LCRO 105/2010

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 Number 2
BETWEEN	**AQ** of Auckland Applicant
AND	**ZI** of Auckland Respondent

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

DECISION

Background

[1] In July 2008, the firm of AAM (AAM) was instructed by the Applicant on behalf of himself, one of his sisters, and the husband and family of a deceased sister, in connection with a family protection claim against his late father's estate.

[2] The file was assigned to the Respondent, a senior solicitor in the firm, with Mr ZH (ZH) as her supervising partner.

[3] As required by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Client Care Rules), AAM provided certain information relating to its services to the Applicant at the commencement of its retainer, including its terms of engagement. Included in these was the firm's billing policy, which was to send monthly accounts on an interim basis where there was an ongoing matter.

[4] Bills were sent regularly and paid by the Applicant as the matter progressed, and the Applicant has no issue with bills rendered up to 22 October 2008.

[5] However, by that time, even with a considerable "discount" on the time recorded, the Applicant and other members of the family whom he represented, were becoming concerned that the costs incurred were going to exceed the anticipated overall costs of $50,000.00.

[6] In addition, the Applicant noted inconsistencies in subsequent bills received by him in January and March 2009.

[7] On 2 April 2009, the Applicant made his concerns about these inconsistencies known to the Respondent, and also requested an indication of all possible costs from that point onwards.

[8] On 3 May 2009, he sent a follow-up email requesting a response to his request.

[9] Having received no response to either of these emails, he then sent an email to ZH on 19 May 2009 in which he requested a response to his emails, and withdrew his credit card authorisation for payment of accounts until the matters were satisfactory addressed.

[10] This produced a response from ZH on 25 May 2009 in which he enclosed a detailed estimate of costs to conclude the matter, together with advice as to the best way forward.

[11] The matter proceeded from there to a Judicial Settlement Conference (JSC) on 26 August 2009, at which a settlement was reached.

[12] After the letter from ZH on 25 May 2009, the Applicant had received one bill for $3,744.00 on 23 July 2009, and following settlement, a final bill on 9 December 2009. On receipt of this final bill, the Applicant raised the various issues relating to costs that are the subject matter of his complaint and this review.

[13] As part of an attempt to resolve the matter, AAM agreed to reduce its bill from $20,000.00 to $17,800.00 plus GST plus disbursements.

[14] The Applicant remained dissatisfied with the explanations provided by the Respondent to his queries and lodged a complaint with the Complaints Service of the New Zealand Law Society on 18 February 2010.

The Complaint

[15] The matters raised with the Complaints Service were the matters that had previously been raised with the Respondent and AAM and related to:

- The inconsistencies in the bills of account including apparent duplication of time records,
- The cost overrun,
- The costs incurred in having two lawyers from AAM attend the JSC.

The Standards Committee Decision

[16] The Standards Committee proceeded with a consideration of the matters raised but did not appoint a Costs Assessor to consider the overall fees charged by AAM.

[17] It issued its decision on 21 May 2010 in which it advised that following a consideration of the matter, no further action was to be taken in respect of the complaint.

[18] This decision was issued pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) which provides the Standards Committee with a discretion not to take any further action on a complaint if it appears to the Committee that, having regard to all of the circumstances of the case, any further action is unnecessary or inappropriate.

[19] This decision was arrived at on the basis that the Committee accepted the explanations from the Respondent and noted in particular, that practitioners did not only charge fees based on a time in attendance, but were entitled to take into account all factors as set out in Rule 9.1 of the Client Care Rules. These factors were listed in the Standards Committee's decision.

[20] The Committee also noted that some confusion appeared to have arisen over amounts discussed between AAM and the Applicant in that AAM referred to GST exclusive figures, whereas the Applicant thought they were GST inclusive figures.

[21] The Committee also noted the apology from the Respondent for any distress her mistake may have caused the Applicant when she had simply and mistakenly failed to note his incoming emails requesting an estimate of the costs to conclude the matter.

The Application for Review

[22] The Applicant has applied for a review of the Standards Committee's decision.

[23] He considers that the Standards Committee appears to have accepted nearly all of the statements from the Respondent on face value without question.

[24] He also expresses concern as to the Committee's acceptance of the Respondent's explanation for not replying to his request for an estimate and refers to the "computer errors" arising after October 2008.

[25] He alleges alteration of time sheets and computer records, and in general terms seeks a review of all of the matters put before the Standards Committee.

The Review

[26] The parties have consented to this review being conducted on the basis of the information and materials available to me which include the Standards Committee file and the materials filed in conjunction with this Application.

The Bills

[27] The content and timing of the bills rendered by AAM are at the heart of this matter.

[28] The Applicant has no issues with invoices received up to and including invoice AK 6057732 which was in respect of attendances to 22 October 2008.

[29] The next bill (invoice AK6087544) was dated 22 December 2008 and was for $2,486.25. This was received by the Applicant on 23 January 2009.

[30] In his letter to the Law Society, the Applicant states that the narration on this bill was for the period from 28 October 2008 to 15 December 2008. The only reference to the period covered by the bill itself, is at the beginning of the account, which records that it is for "professional services over the last few months". However, in the covering letter from the Respondent, she states that this bill is for work done during December 2008.

[31] This is clearly wrong. The time sheets received by the Standards Committee but not available to the Applicant at the time, show that invoice number [number] covers the period from 28 October to 14 November.

[32] Given the narration in the account and the statement made by the Respondent, the Applicant understood that costs were billed to date as set out in the firm's Terms of Engagement.

[33] The next bill [number] was dated 19 March 2009 for the sum of $10, 910.25.

[34] Again, the narration in this bill refers to "professional services over the last few months".

[35] Referring to the time sheets, this bill covers attendances from 2 December 2008 to 12 March 2009. This was not clear to the Applicant as no dates are provided on the narration attached to the bills of account.

[36] He was somewhat puzzled by the extent of this bill, given his understanding that the previous bill had covered costs to the end of December and that there had been limited attendances since then.

[37] It was at this stage that the Applicant requested, and subsequently received on 25 May 2009, the estimate of costs to conclude the matter.

[38] The next bill was received on 21 August 2009 although the bill itself is dated 23 July 2009. This bill [number] was for $3,744.00.

[39] The Applicant was assured by the Respondent that this was the only bill she was aware of and, being aware of the firm's Terms of Engagement, and past invoicing, the Applicant again understood that the bill included all costs to date.

[40] That was incorrect. Invoice [number] inexplicitly relates only to a period from 13 to 20 March 2009.

[41] Following settlement of the claim, a final bill dated 23 September 2009 was compiled by the Respondent and forwarded to the Applicant on 25 September 2009. This bill [number] was for $22,545.18 being $20,000.00 fees plus GST plus disbursements. This bill had been reduced from time recorded of $23,677.00 and had consequently being significantly discounted by AAM at that stage.

[42] The end result of these bills, however was that the Applicant had received bills totalling $26,289.18 (GST included) in respect of work for which he had received an estimate of $14,000.00 (GST included) plus work in progress at the time of the estimate.

Duplication of Records

[43] The Applicant refers to the narration accompanying the two bills of account dated 23 July 2009 and 23 September 2009. He points out that the first 21 entries in both accounts are the same. He concludes that this has resulted in the client being billed twice for the same work.

[44] The reason for this is explained by the Respondent in paragraph 27 of her letter dated 12 March 2010 to the Complaints Service and I accept this explanation.

[45] The important records to refer to are the time sheets which were not available to the Applicant at the time of making his complaint. I refer in particular to the time sheets provided by the Respondent to the Complaints Service under cover of her letter dated 12 March 2010, which show the bill numbers.

[46] If the Applicant's contentions were correct, then one would expect to see the same narrations against the time attendances repeated from the March entries to the July entries. This is not the case.

[47] The narrations provided to the Applicant with the bills, are picked up from the time sheets entries. If one refers to the entries beginning 23 March 2009 on the time sheets, they record "discussion with [ZH] re adoption records". This matches the first entry on the narrations to each account. The next 20 entries can be similarly matched.

[48] The time sheet entry on 3 August refers to "letter from [XX] re payment of small legacies". This is picked up however as the 22nd entry in the narration accompanying the bill of 23 September.

[49] Consequently, rather than constituting any double billing, it is clear that what has happened, is that the narration accompanying the 23 September bill has commenced with the narration relating back to the 23 July account.

[50] However, there is no doubling up in the time records, and consequently, the time sheet entries are correct and record total work in progress as at 18 September 2009, as being $23,677.00.

Attendance at the Joint Settlement Conference

[51] The Applicant and the persons whom he was representing, considered that attendance by the Respondent at the JSC was unnecessary.

[52] The reason for her attendance was that ZH was unavailable and that a person with experience and seniority was considered necessary by AAM to put the Applicant's case before the Conference.

[53] Consequently, it was proposed that Mr [XX] from the firm would attend.

[54] However, [XX] was unfamiliar with the file, and it was therefore proposed that the Respondent would attend in conjunction with him, to save him having to spend a considerable period of time becoming familiar with the file.

[55] The need for this was queried by the Applicant but ultimately accepted, on the basis that this would result in savings to the Applicant.

[56] As it turns out, it appears that the Respondent made minimal contribution to the JSC, and [XX] did have sufficient understanding and knowledge of the file to enable him to conduct the JSC without reference to her. Consequently, it appears that the anticipated cost saving as referred to in the Respondent's email of 25 August 2009 did not eventuate.

[57] However, the final bill was discounted by some $4,300.00 partly as an acknowledgment that her attendance at the JSC had not been entirely beneficial to the Applicant.

[58] There is a hint in the correspondence that the Applicant was not entirely happy with the outcome achieved at the JSC which resulted in settlement of the matter. Whether or not, this dissatisfaction adds to the dissatisfaction in respect of costs is not clear but the settlement was accepted by the Applicant and any dissatisfaction with the outcome can not in any way be considered in connection with this complaint.

Estimate

[59] On 2 April 2009, the Applicant requested the Respondent to provide him with an estimate of costs to conclude the matter. On 3 May, he sent a follow-up email and having received no response, sent another email to the Respondent's supervising partner (ZH) on 25 May seeking an explanation as to why he had received no response.

[60] Rule 9.4 of the Client Care Rules provides as follows:

> "A lawyer must upon request provide an estimate of fees and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded"

[61] Although the Rule does not include the word "promptly" with regard to the request for an estimate, when considered in conjunction with Rule 7.2, it is clear that such a request must be responded to in a timely manner.

[62] Rule 7.2 provides as follows:

> "A lawyer must promptly answer requests for information or other enquiries from the client"

[63] The explanation offered by the Respondent was that she had mistakenly overlooked the two email requests sent by the Applicant on 2 April and 3 May. This explanation was accepted by the Standards Committee.

[64] The Client Care Rules were developed by the New Zealand Law Society pursuant to sections 94 and 95 of the Lawyers and Conveyancers Act 2006. One of the objectives of the Act is to protect consumers of legal services. This is an important focus of the Act which had not hitherto been part of the legislation relating to the governance of lawyers. I will return to this subsequently.

[65] As noted, ZH provided his estimate of costs to complete the matter on 25 May 2009. He provided a detailed summary of estimated costs amounting to $12,363.00 plus GST and disbursements which he rounded up to $14,000.00. He also noted that at that time, there was unbilled work of approximately 5 hours of which 1.2 hours related to himself. The charge out rate for ZH was $390.00 per hour and the Respondent's charge out rate was $280.00 per hour. I therefore calculate that the outstanding work or work in progress at the time the estimate was given amounted to approximately $1,500.00 plus GST ($1,700.00). This accords with the Applicant's expectations and is a figure on which the Applicant was entitled to rely.

[66] This is relevant, in that the Respondent has noted that work in progress as at the time of the estimate was approximately $5,000.00. She uses this as a basis for noting that of the final account, only $15,000.00 relates to attendances covered in the estimate.

[67] Nevertheless, the end result is that recorded time at the conclusion of the matter was $23,677.00 plus GST, compared to the estimated costs to finish of $12,363.00 plus work in progress of $1,500.00, a total of $13,863.00 plus GST.

[68] Bills rendered to the Applicant in respect of all work covered by the estimate and the work in progress totalled $23,328.00 plus GST made up of the invoice dated 23 July 2009 ($3,328.00 and the final invoice of $20,000.00).

[69] As an aside, I have noted the Applicant's objection to all discussions about the bills being on a GST exclusive basis, but this reflects the computer programme operated by AAM, which records all time on a GST exclusive basis.

[70] It must be noted that the figures provided by ZH constituted an estimate only (although this is not the case with regard to the work in progress). It was not a quote as stated by the Applicant. Legal costs, particularly those associated with litigation, are difficult to estimate due to the uncertainties as to the course which the proceedings are going to take.

[71] This is noted in the firm's Terms of Engagement which at paragraph 5.1 state that an estimate "will normally be a range between a minimum figure and a maximum figure and is a guide only".

[72] Again, at paragraph 5.3, the Terms of Engagement note that an estimate "is not a quote nor a cap on what may be charged".

[73] The estimate provided by ZH was not in the form of a range as anticipated by paragraph 5.1, but a specific figure based on his estimates of the time that each stage would take.

[74] Notwithstanding the statements made in the Terms of Engagement, there is an obligation on a lawyer to be careful in providing estimates.

[75] Rule 9.1 formalises what was considered to be best practice prior to the Client Care Rules being promulgated. Prior to this, costing guidelines were included in a New Zealand Law Society publication referred to as New Zealand Law Society Property Transactions: Practice Guidelines 2003.

[76] Paragraph 7.2(d) of those Guidelines provided that:

> "It is generally inappropriate to charge a fee in excess of an estimate given to a client. You should advise your client in writing immediately if it becomes apparent that the original estimated is likely to be exceeded. Give reasons for the increase and the revised estimated figures."

[77] In addition, Duncan Webb in his publication entitled "Ethics, Professional Responsibility and the Lawyer" (2nd Edition) at page 388 refers to the decision of Kirk v Vallant Hooker & Partners [2000] 2 NZLR156 and opines:-

> "While the Court of Appeal in Kirk v Vallant Hooker & Partners was cautious and did not say the departure from an estimate renders the bill of costs unreasonable, it is submitted that this may be the case. An estimate is a representation that costs will be in the vicinity of a given sum. Such information must be given with reasonable care (refer *J and J C Abrams Limited v Ancliffe*

[1978] 2 NZLR 420."

[78] In his position as LCRO, Duncan Webb also had cause to consider estimates in his decision of Milnathort v Rhayader LCRO 140/09. That case involved bills of costs rendered in excess of estimates provided on conveyancing transactions, which are somewhat easier to provide estimates on than litigation matters. Nevertheless, the comments made are equally as pertinent. The LCRO referred to the decision K M Young Limited v Cosgrove [1963] NZLR 967 at 969 where it was stated that persons giving estimates must do so with care. It was also noted that the party giving the estimate was the expert in the services to be provided and may be expected to be relied upon by the lay person. Dr Webb also notes that the duty of a person (including a lawyer) in giving a potential client an estimate is "to give him a correct one or say that it could not be done". Daniell Limited v Kebbell [1919] GLR156 at page 160.

[79] The LCRO then goes on to state at paragraph 15 that "a lawyer who gives an estimate must therefore do so with some care ... An estimate should be the amount which work of the nature contemplated in the particular circumstances of the client is likely to cost." He goes on to say that "There is a strong and legitimate expectation by a client that if the transaction proceeds in a usual way, the bill will be in the amount of the estimate, or at least close to it."

[80] Finally, at paragraph 17, he notes "a lawyer is not required to slavishly adhere to the estimate. However, neither should a lawyer slavishly adhere to charging on a time-costed basis. As a matter of professional obligation, the existence of an estimate must be taken into account when setting the amount of the bill. As a matter of law, an estimate must be given carefully and without negligence. It may be that some increase or decrease above or below the estimate is appropriate. However, there is a strong presumption that unless the client has been informed of a potential increase, the bill will be approximately the amount of the estimate".

[81] This latter paragraph gives rise to two observations. The first is that the existence of an estimate is a factor to be taken into account when assessing the final fee and is specifically referred to in paragraph 9.1(j) of the Client Care Rules.

[82] The second observation relates to the obligation imposed by Rule 9.4 that a lawyer must inform a client promptly if it becomes apparent that the fee estimate is likely to be exceeded.

[83] Both of these observations are relevant to the matter in hand. In the first place, there does not appear to have been any note taken of the estimate when rendering the final account, or in any discussions relating thereto. In addition, the Applicant was not at any time informed by the Respondent of the fact that costs were going to exceed the estimate given.

[84] I have calculated that the amount estimated by ZH as being his estimate of costs to conclusion of the matter, was reached just prior to the JSC. This is particularly relevant, given that the Applicant was at the very time querying the need for two lawyers to attend the JSC. This information would have been extremely relevant to that decision. In addition, it would presumably have been an important factor when considering settlement proposals. There is no evidence that this information was imparted to the Applicant.

[85] Consequently, the provisions of Rule 9.4 have been breached by the Respondent in two ways – namely that she failed to provide an estimate of costs when requested, and failed to advise the Applicant that the estimate was going to be exceeded.

[86] A breach of the Client Care Rules automatically results in a finding of unsatisfactory conduct pursuant to section 12(c) of the Act. There is no mental element required – the matter is one of strict liability. The Respondent's explanation of simply and mistakenly overlooking the emails from the Applicant requesting the estimates, is therefore of little or no relevance. The mental element is relevant of course to the question of penalty.

[87] There will therefore be a finding of unsatisfactory conduct against the Respondent in this regard.

Consequences

[88] The consequence of what follows this finding requires some discussion.

[89] A finding of unsatisfactory conduct renders the Respondent exposed to any of the Orders that may be made by the Standards Committee pursuant to section 156 of the Act.

[90] It is appropriate that these breaches of the Rules attract a censure pursuant to s156(1)(b), and an Order to that effect will be made accordingly.

[91] The only other Order pursuant to section 156(1) that it is appropriate to consider, is whether or not the fees should be reduced pursuant to section 156(1)(e). This is what the Applicant seeks.

[92] The issue of costs was clearly a factor which was exercising the minds of the Applicant and his co-plaintiffs when they queried the need to be represented by two lawyers at the JSC. Indeed, it was clearly a matter which they had had reference to from the beginning, as they had sought some indication from AAM as to what the likely overall costs would be.

[93] However, it must be recognised that an estimate is not a quote and providing estimates in litigation matters are difficult. I do note however, that the course that this matter took closely followed the course anticipated by ZH when giving the estimate.

[94] There can be no formula applied in circumstances such as this. The following facts need to be taken into account:

- The starting point must be the estimate of $12,363.00 (all figures will be stated exclusive of GST and disbursements).
- The work in progress figure provided with the estimate was $1,500.00.
- The time recorded at the time of final bill was $23,677.00.
- Effectively therefore there is an estimate provided of $13,863.00 compared with final recorded time of $23,677.00.

[95] In assessing how these facts should be applied, the following factors need to be considered:

- The consequences of providing the wrong work in progress figure must fall on the firm. The figure should have been readily available and should have been correctly provided to the Applicant. This results in an automatic deduction of $3,500.00.
- Whilst I hesitate to provide an acceptable variation on an estimate, a 20% variation on an estimate would not be unreasonable in this particular case. It must be emphasised that this figure is intended to apply only to this particular decision and each case must be looked at against the factual background at the time. This results in an acceptable

variation to the estimated figure of $2,472.00 i.e. up to $14,836.00 – or say $15,000.00.

[96] Taking into account all of the factors referred to above, there will therefore be an Order reducing the Applicant's final bill to $16,500.00 plus GST and disbursements, a total of $18,607.68

[97] The Applicant has paid $13,000.00 on account of this and therefore there is a balance outstanding of $5,607.68 due. If I am wrong in this regard, it is open to the parties to agree the balance due and outstanding.

Final Comments

[98] The facts of this case have highlighted the importance of the need to pay close attention to the provisions of Rule 9.4. If there had been no findings of a breach of that Rule, there would have been no opportunity or reason to consider Orders pursuant to section 156(1) of the Act. Without such breach, it is unlikely that there would have been a finding of unsatisfactory conduct based on a breach of Rule 9.2. Indeed, the issue may not very well have arisen at all as there would have been a discussion between the parties at an early stage with regard to fees in which the way forward would have been agreed after due consideration of the impact of the costs to be incurred.

Costs

[99] In accordance with the LCRO Cost Orders Guidelines, where a decision of a Standards Committee is reversed or significantly modified, the issue of costs before the Committee will be revisited. In addition, there are the costs of the LCRO hearing to be considered.

[100] In this regard, I accept the view that the breach by the Respondent of Rule 9.4 was unintentional. In the circumstances therefore I do not propose that there should be any costs order in respect of the Standards Committee hearing. I wish to record that this should not be any way considered to set a precedent to be followed by the Standards Committees in future where breaches of the Rules are considered.

[101] The matter was of average complexity, and proceeded as a hearing on the papers. In accordance therefore with the LCRO Cost Orders Guidelines, the Respondent will be ordered to make payment of the sum of $1,200.00 on account of costs.

Decision

1. Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed.

2. By reason of the breaches of Rule 9.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, the conduct of the Respondent constitutes unsatisfactory conduct pursuant to section 12(c) of the Lawyers and Conveyancers Act 2006.

Orders

1. Pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act 2006 the Respondent is censured.

2. Pursuant to section 156(1)(e) of the Act, invoice number [number] dated 23 September 2009 issued by AAM is reduced to $16,500.00 plus GST plus disbursements, a total of $18,607.68. A certificate pursuant to section 161(2) of the Act is attached to this decision.

3. Pursuant to section 210 of the Act, the Respondent is to pay $1,200.00 in respect of the costs incurred in conducting this review. These costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 11th day of February 2011.

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Owen Vaughan
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:

AQ as the Applicant
ZI as the Respondent
ZH as an Interested Party
The Auckland Standards Committee Number 2
The New Zealand Law Society