LCRO 88/2012

CONCERNING	An application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee
BETWEEN	**VJ AND VL** Applicants
AND	**AE** Respondent

DECISION

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

Introduction

[1] This is an application for review of a decision of the Auckland Standards Committee 5 which considered a complaint by VJ and VL (the Applicants) against AE (the Practitioner). The Standards Committee resolved to take no further action on the complaint and the Applicants seek a review of that decision.

[2] The complaint concerned the Practitioner's refusal to refund any part of the fee that had been paid by the Applicants when the Practitioner represented them in relation to certain criminal charges.

[3] The Applicants had paid the Practitioner the agreed sum of $10,000. Matters did not eventuate as originally planned or envisaged and the Applicants then briefed another lawyer, and sought a refund of part of the payment made to the Practitioner.

Background

[4] The Applicants are a mother and daughter who were visitors to New Zealand. They were detained at [a New Zealand] Airport when attempting to leave the country with an amount of jewellery in their luggage. This jewellery was alleged by the Police to have been stolen and therefore they were each charged with receiving stolen property. While the initial estimate of the value of the alleged stolen property was $500,000, at the Applicants'

second appearance in Court a second charge of receiving was laid, meaning that that the total estimated value of the jewellery was $770,000.

[5] One of the Applicants contacted the Practitioner from the [Auckland] Police Station by means of the Police Detention Legal Assistance Scheme roster and as a result she met with the Applicants at the Auckland District Court the next morning, Friday [date] May 2011. A bail application made by the Practitioner was successful and the Applicants were remanded until the following Tuesday ([date] May 2011). After their release the Practitioner attended upon the Applicants in her office for some hours.

[6] The Practitioner later informed the Complaints Service that the instructions she had received were that the Applicants wanted to resolve the matter quickly so that they could return home to the United States within the week. She wrote that they made it clear that they wanted their matter to be given top priority. The Practitioner advised that she had discussed with them what was involved and that considerable thought would need to be given as to how the matter could be resolved. She advised that her fee of $10,000 including GST was discussed and agreed upon, and that she had handed them an invoice dated [date] May 2011 for that amount.

[7] The narration of her invoice is as follows:

> My fee for professional attendances in respect of receiving charges, including attendances on yourselves and Police, attending to execution of Official Information & Privacy Act forms for request of disclosure of Police file, serving same on Police, all attendances at Auckland District Court for bail and resolution of charges, reporting to you and to all incidental matters thereto.

[8] The timesheet provided by the Practitioner showed that she gave the matter high priority as requested by the Applicants. There was a record of numerous telephone discussions with the Applicants and the Police, work done over the weekend, and an excess of six hours spent on the following Monday attending upon the Applicants at her office, more telephone discussions with the Police, and research and preparation for the Applicants' second appearance at Court the next morning.

[9] At that appearance the Police sought a two week remand for further enquiries, but over the Police opposition, the Practitioner was successful in obtaining a shorter remand to the Friday (three days later) for a sentence indication where the Practitioner proposed to make the application by oral submissions so as to expedite resolution of the matter quickly, as had been sought by the Applicants.

[10] In a five page letter that the Practitioner hand delivered to the Applicants later that day ([date] May 2011) the Practitioner provided a thorough and detailed report setting out

the facts, summarising the Applicants' instructions, the relevant law, penalty and plea, and informing them of their options. Under the discussion relating to "Penalty" the Practitioner recorded the maximum penalty and the approximate value of the jewellery and informed the Applicants that in the circumstances, and notwithstanding that they were each first offenders, there was no guarantee that they would not receive a sentence of imprisonment.

[11] The Practitioner went on to explain the "sentence indication" process and concluded her letter with the request that she receive clear instructions regarding their plea before the next Court appearance on Friday. This letter also reiterated to the Applicants that the Police regarded the matter as "a serious offence" at the top of the range. She continued that in normal circumstances one would expect the Judge to indicate a significant term of imprisonment, and she informed them that "[i]n putting forwarded [their] case [she] [would] be emphasising the fact that all the jewellery [had] been recovered and that [they were] U.S citizens with responsibilities and commitments."[1]

[12] The next morning, Wednesday [date] May 2011, the Applicants advised the Practitioner that they wished to defend the charges and that they intended to stay in New Zealand for that purpose, and also advised the Practitioner that her services were no longer required. They raised the issue of a fee refund.

[13] The Practitioner informed the Complaints Service that in response to the request for a refund she advised that she would check her timesheet to see what time had been spent. She further stated that on checking her timesheets it was clear that she had already spent time on the matter in excess of the agreed fee, adding that she was nevertheless willing to complete the retainer as per the agreed fee. In any event the matter was not resolved between the parties and a complaint was then made to the New Zealand Law Society.

Complaint

[14] In their complaint the Applicants sought the return of "at least half of the money ... given that [the Practitioner] did not fulfil her role."[2] The basis of the complaint was that they felt they had been "overcharged". They wrote that they had agreed to a pay a fixed price until the resolution of the case. They did not consider their case had been resolved, and considered they were entitled to a refund. They also disagreed with the timetable (presumably the Practitioner's time records) which they perceived to be exaggerated.

Practitioner's response

[1] Letter from AE to VJ, [date] May 2011 at 4.
[2] Letter of complaint from VJ & VL to NZLS, 29 June 2011.

[15] The Practitioner responded to the complaint, which she understood to be that she had agreed to a fixed fee until the case was disposed of, and that this fee potentially included the Applicants' changing their instructions and defending the case.

[16] The Practitioner clarified that "the fee was based on the 'disposing' of the charges within the week, and would involve a guilty plea and possibly a substantial fine."[3] She explained that during the period she acted for the Applicants there was never any suggestion on their part to the Practitioner that they wished to remain in the country to defend the charges.

[17] The Standards Committee file showed that the Practitioner's response was sent to the Applicants who were invited to respond. The possibility of the appointment of a Costs Assessor was signalled. A Costs Assessor was in fact appointed and the parties were advised accordingly. The Cost Assessor's report was eventually sent to the parties with an invitation to comment. The Practitioner took the opportunity but the Applicants did not. They were sent a copy of the Practitioner's comments and advised that the complaint file would be placed before the Standards Committee "within the next month or two",[4] which was done.

Cost assessment

[18] After examining the relevant information (time and attendance records) the Costs Assessor concluded that the complaint was justified and that the Practitioner should refund $4,000 of the $10,000 to the Applicants. In a detailed report the Costs Assessor concluded that the parties had entered into a "conditional fee agreement". In reaching this conclusion he relied on the following part of the Practitioner's response to the complaint:[5]

> [AE] put the terms of agreement as follows:
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> > "There was a clear understanding between the three of us that the resolution would be on the basis of a guilty plea and an appropriate penalty. There was no suggestion they wished to defend the charges as it would have been impossible within that time frame. If there had been any suggestion or contemplation of a jury trial I would not have quoted a fixed fee of $10,000 inclusive of GST."

[3] Letter from AE to NZLS, 15 August 2011 at 4.
[4] Email from NZLS to VJ, 16 February 2012.
[5] Costs Assessor Report, 18 December 2011 at 2.

[19] The assessor's view was that the complaint was justified and that the Practitioner was obliged to refund $4,000 to the Applicants. It is not necessary to set out in any detail the Assessor's reasoning except to note that his view of the fee arrangement was that:[6]

> the payment of $10,000 was paid on the condition [the Practitioner] present submissions at a sentence indication hearing, obtain a sentence indication from the Judge on the basis of the agreed summary of facts and the clients plead guilty provided the indication outcome was acceptable.

On this reasoning the Assessor concluded that the Applicants' decision to plead "not guilty" and discontinue the Practitioner's instructions meant the condition of the presentation of submissions at a pre-sentence indication hearing could not be fulfilled. Therefore the agreement failed and the issue was then whether the Practitioner should retain the fee of $10,000. This led the Assessor to discuss the application of the fee factors contained in Rule 9 of the Rules of Conduct and Client Care (the Rules).[7]

[20] With reference to the "reasonable fee factors" the Assessor concluded that the Practitioner was entitled to a fee for the work she had completed which he calculated to be:[8]

> somewhere between 50% and 70% of the work and services required to comply with the initial instructions of the clients to present submissions at sentence indication hearing, make submissions on sentencing on facts agreed with the Police or the Crown.

As a result, and taking the "middle road" between 50% and 70%, he concluded that the Practitioner was entitled to a fee of $6,000.00 and was therefore obliged to refund $4,000.00 to the Applicants.

[21] In commenting on the Assessor's report, the Practitioner submitted that the Assessor's approach to the fee in attendances was "inappropriate",[9] pointing out that she had to drop all other work and attend solely to this matter, this not being made easier by the fact that the Applicants were demanding as clients. She submitted that the assessor's formula, presumably the "middle road" between 50% and 70%, did "not reflect the nature of the instruction or actual time spent ... at the expense of [her] other files."[10]

Standards Committee decision

[22] The Standards Committee's decision summarised the complaint, the factual

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[6] As at n 5.
[7] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[8] As at n 5 at 7.
[9] Letter from AE to NZLS, 10 February 2012 at 1.
[10] As at n 9.

background, and included consideration of the Cost Assessor's report and the Practitioner's response to it. The Committee resolved to not follow the Assessor's report. First, the Committee observed that "[a] conditional fee agreement cannot apply to criminal proceedings",[11] referring to ss 333 to 336 of the Lawyers and Conveyancers Act 2006 (the Act), and also Rules 9.8 and 9.12 of the Rules.

[23] Second, the Committee rejected that there was a conditional fee agreement, instead taking the view that what was agreed between the Applicants and the Practitioner was a logical and acceptable course of action that never eventuated because the Applicants had terminated the Practitioner's retainer. The Committee went on to state that the terms of that agreement were fair and reasonable in terms of Rule 9.2.

[24] The Committee found that what the Practitioner achieved "was consistent with the retainer",[12] also noting the Practitioner's time records and hourly rate of $450 plus GST, and the fact that she had carried out 25 hours work. The Committee considered that what the Practitioner had billed was reasonable for the work she was required to do (which included work undertaken in relation to organise the sentence indication hearing) and concluded that "the fee that she charged was fair and reasonable, having taken into account all of the circumstances of [the] case."[13]

[25] The Committee stated that:[14]

> [t]he fact that the [Applicants] changed the agreed course of action, and the terms of the retainer did not mean ... that [the Practitioner] could not charge for the work she had carried out because she was entitled to charge for the time she spent on the matter.

[26] The Committee decided to take no further action.

Application for Review

[27] The Applicants sought a review of the Standards Committee decision, seeking a refund of $4,000 as found by the Costs Assessor. Their reasons in support are threefold as follows:-

- They challenge the amount of time the Practitioner recorded for their matter, claiming that neither them, nor the Law Society, was provided with her timesheets.

[11] Standards Committee Determination, 2 April 2012 at [18].
[12] As at n 11 at [19].
[13] As at n 12.
[14] As at n 12.

- They challenge the Practitioner's claim that the resolution they "sought was achievable if [they] had continued with her counsel for a sentence indication that would have permitted [them] to resolve the matter and leave New Zealand in the shortest amount of time possible."[15] The Applicants wrote that the Practitioner's "proposed resolution was never on the table,"[16] presumably meaning that there was never a chance of resolving the matter quickly as was apparently the Applicants' initial wish and the Practitioner's hoped for outcome. In support of this second point the Applicants record that (at the time of filing their application for review) the issue of a sentence indication was current and that the Crown at that time was suggesting a starting point of two to three years imprisonment.

- The third reason alleged, was reckless advice. The Applicants claimed they could have ended up in jail had they entered the guilty plea as the Practitioner had suggested for a theoretical faster resolution. The Applicants believed that the Practitioner's behaviour was "careless and inconsiderate as well as her counsel reckless and imprudent."[17]

[28] In response to the allegation that the Practitioner had not provided time sheets, the Practitioner responded that she had supplied the "[VJ/VL] - Timesheet" to the Applicants on [date] May 2011 (being the day her instructions were withdrawn), together with her final letter of same date.

[29] Regarding the complaint about "reckless advice" the Practitioner responded that both the officer in charge of the case and the "officer in charge of Police Prosecutions" agreed to take a neutral stance on the issue of sentence at the sentence indication hearing (meaning making no submissions to the Court seeking prison).

[30] She pointed out that under the heading "Plea" in her letter of report dated [date] May 2011 she had explained the "sentence indication" process. She summarised again in this final letter the process and options as follows:[18]

> In that letter I made it clear that a sentence indication was given prior to a plea being entered and it was up to [the Applicants] as to whether they accepted the sentence indication. If the judge was not prepared to grant a non-custodial sentence, he or she would have indicated this, so that [the Applicants] would not have to accept the indication.

[15] Review Application from VJ & VL, 27 April 2012 at 3.
[16] As at n 15.
[17] As at n 15.
[18] Letter from AE to LCRO, 15 May 2012 at 1.

Accordingly she rejected the Applicant's suggestion that they "could have ended up in prison as a result of the sentence indication."[19]

Review

[31] This review has been conducted "on the papers" in accordance with section 206(2)(b) of the Act with the consent of both parties.

[32] It is the task of this Office to review the decisions of Standards Committees. The review includes consideration of how the Standards Committee dealt with the complaint and whether its decision is soundly based on the evidence before the Committee.

[33] The third reason in support of the review application is, in effect, a new complaint. It is not open to this Office to consider a complaint that has not been first considered by the Complaints Service, and for that reason I do not address the substantive allegation it raises.

The fee agreement

[34] The formal complaint was unclear about whether the Applicants were suggesting that the $10,000 would cover a trial with extended preparation and appearance. This possibility appears not to have been included in the considerations of either the Costs Assessor or the Standards Committee.

[35] Be that as it may, the Applicants have not challenged the Practitioner's explanation about the need for priority and the Applicants' wish to have the matter progressed quickly. I have also considered the Practitioner's belief that as a result of her efforts "there could have been resolution by way of a guilty plea",[20] implying that the "resolution of charges" (referred to in her invoice) contemplated a penalty, presumably a significant fine, which would enable both Applicants to leave the country within a short period of time, as they wished initially.

[36] The answer to this complaint lies in the nature of the agreement reached between the parties. The Standards Committee decision may be considered to have answered the matter of a "conditional fee agreement". To that I would also refer to the definition (in s 333 of the Act) that a:

> conditional fee agreement means an agreement under which a lawyer agrees with a client that some or all of the lawyer's fees and expenses for the provision to that client of advocacy or litigation services in respect of a matter are payable only if the outcome of that matter is successful (emphasis added.)

[19] As at n 18.
[20] As at n 3 at 5.

Such agreements have "traditionally been regarded as the type of agreement such as a 'no win, no pay' agreement",[21] or in other words, a "contingency fee" where often higher fees are charged to reflect a lawyer's risk in entering into such an arrangement.

[37] I do not consider that the agreement now under consideration is of that type. There is nothing to show the existence of any conditions at all. The fee was set for certain services that were contemplated by both parties at the outset. This is evidenced by both the wording of the invoice and the Practitioner's letter to the Applicants dated [date] May, which contemplated that the Practitioner would take all steps leading up to the "resolution of [the] charges" for the agreed sum.

[38] The Applicants have not disagreed with the assertion that when the Practitioner was first instructed they wanted the matter resolved as quickly as possible, based on a guilty plea. They have also not claimed that they expected the fee would cover a defended trial if pleading guilty became the desired course of action – it was not in contemplation.

[39] Perhaps in hindsight it may have been preferable for the Practitioner to have not used the phrase "resolution of charges" in her invoice but rather "sentence indication". But regardless, I am satisfied that when the Applicants instructed the Practitioner they were very keen to resolve the matter and return to the United States as soon as possible. The "sentence indication" process would have provided the crucial information (sentence on a guilty plea) that would have allowed the Applicants to decide whether to plead guilty and take the consequences, or plead not guilty and stay to defend the charges.

[40] For their own reasons the Applicants withdrew their instructions from the Practitioner only two days from what was intended to be a sentence indication hearing. It may be that any sentence indication given may not have been acceptable to the Applicants, but it is not necessary to speculate. Materially, had they then decided to defend the charges and go to trial, the $10,000 would have been unlikely to have covered the costs involved.

[41] As matters stood, the Applicants had already paid for legal services up to that proposed hearing on Friday [date] May 2011, and not only had the Practitioner spent considerable time preparing for that event, but she had also obtained bail and persuaded a Judge to order a short remand, overcoming Police opposition. It is clear from the timesheet that she gave the matter top priority and made good progress in expediting matters. Her time records and charges are credible and appropriate.

[42] In simple terms the Practitioner was preparing for and remained willing to complete the retainer but the Applicants terminated the retainer. I accept that the work undertaken

[21] As at n 5 at 4.

by the Practitioner took longer than she had originally anticipated but realistically she accepted that she was bound by the agreement; so too were the Applicants. Costs agreements involve a sharing of risk. Here the Practitioner under-estimated her time and the Applicants did not get the totality of services they had agreed to, but that was their decision and they must accept the consequences.

[43] I am satisfied that the agreement entered into was for attendances up to the sentence indication hearing (which provided an opportunity for resolution of the charges) for an agreed fee. The Applicants' withdrawal of the retainer two days before that hearing effectively ended the agreed arrangement and meant the Practitioner could not complete her part of the bargain.

[44] If I am wrong on that point, I also conclude that the fee paid by the Applicants was not excessive in terms of the fee factors in Rule 9, being supported both by the actual time spent by the Practitioner, the degree of urgency, and the importance to the client and the results achieved. There is no basis for altering the decision of the Standards Committee.

Decision

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

DATED this 14th day of May 2013

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Hanneke Bouchier
Legal Complaints Review Officer

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

VJ and VL as the Applicants
AE as the Respondent
The Auckland Standards Committee
The New Zealand Law Society
Secretary for Justice