LCRO 109 /09

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Standards Committee
BETWEEN	**MR FISHGUARD AND MS CANNOCK** Of South Island Applicant
AND	**MR WALSALL** of Auckland Respondent

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

DECISION

Application for review

[1] An application was made by Mr Fishguard and Ms Cannock (the practitioners) for a review of a decision by the South Island Standards Committee. The Committee had upheld complaints made by Mr Walsall in relation to fees he had been charged for legal services.

[2] The complainant had alleged that he had been overcharged for work done in respect of relationship issues and a charge of assault. A total of five bills of costs were rendered between 13 November 2007 and 29 August 2008. Four of these bills predated the commencement of the Lawyers and Conveyancers Act 2006 and they were required to be separately considered under the transitional provisions. The Committee did not uphold the complaint insofar as those invoices were involved. This determination is not challenged.

[3] The final bill of costs dated 29 August 2008 was rendered after the Lawyers and Conveyancers Act came into force on 1 July 2008, and the complaint involving this bill fell to be considered under the new disciplinary regime. The bill covered attendances from 4 June to 27 August 2008 and was confined to attendances in relation to the assault charge. The Standards Committee undertook further investigation and appointed a Costs Assessor who recommended that the fees complaint in respect of the assault charges be upheld and further recommended that the 29 August invoice be reduced from $8,692.31 (which included GST and disbursements) to $4,000 plus GST and disbursements.

[4] After considering the report it had sought from a Costs Assessor and the practitioner's response to that report, the Standards Committee decided to uphold the complaint and found the practitioners to be guilty of conduct in contravention of Rule 9.1, and by virtue of section 12(c) of the Act found the practitioners to be guilty of unsatisfactory conduct, not being a contravention that amounts to misconduct under section 7. The Committee adopted the Assessor's recommendation concerning fee reduction.

[5] The practitioners sought a review of that determination on the basis that the Committee had failed to take account of the principles of reasonable fee factors under the Lawyers:Rules of Conduct and Client Care. They also rely on submissions they had previously made to the Standards Committee in relation to the Costs Assessor's Report.

[6] Pursuant to section 206 of the Act the parties were informed that I considered the review could properly be determined in the absence of the parties and on the material before me. The practitioner and the original complainant agreed to this course.

[7] I also mention for the sake of completeness that the practitioners agreed that the Standards Committee determination be amended to show that they as a partnership, and not their firm, are the proper respondents. This clarification is needed due to the fact that the invoice involved in the complaint was issued by the practitioners when they were operating as a partnership, and that their subsequent incorporation led to the Standards Committee determination being made against the incorporated firm.

Considerations

[8] Chapter 9 of the Lawyers: Conduct and Client Care Rules governs fees, and requires lawyers to charge a fair and reasonable fee for services. Factors to be taken into account in assessing the fairness and reasonableness of fees include those set out in Rule 9.1(a) – (m). Although the practitioners did not particularise which factors they

believed had not been taken into account I have considered the factors in relation to the fees, and to the Cost Assessor's Report and their submissions in response to that Report. I have also considered other provisions in Rule 9, including 9.4 which relates to fee information and advice.

[9] The Costs Assessor's Report had stated that *"a senior lawyer would not have needed to research such issues as trial and criminal procedure, nor what defences were available to an assault charge – such matters should be 'bread and butter' to an experienced criminal lawyer, particularly as the charge was in the nature of a domestic assault, laid under the Summary Offences Act".*

[10] The Assessor was also of the view that the result that was in fact achieved could have been obtained sooner. He noted *'the indication from the Police that if a plea of guilty was entered, a discharge without conviction would not be opposed*", and expressed the view that *"strong representations to the Prosecution Section should have been made at an earlier stage, before the second status hearing was allocated, with a view to a Discharge under s. 106 Sentencing Act being agreed by the prosecutors*."

[11] In reaching his views the Assessor considered all of the bills of costs sent to the client by the practitioners, and submissions from the senior solicitor in the firm who advised that he had done the bulk of the work in preparing and representing the client at the trial.

[12] In responding to the Report the practitioners' submitted that :

- That the assessor failed to comprehend that only .8 hours ($120) of the total charges related to legal research on Criminal Procedure, and largely concerned the status hearing.
- That the assessor did not comprehend that the defence they advanced for their client was novel and involved '*some very fine points of law*'. On this basis they objected to the assessor's comment that '*a senior lawyer would not have had to research such issues ... nor what defences were available to an assault charge*.'
- That the assessor did not take account or sufficient account of efforts made regarding representations to the prosecution to seek discharge without conviction.

[13] The practitioners' submissions appear to have been confined to the 29 August 2008 bill, and focused on one part of one account to the exclusion of other related

costings. However, the Assessor had noted that the research fees included in the final invoice was in addition to research fees charged in earlier bills. In determining a fair and reasonable fee, I noted that the Assessor took into account the research hours and all other attendances involved in relation to the assault charge, by taking into account all of the attendances and the fees that had been charged for this matter in earlier invoices as well as that rendered on 29 August.

[14] My own examination of the earlier bills of costs revealed that three of the earlier invoices (31 January 2008, 30 April 2008 and 30 May 2008) had included fees for professional attendances in relation to the assault charge. Some of these entries referred to attendances on the client, time spent checking the Crimes Act and Summary Offences Act, communications with police, status hearing, several entries for 'research', research as to defence of provocation, research as regards justification of assault, further research on justification defences, and so on. Only the last invoice related to research on the 'novel' defence that the practitioners were then exploring, and referred to research re case law for defence of movable property.

[15] In my view it was not unreasonable that the Assessor should have taken into account the totality of fees for services performed in relation to the assault charge when considering whether fees charged were fair and reasonable. The Assessor did not dispute that the work had been done, but was of the overall view that more time that necessary had been taken up in research, and that an earlier result could very likely have been achieved and avoided much additional work. The approach taken by the Assessor reflected the factors set out in Rule 9.1. The rule requires that the fee must be reasonable in respect of the service provided, and this invites costs to be considered in relation to the whole service rather than by an analysis of one particular bill of costs for the service.

[16] The practitioners considered that the Assessor had not taken account of efforts that had been made in relation to securing a discharge without conviction, and they referred to copies of correspondence attached to their submissions. The Assessor had noted that it had been stated that the Police did not make such an offer until the morning of the hearing. However this is a somewhat different question to that of whether this possibility had been pursued at an earlier date. None of the letters gave any indication that '*strong representations'* referred to by the Assessor had been taken.

[17] It is clear that in reaching his conclusion, the Assessor took into account those factors in Rule 9.1 which were relevant to the service, and these included the time expended, the skill and specialised knowledge required, the results achieved, the

complexity, difficulty novelty of the questions arising, experience of the lawyer, and the estimate of fees that was given, and fees customarily charged in the market and locality.

[18] The Standards Committee considered both the report and the practitioners' submissions. The Committee also noted that the practitioners' client was in fact discharged without conviction on 20 August 2008. I do not doubt that the Standards Committee independently considered the charging factors and relevant circumstances before reaching its determination, and on the information before it, this was a decision that could properly have been made. In my view the Committee's adoption of the Assessor's recommendation as to a fair and reasonable fee for services was also reasonable.

[19] The Standards Committee had also referred to a letter sent by the practitioners to their client on 27 June 2008 wherein they estimated further costs of $4,000 plus GST and disbursements for further work in relation to the assault charge. The invoice rendered on 29 August was nearly double the amount of the estimate. This had also been noted by the Assessor. The practitioners did not comment on this part of the report.

[20] Furthermore, Rule 9.4 provides that a lawyer must inform a client promptly if a fees estimate is likely to be exceeded. This reflects the earlier practice guidelines of the Law Society's *Property Transactions: Practice Guidelines* which stated that it is generally inappropriate to charge a fee in excess of an estimate given to a client, and that a client should be advised in writing immediately if it become apparent that an original estimate is likely to be exceeded, giving reasons and a revised estimate. These principles have found their way into Rule 9 of the Conduct and Client Care Rules.

[21] There is no evidence that the practitioners at any time informed their client that the fee would be considerably higher than the estimate. This failure alone would have been sufficient for a finding of unsatisfactory conduct on the basis of a breach of Rule 9, with reference to Rule 9.4.

Decision

[22] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 I confirm the determination of the Standards Committee, subject only to amending the determination to show the practitioners as the Respondents.

DATED this 9TH day of October 2009

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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 Karr and Ms Cannock as Applicant
Mr Walsall as Respondent
XX Limited as a related party
The South Island Standards Committee
The New Zealand Law Society