

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

DA

Applicant

AND

EB

Respondent

DECISION

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

Introduction

[1] Ms DA, a barrister, applied for a review of a determination of unsatisfactory conduct and orders made against her by the Standards Committee in a decision dated 19 November 2012 (the decision).

[2] The complainant was Ms EB, who had retained Ms DA to represent her in a dispute which arose during the course of her employment. Ms EB approached Ms DA directly in October 2010 to instruct her, and Ms DA arranged a reverse brief with her instructing solicitor, Mr FJ.

[3] Over a period of weeks Ms DA assisted Ms EB, and ultimately negotiated settlement of the employment dispute on terms that enabled Ms EB to resign and receive compensation from her employer, CR. CR also agreed to pay Ms EB's legal fees to Ms DA of \$19,550 including GST, on receipt of her invoice.

[4] Mr FJ played a very limited role early on in his professional relationship with Ms DA, receiving funds into his trust account on account of Ms DA's fees from Ms EB, and paying those out to Ms DA on receipt of her invoices. As the matter progressed,

without reference to Mr FJ or his trust account, Ms DA received payments directly from Ms EB of \$8,000 on account of her fees, and CR of \$19,550 in payment of her invoice.

[5] Ms DA rendered invoices to CR and Ms EB totalling \$33,486.94 (including GST and disbursements),¹ and received a total of \$32,800 from CR and Ms EB,² of which she has since refunded \$11,132.76 to Ms EB.³ Ms EB's complaint centres on the way in which Ms DA charged and accounted for her fees, and aside from some relatively minor issues, she says she was generally satisfied with Ms DA's work and the outcome she negotiated. Ms EB says the legal fees were too high, and because Ms DA failed to properly account to her, Ms DA was substantially overpaid.

[6] Ms EB complained to Ms DA that she had not explained her fees and charges at the start of her retainer, not provided time-sheets, bills, statements, progress reports or an accurate estimate when Ms EB had requested them and had spent time inefficiently. When Ms EB was not satisfied with the explanation or accounting she received from Ms DA, and she laid a complaint to the New Zealand Law Society (NZLS).

Standards Committee Process

[7] NZLS notified Ms DA of the complaint, and she replied, forwarding copies of her invoices, and submissions in which she said she should never have issued a GST invoice to CR, and would not make the same mistake again.⁴ Ms DA said there should be no refund because her fees were reasonable based on the amount of time she had spent on the file,⁵ but if there were to be any refund, it should be made to CR, and not to Ms EB.⁶

[8] When the complaint initially came before the Committee, it appointed a Costs Assessor to consider Ms DA's fees.

Costs Assessor's Report

[9] The Costs Assessor reports meeting with Ms EB and Ms DA, corresponding with the instructing solicitor, reviewing Ms EB's detailed written complaint, submissions, time and attendance records and pleadings, and viewing Ms DA's files. She referred to the settlement agreement Ms DA had negotiated for Ms EB, noting that in addition to payments to Ms EB, CR had agreed to "*contribute the sum of \$17,000 plus GST*

¹ Invoices for \$2,450 DA to FJ (19 October 2010); \$2,619 DA to FJ (29 October 2010); \$19,550 DA to CR (NZ) Limited (19 November 2010); \$8,867.24 DA to EB (25 January 2011).

² \$2,500 EB to FJ (16 October 2010); \$2,750 EB to FJ (27 October 2010); \$8,000 EB to DA (7 November 2010); \$19,550 CR to DA (2 December 2010).

³ \$10,682.76 referred to in page 6 of the Complaint, and \$450 referred to in an email to LCRO (13 March 2014).

⁴ Submissions DA to NZLS dated 28 August 2012 at [2.9] and [2.12].

⁵ Above n 4 at [2.16].

⁶ Above n 4 at [2.18].

towards Ms EB's legal costs upon receipt of a GST invoice"⁷ from Ms DA made out to CR.

[10] The Costs Assessor expressed concerns about the level of Ms DA's fees and the quality and quantity of client information Ms DA had provided to Ms EB. She referred to a refund Ms DA had given to Ms EB as being either \$10,682.76⁸ or \$10,628.76,⁹ and Ms EB's unmet expectation that she should receive a refund closer to \$13,000.

[11] The Costs Assessor considered the total of Ms DA's fees against the reasonable fee factors set out in Rule 9 and 9.1 of the Conduct and Client Care Rules,¹⁰ concluded that her fees were excessive, and should have been between \$10,000 and \$15,000 including GST. It appeared to the Costs Assessor that Ms DA's fees totalled \$22,141.24 including GST (which is not correct)¹¹ and recommended that Ms DA pay a refund of \$7,141.24 (including GST) to Ms EB.¹²

[12] The Costs Assessor also raised a number of matters which had come to her attention while carrying out her assessment. She observed that Ms DA had not provided a letter of engagement in compliance with Rules 3.4 and 3.5, and did not keep appropriate time and attendance records. She noted Ms EB had not been provided with regular invoices or statements, that Ms DA had accepted a bank cheque from Ms EB for \$8,000, although she is a barrister without a trust account, and that Ms DA had presented Ms EB with a personal cheque for \$10,682.76, without reference to her instructing solicitor or his trust account.

Parties' Submissions

[13] Both parties commented on the Costs Assessor's report. Ms EB challenged the accuracy of Ms DA's time records, and raised a number of issues including her belief that Ms DA did not use her time efficiently.

[14] Ms DA said she had kept Ms EB informed of her fees on "each occasion that she was required to make further payments into trust", and admits that she "did not provide her with invoices at the time".¹³ She describes Ms EB as a "very distressed and demanding client".¹⁴ She also referred to the time she spent carrying out a detailed analysis of factual material that she says was necessary for Ms EB's challenge to CR's minutes of disciplinary meetings, providing leverage in the negotiations.

⁷ Costs Assessor's Report dated 28 May 2012 at [9(j)(ii)].

⁸ Above n 7 at [9(k)] and [20].

⁹ Above n 7 at [22].

¹⁰ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹¹ See above n 1.

¹² Above n 7 at [22], [23] and [25].

¹³ Submissions DA to NZLS (emailed on 23 June 2012) at [1(c)].

¹⁴ Above n 13 at [3].

[15] Ms DA said that she had expected her fees would generally be paid through her instructing solicitor, but that when Ms EB had given her the \$8,000 bank cheque when she wanted her services urgently, Ms DA had simply paid the cheque directly into her personal account. Ms DA conceded she “probably should not have accepted the cheque”,¹⁵ and said that she has modified her terms of engagement and practices around providing those to instructing solicitors and clients,¹⁶ as a result of Ms EB’s complaint.

First Notice of Hearing

[16] The Committee decided to set the matter down for a hearing, and sent notices to the parties detailing the issues it intended to consider in the context of the relevant provisions of the Regulations and Rules, and inviting the parties’ submissions on possible referral to the Disciplinary Tribunal, publication and orders under s 156 of the Lawyers and Conveyancers Act 2006 (the Act).

Practitioner’s Submissions on Notice of Hearing

[17] Ms DA filed further submissions in response to the Notice of Hearing, reiterating her submissions on the Costs Assessor’s report, and emphasising her hourly rates, experience, reputation, ability, expertise, and the urgency and complexity of the work she did. She also tendered an open apology for mistakenly accepting a bank cheque and refunding money to Ms EB without appreciating the implications of doing so.¹⁷

Amended Notice of Hearing

[18] The Committee then issued an amended Notice of Hearing advising the parties that it would also investigate whether Ms DA had breached s 110 of the Act by receiving the \$8,000 cheque from Ms EB into her personal account.¹⁸

Parties Further Submissions

[19] Ms EB said that Ms DA had told her to make the bank cheque out to her, and repeated that she could not keep track of her financial position because she had not seen any invoices from Ms DA.¹⁹

[20] Counsel filed submissions on Ms DA’s behalf in which he confirmed that “although no further invoice had yet been issued”²⁰ Ms DA had accepted a cheque for \$8,000 from Ms EB and banked it to her personal account. Counsel’s submission was

¹⁵ Above n 13 at [2(f)].

¹⁶ Above n 13 at [7].

¹⁷ DA Submissions (28 August 2012).

¹⁸ Notice of Hearing (20 September 2012).

¹⁹ Email NZLS to EB (30 August 2012).

that Ms DA had earned the fees, so they were not “fees in advance” and therefore not regulated by s 110 of the Act, the Regulations²¹ or the Rules.

[21] Counsel was critical of the Costs Assessor’s report, highlighting the presence of CR’s lawyer at the time it agreed to pay Ms EB’s legal costs. Counsel submits that CR’s lawyer was under a duty to advise his client if he considered the fee was unfair or unreasonable, so it can be inferred he did not, because CR agreed to pay, and then paid the full amount, without complaint.

[22] Counsel submitted that Ms DA’s “fees do not meet the high threshold of a breach of rule 9 that justifies a finding of unsatisfactory conduct”,²² and formally tendered a refund for an overcharge of \$450 plus GST,²³ which Ms DA later paid (excluding GST).²⁴ In all the circumstances counsel commended the Committee to consider dealing with the complaint by taking no further action.²⁵

Standards Committee’s Findings

[23] The Committee considered all the information and submissions it had received, and decided to take no further action in respect of the way in which Ms DA maintained time and attendance records; her alleged failures to provide invoices to Ms EB, the lack of detail in the invoices she did produce; and the minimal costs deducted by the instructing solicitor that Ms EB says she was not advised of in advance.

[24] It also did not consider, on the basis of counsel’s analysis, that receipting Ms EB’s bank cheque for \$8,000 after doing the work, but before issuing an invoice, constituted a breach of s 110 of the Act.

[25] The Committee made findings of unsatisfactory conduct against Ms DA for breaches of rules regulating the provision of information to clients,²⁶ the charging of fees,²⁷ and two breaches of Trust Account Regulation 10 which regulates the way in which lawyers must deal with funds received.²⁸ It recorded all its findings as being made under s 152(2)(b) of the Act, but without specifying which part of the definition of unsatisfactory conduct each finding fell into under s 12 of the Act.

²⁰ Submissions [GW] to NZLS (2 October 2012) at [9].

²¹ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Trust Account Regulations.

²² Above n 20 at [28].

²³ Above n 20 at [29].

²⁴ Email DA to LCRO (13 March 2014).

²⁵ Above n 20 at [30].

²⁶ Above n 10, Rules 3.4 and 3.5.

²⁷ Above n 10, Rules 9 and 9.1.

Fees

[26] With respect to fees, the Committee said it had looked “at the fee in the round” and “was satisfied in the main with the report”.²⁹ The Committee did not consider it appropriate for Ms DA to have sent Ms EB a further invoice for attendances she had overlooked, after CR had paid her legal fees of \$19,550. The Committee said that the fee had to be fair and reasonable by reference to the contract of retainer under which Ms EB had agreed to pay fees; not by reference to the settlement agreement under which CR had agreed to contribute to her legal fees.

[27] The Committee determined a fair and reasonable fee for the services Ms DA had provided to Ms EB would not exceed \$15,000 including GST, found that Ms DA had overcharged in breach of Rule 9 and entered a finding of unsatisfactory conduct to that effect.

Provision of Information

[28] The Committee considered the information Ms DA had supplied to Ms EB and Mr FJ, and concluded that she had not done enough to comply with the relevant rules. The Committee considered her failures to comply with Rules 3.4 and 3.5 constituted unsatisfactory conduct.³⁰

Money Handling, Invoices, Statements and Reporting

[29] The Committee considered the quality and transparency of Ms DA’s accounting practices, and found that she had breached her obligations under the relevant Rules³¹ by failing to promptly provide Ms EB with an invoice to account for the \$8,000 bank cheque she had accepted from her.

[30] With respect to the alleged breaches of the Act, Rules and Trust Account Regulations,³² the Committee recorded that there was no dispute that Ms DA had accepted the bank cheque and banked it, and set out its reasoning as follows:³³

...In Mr [GW]’s submission, these were not fees in advance, because from Ms DA’s time sheets, over \$8,000 was owing, although no invoice had been issued.

The Committee accepted Mr [GW]’s analysis of the situation in respect of RCCC Rules 9.3 and 14.2, and agreed that there had been no breach by Ms DA.

²⁸ Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

²⁹ Standards Committee Determination dated 19 November 2012 at [25].

³⁰ Above n 29 at [34].

³¹ Above n 10, Rule 9.6, 10, 11 and 11.3.

³² Lawyers and Conveyancers Act 2006, s 110, Above n 28, Regulations 9 and 10 and Above n 10, Rules 9.3 and 14.2.

³³ Above n 29 at [46–48].

The Committee also accepted Mr [GW]'s analysis of the situation in respect of Regulation 9 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 and agreed that there had been no breach by Ms DA.

[31] The Committee found Ms DA had admitted breaching Trust Account Regulation 10 by banking the \$8,000 cheque to her personal account rather than passing it on to her instructing solicitor to bank into his trust account. The Committee accepted counsel's submissions that Ms DA's error was inadvertent, but considered his submissions were relevant only to mitigation because she admitted breaching the Regulation.

[32] The Committee found that although Ms DA had breached Trust Account Regulation 10, she had not breached s 110 of the Act, Trust Account Regulation 9, or Lawyers: Conduct and Client Care Rules 9.3 or 14.2 by receipting the \$8,000 cheque into her personal account.

[33] With respect to the payment of \$19,550 into her personal account, and consequent refund of \$10,682.76 from that account without reference to her instructing solicitor's trust account, the Committee said it:³⁴

...was of the view Ms DA had invoiced CR, and when this money was received, it should have been paid to [the instructing solicitor's] trust account...

[34] The Committee determined the receipt and refund represented a further breach of Trust Account Regulation 10, and was unsatisfactory conduct.

Publication and Orders

[35] The Committee considered that some of Ms DA's "breaches were technical in nature, and may have been simple errors",³⁵ that she had taken remedial action on realising her usual practices did not comply with the Rules and Regulations, and that broadly speaking Ms EB was satisfied with the service she had provided.

[36] The Committee was, however, concerned at the number of breaches, and found that "the breach of RCCC Rule 9 was particularly significant".³⁶

[37] The Committee did not direct publication, but on the basis of the unsatisfactory conduct findings and the Costs Assessor's calculations, ordered Ms DA to:³⁷

- (a) ... reduce her fees by \$7,141.24 (incl GST) pursuant to s 156(1)(e)...;
- (b) ... refund the amount of \$7,141.24 (incl GST) to Ms EB pursuant to s 156(1)(g)...;

³⁴ Above n 29 at [53].

³⁵ Above n 29 at [56].

³⁶ Above n 35.

³⁷ Above n 29 at [58].

- (c) ... pay a fine of \$2,500 to the New Zealand Law Society pursuant to s 156(1)(i)...; and
- (d) ... pay costs to the New Zealand Law Society in the sum of \$1000 pursuant to s 156(1)(n)...

Review application

[38] Ms DA applied for a review on the grounds that the Committee had based its unsatisfactory conduct findings on incorrect evidence, and asks that the orders made against her under s 156 be reversed.

[39] The essence of her review grounds is that she behaved honourably, any breaches were minor and technical in nature, and her conduct was not of a standard to warrant adverse disciplinary consequences for her.

[40] Ms EB maintains that Ms DA's conduct was unsatisfactory, generally agrees with the Committee's findings, and particularly the reduction of Ms DA's fee to \$15,000. Ms EB considers she should receive any excess amount Ms DA was paid.

Role of the LCRO

[41] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee without good reason.

Scope of Review

[42] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review, and the extent of the investigations necessary to conduct that review.

Review hearing

[43] Ms DA attended a review hearing in Auckland on 11 March 2014, and Ms EB attended by telephone.

Review issues

[44] I have considered the findings of unsatisfactory conduct the Committee made, and have found no good reason to interfere with those, except for the Committee's decision to reduce Ms DA's invoice to CR from \$19,550 to \$15,000 including GST on

the basis that it exceeded a fee that was fair and reasonable in breach of Rule 9, and requiring Ms DA to refund the overpayment to Ms EB. It is also necessary to comment on the Committee's findings in respect of s 110 of the Act.

[45] Those aspects of the decision will be discussed further below.

[46] In the course of this review it also became apparent that the Committee did not consider Ms DA's conduct in the context of s 111 of the Act, which imposes an obligation on a practitioner who receives money to properly account for it to the person whose money it is. Given the concerns on review around s 110, and the lack of consideration of the conduct in the context of s 111, Ms DA was invited to tender submissions in respect of s 111, and those have also been considered.

[47] As to the Committee's other findings, there was sufficient evidence before the Committee to enable it to form the view that Ms DA had only complied in part with the relevant Rules³⁸ governing the provision of information to her instructing solicitor and client, and nothing unreasonable in its finding that her conduct did not comply with those rules and was unsatisfactory in that respect.³⁹

[48] There is also nothing objectionable in the Committee finding that Ms DA's failures to promptly provide Ms EB with an invoice for the \$8,000 bank cheque she had accepted from her, and putting herself in a position of having to pay a substantial refund to Ms EB from her personal account after she had received payment directly from CR, breached Trust Account Regulation 10 and was unsatisfactory conduct.

[49] There is also no reason to disturb the Committee's findings that Ms DA's conduct in receiving payment direct from CR was not in breach of Trust Account Regulation 9, or Rules 9.3 and 14.2 of the Conduct and Client Care Rules.

[50] As there is no reason to disturb any of those findings, they will receive no further attention on review other than by way of reference in the discussion that follows.

[51] The issues on review are:

- (a) Whether receiving payment of \$8,000 direct from Ms EB and failing to pay it into a trust account, Ms DA breached s 110 or 111 of the Act; and
- (b) Did Rule 9 apply to Ms DA's invoice to CR?

³⁸ Above n 10, Rules 3.4 and 3.5.

³⁹ Above n 29 at [34].

Facts

[52] Ms DA is a barrister sole. Under the Rules, her primary professional relationship is with her instructing solicitor.⁴⁰ Although most of Ms EB's instructions were directed to Ms DA personally, Ms EB was the instructing solicitor's client, albeit on a reverse brief. Although Ms DA was providing services under a reverse brief, the instructing solicitor was responsible for formally instructing her, and for managing the financial aspects of Ms EB's file on the basis of her instructions to him, and his professional relationship with Ms DA.

[53] It is fundamental to her practice as a barrister that Ms DA should have ensured that the payments she received directly were processed through Mr FJ's trust account. Mr FJ cannot be criticised for Ms DA's conduct in that regard.

Finances

[54] Ms EB paid Mr FJ two amounts, \$2,500 and \$2,750,⁴¹ and he applied those funds to the first two of Ms DA's invoices for \$2,450 and \$2,619.70 respectively.⁴² The result was a shortfall of \$180.30, excluding consideration of any amounts Mr FJ may have deducted for his own costs. There is no evidence of Ms EB having been provided with a statement in respect of those transactions.

[55] Without having first issued an invoice, Ms DA then received payment of \$8,000 directly from Ms EB.

[56] Ms DA then issued CR with an invoice for \$19,550, which it paid directly to her.

[57] At that point Ms DA had issued invoices totalling \$24,619.70,⁴³ and had been paid a total of \$32,619.70.⁴⁴ She was therefore holding \$8,000 of Ms EB's money, for which she had not issued an invoice.

[58] Ms DA later refunded \$10,682.76 to Ms EB, and issued her with a third invoice for \$8,867.24.

[59] The final total of the invoices Ms DA rendered to CR and Ms EB was \$33,486.94 including GST and disbursements.⁴⁵

⁴⁰ Rule 14.4 of the Conduct and Client Care Rules says "...a barrister sole must not accept instructions to act for another person other than from a person who holds a practising certificate as a barrister and solicitor".

⁴¹ Email FJ to DA (20 March 2014).

⁴² Invoices for \$2,450 DA to FJ (19 October 2010); \$2,619.70 DA to FJ (29 October 2010).

⁴³ \$2,450 + \$2,619.70 + \$19,550 = \$24,619.70.

⁴⁴ \$2,450 + \$2,619.70 + \$8,000 + \$19,550 = \$32,619.70.

⁴⁵ Invoices for \$2,450 DA to FJ (19 October 2010); \$2,619.70 DA to FJ (29 October 2010); \$19,550 DA to CR (NZ) Limited (19 November 2010); \$8,867.24 DA to EB (25 January 2011).

[60] Ms DA received a total of \$32,800, made up of \$13,250 from Ms EB and \$19,550 from CR.⁴⁶ She later refunded a further \$450 to Ms EB,⁴⁷ bringing the total amount of her refund to \$11,132.76,⁴⁸ and leaving Ms DA with \$2,117.24, all of which is the subject of invoices she has now rendered to Ms EB.

[61] There is no evidence of Ms DA having cancelled any of her invoices.

Fees

[62] The Standards Committee's view was that a fair and reasonable fee would not exceed \$15,000 including GST, and that Ms DA should refund \$7,141.24 to Ms EB. Although the Committee's calculations result in the total of Ms DA's fees being slightly less than she had actually billed,⁴⁹ more significantly, on the Committee's calculations Ms EB would receive a refund exceeding what she paid. That is inconsistent with the concept of a "refund", which necessarily involves payment back to a person of an amount that person has previously paid.⁵⁰

Conduct

[63] The main difficulty with Ms DA's conduct is that she received payment of \$8,000 direct from Ms EB to cover fees for work she says she had done, but for which she had not issued an invoice. The question the Committee considered was whether her doing so constituted a breach of the Act, Regulations or Rules, finding only that she had breached Regulation 10.

Act, Trust Account Regulations and Rules

[64] The relevant statutory and regulatory provisions are contained in ss 110 and 111 of the Act, Trust Account Regulations 9 and 10, and Rules 9.3 and 14.2 of the Conduct and Client Care Rules.

Conduct and Client Care Rule 14.2

[65] The key provision that is specific to barristers sole is Rule 14.2, which relevantly says:

A lawyer who holds a practising certificate as a barrister sole must not –
...

⁴⁶ \$2,500 Read to FJ (16 October 2010); \$2,750 Read to FJ (27 October 2010); \$8,000 EB to DA (7 November 2010); \$19,550 CR to DA (2 December 2010).

⁴⁷ Above n 23.

⁴⁸ \$10,682.76 referred to at page 6 of the Complaint + \$450.

⁴⁹ By \$62.94.

⁵⁰ "In its natural sense the word [refund] has two components (i) an active, and conscious, transfer of funds (ii) that transfer being a return to the payee of a sum to which the payer is not, or no longer is, entitled": *Commercial Union General Insurance Company Limited v Commissioner of Inland Revenue* (1993) 17 TRNZ 673 (HC) at 19.

(e) receive or hold money... for or on behalf of another person.

[66] The only way in which a lawyer can lawfully receive or hold money for or on behalf of another person is in a trust account. As Ms DA is a barrister sole, she is prevented by Rule 14.2 from operating a trust account, and is prohibited from receiving or holding money for or on behalf of another person.

[67] As Ms DA cannot operate a trust account, it is part of her instructing solicitor's role to receive funds to cover her fees, GST and disbursements, in advance of her rendering an invoice. For the first two of her invoices, that is what Mr FJ did, but Ms DA's position under the Act, Regulations and Rules changed when she received \$8,000 directly from Ms EB without having rendered an invoice.

Conduct and Client Care Rule 9.3

[68] Rule 9.3 applies to barristers and solicitors who wish to take fees in advance, and relevantly says:

A lawyer who wishes to... receive funds to cover fees in advance must comply with the requirements of regulations 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[69] Rule 9.3 does not specify what fees are received in advance of. The argument put forward by counsel for Ms DA, and accepted by the Committee, was that Rule 9.3 did not stand in the way of Ms DA receiving \$8,000 in advance of issuing an invoice, because she had spent and recorded time that she would bill, so the \$8,000 was not funds received to cover fees in advance of her having done the work.

[70] That argument is problematic for a number of reasons. Although there is no difficulty with payment of Ms DA's first two bills by her instructing solicitor, Ms DA continued to do work and record time to Ms EB's file after she had issued those two invoices. When Ms EB requested further assistance from Ms DA, she was required to pay sufficient funds to cover the time already recorded to the file, on which Ms DA placed an estimated value of \$8,000.

[71] When Ms EB produced a cheque for \$8,000, Ms DA receipted it into her personal account to cover her fees for the time she had recorded, but for which she had not yet issued an invoice.

[72] Two conclusions follow from those facts on counsel's argument. First, Ms DA was free to record any amount of time, and seek payment of any amount of fees in advance of issuing an invoice, without recourse to Mr FJ or his trust account.

[73] Second, and more significantly, Ms DA was free to act in a way that thwarted compliance with the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, because those Regulations only apply to funds held in trust accounts.

[74] Neither of those conclusions sits comfortably with the wording of Rule 9.3, or the purposes of consumer protection and maintenance of public confidence in the provision of legal services set out in the Act.⁵¹ Nor do they engender compliance with minimum standards set out in the Rules that preclude counsel holding funds or anything else of value, for another person.

Trust Account Regulations 9 and 10

[75] The Committee found that by receiving \$8,000 directly from Ms EB, without first issuing an invoice, Ms DA had not breached Regulation 9. Regulation 9 imposes a restriction on debiting trust accounts with fees, saying:

- (1) No trust account may be debited with any fees of a practice...unless—
 - (a) a dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or
 - (b) an authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.
- (2) If fees are debited under subclause (1)(a), an invoice must be delivered or posted to the person who has a legal or beneficial interest in the trust account to be debited before or immediately after the fees are debited.
- (3) For the purposes of subclause (2), a practitioner or partner in the practice is not to be treated as having a legal or beneficial interest in the trust account to be debited, solely because the practitioner or partner issues the invoice in respect of that trust account.

[76] The Committee's reasoning was that Regulation 9 did not come into play, because it only applies to funds that are held in a trust account. The \$8,000 was therefore not subject to the regulatory restriction that would have applied if Ms DA had paid it into a trust account, as she has since accepted she should have done. By thwarting the operation of Regulation 9, Ms DA cannot be said to have breached it. While that is a logical outcome, it is not satisfactory in that it side-steps the protections Regulation 9 provides to lawyers' clients.

[77] The Committee was also correct to find that Ms DA had breached Regulation 10, which makes provision for fees and disbursements to be paid in advance of a practitioner rendering an invoice, and says:

⁵¹ Lawyers and Conveyancers Act 2006, s 3.

All money paid to a practice in respect of professional services for which an invoice has not been issued, whether described as a retainer or otherwise, must be retained in a trust account until it is—

- (a) disbursed on the client's behalf; or
- (b) applied in payment of fees in accordance with regulation 9.

[78] As Regulation 10 applies to “all money paid to a practice in respect of professional services for which an invoice has not been issued”, Ms DA was obliged to comply with it. Ms DA accepts that she had not issued an invoice, and admits that Regulation 10 applies. She also accepts that she should have paid the \$8,000 into her instructing solicitor's trust account, where it would have been retained until one of the two things provided for in Regulation 10 happened.

[79] By circumventing Mr FJ and his trust account, Ms DA put herself in a position where she held money that she could not properly account for on the basis of an invoice, and put Mr FJ in a position where he could not properly account for Ms EB's money because he had never received it. As the \$8,000 never reached a trust account, both options were closed off: Mr FJ could not disburse funds that were not in his trust account; nor could he apply the funds in payment of Ms DA's fees in accordance with Regulation 9, or account to Ms EB.

[80] The Committee's finding that Ms DA breached Regulation 10 is therefore confirmed on review.

Sections 110 and 111 of the Act

[81] The next question is whether Ms DA's conduct breached s 110 or 111 of the Act. Counsel's submission for Ms DA was that although she had not issued an invoice, she had earned the \$8,000 and was therefore entitled to the money. Consequently counsel argues that s 110 did not apply to the \$8,000, and Ms DA's submission on review is that for the same reasons, s 111 also does not apply.

[82] The Committee accepted counsel's submission with respect to s 110, and determined the complaint on the basis that s 110 did not apply to fees Ms DA had earned but not billed.

[83] Sections 110 and 111 of the Act impose statutory obligations on lawyers saying:

Obligation to pay money received into trust account at bank

- (1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person—
 - (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of—
 - (i) the practitioner; or

- (ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; and
- (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.
- ...
- (3) For the purposes of this section, a practitioner or an incorporated firm is deemed to have received money belonging to another person if—
- ...
- (b) the practitioner... takes control of money belonging to that person.
- (4) A person commits an offence against this Act and is liable on summary conviction to a fine not exceeding \$25,000 who knowingly acts in contravention of subsection (1) or subsection (2).
- ...

Obligation to account for trust money and valuable property

- (1) If, in the course of the practice of a practitioner ... the practitioner, ... receives or holds money ... on behalf of any person, the practitioner ... must account properly for the money ... to the person on whose behalf the money ... is held.
- ...

[84] Although s 110 requires money to be paid into a trust account, on its face s 111 does not rely on that having happened before it has effect. Section 111 therefore applies to all money held by a practitioner on behalf of any other person, regardless of whether money is actually paid into a trust account or not.

Powers to direct reconsideration of complaints, matters or decisions – s 209(1)

[85] As the Committee did not consider whether Ms DA may have breached s 111 I have considered whether to refer that aspect of the decision back to the Committee for it to reconsider and determine, pursuant to s 209(1)(a) of the Act. I have decided not to for the following reasons:

- The subject matter of the complaint arose in late 2010. Ms EB laid her complaint promptly, in January 2011.
- There is no factual complexity around Ms DA's handling of Ms EB's \$8,000. Ms DA admits receiving and holding Ms EB's money without first having issued an invoice, and without recourse to Mr FJ and his trust account. In a disciplinary context section 111(1) does not require a finding of intent, only conduct, to constitute a breach.
- Ms DA has had the opportunity to lodge submissions in response to concerns raised with her on review in respect of her conduct in the context of s 111. Her submissions are based on the same reasoning she relied on before the

Committee in respect of its concerns over s 110. It is reasonable to infer that the Committee would have reached the same conclusion, based on the same logic, if it had turned its mind to s 111.

[86] Referring the s 111 aspect of the complaint back to the Committee would not be an efficient use of its resources. The emphasis on responsiveness of the regulatory regime⁵² and the obligation to conduct reviews with expedition pursuant to s 200 of the Act are of particular relevance, taking into account the financial aspects of this complaint, and the consumer protection purposes of the Act.

[87] In all the circumstances it is appropriate to determine the s 111 aspect of the complaint on review, to avoid the delay that would be associated in referring back to the Committee for reconsideration.

Discussion

[88] The answer to whether Ms DA breached either s 110 or s 111 lies in the point at which the \$8,000 ceased to be Ms EB's money, and became Ms DA's. If the money was without question Ms DA's at the moment Ms EB gave her the bank cheque, s 110 and 111 would not apply. However, for the reasons discussed below, s 110 and 111 applied to the \$8,000 in advance of Ms DA having issued an invoice. Consequently, Ms DA acted in breach of both sections of the Act.

[89] Ms DA's fee crystallised when she issued her invoice. Time is only one factor among many that a lawyer must consider before charging a fair and reasonable fee. Up to the point when she issued her invoice, the amount of her fee was unascertained, and contingent on her adopting a view on what was fair, reasonable and compliant with Rule 9 taking into account all relevant factors.

[90] Once Ms DA had issued her invoice, the amount of it became subject to objective measures, including for example calculations for tax purposes, and became challengeable under the provisions of the Act, which apply when a fee is charged.⁵³ Issuing an invoice is a necessary step in charging a fee and was a necessary element in properly accounting for the money she received.

[91] I do not consider that Ms DA can claim the \$8,000 was her own in advance of issuing an invoice. At the time she received the \$8,000 in early November 2010, it was not her fee, but was money Ms EB paid in advance of receiving Ms DA's invoice. She should have paid it into Mr FJ's trust account to await the issue of an invoice, which did not occur until several weeks later.

⁵² Above n 51, s 3(2)(b).

⁵³ Above n 51, s 132(2).

[92] Ms DA took control of Ms EB's money, for or on her behalf, in the course of her practice in November 2010. She did not ensure that the money was paid into her instructing solicitor's trust account promptly, or at all, in accordance with s 110. It could not be held for Ms EB or as she directed, in a solicitor's trust account. Ms DA did not account to Ms EB properly for the \$8,000 in the meantime.

[93] In the circumstances, ss 110 and 111 applied to the \$8,000, and by failing to pay it into a trust account, and failing to properly account for it, Ms DA breached both sections of the Act.

[94] The finding that Ms DA did not breach s 110 with respect to the \$8,000 payment is therefore reversed, and replaced with findings that Ms DA breached ss 110 and 111.

Fees – Rules 9 and 9.1 of the Conduct and Client Care Rules

[95] The second review issue is whether Ms DA breached Rule 9 by invoicing CR \$19,550 including GST for her legal costs.

[96] The Committee evaluated Ms DA's fees against the criteria set out in Rule 9 and 9.1, found they were excessive, and reduced them to \$15,000 including GST. As that determination relies on the exercise of discretion by the Committee, I would need to have good reason, and to exercise particular caution, before substituting my own judgement for that of the Standards Committee.

[97] I have carefully considered the Committee's reasoning and formed the view that there is good reason to depart from the Committee's finding that \$15,000 including GST was a reasonable fee for CR to pay.

[98] The consequence of the Committee's reasoning is that CR pays Ms EB's legal costs on an indemnity basis, and Ms EB pays nothing towards her legal fees, but receives a refund greater than the amount she paid.

[99] While Ms EB supports that outcome, it means that Ms DA is required to contribute part of the amount CR paid her for fees towards Ms EB's entitlement on settlement of her employment dispute. That outcome is incongruous and inconsistent with the concept of a refund.⁵⁴

[100] Ms DA's primary submission was that no refund should be made. Her fall-back position is that if a refund were to be ordered, that should be paid to CR and not Ms EB, because under the terms of settlement CR had agreed to pay Ms EB no more than \$10,000 plus her employment-related statutory entitlements.

⁵⁴ As above at n 50.

Discussion

[101] Rule 9 regulates the fees a lawyer can charge to a client. It does not regulate arrangements between a lawyer and a third party. As CR is not Ms DA's client, Rule 9 does not apply to Ms DA's invoice to CR.

[102] Independently of Rule 9, CR agreed to pay Ms DA's legal costs of \$19,550. Ms DA advised CR of the figure at the settlement meeting, and it raised no protest then, or in the two weeks it took to pay her invoice. There is no evidence of CR raising any protest since, and it is implicit in the fact that CR made the payment that it accepted the fee content of the invoice.

[103] In the circumstances there is good reason to reverse the Committee's finding that Ms DA breached Rule 9 by charging CR a fee greater than the Committee considered would have been fair and reasonable under Rule 9. The finding of unsatisfactory conduct made against Ms DA for breaching Rule 9 is therefore reversed.

Summary

[104] The answers to the two review issues are:

- (a) By receiving payment of \$8,000 direct from Ms EB, failing to pay it into a trust account or properly account for it, Ms DA breached ss 110 and 111 of the Act; and
- (b) It was not necessary for Ms DA's invoice to CR for \$19,550 to be fair and reasonable pursuant to Rule 9, because Rule 9 did not apply.

Unsatisfactory Conduct

[105] As mentioned at [25] above, the Committee did not record which parts of s 12 it considered Ms DA's breaches of Rules 3.4, 3.5 and the breaches of Trust Account Regulation 10 fell into. The definition of unsatisfactory conduct set out in s 12(c) of the Act says that in the Act, unsatisfactory conduct in relation to a lawyer means:

conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services ...

[106] All of the breaches of the Act, regulations and rules identified by the Committee, and on review fall within the definition of unsatisfactory conduct under s 12(c) of the Act. On review, all findings of unsatisfactory conduct are recorded pursuant to s 12(c) of the Act.

Outcome

[107] The Committee's finding that Ms DA had breached Rule 9 is reversed.

[108] Six findings of unsatisfactory conduct are made or confirmed against Ms DA pursuant to s 12(c) of the Act in respect of her breaches of ss 110 and 111, Trust Account Regulation 10 on two occasions, and Rules 3.4 and 3.5.

Interim Orders – s 156

[109] As a consequence of this decision, Ms DA is holding \$2,117.24 that belongs to Ms EB. That position requires rectification as soon as possible by way of interim orders.

[110] Pursuant to s 156(1)(g) Ms DA is ordered to refund \$2,117.24 to Ms EB upon Ms EB providing Ms DA with details of an account to which that sum can be refunded.

[111] The corollary of the order for refund is an order pursuant to s 156(1)(f) requiring Ms DA to cancel her fees to Ms EB. Ms DA is ordered to cancel all of her fees to Ms EB.

[112] As a result, Ms DA will have refunded the \$13,936.94 that Ms EB paid, with Ms DA having already been paid in full by CR.

Other Consequential Orders

[113] On review, an LCRO can make any orders a Committee can make under s 156. The LCRO also has the power to direct publication of her decisions as she considers necessary or desirable in the public interest,⁵⁵ and to order payment of costs and expenses on review.⁵⁶

[114] Ms EB has asked for consideration to be given to an order requiring Ms DA to pay her compensation pursuant to s 156(d), and has tendered submissions in that respect, which have been provided to Ms DA with information that is personal to Ms EB having been redacted or removed.

[115] Ms DA has not yet tendered submissions in respect of orders that are available under s 156 (excluding refund and cancellation of her fee), and costs on review, and is invited to do so.

[116] Ms EB is also invited to tender submissions with respect to publication, and costs on review.

⁵⁵ Above n 51, s 206(4); LCRO'S Publication Guidelines.

⁵⁶ Above n 51, s 210.

[117] The parties are invited to file submissions on the matters set out in paragraphs [113] to [116] by 26 September 2014.

Decision

Pursuant to s 211(a) of the Lawyers and Conveyancers Act 2006:

- (a) The findings of unsatisfactory conduct against Ms DA for two breaches of Trust Account Regulation 10, and Rules 3.4 and 3.5 of the Conduct and Client Care Rules are confirmed;
- (b) The decision is modified to record:
 - (i) Findings of unsatisfactory conduct in respect of each breach of ss 110 and 111 of the Act, and
 - (ii) All six unsatisfactory conduct findings are made pursuant to s 12(c) of the Act.

Pursuant to s 156(1) of the Lawyers and Conveyancers Act 2006, Ms DA is ordered to:

- (a) Cancel her fees to Ms EB; and
- (b) Refund to Ms EB \$2,117.24 upon Ms EB providing Ms DA with details of an account to which that sum can be refunded.

DATED this 26th day of August 2014.

Dorothy 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:

Ms DA as the Applicant
Ms EB as the Respondent
[City] Standards Committee [X]
The New Zealand Law Society