LCRO 295/2011

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [an Auckland Standards Committee]
BETWEEN	**MR CM** Applicant
AND	**MS EC** Respondent

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

DECISION

Background

[1] This is an application for a review of a Standards Committee decision by a former client of the respondent practitioner (the Practitioner). In its decision dated 17 November 2011, the Standards Committee determined to take no further action in relation to the Applicant's complaint against the Practitioner, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] The review was filed by the Applicant on 15 December 2011. A copy of the review was forwarded to the Practitioner, who provided a detailed response to it on 25 January 2012. The Practitioner's response to the application was forwarded to the Applicant, using the Post Office box address he supplied when he filed his review.

[3] After an initial assessment I formed a preliminary view that the review might properly be determined on the papers. On 5 March 2012 both parties were written to by this Office and asked to indicate, by 20 March 2012, whether they would consent to

this procedure. The Practitioner indicated her assent in an email to the case manager dated 16 April 2012.

[4] Telephone messages were left by the case manager with the Applicant, asking him to respond to the 5 March letter, but no response was received. A reminder letter was sent to the Applicant on 1 May, which also attached a further copy of the 5 March letter, asking him to indicate his views about a hearing on the papers.

[5] On 28 May an associate of the Applicant contacted the case manager and advised that the Applicant had returned to China. His telephone number and email address in that country were provided. On that same day the case manager sent an email to the address provided, and attached scanned copies of the correspondence that had been mailed to his Post Office box. He was asked to indicate his views about a hearing on the papers, by 12 June 2012. There was no response to this email.

[6] A similar email was sent to the Applicant by the case manager on 6 July; he was asked to respond by 16 July 2012. Again, there was no response from the Applicant. A further similar email was sent to the Applicant on 6 August 2012. To date there has been no response.

[7] This review was initiated by the Applicant, so clearly he is aware of it. This Office has gone to considerable lengths to ascertain whether the Applicant is willing to have his review determined on the papers. There is nothing to suggest that he did not receive the telephone messages that were left for him. Equally, there is nothing to suggest that he has not received the emails that have been sent to his address; none have been rejected or returned.

[8] The Applicant provided the Standards Committee with detailed material when the matter was before it. Similarly detailed material accompanied his review application.

[9] I have an obligation to act in a way that is consistent with the rules of natural justice,[1] as well as an obligation to avoid unnecessary formality and technicality.[2] Furthermore, subject to certain considerations an LCRO may regulate his or her own procedures in such manner they think fit. In all of the circumstances outlined above, I am of the view that the Applicant has had every reasonable opportunity to have exercised the right to be heard. No further delay in concluding this matter can be justified and I have therefore proceeded to undertake this review on the papers, which

[1] Lawyers and Conveyancers Act 2006, s 206(3).
[2] Above n1 s 200.

includes of course the grounds forwarded by the Applicant for the review.

Complaint

[10] The Applicant's complaint raised four issues of concern:

- he sought a refund of some of the fees paid to the Practitioner. He asserted that the Practitioner misled him about his case, so as to extract higher legal fees from him;
- on one occasion the Practitioner informed him at the last minute that she could not attend Court for a scheduled hearing, and without his agreement arranged for another lawyer to attend the hearing instead;
- the Practitioner did not deliver on a promise to obtain a good outcome for him in the case; and
- the total fees he paid to the Practitioner (out of an initial estimate of "about $20,000 to get the best result") were $12,500.

Practitioner's Response to the Complaint

[11] The Practitioner provided the Complaints Service with a detailed response to the complaint, and included the following background information (gleaned from attached documents) which was helpful in discerning the issues.

[12] The Applicant is a Chinese national, who was then residing in New Zealand. Sometime during 2010, at the request of friend (also Chinese) the Applicant offered to assist two Chinese women who needed transit visas to travel through Australia. He obtained the women's passports, and on their behalf completed the appropriate declarations for the transit visas, and lodged these with Australian immigration authorities. He provided his name and contact details on the forms. He did not meet the women, who were not in fact in New Zealand at the time.

[13] The women's passports contained forged New Zealand visa permits. Once this was discovered by New Zealand authorities, the Applicant was arrested and charged with two charges of dishonestly using a document, contrary to s 228(b) of the Crimes Act 1961.

[14] When he first appeared in Court, the Applicant was represented by a lawyer from the Public Defence Service (PDS). On 6 October 2010, and on the advice of that lawyer, the Applicant pleaded guilty to both charges. The case was then adjourned for sentencing.

[15] Against this background, the Practitioner responded as follows:

- The Applicant approached her on New Year's Eve, 2010, when her practice was otherwise closed. Legal advice was given, in Chinese, as well as written terms of engagement and an invoice for the services then provided. Those terms of engagement, dated 31 December 2010, provided for an initial consultation of $400 plus GST, together with an hourly charge-out rate by the Practitioner of $400 plus GST for any additional work. The Applicant paid the Practitioner the sum of $400 on 1 January 2012.

- About a week later the Applicant instructed the Practitioner to represent him at the sentencing hearing. The PDS file was obtained. An amended letter of engagement, dated 6 January 2011, was given to the Applicant, with a quote for the work to be done, of $5,000 (including GST), and stating "further complications from [that] point onwards" would be charged at the rate of $500 per hour plus GST and disbursements.

- Detailed written advice about the charges, in Chinese, was provided by the Practitioner. When he absorbed that advice, the Applicant expressed concern about the impact of the convictions upon his then recent New Zealand residency. He advised the Practitioner that he did not have the assistance of an interpreter when he was advised to plead guilty by the PDS lawyer, and did not therefore appreciate that he was acknowledging having acted dishonestly. He instructed the Practitioner to proceed with an application to vacate his guilty pleas.

- Written instructions to this effect were obtained, and a quote given of $15,000 (including GST) – which covered the application to vacate the guilty pleas and, if successful, a defended hearing on the dishonesty charges.

- The Applicant paid $2,500 towards this on 26 January 2011, together with a further $4,500 on 24 February 2011. By this time, the Applicant had paid the Practitioner a total sum of $7,400, against the quoted fee of $15,000.

- The process of vacating a guilty plea is described by the Practitioner as " … a highly unusual … and technical procedure".[3] Because of the time of the year, there were difficulties in securing disclosure (presumably from the Police). The Practitioner and her firm were nevertheless able to act decisively because of their proficiency in Chinese languages; as well, the Practitioner had "many years of experience"[4] in dealing with similar issues involving a mix of immigration and criminal law.

- The application was filed, and the Court was persuaded to adjourn the sentencing date so that the application could be heard. An employee of the Practitioner attended to that appearance. However after that appearance the Practitioner noted an inconsistency between her instructions (which she recorded in the Applicant's affidavit) and what the PDS lawyer told her. The Applicant had instructed the Practitioner that he did not have a translator when instructing and getting advice from the PDS lawyer. The PDS lawyer, on the other hand, informed the Practitioner that he "had taken [the Applicant's] instructions in relation to the pleas with the assistance of the Chinese translator as arranged through the court".[5]

- The Practitioner spoke to the Applicant about this anomaly and his instructions generally, as a result of which the Applicant acknowledged that he had been assisted by a Chinese translator when he received advice from the PDS lawyer. He also admitted that he had falsified the signatures of the two Chinese women, provided false addresses and acted as if the two women were in fact in New Zealand.

- Concerned by this development, particularly as the application had been filed (accompanied by what was clearly an untrue affidavit) and awaiting hearing, the Practitioner sought the advice of senior counsel. Counsel's advice was that the Applicant must withdraw his application to vacate the guilty pleas, and proceed to a sentencing hearing. The Applicant initially rejected this advice, and insisted that "according to his moral codes from

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[3] Practitioners response to complaint to NZLS (2 September 2011).
[4] Above n3.
[5] Practitioners letter to Applicant (15 July 2011) at p 46. The copy of this letter provided to the Complaints Service by the Applicant is undated, but in her submissions to the LCRO the Practitioner provides a dated version of the same letter.

where he came from, the counsel as his lawyer should be able to work with his instructions however they are given".[6]

- As a result, the Practitioner arranged for senior counsel to meet the Applicant (at her own cost) to confirm exactly what his instructions were. Senior counsel ultimately appeared on the Applicant's behalf at the sentencing hearing, where the Practitioner says an appropriate sentence was imposed. This hearing took place sometime after 24 February 2011.

- The Practitioner refers to having refunded some of the Applicant's retainer to him, "due to the abandonment of the application to vacate the guilty plea after taking into considerations all of the time taken and recorded".[7](sic)

- The Practitioner submitted that she had carefully and properly balanced her obligations to both the Court and to her client, in what was an unusual and difficult situation. She concluded at the time that the appropriate course was to retain senior counsel.

- She says that her fees were fair and reasonable, and that the Applicant was regularly kept informed about his case. She describes him as:[8]

  > a young entrepreneur who had the ability to make decisions and consider information and advice given. He was good at negotiating and required a fixed fee … instead of the uncertainty associated with time based billing.

- Finally, amongst the documents provided by the Applicant was a copy of the Practitioner's time records showing total billable time of $11,124.69 (including GST and disbursements) as between 31 December 2010 and 22 February 2011. It appears that after that date, the Practitioner did not record her time as by then senior counsel had become involved.

Applicant's Response to the Practitioner

[16] The Complaints Service forwarded the Practitioner's response to the Applicant for his consideration but did not invite any comment or response from the Applicant

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[6] Above n3.
[7] Above n3.
[8] Above n3.

who was informed that the "complaint will be now be reviewed and thereafter referred to Standards Committee 1 for consideration".[9]

Issues Identified by the Standards Committee

[17] The Standards Committee identified the following three issues as requiring consideration:

- The Practitioner hid the truth of the case from the Applicant and tried to guide him to a better result so that she could ask for a bigger fee;
- The Practitioner advised the Applicant that she did not have time to attend Court and so arranged for someone else to do so in her place; and
- The Practitioner gave the Applicant "so much hope and promise"[10] that he felt let down at the final result.

Standards Committee's Determination

[18] In its determination dated 17 November 2011, the Standards Committee decided to take no further action on all of the issues of complaint, pursuant to s 138(2) of the Act. The Committee's reasoning was as follows in respect of the three issues:

The Practitioner did the truth of the case from the Applicant and tried to guide him to a better result so that she could ask for a bigger fee.

[19] The Committee noted the changing nature of the Applicant's instructions to the client, and concluded that the "strategy formulated by [the practitioner] was appropriate". The Standards Committee also noted the extent of the work carried out by the Practitioner on the Applicant's behalf, and concluded that nothing done by the Practitioner "gave rise to any professional shortcoming on her part".[11]

[20] In these circumstances the Standards Committee decided to take no further action on this aspect of the complaint.

The Practitioner advised the Applicant that she did not have time to attend Court and so arranged for someone else to do so in her place.

[21] The Standards Committee noted that there is nothing remarkable in a lawyer arranging for an agent to represent their client when the lawyer is otherwise unable to

[9] Letter from NZLS to Mr CM (5 September 2011).
[10] Letter from NZLS to parties (17 November 2011).
[11] Standards Committee's determination (17 November 2011) at [11].

attend a scheduled Court hearing. The Standards Committee did not consider that there was anything unusual about the Practitioner engaging an agent to appear at the sentencing hearing.[12] Again the Standards Committee decided to take no further action in relation to this issue of complaint.

The Practitioner gave the Applicant "so much hope and promise" that he felt let down at the final result

[22] Having regard to the circumstances of the case, in particular the reasons for dismissing the other issues of complaint, the Standards Committee did not consider that this aspect of the complaint could be sustained.[13] No further action was taken.

Grounds for Review

[23] The Applicant provided a six-page response to the Standards Committee's decision. He has also appended to that document, the same material that he provided to the Complaints Service. He raised the following issues in support of the review:

- He did not receive an invitation to appear at the Standards Committee's hearing.
- The Practitioner arranged for alternate counsel to represent him, with inadequate notice; and
- The Practitioner promised to achieve a good result for him, and each time she did so she asked for more fees.

[24] He then expanded on the second and third of the above points. He complained that the Practitioner organised for alternative counsel to represent him, on the afternoon before a scheduled Court appearance; at the same time the Practitioner informed the Applicant that she could no longer proceed with his application to vacate his guilty pleas, and that she could not represent him. She advised the Applicant that the other lawyer would meet him the following morning, at Court.

[25] The Applicant denied that his story had changed throughout the case, (thereby challenging the Practitioner's response) and asserted he did not have the benefit of a translator when he was advised by the PDS lawyer before entering guilty pleas to the charges.

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[12] Above n11 at [13].
[13] Above n11 at [15].

[26] He also expressed confusion about the claim that he changed his story in respect of his involvement with the preparation of false travel documents, stating that he told the Practitioner that he had completed the documents, and this was consistent with the Police Summary of Facts which the Practitioner also had. He was therefore surprised when the Practitioner subsequently told him that, having received disclosure from the Police, he could not proceed with his application to vacate his guilty pleas.

[27] On the matter of fees, the Applicant believed that he was overcharged, and considered that ultimately the same result was achieved as would have been had he continued to be represented by the PDS lawyer. He considered that he "totally wasted $12,500",[14] and that the most he should have paid the Practitioner was the initial $400, on 1 January 2011. He maintained that the Practitioner should have told him then that there was "nothing wrong"[15] with the advice he received from the PDS lawyer.

[28] His belief was that the Practitioner deliberately filled him with false hope, in order to extract fees from him. He believed that the Practitioner decided to stop acting for him because he had not paid outstanding fees of $7,600.

The Practitioner's response to review application

[29] The Practitioner identified three review issues requiring a response from her:

- The presence of a translator;
- The change of Counsel at the last minute; and
- False hope/overcharging.

The presence of a translator

[30] The Practitioner said that when she read documents from the Police file to the Applicant, in Chinese, he was "visibly upset" and "surprised"[16] as to their contents, and said that he had not had the benefit of a translator when interviewed by the Police, and when advised by the PDS lawyer. He was adamant that he had not understood what was said by either the Police or the PDS lawyer. She discerned his overriding concern to be that a conviction for these offences would affect his immigration status, and he instructed the Practitioner that he had not received any advice about that prior to entering his guilty pleas. The Applicant then proceeded to instruct the Practitioner to

[14] Mr CM's application for review (15 December 2011) p 6.
[15] Above n14.
[16] Ms EC's response to review application (25 January 2012) p 2.

apply to vacate the guilty pleas. He felt let down by the process and considered that he had a right to defend himself.

[31] After the application was prepared and filed the Practitioner learned from the PDS lawyer that he had, in fact, used the services of a translator when taking instructions from and advising the Applicant. Concerned by this inconsistency, the Practitioner sought the advice of senior counsel who stated that the Applicant's application to vacate his guilty pleas could not be continued with.

[32] The Practitioner wrote that it is simply not correct for the Applicant to now assert that he did not have the benefit of a translator at the early stage of the proceedings: this is inconsistent with the PDS lawyer's comments, and with the Applicant's own admissions.

Change of Lawyer

The Practitioner rejected the Applicant's assertion that an alternate lawyer was arranged with less than a day's notice. She explained that senior counsel was retained by her, at her expense, once she discovered the "significant inconsistencies in [the Applicant's] instructions".[17] She maintained that this was necessary to ensure that she was able to fulfil her obligations as an Officer of the Court, as well as her obligations to her client. The Practitioner maintained that the Applicant was informed of this at the earliest possible opportunity, and that he in fact met the other lawyer prior to his appearance in Court.

False hope/overcharging

[33] The Practitioner said that the Applicant was made aware of likely fees from the outset and throughout the retainer as circumstances changed, and that the Applicant wanted the certainty of fixed fees, and assented to the arrangements made either by email or by paying sums from time to time as requested.

[34] She explained that the different fee levels changed as the nature of her instructions changed. Initially, at the first meeting on 31 December 2010, the instructions were that the Applicant wanted advice about the forthcoming sentencing hearing. For that a fee of $400 was charged (and paid). A week later, the Applicant's instructions to the Practitioner were to prepare for and appear at the sentencing hearing. For this a fee of $5,000 (including GST) was agreed. However once the PDS lawyer's file was uplifted and the details of the charges were explained to the Applicant,

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[17] Above n16.

his instructions were to make an application to the Court to vacate the guilty pleas, and (if successful) defend the charges. A fee of $15,000 (including GST) was agreed for this.

[35] The Practitioner denied that she gave the Applicant "false hope", and that as part of that, extracted more fees from him. She maintained that she carefully and conscientiously advised him about the charges he faced, and the various options open to him (including the immigration consequences). She said that once it became clear that the application could not proceed, a part of the fees that he had paid towards that was refunded. She believes that at all times the Applicant was fully informed about his case, and that she acted in accordance with his instructions and in his best interests.

Discussion

[36] I have had the benefit of considering all of the material that was provided to the Standards Committee, as well as the Applicant's submissions in support of the review and the Practitioner's response to those submissions.

Not appearing at the Standards Committee

[37] Hearings before Standards Committees are generally conducted on the papers.[18] Only seldom, and at the Standards Committee's discretion, are parties heard personally. It is within the discretionary power of a Standards Committee to take no action on the complaint, and inform the parties of the procedure it proposes to adopt.

[38] In this case the parties were informed by the Complaints Service that the complaint would be investigated on behalf of the Standards Committee, and the results of that investigation would be provided to the parties, and to the Standards Committee for it to consider. The Applicant may be disappointed that he did not appear before the Standards Committee to argue his complaint, but the Standards Committee's procedures were consistent with its obligations under the Act, and neither unfair nor unreasonable.

[39] The balance of the Applicant's complaint, in my view, is that the Practitioner unreasonably or improperly encouraged him to pursue a course of action that was difficult and expensive, with the result that he was significantly overcharged for quite unnecessary work.

Whether the Applicant changed his story

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[18] Above n1 s 153(1).

[40] The Practitioner has been consistent throughout, including in her written response to the Applicant on 15 July 2011, and in her responses to both the Complaints Service and to this review. Her account is clear and straightforward concerning the general advice to the Applicant about his situation. The letters of engagement (which includes an email) are consistent with the developing chain of instructions, and the evidence shows that the Applicant was kept informed of costs and steps taken.

[41] It was only after the Practitioner received the PDS lawyer's file and translated some of the contents to the Applicant, that the enormity of the Applicant's position dawned on him – particularly in relation to the immigration consequences. Up until the point when the parties agreed to a fixed fee for vacating the guilty pleas and defending the charges (26 January 2011), the Applicant's instructions had not "changed" as such; rather, they developed as more detail emerged about the nature of those charges.

[42] What is clear is that the Applicant advised the Practitioner that he did not have the benefit of a translator and that he had not acted with a dishonest intent. In these circumstances the Practitioner reasonably believed that his guilty plea could be challenged.

[43] For this review the Applicant asserted again that there had been no translator at the time he received advice about his plea, but this fact was clearly spelt out by the Practitioner in her 15 July 2011 letter (sent prior to the complaint) – which the Applicant appended to his complaint. This position is also inconsistent with all of the other evidence provided by the Practitioner whose evidence is consistent throughout and supported by evidence of thorough record keeping.

[44] This shows that following her conversation with the PDS lawyer (who asserted that he had used a translator arranged by the Court), and realising that the Applicant's instructions and his affidavit were inconsistent with that position, the Practitioner immediately sought advice from a senior colleague. The advice was predictable – the Applicant could not continue with his application when it was supported by perjured evidence.

[45] The evidence also accords with the Practitioner's advice that the Applicant acknowledged that he had been assisted by a translator at the relevant times, and had, on further enquiry, acknowledged having knowingly participated in the dishonest creation of the transit documents. It was then that the Applicant agreed to abandon his

application to vacate his guilty pleas, and senior counsel represented him at the sentencing hearing.

[46] I do not accept that the Applicant and senior counsel met for the first time on the morning of the sentencing hearing. Given the circumstances confronting the Practitioner, it is extremely unlikely that she would have left the resolution of the difficult issue she faced, to be dealt with in a telephone conversation with the Applicant on the afternoon before a Court appearance.

[47] The actions of the Practitioner were entirely appropriate, and consistent with the proper approach for a lawyer to take when confronted with the possibility that a client may have perjured themselves. Difficult ethical issues can arise when a lawyer finds themselves in that position. Seeking the immediate advice of senior counsel, at her own expense, was not the action of someone who was, to put it bluntly, "fee gouging". No conduct issues arise.

Fees

[48] It is not entirely clear what the position is with regard to fees paid and refunded. Trust account receipts provided with the complaint show total payments made of $7,400. Tax invoices provided with the complaint are for $4,540, $7,500 and $7,505.34 (all GST inclusive). The Applicant says that he has paid a total of $12,500. The Practitioner says that some unspecified fees were refunded to reflect the fact that the application to vacate the guilty pleas was withdrawn and the matter proceeded to a sentencing hearing. Finally, the time records show billable time up to 22 February 2011 in the sum of $11,124.69 (GST inclusive).

[49] The receipts show payments totalling $7,400. I note that the agreed fee for the sentencing hearing was $5,000 (GST inclusive). The letter of engagement dated 6 January 2011, recording this arrangement, described extensive preparatory work for that hearing. That fee was struck before the plea vacating issue arose. Once that issue arose on 26 January 2011, the sentencing work was put on hold. Significant work was then done towards the application to vacate the guilty pleas. That too was halted at the end of February 2011, when senior counsel took over.

[50] The Practitioner's hourly rate after 6 January 2011 was $500 plus GST. On the basis of the Practitioner's time alone, the total sum recorded as paid by the Applicant ($7,400) represents approximately 13 hours of her time ($6,500), which together with

GST amounts to $7,475. Total billable time up to the involvement of senior counsel, is over $10,000.

[51] I have no doubt that the Practitioner and her staff performed the work recorded in the time sheets. They were faced with having to make what is generally an unusual application to vacate guilty pleas, which has a high evidential threshold. The matter was of considerable importance to the Applicant, and the documents prepared and filed reflect a careful and well thought-out approach to the matter. I regard the ultimate fee received by the Practitioner, as evidenced by the trust account receipts, to be fair and reasonable.

[52] In the circumstances I agree with the Standards Committee's determination to take no further action in relation to the complaint.

Decision

Pursuant to s 211(1)(a) LCA, the Standards Committee's decision is confirmed.

DATED this 17th day of October 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 CM as the Applicant
Ms EC as the Respondent
[Auckland Standards Committee]
The New Zealand Law Society