

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2019] NZLCDT 8

LCDT 009/18

UNDER

The Lawyers and Conveyancers
Act 2006

BETWEEN

OTAGO STANDARDS COMMITTEE
Applicant

AND

SIMON NICHOLAS CLAVER
Respondent

CHAIR

Judge D F Clarkson

MEMBERS

Mr M Gough

Mr S Maling

Mr H Matthews

Mr S Walker

DATE OF HEARING 1 March 2019

HELD AT District Court Christchurch

DATE OF DECISION 29 March 2019

COUNSEL

Mr J Shaw and Ms T Ritchie for the Standards Committee

Mr A Tobeck for the Respondent

RESERVED DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Mr Claver has admitted one charge of misconduct, which particularises a range of failures over a two to three year period, in respect of 14 different clients. This decision determines the appropriate penalty to be imposed. It has regard to the nature of the offending, and takes account of aggravating and mitigating factors, bearing in mind the public protective purposes of the legislation¹.

Issues

[2] The issues to be determined are:

1. Is the offending such that, having regard to the factors referred to above, and any relevant precedent, strike-off is the only proportionate response?²
In turn this issue requires the consideration of a number of sub-categories:
 - (a) How serious is the offending?
 - (b) What are the aggravating features of the offending or in relation to the practitioner?
 - (c) What are the mitigating features?
 - (d) A comparison with any similar circumstances in previous penalty decisions.
2. If the answer to the above question is “No”, what is the proportionate response having regard to the same sub-categories?

¹ Lawyers and Conveyancers Act 2006.

² As advanced by counsel for the Standards Committee.

Background

[3] This is set out in full in the charges and particulars which are attached as Appendix I to this decision. They are summarised in penalty submissions filed by counsel for the Standards Committee³ as follows:

- [8] To summarise the factual position, Mr Claver was at all relevant times a barrister practising on his own account. The conduct in question spans the period 2015 to 2017 and relates primarily to legally aided clients who Mr Claver acted for on criminal charges in the Invercargill District Court.
- [9] Fourteen separate clients feature in the charges and were affected by Mr Claver's poor conduct.
- [10] There are a total of eleven particulars:
- (a) Failure to properly advise clients and obtain adequate instructions – particular 1.
 - (b) Failure to follow instructions – particular 2.
 - (c) Acting without instructions – particular 3.
 - (d) Failure to appear in Court – particular 4.
 - (e) Contacting a Judge directly – particular 5.
 - (f) Failure to act competently, in a timely manner and to take reasonable care - particular 6.
 - (g) Misleading the Court – particular 7.
 - (h) Failure to comply with penalty orders made by a Standards Committee – particular 8.
 - (i) Making a false declaration to the New Zealand Law Society ... - particular 9.
 - (j) Mishandling of client funds – particular 10.
 - (k) Failures in dealings with expert witness – particular 11.”

³ Paras [8]-[10].

Issue 1(a) – Seriousness of the Offending

[4] It is submitted by counsel for the Standards Committee that the number and nature of the breaches of client care “... *evidence a fundamental lack of competence and fitness to practice on Mr Claver’s part*”. Mr Shaw also draws attention to a “*lack of care and professionalism*” by the practitioner in administering the financial aspects of his practice.

[5] In terms of the submission that Mr Claver ought to be removed from the ability to practise at all, the Standards Committee relied most heavily on Particulars 7 and 9 as being indicative of misleading or deceptive conduct.

[6] While Mr Shaw conceded in oral submissions that, in relation to the misleading of the Court, while it might not be contended that the practitioner was deliberately misleading, he was at least reckless in making the statements he made. Mr Shaw also accepts that the practitioner was stressed and unwell at the time.

[7] In relation to the false declaration to the Law Society, a matter which the Tribunal views very seriously, the Standards Committee pointed to Mr Claver’s acceptance, in evidence, that there were at least two aspects of the order that he had not complied with.

[8] The self-reporting aspect contained in the renewal of a practitioner’s practising certificate means it is essential for the Law Society to be able to rely on the practitioner’s responses as being accurate.

[9] Mr Claver was insistent that his misleading of the Court was unintentional and that he had preceded his remarks by informing the Judge that he was surprised by the matter being called and therefore did not have his file with him, that he was operating from memory and his memory was not always reliable.

[10] Unfortunately for Mr Claver that aspect is not recorded in the Judge’s minute and no transcript is available to assist him.

[11] In relation to the misleading of the Law Society Mr Claver concedes that he did not give the declaration the attention which it deserved and thought that because he

had previously undertaken a litigation skills course and because he had begun the mentoring arrangement that had been ordered, that he had sufficiently met the rehabilitative orders that had been imposed on him. He accepts therefore that he made errors in his declaration to the Law Society but asks they be seen as careless and indicative of his, then, less than co-operative attitude with the Law Society than deliberately misleading.

[12] Mr Claver is adamant he would never deliberately mislead his professional body. He accepts that he ought to have approached the Law Society to ask if he needed to repeat the litigation skills course, particularly since he was impecunious at the time, and further that he ought to have advised them that the mentoring arrangement had fallen over because of the practical difficulties faced by his practising and living in different towns, and practising in a different town from his mentor.

[13] These factors do weigh in relation to the seriousness of the offending and any consequent penalty. Where deliberate or wilful dishonesty is involved the starting point is certainly likely to be that of strike-off.

[14] Mr Claver accepted that there were a number of deficiencies in his past practice and accepted many aspects of the inadequacy of his services at the time concerned. Against that he points to his health issues and in particular that he was depressed, anxious and overwhelmed and simply tried to work harder to work himself out of a financially precarious position.

[15] In the end, we were not persuaded that Mr Claver, who came across as genuine in the giving of his evidence, was intentionally dishonest either with his professional body or with the Court.

[16] He certainly was extremely careless in regard to these communications and this is reflective of his general mode of operation over the period when his conduct is being examined.

[17] It is clear, and acknowledged by Mr Claver, that he was not equipped to take on the conduct of jury trials, was not equipped to undertake the level of workload which he assumed and was not sufficiently organised in his office systems to be well supported in these circumstances.

[18] All of these problems put the public at risk in an unacceptable fashion.

[19] In summary we regard the level of misconduct at the relatively serious end but not the most serious encountered by the Tribunal.

Issue 1(b) – Aggravating Features

[20] The Standards Committee put four aggravating factors to the Tribunal:

- (a) The number and nature of breaches involved;
- (b) Misleading or deceptive conduct;
- (c) Prior disciplinary history; and
- (d) Failure to engage with prior rehabilitative orders.

[21] In relation to the first two matters, we have already considered those under the heading of seriousness of the offending and consider that more appropriate than as aggravating features. We do take account however of the comprehensive range of failures, which is why we have regarded the matter as in the relatively serious category of misconduct.

[22] The practitioner's prior disciplinary history is certainly a matter of serious concern. Significantly the three prior determinations between November 2013 and December 2017 concern conduct of the same nature as that under current consideration.

[23] As pointed out in the *Cooper v Waikato Bay of Plenty Standards Committee No. 2 of the New Zealand Law Society*⁴ decision cited to us, previous disciplinary history can lead to an uplift in the level of penalty (in that case it was said to justify a further six months suspension).

⁴ *Cooper v Waikato Bay of Plenty Standards Committee No. 2 of the New Zealand Law Society* [2015] NZHC 2352, at [30], Venning J.

Issue 1(c) – Mitigating Features

[24] The practitioner is given considerable credit for his acceptance of the charge and most of the particulars relating to it.

[25] In evidence and in his counsel's submissions, Mr Claver has outlined his background. He came to the law later in life and with some considerable difficulties to overcome personally. As an older practitioner, he was unable to find employment in a law office and therefore has never had the opportunity of direct supervision and mentoring.

[26] He set up practice on his own account after some years working in the role of duty solicitor as well as doing some legal aid assignments. After some five years of this work and fulltime employment in legal publishing, Mr Claver entered practice on his own account as he was then entitled to do.

[27] Although he lived in Dunedin, in order to obtain enough work he was travelling regularly to Invercargill, where he spent most of his working week.

[28] He accepts that when he began to undertake jury trial work he took on far more than he had intended in order to overcome a significant indebtedness, including a very large student loan. He began to suffer from increased stress, anxiety and depression.

[29] Initially, he says that he attributed his difficulties to financial stresses and mismanagement and in early February 2018 was adjudged bankrupt. He says that at that stage he realised the core of his problems was deeper and addressed his own mental health. He undertook counselling and attends weekly counselling sessions still. He appears to have initiated these steps of his own volition. In addition, he has engaged an accountant to control those finances which he is able to manage (as allowed by the Official Assignee).

[30] He has withdrawn from practice in Invercargill and now only appears in the Gore District Court once every three weeks. He has significantly cut his workload so that he is at most times only managing 20 files at a time. He is not undertaking jury work.

[31] We consider he should be given considerable credit for all of these steps, particularly since they will have gone a long way towards also protecting his clients.

[32] His counsel submits that there have not been any further professional difficulties for Mr Claver in the last two years and that that is testament to these arrangements working well.

Issue 1(d) – Comparison with Other Cases

[33] The Standards Committee have referred us to the case of *The Hawke's Bay Lawyers Standards Committee of the New Zealand Law Society v Clarkson*,⁵ in which the practitioner was struck off following a raft of client failures which were somewhat similar to the present matter. Ms Clarkson had been found guilty of four previous disciplinary breaches and, in contrast to the practitioner did not cooperate with the investigative and disciplinary process in the manner that Mr Claver has. Thus a rehabilitative approach was not open in her case.

[34] We were also referred to the decision in *Wellington Standards Committee 2 v Morahan*⁶ but that decision involves a practitioner who had also acted in conflict of interest which is a very serious matter. That practitioner was suspended for four months.

[35] There is also the decision of *Cooper v Waikato Bay of Plenty Standards Committee No. 2 of the New Zealand Law Society*⁷ in which the practitioner who was found guilty of misleading the Court was suspended for 18 months, a period which was upheld on appeal. In that matter the Tribunal and Appellate Court had found the practitioner guilty of wilfully and deliberately misleading the Court. We have not quite reached that point in this matter. However, in Mr Claver's case, there are a raft of other failures as already outlined.

[36] Finally, in the decision of *Deliu v National Standards Committee No. 1 of the New Zealand Law Society*⁸ both the Tribunal, and the High Court on appeal found that

⁵ *The Hawke's Bay Lawyers Standards Committee of the New Zealand Law Society v Clarkson* [2014] NZLCDT 29.

⁶ *Wellington Standards Committee 2 v Morahan* [2017] NZLCDT 34.

⁷ See above n 4.

⁸ *Deliu v National Standards Committee No. 1 of the New Zealand Law Society* [2017] NZHC 2318.

a clear period in which no subsequent offending had been noted was relevant in assessing penalty for previous misconduct.

Discussion

[37] The purpose of penalty proceedings is not a punitive one, it is to protect the public and the reputation of the profession by upholding professional standards. Further purposes can be rehabilitation and deterrence, both specific and general.

[38] In the *Cooper*⁹ decision the High Court held that taking account of a “... *medical condition, particularly the diagnosis of depression ...*” might lead to a reduction in suspension of up to six months. At para [26] of the *Cooper* decision four further decisions are referred to by the High Court namely *Otago Standards Committee v Davidson*;¹⁰ *Hong v Auckland Standards Committee No. 3*;¹¹ *Auckland Standards Committee No. 1 v Garrett*¹² and *Wellington Standards Committee 1 of the New Zealand Law Society v Lester*.¹³

[39] Two of those involved deliberate dishonesty and suspension of 12 months was imposed in each, one involved failure to comply with a Standards Committee order, with a suspension of four months, and the final matter, *Lester*, the Tribunal found there was no deliberate dishonesty although the client was misled, and only a censure was imposed.

[40] The *Daniels v Complaints Committee 2 of the Wellington District Law Society*¹⁴ decision makes it clear that “the least restrictive intervention” ought to be imposed. That approach takes account of the many years and high cost of professional training undertaken by practitioners and their (often) inability, at a later career stage to find alternative employment.

[41] While personal considerations about a practitioner cannot ever be placed ahead of the primary purpose of the legislation, as stated above, we are conscious that strike-

⁹ See above n 4 at [32].

¹⁰ *Otago Standards Committee v Davidson* [2012] NZLCDT 39.

¹¹ *Hong v Auckland Standards Committee No. 3* [2014] NZHC 2871.

¹² *Auckland Standards Committee No. 1 v Garrett* [2011] NZLCDT 29.

¹³ *Wellington Standards Committee 1 of the New Zealand Law Society v Lester* [2015] NZLCDT 23.

¹⁴ *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

off ought to be reserved for the most serious of cases which simply cannot be marked by a lesser response.

[42] We do not consider this case to be at that level and we have determined that strike-off would be a disproportionate response to the failings of a poorly trained, muddled, overworked and depressed practitioner.

Proportionate Penalty

[43] The Standards Committee has sought a suspension of at least two years and an order that the practitioner not practise on his own account unless later authorised by the Tribunal.

[44] We consider that most of the failures in Mr Claver's services to his clients can be cured by firstly a reduction in his workload, which has already occurred, and in managing the type of work he undertakes.

[45] Secondly, we consider that an order that he not practise on his own account will have a sufficient safeguard for the public in terms of oversight of his general standard of work.

[46] Taking into account that it has been two years since he has been faulted, and having regard to the aggravating and mitigating features already set out in this decision, a 12-month suspension accompanied by an order that the practitioner not practise on his own account is a proportionate response.

[47] We consider that at the conclusion of the 12-month suspension, when Mr Claver will have to reapply to the Practice Approval Committee, the committee may well wish to impose further restrictions as are currently in force, in terms of the letter from the New Zealand Law Society of 15 February 2019. As to future mentoring, we consider this needs to be much broader than has previously been considered, there needs to be oversight of Mr Claver's advocacy, the use of the Rules of Procedure and knowledge of the law, all of which have been called into question.

Costs

[48] While we acknowledge that Mr Claver is currently bankrupt and has very limited means that has not previously been a reason for costs to have been borne only by the profession.

[49] We consider that in the circumstances of this case, it is proper that we order the practitioner pay 50 per cent of the Standards Committee costs.

[50] We also direct that the practitioner reimburse the Law Society for the Tribunal costs, which are ordered against the Law Society pursuant to s 257 of the Lawyers and Conveyancers Act 2006 (the Act).

Orders

1. The practitioner is suspended from practising as a lawyer for a period of 12 months from 1 March 2019, pursuant to s 242(1)(e) of the Act.
2. There will be an order that the practitioner is not to practise on his own account until further order of the Tribunal, pursuant to s 242(1)(g) of the Act.
3. There will be an order as to costs in the sum of \$11,564.10 in favour of the Standards Committee, pursuant to s 249 of the Act.
4. There will be an order the Law Society pay the Tribunal costs in the sum of \$4,132.00, pursuant to s 257 of the Act.
5. The practitioner is to reimburse the Law Society for the full amount of s 257 costs, pursuant to s 249 of the Act.

DATED at AUCKLAND this 29th day of March 2019

Judge D F Clarkson
Chair

CHARGES

The Otago Standards Committee charges Simon Claver (**Mr Claver**) of Invercargill with:

Misconduct pursuant to section 241(a) and sections 7(1)(a)(i) and/or (ii) of the Lawyers and Conveyancers Act 2006 (**the Act**);

or in the alternative:

Unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct, pursuant to section 241(b) and sections 12(a), (b) and (c) of the Act;

or in the alternative:

Negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise or as to bring his profession into disrepute pursuant to s 241(c) of the Act.

The particulars of the charges are as follows:

BACKGROUND

1. Mr Claver was, at all relevant times, a barrister practising on his own account.
2. The conduct in question spans the period 2015 to 2017. During this period Mr Claver acted for a number of clients facing criminal charges in the Invercargill District Court.
3. Many of Mr Claver's clients were legally aided. A number of Mr Claver's clients were in custody during the time he was acting for them.

PARTICULAR ONE – Failure to properly advise clients and obtain adequate instructions

RB

Background

4. Mr Claver was assigned to act for RB (**Mr B**) in relation to a charge of male assaults female arising from an alleged incident in October 2015.
5. Mr Claver obtained disclosure from the Police on 29 October 2015 and 20 November 2015.
6. On 24 November 2015 Mr Claver emailed the District Court Registry advising that "*Mr B has instructed that he wishes to enter a not guilty plea and he elects trial by jury*". A case review hearing was scheduled for 21 December 2015.
7. Mr Claver's practice manager forwarded the disclosure material received from the Police to Mr B on 2 December 2015. Mr B was also advised that his next Court appearance was to be 21 December 2015 for a case review hearing and that Mr Claver would meet him in Court on that day.
8. The 21 December appearance was adjourned administratively to 25 January 2016 for a case review hearing.

9. In January 2016 a sentence indication hearing was set down for 19 February 2016 at Mr Claver's request. This occurred administratively with no Court appearance. Mr Claver had not sought or obtained instructions from Mr B in relation to the sentence indication.
10. Mr Claver contacted Mr B two days prior to the scheduled hearing on 19 February. Mr Claver advised Mr B that he had sought a sentence indication hearing. Mr B advised Mr Claver that he did not want a sentence indication.
11. Mr B subsequently terminated the relationship with Mr Claver and SW (**Mr W**) was assigned as counsel on 19 February.
12. At the scheduled hearing on 19 February Mr W advised the presiding Judge that Mr Claver had sought a sentence indication without Mr B's instructions. A further case review hearing was scheduled for 22 April 2016.
13. Mr W subsequently ascertained that Mr B did not properly understand the election of trial by jury that had previously been made. The Court granted an application to vacate the jury trial election and substitute a Judge alone trial at the case review hearing on 22 April 2016.

Failure to properly advise Mr B and obtain adequate instructions

14. Prior to Mr B ending the relationship in February 2016, Mr Claver had not had any appointment with Mr B so as to be able to provide proper advice or obtain adequate instructions.
15. Mr B was not provided with a copy of the Police disclosure until 2 December 2015, after he had purportedly given instructions (on 24 November 2015) to enter a not guilty plea and elect trial by jury.
16. Mr B was not given adequate advice regarding, inter alia, the election of trial by jury.

RI

Background

17. Mr Claver was assigned to act for RI (**Mr I**) in relation to charges of possession of an offensive weapon and threatening to kill arising from an alleged incident on 16 January 2016.
18. Mr I was aged 48 at the time and had a limited criminal history. Mr I had no recorded breaches of bail or previous warrants to arrest.
19. Mr I was remanded in custody following his arrest in January 2016. Mr Claver acted for Mr I from his arrest through until March 2016. No bail application was advanced and Mr I remained in custody throughout this period.
20. On or about 11 February 2016 a not guilty plea and election of trial by jury was entered. A case review hearing was scheduled for 14 March 2016.
21. Mr I wrote a letter of complaint to the legal aid administrators regarding his unhappiness with Mr Claver's services. Mr W was assigned as Mr I's counsel in place of Mr Claver on 11 March 2016.
22. Mr W subsequently took instructions from Mr I and resolved the charges with the Police. Charges were withdrawn and reduced, a guilty plea entered, and a sentence of five months imprisonment imposed.

23. The sentence was satisfied on the basis of time served, with Mr I having spent three weeks in custody beyond what was required to satisfy the custodial portion of the sentence.

Failure to properly advise Mr I and obtain adequate instructions

24. Following an initial meeting, Mr Claver did not meet again with Mr I so as to be able to provide proper advice or obtain adequate instructions.
25. Mr I made various attempts to contact Mr I, including through prison staff, but received no response.
26. Mr Claver did not properly advise Mr I or obtain adequate instructions on, inter alia:
- (a) the entry of a not guilty plea and election of trial by jury;
 - (b) an application for bail; and/or
 - (c) the benefits of attempting to resolve the charges having regard to the likely sentence and the time spent in custody.

DS

Background

27. Mr Claver was assigned to act for DS (**Mr S**) after he was arrested and held in custody on 27 January 2016.
28. Mr S remained in custody throughout the period that Mr Claver acted for him. No bail application was advanced by Mr Claver despite there being an available bail address.
29. Mr Claver only met with Mr S on two occasions, just before both of his Court appearances.
30. A not guilty plea and election of trial by jury was entered on Mr S's behalf.
31. Mr W took over as counsel for Mr S on 17 March 2016. He advanced an application for electronically monitored bail for Mr S on 8 April 2016, though this was declined.

Failure to properly advise Mr I (sic) and obtain adequate instructions

32. Other than at Court, Mr Claver did not meet with Mr S so as to be able to provide proper advice or obtain adequate instructions.
33. Mr Claver did not properly advise Mr S or obtain adequate instructions on, inter alia:
- (a) the election of trial by jury; and/or
 - (b) an application for bail.

NT

Background

34. Mr Claver was assigned to act for NT (**Mr T**) in mid 2015 on one charge of sexual connection with a young person. Mr T elected to defend the charge and a trial by jury was scheduled for 10 August 2015.

35. Mr Claver had little contact with Mr T in the lead up to the trial. Mr T instructed that he had not had sexual connection at any time with the complainant. They discussed whether Mr T should give evidence at trial and Mr Claver recommended against that.
36. Mr Claver was provided with Police disclosure leading up to the trial, including a large bundle of text messages between Mr T and the complainant which were incriminating. Mr Claver did not provide a copy of the text messages and other disclosure to Mr T or traverse the disclosed documents with him.
37. On the morning of the trial (10 August 2015) Mr Claver advised Mr T that:
 - (a) this was the last opportunity for him to receive credit for a guilty plea; and
 - (b) that a guilty plea may make the difference between a sentence of home detention or of imprisonment.
38. Mr Claver met with the Crown prosecutor and the trial Judge in chambers prior to the trial commencing. An informal sentence indication was given to the effect that there would be no full time custodial sentence but a pre-sentence report would be required.
39. Mr Claver advised Mr T of the informal sentence indication, following which Mr T entered a guilty plea and was remanded on bail for sentencing on 28 October 2015.
40. Mr T subsequently breached his bail and was remanded in custody from 6 October 2015 until the sentencing hearing on 28 October 2015.
41. In advance of the sentencing hearing, a pre-sentence report was obtained. The report recorded that no sentence indication was provided with the request. The report recommended imprisonment but noted that home detention was also an available sentencing option and that the address which had been canvassed was suitable.
42. At the sentencing hearing on 28 October 2015:
 - (a) Mr T entered guilty pleas to ten other charges (theft, unlawfully taking a motor vehicle, and unlawfully getting into a motor vehicle). These charges had been laid in July 2015, prior to the sentence indication in August 2015. It is unclear whether the Judge was made aware of these charges when the sentence indication was given.
 - (b) Mr Claver made brief oral submissions. He did not file written sentencing submissions.
 - (c) In his oral submissions Mr Claver:
 - (i) made no mention of the sentence indication previously given;
 - (ii) noted that the only option was a sentence of imprisonment and sought a sentence of 18 months imprisonment; and
 - (iii) did not raise the issue of Mr T being given the option of vacating his guilty plea to the charge of sexual connection with a young person.
 - (d) An end sentence of 3 years 1 month imprisonment was imposed, comprised of 2 years 8 months for the sexual charge with a cumulative term of 5 months for the remaining charges.
43. Mr T filed an appeal against his conviction and sentence for the sexual charge. RE acted for Mr T on the appeal.

44. The appeal was advanced on the basis that Mr T's guilty plea should be set aside because he was misled into pleading guilty as a result of the sentence indication given. The Crown did not oppose the appeal, acknowledging that the conviction should be quashed and a retrial ordered.
45. The appeal was heard in the High Court at Invercargill on 27 June 2016. In a decision dated the same day, Mander J:
- (a) noted that Mr T had entered a guilty plea on the basis that the end sentence would be in the home detention range;
 - (b) stated that his conviction based upon a plea obtained on that false basis could not stand;
 - (c) highlighted a number of failures in the approach taken in respect of the sentence indication;
 - (d) stated that Mr T should have been afforded the opportunity, before being sentenced, to have reconsidered his plea; and
 - (e) quashed the conviction, vacated the guilty plea, and remanded Mr T to the District Court to enter a plea to the charge.

Failure to properly advise Mr T and obtain adequate instructions

46. In preparation for the trial, Mr Claver did not go through the Police disclosure with Mr T and could not therefore properly advise Mr T or obtain adequate instructions from him.
47. In relation to the sentence indication and sentencing, Mr Claver:
- (a) failed to ensure that the sentence indication followed a proper process and addressed all relevant matters;
 - (b) did not properly advise Mr T regarding the effect the additional charges may have upon the sentence indication; and
 - (c) at sentencing, did not provide advice or obtain instructions regarding the option of Mr T vacating his guilty plea given that the sentence to be imposed was contrary to the sentence indication given.

Summary of breaches – particular one

48. In respect of the conduct detailed at paragraphs 4 to 47 above, Mr Claver acted in breach of the following provisions of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**CCCR**):
- (a) Rule 7.1, which relates to the need to properly advise and consult the client regarding progress of the retainer and the steps taken to implement the client's instructions;
 - (b) Rule 7.2, which relates to the need to promptly answer requests for information or other inquiries from the client;
 - (c) Rule 13.3, which relates to the need to obtain and follow informed instructions from the client; and/or
 - (d) Rule 13.13.1, which relates to the duty of a defence lawyer, when taking instructions, to ensure the client is informed of all relevant implications of the decision being made.

49. Mr Claver acted wilfully or recklessly in breach of the requirements noted at paragraph 48.

PARTICULAR TWO – Failure to follow instructions

RB

50. Further to the background set out at paragraphs 4 to 16 above, Mr B instructed Mr Claver to obtain disclosure from the Police in relation to a second series of complaint made by the same complainant. Mr B considered that the disclosure was important to his defence.
51. Mr Claver did not act on Mr B's instructions and failed to obtain the disclosure in question.
52. Mr W subsequently obtained the disclosure in question and ascertained that it was of vital importance to Mr B's defence.

Summary of breaches – particular two

53. In respect of the conduct detailed at paragraphs 50 to 52 above, Mr Claver acted in breach of the following provisions of the CCCR:
- (a) Rule 13.3, which relates to the need to obtain and follow informed instructions from the client; and/or
 - (b) Rule 13.13.1, which relates to the duty of a defence lawyer to act in accordance with the client's instructions.
54. Mr Claver acted wilfully or recklessly in breach of the requirements noted at paragraph 53.

PARTICULAR THREE – Acting without instructions

RB

55. Further to the background set out at paragraphs 4 to 16 above, in January 2016 Mr Claver sought a sentence indication from the Court on behalf of Mr B. A sentence indication hearing was scheduled for 19 February 2016.
56. The sentence indication hearing was scheduled administratively and without Mr B's knowledge. Mr B had not instructed Mr Claver to seek a sentence indication and Mr Claver had not consulted him before doing so.
57. Mr W took over as counsel for Mr B on 19 February 2016 and ascertained that Mr B did not want a sentence indication. The sentence indication hearing was vacated accordingly.

Summary of breaches – particular three

58. In respect of the conduct detailed at paragraphs 55 to 57 above, Mr Claver acted in breach of the following provisions of the CCCR:
- (a) Rule 13.3, which relates to the need to obtain and follow informed instructions from the client; and/or
 - (b) Rule 13.13.1, which relates to the duty of a defence lawyer to act in accordance with the client's instructions.

59. Mr Claver acted wilfully or recklessly in breach of the requirements noted at paragraph 58.

PARTICULAR FOUR – Failure to appear or arrange an agent to appear

KK

60. Mr Claver was assigned to act for KK (**Mr K**). Mr K was scheduled to appear in the District Court at Invercargill on 29 July 2016.
61. Mr K had been remanded in custody due to an issue with his bail address. The Police did not oppose bail but a suitable address was required.
62. Mr Claver failed to appear on behalf of Mr K on 29 July 2016.
63. When contacted by the Registry, Mr Claver advised that he was halfway back to his home address in Dunedin and that Mr K did not have a suitable bail address in any event.
64. Mr K was further remanded in custody for a bail application at a later date.

Other failures to appear (2015/2016)

65. Mr Claver had also failed to appear at 9:30am, as he was required to do, in respect of a callover for Judge alone trials on 29 July 2016.
66. In addition, on regular occasions in 2015 and 2016 Mr Claver failed to appear in Court for list and callover matters.

OF

67. Mr Claver was assigned to act for OF (**Ms F**). Ms F was scheduled to appear in the District Court at Invercargill on 7 March 2017.
68. Ms F was for sentence on one charge of injuring with intent to injure, having pleaded guilty to the charge on 13 February 2017.
69. Mr Claver failed to appear on behalf of Ms F on 7 March 2017.
70. When contacted by the Registry, Mr Claver advised that he had completely forgotten about the appearance, he did not know what the charges were, and he was two and a half hours away.
71. Ms F was further remanded on bail for sentencing to occur at a later date. The presiding Judge directed that new counsel be assigned.

RA

72. Mr Claver was assigned to act for RA (**Mr A**). Mr A was scheduled to appear in the District Court at Invercargill on 3 August 2017.
73. On the afternoon of 2 August 2017 Mr Claver contacted KH of [X Firm] (**Ms H**) to ask if she was available to act as his agent in support of a bail application for Mr A at 11.45am the following day.
74. Ms H advised that subject to her availability and on consideration of Mr Claver's preparation of the application, she would confirm with him.

75. At 4.45pm on 2 August 2017 Mr Claver forwarded Ms H an email with some of his personal notes in respect to Mr A's application for bail, charging documents, summary of facts and an opposition to his bail.
76. Ms H advised Mr Claver by email at approximately 8pm that that she would not have time to attend with Mr A and prepare a bail application.
77. Mr Claver failed to appear on behalf of Mr A on 3 August 2017 or to arrange an alternative agent to appear.
78. Mr A was further remanded in custody for a bail application at a later date.

Summary of breaches – particular four

79. In respect of the conduct detailed at paragraphs 60 to 78 above, Mr Claver acted in breach of the following provisions of the CCCR:
 - (a) Rule 11, which requires a lawyer to administer their practice in a manner that ensures that duties to the Court and clients are adhered to and that the reputation of the legal profession is preserved; and/or
 - (b) Rule 13.2 of the CCCR, which relates to a lawyer's duty not to act in a way that undermines the processes of the Court or the dignity of the judiciary.
80. Mr Claver acted wilfully or recklessly in breach of the requirements noted at paragraph 79.

PARTICULAR FIVE – Contacting a Judge directly

KK

81. Further to the background set out at paragraphs 60 to 64 above, Judge Farnan issued a minute dated 29 July 2016 relating to Mr Claver's failure to appear that day. Her Honour directed that a copy of the minute be provided to the Legal Services Agency and the New Zealand Law Society (**Law Society**).
82. In response to the minute, Mr Claver wrote a letter dated 31 July 2016 to the Invercargill District Court addressed personally to Judge Farnan. The letter provided an explanation for Mr Claver's failure to appear.

Summary of breaches – particular five

83. In respect of the conduct detailed at paragraphs 81 to 82 above, Mr Claver acted in breach of Rule 13.2.2 of the CCCR, which prohibits a lawyer from discussing any case or matter before the Court with a Judge involved in the proceeding outside the established rules of procedure.
84. Mr Claver acted wilfully or recklessly in breach of the requirements noted at paragraph 83.

PARTICULAR SIX – Failure to act competently, in a timely manner and to take reasonable care

EM

Background

85. Mr Claver was assigned to act for EM (**Mr M**) in relation to serious driving charges in March 2015.

86. On 15 July 2015 Judge Farnan gave a sentence indication of 23 months imprisonment, indicating that the sentence would not be converted to home detention. The sentence indication was not accepted.
87. Mr Claver filed written sentence indication submissions prior to the July 2015 hearing. In a subsequent minute, Judge Farnan described Mr Claver's sentence indication submissions as "*not particularly detailed nor ... particularly helpful*".
88. Subsequently, and prior to a scheduled jury trial, Mr M entered guilty pleas in respect of all the charges. This came following a discussion with Judge Callaghan which resulted in Mr M's pleas being changed to guilty. Sentencing was scheduled for 17 February 2016.
89. Mr Claver did not file further written submissions in advance of the sentencing or provide any updating information to the Court.
90. At the sentencing hearing on 17 February 2016 Judge Farnan:
 - (a) stated that the written submissions Mr Claver sought to rely upon from July 2015 were "*woefully inadequate for the purposes of this sentencing today*";
 - (b) noted that there was information available in July 2015 which could and should have been available to Mr Claver and which may well have resulted in a lesser penalty being indicated at the time;
 - (c) noted that Mr Claver had failed to comply with a practice note issued by the Court relating to written sentencing submissions; and
 - (d) adjourned the sentencing to allow written submissions to be filed.

Failure to act competently, in a timely manner and to take reasonable care

91. In respect of the sentence indication hearing in July 2015, Mr Claver:
 - (a) filed written submissions which were neither detailed nor helpful; and
 - (b) failed to ascertain and place before the Court relevant information that may have resulted in a lesser penalty being indicated.
92. In respect of the sentencing hearing in February 2016, Mr Claver:
 - (a) failed to file written sentencing submissions or to otherwise provide updating information to the Court; and
 - (b) sought to rely upon previously filed written submissions which were woefully inadequate for the purposes of the sentencing hearing.

PT

Background

93. Mr Claver was assigned to act for PT (**Mr T**) in relation to a number of charges, including category 3 offending. A sentence indication hearing was scheduled for 17 February 2016.
94. Mr Claver filed written submissions the day prior to the hearing. The written submissions were approximately 1¼ pages and 14 paragraphs in length.
95. At the sentencing hearing on 17 February 2016 Judge Farnan:

- (a) stated that the bulk of the written submissions Mr Claver had filed were "*woefully inadequate from the expected standard of submissions that are normally presented in this Court for category 3 alleged offending*";
- (b) gave specific examples of the shortcomings in the submissions filed;
- (c) remanded Mr T to 12 May 2016 for sentencing; and
- (d) directed Mr Claver to file full and detailed submissions consistent with the sentencing practice note.

Failure to act competently, in a timely manner and to take reasonable care

96. Mr Claver's sentence indication submissions were not filed in a timely manner.

97. Further, the sentence indication submissions were inadequate in that they:

- (a) failed to properly set out the case for Mr T;
- (b) failed to address the defence position on the relevant purposes and principles of sentencing and the applicable aggravating and mitigating factors;
- (c) failed to raise potential mitigating factors on behalf of Mr T;
- (d) made bald assertions without providing any basis or reasoning; and
- (e) did not otherwise comply with the sentencing practice note dated 12 December 2013.

GF, CC and RG

Background

98. On 20 October 2016 Mr Claver appeared for three clients (GF, CC and RG) facing sentence. Written sentencing submissions were filed by Mr Claver in respect of each client.

99. Judge Callaghan, who presided over the sentencing hearings on 20 October 2016, described the written submissions filed by Mr Claver as "*woefully inadequate*".

Failure to act competently, in a timely manner, and to take reasonable care

100. The three sets of sentencing submissions filed by Mr Claver:

- (a) were largely comprised of pre-formatted paragraphs which provided little (if any) analysis or assistance to the Court;
- (b) included assertions that were either unfounded or required further development and explanation;
- (c) were insufficiently detailed or specific to assist the Court; and
- (d) failed to competently present or advance the case on behalf of the three defendants.

RB, RI, DS and NT

101. Further to the background set out at paragraphs 4 to 47 above, Mr Claver failed to act competently, in a timely manner, and to take reasonable care in his representation of Mr B, Mr I, Mr S and Mr T.

JP*Background*

102. Mr Claver was assigned to act for JP (**Mr P**) on charges of assault with a blunt instrument and cultivating cannabis.
103. Mr P was scheduled to appear for a hearing under s14 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (**CPMIP Act**) on 21 July 2017.
104. Mr Claver was not initially aware of the appearance on 21 July 2017. He became aware of the appearance as the matter was called in Court when he was present.
105. When the matter was called, Mr Claver advised the Court that the s14 hearing could not proceed as there had not been a hearing under s9 of the CPMIP Act. This was incorrect. Mr Claver had appeared at the s9 hearing on 5 May 2017.
106. When asked by the Court about the reports prepared under s38 of the CPMIP Act Mr Claver denied having received them. This was also incorrect. The reports had been received by Mr Claver prior to an earlier appearance on 30 June 2017.

Failure to act competently, in a timely manner and to take reasonable care

107. In acting for Mr P, Mr Claver:
- (a) failed to ensure the appearance on 21 July 2017 was properly accounted for; and
 - (b) failed to properly prepare for the hearing on 21 July 2017.

Summary of breaches – particular six

108. In respect of the conduct detailed at paragraphs 85 to 107 above, Mr Claver acted in breach of Rule 3 of the CCCR which relates to the duty to act competently, in a timely manner and to take reasonable care.
109. Mr Claver acted wilfully or recklessly in breach of the requirement noted at paragraph 108.

PARTICULAR SEVEN – Misleading the Court**JP**

110. Further to the background set out at paragraphs 102 to 107 above, in appearing for Mr P on 21 July 2017, Mr Claver misled the Court by incorrectly asserting that:
- (a) The s14 hearing could not proceed because a s9 hearing had not yet occurred; and
 - (b) He had not received the s38 reports.

Summary of breaches – particular seven

111. In respect of the conduct detailed at paragraph 110 above, Mr Claver acted in breach of the following provisions of the CCCR:
- (a) Rule 13, which provides that the overriding duty of a lawyer acting in litigation is to the Court concerned;
 - (b) Rule 13.1, which provides that a lawyer must not mislead the Court; and/or
 - (c) Rule 13.2, which provides that a lawyer must not act in a way that undermines the processes of the Court or the dignity of the Judiciary.
112. Mr Claver acted wilfully or recklessly in breach of the requirements noted at paragraph 111.

PARTICULAR EIGHT – Failure to comply with penalty orders made by a Standards Committee

Background

113. By a Notice of Determination dated 27 August 2015 Mr Claver was found guilty of unsatisfactory conduct by the Otago Standards Committee (**the Committee**).
114. By a Notice of Determination on Penalty dated 11 November 2015 (**the Penalty Determination**) the Committee made, inter alia, the following determinations and orders under s156(1)(m) of the Act:
- (a) That Mr Claver undertake the Advanced Litigation Skills course run by NZCLE (or equivalent acceptable to the Committee) within 18 months of the date of the Penalty Determination and report back to the Committee that he had done so within 20 months of the date of the Penalty Determination;
 - (b) That Mr Claver be mentored by a practitioner acceptable to the Committee for a period of 18 months from the date of the Penalty Determination and that Mr Claver ensure that the mentor reports are submitted in writing to the Committee within 20 months of the date of the Penalty Determination addressing Mr Claver's development as a criminal lawyer; and
 - (c) That Mr Claver report to the Committee within 14 days of the date of the Penalty Determination on the mentoring arrangements Mr Claver had made.
- (**the Orders**).
115. On 15 December 2015 the Committee sent a reminder letter to Mr Claver noting that he had not yet complied with Order (c) above (for which the deadline had expired). Mr Claver was given until 31 January 2016 to comply with that Order.
116. By letter dated 4 August 2017 Mr Claver was reminded of his obligations to comply with the Orders and was given an extension of time until noon 18 August 2017 to comply and to supply the documentation supporting his compliance or to advise why he had not complied with the Orders.
117. Mr Claver made contact with the Committee by email on 24 August 2017, offering the following explanations:
- (a) He had not responded earlier due to health issues.

- (b) He had not enrolled in or attended the Advanced Litigation Skills course as he could not afford the course fee.
- (c) The mentoring arrangement was not suitable so had not proceeded.

118. Mr Claver remains in breach of the Orders.

Summary of breaches – particular eight

119. In respect of the conduct detailed at paragraphs 113 to 118 above, Mr Claver acted in breach of the following provisions of the Act and the CCCR:

- (a) Section 4 of the Act, which relates to a lawyer's fundamental obligation to uphold the rule of law and facilitate the administration of justice; and
- (b) Rule 2 of the CCCR, which also relates to a lawyer's obligation to uphold the rule of law and facilitate the administration of justice.

120. Mr Claver acted wilfully or recklessly in breach of the requirements noted at paragraph 119.

PARTICULAR NINE – Making a false declaration

Background

- 121. Further to the background set out at paragraphs 113 to 118 above, Mr Claver made a "Fit and Proper" declaration to the Law Society on both his 2015/2016 and 2016/2017 application to renew his practising certificate. Mr Claver did not declare that he was in breach of the Orders.
- 122. In answering the questions "*I have complied with or am complying with any applicable orders of a Standards Committee...*", Mr Claver chose "Yes" for both the 2015/2016 year and 2016/2017 years.
- 123. In both instances this was a false declaration as Mr Claver was in breach of one or more of the Orders at the relevant time.
- 124. This question is set by default to "No". There must be a positive decision to select "Yes" for that answer to be given.

Summary of breaches – particular nine

- 125. In respect of the conduct detailed at paragraphs 121 to 124 above, Mr Claver acted in breach of Rule 11.1 of the CCCR, which prohibits a lawyer from engaging in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice.
- 126. Mr Claver acted wilfully or recklessly in breach of the requirement noted at paragraph 125.

PARTICULAR TEN – Mishandling of funds received

TM

- 127. Mr Claver was engaged to act for TM (**Ms M**) in relation to a fraud charge in 2017. Mr Claver was privately retained.
- 128. After signing a letter of engagement and at the request of Mr Claver, Ms M paid him \$3,000.

129. Mr Claver had these funds deposited into his practice account before rendering any invoice for services provided.
130. At some point prior to 31 August 2017 Mr Claver ceased acting for Ms M.
131. Mr Claver retained the \$3,000 as payment of fees for services rendered. Mr Claver did not render an invoice or provide an account or statement to Ms M in respect of the services provided and fees charged.

Summary of breaches – particular ten

132. In respect of the conduct detailed at paragraphs 127 to 131 above, Mr Claver acted in breach of the following provisions of the Act, the CCCR, and/or the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (**the Trust Account Regulations**):
- (a) Section 110 of the Act, which requires a lawyer who receives money for, or on behalf of, a client, to ensure that money is held in a trust account;
 - (b) Rule 9.3 of the CCCR, which requires a lawyer who wishes to debit fees held on trust or to receive fees in advance to comply with regulations 9 and 10 of the Trust Account Regulations;
 - (c) Rule 9.6 of the CCCR, which requires a lawyer to render a final account to a client within a reasonable time of the retainer being terminated; and/or
 - (d) Regulation 10 of the Trust Account Regulations, which provides that all money paid to a practice in respect of professional services for which an invoice has not been issued must be retained in a trust account.
133. Mr Claver acted wilfully or recklessly in breach of the requirements noted at paragraph 132.

PARTICULAR ELEVEN – Failures in dealings with expert witness

TD

134. In July 2015 Mr Claver engaged Dr TD (**Dr D**) to provide an expert witness report for a matter before the Court.
135. Dr D duly completed a report and provided it to Mr Claver.
136. In December 2015 Dr D sent Mr Claver an account for services rendered. Mr Claver failed to pay the account.
137. Between February 2016 and November 2016, Dr D continued to seek payment from Mr Claver. Mr Claver did not settle the account.
138. Following a complaint by Dr D to the Law Society in November 2016, a mediated settlement was reached in February 2017 as to a time payment regime.
139. Mr Claver defaulted on the agreed time payment regime by failing to make payments required in March and April 2017.
140. Dr D notified the Law Society on 28 May 2017 that Mr Claver had failed to make the March and April payments. A Law Society representative contacted Mr Claver and reminded him of his obligations under the agreed time payment regime.

141. No further payments were made by Mr Claver in May, June or July 2017. The March and April payments also remained outstanding.
142. Dr D further notified the Law Society on 4 July 2017 that Mr Claver had still not made the required payments. A formal complaint was initiated and was notified to Mr Claver by letter dated 26 July 2017.
143. On 14 August 2017 Mr Claver paid the balance of the account owed to Dr D.

Summary of breaches – particular eleven

144. In respect of the conduct detailed at paragraphs 134 to 143 above, Mr Claver acted in breach of the following provisions of the CCCR:
 - (a) Rule 10, which requires a lawyer to promote and maintain proper standards of professionalism in the lawyer's dealings;
 - (b) Rule 11, which requires a lawyer to administer their practice in a manner that ensures the reputation of the legal profession is preserved; and/or
 - (c) Rule 12.2, which provides that where a lawyer instructs a third party on behalf of a client to render services, in the absence of an arrangement to the contrary, that lawyer will be personally responsible for the payment of the third party fees, costs and expenses.
145. Mr Claver acted wilfully or recklessly in breach of the requirements noted at paragraph 144.