NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 18
LCDT 019/22, 020/22

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WELLINGTON STANDARDS COMMITTEE 2** Applicant
AND	**ALWYN O'CONNOR** Respondent

DEPUTY CHAIR
Dr J G Adams

MEMBERS OF TRIBUNAL
Ms J Gray
Ms M Scholtens KC
Prof D Scott
Dr D Tulloch

HEARING 1-3 May 2023

HELD AT Tribunals Unit, Wellington

DATE OF DECISION 8 May 2023

COUNSEL
Ms N Pender and Ms N Town for the Standards Committee
Mr G Paine for the Respondent Practitioner

DECISION RE LIABILITY

[1] After three days of hearing, we made orders on 3 May 2023. Those orders are repeated at the end of this decision. This decision gives our reasons for making them.

[2] The charges concern two unrelated, unsophisticated clients, Mr Coles and Mr Allerton. Themes common to both charges include lack of structure in the professional relationship, and consequent lack of boundaries. In addition, Mr O'Connor seemed unaware of some basic rules designed to protect clients.

[3] While acting for Mr Coles, under the guise of friendship and pro bono work, Mr O'Connor took control of his client's bank accounts and used the money as his own despite Mr Coles having received no independent legal advice. He did not place the funds he took in a trust account, nor did he properly account for his use of the funds. While acting for Mr Allerton, he failed to structure the professional relationship so that Mr Allerton could appreciate his legal situation; he failed to clarify for Mr Allerton the perils of allowing deadlines to pass; and he embarked on a risky strategy in which we find his client failed to appreciate the risks.

[4] In both cases, it was Mr O'Connor's professional duty to introduce structure into the professional relationship. Generally, this would begin with a letter of engagement but neither client received one. Mr O'Connor sought to excuse his laxity by casting the relationships as friendships.

[5] The circumstances of the two clients are not identical, nor are the charges. We address them separately. We specify our findings in relation to his conduct and weigh the gravity of it. A benchmark in both cases is whether the conduct brings into question his standing as a fit and proper person to be a lawyer. The broad issues are:

- Was there misconduct in relation to Mr Coles?

- Was there negligence or incompetence in his professional capacity in relation to Mr Allerton of such a degree as to reflect on his fitness to practice?

Was there misconduct in relation to Mr Coles?

[6] Although Mr O'Connor resists a finding of misconduct, he admits some of his conduct as unsatisfactory conduct. Misconduct is the highest level of gravity. The Standards Committee invokes s 241(a) of the Lawyers and Conveyancers Act 2006 (LCA) in two alternatives: s 7(1)(a)(i) – that, while providing regulated services, he engaged in conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable – and s 7(1)(a)(ii) – that, while providing regulated services, he recklessly contravened provisions of the Act and/or rules made under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules).

[7] The Standards Committee alleges that Mr O'Connor failed to co-operate with its investigator. When asked to provide his relevant bank records, he provided only one account (where at least one other account was involved) and he failed to provide more than a redacted version. These defaults hampered both the Standards Committee deliberations and our hearing.

[8] Mr O'Connor admits that he failed to provide a Letter of Engagement to Mr Coles for any of the work he undertook. Although then in his thirties, he was a relatively new lawyer who was not authorised to work on his own. His employer and supervisor was a sole partner in a small-town firm. We have an impression that the level of supervision was superficial. Mr O'Connor took the view that because he proposed to undertake the work pro bono, there was no need for him to provide a Letter of Engagement.

[9] Formal legal work undertaken by Mr O'Connor for Mr Coles included:

- negotiations with Public Trust about Mr Coles' father's estate and his eviction from his late father's home;
- bail applications;
- finding a bail address; representing him at sentencing on drugs charges;
- representing him at a week-long family violence trial;

- representing him at Parole Board hearings; and

- representing him on a careless driving charge.

[10] Mr O'Connor undertook incidental tasks for Mr Coles. These included arranging for his residence to be cleaned up; arranging for the care of his dog while Mr Coles was in prison (for a little over two years); advising him in relation to a loan of $2,500 to a fellow prisoner and facilitating the payment on 19 September 2016; buying two shirts for Mr Coles to wear to court.

[11] Mr O'Connor was slow to recognise that the relationship was professional. There was no agreement as to when they first met. A Parole Board report on Mr Coles dated 22 June 2017[1] recorded Mr O'Connor as having "stated he first met Mr Coles a few years ago when acting as counsel for him…". Mr O'Connor never commented on that document in his affidavit. In submissions to the Standards Committee[2], Mr O'Connor advanced a different version: that, "when I entered practice, … I already considered Mr Coles a friend." Mr O'Connor described the relationship as one of friendship in his sole affidavit.[3] Under cross-examination he was forced to reconsider. Although he attempted to recover ground during re-examination, where he attempted to suggest, on the basis of his vague recollection otherwise, that a "third party" may have been involved in their introduction at an earlier time, we prefer the evidence of Mr Coles. The email from Mr Coles on 10 September 2015[4] appears, on its face, to be their first contact. We find that Mr O'Connor attempted to blur our understanding of the situation to minimise the negative consequences.

[12] In general, we prefer the evidence of Mr Coles to that of Mr O'Connor. Mr Coles made a strongly favourable impression as a truthful witness, straightforward and lacking guile. We think he was mistaken about the extent of the loan he authorised for Mr O'Connor[5] (he thought the figure was $10,000 whereas we accept the written record of $25,000) but we find him a credible witness. Regrettably, this was not so for Mr O'Connor. We found him evasive, selective in recall, obstructive and obfuscating.

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[1] Bundle 86 at p. 91 (foot of page).
[2] Bundle 61 Mr O'Connor's submissions 26 April 2022.
[3] Supplementary Bundle 11, para [4]; Mr O'Connor's affidavit of 26 April 2023 (two working days before the hearing commenced).
[4] Bundle 78.
[5] Bundle 106 in Mr Coles' handwriting.

Examples include his evidence about timing and content of alleged phone calls (e.g. 12 June inconsistent with own email and earlier position); his evidence about the Hallensteins shirts – there is a note to do so in his handwriting, and the purchase was made at Hallenstein's with Mr Coles' EFTPOS card at the relevant date - we found this evidence evasive and untrue; his evidence about funds taken and used was evasive, especially regarding the payments listed in schedule 2 – and he obfuscated by saying he "believes" he paid in full; with regard to his bank records, he continued to insist that "no-one asked for them" which we find to have been quite at odds with the true position. In addition, he attempted to smudge the position about whether Mr Coles had independent legal advice concerning lending money to Mr O'Connor, his lawyer. Ultimately, we found him to have deliberately lied about a material particular – but we shall address that later in this decision.

[13] Mr O'Connor suggested to the Standards Committee that he assisted Mr Coles in a power of attorney role.[6] It is common ground that there was no such appointment. This is another instance where Mr O'Connor attempted to blur, for his professional regulator, the character of his role with Mr Coles.

[14] Under cross-examination, Mr O'Connor accepted (at least formally) that he erred in blurring the professional role with one of alleged friendship. While we acknowledge that Mr O'Connor undertook a number of tasks which a lawyer would not generally do for a client, the relationship was not one of equals. Mr Coles came to think of it as a relationship of friendship by the time he was imprisoned. Mr Coles was socially isolated, grieving his father's death, taking illicit drugs and suffering mental health problems. He was lonely. When in prison, he had only one other visitor apart from Mr O'Connor. He developed trust in Mr O'Connor.

[15] In a file note made by Mr O'Connor, apparently on 19 June 2016, Mr Coles counter-signed an instruction that Mr O'Connor pay, through Mr Coles' online banking, "A gift to you of $2500."[7] Mr Coles was in prison then, having been denied bail. Although Mr O'Connor said Mr Coles insisted on the note being recorded, we are astonished that a lawyer, visiting a client in prison, would see it as acceptable to even note such a proposition. Mr O'Connor says he did not take any funds in reliance on

[6] Submissions 26 April 2022, Bundle 61 at [4].
[7] Bundle 101. The file note also directed Mr O'Connor to pay, through Mr Coles' online banking, a sum of $7560 to Public Trust (relating to his father's estate) and to "Rose for dog care…".

that note. Nonetheless, we find Mr O'Connor had begun drawing funds from Mr Cole's account by way of internet banking (Schedule 1 payments) and ATM withdrawals (Schedule 2 payments) both beginning on 30 May 2016.

[16] On 16 September 2016, Mr Coles instructed Mr O'Connor to pay $2,500 to Paul Paino who was the lawyer for another inmate to whom Mr Coles had agreed to lend that sum.

[17] On 25 January 2017, Mr Coles wrote a loan authority[8] on a page that contained a partial file note written by Mr O'Connor. The writing stated: "[I] Wayne Coles agree to lend Alwyn O'Connor $25,000.00. Payable by agreement." The note is signed by "Wayne Coles." Mr Coles recalled that the sum relating to the 25 January 2017 loan authority was $10,000. We find he was mistaken, and that the document showing the figure of $25,000 in his own handwriting is an accurate copy of the original. This error does not diminish the force of his evidence on other matters.

[18] We find that Mr O'Connor asked for the loan. We prefer Mr Coles' evidence on this and find it to be more probable than Mr O'Connor's claim that Mr Coles was so excited that Mr O'Connor had purchased a building that he made an unsolicited offer. We find the likelihood of Mr O'Connor having manipulated the conversation to achieve this result is high.

[19] Mr O'Connor and Mr Coles coincide in evidence that, on 25 January 2017, Mr Coles told Mr O'Connor he could borrow other amounts from Mr Coles' account if he needed to. Thereafter, Mr O'Connor withdrew sums from Mr Coles' account. He repaid amounts when Parole hearings approached. Mr O'Connor paid no interest for his use of Mr Coles' funds.

[20] Although Mr O'Connor attempted to suggest that he had an impression that Mr Coles had obtained independent legal advice about the arrangement, or even that he had obtained such advice, we have no difficulty dismissing his evidence on this aspect as fanciful and dishonest. Mr Coles was in prison throughout. It was Mr O'Connor's duty, if he were to borrow from a client, to ensure the client had independent legal advice. Mr O'Connor's suggestion that Mr Paino or another named

[8] Bundle 106.

lawyer, or the possibility that a lawyer he did not know about, might have given Mr Coles independent legal advice, fails. We find that Mr Paino was tangentially involved as the lawyer for the other inmate to whom Mr Coles lent $2,500. It was open to Mr O'Connor to call Mr Paino or any other lawyer he contended might have given Mr Coles advice. This was suggested to Mr O'Connor's counsel and to Mr O'Connor. In the face of his duty to ensure independent legal advice, and in the absence of any satisfactory evidence to the contrary, we find, as Mr Coles stated, that he had no such advice. Mr O'Connor's stance on this issue reflects poorly on his candour.

[21] It is common ground that Mr O'Connor used certain funds in Mr Coles' bank account as if the account was his own. On the basis of the partial and redacted material he had, Law Society Inspector Mr Strang assessed that Mr O'Connor withdrew $156,375.41 and repaid $155,950.00. Mr O'Connor has never provided any better form of accounting for the money he took. He took the view at the hearing that Mr Coles could work it out from Mr Coles' own bank statements. Thus, we have no more by way of records than Mr Strang had, namely Mr Coles' bank statements, and only one set of statements for an account for Mr O'Connor (redacted as to amounts). The fact that there was at least one more account that was involved to which Mr O'Connor had access (possibly with his then wife) was only made known by Mr O'Connor at the hearing and was not information provided to Mr Strang. Many of the transactions are of $1,000 at a time, sometimes several per day. Mr O'Connor set up an onerous task for Mr Strang, and for this Tribunal, by not providing clear information that was readily in his power to do.

[22] In preparing his report, Mr Strang took account against Mr O'Connor only of transactions that appeared to be represented in both Mr Coles' account and the one redacted account of Mr O'Connor, together with certain payments Mr Strang could project as probably having involved the other account of Mr O'Connor, details of which Mr Strang had no access at all. Thus, Mr Strang set to one side withdrawals from Mr Coles' account that were obtained by means of an EFTPOS card such as ATM withdrawals and EFTPOS transactions. These are listed in the document referred to in the hearing as "Schedule 2." Totalling $22,251.39, they run from 30 May 2016 to 16 February 2017. Mr Coles was imprisoned continuously from 14 May 2016 to 29 May 2018. We find that an EFTPOS card for Mr Coles' account was operated on 57 occasions while he was in prison. Who did it (if one person)?

[23] Mr O'Connor says he never had a card that could operate Mr Coles account. He suggests an unknown person or persons may well be the culprit. Mr Coles had complained about fraudulent use of his card that occurred on two occasions, but Mr Coles points out that neither of them involved the use of a card; and that he cancelled his card and got a fresh one before he was imprisoned.

[24] In email correspondence with the Prison Property Manager, Mr O'Connor specifically sought release to him of Mr Coles' EFTPOS card. He said "What Mr Coles was hoping to release to me was his eftpos cards which were attached to his keys. When I received the property yesterday the eftpos cards weren't attached."[9] This was on 20 May 2016, ten days before the first use of the card pertinent to these proceedings. Mr Paine put it to Mr Coles that the Police had taken his card.

[25] Mr Coles believed he may have given Mr O'Connor his PIN numbers. Mr O'Connor denies that. Nevertheless, when dealing with Mr Coles' phone provider, and when asked to provide a PIN number, Mr O'Connor used a four-digit number identical to a PIN number for Mr Coles' card. The number was not effective in relation to the phone but the exchange raises a powerful inference that Mr Coles is correct that he gave his PIN number to Mr O'Connor and that Mr O'Connor remembered it.

[26] Mr O'Connor used Mr Coles' account on many occasions. He says he did so only by means that did not require a card. On 14 May 2016, when Mr Coles was imprisoned, his account balance stood at $129,653.09. On 21 April 2017, it had fallen to $50,569.07. A deposit raised the balance but there were further withdrawals. On 24 August 2017, the balance was $35,807.32. On 25 August 2017, Mr O'Connor repaid $49,000, having obtained a loan for that purpose of $50,000 from another client for whom he had acted on her relationship property settlement and who he knew was in funds. He then proceeded to repay his other client by further withdrawals of $1,000 at a time (but several per day) from Mr Cole's account. We suppressed the name of that client and certain gratuitous remarks about her volunteered by Mr O'Connor during his cross-examination. By 24 April 2018, just before Mr Coles received parole, the account balance was $1,707.32 before Mr O'Connor deposited $70,000.00 on 27 April 2018. We draw an inference that Mr O'Connor will have kept a degree of oversight in relation to the running total from time to time. If someone else was operating the

[9] Bundle 96.

account over the two-year window, taking a total of over $22,000 out, we expect Mr O'Connor would have noticed. He accepted that he treated the account as if it was his own.

[27] Mr Coles' criminal trial occurred at Wellington District Court between 7 and 11 February 2017. He was in custody throughout. On 7 February, his EFTPOS card was used at Hallensteins, $99 which we find was to purchase two shirts for him to wear at his trial. On 9 February 2017, there was a withdrawal of $1,000 from an ATM machine at Wellington Railway Station, proximate to the Court. On 10 February there was an EFTPOS debit of $22.39 at City Card and Mags, a store proximate to the District Court. On 7 February 2017, in addition to 12 withdrawals, each of $1,000, and one of $750, all $12,750 obtained by non-card operations by Mr O'Connor, there were six other withdrawals, each of $200 (plus a small fee for using another bank's ATM). Four of them were at Porirua Club and two were from "The Cobb".

[28] Mr O'Connor, who lives near Porirua, says he is not a member of the Porirua Club whose ATM featured in many of the Schedule 2 withdrawals. Mr Paine's submission, that it could not be Mr O'Connor who made these transactions because, as a non-member he could not gain admittance, made little impact in view of Tribunal member Tulloch's personal experience of having visited that club for Poker nights – which is advertised to fall regularly on Tuesdays, a night of the week when some of these transactions occurred.

[29] The fact of the transactions proves that an EFTPOS card existed and was used many times while Mr Coles was in prison. The vast majority of the Schedule 2 withdrawals occurred in Porirua or Mana, locations associated with Mr O'Connor. The standard of proof in Tribunal cases is the balance of probabilities. Because the consequences for Mr O'Connor of an adverse finding are great, we have carefully weighed our consideration. We find an overpowering inference that Mr O'Connor obtained an EFTPOS card for Mr Coles' account and used it on the occasions appearing in Schedule 2. We find that Mr O'Connor deliberately lied about his responsibility for these transactions.

[30] In what respects has Mr O'Connor fallen short of proper practice in relation to Mr Coles?

- He failed to provide a Letter of Engagement at the outset, or at any stage thereafter.

- Because he was acting pro bono (without fee) he misled himself into characterising the relationship as something different from a professional one.

- He misled Mr Coles into regarding him as a benevolent friend.

- He allowed Mr Coles to record a gift while Mr Coles was in prison, consolidating an unhealthy and inappropriate structure between them.

- He manipulated and accepted a loan from Mr Coles that was inappropriately vague as to amount. He failed in his duty to ensure his client had independent legal advice about lending money (unsecured and interest-free) to him.

- He lied about his performance of that duty.

- He treated his client's money as if it was his own.

- He did not pay any of the money he withdrew into a trust account.

- He seems to have failed to seek supervision in relation to these obvious defaults from rules and statutory provisions about dealing with client monies.

- Even if he could rely on the loan offer of 25 January 2017, he began using his client's account from as early as 30 May 2016 (the first Schedule 2 withdrawal of $800).

- In these transactions, he placed his client at financial risk.

- He has never accounted properly, nor fully for these transactions.

- His response to this duty has remained cavalier.

- He lied and obfuscated about his use of the EFTPOS card.

- He failed to provide proper financial records to enable the Inspector to give an accurate record.

- He failed to inform the Inspector about his use of the EFTPOS card, and he withheld relevant information, namely the existence of another personal bank account and that he borrowed from another client to repay Mr Coles, and then re-borrowed from Mr Coles to repay her (in the "money-go-round" to which Ms Pender referred).

- He lied to the Tribunal.

[31] Against this list of serious defaults, we have no hesitation in finding him guilty of misconduct under both heads, namely that while providing regulated services [which is not in dispute] he engaged in conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, and that he recklessly contravened relevant professional obligations under the Act and rules.[10]

Was there negligence or incompetence in his professional capacity in relation to Mr Allerton of such a degree as to reflect on his fitness to practice?

[32] Mr O'Connor accepts the charge at the level of unsatisfactory conduct but resists a finding at a higher level of gravity. The lead charge is laid under s 241(c).

[33] This was another case in which Mr O'Connor regarded the relationship as one of friendship rather than a proper professional relationship. He had acted for Mr Allerton in a relationship property matter which had been resolved. Mr Allerton did engage in friendly relations with Mr O'Connor and Mr Spriggs, who he introduced to Mr O'Connor. They would meet, chat, play cards, and socialise. Mr Allerton was absent from his employment and in receipt of a Covid payment in lieu of wages. In these circumstances, Mr Allerton and Mr Spriggs began some building work to improve Mr O'Connor's property.

[34] Mr Allerton did not want to return to his place of employment. He felt he would like to retire. If he had been offered redundancy, for which his employment contract

[10] These involved breaches of Rules 3.4, 3.5, 3.6, 9.6, 5.4, 5.4.4, and sections 4(c), 110, 111 and 112 LCA, and regulation 7 of the Trust Account Regulations. In addition, he breached s 147 LCA and Rule 10.14.

provided, he would have taken it. If redundancy were offered, he might receive about $8,000. [The precise figures are immaterial, so they are rounded.] His employer sent an offer to all employees, offering voluntary severance. If Mr Allerton took the offer, he would receive about $6,000 after tax. The offer was carefully structured. The employer made it known that voluntary severance was available. If an employee wanted it, they must apply by 5 June 2020. On receipt of the application, the company would either make an offer or not by 12 June. The employee could then accept the offer, finishing work on 19 June; or retain their job and return to the workplace. The notice of 29 May 2020 imposed a tight timetable.[11]

[35] Mr Allerton was tempted by the offer of a lump sum and being relieved of going to work. On the other hand, he would have preferred the extra cash return of redundancy which was not on offer. In the rather casual circumstances where he met Mr O'Connor incidentally while working on Mr O'Connor's property, he spoke to Mr O'Connor about the matter. We do not know when this occurred but we infer it was, at most, a few days only before the first positive step needed to be taken by Mr Allerton. The preliminary conversations occurred in the presence of Mr Spriggs. It seems to have been more in the nature of social chatting than formal legal interviewing where a client explains their position, the lawyer clarifies issues and seeks instructions; the client chooses what instructions to give; and the lawyer acts accordingly.

[36] Mr Allerton wrote an email on 6 June to inform Mr O'Connor about the background and about the structure of the opportunity. Mr O'Connor was distracted with other cases. He did not send a Letter of Engagement to Mr Allerton.

[37] Once he realised the time frame had already expired (Mr Allerton had not taken the first step of applying by 5 June) Mr O'Connor sought more time from the employer. This was extended to Wednesday 10 June so Mr Allerton could have the opportunity of legal advice from Mr O'Connor.

[38] Regrettably, Mr O'Connor took the robust view that Mr Allerton's employer was seeking to take advantage of him by offering this opportunity. Mr O'Connor determined that the employer was really seeking a cheaper form of redundancy; that the employer probably wanted to terminate Mr Allerton's employment without the extra cost of

[11] Bundle, 66, 67.

redundancy. Accordingly, he employed a risky strategy which led him to treat deadlines as unimportant. In addition, Mr O'Connor suggested to Mr Allerton that he had a basis for personal grievance because the opportunity for voluntary severance was not accompanied by background information about why the company had decided to take this step.

[39] On 10 June, Mr O'Connor wrote a relatively aggressive email to the employer, raising a threat of personal grievance, perhaps intending it as a bargaining tool. On 12 June, the employer provided further explanation, rejected any basis for personal grievance, and explained that their duty to deal with all employees equally meant they could not make a special arrangement for Mr Allerton. They provided a further, third, deadline in the afternoon of 12 June and indicated that if Mr Allerton was to apply, he would be offered voluntary severance.

[40] Mr O'Connor recalled having had a telephone conversation with Mr Allerton during the day on 12 June when he offered specific advice on the issue. He had not mentioned the conversation in earlier iterations of his case to the Standards Committee. It is a convenient addition to his evidence. Mr Allerton denies it occurred.

[41] On 12 June, the extension having expired, Mr O'Connor sent a text message to Mr Allerton in these terms: "Hey Chris I've just finished my day in Auckland. Don't worry about their 5pm deadline it's unreasonable….".[12] It shortly became clear that the employer had simply been straightforward. The employer required Mr Allerton to return to work. He chose to leave.

[42] We find that although the matter arose within a chatty atmosphere, it was Mr O'Connor's duty to bring structure to the arrangement when he accepted instructions to act. This may have occurred before 6 June but it certainly occurred at latest on 6 June. Mr O'Connor failed to provide a Letter of Engagement and left his role loosely situated within a casual, friendly atmosphere. We find that Mr Allerton was equivocal. We find that it is most likely Mr O'Connor's communications with the employer were not uniformly copied to Mr Allerton because there is no record of a blind

[12] Bundle 106.

copy apparent on Mr O'Connor's copies. Our impression is that he engaged in the correspondence without close reference to his client.

[43] Two things were required. One was for Mr O'Connor to acquire a competent understanding of the dilemma faced by his client. Regrettably, he took the view that the employer did not mean what it said. The proposition in their notice was simple enough and it turned out Mr O'Connor had misapprehended the situation. This led to the second needful thing: for Mr Allerton to be confronted with the dilemma, be armed with clear advice, and encouraged to decide within the provided timeframe. Regrettably, there is no evidence that any such event was created by Mr O'Connor. On the balance of probabilities, we find that the telephone advice session recently remembered by Mr O'Connor did not occur.

[44] The day after the opportunity was withdrawn, Mr Allerton decided he would take it. But he was too late. He instructed Mr O'Connor to accept the offer, which he did not do until 22 June, some 11 days later.

[45] We cannot find that Mr Allerton lost out on $6,000. We cannot speculate what he would have chosen, had he been placed in the position of having to make a choice, armed with simple, clear advice. He may still have chosen to drift, and the passage of the opportunity would have left him in the position he ultimately found himself. As Mr Paine pointed out, he was never in a position that his job was at risk if he failed to take up the opportunity. We find he missed out on having an optimal chance of making an informed decision. We find it was Mr O'Connor's laxity in structure and practice that allowed this to occur.

[46] Mr Allerton initially took the fallback position that he would file a personal grievance. Mr O'Connor eventually prepared a Statement of Problem, but it was never filed. Whether this was due to default by Mr O'Connor or equivocation by Mr Allerton, we cannot be sure. We cannot determine whether Mr O'Connor's view that there is a sound basis for a personal grievance, or Mr Allerton's understanding that there is not, is correct. Mr Allerton is not currently pursuing one.

[47] This charge involves breaches of Rules 3, 3.4A, 3.5A, 4.2, 4.2.4, 4.4.1, 7.1, 7.6 and 10 of the Rules.

[48] Had this matter only involved a failure to provide a Letter of Engagement, and we had thought that was an oversight, we would have treated it as unsatisfactory conduct, something that could have been dealt with at Standards Committee level. What elevates it is the blurring of the relationships, friendship and professional. There was no crispness to the professional relationship. The issue was never clarified in writing with pertinent advice addressing the options and associated risks. The idea that chats involving another friend in a building workplace in these circumstances, is folly. Mr O'Connor failed to appreciate the inappropriateness when he suggested Mr Allerton had "ample advice" because they were constantly coming into contact around the worksite at Mr O'Connor's property. Mr Allerton, as a client, needed to be given structure. Whether he would have been able to profit from it, we cannot say, but he should have been provided with that, in a timely manner, by Mr O'Connor.

[49] We find Mr O'Connor to have been both negligent and incompetent in the laxity of his attention to Mr Allerton's needs. These features prevailed over the shortish timeframe of this matter. In our view, the fact that, apart from obtaining a short extension at the beginning, Mr O'Connor's legal attentions never coalesced into a focusing event for Mr Allerton is a signal failure in his case. We are influenced by the pattern (four years on) of treating a client as a friend. In this case, they were friends, but Mr Allerton was not to be given third-rate service on that account.

[50] The sums involved in this case were modest. The level of culpability of Mr O'Connor is significantly less than in regard to Mr Coles.

Orders

[51] For the reasons set out, we made the following orders.

1. Mr Coles – that while providing regulated services [which is not in dispute] he engaged in conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, and that he recklessly contravened relevant professional obligations under the Act and rules.

2. Mr Allerton – that he was guilty of negligence or incompetence in his professional capacity in relation to Mr Allerton of such a degree as to reflect on his fitness to practice.

3. The case should be allocated a penalty hearing. Unless counsel advise otherwise, we assume that half a day will be required. Because of the gravity of the findings in the Coles matter, it seems appropriate to have the penalty hearing in person unless counsel advise otherwise.

DATED at AUCKLAND this 8th day of May 2023

Dr JG Adams
Deputy Chair