

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Standards Auckland Committee 4

BETWEEN

FS
of Australia

Applicant

AND

UR
of Auckland

Respondent

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

DECISION

[1] This is an application for review of a decision of the Auckland Standards Committee 4 which considered a complaint by FS (the Applicant) against UR (the Practitioner). The Standards Committee resolved to take no further action on the complaint, and the Applicant seeks review of that decision.

Background

The complaint.

[2] The Applicant filed a complaint against the Practitioner in mid September 2010. The complaint concerned some work undertaken by the Practitioner concerning his personal banking relationships in Auckland that he believed had “turned sour” as a result of a personal dispute with an employee (presumably of the bank) which he believed was “prejudicing his ongoing relationships”. This appears to have involved confidential matters.

[3] The Applicant informed the NZLS that he engaged the Practitioner on a preliminary matter and instructed him (in his first email) to limit his time to 'approximately 2 hours'. The following week, in another email to the Practitioner, the Applicant said he asked the Practitioner to advise if he were able to keep his time to "another hour or two." Copies of the emails were included in the complaint. The Applicant said that the Practitioner did not respond and he reiterated this email the following day.

[4] The Applicant advised that the Practitioner reported back to him in two emails on 5 October, and in the following month sent him an invoice for \$5,046.00. The Applicant informed the Committee that he queried the bill with the Practitioner on several occasions from December to March the following year, in terms of his instructions, and received no response, and that the Practitioner finally responded on 11 March that the fee was reasonable for the time spent.

[5] The Applicant wrote that he reminded the Practitioner of his instructions, and offered to settle the invoice on the basis of the time limits included in his instructions and despite his further emails, the Practitioner did not respond. On 24 May the Applicant offered (and sent) payment of \$1,475 in full and final settlement of the bill, which was rejected by the Practitioner and who also did not address the time limitations issue.

[6] In September it appears that the Practitioner threatened legal action and the Applicant sought the assistance of the NZLS, discovering that the Practitioner ought to have provided him with a letter of engagement. His further letter to the Practitioner raised the omission of the letter of engagement, to which the Practitioner responded that the requirement did not apply where a lawyer was instructed by another lawyer, including a member of the profession in another overseas country.

[7] The matter remained unresolved and the Applicant made a formal complaint to the NZLS. Copies of the relevant correspondence were attached.

The investigation

[8] The complaints were originally mis-described by the NZLS and its original letter of notification to the Practitioner was subsequently amended to identify the complaints as involving excessive charges and the failure to provide a letter of engagement. The notification letter referred the Practitioner to Chapter 3 of the Rules of Conduct and Client Care, in particular to Rule 3.4 (which required a lawyer to provide a client with information about the client service), and Rule 3.7. which excludes the application of

Rule 3.4 where '*...the lawyer is instructed by another lawyer or by a member of the legal profession in an overseas country.*'

[9] The NZLS letter informed the Practitioner that there was no need for him to respond to the complaint until such time as the matter had been considered by the Committee, adding that in the event that the Standards Committee resolved to enquire into the complaint rather than decide to take no further action under section 138, he would be advised accordingly and would be given an opportunity to respond to the complaint at that time.

[10] Despite the above, the Practitioner responded by letter dated 7 October 2010. He described the Applicant as '*an existing client*', alluded to the work undertaken for him, and that costs were in accordance with carefully kept time records and correspondence. He informed the NZLS that the Applicant, although now living in Australia, was himself a lawyer and an associate member of the ADLS.

[11] This letter was not sent to the Applicant.

[12] The Applicant meanwhile wrote again to the NZLS 6 October 2010 with comments on the reference to Rule 3.7 in the NZLS letter of notification. He clarified that "*the matter was a personal matter in New Zealand, and was completely unrelated to (his) membership in a legal profession in the USA. Further (he was) not a member of any other legal profession elsewhere*". He went on to advise that he was semi-retired, living in Australia and had not lived or practised in the USA since 2002.

[13] The Standards Committee considered the complaint and decided that no further action was necessary. Its decision of 24 November 2010 identified the complaints as "overcharging" and "failure to provide terms of engagement". After giving a brief summary of the facts, and including reference to Rules 3.4, 3.5 and 3.7, the Committee concluded:

The Committee considered (the Practitioner's response) that the work was done properly, promptly and successfully and entirely in accordance with instructions and he would submit all relevant records for examination if this matter did proceed. The Committee considered the information to hand regarding the work done in this matter, including (the Practitioner's detailed bill of costs). The Committee was of the view that (the Practitioner's) costs would not amount to unsatisfactory conduct. As to the requirement to provide written information pursuant to Rule 3.4 the Committee accepted that Rule 3.7 applies in this instance. The Committee were (sic) of the view that (the Practitioner's) conduct was not such as to raise any professional standards issues. The Committee resolved to take no further action pursuant to s.138(2) as any further action would be inappropriate.

[14] In reaching this decision the Committee noted the dispute between the parties about whether Rule 3.7 applied and also took note of the Applicant's letterhead describing him as "licensed to practice law" in various countries. It also noted that the Practitioner had offered to submit his records for examination by the Committee if there was to be further enquiry. The Committee referred to the narration on the bill and expressed the view that the Practitioner's costs would not amount to unsatisfactory conduct. The Committee further concluded that Rule 3.7 applied in this case.

Review application

[15] The Applicant sought a review of the Standards Committee decision on both procedural and substantive grounds. He claimed to have been prejudiced by the Committee's failure to observe due process. He also challenged the correctness of the Committee's approach to the complaint, and its views on Rule 3.7.

[16] The parties have consented to the review being determined 'on the papers' pursuant to section 206 of the Lawyers and Conveyancers Act 2006. This section provides for a review to be conducted on the basis of all of the evidence and materials provided by the parties and without a hearing in person, if the LCRO is of the view that the review can be determined in the absence of the parties. I have proceeded with the review on the basis of that information.

[17] The procedural grounds focused on the Committee having reached its decision mainly on views expressed by the Practitioner as to the application of Rule 3.7, and that he had been prejudiced by the Committee's failure to have provided him with a copy of the Practitioner's letter or allowed him the opportunity to respond to it.

[18] The substantive grounds challenged the Committee's conclusion on the application of Rule 3.7, and the Practitioner's failure to have complied with his instructions as to the specific time limits on the Practitioner's services. He also noted that the Standards Committee had not in fact examined the Practitioner's time records.

[19] The Applicant sought a reversal of the Committee's decision, or a referral back to the Committee for full consideration, that this office should exercise its powers to determine the matter.

Considerations:

[20] I deal first with the procedural grounds raised by the Applicant. The first matter of note is that the Practitioner was informed that he was not required to respond to the complaint, and a second matter of note is that when the Practitioner nevertheless did

respond, that letter was not forwarded to the Applicant. This letter was a material to the Committee in its considerations, in particular that it endorsed the Practitioner's view that rule 3.7 did not apply because the Applicant was himself a lawyer, a view that had been implicitly suggested by the NZLS's own letter of notification. This is a further matter of note insofar as the NZLS proffered a view on the complaint before any consideration had been undertaken by the Standards Committee.

[21] Notwithstanding that the Committee had plain evidence before it (from both parties) that the relationship between the Practitioner and the Applicant was one of solicitor/client, there was no analysis undertaken about the application of the Rule 3.7, its decision stating, "*As to the requirement to provide written information pursuant to Rule 3.4 the Committee accepted that Rule 3.7 applies in this instance*".

[22] The Practitioner's letter was clearly material to the Committee's considerations, and procedural fairness required that the Applicant be given the opportunity to comment on it. I agree with the Applicant that this was prejudicial to him.

[23] I also noted with surprise that the Practitioner was advised that he was not required to respond to the complaint, and would not be so required unless the Committee decided to enquire into it. This clearly suggests that the Standards Committee intended to consider the substantive issues based solely on the letter of complaint, which appears from its letter of notification to have been misconstrued by the NZLS in any event. It is also of surprise and some concern that not only did the NZLS misconstrue the essential complaint but in addition formed a somewhat hurried presumption that the circumstances were such that Rule 3.7 might be relevant, which appears to have led the Committee somewhat off-course in its perceptions of the complaint.

[24] The essential complaint alleged that the Practitioner had raised charges in excess of an express instruction to limit his time. This complaint was not in the event considered by the Committee. Instead, the Committee accepted that the Practitioner had no obligation to the Applicant under Rule 3.4 to have recorded the terms of the engagement or instruction, and that the fees were reasonable for the work done.

[25] The Applicant remained unaware of the direction that the enquiry had taken, and having no opportunity to refocus the Committee's attention to the complaint issues, the Standards Committee remained 'off course' in its considerations, the result being that it failed to consider to the essential complaint.

[26] Turning to the substantive grounds of the review application, there are two issues. The first concerns the question of whether the Standards Committee was correct in concluding that Rule 3.7 of the Rules of Conduct and Client Care applied to the situation. This is material insofar as the Practitioner did not send to the Applicant a letter of engagement which, under Rule 3.4, requires a lawyer to provide to a client, in advance of work being done, a written notice of the main aspects of the retainer. (The second questions whether the Committee properly addressed the complaint that had been made, and is discussed below).

[27] Rules 3.4 and 3.5 identify the information which must be provided to a client when a retainer is undertaken. Rule 3.7 provides that

“Rules 3.4 and 3.5 do not apply –

(a) Where the lawyer is instructed by another lawyer or by a member of the legal profession in an overseas country ...”

[28] I have considered the above Rules and all of the views expressed on the application of Rule 3.7. The significance of Rule 3.7 is that it exempts the application of Rule 3.4 which requires lawyers to send to a client, information about the services to be provided.

[29] The Standards Committee “accepted that rule 3.7 applies in this instance”, implying that it found that rule 3.4 and 3.5 did not apply because the Practitioner’s instructions came from the Applicant who is a lawyer. This was also the approach taken by the Practitioner. The Applicant considers that this exemption does not apply when there is a solicitor/client relationship, regardless of whether the client is a lawyer.

[30] The obligations of lawyers as set out in Chapter 3 of the Rules of Conduct and Client Care need to be considered in their proper context. The theme of Rule 3 is “competence and client service”, and requires a lawyer to act in accordance with the terms of the retainer. The client care elements are particularly embedded in rules 3.4 and 3.5. Lawyers have an obligation to ensure that the principle aspects of the client service are recorded in writing and provided to the client in advance of work being undertaken. These are obligations owed by the lawyer who is to provide the service to his or her ‘client’. Both parties agree that the Applicant was ‘the client’ of the Practitioner.

[31] Lawyers are exempt from complying with above obligation if the circumstances in Rule 3.7 apply. Read in its entirety, it is clear that the information requirements of Rule 3 recognises a distinction between lawyers providing services on the instruction of

another lawyer acting in the capacity of a lawyer, and lawyers providing services to a client. For example, the exemption applies where one lawyer instructs another, and a most obvious example is where a solicitor instructs a barrister in relation to litigation or an opinion. Further clarification is provided in Rule 3.7(d) which exempts the application of Rules 3.4 and 3.5 to in-house lawyers providing services to their employer under their employment agreement. This suggests that in such a case the employer is not considered to be a client of the employee-lawyer. I also note that the 3.7 exemption does not apply where the fee (or other) information is requested by the instructing lawyer or member of the legal profession, or if it is impractical to do so or if the client is unlikely to understand the information due to youth or infirmity. Again, this supports a distinction between the roles of lawyers and client.

[32] Rule 3 creates client care obligations that confer protections on consumers of legal services. If the Lawyers and Conveyancers Act intended to exclude certain classes of consumers of legal services from that protection this would have been made explicit. Rule 3.7 is an exemption to a rule that otherwise applied uniformly. There is no basis for enlarging the circumstances where the exemption applies to limit the obligations of lawyers towards a client who is incidentally a lawyer. Where a solicitor/client relationship exists, regardless of the client's status, the client care obligations generally apply.

[33] In the present situation the Applicant was not instructing the Practitioner as "another lawyer" but as a "client" in the ordinary sense of the word. The fact that the Applicant is (or was) a lawyer is immaterial since his relationship with the Practitioner was that of a client. As such he was entitled to all of the protections afforded to clients by the Act and its regulations. That these must be considered paramount is reinforced by the principle purposes of the Lawyers and Conveyancers Act which is to protect consumers of legal services. I conclude that the Standards Committee erred in its view that the exemption in Rule 3.7 applied in this case.

[34] The second arm of the Applicant's review application (and of more significance to him) is that his complaint about the alleged failure to follow his instructions has not been addressed by the Standards Committee. Clearly it was not. It became perceived by NZLS as a complaint about overcharging per se, and led the Committee to form a view about the reasonableness of the fee from the narration on the bill. The complaint is not quite so simple. The Applicant's complaint is that he was charged about five times more than he was expecting to pay. He relies on his instructions to the Practitioner as the basis of not being obligated to pay the fee as charged.

[35] I conclude that the Applicant's main complaint has not yet been addressed by the Standards Committee. It is also evident from my earlier observations that there are additional elements of the Practitioner's conduct that need to be considered in a disciplinary context.

[36] This matter will be returned to the Standards Committee to consider the principle complaint alleging failure by the Practitioner to follow instructions, and to also consider any other aspects of the Practitioner's conduct that relate to the complaint as have been discussed that may raise disciplinary considerations. Without intending to curtail in any way the Standards Committee discretionary powers or procedural autonomy, the Committee must ensure that its processes are fair and transparent.

[37] I also note that the Practitioner provided an extensive response to the review application and the Applicant has commented on that response. These items of correspondence are pertinent to the issues arising in the complaint and will be sent to the Standards Committee.

Outcome

The Standards Committee decision is vacated.

Redirection order

Pursuant to section 209 of the Lawyers and Conveyancers Act, and with reference to the comments and observations in this review, the Standards Committee is directed to reconsider and determine the complaint, taking into account all elements of the Practitioner's conduct that are relevant to the complaint, and to issue a decision that is to be subject to review by this office.

DATED this 12th day of October 2011

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

FS as the Applicant
UR as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society