LCRO 192/2013

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 [X]
BETWEEN	**GK** Applicant
AND	**ZR** Respondent

DECISION

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

Introduction

[1] A decision was issued in respect of this review on 18 August 2016 setting out the relevant facts and conclusions arising from Mr GK's complaint. The review was determined on the basis that there had been unsatisfactory conduct on Mr ZR's part pursuant to s 12 of the Lawyers and Conveyancers Act 2006 (the Act) as follows:

(a) Holding money on behalf of Mr GK as a barrister sole; holding money received in advance of providing legal services and an invoice, and not accounting for money received in contravention of rules 9.3 and 14.2(e) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, and failing to comply with the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, regs 9 and 10, are unsatisfactory conduct pursuant to ss 12(a), (b) and (c) of the Act.

(b) Failures to comply with obligations in relation to legal aid, including not advising Mr GK about his obligations and taking a top up payment, are unsatisfactory conduct pursuant to ss 12(a), (b) and (c) of the Act.

[2] The parties were provided with an opportunity to tender submissions with respect to:

(a) The imposition of a censure and/or fine payable to New Zealand Law Society (NZLS).

(b) Factors affecting whether a direction should be made pursuant to s 206(4) of the Act that this decision, including Mr ZR's name, should be published; and

(c) Whether Mr ZR should be ordered to contribute to the costs of this review, pursuant to s 210 of the Act.

[3] The Committee imposed orders under s 156(1) of the Act, and decided not to publish Mr ZR's name. The orders imposed were a reprimand, an order that Mr ZR refund $3,000 to Mr GK, and pay costs of $750 to the NZLS. The reprimand remains on his record, and Mr ZR says he has otherwise complied with those orders. Those orders can be confirmed, reversed or modified on review.[1]

[4] Section 206(4) also enables a Legal Complaints Review Officer (LCRO) to direct publication of decisions as she or he considers necessary or desirable in the public interest. Unlike publication by a Committee pursuant to s 142(2) and regulation 30 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, it is not necessary for the practitioner to have first been censured. A direction that the decision including Mr ZR's name be published has been carefully considered, with no opposition from Mr GK, and the assistance of submissions and authorities provided by counsel for Mr ZR.

Submissions for Mr ZR

[5] Counsel contends that Mr ZR was not given the opportunity to be heard in relation to the fact that he took and held money in advance and failed to account for it, or that he took an unauthorised top up payment. It is submitted that the $15,000 was a retainer, which included no element of fees, and that Mr ZR could take a retainer in advance of legal aid being granted without then having to seek authorisation from the Legal Services Agency (LSA) to retain the money.

[6] Counsel contends that Mr ZR received the $15,000 before the Act came into effect on 1 August 2008. That being the case, the money was absolutely and incontestably his. Counsel submits the $15,000 cannot subsequently be recategorised

[1] Lawyers and Conveyancers Act 2006, s 211(1)(a).

"to impress [Mr ZR's] funds somehow with an obligation to account for it and/or to disclose it to the Legal Services Agency".[2] *McGuire v Sheridon*[3] and *Sissons v Canterbury–Westland Standards Committee 2*[4] are distinguished, while the effect of *Weal v Wilson*[5] is discussed. Counsel submits that Mr ZR's conduct is at the "lowest end of the scale". On that basis, counsel submits a fine or censure is not appropriate in addition to what the Committee ordered.

[7] Counsel also opposes publication of Mr ZR's name on several bases including that the Committee's decision has already been published in a manner that does not identify Mr ZR, so that re-publication would be double jeopardy. It is submitted that publication is counter to the presumption of privacy of the review process and that the conduct occurred a long time ago. Counsel submits there is no precedent value in publishing Mr ZR's name in the context of a one-off error on his part in unusual circumstances at a time the legislation changed, reoffending is said to be highly unlikely, and that, on the basis of counsel's analysis, "offending is at the lower end of the scale".

[8] Counsel submits Mr ZR has "totally been successful" on review, has paid $750 costs to NZLS arising from the Committee process, and should not be required to pay anything further.[6]

Analysis

[9] Receiving money, charging a fee and taking a payment are not one and the same.

[10] It is accepted that Mr ZR received $15,000 before 1 August 2008.

[11] Counsel submits the $15,000 cannot subsequently be recategorised "to impress [Mr ZR's] funds somehow with an obligation to account for it and/or to disclose it to the Legal Services Agency".

[12] By paying back most of the $15,000 that he received, Mr ZR acknowledged implicitly that money was not absolutely and incontestably his. That undermines the position on which counsel's primary submission relies.

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[2] Submissions dated 15 September 2016 at [5](1).
[3] *McGuire v Sheridon* [2011] NZCA 15.
[4] *Sisson v Canterbury – Westland Standards Committee 2* [2013] NZHC 349, [2013] NZAR 416.
[5] *Weal v Wilson* HC Whangarei CIV-2008-488-73, 22 July 2008.
[6] Above n 2 at 12.

[13] Although counsel's submission that the $15,000 was a retainer has some attraction, the fact that Mr ZR paid back all but the $3,000 he took for his private fees is contrary to the definition of a retainer on which counsel relies.

[14] Mr ZR's conduct is a strong indication that he did not consider he had taken a $15,000 retainer, as counsel would define that term, or that the $15,000 was absolutely and incontestably his.

[15] It is clear from *Weal* that Mr ZR could have charged a fee for privately funded work done before aid was granted. That is not what he did. 1 August 2008 was long past when Mr ZR charged Mr GK a fee.

[16] Mr ZR received the $15,000 before an application for legal aid was made. Aid was granted. Mr ZR invoiced LSA. LSA paid Mr ZR's fees. Mr ZR quantified the fee Mr GK would pay him privately, although he did not issue an invoice. Mr ZR then took the agreed fee by deducting it from the money he was holding on Mr GK's behalf. He had Mr GK's authority to do so, and he refunded the balance as they had agreed.

[17] Mr ZR was a listed provider. He took a payment from Mr GK, to whom he had by then provided services under the legal aid scheme. He did not seek authorisation from LSA. It is not the role of this Office to decide whether the payment was authorised by or under the LSA 2000, or by regulations made thereunder.

[18] According to *Weal*, the second possibility that was consistent with the scheme of LSA 2000 and s 66 of that Act arose after aid had been granted. That was the possibility that the client "could be charged and undertook to pay any top-up authorised".[7]

[19] This Office cannot say whether or not Mr ZR could have charged Mr GK. That is a decision for the LSA. If the LSA had been given the opportunity to comment, it may have decided Mr ZR could charge Mr GK privately. Expressed on the basis set out in *Weal*, Mr GK could have undertaken to pay a top up: but not without authorisation from the LSA.

[20] The disciplinary issue is that Mr ZR should not have taken the payment from Mr GK without first seeking authorisation from the LSA. If he had sought authorisation, he would have known whether he could take payment from Mr GK or not.

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[7] *Weal v Wilson* above n 3, at [56].

[21] It bears repeating that the whole situation could probably have been avoided if Mr ZR had channelled the $15,000 through his instructing solicitor's trust account, rather than paying it into his personal account. Any "funds held on trust for a client are entitled to the special protection offered by the stringent rules surrounding the administration of trust accounts …".[8] There is nothing new about instructing solicitors, or the protections solicitors' trust accounts provide for client money, and for barristers. Those protections were in place well before 1 August 2008.

[22] Mr ZR did not avail himself of those protections, nor did he provide for Mr GK to. He put the $15,000 out of his mind, then ultimately had to pay all of it back. His conduct disregards the privilege of lawyers handling others' money, and most people's sensitivity, including Mr GK's, around others handling their money. That kind of sensitivity provides solid ground for the stringent application of rules surrounding the administration of trust accounts. It also supports the view that Mr ZR's conduct warrants the description "cavalier".

Orders

[23] Against that background, consequential orders made pursuant to s 156 should follow logically from the decision. Section 156 orders vary in character: some are restorative, compensatory, remedial, or educative, others are punitive. I have considered all of the available orders.

[24] The starting point is the seriousness of the conduct. Next consideration is given to the aggravating and mitigating features. Reference may also be made to similar conduct, while noting that most situations are to be individually assessed.[9]

[25] For the reasons discussed above, Mr ZR's treatment of Mr GK's money was cavalier. Like the Standards Committee, I consider Mr ZR's conduct represents a serious contravention of his obligations to Mr GK and to the LSA.

[26] That said, this decision proceeds on the bases of four important features. First, Mr ZR made an error. Second, the circumstances surrounding Mr GK's payment are somewhat unusual in that events straddle a time of legislative change for the legal profession. Third, there is no cogent evidence to the effect that this is anything but an isolated incident. Four, it is not possible to say that Mr ZR did not act with the best of intentions when he paid Mr GK back.

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[8] *Otago Standards Committee v Zhao* [2016] NZLCDT 32 at [9].
[9] Above n 6, at [3].

Objectives of penalty in a disciplinary context

[27] As to the professional consequences that might follow, it is helpful to consider the purposes of the Act, and the comments of the Supreme Court in *Z v Dental Complaints Assessment Committee* that:[10]

> … the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

[28] The objectives of imposing orders in a disciplinary context as discussed by the Medical Practitioners Disciplinary Tribunal in *Re Wislang*[11] include:

> (a) To punish the practitioner.
> (b) As a deterrent to other practitioners.
> (c) To reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

Censure and Reprimand – s 156(1)(b)

[29] Censure and reprimand are punishments. They have general and specific deterrent effects. They stay on a practitioner's record. They also reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[30] The Committee reprimanded Mr ZR.

[31] There is no good reason to interfere with that order. It is confirmed.

Reduce/cancel fees and refund – s 156(1)(e), (f) and (g)

[32] The Committee ordered Mr ZR to refund $3,000 to Mr GK on the basis that Mr ZR was not entitled to charge Mr GK a fee privately in addition to legal aid payments he received. He paid that money although from subsequent submissions on review it might be inferred that he considers he should not have had to.

[33] Section 156(1)(g) provides for a refund to be ordered to give effect to an order that a lawyer reduce or cancel his or her fees pursuant to ss 156(1)(e) or (f). However, the Committee did not order Mr ZR to reduce or cancel the fees he had charged privately to Mr GK.

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[10] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97].
[11] *Re: Wislang* [1999] NZMPDT 102 at [6.12]; upheld in *Wislang v MPDT* DC Auckland No. 4554/99, 27 April 2000.

[34] The fee was agreed between Mr GK and Mr ZR after legal aid had been granted and used up. In that sense, it is counterintuitive to reduce or cancel the $3,000 fee.

[35] However, Mr ZR did not seek authorisation from the LSA to charge Mr GK a fee privately. He should have.

[36] Assuming it has not already been cancelled, the fee is cancelled pursuant to ss 211(1)(b) and 156(1)(f), and the order to refund pursuant to s 156(1)(g) is confirmed.

Fine – s 156(1)(i)

[37] Section 156(1)(i) provides for an order to be made requiring a practitioner to pay a fine not exceeding $15,000 to NZLS. A fine in that context meets the objective of punishment for a professional wrongdoing and acts as a deterrent to other practitioners.

[38] As to the former, I note the Supreme Court's direction that the purpose of the statutory disciplinary proceedings is to maintain appropriate professional standards, rather than to punish a practitioner for misbehaviour.

[39] Mr ZR made a serious but isolated error in somewhat unusual circumstances and took steps to address the issue with his client, but apparently not with the LSA. It is not part of the role of this Office to decide what implications, if any, there might be for Mr ZR's contract with LSA, however I am not convinced that imposing a fine would be a fair or balanced response to the conduct.

[40] No fine is ordered.

Costs – s 156(1)(n)

[41] The Committee ordered Mr ZR to pay costs of $750. There is no reason to reverse that order. It is confirmed.

Costs on Review – s 210

[42] Section 210 of the Act allows a LCRO to make such order as to the payment of costs and expenses on review as the LCRO thinks fit, with reference to the LCRO's Costs Orders Guidelines.'

[43] Paragraphs [3] to [5] of the Guidelines set out the circumstances in which costs may be ordered against a practitioner. Costs may be ordered where a finding of

unsatisfactory conduct is made or upheld against a practitioner in favour of NZLS. In general, where an adverse finding is made or upheld against the practitioner that practitioner will be expected to bear approximately half of the costs of the review.

[44] Although Mr ZR did not apply for a review, and did not request a review hearing, the result of this review is not favourable to him. In the circumstances Mr ZR is ordered to pay costs on review according to the guideline amount, of $1,200.

Publication

[45] The Committee did not consider it necessary or desirable for Mr ZR's name to be published.

[46] Counsel for Mr ZR submits it is not necessary or desirable in the public interest for Mr ZR's name to be published.

[47] Mr GK has not expressed any firm view.

[48] Although the process of review by this Office is presumptively private, the primary purpose of publication is to protect the public.

[49] Legal aid is administered by the Secretary for Justice through the LSA. A copy of the decision is provided to the Secretary for Justice. That enables the public purse to be protected if those responsible for it consider that is the proper response.

[50] The circumstances of the present matter, including its isolation and somewhat unusual features, are not such as to render publication of Mr ZR's name necessary or desirable to protect the public interest more broadly.

[51] A direction is made to publish this decision with identifying details removed.

Decision

[52] Pursuant to s 211(1)(a) and (b) of the Lawyers and Conveyancers Act 2006 the orders reprimanding Mr ZR pursuant to s 156(1)(b), ordering him to pay a refund pursuant to s 156(1)(g) and costs of $750 pursuant to s 156(1)(n) are confirmed.

[53] Pursuant to ss 211(1)(b) and 156(1)(f) of the Lawyers and Conveyancers Act 2006 Mr ZR is ordered to cancel his fee, if any, to Mr GK.

[54] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Mr ZR is ordered to pay costs of $1,200 to NZLS within 28 days of this decision.

DATED this 13th day of December 2016

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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 GK as the Applicant
Mr AB as the Representative for Mr GK
Mr ZR as the Respondent
Mr CD as the Representative of Mr ZR
[City] Standards Committee [X]
The New Zealand Law Society
Secretary for Justice