LCRO 160/2013

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	**KL** Applicant
AND	**WS** Respondent

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

DECISION

Introduction and Background

[1] Mr KL has applied for a review of the Area Standards Committee's decision to take no further action pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) in relation to his complaint against WS.

[2] Ms WS began acting for Mr KL in late September 2008 when he was first arrested and charged with drug dealing and related offences. Mr KL approached Ms WS directly and Ms WS arranged a reverse brief with her instructing solicitor, Ms YL.

[3] Ms WS represented Mr KL through the various pre-trial court appearances and throughout a 16 day trial in June 2011. Mr KL was convicted of some offences and

acquitted of others. Ms WS was also initially instructed to act for Mr KL on sentencing. He terminated her retainer before sentencing, but after Ms WS had taken steps towards building a case for the Court to impose a non-custodial sentence.

The complaint and the Standards Committee decision

[4] Mr KL complained both about the fees charged by Ms WS and the adequacy of her representation before and during the trial. In particular Mr KL complained that Ms WS:

(a) Failed to provide terms of engagement until after the conclusion of the trial in contravention of rules 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

(b) Overcharged for work done and failed to provide adequate documentation and support for the invoices in contravention of rules 9 and 9.1.

(c) Failed to appropriately challenge the Crown case or apply for severance prior to the trial.

(d) Did not prepare adequately for the trial and performed poorly as counsel during the trial including failing to challenge prejudicial evidence.

(e) Inappropriately delegated certain aspects of the work both before and during the trial to her junior Mr TH.

[5] The Standards Committee found that Ms WS had breached rules 3.4 and 3.5 by not providing Mr KL with the terms of engagement until the conclusion of the trial. However, it considered this to be a technical breach, that did not reach the required threshold to be considered unsatisfactory conduct. The Committee further concluded that it found no evidence of any breach of professional standards in relation to Mr KL's allegations regarding Ms WS's competence throughout the time she acted for him.

[6] The Committee also appointed a costs assessor who provided a report. The cost assessor's view was that Ms WS's fees were not fair and reasonable, and suggested a reduction of a little over $30,000. The Committee considered the cost assessor's report, but disagreed with his assessment. The Committee concluded that Ms WS's fees were fair and reasonable for the services she had provided.

Application for review

[7] Mr KL disagrees with the Standards Committee decision and considers it contained a number of incorrect factual statements in relation to the progression of his trial. He also considers that it was wrong for the Committee to ignore the costs assessor's report when reaching its decision that the costs charged were fair and reasonable. In addition it failed to deal with his allegation that he paid significant sums of money to Ms WS before seeing an invoice, and that he was requested to pay money in advance of the trial for which no invoice has been provided.

Review on the papers

[8] With the parties' consent, this review has been undertaken on the papers pursuant to s 206(2) of the Act. That section allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties, as is the case here.

Nature and Scope of Review

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

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore 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.

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

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A

[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475, at [2].

> 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.

[11] Given those directions, the approach on this review is to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

The issues

[12] The issues for consideration on this review relate to Ms WS's conduct, service and fees. The questions considered are:

(a) Did Ms WS fail to adequately represent Mr KL in the various steps leading up to the trial, in preparing for the trial or during the conduct of the trial?

(b) Did Ms WS delegate attendances to Mr TH inappropriately?

(c) Does Ms WS's conduct in relation to the provision of information and her fee charging practices contravene practice rules 3.4, 3.5, 9.3 or 14.2(e) and if so, do any or all of those contraventions fall within the definition of unsatisfactory conduct in s 12(c) of the Act?

(d) Were the fees Ms WS charged fair and reasonable for the services she provided to Mr KL?

Analysis

Did Ms WS fail to adequately represent Mr KL?

[13] Mr KL says he was not happy with the services provided by Ms WS. Among other things Mr KL says that Ms WS added additional charges before the trial started. He says she did not challenge the charges against him prior to trial, nor did she challenge key evidence at the trial. He also considers that Ms WS's preparation for trial was substandard and rushed, and says she should have applied to have his trial heard separately to that of his co-accused.

[14] The three original drug dealing charges increased to some 15 charges before trial. However Mr KL misconceives the role of defence counsel when he says that Ms WS added the additional charges. It was not Ms WS that added the charges but the prosecution. It is reasonably common in large-scale trials for the number and type

of charges to alter between arrest and trial. The fact that Ms WS had warned Mr KL of this possibility after he had been arrested does not mean that she had the charges added.

[15] Ms WS's view was that any application for severance of the trial would have been futile. The charges faced by the various accused were related even if the accused were not known to each other. One of the lawyers who appeared for the Crown at the trial confirmed that it was very unlikely that the Crown would have consented, or that the presiding Judge would have agreed, to Mr KL being tried separately to his co-accused. The Crown lawyer also expressed the view that the presiding Judge would have been unlikely to grant an application for severance of the defendants.

[16] The view expressed by the Crown lawyer supports Ms WS's position. There is good reason to accept it and no reason not to. The question of severance was one for Ms WS to answer based on the exercise of her professional judgement. That judgement was not plainly wrong. I therefore accept that no conduct issue arises from Ms WS not having made an application for severance.

[17] The material that has been provided as part of the complaint and review also supports the view that Ms WS appropriately challenged the evidence and charges both in the pre-trial stages and at the trial itself. Ms WS was successful in a pre-trial application to have the counts of money laundering and importation dismissed prior to trial. There is also evidence of key prosecution evidence being challenged by cross examination during the trial. Which witness are cross examined, and how, are also matters for the exercise of counsel's professional judgement. Again, there is no evidence to suggest that judgement was plainly wrong.

[18] Mr KL's complaints against Ms WS are wide ranging criticisms of Ms WS's management of the trial and steps leading up to the trial. It is not the role of this Office to examine every decision made by counsel during the course of each stage of a litigation process with a view to determining the adequacy or otherwise of the decisions made.

[19] However, in considering this aspect of the review application all the information that was before both the Committee and the further material that has been submitted in the context of this review has been considered. This part of Mr KL's complaint is not well supported by evidence. I therefore agree with the Committee that, viewed in context, the complaints made in respect of Ms WS's conduct, cannot properly form the basis of conclusion that her conduct was unsatisfactory. There is no reason to alter or reverse this aspect of the Committee's decision, and good reason to confirm it.

Did Ms WS delegate attendances to Mr TH inappropriately?

[20] At the time Ms WS was engaged, both Mr KL and his father agreed that Ms WS should engage a junior to assist with preparation and attendance at trial. Initially Ms ZX acted as junior but when she was unable to continue acting, due to other commitments, Mr TH took over her role. This was with the agreement of Mr KL. Ms WS delegated appearances to Mr TH on two occasions for relatively minor matters in the pre-trial stage. He also acted as second counsel at trial and led evidence from a defence witness.

[21] Mr TH had appeared with Ms WS as second counsel on several other occasions, and Ms WS says she considered him to be a highly competent lawyer. At the time of the trial Mr TH had been practicing law for at least 16 years. Prior to that he had been a police officer and had several years of experience as a drugs detective.

[22] The evidence does not support the allegation that Mr TH was not sufficiently experienced or competent to act as junior counsel in pre-trial appearances, or in assisting with the preparation of evidence or at the trial. There is good reason to believe the matters Ms WS delegated to Mr TH were well within his areas of experience and expertise. There is also little by way of evidential support for the allegations that Mr TH did not act competently throughout the pre-trial period or during the trial itself. This aspect of the decision is therefore also confirmed.

Did Ms WS's conduct contravene practice rules 3.4, 3.5, 9.3 or 14.2(e) and if so, do any of those contraventions fall within the definition of unsatisfactory conduct in s 12(c) of the Act?

Rules 3.4 and 3.5

[23] Ms WS accepts that she did not provide Mr KL with written information as required by rules 3.4 and 3.5 until after the trial. It appears that when issuing terms of engagement for the sentencing work Ms WS realised she had overlooked providing the information required by rules 3.4 and 3.5 when she was first instructed. The Committee concluded that, as the requirements had been in place for less than two months at the time of the breach, this was a technical breach only. In the circumstances it considered the breach did not justify a finding of unsatisfactory conduct.

[24] There were no specific provisions in respect of barristers sole in 2008. Rules 3.4 and 3.5 regulated all lawyers. Those rules say:

> 3.4 A lawyer must, in advance[3], provide a client with information in writing on the principal aspects of client service including the following:
>
> (a) the basis on which the fees will be charged, when payment of fees is to be made, and whether the fee may be deducted from funds held in trust on behalf of the client (subject to any requirement of regulation 9 or 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008):
>
> (b) the professional indemnity arrangements of the lawyer's practice. This obligation is met if it is disclosed that the practice holds indemnity insurance that meets or exceeds any minimum standards from time to time specified by the Law Society. If a lawyer or a practice is not indemnified, this must be disclosed in writing to the client:
>
> (c) the coverage provided by the Lawyers Fidelity Fund and if the client's funds are to be held or utilised for purposes not covered by the Lawyers' Fidelity Fund, the fact that this is the case:
>
> (d) the procedures in the lawyer's practice for the handling of complaints by clients, and advice on the existence and availability of the Law Society's complaints service and how the Law Society may be contacted in order to make a complaint.
>
> 3.5 A lawyer must, prior to undertaking significant work under a retainer, provide in writing to the client the following:
>
> (a) a copy of the client care and service information set out in the preface to these rules; and
>
> (b) the name and status of the person or persons who will have the general carriage of, or overall responsibility for, the work; and
>
> (c) any provision of the retainer that limits the extent of the lawyer's or the practice's obligation to the client or limits or excludes liability. The terms of any of those limitations must be fair and reasonable having regard to the nature of the legal services to be provided and the surrounding circumstances.

[3] "The expression 'in advance' is contained in section 94(j) of the Act. Accordingly, lawyers are recommended to provide the information set out in rule 3.4 prior to commencing work under a retainer".

[25] The Committee correctly noted that rules 3.4 and 3.5 had been in place at the time for less than two months. However, lawyers had been given a significant amount of prior notice that the rules were to be introduced, and of what they would contain. The changes were well publicised to lawyers in advance of them taking effect on 1 August 2008. Information and training had been made available to members of the profession on the new regulatory requirements.

[26] The evidence in the present matter is that Ms WS discussed some of the key matters required to be covered in written terms of engagement when she was first instructed.

[27] However, rules 3.4 and 3.5 identify specific information that is to be provided, and requires that information to be provided in writing. Rule 3.4 requires the lawyer concerned to provide that information in advance, and the footnote to that rule recommends that information is provided prior to commencing work under a retainer.

[28] Rule 3.4(c) required Ms WS to provide information about the coverage provided by the Lawyers Fidelity Fund. It also required her to provide information about whether the client's funds are to be held or utilised for purposes not covered by the Lawyers' Fidelity Fund.

[29] Part 10 of the Act applies to the Fidelity Fund. The provisions of Part 10 do not appear to apply to barristers sole, who have a general exemption from compliance with s 112(1) because they are prohibited by rule 14.2(e) from holding money on behalf of another person. Barristers sole are therefore not obliged to maintain the trust account records required by s 112(1).

[30] Ms WS says she paid the money she received for Mr KL's trial into her business account. That is not trust account. It appears unlikely that money would have been covered by the provisions of the Lawyers Fidelity Fund. I may be wrong, but I doubt that Ms WS discussed the Fidelity Fund with Mr KL before she received money in advance of providing services or issuing invoices.

[31] Rule 3.5 has no footnote, but takes a more directive approach to timing, requiring the lawyer concerned to provide the information specified "prior to undertaking significant work under a retainer".

[32] To comply with each of the rules, Ms WS was to provide the information specified prior to undertaking significant work under her retainer with Mr KL, via her reverse brief with Ms YL. It would have been prudent for Ms WS to have provided the specified information in writing to both Ms YL and Mr KL, particularly as she was instructed under a reverse brief. That way Ms WS would have been able to demonstrate she had complied with the rules, and known with a reasonable degree of certainty that Mr KL had the requisite information and could have asked informed questions about it, given Ms YL's apparently limited involvement in her role as instructing solicitor. That did not happen.

[33] The question is what disciplinary response, if any, should meet those admitted contraventions of rules 3.4 and 3.5, both of which appear on their faces to impose strict mandatory requirements.

[34] Rule 3.4 was recently discussed by the High Court in *McGuire v Manawatu Standards Committee*.[3] Gendall J said:[4]

> … A complication obviously arises when one considers footnote 3 to r 3.4 … This uses the language "lawyers are recommended" to provide the information "prior to commencing the work under a retainer. What seems at first glance to be the mandatory nature of r 3.4(a) would appear to be significantly softened by what is only a "recommendation" explanation for advance notification prior to "commencing work".

[35] In that case Mr McGuire was providing conveyancing services to clients in his capacity as a solicitor. He had negotiated a fixed fee with his clients orally. He then sought to increase the fee when he provided written terms of engagement, after having done some work under the retainer.

[36] His Honour observed that:[5]

> Clearly the policy behind the requirements for letters of engagement specified in r 3.4 is to fully inform clients of important matters including fee levels, and fee payment arrangements, indemnity insurance and fidelity fund arrangements, and complaints mechanisms. A question must arise as to whether any mischief has occurred in this case from what might be thought to be only a short delay which occurred in Mr McGuire providing this information/letter of engagement … In my view, any delay that did occur here might be seen at most as a technical breach of r 3.4 and nothing more. And, as I have noted, little if any mischief was caused. Certainly, as I understand the position, this delay was not a significant target in the Ranganathans' complaint against Mr McGuire.

[37] Before concluding it was wrong for the Committee to have made (and the LCRO to have confirmed) a determination of unsatisfactory conduct in respect of Mr McGuire's contravention of r 3.4, His Honour said:

> And, it is still not entirely clear as I have outlined above, whether taking into account footnote 3, the r 3.4 requirement to provide a letter of engagement "in advance" is simply a recommendation rather than a mandatory requirement. Issues arise too as to whether any work can be undertaken by a lawyer before a letter of engagement is provided. On all of this, as I see it, the better view here is that, in making the findings they did arguably both the Committee and the LCRO misapplied the law relating to r 3.4 by failing to apply the right legal test. If I am wrong on this and even if, however, the requirement for a letter of engagement in advance is mandatory and there had been a purely technical breach of that rule here, the fact that this has resulted in serious findings of unsatisfactory conduct against Mr McGuire from both the Committee and the LCRO, with such significant consequences for Mr McGuire and his future professional reputation that a cautious approach was required and that did not occur here.

[38] The High Court's concerns related to the particular facts of *McGuire*. First, the length of the delay in that case was short within the overall duration of the retainer.

---

[3] *McGuire v Manawatu Standards Committee* [2016] NZHC 1052 at [61] to [66].
[4] At [62].
[5] At [64].

Second, that the provision of information in that case was not a significant aspect of the client's concerns. The case also highlights a level of uncertainty over the legal test.

[39] The facts of Mr KL's complaint about Ms WS's conduct raise quite different issues to those considered in *McGuire*. Significantly, Mr McGuire was not in practice as a barrister sole as Ms WS was at the relevant time. Ms WS's conduct occurred before rules 3.4 and 3.5 were amended in July 2015 to include specific provisions to regulate the conduct of barristers sole as rules 3.4A and 3.5A. Although those rules do not resolve the questions discussed by the High Court, they do highlight differences between lawyers in practice as barristers sole and lawyers in practice as barristers and solicitors who operate trust accounts.

[40] The key point is that barristers sole do not operate trust accounts and do not hold money or other valuable property for or on behalf of another person. It appears to be the case that any money paid to a barrister sole that has not been the subject of an invoice for services provided can only be held on behalf of that other person.

[41] Money held in a solicitor's trust account is protected by regulations that only apply to trust accounts. Barristers sole expose themselves and any other person on whose behalf they hold money, to a range of potential difficulties by holding money in advance of issuing an invoice for fees outside the regulatory protections a trust account provides. Given the consumer protection purposes of the Act, perhaps the more significant risks to be considered are those to which barristers sole might expose another person who unwittingly hands over control of their money to a barrister to hold in advance of the barrister issuing an invoice for his or her fees.

[42] Risks of that type are explicitly addressed by the amendment to the rules in 2015, which introduced new rules 3.4A and 3.5A that apply specifically to the information barristers sole are required to provide, and in particular rule 3.4A(c) which requires a barrister sole to advise a client in writing "in advance" of the "fact that the Lawyers' Fidelity Funds does not provide any cover in relation to a barrister sole as he or she does not hold clients' funds".

[43] The new rule effectively places an onus on barristers sole to tell clients "in advance" that they do not hold clients' funds. It appears sensible that "in advance" in that rule is likely to be interpreted to mean that barristers sole must provide information under rule 3.4A before another person potentially compromises their position by handing over control of their money to the barrister sole, without the barrister sole having first provided an invoice giving rise to an lawful entitlement to claim, and presumably be paid, fees for services provided.

[44] I take it that one of the purposes of Ms WS providing information in advance in 2008 under rule 3.4(c) was to enable anyone who paid her money to be informed of the extent of their potential exposure to the risks involved in giving her money, albeit the risks of Ms WS holding money for Mr KL or his parents may in fact have been infinitesimally small because of the way she managed funds paid into her long term business account.

[45] Gendall J's concern related to questions that "must arise as to whether any mischief has occurred". I take it that can be extended to preventing mischief from occurring. Rule 14.2(e), discussed in more detail below, prohibits barristers sole from holding money for another person, presumably because holding money for another person can lead to all sorts of mischief.

[46] Ms WS provided the vast bulk of her services, both as to duration and significance, to Mr KL before she complied with rules 3.4 and 3.5. She had raised invoices for some of those services, and been paid significant sums of money, including a sum of $115,000 that she requested be paid before commencement of the trial. Thus payment of her fees for the services she was to provide in relation to the 16 day trial was secure, even if issue had been taken with her conduct, service or fees after the trial concluded. She had control of the money. The attraction of those arrangements is easy to understand from the perspective of a barrister sole who is not relying on the instructing solicitor to hold security for fees in a trust account.

[47] The trial concluded before Ms WS complied with rules 3.4 and 3.5, so she also failed to let Mr KL know about her complaint handling procedures, and failed to advise on his right to make complaint to NZLS until after the trial. Whether he already knew about the NZLS complaint process or not is irrelevant. Ms WS was under an obligation to make sure she told him. He had a right to know. He was in deep trouble and in dire need of legal services. In that sense, he was vulnerable.

[48] The approach by this Office has generally been to encourage compliance, and discourage non-compliance with rule 3.4, and rule 3.5, by making findings of unsatisfactory conduct where there is clear evidence of a practitioner having contravened those rules. That approach has been based on the mandatory language of the rules on their face. The discretion as to whether a contravention has occurred generally relates to how late the lawyer was in providing the information required under rule 3.4, and the significance of the work the lawyer had done before sending out the information required by rule 3.5. Those discretions involve quantitative and qualitative assessments based on the facts in each case.

[49] Although this Office has a role in promoting consistency in approach to the application of the rules, as signalled by Gendall J in *McGuire*, a cautious approach is necessary. Reputations are at stake.

[50] I have therefore taken a cautious approach to whether Ms WS's conduct in contravening rules 3.4 and 3.5 falls within the definition of unsatisfactory conduct in s 12(c) of the Act. That caution is intensified by the knowledge that the power to make a determination of unsatisfactory conduct at first instance on review pursuant to ss 152(2)(b)(i) and 211(1)(b) is itself not subject to review by this Office, as a decision by a Standards Committee is. I have therefore considered the bigger picture of Ms WS's conduct before reaching a conclusion in relation to rules 3.4 and 3.5.

Rule 14.2(e)

[51] Rule 14.2(e) says:

> Practice as barrister sole
>
> 14.2 A lawyer who holds a practising certificate as a barrister sole must not-
>
> …
>
> (e) receive or hold money or other valuable property for or on behalf of another person; or

[52] On 22 May 2011 Ms WS emailed Mr KL's parents saying:

> Nick advised you wanted an invoice for trial fees. Please note that I have attached a Request for Trial Fees for myself and TH. An invoice will be rendered at the completion of the trial.
>
> The fees need to be paid prior to the start of the trial as advised
>
> I look forward to receipt of banking tomorrow.

[53] Attached to that email was a statement headed "Request for payment fees for Jury Trial" requesting that $115,000 be paid into Ms WS's bank account with details provided. On receipt of the email Mr KL says his father paid the $115,000 into Ms WS's account.

[54] Ms WS has not produced a copy of any invoice she rendered after completion of the trial. Although her lawyers' submissions on review explain how she allocated the money, Mr KL alleges that many thousands of dollars were paid to Ms WS before there was any sight of an invoice. He also says that he has never received an invoice for $115,000 paid prior to the trial.

[55] Ms WS receiving payment direct from Mr KL senior in advance, without issuing an invoice, highlighted conduct issues the Committee did not consider. Ms

WS's conduct in receiving payment direct raises concerns arising from s 110 of the Act, and related provisions in the Trust Account Regulations and rules.

[56] Section 110 requires any money received by a lawyer for, or on behalf of, any person to be paid into a trust account. As Ms WS is a barrister, rule 14.2(e) prohibits her from receiving or holding money for or on behalf of another person. Rule 9.3 provides that lawyers who receive funds to cover fees in advance must comply with the requirements of regulations 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008. Any money paid on account should have been received into Ms WS's instructing lawyer's trust account and held there until payment of Ms WS's fees could be made in accordance with the Act, regulations and rules.

[57] Trust Account Regulation 10 for example provides:

> All money paid to a practice in respect of professional services for which an invoice has not been issued, whether described as a retainer or otherwise, must be retained in a trust account until it is–
>
> (a) Disbursed on the client's behalf; or
>
> (b) Applied in payment of fees in accordance with regulation 9

[58] Regulation 9 provides that a trust account may not be debited with fees unless a dated invoice has been issued and an authority in writing has been given by the client specifying the sum that can be applied to the fees.

[59] Given the concerns around s 110, regulation 9 and 10 and rule 14.2(e), and the lack of consideration by the Committee of the conduct in this context, Ms WS was invited to file submissions in respect of s 110 and those have also been considered.

[60] Ms WS accepts that the money paid in advance was paid directly into her account and was not paid into a trust account. Her counsel submits that the account it was paid into was Ms WS's long term business account and the money was held in that account until the work in respect of which the fees had been paid had been completed.

[61] Ms WS's long term business account was not a trust account for the purposes of the Act. It is fundamental to her practice as a barrister that Ms WS should have ensured that fees paid to her in advance were processed through Ms YL's trust account. It is also of concern that Ms WS received a payment of $115,000 and then appears to have applied that money to her fees and those of Mr TH without issuing an invoice.

[62] As Ms WS is a barrister sole, she is prohibited by rule 14.2 from receiving or holding money on behalf of another person and does not operate a trust account.

Paying fees into a long term business account is not sufficient to comply with the rules and circumvents compliance with the Trust Account Regulations.

[63] Ms WS accepts the fees were paid in advance and acknowledged at the time she requested them that she could not issue an invoice until the work was done. She also accepts that the fees were paid directly into her account and not into a trust account. By the circumvention of Ms YL and her trust account Ms WS put herself in a position where she held money that she had not properly accounted for on the basis of an invoice. That is conduct that contravenes rules 9.3 and 14.2(e).

Outcome

[64] Ms WS has had the concerns of this Office put to her. The submissions by Ms WS's counsel have been carefully considered in the course of this review.

[65] Conduct can be unsatisfactory under s 12(c) of the Act when there is a contravention by a lawyer any of the practice rules under the Act that apply to that lawyer. In this case Ms WS has contravened rules 3.4, 3.5, 9.3 and 14.2(e). While contravention of rule 3.4 or 3.5 on its own might not have reached a point where a finding of unsatisfactory conduct was justified, as part of the overall pattern of Ms WS's conduct such a determination is warranted.

[66] The circumstances are such that, pursuant to ss 152(2)(b)(i) and 211(1)(b)(i) determinations are made on review that there have been three separate instances of unsatisfactory conduct on the part of Ms WS that fall within the definition of unsatisfactory conduct in s 12(c) of the Act for contraventions of:

(a) rules 3.4 and 3.5;

(b) rule 9.3, and

(c) rule 14.2(e).

Were the fees charged by Ms WS fair and reasonable?

[67] In total Ms WS charged fees of $157,000 exclusive of GST, for all services provided to the end of the trial, and a further $6,250 for work done in relation to the sentencing. Ms WS's invoices included time and attendance by all junior staff including Mr TH. The details of the various accounts are as follows:

Date	Details	Fee	GST	Total
01/01/2009	Bail variation attendances for overseas travel including court appearances on 19/12/2009 and 22/12/2009.	$5,000.00	$625.00	$5,625.00
26/03/2010	Depositions, preparation and hearing, further bail variation including court attendance on 29/01/2010.	$40,000.00	$5,000.00	$45,000.00
27/09/2010	Pre-trial application – s 347 discharge on money laundering, court attendance 17/09/2010, change bail conditions.	$10,000.00	$1,250.00	$11,250.00
10/11/2010	Further bail variation.	$2,000.00	$300.00	$2,300.00
22/05/2011	Request for payment of fees in advance for trial preparation and trial.	$100,000.00	$15,000.00	$115,000.00
07/09/2011	Sentencing preparation.	$6,250.00	$937.50	$7,187.50
			Total	**$186,362.50**

[68] Ms WS says her notional hourly rate is $450 per hour plus GST and the hourly rate for Mr TH was $200 per hour plus GST. However Ms WS says she does not generally charge on a time and attendance basis but uses the hourly rate for the purposes of calculating fee estimates. The fees rendered therefore were not calculated strictly on a time and attendance basis but also took into account other factors such as the nature and complexity of the work done. In some cases the fees charged were considerably less than what would have been charged if Ms WS had charged Mr KL for both her time and that of Mr TH on the basis of their respective hourly rates.

[69] Mr KL's main complaint in relation to the Committee's decision is that it did not follow the costs assessor's report. He says there was no purpose in having the fees review done if the Committee had no intention of listening to the recommendations. That concern misconceives the role of a costs assessor and overlooks that the Committee has a statutory duty to decide matters itself, and is not bound to accept the Costs Assessor's views.

[70] It is clear from the decision that the Standards Committee did consider the cost assessor's report when reaching its determination, as well as the submissions

made by the parties to the complaint. The Committee was not obliged to follow the recommendations in the cost assessor's report, but was required to consider all the factors set out in rule 9.1 and reach its own independent view of the fairness and reasonableness of the fees. The costs assessor's report was provided to assist the Committee in that process. Plainly the Committee also considered Ms WS's detailed comments on the Costs Assessor's report, although Mr KL did not take up the Committee's offer to comment.

Rules 9 and 9.1

[71] Rule 9 prohibits a lawyer from charging a client more than a fee that is fair and reasonable for the services provided. That fee is set having regard to the interests of both the client and the lawyer, and having regard also to the factors set out in rule 9.1.

[72] Rule 9.1 states that the factors to be taken into account when determining whether a fee is fair and reasonable include as a minimum:

> (a) the time and labour expended:
>
> (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
>
> (c) the importance of the matter to the client and the results achieved:
>
> (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
>
> (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
>
> (f) the complexity of the matter and the difficulty or novelty of the questions involved:
>
> (g) the experience, reputation, and ability of the lawyer:
>
> (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
>
> (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
>
> (j) any quote or estimate of fees given by the lawyer:
>
> (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
>
> (l) the reasonable costs of running a practice:
>
> (m) the fee customarily charged in the market and locality for similar legal services.

[73] The costs assessor had recommended a total reduction of $31,337.50 primarily on the basis that he considered Ms WS's notional hourly rate of $450 to be too high. His opinion was that an hourly rate of $350 was more appropriate. The

Committee however strongly disagreed with the recommendation regarding Ms WS's hourly rate. Taking into account her level of experience and the relatively complicated nature of the proceedings the Committee was of the view that an hourly rate of $450 was reasonable and not out of line with fees charged by other criminal barristers in Auckland of similar standing to Ms WS.

[74] Hourly rate is something of a red herring in this case, because Ms WS did not charge strictly on a time in attendance basis. The costs assessor recommended reducing the 22 May fees for the trial by $15,000. That recommendation was made largely because he considered Ms WS's view that two to three days of preparation was required for each day of hearing was antiquated and unrealistic.

[75] According to submissions put for Ms WS, if the court hearing time were calculated only on a time and attendance basis for Ms WS and Mr TH, fees would have totalled $83,200 (GST exclusive). This means that only $16,800 of the 22 May bill would have been for preparation. That works out to less than 38 hours based on Ms WS's nominal charge out rate of $450 an hour, and equates to approximately one third of a day's preparation for every day of trial. She is an experienced lawyer and her notional hourly rate reflects a reasonably high level of expertise. Presumably Ms WS's experience and expertise were qualities Mr KL found attractive when he first instructed her.

[76] Ms WS charged Mr KL substantial fees. However, taking the matters outlined in rule 9.1 into account I do not consider the fees charged were unfair or unreasonable overall.

[77] The proceeding was complex and involved multiple defendants. A significant amount of time and resources were required to ensure Ms WS fulfilled her professional obligations to Mr KL. The matter was important to Mr KL. His freedom was at stake, and his financial position in jeopardy.

[78] Ms WS advised Mr KL of her best guess as to costs. I accept that it would have been virtually impossible for her to have provided him with a quote early on, or perhaps at any point until shortly before trial, with any degree of accuracy.

[79] In all the circumstances, I am satisfied that the fee overall is fair and reasonable for the services provided to Mr KL, having regard to his interests and those of Ms WS, and to the factors set out in rule 9.1.

Submissions – s 156

[80] As three findings of unsatisfactory conduct have been made in respect of Ms WS's conduct for the first time on review, the parties are provided with an opportunity to comment on the consequences that should follow. The parties have 14 days from the date of this decision, to file submissions in relation to orders that might be made pursuant to s 156 of the Act.

Costs on Review

[81] Pursuant to s 210 of the Act and the LCRO's Costs Orders Guidelines, the LCRO has discretion to order costs on review. Pursuant to the Guidelines, Ms WS is ordered to pay costs on review of $1,200 for a hearing of average complexity, on the papers.

Direction to Publish - s 206(4)

[82] Pursuant to s 206(4) of the Act, publication of this decision is directed, without identification of the parties.

Decision

[83] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

(a) modified to record a determination made pursuant to ss 211(1)(b) and 152(2)(b)(i) that there has been unsatisfactory conduct on the part of Ms WS pursuant to s 12(c) consisting of contraventions of Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 3.4, 3.5, 9.3 and 14.2(e); and

(b) otherwise confirmed.

[84] Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Ms WS is ordered to pay costs on review of $1,200 within 28 days of the date of this decision.

DATED this 15th day of June 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 KL as the Applicant
Ms WS as the Respondent
Ms RT as Representative for the Respondent
Area Standards Committee
The New Zealand Law Society
The Secretary for Justice