LCRO 43/2016

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

DECISION

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

Introduction

[1] Ms XZ has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of her complaint concerning the conduct of the respondent, Ms QW.

Background

[2] Ms XZ instructed Ms QW to represent her in matters arising from her matrimonial separation. Ms QW was instructed to proceed an application for spousal maintenance.

[3] Ms QW delegated a considerable amount of the work involved in preparing the maintenance application to Ms GL.

[4] Ms XZ was unhappy with the representation she received from both lawyers. She had concerns about the fees charged, and the quality of the advice provided

[5] She filed complaints with the Lawyers Complaints Service about both practitioners.

The complaint and the Standards Committee decision

[6] Ms XZ lodged a complaint in respect to Ms QW with the New Zealand Law Society Complaints Service (NZLS) on 27 January 2015.

[7] She attached, with her complaint form, a copy of correspondence she had forwarded to Ms QW and Ms GL dated 14 December 2014, in which she had set out her concerns.

[8] The Committee identified the complaints to be addressed as:

(a) Did Ms QW exceed an initial fee estimate without advising Ms XZ and, if so, did she breach her professional obligations under r 9.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) or under any other rule or enactment?

(b) Did Ms QW overcharge, that is did she charge fees which were not fair and reasonable in the circumstances and, if so, did she breach her professional obligations under r 9 and following of the Rules or under any other rule or enactment?

(c) Did Ms QW provide negligent and incompetent advice and, if so, did she breach her professional obligations under r 3 of the Rules or under any other rule or enactment?

[9] The Committee appointed Mr YP as a costs assessor, to complete an appraisal of the fees.

[10] The Committee delivered its decision on 16 February 2016.

[11] The decision was comprehensive.

[12] The Committee determined, pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action on the complaints.

[13] In reaching that decision the Committee concluded that:

(a) it was more likely than not that no fee estimate had been provided;

(b) fees charged were fair and reasonable; and

(c) Ms QW had provided competent representation.

Application for review

[14] Ms XZ filed an application for review on 11 March 2016. The outcome sought is for fees charged to be refunded.

[15] The application filed by Ms XZ is identical to the application she filed in support of her review of the Committee's decision in respect to Ms GL.

[16] There is a considerable degree of overlap in the applications, and it is important to identify the specific grounds of review which are relevant to Ms QW.

[17] Ms XZ submits that:

(a) Ms QW had failed to disclose relevant information to her;

(b) it was clear from her correspondence with Ms QW that she (Ms XZ) had failed to understand the nature of the retainer;

(c) information had been withheld from her at the commencement of the retainer; and

(d) the Committee's comments that she had been "late" in paying accounts to Ms QW in a previous retainer was inaccurate.

[18] Ms XZ's review application was accompanied by comprehensive documentation. Further submissions were filed prior to hearing.

[19] Considered in its totality, the argument that permeates Ms XZ's application is argument that she was not sufficiently informed as to the risks involved in the litigation or sufficiently informed as to the possibility of pursuing alternative options, that she was given unrealistic expectation as to possible outcomes, and not provided with accurate information concerning her fees.

[20] Ms XZ summarises her position at [33] of her application dated 11 February 2016, where she describes her concerns thus:

> it is the lack of information that I was given about the process, and the lack of information regarding the hit and miss outcomes of court proceedings, that I object to. I was in need of "information and protection" and I received neither. It was the fact that I was led down a very stressful and enormously expensive pathway, with absolutely no guarantees, and information was withheld from me every step of the way.

[21] Ms QW was invited to comment on Ms XZ's review application. She submits, through her counsel, that:

(a) her response to the complaints had been comprehensively addressed in her submissions to the Standards Committee of 18 November 2015, on which she places reliance;

(b) Ms XZ was raising fresh issues in her review application particularly:

(a) that Ms QW had failed to disclose relevant information; and

(b) that Ms QW failed to take reasonable steps to ensure that Ms XZ understood the nature of the retainer and the work required to progress her instructions;

(c) the LCRO had no jurisdiction to consider fresh matters raised on review;

(d) Ms XZ had been kept appraised at each stage of the process;

(e) Ms QW had provided Ms XZ with terms and conditions of engagement at commencement;

(f) Ms QW had comprehensive discussions with Ms XZ during the course of the retainer, during which full explanation was provided to Ms XZ regarding all issues that were being addressed;

(g) Ms QW had provided Ms XZ with as much protection and information as a reasonably prudent lawyer could provide a client;

(h) Ms XZ did not appear to be pursuing the issues that were before the Committee, in particular, allegation that Ms QW provided a fee estimate or overcharged;

(i) Ms XZ was provided with sufficient information to enable her to make informed decisions;

(j) no guarantee was provided to Ms XZ as to outcome; and

(k) Ms QW had done her upmost to secure the best possible outcome for Ms XZ.

[22] As Ms QW places reliance on the submissions filed with the Committee, I will briefly refer to those, noting that Ms QW provided a response to the complaint on 30

March 2015. That response was supported by further comprehensive submissions filed by her counsel on 4 December 2015.

[23] In those submissions, Ms QW contends that:

(a) she accepted instructions from Ms XZ on an understanding that fees would be promptly paid;

(b) she had been specifically instructed by Ms XZ that all communications with her former husband's lawyer were to be conducted through correspondence;

(c) an offer received from Ms XZ's husband to settle all outstanding matters had been emphatically rejected by Ms XZ;

(d) she did not provide an estimate for the spousal maintenance application;

(e) Ms XZ had been comprehensively informed on all issues and the permutations of settlement;

(f) as an experienced practitioner, she would not have provided an estimate of fees which was quite unrealistic;

(g) at no time prior to settlement, despite having received accounts, did Ms XZ raise suggestion that a "firm" estimate had been provided; and

(h) no particulars have been provided by Ms XZ as to what advice was allegedly negligent and/or incompetent.

Review Hearing

[24] The review hearing proceeded on 7 December 2017.

[25] Ms QW was represented at the hearing by Ms RD who filed further submissions prior to hearing.

Information Received After Review Hearing Concluded

[26] On 18 December 2017, the LCRO received two emails from Ms XZ, one of which contained two attachments. She indicated that she had provided the emails in response to my query at hearing as to whether she could point to any written evidence of an agreement being reached to fix her fees at $7,000.

[27] I was reluctant to consider evidence filed after the conclusion of the hearing.

[28] It is well accepted, that it would only be on rare occasions that a decision maker will accept further evidence after a hearing has concluded.

[29] The guidelines provided to parties on review, inform the parties that:

(a) In general, the LCRO will not consider new information which should have been placed before the Standards Committee. Any person who seeks to introduce new information which was not made available to the Standards Committee will need to provide good reason as to why it was not available to the Standards Committee and show that it is relevant to the review.

(b) All evidence should be made available to the LCRO prior to hearing. This will usually comprise of information considered by the Standards Committee (the Standards Committee file would have been obtained by the LCRO) and any further explanations and submissions provided by the parties for the review.

[30] The GL decision was delivered prior to receiving the additional information from Ms XZ. Once a Review Officer has delivered a decision, the Officer has no jurisdiction to take any further steps.

[31] The information provided by Ms XZ was intended by her to:

(a) Corroborate her view that a firm agreement had been reached to fix her fees at $7,000, that position reinforced by two emails.

(b) Advise that she was able to have a friend provide an affidavit which would confirm that Ms XZ had phoned her friend during the settlement conference, and the friend would confirm in her evidence that Ms XZ was in a distressed state.

[32] I have decided to consider the two emails, but I am not prepared to allow Ms XZ to produce an affidavit from her friend. I see little evidential value in the proposed affidavit, and considerable scope, if it was produced, for procedural unfairness. It is not disputed that Ms XZ found the process to be distressing. I need no further evidence of that. If the proposed affidavit was to go further and report statements that Ms XZ had purportedly made to support her argument that she did not understand what was happening at the conference, that would raise issue as to why

this evidence was not put before the Standards Committee at commencement. Little weight could fairly be placed on it.

[33] In the face of Ms QW's (and Ms GL's) rejection of suggestion that an estimate had been provided, it could be expected that Ms XZ would have been well aware of the need to garner any evidence which would assist in establishing her position, particularly evidence that was in writing.

[34] I have considered the emails on the basis that:

(a) Ms QW was provided with copies of the emails and given opportunity to respond;

(b) I reserved the right to determine whether I required any further response from Ms XZ;[1] and

(c) no further information was to be filed.

Nature and scope of review

[35] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[36] More recently, the High Court has described a review by this Office in the following way:[3]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the

[1] A response was received from Ms QW. I did not require Ms XZ to reply.
[2] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[3] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

> LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[37] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) consider all of the available material afresh, including the Committee's decision; and

(b) provide an independent opinion based on those materials.

Analysis

[38] The issues to be considered on review are:

(a) Do the grounds advanced on review raise new issues?

(b) Did Ms QW provide an initial estimate which was exceeded?

(c) Did Ms QW provide competent advice?

(d) Were the fees charged fair and reasonable?

Issue 1 — Do the grounds advanced on review raise new issues?

[39] The task of a Legal Complaints Review Officer (LCRO) is to exercise the powers of review conferred by the Act.

[40] A LCRO may, in reviewing a final determination of a Standards Committee, review all or any of the aspects of the Committee's inquiry in relation to the complaint or matter to which the final determination relates, and of any investigation conducted by or on behalf of the Committee in relation to the complaint or matter to which the final determination relates.[4]

[41] The jurisdiction of the LCRO is confined to addressing the complaints considered by the Committee.[5]

[42] I am unable to consider fresh complaints raised at the review stage.

---

[4] Lawyers and Conveyancers Act 2006, s 203.
[5] *AB v DE* LCRO 75/2014 (11 July 2016) at [32].

[43] Ms RD argues that Ms XZ is endeavouring to raise new issues on review that were not before the Committee. She submits that Ms XZ has recast her complaints as being concerns that Ms QW failed to:

(a) disclose relevant information;

(b) take reasonable steps to ensure that Ms XZ understood the nature of the retainer;

(c) provide information at the outset in a manner which was clear and not misleading; and

(d) provide information "as to the enormity of steps in the process" and "associated risks".

[44] I note that whilst the Committee addresses complaint that Ms QW had failed to provide competent advice,[6] there is no indication that the Committee directed itself to a consideration of r 7.1 which provides that:

> a lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about progress on the retainer. A lawyer must also consult the client (not being another lawyer acting in a professional capacity) about the steps to be taken to implement the client's instructions.

[45] It is clear from perusing the complaint filed by Ms XZ, that she did raise complaint that she had not been kept sufficiently informed. In recording her complaint, she noted:

> as time went on it became clear how uninformed my decision was – as I had absolutely no idea of the process despite repeatedly asking for information and voicing my concerns.

[46] This is complaint of a failure to be kept informed.

[47] Whilst I do not consider that the Committee directly addressed that issue, the oversight is capable of cure on review.

[48] I do not propose to send the matter back to the Committee for further consideration. The interests of both parties are best served if the matter is dealt with, as I am able to do, without further delay.

[49] Ms XZ's concern that she was not kept sufficiently informed, whilst identified in her initial complaint, was clarified in her submissions filed on 5 December 2017.

---

[6] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

[50] In those submissions, she contends that:

(a) basic information was withheld from her at the outset;

(b) she had been "steered towards an application for spousal maintenance";

(c) she had been unable to make an informed decision on, or give informed consent to, the steps that were taken;

(d) she had been charged for services which she had not agreed to; and

(e) information was drip fed to her as the process unfolded.

[51] Ms XZ's argument that she was not kept properly informed must be considered from the context that two lawyers were involved in progressing the maintenance application. Ms QW was the senior practitioner and it was she who was running the cutter. But Ms GL was communicating with Ms XZ in respect to the matters which had been entrusted to her care. Ms GL's role was not insignificant. She was tasked with preparing the applications and the submissions.

[52] Ms XZ traversed all issues at the review hearing but in doing so it became abundantly clear that the issue of most significance for her was concern that neither Ms QW nor Ms GL had, at any stage, properly advised her as to what the likely total costs would be in proceeding an application for spousal maintenance.

[53] Her complaints about Ms QW's fees did not identify any specific issues with the accounts (and I will address this when considering the fee complaint) but rather emphasise that she was not, at any stage of the proceedings, alerted to what her possible costs may be.

[54] Flowing from this, she suggests that it would have been unlikely that she would have progressed her maintenance application if she had been made aware of the likely costs involved.

[55] This in turn leads to allegation that she had not been properly advised of the alternative options available to her, particularly mediation, and suggestion that Ms QW had "steered" her down the wrong path.

[56] Overarching these arguments was Ms XZ's depiction of herself as a person inexperienced in legal matters who was, at the relevant time, traumatised by the financial pressure she was under, the pressure of the court proceedings, and the

emotional cost of having to challenge her former husband's resistance to meeting what she considered to be his legitimate financial obligations.

[57] Ms XZ said that she was so overwhelmed with the circumstances that she was dealing with, that she needed very careful and attentive guidance from her lawyers. She described herself as being overawed, and having difficulty in following what was going on.

[58] Ms XZ provided vivid contrast to this characterisation of herself (this to show how traumatised she had become by the events) when she explained how she was a capable and competent individual, who had successfully managed her own business for 20 years.

[59] It is helpful when considering the question as to whether Ms XZ was sufficiently informed, to closely examine the exchanges between Ms XZ and Ms QW, particularly those which took place during the first three months of what was a five-month retainer.

[60] Prior to instructing Ms QW (who had previously acted for her) Ms XZ had been attempting to resolve matters arising from her separation directly with Mr XZ's lawyer.

[61] She met with Ms QW on 7 April 2014. A file note made by Ms QW records that she discussed the issue of maintenance with Ms XZ at that meeting, along with other matters.

[62] A further meeting took place on 8 April 2014.

[63] On 10 April 2014, Ms QW spoke to Mr XZ's lawyer and raised the issue of interim maintenance.

[64] Correspondence was then prepared for forwarding to Mr XZ's lawyer. That correspondence traversed both maintenance and relationship property issues. Ms XZ approved the correspondence prior to it being sent on 22 April 2014.

[65] A further meeting took place on 8 May 2014, at which time Ms QW says she had further discussions with Ms XZ concerning maintenance. Ms QW says that at that meeting she discussed with Ms XZ options for progressing matters, including the possibility of endeavouring at first step, to negotiate a settlement.

[66] Further correspondence was forwarded to Mr XZ's lawyer on 8 May 2014. That correspondence attached a budget that Ms XZ had prepared and was intended to

lay the grounds for argument that Mr XZ had an obligation to provide continuing financial assistance to Ms XZ.

[67] Mr XZ's lawyer responded on 13 May 2014. Suggestion that he should make financial contribution to Ms XZ was emphatically rejected. Argument was advanced that her claim was both "unmeritorious and flawed" and that his "obligation to maintain Ms XZ has long since expired". It was Mr XZ's position that he would only negotiate a settlement on the basis of all outstanding relationship property matters being settled.

[68] Ms QW forwarded a copy of that correspondence to Ms XZ with recommendation that "I think we should urgently apply for interim maintenance – your thoughts".

[69] Ms QW arranged a further meeting with Ms XZ on 14 May 2014, at which she says she discussed with Ms XZ the possibility of filing an application for interim maintenance.

[70] By this point, Ms XZ appeared to be acknowledging that it was unlikely that Mr XZ would agree to a settlement.

[71] Further correspondence was received from Mr XZ's lawyer on 14 May 2014. Mr XZ made clear his position that he was committed to achieving a global settlement of all matters. Ms QW says that Ms XZ was not prepared to consider settling on that basis at that time.

[72] On 31 May 2014, Mr XZ's lawyers attempted to personally serve Ms XZ with an application for dissolution of marriage.

[73] Ms QW says she then discussed with Ms XZ the possibility of both making a further settlement offer whilst at the same time filing an interim application for maintenance as a backup in the event that agreement could not be reached. Ms QW says that she discussed the pros and cons of the options available with Ms XZ.

[74] Ms QW says that on 4 June 2014, Ms XZ instructed her to proceed with the spousal maintenance application.

[75] In an email to Ms GL of 6 June 2014, Ms XZ advised Ms GL that she did not consider that a global settlement was "appropriate".

[76] Ms QW says that both she and Ms GL agreed that further attempts would be made to explore the possibility of settlement before initiating any proceedings.

[77] Further discussions took place on 9 June 2014. A file note recording that meeting indicates that Ms QW discussed a variety of scenarios with Ms XZ, including the possibility of securing a maintenance order following the dissolution of Ms XZ's marriage.

[78] On 20 June 2014, Ms QW received from Mr XZ's lawyers a settlement offer dated 10 June 2014. That offer advanced proposal for a full and final settlement of all outstanding property issues.

[79] Ms XZ provided Ms QW with a comprehensive response to the offer received.

[80] Ms XZ was firmly opposed to any settlement proposal which brought, as her former husband had suggested, trust assets into the relationship property pool. It was Ms QW's view that Ms XZ's preoccupation with the trust issue diverted her from taking on-board advice which was at odds with her view of the situation.

[81] Ms QW forwarded correspondence to Mr XZ's lawyer on 7 July 2014. The June 10 2014 settlement offer was rejected. A counter offer to settle maintenance issues only was advanced.

[82] On 16 July 2014, Ms XZ advised Ms QW that Mr XZ had suggested the parties consider mediation. In email correspondence to Ms XZ on that day, Ms QW expressed her view that mediation would be appropriate provided that agreement could be reached on interim maintenance arrangements. Ms QW suggested a mediator who she considered would be suitable.

[83] Ms XZ then followed up directly with Mr XZ to see if she could persuade him to accept an obligation to continue making maintenance payments. On 17 July 2014, in an email to Ms QW, she reported a lack of progress and noted "so I guess we have our answer sadly. Guess we need to press ahead with the maintenance application".

[84] On 18 July 2014, Mr XZ's lawyer wrote to Ms QW advising that "it would seem that the parties have reached somewhat of an impasse, particularly with regard to maintenance".

[85] On 22 July 2014, Ms QW advised Ms XZ that it presented as highly unlikely that a settlement could be agreed. She says she was given firm instructions by Ms XZ to proceed with an application for spousal maintenance.

[86] On 1 August 2014, Ms XZ forwarded an email to Ms QW in which she said "thank you for explaining the process and timeframe, I just wanted to be mindful that the time is getting away on us". On that same day, Ms GL emailed Ms XZ advising as

to when she had expectation that the documentation would be completed. Shortly after, Ms GL in response to a query from Ms XZ, clarified the approach the court adopts to determining costs.

[87] It is against that background that Ms XZ makes complaint that she was not properly informed, that she was overwhelmed, and pressured into pursuing a course of action that she didn't fully understand.

[88] Having carefully considered the exchanges between Ms QW and Ms XZ detailed above, I do not accept Ms XZ's argument that Ms QW failed to keep her adequately informed. Suggestion that information was withheld from her is at odds with the evidence of the numerous discussions and correspondence between the parties which took place against the backdrop of several attempts to negotiate a settlement.

[89] Ms XZ, in her written submissions of 5 December 2017, suggests that both she and her husband were willing to negotiate using "different routes that were not undertaken". From this she appears to be suggesting that Ms QW took her down the wrong path and that other options could have achieved a more cost-effective outcome.

[90] I do not agree with that analysis. It is clear that Ms XZ held a strong conviction (as she was entitled to) that her contribution to the marriage relationship and to the business that had continued to be operated by her husband following separation, was deserving of a reasonable level of financial support.

[91] She was not prepared to resolve all of the property issues on the basis as suggested by Mr XZ, and was committed to advancing an application for maintenance in the face of his manifest refusal to contemplate settlement on any terms other than those which constituted a full and final settlement of all outstanding matters.

[92] The email exchanges between Ms XZ and Ms QW, together with the files notes made by Ms QW recording the issues addressed in discussions between the two, indicates, in my view, that Ms XZ was properly informed both as to the options available to her, and the steps that were taken on receipt of her instructions.

[93] Advice received from Ms QW was overlaid with the advice Ms XZ received from Ms GL.

[94] A careful consideration of the not inconsiderable exchanges over what was a three-month period, confirms that several efforts were made to negotiate a settlement,

that mediation was contemplated and that Ms XZ was instrumental herself in advancing argument that an application for spousal maintenance should be progressed.

[95] Nor does any examination of this process lead to conclusion that Ms XZ was unable to assert her position. To the contrary, she provided decisive response to her husband's various settlement proposals, and was committed to taking steps to ensure that she received the level of financial support from Mr XZ that she believed she was entitled to.

[96] There is evidence that she was well capable of advancing her position. Suggestion that she was so malleable as to make her vulnerable to Ms QW taking her down a path she did not want to travel, is not supported by the evidence of her direct (and appropriate) involvement in the decisions being made. Her ability to stand up to Ms QW is well illustrated by her insistence (in the face of objection from Ms QW) that Ms QW only communicate with her husband's lawyer through correspondence.

[97] It was not the case that Ms XZ was not provided with options. She was. Nor was it the case that no efforts were made to achieve settlement. Mr XZ's obdurate refusal to entertain any discussions regarding maintenance without those discussions being linked to efforts to resolve all outstanding relationship property matters, inevitably frustrated any possibility of settlement as Ms XZ was opposed to linking the maintenance issues with the unresolved relationship property matters.

[98] Whilst it may now present as unpalatable to Ms XZ, the decision to advance the maintenance application was influenced by her unwillingness to consider negotiating a final settlement. Whilst she remained convinced that she was entitled to receive a certain level of financial support from her former husband, but unwilling to settle all of the relationship property matters, a maintenance application presented as the only viable option available.

[99] Ms XZ advanced argument at hearing that Ms QW had failed to advise her at commencement of her entitlement to claim child support through IRD. She says that if she had been advised of this option she would not have had to take an application to the court. Ms QW rejected argument that she had not discussed the possibility of making an application for child support. She referred to a file note which referenced (albeit briefly) to what she said was evidence of a discussion with Ms XZ in which the issue had been traversed. It is not for me, in this jurisdiction, to examine every decision made in the course of litigation and to attempt to second-guess what steps could have been taken in the course of that litigation, but the evidence of the

exchanges between Ms QW and Ms XZ, gives indication that there were a number of discussion concerning the various options available to Ms XZ.

[100] I do not accept that Ms XZ did not understand what was involved in pursuing a maintenance application. Whilst both lawyers argued that it was difficult to predict outcome, the objective sought was easily understandable and it would clearly have been the case that in the process of assembling the information that had to be put before the court, Ms XZ would have understood the substance of what was involved in such applications.

[101] I am confident that by the time the decision was made to advance the application, Ms XZ was well informed as to what was involved and that she herself, as was entirely proper, gave clear instructions to proceed the application.

[102] I am not persuaded that Ms XZ would necessarily have made a decision not to advance the application if she had been made more fully aware of the likely costs involved.

[103] It is speculative to assume that she would have withdrawn her application. She was adamant that her husband was not meeting his financial obligations. She held a strong conviction that she was entitled to receive fair remuneration from a business that she had made substantial contribution to over many years. These were strong motivations for her to pursue her application.

[104] A final issue raised by Ms XZ which fell within the scope of complaint that Ms QW had failed to keep her properly informed, was argument that Ms QW had not sufficiently explained the terms of the settlement agreement to her.

[105] More than that, Ms XZ maintained that Ms QW failed to advise her what was happening at the Court. She describes a scenario where Ms QW was engaged in discussions with her husband's lawyer (from which she was excluded) culminating in Ms QW presenting her with a settlement agreement accompanied by brusque instruction to "sign it". Absent from this process says Ms XZ, was any advice about the process, any explanation of what was occurring, and any meaningful opportunity for her to provide proper consideration of the agreement presented.

[106] It is so fundamental as to approach the trite to emphasise that the obligations of a lawyer conducting settlement negotiations prior to commencement of a court hearing are, at minimum:

(a) to ensure that their client is amenable to considering settlement;

(b) to ensure that their client understands the negotiations process;

(c) to ensure (if the lawyer is speaking directly with opposing counsel in the absence of their client) that any representations made to opposing counsel are within the scope of their client's instructions;

(d) to ensure, when reporting back to their client, that they provide accurate account of the progress being made;

(e) to ensure that their client fully understands the nature and full implications of any settlement offer received; and

(f) to ensure that if a settlement offer is presented, that the client is provided with as comprehensive an assessment as possible, as to the consequences of settling as opposed to proceeding with the Court hearing.

[107] Ms QW rejects suggestion that Ms XZ was not kept appropriately informed concerning the settlement negotiations, or that the terms of the settlement were not discussed with her.

[108] It is impossible at this distance, in the face of the differing recollections, to determine precisely what occurred at the settlement conference.

[109] The only other evidence of what transpired at the conference, is that provided by Ms GL who advised that she had attended the conference and had remained with Ms XZ throughout.

[110] Ms GL's evidence was that she had discussed the options proposed with Ms XZ, and reinforced to her, that it was Ms XZ's decision, and hers alone, as to whether she agreed to settle the dispute or elected to proceed the matter to a hearing.

[111] I accept that it can be enormously challenging for parties who have endured the often difficult and taxing process of progressing an application through the court, to take on board, often at last minute, all of the permutations and consequences of settlement negotiations which have been conducted at the court door.

[112] A lawyer, when guiding their client through this labyrinth, must ensure that their client fully understands the balance between the desirability of achieving the certainty of outcome that settlement provides, with a clear understanding of the risks involved in continuing the litigation. It is the lawyer's responsibility to ensure that their client is fully informed as to the consequences of any settlement agreed to.

[113] Whilst I appreciate that Ms XZ, when she had opportunity to reflect on the settlement, was unhappy with the outcome, I cannot comfortably conclude that Ms QW failed to properly advise Ms XZ as to the implications of the settlement agreement.

[114] What is apparent, is that the settlement discussions took place over a considerable period of time during which Ms XZ had the benefit of being assisted by two lawyers, one of whom remained with her throughout and whose evidence was that she had reinforced to Ms XZ that the ultimate decision to accept or decline any proposed settlement, was Ms XZ's alone.

[115] Ms XZ said that she had difficulty not just at the settlement stage, but throughout the entire process, understanding what was going on. With every respect to Ms XZ, in my view, that characterisation presents as discordant with the indications she had given of being a competent individual, who had a determination to pursue a claim that she considered to be fair and reasonable. She had formed a firm view of the merits of her claim. She resisted settlement offers that she was opposed to, and provided reasoned justification for her positions. She was an experienced businesswoman. She understood the issues engaged by the broader property dispute. Whilst I appreciate that she found the settlement discussions daunting, I think it unlikely that her role in the settlement discussions was reduced to that of a disempowered observer, who had minimal understanding of the negotiation process, or what the settlement reached involved.

[116] Having carefully considered the parties' written submissions, the submissions advanced at hearing, the material on the file, and having had opportunity to scrutinise the exchanges of correspondence between Ms QW and Ms XZ which took place during the course of the retainer, I am not satisfied that Ms QW failed in her obligation to ensure that Ms XZ understood the nature of the retainer, or that she failed to keep Ms XZ informed about progress with the retainer.

Issue 2 — Did Ms QW provide an initial estimate which was exceeded?

[117] Ms XZ maintains that Ms QW had provided her, at the commencement of the retainer, with an estimate of $7,000 to cover all of the legal costs, including costs incurred by Ms GL.

[118] I have addressed the question as to whether the fees charged by Ms GL were covered by an estimate in the GL review decision, and I need but briefly to touch on those matters here.

[119] Rule 9.4 of the Rules provides as follows:

> A lawyer must upon request provide an estimate of fees and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded

[120] The Rules were developed by the New Zealand Law Society pursuant to ss 94 and 95 of the Act. One of the objectives of the Act is to protect consumers of legal services.[7] This is an important focus of the Act which had not hitherto been part of the legislation relating to the governance of lawyers.

[121] Rule 9.1 formalises what was considered to be best practice prior to the Rules being promulgated. Prior to this, costing guidelines were included in a NZLS publication referred to as New Zealand Law Society Property Transactions: Practice Guidelines 2003.

[122] Paragraph 7.2(d) of those Guidelines provided that:

> It is generally inappropriate to charge a fee in excess of an estimate given to a client. You should advise your client in writing immediately if it becomes apparent that the original estimated is likely to be exceeded. Give reasons for the increase and the revised estimated figures.

[123] Duncan Webb the learned author of "Ethics, Professional Responsibility and the Lawyer" refers to the decision of *Kirk v Vallant Hooker & Partners* [2000] 2 NZLR156 and observes:[8]

> While the Court of Appeal in Kirk v Vallant Hooker & Partners was cautious and did not say the departure from an estimate renders the bill of costs unreasonable, it is submitted that this may be the case. An estimate is a representation that costs will be in the vicinity of a given sum. Such information must be given with reasonable care.

[124] In his role as LCRO, Duncan Webb also had opportunity to consider estimates in his decision of *Milnathort v Rhayader*.[9] That case involved bills of costs rendered in excess of estimates provided on conveyancing transactions, which are somewhat easier to provide estimates on than litigation matters. Nevertheless, the comments made are equally as pertinent. The LCRO referred to the decision *K M Young Ltd v Cosgrove* where it was stated that persons giving estimates must do so with care.[10] It was also noted that the party giving the estimate was the expert in the services to be provided and may be expected to be relied upon by the lay person. Dr Webb also

---

[7] Lawyers and Conveyancers Act, s 3(1)(b).
[8] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 323, discussing *Kirk v Vallant Hooker & Partners* [2000] 2 NZLR 156 (CA) and citing *J and J C Abrams Ltd v Ancliffe* [1978] 2 NZLR 420 (SC).
[9] *Milnathort v Rhayader* LCRO 140/09 (23 November 2009).
[10] At [13], citing *Young Ltd v Cosgrove* [1963] NZLR 967 (SC) at 969.

notes that the duty of a person (including a lawyer) in giving a potential client an estimate is "to give him a correct one or say that it could not be done".[11]

[125] The LCRO then goes on to state that:[12]

> a lawyer who gives an estimate must therefore do so with some care ... An estimate should be the amount which work of the nature contemplated in the particular circumstances of the client is likely to cost. He goes on to say that "There is a strong and legitimate expectation by a client that if the transaction proceeds in a usual way, the bill will be in the amount of the estimate, or at least close to it".

[126] Finally, he notes:[13]

> a lawyer is not required to slavishly adhere to the estimate. However, neither should a lawyer slavishly adhere to charging on a time-costed basis. As a matter of professional obligation, the existence of an estimate must be taken into account when setting the amount of the bill. As a matter of law, an estimate must be given carefully and without negligence. It may be that some increase or decrease above or below the estimate is appropriate. However, there is a strong presumption that unless the client has been informed of a potential increase, the bill will be approximately the amount of the estimate.

[127] What is clear from the above, is that it could be expected of an experienced and senior practitioner, that she would exercise a degree of care when providing estimates for anticipated services.

[128] Ms QW rejects suggestion that she would have given an estimate of $7,000, arguing that it would have been be perverse of her to do so, when her experience informed her that the cost involved would considerably exceed $7,000.

[129] Mr YP concluded that the total fees that would be incurred on an interlocutory application of this importance and complexity, would be in the vicinity of $20,000-$25,000.

[130] The bulk of the fees incurred arose from the work completed by Ms GL. I am satisfied that Ms XZ was advised that Ms GL was unable to provide an estimate of her fees at commencement, and there is no indication of Ms XZ having made request of Ms GL for an estimate to be provided. Ms GL's terms of engagement made it clear that fees would be charged on a time/cost basis.

[131] Having agreed to take on the retainer on the basis that Ms GL would cover much of the work, it presents as unlikely that Ms QW would give an estimate for all

---

[11] At [14], citing *Daniell Ltd v Kebbell* [1919] GLR 156 at 160.
[12] At [15].
[13] At [17].

fees, without making it crystal clear to Ms GL that her fees were circumscribed by a $7,000 estimate provided.

[132] Ms GL's fee advice specifically recorded that an estimate could not be provided. Ms GL had, during the course of the retainer, discussions with Ms XZ concerning payment of her fees. As a result of those discussions, agreements were reached which would provide Ms XZ with an opportunity to pay her fees off over a period of time. Ms XZ's attention would have been very focused on her fees in those discussions. There is no indication, as could reasonably be expected, of Ms XZ raising objection that she was being charged fees substantially in excess of an estimate she had been provided. Criticism can fairly be made of Ms QW that she relied on a terms of engagement agreement she had entered into with Ms XZ earlier, rather than updating the position, but Ms XZ took little issue with that. I place little weight on the terms of engagement relied on by Ms QW, to assist in clarifying whether an estimate was provided or not.

[133] At hearing, Ms XZ did not advance her claim that she had been provided with a firm estimate at commencement with any degree of robustness, focusing rather on argument that Ms QW should have given her an indication at the start of the retainer as to what the total fees would likely be, and provided her with updates as the retainer progressed.

[134] Whilst the arguments are not mutually exclusive, there is nevertheless a measure of contradiction in the positions advanced by Ms XZ.

[135] If it was her belief that she had been provided with a firm estimate at commencement, then clearly she would not have had expectation that Ms QW would provide her with regular updates as to what her total costs would likely be.

[136] During the hearing, Ms XZ was unable to point to any documentation which evidenced any reference to an estimate having been provided, nor could she point to any instance of her raising objection to the fees being charged, other than the complaint she raised after the matter had been concluded.

[137] Subsequent to the hearing, Ms XZ provided further evidence (see [26]–[34] above).

[138] Ms XZ provided two emails. The first, dated 24 May 2015, is addressed to a friend of Ms XZ's. In this email, she is discussing the efforts she is making to settle maintenance issues with her former husband. She states:

> I let him know last night what the court would cost for the maintenance hearing, that we need to be there 1 – 2 hours and my lawyer would be looking at him paying the $7,000 cost to do so, because he has left me without an income.

[139] I assume that Ms XZ is advancing this as evidence to support her contention that a firm fee of $7,000 had been agreed.

[140] I cannot conclude from this, that any firm arrangement had been reached to cap Ms XZ's fees. There is uncertainty as to precisely what was intended by this email, and it would be unduly speculative to draw from it, the conclusion that Ms XZ argues for.

[141] Evidence of email discussions between Ms XZ and Ms QW concerning the estimate issue, would have considerably greater significance.

[142] The second email, dated 28 August 2015, is an email from Ms XZ to her former husband, written after she had filed her complaints.

[143] In this email, Ms XZ makes inquiry of Mr XZ as to the costs he had incurred in dealing with what she describes as the "maintenance stuff". She says in her email:

> Remembered you saying you paid something like $7,000 for the maintenance stuff? Or was it more in the end? It's a real struggle without that extra buffer because my full-time wage does not even cover food and rent each week. Anyway if you would kindly let me know what you paid it will help my response to legal complaints.

[144] I am uncertain as to how this assists Ms XZ. No proper conclusions can be drawn as to the relevance of Mr XZ's fees to Ms XZ's position. It is quite unclear as to what work was involved in Mr XZ incurring fees of around $7,000. Mr XZ's indication of what fees he incurred do not throw any light on the question as to whether Ms XZ was provided with a firm estimate at the commencement of the retainer.

[145] It is important to reiterate, that the work completed by Ms QW was not solely related to advancing the maintenance application.

[146] Both Ms QW and Ms GL rendered invoices regularly during the course of the retainer. It would have become readily apparent to Ms XZ early on, if there had been a firm estimate provided, that the estimate had been quickly exceeded. I am satisfied that the regular invoicing by both practitioners, ensured that Ms XZ was kept up to date with the state of her accounts

[147] The costs assessor, in breaking down the work completed by Ms QW, noted that "at least on a simplistic level, the estimate- if it were given- does not appear to

have been exceeded (or if it was, only marginally so)". The assessor noted that some of the work completed did not specifically relate to the maintenance application.

[148] In my view, inquiry into argument as to whether a global estimate was provided at commencement must properly proceed on the basis that all of the fees, for all of the work (including the work completed by Ms GL), must be taken into account, as it was clearly Ms XZ's argument that it was her understanding that a firm estimate had been provided to cover all of the anticipated fees.

[149] When two lawyers are working on the same case, it is imperative that their client is kept informed about the financial consequences of their being, as was the case here, two separate retainers.

[150] But I am satisfied that Ms XZ understood the basis on which Ms GL was engaged, and was aware throughout that the work would be apportioned between Ms QW and Ms GL and that she was liable for fees incurred by both practitioners.

[151] It may have been the case that Ms XZ genuinely misunderstood an indication that she had been given at some stage about her fees, but suggestion that she was provided with a firm estimate is not established by sufficient evidence which could properly and comfortably lead me to that conclusion.

[152] I am not persuaded that Ms QW provided Ms XZ with an estimate of fees at the commencement of the retainer.

Issue 3 — Did Ms QW provide competent advice?

[153] In providing regulated services to a client, a lawyer must always act competently and in a timely manner.[14]

[154] Ms XZ's argument that she was not competently represented by Ms QW, is closely linked to argument that the settlement she achieved was inadequate, and that Ms QW should have:

(a) steered her away from filing an application for spousal maintenance;

(b) informed her of her option to file an application for maintenance with IRD; and

(c) kept her better informed about costs.

[14] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 3.

[155] These issues have largely been addressed in considering the question as to whether Ms QW failed to keep Ms XZ adequately informed.

[156] Ms QW had acted for Ms XZ previously, and acknowledged that she initially had a considerable degree of confidence in Ms QW.

[157] Ms QW was initially hesitant to take on the case, not because of any concerns she had regarding the case, but rather because she was extremely busy and hesitant to take on new work.

[158] This difficulty was overcome in part by her arranging for Ms GL to take on the task of preparing the maintenance application.

[159] Whilst the focus in the course of these two reviews has been on the maintenance application, it is clear that a significant amount of Ms QW's time was initially spent in attempting to negotiate a settlement with Mr XZ.

[160] Whilst the matter proved to be incapable of settlement, no criticism can fairly attach to Ms QW for that. Ms XZ's husband was not prepared to settle on terms that Ms XZ considered to be acceptable. Regrettably, in relationship property disputes, it is often the case that considerable time is spent in settlement negotiations which ultimately prove to be fruitless.

[161] But it appears to be the case that Ms QW's attempts to finalise matters, without the need for intervention from the court, were advanced with care and vigour, and Ms XZ makes no criticism of the steps taken by Ms QW to negotiate a settlement which would have allowed the parties to avoid the cost of litigation in the court.

[162] Whilst Ms QW had responsibility to oversee the maintenance application, her main involvement with the application was at the end of the process, when the application had got to court. She was instrumental in negotiating the settlement with Mr XZ's lawyer.

[163] Ms XZ was dissatisfied with the outcome achieved. As has been noted, she had formed a view that the settlement reached put her in no better position than she would have been, if she had accepted an offer she had been presented with (the June offer). She considered that she had incurred unnecessary costs. She says that if she had been properly and more realistically advised as to the likely outcome of her application, she would not have proceeded with the application.

[164] The June offer did not solely address maintenance issues. That offer was submitted as part and parcel of a proposal for settlement of all outstanding property matters. If Ms XZ had wished to accept the June offer, she would have also had to accept the proposals advanced regarding the other property issues. She was not prepared to do so.

[165] I agree with the costs assessor that Ms XZ's argument that she would have been better off to have accepted the June offer, ignores a substantial part of the reality. The offers dealt with different issues.

[166] It can be a taxing and difficult task to balance the value of achieving a settlement with the certainty that that inevitably provides, with the potential risk of continuing of litigation.

[167] I am not persuaded on the evidence advanced at review, that Ms QW failed to provide competent representation.

Issue 4 — Were the fees charged fair and reasonable?

[168] In considering the reasonableness of the fees charged, I have had the benefit, as did the Committee, of a comprehensive cost assessor's report, prepared by Mr YP.

[169] Whilst I am required to bring an independent view to the matter, Mr YP's report is helpful in that it:

(a) addresses each of the reasonable fee factors, and identifies those of relevance;

(b) considers the reasonableness of the fees by undertaking a "global" analysis of the fees; and

(c) examines each account by reference to the assessor's view of what would be a commonly charged fee for the work reflected in the particular account

[170] Mr YP brought to his analysis, the expertise of an experienced practitioner who had experience in drafting proceedings of similar complexity to those which are the subject of scrutiny.

[171] Having carefully examined the reasonable fee factors, the individual accounts, the materials on the file, the parties' submissions, the cost assessor's report and

having heard from the parties, I find myself in agreement with the cost assessor and the Committee that the fees charged were fair and reasonable.

[172] I agree with Mr YP that Ms QW's hourly rate fairly reflected her seniority and experience. It was the cost assessor's view that her hourly rate was on the low side.

[173] It is significant that the cost assessor who had experience in advancing maintenance applications, examined each account by reference to time spent on the work involved. Mr YP concluded, with respect to all of the accounts, that the fees charged for the specific components of work were either well within what would be considered an acceptable range, or in some cases, significantly less than what would commonly be charged

[174] Considering the accounts in their totality, the assessor concluded that the fees charged were at the lower end of the average range.

[175] When given opportunity to identify any particular concerns with the accounts, Ms XZ was unable to point to any specific concerns. She returned to argument that her focus was on the outcome achieved and what she perceived to be a failure on the Ms QW's part to guide her down a more productive and less costly path.

[176] As has been noted, the work completed by Ms QW essentially broke down into two parts. Firstly, the work involved in attempting to settle. Secondly, costs incurred in representing Ms XZ at court.

[177] I can identify no instances where there appears to be a replication of work completed. The work identified in the invoices reflects work that would be required to be completed. This was clearly a case where there was a degree of urgency and a desire on Ms XZ's part to advance matters as promptly as possible. Ms QW was an experienced and senior practitioner, and I can identify no examples of her failing to provide appropriate supervision of the file. She appears to have engaged closely with Ms XZ, particularly in the first few months of the retainer. She kept careful file notes recording relevant matters.

[178] Having considered carefully the work completed by Ms QW, and having regard to the relevant fee factors I am required to address, I am satisfied that the fees charged were fair and reasonable

[179] I see no grounds which could persuade me to depart from the Committee's decision.

Decision

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

DATED this 20TH day of December 2017

_____

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:

Ms XZ as the Applicant
Ms QW as the Respondent
Ms RD as the Representative for the Respondent
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice