

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the [City] Standards Committee [X]

**BETWEEN**

**BG**

Applicant

**AND**

**HL**

Respondent

**DECISION**

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

**Introduction**

[1] Mr BG has applied for a review of a decision by the [City] Standards Committee [X] to take no further action in respect of his complaints concerning the conduct of the respondent, Ms HL.

**Background**

[2] In December 2011, Mr BG was involved in a domestic dispute with his wife. Resulting from that, he was charged with three criminal offences.

[3] In January 2012, Mr BG, accompanied by his wife, attended at Ms HL's office. The parties disagree as to whether initial meetings Mr BG and his wife had with Ms HL were for the purposes of him obtaining legal advice, or whether those visits were unannounced visits initiated by Mr BG during which Ms HL deliberately avoided providing legal advice to Mr BG.

[4] On 19 January 2012, Ms HL received copies of the initial disclosure from Mr BG's former lawyer. On receipt of that disclosure, she contacted police prosecutions, discussed the charges with a police sergeant, and explored the possibility of the Police agreeing to vary existing bail conditions and withdrawing some of the charges. It was at that point that Ms HL submits her retainer was confirmed.

[5] Mr BG appeared in the [City] District Court on 20 January 2012. The prosecution indicated that they would agree to withdraw the more serious charge of threatening to kill, if Mr BG entered guilty pleas to the two lesser charges. Pleas were entered on that basis.

[6] An application was prepared for a discharge under s 106 of the Sentencing Act 2000 (s 106 discharge). That application was heard but not finally determined on 27 March 2012. Following that hearing, Mr BG and Ms HL became engaged in what appears to have been a heated discussion. What was discussed and the demeanour adopted by the respective parties during the course of that discussion is a matter of dispute between them, but what is clear is that immediately following that discussion, Mr BG terminated the retainer.

[7] Mr BG re-engaged his previous counsel, and made application to vacate his earlier pleas. A significant argument advanced by him in support of that application, was his contention that he had not been properly advised by Ms HL, and in particular, had not been shown a copy of the police summary of facts before his pleas were entered.

[8] Ms HL provided an affidavit to the Court in which she set out her view of events.

### **The complaint and the Standards Committee decision**

[9] Mr BG lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 27 April 2012. The substance of his complaint was that:

- (a) Ms HL had asked him to attend at her office with his wife present.
- (b) His ability to explain his position had been compromised by his wife's attendance at meetings with Ms HL.
- (c) Ms HL had failed to disclose the police summary of facts to him.

- (d) Ms HL had entered guilty pleas without him being fully aware as to the nature of the allegations made against him.
- (e) Ms HL had indicated concession to the summary of facts when that was not his position.

[10] Ms HL had opportunity to respond to Mr BG's complaint. She submitted that:<sup>1</sup>

- (a) Mr BG had insisted, despite her protestations, that his wife attend a meeting at her office on 12 January 2012.
- (b) On arriving at her office on that day, she had demanded that Mr BG's wife leave her office but she had refused to do so.
- (c) Mr BG had indicated at the meeting on 12 January, that he wished to instruct her, but she had advised him that she was unable to represent him whilst he had another lawyer acting for him.
- (d) Mr BG attended a further meeting with her on 16 January, at which time she provided him with some general advice concerning the charges he was facing, but from a context in which she was emphasising that she was not acting for him.
- (e) At this meeting, Mr BG made admissions which caused her to caution him as to whether he wished to instruct her.
- (f) On 19 January 2012 she received Mr BG's file from his previous lawyer.
- (g) On receipt of the file she had discussions with police prosecutions, and sought their views as to whether they would consent to having some of the charges withdrawn.
- (h) She appeared with Mr BG at the [City] District Court on 20 January 2012, at which time she discussed the police summary of facts with Mr BG, and having done so, entered, on his instructions, guilty pleas to two charges, the Police having agreed to withdraw one.
- (i) She discussed with Mr BG a proposal to seek a s 106 discharge, an approach that was agreed to by Mr BG.

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<sup>1</sup> Letter HL to Complaints Service (12 June 2012).

- (j) She then obtained a copy of the complainant's statement, and prepared a s 106 application.
- (k) At the sentencing hearing on 27 March 2012, the Judge had asked Mr BG if he wished to vacate his pleas.
- (l) Following the sentencing hearing Mr BG had advised her that he wished to vacate his guilty pleas and to terminate the retainer.
- (m) She rejected allegation that Mr BG had not had opportunity to peruse the summary of facts, or that he was not fully informed throughout.

[11] The Committee distilled the issues to be considered as:

- (a) Was it appropriate for Ms HL to meet with Mr BG together with his wife, who was the alleged victim in the matter?
- (b) Should Ms HL have advised her client to plead guilty at a time when Mr BG had not yet seen the police summary of facts, and was Ms HL's conduct acceptable when she stated to the court that Mr BG had accepted the police summary of facts at a time when he had not seen them and he had not instructed Ms HL to do so?

[12] The Committee delivered its decision on 15 January 2013. The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate. In reaching that view, the Committee concluded that:

- (a) Whilst it was unwise of Ms HL to have seen both Mr BG and his wife at the same time, the Committee took into account that Mr BG was insistent on seeing Ms HL, and that Ms HL was not acting for Mr BG at the time of the meetings
- (b) It was probable that Ms HL would have discussed the summary of facts with Mr BG.
- (c) It did not conclude that Ms HL had misled the court.

**Application for review**

[13] Mr BG filed an application for review on 15 January 2013.

[14] He submits that:

- (a) The Committee's decision was wrong and unacceptable.
- (b) Ms HL had misrepresented the situation when she had stated that she had been insistent that Mr BG's wife not attend the January meetings.
- (c) Ms HL had specifically discussed his case with his wife, and had recommended that she meet with a victim advisor.
- (d) Ms HL had guided his wife as to the matters that she should address with the victim advisor.
- (e) The Standards Committee had failed to adequately consider his evidence.

[15] Ms HL was invited to comment on Mr BG's review application.

[16] She submitted that:<sup>2</sup>

- (a) Mr BG's allegation that he had never seen the police summary of facts until the sentencing date was untrue.
- (b) Mr BG had made several admissions to her, concerning the assault on his wife.
- (c) Mr BG's decision to change his plea was unnecessary and malicious.
- (d) Mr BG's decision to lodge a complaint was driven by ulterior motives.
- (e) She had represented Mr BG competently, and in accordance with instructions provided.

**Hearing**

[17] Both parties attended a hearing on 14 March 2017.

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<sup>2</sup> Letter HL to Legal Complaints Review Officer (14 May 2013).

[18] Around midday on the day following the hearing, my Office received an email from Mr BG in which he advised that:

- (a) At the conclusion of the hearing, Ms HL had indicated to Mr BG that she would like to talk with him.
- (b) They had gone into a court interview room.
- (c) Ms HL had tendered apology to him and offered to refund the \$2,000 he had paid in fees, and to make a payment towards costs he had incurred in the sum of \$3,000.
- (d) He wished to withdraw his application for review.

[19] Ms HL was provided with a copy of Mr BG's email and given opportunity to comment on it. She elected not to do so.

[20] I am required then to consider whether it is appropriate to continue with the review, and whether I am able to do so in the face of Mr BG's indication that he seeks to withdraw his application.

[21] His indication that he now wishes to withdraw his application on the basis that Ms HL has tendered an apology and paid him a sum in compensation, is reflective of the parties having reached an agreement to settle.

[22] Section 199 of the lawyers and Conveyancers Act 2006 (the Act) directs that a Legal Complaints Review Officer (LCRO) must, on receiving an application for review that is made in accordance with the Act, conduct that review.

[23] Whilst Mr BG has now advised that he wishes to withdraw his review, I am not prepared to sanction that application.

[24] The focus of a disciplinary inquiry, has been described as a process which sets out to:<sup>3</sup>

... ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [128].

[25] As will become apparent, after reviewing the file and hearing at length from the parties, I had reached conclusion that the review raised conduct issues which needed to be addressed.

[26] Mr BG's indication that he wishes to withdraw his application on the basis that he has reached a settlement with Ms HL does not diminish or extinguish my obligation to conclude the review.

[27] Whilst Mr BG indicates that the financial agreement that he has apparently reached with Ms HL, meets in significant part those elements of his application which were focused on achieving some measure of financial compensation, and that his objective was not to seek a disciplinary outcome that would be punitive, that stance must be considered alongside his written submissions where he argues in terms and tone that approach the forceful, that Ms HL's conduct was unacceptable and requiring of a disciplinary response.

[28] Attempts by parties to settle professional complaints are to be encouraged, and the disciplinary mechanism provides opportunity for parties to endeavour to do so. The first step in the complaint process anticipates that parties who are dissatisfied with their lawyer will have opportunity to sort out the problem by initially dealing directly with the lawyer. It is a requirement that a lawyer ensures that the lawyer's practice establishes and maintains appropriate procedures for handling complaints by clients with a view to ensuring that each complaint is dealt with promptly and fairly by the practice. When a lawyer owns a sole practice, the complaints procedure may include the reference of complaints to an independent lawyer for consideration.<sup>4</sup>

[29] A Review Officer may, on receipt of an application for review, direct that the parties explore the possibility of resolving the dispute by negotiation, conciliation or mediation.<sup>5</sup>

[30] However, if the matter to which a review relates involves an issue of misconduct or unsatisfactory conduct, the Legal Complaints Review Officer may conduct the review in relation to that issue despite any settlement agreed by the parties to the review.<sup>6</sup>

[31] Whilst a Review Officer's statutory power to continue with a review as set out in s 201(4) of the Act, arises in the context of the Officer having directed the parties to attempt to negotiate a settlement, in my view, opportunity for a Review Officer to

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<sup>4</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.8.

<sup>5</sup> Lawyers and Conveyancers Act 2006, s 201.

<sup>6</sup> Section 201(4)(c).

exercise a discretion to continue with the review process, in circumstances where there has been a settlement reached following a directed mediation, sensibly, and properly would also have application in those situations where the parties had, through their own efforts, reached a settlement.

[32] I consider that it is necessary and appropriate to continue with the review, despite indication that a settlement had been agreed, after the hearing had been concluded.

[33] It is my intention for reasons which will become clear, to reverse the Standards Committee decision, and to make an unsatisfactory conduct finding. In arriving at that view, I have reached firm conclusion that Ms HL would benefit from a direction that she receive guidance from a senior practitioner. A consideration of the consumer protection objectives and the role of the disciplinary process in the maintaining of professional standards, were to the forefront when deciding to conclude the review.

[34] Whilst attempts to negotiate settlement of a complaint are in many circumstances appropriate, practitioners should be particularly attentive to the need to ensure that discussions with a complainant are conducted carefully, and with attentive need to ensure that there can be no suggestion that the practitioner has asserted any improper influence over the complainant. This is particularly so in circumstances such as these, where the decision to withdraw the review (made after the hearing had concluded) is accompanied by an agreement to pay financial compensation. In noting that, I do not suggest that there was any impropriety on Ms HL's part.

### **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:<sup>7</sup>

... 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

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<sup>7</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].



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:<sup>8</sup>

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 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 are:

- (a) Did Ms HL compromise Mr BG's position, by allowing Mr BG's wife to be present at the initial meetings?
- (b) Did Ms HL fail to provide Mr BG with a copy of the police summary of facts, and go through that summary with him?

### *Preliminary Comment*

[39] On most of the significant issues at the heart of this review, the evidence of Ms HL and Mr BG is diametrically at odds. They have totally differing recollections as to what was and was not discussed at their initial meetings. They have totally differing recollections as to when the retainer was confirmed. They have totally differing recollections as to what advice was provided, and what instructions were given.

*Did Ms HL compromise Mr BG's position, by allowing Mr BG's wife to be present at the initial meetings?*

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<sup>8</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[40] Mr BG was facing serious criminal charges, involving allegation that he had assaulted and threatened to kill his wife.

[41] His bail conditions directed that he was to have no contact or communication with his wife.

[42] Before considering Mr BG's involvement with Ms HL, it is necessary to consider whether, as a matter of general principle, it is appropriate for a defence lawyer defending a client against allegations that the client has assaulted his wife, to meet with the client's wife (the complainant).

[43] The nature of Ms HL's involvement with Mrs BG is in dispute between the parties, but it is clear that Ms HL met with Mrs BG on two occasions prior to Mr BG entering pleas.

[44] It would have been readily apparent, that Mrs BG would have been a witness in the proceedings, if the matter had proceeded to a defended hearing.

[45] Rule 13.10.04 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), provides as follows:

A lawyer engaged in any proceedings does not have the sole right to call or discuss the case with the witness. A lawyer acting for one party may interview a witness or prospective witness at any stage prior to the hearing, whether or not the witness has been interviewed by the lawyer acting for the other party.

[46] Whilst that rule presents at first blush as putting no impediment in the path of a lawyer's wish to interview any witness or prospective witness, a footnote to the rule suggests that if a lawyer intends to interview a prosecution witness, a cautionary approach should be adopted. The footnote recommends that:

Where a lawyer proposes to interview a witness for the other side, it is prudent to inform the lawyer representing the other side of this fact, especially in respect of sensitive criminal matters where it is important to take steps to avoid any suggestion of interfering with the course of justice.

[47] Nowhere is it suggested that Ms HL was interviewing Mrs BG in her potential capacity as a witness (indeed Ms HL denies any initial formal meeting) but the terms "witness" and "interview" are not terms of art in this context: they refer to a person who can give admissible evidence about a fact or issue in dispute in a matter that is before the courts. "Interview" means no more than talking to that person. It describes a process and not a format.

[48] Question as to whether a defence lawyer was expressly prohibited from interviewing a prosecution witness was directly addressed in the High Court decision of *Harold v Legal Complaints Review Officer*.<sup>9</sup> That decision is of particular assistance, in that it concerned a review of decisions of a Standards Committee and the LCRO which had respectively, made and affirmed conduct findings against a practitioner who had spoken with a prosecution witness.

[49] In that case, the Standards Committee had in considering the conduct as it was required to do by reference to the Rules of Professional Conduct under the Law Practitioners Act 1982, (being that the conduct complained of occurred prior to the coming into force of the Lawyers and Conveyancers Act 2006) concluded that a practitioner's conduct in speaking with a complainant who had made allegation of assault against the practitioner's client, had been unsatisfactory.

[50] The Standards Committee considered that there was a well-established convention that applied to Crown and police witnesses, which required defence counsel to notify the Police or the Crown, before they attempted to interview a police or Crown witness.

[51] On review, the Review Officer affirmed the Committee's approach, and also concluded that there was a well established convention; one strictly observed by lawyers practising at the criminal bar, that defence lawyers were obliged to contact the Police or Crown, before interviewing a witness. The practice was described by the Review Officer as a "no contact" policy. It is necessary to note, that the Review Officer's determination, also considered the effect and consequence of court and national operating guidelines applied in cases where there was allegation of domestic violence.

[52] The High Court set aside the decisions of the Committee and the LCRO. In doing so, the Court concluded that:<sup>10</sup>

- (a) The Rules (both pre and post 1 August 2008) imposed no prohibition on a lawyer speaking with a witness.
- (b) The Committee's conclusion that a long standing convention prevented lawyers from contacting a witness conflicted with the conduct rules.

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<sup>9</sup> *Harold v Legal Complaints Review Officer* [2012 NZHC 145, [2012] 2 NZLR 559

<sup>10</sup> At [43-48].

- (c) Whilst the Rules of professional conduct did not solely govern the situation, they expressly applied to the type of conduct in question and were highly relevant.
- (d) Those Rules should have been given weight and incorporated into the reasoning process.

[53] Whilst the Court concluded that there was no convention in place that overrode the force of the Rules, it made clear that there could be situations where a breach of professional standards may arise as a consequence of a lawyer speaking to a prosecution witness.<sup>11</sup>

There can undoubtedly be circumstances where it will be a breach of professional standards for a practitioner to have a discussion with a witness for the other side. If that discussion arose to the practitioner's knowledge as a consequence of improper pressure or conduct, the contact could be conduct unbecoming. A practitioner could be found in certain circumstances, to have been guilty of grave discourtesy, or bullying or intimidatory behaviour. This sort of conduct could well give rise to a complaint that is upheld. In certain circumstances, it may be prudent or courteous to inform the lawyer representing the other side of the fact of an interview.

[54] Approaching the facts of this particular case, I proceed from the basis that there is no recognised convention in place that prevented Ms HL from speaking with Mrs BG, and a recognition that the Rules reinforce that a lawyer acting for one party, may interview a witness or prospective witness at any stage prior to the hearing.

[55] That being said, the need for a defence lawyer to tread carefully is noted both in *Harold*, and in the footnote to rule 13.10.4, which emphasises the desirability of a lawyer informing the other side of an intention to interview a witness, especially in respect of sensitive criminal matters.

[56] Mr BG faced serious criminal charges, which arose from a domestic incident. His wife was the complainant. A condition of his bail prevented him from having any contact with her. If Ms HL was to have any contact with Mrs BG, it was imperative, for a number of reasons, that any contact was carefully managed.

[57] Of particular concern to any competent and careful lawyer, would be the need to ensure that contact with a complainant witness did not carry any possible risk of compromising the court process, nor provide any basis for accusation that the process had compromised the witness. This is critical in circumstances where the charges laid have a domestic context.

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<sup>11</sup> At [63].

[58] To many people a lawyer is a person in authority. There is the potential for a power imbalance when a lawyer speaks to a layperson, and care must be taken by the lawyer not to apply - even indirectly - undue pressure.

[59] Care is needed when the witness being interviewed is vulnerable - such as young people, the elderly, the unwell or those for whom English is a second language.

[60] Victims of offences occupy a special place in criminal proceedings. Judges are required to take their views into account in bail hearings, suppression hearings and sentencing hearings. It is important that those views may be freely given.

[61] Victims of domestic or sexual violence are seen as especially vulnerable. The dynamics of that type of offending are complex. Victims may have competing loyalties. They may be receiving further threats.

[62] More than one interview of a witness can give rise to the suggestion that a lawyer has moved from seeking clarification, to giving advice tailored to suit the interests of their client.

[63] It is important to note that Ms HL's contact with Mrs BG occurred in circumstances where her defendant husband, was present on both occasions. This presents as a quite different situation to that in *Harold*, where the practitioner had but fleeting contact, alone, with the complainant at the Court.

[64] Meeting with a complainant in the presence of the accused, exposes the lawyer's client to risk of allegation that their client (and by association the lawyer) may be endeavouring to influence the complainant, and thus put the lawyer at risk of allegation that they have subverted their overriding duty to the court.

[65] There is also the troubling issue of Ms HL potentially abetting Mr BG's contact with his wife when his bail terms prevented that.

[66] It is accepted by Ms HL that she had two meetings with Mr BG and his wife in January 2012.

[67] Ms HL is emphatic that both those meetings took place without her consent or agreement. She says that Mr BG turned up at her office unannounced, accompanied by his wife, and that on both occasions she made insistent request of Mr BG's wife to leave her office, but despite those protestations, both refused to do so. She argues that whilst Mr BG had advised her that he was facing criminal charges and indicated a

desire for her to represent him, she steadfastly refused to do so, and was only prepared to offer him general advice.

[68] Ms HL argues that the point at which there was confirmed agreement that she would take on Mr BG as a client, was on the 19 January 2012 when she received Mr HL's file from his previous lawyer.

[69] Mr BG has a different view. He says that both he and his wife had met with Ms HL prior to their meetings in January 2012. He says that a personal relationship had developed between the parties, and notes that he had dropped off a small gift at Ms HL's office just prior to Christmas 2010 and that he and his wife had attended Ms HL's wedding in March 2012.

[70] Mr BG says his first lawyer had advised him that he could not continue to represent him because of a conflict of interest, but at hearing he suggested that he had terminated the retainer because Mr BG's wife did not have confidence in his lawyer. Mr BG said that his first lawyer had refused to meet with him if his wife was present.

[71] Having decided to terminate his first lawyer's retainer, Mr BG says he then turned to Ms HL. He did so because Ms HL was a person who he knew. He says that his wife phoned Ms HL, and that Ms HL immediately confirmed arrangements for him and his wife to attend at Ms HL's office.

[72] There is agreement that Ms HL met with Mr BG, and his wife on two occasions in mid January 2011. They agree that the second meeting took place on 16 January 2011. There is disagreement as to whether the first meeting took place on 12 or 13 January 2011. Little turns on that point.

[73] Mr BG says that Ms HL made it clear at those meetings that she would represent him in the criminal proceedings. He says that a fee was agreed and that he paid Ms HL \$1,000 in cash on account of fees at the first meeting (for which he did not receive a receipt at the time) and that Ms HL discussed the case directly with his wife, and discussed a strategy for his wife which would assist his case.

[74] Ms HL's position, consistently advanced in her submissions to the Committee and on review, and resolutely maintained at hearing was that:

- (a) She had not made an appointment for Mr and Mrs BG to attend at her office.

- (b) Mr and Mrs BG had turned up at her office on two occasions in January 2012 unannounced.
- (c) She had rigorously attempted to persuade Mrs BG to leave her office on both occasions, but she had refused to do so.
- (d) At the first meeting (12 January 2012) she did not talk to Mrs BG.
- (e) At the second meeting (16 January 2012) she was alerted to Mr BG's bail conditions which prohibited him from having contact with his wife, and accordingly advised Mr BG that she could not, as his potential lawyer, talk to his wife and nor should he.
- (f) She was not retained as Mr BG's lawyer until she received disclosure on 19 January 2012.

[75] Having carefully considered all of the written submissions, and having heard at length from both Mr BG and Ms HL, I conclude that:

- (a) Ms HL did agree to meet with Mr and Mrs BG.
- (b) That she did discuss the case with Mr and Mrs BG at the January 2012 meetings.
- (c) That she did agree to represent Mr BG at the first meeting.
- (d) It was probable that Mr BG's first payment on account of fees was paid to Ms BG at the first meeting.
- (e) It was probable that Ms HL did, at those early meetings, provide advice to Mrs BG as to the matters she should discuss with the victim advisor.

[76] In reaching that view, I am mindful that having done so, that conclusion presents difficulties for Ms HL, as it challenges the fundamental positions she has advanced from the time the complaint was first lodged.

[77] I have not reached that view lightly. I have given weight to a number of factors.

[78] Firstly, I considered Mr BG's recollection of events to be the most credible, and most consistent with the information available that was able to provide insight into how his case had been progressed.

[79] Mr BG presented as an articulate individual. Whilst he argues that he was not aware of the precise allegations that had been made concerning the domestic incident, it was clearly the case that he understood that he had been subjected to bail conditions, and that he was required to reappear in Court on 20 January 2012.

[80] Ms HL argues that the retainer was only finalised, once she had received a copy of the initial disclosure on 19 January 2012, the day before Mr BG was to appear in Court.

[81] I think it unlikely that Mr BG, having attended meetings with Ms HL on 13 and 16 January, would have sat back and remained unrepresented until Ms HL confirmed her preparedness to act at last minute. Mr BG is a businessman. He explained that he had, in the course of running his businesses, worked closely with a number of lawyers. Whilst not familiar with the criminal process, he was nevertheless accustomed to instructing lawyers.

[82] Whilst Ms HL contends that she was not instructed by Mr BG until 19 January, and that she only provided advice of a general nature to Mr and Mrs BG, she made a note of the matters discussed at the 13 January meeting. That note records the charges Mr BG was facing, makes reference by name to the victim advisor that Mrs BG was subsequently to visit, and mentions "bail condition"(although not detailing the specific conditions imposed).

[83] The notes made are, in my view, reflective of a lawyer gathering basic information at commencement of preparing a client to respond to criminal charges. In referencing the name of the victim advisor, it presents as highly probable that Ms HL was discussing matters specifically relevant to Mrs BG.

[84] Whilst Ms HL suggests that she did not know what Mr BG's bail conditions were, the nature of the charges that Mr BG was facing, and the domestic context from which those charges arose, should reasonably have given her pause to consider the high probability of a non association condition being in place, and to properly be apprehensive about having parties meet in her office in circumstances which may have provided grounds for a potential criminal charge (breaching bail), for what she was then regarding as her prospective client. There is no dispute that she had details of the bail conditions before her at the second meeting.

[85] At this initial meeting, Ms HL provided Mr BG with a name of a counsellor, and advised him to commence counselling immediately. This was advice consistent with a



lawyer taking immediate steps to ensure that her client was equipped to be in best position to present himself to the court.

[86] If there was uncertainty as to whether Ms HL had been formally retained on 13 January, or as to whether she was providing general rather than specific advice in a well intentioned effort to assist Mr and Mrs BG, the meeting of 16 January presents as more conclusive.

[87] It is noted that the second meeting took place shortly after the first. Ms HL's argument that she continued to refuse to engage with Mr BG (and was apparently still unable to enforce her insistence that Mrs BG leave her office) presents as surprising. Having been confronted with a situation in which she says she was immensely discomforted by just a few days earlier, it could reasonably be expected that Ms HL would have been equipped to deal more decisively with the situation when it arose again.

[88] At this second meeting, Ms HL submits that she made some general comments to Mr BG concerning the charges he was facing. During this meeting, Ms HL says that Mr BG made several admissions. She says that Mr and Mrs BG were emotional and "constantly arguing", as they had been at the first meeting.

[89] At the conclusion of this meeting, Ms HL provided Mr BG with a letter of engagement. She describes this as a "draft" letter of engagement, and given to Mr BG so he could take it home and consider it. In addition, she asked Mr BG to prepare a statement of events.

[90] Whilst she conceded that Mr BG assured her at this meeting that he wished to instruct her, Ms HL argues that she did not "want to pressure him".

[91] The letter of engagement is dated and addressed to Mr BG. It commences by detailing the services to be provided to Mr BG, and lists the charges he is facing. The letter of engagement records that Mr BG is to be bound by the terms of the engagement, if after receipt of the letter, he advises Ms HL that he accepts the terms, or instructs her to proceed.

[92] Ms HL correctly notes that the letter of engagement was not signed. For reasons I was unable to establish, Mr BG was apparently resistant to signing a formal letter of engagement. At the time when the retainer terminated following the March hearing, Mr BG had still not signed the letter of engagement.

[93] I do not accept Ms HL's argument that she had given Mr BG a letter of engagement to simply consider and reflect on. Providing him with that document, whilst at the same time making request of him to prepare a summary of events, is consistent with an understanding being reached, that Ms HL was to represent Mr BG.

[94] Attention then turns to the summary that Ms HL had prepared to assist Mrs BG with focusing on what she (Mrs BG) was to say when she met with the victim advisor.

[95] Ms HL does not dispute that she spoke with Mrs BG, that the subject of that conversation was the issues to be addressed by Mrs BG when Mrs BG met with the victim advisor, and that she made a written record of that discussion. The discussion took place in Chinese. Mr BG says that Ms HL provided a written summary for his wife, in order to "tell her what to say when she meets the victim adviser".

[96] Those notes were written in the Chinese language, and Mr HL had provided a translation.

[97] Mrs BG took no objection to the translation provided by Mr BG.

[98] The notes are comprehensive.

[99] If it was the case that Ms HL took a statement from Mrs BG at one of the January meetings, that would contradict Ms HL's position that she had not spoken with Mrs BG when she visited her office in January 2012, that she had been insistent that Mrs BG leave her office, and that she had been resistant to engaging in any discussions with Mrs BG.

[100] Whilst accepting that she had discussed with Mrs BG matters Mrs BG should traverse with the victim advisor, Ms HL submitted that she simply made a note of Mrs BG's views so that Mrs BG would not overlook any significant matters when she met with the advisor. She maintained that her discussion with Mrs BG took place at Court, following one of Mr BG's appearances.

[101] Ms HL's notes of 13 January 2012 make specific reference to Ms Y, a victim advisor at the [City] District Court.

[102] Ms Y provided a report to the Court on 20 January 2012. That report records that Mrs BG had met with her the previous day, and that Mrs BG had prepared a statement that she wished to have put before the Judge. The statement is comprehensive.

[103] Having prepared such a comprehensive account for the victim advisor (and provided that to the victim advisor the day before Mr BG's appearance on 20 January 2012), it presents as unlikely that Mrs BG would consider it necessary to provide further account to Ms HL, after her husband's appearance on 20 January 2012.

[104] Ms HL emphasised that she had not met further with Mrs BG at her office, following the meetings in January 2011. The next occasion that Mrs BG would have had opportunity to meet with Ms HL was at Mr BG's sentencing on 27 March 2012.

[105] A brief update report was provided to the Court on that day by a victim advisor who had met with Mrs BG on the morning of the hearing. Ms HL prepared a file note recording what had transpired at the Court on 27 March 2012. That file note was prepared in the context of her wishing to record events that had ended in Mr BG terminating her retainer. She makes no reference to having spoken with Mrs BG or making notes recording matters that Mrs BG wished to have presented to the victim advisor. There would appear to be no reason as to why Mrs BG would think it necessary or to provide a statement of her views to Ms HL. By this time, the Court had been provided with both the comprehensive report, together with a brief update.

[106] I think it probable that Ms HL took the statement from Mrs BG at one of the January 2011 meetings.

[107] But if I am mistaken in that, and it was the case that she took the statement after Mr BG had appeared in court, I would be still of the view that it was inappropriate for her to speak to Mrs BG concerning Mrs BG's meeting with the victim advisor.

[108] The matters were still before the Court. If it was the case that Ms HL took the statement from Mrs BG on 20 January 2012, this would have been the third time that she had met with Mrs BG and her husband, since Mr BG had been charged.

[109] It was, in my view, unwise for Ms HL to be assisting Mrs BG. She put herself at risk of accusation that she had assisted in formulating an approach to be adopted with the victim advisor. Her decision to record Mrs BG's account of what had transpired between herself and her husband, in the knowledge that the information was to serve as an aide memoir for Mrs BG, presents as markedly at odds with Ms HL's stated position that she was vehemently opposed to meeting with Mrs BG and acutely mindful of the risks of doing so.

[110] The statement when examined, may present as Ms HL describes it, as no more than an attempt by Mrs BG to clarify what had occurred in the course of the domestic incident, but viewed objectively there are elements of the statement that

could raise concern that the statement of position is crafted with purpose of assisting Mr BG. The statement raises issue as to Mrs BG's ability to provide accurate account.

[111] For example, Mrs BG reports that:

- (a) She cannot recall what she told the Police.
- (b) Her English was poor.
- (c) She was emotional and incoherent when she gave her statement.
- (d) The Police failed to record much of the information she had provided.
- (e) Mr BG had hit himself with a knife.
- (f) Mr BG had made no threat to kill.
- (g) The couple had a "small" quarrel.
- (h) Mr BG had just "pushed" her.

[112] This is not to suggest that Mrs BG was not providing an honest account of her recollection, but rather to emphasise the difficulty that Ms HL faced by involving herself so directly with the complainant.

[113] This is a statement which would provide considerable assistance to Mr BG. Ms HL was exposing herself to risk of accusation that the complainant was being unduly influenced by the lawyer of the man charged with assaulting her.

[114] These concerns are amplified when the domestic context is considered.

[115] There is an acute sensitivity of the need to ensure that victims of domestic violence are both protected from any untoward attempts to assert pressure on them to resile from allegations made, and that there is opportunity for their voices to be heard.

[116] This is reflected in the Victims' Rights Act 2002, which has as its purpose, improving provisions for the treatment and rights of victims of offences.

[117] Section 17 of that Act, records that it is the responsibility of the prosecutor to make all reasonable efforts to ensure that relevant information about the impact of the offence on the victim is put before the Court.

[118] In meeting with Mrs BG in the manner she did, Ms HL also put her own client at risk.

[119] I do not accept Ms HL's argument that she was unable to resist (on two occasions) Mr and Mrs BG's demands that they meet with her, despite her reluctance to do so, and her awareness of the difficulties that could arise if she was to meet with Mrs BG.

[120] This is argument that a lawyer's professional obligation and duties can be subverted by the vigorous demands of insistent and forceful personalities.

[121] At hearing, Ms HL posed the question, "they would not leave, what could I do?" She explains her inability to enforce her demand that the BGs leave her office on two occasions, by argument that cultural imperatives and common courtesy, prevented her from being as insistent as she should have been.

[122] Whilst I accept that Ms HL may have been anxious not to offend, in circumstances such as these, her professional obligations must be seen to prevail over personal concerns.

[123] The practice of criminal law requires a degree of robustness. In the course of running a criminal practice, a lawyer will on occasions be required to stand firm against a client's insistence on the lawyer adopting a course of action that the lawyer considers to be adverse to the client's interests, or compromising of the lawyer's professional obligations.

[124] Mr BG says that he was inhibited from speaking to Ms HL in a frank and open manner because of the presence of his wife. He says he was unable to tell Ms HL his side of the story.

[125] Ms HL says that in the course of the discussions with Mr BG, Mr BG made admissions which were damaging. She says that she told Mr BG that she would not advise him to defend the charges because of the admissions made.

[126] These discussions, taking place in the presence of the complainant, must have had significant potential to compromise Ms HL's ability to defend Mr BG, and to have drawn her into a potentially hazardous procedural labyrinth.

[127] One being that it was possible that Mrs BG would be required to give evidence.

[128] Measuring this conduct against the need for caution that is recommended by rule 13.10.14, the Court's comments in *Harold* and the absolute necessity to ensure that the position of complainants in the progressing of a domestic violence matter

before the Courts is not compromised, I am of the view that Ms HL's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, and was conduct that would be regarded by lawyers of good standing as being unacceptable and unprofessional.

[129] A finding of unsatisfactory conduct is established pursuant to ss 12 (a) and (b) of the Lawyers and Conveyancers Act 2006.

*Did Ms HL fail to show Mr BG the police summary of facts?*

[130] Mr BG is adamant that he was not provided with a copy of the police summary.

[131] It is his contention that he was unaware of what the summary contained, until after he had pleaded to the charges.

[132] He says that he would not have entered guilty pleas, if he had been made aware of what was being alleged.

[133] Ms HL rejects suggestion that Mr BG was unaware of what the police summary contained.

[134] She contends that she went through the summary with Mr BG at court before entering his pleas that he was fully cognisant of what was in the summary. She says that Mr BG was insistent that guilty pleas be entered, and that his primary focus was on having his bail conditions varied.

[135] I am unable to resolve the issue on the evidence before me.

[136] I am unable to reach firm conclusion as to whether Ms HL did or did not address the summary with Mr BG. No disciplinary issues arise then from this aspect of the complaint.

[137] What is clear however, is that if Ms HL had adopted what I understand to be common practice for defence lawyers of having Mr BG record in writing that he understood the nature of the charges and the implications of entering guilty pleas, and had made request of him to endorse the summary of facts, that would have removed any room for uncertainty as to what had been discussed, understood and agreed at the court.

*Other Matters*

[138] Whilst not directly raised as part of the complaint, in the course of conducting this review, I was alerted to other issues which raised concern.

[139] As these matters were not part of the initial complaint, and not part of the Committee's inquiry, I do not raise these matters as issues which contribute to the unsatisfactory conduct finding that has been made, but rather to amplify the reasons for the orders that I propose to make.

[140] Considered in its totality, it is my view that Ms HL failed to manage Mr BG's case in a competent manner.

[141] The extent to which she failed to manage her client (particularly interactions with her client's wife) are dealt with at length above.

[142] Her insistence that she was unable to resist demand from her clients, and suggestion that the brief was "imposed" on her, was concerning.

[143] Her failure to attend to basic requirements such as formalising a letter of engagement, have contributed to the uncertainty as to when the retainer commenced.

[144] There were clear shortcomings in the way in which she managed the financial aspects of the retainer.

[145] Whilst she suggested at hearing that she had provided an invoice to Mr BG for services rendered, there was no evidence of her having done so. She indicated that she had provided a statement to Mr BG, but that the statement was retained in electronic format.

[146] She indicated that she kept time records, but advised that those records were also stored in an electronic format.

[147] Prior to the hearing, request was made of Ms HL to have her complete file available for the hearing.

[148] Despite complaint raised by Mr BG that Ms HL had failed to provide him with a record of funds paid, Ms HL provided no evidence of time records or of her having invoiced Mr BG for work completed.

[149] Ms HL practises as a barrister. There are clear rules around the circumstances in which a barrister can directly accept funds from a client.<sup>12</sup> Ms HL's terms of engagement recognise this and record that a retainer is to be paid at commencement, and that the retainer is to be paid into the trust account of her instructing solicitor. The process by which Ms HL may deduct funds from the instructing solicitor's account is also carefully described in the letter of engagement.

[150] There is no evidence that Mr BG was advised at any stage that fees were to be paid to an instructing solicitor. He says that Ms HL required him to pay a \$1,000 retainer directly to her at the first interview, and that she only provided receipts for payments made, after he raised objection that he had no record of the payments.

[151] The focus of the legislation governing the discipline of lawyers in New Zealand has consumer protection as one of its principal objects.<sup>13</sup>

[152] In my view, an appropriate outcome for this review is for orders to be made that provide opportunity for Ms HL to receive some guidance on matters relating to the management of her practice.

[153] Such directions can be made consequential on a finding of unsatisfactory conduct being made.

[154] In fairness to Ms HL, I must emphasise that I formed a clear impression from her at the review hearing that she appreciated that she had made mistakes. I also consider that she was motivated by good intentions, and genuine in her desire to assist Mr and Mrs BG.

### **Costs**

[155] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

[156] Taking into account the Costs Guidelines of this Office, the practitioner is ordered to contribute the sum of \$1,200 to the costs of the review.

[157] The order for costs is made pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006

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<sup>12</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 14.2(3), 14.10.

<sup>13</sup> *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [10].



**Orders**

[158] The following orders are made:

- (a) Ms HL is to pay \$1,200 in respect of the costs incurred in conducting this review pursuant to s 210 of the Act. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.
- (b) Ms HL is to take advice in relation to the management of her practice from a senior criminal practitioner appointed and approved by the New Zealand Law Society (s 156(1)):
  - (i) The practitioner appointed to assist Ms HL is to provide assistance for a period of five hours.
  - (ii) Any costs that may be incurred by the practitioner in providing assistance to Ms HL, are to be met by Ms HL.
  - (iii) The areas which the senior practitioner is to address with Ms HL are to include, but not necessarily be limited to:
    - (1) Duties and obligations arising at commencement of retainer.
    - (2) Briefing clients on criminal matters.
    - (3) Managing fees.

**Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed in accordance with the directions made above.

**DATED** this 27<sup>th</sup> day of April 2017

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**R Maidment**  
**Legal Complaints Review Officer**

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

Mr BG as the Applicant  
Ms HL as the Respondent  
[City] Standards Committee [X]  
New Zealand Law Society