

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

QQ

Applicants

AND

NP

Respondent

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

DECISION

Introduction

[1] Mr QQ has applied for a review of a decision by the Standards Committee in which the Committee made a finding of unsatisfactory conduct under s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) against him for failing to respond to Mr NP's enquiries in a timely manner, in contravention of rule 3.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules). The Committee ordered Mr QQ to apologise to Mr NP, and to pay \$950 towards the costs and expenses of the Committee's enquiry.

Background

[2] Mr QQ acted on a legal aid assignment for Mr NP dated 2 August 2011 in respect of criminal matters. When Mr QQ was assigned, Mr NP was being held in prison on remand. He says he tried to contact Mr QQ without success, and says when he had heard nothing from Mr QQ by 6 September 2011, he wrote to the New Zealand Law Society (NZLS) raising his concern.

Standards Committee

[3] The Committee forwarded Mr NP's complaint to Mr QQ. In response Mr QQ said he was not aware that Mr NP had tried to make contact with him, or that he was being held on remand. He said he had received and considered the assignment and attached opposition to bail, and formed the view from the information available to him that Mr NP was out on bail. He says his conclusion was based on Mr NP's address and phone number being residential rather than prison, and the first court date was recorded as being two months later. He says he had no reason to believe Mr NP's matter was especially urgent, and was intending to contact him after he had police disclosure, which would have been weeks in advance of the next hearing date advised in the legal aid assignment.

[4] The Committee considered whether Mr QQ's conduct in failing to respond to calls and messages from Mr NP might constitute a breach of rule 3.2 of the rules, which provides: "A lawyer must respond to inquiries from the client in a timely manner".

[5] The Committee noted Mr QQ's evidence that he did not consider bail was an issue of concern to Mr NP because of his contact details and the delay before the next court date. It accepted Mr NP's evidence that he had tried repeatedly but unsuccessfully to contact Mr QQ after he was advised of the assignment.

[6] The Committee observed that rule 3.2:

... envisages that a client is entitled to expect that a lawyer will respond to their enquiries when the client leaves a message for the lawyer to contact them. The expectation of criminal clients, particularly those who are remanded in custody, is high.

[7] The Committee was critical of Mr QQ for not providing any evidence of steps he had taken when he received notice of his legal aid assignment, observing that "in criminal matters, particularly those with domestic connotations, the custody status of the client is a fundamental one for assigned lawyers to be clear about, from the earliest possible opportunity".

[8] Having been assigned, the Committee considered Mr QQ was obliged to make enquiries promptly, given the serious nature of the charges Mr NP faced, and because an opposed bail form accompanied the assignment. The Committee considered Mr QQ should have been more proactive in ensuring clients, including Mr NP, could contact him.

[9] The Committee concluded that Mr QQ's failure to respond to Mr NP, who was remanded in custody, was a breach of rule 3.2 in all the circumstances, and fell within the definition of unsatisfactory conduct under s 12(c) of the Act.

[10] Pursuant to s 156(1) of the Act, the Committee ordered Mr QQ to apologise in writing to Mr NP, and to pay costs and expenses incidental to the Committee's enquiry of \$950. It did not consider publication of details identifying Mr QQ was warranted.

[11] Mr QQ was dissatisfied with that outcome, and applied for a review.

Review Application

[12] Mr QQ says the decision is invalid, void, and incorrect and asks that it be quashed. Mr QQ raises a number of objections, but of particular relevance is his objection to a finding of unsatisfactory conduct being based on his failure to respond to contact from Mr NP, when he says he was unaware that Mr NP was trying to contact him. He says he could not respond to Mr NP's enquiries, if indeed he had made them, because he knew nothing of them. Logically, he says, he could not respond to an enquiry he knew nothing of.

[13] He considers it was improper for the Committee to have found his conduct to be unsatisfactory when the Committee did not verify whether Mr NP had made the calls he relies on but easily could have, for example by asking Mr NP for details, and obtaining phone records from the prison.

Role of LCRO on Review

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

Scope of Review

[15] The LCRO has broad powers to conduct her own investigations, including the power to exercise for that purpose all the powers of a standards committee or an investigator, and seek and receive evidence. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Review Hearing

[16] Mr QQ attended a review hearing in [City] on 9 June 2015. Mr NP was not required to attend and the review hearing proceeded in his absence.

Review Issue

[17] The Committee's finding that Mr QQ did not respond to Mr NP's enquiries is not well supported by the evidence. There is no evidence to support Mr NP's assertion that Mr QQ knew he had made contact but did not respond to him, and some merit to Mr QQ's point that Mr NP could have written to him rather than NZLS in the first instance. On that basis a finding that his conduct contravened rule 3.2 is difficult to sustain. In the circumstances the finding of unsatisfactory conduct under s 12(c) of the Act is reversed.

[18] The question on review relates to whether, in all the circumstances, Mr QQ's admitted failure to contact his client for nearly a month after he accepted an assignment as counsel is unsatisfactory conduct pursuant to s 12 of the Act.

[19] For the reasons discussed below, the answer to that question is yes. The result is that findings of unsatisfactory conduct pursuant to s 12(a) and (c) of the Act are recorded against Mr QQ. The penalties are confirmed and Mr QQ is ordered to pay costs on review.

Discussion

[20] The purposes of the Act include protecting consumers of legal services¹ like Mr NP. The issue Mr NP raises in his complaint is Mr QQ's lack of response, despite his attempts to make contact. Mr QQ's evidence that he did not receive messages is a distraction from the central issue, because he was aware from correspondence he received from the Ministry of Justice that he had been assigned as counsel for Mr NP to act on legal aid.

[21] The rules provide an exemption from the intervention rule in criminal proceedings where the client is legally aided.² However, they do not provide an exemption from the rules requiring lawyers to provide information to clients,³ or from the obligation when providing regulated services to a client to act "competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care".⁴ The

¹ Lawyers and Conveyancers Act 2006, s 3(1)(b).

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 14.6(f)(i).

³ Rules 3.4 to 3.5.

⁴ Rule 3.

provision of information under the rules, and the requirement to act in a timely manner, help to serve the consumer protection purposes of the Act.

[22] Mr QQ's evidence at the review hearing was to the effect that although his practice mostly did not comply with those rules in 2011, and he did not send any such information to Mr NP, he now routinely sends out the information the rules require. He says that even if he had sent correspondence to Mr NP, he would not have received it because he was not at the address provided. That, however, misses the point. If Mr QQ could have demonstrated he had complied with the rules, he could not have been criticised for failing to make contact with his client, even if his client was not at the address provided.

[23] It is necessary to consider whether Mr QQ's admitted failures to provide information to Mr NP and taking no steps to contact him, in the circumstances, fall within the definitions of unsatisfactory conduct set out in s 12 of the Act which relevantly says:

In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—

- (a) conduct of the lawyer... that occurs at a time when he ... is providing regulated services and is conduct that falls short of the standard of ... diligence that a member of the public is entitled to expect of a reasonably competent lawyer;...
- (c) conduct consisting of a contravention of this Act, or of any ...practice rules made under this Act that apply to the lawyer...

[24] Mr QQ was assigned as counsel to provide regulated services to Mr NP. Mr QQ knew from the documents he received with the legal aid assignment what charges Mr NP was facing, and that Police opposed bail. He does not say he knew the result of the opposition to bail, he simply drew the inference. It would have been a simple matter to have checked. He could have done that by contacting his client. Equally, as assigned counsel, he could have checked by phoning the Court or Police, and it is unlikely he would have encountered resistance to a request for such information.

[25] There could be nothing unreasonable in a member of the public in Mr NP's position expecting Mr QQ to check. Mr QQ was aware Police opposed bail. His failure to make any enquiry, relying instead on an assumption as to Mr NP's custody status, albeit one based on some information, fell short of the standard of diligence Mr NP was entitled to expect of Mr QQ.

[26] Mr QQ's admitted failure to provide information to Mr NP in accordance with the rules contravened rules 3.4 and 3.5.

[27] In the circumstances it is proper to make findings that by his conduct Mr QQ's fell short of the standard in s 12(a), and contravened practice rules in breach of s 12(c). As Mr QQ's conduct falls within the definitions of unsatisfactory conduct set out in s 12(a) and (c) of the Act, the decision is amended to record findings to that effect for the reasons set out above.

Penalty

[28] The Committee ordered Mr QQ to apologise in writing to Mr NP within 30 working days of the date of the determination, pursuant to s 156(1)(c) of the Act.

[29] Although the basis of the unsatisfactory conduct findings made in this decision is different from the Committee's decision, the level of affront experienced by Mr NP is similar. An experience like Mr NP's has the capacity to undermine, rather than maintain, confidence in the provision of legal services. An apology should go some way to repairing that damage. In the circumstances Mr QQ is ordered to send a written apology to Mr NP within 30 working days of the date of this decision. The registry will provide Mr QQ with Mr NP's last known address. Mr QQ is to send the apology to that address.

[30] Although the Committee's decision is amended on review, the complaint disclosed conduct of concern in a disciplinary context. The Committee's enquiry was necessary and appropriate. It is therefore proper to confirm the order that Mr QQ contribute \$950 to the costs and expenses incidental to the Committee's enquiry. That order is also confirmed on review.

[31] Both adverse findings on review were at the lower end of the range of conduct defined as unsatisfactory. Mr QQ's evidence was that he now routinely complies with the rules requiring him to provide information to clients. I am satisfied that his conduct was the product of oversight and poor practice, rather than a deliberate flouting of the rules. I am satisfied by Mr QQ's evidence that he does not practice now as he did then.

[32] No purpose would be served by imposing any other penalty on Mr QQ on review, although it remains incumbent on him to pay the Committee's costs and send a written apology to Mr NP.

Costs

[33] The LCRO has discretion to order costs on review pursuant to s 210 of the Act and the LCRO Costs Orders Guidelines.

[34] Mr QQ's review application was unsuccessful and resulted in a second finding of unsatisfactory conduct being recorded against him. He requested a hearing in person. It is appropriate that he contribute to the costs of this review, which would otherwise be defrayed across all New Zealand lawyers.

[35] The Guideline amount for a straightforward review, with a hearing in person, is \$1,200. Mr QQ is ordered to pay \$1,200 pursuant to the Guidelines and s 210 of the Act.

Decision

1. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Committee's decision is amended as set out in this decision, findings of unsatisfactory conduct pursuant to s 12(a) and (c) are recorded, and the penalties under s 156(1)(c) and (n) are confirmed.
2. Pursuant to s 210 Mr QQ is ordered to pay costs on review of \$1,200 by 15 July 2015.

DATED this 15th day of June 2015

D Thresher
Legal Complaints Review Officer

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

Mr QQ as the Applicant
 Mr NP as the Respondent
 Standards Committee
 The New Zealand Law Society
 Secretary for Justice