

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [North Island] Standards Committee [X]

**BETWEEN**

**NE**

Applicant

**AND**

**RL**

Respondent

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

**DECISION**

**Introduction**

[1] Mr NE has applied for a review of a decision by the [North Island] Standards Committee [X] dated 20 February 2013 in which the Committee decided to take no further action on Mr NE's complaints with respect to Ms RL's conduct and fees charged by her firm.

**Background**

*The Complaint*

[2] On 1 February 2011 Mr NE instructed SA to represent him in a paternity dispute before the Family Court. In his complaint to the New Zealand Law Society (NZLS)<sup>1</sup> Mr NE says he initially met with Mr SA, and was told that Ms RL would assist him, but that Mr SA would represent him in court.

[3] In response to a request for an estimate of costs, Mr NE says he was told that a day's hearing in court would cost between \$5,000 and \$7,000, but he says that fees then

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<sup>1</sup> Complaint NE to NZLS (24 April 2012).

escalated beyond his expectations. I note from materials provided by Mr NE<sup>2</sup> that the Committee commenced a separate own motion enquiry in respect of the fees, and did not address that as part of Mr NE's complaint against Ms RL. As that matter appears to have been addressed elsewhere, and is not the subject of the decision on review, I have not considered the fees aspect of Mr NE's complaints against Ms RL, despite it having been referred to in the Committee's notice of hearing and in the course of the review hearing.

[4] Mr NE says he dealt mostly with Ms RL. He is critical of her interpersonal skills, says she did not act in his best interests, did not communicate well and lacked the necessary expertise to handle his matter. He says she appeared to be unprepared at meetings, had not come to grips with the evidence and handled discovery incompetently. He says she failed to review the contents of a CD he had provided, and that the other party disclosed medical records to Ms RL in July, but she delayed making them available to him until 30 August 2011. He says he became increasingly concerned about her ability to assist him.

[5] Mr NE says that when he became aware that the firm was reluctant to continue acting without him having paid his fees, he instructed Ms RL to forward his files to his new lawyer. He says she assured him that he had all of the disclosed documents, but he later discovered that she had not given him everything the other party had provided to her, and that discovery was incomplete. He says Ms RL had discontinued a discovery application on the basis that discovery was complete.<sup>3</sup> As a result, he says his new lawyer had to apply for further discovery, which would have been unnecessary if Ms RL had handled her part of discovery competently. He resents having to pay his new lawyer to do work he considers Ms RL did not do properly, but has billed for.

[6] Mr SA responded on Ms RL's behalf,<sup>4</sup> describing the background to the Family Court proceeding, and his advice to Mr NE that he considered his preferred strategy of avoiding a routine paternity test was a tenuous and unusual approach. Mr SA says Mr NE's approach, including requesting that the applicant for paternity orders disclose her medical records, was resisted by the applicant, and that added to the cost and complexity of the proceeding. Mr SA says Ms RL communicated appropriately, dealt with the file competently and skilfully. He says where necessary she consulted with him and he regularly supervised her. He says she corresponded appropriately with Mr NE until a formal application for a declaration that SA was no longer instructed was made on 30 October 2011.

### **Standards Committee**

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<sup>2</sup> Email NE to LCRO (11 December 2014).

<sup>3</sup> Letter NE to NZLS (30 July 2012).

<sup>4</sup> Letter SA to NZLS (22 June 2012).

[7] [North Island] Standards Committee [Y] directed the parties to explore resolution of Mr NE's complaint by alternative resolution under s 143 of the Lawyers and Conveyancers Act 2006 (the Act). The parties were unable to resolve their disputes, and the complaint was considered by [North Island] Standards Committee [X] (the Committee).

[8] The Committee issued a notice of hearing<sup>5</sup> advising the parties that it intended to consider the complaint on the basis that it related to poor service,<sup>6</sup> failure to communicate and keep Mr NE informed,<sup>7</sup> overcharging,<sup>8</sup> failure to follow instructions and complete discovery,<sup>9</sup> and filing a notice of discontinuance for the discovery application prematurely and before discovery was complete.<sup>10</sup>

[9] The parties provided submissions and further information to the Committee. On Ms RL's behalf, Mr SA acknowledged that although she routinely practices in the Family Court jurisdiction, she had no experience in paternity applications that were not to be dealt with on the usual basis that the ostensible father would submit to a DNA test.

[10] Mr SA refutes Mr NE's criticisms of Ms RL's conduct overall, and with respect to discovery says that the other party's lawyer undertook to file a full set of documents with the Family Court and Ms RL's reliance on her to do so was reasonable in the circumstances at the time.<sup>11</sup>

[11] Mr NE repeated his request for compensation,<sup>12</sup> based on the expense of his new lawyer having to obtain copies of his files from the Court when Ms RL's firm withheld his file because he had not paid, and duplicating work on discovery after Ms RL withdrew the previous application for discovery.

#### *Committee's consideration*

[12] The Committee then considered the materials before it, and broadly rejected Mr NE's complaints. The Committee recorded that it was:

...mindful that not every mistake, error or oversight amounts to unsatisfactory conduct as defined by sections 12 (a) and (b) of the Act. A 'reasonably

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<sup>5</sup> Notice of hearing (1 November 2012).

<sup>6</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rule 3.

<sup>7</sup> Rule 7.1.

<sup>8</sup> Rule 9.

<sup>9</sup> Rules 13 and 13.3.

<sup>10</sup> Rule 13.

<sup>11</sup> At the time of the review hearing a decision from this Office on review of a complaint by the expert witness against Mr SA was the subject to an application for judicial review. The High Court has since released its decision on that matter in CIV 2014-404-1353, which has no impact on this review.

<sup>12</sup> Email NE to NZLS (11 December 2012).

competent lawyer' does not mean a lawyer who never makes a mistake.  
Reasonable competence does not mean perfection.

[13] In all the circumstances the Committee did not consider that a finding of unsatisfactory conduct against Ms RL was warranted, and determined to take no further action on the matter pursuant to ss 138(2) and 152(2)(3)<sup>13</sup> of the Act.

[14] Mr NE was not satisfied with the outcome, and applied for a review.

### **Review application**

[15] In his review application, Mr NE says the Committee did not properly consider the consequences of Ms RL's lack of attention to detail. He says her failure to do her job properly added significantly to his costs, and he maintains his complaint about her lack of competence. He says that her conduct was not to an acceptable standard and resists paying for Ms RL's incompetence. He asks that all of his fees be refunded, and that disciplinary action be taken against Ms RL.

[16] Ms RL generally relied on the evidence and submissions that had been presented to the Committee, and highlighted the work she had done with respect to the documents supplied by the other party's lawyer. She says there is no evidence of any added cost to Mr NE, repeating her reliance on the other party's lawyer to produce a full bundle of her client's document to the Court, which would also have been available to Mr NE's new lawyer.

[17] Ms RL also referred to paragraph [16] of the decision saying the Committee was incorrect in saying that:

The Committee accepted that Ms RL took steps to check and cross-check documents to hand, **which may explain why it took a month to pass the documents on to Mr NE. it appears Ms RL may not have realised at that time that neither she, nor Mr NE, received a copy of all the documentation....**

(Ms RL's emphasis)

[18] Ms RL says that she promptly identified that documents were missing so she requested copies from opposing counsel by email, and supplied copies of the relevant emails. She also said:

It was not initially intended that the records were to be passed on to Mr NE. They were to be passed directly to the expert. We refer to paragraph 22 of our submissions.

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<sup>13</sup> Which does not exist.

A month passed because the writer first liaised with the expert Dr ZO. We had told Mr NE this would occur in our email to him of 26 July 2011, which is attached once again for completeness.

[19] The email to Mr NE dated 26 July 2011 said:

... we have just received over 150 pages of [the applicant's] medical records by email. In all likelihood we will now be able to discontinue the discovery proceedings and will not need to go to the 10 August hearing.

The next step is to send the records to the expert we found, Dr ZO, who can assess conception date range. This will of course be an additional cost to you, but in our view a necessary step for the proceedings. We will send him a fax today asking for an estimate of costs...

[20] When he received Ms RL's submissions, Mr NE said that he had not been provided with a copy of Mr SA's submissions to the Standards Committee dated 26 November 2012. This Office provided a copy of those submissions, and Mr NE responded.<sup>14</sup> His response highlights a potential professional conduct issue that was not addressed by the Committee, but which was latent in his original complaint, which relates to whether Ms RL properly disclosed information to him.

[21] Mr NE says that when he collected the information from Mr SA's office to enable him to instruct his expert he was told that it contained all the documents disclosed by the other party.

[22] Ms RL says that is not correct.

[23] Mr NE says he later discovered that the documents provided were only a small sample of the significant number of medical records the other party had disclosed. He says he did not know what documents had been disclosed, but the bundle he was given only included documents that Ms RL and the expert she had discussed the matter with considered relevant. He says that he, his new lawyer, and his new expert disagree with Ms RL's view on relevance and their ability to continue with his matter was impeded by them not having all of the information the applicant had disclosed.

[24] Mr NE says difficulties arose for him when, through his new counsel, he sought to instruct a different expert. He says his new lawyer wrongly believed, as did Mr NE, that he had provided her with everything the other party had disclosed. He said his new lawyer concluded that the other party to the Family Court proceeding had not fully disclosed all her medical files, and she then spent a significant amount of time and effort identifying what had and had not been provided, and attempting to obtain further information. This led to her applying for orders for further discovery to the Family Court, resulting in further cost to him.

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<sup>14</sup> Email NE to LCRO (16 July 2013).

Mr NE attributes the added cost to him to two failures by Ms RL: first, by wrongly discontinuing a previous application for discovery orders, and second, by failing to release all the disclosed documents.

[25] At the review hearing Ms RL said that a staff member had handed an envelope containing the relevant documents to Mr NE when he came to collect them. She said she had not told the staff member that all the documents the applicant had disclosed were in the envelope, nor had she told the staff member to tell Mr NE all the documents were there. Furthermore, the applicant had disclosed her medical records through the discovery process on the basis that her personal medical records would go to Mr NE's medical expert rather than to Mr NE.

[26] Mr NE says that is not correct, and that he expected he would be provided with all the disclosed documents, and believed he had been.

[27] In his submissions on behalf of Ms RL, Mr SA says he does not routinely provide copies of every document and all correspondence to clients, and is under no obligation to do so. However, he refers to an email Ms RL sent to Mr NE saying that there were around 150 pages of disclosed documents,<sup>15</sup> and says that it would have been obvious to Mr NE when he collected the documents that the envelope contained substantially fewer than 150 pages. Mr SA says if Mr NE had asked at the time he would have been told that he had been given the documents that had been identified as the necessary ones for instructing an expert.

### **Role of the LCRO**

[28] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

### **Scope of Review**

[29] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

### **Review Hearing**

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<sup>15</sup> Email RL to NE (26 July 2011).

[30] Ms RL did not consent to the matter being determined on the papers, so a hearing with both parties present took place in [city] on 20 November 2014.

### **Review Issue**

[31] Having carefully considered all of the information available on review, I have been unable to identify any reason to depart from the Committee's decision on conduct as far as it goes. There is, however, a further matter that requires consideration. The Committee does not appear to have considered whether Ms RL complied with her obligation under rule 7,<sup>16</sup> which relates to the disclosure of information by lawyers to clients.

[32] As that matter had not been identified by the Standards Committee, the parties were given an opportunity after the review hearing to tender submissions on whether that aspect of the complaint should be referred back to the Committee under s 209 of the Act for it to consider.

[33] The parties were also given the opportunity to consider whether the question of fees should be determined, but, as mentioned above materials provided by Mr NE<sup>17</sup> after the review hearing indicate that the complaint about fees was separately determined by the Committee as a result of an own motion enquiry. There is therefore no need to consider the fees issue any further.

[34] Mr SA's brief submission was that as a point of principle, both matters should be referred back to the Committee for consideration on the basis that "the court of first instance must have the right to determine the issue. The matter cannot be raised on appeal if it has not been considered at first instance".<sup>18</sup>

[35] Mr NE, expressing concerns about the integrity of the Standards Committee process, sought to have matters determined on review.<sup>19</sup>

### **What should be the outcome of this review?**

[36] I have considered whether it is appropriate to refer this aspect of Mr NE's complaint back to the Committee for it to consider and determine under s 209 of the Act. I have decided not to for the following reasons.

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<sup>16</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>17</sup> Email NE to LCRO (11 December 2014).

<sup>18</sup> Email SA to LCRO (9 December 2014).

<sup>19</sup> Email NE to LCRO (11 December 2014).

[37] I have had regard to the point of principle raised by Mr SA. In this case, while recognising that the framework of Part 7 of the Act anticipates decisions being made at first instance by Standards Committees, I consider that I can proceed with my review on the basis that if I am confronted with any uncertainty, or if I form a preliminary view that may be prejudicial to Ms RL, I would refer the matter back to the Committee.

[38] I am satisfied that no other conduct concerns arise with respect to Ms RL's dealings with Mr NE, and that if there were a breach of rule 7, it would be one of the less serious of its type.

[39] I have had the opportunity to hear from both parties on review on the rule 7 issue, and both of them had the opportunity to make submissions at the review hearing.

[40] I consider I have sufficient information to make a fair and informed decision.

[41] The resources of the Standards Committees and this Office should be used efficiently and effectively. I do not consider a referral back would be an efficient or effective use of the resources of the Standards Committee.

[42] Mr NE is willing to have the matter determined on review.

[43] Dealing with the matter on review is consistent with the consumer protection purpose of the Act, and not otherwise generally inconsistent with the purposes of the Act.

[44] Mr NE's original complaint to NZLS is dated 24 April 2012. It is almost three years old. Further delay would be inconsistent with the purpose of processing and resolving complaints expeditiously within the framework of the complaints and disciplinary provisions of the Act,<sup>20</sup> and with the concept of a responsive regulatory regime in relation to lawyers.<sup>21</sup>

## **Rule 7**

[45] Mr NE's original complaint to NZLS refers to narrations on invoices and includes the following:

Perusing discovery/medical documents received – as I later found out, [Ms RL] had received the medical documents from the other party sometime in July but I was never asked to pick these up until 30 August 2011. In addition, [Ms RL] advised me that these were all the medical documents that were included in submissions from the other party. Unfortunately, [Ms RL] failed to check that the documents provided were all of the material provided by the other party, and it was not until later that my new lawyer found out that [Ms RL] had accepted and provided only a fraction of the documents files (sic) with the court...

<sup>20</sup> Lawyers and Conveyancers Act 2006, s 120(2)(b).

<sup>21</sup> Section 3(2)(b).



[46] It is possible to distil from that paragraph of his complaint a concern that Mr NE did not know, because Ms RL did not tell him, what documents were provided. That had consequences for his ability to properly instruct his new lawyer. The question then is what was the nature and scope of Ms RL's professional obligation in relation to the provision of information to Mr NE. Disclosure of information by lawyers to clients is the subject of rule 7, which says:

A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.

[47] Reference is made in the Rules to the High Court decision of *McKaskell v Benseman*<sup>22</sup> in which Jeffries J said:<sup>23</sup>

The fiduciary must, in dealing with those to whom he owes such an obligation, reveal fully all circumstances that might affect their affairs, and is thus under a duty of disclosure not imposed on others...

[48] As a fiduciary, Ms RL was under an obligation to promptly disclose to Mr NE all information that she had or acquired that was relevant to the matter in respect of which she was engaged by Mr NE. It is important when considering the rule to note that the obligation relates specifically to information that is relevant to the matter in respect of which the lawyer is engaged, not to every piece of information that the lawyer acquires in the course of the retainer.

[49] It is also relevant to note that determining relevance involves an exercise of professional judgement by a lawyer. In this case Ms RL exercised her judgement in conjunction with a medical expert, because the information at the centre of Mr NE's complaint comprised personal medical records provided in the course of discovery for the purpose of instructing an expert witness in the proceeding.

[50] The key point is that it would have been obvious to Mr NE from the email of 26 July 2011 that 150 pages of medical records had been disclosed. Ms RL sent that email the same day that she acquired the medical records. Her obligation at that stage was to promptly disclose to Mr NE that she had acquired medical records, and she met that obligation. However, she was not at that stage in a position to have determined what may be relevant, what may be irrelevant, and what may be absent.

[51] Ms RL explained in her email of 26 July 2011 how she was going to determine relevance, namely in consultation with the medical expert. After having that discussion, she

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<sup>22</sup> *McKaskell v Benseman* [1989] 3 NZLR 75 at [87].

<sup>23</sup> At [87].

and he formed the view that only a few of the documents were relevant to the aspect of Mr NE's matter that was in contention, namely an expert medical opinion on the range of possible conception dates.

[52] That done, Ms RL provided copies of the information she and the medical expert had identified as relevant to Mr NE. It is worth noting at this point that, even if her view of relevance differed from that of Mr NE's next lawyer, there is no reason to think that should result in an adverse professional disciplinary finding against Ms RL. It has previously been said that a "barrister is under no duty to be right; he is only under a duty to exercise reasonable care and competence".<sup>24</sup>

[53] Ms RL's obligation was to exercise reasonable care and competence in forming a view on relevance. The fact that she formed a view on relevance in consultation with the medical expert that was likely to be instructed to appear as a witness in Mr NE's defence to the paternity orders sought against him supports the conclusion that she met her obligations in that regard.

[54] I therefore conclude that Ms RL complied with her obligation under rule 7 by promptly disclosing to Mr NE all information that she had or acquired that was relevant to the matter in respect of which she was engaged by him.<sup>25</sup>

[55] Pursuant to ss 211(1)(b) and 138(2) I decide not to take any further action on Mr NE's complaint because, having regard to all the circumstances of the case, any further action is unnecessary and inappropriate.

### **Outcome**

[56] Having carefully considered all of the information available on review, including the evidence and submissions of the parties at the review hearing, the determination of the Standards Committee is confirmed, and further action with respect to Mr NE's complaint in relation to the provision of information is unnecessary and inappropriate.

### **Costs**

[57] An LCRO has a wide discretion to consider costs pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines.

[58] Mr NE was entitled to apply for a review, and did so. He has not conducted himself in a manner that would attract an order for costs against him.

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<sup>24</sup> *Saif Ali v Sydney Mitchell & Co (a firm)* [1980] AC 198 at [231].

<sup>25</sup> Above n 16, rule 7.

[59] No adverse finding was made against Ms RL either by the Committee, or on review. There is no other reason why she should be ordered to contribute to the costs of this review.

[60] No orders for costs are made on review.

### **Decision**

[1] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Auckland Standards Committee 4 is confirmed.

[2] Pursuant to ss 211(1)(b) and 138(2) of the Lawyers and Conveyancers Act 2006, having regard to all the circumstances of the case, any further action on Mr NE's complaint about provision of information is unnecessary and inappropriate.

**DATED** this 27<sup>th</sup> day of February 2015

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D Thresher  
**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 NE as the Applicant  
Ms RL as the Respondent  
Mr SA as a Related Person under s 213  
[North Island] Standards Committee [X]  
New Zealand Law Society  
Secretary for Justice