LCRO 196/2016

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 No [X]
BETWEEN	**GY** Applicant
AND	**SO** Respondent

DECISION

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

Introduction

[1] Ms GY has applied for a review of a decision by the Area Standards Committee Number [X] to take no further action in respect of her complaint concerning the conduct of Ms SO.

[2] Ms GY and her former partner, Mr YR, both from [Town], have a child, [PM]. During 2013 Mr YR applied for a parenting order, and an order to prevent Ms GY removing [PM] from New Zealand.

[3] Ms SO, of [Town] Family Law, acted for Mr YR. Ms GY was separately represented. An order preventing removal was made on 9 April 2013. No parenting order was made.[1]

[1] *YR v GY* FC [Town] FAM-2013-[XXX] [XX], Direction 20 March 2014 at [2] and [5].

[4] Subsequently Ms GY and Mr YR reconciled their differences for a period during which they consulted the second of two firms of lawyers who had acted for Ms GY. They signed a consent memorandum to discharge the order preventing removal. Orders were made on 21 February 2014. Ms GY then departed for Australia with PM.

[5] Just over two years later, with plans to visit Canada, and possibly the United Kingdom, Ms GY thought that she may need a New Zealand parenting order for PM. She made an internet search for lawyers practising in [Town]. On 8 April 2016 at 1.10 pm she telephoned [Town] Family Law to make enquiries about that matter.

[6] Ms GY informed the receptionist who answered her call that she wanted to make enquiries about obtaining a parenting order. The receptionist requested her name, PM's name, and then Mr YR's name for the stated purpose of carrying out a conflict check. Ms GY provided these details before an interruption to the phone connection ended the conversation.

[7] The receptionist immediately relayed the details obtained from Ms GY to Ms SO who then telephoned Mr YR and passed on the information to him. Ms SO then telephoned Ms GY and left a message on her voicemail that Mr YR would not consent to PM "moving to Canada" and asked Ms GY to call her back.[2]

[8] Following that phone call Ms GY reviewed her emails concerning the parenting issues in 2013. She realised that Ms SO had acted for Mr YR on that matter.

[9] The issue on this review concerns Ms SO's disclosure to Mr YR of the information imparted to her firm by Ms GY during Ms GY's enquiry.

Complaint

[10] Ms GY lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 8 April 2016. The substance of her complaint was that:

(a) Having established that Ms SO's firm previously acted for Mr YR, the receptionist ought to have ended the phone call and not asked further questions of Ms GY.

(b) It had been two years since Ms SO had been in contact with Mr YR. Without obtaining Ms GY's consent Ms SO had passed on to Mr YR the

[2] Email from GY to Complaints Service (8 April 2016).

information that Ms GY had imparted to the receptionist about her travel plans, and her enquiry about a parenting order.

[11] In support of her complaint she states that:

(a) She had planned to visit Canada for six months or so. She wanted to make enquiries of a lawyer in "[her] hometown [Town]" to ask about "the process of applying for a parenting order?"

(b) To that end she phoned [Town] Family Law. The receptionist requested her name, and PM's name which she gave hesitantly because "[Town] is a very small town". The receptionist then requested Mr YR's name "just to check [Mr YR] isn't a client of ours".

(c) After leaving the phone unattended "for a little bit" the receptionist asked Ms GY to "go ahead". Ms GY proceeded with her question until the phone connection was interrupted.

(d) Approximately fifteen minutes later Ms SO left a message on Ms GY's voicemail.

Ms SO's response

[12] In her response Ms SO refers to the receptionist's record of that conversation, namely, that:[3]

(a) The receptionist informed Ms GY that Ms SO was unavailable and asked if he could take a message.

(b) Ms GY asked to speak to another lawyer who was also unavailable – the receptionist again offered to take a message.

(c) Ms GY asked "for advice about procedures for leaving Australia with her child to live in Canada for a year and then England for a possible further two years".[4]

(d) In response, the receptionist asked for Ms GY's name. Ms GY "carried on talking about the child's father having shown no interest in seeing [the child] for the two years she had been living in Australia".[5]

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[3] Letter SO to Lawyers Complaints Service (3 May 2016).
[4] At 2.
[5] At 2.

(e) The receptionist then requested the child's father's name "in case he is a client of ours?" Ms GY replied "YR is he a client of yours?"[6]

(f) Having searched the firm's client database the receptionist informed Ms GY that the firm had not "represented any YR's".[7]

(g) In response to a second request for her name Ms GY "asked what she could do to apply for a Parenting Order".[8]

(h) Having been informed by the receptionist that "she was best seeing a lawyer in Australia" and that "she would require the child's father's permission to leave Australia" she "mentioned the names YR and PM".[9]

(i) The receptionist then asked if PM' fathers' name was "YR", and stated that if so then the firm "couldn't advise her on any matters".[10]

(j) The phone connection was then interrupted. Ms GY did not identify herself at any time. "Later that afternoon the receptionist provided Ms SO with the phone message details".

[13] Ms SO:

(a) "[S]trongly believe[s] that Ms GY knows very well that [Ms SO] [had] acted for Mr YR" because Ms SO's name "was on the record as [Mr YR's lawyer] for a year"; her name "is on many documents she would have received"; and Ms GY had attended "a round table meeting" at [Town] Family Law's offices.[11]

(b) States that [AA & BB] had acted for Ms GY after Ms SO had ceased acting for Mr YR.

(c) Says that because she had acted for Mr YR "in obtaining an order for non-removal of [PM] from New Zealand", she considered that "it was [her] duty to advise [Mr YR] who had previously retained [her] … of the phone call".[12] After doing so she then telephoned Ms GY after speaking with Mr YR and left a message for her to call back.

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[6] At 2.
[7] At 2.
[8] At 2.
[9] At 2.
[10] At 2.
[11] At 2.
[12] At 3.

[14] In conclusion, Ms SO states that "at no point did [she] believe [Ms GY] to be a potential client". As such she did not consider that she had "breached a duty of confidence to Ms GY".[13]

[15] In reply Ms GY:[14]

(a) Disputes the receptionist's version of the telephone conversation with her. She says that she would not have called Ms SO's firm had she realised that Ms SO had previously acted for Mr YR.

(b) After carrying out an internet search she had telephoned [Town] Family Law, "not [Ms] SO". She "did NOT ask for [Ms] SO". She "asked to speak with a lawyer".

(c) Says that the receptionist "did not ask to take a message, nor did he ask [if he could] help instead".

(d) States that "within the first minute" of the conversation she provided her name, PM's name, and Mr YR's name which she considered "completely irrelevant as it was purely a general enquiry".

(e) Says that after making the call, she searched her 2013 email correspondence and realised from an email copied by her lawyer to Ms SO that Ms SO had acted for Mr YR.

Standards Committee decision

[16] The Standards Committee delivered its decision on 3 August 2016 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[17] The issue identified by the Committee was whether Ms SO "breach[ed] any duty of confidentiality to Ms GY by proceeding to contact [Mr YR] on the parenting order matter without instructions to do so."[15]

[18] In reaching the decision to take no further action on Ms GY's complaint, the Committee:

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[13] At 3.
[14] Email GY to Lawyers Complaints Service (6 May 2016).
[15] Standards Committee decision at [9](a).

(a) Regarded the receptionist's action upon receiving Ms GY's phone call as "carrying out a standard conflict check based on information given to him by Ms GY".[16]

(b) Considered that Ms SO acted appropriately in contacting Mr YR to advise him of Ms GY's intended travel plans.

(c) Stated that Ms SO did not owe a duty to Ms GY "as she was not a client, and, … the contact had not reached the point of a proposed retainer".[17]

(d) Found it "difficult to accept that Ms GY did not know that Ms SO was [Ms GY's] ex-partner's lawyer in light of the background to the matter".[18]

(e) Concluded that "there are very few solicitors in [Town] and … Ms SO and Ms GY had met in previous round table meetings".[19]

Application for review

[19] Ms GY filed an application for review on 31 August 2016. She seeks an apology from both Ms SO, and the receptionist. She also requests that Ms SO be fined.

[20] In support of her application she:

(a) Asks whether a lawyer who has received "information from a random phone call made - general enquiry – who just so happens to be her former client's ex-partner" is permitted to contact a former client.[20]

(b) Again disputes the receptionist's version of the telephone conversation between him and Ms GY.

(c) States that she would not recognise the lawyer who acted for her, Ms SO, or PM's lawyer "in the street … as 99 per cent of contact was made via email".[21]

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[16] At [23].
[17] At [24].
[18] At [24].
[19] At [24].
[20] Application for review, Part 7.
[21] Above n 20.

Ms SO's response

[21] Ms SO was invited to comment on Ms GY's review application. She refers to her submissions made to the Standards Committee and states that she has nothing more to add.

Review on the papers

[22] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[23] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[24] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[22]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[22] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

[25] More recently, the High Court has described a review by this Office in the following way:[23]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[26] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Issue

[27] The issue on this review is whether Ms SO owed a duty to Ms GY to hold in confidence the information Ms GY imparted to Ms SO via her receptionist, and if so, whether she breached that duty when she disclosed that information to Mr YR.

Analysis

Duty of confidence

[28] Lawyers owe a duty of confidence to their clients in respect of "all information concerning [their] client, the retainer, and the client's business and affairs acquired in the course of the professional relationship".[24]

Commencement of the duty of confidence

[29] The duty of confidence "… commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates) …".[25]

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[23] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[24] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 8.
[25] Rule 8.1. See also rule 3.3-1, Commentary [4] The Law Society of Canada, Rules of Professional Conduct.

[30] A "disclosure" by a person to a lawyer in respect of a proposed retainer between them concerns "all information concerning [the person] … and the [person's] business and affairs …" provided to or imparted to the lawyer by the person.[26]

[31] The word "disclosure" is qualified by the words "in relation to a proposed retainer (whether or not a retainer eventuates)".[27]

Was there a retainer?

[32] The term retainer is defined in rule 1.2 as:

> … an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not

[33] For the purposes of the rule, "retainer" is itself qualified by "proposed". In this context "proposed" means "suggested" or "intend[ed]".[28] This is consistent with the meaning of "eventuates", namely, "happen, result, come about".[29]

[34] It follows that whilst at the point of disclosure the person may not yet have retained the lawyer, the intent of the rule is that where "… the information … was imparted in confidence, ... it would not be permissible for the lawyer to reveal the information, or even the nature of the transaction to a third party".[30]

[35] The conclusion reached by the Committee was that Ms SO did not "owe[d] any duty to Ms GY as [Ms GY] was not a client", and the rule did not apply – that is, the duty of confidence had not commenced - because "the contact" between Ms GY and Ms SO "had not reached the point of a proposed retainer".[31] In support of that view, the Committee referred to Ms SO's argument that Ms GY "was [not] a potential client nor did they speak directly in order for Ms GY to make disclosure to her in relation to a proposed retainer".[32]

[36] The first point to make, as discussed above, is that pursuant to rule 8.1 the duty of confidence depends on the timing of a disclosure by the person concerned which may occur before the lawyer is retained by that person. From the information

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[26] Rule 8.
[27] Rule 8.1.
[28] *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2003) at 2371.
[29] At 873.
[30] Duncan Webb, Kathryn Dalziel and Kerry Cook, *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [8.5].
[31] Standards Committee decision at [24].
[32] At [20].

provided to this Office it is clear that at the time Ms GY made her disclosure there was no retainer. This was unlike the situation in a previous decision of this Office where it was found that the person who made the disclosure to a member of a firm had retained another member of the firm to act on the sale of a property. The member of the firm to whom the disclosure was made passed on that information to a third member of the firm who passed it on again to a potential, purchaser.[33]

[37] Secondly, the rule requires a lawyer to whom the information has been disclosed in relation to a proposed retainer to hold that information in confidence "… whether or not a retainer eventuates …".

[38] In practice, interactions between a person who makes enquiries of a lawyer about the possibility of engaging or retaining that lawyer to provide legal services may or may not lead to the formation of a retainer. Upon receipt of such an enquiry, the lawyer concerned must take into account a range of considerations before deciding whether he or she can accept a retainer.

[39] In broad terms, such considerations include whether the subject matter is within the lawyer's area of expertise, the availability of the lawyer, the fees proposed by the lawyer, whether the lawyer has a conflict of interest either personally, or where the lawyer acts for another client whose interests conflict with those of the person making the enquiry and so on.

[40] Depending on the particular circumstances, one or a number of interactions may follow an initial enquiry that may or may not lead to the formation of a retainer. All information imparted by the person to the lawyer, from the person's initial enquiry to the last of the communications between them that either results in the formation of a retainer or the person going elsewhere, falls under the umbrella of the rule. Even "the nature of the transaction" or matter.[34]

[41] The rule does not provide for an assessment of the nature of the enquiry such as that referred to by the Committee, namely, whether there is a certain level of contact between the person and the lawyer that suggests a degree of, or a greater likelihood of the formation of a retainer so as to qualify as a "proposed retainer". In my view that approach could prevent the rule from being "applied as specifically as possible", and "…as sensibly and fairly as possible."[35] It would introduce an artificial and unintended barrier to imparted information being protected by the rule. It could lead to would-be or

[33] *RV v IP and RM* LCRO 212/2014.
[34] Above n 30, at [8.5].
[35] *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].

prospective clients being unable to make full and frank disclosure of all matters relating to the subject which led them to make the enquiry.

Information imparted by Ms GY

[42] It is clear from both Ms GY's and the receptionist's versions of the telephone conversation that, with travel plans in mind, Ms GY called Ms SO's office to make enquiries about the procedure to obtain a parenting order for PM in New Zealand.

[43] During that conversation, having described the nature of the enquiry to the receptionist, Ms GY, at the receptionist's request, then provided (at a minimum) PM's and Mr YR's names. Once the receptionist had established that PM's father was Mr YR, for whom Ms SO had previously acted, he informed Ms GY that if that was the case, then Ms SO could not act for Ms GY.

[44] In support of her contention that she does not believe Ms GY "to be a potential client", Ms SO states that "she did not speak directly with [Ms GY]". However the rule draws no distinction between circumstances first, where, as in Ms GY's case, information is provided to a lawyer (via a staff member) during a telephone enquiry about legal assistance sought by that person, or secondly, where the person meets with a lawyer and imparts the information to the lawyer during the meeting.[36]

Exceptions to the duty of confidence

[45] There are exceptions to the duty of confidence. Those exceptions which are "required" (rule 8.2), and those which are "permitted" (rule 8.4). Ms SO has not sought to rely on any of these exceptions, and on the information provided to this Office no evidence has been produced to suggest that any apply. It is clear that Ms GY did not authorise the disclosure expressly or impliedly (rule 8.4(a)).

Duty owed to Mr YR?

[46] Ms SO acknowledges that she had previously acted for Mr YR. She submits that "it was [her] duty to advise [Mr YR] who had previously retained [her] … of the phone call …".[37]

[47] That Ms SO did not owe a duty of disclosure to Mr YR is explained by the difference between the duty of disclosure contained in rule 7, and the equivalent common law rule.

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[36] Above n 30, at [8.5] – or by letter, email and so on.
[37] Above n 3.

[48] Rule 7 requires that:

> A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

[49] On the other hand, the common law rule "is wider and requires disclosure of information material to the client".[38]

[50] It follows that under rule 7 "if the information does not relate to the retainer … no disclosure is required". On the other hand, "[u]nder the common law, disclosure would be required, save for a lawyer's obligation not to attempt to obstruct, prevent, pervert or defeat the course of justice".[39]

[51] At the time Ms GY telephoned Ms SO's firm there was no lawyer-client relationship between Ms SO and Mr YR. Ms SO had not acted for Mr YR for more than two years. She was not acting on a current matter for him. As such, Ms SO was not required by rule 7 to disclose to Mr YR the information imparted by Ms GY to Ms SO via her receptionist.[40]

Conclusion

[52] In summary, Ms GY made an enquiry of Ms SO's firm, [Town] Family Law, about the process for obtaining a parenting order in respect of Ms GY's and Mr YR's son, PM. On the evidence produced both to the Committee and to this Office, it is more probable than not that she made that enquiry unwittingly, not realising until after the call had ended that Ms SO had acted against her when representing Mr YR some two years earlier.

[53] During the telephone conversation with Ms SO's receptionist, she informed him of the nature of the enquiry, namely her travel plans with PM, hence her question about a parenting order. Disclosure of PM's and Mr YR's names was sufficient to enable the receptionist to identify her, and having checked the firm's client database, inform her that by having acted for Mr YR that Ms SO was conflicted.

[54] The receptionist immediately passed on this information to Ms SO who straightaway called Mr YR and obtained his instructions. She then called Ms GY leaving a message on her voicemail that Mr YR would not consent to PM "moving to

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[38] Above n 30 at [10.4.3].
[39] At [10.4.3].
[40] Ms SO still owed Mr YR, as a former client, "[a] duty of confidence [which] continues indefinitely after the person concerned has ceased to be the lawyer's client": rule 8.1.

Canada". Ms SO does not, as does Ms GY, provide details of her message, but she does not deny Ms GY's version of that message.

[55] To a large extent these events which led to Ms GY's complaint are unfortunate. In my view they stem from Ms SO, upon receiving the information from her receptionist, not then taking a moment to reflect on the action that was required before acting as she did. This includes a consideration of her professional obligations.

[56] Ms GY had made an enquiry about a legal process. The result was that this immediately became elevated to a situation where Ms SO, with only the information relayed to her, without obtaining clarification or further details from Ms GY, and without her consent, disclosed that information to Mr YR, a former client for whom she was not currently acting.

[57] In doing so she obtained his instructions that he did not consent to PM "moving to Canada" - not visiting Canada as Ms GY states was her intention - and without speaking to Ms GY left that message on her voicemail.

[58] I am satisfied that in the context of the telephone enquiry made by Ms GY of Ms SO's firm that rule 8.1 applied. As such Ms SO owed Ms GY a duty of confidence in respect of the information imparted by Ms GY to Ms SO via her receptionist. By disclosing that information to Mr YR, Ms SO contravened rule 8 which constitutes unsatisfactory conduct under s12(c) of the Act.

Decision

[59] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed.

Orders

[60] In giving consideration as to whether it is appropriate to order a penalty, I refer to the guidance provided by the High Court which has stated that the "predominant purposes [of orders] are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties and to provide scope for rehabilitation in appropriate cases …".[41]

[41] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [22]. See also s 3 of the Act - the consumer protection purposes.

[61] I have concluded that in these particular circumstances a finding of a contravention of the rules which constitutes unsatisfactory conduct is sufficient in itself without additional penalty. My reasons for reaching this conclusion are:

(a) The unfortunate context which led Ms GY to make her complaint.

(b) The mistaken belief held by Ms SO that although she had not acted for Mr YR for some two years she still owed Mr YR a duty of disclosure to pass on to him the information provided by Ms GY.

(c) No broader issues of consumer protection or public welfare have been raised by this review other than the public interest in lawyers maintaining professional standards and ensuring compliance with the rules.

Costs

[62] Where an adverse finding is made costs will be awarded in accordance with the Legal Complaints Review Officer (LCRO) Costs Orders Guidelines. It follows that Ms SO is ordered to pay costs in the sum of $900.00 to the New Zealand Law Society by 16 October 2017 pursuant to s 210(1) of the Act.

DATED this 15th day of September 2017

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B A Galloway
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:

Ms GY as the Applicant
Ms SO as the Respondent
[Area} Committee No. [X]
The New Zealand Law Society