LCRO 56/09

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	**COMPLAINANT R** of Whangamata Applicant
AND	**Lawyer D** of Auckland Respondent

The names and identifying details of the parties have been removed from this decision.

DECISION ON PENALTY AND COSTS

Introduction

[1] In a decision of this office dated 19 June 2009 Lawyer D (the practitioner) was found guilty of unsatisfactory conduct pursuant to section 12(c) of the Lawyers and Conveyancers Act by virtue of having breached Rule 10.1 of the Rules of Conduct and Client Care. The facts giving rise to this finding were traversed in that decision and do not need to be repeated here. Submissions were invited from the practitioner in relation to appropriate orders in respect of penalty and costs, and publication.

[2] Following that decision submissions were received from Mr XX who, on behalf of the practitioner, submitted that the review hearing was defective for reasons that included a failure to observe the rules of natural justice and errors by the LCRO. He asked that the decision to be recalled, and if that could not be done on the papers then for a hearing.

[3] I took this to be an application for a rehearing and informed the parties accordingly. The review applicant was also sent a copy of Mr XX's letter and invited to respond. A copy of his response was subsequently sent to Mr XX and the practitioner. I considered the application on the information that had been provided by both parties. A decision was issued on 10 August 2009 that informed the parties the application was declined, and the reasons for that decision.

[4] The only outstanding matter that remained was to consider what orders would be appropriate in this case. Mr XX forwarded submission on the practitioner's behalf in relation to these matters.

[5] By s 211(1)(b) of the Lawyers and Conveyancers Act (the Act) I am able to make any orders that could have been made by a Standards Committee. The range of orders that may be made are set out in section 156(1) of the Act. From among these I have given consideration to a fine (section 156(1)(i) of the Act) and a censure (section 156(12)(b) of the Act.) In deciding the appropriate orders to make I am mindful that I have found unsatisfactory conduct by the practitioner Lawyer D in respect of one matter.

Principles in imposing a fine

[6] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

- to punish the practitioner;
- as a deterrent to other practitioners; and
- to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[7] Mr XX provided background information to support his submissions for the practitioner to the effect that the conduct should be viewed against the nature of the dealings between the two lawyers, and that this provided some context for the Practitioner's conduct. He submitted that reasons involved in the delay should be regarded as mitigating factors to be taken into account when considering a monetary penalty.

[8] Mr XX referred to the slow pace with which the relevant transaction was able to progress, that the reasons for the delay were known by the complainant's solicitors, and that notwithstanding the failure to respond to enquiries of his colleague the practitioner had continued to progress the transaction which involved the complainant. He included information describing the practitioner's activities. He added that the

practitioner was following his client's instructions and that the complainant's solicitor had given no indication that he had considered the practitioner's conduct to be unsatisfactory.

[9] Mr XX characterised the complaint as one involving a failure to send a holding letter. He pointed out that the practitioner owed no duty to the complainant who was not his client. He referred to the practitioner's unblemished record. He submitted that any penalty should reflect the particular conduct that was found to be unsatisfactory as it relates to the relevant rule.

[10] Mr XX advised that the practitioner acknowledges he could have done better, and that with the benefit of hindsight admitted that he could have sent a holding letter, adding that the practitioner regretted not having done so.

[11] Mr XX referred to another decision of this office (29/2009) wherein the LCRO had considered, with regard to the range of penalties provided by the Act, that the starting point for a fine would be $1,000. Mr XX submitted for Lawyer D that the conduct was at the very low end of the scale of unsatisfactory conduct and that it would be appropriate that no monetary penalty be imposed.

[12] I have considered the submissions in relation to the finding of unsatisfactory conduct in this case. The essence of the decision was that the practitioner had failed to respond to his colleague's correspondence in a timely fashion. I had noted that it would have been sufficient for the practitioner to have informed his colleague why no further information was yet available when the enquiries, and requests for a response, were made.

[13] The practitioner's conduct was unacceptable, but not disgraceful or deplorable in any way. The "condemnation or opprobrium" which ought to be imposed in this case is modest. The Act provides for a monetary penalty of up to $15 000 when unsatisfactory conduct is found. This level of fine indicates a legislative intent that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked. This is a significant change from the position under the Law Practitioners Act 1982 (repealed) where the District Disciplinary Tribunals could only impose a much more modest fine of up to $2000 (s 106(4)(a)).

[14] For a fine of that magnitude to be imposed it is clear that some serious wrongdoing must have occurred. The conduct under consideration in this case is at the other end of the spectrum. It is unlikely that large fine would properly be imposed for conduct which was due to inadvertence or a failure to appreciate the proper legal position.

[15] In addition to Mr XX's submissions I also considered other factors that appeared to be relevant. The rules governing professional dealings imposed by Rule 10 of the Rules of Conduct and Client Care are not new insofar as they reflect Rule 6.01 of the Rules of Professional Conduct for Barristers and Solicitors under the former Law Practitioners Act. What may be novel, however, is that their application has not hitherto been tested, or in any event has not been examined within the disciplinary regime of the Lawyers and Conveyancers Act. This may reflect little active awareness of its existence by either the legal profession or the public. In any event the consumer focus of the Lawyers and Conveyancers Act makes it more likely that matters arising in the professional relationship between practitioners, insofar as these matters may impact on clients, will be pursued by members of the public in the form of complaints, possibly at time with the encouragement of their lawyers. In this case the complainant had become very agitated when her own lawyer was unable to get any response from the practitioner who was acting on the other side of the transaction despite requests having been made. It may be useful to note that the review applicant stated that the complaint arose as a result of the complainant's lawyer advising her to write to the New Zealand Law Society.

[16] Having considered all of these matters I have decided not to impose a fine in this present case. The main reason is that notwithstanding that the standards that apply in professional dealings are not new, the external monitoring of inter-professional relationships has been historically rare. This case serves as a reminder to practitioners of the rules that govern their professional dealings with one another and is a signal that the maintenance of proper standards of professionalism will be monitored in the context of the objectives of Lawyers and Conveayncers Act. The principal importance of this present case may be seen to lie in its educational value at this time. I need to add however that the decision to not impose a fine is exceedingly unusual and should be taken to apply to this case only, and in the particular circumstances that arise in this case. Any future complaint of a similar kind will be unlikely to escape the imposition of a fine.

[17] There has however been a breach by Lawyer D and it is important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional obligations. The unsatisfactory conduct should not go unpunished, and I have also considered other orders that may be that are not of a penal nature. Those orders have the functions of improving the competence of practitioners, ensuring ongoing compliance with regulation, and providing redress to wronged parties.

Censure

[18] In the present case I have decided it is appropriate and sufficient to make an order censuring the practitioner. The purpose of a censure is to set out the conduct as unacceptable and to reflect the condemnation of the conduct by the public and the profession and as a deterrent to other lawyers from engaging in similar conduct. The following order is made:

- Lawyer D is censured pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006.

Costs

[19] Where a finding has been made it is generally appropriate that a lawyer in respect of whom orders have been made will be expected to meet a significant portion of the costs of the review. The Guidelines on Costs issued by this office state that in general for a case of this type (relatively straightforward and dealt with on the papers) a costs order of $900 would be made. The review was entirely straightforward and dealt with on the papers. I do not intend in this instance to factor in the additional attendances in relation to Mr XX's challenge of the original review decision.

[20] The application for review was properly made. In light of these matters Lawyer D is ordered to pay to the New Zealand Law Society $850.00 in respect of the costs incurred in conducting this review to be paid within 30 days of the date of this decision.

Publication

[21] The Guidelines for Parties to Review of this office state that the interim position is that "in general the LCRO will not publish the names of lawyers or conveyancers who are found guilty of unsatisfactory conduct for the first time". There is no reason to depart from this position in this case. A material element of this decision with regard to publication is its educational value and this can be achieved without publication of the practitioner's identity. I am of the view that this decision is to be made available to the public with the names and identifying details of the parties removed in the normal way.

Orders

[22] The following orders are made:

- Lawyer D is censured pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006.

- Lawyer D is to pay $850.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those

costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 4th day of September 2009

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Hanneke Bouchier
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:

Complainant R as Applicant
Lawyer D as Respondent
Mr XX as Respondent's Counsel
The Auckland Standards Committee 1
The New Zealand Law Society