LCRO 33 / 09

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| **CONCERNING** | An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | A determination of Waikato Bay of Plenty Standards Committee 2 |
| **BETWEEN** | **COMPLAINANT V** of Taupo<br>Applicant |
| **AND** | **LAWYER B** of Rotorua<br>Respondent |

## DECISION

### Background

[1] Complainant V was subpoenaed to attend as a witness at the High Court in Rotorua. Lawyer B obtained the subpoena and arranged its service on Complainant V on behalf of his client. The matters in issue concerned the mental competency of a patient of Complainant V at the time a will was executed. It appears that Complainant V was a reluctant witness.

[2] The subpoena was delivered with a letter dated 15 May 2008 containing an amount for travel expenses and attendance fee for one day. That letter also stated that "If your attendance is required beyond Monday dd of mm 2008 a further payment will be made". Complainant V was required to attend at the Court on both Monday dd mm and Tuesday dd mm. The entitlement to payment of witnesses is set out in the Witnesses and Interpreters Fees Regulations 1974 (the Regulations).

[3] Complainant V sought payment of the additional day's witness expenses from Lawyer B. There was an exchange of correspondence in which Lawyer B declined to make that additional payment. Complainant V complained to the New Zealand Law Society on 3 October 2008. Lawyer B was given an opportunity to respond to the complaint and did so on 29 October 2008. In that response he suggested that he and

Complainant V differed as to the proper entitlement of Complainant V under the Regulations. Lawyer B did not provide any argument or analysis of his approach to the regulations, other than the bare assertion that Complainant V was entitled to no further payment. He also added that Complainant V was "a reluctant and unhelpful witness". Complainant V replied to that response on 1 December 2008 reiterating his claim and suggesting that Lawyer B's interpretation of the Regulations was not well founded. He also submitted that in his view whether or not he was helpful as a witness had no bearing on the question of his entitlement to witness fees.

[4] The Waikato Bay of Plenty Standards Committee 2 considered the matter and on 20 February 2009 resolved to take no further action. It considered that Mr Ludbrook was of the view that he was being underpaid as an expert witness. It concluded that this was a legal matter and not within the jurisdiction of the Committee.

[10] It should be noted that in this case Complainant V was not an expert witness, nor has he suggested that this was the case. In this respect the Committee erred. Complainant V is seeking payment of the daily rate of an ordinary witness under the Regulations. Regulation 5(1) provides:

> Subject to sub-clause (2) of this Regulation, the fees, allowances, and travelling expenses payable to any witness shall be in accordance with the appropriate scales specified in the Schedule to these regulations.

The Schedule provides for the following payments in clause 3:

> To any other witness, not being a school child or a child under school age, —
>
> (a) …
>
> (b) For every day on which attendance is required for a period exceeding 3 hours $ 50.00.

[11] It is difficult to see that there is any reasonably held difference in interpretation between Lawyer B and Complainant V in this matter. The claimed difference in interpretation is further strained given the clear statement by Lawyer B that "If your attendance is required beyond Monday dd mm 2008 a further payment will be made". It is clear that Complainant V was entitled to the witness fees for an additional day. Even if this were not strictly the case, the undertaking of Lawyer B to make a further payment if further attendance was required would place an obligation on him to ensure this was done. I do not consider that there has been a good faith difference of interpretation of the Regulations between Complainant V and Lawyer B in this case. Accordingly I consider that the Committee was in error in declining to hear this matter for lack of jurisdiction.

[12] It is also relevant that under the Rules of Professional Conduct for Barristers and Solicitors (which were in force at the time) some guidance is given in this matter. In particular r 7.03 deals with the payment of witness expenses and notes that the lawyers has a professional obligation to meet the fees of expert witnesses in the absence of other specific arrangements. Paragraph (5) of the commentary notes further that:

> The provisions of this rule will also apply in circumstances where a practitioner has made a personal commitment to be responsible for the fees and expenses of a non-expert witness.

[12] Lawyer B undertook to pay any further amounts due and owing. In the absence of words limiting that obligation to his client it is to be inferred that that commitment was a personal one.

[14] Lawyer B was given the opportunity to reply to the application for review to this office. He did so on 7 April 2009. In that letter Lawyer B noted that Complainant V was required on two days, and that his evidence was of a non-expert nature. He also again reiterated that Complainant V was "entirely unhelpful throughout" and that the lack of co-operation of Complainant V caused "considerable expense". He also suggested that the amount was trifling and that Complainant V has lost any proper sense of proportion.

[15] The amount at stake is not relevant. Neither is the fact that Complainant V may have been uncooperative as a witness. Both the Regulations and Lawyer B's undertaking to pay support Complainant Vs claim in this matter.

[15] This review concerns conduct which occurred prior to 1 August 2008 and as such the applicable rules and standards are those in force at that time. In particular, s 352 of the Lawyers and Conveyancers Act 2006 states that penalties may only be imposed in respect of conduct which could have been imposed for that conduct at the time the conduct occurred. The applicable standards are therefore set out in s 106 of the Law Practitioners Act 1982. That section provides that disciplinary sanction may be imposed where a practitioner is found guilty of misconduct in his professional capacity, or conduct unbecoming a barrister or a solicitor (the provisions relating to negligence and to criminal convictions are not relevant here).

[16] I am satisfied that the conduct of Lawyer B in this instance does not amount to misconduct. There can be no suggestion that the conduct here is 'reprehensible' 'inexcusable', 'disgraceful', 'deplorable' or 'dishonourable' in the sense that those terms have been used in relation to issues of professional conduct. (See for example *Atkinson v*

*Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105).

[17] However, I am of the view that the conduct of Lawyer B is conduct unbecoming a barrister or a solicitor. A practitioner is guilty of conduct unbecoming where the conduct falls below the standards acceptable to "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811). In this case I am of the view that a competent, ethical, and responsible practitioner would have found Lawyer B's failure to honour the undertaking to pay the additional fee made in the letter of 15 May 2008 unacceptable.

[18] In making this finding I observe that I consider this matter to be at the lowest end of the scale of offending. I do not propose to impose any punitive sanction.

[19] I also note that the refusal of Lawyer B to pay has involved the disciplinary machinery of this office and of the Standards Committee being invoked. Had he honoured his obligation this would not have been necessary. Given the fact that I have found that the obligation to pay was clear it is appropriate that an order for costs be made against him. I take into account the fact that this was a relatively straightforward matter, and that (with the consent of the parties) this matter was disposed of on the papers. In light of this, and in light of the amount at stake, the costs orders I make are for a contribution and do not seek to recover all of the costs and expenses incurred in this matter.

**Conclusion**

[10] The application for review is upheld pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Waikato Bay of Plenty Standards Committee 2 is reversed. In light of the foregoing the following orders are made.

- Lawyer B is ordered to pay to Complainant V the sum of $50.00 pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act.

- Lawyer B is to pay to the New Zealand Law Society the sum of $150 in respect of the costs and expenses of the investigation of the Society pursuant to s 210(3) of the Lawyers and Conveyancers Act.

- Lawyer B is to pay to the New Zealand Law Society the sum of $300 in respect of the costs and expenses of the Legal Complaints Review Officer incurred in the

conduct of the review Society pursuant to s 210(3) of the Lawyers and Conveyancers Act.

**DATED** this 21st day of April 2009

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Duncan Webb

**Legal Complaints Review Officer**