LCRO 271/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Canterbury Westland Standards Committee 1
BETWEEN	**MR BF OBO THE ESTATE OF MR BG** Applicant
AND	**MR CV** Respondent/Practitioner

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

DECISION

Background

[1] The Standards Committee decided to take no further action on a complaint made by Mr BF on behalf of his father, Mr BG. By the time that the Committee issued its decision Mr BG had passed away. The administrator of the estate authorised the continuation of the complaint to review, and appointed Mr BF to deal with it on behalf of the estate.

[2] Mr CV (the Practitioner) had acted for Mr BG for many years, and also for Mr BG's family trust. The family home had been transferred to the Trust, with the trustees being a brother of Mr BF and two independent individuals.

[3] When Mr BG suffered a stroke and was in the hospital in a precarious state of health, his son Mr BF (who had returned to New Zealand from his home [overseas]) contacted the Practitioner with several questions about financial matters relating to his father. In around mid-June, at Mr BF's request, the Practitioner attended the hospital (Mr BF and other family members being present) at which time Mr BF questioned the

Practitioner about the status of the family home in relation to asset testing and in connection with on-going healthcare needs for his father.

The Complaint

[4] Mr BF's complaint was that the Practitioner appeared not to have the knowledge to deal with requests for advice sought at that time; that the Practitioner failed to refer the family to a colleague who could answer their questions; and that the Practitioner had ignored requests for information.

[5] A further complaint alleged that the Practitioner had failed to act on an instruction given by Mr BG. Mr BF contended that the family had suffered loss by reason of having to change lawyers.

Practitioner's Response

[6] In response to the complaint the Practitioner confirmed that he had acted for Mr BG for many years and that he had also acted for the Family Trust, and provided some general background. He had never acted for Mr BF, he wrote, but that his dealings with Mr BF had been difficult, and "characterised by hostility, suspicion, anger and belligerence".[1]

[7] Addressing the specific complaint the Practitioner explained that he learned of his client's stroke on 27 April 2011 when he received telephone calls from a close friend of his client, and from his client's other son. The Practitioner wrote that Mr BF had contacted him on 29 April expressing concerns about his father's health, but also wanting to know whether "the state or whoever"[2] could make a claim against the trust property. On 24 June 2011 Mr BF telephoned again, referring to his father's savings and seeking access to his father's bank account, adding that he wanted to discuss the property.

[8] On 26 June the Practitioner received an email from Mr BF (copy provided to the Standards Committee) regarding a meeting for the following day at the hospital where Mr BG was located. The Practitioner said he attended the meeting at the hospital, and a short time spent alone with his client allowed him to judge that Mr BG was "clearly unwell and confused",[3] and was unable to play any meaningful part in the meeting.

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[1] Letter from Mr CV to Standards Committee (29 March 2012) at [2].
[2] Above n1 at 3.
[3] Above n2.

[9] The Practitioner set out his account of the meeting which he said lasted only a few minutes, describing Mr BF as "aggressive",[4] and concerned about safeguarding the Trust property, and seeking assurances about the Trust property and any potential future liability. The Practitioner stated that Mr BF "was seeking a guarantee that the Trust fund would be preserved".[5] The Practitioner said that Mr BF confirmed his concern to be that the Trust property be preserved beyond his father's life. The property was owned by the Family Trust and the Practitioner explained that he told Mr BF he was unable to provide any such guarantee (for reasons that there could be changes in the law or other factors), and despite Mr BF's pushing for a clearer answer, he (the Practitioner) was unwilling to go further, and reminded Mr BF that he was lawyer for that Trust. The Practitioner added that Mr BF's response was that he may not be the lawyer for much longer and he would get someone who would give a clearer answer.

[10] The Practitioner described Mr BF's behaviour as angry, and perceiving the situation as becoming confrontational and causing his client anxiety, the Practitioner elected to depart, adding that Mr BF had called him a "wanker"[6] as he left the room. The Practitioner wrote that he had only charged for services rendered to the father or the Family Trust.

[11] The Practitioner also commented on a timeline of events that had been provided by Mr BF, and with particular reference to an email sent to the Practitioner on 29 June in the name of his client (sent from Mr BF's email account). The Practitioner said he did not believe that the email was in fact from his client, and he took no action on it. That email had essentially repeated the earlier requests for information, and included an instruction to prepare a power of attorney appointing Mr BF.

Mr BF's Comments

[12] Mr BF considered that the Practitioner's description of him reinforced his complaint. He commented that lawyers are regularly required to be involved in difficult cases, and had a professional duty to be equipped to appropriately handle such situations and personality types. He advised that the decision to change lawyers had been made by the family (including himself), and contended that the Practitioner failed to understand the basic requirement that payment of bills, and the ongoing financial and personal wellbeing of his father, required a power of attorney.

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[4] Above n2.
[5] Above n1 at 4.
[6] Above n5.

[13] Mr BF also commented that the Practitioner was friendly with one of the trustees (of the Family Trust) and questioned his impartiality and "considerable influence"[7] over the trustees. Mr BF advised that the new lawyer was able to provide the family with the advice that had been sought from the Practitioner (with regard to the trust, tax and financial matters) which he saw as proof that it was not a difficult case, and that he (Mr BF) was not a difficult "client". Mr BF concluded that due to the Practitioner's incompetence and lack of communication, his level of service and conduct was unprofessional and unacceptable.

Standards Committee Decision

[14] The Standards Committee considered the information provided by both parties, and also noted the Practitioner's belief that the 29 June email did not represent the words or instructions of his client, Mr BG, which resulted in the Practitioner not engaging further with Mr BF, after which another lawyer was engaged.

[15] The Committee commented that despite being unwell, it was Mr BG who was the Practitioner's client, and that there was no suggestion that Mr BG could not understand advice or give instructions. The Committee noted that there was no suggestion that the advice given by the Practitioner at the 27 June meeting was incorrect. The Committee acknowledged that at times of serious illness family members will rally-around and endeavour to assist that person with care and advice.

[16] The Committee referred to other lawyers being retained to represent Mr BG and the Family Trust, noting that in such circumstances it is to be expected that the new lawyers will spend time familiarising themselves with the matter and that this can result in duplication of work. In those circumstances the Committee did not consider that the Practitioner should compensate for that duplication.

[17] After taking all of relevant matters into account the Committee concluded that no professional conduct issues arose, and decided no further action was necessary.

Review Application

[18] Mr BF sought a review of the decision because he considered that the Standards Committee did not take into account:[8]

> ...crucial aspects of the complaint which provided evidence that [the Practitioner] did not act in the interests of his client, [Mr BG], and that his inaction amounted to

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[7] Letter from Ms BH on behalf of Mr BF to Standards Committee (23 April 2012) at [6].
[8] Application for Review from Mr BF (16 October 2012).

> negligence...and that this inaction forced [Mr BG] to seek legal remedy elsewhere.

The outcome sought was a reduction or cancellation of the outstanding fees to the Practitioner (approximately $1,000).

[19] The overall thrust of his submissions was that at a time when Mr BG most needed the services of his lawyer, the Practitioner was unhelpful and uninformative in respect of serious issues (including forward financial planning) that needed to be addressed. Mr BF emphasised that the Practitioner should have immediately grasped this and provided specific and clear advice.

[20] Mr BF disputed that he was asking for a "guarantee that the trust property could be protected"; rather, he was asking "that the standing of the trust, as it was then and there, be explained and accounted for".[9] He commented that the new lawyer was able to provide that information promptly, which demonstrated that the matters were straight-forward.

[21] Mr BF also questioned why the Practitioner would attend the 27 June meeting, and should have told Mr BF to go elsewhere for legal advice. He considered that the other trustees should have been included in the meeting – by not doing this, the Practitioner created confusion and failed in his duty to Mr BG to give specific advice. He contended that the Practitioner agreed to the 27 June meeting (with Mr BG and Mr BF's two brothers) with no clear purpose in mind or facts to hand, and when pressed, could not provide necessary information, and gave up when placed under pressure. He described the Practitioner as having done his father a grave disservice at a time that called for guidance and expertise.

[22] Of particular concern to him was that the Standards Committee glossed over the Practitioner's acknowledgement that he did not respond to the email he received from Mr BG (the 29 June email), and which was recorded on his timesheet as having come from Mr BG, and billed for. His view was that the Practitioner ought not to have charged for it if he believed that the email did not come from his client. Mr BF claimed that his father dictated the email to him (Mr BF), because he was unable to write due to the stroke. When he did not receive a response from the Practitioner Mr BG retained another lawyer. Mr BF commented that the new lawyer clearly considered that Mr BG had the capacity to give instructions, and was not otherwise being unduly influenced.

[9] Above n8.

Mr BF considers that the fact that his father instructed a new lawyer is clear evidence of his dissatisfaction with the Practitioner and his advice.

[23] In connection with the post-27 June meeting attendances Mr BF regarded most of these as excessive, and evidence of the fact that the Practitioner was deliberately delaying releasing the file to the new lawyers. He noted, for example, that the Practitioner agreed to reduce the time charged for a phone call to one of the independent trustees.

[24] In conclusion Mr BF asserted that if the Practitioner had responded to his father's 29 June email, "all would have been well".[10] Instead, the Practitioner ignored it, yet still billed the father for receiving it.

Practitioner's further submissions

[25] The Practitioner relied upon his submissions to the Standards Committee, but emphasised the following:[11]

- At all times he has acted in the best interests of Mr BG;
- At all material times he had full knowledge of the affairs of the Family Trust, as well as the confidence of the trustees;
- At no point after he had his stroke, did Mr BG ask the Practitioner for legal advice. On the two occasions that he met him after he had the stroke, Mr BG was clearly unwell;
- At no point did he act for Mr BF;
- He was not in a position to discuss Family Trust matters without their consent, or in the absence of the trustees, and as matters unfolded it never reached the stage of getting that consent (new lawyers were retained);
- He did not believe that the 29 June email came from the father, and his time sheet recorded "receive email ([Mr BG])" rather than "receive email from [Mr BG]";
- He denied that there was a protracted handover of the relevant files; the pre-conditions to this occurring were appropriate authorities (which were

[10] Above n8.
[11] Letter from Mr CV to LCRO (6 November 2012).

delayed by the new lawyers) and payment of outstanding invoices (this requirement was ultimately waived by the Practitioner).

[26] In a brief response Mr BF rejected the Practitioner's assertion that he acted at all times in the best interests of Mr BG, and otherwise restated his position.

Hearing On the Papers

[27] With the consent of both parties, this review has been conducted on the papers pursuant to s 206 of the Act which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

Discussion

[28] I have considered all of the material on the Standards Committee file, as well as that provided by the parties for this review. In the context of this review, there appear to be two main issues to consider:

- The advice given by the Practitioner on 27 June 2011; and
- The Practitioner's failure to respond to the 29 June email.

The Meeting on 27 June 2011

[29] The allegation is that the Practitioner's response to questions fell below the standard that could reasonably be expected from a lawyer, given his client's situation.

[30] There are several elements to be considered. First is that Mr BF's email (setting up the meeting at the hospital) did not signal what the Practitioner would be asked to address. While Mr BF was critical of the Practitioner not having a proposed plan of action to deal with issues at that time, it is difficult to see how the Practitioner could have anticipated the questions that Mr BF would put to him. I do not accept that the Practitioner's knowledge about Mr BG's stroke was, alone, sufficient to have put him on notice of what would be sought from him.

[31] Mr BF's criticism of the Practitioner's advice does not demonstrate how that advice fell below the standard that a competent lawyer familiar with the issues should give to their client. I can find no criticism of the Practitioner's response to specific questions posed by Mr BF about the Family Trust. With no prior warning of either the purpose of the meeting or the issues to be covered, it is difficult to see how the Practitioner could have been expected to answer specific questions. Whether or not

the word "guarantee" was indeed used, I accept that the Practitioner understood the question in that light and he prudently qualified his response by reference to uncertainties that might arise in the future. That he could not or would not provide a specific answer to Mr BF's specific questions does not indicate to me that the Practitioner could not have provided an answer. What it suggests is that the Practitioner came unprepared to address specific issues.

[32] Moreover, any discussion concerning the assets of the Trust (which included the family home) would have needed the involvement of the trustees, and nothing could have indicated to the Practitioner that they should attend the meeting. Following on from this, I do not see how the Practitioner could be criticised for failing to bring the trustees to the meeting at the hospital. I reiterate that there was nothing that could have prepared the Practitioner to expect that his client would be seeking particular advice or action, or that his client's family would be looking to him, and the trustees, for information about Mr BG's finances, or about trust assets.

[33] My impression is that Mr BF's criticism is essentially an allegation that the Practitioner failed to respond to the needs and circumstances of his client at the time and failed to provide the necessary advice that was indicted by the circumstances of his client. Mr BF and his family were understandably deeply concerned about their father and how his future care was to be managed, including consideration of financial resources.

[34] I have also considered submissions made by Ms BH, who is a trustee of the Family Trust, and related to the family. Ms BH was authorised to respond for Mr BF after his return [overseas]. She submitted that the Practitioner's description of Mr BF as "forceful" and "intimidating"[12] was evidence of the Practitioner's unprofessional behaviour. Her reasoning was that lawyers are often required to deal with difficult cases involving emotionally charged clients, and they have a professional duty to be equipped to handle such situations and personality types. If this is intended to suggest that lawyers are obliged to put up with rudeness on the part of clients or their families, then I cannot agree. In this case the Practitioner clearly explained why he left the room.

[35] The issue is whether professional conduct concerns arise from the above events. I do not see that there is any proper basis for criticising the Practitioner's conduct in respect of the meeting at the hospital. It is not unusual that conflict or tension arises in situations such as this family found itself in at that time. Nor is it

[12] Above n7 at [4].

unusual that the lawyer known to be connected with the client might be contacted. In such circumstances the lawyer needs to be clear about his or her professional responsibilities, and remain mindful of who is their client. Matters of confidentiality may be crucial.

[36] The fact that a request for information comes from a family member carries with it no special status: the lawyer cannot divulge their client's affairs without the express consent of that client. While the wider family may regard the Practitioner as "the family lawyer", in reality that is a meaningless expression. Lawyers act for clients – sometimes a single member of a family; sometimes for more than one family member or entity. Duties of care and confidentiality extend only to identifiable clients. Materially, neither Mr BF nor other family members were clients of the Practitioner, and he owed Mr BF no particular duty, nor was he professionally obligated to him in any way.

[37] I do not see any professional conduct issues rising from the above events.

Failure to Respond to the 29 June Email.

[38] On 29 June 2011 (two days after the above meeting) the Practitioner received an email (via Mr BF's email account) with a list of questions. Mr BF insisted that the content of the email was dictated by his father, but the Practitioner doubted this was so and he did not respond.

[39] The Practitioner explained that having dealt with Mr BG for a number of years, and having observed him two days before, and noting the content of the email, he did not accept this email as having come from his client.

[40] The question is whether professional conduct issues arise from the Practitioner's failure to have responded to that email.

[41] In my view the Practitioner has provided a reasonable explanation for not acting on the email purportedly sent by Mr BG and I accept that his doubts that the email could have been dictated by Mr BG was supported by his own observations of Mr BG's condition and circumstances. The Practitioner would also likely have noted that the questions included in the email reflected those raised by Mr BF himself at the hospital meeting.

[42] Considering these matters, also taking into account that the Practitioner might have been more helpful, I can find no basis for a disciplinary finding against the Practitioner. No prudent lawyer would act on any instruction where there was doubt

about the source of that instruction, and in particular there could be no criticism of the Practitioner in such circumstances for not responding to the proposal that a power of attorney be prepared as requested.

Additional Observation

[43] Notwithstanding the above, and Mr BF's misplaced assumption about the professional responsibilities of lawyers, it seemed to me that the Practitioner might have been more helpful in the circumstances, especially when he became fully aware of the difficult situation for the family, and where there were questions about the extent to which Mr BG was well enough to impart instructions. It would have been open to him to have responded in some affirmative way when receiving the email, beyond merely speaking on the telephone to one of the independent trustees. There is some merit in the suggestion that he could have endeavoured to meet with Mr BG and the trustees in circumstances in which advice could be freely sought and given, it being within the Practitioner's scope of professional responsibility to consider his client's best interests at that time. It is possible that Mr BF might have insisted upon being present, but the Practitioner could then have assessed whether it was in Mr BG's best interests for any meeting to proceed.

[44] In that light I accept that to some extent there is merit in Mr BF's criticism of the Practitioner's failure to have been proactive, particularly insofar as the 27 June meeting raised the potential problem about the cost of long term health care for Mr BG, and the Practitioner could have taken steps to coordinate the trustees and Mr BG, met with them and provided advice and guidance. Mr BF speculated that had the Practitioner been more responsive when he received the email, matters would have proceeded smoothly and normally.

[45] The Practitioner's explanation is as follows: [13]

> I did intend to see [Mr BG] but was of the view, having heard the comments of [Mr BF] at the meeting [on 27 June 2011], that it would be inappropriate to do so. [Mr BF] had clearly indicated that changes were to be made. ...[Mr BF] is a forceful personality. If I had returned to see [Mr BG], no doubt that would have caused a further pressure upon him and having to choose whether to retain me as a solicitor or to go against the wishes of [Mr BF]. I did not want that situation to arise.

[13] Letter from Mr CV to the Standards Committee (29 March 2012) at 4.

[46] It may well be that the Practitioner's experience of Mr BF's overbearing behaviour led him to consider whether Mr BG might be under some pressure from Mr BF, and that he did not wish to place any more stress on Mr BG. At the same time the Practitioner might also have considered that Mr BF's behaviour was affected by his concern for his father's wellbeing.

[47] These observations are reasonable despite there being no professional conduct issues arising in this complaint.

Delay in Forwarding File to New Lawyers

[48] It appears that the family began taking steps in mid-July 2011 for the father to be represented by a different lawyer. On 2 September the Practitioner received a letter from the new lawyers, informing him that they were now acting. Over the next few months there were exchanges of correspondence with the new lawyers whilst the appropriate authorities to uplift the files were prepared and provided. By early 2012, all files had been delivered by the Practitioner to the new lawyers, but there remained an outstanding invoice of $1,093.78 (GST inclusive).

[49] Two complaints arose from this. In the first, Mr BF claimed that all matters were quickly and efficiently organised by the new lawyer, and that the Practitioner delayed matters by taking his time to deliver the relevant client files to the lawyer. The Practitioner denied any protracted handover of the files. He wrote that he had made it clear that the documents would be released on payment of his fees, and the appropriate authority being sent to him by the trustees. The Practitioner added that he did release the files even though all of his fees were not paid.

[50] Chapter 4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 deals with the termination of a retainer, and the Practitioner's obligations to release files. Lawyers are entitled to exercise a lien over a file where there are unpaid fees.

[51] Mr BF did not address this issue when commenting on the Practitioners' response. It may be that he considered the second complaint fully answered the matter, namely concerning the Practitioner having charged a fee in respect of the 29 June email, yet having denied it came from his father. Mr BF's point is that the Practitioner must have known that the email contained his father's instructions, as he recorded it on his timesheet and charged for receiving it. He likened it to 'fraud' that the Practitioner should claim that it wasn't an instruction from his client, and yet charge for it.

[52] On that point, it is perfectly acceptable for a lawyer to record and charge for incoming correspondence, whatever its provenance. Lawyers have no control over the correspondence they receive, and to suggest that they should only make a charge for authenticated material is untenable. This was not a reason for non-payment of the Practitioner's fees. There is nothing to indicate that the Practitioner was in breach of his obligations under Rule 4.[14]

[53] Mr BF also sought compensation for the advice he got from the new lawyer, which the Practitioner had failed to provide. I do not accept this as the proper basis for compensation, and agree with the approach taken by the Standards Committee which noted that when there is a change of lawyer it is not unreasonable that there may be some duplication of legal charges given that the new lawyer has to familiarise themselves with something that the former lawyer has already charged for.

[54] Having found no breach by the Practitioner of his professional obligations it is appropriate to confirm the Standards Committee's decision as correct.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Standards Committee's decision is confirmed.

DATED this 6th day of September 2013

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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:

Mr BF as the Applicant
Mr CV as the Respondent
The Canterbury-Westland Standards Committee
The New Zealand Law Society

[14] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.