interests of the Applicants former wife. This would for example have prohibited the Practitioner representing the Applicant in relationship property matters where the Practitioner's wife was representing the Applicants wife in the same matter. However that was not the case here, as the Practitioner was representing the Applicant in a criminal matter. There was no conflict between the interests of the clients. There was also no breach of the above Rule where the matters involved were different.

[20] The Committee also noted that the reason for the wife not being called as a witness are explained by a file note which was considered to be sufficient evidence of a discussion having occurred between the Practitioner and the Applicant which resulted

in a decision to not call the wife. Also noted was that some concern was expressed that the wife would be a Crown witness (there was evidence that the Crown had wanted to call the wife) and that she had declined to give evidence for the Crown witness.

[21] I have considered all of the issues and discussed them at some length with the Applicant and his counsel at the review. For reasons given at the review, and in this written decision, I agree that the Standards Committee was correct in the view that it took of the complaint. The application is therefore declined.

### **Decision**

Pursuant to section 355 of the Lawyers and Conveyancers Act 2006 and section 97 of the Law Practitioners Act, I confirm the Standards Committee decision declining to uphold the complaint, which decision should be amended to record that it is made pursuant to section 101 of the Law Practitioners Act.

**DATED** this 29<sup>th</sup> day of September 2011

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Hanneke Bouchier  
**Legal Complaints Review Officer as Lay Observer**

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr ID as the Applicant  
Mr IE as Counsel for the Applicant  
Mr QW as the Respondent  
The Taranaki Standards Committee  
The New Zealand Law Society