

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

[2022] NZLCRO 58

Ref: LCRO 1/2021

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee X

BETWEEN

NB

Applicant

AND

GP

Respondent

DECISION

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

Introduction

[1] Mr NB has applied for a review of a decision by the [Area] Standards Committee X to take no further action in respect of his complaint concerning the conduct of the respondent, Mr GP.

Background

[2] Mr NB was in dispute with the Accident Compensation Corporation (ACC).

[3] ACC had declined to provide funding for elective surgery that Mr NB wished to have performed.

[4] Mr NB instructed Mr GP to appeal ACC's decision in the District Court.

[5] A hearing proceeded in May 2019. In a decision issued on 5 June 2019, the Court dismissed Mr NB's appeal. The judge determined that whilst Mr NB had suffered an injury in 1981, the issues that Mr NB was experiencing with his back were the result of a degenerative disease or a genetic condition.

[6] In correspondence to Mr GP on 17 June 2019, Mr NB expressed dissatisfaction with the Court's decision. He did not provide instructions to Mr GP to lodge an appeal.

[7] Around 25 June 2019, Mr GP made request of a junior lawyer at his firm to check the time frames for lodging an appeal of the District Court judgement.

[8] Mr GP wrote to Mr NB on 28 June 2019, advising as to Mr NB's options in respect to advancing an appeal. Mr NB confirmed his instructions to file an appeal. Mr GP did so on 2 July 2019. The application was dismissed on grounds that the application had been filed out of time.

The complaint and the Standards Committee decision

[9] Mr NB lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 11 May 2020. The substance of his complaint was that:

- (a) following the District Court issuing its decision, he had instructed Mr GP to proceed with an appeal; and
- (b) Mr GP's failure to correctly advise on the timeframes for filing an appeal, had resulted in his leave to appeal being dismissed; and
- (c) as a consequence of Mr GP's failure to provide correct advice, he sought reimbursement of fees paid.

[10] Mr GP provided response to Mr NB's complaint on 29 July 2020.

[11] He submitted that:

- (a) the application for leave to appeal had been filed out of time and he accepted responsibility for that error; and
- (b) whilst regretful for the mistake, he did not consider that the mistake carried serious consequence for Mr NB, as he had formed a view that there was no proper basis to appeal the District Court decision; and
- (c) he considered the representation provided to Mr NB on the District Court appeal was of a high quality.

[12] The Standards Committee delivered its decision on 30 November 2020.

[13] The Committee determined, pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[14] In reaching that decision the Committee concluded that:

- (a) whilst Mr GP had erred in failing to take steps to facilitate filing of the appeal earlier, and erred in miscalculating the timeframe for filing the appeal, the Committee did not consider that the errors were of such magnitude as to require a disciplinary response; and
- (b) Mr GP had, on identifying the error in calculation of timeframes, provided Mr NB with considerable assistance in pursuing alternative remedies; and
- (c) Mr GP had provided competent and adequate representation to Mr NB in the appeal progressed in the District Court.

Application for review

[15] Mr NB filed an application for review on 22 December 2020.

[16] Mr NB prefaces his review submissions with an account of the health problems he has endured as a consequence of suffering an accident in 1981. It is his firmly held view, that ACC have persistently over a lengthy period of time, failed to provide or accept, an accurate diagnosis of his medical condition.

[17] Mr NB submitted that Mr GP had:

- (a) failed to competently represent him in the District Court appeal; and
- (b) failed to inform him of the option to seek leave to appeal the decision of the District Court; and
- (c) failed to understand the substance of Mr NB's case; and
- (d) endeavoured to ameliorate his failure to correctly advise him as to appeal time frames by recommending he pursue his complaint with authorities who had no jurisdiction to address his concerns.

[18] Mr GP was invited to comment on Mr NB's review application.

[19] He submits that:

- (a) Mr NB's case had been comprehensively discussed with him prior to the District Court hearing, and Mr NB had suggested changes to the submissions prepared and had been supportive of the submissions filed; and
- (b) the difficulty that Mr NB faced with his case (and it was a problem that was fully traversed with Mr NB prior to hearing) was that he lacked medical evidence to support his contention that the accident he had suffered in 1981 had been responsible for ongoing problems with his spine; and
- (c) Mr NB's case was compromised by the fact that his own specialist would not provide authoritative opinion to support the position argued for by Mr NB; and
- (d) in view of the lack of medical evidence available to support Mr NB's position it was "wholly unsurprising" that he was unsuccessful in advancing his case; and
- (e) he had been "upfront" with Mr NB in informing him as to the likely outcome.

Hearing

[20] A hearing proceeded on 25 May 2022.

[21] Mr GP was represented by Mr LM.

Nature and scope of review

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

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

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

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore

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

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.

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

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

[24] 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.

Discussion

[25] The issues to be addressed on review are:

- (a) Did Mr GP provide competent representation to Mr NB, in advancing his appeal before the District Court?
- (b) Did Mr GP's failure to lodge an application for leave to appeal in time, require a disciplinary response?

Analysis

Did Mr GP provide competent representation to Mr NB, in advancing his appeal before the District Court?

[26] Mr NB complains that Mr GP failed to adequately represent him, when advancing his appeal³ in the District Court.

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

³ The application advanced was an application seeking leave to appeal the District Court decision. I will reference that application on occasions as "the appeal".

[27] He considers that Mr GP failed to formulate a coherent strategy for his case.

[28] Mr GP considers that he provided a high standard of representation to Mr NB. He emphasises that he had provided clear and firm advice to Mr NB throughout, and that he had cautioned Mr NB that his case was not a strong one.

[29] Mr GP's contention that he had warned Mr NB of difficulties that would be encountered in advancing an appeal, is supported by correspondence that Mr GP had forwarded to Mr NB in September 2017. In that correspondence, Mr GP gives Mr NB stark warning that he considered that the medical evidence Mr NB relied on to provide foundation for his proposed appeal, fell well short of what was required. Mr GP identifies a number of obstacles he had identified in the documentation which recorded Mr NB's engagement with several health professionals over many years.

[30] Mr GP's correspondence highlights the risks for Mr NB (including financial) if he was to elect to proceed with an appeal.

[31] Mr NB's complaint, framed in terms of a professional conduct complaint, is complaint that Mr GP had failed to provide him with competent representation.

[32] The conduct rule⁴ of particular relevance to an examination of Mr NB's complaint is r 3, which directs that in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[33] In *LCRO 205/2015*, the Review Officer addressed the factors a Review Officer may consider, when addressing complaint that a lawyer has failed to act competently. Paragraphs [34] to [42] following, are adopted from that decision.⁵

[34] A lawyer's conduct may be deemed to be unsatisfactory if, in the course of providing regulated services to their client, their conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.⁶

[35] The duty to act competently has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help".⁷

⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

⁵ *R and N Family Trust v EL 205/2015* (27 June 2019).

⁶ Lawyers and Conveyancers Act 2006, s 12(a).

⁷ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington 2016) at [11.1].

[36] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.⁸

[37] It has been noted that lawyer's competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer.⁹

[38] Not surprisingly, neither the Act, nor the Rules, attempt to lay down a definitive definition of competence, a determination of which must inevitably be attempted through an examination of a variety of factors including, but not limited to, the nature of the retainer and the context in which the conduct complaint arises.

[39] It is important to recognise that an obligation to provide competent advice does not impose unreasonable burden on a practitioner to be always right, or to always provide the right advice.

[40] It has been noted that:¹⁰

while there is an existing professional duty of competence in New Zealand, albeit one which is particularly narrow, there is no duty to provide a high level of service to clients. The duty of competence is, in reality, a duty not to be incompetent and is aimed at ensuring minimum standards of service.

[41] What may on first reading present as a singularly less aspirational objective for a profession than would be expected is, on closer examination, an affirmation of a reasonable standard of expectation of the level of competency required of lawyers. All lawyers are expected to provide a competent level of service to their clients.

[42] A broad, and useful expression of the indicia to be considered in determining competency was attempted by the American Bar Association in a discussion document where it said:¹¹

Legal competence is measured by the extent to which an attorney(1) is specifically *knowledgeable* about the fields of law in which he or she practises, (2) performs the techniques of such practice with *skill*, (3) manages such practices *efficiently*, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) *properly* prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically *capable*. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

⁸ At [11.3].

⁹ GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [4.24].

¹⁰ Webb, Dalziel and Cook, above n 8 at [11.3].

¹¹ American Bar Association and American Law Institute *Committee on Continuing Professional Education Model Peer Review System* (discussion document, 15 April 1980).

[43] It is important to emphasise, that it is not the role of a Standards Committee, nor of a Legal Complaints Review Officer, to cast themselves in the role of a de facto court, and to make determinations on issues of law and evidence that have been put before the court.

[44] In *Auckland Standards Committee 3 v Castles* [2013] NZLCDT 53, the Lawyers Disciplinary Tribunal emphasised that it "...was not the Tribunal's role to closely analyse and second-guess every move of counsel during each piece of litigation. We consider our role is to take an overview and to look at patterns of behaviour."

[45] Mr NB is not specific in identifying particular failings of Mr GP, rather his criticism is couched in general terms that Mr GP had failed to understand the argument that needed to be advanced to the Court, and had failed to put a critical issue before the Court.

[46] In addressing those concerns, I have, as did the Standards Committee, read the submissions which formed the basis for the argument advanced for Mr NB in the District Court. I have also given careful attention to the submissions filed for the ACC, and the decision of [Judge L] delivered on [date].

[47] I agree with the assessment of the Standards Committee, that a review of the material described gives indication that Mr GP had provided adequate and competent representation to Mr NB.

[48] In cases which seek to appeal a decision of the Corporation to decline assistance for a medical procedure, the medical evidence is critical. That point was emphasised by the presiding judge, who noted in his decision that it was common when assessing the nature of back injuries of the type suffered by Mr NB, that the medical evidence was frequently unable to establish a clear link between cause and effect.

[49] It was uncertain from Mr NB's written submissions as to what Mr GP could have done, should have done, or failed to do, which would have had the consequence of achieving his desired outcome, and he was unable at hearing to adequately fill in those gaps. At hearing, Mr NB argued that Mr GP's failure to put a specific question to ACC in the course of the hearing, was a significant factor in him not succeeding with his case.

[50] With every respect to Mr NB, having considered the breadth of issues engaged in his appeal, and the decision from the Court that comprehensively traverses the raft of issues engaged by the appeal, I think it unlikely that a dispute that had been litigated in various forums over a considerable period of time would have encountered immediate resolution in Mr NB's favour, on the back of answer to a single directed question.

[51] I accept that Mr NB was disappointed with the outcome of the District Court hearing, and I am very mindful that for many individuals in a similar position to Mr NB, battling the ACC over many years to achieve what they consider to be a fair and accurate assessment of a medical condition that has off-times caused considerable pain and distress, can be extremely challenging. But disappointment with outcome does not establish complaint that Mr GP failed to provide Mr NB with competent representation.

[52] I am satisfied that Mr GP, in advising Mr NB on the steps to be taken on appeal, and in preparing for and advancing the appeal, provided competent representation to Mr GP.

Did Mr GP's failure to lodge an application for leave to appeal in time, require a disciplinary response?

[53] This issue also engages a consideration of the question as to whether Mr GP had met his obligations to provide competent representation to Mr NB.

[54] At hearing Mr GP acknowledged, as he had in his written submissions, that an error had been made.

[55] Mr GP's failure to correctly calculate a time frame for filing Mr NB's application for leave to appeal the decision of the District Court was a significant error.

[56] It is well understood that the consequences for many parties engaged in litigation are measured not just in financial terms, but by reference to the inconvenience, worry and stress that is often a close travelling companion for parties engaged in the often laborious process of advancing a dispute through the court.

[57] It is important that lawyers carefully explain the process to their clients at each critical point in the proceedings, including taking steps to discuss options available to their client when they are confronted with a decision from the court that goes against them.

[58] Learning that the case in which they have invested a significant financial and emotional commitment has been unsuccessful, is often understandably a distressing experience for a lawyer's client, and it is necessary at this juncture that the lawyer provide their vulnerable client with clear direction as to future options. That examination frequently requires attention to the question as to whether consideration should be given to mounting an appeal.

[59] Matters to address would include a preliminary assessment as to whether there were viable grounds to launch an appeal, an estimate of the likely costs involved, and a careful, measured and informed indication from the client as to whether they wished to continue with the litigation.

[60] It would be considered good practice (and Mr LM did not disagree) for a lawyer to sit down with his or her client following receipt of a court judgement, and carefully work through the options.

[61] Mr GP acknowledges that he had not turned his mind to the appeal process until late in the piece.

[62] It could be expected of lawyers that overarching the process of providing advice to a client on appeal options, would be an appreciation and understanding of the time frames required for filing the appeal, and an acute awareness that their client's ability to proceed an appeal could be irreparably compromised if the appeal was filed out of time.

[63] In many jurisdictions (as was the case here) failure to file an appeal in time was fatal.

[64] The particular time frames open to a litigant to challenge a decision may be determined by Statute or regulations specific to the particular jurisdiction (in this case ACC) or operational rules specific to the particular court in which the case has been heard.

[65] It could have been expected of Mr GP as a lawyer experienced in managing ACC cases, that he would have had a clear understanding of the time frame for filing an application for leave, or if uncertain, had recognised the need to carefully check the time frame to appeal the decision of the District Court.

[66] As noted, the consequences of failing to file an application for leave in time can have serious consequences for the lawyer's client. In this case, Mr NB lost opportunity to advance his case further.

[67] It is clear from the information on the Standards Committee file, that Mr GP had asked a junior colleague in his office to check the time frames for filing an application for leave to appeal the District Court's decision and had made request of her to identify the last day for filing the application. The information provided to him was incorrect.

[68] Mr GP, with a commendable recognition of his responsibilities as the lawyer managing Mr NB's case, did not attempt to shift blame for the error to his junior colleague.

To his credit, he acknowledged immediately that he was responsible for the error that had been made.

[69] Mr LM submitted that Mr GP had little confidence that Mr NB would have prospect of success with his application for leave to appeal. He indicated that the application had been lodged (albeit without knowledge that it was out of time) with purpose to preserve Mr NB's position. As I understood the argument, it was Mr GP's intention to sit down with Mr NB and have a frank discussion with him about the risks involved in proceeding further, and to make it clear to Mr NB that his leave application had little prospect of success.

[70] Whilst I accept Mr GP's evidence that he considered that Mr NB's case was weak (that advice was consistent with the assessment Mr GP had made as to the strength of Mr NB's case at commencement and would have been reinforced by the Court decision), the strength or otherwise of Mr NB's case was not relevant to the question as to whether Mr GP had obligation to file the application for leave in time.

[71] Mr GP had not turned his mind to the question as to whether Mr NB wished to advance an appeal as early as he should have. But when the issue of a possible appeal was traversed with Mr NB, Mr GP received instructions to proceed.

[72] It is not disputed that when the error was brought to Mr GP's attention, he was forthright in acknowledging the mistake that had been made, and energetic in attempting to assist Mr NB with attempts to resolve the issues through other avenues.

[73] It is clear from the Standards Committee's decision, that the factors which were instrumental in persuading the Committee to conclude that Mr GP's error "was not of a magnitude which necessitated disciplinary action" were the steps taken by Mr GP subsequent to the mistake coming to his attention.

[74] The Standards Committee corralled these steps under general description of a consideration of the "circumstances of the case". Those circumstances included the elements of Mr GP's responses previously referenced including Mr GP's immediate apology and the assistance provided to Mr NB in pursuing alternative remedies. These factors were sufficient to persuade the Committee that Mr GP had "adequately demonstrated that he was aware of the need to take more care in future when dealing with potential appeals".

[75] With every respect to the Committee, in focusing on the steps taken by Mr GP subsequent to the error coming to light, its decision pays insufficient attention to the gravity of the mistake made.

[76] This was a serious breach.

[77] It is approaching the trite to emphasise the importance of a lawyer accurately advising their client on matters as critical as time frames for filing an appeal.

[78] Whilst immediate and honest acceptance of responsibility for the error made, and a willingness to assist their client with problems that may arise as a consequence, may be sufficient in some circumstances to provide defence to claim that the conduct was unsatisfactory, I am not persuaded that such an approach is appropriate here.

[79] In my view, a lawyer's failure to identify the correct time frame for filing an appeal represents a significant failing, and a serious breach of a lawyer's obligation to act competently. It is conduct which is appropriately signalled to the profession as conduct that is likely to attract a disciplinary response.

[80] The Legislation governing the discipline of lawyers in New Zealand has consumer protection as one of its principal objects.¹²

[81] Emphasising the importance for lawyers of ensuring compliance with statutory timeframes when representing clients in litigation, is necessary to reinforce the consumer protection issues that are engaged, particularly the importance of sustaining a client's ability to continue to progress their claim.

[82] Mr GP's failure to lodge the appeal in time constituted a breach of r 3. There are no mitigating circumstances relating to the breach which would justify departing from the response of a finding of unsatisfactory conduct.

[83] The breach constituted unsatisfactory conduct as defined by s 12(c) of the Lawyers and Conveyancers Act 2006. I am not saying that Mr GP is not a competent lawyer. The finding is that on this particular matter, he did, in respect to a critical issue of that representation, fail to represent Mr NB with the necessary degree of competency.

[84] Having established that Mr GP's conduct was unsatisfactory, attention turns to the question of penalty.

[85] It is here that Mr GP deserves, and should be accorded, the benefit of the steps taken to assist Mr NB. It is also relevant that some consideration be given to the fact that whilst he properly acknowledged responsibility for the error, he was unfortunately given inaccurate advice by a junior lawyer from his firm.

¹² *Orlov v New Zealand Law Society* (2013) NZ CA to 30, (2013) 3 NZLR 562 at 10.

[86] I agree with the Committee that Mr GP had adequately demonstrated that he was aware of the need to take more care in the future when dealing with appeals.

[87] The finding of unsatisfactory conduct, without further penalty, is a sufficient and proportionate response to the conduct finding.

[88] There will be an order reversing the Standards Committee decision, together with an order that Mr GP's conduct was unsatisfactory.

[89] Mr NB sought orders that fees paid to Mr GP be refunded. Those fees were incurred in respect to work completed by Mr GP in advancing Mr NB's appeal in the District Court.

[90] Mr NB identifies no specific concerns with the fee charged, rather his request for refund rests solely on allegation that Mr GP had failed to provide him with competent representation. As discussed above, I can identify no evidence which would support contention that Mr GP had breached his obligations to competently represent Mr NB on the appeal.

[91] Mr NB did not address either in his submissions or at hearing, argument that Mr GP had caused him loss of opportunity (with financial consequence) by ending his ability to pursue avenues to appeal the decision of the District Court, but for completeness I record that argument of that nature could not be considered on review. That argument if advanced (an argument for compensation) would require evidence of actual loss suffered by Mr NB, evidence which could only be established on the back of it having been established that Mr NB's alleged loss had been directly incurred as a consequence of failings on the part of Mr GP. Argument of that nature is properly ventilated through the vehicle of a claim in negligence, rather than a professional conduct complaint.

Costs

[92] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. Mr GP is ordered pursuant to s 210(1) of the Act, to pay costs in the sum of \$1,200 to the New Zealand Law Society within 30 days of the date of this decision.

Enforcement of costs order

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

Anonymised publication

[94] 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.

Orders

- (i) Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed.
- (ii) Pursuant to s 211(1)(b) and s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 a determination is made that there has been unsatisfactory conduct on the part of Mr GP under s 12(c) of the Lawyers and Conveyancers Act 2006
- (iii) Mr GP is to pay \$1,200 in respect of costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 31st day of May 2022

R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr NB as the Applicant
Mr GP as the Respondent
Mr LM as the Respondent's Representative
Ms MF as a Related Person
[Area] Standards Committee X
New Zealand Law Society
Secretary for Justice