LCRO 68/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Wellington Standards Committee
BETWEEN	**CA** Applicant
AND	**DO** Respondent

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

Introduction

[1] CA has applied for a review of a determination by Wellington Standards Committee in which it found that CA's conduct constituted unsatisfactory conduct. In that determination, the Standards Committee called for submissions from the parties on penalty.

[2] In a subsequent determination the Committee then made its findings on penalty.

[3] CA has not applied for a review of the penalty determination, and consequently, if I confirm the findings determination (which is the one in respect of which a review has been sought) the penalty determination will stand. It may be that CA is not aware of these consequences, but I must proceed on that basis.

[4] However, it is important that I record that I have not taken any aspect of the penalty determination into account when reaching my decision in this review.

Background

[5] In November 2009 CA was approached by a neighbour and friend of the complainant's mother, DP. I will refer to DO, the complainant, as 'the Complainant'.

[6] DP's neighbour and friend, on her behalf, requested CA to assist DP in resisting the intention of her family to move her into a rest home. The approach to CA was made on Wednesday 25 November 2009, and the family's stated intention was to relocate DP on the following Monday.

[7] CA attended on DP at her home on 25 November, accompanied by his wife/secretary and another lawyer, CC. DP told CA that her daughter (DQ) had been appointed her attorney but that she did not wish to go into a rest home. CA formed the view that DP had sufficient capacity to make decisions and made particular reference to the fact that she was listening to a cricket game when he arrived and was able to tell him the score. She also provided him with the names and contact details of her two daughters and gave CA no reason to suspect that she lacked capacity to give instructions.

[8] CA prepared a hand-written document for her, which I have reproduced in full:

> 25 November 2009
>
> I, [DP], Pensioner, swear as follows:
>
> a. I revoke any previous power of attorney made by me, granting any power of attorney to my children or to anyone else.
>
> b. I authorise [CA], or [CB], to make any decisions regarding relocating from my address in [address].
>
> c. For the avoidance of doubt, this document has been drafted to prevent my relocating from [address].
>
> d. I am making this statement knowing this will disempower my children in this matter.
>
> Signed:
>
> [DP] 25 November 2009
>
> Witnessed by
>
> [CC], solicitor of the High Court and sworn this 25th day of November at 138 Cambridge Terrace, Levin.
>
> Witnessed by
>
> [CD] – 25 November 2009

> I, [DP] authorise [CA], [CB] or [CC] to be able to make enquiries with any medical service and Housing NZ and any other organisation regarding being able to live on my own.
>
> This authority supercedes any other document signed by me and also includes a power of attorney granted to [DQ], my daughter.
>
> Signed:
>
> [DP]
> Dated 25 November 2009.
>
> Witnessed by
>
> [CD]
>
> [CC]
> Barrister and Solicitor of the High Court of New Zealand

[9] Later in the day, CA rang DQ and advised her that DP had cancelled the Power of Attorney appointing her and that he (CA) had been appointed attorney in her place. He advised DQ that this was an interim measure only and that a meeting should be held with DP, himself and the family to discuss matters.

[10] It would seem, that in that telephone conversation, DQ advised CA that her mother had been assessed by [facility] at [name] Hospital on 17 November as requiring full-time care and had also advised that it was necessary to activate the Enduring Power of Attorney appointing her as DP's attorney.

[11] CA wrote to the doctor who had made this assessment and requested her to confirm to him what her recommendations had been. He also filed an application for Legal Aid on behalf of DP. CA's lead provider was a barrister in [town] who provided mentoring and supervision for CA. Through her counsel, that barrister has advised the Committee that she had spoken to CA on the afternoon of 25 November and advised him that he should tell DP that she had no choice but to get an assessment as to whether she could continue living alone. She pointed out to CA that if DP did not have capacity at the time when she gave CA her instructions, then the termination of the existing Power of Attorney and the new appointment would be inoperative.

[12] On 2 December 2009, CA received a telephone call from the [facility] doctor who had assessed DP, who confirmed her assessment that DP required 24 hour care. That was recorded by a letter to CA of the same date in which the doctor stated:[1]

> Thank you for your letter regarding [DP]. I had assessed [DP] on 17 November 2009. I explained to [DP] and her daughter, [DQ], that [DP] needs 24 hour supervision because of significant cognitive impairment.
>
> [DP]'s cognitive function has deteriorated since the last assessment.
>
> [DP] has significant impairment in short term memory as well as significant impairment in executive function. Her judgement and planning are impaired. This compromises her safety. She has no insight regarding her impairment.
>
> [DP]'s daughter, [DQ], has EPoA which is enacted.

[13] In the meantime, DP had consulted her own GP who advised in a letter addressed to CA dated 4 December 2009:

> I can confirm that [DP] does not want to go into a rest home at present. I have attended [DP] for many years and am aware there is a mild to moderate degree of dementia on her part and that there has been ongoing family concerns over her ability to safely be in her own place.
>
> At present she has support services in place which enable to stay in her own flat safely and am happy to go along with her wishes with her current health status.

[14] CA sought advice from another lawyer from whom he sought assistance from time to time, who advised that:[2]

> They [the family] would have to get a committal order. It is up to the doctor and family to convince a court that she should be shifted out of the home. Your client does not have to go unless there is an order (if she has mental capacity).

[15] On 20 December 2009, CA wrote to DP's three children. In that letter he advised:[3]

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[1] Letter from [facilty] to CA (2 December 2009).
[2] Email from [lawyer] to CA (8 December 2009).
[3] Letters from CA to DQ, DO (the Complainant) and DR (20 Decemeber) at [5].

> I understand from your mother that you intend to have her placed in a rest home in early January. This letter is to advise you that your mother has engaged my services as a lawyer and I am representing her. Legal Aid has been granted.
>
> This letter is to further advise you that unless you can prove your mother is suffering from mental disabilities, she cannot be forced to move from her house.
>
> We are aware of your concerns, particularly as your mother is a smoker, and we have no doubt you are acting in what you perceive to be her best interests, but the reality is that there is no legal power for you and your siblings to force her to move from her address.

[16] CA also engaged the services of Age Concern to assist in resolving the issues that had arisen. In one letter to CA, the field worker wrote:[4]

> You have worked extremely hard in what is an agonising situation for family and client – there are often no easy outcomes in these sorts of situations. Thank you for your referral to us – it was appropriate, and I look forward to perhaps working with you again in the future.

[17] Although Legal Aid had been approved, CA considered there was nothing further to be done as the family had decided not to try and move DP into a rest home and therefore CA considered he had achieved what he had been instructed to do. He therefore closed and costed his file.

The complaint

[18] The complainant lodged her complaint with the New Zealand Law Society Complaints Service on 12 July 2010. She complained CA had informed her mother "that her family could not put her into a rest home. He informed my sister that the [Enduring Power of Attorney] had [sic] revoked and held by his firm".[5]

[19] Her specific complaints were:[6]

> - [CA] was never given nor asked to be EPoA by his client (my mother). I requested a copy of tasks covered by Legal Services Agency which does not ask for EPoA to be reviewed or up for discussion.

[4] Letter from [field worker] to CA (31 March 2010) at [2].
[5] Email of Complaint from DO (the Complainant) to NZLS (12 July 2010).
[6] Above n5.

- [CA] has misrepresented his standing as having EPoA. Our family questioned [CA] over the legal processes and documentation for EPoA but we never had an answer.
- [CA] advises my mother a cause of action contrary to her best interest.
- [CA], after being in receipt of a copy of the Specialist outcomes, requests mum's GP for a letter to the effect that mum could stay in the community. Legal and moral etiquette seem to fail here. Obtaining personal information re my mother from medical professionals? Credibility suffers.
- [CA] was assigned the question of "What are my rights". There is no estate, no legal issues, no financial issues and no family saga's. There should have been a very easy simple and straightforward answer to a straightforward question.

The Standards Committee determination

[20] The Standards Committee recorded its determination in the following way:[7]

1. [CA] purported to revoke the Enduring Power of Attorney by way of a general power of attorney in his and his wife's favour. The document was not operative and was completed without any independent assessment of [DP]'s competence. This shows [CA]'s lack of knowledge and his poor judgment in proceeding as he did.
2. The reports from [ZZ][8] were focussed on the exercise of judgment by [CA] and the extent of supervision being provided to him. Whilst helpful to the Committee in its deliberations, it was for the Committee as a whole to determine any action regarding [CA]. In the Committee's view, [CA] had fallen below the standard of competence and diligence that members of the public were entitled to expect of a reasonably competent lawyer.

[21] The Committee therefore concluded that CA's conduct constituted unsatisfactory conduct and called for submissions as to penalty and publication.

Review

[22] The issue to be considered here is whether CA's conduct in proceeding on the basis that DP had sufficient capacity to provide him with instructions to terminate an existing Power of Attorney and to appoint him her attorney, constituted unsatisfactory

[7] Standards Committee Determination (5 March 2012) a 4.
[8] Refer below to [39] to [41].

conduct.

[23] Lawyers are not mental health experts. They can only act on the situation that presents to them. In some cases, clients may present as having full capacity, yet a clinical assessment will show that they lack the requisite mental capacity to enter into legal documents and to give instructions to a lawyer.

[24] In my view, the Standards Committee has been unduly harsh on CA. He was asked to attend on DP to assist her in resisting the family's intention to move her into rest home care. When he attended at her home, she was able to advise him of the score in a cricket match to which she was listening at the time, and it would seem she was able to provide him with various contact details for her family. He had no reason to suspect that she lacked capacity.

[25] The intended action was imminent – the family had commenced packing up her belongings and had removed a stamp collection belonging to her. In addition, it appeared that it was the family's intention to have her dog "put down" as it was unable to accompany her into the rest home.

[26] Naturally, the family would have more information as to her present circumstances. However, CA was being asked to help DP oppose the family's proposed actions and to have approached the members of the family directly could have constituted a breach of confidence.

[27] DP was distressed by the family's proposals and expressed a strong desire to stay in her own home. Urgent action was needed.

[28] A lawyer with perhaps more experience, would have recognised that an Enduring Power of Attorney for Personal Care and Welfare can only be acted on if the donor lacks capacity, and a certificate to that effect was necessary before any action could be taken. All that CA needed to have done was to challenge the proposed action by the family on the grounds that DP retained capacity. Alternatively, he could have written to DQ advising that the Power of Attorney had been revoked.

[29] However, faced with the need for urgency, CA had DP execute a document which recorded cancellation of the existing Power of Attorney, and appointed him attorney in what he expressed to be an interim measure.

[30] Whatever action CA took relied upon the fact that he considered DP retained capacity to make decisions and give instructions. Subsequently, he was advised that DP had been assessed as lacking capacity. However, when he attended on DP he

was faced with a difficult situation. He had been asked by his client to act decisively and urgently. He contacted his client's GP and Age Concern for assistance. They may not have been the most appropriate people to express opinions, but they were people whose opinions carried some weight.

[31] The Complainant expresses unhappiness that her mother now has a mind-set that nobody can move her. That has no doubt caused difficulties in ensuring that DP is properly cared for, but the presumption in the Protection of Personal and Property Rights Act 1988 is that:[9]

> every person is presumed, until the contrary is shown, to have the capacity to understand the nature of decisions about matters relating to his or her personal care and welfare...

[32] The Committee has stated that CA's conduct showed his "lack of knowledge and poor judgment".[10] It does not provide any insight into what it considers CA should have done in the circumstances.

[33] Various judgments of the Courts in the context of negligence claims have commented on the obligations of lawyers in such situations. In *Arthur J S Hall & Co (a firm) v Symonds* Lord Hobhouse had this to say:[11]

> The standard of care to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercise of judgment have to be made in often difficult and time constrained circumstances. It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made.

[34] Again, in *Saif Ali & Anor v Sydney Mitchell & Co (a firm) & Ors*[12] the Court had this to say:

> The barrister is under no duty to be right; he is only under a duty to exercise reasonable care and competence. Lawyers are often faced with finely balanced problems. Diametrically opposite views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent.

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[9] Section 93B(1)(b)(i).
[10] Above n7.
[11] *Arthur J S Hall & Co (a firm) v Symonds* [2002] 1 AC 615 at 737.
[12] *Saif Ali & Anor v Sydney Mitchell & Co (a firm) & Ors* [1980] AC 198 per Lord Salmon at 231.

[35] Finally, in *Griffin v Kingsmill*[13] the Court said:

> Here again, a difficult judgment has to be made; and unless the advice was blatantly wrong, i.e. such as no competent and experienced practitioner would give it, it cannot be impugned and the prospects of successfully doing so would seem very slight.

[36] ZZ, in his reports to the Committee, did not consider that CA's behaviour fell short of the required standard. However, the Committee seemingly dismissed his reports with the comment that: "[w]hilst helpful to the Committee in its deliberations, it was for the Committee as a whole to determine any action regarding CA."[14] Again, the Committee did not offer any reasons why it disagreed with [the investigator's] comments.

[37] Overall, I am left with the view that the Committee has come to a decision that is out of step with the facts, the presumption of the law, and [the investigator's] reports, who the Committee describe as a "very experienced practitioner…with a practice involving family, property and civil litigation matters."[15]

The Standards Committee investigation

[38] Upon receipt of the complaint from the complainant on 12 July 2010, the Committee sought a response from CA. That was received on 13 August. In separate communications with the Law Society, CA volunteered to forward his file and this was received on 20 September.

[39] The Standards Committee determination records that the Committee's initial consideration of this matter took place on 5 October 2010. I note that there is a report from a Committee member (ZZ), which is dated as being received on that date, and I assume that this report was available to the Committee.

[40] However, at that initial meeting, the Committee determined to request ZZ to visit CA and a letter was sent to CA on 21 October 2010:

> As you are aware, this matter was referred to Standards Committee 1 for consideration.

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[13] *Griffin v Kingsmill* [2001] Lloyd's Rep BN 716.
[14] Above n7.
[15] Letter from NZLS to CA (21 October 2010).

> At its meeting on 5 October 2010, the Committee decided that it would benefit both you and the Committee if, as a first step, [ZZ], from the Committee paid a visit to you and your offices.
>
> ...
>
> [ZZ] will be in contact with you shortly.

[41] Having paid a visit as requested by the Committee, ZZ followed with a further report on 4 March 2011.

[42] What is of concern to me is that the status of ZZ does not appear to have been addressed by the Committee. He was a Committee member at the time of his initial report and there is no issue with that. However, at the time he was requested to visit CA's premises and discuss the complaint with him, it was necessary to clarify his status.

[43] The Standards Committee determination noted that the Committee questioned whether a mentor was required for CA. However, the letter of 21 October 2010 did not make any comment as to the purposes of [the investigator's] meeting or his status, or indeed his powers.

[44] The instructions to ZZ were communicated by email dated 14 October 2010. This email stated:

> At its recent meeting Standards Committee 1, whilst noting that the validity of the Enduring Power of Attorney was a matter for the Family Court, expressed its concern at the poor judgment shown by [CA] and at the extent of supervision being provided to him. It questioned whether a mentor was required.
>
> You will be pleased to know that it decided that the best course was to have you visit [CA] and report further!

[45] That was the extent of the Committee's communication to ZZ. There was no direction to him as to what was expected of him other than the Committee requested a further report from him.

[46] It is not the role of a person requested to assist a practitioner and act as a mentor to then be asked to provide reports to the Standards Committee. In addition, the communication with CA as to the role ZZ was to play is unclear – was he there to assist and provide advice to CA, or was he there to investigate and report to the Law Society? In my view, CA was entitled to know the basis on which he was communicating with

ZZ. Was he able to confide in ZZ, or was he being asked to provide information to a committee investigator?

[47] From my view of the communications between ZZ and the Committee there is no doubt in my mind that the Committee expected ZZ to provide a further report to the Committee – indeed it specifically asked him to do so. I therefore conclude that his role was that of an investigator.

[48] Section 144 of the Lawyers and Conveyancers Act 2006 provides for the appointment of investigators on such terms and conditions as the Committee sees fit. Section 145 of the Act then requires that any person appointed as an investigator must be supplied with a written instrument of appointment which must comply with the formalities required by that section.

[49] I do not see any such instrument of appointment on the Standards Committee file, and the request to visit CA in the email dated 21 October does not comply with the provisions of the Act.

[50] In addition, s 149 of the Act requires that any report provided by an investigator is to be supplied to the complainant and the practitioner complained about. There is no indication on the Standards Committee file that ZZ's report of 4 October was provided to the parties.

[51] Following its meeting on 1 June 2011, the Committee determined to inquire into the complaint and it issued a Notice of Hearing seeking responses by 7 July 2011. Neither CA nor the Complainant responded and the date for responses was extended to 1 August 2011.

[52] CA's response was to forward a copy of an affidavit sworn by the neighbour/friend of DP that sought CA's assistance on her behalf. This was provided to the complainant and she responded to the Committee with comments on the content of that affidavit.

[53] Following a further meeting of the Committee on 7 December, the Committee sent CA, at his request, the two reports received from ZZ and the matter was finally considered by the Committee at its meeting on 5 March 2012. There is no indication that either of the reports were sent to the Complainant.

[54] The end result of what I would consider to be procedural deficiencies, is that CA was interviewed by ZZ without being properly informed as to what ZZ's status was. It was only as a result of a request by him that the Committee sent the two reports to him.

At the time of being interviewed by ZZ, it is conceivable that CA was unaware of the existence of the first report.

[55] I have come to the view that the procedural irregularities which have occurred in this matter have been such as to constitute a breach of natural justice for both parties, and on this basis alone I consider that the Standards Committee decision should be set aside.

[56] Whilst I am conscious of the fact that the penalty determination is not subject to review, I note that the Committee ordered publication of the facts of the matter *and* publication of CA's name. There is no indication that the issue of publication was referred to the New Zealand Law Society Board for approval prior to publication as required by Regulation 30(1) of the Standards Committee Regulations.[16]

[57] On this basis, the Committee should not in any event proceed with publication.

Outcome

[58] Having reached the views expressed above, I must make a decision as to the outcome of this review. The initial option that presents itself to me is to refer the matter back to the Committee to reconsider. This has the obvious undesirable outcome of further prolonging this complaint and I am mindful of the period of time that has elapsed during the process of this review.

[59] In his letter to this Office dated 4 February 2013, CA advises that:

> In light of the stress caused by this complaint, among other issues, I have ceased practice as a lawyer and have not renewed my practising certificate. The practice was not financially viable and as a result, I have approximately $48,000 of debt. My wife and I are both working 12 hour shifts, seven days a week to discharge those debts.

[60] One of the purposes of the Lawyers and Conveyancers Act 2006 is to protect the consumers of legal services.[17] In the first instance I have come to the view that CA's conduct does not constitute unsatisfactory conduct. In addition, it would seem that any risk that CA presented to the public has evaporated by virtue of the fact that he has ceased to practice.

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[16] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations 2008.

[17] Lawyers and Conveyancers Act 2006, s 3(1)(b).

[61] Overall, I have come to the view that this matter would be best dealt with by reversing the determination of the Standards Committee and substituting a decision to take no further action.

[62] As a result of this decision, the subsequent penalty decision made by the Standards Committee will need to be recalled, as there is no finding of unsatisfactory conduct in respect of which penalties are to be made.

Decision

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

2. Pursuant to s 152(2)(c) and 211(1)(b) of the Lawyers and Conveyancers Act 2006, there will be no further action with regard to the complaint.

DATED this 26th day of September 2013

O W J Vaughan
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:

CA as the Applicant
DO as the Respondent
The Wellington Standards Committee
The New Zealand Law Society