

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

WN

Applicant

AND

YL and TM

Respondents

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

Introduction

[1] Mr WN made 10 complaints against Ms YL, the principal of [Law Firm A], and 10 complaints against Ms TM, who was at the time an employed solicitor at the firm.

[2] Mr WN sought advice from the firm in December 2010 with regard to his concerns about contact between his son, MC, and Mr WN's parents and sister.

[3] Mr WN terminated his instructions in September 2011.

[4] [Area] Standards Committee determined to take no further action in respect of Mr WN's complaints.

Background

[5] On Friday 17 December 2010 Mr WN sought advice from [Law Firm A] as to how he could prevent contact between MC (who was in his mother's custody) and Mr WN's family (his parents and sister).

[6] In the Letter of Engagement sent to Mr WN on 17 December 2010, Ms YL described the services to be provided in the following manner:

Our Services: In accordance with your instructions you have engaged our Firm to attend on your parenting arrangements in relation to MC.

[7] The Letter of Engagement went on to refer to the firm's charges:

Charges to you: At this stage it is not possible to provide an estimate of our likely fees plus GST and disbursements. This is because we cannot be certain at this stage how much will be required. However, we will bill you regularly so that you are informed of ongoing costs as this matter progresses.

The hourly rate for our services is \$250.00 per hour plus GST together with any disbursements incurred.

[8] Following initial attendances on Mr WN, Ms YL wrote to MC's mother (Ms NA) on 20 December 2010:

[redacted]

[9] Ms NA made it clear in a telephone discussion with Ms YL following receipt of her letter that she did not intend to respect Mr WN's wishes.

[10] On 23 December 2010, Ms YL filed an application for a parenting order (the application) prohibiting Mr WN's parents and his sister from having contact with MC.

[11] It became apparent that Ms NA would not voluntarily comply with the application and in a file note of a 27 January 2011 telephone conversation with Mr WN, Ms YL recorded that Ms NA had spent the whole of the previous day with MC and Mr WN's parents.

[12] The Court appointed lawyer for MC prepared a report that was not supportive of Mr WN's application.

[13] Ms NA instructed a lawyer and a notice of defence opposing the application was filed. It is apparent from the file that Ms TM then became involved with the file to assist Ms YL.

[14] Various matters relating to the file, and correspondence, continued on a regular basis.

[15] A judicial conference was set down to take place on 20 September 2011 and following a Directions Conference, the Judge issued a Minute directing that a full

report¹ from a Child, Youth and Family Services social worker be available for the conference. Mr WN was also [censured].²

[16] Subsequently, Ms TM began to express reservations about the likely success of Mr WN's application and referred to his frequent absences overseas for work as being a factor. After advising of the difficulties she and Ms YL were having in obtaining witnesses to support Mr WN's application she wrote on an email dated 12 July 2011:

... your application is based around your concern for MC's safety and welfare. It would appear that Ms NA's counsel could challenge that based on your decision to go offshore at the present time. Whilst we understand that you have been required to for financial reasons, in our experience people who are concerned about their child's safety and welfare have endeavoured to meet their financial needs through different avenues to maintain close contact with the child/children concerned.

In light of the above mentioned and the Court process thus far we do not believe that your application will be successful under the circumstances and you will, of course, incur further costs associated with pursuing same. A Judge, taking everything into consideration and also hearing from NA appears mostly likely to give Mr and Mrs WN Senior the benefit of the doubt.

[17] In an email dated 13 August 2011 Mr WN expressed a desire to continue with the application notwithstanding that the date fixed by the Judge for further affidavits to be filed had passed without any further evidence being supplied by Mr WN. In this regard, Mr WN had advised that the family doctor may provide evidence, but having been contacted by Ms TM, the doctor expressed an unwillingness to become involved.

[18] In an email dated 17 August 2011, Ms TM expressed further reservations about the likely success of Mr WN's application. She said:

As previously advised unfortunately the date for filing any further evidence has passed.

In addition you need to be aware that if the Lawyer for Child is indicating that she believes that there is no difficulty with MC having contact with your parents then that can be very persuasive in the eyes of the Court.

[19] Towards the end of August, in a series of emails between Mr WN and Ms TM it is apparent that Mr WN was becoming dissatisfied with [Law Firm A]. On 29 August 2011, he wrote:

Hi TM

Could you please write to NA's Solicitor and ask how they came to receive the following mentioned information! That I intended to provide affidavits from two witnesses!

¹ Pursuant to Care of Children Act 2004, s 132.

² Court Minute.

Kindly

Regards WN

[20] Ms TM replied on 30 August 2011:

Dear WN

Thank you for your email yesterday. We can advise that it was advised at Court on 29 June 2011 that you intended to file two other affidavits.

Furthermore we can advise that Ms SR (Lawyer for MC) has proposed that she observe MC with Mr and Mrs WN Senior. We would be grateful if you would advise of your position in relation to this at your earliest convenience.

We look forward to hearing from you soon

...

[21] Mr WN replied on 30 August 2011:

TM

Thank you for your correspondence 30/Aug/2011. Could you confirm who advised the court re: those Affidavits?

With reference to Ms SR (MC's Solicitor) staying as being an observer, who would be paying for this?, in fact on this matter who in fact is paying for MC's Legal commitments?

My position at this time in relation to Ms SR is non-revocable, to my earlier stated opinion that it does not address my position as Father being prejudiced.

[22] Ms TM replied the same day:

Dear WN

In terms of the costs of Ms SR's fees, these are met by the Court at the present time. We do not see this changing but will advise you if this is to occur.

At the EIP conference (which you were unable to attend) I was asked how many affidavits you wished to file and advised the Court that you wished to file two.

In relation to Ms SR's proposal to visit MC whilst he is with your parents, if you fear that this may prejudice your position then we suggest that you decline such a proposal. We can advise Ms SR of same. We would be grateful if you could confirm whether you wish us to do so at your earliest convenience.

We look forward to hearing from you soon

Yours faithfully

TM BA/LLB

[23] Mr WN replied on 31 August 2011:

Dear TM

Appreciate correspondence.

You advise that at present courts covering Ms SR ie (MC's solicitor costs) I note this may be subject to change.

Does this mean I would be obligated to pay cost previously or presently incurred (re SR)

This is not a position I would find satisfactory,

With reference to remainder of your e-mail I will be in contact after I have given this consideration.

Look forward to your reply

Regards WN

[24] Mr WN followed that with a further email on the following day:

Dear TM

Could you please advise, with reference to the cost of MC's Lawyer, are these costs capped?

Can you also confirm as to whether NA is receiving Legal aide [sic] or not?

Why is MC in need of a Lawyer?

And why is NA involved in this matter?

as I initially only came to organize a restraining order of sort on my parents having access + input to the upbringing of my son.

Look forward to your reply

Regards WN

[25] It would seem that Mr WN advised Ms TM by telephone on 7 September 2011 that he was terminating his instructions and had asked friends to collect his file. In an email on that date he advised Ms TM that his friends would be at her office in a few hours to collect the file.

[26] Ms TM advised she was unable to meet such a tight timeframe and the file would only be released once a final account had been rendered and all accounts paid. It would seem the file was released although the balance of fees remained outstanding.

[27] In November, Mr WN questioned the firm's invoices and in response, the firm provided copies of the firm's time records.

[28] Ms YL advised the Legal Complaints Review Officer (LCRO) in a letter dated 26 July 2015 that \$2,685.50 remained unpaid and proceedings were filed in the District Court. She advised that proceedings were:

... discontinued as it became clear that Mr WN would press the matter to hearing and that in terms of time, personal and financial resources, this would not be a useful course of action for the firm at that time.

Mr WN's complaints and the Standards Committee determination

[29] Mr WN's complaint to the Lawyers Complaints Services is dated 11 November 2015.

YL BA/LLB

1. From the onset of representation [Law Firm A] (YL) mislead [sic] me that from the onset that "this was a very simple matter to have a court order restricting third party access to my Son".
2. (YL) failed to provide an estimate of fees, reference letter dated 17 December 2010 from [Law Firm A], incorporated back to comprehensive duplicate file
3. (YL) Failed to provide information about work to be done, and who would be [sic] carry this out (refer file, note was never advised that another lawyer would handle this further on
4. (YL) Failed to discuss with me objectives and how they should be best achieved (Reference duplicate file)
5. (YL) Failed to Protect & Promote my interest and act for me free from compromising influences or loyalties (Reference duplicate file)
6. (YL) Failed to give clear information and advice, Failed to discuss Legal Aid, the only discussion resulted when I raised the issue some months following with TM [sic]
7. Failed to act in my best interest and act with due diligence, prejudiced my position by firstly not providing documentation pertaining to this matter, then by knowingly withholding documentation (Reference duplicate file reference emails letters between myself and YL)
8. Failed to release file when requested on more than one occasion,
9. When file was finally released, on reviewing this I discovered numerous deletion pertaining to the hand written notes, (pages labelled with pink post its)
10. Concerned at the inaccuracy's [sic] in the content of some of these notes

TM BA/LLB

1. Failed to Protect & Promote my interest, and act for me free from compromising influences or loyalties (Reference duplicate file) without prejudice was instrumental in delaying mediation on two occasion by not

being available to attend although point to note (I was still billed 10 units of time in regards to counsel time notifying other party's to this effect

2. Failed to Protect my privacy and ensure appropriate confidentiality (Reference duplicate file reference emails between myself and TM Dated 11th August 2011)
3. Failed to act in my best interest and act with due diligence,
4. Failed to advise that the respondent was in receipt of legal aid.
5. Mislead myself that a so mentioned professional was not willing to testify on my behalf, when in fact this was not the case (Dr BN 6845154) since advised myself otherwise to the effect that he stated "he would prefer not to but if necessary he would"
6. Failed to respond to various questions, in particular email sent 30th June 2011/Letter sent & copy emailed 7th November 2011/Letter sent, copy emailed to TM at [Law Firm B] 24th January 2012 (note 2012 letter received response from a work colleague, of TM) have included an external copy of both letters, external to duplicate folder, although this folder still contains all including emails.
7. Failed to release file when requested on more than one occasion,
8. When file was finally released, on reviewing this I discovered numerous deletion pertaining to the hand written notes. (pages labelled with point post its)
9. Concerned at the inaccuracy's [sic] in the content of some of these notes
10. Without prejudice the following statement made by TM, speak volumes and require explanations!

Reference email dated 12 July 2011! Whereby TM has stated in this email that "Whilst we understand that you have been required to for financial reasons, in our experience people who are concerned about their child's safety and welfare have endeavoured to meet their financial needs through different avenues and maintain close contact with child/children concerned"

Reference Email dated 13th July 2011 whereby TM has stated in this email That "We know that everyone's situation is different and difficult however where the concerns have been great the parent has even gone so far as to stop work or enter a new form of employment We just wanted to let you know that this is likely to be something the court will consider.

Have included an external copy of both emails, external to duplicate folder, although this folder still contains emails.

[30] The Standards Committee noted that "with his complaint Mr WN provided his file but did not specify which parts of the file were of concern to him and which parts supported his complaints".³

³ Standards Committee determination (18 May 2015) at [2].

[31] The Committee then identified the issues to be addressed and commented on each:⁴

Complaints about Ms YL

... The Standards Committee reviewed the material provided by Mr WN with his complaint and found nothing in the material provided that support the allegation that [Law Firm A] said the matter would be simple. The fact that [Law Firm A] said that it could not provide a fee estimate supports the view that the complexity was unknown at that time. It appears Mr WN has been billed \$7523 (7 bills) for the work undertaken. These fees are reasonable for the services provided.

Competent advice and service – ... The Standards Committee has been unable to discern anything in the material provided that leads to a conclusion that Mr WN did not receive competent advice from Ms YL. It appears from the file that she has done all that is reasonably possible to assist Mr WN to resolve the matters of concern to him ...

Legal aid – In so far as a grant of legal aid is concerned, it appears that legal aid was discussed but it is not clear why Mr WN is making this complaint as, given his employment, he would not have been eligible for legal aid.

Uplift of file – There is nothing to indicate that the file was not provided in a timely way.

Complaints about Ms TM

Competent advice and service - ... The Standards Committee has been unable to discern anything in the material provided that leads to a conclusion that Mr WN did not receive competent advice from Ms TM. It appears from the file that she has done all that is reasonably possible to assist Mr WN to resolve the matters of concern to him. It would appear that for a variety of reasons, specific to Mr WN, his application and the parties involved, that the matter progressed in the way it did.

Privacy – There are notes on the file of a discussion with Mr BN dated 7 July. The notes record that the Doctor was not happy going to Court or giving evidence. This is recorded in the file note and this advice was presumably passed on to Mr WN. Dr BN may have said something different directly to the complainant. This is not evidence of misconduct by the lawyer.

Response to communications – ... He was advised on 14 November 2011 that there had been no contact from Mrs WN Senior or ZR ...

Uplift of file – There is nothing to indicate that the file was not provided in a timely way.

Conflict of interest - ... The Standards Committee is of the view that the circumstances raised by Mr WN do not in any way raise the prospect of a conflict of interest.

⁴ At [6]–[14].

Review

Delegation

[32] The review progressed by way of an applicant only hearing in [City] on 3 August 2017 attended by Mr WN. Neither lawyer was required to attend and did not exercise their right to do so.

[33] The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the LCRO pursuant to clause 6 of schedule 3 of the Lawyers and Conveyancers Act 2006. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

Lack of evidence

[34] As noted above⁵ the Standards Committee commented on the failure by Mr WN to refer to specific evidence in support of his complaints. Although a Standards Committee "must give reasonable assistance to any person who wishes to make a complaint ..."⁶ it is not sufficient for a complainant to make allegations unsupported by specific references and evidence. In the present instance, Mr WN has alleged 10 instances of unsatisfactory conduct by each lawyer and merely provided the lawyers' file to the Committee. A Standards Committee is not required to make out the complainant's case for him or her.

[35] Mr WN's application for review added little, if anything, further. He repeated the 10 complaints against each lawyer and briefly commented on the Committee's determination. A comment in that application that "I do not consider this response to be acceptable and do not agree with the findings as I do not believe that this view relates to the documented standards in regards to what one can expect from a lawyer/law firm" adds nothing to the evidence in support of a complaint.

A straightforward matter

[36] An applicant only hearing was scheduled to provide Mr WN with the opportunity to identify material in the file and refer to evidence which supported his complaints. At the review hearing, Mr WN repeatedly stated that he had been led to believe by Ms YL that it would be a simple matter to obtain an order from the Court

⁵ At [30].

⁶ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 8(2).

preventing his parents and sister from having contact with MC. On many occasions, Mr WN referred to a pamphlet published by the New Zealand Law Society entitled "What I can expect from my lawyer". He said he was led to believe he had rights as a parent and that it would be simple to have his right to direct who his son should have contact with enforced. He says that did not turn out to be the case.⁷

[37] There is nothing in the comprehensive (and legible) file notes made by the lawyers throughout the file that give any suggestion that either lawyer led Mr WN to believe what he wanted to achieve would be a simple matter.

[38] The Letter of Engagement sent to Mr WN gives an indication of what it is likely the lawyers' advice would have been and if this was not verbalised to Mr WN it is nevertheless clear from the written terms of engagement which say "... we cannot be certain at this stage how much will be required ...". The inference to draw from this statement is that the lawyers were uncertain how matters would progress.

[39] At the review hearing Mr WN referred to the letter sent by Ms YL to Ms NA on 20 December 2010 in which she writes "It is not your place in the circumstances to continue contact for MC with Mr and Mrs WN Senior and Mrs Pin or other members of Mr WN's family". Mr WN asserts this is evidence Ms YL was advising that the matter was going to be straight forward.

[40] This is not accepted. It is unlikely that any lawyer would suggest in these circumstances that it was going to be a simple matter to have Ms NA comply with Mr WN's wishes. If the matter was straightforward, as Mr WN says he was led to believe, then it would have made sense for Ms YL to suggest to Mr WN that he contact Ms NA directly to advise he did not want MC to have contact with his family.

[41] Ms YL's letter prompted an immediate response from Ms NA. She advised Ms YL in a telephone conversation that she did not intend to take directions from Mr WN.

[42] Ms YL then promptly prepared the application for a parenting order which was signed by Mr WN on 23 December 2010 along with a supporting affidavit.

[43] As a result, it is apparent that Mr WN would have been aware within the space of two weeks from consulting Ms YL that Ms NA was not going to co-operate. Even if Mr WN had been thinking the matter was going to be straightforward, there was by then, a clear indication that it was not.

⁷ There is no evidence as to what the outcome of the application was and this has not been enquired into as the lawyer's brief was terminated before the application was heard.

[44] On the file is a five-page handwritten note recording a conversation between Ms YL and Mr WN on 25 January 2011 which commences “where to from here?” The note then records an extensive discussion between Ms YL and Mr WN canvassing various matters that had, and could then, occur. Again, this provides evidence that Mr WN could no longer have been labouring under an incorrect assumption.

[45] Ms NA filed a Notice of Defence in February 2011, by which time also, a lawyer had been appointed by the Court to represent MC’s interests.

[46] Mr WN’s continued protestations that he had been led to believe, and remained under the impression, the matter was going to be straightforward is unsupportable.

Failure to advise

[47] Mr WN also argues that overall there was a lack of information forthcoming from Ms YL and Ms TM. A review of the file shows that the lawyers were in continuing communication with Mr WN and there are frequent references to delays in either Mr WN receiving, or responding to, communications. That is no fault of the lawyers.

[48] At the review hearing Mr WN referred to a number of emails from himself to either lawyer in which he asked questions about how matters were to proceed. He cites this as evidence of a lack of information being provided.

[49] Some of the questions asked by Mr WN, had no, or only minimal, impact on the progress of the file and some of the emails referred to only contain refusals by Mr WN to accept what was being said (for example, by the lawyer appointed to represent MC.)

[50] There is some perversity about Mr WN’s claims that the lawyers did not properly advise him. When Ms TM expressed serious reservations about the likelihood of success of the application because of Mr WN’s ongoing absences overseas, he did not seem to accept the advice being provided. It would seem Mr WN only wanted to receive advice that supported his own views and requirements.

Other matters

[51] It is not necessary to individually address each of the 10 complaints made against each lawyer. Mr WN has not provided anything on review that leads to a different conclusion from that reached by the Standards Committee.

[52] Because each complaint is not addressed specifically does not mean they have not been considered. The evidence in support of each complaint is either lacking or insufficient.

[53] Mr WN complains that the lawyers did not release his files when requested. In the first instance, it would seem that he was requiring to uplift his file almost immediately following withdrawal of his instructions. In addition, Mr WN had not paid all outstanding fees and in this regard it is noted that the file was released notwithstanding that fees remained outstanding. Mr WN disputes the fees, but the grounds for dispute are unclear.

[54] Mr WN also complains that when the files were released parts of the handwritten notes were deleted. A lawyers' notes are not the property of the client, and could in fact have been removed altogether.

[55] Mr WN complains the lawyers delayed mediation because they were not available. The lawyers would have other client matters to attend to. A lawyer may also have matters of a personal nature that results in a lawyer being unavailable for client matters. Timetabling of mediations and court hearings must always take into account a lawyer's availability.

[56] The allegation of a conflict of interests is a serious allegation to make. Mr WN expanded on this allegation in an email to the Lawyers Complaints Service on 30 April 2015.

[57] Mr WN lives in [Town]. He says that at one stage, Ms TM asked a general question about [Town], in response to which, Mr WN says he commented in his 30 April 2015 email on concerns he had about "one particular family's unparalleled influence and control over the town and community." He says that family had a "close association with his extended family." He says that he became aware that [Law Firm A] had an employee who he thinks was the daughter of the family in question.

[58] It is clear that what Mr WN raises is not a conflict of interests. [Law Firm A] was not acting for any party whose interests conflicted with those of Mr WN.

[59] Rule 5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provides that "[a] lawyer must be free from compromising influences or loyalties when providing services to his or her clients." Having an employee who was a member of a family with close associations with his own family does not mean that the lawyers were in any way compromised in their ability to properly and adequately act in Mr WN's best interests.

[60] There is absolutely no evidence to support Mr WN's allegation. His complaint is based on nothing more than unfounded speculation. This is indicative of the strength of all of Mr WN's allegations.

[61] I refer specifically also to the complaint that the lawyers did not advise Mr WN that Ms NA was on legal aid. Mr WN did not refer to anything on the lawyers' file that indicates they were aware of this, but in any event, whether Ms NA was on legal aid or not would not have been recognised by either lawyer as being fundamentally important to Mr WN.

Summary

[62] Mr WN's complaints and allegations are unsupported by evidence and further action is not necessary or appropriate.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 21st day of September 2017

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 WN as the Applicant
Ms YL and Ms TM as the Respondents
[Area] Standards Committee
The New Zealand Law Society