LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 092

Ref: LCRO 24/2023

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	**RD** Applicant
AND	**KE and PS** Respondents

DECISION

The names and identifying factors in this decision have been changed.

Introduction

[1] In August 2021, Mr RD (RD) made a complaint to the New Zealand Law Society Lawyers Complaints Service (NZLS) about the professional conduct of Mr KE and Ms PS.

[2] RD's complaint was referred to the [Area] Standards Committee [X] (the Committee), which inquired into it.

[3] In a decision in January 2023, the Committee decided to take no further action in respect of the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), on the basis that any further action was unnecessary and inappropriate.

[4] RD seeks review of the Committee's decision.

Background

[5] Much of the background recorded below is not directly relevant to RD's complaint but I record it to provide the context in which the complaint was made and the underlying concerns that prompted it.

[6] RD is one of three siblings. His sister is Ms WD (WD) and his brother is Mr UD (UD).

[7] Their parents, Mr BD (BD) and Mrs MD (MD), lived in a home at [Road A], [Suburb A]. The home was owned by the D Family Trust. She had Alzheimer's disease and he had Parkinson's disease.

[8] The [Suburb A] home was sold in 2015 and Mr BD and Mrs MD moved in with WD and her partner, Mr AZ, in a property they had bought six months earlier in [Suburb B].

[9] RD initially recorded his belief that his parents contributed about $450,000[1] from the proceeds of sale of the [Suburb A] property to the $1,000,000 purchase price of the [Suburb B] property.

[10] The lawyers used for these transactions were a firm called [Law firm] in [redacted].[2] Mr VB was the sole principal of that firm. Ms PS was an employed solicitor.

[11] Prior to the sale of the [Suburb A] property, the trustees of the D Family Trust were BD, WD and Ms PS.[3] RD says that Ms PS "was the third trustee on the family trust and her name was on the house title on [Road A], note she had these removed days before my parents' [Road A] house sold".

[12] Ms PS acted on the sale of that home and on the purchase of the [Suburb B] property by WD and Mr AZ. RD believed that some of the proceeds of the sale of the [Suburb A] property had been applied indirectly in the purchase of the [Suburb B] property.

[13] The implication of the trust's ownership of the [Suburb A] property is that any proceeds of sale that might have been used towards the purchase of the [Suburb B] property were trust funds.

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[1] RD later quantified the exact figure as $442,910.
[2] There is one reference in the materials to the firm being based in [redacted].
[3] File note of IY (24 May 2017).

[14] There is neither a trust deed nor any other document evidencing the constitution of the trust in evidence, although it appears from the correspondence that RD's lawyer does hold a copy of the trust deed. In its decision, the Committee stated its understanding that WD and UD were trustees of the D Family Trust.[4]

[15] MD died in 2017. Also in 2017, according to RD, BD "was alarmed to find he had little money left in his bank account and was not on the property title". He consulted a different lawyer, Ms IY, of [Suburb B]. Ms IY drafted for him a document described as a "codicil" to his Will, which he signed.

[16] Clause 1 of the codicil starts with the rather problematic statement "I am not sure if or when I have made a Will". It then refers to RD's belief that "a deed of family arrangement or something similar" had been drafted relating to the purchase of the [Suburb B] property.

[17] In clause 2, BD appointed UD as his sole executor and trustee.

[18] In clause 5, BD recorded the $450,000 cash contribution to the [Suburb B] purchase as well as a contribution that he believed was $200,000 from his wife's brother, GQ, in [redacted], "together with the mortgage in the name of my daughter WD and her partner AZ".

[19] In clause 6, BD recorded his awareness "that the title is in 4/5 in WD's name and 1/5 in her partner's name". This is or was factually correct.

[20] In clause 7, he expressed his "sincere wish that my sons are to receive $100,000 each from my estate". In clause 8, he stated: "I urge my daughter WD and her partner AZ to either raise sufficient funds to make the payments to RD and UD or sell the house to make those payments".

[21] In clause 9, BD stated his awareness "that the documentation here might not be in the format required by law" but referred to the fact that he and his wife were living with WD and stated his concern about not wanting to "rock the boat".

[22] Mr VB died. Mr KE had been Mr VB's practice attorney. In his capacity as practice attorney, Mr KE came into possession of the client files of [Law firm]. Ms PS became an employed solicitor at [Law firm C].

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[4] As discussed later in this decision, the Committee has had access to file information that is not available to this Office.

[23] It is not suggested in the complaint that Mr KE had any role in the property transactions or legal arrangements that have given rise to RD's concerns about WD's use of their father's, or the D Family Trust's, property and money.

[24] BD died in July 2020. It seems that he probably did have a Will. In an email to the NZLS on 22 October 2021, RD refers to "… a handwritten Will that WD has supplied that just happens to include her son as a beneficiary".

[25] In another email to the NZLS on 2 December 2021, RD stated that:

> After KE, WD went to [Law firm D] and is now with LW. According to [Law firm E], the only testamentary documents they had was a joint handwritten Will dated 2006 and the Codicil. This means they were not given the files and it is highly likely that LW also does not have them.

[26] Neither Will has been produced in evidence. I infer that RD does have a copy of the Will referred to in his 22 October 2021 email but not a copy of the 2006 "joint handwritten Will", assuming they are different. It is unclear whether the codicil referred to in the above extract is the same as the 2017 codicil.

[27] RD subsequently clarified his understanding of the financial arrangements regarding the [Suburb A] and [Suburb B] transactions. In an email to the NZLS on 1 February 2022, he stated that:

> [The [Suburb B] property] was purchased [in] [redacted] for $999,000, WD was loaned $800,000 from GQ on the proviso that when my parents' house sold in [Road A], the proceeds of the sale was sent to him as my parents' share of the house. (sic). My parents' house in [Road A] didn't sell until August 2015 for $550,000, this was then paid to GQ (my parents owed GQ $107,089 so the actual contribution was $442,910). …I have all my father's bank statements and no funds entered his account from his house sale.

[28] Mr KE later recorded in correspondence his understanding that WD was also BD's general attorney. No power of attorney document is in evidence. It appears that WD had also been appointed BD's enduring attorney for property. It is unclear to me when this occurred, as only the first page of this document is in evidence.

[29] RD says that, after gaining access to his father's banking records, he was able to track over $100,000 of expenditure by WD that he says was for WD and her partner, AZ's, benefit. He prepared a schedule distinguishing that expenditure[5] from other expenditure that he considered was arguably for Mr BD and Mrs MD's benefit as well.[6]

[5] Approximately $111,000.
[6] Approximately $89,000.

[30] A file note made by Ms IY on 29 May 2017 refers to alterations that were made to the [Suburb B] property to accommodate Mr BD and Mrs MD's living arrangements. It also refers to the installation of [redacted].

[31] The implication of these references is that BD was concerned that his money or the D Family Trust money might have been spent on these improvements, although this is not expressly stated in the file note.

[32] RD naturally wished to establish whether or not his father's testamentary wishes could be realised, either under the "sincere wish" expressed in the codicil or under the Will that WD had told him about.

[33] To achieve that, he had to have someone with legal authority with whom he could engage. That person would be the executor if the estate had, or should have had, realisable assets. Alternatively, it would be the trustees of the D Family Trust.

[34] RD initially sought to obtain relevant information directly from Ms PS in June 2020. This was a telephone discussion of some eight and a half minutes' duration. Regarding this conversation, RD says that he:

> … asked her for the house sale documents and will. She told me she was away from home and the documents were in storage and that she would find them and supply them when she got home. She never got back to me. I then found out VB had died and PS was working with KE ([Law firm C]) he was also WD's Lawyer.

[35] In later correspondence to the NZLS, RD clarified that "when she got home" meant "when she got home from holiday". RD's summary of this conversation is not disputed by Ms PS.

[36] RD next instructed Mr SK of [Law firm F] to make enquiries of [Law firm C]. On 30 November 2020, Mr KE wrote to Mr SK relevantly that:

> **BD estate**
>
> I confirm I am meeting with WD and UD on Wednesday and can then release documents to you.
>
> Things have been delayed as the clients were originally [Law firm] clients and PS, the solicitor acting, has been in hospital with childbirth.
>
> I understand the additional files are now on their way to me…

[37] No such documents were released by Mr KE. The implication is that he was instructed by WD and UD not to do so, although RD says that UD did not attend the meeting.

[38] RD then instructed Mr TZ of [Law firm B] to pursue enquiries on his behalf with [Law firm C]. On 23 February 2021, that firm wrote to Mr KE by email attaching a copy of the 2017 codicil and of the trust deed for the D Family Trust and requesting a copy of all files held by [Law firm C] relating to the affairs of the late BD in electronic form if possible. It seems there were further, unspecified "follow ups" from [Law firm B].

[39] Mr KE did not respond either to the letter of 23 February 2021 or to the follow up enquiries until late April 2021.

[40] [Law firm B] wrote again to Mr KE on 21 April 2021. This time, Mr TZ stated his understanding that Mr KE acted for WD and asked him to advise whether he also acted for UD. He set out his understanding of various property transactions, based on information from both RD and UD, and set out RD's indicative legal position in relation to potential claims against WD.

[41] Mr TZ recorded his disappointment that Mr KE had not responded to [Law firm B]'s letter in February 2021 and the subsequent follow ups, as well as not responding to Mr SK's enquiry of November 2020.[7]

[42] He further indicated he had instructions to commence proceedings under the Administration Act 1969 and requested copies of conveyancing files regarding four property transactions between 2008 and 2015 on which he stated Ms PS had acted, as well as copies of other files, deeds, Wills and enduring powers of attorney.

[43] Mr KE responded briefly by email on 22 April 2021 stating:

> I advise that I no longer act for WD or UD.
>
> I have forwarded your letter directly to her.
>
> I have suggested she contact you directly.
>
> Kind regards

[44] After receiving Mr TZ's 23 February 2021 letter, Mr KE had sought instructions from his client, WD. Mr KE produced in evidence an "authority to uplift" document dated 25 March 2021 signed by WD. This document stated as follows:

> **Authority to uplift**
>
> [Law firm C] Ltd
> [redacted]
>
> **Re: WD**

[7] Mr KE had in fact initially responded. See [36] above. It seems he had not subsequently communicated with Mr SK.

> I confirm that I have uplifted the below files/documents from [Law firm C] Limited:
>
> - Sale of [Road A], [Suburb A] – [Law firm]
> - Purchase [redacted], [Suburb B] – [Law firm]
> - File #[redacted] – Relationship Property File
> - File [redacted] – Estate of BD File
>
> Signed on this 25 day of March 2021
> (Sgd) WD
> WD
>
> P.s. please note for expediency we have not retained copies of these files.

[45] It is evident from the postscript that Mr KE prepared the authority to uplift himself.

The Complaint

[46] The complaint related mainly to the alleged failure by Mr KE and Ms PS to deliver to RD or his lawyers, first Mr SK and then Mr TZ, files relating to the BD's legal affairs.

[47] RD considered that he needed access to the information on the files to assist him to build a case against WD relating to her alleged inappropriate application of property and money belonging to their father and/or to a family trust, the D Family Trust, for her own benefit.

[48] RD also complained about Ms PS acting in a conflict of interest situation as between various [D Family] members or entities, or at least asked the Standards Committee to determine whether she had done so.

[49] The primary remedy RD sought was for all relevant files and documents requested by his lawyer, Mr TZ, to be provided by Mr KE's firm, [Law firm C]. He also sought compensation for the expense he had incurred in trying unsuccessfully to get access to the file information.

[50] Mr KE and Ms PS were invited to respond to the complaint. In his initial response in October 2021 explaining the circumstances of WD's uplifting of the files he held, Mr KE recorded that:

> Up until this time we had navigated a confusing path in regard to old files and the financial involvement of overseas relatives who were asked to provide information regarding their funding.

> My initial instructions were from WD and her brother, UD, and with whom I had 2 meetings. It was apparent that Letters of Administration would be the appropriate path in the absence of a Will, however it was yet to be determined the extent of the Estate and initial enquiry suggested that the estate may not be sufficient to require Letters of Administration.
>
> We attempted to progress matters in regard to the fact that there was no Will of the deceased and also the added confusion of the claim of an existing Codicil without the apparent existence of a Will.
>
> I communicated on 3 occasions with other lawyers after advising the parties to direct their enquiry through an appropriate appointed counsel. The last correspondence was with [Law firm B] on the 22 April 2021 with Mr TZ advising that we no longer acted since the uplift dated 25 March 2021.

[51] Mr KE also recorded his understanding that WD "was obtaining advice from both the appointed women's refuge lawyer and LW". Mr LW is a barrister who specialises principally in relationship property law.

[52] Ms PS's sole contribution to the written evidence before the Standards Committee and this Office has been a single, one-paragraph letter in which she stated:

> Whilst my involvement with [Law firm] was in the capacity of staff solicitor I fully recall that WD assisted her father in all matters as she was caring for him and in the course of my work I met, during appointments they had with VB, both WD and her father on numerous occasions.

The Standards Committee's inquiry

[53] In December 2021, the Committee issued an order for production of documents, pursuant to s 147 of the Act, to Ms PS and Mr KE seeking from them, in summary:

(a) A copy of the authority to uplift files from [Law firm C];

(b) Electronic copies of the documents uplifted;

(c) An electronic copy of the conveyancing file regarding the purchase of the [Suburb A] property in 2008;

(d) An electronic copy of the conveyancing file regarding the sale of a property in [Town A] in 2009;

(e) An electronic copy of the conveyancing file regarding the sale of the [Road A], [Suburb A] property in 2015;

(f) A copy of the conveyancing file for the purchase of the [Suburb B] property in 2015;

(g) Any other files, deeds or correspondence regarding any arrangements reached concerning the [Road A] ([Suburb A]) and/or [Suburb B] properties;

(h) A copy of any Wills held for MD and BD;

(i) Copies of all enduring powers of attorney for MD and BD;

(j) All documents in relation to discussions, correspondence and assistance provided to Ms IY in relation to the preparation of the 2017 codicil.

[54] In reply, to that order, Mr KE, after referring to his general explanation of 12 October 2021, relevantly stated as follows:

> An uplift was signed by WD on 25th day of March 2021. The files simply contained files given to me by WD and also [Law firm]. In addition, her personal files were included. …
>
> All previous work enquired about was undertaken by [Law firm] by the principal VB who has sadly passed away.
>
> I understand from PK[8] all files were kept manually and in regards to 2008/2009 conveyancing files, I expect they have been destroyed after the 7/8 year requirement. Any files obtained from [Law firm] were provided to WD with the uplift.

[55] The implication of his reference to the files being kept "manually" was that there were no electronic file records.

[56] The Committee also sought a copy of Ms IY's file. Her file was duly provided. The correspondence on the file clearly evidences BD's concerns about ownership of the [Suburb B] property and his belief about his financial interest in it, as well as about his wish to make financial provision for RD and UD.

[57] Ms IY took comprehensive file notes of her attendances on BD and gave him very clear written advice about the legal position once she had researched it and about steps he might be able to take to make financial provision for RD and UD.

[58] In February 2022, the Committee also wrote to WD referring to the four files she uplifted from [Law firm C] on 25 March 2021 and asking her for copies of them. In doing so, it stated that "the files would be kept confidential for the purposes of the Committee's investigation under the provisions of the Lawyers and Conveyancers Act 2006".

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[8] PK is PS. She was married to Mr VB.

[59] The provisions of the Act that the Committee was referring to are not stated and are not obvious. The Act does not constrain a Committee from disclosing information for the purposes of its inquiry.

[60] Also in February 2022, the Committee sent a further information request to Ms PS and Mr KE for:

(a) An explanation as to how they believed WD was entitled to uplift the four specified files "when it appears that she was not an executor or court appointed administrator of BD's estate";

(b) Copies of all documents relating to BD and MD that [Law firm C] possessed, including all trust account records and ledgers recording the deposits and receipts for the four identified files, particularly the sale of the [Suburb A] property and the purchase of the [Suburb B] property;

(c) If the firm did not possess such documents, an explanation why the firm had not retained them and confirmation whether any other party held them.

[61] The Committee also specifically requested that Ms PS and Mr KE respond separately to the letter and to all future enquiries by the Committee given that their positions were materially different.

[62] Ms PS's brief response to this request, quoted at [54] above, could be seen as deflective. In fairness to her, however, the Committee's 17 February 2022 request related to the provision of documents, not to the primary complaint against her which related to conflict of interest in potentially having acted for different clients with conflicting interests in relation to the various property transactions specified in the Committee's original information request.

[63] In relation to the documentation requests, Mr KE replied as follows:

(a)(i) & (ii) These files came from [Law firm] and were uplifted by WD per the uplift letter provided earlier.

(a)(iii) This was WD's personal file.

(a)(iv) This was the file relating to her initial contact with us and the invoice for our initial work ($776.25) was invoiced to her and part paid (ledger and invoice attached).

(b) The applicable ledger from [Law firm] and our ledger for the initial services are attached.

[64] Mr KE further recorded that:

> We were initially engaged by WD and her brother as noted in my earlier letter. As can be seen from our invoice previously supplied and attached here again in reference, our involvement was minimal and equated to approximately 2 hours of attendances to the estate matter.
>
> WD had been caring for her father for some 14 years and was fully involved in assisting in matters concerning him and the property transactions conducted by [Law firm]. In addition, I understand that WD was appointed attorney for both her mother and father whilst they were alive.

[65] Mr KE also stated that he had responded on behalf of both himself and Ms PS because "… requests made upon [Ms PS] as staff solicitor for [Law firm] or for [Law firm C] would seem inappropriate as any complaint should be directed to the law firm involved and not the staff". I observe in passing that there is no statutory, procedural or ethical basis for that comment.

[66] Of material significance to RD's enquiries but not to this review, Mr KE provided a copy of a handwritten [Law firm] trust account ledger card, number [redacted], for the D Family Trust covering the period from June 2008 to September 2015. The ledger card records three property transactions in 2008, 2009 and 2015 respectively.

[67] The ledger card evidences that the entire net proceeds of the sale by the trust of the [Town A] property in 2009 ($286,435.95) and of the [Suburb A] property in 2015 ($547,621.49) were applied in payment of sums owing to Mrs EZ as mortgagee, a total sum of $834,057.44, both payments being made "direct by bank".

[68] The ledger card shows a nil balance as at September 2015.

[69] A second [Law firm] ledger card, number [redacted], was also provided. This appears to have been originally in the name of "D Family Trust" as the client, with that client name having been crossed out and replaced by "[redacted]". The transactions recorded on it relate to the [Suburb B] property purchase.

[70] The card records a receipt and payment of $99,900 in March 2015, the receipt of that sum being "By Bank A (WD)". For the settlement of the purchase in April 2015, the ledger card records a receipt of $901,619.56 "By Bank A ($260,000 advance + own funds)".

[71] I have referred to the above details of the Committee's inquiry process and the information obtained as a result of it for three reasons. The first is to make clear that the Committee has used its inquisitorial powers and done its level best to respond to the underlying substance of RD's concerns, which are essentially about access to information about his parents' property transactions.

[72] The second reason is that the transactions recorded on the ledger cards appear to evidence that there has been no flow of funds from the [Suburb A] property sale via the D Family Trust to the purchase of the [Suburb B] property, at least not directly.

[73] Ms IY's file notes of her instructions from BD as well as the 2017 codicil clearly record BD's belief about the fact and amount of his financial interest in the [Suburb B] property. This appears to be the primary basis of RD's similar belief, although his lawyer's April 2021 letter to Mr KE also refers to information from UD. On the basis of the available records, the factual basis for that belief must be uncertain.

[74] The third reason is that, on the basis of the available evidence, it is unclear to me why anyone would consider or presume that the files recorded in the authority to uplift document belonged to the estate of BD.

[75] As noted at paragraph [58], the NZLS wrote to WD asking for the files. It seems that WD then delivered possession of the files she had uplifted to Mr LW. Mr LW then provided some of them to the Committee for the purposes of its inquiry.[9]

[76] The Committee records available to me do not include any description of the files it received from Mr LW. Nor do they include any reference to information contained on those files that the Committee took into consideration in reaching its decision, other than the trust account ledger cards.

[77] By letter dated 3 June 2022, Mr KE advised the Committee as follows:

> I have reviewed the period from 24 February 2021 being the date I received the notification from [Law firm B] that they were acting for RD. It would appear to be a confusion of this initial date as seen from the attached.
>
> Following this I communicated with WD to discuss matters. She at the time was being assisted by Women's Refuge as a result of domestic matters, so there was some delay in obtaining instructions.
>
> At this point due to her difficult position re. funds it was proposed that she engage a lawyer that could provide legal aid assistance. Approximately mid-March it was decided she was to engage an alternative lawyer and a file was prepared for upliftment and I ceased to act for her.
>
> The file was awaiting payment but finally released to WD to take to her new lawyer.
>
> [Law firm B] was notified on 23 April by return letter that I no longer acted for her.
>
> It is normal practice that even while we await instructions, we acknowledge this and the receipt of correspondence from the other party's lawyer. Unfortunately, I was off work and hospitalised mid-March so a courtesy letter may have been overlooked.

[9] I presume these excluded WD's own relationship property file.

[78] A sub-committee of the Committee then interviewed Ms PS and Mr KE. I will refer to this interview later in this decision.

[79] Having conducted its inquiry, the Committee resolved to return the files into the possession of Mr KE via Mr LW. It is unclear to me why the Committee thought that would occur. There is no suggestion on the file that Mr KE was Mr LW's instructing solicitor.

[80] In any event, Mr LW declined to accept custody of the files, apparently on the basis that his client, WD, was not entitled to their possession and that the files belonged to BD's estate. He is recorded in a file note of the NZLS as suggesting that the files should be returned to [Law firm C].

[81] The Committee then gave custody of the files to the NZLS. I presume this was on the basis that [Law firm C] no longer acted for any relevant client. My understanding is therefore that the files are currently in the custody, by default, of the Lawyers Complaints Service.

The Standards Committee's decision

[82] The Committee considered the issues arising from the complaint to be:

(a) Whether Ms PS was acting under a conflict of interest in acting for BD and/or WD, in her employment as a solicitor at [Law firm] and subsequently at [Law firm C].

(b) Whether Mr KE owed any professional duties to RD (including duties to respond to correspondence) and if so:

(i) Whether Mr KE breached those professional duties; and/or

(ii) Whether any such breaches reached a threshold that requires a disciplinary response.

[83] In relation to the first issue, the Committee states that it was advised by Ms PS that she worked as an assistant solicitor on BD's files while she worked at [Law firm] and did not have primary conduct of his or WD's files, and that at no time since working at [Law firm C] had she had substantive involvement with BD's estate files.

[84] There is no evidence before me of the basis for the first statement. The second statement is supported by Mr KE's written evidence.

[85] The Committee resolved that it was satisfied that Ms PS had not worked under a conflict of interest either at [Law firm] or at [Law firm C] and there were therefore no professional conduct concerns that arose in relation to that issue.

[86] In relation to whether Mr KE owed any professional duties to RD, the Committee considered that the issue could be broken down into two sub-issues:

(a) Whether Mr KE had the requisite authority to share estate information with RD in response to RD's requests; and

(b) Whether Mr KE was under a duty as a lawyer to respond to reasonable inquiries from other lawyers (including RD's lawyer).

[87] In relation to the first sub-issue, the Committee decided that Mr KE was not authorised to share the estate documents and associated information with RD and that the sharing of any such information was the role and responsibility of the estate's executor.

[88] In relation to the second sub-issue, the Committee expressed itself in the following terms:[10]

> … the Committee accepted that it was not good professional practice for Mr KE not to have responded to Mr SK's letter and then to have provided a delayed response to [Law firm B]'s correspondence.
>
> The Committee noted that Mr KE had inherited another lawyer's files and had been placed in the middle of a very difficult and delicate family dynamic. Whilst it was understandable that Mr KE may not have known how to respond to BD's lawyers, in light of the legal and factual complexities of the matter before him, that did not excuse him of his wider duty as a lawyer to maintain standards of professionalism under Rule 10, of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("RCCC").
>
> The Committee concluded that whilst Mr KE should have responded to RD's lawyers' enquiries, Mr KE was not under a duty to respond to BD's lawyers' correspondence quickly; sometimes delays happen in legal practice and not all delays automatically necessitate a disciplinary finding against a legal practitioner.

[89] On that basis, the Committee decided to take no further action in respect of the complaint. It concluded its decision with the following comment:[11]

> The Committee, which has spent significant time and resource trying to establish the background facts to this complex case, noted RD's clear and understandable frustration in trying to establish his entitlement as a beneficiary of his father's Estate. However, the Committee also noted that RD's complaint appeared to be predicated on an incorrect assumption that he was entitled to receive information relating to his father's Estate. The Committee concluded that the correct and

[10] Standards Committee determination (26 January 2023) at [17]–[19].
[11] At [22].

> proper forum for RD's enquiries regarding his father's Estate was through the court system.

[90] The Committee's decision is dated 26 January 2023. Having considered all the information before it, the Committee resolved that it was satisfied that Mr KE's conduct in the circumstances did not reach a threshold which warranted a disciplinary response.

[91] The Committee described Mr KE as "simply the lawyer who, due to the passing of Mr VB, held the estate documents". It considered that Mr KE was correct not to share information relating to the D Family Trust and BD's estate with RD.

Application for review

[92] In his application for review, RD raises various specific errors in the Committee's decision. First, he states that the Committee was incorrect to state that WD and UD were both nominated executors under BD's Will, that only UD is named as executor and trustee, not WD, and that UD does not want to be executor and will not perform the role.

[93] The evidential basis on which the Committee made its statement is unclear to me. There is no copy of a Will on the Standards Committee file provided to this Office. It is possible that a copy of a Will was on the files made available to the Committee for the purposes of its inquiry.

[94] RD draws attention to an incorrect statement by the Committee in paragraph [7] of its decision that Mr KE replied to Mr TZ "advising him that he was no longer WD's lawyer and that WD had uplifted her father's legal files, including the estate documents, from [Law firm C] on 25 March 2021".

[95] RD is correct. Mr KE's email to Mr TZ of 22 April 2021 made no reference to WD uplifting any files and no reference to the estate documents.

[96] RD draws attention to the fact that in his correspondence with the NZLS, he expressed his concerns about the documents being given to WD and says that:

> If we had known back in 25/03/2021 I would not [have] spent thousands of dollars searching for them, unfortunately WD has been convicted of fraud in the past and uses different names, so as I mentioned as to [the] Law Society, how do I know the files are now fully intact.

[97] RD also refers to the Committee's statement at paragraph [22] of its decision that he, RD, had an incorrect assumption that he was entitled to receive information relating to his father's estate and asks "… how was WD entitled to receive this information?".

[98] As to the outcome he seeks from the review, RD says that:

> I have now spent over $20,000 and no longer can afford starting again and going through the court system. I would like to be compensated for the money I have spent searching for the files that I was not told had been given to WD. I would like to see my father's files, I don't think I should have to pay for whatever it takes for me to see these files as they may not now be fully intact because of KE's actions.

[99] In subsequent correspondence to this Office, RD stated:

> With regards to the receipt of the Standards Committee file, I presume the file will include my Father's estate files currently held by the Law Society. When I last spoke to [redacted] she mentioned the Standards Committee were not sure what to do with these files and were considering sending them to KE. My Fathers files are part of the review so please make sure they have been retained and are part of the Standards Committee file.

Review on the papers

[100] 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. The parties have agreed to that course of action.

[101] 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

[102] 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.
>
> 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" …

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

> … 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.

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

> 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.

[104] 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.

Procedural directions

[105] After an initial appraisal of RD's application to identify any relevant procedural issues, I issued a Minute to the parties. This was to make clear, in summary, the following things:

(a) Regardless of the outcome of the review, I had no power to direct Mr KE to release to RD the file information that Mr KE no longer held;

(b) Again, regardless of the outcome of the review, I had no power to direct the NZLS to release to RD information contained on the files that had been left in its custody by default as a result of the course of events explained in the background section of this decision;

(c) This Office is not a Court and has no power to determine legal disputes or issues of law that might lie between RD and his siblings that are properly within the jurisdiction of the Court;

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

(d) I did not intend to listen to a recording made of an interview conducted by the Standards Committee with Ms PS and Mr KE in the course of its inquiry and, for that reason, I made clear to Ms PS and Mr KE that they had opportunity to provide to this Office in writing any information relating to the complaint that either of them might have given to the Committee in the course of that interview.

[106] The reason for the first three matters referred to in the Minute is that I did not wish RD to have unrealistic expectations about the powers of this Office and the outcome of his review application in the context of the frustrations he had experienced in accessing the information about his parents' legal affairs.

[107] My concern about the fourth matter was that the Committee had recorded the interview with Ms PS and Mr KE and then resolved not to provide a copy of that recording to RD. It did so on the basis of legal advice from the NZLS. The legal advice itself is not available to me, although the Committee's minutes indicate its general nature and that the advice traversed issues of:

(a) compliance with the rules of natural justice;

(b) solicitor-client privilege;

(c) the potential application of the Privacy Act.

[108] The difficulty the Committee may not have properly addressed in that regard is the distinction between a lawyer being constrained in responding to a complaint because the client's privileges have not been waived and the situation where that lawyer provides information to a committee that would otherwise have been subject to solicitor-client privilege.

[109] A lawyer is undoubtedly entitled to decline to respond to a complaint, or to any aspect of a complaint, if doing so would breach solicitor-client privilege that has not been waived.[14] If the lawyer does provide information, however, the default position can only be that he or she does so on the basis that solicitor-client privilege has been waived.

[110] It seems to me that a standards committee puts itself in a difficult position in relation to its natural justice obligations if it agrees to receive privileged information on the basis that it will take that information into account in its deliberations while preserving the confidentiality of that information as between the lawyer and the lawyer's client.

[14] Sections 271 and 151(4) of the Lawyers and Conveyancers Act 2006 and sub-part 8, part 2 of the Evidence Act 2006.

[111] I have some disquiet about the other four specified grounds, all of which appear to relate to the Committee's factual inquiry and not to the Committee's deliberations on the application of the professional conduct rules once it has established the background facts. It seems to me challenging in principle that a standards committee would establish the factual basis for its deliberations partly through an interview with one party and not disclose the factual basis of its findings to the other party.

[112] I note that the Committee expressed uncertainty about its position in relation to the matter and "considered that there is a need for the NZLS to formulate a policy regarding Standards Committees' exercise of their investigatory powers online". I will have some recommendations to make to the NZLS on this matter later in this decision.

[113] Be that as it may, I made clear in my Minute to the parties that RD had described the situation he found himself in (in relation to seeking access to file information) as "a complete mess" and that I wished to ensure that the review process by this Office did not make that perceived situation any worse.

[114] I therefore advised the parties that I would not listen to the Committee's recording of the interview and that any information that Mr KE or Ms PS might have communicated in that interview that they wished to put forward for the purposes of this review would need to be put in writing and would be provided to RD for review and comment.

The issues

[115] The issues I have identified for consideration in this review are as follows:

(a) Was Ms PS involved in the provision of legal services for any relevant [D Family] client as an employed solicitor at [Law firm]?

(b) If so, who was she acting for at [Law firm]?

(c) Did Ms PS act in a conflict of interest situation when providing legal services at [Law firm]?

(d) Was Ms PS involved in providing legal services for any relevant [D Family] member when employed by [Law firm C]?

(e) If so, did she act in a conflict of interest situation when providing legal services at [Law firm C]?

(f) What were Mr KE's obligations as practice attorney for Mr VB in relation to custodianship of [Law firm] files?

(g) Who was Mr KE acting for?

(h) Did Mr KE breach any professional obligations in connection with the "uplift" of files by WD?

(i) What professional obligations, if any, did Mr KE owe to RD?

(j) Did he breach any such professional obligation?

(k) Does any breach of professional obligations by Mr KE, either owed to RD or otherwise, reach the threshold for a finding of unsatisfactory conduct?

(l) Is there any basis for awarding RD compensation for any of the legal costs he has incurred in endeavouring to get access to the information contained in the files currently in the custody of the NZLS?

Discussion

(a) Was Ms PS involved in the provision of legal services for any relevant [D Family] client as an employed solicitor at [Law firm]?

[116] Ms PS has confirmed that she was involved in the provision of legal services when she was an employed solicitor at [Law firm]. RD says that she was the solicitor acting on the sale of the [Suburb A] property and the solicitor acting on the purchase of the [Suburb B] property, as well as the solicitor acting on the two previous property transactions in 2008/2009 referred to in [Law firm B]'s April 2021 letter. Ms PS does not dispute his statement.

[117] I find that Ms PS was involved in the provision of legal services for [D Family] members as an employed solicitor at [Law firm].

(b) If so, who was she acting for at [Law firm]?

[118] The [Suburb A] property was sold by the trustees of the D Family Trust. They must have been her primary client on that transaction. The [Suburb B] property was bought by WD as to a 4/5^{ths} share and AZ as to a 1/5th share. They must have been her primary client on that transaction.

[119] The 2008 and 2009 property transactions must also have been on the instructions of the trustees of the D Family Trust, who at that time apparently included BD.

[120] Ms PS may also have acted for BD and MD. There is no evidence before me of any legal work undertaken for them personally. This may well be because Ms PS has avoided answering the Committee's enquiries of her in that regard, although she may have done so during the interview conducted by the Committee.

[121] The only information available to me is the evidence of Mr KE that he did not receive any deeds, Wills, powers of attorney or the like of BD and MD following Mr VB' death.

(c) Did Ms PS act in a conflict of interest situation when providing legal services at [Law firm]?

[122] It nevertheless seems likely that both BD (and MD) and WD were clients of [Law firm]. There is nothing inherently wrong with that. As the Committee stated, it is not unusual for a law firm to act for various different members of the same family.

[123] A conflict of interest can arise in two different ways in these circumstances. The first is where a law firm acts for two different clients in relation to the same legal matter. This scenario is regulated by rr 6 and 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). Rule 6 provides as follows:

> In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

[124] Rule 6.1 provides as follows:

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

[125] Rule 6.1.1 provides as follows:

> Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.

[126] For completeness, the application of the above two rules is also informed by the three succeeding rules, as follows:

> 6.1.2 Despite rule 6.1.1, if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer

acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.

6.1.3 Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have been or will be breached.

6.2 Rule 6.1 applies with any necessary modifications whenever lawyers who are members of the same practice act for more than 1 party.

[127] The starting point in the application of these rules is that a firm cannot act at all for two clients on a matter if there is a more than negligible risk of the firm being unable to discharge its obligations to both (or more) clients.

[128] The potential relevance of these rules to the course of events traversed by RD in his complaint is to the purchase of the [Suburb B] property following the sale of the [Suburb A] property. It seems that:

(a) WD bought the [Suburb B] property in her personal capacity, as tenant in common with her partner, AZ;

(b) she did so about five months before the [Suburb A] property was sold;

(c) the [Suburb A] property was owned, as at settlement of its sale, by WD and UD in their capacity as trustees of the D Family Trust;

(d) a substantial sum representing proceeds of sale of the [Suburb A] property may have been applied indirectly towards the purchase of the [Suburb B] property, via Mrs EZ;

(e) Mr BD and Mrs MD were dependent at the time on WD for their accommodation and wellbeing.

[129] I have expressed paragraph (d) above in that way because the [Law firm] trust account ledger cards produced to the Committee by Mr KE do not appear to support RD's belief. Rather they appear to show that the [Suburb B] property was bought by WD mainly with bank finance and partly from her own funds and that all the proceeds of the subsequent [Suburb A] property sale were paid to Mrs EZ as mortgagee.

[130] The available information indicates that [Law firm] acted:

(a) for WD and UD as trustees of the D Family Trust on the [Suburb A] property sale; and

(b) for WD personally, jointly with Mr AZ, on the [Suburb B] property purchase.

[131] It is possible that [Law firm] also acted for BD and MD, in some capacity. On the information available to me, this is speculative. The 2017 "codicil" refers to BD's belief about "a deed of family arrangement or similar" but no such document was received by Mr KE as practice attorney.

[132] The Committee unhelpfully did not record either the factual basis or the reasoning for its positive finding that "Ms PS had not worked under a conflict of interest … at [Law firm]". The only comment it makes is that Ms PS "did not have primary conduct of BD's or WD's files".

[133] If that is the only basis on which the Committee made its positive finding, then I find that it was an insufficient basis for that part of the Committee's decision. If a firm has acted in breach of r 6.1 through the agency of two or more lawyers, it matters not which of them has primary conduct and which secondary conduct of the legal work and whether one of them is an employed solicitor.

[134] There is, however, no evidence before me that [Law firm] ever provided legal services to BD personally, or to BD and MD jointly.

[135] If there was evidence before the Committee that [Law firm] did act in some way for BD and MD in connection with the property transactions, or in relation to their living arrangements or personal care, while also acting for WD and/or the family trust in relation to the same matter, there may have been a risk of [Law firm] not being able to discharge the obligations owed to two or more clients. I am not satisfied that the Committee has turned its mind to that issue, despite having interviewed Ms PS.

[136] It is not open to me to make any finding of breach of the Rules based solely on inferences, unless the inferences are compelling. The most logical inference based solely on the trust ledger cards, the outcome of the transactions and the names of the files is that [Law firm] acted on WD's instructions for WD's personal benefit in relation to the [Suburb B] property purchase and for WD and UD as trustees of the D Family Trust on the [Suburb A] property sale.

[137] In neither case is there any evidence before me that [Law firm] acted for a second client such as to give rise to a conflict of interest. There is also extensive evidence that BD subsequently instructed a different lawyer, Ms IY, regarding his concerns about his personal legal affairs.

[138] My reluctance to make a definitive finding about the matter arises because I do not have access to the necessary information. The Committee has the benefit of access to the files, which remain in the possession of the NZLS. It has also had the benefit of conducting an interview with Ms PS. It is a reasonable assumption that something as basic as who she was taking instructions from and who she was acting for at any relevant time would have been part of the subject matter of that interview.

[139] I am conscious, as I am sure the Committee must have been, that none of this discussion is of any potential practical benefit to RD. It seems that his parents had no equity personally in the [Suburb A] property and therefore none in the [Suburb B] property. It seems likely that the $443,000 that RD believes was contributed to the [Suburb B] property, if that is so, was Mrs EZ's[15] money rather than funds of the D Family Trust. All the proceeds of the [Suburb A] sale were paid to Mrs EZ as mortgagee.

[140] RD clearly has a different understanding and his legal adviser, Mr TZ, has stated a different understanding based on information he stated he had received from both RD and UD as well as, presumably, the 2017 codicil.

[141] According to Mr TZ's letter of 21 April 2021 to Mr KE, the original loan from EZ was $392,000, of which $286,410.95 was repaid on sale of the [Town A] property leaving $105,589.05 outstanding, with that balance then being satisfied on sale of the [Suburb A] property.

[142] The figure of $286,410.95 is consistent (within $25.00) with the entry on the trust ledger card [redacted] relating to the [Town A] sale. The figure of $105,589.05 is not.

[143] If the financing arrangements between Mrs EZ and the D Family Trust somehow provide a route to inheritance for RD, that is a matter he can pursue but not through a professional disciplinary process.

[144] For present purposes, RD has made a complaint against Ms PS of acting in a conflict of interest situation and he is entitled to have that complaint properly considered on the available facts. The facts are not available to me. They are available only to the Committee.

[145] The finding I make is that the Committee was wrong to make a positive finding that "Ms PS had not worked under a conflict of interest" on the grounds that it did. This finding should not be interpreted as implying that I hold a view that Ms PS did act in a conflict of interest situation. It is simply that the matter needs to be properly considered

[15] RD and Mr TZ both refer to Mr GQ but the trust ledger card refers to Mrs EZ.

by the Committee on the basis of all the information available to it. The Committee then needs to give adequate reasons for its finding.

[146] In directing the Committee to reconsider the matter, I repeat the comment made in my procedural Minute of 2 August 2023. The Standards Committee is not a substitute for a Court. RD's conflict of interest complaint against Ms PS is unlikely to advance his interests in relation to any claim of rightful inheritance from his father's estate or in relation to the D Family Trust.

[147] At paragraph [123], I stated that a conflict of interest can arise in two different ways in these circumstances. The second is where a lawyer acts for a client against a former client and uses information confidential to the former client for the benefit of the current client. The applicable rules are rr 8.7 and 8.7.1.

[148] Rule 8.7 states the primary principle that:

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

[149] Rule 8.7.1 goes on to provide that:

> 8.7.1 A lawyer must not act for a client against a former client of the lawyer or of any other member of the lawyer's practice where—
>
> (a) the practice or a lawyer in the practice holds information confidential to the former client; and
>
> (b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and
>
> (c) there is a more than negligible risk of disclosure of the confidential information; and
>
> (d) the fiduciary obligation to the former client would be undermined.

[150] The focus of r 8.7.1 is the protection of a client's confidential information. This includes preventing situations where that information might be used against the client for the advantage of another person. RD's complaint does not appear to raise any issues of misuse of client information, noting that RD himself was never a client of [Law firm].

[151] Although RD raises the possibility of a conflict of interest by reason of the fact that [Law firm] acted for more than one [D Family] member or entity, he does not assert that the firm held any information confidential to BD the disclosure of which to WD might have adversely affected BD's interests.

[152] My finding on this aspect is that there is no evidence before me of any disclosure by either Ms PS or Mr KE to WD of information confidential to BD that was adverse to BD's interests.

(d) Was Ms PS involved in providing legal services for any relevant [D Family] member when employed by [Law firm C]?

[153] There is no evidence before me that Ms PS was involved in providing legal services to either WD or UD when employed at [Law firm C]. Mr KE says that she was not involved in his advice to WD and UD.

(e) If so, did she act in a conflict of interest situation when providing legal services at [Law firm C]?

[154] For the above reason, this question does not need to be answered.

(f) What were Mr KE's obligations as practice attorney for Mr VB in relation to custodianship of [Law firm] files?

[155] This issue requires some consideration of the powers and duties of a practice attorney. Mr VB was a sole practitioner. As such, he was obliged by s 44 of the Lawyers and Conveyancers Act 2006 to appoint a practice attorney.

[156] Under sch 1 cl 7(d) of the Act, a practice attorney is obliged to act as such during the period from the date of the donor's death until his or her administrator either lawfully disposes of the practice or revokes the power of attorney.

[157] Under sch 1 cl 9 of the Act, the powers and duties authorised to be exercised and performed by the attorney are:

> (a) to conduct the donor's practice; and
>
> (b) to operate the donor's trust account or accounts; and
>
> (c) [not relevant]; and
>
> (d) to do all things necessary for, or incidental to, the exercise of those powers…

[158] In short, all the powers and duties of Mr VB devolved to Mr KE in relation to the [Law firm] practice. The applicable duties included all duties of Mr VB arising under the Rules.

[159] At the risk of stating the obvious, this does not mean that the practice attorney is responsible for any breach of the rules committed by the donor of the power of attorney before the power came into effect (in this instance, on Mr VB' death). Consequently, Mr KE is not professionally responsible for any hypothetical breach of the conflict of interest rules by Ms PS when she was an employed solicitor at [Law firm], or by Mr VB before his death.

[160] Mr KE's only relevant obligation here was to take reasonable care in the storage of the [Law firm] file records and to deal with them appropriately on termination of his retainer.

(g) Who was Mr KE acting for?

[161] In relation to the proper storage of [Law firm] file records, Mr KE's obligations were owed to the person properly entitled to those file records.

[162] So far as the fresh instructions were concerned, the evidence is that Mr KE was acting for WD and UD. His letter of 30 November 2020 to Mr SK refers to both WD and UD and, in his letter to the NZLS of 12 October 2021, he states that "my initial instructions were from WD and her brother UD with whom I had two meetings". Those instructions related to the matter of BD's estate.

[163] The reference in the "authority to uplift" document to "File #[redacted] – Relationship Property File" indicates that Mr KE also commenced acting for WD personally regarding relationship property issues before she changed to a legal aid provider.

[164] It seems that Mr KE's instructions were short-lived. He described the extent of his involvement in his letter of 12 October 2021 to the NZLS, which is quoted at paragraph [64] above.

[165] Although RD has made no allegation against Mr KE of acting in a conflict of interest situation, I record that Mr KE does not appear to have been in any difficulty in that respect. He was not acting for more than one client on the same matter so as to give rise to any issue under r 6.1. Nor does there appear to be any potential issue of disclosure of confidential information of one client to another client.

[166] I note that Mr KE does not appear to have known about any Will of BD's. It is implicit that there was no such Will in the records held by [Law firm] that he received as practice attorney.

(h) Did Mr KE breach any professional obligations in connection with the "uplift" of files by WD?

[167] The [Suburb A] property was owned by the trustees of the D Family Trust. The file relating to its sale must belong to those trustees, namely WD and UD. On that basis, it would have been open to WD and UD, as the trustees of that trust, to direct Mr KE to deliver the file to WD.

[168] I find it difficult to see how the file relating to the purchase of the [Suburb B] property could be anything other than the property of the purchasers and registered proprietors of that property, WD and AZ. If any other "client" entity had an interest in the transaction and therefore the file, it could only have been the D Family Trust (in the person of WD and UD), not BD or his estate.

[169] Assuming these are two of the files currently in the custody of the NZLS, I am puzzled by the view reportedly taken by WD's counsel, Mr LW KC, that she was not entitled to possession of them and that they were the property of BD's estate.

[170] Be that as it may, there is nothing in the circumstances to suggest to me that it was inappropriate for Mr KE to deliver possession of those files to WD.

[171] There is then the file with the title "Estate of BD file". Based on Mr KE's explanation, this appears to be his own file of his instructions from and advice to WD and UD about their father's estate. He stated that,[16] "this was the file relating to her initial contact with us and the invoice for our initial work ($776.25) was invoiced to her and part paid (ledger and invoice attached)".[17]

[172] If this was the case and if this was one of the files passed by Mr LW KC to the Committee, it again surprises me that Mr LW would not have accepted the return of it. In any event, Mr KE's professional obligations relating to that file would be owed only to WD and UD.

(i) What professional obligations, if any, did Mr KE owe to RD?

[173] RD was not Mr KE's client. A lawyer owes very limited obligations to someone who is not his client. For regulatory purposes, those obligations were expressed at the relevant time (November 2020 – April 2021) in rr 10, 10.1 and 12 of the Rules as follows:

> 10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

[16] Letter of Mr KE to the NZLS (7 March 2022).
[17] The second attachment was in fact a trust account statement, not an invoice.

> 10.1 A lawyer must treat other lawyers with respect and courtesy.[18]
>
> 12. A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.

(j) Did he breach any such professional obligation?

[174] The Committee initially considered that Mr KE had breached r 10 by failing to respond at all to the [Law firm B] letter of enquiry of 23 February 2021. It could also have found a breach of r 10.1 in those circumstances. Its subsequent formal decision was that "Mr KE's conduct in the circumstances did not reach a threshold which warranted a disciplinary response".

[175] This conclusion was premised on its findings that:

> [The circumstances] … did not excuse him of his wider duty as a lawyer to maintain standards of professionalism under Rule 10 …
>
> … whilst Mr KE should have responded to RD's lawyers' enquiries, Mr KE was not under a duty to respond to RD's lawyers' correspondence quickly; sometimes delays happen in legal practice and not all delays automatically necessitate a disciplinary finding against a legal practitioner.

[176] The best view of the effect of its decision is that Mr KE was found to have breached his general obligation under r 10 to maintain proper standards of professionalism in his dealings but that the breach was not of sufficient gravity to warrant a finding of unsatisfactory conduct.

[177] I consider that there are three other aspects of Mr KE's handling of the matter that are relevant to an assessment of his conduct. The first is his initial, positive written response to Mr SK's enquiry in November 2020 prior to his meeting with WD and UD (or just WD), followed by the fact that he did nothing further after that meeting.

[178] A lawyer's instructions from his client are privileged and a lawyer has no obligation to disclose privileged instructions, whether in the context of responding to a complaint or otherwise. This extends to disclosure of instructions from a client not to do something.

[179] It is a reasonable inference that Mr KE was instructed by his clients, WD and UD (or just WD), not to respond to Mr SK's enquiry. If that was the case, it cannot constitute a failure to maintain professional standards.

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[18] Rule 10.1 was amended from 1 July 2021. It now reads as follows: "A lawyer must, when acting in a professional capacity, treat all persons with respect and courtesy".

[180] The same could be said in relation to the fact that Mr KE did not respond to the [Law firm B] letter of 23 February 2021. In that instance, however, it seems that he did not have any instructions rather than having instructions not to respond.

[181] Mr KE's retainer was then terminated in late March 2021, but he still did not respond to the enquiry he had received from [Law firm B].

[182] It is a common courtesy as between lawyers at least to acknowledge receipt of a communication if not also to indicate that one is awaiting instructions as to any response. Mr KE appears to acknowledge that his failure to respond at all lacked courtesy and explained that this was not consistent with his usual practice.

[183] In this instance, Mr TZ would have been under the continuing impression that Mr KE was acting in the matter and would have had a reasonable expectation of receiving a response in due course, if not immediately. I consider it would have been appropriate for Mr KE to inform Mr TZ once Mr KE's retainer had been terminated, rather than simply doing nothing.

[184] On the information available to me, which does not include any evidence from Mr KE that he was instructed not to respond, I confirm what I understand to have been the Committee's finding of breach of r 10 by Mr KE. I find that it was also discourteous and thereby a breach of r 10.1.

[185] I agree with the Committee, however, that the breaches were of a minor nature in the circumstances and do not warrant a finding of unsatisfactory conduct.

[186] RD also complains, in effect, that Mr KE should have informed Mr TZ that Mr KE no longer held the estate's files and had not taken copies of them.

[187] Mr KE does not explain what the "exigencies" were that prompted him not to take copies of files he held as practice attorney. I consider it to be standard practice of any law firm to take a copy of a file that is being uplifted on a change of lawyer. The NZLS has published guidelines for lawyers on the matter.[19]

[188] A lawyer's basic regulatory obligation is that documents held on the client's behalf must be returned to the client on termination of the retainer or be disposed of as directed by the client.[20] Rule 4.5(b) then expressly permits a lawyer to retain copies of the client's documents where this has been agreed in the retainer, or where it is considered necessary for the purposes of defending a claim or complaint. There is a

[19] "Ownership and retention of records on termination of retainer", opinion of YW, barrister, March 2014.
[20] Rule 4.4.1.

substantial body of case law about the categories of documents a lawyer is entitled to retain.

[189] Despite the common practice, I am not aware of any professional obligation to retain a copy of a client's file when that file is uplifted. If there were such an obligation, it would not have been owed to RD, as he was not Mr KE's client, in Mr KE's capacity as Mr VB's practice attorney. The same applies in relation to any documents that might arguably have been held for BD's estate; RD was not named as an executor.

[190] As I have previously noted, the vendor client in relation to the [Suburb A] property sale was WD and UD in their capacity as trustees of the D Family Trust. The purchaser client in relation to the [Suburb B] property purchase was primarily WD. In those circumstances, there was no reason for Mr KE to think there might be anything inappropriate about delivering the purchase file to WD on her instructions.

[191] Mr KE would have needed instructions from both WD and UD to release possession of the sale file to WD. If there is any issue in that regard, it is a matter between Mr KE and UD.

[192] Mr KE did not have any obligation to inform RD's lawyer, Mr TZ, that he no longer held the files or copies of them.

(k) Does any breach of professional obligations by Mr KE, either owed to RD or otherwise, reach the threshold for a finding of unsatisfactory conduct?

[193] I agree with the Committee on this issue. In all the circumstances, Mr KE's failure to respond at all until pressed could be considered to be either a breach of the general obligation to maintain professional standards under r 10 or an issue of discourtesy under r 10.1. In neither case, however, does it warrant a finding of unsatisfactory conduct.

(l) Is there any basis for awarding RD compensation for any of the legal costs he has incurred in endeavouring to get access to the information contained in the files currently in the custody of the NZLS?

[194] It follows that there is no basis for awarding RD compensation.

Other matters

Reconsideration by the Committee of the conflict-of-interest issue

[195] The Committee's process in reconsidering the conflict of interest issue is a matter for the Committee. I offer the following observations in that regard:

(a) There is no evidence on the file information available to me of the assertion of solicitor-client privilege by any relevant person.

(b) If the files show that there is no evidence of Ms PS having acted for more than one client on the same matter in breach of r 6.1 (for example, not having acted for BD and MD in relation to the [Suburb A] sale or the [Suburb B] purchase), then that information is relevant to the Committee's inquiry and may be information it can disclose to RD for the purposes of its inquiry as permitted by s 188(2) of the Act;

(c) If the files evidence that Ms PS did act for more than one client on the same matter in breach of r 6.1 (for example, acting for BD and MD as well as for the trustees of the D Family Trust on the [Suburb A] sale or for BD and MD as well as WD and Mr AZ on the [Suburb B] purchase), then that information is also relevant to the Committee's inquiry and may be information it can disclose to RD for the purposes of its inquiry.

[196] I would expect it to be a reasonably straightforward matter for the Committee to inspect the files in the possession of the NZLS and satisfy itself whether or not BD and MD had any client status in respect of the two transactions separate from the trustees of the D Family Trust trustees and WD and AZ respectively.

[197] I note again that any Committee finding in that respect will be of no practical benefit to RD. Depending on how the NZLS responds to the observations I make at paragraphs [221] to [223] below, RD may wish to indicate to the NZLS whether or not he has any wish for the matter to be reconsidered. It is open to a standards committee to resolve to take no further action on a matter at any time if the complainant does not wish any further action to be taken. This includes any matter it has been directed to reconsider.

Recommendation to the NZLS under s 213 of the Act

[198] Section 213(1)(b) of the Act requires me to report to the NZLS "any recommendations made as a result of the review". In that context, I have some concern

about one aspect of the process undertaken by the Committee in inquiring into RD's complaint.

[199] In early June 2022, a sub-committee of the Committee conducted an interview by Zoom with Ms PS and Mr KE as part of its inquiry into the factual circumstances giving rise to the complaint. RD was not privy to the interview. The interview was recorded.

[200] The Committee then asked itself the question of whether it should provide a copy of the recorded interview to RD. Being unsure of the answer to that question, it sought advice from the NZLS. The NZLS apparently gave it written advice regarding the matter. That written advice is not included on the Committee's file available to this Office. The file does contain reference to some elements of the advice, however.

[201] In relation to whether the Committee was required to share the record of the Zoom call with RD, the following comments are recorded:

> (a) Ordinarily, all information is shared between the parties, as a matter of natural justice. The Practice Note[21] says that standards committees should 'exercise caution' about doing otherwise (paragraph 18.5).
>
> (b) But there is no absolute position that in all circumstances information must be shared. It all comes down to natural justice, which the Committee would have to assess and make a call on (if it could overcome the privilege/confidentiality issue).

[202] In relation to whether the Committee was entitled to share the record of the Zoom call with RD, the following comments are recorded:

> (a) If the call contains information that is privileged and/or confidential to the lawyers' clients, [the NZLS legal adviser] does not see how the Committee is entitled to share that information with RD.[1] Section 18 of the Practice Note, headed 'Dealing with Privileged Communications', paragraph 19.3 notes:
>
> > If the lawyer is constrained from responding to a complaint by a non-client, because the other client's privileges have not been waived, then the Standards Committee will need to assess whether it can proceed with the investigation at all, on natural justice grounds. It may be unfair to do so if the lawyer is unable to answer the complaint because of the inability to refer to privileged communications.
>
> [1] Section 271 of the Act provides that nothing in the complaints and discipline part of the Act affects legal professional privilege.

[203] A further comment is then recorded about the "further issue of privacy" as follows:

> The Practice Note says that any person who is the subject of discussion at a meeting or hearing has rights under the Privacy Act to request access to his or

[21] Practice Note concerning the functions and operations of Lawyers' Standards Committees.

> her personal information, although the materials may be subject to deliberative privilege.

[204] The Committee's minutes of its meeting of 8 September 2022 then record that the Committee resolved not to share the recording, a transcript of the recording or a summary of the recording with the complainant, RD. The grounds for that decision were stated to include the following:

> (a) The Zoom call formed part of the Committee's investigation of the complaint. It was conducted so that the Committee could understand complicated background facts regarding the wider circumstances of the complaint, which had not otherwise become clear through the Committee's protracted correspondence with Mr KE;
>
> (b) The Committee considered that the Zoom call was analogous to a meeting conducted in person with Mr KE and Ms PS, in which there would be no apparent obligation upon the Committee to share the information obtained with the complainant.
>
> (c) The call was recorded for the purpose of sharing the information with the wider Committee, not the complainant;
>
> (d) The sub-Committee participated in the Zoom call on the understanding that the information would not be shared with the complainant. The Committee would have been inhibited in its fact-finding role and line of questioning had it known it would be required to share the recording with the complainant;
>
> (e) The complainant does not have a right to the privileged information discussed during the call, which includes details of the complainant's late-father's estate, the D Family Trust, the D Family Trust account information and his sister's legal concerns.
>
> (f) The Committee considered that there is a need for the NZLS to formulate a policy regarding Standards Committees' exercise of their investigatory powers online.

[205] I emphasise that the comments quoted above represent a Professional Standards Officer's (PSO) interpretation of elements of legal advice rather than the legal advice itself. The Committee's minute then represents a further interpretation of the application of the PSO's interpretation of the advice to the facts of the particular matter. I nevertheless have some concern about the end point, namely a decision by the Committee not to share with the complainant the record of factual enquiries made by the Committee.

[206] I note that the only guidance given in the Practice Note that is peripherally on point is paragraph 18.5 which reads as follows:

> Standards Committees should exercise caution about receiving privileged or confidential correspondence where the party submitting the correspondence is stipulating that the other party should not see it. However, there might be occasions where it is necessary and appropriate to do so, on the understanding that the other side will be provided with a redacted version and explaining the

> reason for the redaction (for example, concerning sensitive health or finance-related information).

[207] I refer to that paragraph being peripherally on point because it deals with the potential redaction of privileged or confidential correspondence rather than a record of an interview conducted as part of a committee's enquiries into the facts of a complaint.

[208] The concern I have about the Committee's decision can be summarised as follows:

(a) A lawyer is not obliged to respond to a complaint, or to any aspect of a complaint, if to do so would breach solicitor-client privilege that has not been waived.

(b) As stated in paragraph 18.3 of the Practice Note:

> If the lawyer is constrained from responding to a complaint by a non-client because the client's privileges have not been waived, then the Standards Committee will need to assess whether it can proceed with the investigation at all, on natural justice grounds. It may be unfair to do so if the lawyer is unable to answer the complaint because of the inability to refer to privileged communications.

(c) The onus is on the lawyer to determine whether information potentially relevant to a response to a complaint is subject to solicitor-client privilege.

(d) The Standards Committee has the power to receive in evidence any information, including privileged information,[22] and its right to do so expressly overrides the application of the Evidence Act 2006 to its proceedings.[23]

(e) If a lawyer responds to a complaint by providing information to the Committee that would otherwise be privileged, the default position has to be that the Committee is entitled to assume that privilege has been waived.

(f) Conversely, the default position has to be also that a committee cannot receive information from a lawyer on the basis that it somehow remains subject to solicitor-client privilege.

(g) To do so would likely, if not inevitably, result in breach of the rules of natural justice if the necessary implication is that the Committee will not disclose the information to the complainant.

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[22] Section 151(1) of the Act.
[23] Section 151(4).

(h) The default position should apply unless the complainant agrees beforehand that the information, or any privileged aspects of the information if there is a mixture of privileged and non-privileged information, will not be disclosed to the complainant. This is perhaps unlikely but is not inconceivable.

(i) If the lawyer discloses to a committee privileged information without instructions or permission from the lawyer's client to do so, that may be a problem for the lawyer but not for the committee. The committee is not obliged to recognise a privilege that is not asserted.

[209] I acknowledge that this issue is far from straightforward. Fundamentally, however, it is not appropriate for a standards committee to make findings of fact on the basis of information provided by one party and known to the committee that is not disclosed to the other party as part of the inquiry process.

[210] In the present instance, the recording of the sub-committee's interview with the lawyers was part of the file material provided by the Lawyers Complaints Service to this Office. Because of my own view of the issue, as summarised above, I declined to listen to the recording as part of the review process.[24]

[211] I certainly would not wish potential difficulties over privileged information to constrain any standards committee in pursuing its fact-finding function in a robust and comprehensive manner by whatever methods it thinks fit (under s 142 of the Act) that are consistent with its obligations under ss 141, 142, 151 and any other applicable provisions of the Act. A standards committee has inquisitorial powers and it should not be shy of using them.

[212] To be clear, I am not referring in this discussion to any record of the Committee's deliberations once it has completed its fact-finding inquiry. In this instance, the interview and the recording of it cannot have been deliberative.

[213] I note also that the Committee's minute does not record that either Ms PS or Mr KE advanced the position that information they were giving to the Committee remained subject to solicitor-client privilege. This seems to have been a view formed by the Committee itself.

[214] I observe that the Practice Note is binding on standards committees, in terms of regulation 28 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008. Consequently, the statements made in

[24] This decision was advised to the parties by Minute at commencement of the review process.

section 18 of the Practice Note, although expressed in terms of guidance, are mandatory. I am not confident that they give standards committees sufficient clarity.

[215] In this instance, the Committee resolved that "there is a need for the NZLS to formulate a policy regarding Standards Committees' exercise of their investigatory powers online". Whether or not a committee exercises its powers "online" is not germane. What is important is what the "ground rules" are when seeking relevant information from lawyers in the context of an inquiry or investigation. Lawyers need to know what those ground rules are and so do complainants.

[216] My own understanding of the usual practice of standards committees, or of professional standards officers on their behalf, has been that if a party to a complaint seeks to adduce evidence on the basis that it is to remain privileged or otherwise confidential, the party is given the option of either withdrawing the evidence or waiving any claim to privilege or confidentiality. I do not know whether that is a consistent practice across all standards committees.

[217] I note also that the specific reference to trust account records in paragraph (e) of the Committee's minute of its reasons for non-disclosure is incorrect. Trust account records belong to the lawyer, not to the client, and do not constitute privileged information.[25]

[218] It was unclear to me from the file whether a copy of the two [Law firm] ledger cards was provided to RD once obtained by the Committee from Mr KE. Mr TZ appeared to have had some but not all of the same information. I provided the copy ledger cards to him for comment and have referred to them and the information that is evident from them in this decision. This is not privileged information.

[219] In terms of my obligation under s 213(1)(b) of the Act, the recommendation I make to the NZLS is that it reconsider the adequacy of section 18 of the Practice Note and give clear guidance to standards committees as to:

(a) what information they can or should receive in evidence when information is claimed to be subject to solicitor-client privilege or confidentiality on other grounds; and

(b) what are standards committee's powers and obligations are in relation to disclosure of such information in the course of its inquiry.

[220] I record that the above recommendation has no bearing on the outcome of this review.

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[25] *Re Merit Finance & Investment Group* [1993] 1 NZLR 152 (HC); s 393(4) of the Companies Act 1993; and *BQ v CR* LCRO 281/2012 at [14].

The files in the possession of the NZLS

[221] There remains the matter of the files in the possession of the NZLS. As I have made clear to the parties, I have no jurisdiction to give any direction to the NZLS relating to those files. I hope the NZLS remains in possession of them, as it will be difficult for the Committee to reconsider the conflict of interest issue I have directed it to reconsider without having access to the relevant file or files.

[222] Aside from that aspect, I offer the following observations in the hope that they might be useful to the NZLS in considering its position as custodian of the files:

(a) It seems that WD's counsel, Mr LW KC, has declined to accept custody of the files on the basis that WD does not assert any right to possession of them and they belong to BD's estate.

(b) According to Mr KE's correspondence, he has given advice to WD and UD about the possibility of an application for letters of administration of BD's estate. He appears to have done so on the basis of either instructions or an assumption that there was no Will.

(c) It appears that Mr KE was subsequently provided by [Law firm B] with a copy of the "codicil" document which, regardless of its other uncertainties, names UD as sole executor and trustee.

(d) RD has given evidence that UD has declined to apply for letters of administration.

(e) RD has given evidence of knowledge of the existence of a Will and that a copy of it is held by WD's lawyers (who he identifies as [Law firm D] in one place and [Law firm E] in another).

(f) The implication of RD's evidence is that he has not seen a copy of this Will himself but that he has seen a copy of the Will that names WD's son as a beneficiary.

(g) It is possible that there is a copy of a Will or at least reference to a Will on the files in the possession of the NZLS.

(h) One of the procedural options open to RD is to apply for letters of administration himself, given the apparent (or alleged) decision or failure of either of his siblings to do so.

(i) The NZLS may wish to take note that this does not appear to be a situation of a contest over entitlement to possession of the files but rather an abnegation of responsibility for them.

(j) There is no evidence available to me of the assertion of solicitor-client privilege by any relevant person.

(k) The NZLS may wish to consider whether it might be appropriate, pragmatic and unobjectionable to review the file information and provide to RD or his named lawyer copies of any documents that might be considered relevant to RD's consideration of whether or not to apply for letters of administration of BD's estate.

[223] The above comments are merely observations. They do not constitute a recommendation in terms of s 213(1)(b) of the Act.

Decision

[224] For the reasons set out above, I direct the [Area] Standards Committee [X] to reconsider the complaint that Ms PS acted in a conflict of interest situation when an employed solicitor at [Law firm]. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is otherwise confirmed.

Publication

[225] RD is permitted to provide a copy of this decision to his lawyer and to disclose it for the purposes of any relevant court application or proceedings that he may become a party to in connection with the estate of the late BD or the D Family Trust.

[226] 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 05TH day of September 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:

Mr RD as the Applicant
Mr KE and Ms PS as the Respondents
[Area] Standards Committee [X]
New Zealand Law Society