LCRO 76 /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 4 of the New Zealand Law Society
BETWEEN	**Mr Austell** of Auckland Applicant
AND	**Ms Somerset (also known as...)** of Auckland Respondent

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

DECISION

Application for review

An application was made by Mr Austell for a review of a decision by the Auckland Standards Committee 4 in respect of her complaint against him by Ms Somerset. The complaint related to legal work done for Ms Somerset by Mr Austell in respect of the division of property consequent on the ending of Ms Somerset's relationship.

The Standards Committee upheld the complaint and found Mr Austell guilty of conduct unbecoming in that he acted in a conflict of interest situation in breach of r 1.03, 1.04 and 1.07 of the Rules of Professional Conduct for Barristers and Solicitors. The Committee imposed orders censuring Mr Austell, imposing a fine of $2000, reducing his fees to $1.00 (including ordering a refund of fees paid), imposing costs, and ordering publication.

In his application for review Mr Austell accepted that the finding of the Committee as to conduct unbecoming was open to it and did not seek to challenge that aspect of the decision. Rather he challenged the orders made. In particular Mr Austell sought a

review of the decisions of the Committee to reduce his fees in this matter and that his name be published.

At the hearing Mr XX (for Mr Austell) raised orally that he considered that the fine imposed should also be revisited (although in his written submissions he stated that this aspect of the decision was not challenged). The suggestion was not pressed. I have, however, considered it and for the reasons given below the fine imposed by the Standards Committee will stand.

I also observe that prior to the hearing I signalled that given the apparent seriousness of the conduct involved there was a possibility that the matter was better dealt with before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal by way of prosecution. While the question was not directly addressed, the submissions on behalf of Mr Austell were largely directed to the characterisation and seriousness of the offending. In the event I do not consider it necessary to address that matter further.

The parties have entered into an arrangement in respect of the orders of the Standards Committee to reduce and refund fees and I will not consider the substance of those orders further.

The central question to be determined is therefore whether or not Mr Austell's name should be published. There were two main strands to the argument of Mr Austell in support of his contention that publication was not appropriate. The first was that he had not been accorded a proper hearing before the Standards Committee both in respect of the substantive question of his conduct and also in respect of the question of the proper penalty. The second (and related) ground was that the Committee mischaracterised his conduct. While it was accepted that aspects of his conduct fell short of that required of a lawyer, he argued that it did not amount to a conflict of interest as characterised by the Committee.

Mr XX for Mr Austell argued that the Committee failed to adhere to the principles of natural justice in the way it considered this matter in two regards. First, it was argued, the Committee failed to put to him the nature of the allegations against him. Second, once the Committee had concluded that a sanctionable breach had occurred, it failed to give him an opportunity to be heard on the nature of the sanctions imposed.

Natural Justice: Notification of nature of allegation

The original complaint was made to the Auckland District Law Society by lodgement of a "request for fee review " form and "request for complaint investigation" form. It appears that that complaint was originally made shortly after 1 August 2008 when the Auckland District Law Society ceased to have jurisdiction to consider complaints

against lawyers. The complaint was then transferred to the New Zealand Law Society which assumed jurisdiction over the matter pursuant to the Lawyers and Conveyancers Act 2006.

Mr Austell was supplied with a copy of the complaint and accompanying material by the New Zealand Law Society by a letter dated 4 September 2008. That letter enclosed the forms previously submitted to the Auckland District Law society (request for fees review and request for complaint investigation), a five page letter of Ms Somerset dated 18 August 2008 outlining her grievances and a copy of an affidavit filed in Court by Mr Austell (in an action to recover fees) with hand-written notations on it that was particularly objected to by Ms Somerset. The letter from the Law Society stated that its purpose was to notify Mr Austell of the complaint and give him an opportunity to respond.

The file of the Standards Committee also indicates that a telephone conversation occurred between an officer of the Society and Mr Austell on 9 September in which Mr Austell indicated that he would seek an adjournment of proceedings in the District Court against Ms Somerset. That file note also records that Mr Austell was informed that due to the change in the law there would be no costs revision of his bill.

Mr Austell responded to the complaint by providing to the Society a full copy of the affidavit that he had filed in the District Court in proceedings against Ms Somerset for recovery of his fee which recounted his version of events and attached relevant documents and correspondence.

On the basis of the information provided the Standards Committee resolved to inquire into the complaint. This was communicated to Mr Austell who was requested to provide a copy of the draft separation agreement he had prepared and a breakdown of the time he spent with Ms Somerset, her former husband, and accountants or other advisors.

Mr Austell responded on 10 November. In his response he focussed on the quantum of costs. The Standards Committee considered the matter further and sought additional information. On 12 January 2009 the Society wrote to Mr Austell noting the allegation of overcharging and requesting further information to complete the inquiry into the level of fees charged. On 21 January 2009 Mr Austell responded with a lengthy letter justifying the quantum of his fee and attaching various supporting documents.

In that letter Mr Austell observed in paragraph (d) on page 5 that Ms Somerset “is now alleging that I acted for both her and Y. This is at the very least an allegation of misconduct and if it is persisted with will become a notifiable event and I will need to advise my insurers”. At para 12 on page 7 of the same letter he stated “I take the

allegation that we were acting for Y as well as Ms Somerset seriously" and proceeded to respond to the allegation. In light of this statement it cannot be suggested that Mr Austell was not aware that a serious allegation of conflict of interest had been made against him.

Mr Austell was informed by letter of 25 February 2009 that the matter would be heard on the papers by the Standards Committee on 26 March 2009 and that submissions should be made before that date. Submissions were specifically invited on the nature of the alleged conduct, the orders that the Standards Committee should make, and the possibility of publication. Mr Austell responded by a brief email of 4 March stating that he had nothing further to add other than to state "I am not guilty of misconduct".

I also observe that in a letter to Mr Austell of 21 July 2008 (which was supplied to the Standards Committee) Ms Somerset's lawyer had clearly alleged "you have directly and effectively acted for both [Ms Somerset and Y]". That letter was sent about a month before the complaint was made to the Society by Ms Somerset.

From the internal notes of the Society it is clear that the question of whether a conflict of interest existed was at the forefront of the mind of the Committee. However, in its investigation it considered that it required further information to assist it in approaching the question of the level of the fee. It appears that this led Mr Austell to assume that the sole concern of the Committee was with the level of the fee. Fundamentally Mr Austell argues that he was not fairly put on notice that the Committee was investigating and considering the allegations of conflict of interest as well as the fee arrangement.

Standards Committees are obliged to send particulars of a complaint to the person to whom the complaint relates and invite that person to make a written explanation (s 141(a) Lawyers and Conveyancers Act). That obligation was clearly complied with. However, what the Committee did not do was keep Mr Austell informed of its own views as they developed. The gist of the argument for Mr Austell was that the Committee, in its communications to Mr Austell made it appear that it was concerned only with fees and not with conduct. I must determine whether in this the Committee failed to adhere to the principles of natural justice.

There is clearly no obligation for a Standards Committee to explicitly notify a practitioner of the exact findings that it might make. While the laying of a charge is an appropriate procedure for the Disciplinary Tribunal the legislation makes it clear that the procedure of the Standards Committee is a summary in nature. There can be no general obligation on a Committee to let a lawyer know the direction of its deliberations

as its investigation progresses (although it may choose to do so as part of its investigative process).

Moreover a large part of the information which was relevant to the determination of the Committee was found in the affidavit of Mr Austell (with the annexed documents) which he provided. While the correspondence of the Committee demonstrated that its investigation was seeking further information in respect of the fees arrangement (and in particular how much time was spent with Y), this did not preclude it from making findings in respect of the wider matters. It is also clear that Mr Austell was aware that the findings of a professional disciplinary nature might be made against him. As already noted, in response to the notice of hearing of the Standards Committee he replied by an email dated 4 March 2009. In that email he stated "I am not guilty of misconduct" and "in the event of a finding of misconduct…[the Committee ought] reserve any decision to publish until any rights of appeal by either party have been exhausted".

The issue of what guidance should be given to a lawyer who is the subject of a complaint was addressed in *B v Canterbury District Law Society* [2002] 3 NZLR 113 where at para [11] Randerson J stated:

> Generally, referring the letter of complaint for comment will be sufficient but if the letter does not make the substance of the complaint clear, the committee may need to clarify it for the practitioner.

I observe that that case was decided under the provisions of the now repealed Law Practitioners Act 1982. Under that Act the Complaints Committees were empowered only to lay a charge or dismiss a complaint (with limited powers to impose costs orders). Under the Lawyers and Conveyancers Act the Standards Committees have considerably wider powers to make findings of unsatisfactory conduct (but not misconduct) and impose significant punitive and remedial orders. As such it is appropriate that Standards Committees and the Complaints Service ensure that the lawyer is aware of the nature of the allegations made against him or her. This may be either from the complaint itself, by correspondence from the Complaints Service or from some acknowledgement by the lawyer demonstrating that they are aware of the nature of the allegations.

It would not be proper to impose an onerous burden on Standards Committees or to require any particular framing of the allegations made against the lawyer. However as noted in *B v Canterbury District Law Society* [2002] 3 NZLR 113 at para [48] in some cases merely sending the letter of complaint will not be enough and it might be necessary to separately identify the particulars of the complaint intended to be considered. It was also noted there that if matters emerge in the course of the

investigation which are not referred to in the complaints, there may be a need to inform the lawyer that these matters are to be considered.

Most basically because the Committee had power to make a determination in respect of Mr Austell's interests it had the duty to ensure that he be given fair opportunity of correcting or contradicting any relevant information prejudicial to his or her view received by the decision maker: *Singh v Auckland District Law Society* [2000] 2 NZLR 604 para [58].

Of course a Committee could not reach a decision on a matter that it had positively led the lawyer to believe was not in issue and need not be addressed. However, a Committee is not prevented from making a finding adverse to a lawyer simply because it has not put the lawyer on notice that it is in issue and its requests for information have focussed on a different aspect of the complaint. The starting place is that it is for the lawyer, in full possession of all of the information, to address whether the course of conduct which is apparent from that information, falls foul of any of the applicable professional standards. Only where the original complaint is obscure and the nature of the allegation cannot reasonably be seen from the complaint on its face does an obligation arise on the Complaints Service or Committee to point to particular matters of concern.

Having examined the material and the responses of Mr Austell I am satisfied that he was fully aware of the allegation of conflict of interest and responded to it. While given the decision of the Committee he may now wish that he had given it more attention, the fact that the Committee did not explicitly put Mr Austell on notice that a finding of a conflict of interest was possible did not result in a breach of natural justice. In any event, Mr Austell has now been fully heard on those questions which have been considered afresh.

Natural Justice: Hearing on Penalty

It was also maintained on behalf of Mr Austell that once the Committee had concluded that a conflict of interest existed he ought to have been given an opportunity to be heard on the issue of what orders ought to be made. On 25 February 2009 the Complaints Service notified Mr Austell that the matter was to be heard on the papers on 26 March 2009. In that notice he was advised to make submissions on penalty and publication.

The starting place in assessing the obligations of the Standards Committee is the Act itself. The power of the Committee to make orders is found in s 156 of the Act. Neither that section nor any other provision of the Act requires the Committee to seek the

views of the lawyer after making a finding against him or her but before imposing orders. The Committee is, however, bound by the rules of natural justice as stated in s 142(1) of the Act.

In his submissions for Mr Austell, Mr XX suggested that it would almost always be the case that where the Committee makes a finding against a lawyer the lawyer must be given the opportunity to make submissions on the orders made. In making that argument he referred to the processes of the criminal courts, and also to the Disciplinary Tribunal. Of course the jurisdiction of the Standards Committees (and Disciplinary Tribunal) is not criminal and considerable caution must be exercised in importing criminal rules of procedure into the professional disciplinary context: *Z v Complaints Assessment Committee* [2008] NZSC 55.

I observe that this is not a situation in which Mr Austell was putting an argument to the Committee which was inconsistent with him making submissions on penalty prior to an adverse finding being made. If, for example, a lawyer was maintaining that he did not engage in the course of conduct alleged it would be inconsistent to also make a submission on penalty prior to a decision on that matter. In such a case it would be necessary for the Committee to resolve the issues of fact before seeking submissions on penalty. In the present case there was no material dispute of fact about the conduct engaged it. The question was whether the conduct amounted to a breach of professional standards.

In the present case there was no bar to Mr Austell making submissions on the appropriate response of the Committee should it conclude (as it did) that the conduct engaged in amounted to a professional breach. There has been no breach of natural justice in this regard.

Characterisation of conduct

While Mr Austell does not dispute the finding of the Standards Committee that he was guilty of conduct unbecoming, he states that his conduct was not unprofessional to the extent and in the way stated by the Standards Committee. This is of course relevant to the question of publication. In its decision the Standards Committee found that the arrangement entered into by Mr Austell with Ms Somerset and her husband "constituted a clear conflict of interest" in breach of the Rules of Professional Conduct. It was characterised as a "serious" breach and the Committee stated that he "should never have acted for both Ms Somerset and her husband Y". It was submitted on review that this was a mischaracterisation of the conduct and that in reviewing the

decision of the Committee to publish the name of Mr Austell I should take into account that the Committee wrongly construed the conduct.

It was accepted that the fee agreement entered into was inappropriate (and that the finding of the Committee of conduct unbecoming is able to be upheld in that regard). However it was argued that the conduct of Mr Austell in dealing with both Ms Somerset and her husband was not a conflict of interest. In considering the issue of publication I must therefore examine the nature of the work done by Mr Austell and his relationship with Ms Somerset and her husband. A primary source of information in this regard is Mr Austell's affidavit placed before the District Court and the annexures to it.

Ms Somerset instructed Mr Austell's firm, on 3 September 2007 to assist her in respect of her separation from her husband (Y). An estimate for the preliminary work of $950 was provided. Mr Austell has deposed that he considered Ms Somerset to be a difficult client and that she did not trust her former husband and she believed that her husband had been hiding assets. He stated that Ms Somerset's instructions were "vague".

It appears that Y chose to act largely for himself at least at the outset (although he was advised by a barrister in some way). Mr Austell dealt with Y directly in identifying assets of the relationship. It appears that there was a considerable amount of work involved in ascertaining the extent of various financial assets. On 23 October Mr Austell indicated in a letter to Ms Somerset of that date that he would "On your behalf, meet with Y and attempt to get one comprehensive list of all the assets". At this time a fee of $8 000 - $10 000 was estimated. In the ensuing months Mr Austell worked with Y in ascertaining the assets of the relationship.

Mr Austell has deposed that in October or November 2007 Ms Somerset would be "aggressive and hostile and very scattered in her thinking" and that he "started to question [Ms Somerset's] ability to give us clear instructions".

Some time prior to 11 December 2007 it appeared that Mr Austell's approach changed from dealing with Y solely to obtain information, to dealing with him hoping to reach a negotiated agreement between Y and Ms Somerset. On 11 December he wrote to Ms Somerset and Y jointly.

That letter is written in a tone which suggested that both Y and Ms Somerset are being treated as clients. One paragraph reads:

> Our philosophy is to work very hard to listen to our client's needs and to work wherever possible towards a unique solution that is amicable, cost effective and prompt. You are in a rather unusual situation here because Y is not currently represented by a lawyer. Of course any sign-off of the separation agreement

> will require him to be independently advised, but in the meantime we seem to have developed a working relationship that gives as a good deal of optimism.

The letter continues:

> We have also been able to work with both of you to bring about a clear understanding of the incredibly complex "money go round" that has occurred in your financial affairs over the period in question.

The letter proceeded to outline proposed steps which included negotiating on values when they are not agreed, drawing up a plan for division, and transferring ownership of assets to new entities. The letter also extols Mr Austell's "unique collaborative approach to what has been a complex dispute resolution activity".

The letter stated that "We cannot of course act for Y, but in effect I have been liasing with him to carry out the functions that his lawyer would ordinarily perform". It was against the background of this letter that Mr Austell revised his estimated fee from $10 000 to $35 000 and suggested that they be shared equally between Ms Somerset and Y. It was observed that while the involvement of lawyers was a necessary evil "You are both in the process now and we are doing the business for the both of you".

A further letter was sent to both Ms Somerset and Y by Mr Austell on 20 December in a similar vein. It also raised the fact that Y would agree to contribute to fees only on the basis of a completed separation agreement and that that was acceptable to the firm. That letter enclosed a bill of $12 050.

In the course of the dealings between the parties a draft separation agreement and related agreement in respect of a holiday home was produced.

Mr Austell stated in his affidavit that he had primary responsibility for dealing with Y and he was "acutely aware" that he would need independent advice. He states that he made it clear that he acted for Ms Somerset and that "Y would need any agreement he made with me reviewed by his solicitor". In a later letter (of 10 November 2008) to the Complaints Service Mr Austell stated that there were 40 documents which indicated contact with either Y or his advisers. Mr Austell declined to give a clear indication to the Committee of how much time he had spent with Y on the basis that to do so would be speculative.

The approach of Mr Austell is captured by his recounting of the auction of the family home when it did not reach the hoped for price. He states that at that time he "spent a significant amount of time shuffling back and forth between [Ms Somerset] in one room and Y in the other attempting to finalise the separation agreement".

Ms Somerset's view of the relationship can be seen from her draft affidavit which she tendered to the Society. In paragraph 10 of that affidavit she complained that in her view Mr Austell was unduly protective of Y's interests and Mr Austell was effectively working for Y.

A final document which was tendered at the hearing of this review was a letter dated 30 March 2008 from Y to Mr Austell. It is unclear whether that document had been seen by Ms Somerset or her counsel previously. That letter was tendered in support of the argument that Mr Austell was not acting for Y. In it Y complains that the proposed settlement penalised him unduly. He states that "at meetings with Mr Austell and D I am being asked how much I will concede in order to achieve settlement".

I have considered all of the information put before the Standards Committee as well as the additional information provided at the hearing of the Review and the submissions. Mr XX argued that there was no professional breach other than the attempted implementation of the fee arrangement that was disadvantageous to Ms Somerset. I do not think that this is the case. The Standards Committee was correct in its conclusion that Mr Austell had acted in a situation where he was not acting exclusively in the interests of Ms Somerset but was also assuming duties to Y. While the relationship between Y and Mr Austell may not have mirrored the usual lawyer-client relationship I take into account a number of features of the dealings which taken together show that it was not consistent with the duties Mr Austell owed to Ms Somerset:

[a] Most obviously the fact that it was contemplated that Y would pay half of Mr Austell's significant fees suggest that Y could expect a level of service and attention to his interests.

[b] While at the outset the intention may have been simply to gather information, at some stage the objective changed. Mr Austell assumed the role of a mediator between the interests of Ms Somerset and Y in ascertaining the nature of property, how it would be disposed of, and the terms of a final settlement.

[c] Mr Austell, by his own admission, undertook for Y work that would usually be done by "his" lawyer.

[d] Over the course of the retainer Mr Austell's attitude to Ms Somerset became inconsistent with a relationship of trust and confidence. He considered Ms Somerset to be "aggressive, hostile, and very scattered in her thinking", He doubted her capacity to give clear instructions.

[e] In seeking to mediate an agreement between Ms Somerset and Y it is clear that Mr Austell had numerous and extensive meetings with Y without Ms Somerset being present.

[f] Mr Austell wrote to Ms Somerset and Y jointly in a manner which indicated he was working for them both. No evidence of contemporaneous correspondence reporting to Ms Somerset alone regarding the matters in issue and appropriate strategies was provided. In an exclusive lawyer-client relationship such direct communications would be expected.

Taken alone none of the above factors alone would show a breach of obligation by Mr Austell. There is no prohibition on a lawyer dealing direct with an unrepresented party (including if necessary without the attendance of his or her own client). However the course of action adopted by Mr Austell was fraught with considerable risk and when viewed globally Mr Austell did not adhere to his professional obligations.

I conclude that the relationship between Mr Austell and Y went considerably beyond that which would be appropriate between a lawyer and self represented person. It appears that Mr Austell considered it appropriate to seek to mediate a settlement between Y and Ms Somerset at the same time as acting as Ms Somerset's lawyer. In so doing he engaged in work for Y which by his own admission included work usually done by a lawyer. In his approach to reaching a resolution of the dispute between Ms Somerset and Y Mr Austell sought to satisfy what he saw as the legitimate interests of both Ms Somerset and Y. That is not the role of a lawyer whose loyalty must be undivided.

Mr Austell has maintained that his approach was appropriate. This suggests a concerning lack of sensitivity to his obligations of loyalty to his clients and a continuing failure to appreciate the nature of his lapses.

Rule 1.03 of the Rules of Professional Conduct for Barristers and Solicitors provides:

> A practitioner must not act or continue to act for any person where there is a conflict of interest between the practitioner on the one hand, and an existing or prospective client on the other hand.

Mr Austell breached r 1.03 when he negotiated a fee agreement which was manifestly against the interests of his client. Given that the fees ultimately claimed related to work done for Y Mr Austell was also in breach of r 3.01 in so far as having regard to the interests of Ms Somerset the fee was not fair and reasonable.

Rule 1.04 of the Rules of Professional Conduct for Barristers and Solicitors provides:

> A practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of all parties.

Mr Austell breached r 1.04 when he undertook the work of a lawyer for both Ms Somerset and Y in relation to the separation agreement. In so doing he also failed to address the conflict of interest in the manner set out in r 1.07.

In light of the forgoing the finding that Mr Austell was guilty of conduct unbecoming a solicitor was appropriate, as was the characterisation of the conduct of Mr Austell as a clear and serious conflict of interest.

Publication

The foregoing analysis was necessary to ascertain whether the basis upon which the Standards Committee resolved that it was proper to publish Mr Austell's name was erroneous. I have concluded that it was not.

However, I accept that any decision of a Standards Committee can be revisited on review. I accept the submission of Mr XX that my powers of review are not restricted to an examination of the procedure of the Standards Committee and I ought to consider the matter afresh. However I also recognise the fact that the Standards Committee comprised of fellow lawyers and a lay observer has concluded that publication is proper.

The power of a Standards Committee to publish its decisions is set out in s 142(2) of the Lawyers and Conveyancers Act 2006 which states that a Committee may direct such publication of its decisions as it considers necessary or desirable in the public interest. While the proceedings of the Committees are held in private there does not appear to be any particular presumption as to whether or not decisions should be published. As such the question of publication should be addressed on the basis of recognised applicable principles and without any particular predisposition either way.

I also take into account a number of factors which may not have been before the Standards Committee. In particular:

[g] Ms Somerset has adopted that stance that the question of publication is an "intra-professional" matter and is happy to abide by the decision of the professional body in the matter. She does not actively seek publication of Mr Austell's name.

[h] Mr Austell has not had a negative finding on a matter of professional discipline made against him previously.

[i] Mr Austell apologised orally in person to Ms Somerset and expressed contrition in respect of his lapses as he saw them.

[j] Mr Austell provided references from two practitioners of standing.

The main thrust of the submissions for Mr Austell in respect of publication was that he had made an error of judgement in structuring the fee arrangement with both Ms Somerset and Y in the way he did. It was submitted for Mr Austell that viewed in context this was not a serious professional lapse and in light of this the publication of the details of the infringing would be disproportionate. I have not accepted his arguments that the offending was not serious and restricted only to the fee arrangement.

The breaches by Mr Austell were serious. They showed a lack of understanding of his professional obligations and resulted in a failure to protect and promote the interests of his client, Ms Somerset, to the exclusion of the interests of others. The seriousness of the transgression is a central consideration when considering whether or not the Standards Committee was correct in its decision to publish details of the offending.

I was referred to paragraph 46 of the guidelines of this office which deals with publication. That paragraph provides:

> In general the LCRO will not publish the names of lawyers or conveyancers who are found guilty of unsatisfactory conduct for the first time. This is due to the fact that the regulatory framework which the LCRO oversees is new (having commenced on 1 August 2008). The focus of the framework is on complaints resolution and improvement of the quality of legal services for consumers. The interim position of the LCRO is that the public interest in achieving these objectives is best served by adopting a presumption against publication of names of practitioners. This stance will be reviewed in due course.

The guidelines proceed to further state that:

> It should be noted that the policy of not publishing the names of practitioners who are found to have been guilty of unsatisfactory conduct may be departed from. This may be appropriate where the conduct of the practitioner demonstrates a flagrant disregard of the relevant rules or the obligations owed to a client or a severe or repeated departure from acceptable standards.

I observe that the policy of this office in not publishing names is founded in part on the consideration that some of the obligations now imposed on lawyers are new, having come into effect only on 1 August 2008. Mr Austell's breaches concerned conduct which occurred prior to 1 August 2008 and was a breach of well known and established

standards. Mr Austell's conduct amounts to a severe departure from acceptable standards and would warrant consideration of publication in any event.

I also observe that I am reviewing the decision of the Standards Committee (rather than making a decision on a new finding of professional breach). In this respect regard must be had to the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 to which the Standards Committee was obliged to have reference. Regulation 30 provides that the Standards Committee must take into account the public interest and, if appropriate, the impact of publication on the interests and privacy of the complainant; clients of the censured person; relatives of the censured person; partners, employers, and associates of the censured person; and the censured person.

It was submitted for Mr Austell that the public interest factors of deterrence and education of practitioners did not warrant publication in this case and would be "disproportionate". It was also submitted that publication was not necessary to provide protection to the public and the profession.

In its decision the Committee referred to a number of authorities. In *S v Wellington District Law Society* [2001] NZAR 465 (which concerned an appeal from a decision of the Disciplinary Tribunal not to suppress a name) it was noted that the question of publication:

> requires consideration of the extent to which publication of the proceedings would provide some degree of protection to the public, the profession, or the court. It is the public interest in that sense that must be weighed against the interests of other persons, including the practitioner, when exercising the discretion whether or not to prohibit publication.

The Committee also referred to *Director of Proceedings v Nursing Council of New Zealand* [1999] 3 NZLR 360 in which the High Court was considering the basis upon which presumptively private proceedings against a nurse should be open to the public. It was observed in that case (at p 383 / 384) that public accountability was an important consideration which must be taken into account when considering such matters. Baragwanath J in that case also identified that values of public education and alerting to risk are related and also of significance. His honour also recognised the privacy interests of the practitioner complained against.

I am also guided by *Dean v Wellington District Law Society* (High Court Wellington, 26 July 2007, Randerson, Ronald Young, Simon France JJ CIV-2006-485-2961) where the court overturned an order suppressing the name of the practitioner. That decision

was made even though the offending was not at the highest end. A compelling factor was the public interest in potential clients knowing of the disciplinary charge having been established against the practitioner.

There is a strong public interest in consumers of professional services knowing not only that a practitioner has fallen short of the expected professional standard, but also who that practitioner is: *Zimmerman v Director of Proceedings* (High Court Wellington, 29 May 2007 Clifford J CIV-2006-485-761 para [13]. In this regard the Committee also referred to *Gill v Wellington District Law Society* (High Court Wellington, 7 December 1993, Barker, Ellis, and Doogue JJ, AP120/93) where the Court stated "We consider that the public has a right to know what practitioners have infringed the standards in the profession".

There is no evidence before me of any particular detrimental impact that an order of publication would have on Mr Austell. In light of this I infer that there would be no exceptional or unexpected affects of an order of publication. Given the fact that no particular submissions were directed to the question of the impact of publication I have difficulty in accepting the submission that the effects of publication would outweigh the public interest. Ms Somerset has indicated she will abide by the profession's decision on this matter. In any event there will be no publication of her identity. There appear to be no other particular interests (such as those of clients, relatives, partners, employers, or associates of Mr Austell) which need especial consideration in this case.

I consider that in all of the circumstances the interests of the public outweighs the personal interest of privacy of Mr Austell and that the decision of the Standards Committee to publish the facts of its decision and the identity of Mr Austell was a proper one.

Fees

When this matter came before me for hearing I signalled that the question of reduction of fees was one which it would be open to the parties to resolve between themselves. The parties took the opportunity in an adjournment to consider this question. An understanding was reached. Mr Austell wanted to resolve all matters together however it was ultimately accepted that it was not open to the parties to agree between themselves disciplinary matters such as the finding of conduct unbecoming and whether identifying details be published. At the hearing Mr Austell's counsel stated that the parties had reached agreement on fees and insofar as he was concerned the

agreement stood regardless of how other matters were decided. However, I indicated that if a decision on publication adverse to Mr Austell were made and it was considered that further consideration of the fees question was required (including putting any agreement into the form of a consent order) the matter could be addressed further. If this is required by either party application should be made to this office within five working days of the date of this decision.

Costs

It is also appropriate that an order of costs be made against Mr Austell in light of the fact that he has been found to fall short of the applicable professional standards and has been unsuccessful in this application for review. This matter was conducted by a hearing in person and was of average complexity. I take account of the *Costs Orders Guidelines* of this office. Mr Austell is required to pay $1600.00 in respect of the costs of this review.

Decision

The application for review is declined pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Standards Committee is confirmed. I order as follows:

- Mr Austell is to pay $1600.00 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.
- If the issue of fees is not finally resolved between the parties either party is at liberty to apply for orders in that regard within five working days of the date of this decision.

DATED this 2nd day of September 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:

Mr Austell as Applicant
MsSomerset as Respondent
Auckland Standards Committee 4
The New Zealand Law Society