LCRO 128/2012

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
BETWEEN	**MR DL** Applicant
AND	**MR EX** Respondent

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

DECISION

Background

[1] This matter relates to a complaint which was primarily about fees charged to the estate of Mr DN, for whom Mr DL acted. The complainant is Mr EX who was a beneficiary under the will of Mr DN. The Auckland Standards Committee upheld the complaint and reduced Mr DL's (the Practitioner) fees substantially.

[2] The Practitioner seeks a review of the decision of the Committee. The Practitioner disagrees with the extent to which his legal fees for the estate administration were reduced by the Committee and has offered as an alternative a reduction in the disputed fees by approximately 25%, equating to a sum of $7000.

[3] The facts surrounding the complaint are that:

a. Mr DN had been a client of the Practitioner for more than 30 years. Mr DN contacted the Practitioner and asked him to fly to [Australian city], Australia

to prepare a revised will for him. Mr DN had lived in Australia for more than ten years at this time and was close to death.

b. The Practitioner flew to [Australian city] and met with Mr DN. The trip took a total of two days, including travel time. A will was prepared by the Practitioner, the effect of which was that:

   i. Mr DN's third wife was bequeathed the contents of their joint home and given a life interest in it;

   ii. Mr EX, the son of his second wife of over 40 years, was the principal residual beneficiary; and

   iii. a provision of $20,000.00 was made for one of Mr DN's daughters from his first marriage, but no provision was made for the remaining three children from his first marriage.

c. Mr DN died on, 2 August 2009.

d. On 3 August 2009, the Practitioner presented a bill for $10,150.00 to the estate, for the visit to meet Mr DN and prepare his will.

e. On 17 August 2009, the Practitioner again flew to [Australian city] as one of the trustees of Mr DN's estate for a meeting of the trustees and some of the beneficiaries. The Practitioner attended Mr DN's funeral and travelled back to New Zealand with Mr DN's ashes.

f. On 20 August 2009 the Practitioner rendered an invoice for $13,954.06 (including GST and disbursements).

g. Two of Mr DN's children from his first marriage then sought payment under the will. After negotiations between the Practitioner and their individual lawyers, a settlement was agreed in which each of those children would receive $20,000.00.

h. The Practitioner rendered a further bill relating to the resolution of these claims on 1 December 2009 in the sum of $16,593.75.

i. Work finalising the estate was undertaken and a final bill for $3,712.50 was rendered on 14 May 2010. The total of all bills was $34,260.31.

j. When concerns were raised by Mr EX's wife about the legal costs (it appears that the Practitioner had predicted a fee of around $40,000), he replied by email on 27 October 2009 that his legal fees may be less than $40,000.00, but he did not consider that a reduction in fees was appropriate, as he felt that by securing a successful settlement he had saved the estate $15,000.00. Mrs EX's reply email showed that she was aware that the Practitioner's hourly rate was $500.00, she also queried whether the bill should be so high and requested a copy of it.

The Complaint

[4] The New Zealand Law Society (NZLS) received a letter of complaint from Mr EX on 4 May 2011. There were a number of complaints made by Mr EX, relating to the Practitioner's handling of Mr DN's estate:

a. fees were not fair and reasonable;

b. failure to properly inform Mr EX of the basis on which the legal work would be undertaken, and the correct process for complaining to the NZLS;

c. failure to provide Mr EX with a letter of engagement;

d. the Practitioner was confused between his role of trustee with that of barrister;

e. the Practitioner made a mistake with probate in Australia, resulting in the resealing of the New Zealand probate; and

f. failure to provide a final, itemised bill to Mr EX.

The Practitioner's Response

[5] In a preliminary response to the NZLS by email on 20 May 2011, the Practitioner wrote that the complaint was ridiculous and that Mr EX was very lucky to be a beneficiary under Mr DN's will.

[6] In his full letter of response, dated 1 June 2011, the Practitioner commented:

a. that the NZLS did not have the ability to review his fee of $10,150.00 for his initial visit to [Australian city] to see Mr DN, as this had been rendered to Mr DN when he was alive;

b. he had anticipated that some of the children from Mr DN's first marriage may challenge his will and that, when this occurred, the Practitioner successfully negotiated settlement of two potential Family Protection claims; and

c. that his legal costs of $30,547.81 equated to approximately 60 hours work for him, undertaken over many months. The Practitioner did not feel that this was in any way an excessive charge, but noted that he was unable to provide relevant time records as he had destroyed his file.

Mr EX's Comments

[7] Mr EX said that he thought that a total of $50,000.00 for legal fees was excessive, especially for an estate of $270,000.00. Furthermore, the fee seemed excessive to Mr EX because the Practitioner had indicated to him at Mr DN's funeral that his role in the estate matter would be minimal and that most of the day-to-day work would be done by Mr EY, a Senior Legal Executive with EZZ Lawyers of [Auckland Suburb], whose hourly rate was much lower. The Practitioner had arranged a 'reverse brief' with EZZ, with whom he has an arrangement whereby the firm handles estate administration when the Practitioner is an executor and/or a trustee of an estate.

[8] Mr EX thought that the Practitioner was going to act in his role of trustee, rather than that of barrister.

Appointment of a Costs Assessor

[9] On 6 September 2011, the NZLS wrote to the Practitioner to advise him that it was appointing a costs assessor to assess all of the invoices complained about by Mr EX.

[10] In December 2011, Ms ZW, a Partner at ZZV in Auckland was appointed as costs assessor. She completed her report on 22 December 2011, and copies were sent that day to Mr EX and the Practitioner for comment.

[11] The Costs Assessor reviewed four invoices;

1. $10,150.00 on 3 August 2009;

2. $13,954.06 on 20 August 2009;

3. $16,593.75 on 1 December 2009; and

4. $3,712.50 on 17 May 2010.

[12] Prior to preparing her report, the Costs Assessor spoke with both the Practitioner and Mr EX. She considered the relevant factors to be taken into account in determining the reasonableness of a fee, as contained in Rule 9.1 of the Conduct and Client Care Rules,[1] relevant case law, and a paper on costing. Having taken these into account, the Costs Assessor concluded that:

a. the invoice of 3 August 2009 was to be upheld; and

b. each of the remaining three invoices should be reduced by a total of $17,775.00.

The Practitioner's Response

[13] The Practitioner, in his letter of 24 January 2012, felt that the Costs Assessor's report was seriously flawed because it failed to take into account all of the time that the trip had actually involved, and that the suggested reduction in fees was inappropriate.

The Decision of the Standards Committee

[14] The Committee determined that some of the complaints were unfounded, but that the Practitioner's conduct was unsatisfactory as defined by s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) in the following areas:

a. that the invoices dated 20 August 2008, 1 December 2009 and 14 May 2010 were not fair and reasonable having regard to the requirements in Rule 9.1 (a) to (m) (also finding that the Practitioner's hourly rate of $500 was not excessive);

b. failure to provide information to Mr EX about the principal aspects of client service, contrary to Rule 3.4 of the Rules;[2] and

c. failure to render a final, itemised, account to Mr EX, contrary to Rule 9.6 of the Rules.

[15] The Committee resolved to postpone the Orders that they wished to make in relation to their findings and provided the Practitioner with an opportunity to make submissions in relation to possible Orders.

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[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[2] Above n1.

[16] On 8 October 2012, the Committee decided to censure the Practitioner, fine him $2,000.00 and order him to pay costs of $2,500.00. The Committee directed that the facts be published, but not include details that would lead to the identification of any of the involved parties.

Application for Review of the Decision of the Standards Committee

[17] On 15 June 2012, this Office received an application from the Practitioner for a review of the decision of the Standards Committee. The Practitioner's application focuses on only one aspect of the Committee's decision, namely to reduce his legal fees related to the administration of Mr DN's estate. The Practitioner states that the Costs Assessor failed to take into account that as a result of his negotiations, he believes that he saved the estate $15,000.00 to $20,000.00. In light of his legal experience of 40 years, the Practitioner sees his fees being reduced to a "ridiculously low"[3] level and as an alternative to the Costs Assessor's reduction, he suggests a reduction in legal fees of $7,000.00.

Mr EX's Response

[18] Mr EX agreed with the decision of the Committee. He also stated that the lawyer acting for Mr DN's two children sent relevant correspondence to Mr EY, so the Practitioner did not spend a great deal of time advocating for them. Finally, Mr EX rejected the Practitioner's offer to reduce his bill by $7,000.00.

Analysis and Review

[19] I first address a submission relating to the Standards Committee having issued, by separate decisions, its conclusion as to the substantive complaint and as to penalty. Mr DM, who represented Mr DL, submitted that following the substantive decision and the review application being filed, the Standards Committee was then functus officio.

[20] The (first) substantive decision stated that:[4]

> The Committee deemed it appropriate to defer making any orders pursuant to s 156 or a direction of publication under s 142(2) of the Act in order to seek submissions from the parties as to...

It is clear from this that the Committee's decision was not yet complete and that the decision on penalty would be made after submissions were received from the parties. I

[3] Application for Review from the Practitioner to LCRO (14 June 2012).

therefore do not agree with the submission as clearly the Committee's function was not yet finished.

[21] Turning to the decision about the Practitioner's fees, it should firstly be noted that the task of both the Standards Committee and the independent costs assessor, the Costs Assessor, have been made considerably more difficult as a result of the Practitioner not being able to provide either the client's file or time records. The Practitioner noted that the client's file was destroyed, possibly when he moved Chambers in September 2011. As this was after he became aware in June 2011 of the complaint being made against him, the occurrence is particularly unfortunate for all parties.

[22] In his letter to the New Zealand Law Society on 24 January 2012, the Practitioner objected to the Costs Assessor's recommended reductions in his legal fees. He said that "I have kept accurate time records for that account". Unfortunately, the Practitioner did not provide these records to the Costs Assessor or the Standards Committee, so the Practitioner has been unable to provide any evidence to substantiate his claims about the work he actually undertook. Obviously the existence of records would have assisted in this inquiry considerably. The absence of those records does not of itself provide evidence of anything. However it is of note that it is for the Practitioner to justify his bill and the absence of clear records by which to do so may make matters more difficult for him.

[23] Mr DM notes in his letter of 2 November 2012 that as the Costs Assessor did not have the file what she produced "...is a reconstruction of what might have occurred and not an assessment of what actually occurred". With respect, as the Practitioner has been unable to produce any such documents himself, what he states occurred is also in fact what may have occurred, rather than what actually occurred. (I have had the advantage of the report of the Costs Assessor who was appointed as an expert costs assessor. That has, in turn, been reviewed by a Standards Committee comprised of lawyers and a lay member. There has been no suggestion that the Costs Assessor was not suitably qualified.) The main thrust of the application for review appears to be simply that the conclusions reached were wrong. In the absence of any obvious error the view of the Costs Assessor and the Committee should not be lightly dismissed.

[24] However, there may be a number of reasons for overturning the finding of a Standards Committee in respect of the quantum of a bill of costs, such as where there

[4] Standards Committee decision (12 June 2012) at [35].

has been a procedural omission or inadequate assessment, or where the conclusions of a Standards Committee or costs assessor were so unreasonable as to be clearly wrong, or where proper principles have not been applied (that is to say where the proper considerations have not been taken into account). Whatever the reason may be, a variation of a Committee's decision on costs would be accompanied by reasons in any event.

[25] In this instance Mr DN had chosen to use the Practitioner as his advisor. The Practitioner is a senior practitioner with considerable expertise. For this reason the Costs Assessor and the Committee concluded that the starting position of an hourly charge of $500 plus GST was not unreasonable. There is no suggestion that this is in error.

[26] The Costs Assessor provided a thorough report in which she reviewed the work undertaken against the relevant principles. She made an assessment of how long the work ought to have taken, as well as assessing against the factors set out in Rule 9.1 of the Rules. The main thrust of the application for review appeared to be that insufficient weight was given by the Costs Assessor to the experience of the Practitioner and the fact that by resolving the Family Protection Act claims significant costs to the estate were saved.

[27] In respect of the experience of the Practitioner, the Costs Assessor noted that he had the appropriate level of skill. To that, it might be added that the hourly rate charged by the Practitioner is at the generous end of the scale (though there is no suggestion that it is excessive) and properly reflects his seniority. It was appropriate to make no special allowance for this in considering the fee.

[28] In respect of the outcome the Costs Assessor noted that the results achieved were satisfactory, but may have been due to the difficulty and cost of bringing a Family Protection Act claim as well as the efforts of the Practitioner. This appears to be an appropriate assessment. There is no doubt that the outcome was a good one for the estate, however there is no suggestion that it was appropriate to impose a significant premium on the bill in light of that.

[29] There is, however, one matter which I consider ought properly have been taken into account but which was not. That is that Mr DN, though resident in Australia, appointed the Practitioner to act for him even though he knew that he resided in New Zealand. This would necessitate a degree of travel (and as it transpired there

were two trips to [Australian city]). The fact that more time was spent on matters than the Costs Assessor accepted on the second trip to [Australian city] has been referred to by the Practitioner. I consider that in such a circumstance it is appropriate for some allowance to be made for the costs associated with travel. In the absence of clear treatment in the terms of retainer the allowance should probably be modest and each case may differ. Matters which may be relevant will include:

a. whether the legal work was the sole purpose of travel;

b. whether time was able to be spent doing other legal work;

c. the degree of disruption caused by the travel and the fact that the legal work was undertaken away from the lawyer's normal place of business; and

d. the time actually taken by the travel.

[30] In the present case it appears that no allowance was made for these matters in the consideration of the 20 August 2009 invoice. It is not clear whether they were a factor in the mind of the Practitioner when he set the fee. I deal with this below.

Invoice Dated 20 August 2009

[31] On 20 August 2009, the Practitioner produced an invoice for $13,954.06. This invoice consisted of the Practitioner's fee for attendances between 2 August and 20 August 2009, and disbursements for his airfare, taxis, hotel and a notice in the [newspaper].

[32] The Practitioner charged Mr DN's estate $10,750.00 for his legal fees (exclusive of GST). At his hourly fee of $500, this equates to 21.5 hours of work. It is reported by the Practitioner that during this period he attended a meeting with some of the beneficiaries in [Australian city], immediately prior to Mr DN's funeral; that he attended another meeting to obtain information to administer Mr DN's estate; and that he instructed EZZ to prepare the necessary probate.

[33] In their letter of 26 June 2012, Mr and Mrs EX comment that the Practitioner presented the eulogy at the funeral, met some family members at a dinner prepared by a family member, and collected the ashes of the deceased for return to New Zealand. The Practitioner has stated that he did not charge for these attendances. This is appropriate as these would appear to fall outside of the provision of legal services and ought not to be charged for.

[34] The Costs Assessor estimated that the work undertaken by the Practitioner would equate to approximately four hours, rather than the 21.5 hours charged. It is my view that 21.5 hours is an excessive number of hours for the work that the Practitioner describes, and that the Costs Assessor's estimate is reasonable for the work actually undertaken.

[35] However, as mentioned above, I consider that some allowance should be made for the time and inconvenience of the travel in this case. I note that this is not a precise exercise, however, in all of the circumstances I consider that an allowance of some 12 hours is appropriate, and that this might reasonably be charged at half of the Practitioner's usual rate. This leads to an adjustment of $3,000.00 plus GST of $375.00 (at the then applicable rate) in favour of the Practitioner.

[36] The invoice of 20 August 2009 is therefore certified in the sum of $7,485.31 (including GST and disbursements).

Invoice Dated 1 December 2009

[37] On 1 December 2009, the Practitioner produced an invoice for $16,593.75. This invoice was for "[a]ll attendances from 21 August 2008 to 1 December 2009". During the three months between the invoice of 20 August and the invoice of 1 December 2009, the Practitioner states that he undertook work to the value of $16,593.75. This equates to almost 29 hours of work, at the Practitioner's hourly rate of $500. Unfortunately, due to the lack of documentation about the legal services provided, it is not possible to comment on this further.

[38] Whilst it is acknowledged that this was a period during which the Practitioner was negotiating with parties in relation to possible Family Protection claims, the Costs Assessor stated that a lawyer of the Practitioner's experience would not have taken 30 hours to do the work that he described as being reflected in the invoice. She noted that in light of the modest amount of the estate the litigation risk did not appear to be high. It was recommended that it be reduced to $11,531.25. That was adopted by the Standards Committee and I see no reason to depart from that.

[39] The invoice of 1 December 2009 is therefore certified in the sum of $11,531.25 (including GST and disbursements).

Invoice Dated 14 May 2010

[40] Finally on 14 May 2010, the Practitioner produced an invoice for $3,712.50. This

related to legal work to complete the administration of the estate. This equates to a further six and a half hours of the Practitioner's hourly rate.

[41] The Costs Assessor considered the work reflected in this latest invoice together with the 1 December 2009 invoice. The Costs Assessor believed altogether a figure of 22 hours, rather than what actually equates to 35 hours charged by the Practitioner, was reasonable for someone of the Practitioner's experience to have completed the work he described to her as being the basis for this invoice and the one dated 1 December 2009.

[42] In light of this the Costs Assessor suggested that the 14 May 2010 invoice be reduced to $843.75. The Costs Assessor's suggestion was accepted by the Standards Committee. Whilst the Practitioner objects to this reduction, he has been unable to demonstrate the 35 hours that he actually spent providing legal services across the two invoices, and what those services were. It is my view that the Costs Assessor's figure is reasonable and should be accepted.

[43] The invoice of 14 May 2010 is therefore certified in the sum of $843.75 (including GST and disbursements).

Conclusion

[44] The Practitioner has objected to the decision of the Standards Committee to reduce his legal fees in relation to this matter. Unfortunately, the Practitioner has been unable to produce any documentation that demonstrates the amount of time that he spent on providing legal services and the specific work that he did in relation to the estate administration. An independent assessment was undertaken of the time that it should have taken a practitioner of the Practitioner's experience to complete the legal work. This assessment was provided to, and considered by, the Committee. The Committee accepted the recommendations in that assessment and determined that the Practitioner's invoices of 20 August 2009, 1 December 2009, and 14 May 2010 were not fair and reasonable. It is my view that decision was largely correct. The only modification I would make would be to provide an allowance of $3,000.00 plus GST to reflect the time consumed by travel to Australia.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Standards Committee's finding of unsatisfactory conduct is confirmed.

The Committee's decision as to the quantum of a fair and reasonable fee is modified, and an amended certification pursuant to section 161(2) of the Lawyers and Conveyancers Act 2006 accompanies this decision.

DATED this 16th day of December 2013

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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 DL as the Applicant
Mr DM as the Representative of the Applicant
Mr EX as the Respondent
The Auckland Standards Committee
The New Zealand Law Society