LCRO 64/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Canterbury-Westland Standards Committee 2
BETWEEN	**MR SHROPSHIRE** of Christchurch Applicant
AND	**MS MARCH** of Christchurch Respondent

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

DECISION

Application for review

[1] An application for review was made by Mr Shropshire (the Applicant) of a decision by a Standards Committee which declined to uphold his complaint against Ms March (the Practitioner). The Standards Committee enquired into the Applicant's complaint and conducted a hearing on the papers. Having considered the written submissions and responses of the parties, the Standards Committee determined, pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act), to take no further action with regard to the complaint. The Committee perceived the Conduct and Client Care Rules relevant to the complaint were 2.3, 5, 6, 10, 12, 13 and 13.3.

[2] The Applicant sought a review of the Committee's decision on the basis that the *"Standards Committee erred in fact and in law"*. He particularly challenged the

Committee's application of Rules 2.3 5, 10, 12 and 13 to the issues arising in the complaints. A review hearing was held and attended by the Applicant and the Practitioner.

Background

[3] The complaint was made against the Practitioner who had acted for the Applicant's former wife in relation to their separation, and also child maintenance matters. In brief, in relation to a child maintenance assessment in 2009, it appears that the Applicant had failed to file all relevant financial information with the IRD at the time of a reassessment, and as a result his contributions (as assessed by the Child Support Agency (CSA)) were reduced to the minimum, and his former wife (the Practitioner's client) was ordered to pay child support to the Applicant. This appears to have been the material event which led her to seek the assistance of the Practitioner towards the middle of 2009. With the assistance of the Practitioner, the Applicant and his former wife had participated in some counselling sessions in early 2009, these session did not conclude any discussion of child support. The Applicant said that he had wanted to discuss these matters with his former wife and that she had refused to do so. The Practitioner responded that the counselling was more widely aimed at improving relations between the parties which had been acrimonious, and there had been some hope or expectation that the outcome of better communications would have opened up to discussions on matters, including child support.

[4] When the former wife attended on the Practitioner in respect of the CSA assessment the opportunity to appeal it was already passed. Neither the Practitioner nor her client knew that the assessment had been made on the basis of insufficient information having been provided by the Applicant to the IRD, and that it was therefore erroneous. The Practitioner filed, on her client's behalf, proceedings in the District Court. An application for a Departure Order made out of time could only be filed if coupled with an application for spousal support, and for that reason spousal support was also sought. The Practitioner considered that there was justification in making these applications in the light of the CSA's assessment that the Applicant should pay no child support but receive payments from his former wife.

[5] At the same time that the Practitioner was preparing court proceedings, the Applicant was taking steps to have the assessment corrected. Neither of them took any steps to inform the other of the actions being taken. Out of this background the Applicant filed complaints against the Practitioner.

Complaints

[6] Underlying the complaints was the Applicant's view that the filing of proceedings had been unnecessary, and could have been avoided if the Practitioner had made prior contact with him (or his lawyer), and/or taken steps to ascertain the accuracy of the CSA assessment, either with the CSA or by contacting him (or his lawyer) before taking court action. He considered the Practitioner to have breached several of the Rules of Conduct and Client Care.

[7] Additional complaints included an allegation of conflict of interest arising from the contention that the Practitioner was not charging her client fees. The Applicant perceived the Practitioner's intention was to attract more clients and she therefore had a personal interest in the outcome of the case which amounted to a conflict of interest. He also took exception to certain information that had been included in the affidavit of his former wife, that had been filed in the Court, in particular in relation to the way that the Applicant had structured his finances. The Applicant perceived that information had been put before the court had inappropriately questioned his honesty. There was a further complaint that the Practitioner had failed to consider alternatives to litigation. The Applicant considered the Practitioner's actions in filing court proceedings were not only precipitous abut also inflammatory and negligent, and contributed to the difficulty relationship between him and his former wife. These allegations were considered by the Applicant to demonstrate how the Practitioner had breached her professional obligations.

[8] This review addresses the Rules indentified by the Applicant as having been applied erroneously by the Standards Committee, namely 2 (2.3), 5, 10, 12 and 13 (13.4) .

Relevant Rules of Professional Conduct

[9] *Rule 2* obliges lawyers to uphold the rule of law and facilitate the administration of justice. The rule recognises the overriding duty of a lawyer as an officer of the Court, and prohibits lawyers from any attempt to obstruct, prevent, pervert or defeat the course of justice. Rule 2.3 states that a lawyer must use legal processes only for proper purposes, and must not use, or knowingly assist in using, the law or legal processes for causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests or occupation.

[10] *Rule 13* imposes similar obligations upon a lawyer acting in litigation, reiterating the duty to the court, and imposing an absolute duty to not mislead or deceive the court. *Rule 13.4* requires a lawyer assisting a client with dispute resolution to keep the client advised of alternatives to litigation that are reasonably available and to enable the client to make informed decisions regarding resolution of the dispute.

[11] *Rule 5* requires a lawyer to be independent and free from compromising influences or loyalties when providing services to his or her clients. This Rule also deals with conflict of interest situations, and prevents a lawyer from acting where the lawyer has an interest that touches on the matter relating to the regulated services.

[12] *Rule 10* requires lawyers to promote and maintain proper standards of professionalism in the lawyers' dealings. This rule generally deals with the professional relations between lawyers, the restrictions on contact with clients of other lawyers.

[13] *Rule 12* covers a lawyer's interaction with unrepresented or self- represented persons.

Application of the Rules to the complaint

[14] I propose to approach this review by addressing the Standards Committee approach to the complaints insofar as that has been contested by the Applicant, in with reference to the relevant rules.

Did the Practitioner have an obligation to communicate with the Applicant prior to filing court proceedings?

[15] The complaint is fundamentally that proceedings were issued at all, and without any prior communications from the Practitioner to either him or his lawyer. The Applicant submitted that an enquiry about the CSA assessment by the Practitioner could have clarified the matter quickly, and would likely have avoided the necessity of filing proceedings, and avoided the unnecessary costs and time. In the Applicant's view the Practitioner owed him a duty as a consumer of legal services to have been dealt with by the Practitioner with fairness and integrity. He considered that her failure to contact him in relation to the matter was an example of her failure to demonstrate professionalism. The Applicant questioned whether the Practitioner was using the legal process for a proper purpose. An underlying implication is that the proceeding was a waste of legal resources, and unnecessary use of the court system.

[16] The professional obligations of a lawyer are to promote and protect the interest of their client. There is no general professional duty on a lawyer towards a third party who is not a client. The rules are clear that the duty owed by a lawyer (in litigation) is first to the court and then to the client to the exclusions of all others. While there are some exceptions, these arise in limited circumstances that have no application here. There are Rules that impose duties on lawyers in the way they engage with unrepresented parties, and also define the circumstances in which a lawyer may contact the client of another lawyer. Outside of these situations, a lawyer has no duty towards another person who is represented by their own lawyer.

[17] I have considered the evidence surrounding the filing of the proceeding. The parties had attended some counselling sessions from the start of 2009 which had not gone well, and there continued to be a good deal of acrimony. There was evidence to show that communications were fraught. The Applicant acknowledged that the matter of child maintenance had been, and continued to be, a matter of significant tension. Against this background the former wife received the CSA assessment which, unexpectedly, required her to make child maintenance payments to the Applicant. When she sought the assistance of the Practitioner she was already out of time to challenge the assessment, and no doubt the Practitioner and her client discussed the options of challenging it.

[18] The erroneous CSA assessment had been done while the Applicant was briefly overseas, and he admitted that he often "*put aside*" the "*endless*" IRD correspondence. There was evidence that his accountant had not been in a position to provide all necessary information, but the overall impression was that the Applicant did not give the matter earnest attention. He had informed the Committee that had did not become aware that there was 'an issue' until he was informed by the Counsellor; by that time he had already made contact with the CSA and his accountant concerning the assessment which he had discovered was wrong. He wrote to the CSA on 5 May requesting that the previous rate be applied until a full assessment could be made. The day before, his former wife had sworn an affidavit to accompany her applications to the Court. Essentially there was a crossing of paths in the actions that were being taken by each in respect of the child maintenance.

[19] The Applicant acknowledged that he did not communicate with his former wife or the Practitioner about steps he was taking about amending the erroneous assessment. This seems to be somewhat surprising in the light of his awareness that there was 'an issue'. He acknowledged that the matter of child maintenance was an ongoing point of

tension between them, and so he knew or must have had some appreciation of the impact that the erroneous assessment would have on his former wife, but he did nothing to inform her (or her lawyer) immediately he discovered the error, nor of actions he was taking to remedy the matter. Had he done so the outcome might have been somewhat different. The failure to communicate this information may be explained in terms of the acrimonious relationship but the result was that in this vacuum of knowledge and information, the former wife, with the Practitioner's assistance, commenced court proceedings. The fact is that the Applicant had knowledge that the assessment was wrong, the Practitioner and her client did not. It cannot have been a surprise to him that his former wife would take steps to challenge the assessment, that she would in all likelihood seek the Practitioner's assistance.

[20] I accept that had the Practitioner contacted the Applicant or his lawyer, she would have learned of steps being taken by the Applicant to correct a wrong assessment. By this complaint the Applicant seeks to transfer to the Practitioner the responsibility of discovering that the assessment was wrong, and to have taken the matter up with him or his lawyer, before filing proceedings. However, I see no reason why the Practitioner would have been obliged to alert the Applicant in advance to any action that his former wife proposed to take to challenge the CSA assessment.

[21] The fact that proceedings were filed at that time primarily to challenge the CSA assessment that was not known to be incorrect does not amount to a breach any rule of professional conduct on the Practitioner's part. It was open to the former wife to pursue the matter by legal means available to her, and this does amount to an improper use of legal processes. I accept the Practitioner's submission that she had to exercise her professional judgment in relation to many of these matters, and furthermore she also had to follow her client's instructions. There is no part of this complaint that supports finding against the Practitioner under Rule 2 (or any part of it) or any other Rule.

Did the Practitioner breach an obligation to not mislead the court?

[22] The Applicant considered the Practitioner had misled the Court in two respects, first as to the CSA assessment, and second in relation to information contained in her client's affidavit. The Practitioner denied having misled the Court. Regarding the accuracy of the assessment, the Practitioner said that at the time of filing the proceedings the assessment was in fact current. She further submitted that it was not unreasonable that she and her client should have assumed that the CSA assessment was correct at that time, that there was nothing to have indicated that it was not. She

pointed out that she and her client were also unaware that at the time that the proceedings were filed that the Applicant had taken steps to have the assessment reviewed.

[23] The evidence confirmed that at the time of filing the proceeding the CSA assessment was current, in that it had not yet been amended. I accept the Practitioner's explanation that there was nothing to indicate that the assessment was wrong or raised doubts. The evidence shows that at the time of the proceedings were filed the former wife was liable to pay child maintenance to the Applicant pursuant to a current CSA assessment. There is no basis for the complaint that the Practitioner misled the Court in this regard.

[24] The second part of the complaint related to the affidavit sworn by the Applicant's former wife, and filed in the Court by the Practitioner. This referred to that part of the affidavit sworn by the former wife which stated, *"I can only assume that (*the Applicant*) has used the asset ownership structure of employment through companies and share ownership by a trust to bring his taxable income down to the level he has been assessed at."* The Applicant perceived that the former wife had made an allegation against him of fraud against the IRD, and that in filing the affidavit the Practitioner had allowed misleading information to be placed before the Court. The Practitioner denied that any allegation of fraud had been made in her client's affidavit, and added that the Applicant had misrepresented the basis upon which the case had been put before the Family Court. The Practitioner disagreed that this amounted to an allegation of fraud against the IRD.

[25] Having examined the complaint, the evidence and the relevant circumstances, I do not agree with the Applicant's interpretation of the matter. The deponent's statement is expressed as an "assumption", and appears to have been made in the light of the CSA assessment and in circumstances where the deponent believed that the Applicant's known income was not properly reflected in that CSA assessment. It could not be considered a gratuitous statement, since the deponent had linked the assessment (reducing the Applicant's liability for child maintenance) with the Applicant's rearrangement of his financial affairs is apparent in the client's affidavit. I can see no objection to the Practitioner having filed her client's affidavit that included the deponent's knowledge or beliefs of the Applicant's financial affairs, these being pertinent to the application. I cannot agree that it amounts to an allegation of fraud. There is no part of this complaint that supports finding against the Practitioner under Rule 13 (or any part of it) or any other Rule.

Did the Practitioner fail to consider alternatives to litigation?

[26] The Applicant's complaint is understood to be that the Practitioner ought to have explored alternative option to resolve the matter rather than proceeding to litigation. Lawyers practising in the area of family law are required to promote conciliation as a means of resolving disputes between the parties. The Practitioner denied having failed to discuss with her client alternatives to litigation. She considered she had discharged her duty in having facilitated the counselling. She submitted that there was a serious break down in communications which was not really improved by the counselling, and that no merit was perceived in more counselling or other dispute resolution alternatives. While the timing of the court proceeding may have been triggered by the CSA assessment, the Practitioner submitted that the ongoing acrimonious relationship between the parties made court proceedings very likely in any event.

[27] The evidence was that there had been a number of counselling sessions but these had failed to resolve issues or improved dialogue between the parties. The Applicant acknowledged that there was basically nothing that he and his former wife could agree on, and his awareness that she had been dissatisfied for some time with the child maintenance assessments. Samples of correspondence (by the Practitioner and the Applicant supplied in relation to the complaint) revealed the negative tenor of the relationship.

[28] There is no obligation on a lawyer to press a client into alternative dispute resolution pathways in any event, but in this case, with the Practitioner's assistance, there had been counselling which had demonstrated that dialogue was unlikely to resolve disputed matters. I accept that the Practitioner had taken steps to promote conciliation, and the above history does not indicate that this matter would likely have been resolved by means other than litigation. I accept the Practitioner's submissions that she was acting on her client's instructions in filing the proceeding. I have no seen no proper basis for criticising the Practitioner's conduct in this regard. There has been no breach of Rule 13.4.

Was there a solicitor/client conflict?

[29] It was the Applicant's view that by not charging for legal services the Practitioner was seeking to attract more clients to the firm, and that this compromised her loyalties because she had a personal stake in the litigation. He described this as the Practitioner having a "personal interest" in the outcome of the proceeding.

[30] The Practitioner denied having a personal stake, adding that there was no contingency fee arrangement of any kind. She considered that any payment arrangements between her and her client were private and confidential. There is no suggestion that the Practitioner has other any interest in the matter other that the fees.

[31] I see no basis for upholding this complaint. There is no legal or professional prohibition on lawyers charging below a current market level, or carrying out work on a pro bono basis. Indeed there is arguably a public perception that legal fees are often too high. Arrangements concerning fees are a matter for the lawyer and client, and are subject to the regulations set out in the Conduct and Client Care Rules. No complaint is made by the Practitioner's client.

[32] Fees charged for professional services does not equate to the provider of services acquiring a personal stake in the outcome of the services. If it is the Applicant's contention that the Practitioner was motivated to provide good services in the hope of getting more clients, this would not appear to be any different from any other professional hoping that their good services would attract new business. It would be unlikely that any arrangement concerning a reduction in fees would attract new clients in the absence of sound professional services being rendered. Clearly, no law firm could survive very long if they did not charge clients, and there appears to be nothing wrong with good services attracting clients from elsewhere. Having considered the complaint, the Practitioner's response and the evidence, I can find no evidence to show that the Practitioner was influenced by motives other than the interests of her client. There is no part of this complaint that supports finding against the Practitioner under Rule 5 (or any part of it) or any other Rule.

[33] Although I have not addressed each and every issue raised by the Applicant I have given consideration to all matters he raised and have found no basis for upholding any of the complaints against the Practitioner.

Decision

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

DATED this 28th day of October 2010

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr Shropshire as the Applicant
Ms March as the Respondent
W an interested party
The Canterbury-Westland Standards Committee 2
The New Zealand Law Society