LCRO 281/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee
BETWEEN	**CE** Applicant
AND	**DT** Respondent

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

DECISION

Introduction

[1] The Standards Committee made a finding of unsatisfactory conduct against lawyer CE (the Practitioner) by reason of his failing to have provided his client, DT (the Respondent), with information in keeping with his obligations under Chapter 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). This concerned his failure to have provided the Respondent with a Letter of Engagement. The Practitioner is a barrister, and considered himself exempt from this obligation but in the Committee's view, the fact that another lawyer had provided the Respondent with information about services did not exempt the Practitioner from complying with his obligations to provide client information to her. He was ordered to pay a fine of $1,000 and costs of $500.

Review Application

[2] The Practitioner sought a review of the Standards Committee decision. There was one ground for his review application. He maintained that he is exempt from the obligation imposed by Rule 3.4 of the Rules because he had been instructed by

another lawyer to act for the Respondent. The Practitioner referred to Rule 3.7(a) in support of his application.

[3] A review hearing took place on 21 August 2013, attended by the Practitioner. The Respondent was linked in by telephone from [overseas].

Discussion

[4] The review issue is whether, by virtue of Rule 3.7, the Practitioner is exempt from Rules 3.4 and 3.5 of the Rules. The latter Rules require a lawyer to provide to a client certain information prior to commencing a retainer. That information concerns how fees will be charged and are to be paid; information about the lawyers' fidelity fund and complaints mechanisms; information about the name and status of the person or persons who will have the general responsibility for the work; and any other terms that are relevant to the retainer.

[5] A lawyer who is instructed by another lawyer is not required to comply with that obligation. This is made clear by Rule 3.7(a) which states that Rules 3.4 and 3.5 do not apply where:

> ...the lawyer is instructed by another lawyer or by a member of the legal profession in an overseas country, unless the fee information or other advice is requested by the instructing lawyer or member of the legal profession, as the case may be...

[6] The Practitioner's position is that he relies on the above exemption. There was nothing in the Standards Committee decision to suggest that the Committee had given any consideration to Rule 3.7 and its terms. The Committee wrote:[1]

> The fact that another lawyer, [DU], provided [the Respondent] with information about services provided by [DU], did not exempt [the Practitioner] from complying with his obligation of providing client information to [the Respondent] in keeping with [Rule 3 of the Rules].

Background to the complaint

[7] The complaint arose when the Practitioner took steps (in the Disputes Tribunal) to challenge the quantum of the Respondent's professional fee for services she had provided to him – she had deducted her fee by way of a set-off when she paid the

[1] Standards Committee Determination (16 November 2011) at [20].

Practitioner's fees for services rendered to her. The Practitioner considered the set-off was excessive and for that reason sought to challenge her bill.

Complaint

[8] In her original complaint the Respondent referred to having paid the Practitioner fees in excess of a quote of $3,500, and that the Practitioner had not honoured a contra-deal arrangement with her in respect of services she had provided to him. She mentioned that there was nothing in writing but she had trusted him to honour the arrangement. She sought a refund of overpaid fees.

[9] Her letter of complaint described the circumstances leading to her providing healing services to the Practitioner, and recorded her impression that most of the work (on her employment issue) had already been done. She wrote that she was "completely stunned"[2] on receiving the Practitioner's final bill of $6781.31 and went to discuss this with him but did not question the bill as her focus was on how she would pay it, and payment arrangements were then agreed. She alleged that the Practitioner became "very upset" when she later sought details about the bill. She explained that the Practitioner then emailed her a "Creditors' Application for Adjunction Order", following which the Respondent emailed the Practitioner her own invoice in the sum of $1,230 (incl) for services she had provided (including details) and added that the further services he had sought were cancelled when he realised her fees. She explained that when she heard nothing further she assumed he accepted her charges, and she deducted these from the final payments to the Practitioner, and was surprised when he lodged a claim against her in the Disputes Tribunal.

[10] The complaint that the Practitioner had not provided her with any written terms and conditions was seized on by the Standards Committee and ultimately became the central focus of its investigation, leading to its adverse finding against the Practitioner.

Practitioner's Response

[11] The Practitioner informed the Standards Committee that a solicitor, DU, had acted for the Respondent since December 2008 and he had provided her with a Letter of Engagement. The Practitioner said he was instructed in November 2009, at which time DU was the solicitor on the record but this was changed because the Respondent was considering lodging a complaint against DU and it was therefore appropriate to have him removed. The Practitioner then arranged for CF to be his instructing solicitor

[2] Complaint by DT to NZLS (16 May 2011).

on a reverse brief arrangement on the basis that CF had no responsibility for the Practitioner's fee. The Practitioner said that the Respondent was aware of this arrangement and the reason for it.

[12] The Practitioner explained that he considered it unnecessary to provide a further Letter of Engagement to the Respondent.

[13] The Practitioner said that he had given her a fees estimate of $6,000 which he had complied with. He noted that the Respondent had paid his first invoice without any objection and following her enquiry about costs limits, he had assured her that he would not exceed the quoted amount. The Practitioner noted that there had been no complaint about his fees until he lodged a claim against her in the Disputes Tribunal.

Respondent's Comments on the Practitioner's Response

[14] The Respondent informed the Committee that she had never received a Letter of Engagement from DU, and questioned whether the Practitioner had seen such a letter. She also questioned how DU could be considered to have been the instructing solicitor when she had dispensed with DU's services prior to approaching the Practitioner. She said she had never met CF and was unaware of any arrangements between him and the Practitioner.

[15] She reiterated that the agreed amount for the Practitioner's services was $3,500. She also noted that the Practitioner had made no mention of the "fees arrangement" he entered with her, and questioned whether this may have been made more explicit had there been a Letter of Engagement. As to the timing of her complaint, she referred to the distress caused by the employment dispute, and having been forced to take action because of the Practitioner's threat to bankrupt her.

Standards Committee Enquiry

[16] On the Standards Committee file was a copy of its Minute of a July 2011 meeting, wherein the Committee noted the exemption raised by Rule 3.7(a), and also recorded the necessity to obtain further details from the Practitioner and both of the instructing solicitors about fees charged and amounts paid, details of the terms of engagement, and information about the set-off claimed by the Respondent. This appears not to have been done because the Committee's file shows that the only letter sent thereafter was to the Practitioner, with a request for this information. The file suggests that no enquiry was made of either DU or CF.

[17] In reply to the Committee's enquiry, the Practitioner informed the Committee that he had understood DU had provided a Letter of Engagement but he himself did not have a copy, adding that he did not consider it necessary to do so himself given that the instruction was a continuing one. He informed the Committee that his agreement with the Respondent at the outset was an hourly rate of $350, with an estimated total fee of $6,000.

[18] As to the matter before the Disputes Tribunal, the Practitioner stated that he had referred to the Tribunal the Respondent's bill of $1,230 for five sessions which he claimed should have totalled $450.

[19] In a further letter the Practitioner informed the Committee that he had never estimated a fee of $3,500 and never would for a matter of this nature. He said his interim fee had exceeded this in any event, and this was provided before the matter had gone to trial. He wrote:[3]

> No issue was raised because there was no issue. No issue was raised regarding the final fee in June 2010. The first time any mention of a $3,500 estimate was in an email from the Complainant in December 2010 – six months after the final invoice was sent.

The Practitioner continued that it was "ridiculous"[4] to suggest that he would work for $3,500 for a complex matter, which at his rate of $350 per hour, amounted to ten hours. He referred to amending the claim, drafting briefs, preparing opening and closing submissions and attending a hearing, receiving the decision and all incidental attendances.

[20] I note that the Committee accepted that the Practitioner had an instructing solicitor, finding no evidence that he had failed to comply with his obligations under Rule 14 or 14.4. It seems the Committee also accepted that DU had provided the Respondent with a Letter of Engagement. The Committee nevertheless concluded that this did not exempt the Practitioner from complying with his own obligations under that Rule. As noted, this is at the heart of the Practitioner's review application.

Review hearing

[21] At the review hearing the Practitioner repeated his assertion that, as a barrister, he was exempt from the obligations in Rule 3.4 and 3.5.

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[3] Letter from CE to NZLS (8 September 2011).
[4] Above n3.

[22] The Respondent repeated her challenge of the Practitioner's claim to have been instructed by DU whose services had been terminated before she approached the Practitioner. She referred to the absence of any Letter of Engagement in her file (that the Practitioner had uplifted from DU), contending that it was the responsibility of the Practitioner to have checked that such a letter had been sent.

[23] The Practitioner's evidence was that he had contacted DU to get the Respondent's file, and that DU had advised him that a Letter of Engagement had been sent. He referred to telephone exchanges between himself and DU.

Discussion

[24] What is clear in this case is that if there was an 'instructing solicitor', then the usual steps for such an appointment are absent here. What appears to have happened was that the Respondent's concerns about aspects of DU's conduct led to her terminating the retainer with DU and then contacting the Practitioner who agreed to act in what was a current employment matter. In that regard the Practitioner is right to have identified that this was a continuation of an existing matter, and his assumption that DU would have complied with his own obligations under the Rules was not unreasonable. What the Practitioner has overlooked however, is that no information was provided in writing to the Respondent about his own charge out rate. The Practitioner's evidence is that he informed her verbally of his hourly rate and estimated the fee at $6,000, which was supported by a file note that the Practitioner produced, which he said was recorded at their first meeting.

[25] It remains undisputed that this information was not provided to the Respondent in writing, as is contemplated by the Rules. It is information that ought to be provided by a solicitor who instructs a barrister to undertake work for a client. However, I do not agree that the 'contra-deal' would have been recorded, as this would have been most unusual.

[26] The impression I gained from the Practitioner's evidence is that he holds the view that that his barrister status per se exempts him from the obligations in Rules 3.4 and 3.5. In this context it appears he gave no thought to the substantive purposes of the Rules, which are intended to keep a client informed of certain matters, including fees. This is an integral aspect of the consumer protection purpose of the Lawyers and Conveyancers Act.

[27] Had the Practitioner considered this matter more carefully it would have been immediately obvious that the circumstances were such that the Respondent would not

have received the necessary information (about the Practitioner's charges) in written form from DU.

[28] Had the Standards Committee considered the matter more carefully it would have been immediately obvious that there was no 'instructing solicitor' in the usual sense of what that means. I noted that under the heading of "Instructing Solicitor" in the Committee's decision, the Committee wrote that "[t]here was no evidence to support a claim that [the Practitioner] had failed to comply with his obligations under [Rules 14 or 14.1 of the Rules]."[5] This is somewhat puzzling given that those Rules have no bearing on the question of whether the Practitioner had complied with the intervention rule. Perhaps the Committee intended to refer to Rule 14.4.

[29] In any event, there seems to be no dispute that the Respondent did not receive information in written form from the Practitioner. There is not dispute that he told her of his hourly charge-out rate. What is in dispute is the estimate.

[30] The Practitioner's file note (from their initial meeting) included notations about the retainer and also noted "6K". That the Practitioner had clear recollection of that meeting was explained on the basis of recalling the nature of the Respondent's specific complaint about DU which led to deciding that it was necessary to replace him as solicitor on the record.

[31] I accept that the Respondent has no recollection of substituting the solicitor on the record, but at the same time I consider it more likely than not that the necessity for removing DU from the record and replacing him with CF - and what that meant - would have been explained by the Practitioner, even if these matters did not register with her at that time.

[32] I return to the main review issue, which concerns the Practitioner's failure to have complied with the obligation contained in Rules 3.4 and 3.5. As noted, his position is essentially that he is entitled to claim the 3.7(a) exemption because he is a barrister. The Practitioner submitted that his view was shared by a good many barristers practising in Auckland. Be that as it may, I am also aware (from the work of this Office) that many barristers take a 'best practice' approach and independently provide written Terms of Engagement for a client when they are instructed.

[33] Since the events complained of, the scope of a barrister's responsibilities in this regard have been to some extent clarified by a decision of the Lawyers and

[5] Above n1 at [19].

Conveyancers Disciplinary Tribunal in *Auckland Standards Committee 1 v Hart.*[6] The Standards Committee (as prosecutor) claimed that Mr Hart, a barrister, breached his obligation under Rule 3.4 in failing to provide the necessary information to his client whom he knew was assuming the responsibility for paying his fees. The essence of the submission was that there was only superficial compliance by Mr Hart with the intervention rule insofar as the instructing solicitor (on a reverse brief) was essentially acting as "a post box" solicitor, and the circumstances existing in that case reflected an intention of the client to deal directly with Mr Hart. The Tribunal accepted that the nature of the arrangement was such that that the responsibility (under Rule 3.4 and 3.5) normally falling on the solicitor then fell on Mr Hart, regardless of his being a barrister.

[34] The Tribunal referred to the purposes of the Lawyers and Conveyancers Act 2006 which was to maintain public confidence in the provision of legal services, and to protect consumers of legal services. The Tribunal concluded that where a barrister is involved in an arrangement where he or she receives money directly from a client, and where the barrister has effective control over the fees billed to the client, a lawyer's obligation under Rule 3.4 to provide full advance disclosure of fee information to his or her client remains notwithstanding the technical interposition of an instructing solicitor. The Tribunal accepted the Committee's position that:[7]

> ...any other interpretation would fail to reflect the reality of the situation, and thus fail to uphold in practice the fundamental principles and purposes of the Lawyers and Conveyancers Act.

[35] There are significant differences between the *Hart* situation and the present case, there being very many elements in *Hart* that find no parallel here. These include that the Practitioner did provide verbal information to the Respondent about his charging rates, there had been a solicitor (DU) who acted for the Respondent, and he did have contact with DU (as shown in his time sheets). It appears that the Practitioner had assumed that this provided a sufficient nexus of an 'instructing solicitor'.

[36] I accept that the Practitioner held an honest belief that he had complied with his professional obligations, and I also am willing to accept that before *Hart* many barristers in his situation very likely took the same view of the Rule 3.7 exemption. I

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[6] *Auckland Standards Committee 1 v Hart* [2012] NZLCDT 20 (2 August 2012).
[7] Above n6.

also note that at the time in question the obligations of a barrister had not been clarified in the way that is now the case following *Hart.*

[37] I also noted that the Standards Committee accepted that the Practitioner was instructed by DU, and also that DU had complied with Rules 3.4 and 3.5, which also indicated a lack of clarity about this question. It therefore seemed surprising that there was no discussion about why the Rule 3.7 exemption did not apply in this case.

[38] The review question was whether the disciplinary finding against the Practitioner should stand. There are a number of factors in this case that led me to conclude that there was a reasonable basis for quashing the decision. My overall impression was that the Practitioner held an honest, if mistaken, view of the scope of responsibility that falls on barristers with regard to providing information to clients. I took into account that at the time in issue (pre-*Hart*) there appears to have been a wide discrepancy in practice among barristers as regards to issuing clients with a Letter of Engagement directly. There was some discussion at the review hearing about this, and as already noted, the scope of responsibility has since been clarified by *Hart*. This case was published in 2012, and must be considered to have clarified any remaining doubts about the responsibilities of barristers.

[39] I also took into account that the Practitioner had verbally discussed with the Respondent the scope of the work and his fees. While not in writing, the Respondent was aware of the rates charged by the Practitioner. There is a dispute about the matter of an estimate but I consider it unlikely that the Practitioner would have quoted or estimated $3,500 for the work that was involved, and I accept his evidence in that regard.

[40] Also relevant was that the Standards Committee found no excessive charging by the Practitioner, and having considered the file I accept the Standards Committee conclusion that the fee was fair and reasonable for the work done. This in itself is indicative that the Practitioner was unlikely to have quoted a fee of $3,500. It would have been apparent to him early in the retainer that there was still a significant amount of work to do, and I do not accept the Respondent's perception that "...most of the legal work...was completed by [DU]...";[8] it is unlikely that she would have been fully aware of what was yet to be done.

[41] I also took into account that the Respondent did not raise any complaint about the Practitioner's fees when she got the final bill, and she had already paid him an

[8] Above n2.

amount that exceed the alleged quote, apparently without objection. I have considered the Respondent's explanation for delaying raising an objection to the Practitioner's fee, but overall I accept that her complaint arose from the fact that the Practitioner was quibbling about her professional charges, and that no complaint about his fees would otherwise have been made. The Practitioner particularly noted that the matter of the quantum of his fee had not been raised as an issue, and that only when he went to the Disputes Tribunal did this complaint follow. This is to some extent reflected in the complaint letter sent by the Respondent which shows that the complaint arose after the Practitioner had referred the Respondent's fees to the Disputes Tribunal. That is to say, the main complaint did not revolve around the absence of a Letter of Engagement, but rather, concerned the question about the value of the set-off that the Respondent claimed for services she had provided to the Practitioner.

[42] A discretionary power exists to take no further action despite a perceived falling short of professional standards. For reasons given above, and also having discussed with the Practitioner the scope of his professional responsibilities under Chapter 3, I am confident that he is better informed of these important matters, and is likely to be more diligent in the future. In these circumstances I considered there to be a proper basis for exercising my discretion and quashing the adverse finding in this case.

Scope of Standards Committee enquiry

[43] One further comment needs to be made in respect of this file, although wholly unrelated to the complaint against the Practitioner.

[44] The original complaint included a brief explanation by the Respondent about why she terminated her retainer with DU. She particularly referred to a change in DU's behaviour towards her, and:[9]

> ...his inappropriate and unsolicited emails which in my view bordered on sexual harassment, I was feeling completely distraught and did not feel comfortable or safe in continuing with his services.

[45] There is nothing on the Standards Committee file to indicate that any enquiry was undertaken in respect of this issue. The Committee's Agenda notes and Minutes record nothing more than "a change in DU's behaviour" towards the Respondent, with no further comment. The Committee's sole focus appeared to be on issues arising in the complaint against the Practitioner.

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[9] Above n2.

[46] The Respondent's comment may have been intended as nothing more than an explanation for terminating the retainer with DU; it is clear that this was incidental to her main complaint which was against the Practitioner.

[47] However, when a Standards Committee receives information that includes allegations about another lawyer that raises conduct issues which are, or could potentially be, of considerable concern, it is my view that a Committee should act on such information. Depending on the information that is provided, the Committee could either seek further clarification from the Respondent, and/or commence an own-motion enquiry, as indicated by the circumstances.

[48] It is important to make the point that where a Standards Committee receives information that is incidental to the main complaint, but which raises potentially serious conduct issues of this (or any other) kind involving another lawyer, it is not appropriate for that Committee to simply do nothing about that information. Whether, and what, steps might be taken will necessarily depend on the information provided, but Committees will do well to remember their overall responsibilities within the regulatory framework of the Lawyers and Conveyancers Act.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed. All fines and orders are consequently quashed.

DATED this 30th 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:

CE as the Applicant
DT as the Respondent
Auckland Standards Committee
The New Zealand Law Society