LCRO 332/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City] Standards Committee
BETWEEN	**AB** Applicant
AND	**CD** Respondent

DECISION

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

Introduction

[1] Mr AB has applied for reviews of two decisions respectively dated 8 October 2013 (the first decision) and 11 November 2013 (the penalty decision). In the first decision, the [City] Standards Committee made a finding of unsatisfactory conduct against Mr AB. In the penalty decision the Committee ordered Mr AB to pay $1,000 towards the costs of its inquiry and hearing.

Background

[2] Mr AB is a lawyer in a firm which specialises in insurance litigation. He acts for insurance companies and insured persons.

[3] Mr CD is a barrister practising in Christchurch. His practice is predominantly in criminal law. At the times that are relevant to this complaint, Mr CD held a policy of professional indemnity insurance (the policy). For ease of reference throughout this decision the insurer is referred to by its most recent name, [Insurer].

2005 to 2007

[4] In August 2005 Mr CD represented Mr [EF] in relation to criminal offending. A jury found Mr [EF] guilty, and he was sentenced to three years imprisonment. Mr [EF] appealed against the conviction.

[5] One of the grounds of Mr [EF]'s appeal was that Mr CD's representation of him had been inadequate. He contended Mr CD had not led evidence that was available, and which demonstrated Mr [EF]'s innocence.

[6] In March 2006 the Court of Appeal allowed Mr [EF]'s appeal. The Court identified fatal flaws in the trial, arising from the prosecutor's address to the jury and the Judge's summing up, although neither of those points had been raised by Mr [EF] in his arguments on appeal. The Court of Appeal ordered a retrial in the District Court, without considering or ruling on the allegation that Mr CD's representation had been inadequate.[1]

[7] The retrial began in January 2007. The evidence, including that which Mr CD had not led in the first trial, emerged. Counsel for Mr [EF] argued that no jury properly directed could convict Mr [EF] on the basis of the available evidence. The District Court Judge agreed, granting Mr [EF]'s application and discharging him pursuant to s 347 of the Crimes Act 1961,[2] which operates as an acquittal.

[8] There is no evidence to suggest that [Insurer] was aware of any of these events that took place from 2005 to 2007.

Proceedings by Mr [EF] against Mr CD

[9] Several years later, in April 2011, Mr [EF]'s lawyer wrote to Mr CD notifying him that Mr [EF] intended to commence proceedings against him in negligence and contract arising from Mr CD's representation at the trial in 2005.

[10] Mr CD promptly notified [Insurer] of Mr [EF]'s intention to make those claims against him.

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[1] *R v Mason* CA 340/05, 16 March 2006.
[2] *R v Mason* DC Christchurch CRI 2005-009-428, 7 February 2007.

[11] [Insurer] recommended to Mr CD that he act as a "prudent uninsured [pending] resolution of indemnity".[3]

[12] Consistent with [Insurer's] recommendation, Mr CD wrote to Mr [EF]'s lawyer denying liability.

[13] Mr [EF] filed proceedings in negligence and contract and those were served on Mr CD in July 2011 (the negligence proceedings).[4]

[14] Mr CD told [Insurer] Mr [EF] had served the negligence proceedings on him.

[15] [Insurer] and Mr CD agreed that he should defend the negligence proceedings.

[16] On that basis, [Insurer] instructed Mr AB to take instructions from Mr CD so he could prepare, file and serve documents in defence.

[17] Mr CD provided instructions to Mr AB.

[18] Mr AB prepared documents identifying himself as solicitor on the record for Mr CD in the negligence proceedings. He then filed and served those documents in accordance with his instructions from [Insurer] and Mr CD.

Mr AB's instructions from [Insurer]

[19] [Insurer] then asked Mr AB to advise it on whether or not it was obliged to indemnify Mr CD under the policy (instructions on indemnity).

[20] Mr AB accepted [Insurer's] instructions on indemnity.

[21] After considering the information available to him, which would have included the instructions he had taken from Mr CD, and the policy documents, Mr AB provided [Insurer] with advice (advice on indemnity).

[22] On 16 September 2011 [Insurer] acted on Mr AB's advice on indemnity and wrote to Mr CD telling him it had declined his claim under the policy.

Mr CD instructs Mr AB

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[3] Email [Insurer] to Mr CD's broker and agent, [MN] (7 April 2011).

[4] The statement of claim pleaded both a breach of contract and negligence, but for ease of reference those causes of action will be described in this decision as "the negligence proceedings".

[23] Unaware that Mr AB had provided advice on indemnity to [Insurer] or that [Insurer] had relied on that in deciding to decline cover under the policy, Mr CD asked Mr AB to accept his instructions to act for him in the negligence proceedings on the basis that Mr CD would pay Mr AB's fees.

[24] Mr AB accepted Mr CD's instructions to act in the negligence proceedings. He sent Mr CD a letter of engagement setting out the services he would provide,[5] and later directed his fee invoices to Mr CD for those services.

[25] Still oblivious to the fact that Mr AB had provided advice on indemnity to [Insurer], Mr CD also asked Mr AB to accept his instructions to challenge [Insurer's] decision not to indemnify him under the policy.

[26] Mr AB responded by email to Mr CD dated 20 September 2011, saying:

> Given that I was instructed by [Insurer] for you I am precluded from advising you on any issue with that insurer regarding cover.

[27] Mr AB did not tell Mr CD that [Insurer] had declined cover after receiving his advice on indemnity.

[28] Mr CD replied to Mr AB's email on 21 September 2011, saying "it is unfortunate that you have a conflict here as your advice would be hugely helpful".

Mr [GH] QC challenges [Insurer]

[29] Mr CD continued to retain Mr AB in the negligence proceedings. He also retained Mr [GH] QC to challenge [Insurer's] indemnity decision. [Insurer] was not joined to the negligence proceeding, but during negotiations between Mr [GH], [Insurer] and its new lawyers[6] in early 2012, [Insurer] disclosed the existence of Mr AB's advice on indemnity saying [Insurer] had relied on that in deciding to decline cover for Mr CD under the policy.

[30] On 21 March 2012 Mr CD ended his retainer with Mr AB and instructed his solicitor, Mr [IJ], to make enquiries of Mr AB, and request written responses from him.[7] The matters Mr [IJ] raised included Mr AB having advised [Insurer] that it had grounds to decline cover to Mr CD under the policy. Mr [IJ] referred to Mr CD having continued to instruct Mr AB in the negligence proceedings at his own expense, and to the risk of

[5] Letter ABr to CD (3 October 2011).
[6] Not Mr AB or his firm.
[7] Letter IJ to AB(21 March 2012).

any inter-party costs liability that might arise from the negligence proceeding, without Mr AB having told Mr CD he had provided advice on indemnity to [Insurer].

[31] Mr [IJ] specifically noted that Mr AB's advice to Mr CD did not include advice on whether he should join [Insurer] as a third party in the negligence proceedings.

[32] Mr AB's reply to Mr [IJ]'s letter on 5 April included the following:

(a) He was instructed by [Insurer] on 18 August 2011 in relation to the indemnity issue.

(b) He did not tell Mr CD that he was providing advice on indemnity to [Insurer].

(c) He considered that Mr CD would have known that he would be providing advice on indemnity to [Insurer] because "in the normal course a solicitor appointed by an insurer gives advice on indemnity and [he] expected that to be known to Mr CD as an experienced practitioner".

(d) The insurance policy between [Insurer] and Mr CD provided that Mr CD was to provide all necessary information to [Insurer] to enable it to determine its liability under the policy, and that there was no legal professional privilege as between Mr CD and counsel for [Insurer], i.e. Mr AB.

(e) He had agreed to act for Mr CD privately after [Insurer] decided not to indemnify him. [Insurer] had agreed to Mr AB acting privately for Mr CD.

(f) He had no obligation to advise Mr CD about [Insurer's] decision on indemnity, including whether [Insurer] might be joined as a third party in the negligence proceedings.

[33] Mr AB concluded his letter by saying that:

> if … Mr CD was not … aware that I would be giving indemnity advice to [Insurer], I apologise to him for not informing him expressly of that. In hindsight I accept that it would have been prudent for me to have done so.

Mr CD terminates Mr AB's retainer

[34] As mentioned above, Mr CD terminated Mr AB's retainer on 21 March 2012. Mr CD considered Mr AB was conflicted in continuing to act for him in the negligence proceedings when he had given [Insurer] advice on indemnity.

[35] Mr [IJ] replaced Mr AB as solicitor on record for Mr CD in the negligence proceedings, and continued to instruct Mr [GH] as counsel.[8] Mr [GH]'s advice to Mr CD when he took over the negligence proceedings included advice to the effect that Mr CD's opportunity to join [Insurer] as a third party to the negligence proceedings had passed.

Complaint

[36] In a letter dated 29 May 2013 Mr CD made a complaint to the New Zealand Law Society (NZLS). The nub of his complaint was that having provided [Insurer] with advice on indemnity, the rules around conflict of interest prevented Mr AB from acting for Mr CD in the negligence proceeding.

[37] Mr CD submits that the essence of Mr AB's conflict is captured in the following:

(a) Rule 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules).

(b) The dicta of Penlington J in *Nicholson v Icepak Coolstores Ltd.*[9]

(c) Mr AB's client care letter.

[38] Mr CD submits that the decision in *Nicholson* is authority for the proposition that a conflict of interest arises when a lawyer advises an insurance company whether to indemnify, and simultaneously advises the insured on defence strategy. The conflict is managed if there is full disclosure of this dual role and the insured agrees to continue instructing the lawyer.

[39] Mr CD said that if he had known that Mr AB had provided advice on indemnity to [Insurer], Mr CD would not have retained Mr AB to represent him in the negligence proceedings.

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[8] The negligence proceedings were heard by [Judge x] in [Month Year]. Mr [EF]'s action against Mr CD was dismissed: *EF v CD* [2013] NZHC 1321.
[9] *Nicholson v Icepak Coolstores Ltd* [1999] 3 NZLR 475 (HC).

[40] By way of outcome, Mr CD sought a refund of all the fees he had paid to Mr AB in the course of their retainer. Mr CD said that engaging Mr [GH] to act in the negligence proceeding part way through had involved a duplication of work.[10] Mr CD says he had to pay twice for the same legal services. He also says he was potentially prejudiced by his inability to join [Insurer] as a third party to the negligence proceedings so that the Court could determine the question of [Insurer's] obligations to Mr CD under the policy.

Mr AB's Response

[41] Mr AB responded to the complaint on 3 July 2013. His principal submissions in response to the allegation that he acted in circumstances where Mr CD's interests conflicted with [Insurer's] were that:

(a) The interests of [Insurer] and Mr CD did not conflict over the negligence proceedings.

(b) Their interests diverged on the indemnity issue.

(c) He did not provide Mr CD with advice on indemnity.

(d) He did not, therefore, separately act for [Insurer] and Mr CD on an issue in respect of which there was a conflict of interest in their positions.

[42] Mr AB did not accept that Mr CD would not have known that he had given [Insurer] advice on indemnity.

[43] Mr AB confirms that Mr [IJ] raised the issue of conflict with him, and says that he apologised for not having expressly informed Mr CD that he had given [Insurer] advice on indemnity. Mr AB says that he accepts in hindsight "that it would have been prudent for [him] to have done so"[11] when he accepted Mr CD's instructions to act for him in the negligence proceedings.

[44] Mr AB submitted that *Nicholson* could be distinguished, because the insurance company and the insured were parties to substantive litigation with one lawyer acting for both, and the insurance company sought to adduce evidence from the lawyer about things that the insured had said to him.

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[10] As the parties settled the issue of compensation between them, detailed discussion about that aspect of Mr CD's complaint is not necessary.
[11] Letter AB to NZLS (2 July 2013) at [7].

Mr CD's comments on Mr AB's response.

[45] Mr CD said he did not know that it was "standard practice" for lawyers advising insurance companies to have a dual role, such as occurred in the situation in which he found himself. He submits that *Nicholson* is authority for saying that this is in fact bad practice.

[46] Mr CD contended it was part of Mr AB's role as his counsel in the negligence proceedings to provide him with advice on which parties, if any, could and should be joined to the negligence proceedings.

Further comment from Mr AB

[47] Mr AB maintains that *Nicholson* is not authority for the proposition that the dual role played by lawyers advising insurer and insured is bad practice. He considers that it simply establishes that in some circumstances the contractual waiver of confidentiality between an insured and an insurance company's appointed counsel will not trump legal professional privilege. Legal professional privilege would prevail if the insured reveals something to counsel which may lead to indemnity being declined.

[48] Mr AB submits that *Nicholson* establishes that a conflict will arise at that point. If and when it does, counsel must declare it to insurer and insured, then cease to act for either.

[49] Mr AB also acknowledged that he should have made it clear beyond doubt to Mr CD that he was providing advice on indemnity to [Insurer]. He referred to an earlier apology for this oversight that he had provided to Mr CD.[12]

Submissions on Mr AB's behalf by Mr [KL] QC

[50] On 29 August 2013 Mr [KL] filed submissions on Mr AB's behalf, relying on Mr AB's earlier evidence and elaborating on his submissions, emphasising:

(a) Mr AB had no obligations to Mr CD in relation to the indemnity decision, so he was not conflicted in acting for him in the negligence proceedings; therefore there has been no breach of rule 6.

[12] Letter AB to IJ (5 April 2012).

(b) Mr AB accepts that he ought to have informed Mr CD that he was providing advice on indemnity to [Insurer] even though he assumed that Mr CD would be aware of this.

(c) Mr AB responsibly apologised to Mr CD for not having informed him that he was providing [Insurer] with advice on indemnity.

Standards Committee decisions

First decision

[51] The Standards Committee conducted a hearing on the papers. It summarised the issues of complaint as being:[13]

(a) What standards of professional conduct apply?

(b) Was there an actual or potential conflict of interest?

(c) Did Mr AB breach rule 6.1 when he accepted instructions from [Insurer] to provide advice on indemnity and continued to act for Mr CD in the negligence proceedings?

(d) Did Mr AB breach rule 6.1 when he accepted instructions from Mr CD to act in negligence proceedings after providing advice on indemnity to [Insurer]?

Standards of conduct

[52] The Standards Committee identified rules 6.1, and 7 as relevant. Those rules say:

> 6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients.
>
> 7 A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

[53] After setting out the parties' arguments, the Committee considered *Nicholson* noting it was decided under the old Rules of Professional Conduct for Barristers and Solicitors, which were replaced in August 2008 by the rules.

[13] Standards Committee decision, 8 October 2013 at [14].

[54] The Committee considered that when [Insurer] instructed Mr AB to prepare and file a statement of defence, Mr AB was "plainly acting for [Insurer] and [Mr CD]", because he "obtained information from [Mr CD] so that he could file a statement of defence".[14]

[55] The Standards Committee concluded that "there was at the very least a potential conflict of interest" from when [Insurer] refused to indemnify Mr CD and Mr AB continued to act in the negligence proceedings.[15]

[56] The Committee also noted that:[16]

> … the first thing any competent lawyer would have considered in [these] circumstances would be whether the insurer ought to be joined immediately as a third party to the proceedings.

[57] The Committee thus concluded that[17]

> … the lawyer acting on the substantive matter and the lawyer advising Mr CD on the indemnity issue needed to be one and the same lawyer. Any other arrangement was clumsy and potentially at least involved unnecessary expense. Mr CD needed to be represented by a lawyer who could give disinterested and objective advice both as to [the negligence proceedings] and as to any claim for indemnity against the insurance company.

[58] The ratio of the Committee's decision is set out as follows:[18]

> In the committee's view however, a lawyer, who is instructed by an insurance company and who advises that insurer that there are grounds to decline a claim, when asked by the insured if he would then continue acting for the insured, ought at the very least to have made full disclosure of the fact that he had been involved in advising the insurer as to the indemnity issue.
>
> That immediately raises issues such as: How does the lawyer make full disclosure to the insured without breaching his duty to the insurer to keep his advice to the insurer confidential?

[59] The Committee concluded there had been unsatisfactory conduct on Mr AB's part, and invited the parties to make further submissions about the nature of any orders that might be made, including whether compensation was payable by Mr AB to Mr CD.[19]

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[14] At [31].
[15] At [34].
[16] At [35].
[17] At [36].
[18] At [38] – [39].
[19] At [44] – [45].

[60] Written submissions on those topics were filed and exchanged. The parties had discussions with one another about compensation and reached agreement on that matter.

[61] As a consequence of that agreement, Mr CD and Mr [KL] on behalf of Mr AB, wrote to NZLS inviting the Committee to withdraw the first decision and the determination that there had been unsatisfactory conduct on Mr AB's part.

[62] Mr [KL] raised an issue of natural justice arising from the process leading to the first decision, in connection with a letter that had been sent to the Standards Committee by Mr CD before the hearing, and to which Mr AB had not been given an opportunity to respond.

The Penalty decision

[63] The Standards Committee considered the parties' submissions and on 11 November 2013 issued the penalty decision. It declined to interfere with the first decision so the finding of unsatisfactory conduct remained. Mr AB was ordered to pay $1,000 towards the costs of the Committee's inquiry and hearing.

[64] The Standards Committee also directed anonymised publication of its decision:[20]

> … for the purpose of promoting and maintaining high professional standards in the legal profession and alerting practitioners to the potential conflicts that can arise in relation to professional indemnity insurance claims and related civil proceedings.

[65] In relation to the joint request to withdraw the first decision, the Committee said the following:[21]

> … the Committee is not prepared to withdraw its earlier decision. Even if it were legally within its power to do so – the Committee's tentative view is that it is not – the withdrawal of the earlier decision would, in the Committee's view, create an undesirable precedent. It might also convey a perception that it is possible for practitioners to 'buy their way out of' adverse findings.

[66] In relation to Mr [KL]'s concerns about a breach of natural justice, the Committee concluded that there had been "full opportunity for both parties to make submissions".[22]

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[20] At [4].
[21] At [6].
[22] At [11].

Application for review

[67] On 20 November 2013 Mr AB filed an application in this Office to review both determinations.

[68] The review grounds may be summarised as follows:

(a) There was no actual or potential conflict of interest between Mr AB's obligations to [Insurer] and Mr CD at any one time.

(b) If there was, a finding of unsatisfactory conduct was not warranted.

(c) The Standards Committee erred in finding that there was insufficient disclosure to Mr CD of Mr AB's instructions to provide advice on indemnity to [Insurer]. Mr AB informed Mr CD that he could not act against [Insurer's] interests and Mr CD did not question this.

(d) In any event [Insurer] was not joined as a third party in the negligence proceedings, which were unsuccessful against Mr CD.

(e) The Standards Committee did not seek advice about "the normal process and standard" and whether Mr AB had departed from these.

(f) The Standards Committee made the first decision when Mr AB had not responded to submissions that had been made by Mr CD.

(g) The Standards Committee ignored the settlement that had been reached and the request to withdraw the first decision.

(h) The Standards Committee failed properly to consider Mr AB's submissions.

[69] Mr CD responded to the application for review in an email to this Office on 27 November 2013, as follows:

> As I have previously stated, the arrangement reached between myself and Mr AB is, from my point of view, satisfactory and I regard the matter as being at an end ... It follows that I cannot oppose Mr AB's application.

[70] In a further email sent by Mr CD to this Office on 14 April 2014, he said:

> We have resolved our differences very amicably and I no longer wish to pursue this matter. In my view there is no need for a hearing and I would be grateful if you would treat my complaint as formally withdrawn.

[71] Mr CD sent a further letter to this Office dated 10 September 2014, and said:

> I reiterate that Mr AB has recompensed me for expenses incurred by the situation and I am satisfied with that. I do not wish, as I have already indicated, that there be any further consequences for Mr AB.

Mr AB's further submissions

[72] On 1 September 2014 Mr AB filed written submissions in support of his application for review through his counsel Mr [KL]. His submissions may be summarised as follows:

(a) Mr AB denies that there was "a potential conflict of interest from the time [Insurer] declined the claim and Mr AB continued to act for Mr CD".

(b) The Committee's approach to whether there was a conflict did not relate to the defence of the negligence proceedings (about which there was no conflict) but the costs of Mr CD's representation. This is irrelevant to the issue of whether there was a conflict.

(c) The Committee failed to critically analyse the relevant rules and whether they applied to these facts.

(d) The Committee was wrong in its analysis of *Nicholson*.

(e) Mr AB did not act for Mr CD in providing advice on indemnity, and therefore owed him no obligations in relation to that issue; so there can have been no breach of rule 6.1.

(f) Mr AB was not given an opportunity to respond to a submission to the Committee made by Mr CD on 27 August 2013.

(g) Mr AB's failure to expressly advise Mr CD that he had advised [Insurer] on the issue of indemnity was "understandable" because he reasonably believed Mr CD would be aware of his practice.

(h) The Committee erred in finding Mr AB guilty of unsatisfactory conduct. Mr AB's conduct was "marginal and [an] understandable misunderstanding at most".

Review on the papers

[73] Mr AB and Mr CD have both consented to this review being conducted on the papers pursuant to s 206 of the Lawyers and Conveyancers Act 2006 (the Act). Section 206 allows a Legal Complaints Review Officer (LCRO) to conduct the review

on the basis of all the information available if the LCRO considers the review can be adequately determined in the absence of the parties.

Role of the LCRO on Review

[74] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[23]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[75] More recently, the High Court has described a review by this Office in the following way:[24]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[76] Given those directions, the approach on this review will be to:

a. Consider all of the available material afresh, including the Committee's decision; and

b. Provide an independent opinion based on those materials.

Review Grounds

Unfair process – unable to respond and not properly considering submissions

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[23] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[24] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475, at [2].

[77] Mr AB says he was denied the opportunity to respond to late-filed submissions that the Committee took into consideration, and that the Committee did not consider his submissions properly.

[78] Mr AB has added to his comments in the course of this review. All of the material provided by the parties has been considered in the course of this review. I am mindful of Mr AB's concerns regarding fairness of the Committee's determination in substance and process. However, Mr AB does not contend that the evidence of his conduct, which is not disputed and is central to this review, is incorrect. While I understand Mr AB's concerns, they do not affect the application of the rules to his conduct, and have no real impact on the outcome of this review. The balance of the review grounds have been considered and are addressed in the analysis that follows.

Request to withdraw the first decision

[79] The decision records the consideration the Committee gave to Mr AB's request to withdraw the first decision. It did not ignore his request. Given the provisions of s 152 of the Act, I doubt the Committee had the power to withdraw the first decision. Section 152(4) says that the Committee's determination is final, but subject to the right of review by this Office, and, of course, judicial review by the High Court. In the circumstances there does not appear to be any difficulty with the Committee having proceeded to consider orders under s 156 or publication.

[80] Although Mr CD has no interest in pursuing the matter, the proper process for this Office is to conduct a review on Mr AB's application, pursuant to the Act, and report the outcome pursuant to s 213.

Normal Standards

[81] Mr AB objects to the Committee not having sought advice about the "normal standards" for lawyers acting for insurer and insured. There are two reasons for rejecting that argument, one logical, the other procedural. First, a practice can be "usual" yet still not accord with the rules. Second, the Committee was not required to have evidence of "normal standards". Section 151(1) enables a Committee to decide what help, if any, it needs to assist it in reaching a decision.

Review Issue

[82] The issue on review is whether there has been conduct on Mr AB's part that falls within the definition of unsatisfactory conduct in s 12 of the Act.

Analysis

Unsatisfactory conduct – s 12 of the Lawyers and Conveyancers Act 2006

[83] Section 12 of the Act says:

> In this Act, **unsatisfactory conduct**, in relation to a lawyer … means–
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> …
>
> (c) conduct consisting of a contravention of this Act. … or practice rules made under this Act that apply to the lawyer …

[84] The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 are practice rules made under the Act that apply to Mr AB.

Rules

[85] The following rules are particularly relevant when considering Mr AB's conduct:

> 6 In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.
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> 6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.
>
> 6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.
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> 7 A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.[8]

[86] Given the thrust of those rules, it is relevant first to determine who Mr AB was acting for. That point was considered and decided by the High Court in *Nicholson* on the basis that both insurer and insured were clients of lawyer Z. His Honour described the relationship as the "tripartite situation".

Nicholson

[87] In *Nicholson* the insurer argued that the insured was not Z's client, although it accepted that there was a fiduciary relationship between Z and the insured. Relying on authority, and noting that Z had referred to himself in correspondence and in pleadings

as acting for the insured, Penlington J had little hesitation in concluding that both the insurer and insured were Z's clients.[25]

[88] The insured was Z's client, so that relationship was covered by legal professional privilege. Z was unable to give evidence on behalf of the insurer about what the insured had told him. That resulted in a situation where there was no evidence from Z on the disclosure that had led to the insurer revoking indemnity in that case.

[89] Following settled principles of contractual privity, his Honour concluded that Z was not a party to the contractual arrangement between the insurer and the insured. The Court noted that the insured had a continuing contractual obligation to provide the insurer with any and all information that might affect the issue of indemnity.

[90] However, Z's professional duties were governed by his professional and ethical responsibilities to his clients, the insurer and the insured. Those responsibilities included duties to protect the confidentiality of insurer and insured. Those parallel duties had been in existence from the start of the lawyer/client relationship between Z and the insured and Z and the insurer.

[91] Conflict between what had started out as parallel duties eventuated when the insured made disclosures to Z of information that was relevant to the contractual relationship between insurer and insured. When the insurer instructed Z to reveal those disclosures, Z could not, because although the information was relevant to the contractual claim, it was protected by privilege because the insured was also Z's client.
Other authorities

New Zealand

[92] There is some discussion in texts in use in New Zealand, including in *Ethics, Professional Responsibility and the Lawyer*, where the authors say:[26]

> While the terms of the contract and the principles of insurance law may govern the manner in which the insurer is entitled to act, there is little to assist the lawyer who is acting for clients with such divergent interests. It does, however, appear clear that as soon as an actual conflict of interest arises between such clients, the lawyer will be placed in an impossible situation and the only realistic alternative is to advise both clients to seek separate legal advice.

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[25] His Honour noted that "the preponderance of judicial opinion ... tends to favour the view that the insurer-appointed solicitor becomes the solicitor for the insurer – at least from the time when issue is joined and the insurer-appointed solicitor unequivocally states in a pleading filed on behalf of the insured that he/she is the solicitor for the insured" at [33].

[26] Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Laywer* (3rd ed, LexisNexis, Wellington, 2016) at [7.16].

(Citation omitted)

[93] In *Lawyers Professional Responsibility* the author said:[27]

> If the insurer declines to indemnify the insured, the insurer-appointed lawyer must cease to represent both the insurer and the insured because of a conflict of interest. A core aspect of the conflict is that the lawyer's duty of undivided loyalty to the insured proscribes divulging to the insurer the insured's confidential or privileged information that is adverse to the insured's interests …

Australia

[94] The New South Wales Court of Appeal considered whether an insurer could use statements provided by an insured to a claims assessor commissioned to investigate a workplace injury.[28] The decision also considered the position of a lawyer acting for both insurer and insured.

[95] The Court considered Penlington J's judgment in *Nicholson* and held that his Honour's "framework of analysis is consonant with other Australian cases".[29]

[96] The Court also held:[30]

> … there is no doubt that [A] became the … insured's solicitor when, on instructions from the insurer, they filed a defence in the plaintiff's proceedings ... It follows that any information divulged confidentially by the insured to the solicitor would attract client-legal privilege whether or not the insured was also a client. On top of that, the solicitor would have been under duties of confidentiality and undivided loyalty to the insured client not to divulge that information to the insurer without permission to the extent that the information was adverse to the insured's interests, unless of course the policy conditions clearly overrode any such obligation.
>
> (Citations omitted)

[97] It has been argued elsewhere that "where the interest of insurer and insured diverge, the solicitors cannot act further without the fully informed consent (which will inevitably mean independent legal advice) of both parties".[31]

Mr AB's conduct

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[27] G E Dal Pont *Lawyers' Professional Responsibilities* (5th ed, Thomson Reuters, Sydney, 2013) at [7.105].
[28] *Mercantile Mutual Insurance (NSW Workers Compensation) Ltd v Murray* [2004] NSWCA 151, (2004) 13 ANZ Ins Cas 61-612.
[29] At [57].
[30] At [57].
[31] Chris Chapman and Jillian Mallon "*Conflicts of Interest Faced by Solicitors Instructed by Insurers to Conduct Litigation on Behalf of Insureds* (1996) 26 VUWLR 679 at 703.

[98] The Act and rules set out the starting point. In particular, as a lawyer Mr AB was obliged by rule 4 to be available to take instructions within his area of practice unless he had good cause to refuse to accept instructions. However, the mere fact that the instructions fell within his area of practice did not mean Mr AB was obliged to accept them.

[99] Good cause to have refused to accept instructions from either [Insurer] or Mr CD included instructions that could require Mr AB to breach any professional obligation. "Could" in rule 4 signals a point at which Mr AB can be expected to have assessed whether or not accepting instructions from both Mr CD and [Insurer] could require him to breach a professional obligation. The answer to that question was a matter for Mr AB's professional judgement based on what he knew at the time.

[100] Mr AB first accepted instructions from both clients to act in the negligence proceedings in July or August 2011.

[101] [Insurer] had not made a decision on whether to cover Mr CD for his claim under the policy at that stage. There is no evidence either way as to whether [Insurer] received legal advice on its legal obligations to Mr CD under its policy from anyone other than Mr AB at any stage. [Insurer] could properly avoid liability for Mr CD's legal costs and any Court ordered costs otherwise covered by the policy if there was some lawful basis on which to do so.

[102] It is clear from Mr CD's evidence that when he agreed with [Insurer] that he would defend the negligence proceedings, he did not know whether [Insurer] would indemnify him or not. Pending [Insurer's] decision on its liability under the policy, Mr CD must be taken to have been willing to accept the risks of defending the negligence proceedings, including the costs risks, even if he had to cover those himself.

[103] As Mr AB was prohibited by rule 4 from refusing instructions without good cause, the usual operating presumption would have been that he would be available and would not refuse to accept instructions. Whether he knew [Insurer] had agreed to indemnify Mr CD or not, there is no difficulty with the fact that Mr AB chose to accept instructions from both clients to act in the negligence proceedings in July or August 2011.

[104] However, the circumstances took a different turn on 18 August 2011 when [Insurer] asked Mr AB for his advice on indemnity: that is, whether [Insurer] would pay Mr CD's legal fees, and accept the costs risk in the negligence proceeding. The costs risk was integral to the negligence proceeding. Mr AB's job, based on his knowledge of

the facts as disclosed to him by Mr CD and [Insurer], including the terms of the policy, and Mr AB's view of the law as it applies to those facts, was to form an independent opinion but then to only advise [Insurer] on its legal position under the policy.

[105] The advice on indemnity was confidential to [Insurer]. [Insurer] could claim or waive its right to claim privilege over the advice on indemnity. In a practical sense, Mr CD had a keen interest in any reservations of confidence and privilege [Insurer] may have had.

[106] In circumstances where [Insurer] had not committed to indemnifying Mr CD, the existence of the contractual relationship between [Insurer] and Mr CD gave rise to a situation where Mr AB could have been required to breach professional obligations. It is not always the case that a lawyer cannot act for insurer and insured. The distinguishing features of the present facts are that [Insurer] had not decided whether it would indemnify Mr CD or not, and it wanted Mr AB to use all the information at his disposal to provide it with advice on that.

[107] Acceptance of [Insurer's] instructions gave rise to circumstances where there was a more than negligible risk that Mr AB may have become unable to discharge the obligations he owed to Mr CD and [Insurer].

[108] My view on the point at which a more than negligible risk of conflict arose is therefore earlier than the Committee concluded it was.

[109] Within the contractual and professional relationships between lawyer and clients the facts were not private, confidential, privileged or contentious. The question for Mr AB was whether Mr CD had voided his right to have [Insurer] indemnify him. As it happens, Mr AB's advice to [Insurer] was that it did have grounds to decline cover under the policy.

[110] Whether Mr AB's advice was correct as a matter of law based on the particular facts could have been argued either way. A dispute between insurer and insured was likely and foreseeable. Mr AB would have had to pick one side or the other. Mr AB could not have argued both positions in the same dispute while he owed fiduciary obligations to both parties. Mr AB could not have negotiated a resolution with both parties relying on him for advice. That task fell to Mr [GH] and [Insurer's] new lawyers.

[111] Absent a negotiated outcome, the legal position as between insurer and insured would fall to be determined by someone else, in this case, the Court. The evidence is that Mr CD was not provided with advice on joinder of [Insurer] until it was too late. Mr AB had already formed a view, in formulating his advice on indemnity, that

[Insurer] was not liable to Mr CD under the policy. On that basis, it is not surprising Mr AB did not advise Mr CD on joinder.

[112] When Mr CD asked Mr AB about representation in relation to [Insurer's] decision not to indemnify, Mr AB's statement to Mr CD was as follows:

> Given that I was instructed by [Insurer] for you I am precluded from advising you on any issue with that insurer regarding cover.

[113] If that is the full extent of what Mr AB told Mr CD, and it appears that it is, it evidences a failure to obtain prior informed consent from Mr CD to Mr AB advising [Insurer] on indemnity. Mr AB subsequently confirmed he had not told Mr CD before he accepted [Insurer's] instructions, and apologised for not having done so.

[114] Mr AB says lawyers routinely advise insurer and insured in similar circumstances, and says he assumed Mr CD knew that. That is not sufficient to demonstrate compliance with rule 6.1.1. Mr AB does not say he turned his mind to the rules, and how they operate in relation to the discharge by a lawyer of obligations where duties may or do conflict. Given the prohibition on lawyers acting for clients with conflicting interests, the least Mr AB should have done was to tell Mr CD that [Insurer's] had asked him to provide it with advice on indemnity. Mr AB could, and should, have done that before he decided whether to accept [Insurer's] instructions.

[115] Mr AB also had a duty to protect and hold in strict confidence all information concerning [Insurer] and Mr CD, each of their retainers, business and affairs acquired in the course of their professional relationship pursuant to rule 8. That duty had commenced by the time each of them became Mr AB's client and continued towards each of them indefinitely.[32] That duty of confidence extended to include Mr AB's advice on indemnity to [Insurer] alone.

[116] Mr AB was in possession of advice that was confidential to [Insurer]. He provided it to [Insurer]. [Insurer] relied on it. Mr CD was disadvantaged by the decision [Insurer] made to decline cover under the policy based on Mr AB's advice. In the circumstances, it cannot be said that Mr AB exercised his professional judgement solely for the benefit of Mr CD as rule 5.2 requires. In acting for Mr CD in the negligence proceedings, Mr AB did not protect and promote Mr CD's interests with respect to his costs or the costs risk in that proceeding, to the exclusion of a third party, namely [Insurer].

What should Mr AB have done?

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[32] Rule 8.1.

[117] When [Insurer] asked Mr AB for advice on indemnity Mr AB should have been alert to the more than negligible risk that he may be unable to discharge the obligations he owed to one or more of his clients.

[118] It must have been apparent to Mr AB when he accepted [Insurer's] instructions that Mr CD's interests in being indemnified against all of the costs risks arising from the negligence proceedings would not be met if Mr AB formed the opinion that [Insurer] had grounds to decline cover under the policy.

[119] Before he accepted [Insurer's] instructions, Mr AB should have followed the process set out in rule 6.1, and the rules that follow. Pursuant to rule 6.1.1., Mr AB may have been able to continue acting for insurer and insured while providing [Insurer] with advice on indemnity if he had obtained the prior informed consent of [Insurer] and Mr CD. However rule 6.1.2 would then apply, because Mr AB could not independently advise Mr CD on the negligence proceedings, including the costs risk, without advising him that [Insurer] could be joined as a third party, or recommending [Insurer] should be so joined.

[120] [Insurer] indemnifying him under the policy would obviously have been of significant benefit to Mr CD. Indemnity for his and others' costs was very much in his interests. He would not have had to pay the costs of his own representation as the negligence proceedings progressed, or run the risk of being ordered to contribute to Mr EF's costs at the conclusion of the negligence proceedings. The costs to Mr CD could have been significant. That is why, when [Insurer] later refused to indemnify him, he needed objective legal advice on whether he had a lawful basis on which to challenge [Insurer's] decision to decline cover by joining [Insurer] as a third party to the negligence proceedings.

[121] Mr AB's argument that the advice on indemnity in relation to the negligence proceeding, and the negligence proceeding were entirely unrelated matters is not accepted. The risk of costs was integral to the negligence proceeding. They were part of the same matter.

[122] In the circumstances, Mr AB left himself in a situation where he had formed the view that [Insurer] was not obliged to indemnify Mr CD, did not promptly disclose that information to Mr CD or advise him that he could challenge [Insurer's] decision to decline cover under the policy by promptly joining [Insurer] as a third party to the negligence proceedings in which Mr AB was acting. Mr AB did not tell Mr CD that [Insurer] had asked him for advice on indemnity, and although he had the chance, he did not tell Mr CD he had given that advice. Given his obligations of confidence to

[Insurer], it is not difficult to understand why Mr AB did not promptly and clearly explain to Mr CD that he had given advice on indemnity to [Insurer]. Mr AB was caught in circumstances where he was unable to discharge the obligations he owed to Mr CD and to [Insurer]. He is unable to demonstrate that he complied with rule 7 or rule 6.1, or that he followed the process set out in rules 6.1.1 and 6.1.2.

Unsatisfactory Conduct

[123] The key question on review is whether there has been unsatisfactory conduct on the part of Mr AB pursuant to s 12(c) of the Act. Mr [KL] submits that a finding of unsatisfactory conduct is not warranted because of:[33]

> The out of the ordinary consequence which a finding of unsatisfactory conduct would have for Mr AB and his firm [XX] The firm is a specialist insurance firm involved solely in such work. Insurer clients and prospective clients now almost routinely enquire whether the firm has substantiated complaints against it. A positive answer to such question would have a disproportionate effect on Mr AB and the firm.

[124] The approach that is consistent with all three of the Act's purposes is for clients and potential clients seeking to engage a lawyer to be free to ask whether any complaints have been made about that lawyer or firm, and if so, what the outcome was.

[125] Lawyers must answer honestly.[34]

[126] Disciplinary history may be an important part of a decision as to whether to engage a particular lawyer or firm. It may not be determinative, but it may be a relevant factor. All New Zealand lawyers are subject to the disciplinary provisions of the Act. It is not sufficient to argue that what discretion there is in making a finding of unsatisfactory conduct should not be exercised because Mr AB's firm would suffer "out of the ordinary consequences". There is no reason to believe that if there were to be any consequences to Mr AB or his firm, that they would be disproportionate.

[127] Mr AB did not pay sufficient regard to core obligations that apply when a lawyer acts for more than one client in a matter. Those obligations, and the process by which to manage conflicts, are set out in plain language in rule 6 and its sub-rules.

[128] Although my view on the timing differs from the Committee's, there is no reason to form a different conclusion to that formed by the Committee. The Committee's determination that there has been unsatisfactory conduct on the part of Mr

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[33] Submissions on behalf of AB, 1 September 2004 at [35](c).

[34] Rule 11.1 prohibits lawyers from engaging in misleading or deceiving conduct towards anyone on any aspect of the lawyer's practice.

AB pursuant to s 12(c) of the Act for contravention of practice rules made under the Act is confirmed.

Orders under s 156

[129] The Committee ordered Mr AB to pay its costs, of $1,000. There is no reason to depart from that order.

[130] The parties have reached agreement over the payments to be exchanged between the two of them. Mr CD declares himself satisfied by the agreement he has reached with Mr AB. In the circumstances, orders of a compensatory nature are not appropriate.

[131] In circumstances where Mr CD has no residual concerns, and there is no compelling reason to impose any of the other orders provided for under s 156, the decision of the Committee to order Mr AB to pay costs is confirmed.

Publication – s 206(4)

[132] There is no public interest to be served in directing publication of details identifying Mr AB, although a direction is made to publish this decision with identifying features removed.

Costs on review – s 210

[133] The Legal Complaints Review Officer (LCRO) has a discretion to order costs pursuant to s 210 of the Act, guided by the LCRO's Costs Orders Guidelines.

[134] Those guidelines provide for a contribution to the cost of the review to be paid by the lawyer who is unsuccessful, in this case Mr AB.

[135] Mr AB's application for review has not resulted in a different outcome. The Committee's determination that he acted where the interests of his two clients conflicted is confirmed.

[136] In the circumstances Mr AB is ordered to pay costs according to the Costs Orders Guidelines for a review of average complexity on the papers. Mr AB is ordered to pay $1,200 pursuant to s 210 of the Act.

Decision

[137] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination that there has been unsatisfactory conduct on Mr AB's part is confirmed.

[138] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Mr AB is ordered to pay $1,200 in costs on review to the New Zealand Law Society within 28 days of the date of this decision.

DATED this 14th day of March 2017

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D Thresher
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 AB as the Applicant
Mr [KL] QC as the Applicants Representative
Mr CD as the Respondent
Ms [OP] as a related party
[City] Standards Committee
The New Zealand Law Society