LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 080

Ref: LCRO 201/2021

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	**DK obo THE LK ESTATE** Applicant
AND	**BY and FM** Respondents

DECISION

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

Introduction

[1] In November 2015, Mr DK [redacted] made complaints to the New Zealand Law Society (NZLS) against Mr BY and Ms FM of the law firm [Law firm A].[1] Mr BY was a partner of that firm. Ms FM was an employed solicitor.

[2] Mr DK made the complaints on behalf of his mother, Mrs LK.

[3] The complaints were referred to the [Z] Standards Committee (the [Z] Committee). After inquiring into the complaints, the [Z] Committee determined, in a single decision, to take no further action on them. That was in May 2016.

[1] Lawyers Complaints Service file numbers 13875 and 13876.

[4] Mr DK did not apply for review of that determination. He was nevertheless dissatisfied with the outcome. In 2019, he brought a claim in the Disputes Tribunal against [Law firm A] as a firm.[2] This claim was based on the same factual allegations as Mr DK had made in his complaints to the NZLS.

[5] In the Tribunal, Mr DK alleged negligence on the part of [Law firm A] causing economic loss and misleading conduct for the purposes of the Fair Trading Act. Stating that it had no jurisdiction in negligence claims, the Tribunal treated this as a claim in contract that was also covered by the Consumer Guarantees Act, as well as the Fair Trading Act.

[6] In the Disputes Tribunal claim, Mr DK sought a refund of various fees paid by Mrs LK to [Law firm A], together with compensation for alleged financial loss and physical and mental harm that Mr DK claimed had flowed from [Law firm A]'s conduct. His claim was for $29,000 plus interest. In September 2020, in a thorough, 10-page decision, the Disputes Tribunal Referee dismissed Mr DK's claim.

[7] In August 2021, Mr DK made fresh complaints to the NZLS, this time as executor in Mrs LK's estate.[3] Mrs LK had passed away in February 2016. In the fresh complaints, Mr DK sought for the original complaints against Mr BY and Ms FM to be "reopened" on the grounds that there was fresh evidence of wrongdoing on their part. The nature of the fresh evidence is discussed later in this decision.

[8] These fresh complaints were referred to the [Area] Standards Committee [X] (the ASCX). In its consideration of them under s 137 of the Lawyers and Conveyancers Act 2006 (the Act), the ASCX, also in a single decision, considered the key issue for it to determine was:[4]

> …whether there was any new evidence to justify the Committee reconsidering the decisions of [the] [Z] Committee … in respect of [the original complaints], and if so, whether any new evidence warrants a finding that either Mr BY and/or Ms FM breached their obligations to Mrs LK.

[9] In relation to the complaint against Ms FM, the ASCX decided that the additional evidence put forward by Mr DK might possibly constitute new evidence, although this was unclear, but that it did not change the substance of the original complaint about Ms FM's conduct that had already been determined by the [Z] Committee. On that basis, it decided that the two complaints were "in substance identical" and that it did not have to consider the matter further.

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[2] Case No. CIV-XXXX-XXX-XXXXXX.
[3] Lawyers Complaints Service file numbers 22325 and 22326.
[4] Standards Committee decision (18 November 2021) at [14].

[10] The Committee considered that it could treat the allegations made by Mr DK against Mr BY as a fresh complaint. This was because it was unclear to the Committee whether or not correspondence Mr DK relied upon as fresh evidence had been before the [Z] Committee. The correspondence was by email between law firms and was associated with a letter of 12 September 2015 to Mr BY signed by Mrs LK.

[11] Mr DK also considered that expert forensic handwriting evidence was now available that was material to the outcome of the original complaints. The ASCX implicitly did not consider this to be fresh evidence, or at least not fresh evidence material to the outcome.

[12] Mr DK also asserted that Mr BY had "withheld facts" from the [Z] Committee and had "presented false evidence" to that Committee. Particulars of these allegations and of the email correspondence that the ACSX considered might constitute fresh evidence are discussed later in this decision.

[13] After considering the correspondence on the basis that it might constitute fresh evidence, the ASCX resolved to take no further action pursuant to s 138(2) of the Act because no further action was necessary or appropriate.

[14] Mr DK now seeks review of the ASCX's decision. Mr DK asserts (paraphrased) that the ASCX made so many errors of fact, analysis and interpretation, as also discussed later in this decision, that its decision is unsound.

[15] The remedies or outcomes Mr DK seeks are:

(a) An investigation and review of the FM and BY cases and of the Law Society's Standards Committees' decisions;

(b) this Office overturning those decisions;

(c) censure of Ms FM and Mr BY; and

(d) compensation of $25,000 for the LK Estate towards substantial losses caused by [Law firm A]'s actions.

[16] Mr DK's reference to "the Law Society's Standards Committees' decisions" includes both the initial [Z] Committee decision on the first two complaints and the ASCX's decision on the second two complaints.

Background

[17] Mr DK's four complaints and his Disputes Tribunal claim all arise from a long-running and apparently bitter contest for control of Mrs LK's legal affairs and of her estate between Mr DK on one side and his sister, Mrs ER, and her husband, Mr JR, on the other.

[18] The Rs lived in [Country D]. Mr DK lived in the [Country E].

[19] Immediately before the relevant course of events, Mrs LK was 94 years old. Mr DK was her enduring attorney for both welfare and property.

[20] [Law firm A] had been Mrs LK's lawyers for many years. Mr BY had been the partner with primary responsibility for the firm's legal work for her.

[21] In April 2015, Mrs LK was very ill in hospital with multiple myeloma. According to Mr DK's submissions to the ASCX and this Office, she was also suffering from numerous associated medical conditions and symptoms detailed later in this decision.

[22] On 31 March 2015, Mr JR contacted [Law firm A] stating that Mrs LK wanted to review her Will and enduring powers of attorney (EPAs). Mr BY was on holiday at the time. Ms FM, who was an associate within the firm, attended on Mrs LK at hospital on 2 April 2015. She took instructions from Mrs LK about amending the EPAs, Mrs LK's family trust structure and her Will.

[23] The amendments to the EPAs were to replace Mr DK with Mrs ER as enduring attorney for both welfare and property and to remove a clause specifying that a named doctor, her GP, was required to undertake any assessment of her mental capacity.

[24] The amendment to the family trust structure was to replace Mrs LK with Mr JR as sole trustee. This was done by the appointer of trustees of the trust, Mr ZK, who was Mrs LK's former husband and DK's and Mrs ER's father.

[25] The amendment to the Will was to add a codicil. I have no information as to the content of the codicil except that Mr DK says it was "to include" or was "in favour of" Mr JR.

[26] I have no information as to when the amendment documentation was signed but infer that it was either on 2 April 2015 or otherwise promptly after the instructions were taken.

[27] Ms FM did not consider it necessary to have Mrs LK's mental capacity assessed.

[28] Mr DK believed that she should have done so and that, if she had, the changes would not have been made. Once he learned of the changes, he set out to reverse them.

[29] Mr DK's original complaint against Ms FM was that in not having Mrs LK's mental capacity assessed when taking her instructions in April 2015 while she was in hospital, Ms FM failed in her duty to take reasonable care and thereby breached r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[30] The complaint was premised on Mr DK's belief that by reason of her age and physical frailty as a result of her medical conditions and the chemotherapy treatment she was undergoing, Mrs LK lacked the mental capacity necessary to be able to give Ms FM instructions regarding her legal affairs.

[31] Mr DK also believes that, at the time, Mrs LK was acting under duress from Mr and Mrs R and that they coerced her into changing her enduring powers of attorney, appointing Mr JR as sole trustee and changing her Will.

[32] In the context of that belief, Mr DK asserted that Mr and Mrs R were present when Ms FM took Mrs LK's instructions.

[33] Mrs LK's medical condition improved appreciably. In late June 2015, both she and Mr DK contacted [Law firm A] expressing concern about the April events. There were then various exchanges between Mr DK, Mrs LK, the firm and another lawyer, Mr CV of [Law firm B].

[34] The outcome was that Mrs LK engaged Mr CV as her new lawyer and instructed delivery of her documents held by [Law firm A] to [Law firm B]. Mr BY arranged the delivery of her documents to Mrs LK but requested an assessment of her mental capacity before delivering them to Mr CV.

[35] Mrs LK's capacity was duly assessed, favourably, and Mrs LK's documents were delivered to [Law firm B]. This was in mid-August 2015. Mr CV arranged for Mr DK to be reappointed as Mrs LK's enduring attorney for both welfare and property.

[36] It seems that there were difficulties over the trusteeship issue. According to an extract from an affidavit by the appointer, Mr ZK, he was persuaded to request Mr JR to

resign as trustee, Mr JR refused to do so, a complaint was then made to "the Society of Accountants"[5] and Mr JR eventually resigned.

[37] The Rs were represented by [Law firm C]. In mid-September 2015, Mr BY received from Mr YC of that firm a letter of instruction dated 12 September 2015 ostensibly from Mrs LK, the details of which are discussed later in this decision (the September Letter). There were telephone conversations and email correspondence between Mr YC and Mr BY about the September Letter.

[38] For reasons traversed later in this decision, Mr BY did not consider it appropriate to act on the instructions contained in the September Letter until he had verified those instructions directly with Mrs LK. This did not occur until he visited her on 13 November 2015.

[39] The outcome of their discussion was that Mr BY did nothing further in relation to the September Letter.

[40] Two days earlier, on 11 November 2015, Mr DK had filed with the NZLS his first complaints against Ms FM and Mr BY. Mr BY was unaware of this at the time. He became aware of the complaints on 25 November 2015.

[41] Also in November 2015, Mrs LK made a further change to her Will. I understand from Mr DK's submissions that this change was partly to clarify that art works in her possession were his property. It seems there were other, more material changes, which I will touch on later.

[42] Mr DK appears to have been of the mistaken belief that his status as Mrs LK's enduring attorney, for most of the period in question, meant that he ought to have been consulted by Mrs LK's lawyer about her legal affairs and had the right to influence what was done or not done in the execution of her instructions.

[43] In that context, and in the context of his complaint about Ms FM and his developing disputes with the Rs, Mr DK expressed various concerns about Mr BY's professional conduct that are summarised by category two pages below and traversed in more detail later in this decision.

[5] Presumably the New Zealand Institute of Chartered Accountants.

Application for review

[44] In relation to the ASCX's fresh consideration of his complaint against Ms FM, Mr DK argues (paraphrased) that:

(a) There were errors in the [Z] Committee's decision. These appear to be largely the same alleged errors as Mr DK said compromised the ASCX's decision.

(b) He has not complained about Ms FM's conduct "repeatedly" and, to the extent that the ASCX dismissed his complaint for that reason, the decision was erroneous.

(c) The ASCX, in stating that "Mrs LK was receiving treatment for cancer", erred in not referring to her specific health conditions and medical facts.

(d) There were multiple reasons for Ms FM to have doubts about Mrs LK's capacity. These included that the medical evidence explained how Mrs LK's "diseases, afflictions, maladies and treatments together" affected capacity.

(e) The ASCX made an error of fact in stating that Mr BY, rather than Ms FM, took the instructions from Mrs LK.

(f) The ASCX made an error of fact in referring only to changes to the EPAs and family trust and not also referring to a change to Mrs LK's Will in favour of Mr JR in the form of a codicil.

(g) The ASCX erred in finding that even with the addition of new evidence, the complaint was in substance identical to the complaint against Ms FM that was determined by the [Z] Committee.

(h) The ASCX erred in omitting from its consideration the issues of undue influence and coercion.

(i) More generally, "it would be unjust and harmful … to let stand a ruling that potentially could jeopardise every New Zealander, elderly and ill, in hospital".

[45] In relation to his complaint against Mr BY, Mr DK's arguments are too numerous and varied, in over 260 numbered paragraphs of submissions to the ASCX and this Office over 65 pages, to warrant itemising them twice in this decision. I will endeavour

to discuss the substance of them in an order that aids comprehension and analysis. Broadly, they encompass:

(a) submissions as to the alleged motivations of Mr BY, based on the material Mr DK has put forward as fresh evidence, including submissions as to Mr BY's alleged partiality and bias in the contest between Mr DK and the Rs for control of Mrs LK's affairs;

(b) submissions as to Mr BY's alleged conflict of interest;

(c) submissions as to Mr BY allegedly misleading and lying to the [Z] Committee; and

(d) submissions as to errors of fact, omission and interpretation by the ASCX in its decision.

Review on the papers

[46] 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. Neither party has objected to this course of action.

[47] Mr DK has filed extraordinarily detailed and careful submissions. On behalf of Ms FM and Mr BY, [Law firm A] filed submissions for the ASCX's consideration and relies on those submissions.

[48] In the interests of clarity of understanding for all parties, I record that I do not have access to the submissions made to the [Z] Committee. This is procedurally appropriate, as the [Z] Committee decision is final and this hearing relates only to review of the ASCX's decision on the fresh complaints. I do, however, have the [Z] Committee's decision.

[49] I record that I have carefully read the [Z] Committee decision, the fresh complaint, the response to the complaint, the ASCX's decision and the submissions filed by both parties for the ASCX's consideration and by Mr DK for the purposes of this hearing. 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

[50] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[6]

> … 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.

[51] More recently, the High Court has described a review by this Office in the following way:[7]

> 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 determination.

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

(a) consider all the available material afresh; and

(b) provide an independent opinion based on those materials.

[53] To be clear, the required approach does not involve an analysis of whether the ASCX was "right" or "wrong" on any particular issue. Nevertheless, in fairness to the ASCX and in aid of Mr DK's understanding, I will comment, where appropriate, on Mr DK's criticisms of the ASCX's analysis.

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[6] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[7] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

The issues

[54] In relation to the complaint so far as it relates to Ms FM, the issues I have identified for consideration in this review are as follows:

(a) Do I have jurisdiction to inquire into the matter and is the complaint an abuse of process?;

(b) Is there fresh evidence relating to the propriety of the professional conduct of Ms FM that Mr DK complained about in his first complaint?;

(c) Does that fresh evidence establish that Ms FM failed to take reasonable care when taking Mrs LK's instructions at the hospital or when getting the documentation signed in April 2015?;

(d) Has Mr DK raised anything else that renders the decision of the ASCX in relation to Ms FM unsound?;

(e) Does any failure by Ms FM to take reasonable care warrant a disciplinary response?;

(f) Are there grounds for awarding compensation to the [LK] Estate arising from Ms FM's conduct.

[55] In relation to the complaint so far as it relates to the conduct of Mr BY, the issues I have identified for consideration in this review are as follows:

(a) Do I have jurisdiction to inquire into the matter and is the complaint an abuse of process?

(b) Is there fresh evidence relating to the propriety of the professional conduct of Mr BY that Mr DK complained about in his first complaint?;

(c) What are the particulars of Mr BY's professional conduct that Mr DK is complaining about at this juncture and in relation to each of those particulars:

(i) has the matter already been determined by the [Z] Committee; and

(ii) if not, did Mr BY fail to meet his professional obligations to Mrs LK?;

(d) If so, does any such failure warrant a disciplinary response?;

(e) Are there grounds for awarding compensation to the LK Estate arising from Mr BY's conduct?

Discussion in relation to Ms FM

(a) Do I have jurisdiction to inquire into the matter in relation to Ms FM and is the complaint an abuse of process?

[56] The first question to consider is whether Mr DK's second complaint against Ms FM replicates his first. This requires a discussion of the law concerning repeat claims or complaints.

[57] In general, it is not open to a complainant who has been unsuccessful with a complaint to start the process again by filing of a second complaint that rehashes the ground covered by the first. The general description of claims or complaints which are repetitive is that they are an abuse of process.

[58] Lord Reed, a Deputy President of the United Kingdom Supreme Court, has explained that:

> The power to dismiss a case summarily as an abuse of process was first employed in England in 1875, in a case brought by Thomas Castro, the Tichborne claimant. After he had been held to be an impostor and imprisoned for perjury, he sought to challenge his conviction by a civil procedure which required the consent of the Attorney General. When the clerk declined to seal the writ, as the Attorney General had not given his consent, Castro sued the clerk for half a million pounds in damages. The defendant immediately applied to the Court of Exchequer to have the action stayed. After consulting all the Barons, the court decided that it had the power to dismiss the action summarily. Baron Bramwell said that the action was absolutely groundless, and was one in which the court, in the exercise of its discretion, ought to stop the proceedings as being an abuse of the process of the court … By the early twentieth century, the power to stay or dismiss actions which were an abuse of process was regarded in England as an aspect of the inherent jurisdiction of the court: that is to say, the powers which the court possesses simply by virtue of being a court, because they are essential to its proper functioning.[8]

[59] Our Supreme Court has endorsed a statement of Lord Bingham that, in deciding whether further proceedings are abusive, a court makes a broad, merits-based judgment which takes account of the public and private interests involved and of all of the facts of the case, focusing attention on the crucial question whether in all the circumstances a party is misusing or abusing the process of the court.[9]

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[8] Lord Reed "Lies, Damned Lies: Abuse of process and the dishonest litigant" (lecture at the University of Edinburgh, Fifth Annual Lecture at the Centre for Commercial Law, 26 October 2012).
[9] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at 29.

[60] The fact that the second complaint may have been made in good faith, without an actual intent to abuse the disciplinary process, is not the crucial point. The end focus is on the effect on the party who is the subject of the complaint.

[61] The critical point, as an English court has explained it, is that:

> No one ought to be twice troubled or harassed for one and the same cause.[10]

[62] In delivering his judgment in *R (on the application of Coke-Wallis) (Appellant) v Institute of Chartered Accountants in England and Wales (Respondent)*[11], Lord Collins remarked that:

> In Australia it was held that a doctor who had been censured by a Medical Board could not subsequently be the object of a second inquiry into alleged infamous conduct: *Basser v Medical Board of Victoria* [1981] VR 953. See also in New Zealand *Dental Council of New Zealand v Gibson* [2010] NZHC 912 (dentist bound by findings of disciplinary tribunal). In some cases, the same result has been achieved by finding that the disciplinary tribunal is functus officio after the first decision: *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 (Canadian Supreme Court). In the United States, in *Florida Bar v St Louis*, 967 So. 2d 108 (Fla 2007) and *Florida Bar v Rodriguez*, 967 So. 2d 150 (Fla 2007) the Supreme Court of Florida accepted that *res judicata* principles[12] applied to successive complaints brought by the Bar ...

[63] He did go on to say that:

> But it has also been said that res judicata or double jeopardy principles may not apply to disciplinary bodies because their "disciplinary requirements serve purposes essential to the protection of the public, which are deemed remedial, rather than punitive": *Spencer v Maryland State Board of Pharmacy*, 846 A 2d 341, 352 (Maryland Court of Appeals, 2003); cf *Re Fisher*, 202 P 3d 1186, 1199 (Sup Ct, Colorado, 2009).

[64] Section 152(4) of the Act is a statutory embodiment of the common law principles set out above. It provides that, subject to the right of review to this Office and a right to recover damages, every determination made under s 154(1) of the Act is final.

[65] A complaint about the conduct of a lawyer can in most cases be stated in reasonably straightforward terms. The Committee inquiry process provides opportunity for each party to fully air both the complaint and any response to it. As well, the Committee itself has power to require the production of further information. Committees are made up of practising lawyers and lay people, all chosen for their judgment and skill and, in the case of lawyers, their relevant experience.

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[10] *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54.
[11] *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] UKSC 1 at [58].
[12] The Latin term "*res judicata*" means that the thing (or issue) has already been decided.

[66] Committees are adept at identifying conduct issues and seeking comment from parties about those issues. Non-lawyer complainants are offered every opportunity to explain their complaint and encouraged to provide as much detail as necessary.

[67] Occasionally, a committee will identify issues of concern about a lawyer's conduct that were not identified by the complainant.

[68] A committee's decision on a complaint, even if expressed succinctly as is the case in this instance (by both the [Z] Committee and the ASCX), will be the result of thorough analysis. When consumer protection underpins the process, careful attention is paid to the conduct of the lawyer complained about.

[69] It must be emphasised, as illustrated by the decisions discussed above, that if a committee is to reconsider a complaint that has already been the subject of an earlier committee determination, there must be compelling reasons advanced to merit any further inquiry.

[70] In rare cases, a person may relitigate[13] an earlier complaint. Those uncommon cases are generally confined to those circumstances where a party uncovers further, relevant evidence that was not available at the time that the first complaint was made. In New Zealand, the principle has been expressed as follows:[14]

> The conventional requirements are that the further evidence must be fresh, it must be credible and it must be cogent. Evidence is not regarded as fresh if it could with reasonable diligence have been produced at the trial.

[71] In those cases, it would fall initially to the committee charged with inquiring into the second complaint to consider whether the fresh information that had come to light was relevant and information that the committee considered should have been produced, or was not able to have been produced, when the first complaint was under consideration.

[72] Again, it must be emphasised that it is neither appropriate nor acceptable for a person to use the complaints process under the Act to bring complaints against a lawyer on an evolving basis. The requirement for complaints to be dealt with expeditiously and the need for finality are both seriously compromised if a person is permitted to respond to an adverse finding simply by filing a further complaint.

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[13] Mr DK has submitted on the meaning of this word. In this context, it means just to pursue a legal dispute a second time, regardless of whether this is in a court or in another forum.
[14] See *Rae v International Insurance Brokers (Nelson Marlborough Ltd)* [1998] 3 NZLR 190, 192 (CA).

[73] In this instance, the fresh complaints were filed six years after the first ones and there can be no dispute that they are based on the same allegations about the same conduct arising from the same course of events. On the face of it, there is a very strong argument that they constitute an abuse of process.

[74] Nor is it acceptable for a complainant to attempt to avoid an allegation of filing repetitive complaints by "tweaking" their complaints in an attempt to convince the decision-maker that new matters have been raised.

[75] For the most part, it can be reasonably expected that a person who has concerns about a lawyer's conduct is able to identify and articulate those concerns and garner all relevant evidence at the time the concerns arose.

[76] The primary question to consider here is therefore whether the additional information relied on by Mr DK is sufficiently fresh, credible and cogent to merit further inquiry being made into his complaint.

(b) Is there fresh evidence relating to the propriety of the professional conduct of Ms FM that Mr DK complained about in his first complaint?

[77] The ASCX found that the only arguably additional evidence relating to Ms FM's conduct was the more detailed description by Mr DK of Mrs LK's medical conditions and particularly her symptoms, including blurred vision and vertigo. It considered that:

> (a) it was not clear that the medical evidence in question was not available to the [Z] Committee; and
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> (b) even if it was not available to the [Z] Committee, it existed at the time of the complaint, was available to Mr DK and could have been made available to the [Z] Committee.

[78] The ASCX nevertheless proceeded on the basis that the additional information "may possibly be new evidence" but found that the fresh complaint against Ms FM was "in substance identical" to the original complaint against her and that the further medical evidence did not change the substance of that complaint.

[79] The ASCX's decision that it did not have to consider the matter further could have been expressed either as a finding that it had no jurisdiction to do so or as a finding that the fresh complaint was an abuse of process.

[80] I have decided not to adopt an unduly technical approach to the matter. I am willing to accept, for argument's sake, that the additional medical information constitutes

"fresh" evidence regardless of whether or not it could have been put to the [Z] Committee in 2016.

(c) Does that fresh evidence establish that Ms FM failed to take reasonable care when taking Mrs LK's instructions at the hospital or when getting the documentation signed in April 2015?

[81] It is for Mr DK to establish, on the balance of probabilities, that Ms FM failed to take reasonable care in the circumstances that pertained when taking instructions from Mrs LK about her legal affairs.

[82] As correctly noted by the Disputes Tribunal Referee, s 93B of the Protection of Personal and Property Rights Act 1988 (PPPR) provides that every person is presumed to be competent and to have capacity until the contrary is shown.

[83] Mr DK's assertion is that Mrs LK lacked mental capacity at the time. It is therefore for him to establish that Ms FM was at least put on inquiry that Mrs LK might lack mental capacity and therefore that her mental capacity should be assessed.

[84] Mr DK has set out in detail the medical conditions he says Mrs LK was suffering from when she was hospitalised in April 2015. He describes them as follows:

> Haemorrhaging, Multiple Myeloma, being on drugs (including chemotherapy), Hypercalcaemia, Macrocytosis, Hyper-viscosity of blood, Hyponatremia, blurred vision, vertigo, being fearful, and suffering the torturous drilling into her bones.

[85] Mr DK is clearly a man of definite and strongly held opinions but he does not claim to be a general practitioner, a geriatrician or otherwise a person with expertise in the assessment of mental capacity. Nor am I.

[86] There is no evidence before me, and there was no evidence before the ASCX, that the undoubtedly severe physical effects of the medical conditions from which Mrs LK was suffering and for which she was being treated had any effect on her mental capacity. Mr DK has had more than ample opportunity to adduce such evidence. This is not a matter about which adverse assumptions can properly be made.

[87] Mr DK's argument is, in effect, that someone so severely physically ill must be assumed to be mentally incapable unless her capacity is positively affirmed. In my view, this is not so as a matter of evidence. Further, such an assumption would be inconsistent with s 93B of the PPPR.

[88] Implicitly, Mr DK's alternative argument is, in effect, that because Mrs LK subsequently reversed the EPA arrangements and the change to her Will once her

medical condition improved (noting that the eventual change of the trusteeship was effected by Mr ZK, not Mrs LK), she must have not genuinely intended to make the changes she made in April 2015 and therefore lacked mental capacity when she made those changes. Again, this is not necessarily so.

[89] It seems likely that Mrs LK was influenced in her thinking, at various material times, by whoever was occupying her attention and giving her advice at the time. Sometimes this was the Rs. Sometimes it was Mr DK. Each has accused the other of manipulating Mrs LK. This does not necessarily mean that she was not thinking at all, or not thinking cogently; in short, that she was not in command of her faculties.

[90] The lack of capacity that Mr DK asserts was implicitly temporary. Of note, the Referee in the Disputes Tribunal decision made the following comment:[15]

> Mr DK also said that he had spoken to his mother by phone while she was in hospital and she was mentally competent. Mr DK said that this [sic] discussed her treatment and her expressed fear of a medical procedure and does not determine whether she had or did not have mental capacity to amend her affairs in the manner she did. However, I am satisfied that this further supports the view that despite her medical condition, Mrs LK presented as mentally capable.
>
> In her statement, Ms FM says that she spoke to Mrs LK independent of Mr and Mrs R and relied on her own professional judgement of Mrs LK's capacity.

[91] It is unclear exactly when Mr DK was in communication with his mother in April 2015 and how closely the timing of those communications was with Ms FM's attendances. It seems, however, that Mr DK considers that Mrs LK had capacity when talking to him but not when talking to anyone else around that time. I consider this stance as difficult to accept as did the Disputes Tribunal Referee.

[92] Mr DK does not assert any lack of capacity in June 2015 when he succeeded in having the EPA arrangements changed back again.

[93] He records that Mrs LK's mental capacity was formally assessed in August 2015 at Mr BY's request. Regardless of Mr DK's assertions about the impropriety of Mr BY requesting that assessment, the assessment resulted in affirmation of Mrs LK's capacity at that time.

[94] In October 2015, Mrs LK handwrote letters countermanding instructions she had given in letters in mid-September that she signed (but did not write). Mr DK has produced the October letters in evidence. It is again implicit that he does not question her capacity at that time.

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[15] Disputes Tribunal decision in CIV-XXXX-XXX-XXXXXX at [29].

[95] The first complaints were filed in November 2015. In filing them, Mr DK acted as Mrs LK's attorney. I infer that this was a general power of attorney rather than the EPA. This is because Mrs LK herself separately authorised the complaints in writing. The necessary implication is that she had capacity at that time also.

[96] In summary, there is just one period of time in early April 2015 when being attended by Ms FM during which Mrs LK lacked capacity, according to Mr DK. This renders Mr DK's essential argument against Ms FM inherently improbable.

[97] Be that as it may, Mr DK has simply adduced no evidence of Mrs LK's supposed lack of mental capacity. Mr DK's own opinion is not evidence.

[98] Given the length of time over which Mr DK has pursued these allegations and the number of different processes he has undertaken, I consider it telling that there remains no independent evidence of Mrs LK's alleged incapacity, either in early April 2015 or at any other time between then and November 2015. She died in February 2016.

[99] In evidential terms, there is nothing before me to persuade me that Mr DK's genuinely held opinion that Mrs LK lacked capacity should carry any greater weight than Ms FM's genuinely held opinion that she had capacity, other than the fact that Ms FM was physically present when attending on Mrs LK whereas Mr DK was not. He was in the USA.

[100] In terms of the principle stated at paragraph [70] above, I will accept that Mr DK's additional evidence is "fresh evidence" and that it is a credible layperson's summary of medical information provided to him but I am not persuaded that it is cogent for any purpose other than describing Mrs LK's medical conditions and symptoms.

[101] Accordingly, I find that Mr DK has not established, on the balance of probabilities, that there were "multiple reasons for Ms FM to have doubts about Mrs LK's capacity", or any such reason.

[102] Finally in relation to Ms FM, there is Mr DK's general submission that "it would be unjust and harmful … to let stand a ruling that potentially could jeopardise every New Zealander, elderly and ill, in hospital". Whilst I acknowledge the genuineness of Mr DK's convictions, this is unwarranted hyperbole. The sole issue here is whether Ms FM met her obligation to take reasonable care in taking Mrs LK's instructions in the circumstances at the time.

(d) Has Mr DK raised anything else that renders the decision of the ASCX in relation to Ms FM unsound?

[103] Mr DK did not apply for review of the [Z] Committee's two decisions. Those decisions are therefore final in relation to the matters determined by the [Z] Committee. I have no jurisdiction to consider any alleged errors in those two decisions other than by reason of Mr DK advancing fresh, credible and cogent evidence, as previously explained.

[104] Mr DK says that he has not complained about Ms FM "repeatedly" in the sense of "complaining constantly and over and over again" rather than requesting that a complaint matter be reopened by reason of fresh evidence. This is a reference to a reference made by the ASCX in its decision[16] to a decision of this Office[17] in which the LCRO stated:

> It can be further noted that while s 132 of the Act gives any person a right to complain about the conduct of a lawyer, that does not give a person the right to complain about the same conduct repeatedly. Accordingly, if a complaint is in substance identical to a complaint that has already been made, then the Complaints Service and the Standards Committee will have already discharged its obligations under the Act and will not be required to consider the complaint again.

[105] I accept Mr DK's submission from a linguistic viewpoint. Nevertheless, a second complaint against the same person about the same conduct based on the same facts is a repetition of the first complaint. As stated at paragraph [61] above, the critical point is that "no one ought to be twice troubled or harassed for one and the same cause".

[106] Mr DK refers to legal attempts through Mr CV to establish duress and/or coercion of Mrs LK on the part of the Rs. He submits that the ASCX erred in omitting those issues from its consideration.

[107] The question of whether either duress and/or coercion were at play is a legal issue that is the province of the Court. According to Mr DK, that issue has indeed been the subject of Court proceedings. In his submissions to the ASCX, he referred to two High Court cases that commenced in 2019.[18]

[108] He states that "coercion, undue influence and Mrs LK's capacity" were "the exact issues" in both High Court cases. Mr DK discloses no other details about the purpose of, parties to, or outcome of the High Court proceedings.

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[16] At [15].
[17] *FC v RU* NZLCRO 273/2012 at [21].
[18] The civil record numbers are referred to in September 2021 submissions but are not cited here as they would identify the parties to the Court proceedings and thereby might identify the applicant in the published version of this decision.

[109] I observe that a Court proceeding involving allegations of duress and/or coercion and undue influence would be unlikely to be consistent with an underlying condition of lack of capacity. Such allegations would normally imply undue influence on, or an overbearing of, acts of will on Mrs LK's part, not an absence of will. A lack of capacity would normally be argued in the alternative.

[110] I observe also that if Mrs LK's capacity in April 2015 had been a material issue in the High Court proceedings, it is likely if not certain that Ms FM would have been asked or subpoenaed to give evidence about it. There is no suggestion that this occurred.

[111] Nor is there any suggestion from Mr DK that it was established in the High Court proceedings that Mrs LK did not have capacity in early April 2015.

[112] In the absence of any further information about the Court proceedings themselves or about the possible materiality to them of Mrs LK's capacity in April 2015, I do not consider that Mr DK's allegations in this process about duress and/or coercion could have any bearing on the question of the exercise of reasonable care on Ms FM's part as to whether or not any assessment of capacity was required.

[113] Next, Mr DK submits that the ASCX erred in fact in stating that Mr BY, rather than Ms FM, took the instructions from Mrs LK in April 2015. On the face of it, this is an error of fact. The alternative explanation is that the ASCX was referring to Mr BY's supervisory responsibility for the conduct of the file as a whole, as the [Law firm A] partner responsible for Mrs LK's affairs. In either case, this does not make the ASCX's decision unsound.

[114] Next, Mr DK refers to the ASCX's omission to refer to the April 2015 change to the Will. I find that the ASCX's lack of reference to the codicil to Mrs LK's Will had no bearing on its decision and has no bearing on the question of whether or not Ms FM exercised reasonable care.

[115] I find also that the ASCX did not fail to refer to Mrs LK's specific health conditions. It clearly does so in each of paragraphs [16], [17], [18] and [19] of its decision without quoting verbatim from Mr DK's submission. I further find that the manner of its reference to the medical evidence had no bearing on the question of whether or not Ms FM exercised reasonable care.

[116] I find that the ASCX did not err in finding that even with the addition of new evidence, Mr DK's fresh complaint was in substance (in relation to Ms FM) identical to his first complaint.

[117] Were it necessary to do so, it would be open to me to find that, for that reason, I have no jurisdiction to consider the fresh complaint or that the fresh complaint is an abuse of process. The finding I make is simply that there is no merit in the fresh complaint.

(e) Does any failure by Ms FM to take reasonable care warrant a disciplinary response

[118] For the reasons explained above, there is no evidence of any such failure.

(f) Are there any grounds to award compensation to the LK Estate arising from Ms FM's conduct?

[119] No.

Discussion in relation to Mr BY

(a) Do I have jurisdiction to inquire into the matters raised by Mr DK about Mr BY in this review and is Mr DK's complaint against Mr BY an abuse of process?

[120] The first question here is again whether Mr DK's second complaint replicates his first. All the same considerations apply as they are set out in the above discussion of this issue in relation to Ms FM.

[121] I have the strong impression that Mr DK has developed his thinking and the particularity of his arguments as a consequence of the pursuit of his allegations and claims in the Disputes Tribunal, and in the context of the two sets of High Court proceedings he makes largely passing reference to in his submissions to the ASCX.

[122] To the extent that this is the case, the most appropriate course for me to take is to decide not to inquire further. I have two reservations in that regard. The first is that it is not easy to distinguish in Mr DK's materials between what is merely a much more developed version of what he argued in 2016 and what is arguably fresh evidence.

[123] The second is that both the [Z] Committee decision and the ASCX decision are clear and direct in their conclusions but brief, to the point of being cursory, in their reasoning. I mean no criticism by that comment. It is clear to me that both Committees took a broad, principled view of the entire course of events and were untroubled in concluding that neither Ms FM nor Mr BY had done anything wrong, without seeing the need to delve into Mr DK's linguistic and interpretative dissection of the available written material.

[124] I also consider that Mr DK's very strong convictions are misguided or misconceived but, in the interests of achieving finality in this drawn-out saga, I consider it desirable to endeavour to leave Mr DK with the understanding that the material issues he raises have been properly explored, considered and addressed.

[125] Accordingly, I propose to express my fresh and objective view of his material perceptions and arguments under the broad categories set out in paragraph [45] above.

(b) Is there fresh evidence relating to the propriety of the professional conduct of Mr BY that Mr DK complained about in his first complaint?

[126] The fresh evidence Mr DK relies on comprises, in summary:

(a) The lawyer-to-lawyer correspondence about the September Letter;

(b) expert forensic handwriting evidence about the September Letter (and a second letter the same day to [Law firm B]); and

(c) photographic evidence of Mrs LK wearing her glasses.

[127] Mr DK's interpretations of, and arguments and submissions about, documentary evidence, [Law firm A]'s submissions and the [Z] and ASCX Committee decisions are not "evidence".

[128] I accept, as the ASCX did, that it is conceivable that the lawyer-to-lawyer correspondence surrounding the September Letter was not on the file reviewed by the [Z] Committee, although I think that is unlikely.

[129] In that regard, I note from the [Law firm A] letter of 21 March 2016 that the firm opened a separate file with the file name "Requests for info from [JR and ER]" and that this file was provided to the [Z] Committee.

[130] The forensic handwriting evidence relates to the September Letter. Although there is no reason to think forensic handwriting evidence could not have been obtained at the time and put before the [Z] Committee, I accept that the evidence itself post-dates the [Z] Committee hearing and will treat it as fresh evidence.

[131] The photographic evidence is date-stamped and clearly could have been produced to the [Z] Committee if Mr DK had thought to do so. I do not accept it as fresh evidence. I note in any event that the photograph Mr DK relies on[19], as he himself

[19] At [79] of his submissions to the ASCX dated 13 August 2021.

records[20], is electronically dated 12 November 2015, not the date of Mr BY's visit which was the following day, 13 November 2015. It therefore does not constitute evidence of anything occurring on 13 November 2015.

[132] Specifically, it does not constitute evidence that Mr BY misled or lied to the [Z] Committee about Mrs LK not having her glasses on 13 November 2015 and consequently his reading of the September Letter to her rather than giving it to her to read.

(c) What are the particulars of Mr BY's professional conduct that Mr DK is complaining about at this juncture and, in relation to each of those particulars:

(i) has the matter already been determined by the [Z] Committee; and

(ii) if not, did Mr BY fail to meet his professional obligations to Mrs LK?

Complaining "repeatedly"

[133] Mr DK made the same submission about his fresh complaint against Mr BY as he made about his fresh complaint against Ms FM, namely that he had not complained "repeatedly". I repeat the observations set out in paragraphs [104]–[105] above.

Partiality

[134] Although detailed individually and in numerous different ways in Mr DK's submissions, all his allegations of partiality, bias, conflict of interest, misleading conduct and dishonesty on Mr BY's part are different expressions of his central tenet that Mr BY was in some way on the Rs' side in Mr DK's contest with them for control of Mrs LK's affairs and therefore acting in their interests rather than Mrs LK's, as determined or defined by Mr DK.

[135] The [Z] Committee was satisfied that this was not so. The Disputes Tribunal Referee was satisfied that it was not so. The ASCX was satisfied that it was not so.

The September Letter

[136] Central to Mr DK's beliefs are the September Letter and the surrounding lawyer correspondence. The text of the handwritten September Letter, which was addressed to [Law firm A] for the attention of Mr BY, was as follows:

[20] At [80] of those submissions.

Please can you write a detailed account of our conversations and meetings in April and July 2015, as well as details of the legal documents I signed.

Regards

[LK]

N.B.
Please send to *[redacted],*
[redacted]
[redacted]

[LK]

Inappropriate paraphrasing

[137] Mr DK submits that the ASCX inappropriately paraphrased the content and substance of the September Letter in its decision. In making that statement, I am paraphrasing Mr DK's nine paragraphs expounding on the linguistic nuances and implications of the September Letter. In doing so, I seek to demonstrate that there is nothing inappropriate or careless about a decision-maker paraphrasing the substance of evidence or a submission. Doing so does not evidence a lack of understanding of the point that is being made.

[138] Mr DK persistently misconstrues the significance of the steps either taken or not taken by Mr BY in response to his receipt of the September Letter. It would not be unfair to Mr DK to characterise his interpretations of the subsequent course of events as having a conspiracy flavour to them that is unwarranted on an objective analysis of those events and of the evidence given about them.

[139] The material facts relating to the September Letter are that:

(a) The September Letter was received less than a month after Mrs LK had changed lawyers and after her files and documents had been delivered to her new lawyer, Mr CV;

(b) The letter had plainly, even to the untrained eye, not been written by Mrs LK, although she had apparently signed it and added the note at the bottom;

(c) As Mr DK points out, the letter made reference to a supposed meeting between Mrs LK and Mr BY in July 2015 that had apparently never occurred;

(d) The letter instructed that the requested "account" be given to a third party, the Rs, albeit that this instruction was in Mrs LK's handwriting;

(e) No doubt for all of the above reasons, as well as his knowledge of the manoeuvrings between Mr DK and the Rs, Mr BY considered the letter to be odd or, as he subsequently described it to the Disputes Tribunal Referee, "puzzling, unusual, strange and questionable";

(f) Consequently, he did not accept the instruction at face value and did not act upon it;

(g) Instead, he resolved to visit Mrs LK and verify the instructions;

(h) As the possible, if not probable, implication was spending chargeable time giving effect to an instruction of likely benefit to the Rs rather than to Mrs LK, and doing so a short time after he had effectively been sacked as her lawyer, he sought to ensure (as both the [Z] Committee and the ASCX found) that acting on the instruction would not be at Mrs LK's cost;

(i) Having eventually, almost two months after his firm received the letter, visited Mrs LK to verify the instruction, Mr BY did nothing to action the instruction in the September Letter;

(j) Further, his own advice to Mrs LK was that there was no need for her to provide information to the Rs, as evidenced by his contemporaneous records;

(k) To the extent that the September Letter might have constituted an attempt by the Rs to obtain information confidential to Mrs LK without her fully informed understanding of their purpose, which is undoubtedly possible, it was unsuccessful.

[140] On this issue, the various findings to date have been:

(a) By the [Z] Committee, that "the Committee does not consider that the serious allegations are supported by the material on the file".

(b) By the Disputes Tribunal, that:

> The purpose of Mr BY's meeting put forward by Mr DK has not been established and I am not satisfied that [[Law firm A]] managed things unreasonably. Overall, I am not satisfied that Mr BY's handling of the visit to Mrs LK was unreasonable or amounted to a breach of contract or the CGA, or amounted to misleading or deceptive conduct under the FTA. The

> explanations provided by Mr BY are reasonable and supported by his correspondence and file notes. Whilst Mr BY's account is disputed by Mr DK and differs from the written notes of Mrs LK, the claims made by Mr DK have not been established.

(c) By the ASCX, that:

> … there was no evidence that Mr BY misled the [Z] Committee 2 in his description of the purpose of his visit to Mrs LK on 13 November 2015. The Committee considered that Mr BY's descriptions of his actions were consistent with the information provided in the file.
>
> The Committee observed that having been advised by Mrs LK that she did not want him to act, Mr BY did nothing and therefore the Letter had no effect.

[141] I return at this point to the issue of the jurisdiction of this Office and repeat that any additional evidence produced at this juncture must be fresh, credible and cogent to warrant further inquiry.

[142] I accept that the evidence of the forensic document examiners is fresh evidence. It is not, however, fresh evidence of something that was not known or strongly suspected at the time, namely that Mrs LK did not write the letter but did sign it. There is no evidence that she did not intend to do so. Mr DK's submissions referring to the letter as a "fake" and a "forgery" are untenable.

[143] To the extent that the lawyer correspondence surrounding the September Letter might not have been considered by the [Z] Committee, it is neither credible nor cogent evidence of any of the alleged improper motivations and conduct advanced by Mr DK.

[144] On the contrary, the material is consistent with Mr BY taking a prudent, cautious and sceptical approach to the ostensible instructions he had received and, in doing so, demonstrating that he was concerned only for the interests of his client, or former client, Mrs LK.

[145] In that regard, there is one issue on which I differ from the ASCX. At paragraph [23(c)] of its decision, the ASCX expressed the view that "it was appropriate that Mr BY did not discuss the [September] letter with CV as the Letter appeared to contain new instructions".

[146] I accept this statement to be correct on a technical basis. The letter was addressed to [Law firm A] and instructed the firm, and specifically Mr BY, to do something. Again technically, the fact of the instruction was confidential to Mrs LK and it did of course relate to dealings between Mrs LK and [Law firm A] when they were her lawyers.

[147] The firm's submissions to the ASCX included the statement that "in the absence of instructions from Mrs LK to do so, it was not appropriate for Mr BY to contact Mr CV about the Letter given his duties of confidentiality to her".

[148] A less technical approach could well have been taken in the circumstances, as a proper expression of Mr BY's fiduciary duties. Context is important. In this instance, Mrs LK had, after many years, changed her lawyers just a month previously. One can well speculate that this was due to Mr DK's influence and Mr BY presumably did so. Be that as it may, Mr BY was clearly aware of the contest acting its way out between Mr DK and the Rs.

[149] Mr BY had received an ostensible written instruction that was odd (or any of the other expressions used by Mr BY himself [21]) on its face, an instruction that prompted him to proceed with scepticism and caution. Assertions of coercion and undue influence were sitting in the background. In my view, most lawyers in that situation would consider it permissible and appropriate to communicate with the client's new lawyer on a professional basis about the fact of having received the instruction.

[150] I emphasise that I do not consider there to be a "right and wrong" aspect to the matter and do not criticise Mr BY for the approach he took, based purely on client confidentiality. Rather, I observe that there are some occasions where lawyer-to-lawyer communication about the interests of a mutual client can be appropriate and beneficial.

[151] I would go so far as to say that I am surprised by the firm's apparently narrow focus on what it considered to be its confidentiality obligations in the circumstances and by Mr BY's decision not to contact Mr CV about the matter, assuming she was acting for Mrs LK.

[152] The inference I draw is that Mr BY might well have been concerned about the possibility that Mr CV might have been acting for Mr DK as well as Mrs LK and acting on his instructions rather than hers. In the context of claims of undue influence and the very recent change of solicitors, that would have been a reasonable inference for Mr BY to draw. If that was the case, Mr BY's caution was undoubtedly prudent.

Alleged breach of Rule 10.2

[153] On a related note, I find that Mr BY's act in meeting with Mrs LK without first contacting Mr CV did not constitute a breach of r 10.2 of the Rules, as asserted by Mr DK. Rule 10.2 provides that:

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[21] See [139e] above.

> A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer **in that matter** except as authorised in this rule (my emphasis).

[154] On the face of the September Letter, "the matter" which Mr BY was communicating directly with Mrs LK was her ostensible instruction directly to him to provide the requested "account" of her dealings with him and his firm at the relevant time.

[155] If the September Letter had been provided to him by Mr CV, it would have been improper for Mr BY to communicate directly with Mrs LK. The September Letter was in fact provided to him by [Law firm C], who Mr BY knew did not act for Mrs LK.

Failure to visit or contact Mrs LK promptly

[156] This submission appears to relate to a lack of urgency by Mr BY in responding to the concerns expressed by Mr DK on 29 June 2015 and/or the concerns expressed by Mrs LK on 22 June 2015. This matter has been considered and dealt with in the [Z] Committee decision.[22] I have no jurisdiction to reconsider it.

Unwelcome visit

[157] Mr DK submits that the ASCX's finding that Mr BY "met with Mrs LK on 13 November 2015 to establish her instructions" was "factually untrue" and that he "had an agenda to exonerate FM and [ER] and [JR] from coercion or undue influence".

[158] This allegation appears to have been advanced in some form before the [Z] Committee, which refers to the September Letter as being advanced to support an allegation by Mr DK "that Mr BY and Mrs ER colluded with each other to create the letter, in an attempt to legitimise the meeting that subsequently took place between Mr BY and Mrs LK on 13 November 2015".

[159] The [Z] Committee concluded that it "does not consider that the serious allegations are supported by the material on the file".

[160] I find that the matter of the November visit has already been determined by the [Z] Committee, that I have no jurisdiction to reconsider it and specifically that the content of the September Letter and the surrounding lawyer correspondence, which I have read, does not constitute cogent evidence requiring reconsideration of the fact of the visit.

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[22] At [35]–[38] of his submissions.

Conflict of interest

[161] Mr DK submits[23] that various items of correspondence and telephone conversations (to which Mr DK was not a party) established that Mr BY had a conflict of interest and that this had been ignored, presumably by the [Z] Committee.

[162] Again, this matter arises for consideration only because it is not absolutely certain, as acknowledged by [Law firm A] in their submissions, that the lawyer-to-lawyer correspondence in September 2015 concerning the September Letter was on the file provided to the [Z] Committee, although they had no reason to think it was not.

[163] I can find nothing in Mr DK's extensive submissions about the exchanges between Mr YC and Mr BY to indicate that Mr BY did anything other than decline to act on the ostensible instruction from Mrs LK until he had verified that instruction with her. Further, there is nothing in any of the material to suggest that he acted in the Rs' interests.

[164] I also specifically reject Mr DK's various submissions to the effect that, in deciding to visit Mrs LK, Mr BY was motivated by the supposed "profit" to be derived from doing so.

Alleged bias

[165] Mr DK asserts that Mr BY showed bias towards the Rs by not ensuring that capacity was assessed when the instructions were taken by Ms FM in April 2015 (Mr BY being on holiday at that time) but requiring capacity to be determined before acting on instructions to send Mrs LK's documentation to Mr CV.

[166] This is another of the several allegations made by Mr DK of partiality or bias on Mr BY's part in the contest between Mr DK and the Rs. Mr BY's only client was Mrs LK. He owed no obligations to Mr DK and no obligations to the Rs.

[167] Mr DK had taken Mr BY to task in late June 2015 for not, in his supervisory partner capacity, ensuring that Ms FM had Mrs LK's capacity assessed in April 2015. Mr DK having made that criticism on the basis that Mrs LK lacked capacity, it is somewhat ironic that he should then criticise Mr BY for taking a more cautious approach when next receiving instructions ostensibly from Mrs LK or in relation to her affairs.

[168] I have no jurisdiction to review aspects of the original complaint that have already been determined finally by the [Z] Committee. I nevertheless make the

[23] At [73] of his submissions.

observation that there is nothing in any of the material before me that was undisputedly before the [Z] Committee to indicate that Mr BY acted in any way and at any time other than in Mrs LK's interests.

Related submissions

[169] For clarity, I specifically reject Mr DK's related submissions that:

(a) The ASCX erred in stating that "Mr BY consequently met with Mrs LK on 13 November 2015 to establish her instructions" when, according to Mr DK, this was factually untrue.

(b) The ASCX erred in disregarding evidence that "Mr BY was working against Mrs LK's interests, was working for the Rs' interests and had a conflict of interest".

(c) New information proved that "Mr BY was not honest with the [Z] Committee" and "there is evidence that Mr BY lied to the [Z] Committee".

(d) The ASCX erred in finding "that there was nothing in the letter or accompanying correspondence with YC from [Law firm C] which indicated that Mr BY had acted inappropriately" when, according to Mr DK, Mr BY knew that the letter of instruction purporting to be from Mrs LK was a Rs' initiative, for the Rs' benefit, there were doubts as to Mrs LK's capacity and there were issues of undue influence.

(e) Mr BY knew he was interfering in a family dispute having been removed as Mrs LK's lawyer.

(f) Mr BY was improperly motivated by a desire to protect Ms FM and [Law firm A] from the danger arising from Ms FM's alleged misconduct in failing to establish Mrs LK's capacity.

(g) Mr BY attended on Mrs LK when he knew he "was not Mrs LK's lawyer and had been fired by Mrs LK for working for the Rs' interests and failing to visit her in hospital when she needed his protection and help".

(h) Mr BY was "working to oppose CV's actions against [JR]".

(i) Mr BY did not visit Mrs LK "to seek instructions" from her but to "try to obtain a supply of information … for the Rs".

(j) The ASCX erred in finding that "it was appropriate for Mr BY to be paid by the Rs" when, according to Mr DK, it was inappropriate and a conflict of interest for Mr BY "to be paid by the opposing party in an ongoing legal dispute" and it was also inappropriate for Mr BY "to keep such a financial agreement secret from Mrs LK" and "to make a secret agreement … on behalf of Mrs LK".

(k) Mr BY had acted in a conflict of interest by "trying to obtain a declaration from Mrs LK that the Rs had not pressured or placed undue influence on Mrs LK to obtain control of the K Family Trust, alter the Will or obtain her enduring Powers of Attorney".

(l) The ASCX erred in observing that "having been advised by Mrs LK that she did not want him to act, Mr BY did nothing therefore the [September] letter had no effect".

Change to the Will in April 2015

[170] Mr DK submits that at paragraphs [5]–[6] of its decision, the ASCX omitted to refer to a change made to Mrs LK's Will in the form of a codicil "in favour of" Mr JR. Mr DK does not explain the relevance of this to his complaint.

[171] Mr DK does explain, however, that "these changes were removed by [Mrs LK] after leaving hospital". If that is correct, it is difficult to discern how the short-lived change to the Will could have been "…an important part of … the litigation costing $100,000 that followed", as asserted by Mr DK, unless the litigation was in fact about the reversal of the April Will change in August 2015 at Mr DK's behest.

[172] In any event, the matter is irrelevant to the substance of Mr DK's second complaint, the ASCX's decision and this decision.

Omission of reference to Mrs LK's 22 June 2015 contact with [Law firm A]

[173] Mr DK submits that, in referring at paragraph [7] of its decision to his contact with [Law firm A] on 29 June 2015, the ASCX omitted to refer to Mrs LK's own contact with the firm on 22 June 2015, and that this evidenced either lack of understanding or bias on the part of the ASCX.

[174] This is an extraordinarily long bow that misses the mark. It is both impossible and inappropriate for any committee to make reference to every single communication or other item of evidence in determining a complaint. I consider this to be one of

numerous examples of Mr DK criticising the finest detail of process without addressing relevance or materiality to the outcome of the complaint.

[175] The concerns were apparently expressed by both Mrs LK and Mr DK. The outcome was that Mrs LK changed lawyers. Her documentation was provided firstly to her, her capacity was then assessed and her documentation was also provided to [Law firm B]. Nothing turns on this.

Engagement of Mr CV

[176] Mr DK submits that it is factually untrue that Mrs LK engaged Mr CV "as a consequence of correspondence". Mrs LK's reasons for changing lawyers are known only to Mrs LK, now deceased. The fact is that she changed lawyers. This has no bearing on the fresh complaint.

Omission of reference to Mrs LK's 25 November 2015 Will

[177] Mr DK submits that the ASCX "has omitted that [Mrs LK] changed her Will after [Mr BY's] unwelcome visit [of 13 November 2015]". The submission itself[24] makes no sense. Mr DK does not assert that Mr BY acted in relation to the change to the Will. I find that this does not constitute fresh evidence relating to the complaint.

[178] For clarity, the change to the Will that Mr DK refers to is in November 2015 and is not the change to the Will by way of a codicil that he refers to in April 2015 which, also according to Mr DK, was "reversed" after Mrs LK left hospital.

[179] Mr DK then refers[25] to "the changes to [Mrs LK's] Will (including **hundreds of thousands of dollars** in litigation over the Will) …" (his emphasis). No information is provided as to any connection there might be between Mr BY's conduct and the various changes Mrs LK made to her Will, apparently on three occasions between April and November 2015.

[180] I note that Mr DK includes in his submissions an extract from a file note of Mrs LK's lawyer at the time, Mr CV, to the effect that he cautioned her against the change to the Will she instructed him to make in November 2015 because it resulted in Mr DK, not Mrs ER, benefiting disproportionately from Mrs LK's estate.

[24] At paragraph [61].
[25] At paragraph [69].

[181] I note that Mr DK does not say that the High Court proceedings about coercion, undue influence and lack of capacity were brought by him against the Rs, rather than vice versa.

[182] Be that as it may, there is no evidence, let alone fresh evidence, linking Mr BY's communications with Mrs LK in November 2015 with the issues in the High Court proceedings, whatever they might have been. I observe that, as with Ms FM, if Mr BY's conduct had been relevant to those proceedings, then he would surely have been required to give evidence.

[183] Mr DK's submissions to the ASCX in this regard are particularly perplexing. At paragraphs [153]–[158], in summary:

(a) Mr DK refers to Mr BY's 17 November 2015 letter in which Mr BY recorded that "I advised that you are free to change your Will at any time" and that "we also discussed your Will and your concerns about including [JR] as an executor" and that "if you want to do so, I recommend that you contact CV".

(b) Mr DK then states that "in fact, my mother changed her Will in a perfectly reasonable manner to allow me more responsibility in the distribution of her Estate and the responsibility and trust to be fair to my sister".

[184] Mr DK then refers Mr CV's 25 November 2015 file note in which, among other things, Mr CV recorded that "she confirmed [D] as the sole executor" and that "I pointed out to her that this gave [D] two properties and [E] one. I said [E] may challenge the Will under the Family Protection Act as she didn't receive the same amount as [D]". Mr CV then recorded that "she seemed to me to know what she wanted and what she was doing".

[185] Mr DK then submits that "this simple change still brought grief and colossal cost upon both the [K] and [R] families". Mr DK does not explain how his mother's "perfectly reasonable" change to her Will resulted in such grief and colossal cost.

[186] What puzzles me is how Mr BY's recommendation to Mrs LK that she consult Mr CV about her concerns about Mr JR and about changing her Will could possibly support any complaint by Mr DK of improper conduct on Mr BY's part.

[187] It seems that CV then took instructions from Mrs LK after establishing she had capacity. The outcome was that Mrs LK then changed her Will in favour of Mr DK as to

both control of her estate and Mr DK benefiting disproportionately from it in comparison with Mrs ER.

[188] Yet Mr DK makes a complaint about Mr BY. This makes absolutely no sense.

Submissions as to errors of fact, omission or interpretation made by the ASCX

[189] I reiterate that this decision represents the outcome of my fresh analysis of all the evidence and is not dependent on any analysis of the ASCX being right or wrong on any issue. Nevertheless, I consider that Mr DK has misunderstood some of the ASCX's findings and it is appropriate to clarify those matters.

[190] Mr DK submits that the ASCX erred in stating that "Mr BY advised that he had to discuss it with Mrs LK as Mr DK was no longer the holder of the EPA" when Mr DK's complaint was in fact that Mr BY did not discuss the relevant matter with Mrs LK but instead pretended he could not reach Mrs LK by phone, or travel to the hospital to see her in person.

[191] The submission appears to relate to the matter of Mr BY not visiting or contacting Mrs LK promptly. It has been dealt with in the [Z] Committee decision.

[192] Mr DK submits that the ASCX erred in finding that [Law firm A] were requested on 12 September 2015 to report to Mrs LK on all work carried out between April and June 2015 when in fact two letters were written on 12 September 2015, one to Mr BY and the other to Mrs LK's new lawyer, Mr CV, both falsely purporting to be Mrs LK's instructions.

[193] The fact that a separate letter was written on the same day to Mr CV is irrelevant to Mr DK's complaint. As already discussed, Mr DK's characterisation of the September Letter as "falsely purporting to be Mrs LK's instructions" is not supportable on the evidence.

[194] Mr DK submits that the ASCX erred in stating that [Law firm A] was requested to "report" to Mrs LK when in fact the firm was asked for an "account". Nothing turns on any fine linguistic distinction between a "report" and an "account".

[195] Mr DK submits that the ASCX erred in stating that the September Letter asked for an account of "all work carried out between April and June 2015" when in fact it asked for an account of "our conversations and meetings in April and July 2015" and that the letter also asked for "details of the legal documents I signed". I have already commented on the legitimacy of paraphrasing when referring to the substance of evidence.

Duress/undue influence/coercion

[196] Mr DK submits that the ASCX erred in omitting from its consideration the issues of alleged undue influence and coercion. I reiterate my comments at paragraphs [106]- [112] and [177] to [188] above on that subject.

Availability of Mr BY's file

[197] Mr DK submits that the ASCX's decision was procedurally unsound because the files of Mr BY that the ASCX ordered to be produced should have been made available to Mr DK.

[198] Where a lawyer's file has been produced, it is not usual for a standards committee to provide a copy of it to the complainant.

[199] In this instance, Mr DK could have required either Mr BY or Mr CV to provide him with a copy of the relevant files at any time from 2015 onwards. He was apparently Mrs LK's attorney before her death. He has been her executor since probate was granted. He has had ample opportunity to obtain and review the files.

Other submissions

[200] The above is not a complete list of Mr DK's numerous submissions about Mr BY's alleged improper motivations, purpose and conduct in his dealings with Mrs LK. This does not indicate that I have not read and considered all such submissions on that general subject. I have done so and I reject them.

(d) Does any failure by Mr BY to meet his professional obligations to Mrs LK warrant a disciplinary response?

[201] I find that Mr BY did not fail to meet his professional obligations to Mrs LK. Accordingly, this question falls away.

(e) Are there grounds for awarding compensation to the [LK] Estate arising from the conduct of Mr BY?

[202] No.

Decision

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

Publication

[203] [Law firm A] is permitted to disclose a copy of this decision to its insurers and/or for the purposes of any relevant court proceeding relating in any way to the course of events and/or Mrs LK's estate.

[204] 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.

DATED this 31ST day of July 2023

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Fraser 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:

Mr DK as the Applicant
Mr BY and Ms FM as the Respondents
Ms QT as the Respondents Representative
[Law firm A] and all partners within the firm as a related entity/related persons
[Area] Standards Committee [X]
New Zealand Law Society