

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

SP

Applicant

AND

QH

Respondent

DECISION

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

Introduction

[1] Ms SP has applied for a review of a decision by the [Area] Standards Committee 2 (the Committee) that made unsatisfactory conduct findings against her on account of her:

- (a) undue delay in releasing files and documents to new lawyers engaged by Mr QH and his family trust; and
- (b) failure to render a bill of costs within a reasonable time after a matter's conclusion.

Background

[2] The background was that:

- (a) Ms SP had acted for Mr QH's family trust (the Trust), and in the preparation of a new will for him.
- (b) On 5 November 2015, Mr QH engaged [law firm] ([law firm]) to represent him and the trust. [law firm] sent Ms SP a signed request to uplift Mr QH's and the Trust's files and documents.
- (c) On 10 November 2015, Ms SP sent an invoice to Mr QH in relation to will instructions (which the Committee took to relate to 2007) and a statement of costs said to be outstanding from the Trust.
- (d) These were accompanied by the advice that there would be no files and documents released until all costs rendered had been paid.
- (e) On 11 November 2015, [law firm] wrote to Ms SP to confirm a request made by them to Ms SP the previous day, also noting in that correspondence that Ms SP was not to contact Mr QH directly.
- (f) Mr QH had settled his outstanding costs on 18 December 2015, but it was not until Friday 5 February 2016, by which time Mr QH had complained of delay to the New Zealand Law Society Complaints Service (the Complaints Service) on 25 January 2016, that Ms SP advised [law firm] that the files had been available to uplift since the beginning of that week.
- (g) The business week had begun on Tuesday 2 February 2016, as the Monday was Auckland Anniversary Day.

The complaint and the Standards Committee decision

[3] Mr QH's complaint was advanced in three emails forwarded to the Complaints Service in January and March 2016.

[4] In his first email of 25 January 2016, Mr QH made complaint that:

- (a) Ms SP had refused to provide files. He had received an invoice for work completed in 2011, of which he had no knowledge; and
- (b) request for clarification of the invoice had not been responded to.

[5] On 1 March 2016, Mr QH wrote further to NZLS. He made complaint that:

- (a) the file relating to his will matters had not been provided; and

(b) requests to provide the file had been ignored.

[6] Mr QH wrote further to the Complaints Service on 30 March 2016. In this brief correspondence, he expresses his sense of dissatisfaction that his complaints had failed to achieve the desired results.

[7] In informing Ms SP of the complaints made by Mr QH, the Complaints Service characterised the complaints as being:

- (a) a failure to respond to enquiries in a timely manner;
- (b) failing to release all documents and files without undue delay after the client terminated the retainer; and
- (c) failing to provide a receipt in relation to funds paid.

[8] Ms SP was provided opportunity to respond to the complaint. In correspondence to the Complaints Service of 4 May 2016 (supplemented by further submissions made on 30 June 2016), Ms SP submitted that:

- (a) Mr QH's request for his file coincided with the busy Christmas "rush" period;
- (b) all files had been uplifted in the first week of February 2016;
- (c) [law firm] were labouring under a misapprehension that a file should be in existence for a will that had been drafted nine years previously;
- (d) her availability to provide the file had to be prioritised taking into account the busy period prior to the Christmas break and the pressure of work involved in clearing the post-Christmas work backlog;
- (e) a deed of resignation of trustees was signed and forwarded to [law firm];
- (f) matters relating to finalising Trust issues had been resolved prior to her receiving Mr QH's complaint;
- (g) had Mr QH not terminated his instructions with her firm, or had [law firm] not insisted on her not communicating with Mr QH directly, the problems would not have occurred;

- (h) no receipt was provided for payment received in respect of invoice 1052 (totalling \$240.93), as no receipt was requested;
- (i) she had understood that issues with respect to trust administration and drafting of the will had been resolved;
- (j) she considered Mr QH's complaint to be frivolous and vexatious; and
- (k) Mr QH had not queried any of the invoices provided.

[9] Mr QH responded to Ms SP. In doing so, he provided copies of all correspondence between [law firm] and Ms SP's office, this to reinforce his view that Ms SP had been persistently dilatory in responding to requests. It was Mr QH's view that whilst Ms SP had released some of his files, others had not been released, in particular a file recording his instructions for drafting his will, and a file recording the details for the establishment and ongoing administration of his trust.

[10] The Committee identified the issues to be considered in its notice of hearing issued to the parties as being:

- (a) whether Ms SP breached r 3.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), by failing to respond to inquiries from her client in a timely manner;
- (b) whether Ms SP breached r 4.4.1 of the Rules by failing to release all documents and files without undue delay after the client terminated the retainer; and
- (c) whether Ms SP breached r 9.6 of the Rules by failing to render a final account within a reasonable time of concluding a matter.

[11] The Committee delivered its decision on 19 August 2016. The Committee determined pursuant to section 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act), that Ms SP had contravened:

- (a) rule 4.4.1 of the Rules by failing to act without undue delay upon a written request to uplift documents, this amounting to unsatisfactory conduct; and

- (b) rule 9.6 of the Rules by rendering on 5 November 2015 a bill relating to will preparation, that had not been rendered within a reasonable time of completion of the matter, this delay amounting to unsatisfactory conduct.

[12] The Committee:

- (a) ordered Ms SP to cancel and refund the fee of \$294 plus GST incurred for preparation of the will;
- (b) fined her \$1,000;
- (c) ordered her to pay \$750 costs; and
- (d) ordered the publication of its determination with the names of the parties anonymised.

Application for review

[13] Ms SP filed an application for review on 30 September 2016. The outcome sought is:

- (a) the unsatisfactory conduct findings to be reversed;
- (b) reversal of the order cancelling her bill; and
- (c) quashing of the fine and costs orders.

[14] Addressing complaint that there had been undue delay, Ms SP submitted that:

- (a) The Committee's decision was internally contradictory because it had concluded that a delay from 7 to 16 December 2015 was not culpable (thus a r 3.2 issue concerning timely response to client inquiry was taken no further), but then had determined that a delay of 10 days from the time she had received a reminder from Mr QH's lawyers, to when the files were uplifted was "undue delay".
- (b) The documentation request had been made on 5 November 2015 but outstanding invoices were not paid until 18 December 2015, which was close to the commencement of the holiday period.
- (c) The files had not been picked up in the first week of February 2016 after Auckland Anniversary Day, despite having been available in the week of

25 January 2016. It had been the position throughout that [law firm] had wished to utilise courier services arranged by them to uplift the files.

- (d) The Committee appeared to have read the rule as if it demanded compliance “without delay” instead of “without undue delay,” and “undue” carried the connotations of “unjustifiable” or “excessive”, which were not apt given the intervention of the holiday period.
- (e) A response time of one to two weeks in usual circumstances could not be considered to constitute “undue delay”.

[15] Addressing complaint that she had been dilatory in providing her client with his account, Ms SP submits that:

- (a) the Committee had misinterpreted the facts. Mr QH was not billed in 2015 for work completed in preparing a will in 2007;
- (b) in 2007, Mr QH was separating from his wife and afterwards the family trust was established;
- (c) despite reminders to update his will after that, he did not take steps to do so until the 2014 annual trustee meeting;
- (d) he then agreed to update his will with the intention that he would sign a revised will at the 2015 meeting. When he decided to change lawyers, he was billed for work in progress; and
- (e) billing for work in progress could not constitute a breach of r 9.6, particularly in circumstances where a request had been made to uplift the files.

Mr QH's response

[16] Mr QH was invited to comment on the review application and did so on 14 October 2016.

[17] As to undue delay, he submits that:

- (a) he did not agree with the Committee's findings that there had been no breach of r 3.2;
- (b) Ms SP's timeline was incomplete — there were cumulative delays;

- (c) the files could have been uplifted from Ms SP by or before 22 December 2015 had she made them available for uplift when he paid her bills on 18 December 2015;
- (d) there had been a delay of seven weeks before the files had been released; and
- (e) [law firm] did not hear from her about their availability for uplift until 5 February 2016.

[18] As to the will-related bill, he submits that:

- (a) he agrees with Ms SP that the Committee had misinterpreted the facts;
- (b) his complaint had not been in respect of an invoice for a 2007 will;
- (c) his complaint was actually related to work apparently carried out for the Trust during the years ending 31 October 2011 (invoice 742) and 31 October 2012 (invoice 743);
- (d) he did not recall sighting these invoices, or receiving any reminders as to non-payment, at any time before November 2015;
- (e) he considered it probable that the invoices had been generated by Ms SP on receipt of instructions to release his files;
- (f) he was unsure when he had given instructions to update his will; and
- (g) despite request made of her, Ms SP had not provided evidence of any file having been prepared in respect of instructions to draft a will.

Review on the papers

[19] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[20] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the

information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[21] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

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

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

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

[22] More recently, the High Court has described a review by this Office in the following way:²

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

[23] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) consider all of the available material afresh, including the Committee’s decision; and
- (b) provide an independent opinion based on those materials.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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

Analysis

[24] The issues to be considered on review are:

- (a) Was the Committee correct to conclude that there had been no breach of r 3.2 of the Rules?
- (b) Had there been an unacceptable level of delay on Ms SP's part in making Mr QH's files available?
- (c) Had Ms SP breached r 9.6 of the Rules by failing to render a final account within a reasonable time of concluding a matter?
- (d) Did Ms SP render invoices for work that had not been completed?
- (e) Do any conduct issues arise from Ms SP's failure to provide Mr QH with a file relating to his will instructions?

Was the Committee correct to conclude that there had been no breach of r 3.2 of the Rules?

[25] Understandably, Ms SP did not seek to review this aspect of the Committee's decision, the Committee having found in her favour on this point.

[26] Equally understandably, the point not having been determined in his favour, Mr QH expressed dissatisfaction with the Committee's conclusion.

[27] It is now well settled that the task of a Review Officer, when conducting a review, is to look at the issues through fresh eyes, and having done so, to bring a robust approach to a consideration of the issues before them. When a party initiates a review, all issues that were put before the Committee are open to examination.

[28] In considering the question as to whether Ms SP failed to respond to inquiries from her client in a timely manner, the conduct rule of relevance is r 3.2 which provides that a lawyer must respond to enquiries from their client in a timely manner.

[29] In the context of this particular complaint, argument that Ms SP failed to respond to inquiries in a timely manner has a degree of overlap with complaint that Ms SP neglected, when requested, to provide her file without undue delay. That element of complaint engages a consideration of r 4.4.1 which provides that a lawyer must act upon any written request to uplift documents without undue delay, subject only to any lien that the former lawyer may claim.

[30] The Committee, in considering Mr QH's complaint as to whether Ms SP had failed to respond to inquiries from her client in a timely manner, distilled that element from Mr QH's initial complaint in which he had raised concern that Ms SP had failed to respond to requests to clarify an invoice she had rendered.

[31] The Committee concluded that a response time of eight days did not amount to a breach of r 3.2.

[32] I agree with the Committee that a delay of that duration, considered in context, would not amount to a breach of r 3.2, but in any event I note that the rule would only have application in circumstances where Mr QH remained Ms SP's client.

[33] Complaint that Ms SP's failure to respond sufficiently promptly to Mr QH's request for information is not, subsequent to the termination of the retainer, captured by r 3.2. That rule requires lawyers to respond in a timely fashion to inquiries from their client. Mr QH was not, for much of the period engaged by the complaint, Ms SP's client.

[34] An examination of the Rules indicates that when the scope and reach of a rule is intended to apply to former clients, the rule expressly records that to be the case.³

[35] On making request of Ms SP on 5 November 2015 to provide his files, Mr QH was making it clear that any previous or continuing retainer with Ms SP, either in his personal capacity or on behalf of the Trust, was terminated.

[36] If there was doubt about that, this would surely have been made clear by 10 November 2015, when Ms SP was instructed by [law firm] not to contact Mr QH directly.

[37] It is not the case however that a lawyer's indifference to responding to reasonable and appropriate requests from a former client (or that former client's lawyer) to clarify matters arising out of the previous retainer, can necessarily escape the scrutiny of a disciplinary inquiry.

[38] A failure to respond to reasonable request to clarify an account may present as a failure on the lawyer's part to promote and maintain proper standards of professionalism in their dealings, as required by r 10.

[39] A lawyer has a duty, when acting in a professional capacity, to conduct their dealings with others with integrity, respect and courtesy (r 12).

³ See Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008, rr 5.12, 8.4, 8.7, 11.

[40] I am mindful that there was a considerable overlap in the requests made to provide information and the request made to uplift the file.

[41] I do not consider that Ms SP breached r 3.2.

Had there been an unacceptable level of delay on Ms SP's part in making Mr QH's files available?

[42] The first step is to examine the relevant timeline.

[43] On 5 November 2015, [law firm] faxed Ms SP an authority to uplift Mr QH's personal and trust files. Request is made as to when the files would be available for collection.

[44] On 6 November 2015 (a Friday), [law firm] left a telephone message for Ms SP requesting her to contact them on the following Monday to confirm arrangements to collect the files.

[45] On 10 November 2015, Ms SP wrote directly to Mr QH's family trust to advise:

- (a) that instructions to uplift the file had been noted;
- (b) she had attended to the drafting of Mr QH's will and enclosed an invoice for "work in progress" on this matter;
- (c) that a lien remained on all files until all outstanding accounts had been paid in full; and
- (d) that documents would be released on payment of all outstanding accounts.

[46] On 10 November 2015, Ms SP forwarded further correspondence to the Trust, in which she:

- (a) referred to the instructions to uplift the file;
- (b) confirmed that as an independent corporate trustee, her firm required an orderly handover of the Trusts affairs;
- (c) advised that she would require appropriate documentation to be prepared to confirm the retirement of her firm as a trustee if that was Mr QH's intention; and

- (d) enclosed statements of account and confirmed that fees would be required to be paid before files could be released.

[47] On 11 November 2015, after an apparently unproductive and contentious phone conversation with Ms SP the day before, [law firm] emailed Ms SP requesting advice as to when the files and documents would be available for collection so that a courier could be arranged. Ms SP was advised that she was not to contact Mr QH directly, and that documents would be forwarded to her to facilitate her removal as a trustee, once [law firm] had an opportunity to sight the trust deed. Ms SP was advised that [law firm] were anxious to receive the documents promptly.

[48] On 1 December 2015, a deed of removal of trustee was forwarded to Ms SP's office.

[49] On 7 December 2015, [law firm] emailed Ms SP seeking clarification of the total amount due by Mr QH and the Trust.

[50] On 16 December 2015, Ms SP advised Mr QH by email that the amount was \$1,534.68.

[51] On 18 December 2015, [law firm] emailed Ms SP noting Mr QH's advice to them that (as has not been disputed) he had paid that amount and renewing the request for the files.

[52] On 12 January 2016, [law firm] faxed Ms SP repeating that request, and confirming that they would arrange a courier to uplift the files.

[53] On 25 January 2016, [law firm] repeatedly telephoned Ms SP's office, finally leaving a request of her to urgently respond.

[54] On 25 January 2016, Mr QH lodged his complaint with the Complaints Service.

[55] On 5 February 2016 (Thursday), Ms SP emailed [law firm] that the "files have been ready to be uplifted from our office this week as Mr QH was previously advised".⁴

[56] There was subsequent correspondence between [law firm] and Ms SP's office concerning matters relating to the finalising of the removal of Ms SP's trustee company as a trustee, but the correspondence that is relevant to this review concerns Mr QH's will.

⁴ In other words, since Tuesday 2 February 2016, given the Monday was Auckland Anniversary day.

[57] On 15 February 2016, [law firm] wrote to Ms SP advising that they did not appear to have received the file relating to Mr QH's will and requesting that file be couriered to their office.

[58] On 3 March 2016, Ms SP emailed [law firm] advising that she had provided [law firm] with a copy of Mr QH's will of 2007. Further, she noted that:

Mr QH has not executed the recent will (with me as an executor) and amidst this has changed solicitors, hence the interim fee. Mr QH will have to either execute the will drafted by us in current form or have another will drafted. We are happy to send the electronic copy of the updated will.

[59] On 3 March 2016, [law firm] responded advising that they simply wish to uplift the file. They asked Ms SP to advise when the file would be available at her reception for uplifting.

[60] On 9 March 2016, [law firm] emailed Ms SP, drawing to her attention the request made in their correspondence of 3 March 2016.

[61] On 17 March 2016, [law firm] requested that Ms SP confirm when their client's will would be available for uplifting.

[62] On 5 April 2016, [law firm] repeated their request.

[63] On 6 April 2016, Ms SP advised [law firm] that an updated will had been couriered to [law firm]'s office.

[64] [law firm] then contacted Ms SP to query whether Ms SP held a file relating to what was described by [law firm] as "matter 2", being the work done in respect to the preparation of Mr QH's will.

[65] A file note made by [law firm] on the day of that conversation records that Ms SP had advised that she was not holding a physical file for matter 2. [law firm] was concerned that there appeared to be no physical file and expressed those concerns in correspondence to Ms SP which was immediately despatched.

[66] Further discussions took place on 12 April 2016, the contents of which were recorded in a [law firm] file note. Ms SP confirmed in the course of those discussions that she was not holding any other files.

[67] A lawyer should, on receipt of instructions to provide a former client's documents to the client's new lawyer, implement that request as expeditiously as possible.

[68] Rule 4.4 directs that a lawyer must act upon a request to uplift documents “without undue delay”.

[69] Ms SP submits that the Committee misinterpreted the rule, reading the rule as if it demanded compliance “without delay”, and in doing so, failed to appreciate that the rule, in requiring that documents be delivered without “undue delay”, necessarily allowed a degree of latitude. To constitute a breach, Ms SP argued that the delay complained of must be unjustifiable or excessive. Ms SP did not consider that the delay in delivering the files could fairly be described in those terms, particularly considering the intervention of the Christmas break.

[70] In *Wilson v Legal Complaints Review Officer*, the High Court provided useful guidance on the approach to be adopted when considering the question as to whether delay on the part of a lawyer in responding to a request to provide files, constituted “undue delay”.⁵

[71] In *Wilson*, the Court noted that the “question of what is undue delay has to be looked at in context and in a way that is not unduly technical, literal or absolute”.⁶

[72] Further, the Court noted that “[it] needs to be borne in mind that there is a difference between unsatisfactory conduct (the result of undue delay), and excusable slippage”.⁷

[73] Clearly, a consideration of context is critical when addressing the issue as to whether a lawyer, following receipt of a request to provide files, attends to that request with sufficient promptness.

[74] The difficulty of laying down “hard and fast” rules, and the critical need to consider context, is well illustrated by the Judge’s comment in *Wilson*, that “a nine month delay will of course almost invariably be undue. One month will often be undue, sometimes even less”.⁸

[75] The request to uplift the files and documents made on 5 November 2015 was not met until the week of 2 February 2016.

[76] The entitlement of Mr QH and the Trust to possession of the files and documents was beyond doubt by 18 December 2015, which was a Friday.

⁵ *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288.

⁶ At [48].

⁷ At [49].

⁸ At [47].

[77] The main explanation proffered by Ms SP to justify the delay, was the intervention of the Christmas holiday period. This, combined with her need to prioritise her commitments on return to work in the new year, provide, says Ms SP, entirely reasonable explanation for her inability to provide the files more promptly.

[78] Ms SP does not, in the submissions filed, indicate when her office shut down for the Christmas break, or when it reopened for business in the new year.

[79] It would be reasonable to assume that Ms SP would have closed her office around 23 or 24 December 2015 and likely reopened near the middle of January 2016. [law firm] had forwarded facsimile correspondence to Ms SP's office on 12 January 2016. That correspondence was not responded to, but it would be expected of a sole practitioner that they would have arrangements in place to ensure that communications received were acknowledged and the senders of those communications notified that the correspondence would be responded to at a later date. In the context of email correspondence, that requirement is often simply met by the implementation of an "out of office" response. It would be expected that a lawyer would ensure that parties who phoned their office in their absence, would receive a message advising when the lawyer would be back at work.

[80] Ms SP advised [law firm] that the files were available to be uplifted on 5 February 2016.

[81] In her email in which she confirmed her position, Ms SP implied that Mr QH himself was already aware that the files were available to be uplifted.

[82] I am uncertain as to why Ms SP has suggested that Mr QH had been advised that he could uplift the files as there is no evidence provided by her to establish that this was the case. Leaving aside that any such communication should have been with his new lawyers (a matter which had been drawn to Ms SP's attention on at least two occasions), Ms SP's email goes no further than to suggest that the files could have been picked up in the business week of 2 February 2016, not the week before as she has since submitted.

[83] In her submissions to the Law Society of 4 May 2016, Ms SP says that the files were uplifted after a "reminder" had been sent through even though she had mentioned to a member of the Complaints Service, that the files were ready to be uplifted. I see no evidence on the Committee's file of the Complaints Service being involved in arrangements to advise [law firm] on the uplift of the files, but in any event, I note that Mr QH's complaint was forwarded to the Complaints Service on 25 January

2016. Mr QH was provided with an acknowledgement of receipt of his complaint on 6 April 2016 and a copy of the complaint forwarded to Ms SP on that date.

[84] Ms SP was aware as early as 5 November 2015, that Mr QH required his files to be released.

[85] It would have been clear to Ms SP from repeated requests made of her by [law firm], that Mr QH was anxious that his files be promptly provided.

[86] On 10 November 2015, Ms SP advised that she would be retaining Mr QH's files until all outstanding fees were paid.

[87] Whilst Ms SP was entitled to assert her rights to a lien, there was nothing in my view, that should have prevented her from taking necessary steps to have the files prepared for release when the fees were settled. It would have been apparent to her from the requests received, that the release of the files was a matter of some importance for Mr QH.

[88] In correspondence advising [law firm] that she required her fees to be paid before the files would be released, Ms SP advised that she would require appropriate documentation to be prepared to confirm the retirement of her firm as a trustee, if that was Mr QH's intention.

[89] Ms SP was correct to identify the requirement for documentation to be completed to effect the resignation, but these matters had no relevance to the issue of release of Mr QH's files and in fairness to Mrs SP, she does not advance that to be the case. Once Mr QH had instructed [law firm] to make changes to his trust, it fell to [law firm] to ensure that any variations or amendments to the Trust that were required, were promptly attended to.

[90] What is clear is that Ms SP's obligation to release the files was not in dispute by 18 December 2015, when Mr QH settled all his outstanding accounts.

[91] As I have noted, Ms SP provides no evidence as to when she closed and reopened her office for the Christmas break. This information would have been helpful particularly as Ms SP argued that the intervention of the holiday break was the main reason as to why she was unable to provide the file more promptly.

[92] Whilst I have taken into consideration Ms SP's argument that her ability to provide the files promptly was significantly impeded by the intervention of the Christmas break, I am not persuaded that the interruption of the holiday period, provides reasonable explanation for the delay that occurred.

[93] Looking, as I am required to do, at the broader context, what is singularly notable about the approach adopted by Ms SP was her repeated failure to provide response to requests from [law firm] to provide the files.

[94] An examination of the file notes prepared by [law firm] and the correspondence between the offices, gives indication of a persistent pattern of Ms SP failing to respond promptly to requests made of her.

[95] Apart from providing indication that she would not release the files until her accounts were settled, Ms SP appears to take no steps to keep [law firm] informed. I see no evidence of Ms SP providing what would only need to have been a brief explanation for any delay. It is clear that on occasions she failed to respond to telephone messages.

[96] It would have been apparent to Ms SP that Mr QH was anxious to secure his files. As early as 11 November 2015, [law firm] were advising Ms SP that they wished to obtain the files promptly.

[97] Assembling Mr QH's files would not have taken a significant amount of Ms SP's time. This was not a situation where there were a substantial number of files to organise.

[98] Ms SP postulated the possibility of courier problems at that time of year as presenting difficulties, but these were not matters for her to be concerned about and had she been immediately cooperative, I can see no apparent reason why [law firm] could not have retrieved the files before the Christmas break. Bearing in mind that she was on notice as early as 5 November 2015 that she was required to release the files, it could have been expected that Ms SP would have had the files ready to uplift shortly after her return to work in the New Year.

[99] Ms SP argues that the Committee's approach was inconsistent in that the Committee had no difficulty in determining that concluding that a response time of seven days in responding to an inquiry did not constitute a breach of r 3.2, but a delay of 10 days from the time the files were uplifted to the time she received a reminder was seen to be unsatisfactory.

[100] Firstly, it must be noted that the Rules do not engage a consideration of the same issue. They are applied by reference to the specific conduct to which the rule relates. Secondly, the delay of 10 days which Ms SP describes does not accurately record the time delay in providing the files. She received the initial request for the files on 5 November 2015. Her accounts being settled on 18 December 2015, she had no

basis from that point onwards to delay releasing the files. On 18 December 2015, Ms SP was reminded of the earlier requests to provide Mr QH's file and further steps were taken by [law firm] to expedite that request.

[101] The files were not made available to uplift until 5 February 2016.

[102] There is no evidence effectively justifying the delay. What could have been a swift and untroubled change-over was unnecessarily compromised by Ms SP's apparent intransigence.

[103] All matters considered, I find that:

- (a) Ms SP failed to meet the uplift request without undue delay;
- (b) she thereby breached r 4.4.1 of the Rules; and
- (c) that breach amounted to unsatisfactory conduct in terms of s 12 (a) and (c) of the Act.

Had Ms SP breached r 9.6 of the Rules by failing to render a final invoice within a reasonable time of concluding the matter?

[104] When lodging his initial complaint, Mr QH expressed concern that he had received invoices for work completed in 2011, when he had no knowledge of that work having been completed.

[105] When advising Ms SP of the complaint that had been received from Mr QH, the Complaints Service noted that Mr QH's complaint engaged three matters, being that Ms SP:

- (a) failed to respond to enquiries in a timely manner;
- (b) failed to release all documents on file without undue delay; and
- (c) failed to render a final account within a reasonable time of concluding the matter.

[106] The Committee focused its investigation on the question as to whether Ms SP had breached r 9.6, by considering the issue as to whether Ms SP had provided an account for work engaged in preparing a will for Mr QH within a reasonable time of concluding the retainer. The Committee concluded that there had been a lapse of eight years from the time Ms SP took instructions, to the time she had issued her invoice for the work.

[107] Not surprisingly, the Committee concluded that a delay of eight years was a breach of Ms SP's obligation to render her invoice within a reasonable time as required by r 9.6.

[108] Having reached that conclusion, the Committee concluded that the fee charged by Ms SP for preparing the will should be cancelled.

[109] On review, both Ms SP and Mr QH were in agreement that the Committee misdirected itself in concluding that the third limb of Mr QH's complaints, was concern that an invoice for preparing a will in 2007, was provided to Mr QH in 2015.

[110] Mr QH says that:

my complaint was not in respect of an invoice for my 2007 will. My complaint was in respect of the older invoices set out on the statement [SP] sent me in her letter of 10 November 2015, which I have never before received.

[111] The invoices of concern to Mr QH were invoices 742 and 743, rendered on 27 and 29 November 2012.

[112] Ms SP agrees with Mr QH that the Committee erroneously concluded that the account rendered for preparing a will related to work that had been done for Mr QH in 2007, when the work in fact was completed in the period 2014 to 2015.

[113] Mr QH expressed reservations as to whether Ms SP had in fact done any work on updating his will until she received instructions that he wished to uplift his files.

[114] I am satisfied that the Committee misdirected its inquiry when it considered that Ms SP had completed work in 2007 and rendered an account for that work in 2015.

[115] It necessarily follows that the Committee's unsatisfactory conduct finding, arrived at on the basis of conclusion that there had been an eight-year delay in rendering an invoice, must be reversed.

[116] Consequential upon that finding, the Committee directed that Ms SP was to refund fees rendered on 5 November 2015 in the sum of \$294. The fee directed to be repaid did not include the GST component charged, or the sum charged for office expenses. The total fee was \$355.93.

Did Ms SP render accounts for work that had not been completed?

[117] The accounts provided by Ms SP which she required to be settled before Mr QH's files would be released, were;

- (a) Invoice 742, rendered 27 November 2012 for work completed to 31 October 2011 in the sum of \$764.75.
- (b) Invoice 743 rendered 29 November 2012, for work completed to 31 October 2012, in the sum of \$414.
- (c) Invoice 1019 rendered 5 November 2015, in the sum of \$355.93.

[118] Mr QH says he has no knowledge of the work that is said to have been done in respect to invoices 742 and 743, or of being provided with those accounts. Nor does he recall receiving any account reminders.

[119] There was no evidence produced to indicate that Ms SP had forwarded Mr QH with reminders to settle his outstanding accounts.

[120] At the very least, there appears to have been a delay of at least 12 months, before Ms SP issued an account for work completed on Mr QH's Trust to the period to 21 October 2011.

[121] Mr QH's broader complaint that he may have been invoiced for work that had not been completed, was not considered by the Committee.

[122] When giving indication to [law firm] of her unwillingness to release her files until all outstanding accounts were settled, Ms SP provided a statement of work completed for Mr QH's trust, the entries recorded under the heading of "Trust Administration-Annual Gifting".

[123] The statement records that accounts rendered on 27 and 29 November 2012 remained unpaid but, perhaps surprisingly, that accounts rendered for gifting work on 3 December 2013 and 3 December 2014, had been paid.

[124] I say surprising as it presents as unusual that Ms SP would not, when rendering her accounts in 2013 and 2014, have brought Mr QH's attention to the outstanding accounts for the preceding period.

[125] On being presented in 2015 with accounts for work completed in 2011 and 2012, work of which he says he has no recollection, Mr QH questions whether the work for which he has been charged, was in fact completed.

[126] His concerns are magnified by him receiving an account for services completed by Ms SP in the preparation of a will, when he is unable to recall having provided her with instructions to draft a new will.

[127] Mr QH's concern that he had been rendered invoices for work that he could not recall having been carried out is understandable.

[128] Before he was able to uplift his files in December 2015, he was required to settle accounts rendered in November 2012. One of those accounts engaged work that had been carried out in the period to 31 October 2011.

[129] It was not surprising that Mr QH was concerned when his attention was drawn to the fact that he had accounts which were long overdue.

[130] It could reasonably be expected that a lawyer would have adequate administrative processes in place to ensure that outstanding accounts were regularly monitored and followed up on.

[131] But it is a serious matter to suggest that lawyer may have generated accounts for work that had not been completed. To be fair to Mr QH, he does not make direct allegation that Ms SP had improperly manufactured the accounts. His concern was that he simply could not recall the work having been done.

[132] In the absence of any explanation provided by Ms SP, any conclusions as to the reasons for her failure to follow up on the overdue accounts, engages a degree of speculation.

[133] Concerns of the nature raised by Mr QH would likely not have arisen, if she had closely monitored her accounts.

[134] Ms SP rendered an account in November 2012, for work completed to 31 October 2011.

[135] That delay aside, it appears to have been Ms SP's practice to render an account for work done on Mr QH's trust matters annually. It was her practice to meet with Mr QH each year to discuss trust matters, following which an account would be rendered.

[136] As noted, consistent with that practice, she rendered accounts to Mr QH for work completed in December 2013 and December 2014, but appears to have neglected to follow up on invoices for work completed in 2011 and 2012.

[137] But I am satisfied that Ms SP completed the work described in the narrations to invoices 742 and 743. The work described is clearly consistent with the work she had been doing on an annual basis for Mr QH since his trust had been established.

[138] I think it probable that Ms SP's attention was drawn to the outstanding accounts when she set about finalising matters to enable the files to be released.

Do any conduct issues arise from Ms SP's inability to provide Mr QH with a will file?

[139] After receiving files from Ms SP, [law firm] had concluded that some files were missing. [law firm] wrote to Ms SP on 15 February 2016, making inquiry as to whether she held a file relating to Mr QH's will.

[140] On 3 March 2016, Ms SP responded advising that she had provided [law firm] with a copy of Mr QH's will of 2007, but noting that Mr QH had not executed the "recent will with me as an executor, hence the interim fee". Ms SP advised that Mr QH would have to execute the will drafted in current form or have another will drafted.

[141] [law firm] responded with a further request to uplift the will file.

[142] On 5 April 2016, [law firm] again asked Ms SP to advise as to when the will file would be available for uplifting.

[143] On 5 April 2016, Ms SP forwarded what she described as an "updated draft will" to [law firm]. A file note made by [law firm] on that day records what appears to have been a reasonably robust discussion between [law firm] and Ms SP. [law firm] recorded that further request was made of Ms SP to provide the file relating to Mr QH's will and noted Ms SP's advice that the will had been completed on instructions, and that there was no physical file in existence.

[144] On 7 April 2016, [law firm] wrote to Ms SP reiterating that request had been made for a copy of the will file, and confirming advice that Ms SP had provided to them to the effect that an administrative number she had assigned to the will was for billing purposes only and that she did not retain a physical file.

[145] [law firm]'s file note of 12 April 2016 appears to have been the last word on the matter. The file note records Ms SP as having advised that it was her practice to store information electronically.

[146] It is reasonable to infer that in making repeated requests of Ms SP to provide Mr QH's file, [law firm] were seeking to establish whether in fact a file had been opened and whether Mr QH's instructions had been recorded.

[147] It is difficult to envisage any circumstances in which a lawyer would consider it prudent to prepare a will without first have taken detailed instructions from their client. Those instructions would commonly include a comprehensive summary of the client's financial circumstances, and a clear summary of the clients wishes.

[148] As noted, Mr QH was concerned when request was made to uplift his files, that he was presented with invoices for work that he could not recall having been completed. It was his view that the invoices may have been generated at the time Ms SP received instructions to release files.

[149] On review, Ms SP provided an explanation for her failure to provide an account for work completed on Mr QH's will earlier than she had.

[150] She says that Mr QH first instructed her to draft a will in 2007 at a time when he was separating from his wife.

[151] It would be understandable that Mr QH would have thought it appropriate to update his will following a significant event such as a marital separation.

[152] Following the decision to establish a family trust, Ms SP says that she encouraged Mr QH to update his will. This was prudent and necessary advice as the establishment of the trust would likely have necessitated changes to be made to Mr QH's existing will.

[153] Ms SP says that despite issuing reminders, Mr QH did not instruct her to update his will until 2014. These instructions were provided at the annual trustee meeting which, if consistent with the date of the earlier annual meetings, would likely have taken place around November 2014.⁹

[154] As noted, Mr QH says that he is unsure as to whether he instructed Ms SP to draft a new will.

[155] Ms SP says that when instructions were received to update Mr QH's will in 2014, the intention was for him to sign the will at the next meeting of the trustees in 2015:

... He did not instruct us to attend to updating of his will until 2014, at the annual trustee meeting. He then agreed for our firm to update his will and the intention was for him to sign at the next annual meeting of the trustees in 2015. However, Mr QH instead engaged [law firm] and decided to uplift the file and therefore was billed accordingly (as clearly stated on the bill narration for work

⁹ Ms SP's statement of 10 November 2015, records an account being rendered on 3 December 2014 for work completed in respect to trust administration annual gifting.

in progress for updating of his will). The instructions were for the period 2014/2015.

[156] It is difficult to reconcile this approach (apparently taken without objection from Ms SP and not within the recollection of Mr QH) with the obligation on lawyers to ensure that instructions to prepare a will are attended to expeditiously.

[157] Instructions to draft a will must be attended to promptly.

[158] The consequences of a failure to do so can be serious for a lawyer.¹⁰

[159] In rejecting argument that she had delayed in providing an invoice for work completed, Ms SP suggests that the invoice, when provided, was for work in progress, a position which she says was clearly stated on the bill's narration.

[160] It is difficult to consider the work that is required in attending to the preparation of a will, as involving a lawyer attending to that work over a significant period of time such as to justify the work falling into what would conventionally be considered to be "work in progress".

[161] Whilst there may on occasions be legitimate reasons as to why there is delay in finalising a client's instructions to prepare a will, most commonly the time engaged in preparing a will from the time instructions are received to the time the will is signed, is brief.

[162] Precisely when Ms SP completed the "work in progress" is uncertain. She was unable to provide evidence of any file notes or any other information, to give indication of when the work that had been completed.

[163] Following the exchanges between [law firm] and Ms SP referred to at paragraphs [140]–[146] above, Ms SP confirmed that she was holding no physical file.

[164] When responding to the Complaints Service on 30 June 2016, Ms SP advised that she had informed [law firm] that Mr QH had not filled out her will questionnaire. I take it that it was her usual practice, as is commonplace in many lawyer's offices, for Ms SP when taking instructions from a client to prepare a will, to ask their client to complete a document which would provide a comprehensive account of the client's assets. She does not however appear to have undertaken that exercise when taking instructions to update Mr QH's will in 2014.

¹⁰ See *Gartside v Sheffield Young & Ellis* [1983] NZLR 37 (CA).

[165] If the will was prepared after receipt of advice that Mr QH had changed lawyers, Ms SP would not have had authority to do the work.

[166] She gives no indication that she had commenced preparing the will around November 2015, in contemplation that it would be finalised at the impending trustees' meeting.

[167] Ms SP's management of issues relating to the drafting and execution of Mr QH's will raise concerns as to whether she failed to act competently and in a timely manner consistent with the terms of the retainer.

[168] A lawyer's obligation to act competently and in a timely manner, as required by r 3, reinforces that the issue of timeliness is to be assessed in a manner consistent with the terms of the retainer.

[169] This issue was not directly considered by Committee, but naturally arises out of the concerns raised by Mr QH as to when the work on the will was supposedly done, whether in fact it was done before request was made to uplift his file, and whether if work had been done, Ms SP had breached her obligation to promptly provide him with an account.

[170] On 3 May 2019, I issued a minute to the parties in which I:

- (a) Indicated that it was my view that the Committee had, in focusing on the argument that complaint was being made about an invoice rendered in 2007, misdirected its inquiry.
- (b) In doing so, failed to address the question as to whether Ms SP's rendering of tax invoices 742 rendered on 27/11/2012, and 1019 rendered on 05/11/2015, constituted a breach of r 9.6.
- (c) Indicated my view that the Committee had failed to address Mr QH's complaint that he had never received invoices 742 and 743, or reminders to pay the invoices.
- (d) Advised that I considered the explanation provided by Ms SP as to why she had delayed in providing an invoice for work preparing a will, should properly be considered by the Committee in order to ascertain as to whether the Committee considered there were any conduct issues that arose as a consequence of the approach adopted by Ms SP.

- (e) Invited the parties to make any submissions (if they wished to do so) in indication of possibility of requesting the Committee to proceed inquiry into whether Ms SP's management of matters relating to the preparation of Mr QH's will raised any conduct issues.

[171] No response was received.

[172] Having considered the possibility of returning the matter to the Committee to consider identified issues, I have concluded that it is preferable, and possible, for me to determine the matters on review without need for further reference to the Committee.

[173] I am mindful that the parties have experienced some considerable delay in having this complaint and review resolved, and I am concerned at the prospect of further delay.

[174] The conduct issues arising from the manner in which Ms SP managed the instructions she had received in respect to Mr QH's will do not properly engage a consideration as to whether she rendered her invoice promptly, but more particularly the issue as to whether work was performed competently and, directly relevant to Mr QH's complaint, whether it would be expected that she would have been able to provide a file which would provide evidence of the instructions received and the work completed.

[175] Ms SP's conduct in respect to the instructions received to prepare Mr QH's will fell short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner and as such constitutes unsatisfactory conduct in terms of s 12(a) of the Act. It was conduct that breached r 3 of the Rules, such as to constitute unsatisfactory conduct in terms of s 12(c) of the Act.

[176] Ms SP should have been able to provide evidence of a file being opened and compiled which comprehensively recorded the instructions received. In response to repeated and persistent requests to provide a copy of the will file, she was unable to do so, and simply provides explanation that she prepared the will on instructions. That is inadequate. Instructions received in respect to the preparation of a will should be carefully recorded.

[177] A written record of the instructions received on occasions assume considerable significance particularly in circumstances where the will is subjected to challenge. A failure on the part of a practitioner to have faithfully recorded the instructions provided in a form which is open to examination constitutes a significant lapse.

[178] Nor is it satisfactory to take instructions to update a will and to proceed on the basis that the document will be prepared and executed some distance in the future. In this particular case, considering the history of Mr QH's annual attendances and the explanation provided by Ms SP recorded at [155] above, it appears to have been the intention that instructions received in December 2014 would be effectively actioned with the signing of the will some twelve months later.

[179] It was Ms SP's obligation to ensure that Mr QH was advised that an arrangement of that nature had potential to compromise his position.

[180] I agree with the Committee, but for different reasons, that it is appropriate that an order be made that Ms SP refund her fees rendered in respect to work completed in drafting the will. The order directing refund of that fee, should be varied to accurately record the total fee charged.

[181] On balance, I have arrived at the same outcome as the Committee, but by a different path.

[182] To summarise I have reached conclusion that:

- (a) there had been no breach of r 3.2;
- (b) there had been a breach of r 4.4.1;
- (c) the Committee had misdirected itself in determining that there had been a breach of r 9.6; and
- (d) Ms SP's failure to provide evidence of instructions, and her delay in ensuring will instructions were implemented promptly, amounted to unsatisfactory conduct.

Costs

[183] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

[184] Taking into account the Costs Guidelines of this Office, the practitioner is ordered to contribute the sum of \$900 to the costs of the review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

[185] The order for costs is made pursuant to s 210(1) of the Act.

Publication

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

Decision and orders

- (a) The Committee's determination that there has been no breach of r 2 is confirmed, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006.
- (b) The Committee's determination that there has been unsatisfactory conduct, pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006, consequential upon a contravention of r 4.4.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, is confirmed, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006.
- (c) The Committee's determination that there has been unsatisfactory conduct, pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006, consequential upon a contravention of r 9.6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, is reversed, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006.
- (d) There is a determination that the conduct of the respondent in respect to the contravention of r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 constitutes unsatisfactory conduct, pursuant to ss 12(a) and (c) of the Lawyers and Conveyancers Act 2006.
- (e) The order directing refund of fees pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 in the sum of \$294.00 is varied to provide that the refund is to be in the sum of \$355.93.
- (f) In all other respects the decision of the Committee is confirmed.
- (g) Ms SP is ordered to pay the costs ordered on this review in the sum of \$900 to the New Zealand Law Society within 30 days of the date of this decision pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006

- (h) Pursuant to s 215 of the Lawyers and Conveyancers Act 2006, I confirm that the order for costs made may be enforced in the civil jurisdiction of the District Court.

DATED this 27TH day of June 2019

R Maidment
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:

Ms SP as the Applicant
Mr QH as the Respondent
[Area]Standards Committee [X]
New Zealand Law Society