LCRO 272/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Standards Committee
BETWEEN	**Mr IV** Applicant
AND	**Ms DD, Ms EE AND Ms FF** Respondents

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

Introduction

[1] Mr IV has applied for a review of the determination by the Standards Committee that he had demonstrated unsatisfactory conduct by:

- rendering fees which were not fair and reasonable;
- failing to communicate with and supply information to his clients;
- a lack of cooperation with the complaints process; and
- breach of regulation 9 trust account regulations.[1]

[2] Having determined that Mr IV's conduct constituted unsatisfactory conduct the Committee:

- censured Mr IV;

[1] Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

- imposed a fine of $500;
- ordered Mr IV to pay $500 by way of costs;
- ordered Mr IV to refund fees charged and received above $9,500 plus GST.

Background

[3] Mr IV acted in the administration of the estate of the late AA. AA was Ms DD's grandfather.[2]

[4] The substitute executors named in Mr AA's will were his two children, Mr BB and Mrs CC. Mrs CC lived in England. Mr BB predeceased his father.

[5] Mr AA's will provided that his estate was to pass to his wife if she survived him for 30 days. If she did not survive him[3] Mr AA's estate was to be divided equally between his children. As Mr BB had predeceased his father, his share of the estate was to be divided equally between his children, Ms DD and her two sisters.

[6] The assets of the estate are listed in paragraph 2.7 of the Standards Committee determination.[4] They included a property in [City A] which was to be sold. Ms DD and her two sisters lived in [City A]

[7] As Mrs CC lived in England she could not attend to the duties required of her as executrix of the will with regard to the New Zealand assets. Specifically, this related to the attendances required to ready the property in [City A] for sale and its ultimate sale.

[8] Probate was granted on the following terms:

> 3. This Probate document appoints Mr IV of [City A], Solicitor, as the lawfully constituted attorney in New Zealand of Ms CC of [Town], England the surviving substitute executor named in the will, the instituted executor Mrs AW having predeceased the executor, and the other substituted executor Mr BB having predeceased the testator, for the use and benefit of the said Ms CC and limited until she shall apply for and obtain grant of administration to herself the surviving substitute executor named in the will as Ms CC as the administrator of the deceased's estate.

[2] Ms DD lodged the complaint on behalf of the respondents (herself and her two sisters) and also represented them for this review. When I refer to Ms DD in this decision, it is for herself and in her capacity as a representative of the respondents.
[3] The will did not include the requirement to survive the testator by 30 days.
[4] Standards Committee determination (14 September 2012).

[9] Ms DD and her two sisters have complained about Mr IV's conduct in administering their grandfather's estate.

The complaints

[10] Ms DD clearly set out her complaints to the Lawyers Complaints Service.

Lack of communication regarding estate distribution and associated fees

[11] Ms DD advised that distributions were made to her aunt (Mrs CC) herself and her sisters in October 2010 "with no prior knowledge of the sum to be received and without correspondence or supporting documentation".

[12] She goes on to advise that further smaller distributions were received in May 2011 "also without correspondence or supporting documentation".

[13] She further advises that it was not until some six months later, after requests by Mrs CC, that a "statement of receipt and payments" dated 13 April 2011 was received. She complains that:

> the statement failed to show the sale price of the residence and deductions from it – referring to "proceeds sale of residence" only, and also disclosed a considerable sum in unexplained fees charged by [Mr IV] which had not been invoiced, approved or notified prior to distribution.

[14] She goes on to state that Mr IV was dilatory in his responses to requests for further information, if not ignoring such requests completely.

Discrepant values of proceeds from house sale brought to Mr IV's attention with no response

[15] Ms DD notes that the balance shown in a statement relating to the sale of the property was not the same as the amount being credited to the estate.

Requests by beneficiaries for information to confirm estate had been satisfactorily administered met with brief and selective response

[16] Ms DD relates difficulties in obtaining information and copies of documents from Mr IV.

Costs

[17] Finally, Ms DD complains about Mr IV's costs.

The Standards Committee determination

[18] In its determination, the Standards Committee made particular note of a lack of cooperation by Mr IV with the Standards Committee. This resulted in a finding of unsatisfactory conduct.

[19] The Committee also made findings of unsatisfactory conduct against Mr IV for:

- rendering fees that were not fair and reasonable;
- failing to communicate and supply information to his clients; and
- breaching reg 9 of the Trust Account Regulations.

[20] I refer to the content of the Standards Committee determination where necessary subsequently, but record here the Committee's comments with regard to Mr IV's authority to deduct fees from Estate funds:

> 1.3 Having carefully considered the matter the Committee is of the view that Mr IV, as Mrs CC's lawful attorney, is able to have an implied right to charge her for his services imported into the power of attorney documents.
>
> 1.4 Lawyers normally charge for their services. No one would expect a lawyer to act without charging, unless there were some other family or social connection with the principal or a pro bono consideration. The fact that a lawyer would expect to charge for estate and Probate services, including when acting as attorney in New Zealand or for an overseas executor, must be sufficiently obvious for it to be imported into the agency agreement as a part of custom and usage.
>
> 1.5 The legal position is that Mr IV may charge his principal, Mrs CC, for his services. As executrix, she has the usual right to be indemnified for all such costs out of the estate – as would any other trustee.

[21] Having made findings of unsatisfactory conduct, the Committee imposed the penalties set out in [2].

Review

[22] The progress of this review was somewhat disrupted by Mr IV's ill health and the death of his counsel. The review ultimately proceeded by way of a hearing in [City B] on 28 January 2016 attended by Mr IV and Ms DD, who was accompanied by a support person.

What was Mr IV's role?

[23] An important issue to be addressed in this review is the status of Mr IV in relation to the estate. This has a direct bearing on whether or not he was able to deduct fees from funds held in the firm's trust account for the estate and his reporting obligations.

[24] Mrs CC was the sole surviving substitute executor. She lived in England and was unable to attend to practical matters required of an executor in New Zealand. Mr IV says:[5]

> That meant that I had to advise the surviving executor named in the will of the alternatives that were open to her in respect of Probate. She chose to appoint me to apply for Probate.

[25] He does not advise whether or not he canvassed with Mrs CC the option of renouncing Probate and having any one or more of the respondents apply. Even if they had not formally applied for Probate, Ms DD says she would have been happy to attend to whatever was needed, and presumably her sisters would have too.

[26] There is some confusion, not least in Mr IV's own mind, as to whether or not he was appointed executor of the will. In the second sentence of his response to the complaint,[6] Mr IV says "I was the executor in the estate".

[27] At other times, he reiterated the fact that he was Mrs CC's attorney.[7] That is a fact which is clearly established by the wording of the Probate as set out in paragraph [8] above. It is an important fact to note.

Deduction of fees

[28] The Standards Committee recorded in [1.5] of its determination (set out in [20] above), its view that Mr IV had an implied right to charge the Estate for services rendered to Mrs CC.

[29] Before reaching this view, the Committee took advice on the issue. I do not intend to address this issue, other than to note that the Standards Committee position rests on an acceptance that Mrs CC was entitled to be indemnified by the Estate for the costs incurred.

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[5] Undated letter IV to Lawyers Complaints Service received 7 November 2011.
[6] Above n 5.
[7] See for example email IV to Lawyers Complaint Service (2 April 2012).

[30] This is a matter of law which neither the Committee nor I should pronounce on. However, the Committee did not base any of its findings of unsatisfactory conduct on this.

Regulation 9

[31] The Committee found that Mr IV had breached regulation 9 of the Trust Account Regulations. This regulation provides:

> **9 Restriction on debiting trust accounts with fees**
>
> (1) No trust account may be debited with any fees of a practice (except commission properly chargeable on the collection of money and disbursements) unless—
>
> (a) a dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or
>
> (b) an authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.
>
> (2) If fees are debited under subclause (1)(a), an invoice must be delivered or posted to the person who has a legal or beneficial interest in the trust account to be debited before or immediately after the fees are debited.
>
> (3) For the purposes of subclause (2), a practitioner or partner in the practice is not to be treated as having a legal or beneficial interest in the trust account to be debited, solely because the practitioner or partner issues the invoice in respect of that trust account.

[32] The Committee found that Mr IV had breached reg 9 by failing to provide a copy of his accounts to the respondents.[8] It is unclear whether Mr IV provided his accounts to Mrs CC, but the basis on which the Committee determined Mr IV had breached reg 9 seems to be set out in [2.10.1] of the determination, where the Committee says "The Complainants say they twice asked for a breakdown of how the fee was incurred and did not receive an explanation". Mr IV did not directly answer this complaint in his response to the Committee.[9]

[33] The initial reaction to the question as to whether or not Mr IV was obliged to provide his accounts to Ms DD and her sisters before he could deduct his fees is that Mrs CC was the executor and he was her attorney. All he needed to do was to prepare his account and leave it on his file. This would apparently satisfy regulation 9(1)(a).

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[8] Above n 4, at [2.14]
[9] Above n 5.

[34] However, regulation 9(2) requires a lawyer to deliver his or her invoice to "the person who has a legal or **beneficial** interest in the trust account to be debited before or immediately after the fees are debited".

[35] A beneficiary under a will is beneficially interested in the estate funds, and must therefore be provided with a copy of the invoice. This may come as something of a surprise to many lawyers, but links in with s 160 of the Lawyers and Conveyancers Act 2006, which enables a beneficiary under a will (and others) to complain about a lawyer's bill of costs.

[36] It is possible that many lawyers, may comply with this requirement almost inadvertently. At the review hearing Mr IV did not accept my suggestion to him, that it was good practice to obtain a Deed of Release from beneficiaries before making distributions in an estate, and in conjunction with seeking the Deed of Release, a lawyer would have to provide information to beneficiaries about the assets and liabilities of the estate, and costs incurred in administering the estate. I note this is the practice recommended in the Legal Practice Manual published by Auckland District Law Society Inc in the chapter on Administration of Estates where the authors state:[10]

> It is not an unreasonable personal representative who asks for the protection of a deed of release. Many probate practitioners recommend such a clearance as a matter of course.
>
> It is generally considered that a deed of release that exhibits and expresses approval of the estate financial statements, or at least approval of a distribution account, is highly preferable to one that is a bare expression of discharge. Non-disclosure of basis data might, in some circumstances, constitute a ground for challenge. Express approval of adequate accounts on which the distribution has been made, removes the most likely source of such a challenge.

[37] Given that Mr IV had not provided his invoice to the respondents, it follows that he has breached reg 9. I therefore confirm the finding of unsatisfactory conduct.

Failing to communicate and supply information to his clients

[38] The Committee also found that Mr IV had demonstrated unsatisfactory conduct by failing to communicate and supply information to **his clients**. Mrs CC was Mr IV's client. The beneficiaries of the estate were not Mr IV's clients and consequently this finding by the Committee could only stand in respect of a failure to provide Mrs CC with information. Although she has seemingly acquiesced in this complaint, she cannot be regarded a complainant in her own right.

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[10] ADLS Legal Practice Manual *Administration of Estates* (vol 6 – ch 3) at [5.1] and [5.3].

[39] The note dated 5 September 2011 from her, addressed "to whom it may concern" provided with the complaint to the Lawyers Complaints Service, authorises Ms DD and her sisters "to do whatever they feel necessary to further their inquiries into matters relating to the above estate including referring the matter to the NZ Law Society". Mrs CC has not provided any information herself to the Committee and as Mr IV's duties were to inform her, it is not possible to come to a view to the requisite standard, based on the evidence provided, that Mr IV has failed in his duty to Mrs CC.

[40] The finding of unsatisfactory conduct for failing to communicate and supply information to "his clients", is therefore reversed.

The discrepancy in the accounts

[41] Mr IV's responses to the questions asked of him about the discrepancy between the statements supplied by him in relation to the sale of the property were rather obtuse. He did not address this complaint in his response[11] to the Lawyers Complaints Service, even though it was clearly raised in the letter of complaint. In a subsequent email[12] he says "I do not understand the discrepancies. There is none as far as I am aware".

[42] The undated statement headed "Sale – [Address] [City A]" shows a debit of $293,722.03 with a narration "Transfer to main estate ledger". On the statement dated 13 April 2011 headed "AA estate Receipts and Payments" there is a credit of $292,282.78 with the narration "Proceeds sale of residence". The difference is clear.

[43] Even at the review hearing when I referred Mr IV to these two statements he continued to assert he could not see the issue and assured me that any discrepancies would have been noted when the firm's trust account was audited. An audit of the firm's trust account would not necessarily mean that these variations in the statements would have been noted. The discrepancy does require an explanation.

[44] Mr IV undertook to investigate the matter and send an explanation of the reason for the discrepancy following the hearing. He then provided by way of explanation, a copy of the firm's trust account ledger for the sale of the property, which shows two amounts being debited to the sale file, and credited to the estate file, the two amounts being $288,688.53 and $5,033.50 (total $293,722.03).

[11] Above n 5.
[12] Above n 7.

[45] The statement dated 13 April 2011 records a credit of $292,282.78. I see no other credit in the statement which accounts for the difference of $1,439.25. I do not consider the difference has been explained but it is beyond the scope of this review to endeavour to clarify this issue.

[46] If Mrs CC remains unsatisfied, she may bring this to the attention of the Complaints Service by way of a further (and direct) complaint herself. Mr IV may of course finally accept there is a discrepancy to be addressed and clear the matter up before it progresses.

Lack of co-operation

[47] Mr IV's obtuseness with regard to this matter followed his seemingly uncooperative responses to the Committee, which led it to comment at length[13] on his obligations to the Committee. This lack of co-operation is apparent in his responses to requests for the details of his fees. The information supplied by Mr IV to the Committee was incomplete, and led the Committee to comment that "the print out is not helpful except to extent it records that 50 hours of time was spent".

[48] The Committee found that Mr IV's lack of cooperation constituted unsatisfactory conduct. That was not of course part of Ms DD's complaint and I can see nothing on the file where the Committee pursued this matter on the basis of an own motion pursuant to s 130(c) of the Lawyers and Conveyancers Act. Consequently, the finding of unsatisfactory conduct for a lack of co-operation with the Committee cannot stand.

[49] In passing, I note I have been unable to find a copy of a Notice of Hearing on the Standards Committee file, and the Complaints Service may wish to investigate this apparent procedural lapse further. This comment is made in relation to the functions of this Office set out in s 192(c) of the Act.

Mr IV's costs

[50] The most significant finding of the Committee was a finding of unsatisfactory conduct against Mr IV for rendering fees which were not fair and reasonable. It reduced Mr IV's fees from $26,116.57 to $9,500 plus GST. It gave no reasons as to how it arrived at the conclusion that this represented a fair and reasonable fee. However, Mr IV himself, has done little to add to the Committee's understanding of his

[13] Above n 4, at [3.3].

bills of costs and I note and agree with the following comments made by the Committee:

> 2.2 Mr IV's response to the costs complaint (he was invited by the Committee in writing on 19 October 2011 to make submissions in response) was a discourse on the duties of an executor and a narrative rundown of what work he did in the course of administration, but without reference to the time spent.
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> 2.3 Following a request Mr IV then produced a print out of the time recorded for this project.
>
> 2.4 The print out is not helpful except to the extent it records that 50 hours of time was spent. No specific narrative was disclosed indicating exactly what work was done. There are only general "Activity" headings such as "Attending", "Perusing" and "Correspondence".
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> 2.5 A further request for clarification including that "any diary submitted should have a narrative entry in one column and a time record in corresponding column" was met with a re-worked copy of the print out referred to in 2.3 above. This had a number of specific hand written entries added but for the period 10 September 2009 to 7 September 2011 the narratives are general in nature and do not disclose what actual work was carried out.
>
> 2.6 So despite requests being made the Committee received information and detail from Mr IV which in the end, has been largely unhelpful.

[51] Immediately prior to the review hearing Mr IV sent me copies of the timesheets which had been supplied to the Committee, together with a 34 page fee survey report carried out by Validatum Limited in 2009 in relation to fees charged by law firms for wills and deceased estate administration. Mr IV did not refer to any particular sections of the report or provide any submissions as to how the report related to the work done and the fees charged by him.

[52] I am familiar with this report and refer to a previous decision of this Office[14] in which the LCRO rejected a submission that a lawyer was able to charge a higher fee in circumstances where he or she held a joint status as trustee/executor, and as a solicitor acting in the administration of the estate.[15]

[53] Mr IV did not specifically advance that proposition although the Committee noted that on the basis of approximately 50 hours time recorded, Mr IV's hourly rate would be $522. The Committee made no comment on that, but it is an excessive hourly rate for the type of work being undertaken.

[54] Without any detail being provided by Mr IV, I can only assume that the work carried out by him included work that Mrs CC would otherwise have carried out as

[14] *Mr A W v Mr Z K* LCRO 230/2012.
[15] At [38].

executor of the will if she had been in New Zealand, or indeed, work that Ms DD and/or her sisters would readily have undertaken if asked. I refer for example to references in the trust account ledger to payment for gardening work on the property and for the house to be cleaned (Chemwash). In the absence of explanation by Mr IV, it can only be assumed that he has billed all attendances for the preparation of the house for sale. He has not provided any detail of the work carried out or explanations of what was done, or the need for it to be done. Without this detail, it is not possible to assess what could have been done by Mrs CC if she was in New Zealand, or by the respondents. I do not accept that these costs can be automatically billed to the Estate, and as noted by the LCRO in *Mr AW v Mr ZK* referring to *Young v Hansen,*[16] "equity requires a trustee to act gratuitously".

[55] The Committee noted the assets of the estate as comprising the house, and some bank accounts, although one of these was an overseas account which necessitated Probate being granted overseas. Again, there is little, if any evidence provided by Mr IV about this, but it may very well be that this proved to be more expensive than obtaining Probate in New Zealand and having Probate resealed.

[56] As well as taking the observations in the preceding paragraphs into account, I take note primarily of the assessment by the Committee of what would constitute a fair and reasonable fee for administration of an estate comprising the assets recorded in the Standards Committee determination.[17]

[57] Before coming to a final decision on this matter, I have referred to what little evidence on review Mr IV provided in support of his contention that the Standards Committee determination was not correct. In the review application, he submitted that he considers "the fee to be fair and reasonable complying with the criteria in chapter 9 Lawyers Conduct and Client Care Rules 2008". He has not provided any detailed comment with regard to each of the factors to be referred to, set out in rule 9.1 of the Conduct and Client Care Rules, when assessing what constitutes a fair and reasonable fee.

[58] I have noted above that his apparent hourly rate of $522 exceed considerably what could be considered to be a fair and reasonable hourly rate for this type of work. At the review hearing Mr IV advised that the crux of his submission was that the Committee did not provide any reasons for its decision. Conversely, Mr IV provides little to support the reasons for his disagreement with the Committee. He mentioned

[16] *Young v Hansen* [2004] 1 NZLR 37 (CA) at [4] and [27]-[36].
[17] Above n 4.

that the Committee had overlooked the fact there were two estates – one in New Zealand and one in the Isle of Man. I have commented on that above.

[59] The Committee did not obtain a report from a costs assessor but that is not necessarily required in all cases. The Committee is made up of lawyers and lay persons. It is to be assumed that some, if not all of the lawyers, will be familiar with or practicing in the administration of estates. Their view is not to be discounted. The difficulty which the Committee had in extracting meaningful information from Mr IV can also not be discounted.

[60] Having considered all of these issues, I have come to the view there is every reason to accept the Committee's determination and very little if anything to enable me to reach a different view. In the circumstances the determination of the Committee with regard to costs is confirmed.

Summary

[61] In summary, I have found that the findings of unsatisfactory conduct with regard to fees and the breach of regulation 9 are confirmed. The findings of unsatisfactory conduct with regard to the failure to communicate with his clients and the lack of cooperation are reversed.

Penalty

[62] The Standards Committee censured Mr IV, imposed a fine of $500, ordered him to pay costs of $500 and to reduce his fees to $9,500 plus GST. I will address each of these.

Censure

[63] A censure has been described by the Court of Appeal as:[18]

> a formal or official statement rebuking a practitioner for his or her unsatisfactory conduct. A censure or reprimand, however expressed, is likely to be of particular significance in this context because it will be taken into account in the event of a further complaint against the practitioner in respect of his or her ongoing conduct. We therefore do not see any distinction between a harsh or a soft rebuke: a rebuke of a professional person will inevitably be taken seriously.

[64] I have noted above that lawyers may be surprised at the requirement of regulation 9(2) to render an invoice to persons beneficially entitled to funds held in a

[18] *NZLS v B* [2013] NZCA 156, [2013] NZAR 970 at [39].

lawyer's trust account. I therefore accept Mr IV may not have been aware of this requirement.

[65] I do not consider the fees charged to be moving towards a level where further condemnation is required. I say this predominantly because there is a lack of evidence as to what it was that Mr IV undertook, but his time records do show he was engaged on matters for the estate for the period recorded.

[66] I do not consider the extra level of opprobrium inherent in a censure to be appropriate, so therefore reverse the censure imposed by the Committee.

Fine

[67] I have confirmed two findings of unsatisfactory conduct against Mr IV. The fine of $500 imposed by the Committee represents a fine at the lower end of the scale, if not the lowest.[19] I therefore confirm the fine.

Costs

[68] Again, the level of costs ordered by the Committee to be paid is towards the lower end of the scale if not the lowest of orders made by a Standards Committee for breach of either the Act or Conduct and Client Care Rules. I have confirmed two findings of unsatisfactory conduct. The order for payment of costs in the sum of $500 will therefore stand.

Further training

[69] Section 156(1)(m) of the Lawyers and Conveyancers Act provides that a Standards Committee or this Office, may order a practitioner to undergo practical training or education. Mr IV has been in practice for more than 50 years, and advised he had undertaken Estate Administration work for more than 40 years. I can see no purpose in ordering Mr IV to undertake further education. It is up to Mr IV to ensure he is acquainted with current requirements and practice.

Decision

[70] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

(1) The censure by the Standards Committee is withdrawn.

[19] The maximum fine that may be imposed is $15,000 pursuant to s 156(1)(i) Lawyers and Conveyancers Act 2006.

(2) The findings of unsatisfactory conduct with regard to the failure to communicate and supply information to his clients, and for lack of cooperation are reversed.

(3) In all other respects the findings of the Standards Committee are confirmed.

Costs

[71] Mr IV's review application has been partially successful. Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 Mr IV is ordered to pay the sum of $800 towards the costs of this review, being one half of the costs which would otherwise be ordered where a Standards Committee determination is confirmed in full.[20] Such sum is to be paid to the New Zealand Law Society by no later than [1 month].

Publication

[72] Section 206(4) provides that I may order publication of this decision as considered necessary in the public interest. Publication usually takes the form of a summary of the decision in the NZLS publication "LawTalk", which is disseminated to all lawyers. I therefore authorise NZLS, at its discretion, to publish the comments in this decision relating to reg 9 removing any detail which may identify any person or firm referred to in this decision.

DATED this 1st day of March 2016

O W J Vaughan
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:

IV as the Applicant
DD, EE and FF as the Respondents
The Standards Committee
The New Zealand Law Society
HP as a related person as per s 213

[20] Refer LCRO Costs Orders Guidelines.