LCRO 145/2015
148/2015

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
BETWEEN	**YK** Applicant
AND	**GS** Respondent
AND	**GS** Applicant
AND	**YK** Respondent

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

DECISION

Introduction

[1] Mr YK has applied for a review of a decision by the [Area] Standards Committee which made findings of unsatisfactory conduct against him pursuant to ss 12(a) and 12(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] Penalty orders were imposed on the back of the unsatisfactory conduct findings.

[3] Mr GS has also applied for a review of the decision.

Background

[4] Mr YK is a barrister. Mr YK represented Mr GS in criminal proceedings from January to November 2014.

[5] Mr GS was charged with assault.

[6] Mr YK was instructed on a private fee basis.

The complaint and the Standards Committee decision

[7] Mr GS lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 21 November 2014 and provided further correspondence on 20 January 2015 in which he amplified on his complaint. The substance of Mr GS' complaint was that:

(a) Mr YK had not kept him informed during the progressing of the case.

(b) He had instructed Mr YK privately on the basis of assurances that he would get him off the charge.

(c) Mr YK had advised him to plead guilty when he had no wish to do so (by electing to seek a sentence indication when he had not been instructed to do so).

(d) He had paid Mr YK $1,580 and did not feel he had received value for money.

(e) Mr YK did not turn up to a callover on 10 November 2014 and a warrant was issued for Mr GS' arrest.

[8] In providing explanation to the Complaints Service as to the nature of the fee arrangement, Mr YK advised:[1]

> In the end we agreed that I would charge him a weekly rate of $50. There was no hourly rate, no set fee, and whilst it was a most uncommon fee it certainly suited the circumstances and was an informed agreement between the two of us. It was a very simple and straight forward terms of engagement; Mr GS would pay me $50 per week and I would strongly represent him. It was an oral agreement upon which we shook hands. I provided him with a client care letter and when the first $50 went into my account I filed with the Court …

[1] Letter YK to Complaints Service (15 January 2015) at [3].

[9] The Complaints Service requested further information. Mr YK was asked to clarify (expressed in the words of the Committee):

(a) Did you comply with the intervention rule and if so, please provide evidence of your instructing solicitor?

(b) Did you provide to Mr GS information in writing on the principal aspects of client service including the basis on which your fees would be charged, and if so, please provide a copy to the Committee?

(c) Did you receive funds from Mr GS directly without placing them in a regulated trust account contrary to rule 14.4 of the Rules of Conduct and Client Care?

(d) Did you issue to Mr GS a fee invoice, and if so, please provide a copy to the Committee.

(e) In providing regulated services to Mr GS did you act competently and in a timely manner consistent with the terms of the retainer and duty to take reasonable care and keep him informed of progress?

[10] A response was requested from Mr YK by 24 March 2015.

[11] Mr YK advised that he intended to appoint counsel. Mr YK instructed Mr KK.

[12] Complaint was raised that the Committee were conflicted. This was argued on the basis that the Committee had dealt with an earlier complaint engaging Mr YK, and Mr YK considered that he had been unfairly treated by the Committee. He had lodged a conduct complaint against the members of the Committee.

[13] In response, the Standards Committee advised that it considered it did not have a conflict of interest that would prevent it from performing its duties in a way that was consistent with the rules of natural justice and resolved to proceed with its inquiry.[2] The letter also requested further documents from Mr YK, including his time records and a copy of his file.

[14] A notice of hearing was attached to the letter from the Standards Committee, which identified issues to be addressed as being:

(a) Did Mr YK act competently and in a timely manner, consistent with the terms of the retainer and duty to take reasonable care?

[2] Letter Ms LL to Mr KK (22 April 2015).

(b) Did Mr YK proceed with a course of action, namely obtaining a sentence indication that he was not instructed to do?

(c) Did Mr YK ensure that Mr GS was represented at a callover on 10 November 2014?

(d) Did Mr YK comply with the intervention rule?

(e) Did Mr YK provide to Mr GS information in writing on the principal aspects of client service, including the basis on which his fees would be charged?

(f) Did Mr YK receive funds from Mr GS directly without placing them in a regulated trust account, contrary to Rule 14.4?

(g) Did Mr YK render a final account to Mr GS?

[15] Objection was raised to the Committee proceeding with its inquiry. Mr YK's counsel advised that if his request to have the matter considered by another Committee was not complied with, an injunction would be sought to prohibit the Committee taking its inquiry further.

[16] The Committee continued with its inquiry.

[17] The Standards Committee delivered its decision on 4 June 2015. The decision is comprehensive and addresses both the conduct and jurisdiction issues.

[18] The Standards Committee rejected argument that the Committee recuse itself and refer the matter to another Standards Committee.

[19] The Committee concluded that at the heart of Mr YK's allegation that he had been unfairly treated in an earlier decision of the Committee, was a fundamental misunderstanding, by Mr YK, of what the Committee had actually said in its decision.

[20] The Committee referred to *Saxmere Company Ltd v Wool Board Disestablishment Company Limited* and the test espoused in that decision of the fair minded lay observer.[3] The Committee concluded that a fair minded lay observer would not consider that the Standards Committee was unable to bring an impartial mind to the issues they had to consider. The Committee further stated:[4]

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[3] *Saxmere Company Limited v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.
[4] Standards Committee decision at [66].

> It is not uncommon for tribunals, be it a Standards Committee, a Coroner, a District Court Judge or indeed a High Court Judge to have their decision subject to appeal or some form of challenge. If on every occasion that such a challenge was made, a Judge or Tribunal member was required to recuse him or herself or itself, then the administration of justice in all its forms would become impossibly complicated.

[21] The Committee determined that no further action was required pursuant to s 152(2)(c) of the Act in respect of the complaint that Mr YK did not act competently or in a timely manner, failed to comply with the intervention rule and failed to provide details of his fee in writing.

[22] The Committee made unsatisfactory conduct findings on the basis of conclusion that Mr YK had:

(a) Failed to appear at a callover.

(b) Arranged for Mr GS to pay funds directly to his account.

(c) Received fees in advance.

(d) Failed to provide Mr GS with a final account.

[23] The Committee imposed the following orders against Mr YK:

(a) Censure (pursuant to s 156(1)(b) of the Act).

(b) Reduction of his fee and a refund of $600 to Mr GS (pursuant to ss 156(1)(e) and (g) of the Act).

(c) Fine of $3,000 (pursuant to s 156(1)(i) of the Act).

(d) Costs of $2,000 (pursuant to s 156(1)(n) of the Act).

(e) Publication of the decision, but without any details that might lead to the identification of the parties involved.

Applications for review

[24] Both Mr GS and Mr YK have filed applications for review.

Mr GS

[25] Mr GS filed an application for review on 17 July 2015. The outcome sought is a full refund of the fees paid.

[26] Mr GS repeats the complaints that he made to the Complaints Service and submits that:

(a) It is unfair that the New Zealand Law Society will receive more money than him, with Mr YK being ordered to pay a fine of $3,000 and costs of $2,000.

Mr YK

[27] Mr YK filed an application for review on 1 July 2015. Mr YK seeks that the unsatisfactory conduct findings and orders of the Standards Committee be reversed. Mr YK states that he seeks "proper justice".[5]

[28] Mr YK submits that:

Unsatisfactory conduct finding – breach of rule 13.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008

(a) Whilst he does not dispute that he had failed to advise Mr GS of his intention to seek a sentence indication, no adverse consequences followed from his electing to do so.

Unsatisfactory conduct finding – s 12(a) of the Act

(b) He had instructed an agent to appear on his behalf at court.

Unsatisfactory conduct finding – rule 9.6

(c) He has not rendered a final account as he considered that the file is not closed. He is waiting for outcome of his review application before he renders an account.

(d) Whilst his fee arrangement with Mr GS was unconventional, he considered that he was meeting the market and providing access to justice. Whilst with hindsight, the arrangement may not present as particularly satisfactory, it was an open, informed and honest agreement at all times.

[5] Application for review, part 8.

Orders made by the Standards Committee

(e) All of the orders should be reversed.

(f) He does not understand what he has done that is so drastically wrong that he should be censured.

(g) He accepts that he took money directly and that he contravened rule 14.4 and should receive a disciplinary sanction, but questions whether a censure is appropriate.

(h) A fine of $3,000 is excessive.

(i) He raised the issue of conflict with the Committee as he had a total lack of faith and trust in the Committee.

(j) Mr GS has provided false and misleading information to the Standards Committee.

[29] By way of general comment, Mr YK argued that he had acted at all times in a timely and appropriate manner and that responsibility for the escalation and delays in relation to the complaint could not be laid at his feet. The Standards Committee had made work for itself and expected him to pay for it. He saw little merit in Mr GS' complaints, describing Mr GS as a "chancer" and a "gamer" who did not deserve a refund of fees.[6]

[30] Mr YK attached to his application copies of the email correspondence between him and the lawyer he had arranged to attend the callover.

Review

[31] This review was progressed by way of a both party hearing in Hastings on 25 August 2017.

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:[7]

[6] Memorandum of Mr YK in support of review, 10 July 2015 at [14].
[7] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

> … 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:[8]

> 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.

Analysis

[35] The issues to be addressed on review for Mr YK are:

(a) Argument that he was treated unfairly by the Committee conducting the inquiry.

(b) Challenge to the Committee's unsatisfactory conduct findings (and orders imposed) in respect to:

(1) Acting without instructions.

(2) Failure to ensure representation at a callover.

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

(3) Failure to place funds received into a regulated trust account.

(4) Receiving fees in advance.

(5) Failure to render a final account.

[36] The issue of central importance to Mr GS on review concerns the fee charged. He considers that he should be refunded all monies he has paid to Mr YK.

Mr YK's Review Grounds

Unfair treatment by the Committee

[37] The Committee's decision is lengthy. Much of the decision is devoted to addressing the procedural arguments advanced by Mr YK.

[38] Mr YK argues that the Committee escalated the complaint, made unnecessary work for itself and then expected him to cover the costs of that work.

[39] As noted, prior to determining the complaint which is the subject of this review, the [Area] Standards Committee had considered an earlier complaint brought against Mr YK, and in due course, issued its decision. On receipt of that decision, Mr YK took issue, not with the Committee's findings, but with a brief reference in the decision to a credibility issue considered by the Committee.[9] Mr YK endeavoured to challenge the decision (or at least the statement to which he objected) not by seeking a review to the Office of the Legal Complaints Review Officer, but by filing a complaint against the lawyer members of the Standards Committee. That complaint was dismissed and that decision was reviewed by Mr YK. The review was unsuccessful.[10]

[40] I am familiar with the background as I was the Review Officer who heard Mr YK's review.

[41] Mr YK, in submissions advanced by his counsel, argued that the [Area] Standards Committee should recuse itself from hearing the GS complaint on grounds that the Committee was conflicted. The Committee's failure to redact from its earlier decision the comment to which Mr YK had taken exception was said to give indication that the Committee could not bring a fair and even handed approach to its consideration of the second complaint. It is argued that the comment made in the first decision represented an unfounded attack on Mr YK's character. It was submitted that

[9] Standards Committee decision, complaint number 11763, 16 December 2014 at [16].
[10] *BB v WT & Ors* LCRO 55/2015.

the concerns raised about the Committee's partiality should have stopped the Committee in its tracks. Argument was advanced that there had been a breach of natural justice.

[42] The Committee correctly noted in its decision that Mr YK's accusation (amplified by his counsel) that his credibility had been compromised by the statement that Mr YK had objected to in the first decision was simply wrong. The statement was supportive, not critical, of Mr YK's position.

[43] Mr YK's allegation that the [Area] Standards Committee could not give him a fair rub of the green in the second complaint has its genesis in his misreading of a brief sentence in an earlier decision.

[44] That error appears to have prompted the procedural objections raised by Mr YK and advanced in forthright terms by his counsel.

[45] There is no evidence to support accusation that the [Area] Standards Committee were in compromised in electing to continue their inquiry in the face of the objections advanced by Mr YK. Nor is there evidence that the Committee was responsible for prolonging the inquiry, or amplifying the complaint.

[46] Mr YK's conviction that the members of the [Area] Standards Committee were ill advised to have their fingerprints on his second complaint, and conflicted, when they were aware that he had raised objection to their first decision is entirely misconceived.

Acting without instructions on sentence indication

[47] I am satisfied that the decision to seek a sentence indication was made by Mr YK without him having consulted with Mr GS.

[48] Mr YK conceded that he alone had made the decision to seek a sentence indication, but emphasised that he had, after giving initial indication to the Court and well before the application was heard, discussed the application with Mr GS. It was his view that Mr GS thoroughly understood the application that was going to be progressed and took no objection to him advancing it.

[49] He submitted (and this was a thread that ran through a number of his submissions) that he had acted with the best of intentions and that there had been no adverse consequences for Mr GS. In the absence of evidence of demonstrable harm why, says Mr YK, should he suffer a disciplinary sanction?

[50] I accept that Mr YK discussed the strategy with Mr GS after he had indicated to the Court that he sought an indication. But I am not persuaded that his failure to discuss the proposed approach with Mr GS had minimal consequence for Mr GS. Mr GS had elected to terminate his legal aid lawyer's retainer as he had formed a view that Mr YK would provide him with robust and competent representation. He had a firm conviction that he had not committed the crime he stood accused of. He was determined to fight the charge. Compromise and acquiescence to indication of a guilty plea was not within his contemplation.

[51] I think it improbable that Mr YK provided, as Mr GS suggested he may have, Mr GS with a guaranteed assurance of success. It is unlikely that an experienced defence lawyer would be prepared to go that far. But Mr YK had advised Mr GS that he had a number of potential defences and he was confident that he could present a robust case to the Court.

[52] Mr GS' financial situation was difficult. His decision to shift his instructions from his legal aid lawyer and engage Mr YK on a private retainer was a decision that carried significant financial consequence for him. I am satisfied that his decision to change lawyers was prompted, in significant part, by a confidence he had drawn from his discussions with Mr YK, that Mr YK understood that he was resolute in his conviction that he was not guilty of the charge he faced and that Mr YK had confidence that the charge could be defended.

[53] Mr GS says that he lost confidence in Mr YK when Mr YK elected to seek a sentence indication. It presented to Mr GS as eroding the determined stance Mr YK had said he would be adopting to defending the case.

[54] Mr YK regrets that he was denied opportunity to advance Mr GS' case. I accept that he took steps to obtain a sentence indication with best of intentions, but in doing so, he undermined Mr GS' confidence. Although likely not wholly instrumental in Mr GS' decision to terminate the retainer, Mr GS' uncertainty and dissatisfaction with the sentence indication issue played a large part.

[55] It is not adequate for Mr YK to justify his failure to consult with Mr GS on an important matter by argument that "no harm" had resulted.

[56] A lawyer's obligation to obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation,[11] is not an obligation that can be

[11] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.3.

ignored or overlooked, nor can a lawyer's failure to consult with their client be excused by argument that the lawyer was simply pursuing an option that was available.

[57] A decision to seek a sentence indication is a matter of significance. Whilst a defendant is of course not bound to accept the indication given, nor does the decision to seek an indication prejudice the defendant's commitment to pursuing a not guilty plea, I accept Mr GS' argument that he felt that Mr YK's commitment to advancing a vigorous defence had been compromised.

[58] If Mr YK had sat down with Mr GS, explained the process to him and given Mr GS an opportunity to express a view and to confirm instructions, all would have been well.

[59] In my view, the finding of unsatisfactory conduct was appropriate, as was the penalty imposed.

Failure to ensure representation at a callover

[60] The Committee concluded that Mr YK had failed to meet his obligations to ensure that Mr GS was represented at a callover on 10 November 2014.

[61] In response to this complaint, Mr YK had advised that he was unable to appear at court but had arranged for an agent to appear on his behalf. Mr YK provided no evidence as to the identity of the agent appointed, no confirmation from the agent, or any explanation as to why the agent had been unable to make contact with Mr GS.

[62] The Committee's ability to inquire into this element of complaint was frustrated by Mr YK's refusal to provide his file.

[63] The position had become clearer by the time of review.

[64] Mr YK provided a copy of email correspondence both to and from the agent appointed and it was clear from that email exchange that Mr YK had arranged for an agent to appear for Mr GS, that his agent had attended at court, and that the agent had made conscientious attempts to locate Mr GS in the court precinct.

[65] This information, if provided to the Committee immediately, would have provided full defence to allegation that Mr YK had failed to meet his obligation to ensure that Mr GS was represented.

[66] It is puzzling as to why Mr YK did not promptly clarify the situation. Mr YK was unwilling to provide his file to the Committee. Nor did he provide any information from the agent he said he had instructed.

[67] Mr YK expressed concern that the Committee had considered that his approach to the inquiry had been obstructive.

[68] On review, he argued that he had been reluctant to provide more details as he did not want his agent's position to be compromised.

[69] That explanation was not persuasive.

[70] Mr YK's agent would not have been compromised by Mr YK providing proper explanation of what had occurred and his failure to do so simply encouraged the Committee, quite reasonably, to the view that there was doubt as to whether an agent had been instructed.

[71] Mr YK's protestations that the Committee had made unnecessary work for itself, and his sense that he had been unfairly treated by the advancing of complaints that were of relative insignificance, do not present as persuasive when considered in the context of the grounds advanced by Mr YK to challenge the independence of the Committee, and his failure to provide information to the Committee that would have assisted the inquiry process.

[72] I am satisfied however that the Committee's finding of unsatisfactory conduct arising from its conclusion that Mr GS had been left unrepresented must be reversed, and the penalty imposed in respect to that element of what the Committee characterised as the conduct breaches, be reduced. I do so on the basis of the material before me that was not before the Committee; not on the basis that the Committee had made an error.

Failure to place funds received into a regulated trust account

[73] Mr YK accepted that he had failed to comply with his obligation to ensure that funds received from Mr GS were paid into a regulated trust account.

[74] On review, Mr YK explained the breach by emphasising that the arrangement he had with Mr GS, whilst unconventional, was nevertheless an arrangement he had entered into with genuine purpose and intent to assist Mr GS. Further, he argued that, as with other elements of the complaints, there had been no adverse consequences arising from the breach. He submitted that the censure penalty imposed was

excessive. He stressed that since the complaint had been made, he had implemented changes in his practice. He now ensured that instructions were taken through an instructing solicitor, and funds received on account of fees, paid to his instructing solicitor.

[75] I do not agree with Mr YK that the breach was of minor significance. The Committee correctly noted that the arrangement put in place by Mr YK made it difficult to provide a clear accounting of the funds. The payment arrangements for the retainer were unusual. The reasons as to why it is necessary, for the protection of clients, for funds received on account of fees to be paid into an audited trust account, are so well understood that I need traverse them no further here.

[76] Mr YK's indication that he has now put in place arrangements to ensure that all fees will be channelled through his instructing solicitor, does no more than reinforce that Mr YK could properly have been expected to have had these arrangements in place from the time he commenced practising as a barrister.

[77] The finding of unsatisfactory conduct and penalty imposed were appropriate. I note that the finding of unsatisfactory conduct, under this head, also took into account that Mr YK, in accepting payments directly, had breached rule 9.3 as the payments could only be characterised as fees in advance.

Failure to render a final account

[78] Mr GS said he had made payments to Mr YK in the sum of $1,580. Mr YK accepted that figure

[79] Mr YK did not provide Mr GS with a final account.

[80] The Committee made request of Mr YK to provide his account, but he failed to do so.

[81] In his submissions on review, Mr YK argued that he had not provided a final account because "from my point of view his [Mr GS'] file is not closed and final. I am awaiting the final decision of this review".[12]

[82] Further, he argues that amount of the account that he eventually renders to Mr GS will be dependent on whether the review confirms the decision of the Committee that he be directed to refund the sum of $600 to Mr GS. If the Committee's decision is

[12] Above n 6, at [3] under heading "The determination that there has been unsatisfactory conduct by failing to render a final account".

confirmed, his account will be rendered in the sum of $980. If the Committee's decision is reversed, he will render an account in the sum of $1,580. .

[83] A lawyer must render a final account to the client or person charged within a reasonable time of concluding the matter or the retainer being otherwise terminated. The lawyer must provide with the accounts sufficient information to identify the matter, the period to which it relates, and the work undertaken.[13]

[84] When Mr GS gave indication that the retainer was ended, Mr YK was required to provide an account within a reasonable time. An account should have been provided to the Committee when request was made.

[85] I have concerns about the arrangement that Mr YK concluded with Mr GS. There is nothing unusual or unconventional in a practitioner making arrangements with their client to make a regular contribution to their fees particularly in circumstances such as these, where Mr GS had indicated that he was in straitened financial circumstances.[14] It assisted him that Mr YK was prepared to accept a relatively modest (although I accept significant for Mr GS) weekly contribution to his fees.

[86] But what was unusual about the fee arrangement was that the weekly payments, as Mr YK describes them, were not strictly payments on account of a fee that would be rendered when the matter was concluded, rather, Mr GS was to continue making the payments and he would be charged, when the trial ended, whatever amount had accumulated to that date.

[87] This arrangement (and I consider it to be unusual) has little affinity with more conventional methods of charging for legal services provided.

[88] A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both the client and the lawyer and the factors set out in rule 9.1.

[89] Some of the factors which must be taken into account when considering the reasonableness of a fee charged, include:

(a) Time and labour expended.

(b) Skill of the lawyer.

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[13] Rule 9.6.
[14] Provided there was compliance with Rule 9.3.

(c) Results achieved.

(d) Complexity.

(e) Fees customarily charged in the market.

[90] But in this case, duration of the retainer is the determinative factor in determining the fee. The quicker the case is resolved, the smaller the fee. The longer the case continues, the larger the fee.

[91] A number of problems can arise with arrangements of this type, not the least of which is the potential for the fee to be significantly influenced by factors outside of the control of both the practitioner and the client.

[92] Mr YK's failure to provide an account impeded the Committee's inquiry, and provides a further counter to his suggestion that it was the Committee, rather than himself, that was obstructing the inquiry, but importantly his failure to provide an account has left Mr GS in a position where he remains uncertain as to what work was done on his behalf.

[93] In the course of the hearing, Mr GS advanced argument that Mr YK had done very little for him. He complained that he had rarely met with Mr YK. He could see no evidence of Mr GS having done any work of significance.

[94] Having had an opportunity to hear from Mr YK, I am satisfied that more work was done on Mr GS' case than allowed for by Mr GS.

[95] There were a number of brief court appearances. Mr YK spent time with Mr GS at commencement working through the facts of the case, and identifying possible defences. I am satisfied that Mr YK spent time with Mr GS working through the material obtained on discovery and identifying which witnesses would be required for cross-examination. Whilst not progressed to the point of a final typed brief, I accept Mr YK's evidence that he had commenced preparing Mr GS' brief of evidence. Mr YK says he was in a position where he was prepared for the trial. I think that significantly more work had been done than Mr GS is able now to recall.

[96] Unravelling argument, as to what had and what had not been achieved, would have been considerably assisted if Mr YK had provided Mr GS with an account which accurately and comprehensively recorded his attendances.

[97] Information provided to Mr GS in a timely fashion, may have gone some way to addressing Mr GS' concerns about the extent of the representation Mr YK had provided.

[98] At the conclusion of the hearing, I directed that Mr YK was to prepare a final account and provide copies of the account to this Office and to Mr GS.

[99] I indicated to Mr YK, that the account should provide a notation, recording the work completed.

[100] Mr YK duly forwarded his account.

[101] There is an aspect to Mr YK's account that presents as problematical.

[102] Mr YK has consistently advanced argument that his fee arrangement with Mr GS (an arrangement he himself concedes to be unusual) was based on a simple arrangement agreed between himself and Mr GS that Mr GS would make weekly payments of $50 to Mr YK's account. When the case was concluded, Mr YK would charge Mr GS a fee equivalent to the amount of the total payments he had received from Mr GS.

[103] As I have noted, Mr YK's fee was not determined by the time spent on the file. His fee was not calculated by reference to time records. The fee was not subject to any changes or alterations as a consequence of unforeseen issues that may have arisen as the case evolved. It was a "what you pay me is what I bill you" arrangement.

[104] The Committee ordered that Mr YK refund $600 to Mr GS. That refund was directed on the basis that the Committee had concluded that Mr YK, in pursuing the sentence indication, had undertaken work that he had not been instructed to do. Without having had opportunity to consider Mr YK's final account, and in dealing as it was with an unconventional fee arrangement, the Committee made an assessment as to the amount of work that it reasonably considered would be involved in advancing the sentence indication and arrived at the figure of $600.

[105] Surprisingly, the account provided by Mr YK notes at the end of the narration recording the work completed the following:[15]

> During the period, I also prepared and sought a sentence indication. You have complained that you did not want a sentence indication. I accept that, and those efforts have not been included for the final invoice.

[15] Letter YK to WS (updated).

[106] Mr YK is saying that he has not charged Mr GS for work spent on the sentence indication.

[107] This is a surprising admission from Mr YK and one which presents as discordant with the arguments advanced by him when he has explained the basis of the fee arrangement.

[108] In stating that his work completed on the sentencing indication has "not been included for the final invoice" Mr YK is now suggesting that his fee is calculated by reference to the work completed.

[109] Mr YK is conveniently reverting to a method of fee calculation which allows him to subvert (or at least challenge) the basis for the Committee's order that he refund Mr GS the cost of the work spent on the sentence indication.

[110] Whilst Mr YK on the one hand argues that his fee is properly calculable at a sum consistent with the fee agreement, he also argues and specifically records in his account that his final account does not take into account aspects of the work that had been done. In advancing this argument, Mr YK is tacitly acknowledging that his account is calculated by reference to the work that has been done.

[111] The only documentary evidence provided on review by Mr YK of the work that had been done, was a copy of the submissions provided by him at the sentence indication, this to support his defence to complaint that he had acted without instructions.

[112] The one area where I have evidence of work completed by Mr YK is now said by him to have not been taken into account when compiling his final account.

[113] Whilst Mr YK did not advance the position directly, I assume that he would argue that when I give consideration to the Committee's decision to direct that Mr YK refund $600 to Mr GS, I should, in reflecting on the appropriateness or otherwise of that order, proceed on the basis that Mr GS had not been charged for work on the sentencing indication, therefore a refund could not be justified.

[114] At no time has Mr YK suggested (and he has filed extensive submissions) that he did not intend to charge for work spent on the sentencing indication, or that the work was considered to be separate and distinct from all other work which was covered by the "charge for what you pay" agreement.

[115] Argument that aspects of the work can be isolated (and said to have not been included in the work charged) is inconsistent with the fee arrangement that Mr YK says was in place.

[116] I do not propose to interfere with the Committee's decision to direct a refund of fees to Mr GS in the sum of $600. I proceed from the basis that the total fee charged for all work carried out was $1,580, and that it was appropriate for the Committee to direct that a portion of the fee be refunded to compensate for work that had been done without instructions.

[117] I agree with the Committee's conclusion that Mr YK's failure to provide an account was unsatisfactory.

Mr GS' Review Application

[118] Mr GS' review was focused on the single issue of the fee charged.

[119] Mr GS accepted that the fee arrangement was as Mr YK describes it. He proceeded then on the assumption that he had been charged the sum he had paid, that is $1,580.

[120] Mr GS argued that he had not received value for money. He maintained that Mr YK had done very little for him.

[121] Mr GS submitted that there was unfairness in the Committee reducing his fee in the sum of $600, but directing that Mr YK pay a fine and costs to the New Zealand Law Society totalling $5,000. He saw this as the Law Society receiving a benefit which exceeded the fee discount he had received.

[122] On discussing with Mr GS the principles behind the imposition of a fine and awarding of costs, Mr GS accepted that those orders fell within the jurisdiction of the Committee to make and were orders entirely separate from the compensation he sought.

[123] The Committee readily accepted that because of the unusual nature of the fee agreement, it was difficult to assess Mr GS' claim for an 80 per cent reduction in his fee. At the review hearing, Mr GS sought to have the entire fee refunded.

[124] I am satisfied, having considered the evidence before me, that it was appropriate to refund Mr GS for the cost incurred in advancing the request for a sentence indication. Mr YK prepared submission and appeared on the application. I

consider that a refund of $600 adequately compensates Mr GS and I do not propose to tinker with the Committee's determination on that point.

[125] Mr GS argued that a refund of total fees paid was justified. In advancing this argument, he suggested that Mr YK had done very little work for him. Mr YK's lack of effort merited, in his view, a refund of all fees paid.

[126] It was clear that Mr YK had attended to a number of the matters that needed to be addressed when taking instructions from a client to defend a criminal charge. He had taken initial instructions. He had appeared at court on a number of occasions. He had obtained disclosure. He had identified the defences to be advanced and discussed those with Mr GS. He had worked on Mr GS' brief. Mr GS' argument for a total refund of his fees, on grounds that Mr YK had done nothing for him, is argument that ignores the extent of the work that had been done.

[127] Nor has Mr GS established that Mr YK provided a poor standard of representation. It is accepted that Mr YK erred in failing to discuss his intention to seek a sentence indication with Mr GS, but that aside, Mr GS identifies no specific criticism of Mr YK's conduct which is supported by evidence other than his allegations that Mr YK appeared disinterested in his case and had done little for him.

Conclusion

YK review

[128] The Committee imposed a fine of $3,000, this was broken down as $1,000 for the conduct breaches, $1,000 for receiving funds directly from the client and $1,000 for receiving funds in advance and failing to render an invoice.

[129] The determination that Mr YK's failure to instruct an agent constituted unsatisfactory conduct is reversed, and the fine of $1,000 imposed for conduct breaches is reduced to $500.

[130] In all other respects, the Committee's decision in respect to Mr YK is confirmed.

GS review

[131] Mr GS' application for a refund of all fees paid is dismissed.

[132] The Committee's decision to award a refund of fee in the sum of $600 is confirmed.

Costs

[133] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

[134] Taking into account the Costs Orders Guidelines of this Office, the practitioner is ordered to contribute the sum of $900 to the costs of the review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

[135] In determining costs, I have taken into account that Mr YK has been successful on one of the review grounds advanced.

[136] The order for costs is made pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified as follows:

(a) The finding of unsatisfactory conduct in respect to failure to provide representation at a callover is reversed.

(b) The fine imposed pursuant to s 156(1)(i) of the Act is reduced from $3,000 to $2,500.

(c) In all other respects the decision of the Standards Committee is confirmed.

(d) Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 Mr YK is to pay to the New Zealand Law Society within 30 days of the date of this decision, contribution to the costs of this review in the sum of $900.

(e) Pursuant to s 215 of the Lawyers and Conveyancers Act 2006, I record that the court in which the orders made for costs may be enforced, is the District Court.

DATED this 18TH day of September 2017

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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:

Mr YK as the Applicant and Respondent
Mr GS as the Respondent and the Applicant
[Area] Standards Committee
New Zealand Law Society
Secretary for Justice