

**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 1 of the New Zealand Law Society

**BETWEEN**

**Mr CN**

of Auckland

Applicant

**AND**

**AUCKLAND STANDARDS  
COMMITTEE 1**

of Auckland

Respondent

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

**DECISION**

[1] The Review Applicant is Mr CN (the Practitioner) who sought a review of a Standards Committee decision which determined to refer the complaints to the Lawyers and Conveyancers Disciplinary Tribunal (LCDT). There were several heads of complaint identified by the Standards Committee for enquiry, but the main complaint concerned the Practitioner's fees which the Complainant had considered were not fair and reasonable in all of the circumstances that were set out in the complaint letter. An additional issue identified by the Committee concerned the related matter of security sought by the Practitioner for payment. The other heads of complaint interfaced with the main complaint. One involved an allegation that the Practitioner had failed to inform the Complainant that legal aid had been approved. The other alleged that the Practitioner had failed to provide information in relation to his charges and/or fees.

[2] The Standards Committee conducted an investigation and determined, pursuant to Section 152(2)(a) of the Lawyers and Conveyancers Act 2006 (the Act), that the complaints should be considered by the Lawyers and Conveyancers Disciplinary Tribunal. No reasons for this decision were included, and it appears that all elements of the complaint were covered by that determination.

[3] The Practitioner sought a review of the determination mainly on the ground that the Standards Committee had been unduly influenced by a costs assessor's report (the S report) it had obtained. The Practitioner contended that the S report made findings against him, or that his comments and observation effectively amounted to findings, and that the report took a more negative view of the Practitioner's conduct than the circumstances warranted. Objection was taken to the absence of any reference to the costs factors that are set out in Rule 9.1 of the Conduct and Client Care Rules which are the guiding principles to charging fees. The Applicant had provided his own costs assessor's report (the B report) to the Standards Committee which he considered fully answered the allegations.

[4] Notwithstanding that the Standards Committee had both reports before it at the time it determined the matter, it was submitted for the Practitioner that the Committee took into account irrelevant considerations to the exclusion of relevant considerations. It was the Practitioner's view that the Standards Committee could have, and should have, determined the complaint itself. The Practitioner asked that this office give consideration to deciding the substantive aspects of the complaints, or alternatively for the matters to be redirected to the Standards Committee to make a decision on all of the substantive issues.

## **Background**

[5] In brief, the Practitioner had been approached by the relative of a person who was being held in police custody in relation to serious criminal charges. (The relative later became the Complainant). The immediate issues requiring legal services involved name suppression and bail, and in relation to these matters the Practitioner provided his services. When later the Practitioner's bills were presented for payment, the Complainant sought clarification from the Practitioner concerning his costs, and this eventually led to a complaint being filed with the New Zealand Law Society.

[6] The complaint was perceived primarily as a costs matter and the Complaints Service appointed a costs assessor (S) who was authorised to undertake an assessment of 3 bills of costs that were the subject of the complaint. The instrument of

appointment for S is dated 14 July 2009, and required S to prepare a report for the Standards Committee which should include his comments on whether the fee was considered to be fair and reasonable in terms of Rule 9.1 of the Rules, and if not fair and reasonable, to specify what he (S) considered would be a fair and reasonable fee, which could be expressed in a range and also invited S to make any other comments about matters arising out of the inquiry which might assist the Standards Committee in reaching a properly informed decision about the costs complaint. In a concluding paragraph, S was instructed, "*when writing your report please bear in mind that it is routine practice to copy costs assessor's report to the parties. You should also note that it is not part of your responsibility to make a finding of unsatisfactory conduct in relation to the costs complaint. That is the function of the Standards Committee based all the material before it.*" S was asked to provide the report within a month.

[7] S contacted the Practitioner with view to interviewing him but for reasons which need not be included in any detail, I observed that the Practitioner raised a number of objections to the assessor's procedures and in the event, they did not meet. However, the Practitioner did provide, at S's request, a printout of his MYOB fees reporting system. S interviewed the Complainant and another person who had acted as a junior lawyer for the Practitioner. On 27 August 2009 S wrote to the Practitioner and informed him that he had interviewed certain individuals (who were identified), adding "*before completing a report, I would like to meet with you to put various concerns I had to so that you may respond.*" Arrangements were sought for a meeting at a suitable time. By end October 2009 no meeting had yet taken place, and meanwhile the Standards Committee was making enquiries of the assessor as to the progress of his enquiry. The evidence on the file showed that S made a number of attempts to meet with the Practitioner and also answered the Practitioner's questions concerning his (S's) procedures. No meeting eventuated and on 23 December 2009 S presented his report to the New Zealand Law Society in which he reported his findings, the steps he had taken, and reasons why he had not met with the Practitioner.

[8] The report was sent to the Practitioner for comment. The Practitioner was also asked to produce certain information, a request made to pursuant section 147(2)(a) of the Act which required the Practitioner to produce certain records and documents for the inspection of the Standards Committee. These were provided in early February. Thereafter the Standards Committee resolved that the matter should be set down for a hearing on the papers pursuant to section 152(1) of the Act and the parties be invited to make written submissions pursuant to section 153(3). The Practitioner was to be provided with all documents relevant to the Complaint, including the relevant

delegations. On 3 March, the Standards Committee sent a Notice of Hearing of Complaint to the Practitioner, which identified the issues for enquiry as:

- a) Reasonableness of fees;
- b) Possible failure to provide the client with a letter of engagement pursuant to Rules 3.4 and 3.5 of the Conduct and Client Care Rules 2008;
- c) Possible failure to have kept the instructing solicitor informed of progress; and
- d) Concerning the Practitioner allegedly ignoring the legal aid grant that have been made.

[9] The Practitioner was informed of the outcomes that could result from the hearing, which included making a determination that the matter be considered by the Disciplinary Tribunal. The date of the proposed hearing was to be 19 March 2010, and the Hearing was to be conducted on the papers. The Practitioner sought an extension of time to make submissions, and was informed that the 19 March's hearing has been postponed till 26 March, with the Practitioner's comments or response being sought no later than the morning of the 25 March 2010. The Practitioner's response (via his Counsel) was forwarded to the Standards Committee on that day.

[10] In addition to Counsel's submissions, the material included a costs assessment (by B) that had been sought by the Practitioner. This report included comments on S's costs assessment report. It also considered the Practitioner's fees with reference to the reasonable fees Factors as set out in Rule 9.1 of the Rules; B had concluded the fees were justified with reference to those factors. The Practitioner submitted that "*overwhelmingly the evidence on the papers favoured him*" and were considered to be a complete answer to the complaints.

[11] On 26 March the Standards Committee resolved to defer hearing the matter until its next meeting. This meant that when the Standards Committee met on the 7 May 2010, it had considered not only the S costs assessor report but also the submissions which included the B costs assessor report. At that meeting the Committee determined that the complaints were to be referred to the LCDT.

## **Considerations**

### *Extent of reviewability*

[12] Previous decisions of this office have concluded that the power to review the exercise of a prosecutorial discretion by the Standards Committee is limited. In LCRO 133/09, the LCRO traversed the authorities concerning the power to review such decisions and concluded that those grounds included situations where the decision to prosecute was:

- 1) Significantly influenced by irrelevant considerations;
- 2) Exercised for collateral purposes unrelated to the objective of the statute in question (and therefore an abuse of process);
- 3) Exercised in a discriminatory manner;
- 4) Exercised capriciously, in bad faith or with malice.

[13] Counsel for the Practitioner made a number of submissions in relation to the exercise of discretion to prosecute. He questioned whether the jurisdiction to review was so narrow, arguing for a wide range of circumstances in which such a decision could be reviewed. It became clear that his concern was that the Standards Committee had been unduly influenced by the S report in determining to refer the complaints to the LCDT. Counsel's argued that the grounds for review "*... must include consideration of material which was unreliable or where the Standards Committee has been unduly influenced by an unreliable or unfairly reasoned report.*" With reference to judicial authority, Counsel submitted that the review grounds should extend to such circumstances.

[14] Having considered the submissions and the cases, I do not think it is necessary to consider whether the grounds as summarised by the LCRO 133/09 should be extended because the concerns raised by Counsel's submissions could, in my view, be considered under the first exception, namely that such a decision is amenable to review if it was significantly influenced by irrelevant considerations (with reference to 1 above).

[15] It was submitted for the Practitioner that the Standards Committee was unduly influenced by the S report and the conclusions or findings by S that there had been wrongful conduct on the part of the Practitioner. The submission was that S had made findings which were outside the scope of his instructions, had made adverse findings which were unreasonable since there was failure to properly justify those conclusions, and that the Standards Committee ought not to have considered S's report.

[16] Counsel compared the two costs assessors reports. He described what he saw as the various shortcomings of the S report, including that it had made unsupported assumptions, and had not considered the Practitioner's fees in terms of the relevant cost factors, and had insinuated dishonesty without any supporting evidence or proper enquiry. By contrast the B report was considered to have been fully reasoned, had considered the Practitioner's fees with reference to relevant costs factors in detail, and concluded that the fees were fully justified. The essence of the submission was that the Standards Committee's decision (the determination to send the matter to the LCDT) was of itself evidence that the Committee had been unduly influenced by the S report. Counsel submitted that "the weight of evidence" presented to the Standards Committee strongly favoured (the Practitioner), and it followed that the Committee's decision to lay charges against that weight of evidence was indicative of an error in the process followed.

[17] I have read all of the material on the file and that presented by and for the Practitioner, for the review and at the review hearing. The submissions in favour of the Practitioner relied heavily on the B report and I agree that there are significant differences between the two costs assessor's reports. These reports essentially express the opinions of two costs assessors on the Practitioner's fees, which opinions are opposed in almost every material respect, and also reached different conclusion in relation to matters of dispute. However, whether it is reasonable to make a comparison is a further question, because as I have noted S did not have the advantage of meeting with the Practitioner and therefore no opportunity to hear from him on the issues relating to his fees. The evidence on the file shows that this was largely due to the Practitioner's unwillingness to make himself available for a meeting. This resulted in S drawing conclusions and drawing some inferences on the basis of such information as he was able to obtain, and these limitations were made clear in the report.

[18] I can find no examples of S having made 'findings' although it is fair to say that his opinions were at times expressed decisively and would have left the Standards Committee in little doubt about the negative views he held about the Practitioner's conduct. By contrast, the information contained in the B report, commissioned by the Practitioner, was accumulated from B's direct contact with the Practitioner and therefore had all the advantages that allowed the compilation of a comprehensive report. I also noted that B's report included equally decisive opinions on matters concerning conflicts in the evidence.

[19] It is unnecessary to make any further comment about these reports because I do not accept that the only explanation for the Standards Committee's determination is the report by S. The limitations of the S report were evident, but at the same time I see no reason why the Committee ought to have preferred B's report over that of S, particularly given the limitations of S's report that I have noted. Given the conflicting views of the assessors, it was open to the Standards Committee to take the view that the reports did not address the concerns under the Committee's consideration. It is more likely that the Standards Committee concluded that the conflicting reports did not answer the concerns raised by the complaints.

[20] The fees complaint involves a serious allegation, and there is a considerable amount of conflicting evidence. A Standards Committee is justified in referring a matter to the Disciplinary Tribunal if on the available evidence the conduct complaint, if found to be proven, is capable of reaching a threshold upon which a finding of misconduct could be made. Such a referral may also be made in appropriate cases where there is conflicting evidence of kind that is preferably resolved by the cross examination procedures available in the Tribunal.

*Practitioner not personally heard*

[21] The Practitioner submitted that he could have fully answered the complaint and addressed any conflicts of evidence had he had the opportunity to have personally addressed the Standards Committee. He said his request to be personally heard had been denied. The Practitioner said he understood that the Standards Committee routinely declined all such requests by parties to be personally heard, and he questioned the legality of a policy to not exercise a discretionary power.

[22] I was unable to locate on the file evidence of a request having been made by the Practitioner or refused by the Standards Committee although I do not discount that this may have been done orally. The Minutes of the Committee record a resolution to set the matter down for a hearing on the papers pursuant to section 152(1) and to invite the parties to make written submissions pursuant to section 153(3) of the Act. The Notice was sent out to the Practitioner on 3 March 2010, and identified four categories of complaint in respect of which the Practitioner was invited to respond. The Lawyers and Conveyancers Act provides by s. 153 that a hearing conducted under s. 152 is to be a hearing on the papers 'unless the Standards Committee otherwise directs'. The general position therefore is that such hearings are normally on the papers and that a hearing would be exceptional. I am unaware of any policy of 'no hearings' being applied in a general way, and simply note that where any administrative body has a

discretionary power, it is not lawful to impose a policy which effectively precludes any opportunity for such discretion to be exercised.

[23] In this case I am unable to see that the Practitioner was prejudiced in this matter by not having been heard personally. He was fully informed of the issues under the Committee's consideration, and given the opportunity to answer them. The Practitioner did in fact respond to those matters in a comprehensive way and his response was before the Standards Committee before it reached a determination on the matter. All of the above suggests that the principles of natural justice were fully complied with.

[24] For reasons given above, I do not agree that the only explanation for the Committee's determination was that it had been unduly influenced by the S report. The Committee had before it allegations which were serious, disputed evidence in relation to those allegations, and was required to consider whether those allegations, if found to be true, could reach a threshold for a finding of misconduct. The fact that it reached a determination along these lines is indicative of the Standards Committee's assessment of the matter.

*Standards Committee failure to provide reasons for decision*

[25] The Practitioner was dissatisfied that the Standards Committee had provided no reasons for the determination it had made, making it difficult to know why the Committee had referred the matter to the LCDT rather than deciding the complaints itself. Section 139 of the Lawyers and Conveyancers Act provides that where a Standards Committee decides to take no action, or no further action, on a complaint, it must give written notice of that decision (to parties mentioned), and that the notice must state the decision and the reasons for it and describe the right of review. That section appears to relate to the prior section, section 138, where a Committee exercises its discretion to take no further action on grounds stated in section 138(1)(a)-(f). No equivalent requirement to give reasons attaches to section 152, which sets out the various determinations that a Standards Committee may make on a complaint or matter.

[26] Despite there being no explicit requirement in the Act to provide reasons there is a general acceptance that reasons are to be given for decisions made by judicial or quasi-judicial bodies. This is an important part of openness in the administration of justice, and is necessary if there is to be any opportunity to correct irregularities that may have arisen. The absence of reasons for a decision impacts on the exercise by a



review body of its supervisory jurisdiction and it is important that sufficient reasons are given to enable someone affected to know why the decision was made and to be able to be satisfied that it was lawful. Where the decision involves the referral of the substantive matter to another decision-making body (as in this case), a Standards Committee is not able to comment on the substantive complaint which then falls under the consideration of the Disciplinary Tribunal. However, there can be no objection to the Committee setting out reasons for its decision to refer the matter to the Disciplinary Tribunal rather than dealing with the matter itself.

[27] In this case, the Standards Committee included no reasons for the determination it had made pursuant to section 152(2)(a) of the Act, adding that the letter was provided to the Practitioner by way of notification of the outcome of the matter pursuant to section 154, (this section referring to charges that were to be laid in the Disciplinary Tribunal). The Standards Committee should have included reasons why the matter was being referred; this is an omission that can be cured via this review process.

[28] I have already expressed the view that the complaint, insofar as it concerns the Practitioner's fees, is serious and also that there is conflicting evidence that has not been resolved by the reports. The complaint, if found to be proven, is capable of reaching a threshold of misconduct, a finding that only the Disciplinary Tribunal can make. That, together with the observation that there is conflict in evidence, makes the referral to the LCDT appropriate in relation to this complaint.

#### *Separating the complaints*

[29] On reflection I am not convinced however that all heads of the complaint should have been included in the Standards Committee determination. The above discussion focuses on the complaint involving the Practitioner's fees and the relevant security he obtained to their payment, which for reasons stated make the Committee's decision to refer them to the LCDT appropriate.

[30] There are other heads of complaint which appear either not to have been fully investigated or where there is no evidence that the Committee have given particular consideration to whether they should be determined by the Committee or be included in prosecution charges. It is not possible to discern from the Committee's file that specific consideration was given to the different elements of the complaint, in particular two parts of the complaint that may be seen as peripheral to the main complaint, but

that could have been given separate consideration, even if to consider whether these could or should be considered separately from the fees complaint.

*Complaint relating to legal aid approval*

[31] The first of these is the complaint concerning the legal aid approval and the allegations against the Practitioner in relation to information given and representations made to the client. This is a conduct complaint that was separate from the question of the reasonableness of the Practitioner's fees, notwithstanding that this matter was considered by the Complainant to have some relevance to the fees issue. Nevertheless the Standards Committee appears to have given no separate consideration to the question of whether this should be separated from the fees issue, and whether it was appropriate to reach a decision on the matter, or whether it should properly form part of the charges to be served on the Practitioner.

*Complaint relating to letter of engagement / information about fees*

[32] The second relates to the allegation that the Complainant had been given no information of the kind contemplated by Rule 3.4 of the Lawyers Conduct and Client Care Rules. This rule imposes an obligation on a lawyer to provide specified information to a client at the start of the retainer. The Practitioner had claimed that no such request had been made by the Complainant (this is disputed) and that he was not therefore obliged to have provided that information. The Practitioner had stated that the fee information had not been asked for and he could therefore be in breach of the Rule. It is understood that in his submission the Practitioner relies on the exception as set out in Rule 3.7 which deals with situations where a lawyer is instructed by another lawyer.

[33] There was no evidence to show that the Standards Committee turned its mind to this aspect of the complaint as a separate issue from the fees complaint, other than noting the Complainant had not been provided with information concerning the Practitioner's charging. The intervention rule requires a barrister sole to act only on the instructions of a lawyer holding a current practising certificate. The Practitioner had provided a copy of a letter of instruction. There was very little clarity however as to the Complainant's contact, if any, with that instructing lawyer, and no evidence of compliance with the requirements of rule 3.4. If it is the case that the Practitioner himself arranged the briefing, this raises a basis for enquiry into the professional obligations of the instructing lawyer, or the Practitioner (as the case may be), in such circumstances, in relation to meeting the requirements imposed by Rule 3.4.

[34] The circumstances surrounding the background to the complaint brings to the fore the reality that individuals will often directly contact a barrister, who in turns makes arrangements to ensure compliance with the non-intervention rule. Where an instructing solicitor is unknown to, or has little or no contact with, the client there is inevitably a lack of clarity concerning compliance with the information requirements imposed by Rule 3.4. One of the main aims of the Lawyers and Conveyancers Act is consumer protection and the purpose of the statutory requirement to provide information is that legal services are provided on a “no surprises” basis. At the centre of this complaint is the allegation that the Complainant had no idea or information about the Practitioner’s likely fees in relation to the work that was to be done. In carrying out its functions under the Lawyers and Conveyancers Act, the Standards Committees are required to consider the objectives of the Act.

[35] There is sufficient evidence on the file to warrant a separate enquiry into this matter, and the Standards Committee ought to have conducted further inquiry into the circumstances in which the Complainant was able to obtain the services of the Practitioner allegedly without a letter of engagement having been provided, and where the responsibilities lay for providing such information in the circumstances of the matter.

#### *Charges against the Practitioner*

[36] A lawyer is entitled to be fully informed of the specific charges that he is required to answer in the Disciplinary Tribunal. Although no charges have yet been framed, it is difficult to discern from the Committee’s determination what matters are likely to be among the charges in addition to the fees complaint.

[37] It is appropriate that before any charges are formulated that the Standards Committee undertakes further enquiry into the two matters identified as requiring further investigation. Any action to prosecute the Practitioner should be delayed until the completion of the further enquiry, to allow the Committee to ascertain what, if any additional charges should be included.

#### **Outcome**

##### *Standards Committee determination on complaint involving the Practitioner’s fees*

[38] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, in relation to the complaint involving the Practitioner’s fees (including the security obtained for payment), the Standards Committee’s determination is confirmed.

**Redirection order pursuant to section 209***Complaint concerning legal aid*

[39] Pursuant to section 209(1)(a) of the Act, the Standards Committee is directed to consider and determine that part of the complaint against the Practitioner concerning legal aid and to make such decision or determination in relation to that complaint as the Standards Committee considers appropriate.

*Complaint concerning failure to comply with Rule 3.4*

[40] Pursuant to section 209(1)(a) of the Act, the Complainant, the Standards Committee is directed, in relation to the complaint involving the alleging failure to comply with Rule 3.4 of the Lawyers Conduct and Client Care Rules, to consider the complaint. The Committee's enquiry should, if necessary, extend to any other Practitioner or Practitioners as the Committee may consider it appropriate.

[41] In relation to both of the above redirections, the Standards Committee is required to make such decision (pursuant to s. 138) or determination pursuant to ss 152(2)(a) or (b) (whether due to the gravity of the matter and/or for reasons relating to conflicting evidence), as the Committee considers appropriate.

[42] The guidelines of this office for costs generally require a Practitioner to contribute to the costs of a review where the review is unsuccessful. In this case, the review was partially successful, but since it raised a number of matters which indicated that the Standards Committee inquiry was incomplete. No costs order will be made.

**DATED** this 23<sup>rd</sup> day of September 2010

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Hanneke Bouchier

**Legal Complaints Review Officer**

In accordance with s.213 of the Lawyers and Conveyancers Act 2006, copies of this decision are to be provided to:

Mr CN as the Applicant  
Mr R as Counsel for the Applicant  
The Auckland Standards Committee 1  
The New Zealand Law Society