

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

[2021] NZLCRO 82

Ref: LCRO 125/2019

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [Area] Standards Committee [X]

**BETWEEN**

**AB**

Applicant

**AND**

**CD and EF**

Respondent

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

**Introduction**

[1] Mr AB has applied for a review of the determination by [Area] Standards Committee [X] in which the Committee determined to take no further action on Mr AB's complaints about Mr EF and Ms CD. Mr EF and Ms CD had acted for Mr AB and his sister (G) in litigation relating to their mother's estate, and then subsequently acted for G against Mr AB.

**Background<sup>1</sup>**

[2] Mr AB and G contested the terms of their mother's will, who died in July 2015. They had no other siblings.

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<sup>1</sup> This background is a much abbreviated version of events but the parties themselves are well acquainted with them.

[3] In August 2015, they instructed Mr EF to assist them. Mr EF provided them with advice concerning the terms of the will and potential claims against the lawyer who had drafted it.

[4] In late September, Mr AB consulted another firm, and the lawyer involved then made contact with Mr EF. In that discussion Mr EF suggested that both G and her brother should instruct the same lawyer, as, at that stage, their objectives were the same.

[5] Subsequently, Mr AB and G had a 'falling out' and G returned to Mr EF.

[6] After seeking advice from two other lawyers, Mr AB ultimately instructed Ms HI. Ms JK QC was engaged by Ms HI to assist with the ensuing litigation.

[7] Ms CD, an associate in the firm,<sup>2</sup> became involved as matters progressed, and proceedings were lodged in the High Court by Mr AB, G, and Mr AB's son, L.

[8] Despite attempts to settle the claims, a two-week hearing was scheduled in November 2018. During the course of the first day of the hearing, the parties reached a settlement of all claims which were recorded in a Minute by [XX J].<sup>3</sup>

[9] Mr AB has complained about the conduct of Mr EF and Ms CD during the course of these matters and for accepting instructions from G.

### **Mr AB's complaints**

#### *Mr EF*

[10] Mr AB's complaints against Mr EF are that Mr EF was conflicted by acting for G, having previously acted for Mr AB jointly with G. He says that Mr EF should either have declined to act for G, or obtained his informed consent to his doing so.

[11] Mr AB says that Mr EF has breached r 6.1.2 of the Conduct and Client Care Rules.<sup>4</sup> In addition, Mr AB says that even if he had provided informed consent, Mr EF was nevertheless in breach of r 6.1.3 because Mr EF breached his duty to Mr AB by using information gleaned from Mr AB during the time that Mr EF had acted for him.

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<sup>2</sup> The firm name is EFs.

<sup>3</sup> Dated 12 November 2018.

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

*Rules 8.7.1 – 8.7.4*

[12] Mr AB says that Mr EF has breached rr 8.7.1 – 8.7.4 because no information barrier was established between Mr EF and Ms CD and this was evidenced by the fact that Mr EF appeared with Ms CD at the court hearing to represent G.

*Ms CD*

[13] Mr AB says that Ms CD has breached a number of the Conduct and Client Care Rules in three fundamental ways:

1. She filed an affidavit in which serious unfounded allegations were made about him.
2. She repeatedly failed to respond to settlement proposals put forward by Mr AB's solicitor.
3. She continued to refuse to engage with his lawyer, both pre and post settlement, to discuss the release of funds held by the lawyers on account of costs.

*Unfounded allegations – rr 13.8.1, 2.3*

[14] The unfounded allegations Mr AB refers to are contained in an affidavit sworn by G.<sup>5</sup> Mr AB refers to some examples:

- That Mr AB's wife "worked as a call girl in [overseas] ...".<sup>6</sup>
- That Mr AB had made death threats against G to their mother.<sup>7</sup>
- That Mr AB had physically attacked his wife.<sup>8</sup>
- That he had hit his mother.<sup>9</sup>

[15] Mr AB submits that G's affidavit contains many hearsay statements which are inadmissible as evidence.<sup>10</sup>

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<sup>5</sup> Affidavit of G AB (12 May 2017).

<sup>6</sup> At [55].

<sup>7</sup> At [58].

<sup>8</sup> At [65].

<sup>9</sup> At [71].

<sup>10</sup> Mr AB refers to the Evidence Act 2006.

[16] Mr AB says that further 'baseless assertions' were contained in an affidavit sworn by OP,<sup>11</sup> who deposed that after Mrs AB's death, Mr AB had neglected her animals. Mr AB says that photographs exhibited to the affidavit were taken after he had left the farm and moved to [City].

[17] He also says that Ms CD was aware of G's unreliability as a witness as he had disproved a statement by her that she had no involvement with another law firm that had been consulted by them both ([ZYX]). He says that G's unreliability as a witness should have been evident to Ms CD.

[18] Mr AB asserts that Ms CD has breached rr 13.8.1 and 2.3 by preparing and filing the affidavits, and these caused him severe distress and "abused a legal process to undermine [his] reputation and thus prejudiced [his] interests in the lawsuit".<sup>12</sup>

[19] Mr AB says he was obliged to obtain sworn affidavits from 20 people to counter these allegations, which resulted in significant legal costs for him. In addition, his counsel was obliged to identify inadmissible evidence and make submissions to the Court, which also resulted in additional legal costs.

#### *Failing to respond to settlement offers*

[20] Mr AB asserts that Ms CD failed to respond to settlement offers submitted through his lawyers, thereby increasing his legal fees. Mr AB submits that it is at least arguable that Ms CD is in breach of r 10.1.

#### *Refusal to engage in discussions to release funds*

[21] Mr AB accuses Ms CD of persistent silence when requested to release the funds held by EFs on account of costs.

#### *Summary*

[22] Mr AB says that overall, Ms CD's and Mr EF's conduct is conduct that "falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".<sup>13</sup>

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<sup>11</sup> Dated 20 May 2017.

<sup>12</sup> Mr AB's complaint at p4.

<sup>13</sup> Section 12(a) of the Lawyers and Conveyancers Act 2006.

[23] In support of his application for compensation, Mr AB attached a schedule of attendances by his lawyers which he says relates specifically to the work generated by Ms CD's conduct. He has calculated the cost of these attendances as being \$65,130.<sup>14</sup>

[24] Mr AB says that in addition to the legal costs, Ms CD's conduct has had the following consequences:

- great stress and distress caused to both himself and his wife;
- lost interest on the funds held in the trust account;
- lost rental income due to late settlement resulting from Ms CD's delaying tactics;
- innumerable hours of otherwise unnecessary work for him;
- reimbursement of overseas witnesses for their legal expenses.

*Mr EF's response*

[25] In response to Mr AB's complaints, Mr EF says:

- none of the lawyers who Mr AB had instructed subsequently had any issues with Mr EF continuing to act for G.
- "...there was no information [he] ever learned from [Mr AB] which had any bearing whatsoever on his family protection or testamentary promises claim".<sup>15</sup>

[26] The claim by Mr AB against his mother's estate "came out of the blue".<sup>16</sup>

[27] Ms HI was aware that Mr EF was involved as he had responded to settlement proposals from her. In support of this Mr EF provided copies of a number of emails sent by him to Ms HI and Ms JK.

[28] "In summary therefore all throughout [Mr AB] was aware [he] was acting for G when [Mr AB] left his firm. The various solicitors who [Mr AB] had instructed including his last solicitor and QC were all aware that [he] had acted for [Mr AB] and G and there was no protest. Two of the lawyers agreed [he] could continue to act."<sup>17</sup>

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<sup>14</sup> In his complaint Mr AB seeks compensation totalling \$40,000.

<sup>15</sup> Mr EF, letter to Lawyers Complaints Service (30 April 2019) at [15].

<sup>16</sup> At [16].

<sup>17</sup> At [18].

### **Ms CD's response**

[29] In her response to the complaint Ms CD drew attention to the concluding paragraph of the Minute issued by His Honour [XX] J:<sup>18</sup>

I warmly congratulate the parties and their diligent counsel for resolving this long-running, corrosive and resource-consuming litigation. The experience of this Court is that settlements reached between family parties are ultimately greatly preferable to those imposed by any Judge. I am ... cognisant of the very significant difficulties which have attached to the negotiations. In my view the parties owe a debt of gratitude to their highly competent counsel in being able to reach the settlement they have.

#### *Conflict*

[30] Ms CD does not accept Mr AB's complaint that she was conflicted by acting for G, and endorses Mr EF's response.

#### *Evidence*

[31] Ms CD answers Mr AB's complaints about the content of G's affidavit with a single comment – she did not accept “that there has been any breach ... in regard to the filing of evidence”.<sup>19</sup>

[32] Ms CD notes that Mr AB's lawyers did not make any complaints about delays by herself in responding to settlement offers nor that her responses lacked respect or courtesy.

#### *Undertaking*

[33] Ms CD is uncertain what Mr AB's complaint relates to in this regard and provided a series of emails between the various parties relating to it. Ms CD does not accept this complaint.

### **The Standards Committee determination**

[34] The Standards Committee identified the issues to be addressed were whether Mr EF and/or Ms CD had:<sup>20</sup>

- a. breached rule 6.1 and/or rule 8 by acting for G against AB;
- b. breached rule 2.3 and/or rule 13.8.1 by filing the Affidavit in Court; and

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<sup>18</sup> [XX] J's Minute (12 November 2018) at [6].

<sup>19</sup> Ms CD, response to complaint (2 May 2019) at p6

<sup>20</sup> Standards Committee determination (16 July 2019) at [18].

- c. breached any of their other obligations to AB or his counsel.

*Rules 6.1 – 6.3, 6.8*

[35] Mr AB argues that the fact that none of his lawyers objected to the respondents acting for G was insufficient to satisfy their obligations. He says that Mr EF and Ms CD were required to obtain consent directly from him.

[36] The Committee noted that r 10.2 prevented the respondents from contacting him directly. In addition, the Committee notes that Mr AB was aware of the fact that Mr EF was continuing to act for G but did not himself raise any objections at the time.

[37] The Committee considered that Mr EF was able to rely on the consent of Mr AB's lawyers and the fact that no objections had been raised by them.

[38] The Committee determined to take no further action on this complaint.

*Rules 8, 8.7, 8.7.1*

[39] The Committee identified three elements of "diffuse knowledge"<sup>21</sup> which would prevent a lawyer from acting:

- a. knowledge of personality, weaknesses, fears and reactions gained over many years when acting in a will dispute;
- b. knowledge of honesty or lack thereof; reaction to crises, pressure or tension; attitude to litigation and settling tactics; and
- c. business knowledge acquired when acting for a former client for a period of 14 years.

[40] The Committee did not identify any insights about Mr AB's character that Mr EF could have obtained, and noted that in the cases referred to in the footnotes, the lawyer/client relationship had been long standing.

[41] "... The Committee considered the lawyer-client relationship between EFs and AB had not been of sufficient duration for Mr EF to gain any significant or useful insights into AB that could have assisted G in negotiating the settlement agreement. The Committee was therefore satisfied this aspect of the complaint had not been made out."<sup>22</sup>

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<sup>21</sup> At [27].

<sup>22</sup> At [28].

*Rules 2.3 and/or 13.8.1 – the affidavits*

[42] “... The Committee noted Ms CD spoke with other witnesses and there were supporting affidavits to corroborate G’s Affidavit. Furthermore, although G was in [Overseas], she would have been able to find out about the events from others who were in New Zealand at the time of the events.”<sup>23</sup>

[43] “The Committee was also mindful that it is not the position of counsel *“to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the Court”*. It was therefore satisfied Ms CD had taken sufficient steps to verify the statements made in the affidavit and had a reasonable basis to believe they were true. Additionally, the Affidavit was filed in response to AB’s claims against the estate and there was a legitimate reason to file it.”<sup>24</sup>

[44] “...the Committee was satisfied Ms CD had taken reasonable steps to ensure there were reasonable grounds for making the allegations made in the Affidavit. The Committee therefore concluded Ms CD had not breached rule 2.3 or rule 13.8.1.”<sup>25</sup>

[45] As a final comment, the Committee observed that the proper place to challenge affidavit evidence was before the Court.

*Other obligations*

[46] The Committee noted that Ms CD’s duty was owed to G and it did not therefore consider it appropriate to address Mr AB’s complaint about Ms CD’s competence.

[47] The complaint about fees needed to be addressed in the context of the settlement agreed to by the parties in which the parties had agreed that costs would lie where they fell.

[48] As the respondents had not dealt directly with Mr AB, the Committee did not consider that either lawyer had breached the duty of respect and courtesy owed to him. In addition, the Committee did not consider that Ms CD had been tardy responding to settlement offers and noted that she was unable to obtain instructions from G at times.

[49] The Committee did not consider that Ms CD had been discourteous or disrespectful to Mr AB’s counsel.

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<sup>23</sup> At [31].

<sup>24</sup> At [32].

<sup>25</sup> At [34].

*The Committee's decision*

[50] “The Committee, having considered the complaint and having exercised its discretion, formally decided to take no further action, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006, because no further action is necessary or appropriate.”<sup>26</sup>

**Mr AB's application for review**

[51] Mr AB says that “the Standards Committee's response to [his] complaint misconstrued or failed to address altogether some of the central issues raised in [his] complaint”.<sup>27</sup>

[52] Mr AB also provided further reasons to support his application in which he:

- reiterates his view that Ms CD breached rr 13.8.1 and 2.3 and that the “false information not only led to unnecessary distress and very considerable additional expense but it notably had an unfairly prejudicial effect on the legal proceedings as a whole”.<sup>28</sup>
- says that “[given] that no such grounds could possibly have existed since Ms CD's extreme accusations were entirely unfounded, Ms CD in her response to my complaint of necessity failed to show that ‘reasonable grounds for making the allegation’ existed.”<sup>29</sup>
- refers to the hearsay content of the affidavits and takes issue with the view of the Committee that “Ms CD had taken reasonable steps to ensure there were reasonable grounds for making the allegations made in the Affidavit”.<sup>30</sup>
- considers that it is the role of the Committee “to decide the validity or otherwise of the affidavit material”; the Committee said it was not its role.<sup>31</sup>

[53] The outcome Mr AB seeks is:<sup>32</sup>

Maximum monetary award possible as compensation for lawyers' misconduct leading to very significant + unnecessary legal expenses.

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<sup>26</sup> At [47].

<sup>27</sup> Application for review (26 August 2019) at Part 7.

<sup>28</sup> Mr AB's supporting reasons for his application for review at [1].

<sup>29</sup> At [2].

<sup>30</sup> Standards Committee determination, above n 20 at [34].

<sup>31</sup> At [35].

<sup>32</sup> Application for review at Part 8.

## **Responses to the application for review**

[54] Mr EF and Ms CD supported the Committee's determination and relied on their submissions and information supplied to the Standards Committee.

## **Review**

[55] A hearing took place in Auckland on 30 March 2021. Mr AB attended by telephone and Mr EF and Ms CD attended in person.

### *Conflict of interest*

[56] Mr AB complains that Mr EF and Ms CD should not have resumed acting for G after he and G fell out. He says that in the course of acting for him previously, they would have gained an insight into his character which they were able to use in the litigation, and particularly during the course of settlement negotiations.

[57] In the review hearing Mr AB also said that the respondents would have gained a significant insight into the nature of the dispute, information relevant to his claims, and an intimate knowledge of the facts. These objections are disregarded as the respondents would have gained that information from G in any event.

[58] The issue to be decided is whether or not Mr EF and Ms CD were conflicted by acting for G against Mr AB.

[59] Rule 6.1 provides:

6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

[60] This rule, and the sub-rules, apply to a lawyer acting for more than one client on the same matter. Mr EF and Ms CD acted for Mr AB and his sister when their interests coincided. When their interests diverged, and each brought separate claims against the estate, each of them instructed separate lawyers.

[61] None of the lawyers instructed by Mr AB raised any objection to the respondents acting for G. Mr AB argues that the fact that his lawyers raised no objection did not mean that he had consented to them doing so.

[62] Rules 10.2 and its subrules at 10.2.1–10.2.6 prevent a lawyer from making contact with another lawyer's client. The respondents were not able to contact Mr AB direct for his consent.

[63] In summary, r 6.1 has no application to the facts of this matter, and no objection was raised, either by Mr AB at that stage, or his lawyers at any time, to the respondents acting for Mr AB.

[64] There has been no breach of r 6.1.

*Confidential information*

[65] Rules 8.1 and 8.7 apply more directly to the matters raised by Mr AB. These rules provide:

8.1 A lawyer's 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). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.

8.7 A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.

[66] The term 'confidential information' is not defined in the Rules. Mr AB submits that when acting for him, Mr EF and Ms CD had gained an insight into his character which would have enabled them to predict how he would react as matters developed and ultimately give them an advantage in the negotiations leading to settlement of the proceedings.

[67] The concept that personal characteristic amounts to confidential information has generated a significant amount of academic and judicial comment. I set out here some extracts from the text *Conflicts of Interest*:<sup>33</sup>

There is an obligation not to disclose or misuse the confidential information of the client, whether the issue is an existing client conflict or a former client conflict. In the latter case, the confidential information obligation is the only obligation that remains. So what is confidential information in this context? In general, for there to be a breach of confidence, the relevant information must have the necessary quality of confidence, must have been imparted in circumstances importing an obligation of confidence and there must be an unauthorised use of that information to the detriment of the party communicating it. ...

There is little authority in this jurisdiction which expressly considers what constitutes confidential information for the purpose of conflicts. ...In *Re Solicitors (A Firm)* Lightman J. said:

... For the purpose of the law imposing constraints upon solicitors acting against the interests of former clients, the law is concerned with the protection of information which (a) was originally communicated in confidence, (b) at the date of the later proposed retainer is still confidential and may reasonably be considered remembered or capable, on the

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<sup>33</sup> Charles Hollander QC and Simon Salzedo *Conflicts of Interest* (3<sup>rd</sup> ed, Sweet and Maxwell, London, 2008) at [7-009] to [7-010]. Citations for the cases referred to have been omitted.

memory being triggered, of being recalled and (c) relevant to the subject matter of the subsequent proposed retainer. ...

...

There is a lot of authority on this in Australia. ...

In *Yunghanns v Elfic Pty Ltd* Gillard J. said:

... In this regard, the relationship between solicitor and client may be such that the solicitor learns a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressures or tension, his attitude to litigation and settling cases and his tactics. These are factors which I would call the 'getting to know you' factors. The overall opinion formed by a solicitor of his client as a result of his contact may in the circumstances amount to confidential information that should not be disclosed or used against the client.

[68] A discussion of this issue would not be complete without a consideration of the case of *Black v Taylor*,<sup>34</sup> which was an appeal from the judgment of McGechan J in the High Court. In the Court of Appeal part of McGechan J reasons were adopted by Cooke P:

Last, the lawyer (and particularly the family solicitor) gets to know personalities. He gets to know something, and often a good deal, of a former client's weakness, fears and reactions. It is as much information passed on as is verbal or written description. Like all information, it can be misused for another person. There could be cases, perhaps with a former client witness' credibility crucial, where such knowledge of personality inevitably acquired by virtue of the former solicitor/client relationship could amount to a real information consideration. There will be cases where a former client's very real fears that he will be cross-examined from a position of unfair superiority should be given consideration.<sup>35</sup>

[69] In the Court of Appeal, Cooke P continued:<sup>36</sup>

Whether that kind of consideration should be put exclusively under the heading of confidential information is unimportant. As to those who may be allowed to represent parties to argue cases, the Courts have an inherent jurisdiction ... it is not then a question of the right to practice generally ... but a question concerning what is needed or may be permitted to ensure in a particular case both justice and the appearance of justice. Obviously it is a jurisdiction to be exercised with circumspection.

[70] His Honour therefore declined to describe the type of information that Mr AB refers to as 'insights', exclusively as 'confidential information'.

[71] The decision as to whether or not a lawyer should be prevented from acting for a client is largely within the jurisdiction of the Court.

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<sup>34</sup> [1993] 3 NZLR 403 (CA).

<sup>35</sup> At 406.

<sup>36</sup> At 406.

*Rules 8.7, 8.7.1*

[72] Rule 8.7 provides:

A lawyer must not use information that is confidential to a client (including a former client) for the benefit of any other person or of the lawyer.

[73] This rule requires that:

- (a) the respondents held confidential information about Mr AB; and
- (b) that confidential information was used for G's benefit.

[74] When considering this issue, the requirement in r 4 that "a lawyer ...must not, without good cause, refuse to accept instructions from any client..." represents the default requirement.

[75] For the reasons that follow, I have come to the view that neither of the respondents have breached this rule.

[76] Rule 8.7.1 provides:

A lawyer must not act for a client against a former client of the lawyer or of any other member of the lawyer's practice where—

- a) the practice or a lawyer in the practice holds information confidential to the former client; and
- b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and
- c) there is a more than negligible risk of disclosure of the confidential information; and
- d) the fiduciary obligation owed to the former client would be undermined.

[77] The immediate observation to be made here, is that sub-paragraphs (a)–(c) are conjunctive, and each of the factors must apply before the restriction applies.

[78] Sub paragraphs (b) and (c) refer to 'disclosure' of the information. That must necessarily mean that the 'confidential information' has been 'disclosed' to a third party. It is difficult to accept that either of the respondents would have 'disclosed' what Mr AB refers to as 'insights into his character' to a third party. As the 'information' has not been 'disclosed', neither subclauses (b) or (c) have been satisfied, and hence, r 6.1.1 does not apply.<sup>37</sup>

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<sup>37</sup> In addition, r 6.1.1 does not apply because r 6.1 refers to acting for more than 1 party.

*Conclusion*

[79] The only conclusion that can be drawn from the discussion above, is that what constitutes confidential information is uncertain, particularly as it relates to knowledge of a person's characteristics.

[80] Although Mr AB's argument cannot be dismissed out of hand, the following factors lead me to the decision that Mr EF and Ms CD have not breached rr 8.7 or 8.7.1:

- Mr AB has not identified any particular characteristic that he considers would have given the respondents an 'insight' into his character that would have enabled them to have an advantage in the litigation and settlement negotiations that could be used to advance G's position. In fact, the strength of character that Mr AB has exhibited in pursuing his complaint and this Review, would tend to indicate that any 'insight' into his character would have revealed that an extremely attractive proposal would have been needed to gain Mr AB's consent.
- Having considered judicial and academic commentary as to what constitutes confidential information, it cannot be said with any degree of certainty, that 'insights' into his character can be considered to be 'confidential information.' Given the degree of uncertainty that exists, there is no basis at all, on which to come to a decision adverse to either Mr EF or Ms CD.
- The brevity of the time during which Mr EF and Ms CD acted for Mr AB.
- In all likelihood, G would have been able to impart knowledge about Mr AB's characteristics.
- Mr AB could have applied to the Court to have Mr EF and Ms CD barred from acting for G and did not do so.
- An adverse finding against Mr EF and Ms CD could only be made if it was clear that a lawyer's knowledge of a former client's characteristics comes within the definition of confidential information for the purposes of the rule. That is not the case.

*The affidavits*

[81] Mr AB's complaint is that the affidavits prepared by Ms CD and sworn by G contains lies, inconsistencies and hearsay evidence. He says that the respondents had a duty to ensure the content of the affidavit was true and correct.

[82] Mr AB refers specifically to r 13.8.1 which provides:

...

13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.

...

[83] Mr AB argues that Ms CD should not have included comments relating to his conduct and about his wife without being able to independently verify them.

[84] That contention amounts to a considerable extension of the requirements of the rule, which require a lawyer to take "appropriate steps to ensure that reasonable grounds for making the allegation exist". Ms CD had corroborating evidence which was sufficient to meet the 'reasonable grounds' test.

[85] The issue is discussed in the text *Ethics, Professional Responsibility and the Lawyer*.<sup>38</sup>

... In the event that tenuous claims or defences are argued in Court, considerable time can be taken up with points which are peripheral to the main issue and doomed to fail.

... By including certain claims (such as of fraud or malice), lawyers may put evidence before the Court that will gain the Judge's sympathy, even though that part of the claim is doomed to fail. Or, by asserting a certain defence, the plaintiff will be put to the further expense of refuting it, thereby making an advantageous settlement more likely. ...

More fundamental than the duty to plead clearly is the duty to plead honestly. Whenever a claim or defence is lodged with the Court, the lawyer of the record signs it. In signing a pleading, lawyers are certifying that the case is not a mere fiction. The Court presumes the lawyers have investigated the evidence and believe, in their judgment, that there is at least a prima facie case to be answered in respect of the claims made. While lawyers are advocates for their clients, they are expected to exercise independent judgment in accepting the assertions made. And where there is some doubt as to the veracity of a client's allegations, lawyers are entitled to seek corroboration from independent investigation. However, lawyers are not required to be unduly suspicious, and in general a solicitor is not required to go behind the word of a client.

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<sup>38</sup> Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [14.8].

[86] These comments suggest that the rule may apply to the pleadings filed by the lawyer. There is however, a general principle that “a lawyer should never knowingly allow a witness to give evidence that is false.”<sup>39</sup>

[87] The author continues:<sup>40</sup>

...it is necessary to be wary of pre-judging a matter because of scepticism of the client’s version of events. In *Orchard v South Eastern Electricity Board*,<sup>41</sup> Donaldson MR stated the balance that an advocate must achieve in respect of the veracity of the client’s assertions:

*It must never be forgotten that it is not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the Court.*

[88] Mr AB asserts that he has provided evidence that G was an unreliable witness and therefore all the information provided by her should have been subjected to extreme scrutiny, to the extent of being independently verified by Ms CD. However, proof of one instance where G’s information to Ms CD was incorrect, does not support Mr AB’s contention that all of the content of the affidavit was unreliable.

[89] Mr AB also complains that the affidavit contained hearsay evidence. Whether evidence is admissible or not is, as noted by the Committee, a matter for the court and steps can be taken to exclude such evidence. It is not a matter to be addressed in the context of a complaint and the disciplinary process which follows.

[90] In conclusion, Ms CD has not breached any of the rules referred to.

#### *Failure to respond*

Mr AB’s complaints included:

1. Ms CD had repeatedly failed to respond to settlement offers; and
2. Ms CD had refused to engage in discussions to release funds held in the lawyers’ trust accounts on account of costs.

[91] Mr AB’s application for review did not refer to these aspects of his complaint either in writing, or at the hearing. On that basis it is fair to assume that Mr AB has accepted the determination of the Committee on these issues.

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<sup>39</sup> At [14.10.11].

<sup>40</sup> At [14.10.11].

<sup>41</sup> [1985] QB 565,572.

[92] Briefly however, in respect of both matters, the respondents had some difficulty in obtaining instructions from G, and when instructions were received, it would seem that she did not agree to either the proposed settlement offers or requests to release the funds.

[93] It is apparent from the emails provided that the lack of a response from Ms CD, or an inability to respond, created frustrations for Mr AB. There is some indication of this from Ms HI when she wrote to Mr EF to seek clarification the firm would not authorise release of the funds.<sup>42</sup>

[94] Mr EF's response was that he considered that the firm remained bound by the undertaking to hold the funds<sup>43</sup> pending a release given by Mr AB's lawyer or an order of the court.

[95] The correspondence supplied amounts to a disagreement as to whether or not the undertakings remained in force and there does not seem to be any lack of response. In addition, Ms CD has not been accused of any lack of respect or courtesy by Mr AB's lawyers.

#### *Other matters*

[96] In his application for review Mr AB said that the Standards Committee had "failed to address altogether some of the central issues raised in [his] complaint". At the review hearing, Mr AB confirmed there were no other matters relating to his complaint that had not been addressed at the hearing.

#### **Decision**

[97] After having considered all of the material provided by the parties (which includes the Standards Committee file) and hearing from the parties in person, I have reached the same conclusion as the Standards Committee, being that no further action is necessary or appropriate with regard to Mr AB's complaints.

[98] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee is confirmed.

#### **Publication**

[99] This decision includes a discussion of conflicts of interests which differs from the common situation where a lawyer acts for more than one party at the same time on

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<sup>42</sup> Ms HI, letter to Mr EF (11 March 2019).

<sup>43</sup> Mr EF, letter to Ms HI (12 March 2019).

the same matter. It also contains a discussion as to what constitutes 'confidential information.'

[100] For these reasons I direct<sup>44</sup> that this decision be published in anonymised format.

**DATED** this 3<sup>rd</sup> day of June 2021

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**O Vaughan**  
**Legal Complaints Review Officer**

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

Mr AB as the Applicant  
Ms CD and Mr EF as the Respondents  
[Area] Standards Committee [X]  
New Zealand Law Society

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<sup>44</sup> Pursuant to s206(4) Lawyers and Conveyancers Act 2006