LCRO 164/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [XX] Standards Committee
BETWEEN	**ZA** Applicant
AND	**YB** Respondent

DECISION

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

Introduction

[1] Mr [ZA] has applied for a review of a decision by the National Standards Committee dated 3 May 2013 in which the Committee decided that further action in relation to Mr [ZA]'s complaints about Mr [YB]'s conduct was not necessary or appropriate, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Mr [YB] acted for Ms [RI] and her husband, Mr [PK], as claimants in a claim (the claim) to the Weathertight Homes Tribunal (the WHT). A translator was involved to assist communication between Mr [YB] and his clients. Ms [RI]'s father, Mr [RI], was also involved in the claim process. The WHT had declared a conflict of interest existed between Ms [RI]/Mr [PK] and Mr [RI], and had directed the claimants to file briefs of evidence, initially by 14 December 2012, and then by 21 December 2012.

[3] Matters were apparently complicated by Ms [RI] and her husband separating, and being at odds over the division of relationship property, which appears to have been linked to the claim. Mr [PK] was represented separately by Mr [OL]. It appears that Ms [RI]'s decision to be independently represented gave rise to the involvement of members of Mr [ZA]'s chambers. The transition of Ms [RI]'s instructions between lawyers led to the complaint that is at the centre of this application for review. The evidence available on review discloses the following.

Tuesday 4 December 2012

[4] A document headed "Authority to Act", which appears to have been signed on 4 December 2012, says:

> I [RI], authorise [ZA] to act for me in regards to my civil matters.
>
> (the Authority to Act).

[5] Mr [ZA] says the signature on the Authority to Act is Ms [RI]'s, but that the authority does not follow the standard form of the authority he has provided for members of his chambers to use, which is far more detailed.

Wednesday 5 December 2012

[6] Mr [YB] received an offer to settle the claim (the settlement offer).

Thursday 6 December 2012

[7] Mr [UF] sent the authority to Mr [YB] attached to a letter on [SH Law] letterhead saying:

> **RE: UPLIFT OF FILE FOR [RI]**
>
> With reference to the above, we have recently received instructions to act for Ms [RI]. Please find enclosed our authority to act.
>
> Due to the urgent attention which the case requires and in light of witness statements which must be completed by next week, we wish to uplift Ms [RI]'s files today at the earliest opportunity. It would be much appreciated if you would please be so kind as to contact us regarding facilitating the uplift of Ms [RI]'s files at your earliest convenience.

> Thank you very much for your assistance and we look forward to hearing from you soon.

[8] The letter was signed by "[UF]", gave his email address as [UF@SHLAW.co.nz], but included no indication of Mr [UF]'s status, designation or whether he was a lawyer.

[9] This appears to be the first Mr [YB] knew of Ms [RI]'s intention to instruct alternate counsel in respect of the instructions that had been given jointly to his firm. Mr [YB] sent an email to Ms [RI] and her husband referring to Mr [UF]'s letter, the authority, and the settlement offer. Mr [YB] made a number of comments and suggested it would be in the "best interest (for now)" for Ms [RI] and her husband to "leave the matter for settlement negotiation" of the claim with him, given his background and relationship with the opposing parties' lawyer. Mr [YB] suggested they meet, with a translator and Ms [RI]'s new lawyer, to discuss the situation.

[10] Mr [YB]'s administrator, Ms [QJ], describes having received several telephone calls or messages recording calls from Mr [UF] after his initial fax was received at Mr [YB]'s office at about 10:07am on 6 December 2012.[1] Ms [QJ] says Mr [UF] phoned her to check she had received his letter and its attachment, and pressed her several times during the day for release of the file.

[11] Mr [YB] and Ms [QJ] say they were fully engaged that day with preparing documents and drafting submissions to meet a rapidly approaching High Court filing deadline. Ms [QJ] explained to Mr [UF] that Mr [YB] was otherwise engaged, and would attend to Mr [UF]'s correspondence when he was free to do so. Ms [QJ] says she mentioned each of the calls to Mr [YB], and repeated her explanation to Mr [UF] each time she spoke to him.

[12] It appears Ms [RI] contacted Mr [ZA] shortly after receiving the email from Mr [YB] referred to in paragraph [9] above, because Mr [ZA] sent an email to Mr [YB] reminding him of his obligations under rules "4.4, 4.4.1, 10 and 10.2 in relation to transfer of files, respect for other practitioners and communications with clients represented by other legal counsel". Mr [ZA] did not expressly repeat Mr [UF]'s request for the file, but indicated he was carrying out an investigation into whether Mr [YB] had approached Ms [RI] with a view to persuading her not to change counsel.

[1] File Note, [QJ], 7 December 2012.

Friday 7 December 2012

[13] In the late morning of 7 December 2012 Mr [ZA] sent an email to the New Zealand Law Society (NZLS) saying he was lodging a formal complaint against Mr [YB] for "not timely attending to the transfer of a litigation file and also for not responding to repeated inquiries from a colleague, my junior Mr [UF]". Mr [ZA] referred to a "14 December 2012 deadline to file written statements" in the Tribunal, his client's decision to engage new counsel, and saying he had heard nothing from Mr [YB]'s firm. Mr [ZA] also said he reserved "the right to amend this complaint if/when evidence as to other wrongful conduct comes to light".

[14] The Lawyers Complaints Service wrote a letter acknowledging receipt of Mr [ZA]'s complaint, and advising him that a member of the Complaints Service would contact him about it in due course.

[15] Mr [YB] replied to Mr [UF] by email, with the letter attached describing Mr [UF] as a solicitor, and saying:

> We refer to your letter of 6 December 2012 and the harassing phone calls that we received from you on 6 December 2012.
>
> There is no present urgency in relation to this matter as Briefs of Evidence for the claimants are only due on or before 21 December 2012.
>
> A final invoice is being prepared in this matter and will be forwarded to the client for payment, upon which the documents can be uplifted to you.
>
> If you consider that the matter is so urgent that you need to uplift the file now, then please note that we hold a lien over the documents and, upon receipt of an undertaking from your firm that our fees will be paid in priority to your firm's fees, we will release the relevant documents to you.
>
> For the record, yesterday, the writer was intensely involved in preparing and filing urgent submissions and bundles documents in respect of two separate High Court matters. There was no urgency in having to immediately drop other commitments to deal with your request to uplift the file. You were advised by the writers Admin that he was extremely busy preparing submissions that had to be filed in the High Court yesterday, and that he would respond to you when able. Regardless, you continued to harass and place unnecessary pressure on the writers Administrator, who herself was trying to deal with urgent typing and preparation of bundles for the High Court.
>
> We consider your request for immediate uplift was unwarranted and misleading.
>
> We also consider your harassing phone calls unreasonable, disrespectful and discourteous, and in breach of rule 10.1 of the Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008. A complaint will be laid with the ADLS.

> To the extent you harass the writer's Administrator about it, your discourtesy was in breach of the ordinary duties one human being owes to another.
>
> We have herein replied to your communication within one day, which we consider is reasonable.

[16] Mr [ZA] emailed NZLS at 5:06pm saying that he wanted to amend his complaint to incorporate his concerns about "a wide range of serious accusations" Mr [YB] had made in his letter to Mr [UF], in particular an allegation of dishonesty against Mr [UF] as "a lawyer", which Mr [ZA] considers was made "without a proper evidential basis".

[17] Mr [ZA] describes Mr [UF] as "junior counsel" and says there can be no proper basis for the allegation, given "all Mr [UF] was doing was trying to acquire a file". Mr [ZA] speculates about the timing and motivations behind Mr [YB]'s letter. He highlights contradictions which he suggests might found a claim in negligence, suggests Mr [YB] was aware of Mr [ZA]'s complaint, and retaliated by drafting an incomplete and inaccurate letter that was dispatched in haste. Mr [ZA] mentions a filing date of 14 December 2012.

[18] Mr [YB] says the Tribunal amended that date to 21 December and he had advised Ms [RI] of that. Thus, Mr [YB] says, Mr [UF]'s claim to urgency was inaccurate and misleading.

[19] It appears no one at Mr [ZA]'s chambers was aware of the extension until Mr [YB] mentioned it in his letter of 7 December. No enquiry appears to have been made of the WHT to ascertain what timetabling directions were in place.

Monday 10 December 2012

[20] Mr [YB] wrote to Mr [ZA], Mr [UF] and Ms [TG], all of [SH Law]. The letter included an enquiry as to which barrister had conduct of the matter, who the instructing solicitor was, and whether it was their intention to represent Ms [RI]'s husband as well. Mr [YB] indicated that if he was paid, received an undertaking that his photocopying costs would be met, and "proper signed instruction" from Ms [RI] addressed to his firm, to facilitate the release of documents to Mr [ZA] specifically in relation to the litigation of which Mr [YB] had conduct at the time, he would provide documents he held for Ms [RI].

[21] Mr [YB] wrote to Mr Cook, who acted only for Ms [RI]'s husband, and advised him of the possible change of representation.

[22] Mr [YB] also wrote to NZLS raising concerns arising from the correspondence with Mr [ZA]'s chambers of 6 and 7 December, highlighting what he described as "procedural and process issues that have not been properly followed by" Mr [ZA] including:

(a) Deficiencies in the signed instruction and authority, from which he concluded that his firm was not properly authorised to release the file to Mr [ZA], or anyone else.

(b) The absence of any written documentation confirming "that a practising barrister and solicitor is instructed to act" for Ms [RI], and that he had not received any authority and instruction to release files to any barrister or solicitor with a current practising certificate.

(c) His obligations to Ms [RI]'s husband, for whom he also acted, given his knowledge of matrimonial problems between them, and a court order that they live separately, which gave rise to him exercising particular caution in his dealings with the file.

(d) Other complications arising from the involvement of Ms [RI]'s father in the proceeding, and a direction from the WHT that there is a conflict of interest between Ms [RI]/Mr [PK] and Mr [RI].

[23] Mr [YB] referred to his obligation to ensure the orderly transfer of the file, and his offer to meet to facilitate that. He said he was willing to facilitate the release of documents or files when a proper instructions and authority addressed to his firm to release documents was received, together with payment of his account. He emphasised he had not received authority or instructions to release the files to any barrister or solicitor with a current practising certificate. His letter set out a number of matters of complaint against Mr [ZA] arising from their dealings, and enclosed correspondence including the letter from Mr [UF] attaching the authority, a letter he had written to Ms [RI]'s husband dated 10 December recording events, and requesting his instruction and authority if he wanted the files released to Mr [ZA], and payment of his fees. He also enclosed his invoice and a file note by his administrator recording her dealings with Mr [UF] on 7 December.

[24] Mr [ZA] emailed NZLS referring to Mr [YB]'s correspondence, and saying he wished to again add to his complaint. He included reference to Mr [YB]'s contact with Ms [RI], suggesting it was an illegitimate attempt to persuade her not to change her representation. Mr [ZA] said the "deadline was imminent" for steps in Ms [RI]'s proceeding; stood by the validity of the authority and said he did not consider it confusing. He confirmed he was acting for Ms [RI] alone, and said that she had "lost trust and confidence in Mr [YB]", so no purpose could be served by a meeting to transition the file. He disputes that Mr [YB] can refuse to disgorge the file if he is not indemnified for his photocopying costs. Mr [ZA] took issue with Mr [YB]'s view of Mr [UF]'s conduct, and considered that because Mr [YB] had not followed through on his stated intention to lay a complaint against Mr [UF], his comment could be taken as "improper and made as a threat" against another lawyer.

Tuesday, 11 December 2012

[25] Ms [TG] emailed Mr [YB] advising that she acted for Ms [RI]'s husband in relation to the leaky home matter, was forwarding authorities to act and advised that a bank cheque would be delivered that afternoon so that Ms [RI] and her husband could uplift their files. She indicated that Ms [QJ] had told Ms [RI] that the files could not be released without Mr [YB]'s authorisation, even if the firm's invoice were to be paid, and continued to press for the release of the files despite Ms [QJ]'s advice that Mr [YB] was in court, not available and would call when he was free.

[26] A disagreement followed between Mr [ZA] and Ms [QJ] on the basis that, according to the Ministry of Justice's Court lists, Mr [YB] was not in court. Mr [ZA] continued to press for release of the files, saying Mr [YB] had not left Ms [QJ] with proper instructions; had he done so she would have known to release the files when the invoice was paid, which eventuated later that afternoon by bank cheque. Mr [ZA] copied all of that correspondence to NZLS.

Wednesday 12 December 2012

[27] Mr [YB] advised Mr [ZA]'s Chambers in the morning that the files were ready to be uplifted.

Standards Committee

[28] Having considered the expanded complaints and exchanges of correspondence, the Standards Committee directed the parties to explore the possibility of resolving the complaint (which by this time also included a complaint by Mr [YB] about Mr [ZA]'s conduct) by mediation pursuant to s 143 of the Act, and to advise by 14 January 2013 if they wished to mediate the complaints.[2]

[29] On 19 December 2012 Mr [YB] phoned NZLS and said he may not take up the offer of mediation, but would write in the New Year with a final view.

[30] Mr [ZA] responded on 20 December 2012 saying he would be amenable to mediation.

[31] NZLS made further attempts to ascertain Mr [YB]'s response to the suggested mediation, and extended the deadline for his response twice. When he did not respond, Mr [ZA] indicated he wished to add a fourth stage to his complaint if there was no "prospect for resolution otherwise". Mr [YB] did not respond to the Committee, and the parties were advised that it would progress its process.

[32] The Committee met and considered the issues raised by Mr [ZA] at each stage of his complaint. The decision dated 3 May 2013 records that the Committee considered Mr [YB] had responded to Mr [UF]'s enquiries in a timely manner, had not unduly delayed transferring the file, had not placed undue pressure on Ms [RI] to retain his services, had not treated Mr [UF] or Mr [ZA] with disrespect, had not improperly threatened to make complaint against Mr [UF], and did not make any adverse findings with respect to the allegations of negligence and failure to respond.

[33] Mr [ZA] was dissatisfied with the Committee's decision, and applied for a review.

Review Grounds

[34] Mr [ZA]'s grounds of review are:

> 1. The Committee gave no reasons for its decision other than to repeat the factual background and come to a conclusion that is devoid of any logical

[2] Letter NZLS to [ZA] and [YB] (Day Month Year).

process much less any analytical thinking, see for example paragraphs [26](vii), (viii), (ix) and (x) required of a judicial decision maker.

2. The Committee wrongly interpreted the practitioner's intimated complaint especially in light of *UF v OU* LCRO 90/2011, which was not carried out as promised and thereby was a threat, not an expression of an intended course of conduct.

3. The Committee failed to consider that the only reason why the file was transferred was the complaint, and also failed to consider the repeated obstructions put forward by the practitioner (which he eventually ignored, evidencing there was no proper basis for them in the first place).

4. The Committee failed to properly apply the ethical rules … especially in relation to former clients and obligations lawyers owe to them, and also did not adequately, or at all, address the full grounds of complaint.

5. The Committee is a hand-selected (by NZLS) adjudicator which is contrary to the basis of natural justice requirement of random, i.e. impartial, allocation of adjudicators.

[35] Mr [ZA] asks that the Standards Committee reconsider in a manner not inconsistent with the ultimate decision of this Office or, alternatively, that this Office exercise jurisdiction to appropriately sanction the practitioner.

Nature and Scope of Review

[36] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[3] [redacted]

[37] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

[38] 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.

Review Hearing

[39] Mr [ZA] attended a review hearing in Auckland on 25 October 2015. Mr [YB] was not required to attend and the hearing proceeded in his absence. A copy of the audio of the hearing has been provided to both parties.

Recusal Application

[40] Mr [ZA] has sought my recusal. That is dealt with in the separate decision headed "Recusal Application" to which this decision is attached, and bears the same date as this decision.

Analysis of the review grounds

First review ground

[41] The first review ground proceeds from the premise that the Committee did not explain how its reasoning resulted in its conclusion.

---

[4] [redacted] [2016] NZHC [redacted], [2016] NZAR 475 at [2].

[42] Although the complaint evolved through a number of stages, the evidence is reasonably straight forward and well documented. The Committee is not required to record the minutiae of its collective thinking. It is reasonably apparent from the decision how the Committee reached the conclusions it did based on the facts available to it.

[43] The concern raised in the first review ground is also met to an extent by this Office forming an independent view, based on the substance and process of the Committee's decision. There is never less information to consider on review. The Committee's decision is one source of information among many to be considered. Weight is for the decision-maker, although I am conscious of the need to exercise some particular caution before substituting my judgement for that of the Committee, without good reason. The analysis and reasons for this decision are set out below.

Second review ground

[44] The second review ground is that the Committee should have interpreted Mr [YB]'s comment on 7 December that he would lay a complaint about Mr [UF]'s conduct as a threat.

[45] Mr [YB] made a complaint on 10 December. It is, therefore, difficult to see the comment made only three days earlier as a threat rather than a forewarning of an intended course of action which eventuated promptly, albeit in a slightly modified form. There is no good reason to pursue that review ground further.

Third review ground

[46] The third review ground is that the Committee failed to consider a series of matters. It is implicit in this ground that the matters the Committee is said to have overlooked were pivotal to the outcome of the complaint.

[47] The matters said to have been overlooked are that Mr [YB]:

(a) Only transferred the file because his conduct was the subject of a complaint to NZLS;

(b) Repeatedly raised difficulties to obstruct the transfer of the file;

(c) Ignored the difficulties he had identified when he transferred the file;

(d) On the basis of the evidence referred to above, had identified difficulties that had no proper basis in the first place.

[48] The first matter referred to above overlooks the very real possibility that Mr [YB] transferred the file when he was satisfied that he could responsibly do so. By 12 December Mr [YB] knew, with a reasonable level of certainty, that Mr [ZA] and his team were instructed to act for Ms [RI] and her husband, that he had met the obligations he owed to them jointly, and that he had been paid for the services he had provided.

[49] The conclusion argued for relies for support on two premises: first that Mr [YB] deliberately obstructed the transfer of the file, and second that he then tried to justify his conduct after he produced the documents requested on behalf of Ms [RI]. Neither premise is well supported by the evidence. The simple fact that complaint has been made does not lead logically or directly to the conclusion argued for. There is no good reason to engage further with the third review ground.

Fourth review ground

[50] The fourth ground of review asserts that the Committee did not apply the ethical rules in relation to former clients and the obligations owed to them by lawyers, and did not adequately address the full grounds for complaint.

[51] That argument is not well supported by the evidence, and again is addressed to some extent in this review.

Fifth review ground

[52] The fifth ground of review contains a suggestion of bias in the Committee process. Given the facts, there is no obvious reason to consider that the constitution of the Committee had any impact on the fairness of the decision making process.

Summary

[53] Individually and collectively the grounds of review do not provide any good reason to depart from the Committee's decision.

Review issue

[54] The original complaint raised the question of whether Mr [YB] had contravened rule 4.4.1. Conduct by Mr [YB] in the course of the complaint process, Mr [ZA] says, evidences contraventions of other professional obligations. Those concerns can generally be addressed with reference to the rules, in particular rules 10, 10.1, 10.2 and 10.2.3, 4.4 and, of course 4.4.1. The questions are whether Mr [YB]:

(a) Was responsible for undue delay in acting on Mr [UF]'s written request to uplift Ms [RI]'s file or attempted to exert undue pressure on Ms [RI] not to terminate the retainer – rule 4.4 and 4.4.1;

(b) Was authorised to communicate directly with Ms [RI] - rule 10.2 and 10.2.3;

(c) Promoted and maintained proper standards of professionalism in his dealings with Mr [UF] and Mr [ZA] - rule 10; and

(d) Treated Mr [UF] and Mr [ZA] with respect and courtesy - rule 10.1.

[55] The answers to those enquiries answer the general question of whether there is good reason to depart from the Committee's decision. For the reasons discussed below, the answer to that question is no. For the reasons that follow, the Committee's decision is confirmed on review.

Analysis

Was Mr [YB] responsible for undue delay in acting on Mr [UF]'s written request to uplift Ms [RI]'s file and did he attempt to exert undue pressure on Ms [RI] not to terminate the retainer – rule 4.4 and 4.4.1

[56] The original issue raised was whether Mr [YB] acted on Mr [UF]'s written request to uplift Ms [RI]'s files with undue delay. That obligation arises under rule 4.4.1 which says:

> 4.4.1 Subject to any statutory provisions to the contrary, upon changing lawyers a client has the right either in person or through the new lawyer to uplift all documents, records, funds or property held on the client's behalf. The former lawyer must act upon any written request to uplift documents without undue delay subject only to any lien[5] that the former lawyer may claim.[6]

[57] No mention has been made of any statutory provision that might apply. Ms [RI] has the right to instruct whoever she chooses at any time. She appears to have decided to change lawyers, and acted on that decision on 4 December 2012. She had the right, either in person or through Mr [ZA] and his team, "to uplift all documents, records, funds or property" held on her, rather than anyone else's behalf.

[58] Having received the written authority from Mr [UF] on 6 December 2012, Mr [YB] was professionally obliged by rule 4.4.1 to act upon it without undue delay.

[59] However, his obligation to act was subject to his claim to a lien to secure payment of his fees. He advised Mr [ZA] and his team of that claim the day after he received Mr [UF]'s request to uplift the file. Ms [TG] advised Mr [YB] on 11 December that he was to be provided with a bank cheque for his fees that day. Receipt of a bank cheque would effectively resolve the lien claim.

[60] There is no evidence of when the bank cheque reached Mr [YB]'s office, but his release of the file in the morning of 12 December is consistent with his fees having been paid on 11 December.

[61] Aside from the lien, preparing a file to be uplifted is not always a simple matter. Ms [RI]'s right was to uplift documents, records, funds, or property held on her behalf. Ms [RI] was not necessarily entitled to receive Mr [YB]'s entire file.[7] Mr [ZA] argues she had an absolute right to everything jointly with Mr [PK]. That sounds like an argument better resolved in respect of a claim to relationship property than in this jurisdiction. It also overlooks the likelihood that Mr [YB]'s file may have contained materials neither Ms [RI] or Mr [PK] was entitled to uplift.

---

[5] A lien is a legal claim of a person against the property of another person that secures the payment of a debt or the fulfilment of an obligation owed by the other person.
[6] This rule does not limit any legal rights that a client may have to copies of documents, for example under the Privacy Act 1993.
[7] *Wentworth v De Montfort and Others* (1988) 15 NSWLR 348.

[62] There is no reason to infer anything sinister from Mr [YB] wanting to personally oversee the release of the file. While file uplifts can sometimes be safely delegated, there is no universal rule. Regardless of any self-interest, the task of checking a file before release is to be undertaken diligently and with proper care guided by the exercise of professional judgement.

[63] Mr [YB] was aware of the 21 December deadline for briefs to be filed. It appears he had advised Ms [RI], but she may not have passed that information on.

[64] Mr [ZA] says there was good reason for Mr [UF] to believe matters were more urgent than they actually were. Mr [ZA] and his team were entitled to rely on what Ms [RI] had told them.

[65] It was reasonable for Mr [YB] to think that Ms [RI] would pass significant information, such as the timeline for filing briefs, on to any new lawyer she might instruct. When Mr [YB] became aware Mr [UF] did not know about the extension he promptly told him. Nonetheless, a level of urgency is to be expected from Mr [ZA] and his team, given the task of preparing briefs on a file recently taken over is also to be undertaken with care and diligence.

[66] While the perception of urgency on the part of Mr [ZA] and his team was inaccurate it was not misplaced. There is no reason to over-stimulate that miscommunication. I do not accept that Mr [YB] is responsible for it. A quick call to the WHT to enquire about the timetable direction might have gone some way to relieving the perceived pressure.

[67] The authority and written request gave rise to a number of complications for Mr [YB], but he was obliged to ensure the orderly transition of the file to new lawyers. That task was not simplified by the instructing solicitor taking no active role, or by the way the uplift request was handled by Mr [ZA] and his team. At the review hearing Mr [ZA] appeared to accept there may have been room for improvement by his team.

[68] For whatever reason, there was a two day delay in the authority being sent to Mr [YB] with Mr [UF]'s request to uplift the file. Mr [YB] is not responsible for that delay.

[69] Although it took five working days from the authority being signed to Mr [YB] releasing the file, it took Mr [YB] less than three working days to respond to what was presented to him by Mr [ZA]'s team. Questions raised by Mr [YB] about the authority

are understandable. Mr [ZA] says it did not follow his usual format. It was not clear on its face. Questions about the instructing solicitor are also understandable, given the urgency and Mr [YB]'s concerns about payment of his fees. Those concerns would not have been allayed by Mr [YB] ascertaining that Mr [ZA] is in practice as a barrister, so cannot operate a trust account and may not be able to provide an undertaking as to fees. Those are matters that would generally be attended to by an instructing solicitor.

[70] There is no reason to think that the complaint against Mr [YB] made any material difference to his conduct in making the file available for uplift. The possibility that the file could have been uplifted sooner if Mr [YB] had been left to get on with the task without the distraction of the complaint process cannot be completely overlooked, but his claim to a lien and the payment of his fee are likely to be a more reliable indicator of the reasons for the timing of the release. Payment and release occurred in a reasonably compressed timeframe, and in any event, without undue delay on Mr [YB]'s part.

[71] The suggestion that Mr [YB] contravened his obligation under rule 4.4 not to exert undue pressure on Ms [RI] not to terminate his retainer with her, or to re-engage him, is not well supported. On its face, the letter Mr [YB] sent to Ms [RI] on 6 December makes sensible enquiries and suggestions, is informative and not overbearing. There is no other evidence to support the concerns Mr [ZA] expressed to NZLS on 10 December that enables me to conclude Mr [YB] exerted undue pressure on Ms [RI] not to terminate his retainer or to re-engage him. No complaint appears to have actually followed alleging a contravention of rule 4.4, and the available evidence gives no reason to believe such a contravention occurred.

[72] In all the circumstances, there is no basis on which to conclude that Mr [YB]'s conduct contravened rule 4.4 or 4.4.1.

Was Mr [YB] authorised to communicate directly with Ms [RI] - rule 10.2 and 10.2.3.

[73] Mr [YB] wrote to Ms [RI] communicating receipt of an offer of settlement after he received Mr [UF]'s letter. As he had been acting on the WHT claim on joint instructions, Mr [YB] had an obligation to put the settlement offer in front of Ms [RI] and Mr [PK]. Mr [UF]'s indication that Mr [ZA]'s chambers were instructed by Ms [RI] "in regards to [her] civil matters" gives rise to the question of whether rule 10.2 was engaged. It is not clear from the face of the authority which the "civil matters" were, but

if Mr [ZA] and his team were acting for Ms [RI] in the claim, rule 10.2 would prohibit Mr [YB] from communicating directly with her except as authorised by the rule.

[74] In particular rule 10.2.3 relevantly says:

> A lawyer may communicate directly with a former client who is represented by a new lawyer for the purpose of confirming the client's instructions and arranging for the orderly transfer of the client's matters to the new lawyer.

[75] Mr [YB]'s letter to Ms [RI] sought confirmation of her instructions and suggested a pathway to the orderly transfer of her matters to her new lawyer, on the assumption that the claim was the "civil matters" referred to. What Ms [RI] chose to do from there on was up to her. Given the timing of events and the suggestion of a language barrier that called for the involvement of a translator, there is nothing objectionable in Mr [YB]'s response suggesting a meeting to facilitate the transition of her instructions to him to a new lawyer, if that is how matters were to proceed. That seems a reasonable approach to the situation in the circumstances.

[76] As Mr [YB] was authorised to communicate directly with Ms [RI] by rule 10.2.3 he did not contravene rule 10.2.

Did Mr [YB] promote and maintain proper standards of professionalism in his dealings with Mr [UF] and Mr [ZA] - rule 10?

[77] Mr [ZA] objects to Mr [YB]'s correspondence.

[78] Mr [YB] denies any wrongdoing.

[79] Having considered the materials before it, the Committee concluded Mr [YB] had not treated Mr [UF] or Mr [ZA] with disrespect, including not having improperly threatened to make complaint against Mr [UF].

[80] Mr [ZA]'s concern is directed toward the way in which Mr [YB] addressed the request for the file, including his dealings and correspondence with Mr [UF], and that of his staff. I am unable to identify evidence of any conduct by Mr [YB] that contravenes rule 10.

Did Mr [YB] treat Mr [UF] and Mr [ZA] with respect and courtesy - rule 10.1?

[81] Mr [ZA] says Mr [YB] was disrespectful towards Mr [UF].

[82] Mr [YB] denies any wrongdoing.

[83] The Committee concluded that Mr [YB] had recorded the basis for his concerns and comments, and that he had an evidential basis for his comments about Mr [UF].

[84] There is no particularly cogent reason to take a different view. Mr [UF] had made a number of telephone calls to Mr [YB]'s office. Those had been met, apparently, with responses to the effect that Mr [YB] would attend to the request when he was free to do so. It appears that when he was free to do so, he did, although not as swiftly as Mr [ZA] preferred.

[85] Mr [UF] and Mr [ZA]'s different expectations about urgency are explicable. It would not be unusual for lawyers assuming conduct of a file to make enquiries of any relevant Court or Tribunal, particularly where a file is not immediately available. Presumably the WHT would have been notified of the change in representation by the instructing solicitor, in any event. The Committee considered that whilst it was not in a position to determine the merits of Mr [UF]'s conduct, Mr [YB] had a sufficient evidential basis for the concerns he had raised, and comments he had made. There is good logic to support that view.

[86] The Committee did not consider that Mr [YB] had, in fact, threatened to make a complaint against Mr [UF]. The Committee was also of the view that the fact that complaint followed against Mr [ZA], rather than Mr [UF], and that Mr [YB] had referred to "ADLS" rather than NZLS, raised no issues that warranted disciplinary investigation. As to the latter point, there is nothing that warrants further consideration as to whether the complaint was a threat for an improper purpose, there is no reason to conclude that it was. The fact that the person who was the subject of the complaint became Mr [ZA], rather than Mr [UF] as the employee, does not alter the thrust of the statement.

[87] On reflection, Mr [YB] evidently formed the view that responsibility for Mr [UF]'s actions were less likely to be attributable to him, and more likely to be attributable to whoever he was taking direction from. There is nothing obviously erroneous in assuming that it was Mr [ZA]. Mr [ZA]'s evidence at the review hearing that he has a "policy" of making complaints as soon as he encounters any resistance to

the disgorgement of a file from another practitioner is not necessarily something lawyers outside his chambers would be aware of.

[88] There is no reason for the Committee to have progressed the allegation of negligence against Mr [YB] or to have been concerned about Mr [YB] not following up on his response to the invitation to consider mediation. Mediation is entirely voluntary. There is nothing objectionable in Mr [YB] either declining mediation, or not confirming that he had declined mediation. Neither of those things prevented the Committee from continuing its inquiry, and there is no suggestion that he was being obstructive to the Committee. It was simply a lack of response. Nothing turns on it.

[89] The Committee concluded that further action was not necessary to address any of the other matters raised in the complaint, and dealt with the bulk of the issues raised. Mr [ZA]'s concern that the Committee's consideration lacked a logical process or analytical thinking is not well supported by the facts or the decision, and in any event if there had been any substance to that concern, that would be met by the formation of a second opinion on review.

Decision

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

DATED this 31st day of August 2016

_____

D Thresher
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 [ZA] as the Applicant
Mr [YB] as the Respondent
Ms [VE] as a Related Party
The [XX]Standards Committee
The New Zealand Law Society