LCRO 298/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City] Standards Committee [X]
BETWEEN	**AA** Applicant
AND	**AB** Respondent

DECISION

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

Background

[1] Mr AA is a Consultant Psychologist.

[2] In May 1999 Mr AA was contracted by the Accident Compensation Corporation (ACC) to provide counselling services to Mr X.

[3] In June 1999, discussions took place regarding the terms of Mr AA's continued engagement. Mr AA was not prepared to provide his services on the terms sought by ACC. On the 16th of September 1999, ACC advised Mr AA that it would not agree to the contract terms he had proposed, and confirmed they had ceased negotiations to contract for his services.

[4] In August 2003, Mr AA commenced counselling Mr X on a private basis. That counselling continued to May 2008.

[5] Mr AA submitted an account to ACC in the sum of $51,285.00, for services provided from August 2003 to May 2008. ACC declined to pay. Mr AA challenged the

decision by way of the ACC review process (ACC review), and then by appeal to the District Court.

[6] Mr AA's ACC review and appeal applications were unsuccessful.

[7] Mr AB represented Mr AA between August 2008 and November 2009 in his claim for recovery of professional fees.

[8] Mr AB was instructed by the [Medical Society (MS)] to represent Mr AA.

[9] Prior to Mr AB being instructed, Mr AA had destroyed his client's clinical notes.

[10] Mr AA became disaffected with the representation he was receiving from Mr AB.

[11] MS instructed Mr AC QC to review the case. Following that review, MS indicated that they would be prepared to provide further assistance to Mr AA, but on strictly prescribed conditions. MS would fund Mr AC's efforts to achieve a settlement with ACC, but were not prepared to support continued litigation.

[12] Mr AA has lodged complaints with the New Zealand Law Society Complaints Service in respect to both Mr AB and Mr AC. The Standards Committee's decisions in respect to both complaints are the subject of applications for review to this office.

The Complaint and the Standards Committee decision

[13] Mr AA makes a number of complaints against Mr AB.

[14] Those complaints (19 in total) are detailed in the Committee's decision of 24 November 2011.

[15] Mr AA's complaints can be summarised as follows:

(i) Mr AB failed to properly advise him about the nature of the relationship between himself, Mr AA and MS, and failed to keep him adequately informed about significant issues relating to his case.

(ii) Mr AB failed to advise him that he should have disclosed to ACC at first opportunity that the clinical notes had been destroyed.

(iii) Mr AB was on occasions inattentive to progressing Mr AA's claim.

(iv) Mr AB made significant errors in his management of the review hearings, including failing to competently advise him on subrogation rights.

[16] In summary, Mr AA submits that Mr AB failed to provide him with competent and appropriate legal advice.

[17] In its decision delivered on 24 November 2011, the Standards Committee, after considering the comprehensive submissions filed from Mr AA and counsel for Mr AB, determined to make no adverse findings against Mr AB.

Application for Review

[18] Mr AA applies to review the decision of the Standards Committee.

[19] He filed comprehensive submissions in support of his application. The application for review in large part reiterates the concerns raised in the initial complaint. In addition to the submissions filed with his initial application, Mr AA filed a response to submissions lodged by Mr AB's counsel.

[20] I am confident that both parties have had an opportunity to present their arguments in a most comprehensive fashion.

Mr AA's arguments on Review

[21] Mr AA is critical of the Committee's decision. He challenges the decision on a number of grounds. He submits that:

(i) He does not seek to review that aspect of the Committee's decision which held that he was not Mr AB's client. He is prepared to "concede that I was not, technically, Mr AB's client".[1]

(ii) He maintains however that, technicalities aside, Mr AB had an obligation to conduct his case with prudence, diligence and professional care.

(iii) He submits that Mr AB failed to adequately explain the nature of their professional relationship. This failure to do so, he alleges, seduced him to the belief that he was Mr AB's client.

(iv) Mr AB misled Mr AA as to the possibility of a complaint being lodged as a consequence of his decision to destroy the clinical notes, advice which contradicted with advice provided by Mr AC.

(v) Mr AB misled the Review Officer in advancing argument that he was representing Mr AA under subrogated rights.

[1] AA's submissions dated 19 December 2011 at 9.

(vi) Mr AB failed to proceed matters expeditiously to a negotiated settlement.

(vii) Mr AB failed to action Mr AA's instructions to issue a Calderbank letter.

(viii) Mr AB failed to pay sufficient attention to the significance of the deemed review decision.

(ix) Mr AB failed to adequately prepare for the second review hearing.

(x) Mr AB failed to provide appropriate advice in respect to the destruction of the clinical notes.

(xi) Mr AB failed to provide adequate response to his complaints.

(xii) Mr AB failed to provide appropriate guidance during cross-examination.

(xiii) Mr AB failed to provide competent legal advice.

Mr AB's counsel's response

[22] Mr AB's counsel in response submits that:

(i) Mr AA has adopted an exhaustive approach to pursuing his complaint which borders on the oppressive.

(ii) Mr AB was instructed by MS.

(iii) Mr AB was correct in his advice that the destruction of the clinical notes may have resulted in the laying of a complaint.

(iv) The application for review was brought in the name of the patient, and it was accepted by the Review Officer that Mr AA's claim for review of fees was progressed on the authority of his patient.

(v) The suggestion that Mr AB was guilty of delay is without merit.

(vi) The issue as to whether a Calderbank letter should have been issued was primarily a matter for MS.

(vii) No problems arose from the deemed review decision.

(viii) Examination of Mr AB's file, his submissions, time sheets, and the expansive correspondence between Mr AA and Mr AB gives clear indication that Mr AB had managed the file in a diligent, professional and competent manner.

(ix) The pivotal problem arising from the destruction of the clinical notes was Mr AA's failure to be forthcoming with the Review Officer.

(xi) Mr AA's claim was opportunistic and tenuous.

(xii) Mr AA had no appreciation or understanding of a barrister's role.

Role of the LCRO on Review

[23] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgment for that of the Standards Committee, without good reason.

[24] In *Deliu v Hong*[2] the High Court held that a Review Officer must reach his or her own view of the matter before him or her.

Parties Approach to the Review Process

[25] Counsel for Mr AB has submitted that the comprehensive submissions filed by Mr AA, his tendency to traverse a raft of issues in great detail, and his willingness to file supplementary submissions, reflects an approach which borders on the oppressive. I do not agree with that assessment, but I do note that Mr AA's extensive submissions are on occasions repetitive, and that exhaustive analysis does not necessarily assist in bringing clarity to the pivotal issues.

[26] In what he describes as his final submissions (dated 1 June 2014) Mr AA sets out his minimum expectation from the review process. He attaches an appendix to his submissions entitled "specific questions" in which he poses no fewer than 51 questions to which he requires response. He makes complaint that in twenty years experience dealing with litigation, complaints procedures, lawyers, tribunals and courts, his experience is that judicial bodies frequently avoid dealing with specific details, in preference frequently adopting a general approach rather then responding to specifics.

[27] It is the task of any body charged with making enquiry into complaint, to isolate the critical issues to be determined, to sift and evaluate the evidence and bring judgement to the conclusions reached.

[28] I appreciate these matters are of considerable import to Mr AA, and that he is anxious to ensure that every issue he considers to be significant is addressed. The

[2] *Deliu v Hong* [2012] NZHC 158.

process of review does, however, inevitably, if it is not to become fettered by exhaustive attention to detail, require a degree of sifting and prioritising of the issues to be addressed. I can assure Mr AA that I have given careful consideration to all of his submissions but do not propose to provide response to each and every one of them. That is not to be taken by Mr AA as indication that any of his arguments have been overlooked.

[29] I propose to approach this review on the basis of identifying the critical issues. I do not consider it appropriate to approach the review from the stance of focusing on the questions set out in the appendix to Mr AA's submissions.

Destruction of clinical notes

[30] Whilst Mr AA makes numerous criticisms of Mr AB, the advice or lack of advice Mr AA says he received from Mr AB regarding the consequences which flowed from his decision to destroy his patient's clinical notes, is the issue identified by Mr AA as being of most importance to him, and the area where he considers he was most severely let down by Mr AB.

[31] At the hearing, Mr AA advised that his concerns regarding the manner in which the evidence concerning the destruction of the medical notes was managed, was the "most important of my complaints". He goes so far as to describe a number of the other concerns he raises as being "peripheral and not worthy of raising".[3]

[32] It is important to note that Mr AA had destroyed Mr X's treatment notes, prior to Mr AB being engaged by MS to represent Mr AA.

[33] Mr AA concedes that his decision to destroy the notes was a dramatic and significant step, prompted he argues from concerns that his client's welfare would be adversely affected if the notes were disclosed.

[34] In the course of the review process, ACC made request of Mr AA to provide his notes. That request does not present as surprising, in the context of Mr AA pursuing a substantial claim to recovery of fees, in circumstances where he had failed to secure ACC's approval for his work prior to commencement, and had continued to provide services over a number of years, without advising ACC that he was continuing to assist Mr X.

[3] AA's submissions at the hearing.

[35] ACC were being asked by Mr AA to pay a substantial account for services he maintained he had provided. It would be expected that ACC, a body tasked when performing its duties with obligation to ensure that public funds were managed in a prudent and accountable manner, would be reluctant to pay for services that had not been approved, without at first step, having solid evidence to support argument that the services had been provided.

[36] At the review hearing commenced on 2 November 2009, and concluded on 26 April 2010, counsel for the ACC suggested to Mr AA that ACC had been making request of him to provide his treatment notes for some time.

[37] Mr AA's response was to indicate that he first became aware that the notes may be required in July 2008.

[38] Prior to Mr AB being instructed, Mr AA had, as noted, destroyed the treatment notes. He was clearly aware that ACC may ask him to produce his notes.

[39] When pressed on the issue of his reluctance to disclose the notes, Mr AA was asked whether he would be prepared to provide an edited version to ACC.

[40] His response was as follows:[4]

> well, that would-- that might, aside from a logistical issue of how-- how I would ensure that the material is blacked out. I guess I could photocopy the notes and then black them out and then photocopy them again, given we are talking about, how many, between August 2004 and 2005 times, that's 250-odd sessions or more. That's a lot of paperwork. But even putting that aside, even if we say yes, we can do that, there's still the fact-- primary fact, the first fact that, as I say, there would be no doubt in my mind that handing the notes over to anybody would-- will damage Mr X's mental well-being. There is no doubt. There is absolutely no way that I will do that, simply not a snowball's chance in hell.
>
> So you're not even prepared to provide a blackened photocopy?
>
> No, I'm not, no.

[41] Mr AA, was subsequently concerned that the responses he provided, could be seen to have misled the Review Officer.

[42] His apparent acquiescence to suggestion that the notes could be photocopied and then modified, would suggest that the notes existed. They did not. They had been destroyed.

---

[4] ACC review transcript at 41-42.

[43] Mr AA is strongly critical of the advice he received from Mr AB in respect to the treatment notes. His criticisms at times approach the intemperate.

[44] Mr AA argues that:

(i) Mr AB should have advised him at commencement to make full disclosure to ACC that the notes had been destroyed.

(ii) Mr AB's failure to do so encouraged Mr AA to the view that he should not disclose that the notes had been destroyed.

(iii) Mr AB's failure to provide competent advice compromised Mr AA and placed him in a position where he could potentially have been at risk of perjuring himself before the Review Officer.

(iv) Mr AB should have intervened when the notes issue arose during the hearing, arranged a brief adjournment and given advice to Mr AA as to how to manage the issue.

[45] With every respect to Mr AA, in advancing exhaustive criticism of Mr AB's management of the notes issue, he brings a complexity of analysis to the matter which obscures a relatively straightforward issue.

[46] Mr AA was pursuing a difficult claim. He was asking ACC to reimburse him for work he had carried out over several years which had not been approved by ACC. This was always going to be a difficult battle for Mr AA.

[47] Mr AA concedes that Mr AB was concerned by Mr AA's disclosure that he had destroyed his notes.

[48] Mr AB was right to be concerned. Those concerns were shared by Mr AA's professional supervisor who "forcefully expressed his view that I should not have done what I did".[5]

[49] Mr AA advances argument that Mr AB should have advised him to disclose to the ACC at the earliest opportunity, that he had destroyed his notes. His failure to do so, says Mr AA, compromised his ability to reach a negotiated settlement with ACC, and placed him in jeopardy when under cross examination at the review hearing.

[5] AA Correspondence to Review Officer (14 April 2010) p 12.

[50] He goes so far as to suggest that Mr AB's failure to advise him to disclose that the notes had been destroyed, was a breach of Mr AB's obligations as an officer of the court.

[51] He argues that:[6]

> Mr AB was obliged, as the barrister representing me and my interests, to ensure that I was advised that if I ever faced any question under cross examination in respect of access to the notes I would, in the circumstances, have an obligation to disclose that I had destroyed some of them. However, Mr AB did not carry out this fundamental professional duty at any time in his representation of me.

[52] Bluntly, this reduces to argument that Mr AB should have advised Mr AA to answer questions honestly.

[53] I reject Mr AA's argument that Mr AB failed in his professional duty, by not advising Mr AA to disclose to ACC at the earliest opportunity that the notes had been destroyed.

[54] It could be fairly argued that Mr AB would have been potentially prejudicing his client's position, if he had insisted on immediate disclosure.

[55] Whilst Mr AB was clearly disquieted by the fact that Mr AA had destroyed his notes, he was under no obligation to advise ACC that the notes had been destroyed, and cannot in my view be criticised for failing to insist that Mr AA disclose what he had done with the notes.

[56] There are no prehearing disclosure requirements for ACC review hearings. Mr AB was clearly aware that the absence of the notes may present difficulties if ACC sought to obtain the notes but he had no obligation to reveal his client's hand before the Review hearing, and the issue as to whether the notes would be required or not, was entirely a matter for ACC to raise, if they elected to do so.

[57] Whilst Mr AB would likely have anticipated that Mr AA would have been asked to provide his notes, he could not be certain that would be the case. Nor is it the case that his failure to insist that Mr AA disclose that the notes had been destroyed, breached any obligation as an officer of the court.

[58] The issue of the notes was a matter of evidence.

---

[6] Above n 1 at 58.

[59] I do not accept Mr AA's submission that Mr AB, in failing to insist that Mr AA disclose that the notes had been destroyed, materially influenced Mr AA's thinking and encouraged Mr AA to provide answers to the Review Officer which were less forthcoming than they could have been. He suggests that:[7]

> the only reason I testified as I did in the second review hearing regarding access to the clinical notes was because of the framework of belief that Mr AB placed me in.

[60] Nor do I accept Mr AA's argument that Mr AB's failure to insist on early disclosure, compromised his ability to answer questions put to him at the review hearing.

[61] Mr AA is an experienced professional. He would understand that his obligations before the Review Officer would be to answer all questions that were put to him in a truthful and frank manner. Mr AA acknowledged at hearing, that Mr AB had never advised him to do anything other than answer questions put to him in a truthful fashion.

[62] The question put to Mr AA as to whether he would be able to provide his clinical notes in a modified form which would allay his concerns that his client's welfare could be compromised, did not, in the circumstances, provide opportunity for a qualified answer. Mr AB cannot be criticised for the manner in which Mr AA elected to answer the question put to him.

[63] Mr AA must have had reasonable expectation that ACC would ask for his notes. Indeed that had been signalled months before the review hearing.

[64] Nor is it reasonable for Mr AA to contend that Mr AB should have interrupted the review hearing when he had concerns that his answers were going awry, and given him advice. The Review Officer would not have countenanced such an egregious interruption to the review process, and Mr AB would have breached his obligations to the review proceedings if he had endeavoured to guide his client in the middle of cross examination.

[65] Importantly, and what appears to have to some extent been overlooked in the plethora of submissions filed, is that Mr AA's claim faltered at first hurdle. Whilst the Review Officer indicated that he had difficulty understanding why Mr AA would destroy his records, his decision makes it clear that the fundamental obstacle to Mr AA's claim

[7] AA's submissions dated 1 June 2014 at 29.

succeeding was his failure to obtain consent from ACC to provide counselling to his client:[8]

> The schedule one clause 4 provision is clear, that unless the regulations apply, the Corporation's prior agreement to treatment is required. There is no question that the Corporation had not agreed to fund treatment with Mr AA in the period following May 2003….I am also satisfied that the ACC's decision from 15 June 2009 is also correct. That decision declined to provide payment for retrospective professional fees for Mr AA from May 2003. That is **primarily** (emphasis added) on the basis that the Corporation had not agreed to fund the treatment requested by Mr AA.

[66] Nor was the District Court Judge who heard Mr AA's appeal diverted by the issue of the destruction of the notes:[9]

> [15] In his submissions Mr AA seeks to make much of the fact that the respondent was not interested in considering reimbursement because Mr AA was not able to provide details of the various counselling sessions he had undertaken, and which, when he was asked for such details he had advised that he had destroyed them.
>
> …
>
> [17] I do not propose to engage in a consideration of those matters which he raised, as I find that they are quite irrelevant to the issue in this appeal, and that the core issue is governed solely by the statutory provisions contained in the Accident Compensation Act 2001, and any regulations made there under.
>
> [18] Clause 4 of Schedule 1 specifically states that the Corporation is not required to pay the costs of claimant's treatment unless the Corporation has given its prior agreement to the treatment. The stated exceptions to that prior agreement principle do not apply in this case.

[67] Mr AA emphasises that his complaint is not prompted by dissatisfaction with the adverse outcome of these proceedings, but from genuine conviction that he was poorly represented.

[68] It is however somewhat artificial to consider complaints of professional failure in the conducting of litigation, without giving consideration to the outcome of the proceedings, and the merits of the case.

[69] There is no evidence to support argument that Mr AB provided inadequate advice to Mr AA in respect to the issue of the notes.

[70] The issue was straightforward. This was not a matter that required complex legal analysis or sophisticated strategy. If ACC made an enquiry regarding the notes or in particular made request of Mr AA to provide his notes, Mr AA had no option but to advise that the notes had been destroyed.

---

[8] Review decision 19 May 2010 at 18, 20.
[9] H v Accident Compensation Corporation [2011] NZACC 36.

[71] Suggestion that Mr AA's case may have been more successfully advanced to a negotiated settlement if the destruction of the notes had been earlier disclosed, is purely speculative.

Subrogation Issue

[72] There is little substance to this complaint. Mr AB may have incorrectly advised the Review Officer that he was appearing on the basis that the claim had been subrogated, but that error had no material effect on the proceedings, and would not justify the imposition of a professional sanction.

[73] It is clear from the Review Officer's decision that he adopted a pragmatic approach to the issue as to whether Mr X's right to review could be subrogated to Mr AA, a degree of latitude was also exhibited on appeal where the District Court Judge accepted Mr AA's status as an advocate for Mr X, when it was quite clear that Mr AA was, as the Judge noted, addressing issues from the perspective of advancing his own interests.

Lawyer Client Relationship – Failure to Adequately Explain MS\Client\Lawyer Relationship

[74] Mr AA makes complaint that Mr AB failed to adequately explain the nature of their professional relationship, and in particular, the dynamics of the "three-way" relationship between MS, Mr AB and Mr AA.

[75] He filed extensive submissions addressing the issue as to whether Mr AB was acting for him in a conventional lawyer\client relationship or whether Mr AB's primary obligations were to MS, who had instructed Mr AB and were paying his bills.

[76] At review, Mr AA indicated that he was prepared to concede that technically MS was Mr AB's client, but he maintained that Mr AB had an obligation to manage his case in a professional manner.

[77] I agree with Mr AA. The fact that Mr AB was engaged by MS did not exclude the existence of a lawyer\client relationship between Mr AB and Mr AA.

[78] In *Nicholson v IcePak CoolStores Ltd*[10] the High Court considered the question as to the nature of the relationship between lawyer and a party represented by that lawyer, in circumstances where the lawyer was instructed to act for the party by an insurance company. After considering the approach adopted in a number of

[10] Nicholson v Icepak Coolstores Ltd. [1999] 3 NZLR 475 (HC).

jurisdictions, the Court concluded that a solicitor client relationship existed between the lawyer and the party they were advocating for, despite the fact that the lawyer was instructed by the insurer.

[79] I think it likely that Mr AB may have failed to adequately explain to Mr AA the particular nature of the relationship. Mr AB acknowledges that subsequent to Mr AA raising these concerns, there is now a better flow of information between barristers and MS, with the result that clearer instructions are provided and recorded in writing. But I do not consider that the issue was one which would give rise to professional sanction, and indeed Mr AA fairly concedes that "this complaint in and of itself is minor, but I submit that it goes to the overall tenor of the way in which Mr AB represented me".[11]

[80] Whilst Mr AA may have been confused as to the respective obligations of the parties, a careful examination of Mr AB's file gives indication that Mr AB progressed Mr AA's case in a conscientious and attentive fashion, and I see no evidence that Mr AB adopted an approach other than that he was committed first and foremost to providing competent representation to Mr AA.

General competency of Representation

[81] Mr AA highlights a number of areas where he considers that Mr AB's representation fell below par.

[82] I have considered each of those complaints, and have carefully perused Mr AB's file, together with the Standard Committee files. The volume of material is comprehensive.

[83] I see no evidence to support argument that Mr AB failed to provide Mr AA with a competent level of representation. I do not consider that objections raised by Mr AA in respect to the issue of the Calderbank letter, or the manner in which the issue of the deemed decision was managed, can lead to conclusion that Mr AB managed those matters ineffectively.

[84] The submissions prepared by Mr AB for the review hearings were comprehensive. The correspondence and time records indicate that Mr AB had devoted a considerable amount of time to managing the case.

[85] Mr AB suggests that Mr AA was not the easiest of clients to deal with. I make no comment on that, but it is clear from the file that Mr AA was intensely engaged in

[11] AA's complaint dated 5 October 2010 at 9.

the litigation, as he was entitled to be, the matter was a serious one for him. Mr AA alleges that on occasions Mr AB failed to respond promptly, or to attend the matters expeditiously. There may have been occasions when Mr AB did not respond to matters with the alacrity sought by Mr AA, but the overwhelming evidence of the file is that Mr AB in large part provided attentive response to Mr AA.

[86] Mr AB's management of Mr AA's case has been reviewed by an independent and experienced senior practitioner. Following that review, MS noted that:

> in the review of the file carried out by Mr AC for the London office of the MS in February 2010, he expressed the view that Mr AA had been well served by Mr AB throughout. That is also the view of the Medical Society.

[87] I see no basis to interfere with the decision of the Standards Committee.

Decision

Pursuant to s 211(1)(a) of the Lawyers & Conveyancers Act 2006 the determination of the Standards Committee is confirmed.

DATED this 9th day of October 2014

_____

R Maidment
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 AA as the Applicant
Mr AB as the Respondent
[City] Standards Committee
The New Zealand Law Society