LCRO 142/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 2 of the New Zealand Law Society
BETWEEN	**Mr BP** of [North Island] Applicant
AND	**Mr YF** of [North Island] Respondent

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

DECISION

Background

[1] The Applicant was convicted of indecent assault in 2002.

[2] One of the outcomes of that was that the Instructor and Passenger endorsements on his driver's licence were revoked and he lost his livelihood by reason of the fact that he was unable to be employed as a bus or taxi driver or operate his driving instructor's business.

[3] Since then he had endeavoured to have these endorsements reinstated so that he could recommence earning a living in the field in which he had operated since 1986.

[4] An application for reinstatement in 2005 had failed, as had an appeal against that in 2006.

[5] In 2008 he instructed Mr YF (the Practitioner) to act on his behalf to again apply for reinstatement.

[6] In a letter dated 21 August 2008, the Practitioner advised the Applicant of the intention of LTNZ to decline the application and advised him of his right of appeal to the High Court. In that letter he noted:-

> "We estimate that our likely costs for preparation of evidence and submissions, and appearing on your behalf to present your appeal, are likely to be in the region of $4,000 to $5,000."

[7] The Applicant instructed the Practitioner to proceed with the appeal.

[8] The appeal was lodged on 10 September 2008 and in early 2009 an outcome was negotiated with LTNZ whereby both Instructor and Passenger endorsements were reinstated. The outcome achieved for the Applicant was therefore completely successful.

[9] The Practitioner had rendered accounts for the work being carried out as follows:- (in each case I record the Practitioner's fees exclusive of GST and disbursements):-

30 July 2008	$3,667.50
13 January 2009	$2,895.00
12 February 2009	$9,120.00
23 February 2009	$2,100.00
Total	**$17,782.50**

[10] This was significantly in excess of the estimate provided by the Practitioner on 21 August 2008.

[11] On 17 April 2009, following receipt of an account rendered reminder, the Applicant wrote to the Practitioner expressing concern at the "enormous final total" and referred to the estimate provided on 21 August 2008.

[12] A "holding" letter was sent by the Practitioner's office on 4 May, indicating that the Practitioner would respond shortly and requesting some payment in the interim.

[13] No payment was made by the Applicant, and the Practitioner did not respond.

[14] A further letter was sent by the Applicant on 16 August 2009 requesting a response from the Practitioner, but when no response was forthcoming, the Applicant lodged his complaint with the Complaints Service of the New Zealand Law Society on 7 September 2009.

[15] The complaint recited the circumstances as set out briefly above, and expressed the Applicant's concern that the fees billed greatly exceeded the estimate provided.

The Applicant advised that he was unable to pay the fees despite the reinstatement of the endorsements to his driver's licence.

The Standards Committee decision

[16] The Standards Committee referred the matter to a costs assessor for a report who recommended that a fair and reasonable fee for the work undertaken by the Practitioner was between $11,000 and $12,000. This meant a reduction of the Practitioner's bills to between 61% and 70% of the amounts charged.

[17] The Standards Committee accepted the report and determined that three of the four bills rendered by the Practitioner were to be reduced by 35%. The Standards Committee did not reduce the first bill rendered on 30 July 2008, as it accepted the Practitioner's submission that it should not be adjusted because it was rendered prior to the estimate.

[18] As a result, the Practitioner's conduct was found to constitute unsatisfactory conduct and the following orders were made:-

- the Practitioner was censured;
- the Practitioner was ordered to reduce his fees as recorded in the determination;
- the Practitioner was ordered to pay the sum of $500 to the New Zealand Law Society in respect of the costs and expenses of and incidental to the inquiry.

[19] The reduction of the Practitioner's bills as ordered resulted in the following charges being due by the Applicant as follows:

Bill dated 30 July 2008	$3,667.50 (no change).
Bill dated 13 January 2009	$1,881.75
Bill dated 12 February 2009	$5,928.00
Bill dated 23 February 2009	$1,365.00
Total	**$12,842.25**

[20] The Committee determined to take no further action in respect of the complaint that the Practitioner's accounts exceeded his estimate. The reasons provided for this were as follows:-

(i) the costs assessor referred to various file notes relating to the level of the costs and the discussions with the Applicant about them, and the possibility of recovery of costs if the appeal was successful.

(ii) the fact that the Applicant was of limited means did not mean that the Practitioner should have adjusted his costs.

(iii) it was important to the Applicant to have the endorsements to his licence reinstated and this was achieved by the Practitioner.

(iv) in all the circumstances no further action was either necessary or appropriate.

The application for review

[21] The Applicant has applied for a review of the decision to take no further action in respect of the estimate for costs. He argues that he should be entitled to rely on the estimate provided and denies being advised in any clear way of the escalation of costs beyond the estimate.

Review

[22] For the purposes of this review, I refer to the Practitioner's fees exclusive of GST and disbursements. This is the basis on which the costs assessor has provided his assessment of a fair and reasonable fee. In addition, I have taken the view that the estimate provided by the Practitioner would have been provided on this basis also. I acknowledge that this is not supported by any evidence, but I adopt this view on the basis of what I consider is common practice amongst Practitioners.

[23] The bills rendered were as follows:-

30 July 2008	$3,667.50
13 January 2009	$2,895.00
12 February 2009	$9,120.00
23 February2009	$2,100.00
Total	**$17, 782.50**

[24] The costs assessor appointed by the Standards Committee reviewed the Practitioner's entire file and met with the Applicant and his support person. He also had discussions with both parties.

[25] In his report, the assessor noted the charge-out rate for the Practitioner as being $250.00 per hour and for his Legal Executive, as being $150.00 per hour. The assessor observed that these were well below the market rates.

[26] Balanced against this, the assessor refers to what he considers extraordinarily long attendances to complete particular matters, and cites several examples where he considers an undue amount of time had been taken to perform particular tasks.

[27] He then reviewed the various factors as provided in rule 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Client Care Rules) to be taken into account to establish a fair and reasonable fee. Of these, he determined that some weighting should be given to the result achieved by the Practitioner, which was a most satisfactory outcome for the Applicant given that his reinstatement application had been declined and other Practitioners had been unable to achieve this result.

[28] Having regard to all of the factors and, as noted, giving some weighting to the result achieved, the costs assessor came to the view that the estimate of $4,000 to $5,000 was inadequate and that a reasonable fee for the entire proceedings would be in the range of $11,000 to $12,000. This included work covered by the bill dated 30 July 2008. This resulted in an overall reduction to between 61% and 70% of the fees rendered. No weighting appears to have been given by the costs assessor to the existence of the estimate.

[29] The Practitioner pointed out that the estimate was provided on 21 August 2008, i.e., after the bill dated 30 July 2008, and that consequently that bill should be excluded from considerations. This was accepted by the Committee. It is hard to see why this should be. The assessor considered that a fair and reasonable fee for the entire proceedings was between $11,000 and $12,000. He had come to this view without applying any weighting to the estimate provided as he referred to a weighting for result only. Even if the Committee had decided that it could not adjust the 30 July bill because the Lawyers and Conveyancers Act did not come into force until 1 August 2008, the subsequent bills could have been adjusted by a greater amount so that the total cost came to between $11,000 and $12,000 as assessed by the assessor.

[30] The result of the Standards Committee decision, however, is that the fees are adjusted as follows:-

Bill dated 30 July 2008	$3,667.50 (no change)
Bill dated 13 January 2009	$1,881.75
Bill dated 12 February 2009	$5,928.00
Bill dated 23 February 2009	$1,365.00
Total	**$12,842.50**

[31] This compares with the Assessor's view that a fair and reasonable fee for the entire proceedings is $11,000 to $12,000 .

The estimate

[32] The Assessor placed no weight on the estimate provided, and notes that it was inadequate.

[33] This raises an initial question as to the level of care taken by the Practitioner in providing the estimate, and whether the Practitioner should not have to carry at least some responsibility for that lack of care.

[34] The estimate was given by the Practitioner with the knowledge that it was likely that LTNZ would oppose the appeal, as it had already declined the application for reinstatement. The assessor notes at paragraph 12.3 of his report that "nothing momentous or untoward occurred along the path to the filing of the proceedings or the disposal of the case other than the fact that the case was settled and would therefore take less time to prepare for and conduct the fixture than would have been the case when the initial estimate was given."

[35] At paragraph 12.4 he notes: " The factual situation was not complex. This was a file with some history but essentially involving LTNZ refusing to issue the Applicant with a "P" licence. The appeal form is straightforward to complete (single page), there was no appearance and a half-day fixture resolved by consent with an agreement as to costs."

[36] With regard to the estimate he notes at paragraph 12.5:-

> "There is a dispute about whether the estimate was varied or whether subsequent estimates replaced earlier ones. It is difficult to resolve this on the papers. If the Practitioner is bound by his written estimate then is GST included?".

[37] Notwithstanding that there was nothing "momentous or untoward" occurring, within two weeks of the estimate being provided, the Practitioner had noted that costs could be as much as $12,000. This would indicate that the Practitioner had been careless in providing the estimate, or had deliberately estimated low to encourage the Applicant to proceed with the appeal, or at least to instruct him to proceed with the appeal rather than instructing another Practitioner.

[38] However, the Applicant may very well have decided that he would not proceed with the appeal even though it was important to him if he had known that his bill was going to be $17,700 plus GST and disbursements (which were not inconsiderable).The Applicant states that he simply could not have afforded that.

[39] The Applicant's financial situation was known to the Practitioner, as acknowledged by him in his letter to the Complaints Service on 30 September 2009. In

that letter he notes that he knew from the statement of position that the Applicant had provided, that "he had few assets, no liabilities and not much income."

Escalation of costs

[40] The Practitioner says that he advised the Applicant on at least two occasions that costs had been or were going to exceed the estimate. The Applicant disputes this. His comments in that regard are quite convincing.

[41] The Practitioner asserts that he first raised the issue of a possible increase in the costs on 5 September 2008, less than two weeks after the estimate was provided. The memorandum which records the content of that phone conversation refers to the possible need for further evidence to counter LTNZ if it persisted in opposing the appeal, the requirement for further negotiating attendances, and the costs of the hearing. As both the Applicant and the costs assessor point out, it was well-known that LTNZ would oppose the appeal as it had already declined the application for reinstatement. There was no reason to expect that it would reverse its position just because an appeal was lodged. In addition, the estimate provided included appearing at the appeal, so there should have been no additional costs in that regard.

[42] The second occasion on which the Practitioner asserts that he raised the matter of costs was on 1 October 2008, when he states that he noted that costs were escalating and that from the information he then had it seemed that costs could be in the order of $12,000 plus GST.

[43] The Applicant says that he does not recall any such conversation. He says that he did not have $12,000 and would have instructed the Practitioner to cease work if he had been told that. He also notes that at that time costs were not escalating and observes that the bill rendered on 13 January 2009 was for $2,895 plus GST and disbursements, making a total of $3,285, a figure which was in line with the estimate provided.

[44] The comment made by the Practitioner at that time could very well have referred to the fact that he had formed the view that the overall cost was going to be in the region of $12,000, being at that stage aware of what was going to be required to complete the matter. However, even this revised estimate was exceeded by nearly 50%.

[45] The major increase in costs beyond the estimate took place between the bills dated 13 January and 12 February 2009. A review of the time and records of the work

undertaken during this period shows that during this period affidavit evidence was finalised. The costs assessor has commented that the time taken over these tasks seemed to be extraordinarily long, but I again note the below market hourly rates applied by the Practitioner.

[46] The overall picture that emerges is that the estimate of $4,000 to $5,000 was so inaccurate that it was irrelevant. The total fees rendered by the Practitioner of $17,782.50 was some three to four times the amount of the estimate. The question to be decided is, who should bear the consequences of that? And would the answer to this change if the Applicant had been warned of the escalation in costs as the Practitioner says he was?

[47] An earlier LCRO decision in which estimates are discussed is *Milnathort v Rhayader*, LCRO 140/09. In that decision the LCRO notes that an estimate must be provided with care. At paragraph [14] the LCRO observes when discussing the case of *K M Young Ltd v Cosgrove* [1963] NZLR 967, that "it was noted that the party giving the estimate is the expert in the services to be provided and may be expected to be relied upon by the lay person." At paragraph [15], the LCRO states: "A lawyer who gives an estimate must therefore do so with care. It is not appropriate for a lawyer to give an estimate to a client where the lawyer knows (or ought reasonably to know) that it is likely that the fee will be greater than the estimate in the client's particular circumstances. An estimate should be the amount which work of the nature contemplated in the particular circumstances of the client is likely to cost."

[48] Again, at paragraph [16] the LCRO states: "It is also relevant that a client will rely on an estimate in retaining a lawyer and it often will not be feasible to cease instructing a lawyer if the estimate increases. A client must be able to reasonably rely on an estimate provided."

[49] This statement is reinforced by the statement made in the case of *Kirk v Vallant Hooker & Partners [2000] 2 NZLR 156* para 49, where the Judge states: "Clients reasonably can expect that they can place faith in estimates....."

[50] The requirement for a client to be able to rely upon estimates was also discussed in a decision of the Queen's Bench (*Wong v Vizards* [1997] [2] Costs LR 46). A number of comments made in that decision are relevant.

[51] At page 49, Toulson J states:-

> "In considering whether a reasonable amount for the work done should exceed what the fee-payer had been led to believe was a worst case assessment, regard should be had to any explanation for divergence. In this case, it has not been suggested that there was any unexpected development between November 1993 and the date of the trial. No satisfactory explanation has been given why the solicitors should be entitled to profit costs exceeding the amount put forward to Mr Wong as their worst case assessment, especially when the trial for which they had allowed ten days was completed in less than eight days."

[52] The Judge goes on to say:

> "The question is whether it is reasonable that Mr Wong should have to pay more than twice what he had been led to expect on a worst case basis, without any explanation as to why there should have been such a disparity. I do not think that it is."

[53] He then notes that:

> "Mr Wong has just cause for complaint if, after seeking a reliable estimate from his solicitors as to his potential costs exposure before deciding to take the matter to trial, he should then be required to pay a far greater amount without further warning or a proper explanation for the difference."

[54] The Judge then refers to the 'Law Society's Guide to the Professional Conduct of Solicitors', 7th Edition, at paragraph 13.07, which states that:

> "When confirming clients' instructions in writing the solicitor should:
>
> …(iii) confirm oral estimates – the final amount payable should not vary substantially from the estimate unless clients have been informed of the changed circumstances in writing."

[55] A statement to similar effect was provided in the New Zealand Law Society publication 'Property Transactions: Practice Guidelines' which contained guidelines for costing prior to the Client Care Rules. At paragraph 7.2(b) the Guidelines provided that:

> "It is generally inappropriate to charge a fee in excess of an estimate given to a client. You should advise your client in writing immediately if it becomes apparent that the original estimate is likely to be exceeded. Give reasons for the increase and revised estimate figures."

[56] These guidelines are as relevant today as they were then.

[57] In the present circumstances, nothing occurred that the costs assessor could identify between the time the estimate was given and the completion of the job which would have been the cause of an increase in costs. The difference between the fees

rendered and the estimate is therefore largely due to the fact that the initial estimate provided by the Practitioner was so inaccurate as to be irrelevant.

[58] It needs to be considered what the consequences of this cost overrun should be. McGechan J at paragraph [44] in *Kirk v Vallant Hooker & Partners* decision stated that:

> "Bluntly, on the question of over-runs beyond estimate, the appellant was given Hobson's Choice. That is not a choice which should prove conclusive against him."

[59] In the present situation, nothing occurred which would have caused a cost overrun. In addition the cost escalation notified to the Applicant was not notified in writing, and indeed the verbal notifications asserted by the Practitioner are disputed by the Applicant.

[60] In summary, therefore, the situation is as follows:

(a) there was an estimate provided that even when given was inadequate.

(b) the Practitioner asserts that within two weeks he advised the Applicant that this assessment was going to be exceeded by up to two and a half times.

(c) the Applicant disputes that he was advised of this.

(d) that the estimate was going to be exceeded would have been clear to the Applicant when the bill dated 12 February was rendered;

(e) nothing out of the ordinary occurred compared to what could have been expected at the time the estimate was given.

(f) did the Applicant have a choice?

[61] In all the circumstances, I come to the view that it is unreasonable that the Applicant alone should carry all of the consequences arising from this set of circumstances.

[62] The question is how to take consideration of these factors?

[63] A strict approach would be to apply the estimate. However, it must be recognised that estimates are not quotes and some variation is permissible.

[64] It is also reasonable that some weight should be given to the fact that the Practitioner was completely successful in achieving the outcome desired by the Applicant. A fair and reasonable fee on this basis, assessed by the costs assessor was a fee of between $11,000 and $12,000.

[65] Any decision made by the Committee or the LCRO commits the Applicant to a bill in excess of what he agreed to and what he considered he could afford with his limited means.

[66] In all of the circumstances, and in carrying out something of a balancing act, I consider that the Practitioner's fees should be reduced to $10,000 for all of the work carried out by the Practitioner. I have arrived at this figure by starting with the figure of $11,000 - $12,000 which the costs assessor considers represents a fair and reasonable fee, acknowledging a weighting for success (but not giving any weight to the estimate.) I have then shared equally the consequences of the inaccurate estimate, to reach a figure of $8,500. (While it is tempting to adopt the position that the Practitioner should bear the consequences of this alone, it must be recognised that an estimate is not a quote, and the respondent has received services to a value considerably in excess of the estimate.) Finally I have added the sum of $1,500 to take account of the fact that the Applicant was either advised by the Practitioner of the cost escalation, or that he raised no objections when it would have been clear to him by at least when the bill was rendered on 12 February 2008.

[67] To give effect to this decision the bills of account dated 13 January, 12 February and 23 February 2009 should be reduced to a total of $6,332.50 plus GST and disbursements. This is done for the reason that there can be no finding of unsatisfactory conduct (and therefore a reduction in fees ordered) in respect of the bill dated 30 July 2008, as it predates the commencement of the Act.

[68] The result of this review is that the Practitioner has not been properly remunerated for a job which has been well-done, and resulted in absolute success for the Applicant. However, this case highlights the need for as much care as possible to be taken by Practitioners when providing estimates. Rule 9.4 of the Client Care Rules obliges a lawyer to provide an estimate of fees if required, and to inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded. This rule reflects the consumer protection objectives of the Act as set out in s3(b). If the requirement to provide estimates is not reinforced by a requirement to have care when doing so, and an obligation to adhere to them as closely as possible (unless circumstances develop which alter the basis on which the estimate is given, and those circumstances are communicated to the client) then those objectives will be undermined.

Decision

1. Pursuant to s211(1)(a) of the Lawyers and Conveyancers Act 2006, the finding of unsatisfactory conduct on the part of the Practitioner is confirmed, as is the censure pursuant to s156(1)(b) and the Costs Order pursuant to s156(1)(n) (wrongly referred to in the Standards Committee decision as s165(1)(n)).

2. Pursuant to s211(1)(a) the order pursuant to s156(1)(e) requiring the Practitioner to reduce his fees, is amended to provide that the total of the bills dated, 13 January, 12 February and 23 February 2009 is to be reduced to $6,332.50 plus GST and disbursements.

A certificate pursuant to s161(2) is provided with this decision.

DATED this 24th day of March 2011

_____

Owen Vaughan
Legal Complaints Review Officer

In accordance with s213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr BP as the Applicant
Mr YF as the Respondent
The Wellington Standards Committee 2
The New Zealand Law Society