

CONCERNING

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

AND

CONCERNING

a determination by the Auckland Standards Committee 1

BETWEEN

DR

Applicant

AND

**AUCKLAND STANDARDS
COMMITTEE 1**

Respondent

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

DECISION

Background

[1] This review application is in respect of a decision by Auckland Standards Committee 1 in respect of an own motion investigation by the Complaints Service following receipt of a Minute from Winkelmann J. In that Minute Her Honour referred to a copy of her decision in *J R v Department of Corrections*.

[2] In that decision, Her Honour was extremely critical of the applicant's performance in advising J R. It is not necessary to go into the details of the case, but the criticism by the Judge arose from the fact that J R pleaded guilty to a charge under section 71 of the Parole Act 2002. Her Honour noted that J R in fact had a strong defence to the charge. In return for the guilty plea, the Prosecution agreed to seek a conviction and discharge. On the applicant's advice, J R expected then to be released from gaol. Instead, he remained in gaol and faced the uncertain prospect of defending an application for recall. In the end, the application for recall did not succeed.

[3] The Judge's comments were made in the course of delivering a Judgment in an appeal against the conviction on the grounds that there had been a miscarriage of

justice, occasioned by the incorrect advice provided by the applicant. The appeal succeeded and the conviction was quashed.

The Standards Committee Determination

[4] The issue for the Standards Committee was the quality of the applicant's representation of her client.

[5] The Standards Committee noted the several findings of Her Honour in which she was critical of the applicant's performance.

[6] The Committee determined that the applicant's conduct constituted unsatisfactory conduct and made the following orders:-

- (a) censure;
- (b) a fine of \$5,000;
- (c) costs in the sum of \$750.

[7] In addition, the Standards Committee resolved that full publication of the matter should be made, which included publication of the applicant's name.

[8] The applicant has applied for a review of the Standards Committee determination.

Review

[9] In her application for review the applicant stated that she wished to apply for a review "on the basis the Standards Committee's discretion was exercised in an unreasonable or irrational way."

[10] In subsequent correspondence with this Office, she made it clear, that while she accepted the finding of unsatisfactory conduct, she asked for the amount of the fine, and particularly the publication order, to be reconsidered.

[11] A review hearing took place in Auckland on 30 June 2011.

The fine

[12] The applicant requested that the level of the fine be reconsidered in light of the fact that the fee received by her for the work undertaken was \$1,587.00 only. At the hearing, she indicated that she had limited means to pay any fine.

[13] The applicant had provided incorrect advice to J R resulting in him remaining in prison for approximately six weeks after the hearing. He faced the uncertainty of the

outcome of the application for recall. In addition, he pleaded guilty to a charge to which he had a very strong defence.

[14] In the appeal before Winkelmann J, the applicant insisted that she did not give advice to her clients because that was not her role. As a result of this approach to advising Mr R, Her Honour found that it was unlikely that she had advised Mr R as to the strength of his defence, or that she linked or balanced the prosecution's "offer" with advice that he had a strong defence. Her Honour noted at paragraph [21] of her decision that "although she undoubtedly left the decision to Mr R, the absence of any effective preparation for the hearing on her part would no doubt have contributed to Mr R's understanding that he did not have a defence to the charge."

[15] Contrary to the applicant's view of her role, Her Honour noted the decision of the Court of Appeal in *R v Merriless* [2009] NZCA 59 at [24], where it was stated that "*counsel have a duty to advise a client as best they can as to courses to adopt in defending, or not, as the case may be, criminal charges. Various options should be outlined, including any possible sentences if convictions occurred, but also the fact that guilty pleas will attract significant discounts when sentencing occurs. It is incumbent upon counsel to express an opinion, if they are able to do so, as to possible or likely outcomes or difficulties in presenting certain defences*".

[16] In paragraph [23] of the decision Her Honour stated that "on any view of the facts, Ms DR' approach to representation of Mr R was casual to the point of neglect."

[17] The applicant did not take issue with any of the comments or findings made by Her Honour. Having regard to these, the Committee was unanimous in its decision in determining that the applicant's conduct constituted unsatisfactory conduct, and imposed a fine of \$5,000. The Committee noted that this was an appropriate fine to impose to reflect the seriousness of the conduct.

[18] The maximum fine that may be imposed by a Standards Committee pursuant to section 156(1)(i) of the Lawyers and Conveyancers Act 2006 is \$15,000. The fine imposed by the Committee represents one third of the maximum and in all of the circumstances there is no reason for the level of the fine to be adjusted. Her Honour was extremely critical of the applicant's preparation and performance in her representation of Mr R, which had extremely serious consequences for her client.

Publication

[19] In previous decisions (refer LCRO 57/2010), this Office has taken the view that where a Standards Committee is contemplating a publication order, the requirements of natural justice dictate that the Standards Committee should inform the lawyer of its finding on the substantive complaint and provide him or her with an opportunity to make submissions on the matter of publication. This was not done in this case. However, given that the applicant has sought a reversal of that order, she has necessarily been given the opportunity by me to make submissions in that regard. This has had the effect of curing the defect in the Committee's procedure.

[20] I have also sought further comments from the Committee as to its reasons for making the publication order and have therefore been able to assess the weight of the applicant's submissions against the views of the Committee.

[21] The main thrust of the applicant's submission was that publication of her name would have significant and catastrophic consequences, both in regard to her practice as a lawyer, and if she chose to pursue an alternative career.

[22] She submits that she has spent eleven years building a reputation as a defence lawyer who is reliable, responsible and who works hard to seek justice for her clients. She submits that she is a lawyer who is always available in person and goes the extra mile for her clients.

[23] At my invitation, the applicant has subsequent to the review hearing, supplied references from three clients. These are in identical form, and I expect they were prepared by the applicant. However, I do accept that they represent the genuinely held views of the persons by whom they have been signed.

[24] In each case, the referee has noted that the applicant has represented them on a variety of charges, and at a variety of different hearings, including bail applications, bail variation applications, status hearings, defended hearings, section 94 LTA submissions, and section 81 LTA submissions requiring affidavits and supporting documentation, amongst other hearings on behalf of the referee. The references record the referee's confidence in the applicant's abilities and include confirmation that the referee would have no hesitation in instructing the applicant again, or to recommend her to other persons needing a criminal barrister.

[25] These references need to be weighed against the performance of the applicant when representing Mr R and the adverse comments made by Her Honour. Judges have a unique opportunity to assess the ability and competence of lawyers who appear before them, and their performance in representing their client's interests. It is only

infrequently that a Judge feels constrained to make such adverse comments as Her Honour has in this instance, and it is therefore right that the Standards Committee should place significant weight on Her Honour's comments.

[26] When considering the issue of publication, the Committee placed particular weight on the public interest factors involved in this matter. It identified those as including:

- the public's right to be informed;
- the public's right to expect competent and diligent legal representation;
- the public's right to choose a lawyer.

[27] In the case of Mr R the "casual" approach to his representation resulted in his being detained in prison for a period of six weeks longer than should have been the case. It is very much in the public interest if a lawyer's shortcomings have resulted in a person being deprived of his freedom, and I agree with the Committee that the public interest factor is extremely relevant to the decision as to whether or not to publish.

[28] The Committee noted that although Her Honour's decision is available to the public, the majority of the public would not be aware of it, and due to the seriousness of the case the Committee considered that publication of its determination was necessary to bring the matter to the public's attention.

[29] Indeed, the fact that the identity of the applicant is made known by reason of Her Honour's decision, is a factor which supports publication.

[30] The purposes of the Lawyer's and Conveyancers Act 2006 are expressed in section 2 as being:-

- (a) to maintain public confidence in the provision of legal services and conveyancing services;
- (b) to protect the consumers of legal services and conveyancing services;
- (c) to recognise the status of the legal profession and to establish the new profession of conveyancing services.

[31] Publication of this decision recognises those purposes.

[32] Consumers of legal services cannot be protected if they are not informed and the consequences for Mr R as a result of the applicant's representation far outweighs the

reasons advanced by her to have the publication ordered by the Standards Committee overturned.

[33] I do take note of the fact that this is the first occasion on which the applicant has been the subject of a complaint, but I also note with some concern that the applicant did not recognise her shortcomings, particularly in connection with this matter, by indicating a desire to better educate herself in this area or generally. I have also taken note of the fact that publication has already occurred both in the form of Her Honour's Judgment and the fact that the Legal Services Agency has been informed.

[34] In all of the circumstances, I concur with the Standards Committee's decision in this regard.

Decision

[35] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

Costs

[36] The Costs Orders Guidelines of this Office, provide that where an adverse finding is made or upheld against a practitioner, that practitioner will generally be expected to bear half the costs of the review. In the present instance, one half of the costs are assessed at \$1,200 as set out in the Guidelines.

[37] However, I consider that this Office is bound by the same considerations as were applicable to the Tribunal in *Kaye v ADLS* [1998] 1 NZLR 151, in that the practitioner's ability to pay, including the practitioner's current earning ability and financial commitments, will be relevant in ordering costs.

[38] The applicant did not provide any specific detail of her practice income but in general terms indicated that her income was minimal by reason of the fact that she practises on a part-time basis and the nature of her practice. She also indicated that her costs and expenses were such that she derived very little net income from her practice as a lawyer.

[39] In the circumstances I have determined to reduce the costs payable by the applicant to one half of the costs that would normally be imposed.

Order

[40] Pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006, the applicant is ordered to pay the sum of \$600 by way of costs to the New Zealand Law Society, such payment to be made within 30 days of the date of this decision.

DATED this 15th day of August 2011

Owen Vaughan
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:

Ms DR as the Applicant
Auckland Standards Committee 1 as the Respondent
The New Zealand Law Society