LCRO 160/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Area Standards Committee
BETWEEN	**KL** Applicant
AND	**WS** Respondent

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

CONSEQUENTIAL ORDERS

Section 156

Introduction and Background

[1] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, on review the decision of the Standards Committee has been:

(a) modified to record a determination made pursuant to ss 211(1)(b) and 152(2)(b)(i) that there has been unsatisfactory conduct on the part of Ms WS pursuant to s 12(c) consisting of contraventions of Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 3.4, 3.5, 9.3 and 14.2(e); and

(b) otherwise confirmed.

[2] The parties were offered the opportunity to file submissions in relation to orders that might be made pursuant to s 156 of the Act by 29 June 2016, and an extension was allowed to 30 June 2016. Submissions were filed on behalf of Ms WS on 30 June 2016. Those have been considered. No submissions were received from Mr KL.

Purposes of the Act

[3] The approach when considering whether to make orders, and if so, which orders to make, is guided by the purposes of the Act. Those include maintaining public confidence in the provision of legal services and protecting consumers of legal services such as Mr KL.

Section 156

[4] Section 156 provides for a range of orders to be made as a consequence of a finding that a practitioner's conduct has been unsatisfactory pursuant to s 12 of the Act. Orders are tailored to the particular circumstances that give rise to the unsatisfactory conduct finding. The objectives of penalty orders made under s 156 in the context of professional discipline include punishing the practitioner, acting as a deterrent to the practitioner and other practitioners, and reflecting the public's and the profession's disapproval[1] of the unsatisfactory conduct.

[5] Not all of the orders provided for in s 156 serve the purpose of punishing the practitioner concerned. Other purposes may be served by orders made pursuant to s 156, such as the provision of compensation or providing a remedy.

[6] The Committee did not refer to the contraventions of rules 9.3 and 14.2(e), and considered the contraventions of rules 3.4 and 3.5 were technical and did not warrant a finding of unsatisfactory conduct. In the circumstances, the Committee made no consequential orders pursuant to s 156. The outcome of the review warrants some consequences beyond orders for costs.

Contraventions

[7] Ms WS contravened four rules.

---

[1] *Wislang v Medical Council of New Zealand* [2002] NZAR 573.

[8] Rules 3.4 and 3.5 required her to provide information to Mr KL before either of them became overcommitted to her representing him. Broadly speaking those rules require lawyers to set out the parameters of the retainer, and notify the client of statutory protections that are available to them. That enables the client to give instructions on the basis of a proper understanding of the nature, scope and terms of the retainer, and to be informed of their rights as a consumer of legal services. The rules assist both parties to communicate clearly, and help to navigate the pitfalls of misunderstanding and miscommunication.

[9] Ms WS's failure to provide the information required by the rules occurred not long after the new regulatory regime came into effect. Ms WS has acknowledged having overlooked the requirement to provide the information, but counsel argues on her behalf that her conduct is explained by:

> …the requirements [having] only been in place for less than two months at the relevant time, so it was understandable why Ms WS may have overlooked these requirements. She remedied the error as soon as she became aware of it (as opposed to having been told that she had erred). Further, Ms WS discussed some of the key elements required to be covered in written terms of engagement when she was first instructed.

[10] The fact that the requirements had only been in place for a short time does not necessarily make it easier to understand Ms WS having overlooked them. Lawyers had ample advance warning of the new rules and what they would contain. NZLS ran seminars and produced draft letters for lawyers to adopt or adapt if they chose. Although the rules provide for limited exceptions to rules 3.4 and 3.5 (none of which applied to the retainer between Mr KL and Ms WS), it was not a complicated administrative matter for lawyers to implement a file opening process that included the information in draft form. As time passes those types of process could be expected to become further embedded in a lawyer's practice, although of course slippage can occur.

[11] On one view, the profession should have been on high alert to ensure compliance in the months that followed the implementation of the new rules. On the view put by counsel, the omission was understandable because the rules had only been in effect for a short time. The argument is unconvincing.

[12] The fact that Ms WS identified the need to provide information, and did so later in the course of the retainer without being prompted to do so is an improvement

on not having provided information at all, but not as good as providing Mr KL with the right information at the right time.

[13] Nonetheless, lawyers are not expected to be perfect. Everyone makes mistakes. Ms WS's failure to provide all of the information the rules say is required in writing is moderated by her having provided some information to Mr KL when they first discussed the terms on which she could be instructed.

[14] The argument that the rules were new would not be compelling if it were applied to the contraventions of rules 9.3 and 14.2(e). Those rules effectively prohibit barristers operating trust accounts and taking fees in advance. The inability to operate a trust account or take fees in advance present significant impediments to barristers securing their fees. They are linked to the requirement to be instructed through a solicitor who can hold funds to secure counsel's fees, and to barristers' inability to sue to recover their fees. Those professional obligations have a much longer history.[2]

[15] Similar limitations to those imposed by rules 9.3 and 14.2(e) were imposed by the Rules of Professional Conduct, various iterations of which had guided the profession for many years, until the Act and its consumer protection provisions came into effect on 1 August 2008.

[16] As Ms WS acknowledges, there is no excuse for her having contravened rules 9.3 and 14.2(e). Nonetheless, it is important to record that there is no evidence, and no suggestion, that Ms WS intended to misuse the money she held on account of her fees.

[17] However, Mr KL was vulnerable and his choices were limited. He was facing serious charges, and needed counsel with a reasonable level of expertise. It is not clear whether anyone told Mr KL he did not have to pay Ms WS in advance. If he had known of the role traditionally played by instructing solicitors, he might well have preferred to pay the money into the instructing solicitor's trust account. It appears he was not given that choice. If he had been told, he would have known that some of the risks of handing over a large sum of money were managed, and that he retained a level of control over that money and any interest earned on it.

[18] Some, but not all, aspects of risk in handing a large sum of money over to Ms WS may have been infinitesimally small because she paid it into a "long term

[2] See for example the commentary in Duncan Webb, Kathryn Dalzie and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 416–418.

business account". Ms WS would have been better placed than Mr KL (or his parents) to foresee the extent of any risk to the money, but she does not appear to have made information available to Mr KL that would have enabled him (or his parents) to evaluate or manage risk, such as the information referred to in rule 3.4.

[19] Unknown, and perhaps unknowable, risks are fundamental to the obligation on lawyers to ensure other people's money and valuables are entrusted to solicitors, who are required to hold and account for them, and where relevant, for any interest that might accrue. Although it is not a matter this Office is well placed to address, counsel's submission at paragraph 3.24 that "no loss was suffered as a result of the conduct" does not sit well with the question of whether interest should have been earned on the money paid in advance, and who might receive the benefit of that. None of the penalty orders in s 156 respond to that type of issue.

Penalty Orders

[20] The penalties that can be imposed on lawyers pursuant to s 156 are a censure or reprimand, and a fine payable to NZLS. Orders should be tailored to respond to the Committee or LCRO's assessment of the lawyer's culpability by reference to other relevant circumstances, which include the impact of the conduct on the client and the risk of repeat offending.[3]

Censure or Reprimand

[21] Counsel submits censure or reprimand are generally reserved for conduct at the upper end of unsatisfactory conduct, and that both are "designed to rebuke the practitioner and will inevitably be taken seriously with regard to the ongoing conduct of that practitioner":[4]

> To censure a practitioner is to harshly criticise his or her conduct. It is the means by which the committee can most strongly express its condemnation of what a practitioner has done…

[22] Counsel argues that a censure would not be an appropriate response to the contraventions of rules 3.4 and 3.5, but does not make the same argument with respect to the contraventions of rules 9.3 and 14.2(e).

---

[3] *NZLS v B* [2013] NZCA 156, [2013] NZAR 970 at [38].
[4] *B v Auckland Standards Committee 1 of the New Zealand Law Society and Others* CIV 2010 404 8451, 9 September 2011 at [38].

[23] As indicated in the substantive decision, publication of Ms WS's name pursuant to s 206(4) is not considered necessary or desirable in the public interest although publication of the decision without Ms WS's name will be directed. For the purposes of publication it has been observed that censure and reprimand are interchangeable.[5] However, censure and reprimand must have different meanings, or no statutory purpose would be served by incorporating both options into s 156(1)(b).

[24] It appears from *NZLS v B* and the LCRO's decision in *CK v Auckland Standards Committee* that while a censure and a reprimand are both rebukes, the former may be viewed as a harsh rebuke, and the latter less so. That nuance is consistent with the range of conduct that may be found to be unsatisfactory pursuant to the various standards set out in s 12 of the Act.

[25] While Ms WS's conduct is worthy of criticism, it is not so serious as to warrant harsh criticism. In the circumstances I consider a reprimand is the appropriate regulatory response to mark out the conduct as unsatisfactory and to reflect condemnation of it. That response is tailored to meet the expectations of members of the public like Mr KL, who rely on lawyers to explain options and risks to them, and who can expect to be allowed to exercise freedom of choice. Ms WS is therefore reprimanded for taking fees in advance, and holding that money for or on behalf of Mr KL or his parents without having provided services or issued an invoice for fees.

Fine

[26] The maximum fine the Act provides for is $15,000. A fine at that level should be reserved for the most serious cases. This is not such a case.

[27] Counsel submits that a fine of $1,000 is the appropriate response to the contraventions of rules 3.4 and 3.5.

[28] I agree, but would add that a fine is also appropriate in conjunction with the reprimand referred to above. Ms WS is fined an additional $1,000 for contravening rules 9.3 and 14.2(e).

[29] A total fine of $2,000 is imposed for all contraventions of the rules.

Other Orders

[5] *CK v Auckland Standards Committee* LCRO 63/2011 at [64].

[30] There is no good reason to impose any of the other orders provided for by s 156. Costs were imposed in the substantive decision.

Orders

[31] Pursuant to sections 211(1)(b) and 156(1)(b) and (i) of the Lawyers and Conveyancers Act 2006 Ms WS is:

(a) Reprimanded; and

(b) Ordered to pay a fine of $2,000 to NZLS within 28 days of the date of this decision.

DATED this 11th day of July 2016

_____

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 KL as the Applicant
Ms WS as the Respondent
Ms RT as Representative for the Respondent
Area Standards Committee
The New Zealand Law Society
The Secretary for Justice