LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 100

Ref: LCRO 002/2018

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 X
BETWEEN	**MC** Applicant
AND	**TL** Respondent

DECISION

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

Introduction

[1] Mr MC has applied for a review of a decision by the [Area] Standards Committee X (the Committee) to take no further action in respect of his complaint concerning the conduct of Mr TL, at the relevant time a lawyer in sole practice as a barrister and solicitor, who acted for Mr MC on an application to set aside a paternity order.

[2] In August 2000, Mr MC had a brief relationship with Ms PW who had a child, [the child], on 24 May 2001. Mr MC had moved to [Country A] to live in March 2001.

[3] On 4 September 2003, Ms PW applied for paternity and custody orders against Mr MC in the Family Court. Substituted service of those proceedings on Mr MC's brother, who lived in [City], was effected on 13 February 2004.[1]

[4] Paternity and custody orders were granted by the Family Court on 27 September 2004.

[5] Twelve years later, in May 2016, Mr MC was approached by [Country A] Child Support, acting on behalf of New Zealand Inland Revenue Department (IRD), demanding payment of "overdue child support of $27,192.78" for [the child].[2]

[6] Mr MC identified what he described as "two inconsistencies" in Ms PW's 2003/2004 proceedings, namely a New Zealand address for him, and Ms PW's belief that he lived in [Country B], not [Country A]. He says his preference was not to submit to a parentage test, but rather challenge Ms PW's evidence on which the paternity order was granted.

[7] As described in my later analysis, from 1 June 2016 Mr TL acted for Mr MC to have the paternity order set aside. He drafted Mr MC's affidavits, provided advice, and assisted drafting Mr MC's mother's and brother's supporting affidavits.

[8] Mr MC also asked Mr TL to inform the police if Mr TL considered Ms PW, by knowingly using a false address for [Mr MC] in her 2004 proceedings, had committed an offence. Eleven months later in May 2017 he asked Mr TL about making a cross-claim against Ms PW for his legal costs incurred in his application to set aside the paternity order.

Complaint

[9] Mr MC lodged a complaint with the Lawyers Complaints Service on 9 June 2017.

(1) Terms of engagement – rules 3.4, 3.5

[10] He claimed despite requesting Mr TL on three occasions to sign the terms of engagement, Mr TL told him [Mr TL's] signature was "not a requirement" of the terms of engagement.

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[1] Family Court order (25 November 2003).
[2] [Country A] Child Support, letter to Mr MC (17 May 2016).

(2) Act competently – rule 3

[11] He claimed he told Mr TL that Ms PW, by "us[ing] a false address" for him in the 2003/2004 proceedings, may have committed an offence, and if so to report that "to the appropriate authorities". He said Mr TL did not respond.[3]

[12] He said the Judge would "want to know" when he knew about Ms PW's 2003/2004 paternity and custody proceedings. He said he became aware of those proceedings when approached by [Country A] Child Support in May 2016. He said that "should have been enough" to have the matter reheard.

[13] He said he instructed Mr TL to apply to "oppose the paternity order only" because he wanted to "[question] the basis on which [the] order ha[d] been obtained". He said if he submitted to the paternity test that would mean "accept[ance]" by him of Ms PW's "version of events" as stated in her affidavit.[4]

[14] He said Mr TL offered to refund half of the retainer, and refer him to another lawyer "with more experience" in such matters if [Mr MC] was "n[o]t happy" with "the way" the matter "was being handled".[5]

(3) Act in a timely manner – rule 3

[15] Although Mr MC acknowledged he "may have taken a bit of time to get [his] affidavit" to Mr TL, he claimed Mr TL had "prolong[ed] the matter unnecessarily".

[16] He said at Mr TL's request he had sent his and his mother's affidavits to Mr TL by "International Express post". He said having "traced" delivery of the package he found it had been "sitting" in "Mr TL's postbox/Mailbox" for "a while" and had asked Mr TL to collect it.

(4) Accept instructions – rules 4, 4.1

[17] Mr MC claimed Mr TL, in response to his later 11 May 2017 request to make a "cross claim" against Ms PW for his legal costs, stated [Mr TL] did not have the "legal capacity/experience" to accept those instructions.[6]

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[3] Mr MC, email to Lawyers Complaints Service (5 July 2017).
[4] Mr MC, email to Lawyers Complaints Service (5 July 2017). Mr MC listed a number of questions including why Ms PW took so long before applying for the paternity/custody orders; the whereabouts of medical evidence in support of the date of conception; why Ms PW tried to convert him to Islam.
[5] Mr TL, email to Mr MC (20 February 2017).
[6] Mr MC asked the Lawyers Complaints Service for "information in relation to cross claims" on such matters in New Zealand.

[18] In his view, if Mr TL could not act for him on those later instructions then [Mr TL] ought not have accepted his initial instructions, and the $3,000 retainer.

Response

[5] In his response which I refer to in my later analysis, Mr TL stated that he was awaiting Mr MC's further instructions, and had offered "to return [Mr MC's] money less [Mr TL's] reasonable fee to date" as Mr MC "wishe[d]".[7]

Standards Committee decision

[6] The Committee delivered its decision on 14 December 2017 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that any further action on the complaint was unnecessary or inappropriate.

(1) Letter of engagement – rules 3.4, 3.5

[7] In the Committee's view, because Mr TL's terms of engagement did not require Mr TL to sign them, Mr TL had not breached any of his professional obligations or duties.

[8] The Committee did, however, make the observation that to avoid "a later dispute" it is "often recommended" the lawyer's letter of engagement be signed by the client.

(2) Act competently – rule 3

[9] The Committee concluded Mr TL had provided competent advice to Mr MC concerning (a) the evidence Mr MC would need to produce "to contest the paternity order", and (b) "the potential disadvantages of Mr MC's refusal to undertake a DNA test".

[10] The Committee did not accept that Mr TL's comment, in his 20 February 2017 advice, that it was open to Mr MC to "find someone far more experienced" to act, was "a reflection by Mr TL of his own competence". In the Committee's view, Mr TL had given the "impression Mr MC no longer had trust and/or confidence in him" at that time.

[11] The Committee observed that any concerns Mr MC had arising from Ms PW having used an incorrect address for Mr MC in her 2004 proceedings was "not necessarily a criminal offence", and "was for inclusion" in Mr MC's application to have the paternity order set aside.

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[7] Mr TL, letter to Lawyers Complaints Service (5 July 2017).

(2) Act in a timely manner – rule 3

[12] Overall, the Committee decided that whilst Mr TL "could have done more" to "manage Mr MC's expectations", and to keep Mr MC "informed of any progress and/or delay", Mr TL's conduct did not reach the threshold for an adverse disciplinary finding.

[13] Having noted that "delay in proceedings is unfortunate", the Committee observed that Mr MC's proceedings "contained a number of difficult and/or unusual issues" which made it "difficult for Mr MC to succeed" in his application to set aside, and "took Mr TL additional time to consider".

[14] The Committee took particular note of (a) Mr MC's refusal to take a parentage test, described by the Committee as "the simplest method of contesting paternity", which had "complicated" progress with the proceedings, (b) Mr MC's brother having told Mr TL that he "knew about" [the child], and had given Ms PW's 2003/2004 documents to Mr MC's mother, and (c) the need for Mr TL to "familiarise himself" with the 2003/2004 proceedings which accounted "in part" for the time taken by Mr TL to draft Mr MC's affidavit.

[15] The Committee also took into account that Mr MC had "presented as a particularly knowledgeable client" and had "regularly provided Mr TL with new information". For that reason, it "would not have been sensible" for Mr TL to issue the proceedings while Mr MC was still providing "information and/or instructions" to Mr TL.[8]

[16] Concerning Mr MC's affidavit which he posted to Mr TL on 11 May 2017, the Committee's view was that the time taken by Mr TL to collect Mr MC's affidavit from his postbox, "at most 10 working days", was "unfortunate", but not a breach of "Mr TL's professional responsibilities".

(3) Respond to inquiries in a timely manner – rule 3.2

[17] The Committee observed that Mr TL either did not appear to have responded to some of Mr MC's correspondence, or had not responded in as timely a manner as "perhaps [he] could have".

[8] A reference to Mr MC's email, 5 December 2016 instructing Mr TL to include in Mr MC's affidavit that Mr MC "was not aware" of the September 2004 paternity and custody orders until approached by [Country A] Child Support in 2016, at the request of the IRD, to make outstanding child support payments to WINZ.

[18] In the Committee's view, this was “unfortunate, and certainly not best practice” with Mr MC “on occasion having to chase” Mr TL for a response to his enquiries.

[19] However, the Committee decided that any “failings” by Mr TL in responding to Mr MC’s inquiries “were minor” and “not of sufficient gravity” as to contravene r 3.2 of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008 (the Rules).

[20] In reaching that position, the Committee (a) acknowledged that due to other client work a lawyer’s response “may not always be as timely as a client would like”, (b) observed Mr TL’s communications included his “telephone attendances … amid the email correspondence”, and (c) considered that “longer delays” had resulted from Mr TL “preparing documents” and “responding to further instructions and/or inquiries” by Mr MC.

(4) Accept instructions – rules 4, 4.1

[21] The Committee observed that Mr MC’s instructions to make a “cross claim” for his costs were not part of Mr MC’s “initial instructions”, and not provided until “approximately 11 months” thereafter.

[22] In the Committee’s view, Mr TL’s response that “he did not have capacity” to do that work at that time constituted good cause to refuse to accept those instructions for the purposes of rr 4 and 4.1 the Rules.

Application for review

[23] In his application for review filed on 3 January 2018 Mr MC claims “prejudice” and “bias” by the Committee. He seeks alternative outcomes. First, Mr TL (a) being ordered to sign his terms of engagement, (b) promptly refer his concerns to the police, (c) advise him of “all legal options available”, and (d) file both his proceedings to set aside, and a “cross-claim” to recover his legal costs.

[24] Alternatively, Mr TL (a) being ordered to refund the retainer, (b) pay Mr MC’s legal costs, and any “[a]dverse costs” for failing “to manage” his instructions, (c) be struck off the roll, (d) be investigated by the police “for possibly considering criminal activity within a judicial process”, and (e) pay for any future damages incurred by him as a result of Mr TL’s “possible negligence”.

[25] He says he suspects the Committee of “possibly [being] involved in a process of concealment of criminal act/s within the judicial process” in respect of his proceedings to set aside the paternity order.

[26] In his view, the Committee did not take into account his mother's affidavit evidence that although she received Ms PW's 2003/2004 proceedings from Mr MC's brother, she had not read them. He says he understood the Committee would have included a consideration of Ms PW's evidence when "look[ing] at all aspects of [his] legal matter".

[27] He says it was "speculative and unsubstantiated" of Mr TL to say "Mr MC's brother told" him that Mr MC's brother "knew about" [the child], and had given Ms PW's 2003/2004 proceedings to Mr MC's mother". He says had he known about the paternity order earlier he would have instructed a lawyer earlier.

(1) Act competently – rule 3

[28] Mr MC says Mr TL ought to have noticed Ms PW "appeared to have utilised a false address" in her 2003/2004 proceedings, and wrongly stated he lived in [Country B] at that time. He claims this evidenced her intention "to abuse the procedure of the court", and "pervert…the course of justice".

[29] He says his instructions to Mr TL (a) to apply to set aside the paternity order were "a reasonable request", and (b) may have included asking Mr TL, as an officer of the court, "to report possible issues of criminality" in respect of the 2003/2004 proceedings which Mr TL "should've followed".

[30] He says there may be "other act/s of criminality" by Ms PW in the 2003/2004 proceedings, now "subject to external police investigation" by him, which Mr TL ought to have reported to the police.[9]

[31] He says the Committee had not taken his mother's affidavit evidence into account.[10] He says Mr TL's attempt to "utilise [Mr MC's brother] as an excuse to conceal and deflect attention from his own mistakes" led to [Mr MC] requesting a police investigation.

(4) Act in a timely manner – rule 3

[32] Mr MC claims "Mr TL's reluctance" (a) to file the application was "highly prejudicial", and (b) it was "unethical, [and] illegal" of Mr TL not to "report possible issues of criminality".

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[9] Mr MC refers to a number of statutory provisions including those concerning vexatious proceedings, a false statement in an application for a paternity order, perjury, and false statements.

[10] Mr MC's mother stated that although Mr MC's brother "presented" her with Ms PW's 2003/2004 proceedings "on 2 separate occasions", she did not read them, or pass them on to Mr MC.

[33] He says having received his, and his mother's affidavits from the post office, Mr TL ought to have carried out [Mr MC's] instructions and filed the application to set aside only.

(3) Accept instructions – rules 4, 4.1

[34] Mr MC claims Mr TL ought to have initially advised him he could seek "to recover" the legal costs of his application to set aside the paternity order.

[35] He says assuming Mr TL knew about "the reasons [for] incurring further unpaid child support costs", then [Mr TL] would similarly know about claiming the "legal costs" of that application. He says he suspects Mr TL knew that, but instead of advising him that, intended to recover the legal costs for [Mr TL's] own benefit.

Response

[36] In his response filed in this office on 1 February 2018, Mr TL says he "rel[ies] on all matters [he] put before the … Committee".[11]

[37] In doing so, he submits the Committee, having reviewed the evidence, and observed the rules of natural justice reached a valid conclusion which took into account "all relevant considerations" without "error of fact or law".

[38] In his submission the Committee's conclusions were "justified and appropriate", and the issues raised by Mr MC in his application for review were fully dealt with as recorded in the Committee's decision.

Review on the papers

[39] Although the parties agreed to the review being determined on the papers, I informed them that I wished to hear from them in person, directed Mr TL to provide submissions, and invited Mr MC to respond to Mr TL's submissions with any comments.[12]

[40] The parties attended a review hearing (by teleconference) on 4 June 2020 at 10.00am.

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[11] Mr TL, letter to Legal Complaints Review Office (26 January 2018).
[12] Mr TL, email to Legal Complaints Review Office (25 March 2020); Mr MC, email to Legal Complaints Review Office (28 March 2020).

Nature and scope of review

[41] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[13]

> … 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.

[42] More recently, the High Court has described a review by this Office in the following way:[14]

> 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.

[43] 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 consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Issues

[44] The issues I have identified for consideration on this review are:

(a) Was Mr TL required to sign his letter of engagement to Mr MC? (rr 3.4, 3.5)

(b) Did Mr TL act competently for Mr MC? (r 3)

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[13] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[14] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(c) Did Mr TL act for Mr MC in a timely manner, respond to Mr MC's enquiries in a timely manner, and promptly answer Mr MC's request for information, and enquiries? (rr 3, 3.2, 7.2)

(d) Did Mr TL refuse Mr MC's instructions to make a cross claim against Ms PW for Mr MC's costs of the application to set aside the paternity order, and if so, did Mr TL have good cause to do so? (rr 4, 4.1)

[45] To the extent Mr MC raises new issues not mentioned in his complaint, he claims Mr TL, in Mr TL's 8 August 2019 invoice, charged him "for a service not provided". Because this invoice post-dated Mr MC's complaint and therefore was not considered by the Committee, I do not have jurisdiction to consider that issue.[15]

Analysis

(1) Letter of engagement – rules 3.4, 3.5

(a) Parties' positions

[46] Mr MC claims Mr TL did not sign his terms of engagement despite being asked to do so on 11 January 2017, and 8 June 2017.[16]

[47] Mr TL acknowledges he did not sign his letter of engagement but says he explained to Mr MC, in his 20 February 2017 advice email, his terms of engagement did not require him to do so.

(b) Discussion

[48] Before a lawyer, like Mr TL, who practices as a barrister and solicitor, commences work for a client, r 3.4 requires that the lawyer "must, in advance, provide in writing to [the] client information on the principal aspects of client service including" the information specified in paragraphs (a) to (d). That includes "the basis on which fees will be charged", the lawyer's "professional indemnity arrangements", and the lawyer's "procedures for the handling of complaints by clients".[17]

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[15] See *IQ v SG* LCRO 56/2011 (March 2012) at [26]. I note that on or about 5 August 2019, Mr MC instructed another lawyer to act for him on the matter.
[16] Mr MC says he also attempted, unsuccessfully, to contact Mr TL by telephone on 5 June 2017.
[17] Rule 3.4 applies to lawyers other than a barrister sole: see Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Amendment Rules 2015, commencing 1 July 2015; footnote 1 of rule 3.4 refers to the words "in advance" contained in section 94(j) of the Act, and recommends that lawyers "provide the information set out in rule 3.4 prior to commencing work under a retainer".

[49] A further requirement in r 3.5 is that a lawyer "must, prior to undertaking significant work under a retainer provide in writing to the client …" information including "a copy of the client care and service information set out in the preface to [the] rules", and "the name and status of the person or persons who will have the general carriage of, or overall responsibility for, the work".[18]

[50] In practice, to ensure compliance with both rules, the required information is "provided [to clients] together" before the lawyer commences work on a retainer.[19] The mode of provision of this information is frequently by a letter of engagement, information for clients and standard terms of engagement documents referred to collectively as "the letter of engagement" sent to clients electronically.[20]

[51] There is no requirement in these rules for signature of the letter of engagement by either the client or the lawyer. This is reflected in the template letter of engagement made available to assist lawyers on the Law Society's website.[21]

[52] In my view, no issues of a professional nature arise for Mr TL on this aspect of Mr MC's complaint.

(2) Act competently – rules 3

(a) Parties' positions

[53] Mr MC claims he told Mr TL that Ms PW, by "us[ing] a false address" for him and stating he lived in [Country B] in her 2003/2004 proceedings, may have committed an offence.[22] He says Mr TL did not respond to his request to report that "to the appropriate authorities". He said it was "unethical, [and] illegal" of Mr TL not to make that report.

[54] Mr TL says he advised Mr MC that taking a paternity test was "the only way" [Mr TL] could "defend the matter successfully", but if Mr MC wished to proceed in that way he would refer [Mr MC] to senior counsel experienced in such matters.

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[18] Duncan Webb "Engagement Letters" (December 2008): before "significant work" is undertaken; it appears to be "…sufficient if the lawyer provides the relevant information as soon as possible"; *AJ v BJ* LCRO 258/2011 (December 2011).

[19] Duncan Webb "Engagement Letters" (December 2008).

[20] New Zealand Law Society "For lawyers: Regulatory requirements: Client care" <https://www.lawsociety.org.nz/for-lawyers/regulatory-requirements/client-care>; rr 1.6, 1.7 of the Rules.

[21] New Zealand Law Society "For lawyers: Regulatory requirements: Client care" <https://www.lawsociety.org.nz/for-lawyers/regulatory-requirements/client-care>.

[22] Ms PW's proceedings recorded an address for Mr MC in [City] she stated in her affidavit in support of her application for substituted service on Mr MC's brother that she "believe[d] [Mr MC] is living in [Country B]".

(b) Discussion

[55] As identified by the Committee, the main aspect of Mr MC's complaint is that Mr TL did not act for him competently on the matter.

[56] The purposes of the Act include maintaining public confidence in the provision of legal services, and protecting the consumers of legal services.[23] To that end r 3, which imposes several duties and applies when a lawyer is providing "regulated services" to a client,[24] states that:[25]

> In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[57] The duty to be competent has been described as 'the most fundamental of a lawyer's duties' in the absence of which 'a lawyer's work might be more hindrance than help".[26] Relatedly, the definition of "unsatisfactory conduct" includes:[27]

> conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[58] Mr MC says he did not accept Mr TL's advice to submit to a parentage test. In his view, Ms PW had "lied". He explains that is why he regarded taking the parentage test as an "accept[ance]" of Ms PW's "version of events as stated in her affidavit". He says he wanted the "opportunity to set the record straight by having the matter reheard".

[59] He claims Ms PW intended "to abuse the procedure of the court", and "pervert…the course of justice". He says there may be "other act/s of criminality" by Ms PW in her 2003/2004 proceedings, now "subject to external police investigation" initiated by him, which Mr TL ought to have reported to the police.[28]

[60] He says Mr TL's statement that [Mr MC's] brother had "told [Mr TL] personally" that [Mr MC's] brother "knew about the child" and "gave" Ms PW's 2003/2004 proceedings to Mr MC's mother was intended "to conceal and deflect attention from

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[23] Section 3(1) of the Act.
[24] Section 6 of the Act, definition of "regulated services", includes "legal services" and "conveyancing services", which are themselves defined.
[25] Rule 1.2 of the Rules: "retainer": "an agreement under which a lawyer undertakes to provide or does provide legal services to a client" is described as the recipient of legal services from a lawyer. The term "client", although not defined, is included in the definition of the term "retainer" in r 1.2.
[26] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [11.1].
[27] Section 12(a) of the Act. See also Duncan Webb "Unsatisfactory Conduct" (2008) 717 Lawtalk 18.
[28] Mr MC, email to Mr TL (6 February 2017): Mr MC refers to a number of statutory provisions including those concerning vexatious proceedings, a false statement in an application for a paternity order, perjury, and false statements.

[Mr TL's] own mistakes" in acting for Mr MC. He says this led to him requesting a police investigation.

[61] For his part, Mr TL explains that it was "difficult for Mr MC to proceed to have the [2004] [order] set aside" faced with (a) Mr MC not wanting to take a parentage test, and (b) the fact that Mr MC's brother, who had been served with the 2003/2004 proceedings, "knew about" [the child], and had given those proceedings to Mr MC's mother.

[62] Mr TL says he advised Mr MC that [Mr MC's] approach was "simply absurd, without merit and will be thrown out by the courts".[29] At the hearing, he said when advising Mr MC of the difficulties faced to overturn the paternity order, he told Mr MC the only way to proceed was to apply to set the order aside supported by a paternity test.

[63] Mr TL said he understood Mr MC was aggrieved Ms PW did not serve him with her paternity and custody proceedings in late 2003/early 2004. However, he said when a defence is not filed the Court has little option but to grant the order applied for.

[64] He says he prepared and sent a draft affidavit to Mr MC in "general" terms with the intention of putting the matter before the Court, and then seeking discovery. He says Mr MC made changes to the draft for which he is not responsible.

[65] He says his view was at the time, and remains, that the police would not investigate Mr MC's perjury allegations until the paternity order had been set aside. For that reason, he says he told Mr MC that if [Mr MC] was "not happy with his representation" he would "pass [Mr MC] to a more experienced counsel in such affairs", and would invoice Mr MC $1,500 for his legal work to date, and refund the balance.[30]

[66] Paternity matters fall within the jurisdiction of the Family Court, not a Standards Committee, or this Office on review.[31] For that reason, it is neither open nor appropriate for me to offer any view as to how the Family Court might have viewed, or view Mr MC's approach of challenging Ms PW's 2003/2004 evidence without submitting to a parentage test.

[67] However, I make the observation that where an individual refuses to undergo a parentage test, the Family Court "may draw such inferences (if any) from the fact of refusal as appear to be proper in the circumstances".[32]

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[29] Mr TL, email to Mr MC (20 February 2017).
[30] Mr TL, email to Mr MC (20 February 2017).
[31] Sections 54 to 59 of the Family Proceedings Act 1980.
[32] Section 57(2) of the Family Proceedings Act 1980.

[68] In this regard, when sending the draft affidavit to Mr MC on 23 December 2016, Mr TL expressed his doubt whether the Court would "just set [the paternity order] aside". He said the paternity order had "been in place for well over a decade". He advised Mr MC that supporting statements from his mother and his brother would "help [Mr MC's] case". He said he was "confident" from his research the Family Court "cannot compel [Mr MC] to give a DNA sample", but by refusing the Court "may infer and find against [Mr MC] if no compelling evidence is produced that [Mr MC] is not the father".[33]

[69] As noted, two months later, on 20 February 2017, Mr TL advised Mr MC that challenging Ms PW's affidavit evidence was "not enough". He advised Mr MC "to say explicitly" why [Mr MC] "[thought] [Mr MC] ha[d] a defence to the order". He advised that the Court would "want to know the likelihood of success" before granting a rehearing. He advised a refusal to submit to a parentage test would "most likely go against" [Mr MC].[34]

[70] In the practice of law, competence "entails an ability to complete the work required by finding the relevant law and applying the relevant skills" in the lawyer's area of practice. Competence "does not necessarily require an exhaustive knowledge of the law or procedure in any particular area". Whether the lawyer concerned meets this standard is to be determined objectively.[35]

[71] However, this does not impose a duty "to provide a high level of service to clients", and "is, in reality, a duty not to be incompetent … aimed at ensuring minimum standards of service". The duty is concerned with "the outcome of lawyer's work rather than the way in which they deal with clients".[36]

[72] Mr TL spelt out to Mr MC the evidentiary obstacles [Mr MC] would have to overcome if he did not submit to a parentage test. He explained to Mr MC that in his opinion [Mr MC's] approach, of having the police investigate the truth or otherwise of Ms PW's statements in her September 2003 affidavit before Mr MC made his application to set aside the 2004 paternity order, would not work.

[73] At the hearing Mr TL said his advice to Mr MC was supported by a recent decision of the High Court, *Shaw v Banks* [2017] NZHC 2125. He referred to his offer in his 20 February 2017 email to refer Mr MC to another lawyer if Mr MC wanted to pursue [Mr MC's] approach. I observe that in response (by email) the following day, Mr MC said

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[33] Mr TL, email to Mr MC (23 December 2016).
[34] Mr TL, email to Mr MC, (20 February 2017).
[35] Webb, Dalziel and Cook, above n 26 at [11.3].
[36] At [11.3].

he was "more than happy" for Mr TL "to represent him in these proceedings" having been "highly recommended by his mother".

[74] From my analysis of the information produced concerning this aspect of Mr MC's complaint, I do not consider that Mr MC has shown to any degree that Mr TL did not act competently for him. I do not consider that any issues of a professional nature arise for Mr TL from the advice he provided to, and the way he acted for Mr MC.

(3) Timeliness – rules 3, 3.2, 7.2 – issues (c), (d)

(a) Parties' positions

[75] Despite acknowledging he "may have taken a bit of time" to return his affidavit to Mr TL, Mr MC claims Mr TL "prolong[ed] the matter unnecessarily". He says Mr TL's "reluctance" to file his application to set the paternity order aside was "highly prejudicial" to him.

[76] He says, as requested by Mr TL, he sent his mother's, and his brother's affidavits to Mr TL by "International Express Post" but Mr TL did not collect them promptly from his postbox.

[77] Mr TL says he prepared and sent a draft affidavit to Mr MC in December 2016 but Mr MC did not return his signed affidavit until "May/June" 2017 which [Mr TL] "received from the Postal agency". He says at the time he was notified of Mr MC's complaint he was in a position to file Mr MC's application.

(b) Professional rules

[78] A lawyer must act in the client's best interest.[37] To that end, the Rules "place some emphasis on timely action as part of expected client service".[38]

[79] Rule 3, referred to above, also requires that lawyers "must" provide regulated services to clients "in a timely manner".[39] Rule 3.2 requires lawyers to "respond to inquiries from the client in a timely manner". Rule 7.2 similarly provides that lawyers "must promptly answer requests for information or other inquiries from the client".

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[37] Section 4(d) of the Act; rule 6 of the Rules.
[38] *KD v WW* LCRO 83/2011 (30 March 2012) at [84] referring also to r 7: "A lawyer must promptly disclose to a client all information".
[39] *KD v WW* LCRO 83/2011 (30 March 2012) at [84]. Rule 3.2: "A lawyer must respond to inquiries from the client in a timely manner"; r 7: "A lawyer must promptly disclose to a client all information"; r 7.2: "A lawyer must promptly answer requests for information or other inquiries from the client".

[80] This Office has considered a number of complaints by clients about their respective lawyers not having been timely in their work, and in responding to requests for advice or updates.

[81] Those decisions in which contraventions of the Rules were found, include a lawyer who had made little substantive progress with the client's matter over a lengthy period, and had not promptly answered requests for information or other enquiries from the client.[40] Other decisions include circumstances where the clients experienced difficulty in reaching their lawyer. On one such matter, this led the clients to "[form] the view" they were ''at the bottom of the pile'';[41] and on another matter a client's repeated requests to the client's lawyer for a response went unanswered.[42]

[82] Such circumstances can be contrasted with decisions in which no contravention was held, such as where a lawyer was "progressing things with an acceptable degree of diligence in the circumstances". It was observed that the lawyer's "conduct … was perhaps not exemplary… in all of the circumstances" but the delays were not "of a nature to fall foul of the professional duty of [the lawyer] to act competently and diligently".[43]

(b) Discussion

[83] In essence, Mr MC claims Mr TL (a) "prolong[ed]" the matter, and (b) did not respond to Mr MC's 11 May request for advice about a "cross-claim" for costs, and did not uplift the affidavits from his postbox soon after delivery from Mr MC.

[84] Mr TL's legal work for Mr MC can be conveniently divided into two time periods. First, from 22 June 2016, the date Mr MC paid the retainer required by Mr TL, to 23 December 2016 when Mr TL sent a draft affidavit and advice to Mr MC.

[85] Secondly, from 11 January 2017 when Mr MC provided feedback on the draft affidavit, until 6 June 2017 when by laying his complaint with the Law Society, Mr MC effectively withdrew his instructions to Mr TL, or put the matter on hold.

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[40] *RI v Hart* LCRO 158/2011 (13 July 2012).
[41] *KD v WW* LCRO 83/2011 (30 March 2012) at [85].
[42] *JV v QG* LCRO 65/2011 (13 September 2012) at [36] and [37]: the client had written five letters (or six as two were dated the same day) to the lawyer who replied to one and thereafter merely handed that correspondence to an employed lawyer to address.
[43] *Buckingham v Wycombe* LCRO 93/2009 (31 July 2009) at [10].

(i) Period 22 June to 23 December 2016

[86] During this period Mr MC provided his instructions to Mr TL, in particular, his statements he wanted included in his affidavit to accompany his application to set aside the 2004 paternity order.

Timeline

[87] Mr TL effectively commenced work for Mr MC following payment of the retainer by Mr MC on or about 22 June 2016.

[88] Mr MC confirmed his instructions on 25 June, adding that Mr TL "may also possibly need to organise a stay order while [Mr TL] defend[s] [him] in these proceedings".

[89] Having received details of Ms PW's 2003/2004 proceedings from Mr TL on 10 August 2016, Mr MC provided his comments on 12 August which formed the basis of his draft affidavit.

[90] Mr TL's office commenced enquiries of the IRD and the Family Court on 11 July, and forwarded copies of Ms PW's 2003/2004 proceedings to Mr MC on 10 August.

[91] Mr MC responded with further instructions two days later. He told Mr TL, among other things, that Ms PW had incorrectly recorded both his name, and his country of residence. He said he denied he was the father of Ms PW's child, said he had been living in [Country A] since March 2001, and asked why it took Ms PW so long to apply for a paternity order.

[92] Two weeks later, on 26 August, he asked Mr TL about progress with preparation of his affidavit, and whether his brother "had been in touch with [Mr TL]". On 29 August he asked Mr TL not to mention [Mr MC's] brother in the affidavit, noted his brother could be required to give evidence, and asked for advice on how best to approach the matter.

[93] On 21 October, Mr MC sent a follow-up email to Mr TL, and on 5 December asked Mr TL to include a statement in the affidavit that he had been unaware of the paternity order until approached by [Country A] Child Support in May 2016.

[94] In his 22 December email, he expressed his "reluctan[ce]" to submit to a parentage test. He said he doubted Ms PW had been truthful, and asked for Mr TL's comment on his view that Ms PW's evidence was "circumstantial".

[95] Mr TL sent a draft affidavit to Mr MC the following day, 23 December, accompanied by the advice referred to above.

Consideration

[96] Mr TL says although Mr MC's matter was initially handled by another member of his firm, he "took [the] file over" during this period.

[97] In response to my request at the hearing to explain the time taken to complete Mr MC's draft affidavit, Mr TL explained his need to familiarise himself with file material, the information received from Mr MC which I have noted was spread out over that period, and the demands of his busy small practice.

[98] Mr TL also submits that in the context of Mr MC's desire to overturn the paternity order granted some 12 years earlier, "a period of four months" was not unreasonable, and did not "disadvantage" Mr MC.

[99] I consider it is open to argument that Mr TL could have advanced Mr MC's matter sooner than he did. However, from the information produced Mr MC did not inform Mr TL that the matter was urgent until 11 January 2017.

[100] In applying the Rules to a particular set of circumstances, the High Court has stated that whilst the Rules are to be "applied as specifically as possible",[44] they "are also to be applied as sensibly and fairly as possible." The rules "are practice rules, not a legislative code".[45]

[101] On balance, it is my view that the time it took Mr TL to provide a draft affidavit to Mr MC, and to advance Mr MC's matter during this period, whilst "not exemplary", does not call for a disciplinary response.

(ii) Period 11 January to 6 June 2017

Timeline

[102] On 11 January 2017, following the Christmas, New Year holiday period, Mr MC asked Mr TL to sign Mr TL's terms of engagement. He asked for written advice on (a) his "legal options" to oppose the paternity order, (b) the New Zealand statutes relevant to his concerns about the truth of Ms PW's evidence, and (c) the applicable standard of proof.

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[44] *Q v Legal Complaints Review Officer* [2012] NZHC 3082 at [59].
[45] *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].

[103] On 6 February Mr MC referred Mr TL to "some inconsistencies" in the draft affidavit. He listed a number of statutes, including s 53 of the Family Proceedings Act 1980 which concerns false statements in respect of applications for paternity orders, and asked Mr TL "if [this] helps".

[104] As noted earlier, Mr TL provided further advice to Mr MC on 20 February. The following day Mr MC told Mr TL he was "more than happy" for Mr TL to act for him. He sent his amended draft affidavit to Mr TL on 24 February and asked for comment.

[105] On 25 February, 3, and 18 March Mr MC sent emails to his mother and brother about their supporting affidavits.[46]

[106] Mr MC informed Mr TL on 19 April that his brother did not want any involvement in the proceedings. He repeated that rather than submit to a parentage test, he preferred to "test" Ms PW's evidence in the 2003/2004 proceedings. He asked whether by using "a false residential address knowingly" Ms PW had committed a criminal offence in those proceedings, and if so Mr TL, as an officer of the court, must report this.

[107] Mr MC sent, by email and post, his signed affidavit to Mr TL on 9 May 2016. He asked Mr TL on 11 May 2016 whether he could make a "cross-claim" against Ms PW for his costs in applying to set aside the paternity order, and if so to prepare another affidavit if required. He asked Mr TL to let him know when [Mr TL] received the affidavits.

[108] On 29 May Mr MC told Mr TL New Zealand Post informed him the affidavits had not been collected. He noted Mr TL had not yet advised him about a "cross-claim", and asked for an update. The following day he told Mr TL that New Zealand Post said his package still had not been picked up. He asked about "the delay", and for an urgent response to his "query about cross-claims".

[109] On 31 May Mr TL informed Mr MC he was "quite busy", and would commence work on Mr MC's matter "th[at] week". He said he could act on the application to set aside the paternity order, but the "cross-claim" was "beyond [his] capability". He said it had taken Mr MC "months" to return the affidavit so the matter "can't be as urgent" as Mr MC was "now" saying. He asked if it was true, as told by New Zealand Post, that Mr MC had complained to New Zealand Post.

[110] On 1 June Mr MC told Mr TL the "matter is and was always urgent". He said he would have been "appreciat[ive]" if his matter "could have been dealt with …quickly". He said he had "just needed some sound advice" about his affidavit.

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[46] Mr MC copied four of those five emails to Mr TL.

[111] He asked, amongst other things, why Mr TL had only just confirmed receipt of the affidavits which had been awaiting collection. He said he did not complain to New Zealand Post, but enquired about his package which he had "trace[d]".

Consideration

[112] To summarise, having received, on 11 January 2017, Mr MC's feedback on the draft affidavit, and his further comments on 6 February, Mr TL provided further advice to Mr MC on 20 February.

[113] The following day, Mr MC told Mr TL to continue acting. On 25 February, 3 and 15 March he was in communication (by email) with his brother and mother about their supporting affidavits.

[114] Mr MC told Mr TL on 19 April that his brother did not want to be involved. He repeated that his approach was to "test" Ms PW's evidence rather than submit to a parentage test. He also raised the possibility of Ms PW having made a "false" statement in her September 2003 affidavit in which case he stated Mr TL had a duty to report that to the appropriate authorities.

[115] On 9 May, Mr MC sent his signed affidavit by post to Mr TL. He asked Mr TL on 11 May about making a "cross claim" for costs against Ms PW assuming success in his application to set aside the paternity order.

[116] It appears from the emails exchanged between Mr MC and New Zealand Post that Mr MC's affidavit was received for collection by Mr TL, at the latest, by 23 May 2017. By 29 May Mr TL had not uplifted Mr MC's parcel from [Mr TL's] postbox.

[117] At the hearing, Mr TL submitted that despite Mr MC's 11 January request for urgency, following [Mr TL's] 20 February advice, he did not receive Mr MC's signed affidavit, which he says Mr MC had "drastically" changed, until the end of May.

[118] In his complaint, Mr MC acknowledges he "may have taken a bit of time" to provide his affidavit to Mr TL. However, I consider Mr TL could have attended to Mr MC's request for advice on 11 January, and 11 May sooner than he did. Nevertheless, it is evident from the above timeline that the matter was progressed, albeit not as quick as Mr MC wanted, throughout this period.

[119] I also make the observation that Mr MC presented as an informed client who wanted his lawyer to approach his matter in a particular way where Mr TL considered the prospects of success were doubtful at best.

[120] Overall, having heard from Mr TL, I am not persuaded by Mr MC that the time Mr TL took to respond to Mr MC's queries, and generally to advance Mr MC's matter reaches a threshold that warrants a disciplinary response.

(4) Mr MC's instructions to make a cross-claim for costs? – rules 4, 4.1

(a) Parties' positions

[121] Mr MC claimed that in response to his 11 May 2017 request for advice about whether he could make a "cross claim" against Ms PW for legal costs, on 31 May Mr TL declined to act on the grounds that [Mr TL] did not have the "legal capacity or experience" to accept those instructions.[47]

[122] Mr TL's position is he told Mr MC that [Mr MC] "may have to" engage "other/senior counsel" if [Mr MC] wished to continue the matter by suing Ms PW.

(b) Professional rules

Availability

[123] Access to legal advice has been described by the High Court as "one of the foundation stones of a free and democratic society".[48] To that end, r 4 provides:

> A lawyer as a professional person must be available to the public and must not, without good cause, refuse to accept instructions from any client or prospective client for services within the reserved areas of work that are within the lawyer's fields of practice.

[124] It will be noted that the requirement that a lawyer be available to the public is qualified by providing that a lawyer must not, "without good cause" described in r 4.1, refuse to accept instructions for services within "the reserved areas of work" that are within the lawyer's fields of practice.[49]

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[47] On 11 May 2017 (by email) Mr MC asked the Lawyers Complaints Service for "information in relation to cross claims" on such matters in New Zealand.

[48] *Lai v Chamberlains* [2005] 3 NZLR 291 (CA) at [106] per Anderson P (dissenting), reproduced by Webb, Dalziel and Cook, above n 26 at [5.7.3]. For a general discussion of the cab-rank rule, see [5.7.1] to [5.7.3]; see also GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) from [3.150].

[49] Section 6 of the Act: the "reserved areas of work" relate to (a) giving legal advice in the context of proposed or actual New Zealand court or tribunal proceedings, (b) appearing as an advocate before a court or tribunal, (c) representing a person before any court or tribunal, or (d) giving legal advice or carrying out any other action required to be carried out by a lawyer under s 21F of the Property (Relationships) Act 1976 or the provision of any other enactment.

Good cause to refuse instructions

[125] Rule 4.1 describes four circumstances that constitute good cause for a lawyer to refuse instructions*:*

> good cause to refuse to accept instructions **includes** a lack of available time, the instructions falling outside the lawyer's normal field of practice, instructions that could require the lawyer to breach any professional obligation, and the unwillingness or inability of the prospective client to pay the normal fee of the lawyer for the relevant work. [emphasis added]

[126] The word "includes" denotes that the list of grounds that constitute good cause is not exhaustive. As noted above, r 4 provides that a lawyer must not refuse to accept instructions within the reserved areas of work "that are within the lawyer's fields of practice". It follows that instructions that "fall outside the lawyer's normal field of practice" constitute a ground for refusing instructions under r 4.1.[50]

(b) Discussion

[127] Mr MC's initial instructions to Mr TL, as recorded in Mr TL's 16 June 2016 email to Mr MC were "firstly enquire with the IRD in NZ why the enforcement is sought against [Mr MC], the basis of such enforcement", and "then look at options as to how to have this order either stayed or defended in another way".

[128] As noted, on 11 May 2017, Mr MC enquired about making a "cross-claim" against Ms PW for "any/all legal costs incurred as a result of these proceedings". On 31 May 2017 Mr TL told Mr MC that those instructions were "beyond [Mr TL's] capability".

[129] Mr MC claims that if Mr TL could not act for him on that matter then [Mr TL] (a) ought not have accepted his initial instructions to apply to set aside the paternity order, and (b) should have advised him at the outset whether he could seek to recover those costs from Ms PW.

[130] He contends that if Mr TL knew about "the reasons [for] incurring further unpaid child support costs", then he would similarly know about "the legal costs" of his application to set aside the paternity order.

[131] As noted earlier, the Committee (a) did not regard Mr MC's 11 May 2017 request as "part of [Mr MC] initial instructions", and (b) interpreted the word "capability" in Mr TL's

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[50] Rule 4.1.3 of the Rules: a lawyer who declines a client's instructions "must" under, "give reasonable assistance…to find another lawyer".

31 May response as "a lack of available time". This led to the Committee deciding it was therefore open to Mr TL to refuse the instructions on that ground.

[132] Mr TL explained, at the hearing, that Mr MC's "chances of success for costs" against Ms PW depended on whether he obtained an order to set aside the 2004 paternity order, "not beforehand".

[133] In his submission, if he was wrong he nonetheless "couldn't see the logic" of Mr MC applying for costs at the same time [Mr MC] made his application to set aside. He repeated that his "tactic" was to put Mr MC's affidavit, in general terms, before the Court and then challenge Ms PW's September 2003 affidavit evidence.

[134] It appears to me that Mr MC and Mr TL may have been at cross purposes on this issue. As noted above, Mr MC stated in his 11 May email to Mr TL that he understood that "the judgment has to be in [his] favour" before he could claim his costs in the proceedings. That is consistent with Mr TL's submissions, referred to above.

[135] It could be expected that if Mr TL was not clear in his own mind about Mr MC's request, then he would have consulted with Mr MC.[51]

[136] However, as when he earlier told Mr MC he would refer [Mr MC] to senior counsel if Mr MC wished to have Ms PW's September 2003 affidavit evidence investigated before testing that evidence in Court, Mr TL similarly told Mr MC that acting on a "cross-claim" was, in effect, "outside [Mr TL's] normal field of practice".[52]

[137] It is unfortunate that on receipt of Mr MC's 11 May email Mr TL did not seek clarification from Mr MC and explain to him, as he did at the hearing, that if [Mr MC] was successful in having the paternity order set aside, he would seek to recover his costs incurred in the proceedings, and separate proceedings would not be required.

[138] Mr TL says by mid-June 2017, he was "in a position to file the interlocutory application with the [Family] Court", but on receiving notice of Mr MC's complaint around that time had not done so.

[139] By then, having received Mr TL's 1 June response, Mr MC had effectively taken the matter out of Mr TL's hands by complaining about Mr TL's conduct to the Law Society.

[140] In these particular circumstances I have decided that a disciplinary response for Mr TL is not called for. In reaching that decision, I make the further observation that had

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[51] Rule 7.1 of the Rules.
[52] Rule 4.1 of the Rules.

Mr MC been successful with his application to set aside the paternity order, the issue of seeking to recover his costs would likely have arisen in the normal course.

Decision

[141] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee to take no further action on Mr MC's complaint is confirmed.

Anonymised publication

[142] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and absent of anything as might lead to their identification.

DATED this 17th day of June 2020

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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:

Mr MC, as the Applicant
Mr TL, as the Respondent
[Area] Standards Committee X
New Zealand Law Society
Secretary of Justice