LCRO 156/10

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Southland Complaints and Standards Committee
BETWEEN	**AA** of X Applicant
AND	**ZZ** of X Respondent

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

DECISION

Application for review

[1] In July 2010, the Southland Complaints and Standards Committee declined to uphold a complaint made by Mr AA (the Applicant) against, Ms ZZ (the Practitioner).

[2] This review relates to a complaint made against the lawyer acting for the Applicant's wife, L. The Practitioner had acted for L in the preparation of the revocation of an Enduring Power of Attorney (EPA) and in the preparation of a new EPA. The Applicant had been the attorney in the EPA that was revoked. At the time that she signed the documents L had been a resident at the X Clinic on a voluntary admission for some five weeks, and was apparently due to leave soon after. The appointment with the Practitioner was made by L's sister who had accompanied L to see the Practitioner.

[3] The Applicant's complaint against the Practitioner was that L was not legally competent to have revoked the EPA. He contended that the Practitioner had made no

effort to seek advice from medical persons responsible for L's care and treatment as to her competency. He informed the New Zealand Law Society that "*The consequences of this document have been traumatic for me and our mutual friends.*" He explained this by stating that L's family had removed her from the X care, spirited her to Wellington to care for her and to arrange alternative medicine, where she was also prevented from contacting her dearest friends.

[4] The Practitioner denied the allegations. She disputed that L lacked legal competency when signing the documents. Her view was that the fact of L being at X Clinic did not necessarily mean she was mentally incapable or incompetent to manage her own affairs. The Practitioner acknowledged that L's sister had arranged the appointment, had given an indication in advance of what L wanted, and had accompanied L to the appointment with the Practitioner. She described an interview that lasted about one hour, during which time she questioned L. The Practitioner explained that she was satisfied as to L's wishes, and intentions in wanting to revoke the EPA in her husband's favour and execute a new one. The Practitioner had considered L to be competent to have given these instructions. She referred to the legal presumption of competence. She further noted that L had gone to X Clinic for depression at her own volition, and preparing to leave at the time of the appointment (although had elected to stay for a further period) but was free to leave at any time. The Practitioner asserted that L appeared able to make decisions, understand the nature of those decisions and foresee their consequences. She also noted that L had expressed some concern about her husband's reaction to her revoking the EPA.

[5] The Applicant wrote again to the Complaints and Standards Officer with his comments on the Practitioner's response. Much of this letter detailed events that had transpired following the revocation of the EPA, which had been alluded to in his original complaint. Additional information was that L had made several attempts to commit suicide, including while she was in the care of her sister. It appeared that at the time that the Applicant wrote to the Committee, L had returned home to live with the Applicant. He wrote he was endeavouring to provide her with the support and stability that she desperately needed in order to pursue her recovery. In his view L had proven herself capable of achieving an outward appearance of normality for short periods of time, but overall, he considered that she lacked competency. He repeated his criticism of the Practitioner for failing to have obtained the input of mental health professionals to ascertain his wife's mental status. He added that the "business at hand" had been directed by other minds, and he took the view that the Practitioner took a very cursory

approach to what were critical circumstances and had failed to make prudent enquiries of those responsible for his wife's care.

[6] He contended that the Practitioner's views were contradictory which he explained in the following way:

> *"Now to turn to a more compelling point which demonstrates an absolute contradiction of (the Practitioner's) position. It is useful to consider the paradoxical need to execute powers of attorney (presumably in favour of her sisters?) in paragraph 5. Quite why, when (the Practitioner) had formed the view that (his wife) was perfectly capable of conducting her own affairs and had, therefore, no need to have a power of attorney in my favour, wasn't thought to be necessary to execute new powers of attorney in favour of other parties, …".*

[7] The Complaints and Standards Committee had asked a number of questions of the Practitioner, in particular, who prepared the documents, who gave instructions for the work, who paid for the work, who did the Practitioner regard as her client, and who paid the account. The Practitioner answered all of these questions, stating that the documents had been prepared by her on the instructions of the client whom she considered to be L, (notwithstanding that the appointment had been made by L's sister), that the sister had agreed to pay the account and for that reason the account had been sent to the sister. The Practitioner informed the Committee that she spent a lengthy period of time with L, and that she had no doubt that L had asked her sister to arrange the meeting, had put a lot of thought into the matter and that she (L) wished to go ahead with the revocation and replace it with a new EPA.

[8] The Complaints and Standards Committee decided to further investigate the matter pursuant to s 152 of the Lawyers and Conveyancers Act and a Notice of Hearing was issued to the parties and submissions invited. The Applicant reiterated his earlier information, but also described a "new development" involving an event that had occurred the week before.

[9] The Practitioner provided a lengthy letter to the Complaints and Standards Office, effectively disputing that her client was mentally incompetent and denied that a medical certificate was required. She reiterated that she had taken the instructions from L directly, notwithstanding that her sister had earlier indicated the reasons for the appointment. The Practitioner enlarged on her earlier information concerning the interview with L, adding that L had told her she had been thinking about this (revoking the EPA that appointed the Applicant) for an extended period and that it was not a last minute decision on her part. The Practitioner stated that her client was quite clear about what she intended. She said that L was not under duress during the interview (also acknowledged by the Applicant), and that the L had suggested that she might put

it (the revocation) in a bottom drawer, to which the Practitioner said, "yes, you do not need to use it until you feel happy to do so." The Practitioner noted that L had nevertheless forwarded the revocation to the Applicant the next day.

[10] The Practitioner also enclosed a "*To Whom it May Concern*" letter, dated 23 June 2010, which had been signed by L and was an acknowledgment by L that she had changed her power of attorney with a sound mind and body, received and fully understood legal advice, and that she had torn up her previous power of attorney so as to ensure it could not be used, and took steps to revoke it and establish a new one. The Practitioner added that if required she would be willing to obtain reports from relevant parties, including from the psychologist at the X Clinic, concerning the impact of her client's discussions. The Practitioner also noted that the Applicant was giving evidence about, and making submissions on, interactions that he had not witnessed.

[11] The Standards Committee considered all of this information, and preferred the evidence of the Practitioner. The Committee accepted that L was her client notwithstanding that her initial instructions had come from the sister, and also accepted that the Practitioner had had lengthy discussions with L. The Committee observed that the validity or otherwise of the revocation of the EPA or the new EPA, were not matters for the Committee, but for a Court to decide. The Committee added that it was satisfied that the Practitioner had not been influenced by L's sister.

Review application

[12] The Applicant's review application referred to (and included) 'new evidence' not available at the time of the complaint. One item was a copy of the fees account the Practitioner had sent to L's sister in which the Applicant had highlighted the references to services provided to "you" (i.e the sister).

[13] The other was a letter written by L wherein L gave her account of the meeting with the Practitioner. This letter is dated 9 August 2010. In it L recounted the events surrounding her meeting with the Practitioner, denied (prior) knowledge of the appointment which she said had been arranged by her sister, denied that she had instructed the lawyer to prepare the EPA and the revocation, and added that she had signed under duress (presumably both the revocation and the new EPA). L's letter continued with an acknowledgement that she signed the revocation "*but on the proviso that it stay in the bottom drawer and not be actioned."* She continued, *"the following morning under duress, I finally agreed that my sister could fax the document to her husband in Wellington. This was actioned by* (my sister*)"*.

Considerations

[14] The crux of the matter is whether there were circumstances that indicted that L lacked, or may have lacked, legal capacity to have given instructions to the Practitioner, or that the Practitioner acted on the instructions of a third party. The Standards Committee is correct in stating that the question of L's competency is not a matter that can be determined by a Standards Committee. However, in a disciplinary context it is open to a Standards Committee to examine the professional conduct of a lawyer where instructions are taken from a client in circumstances where questions arise as to legal competency.

[15] I shall first address is the Applicant's contention that it was not L but her sister who was the Practitioner's client. The evidence he relies on include that fact that the sister made the appointment, alerted the Practitioner about the nature of the appointment, was present at the practitioner's consultation with L and that the Practitioner sent the bill to the sister, which had several references to services having been provided to "you", i.e. the person to whom the bill was addressed.

[16] Most of these matters are incorporated in the following discussion. However, I noted that the Practitioner's bill was sent to the sister, the Practitioner having informed the Committee that the sister had assumed responsibility for payment. There is nothing particularly unusual about professional costs being assumed by a third party, and that alone does not make that third party the recipient of the services that are provided. In this case however, the Practitioner makes several references to services provided to "you" which, on the face of the bill, suggests that the recipient of the Practitioner's service was the sister. For reasons that follow I do not accept that the service were provided to L's sister despite the wording of the bills. The narration is undoubtedly careless and this is unfortunate, but it is not a matter that should attract disciplinary censure. In the context of a disciplinary enquiry my focus is on the substance of the matter. The extent of the sister's involvement is clear from the overall evidence, which makes equally clear that the it was L who was the Practitioner's client.

[17] A large part of the Applicant's information focuses on supporting his view that L lacked legal competency. This is the reasons why the Applicant complained that the Practitioner ought not to have acted on her instructions. The Applicant has provided no medical evidence to support his assessment of L's mental state, and relies solely on his own assessment of L and his evaluation of events that occurred at times subsequent to the services provided by the Practitioner. I noted that the Standards

Committee did not address the issue of L's legal competence, and directed its focus on the matter of who gave the instructions to the Practitioner, concluding that it was L herself who had done so.

[18] The question of legal competency in relation to individuals who have had, or are undergoing, mental health treatment, is a difficult one. Most writings on the subject concern the question of whether a patient is legally competent to consent to treatment. There appear to be varying practices throughout New Zealand law firms as to how instructions are obtained in such circumstances. Many practitioners (but not all it appears) routinely obtain Will instructions, for example, from their client in the absence of any other party being present. Arguably, instructions concerning an EPA may be considered equivalent for these purposes.

[19] The evidence showed that the Practitioner was fully cognisant of the fact that L was a resident of X Clinic at the time in issue. I accept the Practitioner's evidence that she spent considerable time with the Applicant, and was, at the end of an hour, satisfied as to L's comprehension and wishes. In the circumstances I accept that in the interview with L, the Practitioner would have been alert to the issue of legal competency.

[20] There is evidence that L's sister remained in attendance at the interview between the Practitioner and L. The Applicant considered this to be evidence that the Practitioner had been influenced by L's sister. While this is a questionable practice in some situations, it is not conclusive of whether this affected (or prevented) L exercising full legal autonomy. Materially there is evidence from the Practitioner concerning the extent of her discussion with L and the absence of any concerns on her part about L's ability to give instructions. The Standards Committee undertook a thorough enquiry of the Practitioner concerning the events, and its silence on this point (noted earlier) suggests that the Committee held no particular concerns about the Practitioner's conduct in the matter.

[21] In a disciplinary context the most that the Standards Committee could do would be to examine the overall circumstances existing at the time the services were provided. The fact that L's sister arranged the appointment cannot be decisive, nor that she may have given some indication as to the reasons for L's appointment. Nor can the fact that L was at the time a resident at X Clinic be determinative of her legal capacity to instruct a lawyer. The Practitioner is correct to say that an individual undergoing mental health treatment is not necessarily incompetent to make legal decisions concerning their own affairs. L was a voluntary patient at the verge of

leaving X, and entitled to leave at any time, and there is also evidence that a subsequent assessment of L failed to result in her admission to a mental health facility.

[22] The Practitioner's evidence was that although she was instructed by the wife to prepare the revocation of the EPA in the Applicant's favour, she had understood that L had not intended to serve the revocation notice on her husband, but intended to put it in a drawer for the present. The letter written by L supports this. The Practitioner had also provided to the Committee a letter signed by L dated 23 June 2010, in which she claimed she intended to change her power of attorney and had understood the advice she was given and was resolved to revoke it. This letter is completely at odds with the later letter written by L on 9 August (forwarded by the Applicant) in which she contradicts the Practitioner's evidence on all major issues, except in one respect, that being that L confirmed that she intended that the revocation remain in the bottom drawer and not be actioned. L's letter continued that the next day, 'under duress', (presumably applied by her sister) she had faxed the document to the Applicant.

[23] I note that the letter that L provided to the Practitioner was written some three and a half months after L's visit to the Practitioner, and effectively confirms that the services provided by the Practitioner were at her instructions.

[24] The later letter written by L (and forwarded by the Applicant for this review) was written some six weeks after the letter that L had provided to the Practitioner. It was also written after L had resumed living with the Applicant. In these circumstances I do not find that L's August letter is sufficiently persuasive to cancel out her earlier letter provided to the Practitioner, or her actions in signing the EPA, and then forwarding it to the Applicant. These earlier actions all evidence her intention at that time to revoke an existing EPA. To clarify, I do not find the later letter written by L is persuasive of any wrongdoing by the Practitioner.

[25] I may add that a revocation of an EPA is effective when notice of the revocation is given in writing to the attorney. I noted that although the Practitioner prepared the revocation document, the delivery of it to the Applicant (which activated the revocation) did not involve the Practitioner. It is undisputed that at the time the Practitioner prepared the revocation, that L intended to put it aside and not action it immediately. It is also undisputed that the act of notifying the Applicant of the revocation was done by L. These events strongly indicate that L's intention was to revoke the EPA, and she acted on this intention by faxing it to the Applicant, with or without the assistance of her sister, but materially it was not a decision that directly involved the Practitioner.

[26] I need also to refer to the Applicant's reference to the 'paradox' of the Practitioner insisting on her client's legal competency to sign a revocation of the EPA on the one hand, which he considered was inconsistent with his wife signing a fresh EPA on the basis that the fact of her competency should have meant that she did not require an EPA. The fallacy of the submission is that individuals throughout New Zealand sign EPAs every day and do so in preparation for a future time when it will be needed. I therefore see no contradiction in the client having replaced one attorney for another, which is a common occurrence.

[27] I have noted that much of the Applicant's case against the Practitioner is built on events that happened after L's visit with the Practitioner. Much of the evidence advanced for his complaint was based on events that occurred afterwards, and I have noted that many months had passed between L's visit to the Practitioner and her return to the Applicant. Even taking into account that L may have had periodic mental health issues which may have, at times, reduced her legal competency, the events that happened subsequent to her visit with the Practitioner are not necessarily evidence of mental incompetency at the time of her visit to L.

[28] If an adverse finding is to be made against the Practitioner there needs to be reasonably clear evidence that the Practitioner acted in a professionally irresponsible manner. Individuals with mental impairment may nevertheless have legal competency concerning their own welfare and affairs. There is a strong legal presumption of legal competency unless there is contrary evidence. The fact of L's residency at X is insufficient evidence. I accept, as did the Standards Committee, that the Practitioner spent a considerable amount of time with her client and being fully aware that she was a resident at X, would undoubtedly have had at the back of her mind a question concerning competency.

[29] I have reviewed all of the information on the file, and given careful consideration to both the Applicant's views and that of the Practitioner. I accept that the Applicant holds strong views about L's competency but I have seen no evidence on the file that demonstrates that L lacked legal competency at the time of her visit to the Practitioner. I am therefore not persuaded to take a different view to that taken by the Standards Committee in respect of this complaint.

[30] The complaint does, however, highlight the issues of legal competency for lawyers acting for elderly or otherwise vulnerable clients and raises questions about the circumstances that should alert lawyers to their practices in obtaining instructions from such individuals clients, when to consider whether there may be a question of legal

competency, and when and what further enquiry ought then to be taken. This is a matter that might properly be given further consideration by the New Zealand Law Society as part of its Continuing Legal Education programme.

Decision

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

DATED this 24th day of January 2011

_____

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:

AA as the Applicant
ZZ as the Respondent
The Southland Standards Committee
The New Zealand Law Society