

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of Auckland Standards Committee 4

**BETWEEN**

**RM**

Applicant

**AND**

**LN**

Respondent

**DECISION**

**Introduction**

[1] RM has applied for a review of the determination by Auckland Standards Committee 4 in which it found that RM had breached Rules 3.1, 3.6, 9 and 9.4 of the Conduct and Client Care Rules<sup>1</sup>, ordered RM to reduce his fees and ordered him to pay costs to the New Zealand Law Society.

[2] In his review application, RM accepted the findings of the Committee with regard to the breaches of Rules 9 and 9.4 and the Orders to reduce his fees, and requested that the review focus on the findings of breaches of Rules 3.1 and 3.6 and the order to make payment of costs.

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<sup>1</sup> Lawyers and Conveyancers Act (Conduct and Client Care Rules) 2008.

**Background**

[3] LN instructed RM and his firm to act on her behalf to seek compensation for drainage problems encountered with her new property.

[4] The day to day carriage of the file was undertaken by RO, a solicitor in the firm, with RM acting in a supervisory role.

[5] Both RM and RO had contact with LN in connection with the file and although the Standards Committee determination (and consequently this review) relates to RM, LN's complaint referred to both lawyers.

[6] Proceedings were issued against the developer / vendor and the Council.

[7] A judicial settlement conference took place in September 2009 which for various reasons was unsuccessful.

[8] LN was not in a position to incur significant legal costs and made it clear that she did not want to incur the costs of a court hearing.

[9] Following the unsuccessful joint settlement conference, LN withdrew her instructions and settled the matter directly with the Council.

**LN's complaints**

[10] LN complained that the advice from RM and RO had encouraged her to commence proceedings against the Council when it would have been in her interests to have pursued the matter through the Disputes Tribunal. She complained that as a result, she had incurred costs which had not only exceeded estimates provided by RM, but had also not produced a satisfactory result for her.

[11] She also complained that RM and RO were rude and discourteous in their dealings with her, talked down to her, and generally, that their relationship with her was poor.

[12] Having considered all of the material provided, the Standards Committee determined that it did not have jurisdiction to consider the bills of costs rendered prior to 1 August 2008.

[13] In respect of the bills of costs after that date, it determined that there had been

breaches of Rules 9 and 9.4 of the Conduct and Client Care Rules and ordered that the fees be reduced.

[14] In addition, the Committee found that RM had breached Rules 3.1 and 3.6 of the Conduct and Client Care Rules. No Orders were made in respect of those breaches, but RM was ordered to pay the sum of \$1,000.00 by way of costs to the New Zealand Law Society.

### **The applicable law**

[15] LN instructed RM in March 2008. On 1 August 2008, the Lawyers and Conveyancers Act 2006 came into force and it was therefore necessary for the Standards Committee to separately consider the billing and conduct before and after that date. It is not necessary for me to traverse the issues relating to this as the Standards Committee has addressed the issue in its determination at paragraph [15].

[16] Although the Committee's determination referred only to billing prior to 1 August 2008, it did not make any adverse findings in respect of the other conduct complained of prior to that date, and I concur with that determination.

### **Review**

[17] I propose to address a number of preliminary issues in the first instance to establish the parameters of this review. I have noted that although the Committee stated in paragraph [17] of its determination that RM had failed to keep LN informed and to progress matters in a timely fashion, it did not make a specific finding of a breach of Rule 3 of the Conduct and Client Care Rules.<sup>2</sup> In addition, although the Notice of Hearing identified an issue as being the firm's performance at the judicial settlement conference no specific finding was made in this regard.

[18] The outcome of this review is that the determination of the Standards Committee is confirmed, other than where specifically modified or reversed, and consequently the position in respect of both issues will be confirmed. I have not considered it necessary to take these matters any further but confirm that I am aware

of these omissions.<sup>3</sup>

#### **Breaches of Rules 9 and 9.4**

[19] A review applicant cannot determine which parts of a Standards Committee determination is to be reviewed. Whilst an Applicant is invited to provide reasons for applying for a review and to identify matters which the Applicant thinks should be considered, the LCRO may review all or any of the aspects of the enquiry and the Standards Committee determination.<sup>4</sup>

[20] In this instance, RM advised that he accepted the finding of the Standards Committee that he had breached Rules 9 and 9.4 and that he accepted the orders to reduce his fees as directed by the Committee.

[21] Not unexpectedly, LN has not expressed any dissatisfaction with these findings and I consider that there is no reason for me to review this aspect of the Standards Committee determination.

[22] Accordingly, those findings and orders of the Standards Committee will be confirmed.

#### **Breach of Rule 3.6**

[23] The Standards Committee determined that “[RM] had failed to adhere to the fee estimate and had not kept the client informed on that front and that this constituted a breach of Rules 3.6 and 9.4 of the Rules of Conduct and Client Care.”<sup>5</sup>

[24] Rule 3.6 of the Conduct and Client Care Rules provides as follows

If information provided by a lawyer in terms of rule 3.4 or 3.5 becomes inaccurate in a material respect, the lawyer must ensure that the information is updated with due expedition. Rules 3.4 and 3.5 are complied with where a lawyer has previously provided a client with the information required and the information remains accurate.

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<sup>2</sup> “In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.”

<sup>3</sup> Although it may be that the Committee considered that these issues were adequately dealt with in the findings and Orders in respect of costs.

<sup>4</sup> Section 203 Lawyers and Conveyancers Act 2006.

<sup>5</sup> Paragraph [17].

[25] Rules 3.4 and 3.5, insofar as they refer to the provision of information about fees, require a lawyer to advise the basis on which fees will be charged, when payment of fees is to be made, and whether the fee may be deducted from funds held in trust on behalf of the client.<sup>6</sup> There is no reference to fee estimates in those Rules. Fee estimates and the requirement to inform the client if an estimate is to be exceeded is covered by Rule 9.4.

[26] The Standards Committee was therefore incorrect in finding that RM had breached Rule 3.6 and the determination will be reversed in that regard.

### **Factual errors**

[27] RN (on behalf of RM) has drawn my attention to what he considers are factual errors in the Standards Committee determination.

[28] An obvious error is contained in paragraph [12] of the Standards Committee determination, where the Committee recorded that RM had sought a second opinion from another law firm. This is incorrect as it was LN who had sought the second opinion. The Standards Committee determination will be modified in this regard.

[29] RN also submits that the Judge did not state at the judicial settlement conference that there was insufficient evidence to take the matter to Court as recorded in paragraph [11] of the Standards Committee determination. There is disagreement between the parties in this regard. Without a record of the judicial settlement conference, the alleged statement cannot be verified, but the determination of the Standards Committee does need to be modified to take note that the Judges' statement should not be recorded as a matter of fact, but as an allegation by LN that this was what the Judge stated.

### **RO**

[30] Finally, I note that although LN's complaint was in respect of both RM and RO, the Standards Committee proceeded with the matter as a complaint against RM only. At the review hearing, I asked LN whether she wished to have the complaint against

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<sup>6</sup> Rule 3.4 (a) Conduct and Client Care Rules.

RO considered separately, in which case I would refer this aspect of the matter back to the Standards Committee.

[31] LN advised that her complaint was in the main against RM, and indicated that she did not wish to pursue a separate complaint against RO. Accordingly, the matter is best resolved by recording that the complaint against RO referred to in the letter of complaint to the Standards Committee is withdrawn.

[32] RO's conduct is therefore of limited relevance to this review, insofar as RM cannot be accused of being vicariously responsible for any conduct by RO that was considered to be rude or discourteous.

### **Breach of Rule 3.1**

[33] This review is therefore narrowed down to a consideration of the finding of a breach by RM of Rule 3.1 of the Conduct and Client Care Rules.

[34] That Rule provides as follows

A lawyer must at all times treat a client with respect and courtesy and must not act in a discriminatory manner in contravention of section 21 of the Human Rights Act 1993.

[35] The Notice of Hearing dated 1 December 2010 advised that the issues raised by the alleged conduct included

- a) That RM did not keep to his estimate of costs and has overcharged LN for a poor standard of legal work;
- b) That LN achieved a poor litigation result in a judicial settlement conference as her lawyer was unprepared and this amounts to negligence.

[36] There was no reference to LN's complaints about RM's manner towards her although I note that the firm's submissions to the Committee did address these complaints in a general way. However, LN had provided a significant amount of material to the Committee and I consider that RM should have been afforded an opportunity to address specific matters with which LN was concerned.

[37] At paragraph [17] of its determination the Standards Committee noted that

When the client asked about the lack of information RM had failed to respond with respect and courtesy and this amounted to a breach of Rule 3.1.

There was no discussion in the determination of the facts or evidence relating to this

allegation.

[38] The allegation of rude and discourteous conduct was not included in the summary of the complaints at the commencement of the determination and the only mention of this aspect of the complaint is when the Committee recorded the general allegation that “they were arrogant and patronising when she asked for information.” The reference to “they” in the determination is a reference to both RM and RO. In the review hearing, LN also referred to conduct of RO which she found to be unacceptable. However, as noted above in paragraph [32], RO’s conduct cannot be attributed to RM, and has to be discounted when considering the allegations against him.

[39] It was unclear to me what specifically the Standards Committee was referring to when it made its determination. LN raised both generic and specific complaints.

[40] By letter 14 February 2012 I advised the parties that I intended to meet with them for the purpose of ascertaining and examining which aspects of RM’s conduct LN considered was rude and discourteous.

[41] On 13 April, this Office received two statements from LN. One statement was from LM which related to a meeting which took place at LN’s house on 14 November 2008, and one was from LL which also related to that meeting, as well as to the joint settlement conference.

[42] Other than the fact that he was unable to attend the joint settlement conference due to a family illness, the events of that conference have no relevance to the breach by RM of Rule 3.1.

[43] LN also provided an audio recording of a meeting which took place in RM’s office in November 2009. That meeting was recorded without consent from RM and a CD copy was provided to the Complaints Service. However, it was returned to her unheard by the Standards Committee.

[44] LN also referred to what she considered was rude and discourteous behaviour in her letter to this Office dated 26 May 2011 where she says

This is where he responded to my email request to get some clarification of how my case was progressing and the costs involved. In the transcript of the meeting with Colleen Prendergast you will see that she made comment as to how they got upset about my email and how they considered it to be counter productive. There [sic] response to me made me feel as though I had no right to be requesting this information and I still feel to this day that their response was un-necessary and un-professionally abrupt.

LN was referring to a letter from RM dated 22 May 2009 in response to an email from her dated 17 May 2009.

[45] The specific instances to be considered therefore are:-

- (1) the meeting at LN's home on 14 November 2008;
- (2) the letter dated 22 May 2009; and
- (3) the meeting at RM's office in November 2009.

[46] I will address each of these instances in turn. Before I do so, it is necessary to briefly discuss that part of Rule 3.1 which refers to discrimination in contravention of section 21 of the Human Rights Act 1993.

[47] RN referred to this at the review hearing. However, I do not consider that part of the Rule to have relevance to this review. LN has only ever referred to RM's conduct as being rude and discourteous and that was the finding of the Standards Committee. It has not been suggested at any stage that RM discriminated against LN because of her disabilities in any way, other than it being suggested his alleged rude and discourteous conduct was because of her disabilities - i.e. talking down to her.

[48] Whatever the reason for his alleged conduct, the nature of the conduct complained of is not altered, and consequently I have treated the complaint as relating only to the first part of Rule 3.1 namely, the requirement that a lawyer be respectful and courteous towards his or her client.

### **General comments**

[49] It will be apparent to anyone who has had cause to consider the requirements of Rule 3.1, that what constitutes disrespectful and discourteous conduct will vary according to the circumstances. RN submits that when considering whether or not there has been a breach of this Rule, the test must be an objective one and the focus must be on the lawyer's conduct as opposed to the client's response. That submission is accepted. To determine otherwise would impose an impossible standard based on a client's reaction to the lawyer's conduct.

[50] However, in making an assessment of what constitutes appropriate conduct, it is to be expected that a lawyer should be required to conduct him or herself with due regard for the client's known standards and sensibilities. In the present instance, RM



could be expected to have somewhat more patience than usual to assist LN to have a full understanding of the case. The difficulty that arose in this case was that in responding to LN's requests for information, the firm's costs escalated, and LN expressed direct concerns and challenges to the firm's bills of costs.

### **The meeting of 14 November 2008**

[51] This meeting took place at LN's home and was attended by RO and RM. The purpose of the meeting was to discuss details of LN's claim, and particularly a second opinion which LN had obtained from another law firm which suggested that proceeding through the Disputes Tribunal may be a better course of action.

[52] Primarily, that meeting was to take place between LN and RO, who had the day to day carriage of the file. RM determined that he should also attend the meeting to view the state of the property, and as matters of costs were likely to arise, he should attend as the supervising partner. He states that his decision to attend was made at short notice.

[53] However, it appears that he overlooked the fact that he had another meeting scheduled for the same time at his office. Consequently, he was distracted by calls from his office during the meeting and was ultimately required to return to the office. LN considered his conduct during the course of this meeting to be discourteous as he was distracted and appeared to be uninterested in the matters being discussed. RM states that he dealt with all aspects of the case that were within his domain, whilst he left RO (whose file it was) to address the matters raised by LN. He states that by the time the meeting terminated, all matters that needed to be discussed had been addressed. He says that he apologised to LN for the situation that had arisen and he thought that his apologies had been accepted at the time.

[54] The letters from LM and LL refer to this meeting. LM refers to the fact that RM was occupied by texts received and being sent at the meeting, which she describes as rude, arrogant and inconsiderate. LL also describes RM as being distracted and uninterested at this meeting.

[55] In the circumstances as advised by RM, it is understandable that RM was distracted and would appear to be uninterested. It was certainly poor management that he had agreed to attend a meeting when he was required elsewhere. It is also

understandable that LN considered that he had little interest in her case which was of extreme importance to her and for which she was paying considerable fees. She had a legitimate expectation that full attention would be paid to her case at a meeting with her lawyers.

### **The letter of 22 May 2009**

[56] The letter of 22 May 2009 was written by RM in response to an email from LN on 17 May 2009 in which she expressed some dissatisfaction with the firm's performance, and asked whether RM was "still holding up your end of the quotation." She also expressed a view that little in the way of progress had been achieved.

[57] The issue of costs had been raised on a number of occasions and the firm was having some difficulties with containing costs in the face of the numerous communications from LN.

[58] RM's letter expressed the frustrations that they were experiencing in dealing with LN. He pointed out that they were obliged to respond to LN's communications, which in many instances they considered were unnecessary and only repeating what had already been dealt with. RM's frustrations were reflected in his statement that emails such as the one LN had just sent, were only adding to the cost without being helpful or necessary to the progress of the proceedings.

[59] The overall tenor of the letter was certainly direct and confronted the queries raised by LN with what could be considered to be some 'home truths'. The question is whether the letter lacked respect and courtesy.

[60] RN submits that overall the tone of the letter was constructive and did not contain any personal insults or talk down to LN.

### **The November 2009 meeting**

[61] Following the Judicial settlement conference a meeting took place in RM's office in November 2009. This meeting was requested by LN and her supporter LK to discuss the unsatisfactory outcome of the conference. RM acknowledges that he was "direct on the subject of difficulties in the solicitor / client relationship and the

burgeoning cost.” He also acknowledges that he was “terse.” He considered that the client was “repeatedly sceptical and challenging.” He confirms that “he saw it as [his] responsibility to be quite explicit and [he] was.”

[62] As proposed at the review hearing, I have listened to the recording of that meeting provided by LN. Apart from a rather brusque greeting from RM (reference to having half an hour for the meeting) there is nothing said during the course of that meeting by RM that could be considered to be lacking in respect or courtesy.

[63] RM does make reference to phone calls by LN concerning matters discussed previously, but I heard nothing which approached disrespect or a lack of courtesy.

### **Comment**

[64] LN bought a new home. The drainage systems malfunctioned resulting in sewage backflow and flooding. She naturally sought recovery of the costs of rectifying these problems. She instructed RM to act for her in this regard. He advised that she should issue proceedings in the court to enable her to recover losses which could not be recovered in the Disputes Tribunal.

[65] Proceedings were issued against the developer / vendor and the Local Authority both of whom resisted the claim. Costs increased with no result and a judicial settlement conference did not result in a satisfactory outcome.

[66] LN was naturally anxious at the costs being incurred and the lack of results and the tension between her and the firm increased. She asked some direct questions of RM with regard to costs and the firm’s performance. She received some reasonably direct responses.

[67] LN’s direct manner and the need to retrace matters which had already been addressed could be attributed to the consequences of a car accident suffered by her, but to an experienced lawyer this should not present any difficulties. The difficulty that it did present was in containing costs, which was a concern to LN. RM therefore pointed out that the level of costs being incurred related to the time being spent on the matter, sometimes unnecessarily in his view.

[68] The recorded meeting to which I listened included a discussion about a process that had been put in place to have weekly calls to report progress, and also the use of

emails with questions, rather than telephone calls. They were trying to put systems in place to limit the costs.

[69] Unfortunately, one of the emails produced a rather direct response from RM (the letter of 22 May 2009) to which LN took objection. As the proceedings produced no outcome and LN continued to incur costs, the relationship between the parties deteriorated.

[70] It is in this context that LN's complaint against RM has to be viewed. Her goodwill towards the firm diminished, and she became more cynical about the firm's costs and performance. The firm's defence of itself was considered with increasing cynicism.

[71] Even taking into consideration the fact that RM was aware of LN's condition, there is no reason why he should not have responded to LN's correspondence and comments with the degree of directness that he did. Indeed, if he had not done so, he could not be certain that he had delivered his message clearly enough. LN was direct and to the point in her messages to RM, and it was reasonable for him to assume that he could respond in the same manner. In observing her at the hearing, and also listening to the recorded meeting, I do not get the impression that she would be concerned at this. My assessment is that it was the overall frustration at the lack of a resolution, and her concerns at the mounting costs which resulted in LN becoming disenchanted with RM and his firm, resulting in the complaint.

### **Apology**

[72] At the conclusion of the review hearing RM took the opportunity presented to him to offer an apology to LN. He noted that he had done his best to assist LN as well as he could. He expressed his apologies if he had come across as being aggressive in trying to get his message across, or patronising. He noted that if that was how LN had perceived his conduct, then he was sorry.

[73] LN however quite forcefully rejected his apologies. She repeated her view that RM was a rude and discourteous person.

## Summary

[74] The Standards Committee has found that RM's conduct constituted unsatisfactory conduct. It did not however specifically identify either in the Notice of Hearing or its determination, what it was that it was referring to when coming to this determination. There was no discussion in the determination other than a brief repetition of LN's allegations.

[75] In the course of this review, I have identified what it was that LN took specific objection to. While LN's reaction in each case is understandable, when the surrounding facts and circumstances are considered objectively, it can be considered that RM was responding directly to the challenges and queries raised by LN, and in the case of the meeting at her home, the reasons for his distraction can be understood. In the circumstances, it has to be considered whether an adverse disciplinary finding is appropriate.

[76] RM is naturally concerned at the finding of the Standards Committee that his conduct in his relationship with LN constituted unsatisfactory conduct. Even though no Orders were made, the adverse finding is of concern to him and he has incurred considerable time and effort to have that finding reversed. He also tendered what I considered to be a genuine apology at the review hearing. I also take note of the fact that he had also apologised at the time for the problems he encountered at the meeting at LN's home.

[77] Overall, I consider that the finding of unsatisfactory conduct with regard to this aspect of the complaint is not one which can be considered to have been established to the necessary degree. I also have some concerns that the Committee may have attributed some of LN's comments about the conduct of RO to RM. In the circumstances, I have come to the conclusion that an adverse finding is not supported by an objective view of the facts and accordingly I intend to reverse the finding in that regard.

## Costs

[78] Following its findings of unsatisfactory conduct, the Standards Committee ordered RM to pay the sum of \$1,000 to the New Zealand Law Society by way of costs. As this review has partly reversed the determination of the Standards Committee, that

Order will be modified.

**Decision**

1. Pursuant to section 211(1) of the Lawyers and Conveyancers Act 2006 the finding of unsatisfactory conduct arising out of a breach of Rules 3.1 and 3.6 is reversed.
2. Pursuant to section 211(1) of the Act the determination of the Standards Committee is modified as set out above in paragraph [27] and [28].
3. Pursuant to section 211(1) of the Act the Order of the Standards Committee as to payment of costs is varied to reduce the amount of the costs payable to \$500. This is based on the fact that this review has reversed the findings of unsatisfactory conduct in respect of the breaches of Rules 3.1 and 3.6, whilst the findings of breaches of Rules 9 and 9.4 remain.
4. Pursuant to section 211(1) of the Act, the remainder of the determination of the Standards Committee is confirmed.

**DATED** this 2<sup>nd</sup> day of October 2012

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O W J 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:

RM as the Applicant  
RN as the Representative for the Applicant  
LN as the Respondent  
Auckland Standards Committee 4  
New Zealand Law Society