

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

LCRO 195/2018

CONCERNING

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

AND

CONCERNING

a determination by [Area] Standards Committee [X]

BETWEEN

KW

Applicant

AND

LQ

Respondent

DECISION

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

Introduction

[1] KW has applied for a review of the determination by [Area] Standards Committee [X] to take no further action with regard to her complaints about LQ on the basis that “in all the circumstances of the complaint, it appears to the Committee that further action would be unnecessary on inappropriate”.¹

Background

[2] In September 2017 KW was arrested when entering Country A, and charged with importation and possession of controlled drugs. KW’s family were unaware of this and became concerned as they had not heard from her.

¹ Standards Committee determination (date) at [37].

[3] KW's family reside in Country B and on 21 September 2017, her brother, Mr YT, made contact with LQ, the president of The [Language] Speaking Lawyers Association Inc., to enquire whether LQ could act for his sister.

[4] On 22 September 2017, LQ responded. He advised:

- he could help KW
- he was “working on a similar case” and “the outcome look[ed] very promising”.

[5] He continued:

Also, there are certain things you have to understand. Legal services in Country A are not cheap. To have a lawyer representing a client in court would cost minimum NZ\$20,000. I have a very strong barrister who specialises in this kind of cases.

[6] He concluded his email with the following:²

... a free advocate is a formality to some extent [sic] and their objective is to represent a client due to statutory requirements but not to defend him/her. As a rule, they [advocates] tend to agree with the prosecution's position and fulfil a formal function of the defence.

If you are happy with this, please email me and I will take this case if time still permits.

[7] In the meantime, a Legal Aid provider (KI) had been appointed to act for KW and had already applied for bail for her.

[8] On 25 September LQ sent his terms of engagement to YT, advising that “as soon as we receive the signed document, we will be able to represent you and contact your sister”. The terms were general in nature with regard to potential costs, but noted that “if we find an estimate is likely to be exceeded, we will advise you as soon as reasonably possible, and explain why so that we can obtain your further instructions at that time”.

[9] With regard to costs, the terms of engagement concluded:

In your case we are willing to take your instructions on a “time & attendance” and “value of work performed basis”.

[10] LQ had earlier noted his hourly rate at \$350 + GST.

² The copy/translation of this email attached to LQ's response to the complaint (30 January 2018) does not include these paragraphs but in paragraph 6(e) of its decision, the Standards Committee has included the words from the same email. The full email was provided to this Office on review.

[11] LQ followed with an email on 26 September in which he advised that he had arranged to meet with KW on the following day, and offered to take a letter to her if the family wished to communicate with her.

[12] KW's brother responded on the same day advising that they would "definitely get the amount required even if we have to take up a loan secured by our property; we will do whatever is needed".

[13] LQ then sent a further email to YT:³

Dear YT, please see attached our services terms and conditions (retainer). Please look through this document carefully. This is not an agreement. These are the conditions under which we provide services to our clients and we must ensure under the Country A legislation that you are familiar with them before we commence our services. ...

[14] When LQ met with KW on 27 September, he sought, and obtained, her signature to an "Authority to Act" including an authority to instruct a barrister.

[15] On the following day (28 September), LQ made contact with KI, who responded on 5 October, providing details of attendances that had taken place on behalf of KW which included a "not guilty" plea on 5 September followed by an application for bail, which needed to be deferred because of difficulties in locating suitable bail accommodation. By that stage LQ had instructed a barrister (SP) who had also made contact with KI.

[16] On 28 September, LQ rendered an invoice to YT for \$9,500 + GST and \$46 for 'administrative'. It is unclear from the file how this invoice was communicated to YT.

[17] Three payments were received from the family –

2/10/17	\$5,485.50
2/10/17	\$3,525.77
10/10/17	\$1,400
Total	\$10,411.27

[18] Subsequently, either the family advised they could not provide any further funds, or, because no further payments were received, LQ sent an email to KW (who was still incarcerated) on 13 November, which said:

Dear KW, unfortunately your family cannot confirm the acceptance and payment barrister's legal fee. Accordingly, I cannot instruct Mr. RE to act for you in court. Due to two court hearings on 20 and 30 November your urgent actions are required. Please submit immediately an application for legal aid. The corrections

³ LQ, email to YT (25 September 2017).

staff can help you with this matter. Should you require our help with this matter please instruct us ASAP.

[19] On 28 November 2017, LQ sent another email to KW, advising that his choice of barrister had agreed to “accept instructions on legal aid basis”, and on 29 November KW signed an instruction addressed “to whom it may concern” to instruct SP to “contact [the] legal aid office”.

[20] By that time however, KW had already made her complaint to the Lawyers Complaints Service about LQ.⁴ LQ rendered his final invoice to YT on 23 December 2017, which recorded a balance of \$4,356.73 as being due.⁵

KW’s complaints

[21] As noted, KW’s complaint is dated 10 November 2017 and was received by the Complaints Service on 16 November. In her complaint she describes LQ as her “current lawyer”. Her complaints were:

- her parents had told her they had paid LQ “\$13,000 including an extra \$600 to be paid into [her] Prisoner’s Trust Fund Account” which LQ had not done.
- when she questioned LQ about the \$600 he had told her he could not do this as his invoice was still outstanding.
- he had threatened her parents that if he did not receive \$30,000 he (and SP) would cease acting.
- he had advised her parents that she faced “4 life imprisonment sentences” putting stress on her parents, particularly as she maintained her innocence.
- LQ had not provided her with any of the invoices, despite her requesting them.
- LQ did not have a current practising certificate, and this was why he had been asking for adjournments of the bail hearing.
- overall, his service was “unfair, worthless, and very unprofessional”.

The Standards Committee determination

[22] The Standards Committee identified four issues to be addressed:

⁴ KW’s letter of complaint is dated 10 November 2017.

⁵ It is not recorded on the copy invoice provided or other correspondence on the file how this invoice was sent to YT.

- (i) whether any conduct and / or client care issues are raised by LQ's alleged failure to disclose key information to KW and / or the family
- (ii) whether LQ has complied with his obligations under r 9.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)
- (iii) whether LQ's correspondence with the family was consistent with his obligations under rr 2,10, 11.
- (iv) whether the fees rendered by LQ are fair and reasonable for the services provided.

Disclosure of key information

[23] The Standards Committee determined that "the initial delays in receiving KW's disclosure were not caused by LQ".⁶ LQ provided the whole file to KW on 30 October 2017, having received 'disclosure documents' on 5 and 8 October.

Rule 9.5

[24] The Committee accepted that KW was aware of the availability of Legal Aid when she instructed LQ. It goes on to say:

On the balance of probabilities the Committee is also satisfied that LQ advised the family of the availability of legal aid.

[25] The Committee does however express concern at LQ's comment that 'legal aid is not cheap.'

[26] Ultimately however, the Committee determined to take no further action with regard to this aspect of KW's complaint.

Rules 2, 10, 11.

[27] These rules relate to the duty of a lawyer as an officer of the Court and to facilitate the administration of justice and maintain proper standards of professionalism such as to preserve the reputation of the legal profession.

[28] In this regard, the Committee addressed LQ's comments about Legal Aid, and KI in particular.

⁶ Standards Committee determination at [19].

[29] It considered the comments about Legal Aid “were unwise and at worst intentionally misleading”.⁷

[30] However, it accepted LQ’s “submission that the intention behind the comments was to highlight the differences between the roles of criminal litigators in Country B and criminal litigators in Country A”⁸ and determined to take no further action on that issue.

Fees

[31] With regard to this issue, the Committee said:⁹

Having reviewed all the material provided by the parties, including the fee narrations and fee explanations provided by LQ, it is the view of the Committee that the fees charged are fair and reasonable for the work undertaken by LQ. In coming to this conclusion, the Committee notes the time and labour expended by LQ, the amount of material that needed to be analysed and the urgency with which the matters needed to be addressed. While KW and the Family have their own views about how it should have been progressed, in the view of the Committee the matter was progressed in an orderly and timely fashion.

The application for review

Timeliness

[32] The Standards Committee determination is dated 28 August 2018.

[33] The application for review was received at this Office on 16 October 2018.

[34] LQ questioned whether the application for review had been filed in accordance with the requirements imposed by s 198 of the Lawyers and Conveyancers Act 2006. Section 198(b) states that every application for review must be lodged within 30 working days after a copy of the notice of determinationis:

...served on, given to, or otherwise brought to the attention of, the applicant for review (which, in the absence of proof to the contrary, is presumed to have occurred on the fifth working day after it is made, given, or performed or exercised); ...

[35] On enquiry by this Office, it was ascertained that the determination was communicated by ordinary post, and hence the presumption included in the section applies.

[36] The application was received on the 35th working day after the date of the determination and hence complies with the time limit.

⁷ At [28].

⁸ At [29].

⁹ At [34].

The issues

[37] The application for review was prepared by KI and is based on 12 issues critical of the determination by the Committee. A truncated summary of the issues raised are:

- failing to address the inadequate disclosure of financial details.
- ‘errors’ in decisions about LQ’s comments relating to Legal Aid and KI.
- fees.
- LQ bringing the profession into disrepute.

[38] The outcome sought is “compensation, refund of fees, and disciplinary (punitive) action against LQ”.

KI

[39] After KW was released from prison she was obliged to leave Country A and consequently was unable to pursue a review in person. At the review hearing KI confirmed that KW had signed the application for review prior to leaving Country A.

[40] Also provided is a copy of an email from KW to KI, expressing her confidence in him, and specifically requesting he represent her in the course of this review.

[41] Although this is unusual, in that a lawyer is representing a party without that party being present, I have allowed this review to continue on that basis, relying on the direction in s 200 of the Act:

The Legal Complaints Review Officer must conduct any review with as little formality and technicality, and as much expedition, as is permitted by—

- (a) the requirements of this Act; and
- (b) a proper consideration of the review; and
- (c) the rules of natural justice.

[42] LQ objected to KI acting for KW in relation to this review on the grounds that “a successful review of the complaint will also be a vindication of [KI’s] views on the matter and a potential redress to his personal hurt feelings”.¹⁰

¹⁰ In his letter to this Office dated 10 February 2020, formally objecting to KI’s involvement, LQ said: “Large tracts of the complaint relate directly to KI’s involvement in the matter and the perceived slight on his reputation and/or personal hurt feelings”.

[43] LQ also protested “against [KI’s] representation of ... KW” on the basis that KI was ‘conflicted’ and “his acting on behalf of the applicant may be in breach of rr 5, 5.2 and 5.4.2” of the Rules.

[44] He considered it was “untenable for KI to continue to represent [KW] in this matter”.

[45] Having considered LQ’s objections, I instructed the case manager to respond as follows:

... KW is entitled to appoint whoever she wishes to be her support person in this review ... The focus of the review is KW’s complaint about [LQ]. The Review Officer will assess the content of submissions from both parties in its context.

[46] The review hearing proceeded accordingly on 18 June 2020, attended by LQ and KI.

[47] During the course of the hearing I invited LQ to provide a written summary of his reasons for proceeding as he did to ensure that I fully understood his explanations. Following the hearing he provided a letter in this regard.

[48] In the course of the review KI has also submitted that LQ’s attendances were unnecessary/did not take place. I provided LQ’s timesheets to KI to enable him to comment on the detail of these. He has not provided any further comment.

Review

LQ

[49] KW has complained that “overall she had received unfair, worthless and very unprofessional service from LQ”.

[50] LQ was contacted by KW’s family by reason of the fact that he speaks Language A and could communicate with them. He advised that he could help KW. In an email to YT on 22 September 2017, he said:

... To have a lawyer representing the client in court would cost minimum NZ\$20,000. I have a very strong barrister who specialises in this kind of cases [sic].

[51] In the same email he said:

... A free advocate is a formality to some extent [sic] and their objective is to represent a client due to statutory requirements but not to defend him/her. As a rule, they [advocates] tend to agree with the prosecution’s position and fulfil a formal function of the defence.

[52] This is an incorrect portrayal of the work carried out by lawyers providing Legal Aid services, who would, with justification, regard such comments as ‘unacceptable’.¹¹

[53] LQ took advantage of my invitation to provide further information in writing after the hearing to enable me to understand what he was endeavouring to establish as a reason for not engaging a Legal Aid lawyer when he said, “a free advocate is a formality to some extent”. In doing so, he provided a translation of Language A legislation with regard to the rights of an advocate in criminal proceedings.

[54] The translation reads:

Article 6. Powers of Lawyer

3. The lawyer has the right to:

- 1) gather information as is necessary to provide legal representation, and specifically request statements, references and other documents from government agencies, agencies of local self-governments, non-government associations and other organisations in accordance with the procedure established by Article 6.1 of the Federal Law. The said authorities and organisations shall be obliged to provide the lawyer with documents requested or copies thereof;
- 2) interview, subject to their consent, any persons believed to have information germane to the case in which the lawyer is providing legal assistance;
- 3) obtain and present objects and documents that may be deemed to be physical and other evidence, in the manner prescribed by the laws of the Language A Federation;

[55] That does not, in itself, support the contention that the objective of a Legal Aid lawyer in Country A is to “represent a client due to statutory requirements but not to defend him/her” and “agree with the prosecutor’s position”.

[56] That is a misrepresentation of the role of a Legal Aid lawyer, who remains bound to provide the best advice and take the best action for the benefit of his/her client.

[57] It is apparent that LQ did not have the skills himself to advise and represent KW and needed to appoint a barrister to undertake this, which necessarily added to the cost. He ascertained early in the piece, that KW had been approved for Legal Aid, and was represented by KI. However, he did not advise the family of this but I do accept that LQ’s comment that legal ‘aid’ is not cheap, was referring to legal ‘representation’ as opposed to the system of Legal Aid which operates in Country A.

¹¹ Refer to s 12(b) of the Lawyers and Conveyancers Act 2006.

[58] On the same day as advising the family he was going to see their sister/daughter in prison, he sent a further email to them:

... I forgot to mention that [KW's] current lawyer appointed by the state, PKI, does not specialise in criminal law. He practices general law including criminal law. He was a lawyer on duty and was appointed on the day she was detained.

[59] Upon receiving confirmation from the family that they would 'definitely get the amount required', LQ proceeded to make contact with KW and obtained an Authority to Act. He also sent his terms of engagement to the family for signature and return.

[60] At the review hearing LQ explained that he had taken the information about KI from the internet. Whilst that may be correct, KI has advised that he is a level four approved provider, the highest level for this sort of work. If LQ was intending to establish what degree of experience KI could bring to bear for KW, only minimal further enquiry would have been necessary.

[61] It would appear that LQ's advice to the KM family, was designed to move them towards instructing him and dispensing with the services of KI. To achieve that by downplaying KI's credentials, whilst at the same time boosting his own (in fact the credentials of the barrister he intended to instruct) is conduct that breaches s 12(b) of the Act in that it would be unacceptable and unprofessional conduct to lawyers of good standing.

[62] That conduct was compounded, when the family could/did not provide the funding LQ sought and withdrew his services. KW's interests were compromised.

[63] Ultimately, KW obtained the services of another Legal Aid lawyer who was seemingly successful in obtaining EM bail for her, and then successfully defending her against the charges.¹²

Trust account records / payments

[64] In my view, KW's complaints about not receiving information relates specifically to not receiving invoices. She then refers to not receiving 'disclosure' and the Standards Committee seemingly interprets this as meaning receiving a copy of her file.

[65] KW's complaints in this regard relate to a lack of reporting and provision of invoices and statements and this is evident from [2] of the application for review.¹³

¹² There is no direct information as to what eventuated, but this is the information conveyed during the course of this review.

¹³ See [21] above.

[66] LQ provided a copy of his trust account ledger for the matter to the Standards Committee. This recorded the credits referred to in [17] above. It also recorded a payment of \$1,207.50 to SP.

[67] Somewhat oddly however, the trust account ledger provided only covers the period from 2 October 2017 to 19 December 2017. It does not therefore reflect the fee rendered by LQ on 23 December 2017 or the other payments recorded in his invoice of that date. In particular, it does not show the payment of \$150 to KW's Prisoner Account that LQ says he made.

[68] The amounts recorded in the ledger do not correlate to the payments which KW says she was advised by her parents they had made, namely, \$13,000 together with an extra \$600 to be paid into KW's Prisoner's Trust Fund.

[69] In the reasons for her application for review KW says:

The issue of inadequate disclosure of financial details was not dealt with sufficiently.

[70] In this regard, the Standards Committee determination does not specifically address the overall issue as to whether LQ's trust account records accurately reflect monies received and payments made.

[71] Pursuant to s 209 of the Lawyers and Conveyancers Act 2006 I therefore return this particular issue to the Standards Committee to investigate, and in the course of doing so referring to the auditor of LQ's trust account, to ensure that there has been full and adequate recording of all monies received by LQ for KW, and payments made from those funds. In addition, there does not seem to have been full and adequate reporting to KW or her family of monies received and payments made.

Decision / orders

[72] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee to take no further action on KW's complaints is reversed in respect of the decisions / orders made here, but otherwise confirmed.

[73] LQ's conduct constitutes unsatisfactory conduct pursuant to s 12(b) of the Lawyers and Conveyancers Act 2006 with regard to the general complaint by KW that LQ's "service was unfair, worthless and unprofessional" and the somewhat derogatory statements made about the Legal Aid system and, in particular, KI.¹⁴

¹⁴ It must be recorded here the KI did not, at the review hearing, refer to the particular comments about himself, other than to respond to LQ's advice as to where he obtained the information from.

[74] LQ's conduct is such as would be unacceptable to lawyers of good standing. LQ is censured pursuant to s 156(1)(b) of the Act.

[75] Pursuant to s 209(1)(a) of the Act, the Standards Committee is directed to reconsider the matters referred to in [70] above.

[76] The orders made here are in respect of the finding of unsatisfactory conduct pursuant to s 12(b) of the Act. Section 3(1) of the Act provides that the purposes of the Act are:

- (a) to maintain public confidence in the provision of legal services and conveyancing services:
- (b) to protect the consumers of legal services and conveyancing services:
- (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

The censure imposed by this decision reinforces those purposes and it is intended that it be taken seriously.¹⁵

[77] I have also given consideration as to whether or not this decision should be published as LQ's comments with regard to the service of Legal Aid lawyers presents some concern. However, I have determined not to make any such order, as it is likely that LQ's connection with the Legal Aid system and approved lawyers is likely to be minimal.

Costs

[78] Having made a finding of unsatisfactory conduct against LQ, it is appropriate that he meets the costs of this review.

[79] As per the Costs Orders Guidelines issued by this Office, LQ is ordered to pay the sum of \$1,600 to the New Zealand Law Society by 27 July 2020, pursuant to s 210(1) of the Act. Payment is to be made in accordance with the directions in the accompanying letter. Pursuant to s 215 of the Act, the orders for the payment of money in this decision are enforceable in the civil jurisdiction of the District Court.

[80] KI has been involved to a greater extent than would be usual for a lawyer supporting a review party given the facts of this matter, and the fact that KW is not now in Country A. I understand that KI has undertaken this role with no charge to KW or the WM family.

¹⁵ See *New Zealand Law Society v B* [2013] NZCA 156, [2013] NZAR 970 at [39].

[81] In the circumstances, KI may make application for payment of his costs by LQ if he wishes to do so. Any such application is to be forwarded to this Office by no later than 27 July 2020. If KI does make such application, it will be sent to LQ for comment, both with regard to whether or not he should be liable for KI's costs, and the specific amounts claimed.

DATED this 26th day of June 2020

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:

KW as the Applicant
LQ as the Respondent
by [Area] Standards Committee [X]
New Zealand Law Society