LCRO 43 /09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	A determination of the Auckland Standards Committee 2
BETWEEN	**CLIENT H** of Auckland
	Applicant
AND	**LAWYER M** of Auckland
	Respondent

DECISION

Background

[1] This is a review of a decision of the Auckland Standards Committee 2 in respect of a complaint by Client H against Lawyer M. Client H complained to New Zealand Law Society in respect of conduct by Lawyer M of certain property work he undertook on his behalf. The Committee concluded that the complaint gave rise to no issues of a disciplinary nature given the applicable standards. The Committee therefore declined jurisdiction to consider the complaint pursuant to s 351(1) of the Lawyers and Conveyancers Act 2006.

[2] Client H complained on 13 August 2008 in respect of three matters. They were that Lawyer M:

- Failed to identify that a granny flat on a property did not have the requisite consents when the he acted on the property purchase;
- had been dilatory in pursuing a cause of action against a real estate agent consequent on losses incurred in the purchase of a property located in AA Purchase; and

- had been negligent when assisting them with the purchase of a property located in BB Road in 2006;

[3] Lawyer M responded to the complaint on 6 October. In essence his response was that he accepted that he had been dilatory in pursuing the legal action against the real estate agent and apologised. He indicated a willingness to progress the matter and to meet some of the costs incurred. He denied that he had been negligent in advising Client H in respect of the BB Road purchase. The allegation in respect of the granny flat in the complaint was linked to the complaint about the actions against the real estate agent. Lawyer M did not explicitly respond to that aspect of the complaint. I note that in the application for review Client H made clear that he was complaining about three incidents.

[4] On 1 December Client H responded to Lawyer M's reply. In that letter Client H expanded his complaint and suggested that Lawyer M's inaction may have been to conceal his earlier negligence in respect of the purchase of the property. This was a new allegation and amounts to a suggestion that there is a conflict of interest between Lawyer M and his client. This allegation was not put to Lawyer M nor was it dealt with by the Committee in its decision.

[5] In his application to this office Client H suggested that the finding of the Committee suggested that they did not consider his losses significant and that they considered the delays of Lawyer M (which were admitted) to be acceptable.

[6] This review concerns conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date. In general terms, issues of quality of service were not considered to be matters for the professional body prior to 1 August 2008. Matters of professional service that occurred since that date may be the basis for a regulatory response by the professional body.

Negligence and delay

[7] Section 106(3)(c) of the Law Practitioners Act 1982 sets out the disciplinary standard for negligence or incompetence. In cases of negligence or incompetence discipline will follow only where the negligence or incompetence "has been of such a

degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor, or as to tend to bring the profession into disrepute." This is clearly a very high threshold.

[8] It has been stated that mere error or misjudgement will not amount to a professional breach (though it may form the basis for a claim in the courts). Negligence or delay on the part of a particular practitioner must be serious indeed to bring their fitness to practice into question. Similarly, isolated instances of negligence may be such as to lower that practitioner's standing, however only where the negligence or incompetence is serious or repeated is disciplinary intervention needed to ensure the profession as a whole is not brought into disrepute.

[9] In *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514, 533 the High Court considered that for negligence, to reach the disciplinary threshold must be:

> of a degree that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members of the public. Members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think or conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public.

[10] The Standards Committee concluded that there had been no conduct in this case which met that threshold and therefore required a disciplinary response. I presume that they assumed for the purposes of the decision that the allegations of negligence were made out. As a matter of review I am properly reluctant to revisit the judgement of a Standards Committee comprising both lawyer and lay membership which has reached such a conclusion. However, I note that were I to consider the matter afresh on the information available to me, and presuming the allegations made by Client H were well founded, I would reach the same conclusion.

[11] It bears noting that the conclusion of the Standards Committee did not suggest that they considered the delay acceptable, or that the negligence (or alleged losses) were not significant. Rather the Committee found only that assuming the negligence pleaded was established it did not reach the disciplinary threshold.

Conflict of Interest

[12] I have observed that the allegation that Lawyer M was dilatory in pursuing the action against the real estate agent in order to conceal his own negligence was made late in the day. Client H suggested in the letter of 1 December that "the inaction to proceed [with the claim] may highlight a possible oversight or negligence in the work he undertook for us originally". Understandably the allegation of a conflict is not made explicitly. However, underlying the statement is the allegation that Lawyer M was seeking to avoid his own failings in respect of the property purchase coming to light. This allegation does not appear to have been put to Lawyer M (though I note its substance was included in the application for review to this office to which Lawyer M chose not to respond). The allegation is a serious one, which obviously needs to be clearly put to Lawyer M so that he may have an opportunity to answer it.

[13] If this allegation were substantiated it would appear that there has been a breach of Rule 6.06 of the (then applicable) Rules of Professional Conduct for Barristers and Solicitors. That rule requires a practitioner to cease acting where he or she is aware that their client has a potential claim against them. It is also well established that a lawyer should not conduct litigation in which the propriety of their own actions may be in question: *Kooky Garments v Charlton* [1994] 1 NZLR 587. This is a matter which may have been a ground for disciplinary intervention under the Law Practitioners Act 1982 either as misconduct or as conduct unbecoming a barrister or a solicitor. Accordingly the Standards Committee has jurisdiction to consider the matter under s 351 of the Lawyers and Conveyancers Act.

Decision

[14] I direct that the Auckland Standards Committee 2 reconsider and determine the specific matter of whether it was a breach of professional standards for Lawyer M continue to act in respect of the AA dispute given that he had undertaken the conveyancing on that property. This direction is made in accordance with s 209(1)(a) of the Lawyers and Conveyancers Act 2006.

DATED this 27th day of April 2009

Duncan Webb
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:

Client H as Applicant
Lawyer M as Respondent
The Auckland Standards Committee 2
The New Zealand Law Society