LCRO 21/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [North Island] Standards Committee
BETWEEN	**SV** Applicant
AND	**WT** Respondent

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

DECISION

Introduction

[1] Mr SV's review application and his original complaint to the New Zealand Law Society (NZLS) arise from Mr WT's invoice to him dated 19 June 2006 for $12,243, including as a disbursement, Mr GN's fee as counsel (the invoice). Mr SV says that although Mr GN acted for him as counsel, he did not instruct Mr WT to act as instructing solicitor in the matter to which the invoice related. For that reason, he says Mr WT should not have issued the invoice.

[2] Although initially Mr WT said he was Mr GN's instructing solicitor, he now says he agrees with Mr SV, when he says he was not Mr WT's client in the matters to which the invoice relates.

[3] Mr WT describes Mr GN as the "scoundrel" in the case, and attributes all responsibility for his actions to Mr GN. Mr WT says that to the best of his recollection, it is most likely that Mr GN generated the invoice, put it before him, told him he was acting as Mr GN's instructing solicitor, and asked him to sign it. He accepts it is his signature on the invoice.

[4] When he responded to Mr SV's complaint about the invoice, Mr WT provided NZLS with an email referring to an affidavit he had sworn on 29 May 2005 (the affidavit). On review Mr SV provided a copy of the affidavit, which confirmed that Mr WT was Mr GN's instructing solicitor on instructions from Mr SV. Mr WT later sought to resile from that position on the basis that he could not act for Mr SV without a conflict of interest arising, because Mr WT had also previously acted for Mr SV and his former wife in related matters.

[5] At the start of the review hearing attended by Mr SV and Mr WT I indicated that I intended to consider whether the affidavit gave rise to any professional conduct issues on review, because although the affidavit was squarely on the papers before the Committee in the complaint process, the Committee had not addressed the affidavit in the decision relating to the invoice. The reason for that did not become apparent until after the review hearing had concluded, when an enquiry of NZLS disclosed a separate complaint Mr SV had made about the Affidavit, which neither party had mentioned.

[6] NZLS provided a copy of the Standards Committee's decision dated 17 September 2013 disposing of the complaint Mr SV had laid alleging Mr WT had sworn a false affidavit.[1] The Committee considered it did not have jurisdiction to consider the complaint because it was not satisfied that his conduct[2] would have resulted in disciplinary proceedings[3] under the Law Practitioners Act 1982 (LPA), which applied at the time of the conduct in 2006. As no review application has been filed in respect of that decision, it cannot now be challenged as part of this review.

[7] However, to the extent that the affidavit forms part of a pattern of conduct in Mr WT's professional practices, it is relevant to his conduct in signing the invoice that is the subject of this review.

[8] Mr WT's conduct in signing the invoice, and his explanation for it, were identical to his conduct and explanation in respect of the affidavit. He says he completely relied on Mr GN, and did not read the invoice or take any steps to check it was a matter he could properly issue an invoice for.

[9] Mr WT's evidence at the review hearing confirmed that he did not take sufficient care in observing some of his professional responsibilities, and that he did not maintain appropriate boundaries in his professional relationship with Mr GN. The circumstances

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[1] [North Island] Standards Committee decision in complaint XXXX.
[2] Mr WT evidence at the review hearing was that he had instructed Mr GN on a "reverse brief", and that when Mr GN sought to withdraw as counsel for Mr SV, he had placed the affidavit before Mr WT, told him he was the solicitor on the record and asked him to swear the affidavit so that the retainer with Mr SV could be terminated. Mr WT says he swore the affidavit without reading it or taking any steps to verify its contents.
[3] Above n 1 at [18].

of the complaint, elaborated on by further information that was provided in the course of this review, give rise to professional conduct concerns with relation to Mr WT having signed the invoice.

[10] Mr WT's evidence at the review hearing about his role as instructing solicitor, including signing the invoice and swearing the affidavit, established that the degree of reliance he placed on Mr GN, who was independent counsel, extended to the point that he abnegated certain professional responsibilities to Mr GN.

[11] Each lawyer is personally bound to observe his or her own professional obligations. Compliance with professional obligations cannot be delegated by a sole practitioner to a barrister sole. On that basis Mr WT's conduct could be the subject of disciplinary proceedings under the LPA, and that is the basis on which this review has been conducted.

Standards Committee Process

[12] The Standards Committee conducted a hearing on the papers and considered Mr SV's complaint about the invoice. The Committee accepted Mr WT's evidence that he had signed the invoice in good faith at Mr GN's request, that he had made an honest mistake, and that he had never intended wilfully to place himself in a position of conflict of interest.

[13] The Committee considered what it described as Mr WT's "unwitting" signing of the invoice under the transitional provisions of s 351(1) of the Lawyers and Conveyancers Act 2006 (LCA). The decision records two different tests applied by the Committee under s 351(1). The first test correctly refers to whether the conduct "could" have resulted in disciplinary proceedings being commenced. The Committee then recorded having made its decision in reliance on a different test, saying:[4]

> …the high threshold set out in section 351(1) of the Act had not been met. It appears that Mr WT had unwittingly signed a letter presented to him in good faith. Although the Committee considers that more care should have been taken, the Committee does not consider that the conduct **would** have resulted in disciplinary proceedings under the Law Practitioners Act 1982.
>
> (emphasis added)

[14] On the basis of that more stringent, but incorrect test the Committee declined jurisdiction to consider the complaint.

[15] Mr SV was dissatisfied with the decision, and applied for a review.

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[4] Standards Committee decision dated 11 December 2012 at [15].

Review Application

[16] Mr SV's review application asserted that the decision was wrong, and that Mr WT continued to lie about the invoice, described by Mr SV as "fraudulent".

Role of the LCRO

[17] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Scope of Review

[18] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review, and the extent of the investigations necessary to conduct that review.

Review Hearing

[19] The parties attended a review hearing on 15 July 2014.

[20] During the review hearing Mr SV asserted that he had sent various emails to this Office containing information of a substantive nature, and referring to procedural aspects of the review hearing.

[21] He was advised that some of the information he referred to did not appear on the file.

[22] Mr SV handed up hard copies of the information he says is relevant to the substance of the review,[5] and copies of those materials were provided to Mr WT for his comment after the review hearing.

Further Enquiries

[23] Further enquiries made after the review hearing disclosed that at 9:52 am on 18th December 2013 the Ministry had blocked emails from [email address], which was one of the email addresses Mr SV had been using to communicate with this Office. Correspondence with Mr SV appears to have continued through alternative addresses.

[5] Submissions by SV (undated).

[24] On review I have considered the Standards Committee's file, and all of the information on the file held by this Office, which includes correspondence from other email addresses used by Mr SV, and the hard copy of the further information Mr SV handed up at the review hearing.

[25] There is no evidence to suggest that any of the materials Mr SV may have sent from any other email address are not on the file.

[26] If Mr SV considers any of the correspondence he sent to this office from his [email address] from 18 December 2013 onwards is relevant to his complaint, and should be considered on review, he is urged to provide that within 28 days of the date of this decision with a written request that the decision be recalled. If he does so, and I consider the additional material is relevant to the conduct of the review, the decision may be recalled.

Review Issues

[27] Having ascertained that Mr SV's complaint about the affidavit has been disposed of, the only complaint to be addressed on review is Mr WT's conduct in signing the invoice.

[28] The two issues on review are:

(a) whether Mr WT's conduct in signing the invoice was:

(i) conduct in respect of which proceedings of a disciplinary nature could have been commenced under the LPA; and

(ii) acceptable according to the standards of competent, ethical and responsible practitioners.

The answers to those questions are yes and no respectively.

Relevant Law

[29] The events complained of took place before the commencement of the LCA on 1 August 2008. Mr SV lodged his complaint on 27 July 2012. Consequently, the complaint falls to be dealt with under the transitional provisions of the LCA, s 351(1) of which says:

> If a lawyer… is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature **could** have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the complaints service established under section 121(1) by the New Zealand Law Society.

(emphasis added)

[30] A complaint about conduct that occurred before the LCA Act took effect on 1 August 2008 can therefore be made to a Standards Committee constituted under the LCA. When considering the complaint a Committee must apply the standards that applied at the time the conduct occurred, which are contained in ss 106 and 112 of the LCA.

[31] Sections 106 and 112 include provision for disciplinary sanctions to be imposed for a range of conduct, including where a practitioner is found guilty of conduct unbecoming a barrister and solicitor.[6] That standard is carried through as unsatisfactory conduct in to s 12 (b)(ii) of the LCA. A finding of unsatisfactory conduct can therefore be made under s 12 (b) of the LCA for conduct unbecoming at a time when the LPA was in effect.[7]

[32] The test for conduct unbecoming is whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners".[8] Mr WT's conduct has been measured against those standards.

[33] Also in force at the time were the Rules of Professional Conduct[9] which relevantly provided:

> **Rule 2.04:**
>
> A practitioner must ensure that each separate place of business is at all times under effective and competent management by a practitioner who is qualified, in terms of s.55 of the Act, to practise on his or her own account as a solicitor, whether in partnership or otherwise.
>
> **Rule 6.01:**
>
> A practitioner must promote and maintain proper standards of professionalism in relations with other practitioners.

Facts

[34] Mr SV says he did not meet Mr WT before he met Mr GN, and he did not give Mr WT any instructions directly in respect of the matters that were the subject of the invoice, although he says he had contact with Mr WT in 2004 over related matters, at Mr GN's request.

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[6] Those sections also include provisions relating to misconduct, negligence and criminal convictions none of which are relevant to the conduct under review.
[7] *D Evesham v Auckland Standards Committee* LCRO 136/09 at [70] to [72].
[8] *B v Medical Council* [2005] 3 NZLR 810, Elias J at 811.
[9] Rules of Professional Conduct for Barristers and Solicitors.

[35] Mr WT cannot recall, and has little in the way of records to enable him to say with any certainty whether he acted for Mr SV in respect of the matters covered by the invoice.

[36] Although it has been a matter of some concern to Mr SV, it is not essential to the outcome of this review for me to determine whether or not Mr SV was Mr WT's client, or whether Mr WT instructed Mr GN.

[37] Mr WT's poor record keeping and consequent lack of clarity are relevant circumstances in this review. Whether Mr SV was in fact his client at the time or not, there is sufficient evidence to show that Mr WT signed the invoice, and that is the act at the centre of this review.

The Invoice

[38] Mr WT says that the signature on the invoice is his, although no evidence has been provided to support a finding that Mr WT had any part in generating or sending the invoice to Mr SV. The invoice says:

> **TAX INVOICE** G.S.T. No. [details]
>
> Mr SV
> [Address]
>
> **(i) SV v LV FP No 001/XXX-a/02 (District Court)**
>
> **(ii) SV v Police – Alleged Breach of Protection Order**
>
> To Counsel's fees in relation to the above proceedings (2) (as attached) (inclusive of GST)
>
> COUNSEL'S FEE $12,243 $12.243.00
>
> 19 June 2006
>
> **WT Law**
>
> *WT*
>
> **WT**
> **Principal**
>
> DayXXX.doc
>
> **Please detach and return with your cheque**
>
> To: WT Law Our ref:
> [Address]
> Amount: $12,243.00
>
> If making payment via direct credit, our trust account details are:
> [details]
> Account No: [details]

Please include your name and quote the above Reference No:

[39] At the time he signed the invoice, Mr WT says he would not have checked who it was addressed to, and would not have checked his records. The invoice does not contain any reference from Mr WT's accounting system, and includes no client number. Mr WT says that the invoice was not processed through his accounts system, although he says that it probably should have been, and for the purposes of his accounting records the invoice does not exist. He says he has never received any payment for it, although Mr SV says he paid Mr GN in cash.

[40] As Mr WT relies so heavily on his professional relationship with Mr GN to justify his conduct, it is relevant to scrutinise that relationship more closely to see whether it provides any support for WT's position.

Professional relationship with Mr GN – Evidence in Correspondence

[41] In his correspondence to NZLS Mr WT described his professional relationship with Mr GN in the following way:[10]

> Our firm provided secretarial support for Mr GN's barristerial practice. I have checked our database and have ascertained that the footer '[reference]' on the invoice relates to Mr GN's bill records. I have no doubt that he asked my secretary to prepare the invoice on our firm's letterhead and then requested that I sign it to assist him in recovering payment of his fees invoice which he presumably attached to the invoice prepared on our letterhead.
>
> At that time (which predated the current "client care" regime) I was prepared to take instructions on reverse briefs for Mr GN on a fairly informal way and when he asked me to sign the invoice I would have assumed that the invoice related to one of those briefs. At that time I trusted Mr GN as a professional colleague and would not have expected him to ask me to sign an invoice which placed me in a conflict of interest situation.

[42] Mr WT also provided a copy of a letter he had previously written to Mr SV, explaining the position as follows:[11]

> … we have no record of instructing Mr GN (sic) to represent you in any litigation. You feature as a client in our database but no projects have been opened in your name. My recollection is that Mr. GN suggested that we act for you and your then wife, Mrs LV on the sale of the matrimonial home as part of a relationship property settlement. We opened a client and project for you and LV as a couple for that purpose … in May 2004. To the best of my recollection we have never acted for you in any other capacity, and we have no record of any instruction. I was, therefore, considerably surprised to receive a copy of the affidavit sworn on 29 May 2005 in which I deposed that I had received a reverse brief for Mr. GN to act on your behalf in your relationship proceedings against LV and had become solicitor on the record. I have no doubt that the affidavit is genuine and is not, as you have suggested, a forgery. The footer on the affidavit indicates that it was drafted by Mr. GN and typed in our office, since we provided him with secretarial

[10] Letter WT to Lawyers Complaints Service (19 August 2012).
[11] Letter WT to Lawyers Complaints Service (26 October 2012).

> services at the time. I can only surmise that he told me that he had nominated our firm as instructing solicitor and asked me to swear the affidavit in order that he could withdraw from the proceedings.
>
> At our most recent meeting you tabled a tax invoice on our firm's letterhead dated 19 June 2006 relating to Mr. GN's fee as counsel in respect of a District Court action which you had brought against your wife and an action concerning an alleged breach of a protection order. Our computer records show that that invoice was also prepared by Mr. GN in his data folders…

[43] In an email he had sent to Police dated 3 May 2012, that he provided to NZLS, Mr WT said he was providing a statement in his capacity as Mr GN's instructing solicitor to assist with the police enquiry into an allegation of perjury he understood Mr SV had made against Mr GN. Mr WT confirmed he was the deponent of the affidavit, and that he recognised the name of the solicitor who administered the oath. Mr WT described the circumstances around him swearing the affidavit, and said that:

> ... having considered the background with more care after the affidavit was brought to my attention last year, I can see that clearly I would not have agreed to act as instructing solicitor for [Mr SV] in relation to proceedings against his wife – that would have been inappropriate, involving a conflict of interest in view of the fact that we had acted for both of them a year earlier… The statements in the affidavit to that effect are, therefore, incorrect.

[44] Mr WT goes on to discuss the invoice, saying:

> … it must have been drafted by Mr GN; there is no file reference on it and we have no record of the invoice in our accounting system.
>
> In summary, I am satisfied that, notwithstanding the contents of the affidavit, we were never in fact the instructing solicitor on any of the actions in which Mr GN represented [Mr] SV.

[45] Mr WT wrote to NZLS on 26 October 2012 again refuting the suggestion that he had acted negligently or incompetently in signing the invoice, referring to his reliance on the integrity of Mr GN, and his expectation of Mr GN would not involve his firm in a conflict of interest, confirming that:[12]

> … we did on occasion accept reverse briefs from Mr GN in a relatively informal manner. I believe that that was common practice within the profession at the time. I would have assumed that the invoice related to one of those briefs – and I consider that that was a reasonable assumption for me to make.
>
> …
>
> As noted in previous correspondence our firm provided secretarial services for Mr GN. It appears that he took advantage of that to procure my secretary to prepare the invoice (which was prepared in his database, but using our invoice template). I do not consider that that in any way reflects on my effective and competent management of the practice.

[12] Above n 11.

Professional Relationship with Mr GN – Evidence before the Committee

[46] The Committee did not record having closely considered the professional relationship between the two lawyers. There is no evidence that it enquired further into the extent of the "secretarial support" or the "informal way" in which he "was prepared to take instructions on reverse briefs for Mr GN.[13] Nor did it ask how Mr GN could be expected to know whether or not he would be placing Mr WT in a conflict of interest situation, which should have been impossible if client privacy and confidentiality had been effectively and properly managed in Mr WT's office. It was also incongruous for Mr WT to say that he could access Mr GN's database and be able to say the invoice was saved there.

[47] Mr WT's correspondence suggested further enquiries should be made to establish what boundaries were in place between his practice and Mr GN's because that reflects on the extent to which Mr WT had ensured his practice was effectively and competently managed, and indicates the standards he was promoting and maintaining in his professional relationship with Mr GN. Those matters were relevant to the context in which Mr SV's complaint about the invoice arose.

Further Inquiries

[48] At the review hearing Mr WT provided further detail about his professional practice and his professional relationship with Mr GN. Mr WT said he was a sole practitioner who employed a legal executive and a secretary/receptionist. He said he shared offices with Mr GN, who he described as his sub-tenant, and that he and Mr GN generally had unimpeded access to one another's offices.

[49] Mr WT says he also shared with Mr GN his firm's computer server, and his secretary, who provided Mr GN with secretarial and other administrative services. Mr WT says that although Mr GN could not have accessed his trust account, there were no measures in place to prevent him accessing all of Mr WT's clients' correspondence.

[50] Mr WT says that Mr GN also had access to his electronic letterhead, which helps to explain how the invoice came to be generated on Mr WT's letterhead template on Mr GN's instructions.

[51] He describes the arrangements for storing correspondence and documents on the computer system saying "we had a separate folder for Mr GN's correspondence and his bills which have his letterhead on them and on this occasion it appears he has

[13] Above n 10.

gone to my secretary and said put out a bill". The reference "[reference]", he says, could be a reference to either Mr GN's system or his own because Mr WT says they "both had a Monday to Friday sequence" for bills.

[52] Mr WT was able to tell me that the invoice was prepared in Mr GN's data folders, so clearly Mr WT could access Mr GN's clients' confidential information. His evidence shows that open access was reciprocal. Although Mr WT says Mr GN's ability to access data on the computers was limited by his technical skills, that does not excuse Mr WT from implementing appropriate security protocols to protect his clients' confidentiality.

[53] With respect to his "relatively informal" reverse brief arrangement with Mr GN (and other barristers) Mr WT says that he would receive an oral request for instructions, or an email, and would confirm he would act, sometimes in writing and sometimes not. He said at times he made no more than a mental note that he had agreed to act as instructing solicitor.

[54] He says that although practices between the different barristers he briefed varied depending to some extent on what level of support the barrister requested, he never filed any documents for Mr GN, and was not responsible for his correspondence.

[55] He said his role as instructing solicitor to Mr GN was limited to agreeing to act in a nominal capacity. His secretary would produce documents and correspondence, and Mr GN would then take responsibility for disseminating those.

[56] Mr WT says he now considers it is good practice on receipt of a reverse brief to check for conflicts of interest, and to open a file. He acknowledges that was not what he did at the time of Mr SV's instructions, and that that was not his usual practice in 2006, or more generally before the LCA came into effect.

[57] Mr WT says he takes the view that signing the invoice in good faith protects him from professional liability, when it later transpired that the information Mr GN had provided him with was incorrect. Mr WT currently says that in this case Mr SV was not his client, but he accepted, without checking, that Mr GN's information was correct. He said at the time he would not "even have bothered to check the names" when he signed the invoice. He said "if I had noticed the name I might have wondered, because I acted for Mr SV and his wife" and that he "could not have been instructing solicitor without a conflict of interest" so he "would not have accepted the instruction".[14]

[14] Oral evidence at the review hearing.

[58] Although he does not produce any evidence in support, Mr WT says his view is that what he had done was "absolutely normal and common", and that in the interest of collegiality "we did not burden ourselves with too much paper in those days so if he said I'd like you to act as my instructing solicitor on this matter I'd say ok".[15]

[59] With respect to maintaining segregation between his practice and Mr GN's, Mr WT says he relied on his secretary to ensure appropriate boundaries were in place and observed.

[60] Mr WT says that his professional relationship with Mr GN came to an end when they left their shared office, and that by that time he had concerns about Mr GN's behaviour.

[61] Mr WT also said given the same circumstances, and:[16]

> …with the benefit of hindsight obviously we should have obtained a client authority. In those days it was possible to do that, or at least corresponded with him and at that point, in respect of this particular thing, I would have thought – hold on a second, we acted for SV and LV on the sale of their house and this involves a protection order involving her so we could not have accepted the brief, the instruction.

Discussion

[62] At the review hearing Mr SV provided materials recording comments he attributes to Mr WT,[17] and those are generally consistent with Mr WT saying that he did not check his records, or, the name on the invoice before he signed it.

[63] He does not claim to have acted responsibly. Instead, he defends his conduct on the basis that he trusted Mr GN to the extent that it was not necessary for him to check the invoice, and that his conduct was consistent with common professional practice at the time.[18] There is no evidence to support his assertion as to what was common professional practice at the time. Furthermore, his reliance on Mr GN does not relieve him of his personal professional obligation to act according to the standard of a responsible practitioner in his professional practices.

[64] Not checking an invoice before signing it in some situations could be excusable, but in the context of Mr WT's unusually close and relaxed professional relationship with Mr GN it was not the act of a responsible practitioner. All Mr WT needed to do was to read the invoice, and by his own admission, if he had done so, he would have noticed Mr SV's name and that would have alerted him to his potential conflict. Even if he did

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[15] Above n 14.
[16] Above n 14.
[17] Submissions by SV Exhibit "C" dated 15 July 2014.
[18] Above n 10 & n 11.

not immediately recognise the name, as he accepts, it would have been a responsible step to check his records against the name of the person he was billing. He could then have observed the absence of an account number and taken steps at the time to address the anomalies arising from the invoice, before he signed it.

[65] In his professional relationship with Mr GN Mr WT made unwarranted assumptions. If Mr WT had maintained an appropriate standard of professionalism in his professional relationship with Mr GN, he would not have relied on Mr GN to the extent that he did, and would have checked his records before he signed the invoice.

[66] Mr WT's reliance on Mr GN to protect him from conflicts of interest was also misplaced. Bearing in mind Mr WT's obligations of confidence to his own clients, Mr GN should never have been in a position to know, generally or in any specific instance, whether Mr WT might be placing himself in a position of conflict or not. Mr GN was never under a professional duty to ensure Mr WT did not act in a conflict of interest. Mr WT could not delegate that responsibility. The reliance Mr WT says he placed on Mr GN was not proper.

[67] The extent to which Mr WT may have compromised his clients' confidentiality is of concern. Although he did not specify the date on which he and Mr GN left their shared office, that does not appear to have been a recent development. Mr WT's correspondence to NZLS indicates that the relationship was at an end before Mr WT responded to Mr SV's complaint on 19 August 2012, Mr WT's evidence is that their professional relationship is now well and truly at an end.

[68] Mr WT's failures to check the invoice, keep a record of his instructions to Mr GN, and prevent him from accessing confidential client information, are inconsistent with his obligations to effectively and competently manage his practice.

[69] The further evidence given in the course of this review does not support the Standard Committee's analysis, or a finding that Mr WT's conduct met the standards of a responsible practitioner. Nor can his conduct be excused on the basis it was unwitting, or an honest mistake, made in good faith, which may be relevant when considering what consequences may result from his actions.

[70] Without suggesting that there is never a time when delegation is appropriate, in the circumstances that existed at the time Mr SV's complaint arose it was irresponsible for Mr WT to abnegate his professional responsibilities.

[71] In the circumstance Mr WT's conduct fell below the standard of a responsible practitioner. Disciplinary action could have resulted from the subject matter of Mr SV's complaint, and the Committee did have jurisdiction to deal with the conduct.

Powers to direct reconsideration of complaints, matters or decisions – s 209 of the Lawyers and Conveyancers Act 2006

[72] As the Committee considered it did not have jurisdiction to deal with Mr WT's conduct, I have considered whether to direct the Committee to reconsider and determine the complaint.[19] I have decided not to for the reasons that follow:

[73] The conduct complained of occurred in 2006, more than six years before Mr SV laid his complaint.

[74] Mr WT's professional relationship with Mr GN came to an end some years ago, apparently before Mr SV laid his complaint.

[75] Although Mr WT's unusually relaxed attitude to his professional relationship with Mr GN in 2006 elevates his conduct in signing the invoice to a level where disciplinary consequences may be appropriate.

[76] If disciplinary consequences are appropriate, in all the circumstances it is likely that signing the invoice is conduct that falls towards the lower end of the range of professional irresponsibility.

[77] In the interests of efficiency, this is a matter which can be dealt with on review, without unnecessarily expending the Standards Committee's resources by a referral back under s 209 of the LCA.

[78] I have therefore decided not to refer the complaint back to the Committee for it to reconsider, and have completed this review on the basis that Mr WT's conduct may constitute conduct unbecoming pursuant to s 12(b)(i) of the LCA.

Gateway Test - s 351 of the Lawyers and Conveyancers Act 2006

[79] Before proceeding it is necessary to apply the gateway test in s 351(1).

[80] The first question is whether "proceedings of a disciplinary nature could have been commenced".[20] The Lawyers and Conveyancers Disciplinary Tribunal in *Waikato Bay of Plenty Standards Committee No.2 v* B considered s 351 and said:[21]

> … we think that the inquiry has to involve more than the simple proposition that proceedings of a disciplinary nature "could" have been commenced, in that it would have been possible to commence them, irrespective of whether well-founded or not … It is not a matter of finally determining a charge in coming to this view, but considering whether conduct occurring at a time when the Law Practitioners Act was in force could properly have been the subject of a charge under that Act.

[19] Lawyers & Conveyancers Act 2006, s 209(1).
[20] Above n 19, s 351(1).
[21] Waikato Bay of Plenty Standards Committee No. 2 v B [2010] NZLCDT 14.

[81] Given the surrounding circumstances, including the qualities of his professional relationship with Mr GN, Mr WT's conduct is conduct that probably could have founded a charge under the LPA for the purpose of public protection.

[82] The Committee's decision that it lacked jurisdiction is therefore reversed.

Conduct Unbecoming

[83] The next question is whether Mr WT's conduct was conduct unbecoming. The authorities on what comprises "conduct unbecoming" indicate a degree of assessment is required to ascertain whether conduct properly attracts a professional disciplinary consequence.

[84] To reach a finding of "conduct unbecoming" the conduct in question must depart from acceptable professional standards by reference to the test of competent, ethical and responsible practitioners.[22] That departure must be significant enough to attract sanctions for the purposes of protecting the public. A finding of conduct unbecoming is not required in every case where error is shown, and requiring wisdom that is available with hindsight would impose a standard which is unfairly high.

[85] The LCRO in *AF v BN* considered that the question was "not whether error was made but whether the practitioner's conduct was an acceptable discharge of his or her professional obligations".[23] He cited two examples, *Wolverhampton v Shaftesbury* 145/2009 and *CI v XM* 197/2010, where the standard had not been met.

[86] In *Wolverhampton v Shaftesbury* at [58] the LCRO said:

> … Taken as a whole, the Practitioner's approach towards his professional responsibilities in this matter amounted to an accumulation of negligent acts which, demonstrated a careless disregard on his part in meeting his responsibilities, not only in relation to the events in 2002 in failing to have properly completed the work he had undertaken, but also later in 2004 when, discovering that he was unable to account for the documents, his response was equally inadequate in addressing his earlier omissions and bringing the matter to a satisfactory conclusion…

[87] In *CI v XN* the lawyer had failed to complete a gifting programme after having established a trust for the client, which resulted in the Official Assignee being able to recover the ungifted portion that was due to the bankrupt. The Standards Committee considered that this constituted unsatisfactory conduct by reason of it being conduct unbecoming. That was confirmed by the LCRO on review.

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[22] Above n 8.
[23] *AF v BN* LCRO 166/2011 at [68].

[88] The determination as to whether Mr WT's conduct in signing the invoice was sufficiently serious to attract the possibility of disciplinary sanction under the LPA, involves the exercise of judgement.

[89] Mr WT was responsible for effectively and competently managing his practice, including maintaining a clear separation between his practice and that of Mr GN. In signing the invoice, Mr WT abnegated his professional responsibilities. The evidence supports a finding that Mr WT's actions were careless and irresponsible. It is those failings in Mr WT's conduct that gave rise to Mr SV's complaint.

[90] Mr WT could not relinquish his professional responsibilities. The obligation to effectively and competently manage his practice, including taking responsibility for checking the invoice before he signed it, rested on Mr WT alone.

[91] Unlike the practitioner of *AF v BN*, where there were no specific acts or omissions that could be pointed to as clear examples of conduct that fell into the category of conduct unbecoming, signing the invoice without checking it in any way is a clear example of irresponsible conduct by Mr WT. Mr WT's approach towards his professional responsibilities in this matter occurred in the context of a dysfunctional professional relationship, characterised by more than one admittedly irresponsible act by Mr WT. Overall, Mr WT's evidence supports a finding that he had insufficient regard to his professional obligations when he signed the invoice.

[92] In my assessment, Mr WT's conduct properly attracts professional disciplinary consequences. His conduct departed from professional standards of responsibility. That departure, in all the circumstances, was significant enough to attract sanctions for the purpose of public protection.

[93] Signing the invoice, without checking, was careless and irresponsible. It would have been a simple matter for Mr WT to have checked at the time.

[94] Mr WT's conduct was not acceptable discharge of his professional obligations, and cannot be excused by misplaced reliance on a professional colleague. In all the circumstances, his failure to check the invoice before signing it is serious enough to attract disciplinary sanction.

[95] The Committee's decision that it lacked jurisdiction is therefore reversed, and a finding of unsatisfactory conduct is recorded against Mr WT on the basis that his conduct fell below the standard of a responsible practitioner, and is conduct unbecoming pursuant to s 12(b)(i) of the LCA.

Penalties

[96] At the review hearing, Mr WT was given the opportunity to address the concerns arising on review, and was then invited to tender submissions on penalty. His submissions record his view that his conduct does not warrant an adverse conduct finding because his reliance on Mr GN is a complete defence. For the reasons discussed above, that is not correct. It is therefore necessary to consider what orders, if any, should result.

[97] Section 352 of the LCA, which deals with penalty in respect of complaints dealt with under the transitional provisions of the LCA, requires the consent of the practitioner to allow penalties to be imposed under the LCA. Mr WT did not consent, so the penalty provisions of the LPA apply.

Functions of Penalty

[98] The functions of penalty orders in a professional disciplinary context include punishing a practitioner, acting as a deterrent to other practitioners, and reflecting the public's and the profession's condemnation or disapproval of a practitioner's conduct.[24] The seriousness of the conduct may affect which specific penalty is selected, depending on which particular function is being met.

[99] As mentioned above, Mr WT's conduct in signing the invoice was irresponsible, but not a serious breach of his professional obligations. In the circumstances an order to pay a penalty of $500 to NZLS pursuant to s 103(4)(a) of the LPA is a suitable response.

Costs

[100] The LCRO has a broad discretion to order costs pursuant to s 210 of the LCA and the LCRO's Costs Orders Guidelines.

[101] The primary purpose of costs orders under the LCA is to defray the costs of administering the complaints and disciplinary provisions of the LCA, which otherwise fall on all lawyers.

[102] After the review hearing a Minute was issued to the parties, a copy of which is attached to this decision. The parties were invited to provide further submissions with respect to costs, and Mr WT was invited to provide submissions with respect to his conduct, and on penalty.

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[24] *Wislang v Medical Council* [2002] NZAR 573; NZCA 39 (4 March 2002).

Costs Against the Applicant

[103] It is unusual for this Office to impose a costs order against a lay complainant. As the LCRO said in *Kendal v Sherbourne*[25] "[a]ny order of costs against a lay complainant must be used very sparingly and only in egregious cases". It has been necessary to consider whether this was an "egregious case" such that a costs order is warranted, because of the contempt with which Mr SV as complainant, and Mr BV as his nominated representative, treated the process of review.

[104] The approach of the SV and BV brothers to the review was exemplified by their conduct towards this Office at the review hearing. The review hearing was scheduled to commence at 9.30 am. Mr WT and Mr BV were present at the appointed time, but the complainant, Mr SV, arrived late, resulting in a delay of over 30 minutes to the commencement of the review hearing. The commencement of the review hearing was initially ignored the SV and BV brothers, who then became threatening, uncooperative, abusive, rude and obstructive to this Office as the review hearing proceeded, apparently in an attempt to hinder or prevent the inquiry process.

[105] During the hearing, the SV and BV brothers asked more than once for the hearing to be adjourned to enable them to discuss a settlement proposal they wanted to put to Mr WT, which they said would result in them withdrawing Mr SV's complaint. They were advised that consideration would be given to any application to withdraw the complaint, and that the parties were free to enter into whatever negotiations and agreements they wanted to outside the review hearing. They were also told that any private agreement they may reach would not necessarily bring about an end to the review process, which can continue regardless of any agreement reached between the parties, particularly where genuine professional disciplinary matters are under consideration, as they were in this matter.

[106] Nonetheless, the SV and BV brothers pursued their application for adjournment, which when granted, resulted in a further delay with the effect of the SV and BV brothers' conduct overall being to more than double the duration of a review hearing.

[107] Balanced against the SV and BV brothers' extraordinary behaviour at the review hearing is the fact that, in the absence of Mr SVs' complaint, it is unlikely that Mr WT's conduct would have fallen under the scrutiny of NZLS, or this Office. The review has met the purpose of public protection, which is an important consideration in applying the provisions of the Act.

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[25] *Kendal v Sherbourne* LCRO 69/2009 at [88].

[108] It is also relevant that the SV and BV brothers' evident frustrations at the review hearing were based in part on the difficulties they had experienced in communicating effectively with this Office.

[109] On balance I have decided not to order Mr SV to contribute to the costs of review.

[110] Mr SV should note, however, that he runs the risk of an adverse costs order resulting from any future review application he may pursue, that is found to be an abuse of any aspect of the complaints and disciplinary process under the LCA.

Costs Against the Practitioner

[111] Early on in the review process Mr SV requested a hearing, and Mr WT promptly indicated that he intended to attend. In any event, it would have been necessary for Mr WT to attend a review hearing, to answer inquiries arising from his correspondence to NZLS. Mr WT's conduct has been found to be unsatisfactory, and, although the imposition of costs on a practitioner is not in the nature of a penalty, it is the usual practice of this Office to order costs against a practitioner when an adverse finding is made.

[112] Mr WT is ordered to pay the usual costs of a hearing attended by one or both of the parties of $1,200 pursuant to s 210 of the Lawyers & Conveyancers Act 2006 and the LCRO's Costs Order Guidelines.

Decision

Pursuant to s 211(a) of the Lawyers & Conveyancers Act 2006 the decision of the Standards Committee is reversed.

1. Pursuant to ss 211(b) and 152(2)(b)(i) of the Lawyers & Conveyancers Act 2006, a determination is made that there has been unsatisfactory conduct on the part of Mr WT, pursuant to s 12(b) of the Lawyers & Conveyancers Act 2006 in that his conduct in signing the invoice without checking his records to ascertain whether he was acting for Mr SV was conduct unbecoming.

2. Pursuant to s 106(4)(a) of the Lawyers & Conveyancers Act 2006 Mr WT is ordered to pay to New Zealand Law Society a penalty of $500.

3. Pursuant to s 210 of the Lawyers & Conveyancers Act 2006 Mr WT is ordered to pay costs on review of $1,200 to the New Zealand Law Society.

DATED this 26th day of August 2014

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Dorothy 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 SV as the Applicant
Mr WT as the Respondent
[North Island] Standards Committee
New Zealand Law Society