LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 128

Ref: LCRO 200/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**SK and WP** Applicants
AND	**AQ** Respondent

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

Introduction

[1] The applicants, Ms SK and Mrs WP, were at the relevant time the partners of [Law Firm A], an unincorporated law firm in [Suburb A] (the Firm).

[2] They have applied for review of one aspect of a decision dated 28 September 2020 by the [Area] Standards Committee [X] about their professional conduct.

[3] The matter relates to the fairness and reasonableness of fees charged by the Firm to the respondent, Ms AQ, for preparing and filing a without notice application for a parenting order under the Care of Children Act 2004 and a without notice application for a protection order under the Domestic Violence Act 1995 and related attendances.

Background

[4] The respondent met with the applicants on the morning of 28 November 2018 and instructed them to prepare without notice applications to the Family Court for parenting and protection orders.

[5] A discussion occurred about the basis on which fees would be charged. The parties had differing recollections about the outcome of that discussion.

[6] The respondent signed the Firm's terms of engagement.

[7] Work on the applications commenced immediately after the appointment and continued through that day, into the evening and the following morning.

[8] The paperwork was finalised with the respondent on 29 November 2018 and filed at the Family Court before the 3:30 pm deadline for filing such applications for immediate attention by the Court.

[9] The following day, 30 November 2018, the Court granted the application for the parenting order but on terms the respondent considered unsatisfactory in relation to the length of the periods of time the Court ordered the children to be in the care of their father. It declined the without notice application for the protection order, placing that application on notice.

[10] The Firm issued an invoice to the respondent that day for the work to that date. The invoice was for a fee of $8,703.20 including GST.[1]

[11] There was some reasonably limited follow-up work the following week, including the arranging of service of the applications on the respondent's husband in accordance with directions made by the Court and preparing proof of service.

[12] On 4 December 2018, the respondent expressed her disappointment with the Court's decision in an email to one of the applicants and there were email exchanges regarding the effect of the orders made.

[13] On 5 December 2018, the Firm issued a disbursement invoice to the respondent for the cost of the process server serving the applications on the respondent's husband. The invoiced sum was $201.25 including GST.[2]

[1] $7,568.00 plus GST.
[2] $175.00 plus GST.

[14] On 6 December 2018, the respondent instructed another lawyer to progress the applications. On 12 December 2018, she advised a staff member of the Firm of this and asked to uplift her file.

[15] The staff member Firm advised that the file would not be made available until the respondent had paid the Firm's first two invoices, which were overdue or due for payment by that date. The applicants did not appear to be informed of this exchange.

[16] On 13 December 2018, one of the applicants became aware of the change of counsel when the respondent's new lawyer contacted her. This resulted in an email to the respondent requesting instructions and a telephone call the following day.

[17] In an email to the respondent a month later, the applicant made the following reference to some of the content of that conversation:

> You sent me a text to call you and I did, you were highly emotional and made a number of very serious allegations about me and our firm, including that we did not file your applications and that we were abusive towards you. I was shocked to hear of your allegations of our firm (sic) given you had been in email and text correspondence with me prior to changing counsel and not once did you raise any of your concerns with me.
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> I could not discuss anything with you given your highly emotional state so I asked you to put your concerns in writing to me so that I could address it (sic)…

[18] On 17 December 2020, the Firm issued a final invoice to the respondent for attendances between 3 and 14 December 2018. The invoiced sum was $1,122.40 including GST.[3]

[19] The total invoiced cost to the respondent of the Firm's services between 28 November and 14 December 2018 was $10,026.85.[4]

[20] The fees component was $9,825.60 including GST.[5]

[21] The Firm's terms of engagement provided for payment of an invoice to be made within seven days of the issue of the invoice.

[22] The respondent did not pay any of the invoices. Reminders and requests for payment were sent. The respondent made various promises to pay.

[23] In January 2019, the Firm referred the unpaid invoices to a debt recovery agency for collection. The debt recovery agency issued a letter of demand to the

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[3] $976.00 plus GST.
[4] $8,719.00 plus GST.
[5] $8,544.00 plus GST.

respondent in the name of [Law Firm B Ltd] trading as SK Barrister for $14,084.77. The letter of demand did not include any breakdown of the sum demanded.

[24] The reason for the discrepancy of $4,058.92 between the sum claimed and the sum of the Firm's invoices to the respondent has not been explained. Neither has the fact that letter of demand was from a company different from either the Firm or its service company, [Law Firm A] Limited. I note that the respondent also expressed puzzlement about the latter point.

The complaint

[25] On 7 May 2019, the respondent filed a complaint against the applicants with the New Zealand Law Society's Lawyers' Complaints Service (NZLS).

[26] The respondent complained, in summary, that:

(a) during the initial discussion on 28 November 2018, she was promised the choice of paying either a fixed fee for each stage of the legal process or a fee based on the work done at hourly rates;

(b) she was advised that the fixed fee option would be more cost-effective;

(c) she was not quoted a fixed fee either that day or the following day;

(d) the following day, the fixed fee option was withdrawn and she was told she had to pay for the work done at hourly rates.

[27] The outcome she sought was "…what I was promised from the initial meeting by both [applicants] which was a fixed fee for each stage of the process…".

[28] The applicants provided separate responses. Their common position, again in summary, was that:

(a) the fees discussion occurred at the initial meeting on 28 November 2018;

(b) the fees discussion was between Mrs WP and the respondent but Ms SK was present;

(c) the work required for parenting and protection applications fell into three distinct phases;

(d) for each phase, she could elect to pay a fixed fee or for work on an hourly rate basis;

(e) the respondent confirmed she wished the initial work, the preparation and filing of the applications, to be undertaken on an hourly rate basis; and

(f) the letter of engagement completed and signed by the respondent at the time reflected this understanding;

(g) it remained open for the respondent to opt for a fixed fee for the later phases of the work.

The Standards Committee decision

[29] The Committee considered that there were two issues for the lawyers to address. The first issue was whether or not the applicants had reneged on an agreement with the respondent to charge fixed fees.

[30] The second issue, regardless of the outcome of the first, was whether or not the fees charged were fair and reasonable to both parties for the purposes of r 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[31] On the first issue, the Committee found in favour of the applicants. No application for review of that aspect of the Committee's decision has been made, so I do not address it further in this decision.

[32] The respondent not having paid any of the invoiced sums albeit not having expressly complained about their amount, I consider that the Committee was correct to interpret the complaint as, in part, a complaint about the fairness and reasonableness of the Firm's fees.

[33] The applicants were represented by counsel in the Committee's complaint hearing process, which was conducted on the papers. In counsel's submissions responding to the complaint, the Firm:

(a) voluntarily reduced the fees originally charged on the 30 November 2018 invoice by $920.00 including GST,[6] representing two hours of Mrs WP's time at her specified hourly rate of $400 per hour plus GST, and issued an amended invoice resulting in adjusted total fees charged of $8,905.60 including GST;[7] and

[6] $800.00 plus GST.
[7] $7,744.00 plus GST.

(b) offered to reduce the total fees charges by a further 10 per cent so that the total fees charged would be $8,015.04 including GST.[8]

[34] The cumulative reduction in fees made and offered by the Firm was therefore $1,810.56 including GST,[9] representing a total reduction of 18.4 per cent of the fees originally charged.

[35] It appears that the respondent did not respond to the Firm's offer and the matter was not resolved by agreement.

[36] On the second issue, the Committee found in favour of the respondent. It determined, for the reasons discussed later in this decision, that the fees charged by the Firm were not fair and reasonable to both parties for the purposes of r 9 of the Rules and that the applicants' breach of r 9 constituted unsatisfactory conduct in terms of s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[37] It found that a fair and reasonable fee for the work undertaken was $4,500 plus GST and disbursements, for a total of $5,376.25 including GST and disbursements.

[38] This meant that the Firm was required to reduce the fees:

(a) by $4,650.60 including GST[10] from the sums originally invoiced to the respondent;

(b) by $3,730.60 including GST[11] from the adjusted sum invoiced by the Firm after the voluntary reduction of $920.00 including GST; or

(c) by a further $2,840.04 including GST from the adjusted sum resulting from the Firm's further 10% reduction offer that the respondent did not accept.

[39] The Committee was satisfied that the reduction in the fees charged was a sufficient sanction for the breach of r 9 and that no fine was warranted. It made no order for costs.

Application for review

[40] The applicants filed an application for review on 27 October 2020. I record that it is regrettable first, that the Committee did not direct the parties to explore the possibility of alternative dispute resolution of the matter at the outset and secondly, that, owing to

[8] $6,969.60 plus GST.
[9] $1,574.40 plus GST.
[10] $4,044.00 plus GST.
[11] $3,244.00 plus GST.

the case load of the Legal Complaints Review Officer (LCRO), it has taken so long for the review application to be heard. I apologise on behalf of the office of the LCRO for the latter delay.

[41] The outcomes sought by the applicants on review are:

(a) an order quashing the finding of the Committee that the fees charges were excessive;

(b) alternatively, a determination quashing the finding of unsatisfactory conduct regardless of the level of fees considered to be fair and reasonable;

(c) consequently, an offered undertaking from the applicants to reduce the Firm's invoices to the level of fees considered fair and reasonable so as to achieve the purpose of the Act but "avoid the disproportionate harm caused by an adverse unsatisfactory conduct determination".

[42] In support of their application the applicants submitted, in summary, that:

(a) the Committee failed to pay adequate regard to the urgency of the respondent's Court applications;

(b) the Committee did not adequately factor into its decision its own findings that:

(i) the applicants "…undertook a considerable amount of work on the [respondent's] behalf on an urgent basis…"; and

(ii) "the practitioners achieved what they undertook to do in the time frame agreed";

(c) the Committee was wrong to speculate that there was doubling up in the work that was charged for and that a single senior lawyer handling the matter would not have been engaged for an equivalent total amount of time;

(d) the Committee was wrong to find that 8–10 hours for the urgent instructions would have been a reasonable amount of time engaged;

(e) although acknowledging that the time record is but a guideline, the Committee was wrong to overlook that not all the time the applicants had been engaged in undertaking the work had been recorded.

[43] In their submissions, the applicants addressed each of these points in detail by reference to the file records, time records and invoices.

[44] Counsel also submitted that:

> The reason for the dispute does, with all due respect, have the hallmarks of a client who is disappointed with the initial order made by the Family Court following the urgent application by her, resulting in a decision to instruct other counsel and then the declinature to pay any fees at all.
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> To date, the client has paid no portion or contribution towards the fees or even of the disbursement account for the service of the proceedings.

[45] The respondent was invited to comment on the applicants' review application. The salient points of her relatively brief response were that:

(a) she was pleased the Committee considered she had been charged unfairly;

(b) she did not understand "why the lawyers weren't held to account for this other than revising their invoice";

(c) "…significant charges…had been totted up on an hourly basis within the first 24 hours of my initial meeting with [the applicants] and "…I believe a bill of around $6,000–$8,000 had been totted up in less than 24 hours";

(d) when she questioned why the fees were so high, she was told not to worry as she could have a fixed fee option;

(e) when she "…repeatedly asked for the fixed fee option, [she] was told [she] was no longer able to have it as it had been more work than [the applicants] had initially anticipated".

[46] The respondent also stated that:

> I decided however that although I wasn't 100% happy, I would just pay it and move on. To be quite honest, this has been going on for some time now and I would just like this all to be over.

Review on the papers

[47] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows an 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. The parties have agreed to this course of action.

[48] After undertaking a preliminary appraisal of the file, I made enquiry of the applicants, through counsel, regarding two matters. The first was whether the applicants' firm was incorporated or unincorporated at the relevant time. This was because the named payee on the invoices issued to the respondent was [Law Firm A] Limited.

[49] The second matter, in the light of the counsel's submission quoted at paragraph [44] above and the respondent's comment quoted at paragraph [46], was whether or not the respondent had paid the reduced fees ordered by the Committee. Counsel's response was that no payment had been made. This was verified with the respondent, who stated that she had been advised by the NZLS not to pay the amount ordered by the Committee.

[50] 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

[51] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[12]

> … 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.
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> 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" …
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> … 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.

[52] More recently, the High Court has described a review by this Office in the following way:[13]

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[12] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[13] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [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.

[53] 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.

The issues

[54] The sole issues for consideration in this matter, on review, are:

(a) whether or not the fees complaint properly lies against the applicants.

(b) what were the fees charged that were the subject of the complaint?

(c) were the fees charged by the firm to the respondent fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in r 9.1?

(d) if not, what disciplinary consequences should follow and what orders should be made.

Discussion

(a) Whether or not the fees complaint properly lies against the applicants

[55] I initially considered this to be a potential issue because it was unclear whether the fees had been charged by the applicants, trading as the Firm, or by [Law Firm A] Limited. Counsel's response confirmed that the complaint properly lay against the applicants.

(b) What were the fees charged that were the subject of the complaint?

[56] As detailed above:

(a) the fees originally charged were $9,825.60 including GST;[14]

(b) the adjusted fees charged by the time of hearing were $8,905.60 including GST.[15]

[57] The Committee undertook its assessment on the basis that the fees charged were the further reduced figure of $8,015.04 including GST[16] in accordance with the offer made through counsel. This is technically incorrect, as the Firm's offer had not been accepted by the respondent. I nevertheless consider the Committee's assessment on that basis to have been pragmatic in the light of the flexibility demonstrated by the Firm regarding the matter.

(c) Were the fees charged by the firm to the respondent fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in r 9.1?

The fees assessment process

[58] Rule 9 of the Rules provides as follows:

> A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

[59] The reasonable fee factors specified in r 9.1 are as follows:

(a) the time and labour expended:

(b) the skill, specialised knowledge, and responsibility required to perform the services properly:

(c) the importance of the matter to the client and the results achieved:

(d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:

(e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:

(f) the complexity of the matter and the difficulty or novelty of the questions involved:

(g) the experience, reputation, and ability of the lawyer:

(h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:

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[14] $8,544.00 plus GST.
[15] $7,744.00 plus GST.
[16] $6,969.60 plus GST.

(i) whether the fee is fixed or conditional (whether in litigation or otherwise):

(j) any quote or estimate of fees given by the lawyer:

(k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:

(l) the reasonable costs of running a practice:

(m) the fee customarily charged in the market and locality for similar legal services.

[60] The prescribed reasonable fee factors are inclusive. This means that if there are additional factors that are relevant in the circumstances, they can also be taken into account.

[61] One must then step back and look at all the circumstances in considering the fairness and reasonableness, to both parties, of the fees charged. This is often described as looking at the fees charged "in the round".

[62] This is the exercise I have undertaken afresh. Although I do consider the process undertaken by the Committee in coming to its view, as discussed below, it is not a case of my looking at the Committee's analysis to determine whether it is "right" or "wrong" on any aspect. The analysis is mine.

The Committee's assessment

[63] I consider it useful to quote the relevant paragraphs of the Committee's decision in partially redacted but substantially complete form. It commented as follows:[17]

26. When assessing the fees charged, the [Committee] focused solely on the amount which the practitioners have sought to justify in their submissions. That amount includes a reduction of two hours of Mrs WP's time in respect of invoice 2885 and a further 10% concession made by the practitioners as a good faith gesture. For the purposes of the determination, the total fee charged was deemed to be $6,969.60 (exclusive of GST and disbursements) …

27. The [Committee] is composed of a number of lawyers who specialise in family law and practise in the [City A] region. This meant it was well-placed to form a view on the reasonableness of fees charged in respect of without notice COCA and DVA applications. The [Committee] has already accepted that no fixed fee was requested or offered. The assessment that follows proceeds on the assumption that [the respondent] had agreed that time spent would be the primary factor when fixing a fee. [The respondent] signed [the Firm's] terms of engagement which specified that both Ms SK and Mrs WP had an hourly rate of $400.00 (exclusive of GST and disbursements).

[17] Standards Committee decision (28 September 2020).

28. Time and attendance billing is an increasingly common practice amongst lawyers. Rule 9 makes it clear, however, that the time and labour spent on a matter must not be the only consideration when invoicing. Even where a client has agreed to time and attendance billing, the lawyer remains obliged, when setting their fee, to consider all of the "*reasonable fee factors*" listed at Rule 9.1 of the RCCC. [The Firm's] letter of engagement recognises this, referring to the "*reasonable fee factors*".

29. The [Committee] observed that the process of fixing a fair and reasonable fee is as much a qualitative process as it is a quantitative one. There will be occasions where, after considering the particular facts of a matter, a lawyer concludes that it is indeed appropriate to simply convert the value of time spent into a legal fee. In some instances, a lawyer might decide that the particular circumstances warrant an uplift, so that the fee will be more than the value of the time spent. Other times, a lawyer may decide, after standing back and looking at the value of the time spent, that simply invoicing that time would result in a fee that was more than what would be fair and reasonable. In those cases, while time will still serve as a guide, the lawyer may decide it is appropriate to charge less than the dollar value of their attendances.

30. There is no suggestion that the time records were anything other than a true and accurate record of Ms SK and Mrs WP's attendances. There can be no dispute that the practitioners undertook a considerable amount of work on [the respondent's] behalf, on an urgent basis. The practitioners achieved what they undertook to do in the timeframe agreed.

31. Neither did the [Committee] have any concerns about the quality of the work undertaken all the results achieved. While [the respondent] may have been unhappy with the outcome, the result was generally favourable to her to the extent that she was given day to day care of the children. It is understandable that [the respondent] was disappointed that a protection order was not made on a without notice basis. This was not, however, due to any failing on the part of the lawyers. No lawyer can guarantee a particular outcome because litigation, by its very nature, involves a degree of risk.

32. The [Committee] did, however, have concerns about the level of fees charged. Even allowing for the urgency of the instructions, the fees appeared high for the work done. One unusual feature of this matter was the involvement, in what was a relatively straightforward set of applications, of both [the applicants]. As the founding partners of [the Firm], [the applicants] are senior family lawyers. Their hourly rates, while by no means excessive, were nevertheless significant.

33. The [Committee] acknowledged that [the respondent] was aware that both [the applicants] would be involved in her matter, and consented to this, knowing their hourly rates. There is nothing inappropriate, in principle, about two senior lawyers working on the same instructions. At the same time, there is always a risk, when two experienced lawyers are working on the same matter, of a flow-on effect on fees. The implications of this will need to be carefully considered at the billing stage to ensure that the fee is fair and reasonable.

34. [The applicants] have explained that they both became involved because there was a certain urgency to the instructions. It seems that, owing to their pre-existing work and personal commitments, neither one of them had the capacity to undertake the work single-handedly. [The applicants] concluded that, by working together, they would be able to have the applications filed the following day. It would appear that the decision to

> involve both [the applicants] was primarily a practice management one, driven by [the Firm's] staff and resourcing considerations.
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> 35. The [Committee] accepted that the practitioners wanted to help [the respondent] and had the best of intentions. At the same time, it was not persuaded that the way [the applicants] proceeded to share the work between themselves, by working around their existing commitments, was necessarily time or cost-efficient.

[64] The Committee proceeded to traverse in considerable detail the course of events principally over 28 and 29 November 2018 and the work undertaken then and afterwards. This included discussion of the efforts made by the applicants to keep the work moving by transferring responsibility for it back and forth between them while accommodating their other commitments. The Committee expressly acknowledged the respondents' demonstrable efforts, in doing so, to avoid "doubling up".

[65] The Committee nevertheless found as follows:

> 42. …. [The Committee] could not escape the conclusion that the stop-start approach, which resulted solely from the need to work around existing commitments, meant that more time was spent on [the respondent's] matter than would have been the case of a single senior lawyer had handled instructions. There was, of necessity, a degree of overlap due to the number of times the matter was passed from one lawyer to the next. With every transition, the incoming lawyer needed to get up to speed by reviewing the work the other had undertaken. This meant that time was spent which would not have been spent of the instructions had been handled by a single lawyer.
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> …
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> 44. The [Committee] observed that [the applicants] recorded a combined total of nearly 17 hours of attendances up to the point of filing the applications.[18] This time was spent on 28 and 29 November 2018. At hourly rates reflective of their status as senior practitioners, the value of [the applicants'] attendances was significant, in the amount of $6,091.20 (exclusive of GST and disbursements). The [Committee] considered that a senior lawyer, working alone, would have been able to handle the instructions more efficiently, spending between 8 and 10 hours to complete the work. Assuming an hourly rate of $400, the value of such attendances would have been in the region of $3,200 –$4000.00 (exclusive of GST and disbursements). A similar figure would be arrived if a senior lawyer had worked alongside a more junior lawyer, with a lower hourly rate, who could have undertaken the time-consuming tasks such as drafting.
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> 45. The [Committee] wished to emphasise that [the applicants] were entitled to handle the file in the way that they did. Certainly, the approach taken did not affect the quality of the work done. There is nothing precluding two senior lawyers, with existing commitments, cooperating on a single matter. It was [the applicants'] prerogative to use [the Firm's] resources as they saw fit. At the same time, there was an obligation under rule 9 to charge a fee that was no more than what was fair and reasonable. Respectfully, [the applicants] appear to have overlooked the inevitable cost implications

[18] The figure of 17 hours was calculated after deducting the two hours' worth of work by which the Firm voluntarily reduced its fee in response to the complaint.

> of their approach to the matter when time spent was used as the primary means of determining the fee.

[66] The Committee concluded that a fair and reasonable fee for all of the work done, up to and including the termination of the retainer, would be $4,500 (exclusive of GST and disbursements).

[67] Although the Committee decision does not expressly address each of the reasonable fee factors in r 9.1 and discuss its applicability and weighting, I am satisfied from the extracts of the decision quoted above (and from the more lengthy analysis of the course of events and the work undertaken on 28 and 29 November 2018 that I have not quoted above) that the Committee approached its task in a principled, measured and methodical way and implicitly considered all relevant fee factors.

My assessment

General

[68] The first point made by the Committee in paragraph [27] of its determination quoted above is highly pertinent. A standards committee normally comprises seven members, of whom five are practising lawyers and two are lay people. The benefit of this is that a variety of experience and both professional and consumer perspectives can be brought to bear on the assessment of a fair and reasonable fee for legal work.

[69] Committee discussion tends to help identify and distinguish between more relevant and less relevant considerations, address any outlying views and arrive at what is normally an assessment by consensus that is informed by both professional and lay input.

[70] For this primary reason, and despite the need for an LCRO to consider all the material afresh and provide an independent opinion as explained above, the LCRO will normally hesitate long before substituting his or her solitary, subjective view for the considered consensus view of the Committee.

The terms of engagement

[71] Of relevance to the assessment fees, the terms of engagement accepted by the respondent relevantly read as follows:

> Unless otherwise agreed, our fees will be based on our hourly rates and we will charge a fair and reasonable amount taking into account – the time and labour expended, the skill, specialised knowledge and responsibility required, the matter's importance, complexity, urgency or risk, the need for a third party to rely

> on our advice, reasonable costs of running a practice and any other factors unique to the transaction.
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> Our rates at which will be charged are as follows:
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> - Managing Partner and Partner $400.00 per hour (+ GST)
> - Senior Associate $350.00 per hour (+ GST)
> - Solicitor $290.00 per hour (+ GST)
> - Legal Secretary $95.00 per hour (+ GST)

[72] The above provision of the terms of engagement is broadly consistent with the requirements of r 9.1. Its manner of application by the applicants was less so, as the Committee found.

Formulaic calculation

[73] The first and most obvious point that must be made was that the Firm's approach to setting the fee charged was completely formulaic. The original fee simply represented 21.36 hours of recorded time at $400 per hour plus GST. This was not only contrary to r 9, by reason of failing to address the fee factors in 9.1, but contrary to the Firm's own terms of engagement.

[74] There is no evidence whatsoever that either applicant undertook any analysis of a fair and reasonable fee to both parties or took into account the reasonable fee factors in r 9.1 in any way, or any other considerations, when setting the fee.

[75] As the High Court said in *Gallagher v Dobson*,[19] one of numerous cases on fee setting, determining a reasonable fee is "…an exercise in assessment, an exercise in balanced judgment, not an arithmetical exercise".

[76] Time spent and labour expended is one of the 13 prescribed factors to be taken into account under that rule. In isolation, it is no more or less important than the other fee factors.

[77] Nevertheless, the recording of time and the setting of an hourly rate is necessarily a starting point that seeks …to reflect six of the 13 reasonable fee factors, namely:

> (a) the time and labour expended;
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> (b) the skill, specialised knowledge, and responsibility required to perform the services properly;
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> (e) the degree of risk assumed by the lawyer in undertaking the services;

[19] [1993] 3 NZLR 611.

(g) the experience, reputation, and ability of the lawyer;

(l) the reasonable costs of running a practice;

(m) the fee customarily charged in the market and locality for similar legal services.

[78] For that reason, I will discuss those fee factors first, in that order, before identifying the fee factors that are of no application in this instance and then discussing applicable factors that do not have any inherent association with the hourly rate.

Time and labour expended

[79] There is little I can usefully add to the Committee's discussion of this fee factor, other than to note that the Firm's system records time in hours and individual minutes, rather than in five-minute or six-minute time units. This gives rise to a presumption that the recorded time is very accurate.

[80] The Committee was satisfied that there was nothing materially inaccurate or otherwise untoward in the applicants' approach to recording their time. I am similarly satisfied. The applicants had responsibly and pre-emptively addressed what one of them thought might have been a time recording error by reducing the originally recorded time by two hours.

[81] At the same time, the applicants submitted that they believed they had spent additional time on the matter that had not been recorded in the Firm's time recording system. I do not understand this to constitute a submission that a fair and reasonable fee should have been higher than the sums charged.

[82] The respondent herself has not commented adversely on any aspect of the applicants' time recording practice, other than to question how they could have run up $6,000–$8,000 of recorded time in two days. (The recorded time on those two days was $7,568.00).

[83] Using a standard time-recording rate carries an inherent difficulty. Some lawyer time is more valuable than other lawyer time. For example, time spent in email correspondence or telephone attendances arranging a meeting is inherently less valuable than time spent discussing legal issues in the meeting. Similarly, time spent correcting the drafting of the document is inherently less valuable than determining what should be in the document and drafting it in the first place.

[84] Time spent exercising professional judgement and giving the client advice is more valuable than any other time. These "under and over" factors are matters to be

taken into account in setting a time-recording rate and then in assessing a fair and reasonable fee using the time spent on a matter as the starting point.

The skill, specialised knowledge, and responsibility required to perform the services properly

[85] The recording of time tracks the time and labour expended. The hourly rate selected is a basic proxy for the other five fee factors listed above but only as a starting point; it does not determine the value delivered in terms of any of those fee factors.

[86] In this instance, on the basis of the application and affidavit evidence filed, the factual scenario was not unusual and any legal issues were neither novel nor complicated. The work was within the competence of any moderately experienced family lawyer.

The degree of risk assumed by the lawyer in undertaking the services

[87] There was no particular risk undertaken by the applicants in providing their services to the respondent that is not inherent in any lawyer undertaking any legal work for a client. In this instance, the Family Court process for such applications is highly prescriptive and such applications are heavily fact-based.

[88] The inherent risks include the risk of getting advice wrong or making a procedural error or other mistake. In general terms, such risks are managed by having relevant office systems and insurance for negligence. The cost of maintaining such systems and insurance cover is one of the costs that are taken into account in setting an hourly rate.

[89] There was also the credit risk associated with undertaking urgent work for a new client without any retainer payment. The consequent risk was of the client obtaining the benefit of the work done and then terminating the retainer without paying. This is indeed what happened. This is unfortunately not unusual and the scenario would resonate with many family lawyers.

The experience, reputation and ability of the lawyer

[90] I understand from the applicants' evidence to the Committee[20] that, at the relevant time, Ms SK had 14 years of private practice experience and Mrs WP eight years' experience. The Committee described them as "senior family lawyers". On the

[20] [Law Firm A] letter (28 April 2020) at [62].

assumption that the practice experience was primarily in family law, I consider the description to be arguably apt in Ms SK's case.

[91] In any event, there is no doubt that both applicants had appropriate experience and expertise to undertake the required work. The applicants' evidence is consistent with that assessment. Relevantly, they stated that:

> …[We] have several years experience with working with clients from all cultures and socio-economic backgrounds that experience domestic violence and other family law issues. [We] are both involved in community organisations such as [redacted] where [we] provide advice to these organisations and their clients. [We] have presented papers to professional gatherings and seminars in our areas of expertise.

The reasonable costs of running a practice

[92] The "reasonable costs of running a practice" refers to the premises, equipment, staff, support services, insurance, continuing professional development costs and the like that any lawyer incurs in order to provide legal services. Such costs are primarily addressed by the setting of a time-recording rate that takes such costs into account.

The fee customarily charged in the market and locality for similar legal services

[93] There is no information before me of comparable time-recording hourly rates or fee levels in the relevant district for similar work in similar circumstances other than the applicants' evidence, which was that:

> Our charge out rates are $400 per hour which, given our experience, we regard as reasonable and certainly consistent with hourly charge rates rendered by our contemporaries.

[94] I observe that the hourly rate was not out of the ordinary for a senior family lawyer undertaking urgent, important legal work at short notice. I am not entirely convinced about an hourly rate of $400 plus GST for a lawyer with eight years' practice experience but defer to the Committee's judgement in that regard.

[95] There are then four r 9.1 factors that are not applicable at all to the circumstances. The first of these is the possibility that acceptance of the retainer will preclude engagement of the lawyer by other clients.

[96] Secondly, the Committee has found that the fee was not fixed. Nor was it conditional.

[97] Thirdly, no estimate was given by the applicants.

[98] Fourthly, there was no fee agreement. The applicants do not appear to have been of that view. Counsel submitted that "…[the respondent] signed, unequivocally so, the terms of engagement which, at the top of page two, make it clear that the fees were to be charged on hourly rate basis".

[99] This submission appears to rely on the first line of the provision of the terms of engagement quoted at paragraph [71] above and ignores the rest of that paragraph. The applicants were contractually obliged to charge a fair and reasonable fee that took into account the eight, of 13, reasonable fee factors set out in that paragraph and, from a regulatory perspective, were obliged to take into account all reasonable fee factors specified in r 9.1 that were applicable to the circumstances.

[100] For clarity, I find that the provisions of the Firm's terms of engagement do not constitute a fee agreement for the purposes of r 9.1.

[101] This leaves three reasonable fee factors under r 9.1, namely, in the order discussed below:

(f) the complexity of the matter and the difficulty or novelty of the questions involved;

(d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client;

(c) the importance of the matter to the client and the results achieved.

Complexity, difficulty or novelty

[102] There does not appear to have been anything complicated, difficult or novel about the legal work undertaken by the applicants. Work of this nature would be a relatively constant part of the workflow of any family lawyer.

[103] The factual particulars of the applications comprise approximately four typewritten pages and the affidavit in support is 40 paragraphs over nine typewritten pages traversing the history of a 10-year relationship. (The applicants referred in evidence to the preparation of two affidavits but there is no separate affidavit on file in support of the parenting order application).

[104] The work involved in generating these documents appears to have involved face-to-face meetings resulting in extensive handwritten file notes which have then been drafted into application and affidavit form. The applications did not require legal submissions.

[105] The applicants noted that some of their work involved dissuading the respondent from seeking to add more factual material to her affidavit evidence that, in their view, did not materially add to the cogency of her applications. I can well understand the comment; there is often work involved in keeping client evidence short, succinct, relevant and focused.

Urgency and time limits

[106] The fact that the interim parenting order was granted on a without notice basis would suggest that the Court considered that aspect of the matter to be urgent. The fact that the without notice application for a protection order was not granted indicates that sufficient grounds for urgency on that application were not made out.

[107] There is a conflict in the evidence from the parties as to whether the perceived urgency was driven by the respondent or by the applicants. The respondent suggests that it was the applicants who were pressing her to have the applications prepared and filed immediately. The applicants relevantly stated that:

> At no time did she appear to not understand her options but in fact was unequivocal in her position that she required without notice applications to be made and that she sought to file them as soon as possible the next day.

[108] The application and supporting affidavit evidence generally describes longstanding relationship issues. There is evidence of particular incidents, two weeks and one week respectively before the application was made, of relevance to the parenting order application but not to the protection order application. The parties had been separated for some time.

[109] In general terms, the applications were focused on domestic violence and various categories of abuse. A substantial degree of urgency is inherent in such applications, depending on the immediate circumstances. This is because the time that has elapsed since any specific event relied upon is one of the factors taken into account by the Court in exercising its discretion.

[110] Earlier in 2018, the respondent's husband had obtained a without notice order preventing the removal of the children from New Zealand on grounds the respondent considered spurious.

[111] I make those observations because of the Committee's focus on the perceived "double-handling" aspect of the work and the applicants' emphasis on the value associated with the urgency with which they undertook the work and liaising with each other to do so while accommodating their respective other work and personal

commitments. The reasons for the apparent imperative of getting the applications filed the day after instructions were first taken are nevertheless not evident from the file material.

[112] In a hearing on the papers, it is not appropriate for me to make any finding regarding conflict in the parties' evidence. I have no hesitation in concluding, however, that the applicants honestly believed that the applicant wished to have the applications filed urgently and that there were reasonable grounds for them to believe that without notice applications were professionally appropriate based on the respondent's instructions as reflected in her affidavit evidence.

[113] The other observation I make about urgency as a reasonable fee factor relates to the submission by counsel for the applicants as follows:

> They have charged their attendances out at the rate of $400 per hour (not including GST) which, in all the circumstances, is reasonable – certainly not excessive. There was also urgency with regard to the transaction which may have justified an increased fee but, to the contrary, the fee at all times has been charged on a time-and-attendance basis.

[114] Although a submission about charging more for urgency might often carry weight, in this instance the applicants knew from the outset, on their own evidence, that the proposed work was to be undertaken on an urgent basis. With that knowledge, they sought the respondent's approval of fees based on time-recording rates of $400 per hour plus GST. In those circumstances, particularly given their own insistence on the propriety of a fee based solely on time spent at an hourly recording rate, the known urgency of the instruction had already been "built in" to the specified rate.

<u>The importance of the matter to the respondent</u>

[115] The matter, involving the safety and security of both the respondent and her children, was enormously important to the respondent.

<u>The results achieved</u>

[116] The without notice application for the parenting order was successful, albeit on terms the respondent was unhappy with in some respects. The application for the protection order was unsuccessful, with the Court requiring the application to proceed on notice.

[117] As quoted above, the Committee considered it understandable that the respondent was disappointed that a protection order was not made on a without notice basis but this was not due to any failing on the part of the applicants. It commented that

no lawyer can guarantee a particular outcome as litigation, by its very nature, involves a degree of risk.

[118] Often in such circumstances, it is the making of the application and the consequent intervention of the powers of the State in the regulation of the interactions between parties to the relationship that constitutes the primary benefit in terms of "results achieved". Pertinently, the applicants record that the respondent "… felt for a long time she was never heard or believed".

Conclusions

[119] In simple terms, the above observations do not lead me to any conclusion that the Committee was materially misguided or incorrect in any respect in its analysis of the circumstances and its reasoning in determining the appropriate application to those circumstances of the reasonable fee factors in r 9.1.

[120] In drawing that conclusion, I acknowledge that the Committee's finding is itself expressed partly as a hypothetical "time spent" calculation.

[121] On my own analysis, I identify no persuasive reason to depart materially from the Committee's assessment of the amount of the fee that would have been fair and reasonable to both parties in all circumstances, although in certifying an amount payable I propose to allow a modestly greater sum for the attendances overall and to take into account the course of events since then.

(d) If not, what disciplinary consequences should follow and what orders should be made

[122] As I have already commented, the applicants have demonstrated flexibility in principle throughout this matter regarding the amount of a fee that is fair and reasonable to both parties. Their primary concern at both the complaint stage and in this review has been the Committee's finding of unsatisfactory conduct.

[123] Their position is encapsulated in the following extract from counsel's submissions on their behalf:

> A finding of *unsatisfactory conduct*, although the lesser of the two disciplinary findings that the Act renders as potentially available by way of discipline against lawyers, is nonetheless a serious matter and would be regarded seriously by the members of the profession as well as, in particular, these two practitioners. Such an outcome is not reasonable and not warranted…
>
> Even if [the respondent]/the evidence does establish that the fees charged were not fair or reasonable (again denied), it is not in all the circumstances of a degree

> or extent that would reach a reasonable threshold to warrant an adverse determination of *unsatisfactory conduct.*

[124] There are cases where a breach of the Rules is of immaterial effect or of only procedural significance such that a finding of unsatisfactory conduct is not warranted. This is not one of those cases.

[125] The Committee was of the view that the respondent had been materially overcharged for the work done in both dollar terms and in proportion to what it considered to be an objectively fair and reasonable fee. On my analysis, I consider it was reasonable for the Committee to come to that opinion.

[126] Neither the Committee nor I have found there was any associated professional deficiency on the part of the applicants in terms of quality of advice, service or diligence in their brief handling of the respondent's legal affairs. They were not guarantors of the Family Court's response to their client's applications. The Court always forms its own view of the best interests of the children on the information available to it.

[127] If the extract I have quoted in paragraph [17] above is in any way an accurate reflection of the nature of the engagement between the parties after termination of the retainer (as to which I make no finding), there is nothing in the evidence before me to indicate that concerns of that nature could have been warranted.

[128] My primary concern with the applicants' conduct, notwithstanding the retrospective fee adjustment and their subsequent demonstration of openness to a further adjustment of fees, is their manifest failure to give any consideration to the prescribed reasonable fee factors in setting a fee in the first place. This warrants an appropriate professional rebuke and the form of that rebuke is a finding of unsatisfactory conduct.

[129] It is very clear that the applicants take such a finding seriously and this of itself, in all circumstances, demonstrates the achievement of the consumer protection and public confidence purposes of the Act. The private interests of the respondent are met by the resulting fee reduction.

[130] In terms of the respondent's submission quoted in paragraph [45(b)], I consider that a finding of unsatisfactory conduct does constitute "holding the applicants to account" without need of a fine.

[131] I am somewhat surprised by the Committee's decision not to make a costs order, as would normally be expected following such a finding. Its reasoning was that

the applicants had so far gone unpaid for their work and in those circumstances "it would seem disproportionate" for them to be required to pay costs.

[132] This reasoning appears to confuse the purpose of a costs order, which has nothing to do with the complainant, with the achievement of a fair result as between the applicants and the respondent. I do not propose to interfere with the exercise of the Committee's discretion in that regard, however.

[133] I consider it highly unlikely that the outcome of this review would, or should, have any bearing on "any future applications [the applicants] may separately wish to make for appointment to other positions", as suggested by the applicants in their review application. I record my surprise that the applicants considered it appropriate to make that submission (which was not through counsel). Any such concern certainly cannot be a factor in this decision.

[134] I reject counsel's submissions that an unsatisfactory conduct finding gives rise to "disproportionate harm" to the applicants.

[135] I turn now to the amount the respondent should be ordered to pay. The applicants' invoices were due for payment by 24 December 2018. The respondent made a complaint in May 2019. This had the effect of preventing applicants from taking any further step for recovery of the invoiced sums.

[136] The Committee's inquiry process took 16 months, with the decision being issued in September 2020. The applicants applied for review on 29 October 2020. Having elected to apply for review, the applicants put themselves in the position of being unable to pursue recovery of the sum ordered to be paid.

[137] The respondent decided not to pay anything towards the sum to be paid by the Committee. On enquiry, the respondent advised the LCRO's office that she had been advised by the NZLS not to pay anything on account of the sum ordered by the Committee until the review had been completed. This may explain why her approach to the matter has not been consistent with her own comment quoted at paragraph [46] above. It is unnecessary for me to draw any conclusion regarding the respondent's motivation.

[138] If the respondent's recollection is accurate, I consider it surprising that the NZLS would have given advice to that effect. I emphasise that I do not question the respondent's recollection but it was apparently a telephone conversation and her understanding of it may not have been what was intended to be conveyed.

[139] Through no fault of either the applicants or the respondent, it has taken a further three years for the review application to be determined. The practical effect of this course of events is that the respondent has had the benefit of five years' credit, some of which period has been due to her actions, some to the actions of the applicants and some to the delay in hearing this review.

[140] In the circumstance of a complaint to the NZLS about a fees dispute, one might reasonably expect a principled complainant to consider it appropriate to pay a sum he or she considered to be fair and reasonable while reserving all rights in relation to the complaint process.

[141] Where the circumstances are that a standards committee has issued a decision determining a fair and reasonable fee and, in doing so, reduced the fee originally charged by the lawyer, and the lawyer has applied for review, I can identify no reason in principle why the most appropriate course of action would not be for the client to pay the sum ordered by the Committee while reserving all rights in relation to the review process.

[142] In expressing that view, I emphasise that the lawyer is precluded by s 161 of the Act from taking any legal action to recover payment of the fee until the complaint has been finally determined. If an application is made for review, the complaint is not "finally determined" until the review decision is issued. Consequently, it is procedurally open to the client to pay nothing and await the issue of the review decision and accompanying certificate under s 161(2) of the Act.

[143] The underlying legal position is nevertheless that an application for review does not operate as a stay unless the Committee includes a stay as part of its decision.

[144] The purpose of rr 9 to 9.2 is to arrive at an outcome on fees that is fair and reasonable to both parties. Optimally, the procedural management of the complaint and review processes should be guided by the same expectation.

[145] The review process is informal, inquisitorial and robust. In that light, having regard to all the circumstances and in order to do overall fairness between the parties at this juncture, I find that a fair and reasonable fee for the applicants' services was $5,000 plus GST.

[146] Accordingly, the total sum payable by the respondent to the applicants for fees, disbursements and GST for the services originally invoiced in the Applicants' invoices 2885, 2886 and 2910 is $5,951.25. In terms of s 161(3) of the Act, that sum is final and conclusive.

[147] For clarity, it does not include any other amounts for which the respondent may be liable to the applicants under the terms of the retainer. In that regard, the proper sum to be paid for fees not having been finally determined until now, it may be that the applicants are precluded from claiming interest. That is a legal matter that I have no jurisdiction to determine.

[148] I note also that a Court filing fee was payable on the applications and it is unclear from the file whether it was paid and, if so, who paid it. It was not invoiced to the respondent. If that cost was in fact incurred by the Firm, the order in paragraph [146] does not preclude it being charged now.

[149] An amended certificate under s 161(2) of the Act for the sum specified in paragraph [146] will accompany this decision.

Decision

[150] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is:

(a) modified as to the amount the respondent is ordered to pay in accordance with paragraphs [146] to [148];

(b) otherwise confirmed.

Costs

[151] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. I consider this matter to have been reasonably straightforward. It follows that the applicants are ordered to pay costs in the sum of $800.00 to the New Zealand Law Society within 30 days of the date of this decision, pursuant to s 210(1) of the Act. Their liability under this order is joint and several.

[152] Pursuant to s 215 of the Act, I confirm that the order for costs may be enforced in the civil jurisdiction of the District Court.

[153] The underlying legal position is nevertheless that an application for review does not operate as a stay unless the Committee includes a stay as part of its decision.

Publication

[154] Section 206(1) of the Act requires that every review must be conducted in private. Section 213(1) of the Act requires a Review Officer to report the outcome of the review, with reasons for any orders made, to each of the persons listed at the foot of this decision.

[155] Pursuant to s 206(4) of the Act, a Review Officer may direct such publication of his or her decision as the Review Officer considers necessary or desirable in the public interest. "Public interest" engages issues such as consumer protection, public confidence in legal services and the interests and privacy of individuals.

[156] Having had regard to the submissions made on this issue, I have concluded that it is desirable in the public interest that this decision be published in a form that does not identify the parties or others involved in the matter and otherwise in accordance with the LCRO Publication Guidelines.

[157] The parties are permitted to disclose the full text of this decision in evidence in any Court or Tribunal proceeding commenced for recovery of sums owing by the respondent.

DATED this 27th day of OCTOBER 2023

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FR Goldsmith
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 SK and Mrs WP as the Applicants
Mr DU KC as the Applicants' counsel
Ms AQ as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice