

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2020] NZLCRO 118

Ref: LCRO 87/2019

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee

BETWEEN

G OR

Applicant

AND

F HM

Respondent

DECISION

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

Introduction

[1] Dr OR has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of her complaint concerning the conduct of Mr HM, a lawyer, at the relevant time a partner of [Law firm A], [city] (the firm). Mr HM acted for Ms T OR, Dr OR's sister, in proceedings against Dr OR concerning the estates of their parents, Mr and Mrs OR.¹

[2] In October 2016, Ms KD, a lawyer in sole practice, prepared enduring powers of attorney for Mr and Mrs OR, and a codicil to Mrs OR's will.²

¹ Mr J OR was known as Mr R OJ.

² Mrs OR's enduring power of attorney which was produced, and Mrs OR's codicil were dated 6 October 2016. Mrs OR's will dated 16 September 2010, had been prepared by the Public Trust.

[3] In her enduring power of attorney (property and welfare) Mrs OR appointed Mr OR as her attorney, and Dr OR as successor attorney. In her codicil, Mrs OR appointed Mr OR as executor and trustee, or Dr OR if Mr OR predeceased [Mrs OR], or was unable to act.

[4] The following year Mr and Mrs OR sold their family home. Settlement took place on or about 8 December 2017. By that time, they had instructed Mr NQ, a lawyer in another firm, to act for them.³

[5] On 30 January 2018, Mr OR created the XYZ Trust (the trust). The trustees were Mr OR, Dr OR, and Dr OR's husband. Mr OR was appointor of trustees. The beneficiaries included Mr and Mrs OR, and three of their four children, Dr OR, Mr B OR and Ms H OR.⁴ Ms T was not named as a beneficiary.

[6] Mr OR also made a will on 30 January 2018 in which he (a) appointed the senior partner of Mr NQ's firm as executor and trustee, (b) forgave any debts owed to him by the trust, and (c) left the residue of his estate to the trustees of the trust.

[7] Mr HM says he understands that the sale proceeds of Mr and Mrs OR's family home were settled on the trust on 30 January, and that six days after Mr OR's death on 7 April 2018, the trust purchased a residential property.

[8] Mrs OR died on 13 June 2018.

[9] Mr HM commenced acting for Ms T on 11 July 2018 in respect of inquiries she wished to make into Mr and Mrs OR's enduring powers of attorney, Mrs OR's codicil, creation of the trust by Mr OR, settlement of the sale proceeds of Mr and Mrs OR's family home on the trust, and the purchase of the property by the trust.⁵

[10] On 14 July 2018, Mr HM asked (by email) Ms KD for information about these matters. He said he was "looking at" Mr OR's capacity to create the trust including settlement of the sale proceeds of the family home on the trust, and also "any issues of undue influence" by Dr OR. He asked for a copy of the trust deed, copies of Mr and Mrs OR's wills, and any other relevant documents.

[11] In her response (by email) dated 16 July 2018, Ms KD said when she met with Mrs OR in October 2016, she had "concerns that the family home was gifted into the

³ Mr NQ was a partner of [Law firm B].

⁴ Dr OR's, Mr B OR's and Ms H OR's respective children were also included as beneficiaries.

⁵ Ms T was granted legal aid on 2 August 2018.

trust under Power of Attorney for Mrs OR” who had been “diagnosed with dementia”. She said she had prepared enduring powers of attorney for Mr and Mrs OR, and a codicil to Mrs OR’s will. She said Mr NQ had since acted for them.

[12] Ms KD said she “considered Mrs OR to have capacity at the time” although diagnosed with “vascular dementia when [Ms KD] saw her in 2016”. She said during the appointment Mrs OR had a lapse from which Mr OR helped [Mrs OR] to recover. She said when reporting that to Dr OR she suggested Dr OR take [Ms KD’s] notes to Mrs OR’s doctor “to protect the validity” of the enduring power of attorney.

Complaint

[13] Dr OR lodged a complaint with the Lawyers Complaints Service on 9 October 2018. She claimed that Mr HM, by requesting information from Ms KD, had breached his duty of confidence owed to Mrs OR, now owed to [Dr OR] as executrix of Mrs OR’s will, and to the trustees of the trust.

[14] She asked that Mr HM (a) be prevented from acting for Ms T against her, and the trustees due to his conflict of interest by having received information about Mr and Mrs OR, and [Dr OR] from Ms KD, (b) be required to disclose to [Dr OR] details of that information sharing, (c) be required to pay legal costs incurred by her and the trust that had “arisen as a result of [Mr HM’s] inappropriate relationships with [Ms T]”, and (d) be prevented from “any further information dissemination” of the information to Ms KD, “or to other parties not legally entitled to the information”.

(1) Duty of confidence

[15] Referring to rr 8.1 and 8.7 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), Dr OR said she assumed Mr and Mrs OR’s respective rights to confidence owed to them by Ms KD arising out of their lawyer-client relationship with Ms KD passed, on their deaths, to (a) Mr NQ, as executor of Mr OR’s will, and (b) [Dr OR] as executrix of Mrs OR’s will.

(2) Breach of duty

[16] Dr OR claimed (a) by receiving from Ms KD confidential information that belonged to Mr and Mrs OR, and (b) using that information “to help advance his representation of [Ms T]”, Mr HM had breached Mr and Mrs OR’s right to confidence,

now reposed in Mr NQ and her, as Mr OR's and Mrs OR's respective legal representatives.

Response

[17] I refer to Mr HM's response in my later analysis.⁶

Standards Committee decision

[18] The Standards Committee delivered its decision on 16 May 2019, and determined, pursuant to s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act), to take no further action on the complaint.⁷

(1) Mr HM's client

[19] Having identified rr 8.1, 8.1.1 and 8.7 of the Rules as being relevant to Dr OR's complaint, the conclusion reached by the Committee was that (a) Mr HM's professional duties were owed to his client, Ms T, (b) Mr HM did not breach Dr OR's confidentiality when he requested information from Ms KD concerning Ms T's instructions to him, (c) the information Mr HM asked Ms KD to provide "was relevant to advising" Ms T, and (d) "there was nothing stopping [Mr HM] asking for the information".

(2) Request for, and receipt of information

[20] The Committee stated it was "Ms KD's mistake, not Mr HM's" to provide the information "[w]ithout Dr OR's consent".

[21] In the Committee's view, it was for Ms KD, upon receiving Mr HM's request, to tell Mr HM whether she needed Dr OR's consent to provide him with the information requested, and if so "then [to have] taken instructions from Dr OR".

Application for review

[22] Dr OR filed an application for review on 26 June 2019. She expresses her concern that having obtained the information from Ms KD, Mr HM's "actions and

⁶ Mr HM, letter to Lawyers Complaints Service (7 December 2018).

⁷ Section 138(1)(f) of the Act reads: "... take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee, ... (f) there is in all the circumstances an adequate remedy or right of appeal ... that it would be reasonable for the person aggrieved to exercise".

utterances [would] be reflective of the information about” Mr and Mrs OR and herself to her “detriment”, and Ms T’s advantage.

[23] If the Committee’s decision is reversed, Dr OR asks that the names of the lawyers with whom Mr HM “has shared [the] information” be obtained.

(1) Duty of confidence

[24] Dr OR says she disagrees with the Committee’s conclusion that because Mr HM was not acting for her, he did not owe her a duty of confidence, and therefore did not breach that duty by asking Ms KD for the information. She questions why the Committee “made no ruling about [Mr HM’s] use of information to further [Ms T’s] cause against her”, and require Mr HM to cease acting for Ms T.

(2) Confidential information

[25] In Dr OR’s view, the information provided by Ms KD “is relevant” to Ms T’s proceedings against her, and for that reason, it is “intrinsically unjust” for the Committee not to have ordered Mr HM to cease acting for Ms T.

[26] Dr OR says Mr HM “should have known” that the information he received from Ms KD was confidential to [Dr OR] and therefore “disqualified him” from acting for Ms T. She expresses concern Mr HM may have used the information received from Ms KD in applying for legal aid for Ms T.

(3) Duty of confidence arising outside lawyer-client relationship

[27] In Dr OR’s view, although the Committee referred to rr 8.1, 8.1.1 and 8.7 of the Rules, r 8.8, which she says “goes to the heart” of her complaint, is applicable.

[28] Dr OR says Mr HM knew Mr and Mrs OR had died, and Ms T was not executrix of their wills. In such circumstances, she says r 8.8 prohibited Mr HM from requesting the information from Ms KD, and it was “unethical” of him to do so.

Response

[29] In his response, Mr HM says he had not previously acted for Dr OR, and the trust. He says there is “a severe shortage of civil legal aid lawyers”, and if he could not

act for Ms T it was “likely” she “would not receive access to justice”.⁸

[30] In his submission it was “not illegal to request information”, but regardless, the information he received from Ms KD “was kept confidential” to Ms T, and “not shared” with other lawyers except for the draft statement of claim he provided to Ms H’s lawyer.

(1) Mr HM’s client

[31] Mr HM says he explained to Ms KD he was acting for Ms T concerning Mr OR’s “capacity” to “settle the family trust or to transfer the [family home] net sale proceeds to [Dr OR’s] family trust”.

[32] He says for that purpose he requested “a copy of any family trust”, “copies of [Mr and Mrs OR’s] wills”, and “any other relevant documents”.

(2) Receipt of information

[33] In his submission, the information he received from Ms KD was not confidential to Dr OR. He says his “receipt” of that information “repose[d] in [him] no duties to [Dr OR]”. He says Ms KD’s view of Mrs OR’s capacity “was helpful to” Dr OR in respect of “any challenge” by Ms T and Ms H against [Dr OR].

(3) Duty of confidence arising outside a lawyer-client relationship

[34] Mr HM says pursuant to his lawyer-client relationship with Ms T, for whom he was acting, he owed his duty of confidence to Ms T, not Dr OR. For that reason, he submits r 8.8 does not apply.

[35] He contrasts his position to the illustration of the application of r 8.8 in the footnote of the Rules, namely, a lawyer, who is company director and owes a duty of confidence to the company must not “breach or risk breaching” that confidence “to benefit the lawyer, a client, or otherwise”.

Review on the papers

[36] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all

⁸ Mr HM, email to LCRO (24 August 2019).

information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[37] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[38] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁹

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[39] More recently, the High Court has described a review by this Office in the following way:¹⁰

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.

[40] 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

⁹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

¹⁰ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

to consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Issues

[41] The issues I have identified for consideration on this review are:

- (a) Did Mr HM owe Dr OR a duty of confidence?
- (b) If so:
 - (i) What circumstances gave rise to that duty?
 - (ii) Was the information Mr HM received from Ms KD about the OR family confidential to Dr OR?
 - (iii) By receiving that information, and disclosing it to his client, Ms T, did Mr HM breach any duty of confidence he owed to Dr OR?

Analysis

[42] In essence, the questions that arise from these issues are (a) whether Mr HM owed Dr OR a duty of confidence, and (b) whether by requesting and receiving information from Ms KD about Mr and Mrs OR, and disclosing it to Ms T, [Mr HM] breached that duty which disqualified him from acting for Ms T against Dr OR.

(1) Duty of confidence

[43] A duty of confidence is owed by a lawyer to a person with whom the lawyer has, or has had a lawyer-client relationship. However, as discussed below, in some circumstances a duty of confidence may arise for a lawyer outside a lawyer-client relationship.

(a) Lawyer-client relationship

[44] I refer first, to those of the Rules which concern a lawyer's duty of confidence that arises by virtue of the lawyer-client relationship.

[45] The fundamental obligations of lawyers include the obligation "to act in accordance with all fiduciary duties and duties of care owed to clients, and to protect the

interests of clients”.¹¹

[46] Consistent with that obligation, r 8 requires that:

A lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client’s business and affairs acquired in the course of the professional relationship

[47] It will be noted that the duty of confidence is owed to “the client”, and encompasses “all information” concerning (a) the client, (b) the retainer, and (c) the client’s business and affairs “acquired in the course of a professional relationship”.¹² This information can include information about “family and company affairs”, a client’s “personalities”, and “weaknesses, fears and reactions”.¹³

[48] The footnote to r 8 explains that even though information which a lawyer acquires about his or her client, while acting for the client, is in the public domain, such information “will nevertheless be confidential information”.¹⁴

[49] The duty of confidence “... commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer eventuates) [and] continues indefinitely after the person concerned has ceased to be the lawyer’s client”.¹⁵

[50] The requirement “to protect and to hold” a client’s information requires positive action by the lawyer concerned.¹⁶ As well as including the duty not to communicate the information to a third party, the duty requires that a lawyer not “misuse” the information. A lawyer requires the consent of his or her client, or former client, “to make any use” of the information, or “cause any use to be made” of the information “by others otherwise than for” the client’s, or former client’s “benefit”.¹⁷

¹¹ Section 4(c) and (d) of the Act.

¹² Required and permitted exceptions are set out in rr 8.2 and 8.4 of the Rules respectively.

¹³ *Black v Taylor* [1993] 3 NZLR 403 (CA) at 407 and 408. Such information has been described as the “getting to know you principle”, that is, information acquired “in the lawyer-client relationship and is confidential in the sense that it was not publicly available ...”: *GBR Investment Ltd v Keung* HC Christchurch CIV-2009-409-1486, 19 March 2010 at [67].

¹⁴ Rule 8, footnote 10.

¹⁵ Rule 8.1.

¹⁶ See New Zealand Law Society “Practice Briefing: Protecting Clients’ Personal Information” (June 2014).

¹⁷ *Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 235 per Lord Millett, referred to by Justice Susan Glazebrook in her address “Conflicts of Interest: the New Zealand Perspective” (paper presented to the Annual Banking & Financial Services Law & Practice Conference, August 2006); also see *McKaskell v Benseman* [1989] 3 NZLR 75 (HC) at 88; r 8.4(a) .

[51] On the termination of a retainer, “[t]he only duty to the former client which survives the termination of the relationship is a continuing duty to preserve the confidentiality of information imparted during [the retainer’s] subsistence”.¹⁸

[52] Upon “the death of a client or former client, the right to confidentiality passes to the client’s personal representatives”.¹⁹

(b) Outside a lawyer-client relationship

[53] A duty of confidence may also arise for a lawyer outside a lawyer-client relationship. That is, where the lawyer does not act for the person from whom the lawyer receives information, and who claims confidentiality.

[54] In such circumstances, r 8.8, referred to by Dr OR in her application for review, requires that a lawyer:

must not breach or risk breaching a duty of confidence owed by the lawyer that has arisen outside a lawyer-client relationship, whether to benefit the lawyer, a client, or otherwise. In such a case the lawyer must not act for a client against a person in respect of whom confidential information relevant to the matter in issue is held.

[55] To be bound by a duty of confidence pursuant to r 8.8, (a) the lawyer’s relationship with the person claiming confidentiality must be “outside a lawyer-client relationship”, and (b) from that relationship the lawyer holds information confidential to that person.

[56] In such circumstances the lawyer concerned is prohibited (a) from breaching or risk breaching that duty of confidence for the lawyer’s benefit, the lawyer’s client’s benefit, “or otherwise”, and (b) from acting for a client against the person whose confidential information is held by the lawyer.

[57] The footnote to r 8.8 explains that “[e]xamples of such a duty might be duties owed by company directors and officers of the Crown”. In this regard, the commentary to the previous rules of professional conduct warned lawyers against acting for a client where the lawyer, by virtue of the lawyer’s directorship of the company, “comes into possession of information detrimental” to the company.²⁰

¹⁸ *Bolkiah v KPMG*, above n 17 at 235.

¹⁹ Rule 8.1.1.

²⁰ New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors* (7th ed, 2006) at r 1.11, commentary.

[58] The High Court has stated that “rule [8.8] does arguably endorse the ... approach” taken by the Court of Appeal in a decision where the lawyer, whose disqualification was sought by the defendant, had previously acted for a client against the defendant in a mediation, and had signed a confidentiality agreement.²¹

[59] In the High Court decision, the “defendant’s concern” was that the lawyer “may consciously or unconsciously use or disclose something gleaned as a result of his participation in the mediation thereby giving the plaintiffs an unfair advantage”. The High Court described “the test as postulated” by the Court of Appeal as:²²

whether [the Court] can be satisfied that the claim in which [the lawyer] wishes to act [for the plaintiff] is sufficiently dissimilar that the course of the prior mediation [in which the lawyer participated against the defendant] has no relevance to it.

[60] A duty of confidence may also arise for a lawyer from a relationship with a person in a social or family setting “where the relationship carries a reasonable expectation, fostered or at least not dissuaded by the lawyer, that certain communications would remain confidential”. For example, where a lawyer acts for a client against his or her spouse or relationship partner.²³

[61] It has been observed, however, that such disclosures “are not informed by the same policy imperative as the protection of confidences shared with a lawyer in the course of a retainer”.²⁴

[62] Another example, as in the High Court decision referred to above, could be where the information has been obtained by a lawyer by having previously acted against the person claiming confidentiality.²⁵

(3) Discussion

(a) Parties’ positions

Dr OR

[63] Dr OR contends she and Mr NQ, as personal representatives of Mrs OR and

²¹ *South Island Commercial (2004) Ltd v Kiwi Green Island Club Ltd* HC Christchurch CIV-2008-409-261, 15 December 2008 at [64], referring to *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343 (CA).

²² *South Island Commercial (2004) Ltd*, above n 21 at [3] and [61], referring to *Carter Holt Harvey Forests Ltd*, above n 21. See also *GE Dal Pont Lawyers’ Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [8.170].

²³ Dal Pont at [8.160].

²⁴ Dal Pont at [8.160].

²⁵ Dal Pont at [8.170].

Mr OR respectively, have rights to confidence in respect of Mrs OR's and Mr OR's information held by Ms KD who previously acted for Mr and Mrs OR.

[64] As such, Dr OR claims although Mr HM did not act for her, Mr HM (a) owed her and Mr NQ a duty of confidence in respect of information he received about Mr and Mrs OR and [Dr OR] from Ms KD, and (b) breached that duty by disclosing that information to his client, Ms T, to be used in Ms T's proposed proceedings against [Dr OR].

[65] Dr OR claims it is "wrong and unjust" for Mr HM to continue to represent Ms T against her. She says Mr HM's response to her complaint "assigns sinister intent" to her as "the motivating force behind [her] complaint" which was "wrong".

[66] Dr OR says the information "about [her] and [her] supposed motives" was "one-sided and irrelevant" to her complaint. She says it was also "irrelevant" to her complaint that Ms T "is a member of the family".

[67] In Dr OR's view, Mr HM has been "tainted by the information" he received from Ms KD which "cannot be removed". She says she did not regard as "business as usual", Mr HM's request of Ms KD for information "he knew to be privileged", or "could reasonably see to be privileged", or "he kn[ew] [Ms KD] ha[d] no right to give out".

[68] She says she does not accept Mr HM's argument that the information "is discoverable anyway". She says Mr HM "should never have had" the information which he could "use against her even in simply weighing up the costs and benefits" of proceedings in the course of which discovery would be made.

Mr HM

[69] Mr HM says because he had not previously acted, and did not act for Dr OR, or the trust (of which Ms T was not a beneficiary), but acted for Ms T, he did not owe Dr OR a duty of confidence in respect of the information he received from Ms KD, and disclosed to Ms T.

[70] He describes Ms KD's 16 July 2016 email to him providing the information he requested about the OR family as "unobjectionable and factual".

[71] Mr HM disagrees it was "intrinsically unjust" for him to act for Ms T against Dr OR. He says there was not an "ethical lapse" by him. In his submission, he ought to be able to act for Ms T. He regards Dr OR's complaint as "entirely tactical".

[72] He explains that Ms T claimed Dr OR, during the last four months of Mr OR's life, "exerted undue influence" on Mr OR to change [Mr OR's] will to exclude Ms T as a beneficiary of the sale proceeds of Mr and Mrs OR's family home.

[73] He says Ms T had accused Dr OR of "unconscionable conduct" by acting as attorney for Mrs OR, who had dementia, when Mr and Mrs OR (a) on 8 December 2017 sold their family home for approximately \$480,000, and (b) on 30 January 2018 settled the sale proceeds on the trust of which he says Dr OR was sole trustee. He says on 13 April 2018, six days after Mr OR's death, the trust purchased another property.

[74] He says Mr OR's 30 January 2018 will left the sale proceeds of the family home to the trust whereas Mr OR's previous will provided for [Mr OR's] assets to be shared by Mr and Mrs OR's four children equally.

[75] He says Ms T "knew already" about the information he received concerning Mrs OR's dementia, and Mrs OR's will and codicil. He says probate of Mrs OR's will can be searched at the probate registry, and was therefore in the "public domain". As noted earlier, he says Ms KD's view of Mrs OR's capacity "was helpful to" Dr OR in respect of "any challenge" by Ms T and Ms H against [Dr OR].

[76] Mr HM says Dr OR did "not like [him] probing" on behalf of Ms T. He says whilst Dr OR had "concerns about what information" he had disclosed to Ms T, Ms H, and Mr B, they "had an interest in knowing what happened" concerning their parents' estates. He says although Ms H and Mr B OR are discretionary beneficiaries of the trust, "it is not clear whether their interests are protected either".

[77] He says the information he received from Ms KD "was kept confidential" to Ms T, and "not shared" with other lawyers except for the draft statement of claim "circulated to the parties" to provide them with an "opportunity to comment to ensure that [his] instructions were valid".

(b) Lawyer-client relationship

[78] Mr HM did not act, and had not previously acted for Dr OR.

[79] Because Mr HM did not have, and had not been in a lawyer-client relationship with Dr OR, it follows that he did not owe Dr OR the duty of confidence that lawyers owe their clients, and former clients that arises from a lawyer-client relationship, as described in rr 8 to 8.7 referred to above.

(c) Outside a lawyer-client relationship

[80] The remaining questions, therefore, are whether for the purposes of r 8.8, (a) Mr HM's request of Ms KD for information, and Ms KD's response, constituted circumstances "outside a lawyer-client relationship" that gave rise to a duty of confidence owed by him to either or both Ms KD and Dr OR, and (b) if so, whether upon receipt of the information, Mr HM was constrained from acting for Ms T against Dr OR.

Dr OR

[81] Dr OR's position is that r 8.8 prohibited Mr HM from requesting the information from Ms KD.

[82] She says because Mr HM knew Mr and Mrs OR had died, and Ms T was not the executrix of their wills, he "should have known" he was not entitled to the information he received from Ms KD to be used by him for the benefit of Ms T in proceedings against [Dr OR].

[83] Dr OR argues that because that information was confidential to her, upon receipt Mr HM was "disqualified" from acting for Ms T. In her view, "[i]t makes sense" that rule 8.8 "applies" to Mr HM, who she says had obtained Dr OR's confidential information from Ms KD, to prevent "this sort of behaviour from happening".

[84] She says r 8.7.5 "provides guidance" in "protecting" her confidential information from the "risk of being misused".²⁶

Mr HM

[85] Mr HM's submission is simply that because he was acting for Ms T in a lawyer-client relationship, r 8.8 does not apply.

[86] He says this is unlike the example provided in the footnote to r 8.8, namely, a lawyer/company director who owes a duty of confidence to the company concerned not to "breach or risk breaching" that confidence in respect of the company's information "to benefit the lawyer, a client, or otherwise".

²⁶ Rule 8.7.5 in effect prohibits a lawyer in a legal practice, who holds a client's confidential information and who moves to another legal practice, from using that confidential information to benefit another client against the client for whom the lawyer's previous legal practice acts.

Circumstances giving rise to a duty of confidence

[87] As discussed, Mr HM was acting for Ms T in a lawyer-client relationship. He was not acting, and had not previously acted for Dr OR. Therefore, for r 8.8 to apply, any duty of confidence he owed to Dr OR would have to arise “outside a lawyer-client relationship”.

[88] This leads to the question whether there were any circumstances that gave rise to a duty of confidence owed by Mr HM to Dr OR when he made his request to, and received information from Ms KD, such that r 8.8 applied to him. For example, a connection or relationship Mr HM had with Ms KD, or Dr OR “outside a lawyer-client relationship” giving rise to a duty of confidence.

[89] It is reasonable to assume that prior to making his request of Ms KD for the information about Mr and Mrs OR’s estates, Ms T would have informed him that Ms KD had previously acted for Mr and Mrs OR, and may be able to assist with background information about the family.

[90] As lawyers, Mr HM and Ms KD were professional colleagues. However, apart from that connection, no evidence has been produced that when Mr HM made his request of, and subsequently received information about Mr and Mrs OR from Ms KD, there was any other connection or relationship he might have had with either Ms KD or Dr OR that would give rise to the duty of confidence Dr OR claims Mr HM owes her.

[91] Mr HM did not owe a duty of confidence to Dr OR such as a company director (in the footnote to r 8.8 example) might owe to the company concerned. No evidence has been produced of any connection or relationship Mr HM may have had with Dr OR derived from a social setting, or, as discussed earlier, that he had previously acted for a client against Dr OR.

[92] Finally, no evidence has been produced that there was any expectation held by Ms KD “fostered or at least not dissuaded” by Mr HM that the information he received would remain confidential to Ms KD and Dr OR. No such expectation appears in either Mr HM’s 14 July 2016 request, or in Ms KD’s 16 July 2016 response.

Confidentiality of information

[93] If a duty of confidence to a person does arise for a lawyer “outside a lawyer-client relationship”, the second part of r 8.8 prohibits the lawyer concerned from “act[ing]

for a client against [the] person in respect of whom the confidential information relevant to the matter in issue is held” by the lawyer.

[94] Dr OR claims Mr HM knew, or at least ought to have known (a) the information he received from Ms KD was confidential to Ms KD, and Dr OR, and (b) Ms KD owed [Dr OR] a duty of confidence in respect of the information provided.

[95] For that reason, Dr OR claims it was “unethical” of Mr HM to request the information, and having received the information he ought not to have disclosed it to Ms T.

[96] Having decided that there were no circumstances that gave rise to a duty of confidence owed by Mr HM to Dr OR and Ms KD, outside a lawyer-client relationship, it is not necessary for me to consider and decide whether the information Mr HM received from Ms KD was “confidential information”.

[97] That is, because I have concluded there were no circumstances that gave rise to a duty of confidence owed by Mr HM to Dr OR and Ms KD, for the purposes of r 8.8 the information received by Mr HM did not have the cloak of confidentiality conferred by that rule.

[98] However, this discussion aside, the information Mr HM received from Ms KD would, in any event, have been discoverable in any proceedings issued by Ms T, or even if not issued, in pre-pleadings discovery applied for by Ms T.

Conclusion

[99] The High Court has stated that whilst the rules are to be “applied as specifically as possible”,²⁷ they “are also to be applied as sensibly and fairly as possible.”²⁸

[100] Adopting that approach, it is my view that if Dr OR were to succeed in her claim against Mr HM in such circumstances, that could impose upon a lawyer a professional duty or obligation beyond the meaning and interpretation of r 8.8 discussed earlier.

[101] I make the observation that lawyers are bound by the broader duty to “promote and maintain proper standards of professionalism in the lawyer’s dealings”, and are

²⁷ *Q v Legal Complaints Review Officer* [2012] NZHC 3082 at [59].

²⁸ *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].

subject to professional standards which include not to engage in conduct that is “unprofessional conduct”.²⁹

[102] However, I do not consider that Mr HM’s conduct in requesting the information about Mr and Mrs OR’s estates from Ms KD, and upon receipt disclosing it, as he was duty-bound to do,³⁰ to Ms T, either contravenes that broader duty, or the professional standard I have referred to.

[103] For the above reasons, the conclusion I have reached in these particular circumstances is that rule 8.8 does not apply to Mr HM.

Decision

[104] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee to take no further action on Dr OR’s complaint is confirmed, but modified to provide that pursuant to s 138(2) of the Act, any further action is unnecessary or inappropriate.

Anonymised publication

[105] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and absent of anything as might lead to their identification.

DATED this 10TH day of JULY 2020

B A Galloway
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:

Dr OR as the Applicant
Mr HM as the Respondent
Mr AL as a Related Party
[Area] Standards Committee
New Zealand Law Society
Secretary for Justice

²⁹ Rule 10 of the Rules; s 12(b) of the Act.

³⁰ Rule 7 of the Rules details a lawyer’s duty to disclose information to their client.