

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

[2022] NZLCRO 035

Ref: LCRO 167/2021

**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**

**MP**

Applicant

**AND**

**IC**

Respondent

**DECISION**

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

**Introduction**

[1] Ms MP has applied for a review of a decision by the [Area] Standards Committee [x] to take no further action in respect of her complaint concerning the conduct of the respondent, Mr IC.

**Background**

[2] In 2010, Ms MP's former husband, Mr YH, filed proceedings in the Family Court seeking orders for division of relationship and trust property.

[3] In the early stage of those proceedings, Ms MP was on occasions self-represented and on others, represented by counsel.

[4] In October 2013, Ms MP instructed Mr IC to act.

[5] Mr IC engaged in discussions with Mr YH's counsel concerning options for settlement.

[6] In the course of these discussions, Ms MP formed a view that she had grounds for a further claim against Mr YH. The proceedings progressed in the Family Court where the presiding judge determined that a full and final settlement had been agreed between the parties. The court directed that Ms MP was to pay the costs of the court appointed counsel in the sum of around \$41,000.

[7] Ms MP appealed the Family Court's decision. Her appeal was unsuccessful in challenging the Family Court judge's finding that she and her former husband had negotiated a settlement of relationship property, but the High Court dismissed the order made by the Family Court that Ms MP make contribution to the costs of the court appointed counsel. The High Court observed in its decision, that the settlement reached by Ms MP and her former husband did not prevent her from making a claim under s 15 of the Property (Relationships) Act 1976.

[8] The court directed that the matter be returned to the Family Court.

[9] At this stage, Mr IC, on the recommendation of the Family Court Judge, consulted with senior counsel and withdrew as Counsel for Ms MP.

[10] In the period 31 October 2013 to 6 July 2015, Mr IC rendered fees in the sum of \$64,852 (GST exclusive) together with disbursement costs in the sum of \$1,032.77. Mr IC's total fees (GST inclusive and disbursements) were \$75,612.44.

[11] Ms MP agreed (through her then solicitor Mr ND) that Mr IC's fees would be paid when she was in receipt of settlement funds.

[12] Ms MP subsequently changed her instructing solicitor and instructed Mr UJ in that capacity. Settlement funds were paid into Mr UJ's trust account.

[13] Mr UJ initially recommended to Ms MP that Mr IC's invoices be paid. It was Mr UJ's view that the invoices were reasonable.

[14] Ms MP then provided instructions to Mr UJ to transfer settlement funds received to another solicitor.

[15] On 21 February 2020, Mr IC commenced proceedings to recover his fees. Those proceedings were stayed for a period of six months in anticipation that Ms MP would be filing a complaint with the Lawyers Complaints Service.

### **The complaint and the Standards Committee decision**

[16] Ms MP lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 20 November 2020. The substance of her complaint was that:

- (a) Mr IC had no entitlement to fees claimed as he had been conflicted when undertaking work for her; and
- (b) as a consequence of the considerable delay in Mr IC taking steps to recover fees, Ms MP had a reasonable expectation that any claim Mr IC may have had would have been “put to rest”; and
- (c) Ms MP’s failure to respond to Mr IC’s correspondence of February 2017 and an email of 2019, is explained by reference to traumatising experiences which had manifested in avoidant behaviour; and
- (d) counsel was responsible for some of the delay that occurred; and
- (e) at a critical moment in the professional relationship, Mr IC should have ceased acting for Ms MP; and
- (f) in the course of advancing submissions to both the Family Court and the High Court, Mr IC was required to explain and interpret documents he himself had created, leaving it open for inference that he was endeavouring to justify a position before the courts in which his involvement and conduct was open to criticism; and
- (g) irrespective as to whether Ms MP’s challenge to the settlement was right or wrong, Mr IC could not continue to act; and
- (h) Mr IC should have referred his client to fresh counsel; and
- (i) if Mr IC had withdrawn from the proceedings at the point that he should have, no further fees would have been incurred by him; and
- (j) it follows that fees charged were not fair and reasonable.

[17] Mr IC provided a response to the complaint on 25 February 2021.

[18] He submitted that:

- (a) the fee dispute had been long-running and had caused him considerable distress; and

- (b) he was the 13<sup>th</sup> counsel to represent Ms MP in proceedings that had generated voluminous files; and
- (c) despite the scope of the proceedings, he considered the issues raised by the complaint to be narrowly confined; and
- (d) his response to issues of complaint raised (which had been earlier raised in correspondence from Ms MP's counsel) had been addressed in correspondence of 21 February 2017; and
- (e) in his February 2017 correspondence, he had alerted Ms MP of the need for her to raise any issues concerning his fees with the NZLS but despite this advice, no further objection had been taken to his fees until he had taken steps to recover the outstanding fees; and
- (f) core components of a settlement were negotiated in a period leading up to around 2 December 2013, following which there was discussion as to how the settlement would be implemented; and
- (g) on 20 December 2013, Ms MP purported to resile from that settlement in an email copied to him of which he had no forewarning; and
- (h) in advancing argument that settlement had not been agreed in both the Family Court and High Court, he was not intruding into the arena of providing evidence as a witness, but simply making submissions on a specific issue; and
- (i) if there was concern as to whether his independence was compromised in advancing those submissions, it could be reasonably anticipated that a senior High Court judge would have been alerted to the issue and commented on it; and
- (j) he was not compromised in acting for Ms MP; and
- (k) no comment had been made to the court that he had acted in the absence of instructions from Ms MP, his indication to the court was that on being advised by Ms MP that she would not agree to settle, his instructions had changed; and
- (l) at all material times, he had discussed all relevant issues with Ms MP and copied her in on correspondence; and

- (m) whilst Ms MP did not succeed in argument that a settlement had not been agreed, she nevertheless had achieved some productive outcomes; and
- (n) there was a misapprehension as to the explanation for his decision to stand down from acting, consequential on the decision of Judge [Name] to make a complaint about his conduct; and
- (o) the complaint expressed regarding his conduct did not relate to the manner in which he had advanced the appeal in the High Court, but rather was a consequence of the Family Courts judge's reaction to the High Court decision; and
- (p) his withdrawal from the proceedings was discussed with Ms MP, supported by her, and accompanied by indication from her that she would attend to settling his accounts; and
- (q) fees charged were fair and reasonable; and
- (r) Ms MP had agreed that fees would be paid from settlement funds when funds were received; and
- (s) advice he had taken from senior counsel was that there had been no impropriety, breach of ethics or lack of skill on his part in "either the application brought for interpretation of the decision, the conduct of that hearing, the lodging of the appeal, or the conducting of the appeal"; and
- (t) his decision to seek leave to withdraw from acting was not prompted by his actions in bringing or arguing the High Court appeal, it was prompted by the reaction of the Family Court Judge to the outcome of the appeal; and
- (u) the conduct complaint was being advanced as a device to seize a strategic advantage and delay the civil proceedings brought for recovery of outstanding fees; and
- (v) numerous attempts to make contact with Ms MP had proven unsuccessful.

[19] Mr JG responded to Mr IC's defence of his position on 26 March 2021. He submitted that:

- (a) Ms MP's complaint was not confined to the quantum of the fees charged, rather the broader and "more significant" issue, was whether Mr IC had a conflict of interest; and
- (b) to the extent that the Committee may have cause to consider as to whether there were special circumstances, relevant legal tests were met to merit the fees being considered by the Committee; and
- (c) there had been substantial delay from issuing of the invoices, to Mr IC taking steps to initiate recovery proceedings; and
- (d) Mr IC's decision to proceed with his claim brought the conduct concerns back into focus.

[20] The Standards Committee identified the key issue for consideration as being a consideration of the question as to whether it had jurisdiction to determine the fees complaint, given that the issues in contest had arisen in excess of two years prior to the complaint being filed.

[21] In focusing its investigation in that fashion, the Committee considered the application of reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Complaints Service and Standards Committees Regulations) which provides that:

If a complaint relates to a bill of costs rendered by a lawyer or an incorporated law firm, unless the Standards Committee to which the complaint is referred determines that there are special circumstances that would justify otherwise, the committee must not deal with the complaint if the bill of costs –

- (a) was rendered more than two years prior to the date of the complaint; or
- (b) relates to a fee that does not exceed \$2,000, exclusive of goods and services tax.

[22] The Standards Committee delivered its decision on 6 September 2021.

[23] The Committee determined pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[24] In reaching that decision, the Committee concluded that:

- (a) whilst the complaint raised issues as to whether Mr IC should have ceased acting at an earlier stage, it considered that the crux of Ms MP's complaint

was that fees rendered by Mr IC were not fair and reasonable for the services provided; and

- (b) Ms MP had ample time in which to file a complaint at an earlier date having indicated as early as December 2016 that she intended to complain about the fee charged; and
- (c) submission that Ms MP was in a vulnerable state following the end of her relationship (amplified by the distress of the court proceedings) was not sufficient to meet the criteria for special circumstances; and
- (d) it did not consider that complaint relating to Mr IC's failure to step aside at an earlier stage was sufficiently abnormal or uncommon for the test for "special circumstances" to be met; and
- (e) in any event, the significant lapse of time that had passed since the proceedings were on foot, would make any investigation of the concerns raised relating to Mr IC's representation, impracticable or undesirable.

[25] Overall, the Committee concluded that it was not satisfied that there was sufficient evidence to support conclusion that there were special circumstances which would justify the Committee considering the complaint.

### **Application for review**

[26] Ms MP filed an application for review on 14 October 2021.

[27] On review, Ms MP amplifies the arguments she had advanced when progressing her complaint.

[28] Ms MP submits that:

- (a) the Committee should have concluded that there were special circumstances that merited it examining the reasonableness of the fee charged; and
- (b) the Committee's examination of the issues should not have been confined to considering the issue of jurisdiction, but should have considered the issue pivotal to Ms MP's complaint, being her contention that Mr IC should not have acted for her with consequence that no fees would have been incurred if he had responsibly withdrawn from acting when the circumstances required him to do so; and

- (c) the Committee had erred in its approach by confining its analysis to the issue of special circumstances; and
- (d) in applying the “special circumstances” test, the Committee had made an error of law by applying a threshold which was too high; and
- (e) in considering the circumstances which had contributed to delay by Ms MP in filing her complaint, and if a correct approach was adopted to application of the “special circumstances” test, the Committee ought to have been satisfied that there were special circumstances.

[29] Mr IC was invited to comment on Ms MP’s review application.

[30] He submits that:

- (a) Ms MP submits (contrary to persistent overtures indicating the opposite) that her complaint was one concerning the conduct, rather than a complaint challenging the reasonableness of the fees; and
- (b) he considered the complaint to be meritless; and
- (c) the complaint was being advanced with ulterior purpose to stay the civil proceedings for recovery of fees; and
- (d) the complaint filed by Ms MP on 20 November 2020 (five years after the last invoice had been rendered) was described as a “fees complaint” in the correspondence that accompanied the application; and
- (e) analysis of that correspondence confirms that the complaint was being advanced as a fees complaint; and
- (f) the complaint filed did not particularise any rule of professional conduct that was alleged to have been breached, rather the complaint was founded on allegation that he should have withdrawn as counsel; and
- (g) had the complaint advanced been a legitimate expression of concern that there had been a “grave breach of professional standards”, it could have been expected that the complaint would have been articulated as such; and
- (h) the Committee’s attention had been drawn to Ms MP’s subsequent solicitor’s view (Mr UJ) that fees charged were fair and reasonable, together with indication from Ms MP that she would pay her fees; and



- (i) in the context of no steps having been taken by Ms MP to settle the outstanding fees, he had made specific request of Mr UJ in February 2017 as to whether his client would be intending to advance a fees complaint, and informed Mr UJ at that time of the requirement that fee complaints be lodged within two years; and
- (j) Ms MP had been assisted by counsel throughout, and concerns raised that Ms MP's vulnerabilities impeded her capacity to progress a complaint are mitigated by the fact that she had benefit of legal representation throughout; and
- (k) argument advanced for Ms MP was inherently circular in nature, and that whilst argument was made that the complaint was not limited to fees, the argument returns to contention that no fees should be paid; and
- (l) the complaint before the Committee was, as a matter of form and substance, a fees complaint; and
- (m) the initial complaint did not articulate, in a refined form, argument that there had been a conflict of interest; and
- (n) the Committee's analysis was sufficient to dispatch complaint that it had failed to consider and legitimately apply the test for special circumstances as elaborated in the decision of *Cortez Investments Ltd v Olphert & Williams* and subsequent decisions;<sup>1</sup> and
- (o) the review had been brought for an improper purpose; and
- (p) the review clearly lacked merit; and had been advanced with collateral purpose.

## Hearing

[31] A hearing proceeded on 14 April 2022. Ms MP was represented by Mr JG, Mr IC by Mr EZ.

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<sup>1</sup> *Cortez Investments Ltd v Olphert and Collins* [1984] 2 NZLR 434 (CA).

## Nature and scope of review

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>2</sup>

... 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.

[33] More recently, the High Court has described a review by this Office in the following way:<sup>3</sup>

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.

[34] 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

[35] The issues to be determined in this review are narrowly focussed, being:

- (a) was the complaint advanced a complaint about a specifically identified alleged conduct breach (independent of, although having consequence

<sup>2</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>3</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

for, the fees charged) and thus not conduct which fell to be captured by reg 29 of the Complaints Service and Standards Committees Regulations; and

- (b) if the conduct complaint was seen to be narrowly confined to a complaint about fees, was the Committee correct to conclude that it lacked jurisdiction to consider the complaint on grounds that were no special circumstances which would merit the complaint being considered outside the two-year period proscribed by reg 29;

[36] A feature of this review is the length of delay from the time that Mr IC rendered his final account, to the time that Ms MP took steps to lodge her complaint.

[37] Mr IC rendered his final account in June 2015. Ms MP filed her complaint in November 2020.

[38] When Ms MP filed her complaint, it was approaching five and a half years since she had been represented by Mr IC.

[39] The parties provide differing explanations as to the reasons for the delay.

[40] Mr IC says that he had difficulty locating Ms MP, and these difficulties provide (in part) explanation for delay in taking steps to recover his fees.

[41] Mr IC filed proceedings in the District Court to recover outstanding fees in February 2020.

[42] Ms MP responded by filing a notice of defence to the claim, followed by her lodging of the conduct complaint.

[43] As a consequence, it was agreed that the conduct issue should be resolved before the court proceedings progressed further.

[44] That approach is consistent with the obligation on practitioners to refrain from taking steps to recover fees, in circumstances where a complaint has been lodged, until such time as the fee complaint has been disposed of.<sup>4</sup>

[45] Mr IC considers the steps taken to lodge a complaint, to be a transparently cynical attempt on Ms MP's part to utilise the vehicle of advancing a professional conduct complaint, as a means to delay and obstruct the proceedings for recovery of fees.

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<sup>4</sup> Section 161(1) of the Act.

[46] Ms MP rejects suggestion that her complaint was filed with purpose to obstruct the court proceedings. She says that she raised concerns with Mr IC shortly after the final bill was received that there had been correspondence between her lawyer and Mr IC, and that Mr IC's lack of action in taking steps to recover his fees reasonably encouraged her in the view that he had decided to write off the fees. Ms MP interpreted this lack of action as acquiescence by Mr IC to her argument that fees charged should not have been charged.

[47] I am unable to reconcile these differing accounts but nor do I have need to.

[48] But delay of this magnitude in advancing a complaint, inevitably makes the process of conducting investigation into the complaint more difficult.

[49] At the core of Ms MP's complaint is allegation that Mr IC should have withdrawn as her counsel in December 2013. The conduct is required to be scrutinised through the prism of some 9 years having passed from the time of the alleged offending conduct, to the time that conduct is examined through the process of review.

#### *Issue 1*

*Was the complaint advanced a complaint about a specifically identified alleged conduct breach (independent of, although having consequence for, the fees charged) and thus not conduct which fell to be captured by reg 29?*

[50] Before addressing the pivotal issue, it is useful to briefly consider the purpose of reg 29.

[51] In directing that a Standards Committee *must not* (in the absence of special circumstances) deal with a costs complaint if the bill was rendered more than two years prior to the date of the complaint, the clear purpose and intent of the regulation is to provide impetus to potential complainants, to file fee complaints promptly.

[52] There are a number of reasons as to why it is important for fee complaints to be managed expeditiously. Lawyers are entitled to be paid for services provided. Any complaints or concerns regarding a fee charged, could be expected in, the majority of cases, to be identified promptly. Bluntly put, clients are frequently alerted to concerns about a fee their lawyer has charged, on opening the email or envelope containing the invoice.

[53] The exercise that needs to be undertaken in examining the reasonableness of a fee charged by reference to a wide range of fee factors is best undertaken at a time close in proximity to the time the work was undertaken.

[54] Fee complaints most frequently raise concerns that are directly related to the process that has gone into calculating the fee. These concerns may include complaint that the fee charged exceeded an initial estimate or quote provided, or that the lawyer's charge out rate was excessive and not reflective of the time that had been spent on the file. Complaints are frequently raised that work completed on the file was replicated or unnecessary.

[55] Mr JG submits for Ms MP, that the Committee misdirected itself in confining its analysis to a consideration of the issue as to whether there were special circumstances which would enable it to consider the fee complaint. At the core of this misdirection, was the failure of the Committee to adequately address the specific conduct complaint that had been advanced by Ms MP.

[56] Mr JG was, at first step, arguing that the Committee's analysis should have proceeded from the starting point that it was required to consider a conduct complaint that did not engage possibility of being statute barred, and, having done so, that conduct breach if established, could lead to reasonable conclusion that Mr IC was not entitled to charge any fees for services in representing Ms MP, as he was compromised in acting for her, and should not have continued to act.

[57] In submissions filed prior to hearing, Mr JG described the essence of his client's position as being that her complaint related to "conduct and costs".

[58] Whilst Mr JG argues that the Committee erred in concluding that there were no special circumstances that would have merited the Committee examining the fee, at hearing, he conceded that if I was to conclude that there was no substance to Ms MP's complaint that Mr IC was conflicted and should have ceased acting, question as to whether consideration should be given to the question as to whether there were special circumstances which would justify Ms MP's fee complaint be considered out of time, would become irrelevant.

[59] The foundation for complaint that fees charged were unreasonable rested solely on argument that Mr IC should not have represented Ms MP and, as a consequence, he had no entitlement to charge for any services provided.

[60] This was a stand or fall argument.

[61] At hearing, Mr JG argued that the matter should be returned to the Standards Committee so that the Committee could give proper consideration to the conduct issue that he contended had been overlooked by the Committee.

[62] I do not agree with Mr JG that the Committee ignored the question as to whether any conduct issues were engaged as a consequence of Mr IC's failure to step aside at an earlier stage in the proceedings, although I agree with his submission that the Committee's decision did not provide expansive reasons to explain the decision reached on that point.

[63] Mr JG suggested that it would be preferable for a Standards Committee to reconsider the matter rather than for the Legal Complaints Review Officer (LCRO) to address the issue.

[64] I do not consider that the interest of the parties is best served by direction that the matter be returned to a Standards Committee.

[65] The purpose and function of the LCRO is to review Standard Committee decisions. In doing so, the LCRO is required to look at matters afresh and to bring a robust and independent approach to that process.

[66] It has been noted that a singular feature of this review is the considerable length of time that has elapsed from the time that Mr IC represented Ms MP, to the time that a complaint was filed and a decision in respect to that complaint issued.

[67] The interests of neither party are best served by prolonging resolution of the matters further.

[68] Mr JG suggested that if the matter was returned to a Standards Committee, Ms MP would have opportunity to fully articulate her case on the issue that he considered the Standards Committee had paid scant attention to.

[69] Ms MP has had ample opportunity to articulate her position. In the course of advancing her complaint before the Committee, Ms MP provided:

- (a) a comprehensive submission, dated [20 November 2020], setting out her grounds of complaint;
- (b) Mr IC's invoices; and
- (c) copies of relevant judgments; and

- (d) a copy of initial correspondence in which concerns regarding Mr IC's representation were raised; and
- (e) a further submission to the Standards Committee of 26 March 2021.

[70] In advancing her review application, Ms MP provided a further comprehensive submission (14 October 2021) and had benefit of thorough submissions from her counsel.

[71] The Committee's decision was understandably informed from a consideration of the material filed by Ms MP and the various responses provided by Mr IC.

[72] I think it unlikely that much more could be said than has been said. I see little merit and considerable disadvantage in returning the matter to the Standards Committee.

[73] The critical question to address in this review, is the question as to whether Mr IC was in breach of his professional obligations by continuing to represent Ms MP subsequent to Ms MP's indication in December 2013 that she did not consider that the negotiations between Mr IC and her former husband's lawyer had concluded a settlement of property issues.

[74] A careful examination of the submission filed by Ms MP on review, gives clear indication that the focus of her review argument is on addressing concern that the Committee had erred in reaching conclusion that there were no special circumstances.

[75] To the limited extent that the submission addresses what Ms MP had explained in her initial complaint was "the broader and more significant issue" as to whether Mr IC had a conflict of interest, Ms MP articulates the conflict allegation but provides little evidence to support the allegation made. Rather, Ms MP's primary focus is on argument that the Committee had erred in failing to consider the special circumstances argument.

[76] Ms MP does however, in the submission filed, reference what she describes as the "detailed and lengthy analysis" of the conflict argument that had been articulated by Mr UJ, and suggests that neither the Standards Committee nor the LCRO "at this stage" were required to reach a final view on the issue.

[77] I assume that this submission was advanced on the back of Mr JG's argument that the conflict aspect of the complaint should be sent back to the Committee for further consideration.

[78] The conduct complaint is relatively straightforward.

[79] It is contended that when Ms MP stepped back from an agreement that Mr IC had negotiated with her husband's counsel, Mr IC should have stepped down.

[80] In advancing argument both in the Family Court and High Court that a binding agreement had not been reached, it is contended that Mr IC was potentially exposing himself to risk of becoming a witness in the proceedings, and arguing a position that had potential for his personal interests to conflict with that of his client.

[81] Whilst it was initially argued for Ms MP that these concerns were not intended to be reflective of a criticism of Mr IC except in a "limited technical sense", it was nevertheless argued for Ms MP on review, that Mr IC's position both before the Family Court and High Court was untenable in that he was in the uncomfortable position of having to explain and defend the documented history of the transactions which had led him to the view that a settlement had been concluded. In doing so, he was providing explanation for documents that he himself had authored.

[82] A lawyer must avoid at all costs any possibility of their obligations both to the Court and to their client being compromised by any hint of suggestion that their personal interests overlap with the interests of their client or have potential to compromise their overarching obligations to the court.

[83] The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, a lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.<sup>5</sup>

[84] A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.<sup>6</sup>

[85] A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.<sup>7</sup>

[86] A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are an issue.<sup>8</sup>

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<sup>5</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules (the Rules), r 13.

<sup>6</sup> Rule 13.1.

<sup>7</sup> Rule 13.5.1.

<sup>8</sup> Rule 13.5.3.



[87] A lawyer must not make submissions or express views to the court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.<sup>9</sup>

[88] Mr IC is emphatic that he did not breach any duties or obligations owed to the court.

[89] He is supported in this view by an opinion obtained from a senior QC who Mr IC says, scrutinised his management of Ms MP's case in both the Family and High Courts.

[90] Mr IC says that he did not give evidence either orally or in affidavit form. To the extent that the Courts were called on to scrutinise the documentation which was said to have recorded the basis for a settlement agreement, Mr IC says that he did no more than provide a context for and explanation of the documentation, consistent with the instructions he had received from his client, an approach which he says was mirrored by opposing counsel.

[91] It is both impossible and unrealistic at this juncture, to have expectation that either a Standards Committee or Review Officer, can comprehensively and accurately piece together a clear understanding of the nature of the submissions that Mr IC may or may not have made to the respective courts in 2014 and 2015.

[92] All that can be relied on at this juncture, is the decisions issued by the respective Judges, neither of whom gave indication in their judgements of concern that Mr IC may have overstepped the mark in advancing argument on the settlement issue.

[93] Mr IC submits that it would have been expected that a senior High Court judge would have been moved to comment if the judge had concerns that Mr IC was compromised.

[94] Mr JG contends that a lack of judicial comment is not determinative as to whether the Judge was, or was not, was disquieted by Mr IC continuing to represent Ms MP.

[95] But what is required of Ms MP when seeking to reverse the Standards Committee decision, is for her to provide sufficient evidence to support allegation that Mr IC had breached obligations owed either to her or to the court.

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<sup>9</sup> Rule 13.5.4.

[96] A complainant is obliged to support their claim with evidence to the required standard; in this case, the balance of probabilities. It is not enough for a complainant to simply make an allegation.

[97] Ms MP carries the burden of establishing, on the balance of probabilities, that the allegations she makes concerning Mr IC's conduct are established. In other words, she must provide evidence which tips the scales towards it being more probable than not that Mr IC was compromised when representing her.

[98] I see no significant evidence in the submissions filed, as to how Ms MP considered that she had been adversely affected by Mr IC's representation, other than the advancing of argument that if he had stood down, when she now considers he should have, she would have incurred no liability for his costs.

[99] It is argument that is advanced with little regard to the reality of the situation that Ms MP was in. It is argument that is, with every respect to Ms MP, ignoring of the extent to which her own actions had created a difficult situation for herself.

[100] I have emphasised the difficulty in this particular review of securing a clear understanding of particular steps that were taken in the course of litigation that proceeded some years ago. I am mindful of the cautious need to avoid speculating as to what may or may not have occurred.

[101] But it is reasonable to conclude that after Mr IC was instructed, considerable progress was made towards achieving a settlement of relationship property matters, and that these steps were achieved with Ms MP's understanding and agreement.

[102] Mr IC was not the architect of the settlement proposal. A framework for settlement had been proposed by the lawyer instructed prior to Mr IC being instructed.

[103] Mr IC's efforts were focused on attempting to implement that settlement.

[104] His focus on attempting to achieve settlement would present as sensible and constructive, particularly in circumstances where the relationship property dispute had been ongoing for a number of years. There would be few experienced relationship property practitioners who would not be acutely sensitive to the financially costly and emotionally draining consequences for their clients of becoming immersed in prolonged litigation in the Family Court.

[105] Ms MP's circumstances were exacerbated by health problems. The ongoing dispute with her former husband was extremely stressful for her.

[106] Mr IC says that he was the 13<sup>th</sup> counsel instructed by Ms MP. In drawing attention to the number of lawyers instructed, Mr IC is clearly suggesting that Ms MP's apparent difficulties in sustaining a relationship with lawyers she had instructed, reflected a somewhat capricious approach on her part to providing consistent instructions which would have assisted in resolving the dispute with her former husband.

[107] Mr IC understood it to be the case that his retainer with Ms MP was more enduring than those of the lawyers who had preceded him.

[108] I am satisfied that Mr IC kept Ms MP appropriately informed as to the steps that were being taken to advance the settlement proposal. Mr IC says that all steps taken were communicated to his client, that she was copied into all correspondence and that no agreement was indicated to any aspect of the proposal under negotiation, without Ms MP's consent.

[109] It would be expected of an experienced lawyer (as Mr IC was) that every aspect of any proposal for settlement would be approved by Ms MP.

[110] It is not in dispute that Ms MP became dissatisfied with the steps that had been taken to implement a settlement, and that she communicated her dissatisfaction with the proposal to various parties without first consulting Mr IC.

[111] Negotiations having proceeded to the point where Ms MP's husband maintained that the parties had reached a binding settlement, and Ms MP took a contrary view, what were her options?

[112] Inevitably, in the absence of agreement, the dispute appeared destined to continue its laborious journey through the courts.

[113] In advancing argument that she should be relieved of an obligation to pay all the fees incurred by Mr IC, Ms MP provides no explanation as to what steps she would have taken if Mr IC had stepped down.

[114] It is argument that appears to rest on supposition that either no further legal costs would have been incurred by her (clearly unlikely in that she was opposed to settling the dispute), or that more productive legal steps would have been taken by her that would have achieved a more beneficial outcome.

[115] It is difficult to see what options presented to Ms MP in the face of her argument that she had not agreed to a settlement, other than to resist her former husband's position.

[116] And that is what Mr IC says he was instructed to do.

[117] Whilst criticism is made of Mr IC that he should not have continued to act, Ms MP does not identify any specific criticisms or failings of Mr IC in the advancing of her case in either the Family Court or High Court.

[118] Whilst not succeeding in argument that a settlement had not been reached, Ms MP nevertheless achieved a measure of success in the High Court. Orders were made to remit costs that had been awarded in the Family Court, and opportunity opened for her to her to pursue a s 15 claim.

[119] It is difficult to envisage how steps of this nature (which presented as likely options in the face of the position adopted by Ms MP) could have been advanced by her without inevitably incurring substantial legal costs.

[120] There is no evidence of Ms MP having raised objection to the representation received from Mr IC during the time she continued to be represented by him.

[121] Ms MP had consistently represented to Mr IC that she would settle his fees on receipt of settlement funds.

[122] Ms MP did not have the financial means to meet her legal costs and Mr IC was prepared to delay payment until Ms MP was in funds.

[123] It is Mr IC's view that Ms MP had enjoyed a greater degree of confidence in him than she had in the lawyers who had previously represented her, and that when the circumstances arose which compelled him to terminate the retainer, she was appreciative of the representation he had provided.

[124] Criticism of Mr IC's conduct was raised at the point where settlement funds had been received and Ms MP was, in accordance with the arrangement agreed with Mr IC, obliged to settle her account.

[125] Mr IC views the steps taken by Ms MP on receipt of settlement funds (transferring funds to two solicitors trust accounts) as a deliberate attempt on her part to avoid payment. I make no comment on that, but I think it regrettable that Ms MP failed to take steps to lodge her complaint earlier than she did.

[126] On 21 February 2017, in correspondence to Ms MP's lawyer, Mr IC not only provided a response to the concerns that had just been raised, but also invited Ms MP to file a complaint if she had legitimate concerns regarding the fees he had charged.

That invitation was accompanied by indication from Mr IC that if Ms MP wished to challenge the fee, she would need to lodge her complaint within the required time.

[127] Looking at the matter afresh, as I am required to do, and bringing to that appraisal the robust and independent perspective required of an LCRO in the course of conducting a review, I am not persuaded that Ms MP has met the necessary evidential threshold to establish that Mr IC breached duties or obligations owed to her or the Court.

[128] In reaching that view, I have given careful consideration to the helpful submissions filed by the parties and the material on the Standards Committee file. That view has been reached with necessary acknowledgement of the difficulties engaged in assessing professional conduct from a context of the conduct having taken place some years prior to the review hearing.

[129] Having concluded that Ms MP has failed to establish grounds for her conduct complaint, I have no need to consider the issue of special circumstances.

[130] I see no grounds which could persuade me to depart from the Committee's decision.

*Anonymised publication*

[131] 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.

**Decision**

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

**DATED** this 28<sup>TH</sup> day of APRIL 2022

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**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:

Ms MP as the Applicant

Mr JG as the Ms MP's Representative

Mr IC as the Respondent

Mr EZ as the Respondent's Representative

[Area] Standards Committee [x]

New Zealand Law Society