LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 118

Ref: LCRO 175/2022

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**OP** Applicant
AND	**VN** Respondent

DECISION

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

Introduction

[1] Mr OP has applied for review of an October 2022 decision of the [Area] Standards Committee [X] (the Committee) in which it made a finding of unsatisfactory conduct against Mr VN in relation to some aspects of conduct Mr OP had originally complained about in October 2018.

[2] Mr VN has not applied for review of the findings and orders against him.

Background

[3] Mr VN is a barrister sole.

[4] In 2017, Mr OP instructed Mr VN to represent him on bankruptcy-related criminal charges, to do some preliminary work on a possible appeal against convictions entered against him in 2013 for managing businesses while being an undischarged bankrupt for which he had been sentenced to 15 months imprisonment and, expressing the matter broadly, to endeavour to renegotiate his bankruptcy status.

[5] Mr OP had previously been represented by another lawyer, Mr CA.

[6] Mr OP had legal aid for the 2017 criminal charges. He did not have legal aid for the possible appeal against the earlier convictions or for any negotiations that might be possible with the Crown regarding his bankruptcy.

[7] Soon after engaging Mr VN, Mr OP paid him $3,000. This money was not deposited into a solicitor's trust account.

[8] Mr VN proceeded to represent Mr OP on the 2017 charges, which were heard in November 2017. Mr OP was convicted. Mr OP instructed Mr VN to appeal.

[9] Mr VN wrote to Mr OP on 12 January 2018. He included with his letter an invoice for $28,750 for researching, preparing and filing a proposed appeal.

[10] He also confirmed his understanding that Mr OP would obtain funds from a third party to offer to settle bankruptcy matters with the Crown and asked Mr OP for confirmation of the amount before initiating settlement discussions.

[11] In a letter dated 16 February 2018, Mr VN advised Mr OP that he had prepared papers to appeal Mr OP'ss sentencing on the 2017 charges.

[12] Referring in the same letter to the bankruptcy matters, he asked Mr OP to deposit $100,000 into his instructing solicitor's trust account for negotiations with the Crown and advised that the money would be returned should negotiations fail.

[13] The $28,750 invoice was not paid. Nor was any money paid into Mr VN's instructing solicitor's trust account in relation to the proposed negotiations with the Crown.

[14] On 27 March 2018, an associate of Mr VN wrote to Mr OP to advise him that:

(a) Mr VN did not consider there were viable grounds to appeal as the sentence imposed was "within range and in no way reflects an erroneous understanding of prior convictions";

(b) pending charges were proceeding to trial as Mr OP had not deposited settlement funds into Mr VN's trust account; and

(c) Mr VN declined to engage in further discussions with Mr OP as all issues of importance for the impending trial had been addressed.

[15] Mr VN represented Mr OP until 5 June 2018, when Mr OP instructed new counsel, Mr LW.

[16] Through his accountant, Mr OP then requested a refund of the $3,000 he had paid to Mr VN. Mr VN responded by informing Mr OP that he had unpaid invoices for his fees.

[17] On 5 July 2018, Mr VN rendered an invoice to Mr OP dated 21 June 2018 for fees of $7,250 plus GST, a total of $8,337.50. It related to preparatory work on the possible appeal against the 2013 convictions. He requested payment of a net figure of $5,337.50.

[18] On 23 October 2018, Mr OP filed a complaint with the New Zealand Law Society Lawyers Complaints Service (NZLS) about the conduct of Mr VN.

The complaint

[19] In his October 2018 complaint, Mr OP made numerous allegations. I will endeavour to itemise them all below, albeit in summary form. This is because it is important to identify which aspects of Mr OP'ss complaint have already been dealt with by the Committee and this Office.

[20] Mr OP originally complained that:

(a) Mr VN "made up" the invoice dated 21 June 2018 for $7,250 plus GST;

(b) Mr VN failed to provide a copy of Mr OP'ss files on request;

(c) Mr VN undertook legal work not covered by legal aid without instructions to do so;

(d) Mr VN undertook legal work on a possible appeal of Mr OP'ss 2013 criminal convictions when he had been instructed not to do so until an affidavit had been obtained from a court bailiff and, if the affidavit had been obtained, legal aid would have covered Mr OP'ss costs of representation;

(e) Mr VN failed to take reasonable care in that he had made errors in the preparation of the court bailiff's affidavit;

(f) Mr VN offered to negotiate a settlement of Mr OP'ss insolvency with Government Agency [A] but for 18 months took no steps to work on the matter;

(g) as a consequence, Mr VN was ill-prepared to advance his position before the Court in his 2017 trial;

(h) Mr VN did not competently advance a bail application for Mr OP in the 2017 court proceedings;

(i) Mr OP'ss decision to plead guilty to reduced charges in the 2017 trial was made when he had not been fully informed by Mr VN of the consequences;

(j) more generally, Mr VN did not represent Mr OP competently in the 2017 trial;

(k) incorrect information was presented to the sentencing Judge;

(l) following Mr OP'ss conviction, Mr VN failed to follow instructions to appeal the conviction;

(m) Mr VN breached the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the TA Regulations) and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) many times in his dealings with Mr OP, including failure to deposit cash funds into a trust account;

(n) Mr VN deducted funds to pay fees from monies held for Mr OP without authority to do so;

(o) Mr VN deducted funds to pay fees before issuing an invoice to Mr OP; and

(p) funds provided to Mr VN were for the purpose of attempting to settle Mr OP'ss insolvency, not for fees for work on his court case.

The Standards Committee's first decision

[21] The Committee interpreted the substance of Mr OP'ss complaints somewhat differently. It considered the issues to be whether or not Mr VN had:

(a) concocted the 21 June 2018 invoice in order to access funds that would otherwise be refunded to Mr OP;

(b) failed to follow instructions by commencing work on a matter despite Mr OP'ss request not to do so until an affidavit had been obtained;

(c) offered to negotiate a settlement of Mr OP'ss bankruptcy despite Mr OP's assertion that he had been wrongly bankrupted;

(d) failed to obtain a copy of Mr OP's bankruptcy file from Government Agency [A];

(e) made errors in the drafting of an affidavit;

(f) acted incompetently in advancing a bail application;

(g) acted incompetently in representing Mr OP at trial;

(h) failed to provide files despite repeated requests;

(i) declined to accept phone calls from Mr OP from mid-December 2018 onwards and had been reluctant to engage with him throughout the retainer.

[22] In a decision issued in May 2019 (the first Committee decision), the Committee concluded that:

(a) Mr VN's letter of 12 January 2018 clearly detailed the initial steps he was intending to take;

(b) an application for legal aid would have required supporting evidence of the merits of the proposed appeal which Mr OP would have needed to fund privately in the first instance;

(c) a District Court Judge had made strong criticisms of Mr OP's reliability and truthfulness and his ability to present evidence objectively;

(d) it was Mr VN's opinion that Mr OP's sentence was within range and unassailable;

(e) the files had been provided to Mr OP's new lawyer;

(f) Mr OP had been informed that although his phone calls were not advancing matters, he was free to continue to raise any concerns in writing;

(g) Mr OP's complaint largely concerned the competence of Mr VN in advancing Mr OP's criminal defence in the 2017 trial;

(h) the more appropriate forum for Mr OP to advance concerns about competent representation was by way of appeal;

(i) the Committee did not consider the allegations of lack of competence to be well founded; and

(j) it did not consider that Mr VN had "made up" the June 2018 invoice in order to retain funds.

[23] The Committee decided that it was not established that Mr VN had breached any obligations owed to Mr OP and resolved to take no further action on his complaint.

The first LCRO decision

[24] Mr OP applied to this Office for review of that first Committee decision. In a decision issued in March 2021 (the first LCRO decision), my colleague, Mr Maidment, defined the issues to be considered on review as follows:

(a) Was the Committee's obligation to conduct a fair and independent investigation compromised by placing reliance on the decision of the District Court Judge?;

(b) Did the Committee identify and address all the issues of complaint raised by Mr OP?;

(c) Did Mr VN fail to represent Mr OP competently in the 2017 court proceedings?;

(d) Did Mr VN fail to follow instructions to appeal the 2017 conviction?;

(e) Did Mr VN carry out and charge for work on investigating the prospects of success of appealing Mr OP's 2013 criminal convictions when Mr OP's instructions had been to refrain from working on that matter unless a grant of legal aid was secured?;

(f) Did Mr VN fail to return Mr OP's files?;

(g) Did Mr VN represent that he had made comprehensive enquiries of Government Agency [A] in respect of investigating Mr OP's bankruptcy matters when he had taken minimal steps to make enquiries of Government Agency [A]?;

(h) Did Mr VN manufacture an invoice to access funds that Mr OP had deposited?;

(i) Did Mr VN fail to deposit funds received into a trust account and did he access those funds without authority to do so?

[25] It will be evident from the above summaries that the way in which complaint issues were interpreted and expressed up to that point had morphed a little at each step in the process.

[26] In his decision, my colleague affirmed the Committee's findings in the first Committee decision that:

(a) Mr OP's allegations of Mr VN's incompetence had not been substantiated;

(b) Mr VN had been instructed to undertake preparatory work on exploring the possibility of appealing Mr OP's 2013 convictions; and

(c) implicitly, by reason of its general finding that it did not consider Mr VN had breached his professional obligations while acting for Mr OP, he did not fail to advance an appeal of the 2017 convictions.

[27] I acknowledge there is some uncertainty about the third of those issues. On my reading of the first Committee decision, the Committee did not make any express finding in relation to compliance by Mr VN with Mr OP's instructions regarding any possible appeal of the 2017 convictions. The Committee merely recorded that it was Mr VN's professional opinion that Mr OP's sentence was "within range and unassailable".

[28] An appeal against conviction and an appeal against sentence are of course quite different. Mr OP's position as stated in his complaint was that, among other things, he wished to argue that he "had been bankrupted by Government Agency [A] based on fraudulent documentation and then not dealt with in good faith when I asked for my case to be reviewed".

[29] The materials seem to imply that Mr VN confined his advice to whether or not Mr OP had any prospect of success in an appeal against sentence only.

[30] The Committee also left partially open the general issue of Mr VN's competence. At paragraph [16] of the first Committee decision, it stated that:

> … if Mr OP considers he has suffered an adverse outcome as a result of Mr VN's actions, the more appropriate action is to consider an appeal based on competence of counsel. The courts are best placed to assess Mr VN's actions while conducting the defence. Should a court subsequently make adverse findings about Mr VN's competence, Mr OP could resubmit his complaint to the Lawyers Complaints Service. … Based on the material presently before it, the

> Committee does not consider Mr OP's allegations of incompetence are substantiated.

[31] At paragraphs [102]–[103] of the first LCRO decision, my colleague expressed his agreement with the Committee's view of the procedural avenues open to Mr OP in relation to alleged incompetent representation in the 2017 criminal proceedings. He also noted, for clarity, that Mr VN had no involvement in Mr OP's 2013, 2015 and 2019 criminal proceedings.[1]

[32] On the basis of his own fresh analysis of all of the material, my colleague then referred the following issues back to the Committee for reconsideration:

> (i) Did Mr VN carry out work investigating [the] possibility of settlement of Mr OP's historical bankruptcy matters; and
>
> (ii) did Mr OP pay funds in the sum of $3,000 to Mr VN and, if so, did Mr VN manage funds received appropriately; and
>
> (iii) if it is concluded that Mr VN did not receive funds from Mr OP, did Mr VN's continued acknowledgement that he was in receipt of funds, culminating in him issuing an invoice recording credit of funds received, raise any disciplinary issues; and
>
> (iv) was the fee charged by Mr VN for completing work on the historical (2013) appeal fair and reasonable; and
>
> (v) was Mr VN required to release the files obtained from Mr CA; and
>
> (vi) if it was determined that Mr VN was able to retain the CA files, is there evidence of Mr VN advising Mr OP of the basis upon which his files would be released?

[33] In doing so, he directed the Committee to obtain and review Mr VN's files, which he recorded "will be held by Mr VN's current lawyer".[2]

[34] He also recorded that "following the hearing, Mr VN clarified that he was still retaining the files he had uplifted from Mr CA. He advised that these files would be released to Mr OP on payment of his account".[3]

The Standards Committee's second decision

[35] The Committee duly commenced its reconsideration of those issues. It sought and eventually obtained Mr VN's file records, or some of them, although not without considerable difficulty. They were not obtained from Mr OP's current lawyer but from Mr VN. The Committee made three requests and issued two production orders over a ten-month period. Mr VN was dilatory and uncooperative, if not obstructive.

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[1] Mr OP subsequently stated that there had been no proceedings in 2015.
[2] At [132].
[3] At [110]–[111].

[36] As a result, the Committee both expanded and again recast the issues it was considering or reconsidering, as follows:

(a) whether Mr VN received the sum of $3,000 from Mr OP and, if so, whether Mr VN properly dealt with the money in accordance with the Rules;

(b) whether Mr VN carried out work competently, in a timely manner, consistent with the terms of the retainer and the duty to take reasonable care;

(c) whether Mr VN's conduct in respect of the bankruptcy matters was misleading or deceptive or likely to mislead or deceive;

(d) whether Mr VN charged Mr OP a fee that was more than fair and reasonable; and

(e) whether Mr VN was required to release the files obtained from Mr CA and, if it was determined that Mr VN was able to retain the CA files, was there evidence of Mr VN advising Mr OP of the basis upon which his files would be released?

[37] Item (b) in the above list was a new issue, in the sense that it arose from the Committee's review of Mr VN's file records. This was despite the fact that the LCRO had confirmed the Committee's previous findings to the effect that Mr VN had carried out his work competently and in a timely manner, consistent with the terms of the retainer and the duty to take reasonable care.

[38] Item (c), as expressed, was a new issue but it flowed from item (i) of the issues the LCRO had directed the Committee to reconsider.

[39] In a decision dated 13 October 2022 (the second Committee decision), the Committee:

(a) found breach by Mr VN of:

(i) r 14.2(e) of the Rules;

(ii) section 110(1)(a)(i) and (ii) of the Lawyers and Conveyancers Act 2006 (the Act);

(iii) regulations 9 and/or 10 of the TA Regulations and consequently r 9.3 of the Rules;

(iv) r 3 of the Rules;

(v) r 3.3 and/or r 7.1 of the Rules;

(vi) r 11.1 by reason of misleading and deceptive conduct on his part;

(vii) r 9 of the Rules;

(viii) unsatisfactory conduct under s 12(a) of the Act by reason of failing to release files within a reasonable time but without finding breach of r 4.4.1 of the Rules

(b) found unsatisfactory conduct in relation to each of the above breaches;

(c) concluded that "the conduct was towards the moderate range of conduct and that a fine was warranted";

(d) made the following orders:

(i) cancellation of Mr VN's 21 June 2018 invoice for $8,337.50;

(ii) refund of the $3,000 paid by Mr OP;

(iii) a fine of $2,000;

(iv) costs of $500.

Application for review and jurisdiction

[40] Mr OP raised seven specific matters on review in addition to several matters in his original complaint that have not necessarily been fully dealt with to date. The issues raised, in the order I propose to deal with them rather than the order in which they were raised, were:

(a) a terms of service issue;

(b) an issue of alleged slander and consequent breach of rr 2.3 and 2.7;

(c) an issue of alleged breach of the Legal Services Act 2011;

(d) an issue regarding Mr VN's compliance with Mr OP's instructions;

(e) an issue of alleged incompetence in representation;

(f) issues as to the release or transfer of client files;

(g) trust account and fee payment regulatory compliance issues;

(h) honesty issues;

(i) an issue of the fairness and reasonableness of Mr VN's fees;

(j) respect and courtesy issues;

(k) an issue as to appropriate penalty;

(l) an issue as to publication of the Committee's decision.

Review on the papers

[41] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows the LCRO to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties. Mr OP agreed to that course of action. Mr VN did not respond to the request from this Office to express a view on that issue. Rather, through counsel, he agreed to abide the Committee's October 2022 orders.

[42] After carefully reading the complaint, the response to the complaint, the first Committee decision, the first LCRO decision, the second Committee decision and the submissions filed in support of the application for review, I was concerned that Mr VN had filed no evidence or submissions in response to the review application.

[43] I gave him several further opportunities to do so. By letter dated 17 July 2023, I requested any initial response by 28 July 2023 and requested a response from him specifically on the issue of the withholding of Mr OP's files that is discussed in this decision. Mr VN did not respond.

[44] My email from this Office to counsel on three occasions in late September and early October 2023, counsel was requested to confirm that he had no instructions to respond to the letter of 17 July 2023.

[45] By minute on 4 October 2023, I gave counsel and Mr VN some indications regarding provisional views I had formed on some matters and afforded them a final opportunity to file evidence and/or submissions. The brief response from counsel did not pertain to the issues at large in the review.

[46] There are no additional issues or questions in my mind that necessitate any further submission from either party on the matters that are properly the subject of this review.

[47] On the basis of the information available, I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[48] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[4]

> … 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.

[49] More recently, the High Court has described a review by this Office in the following way:[5]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[50] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's second determination, has been to:

(a) consider all of the available material afresh; and

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

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

Issues

[51] I will discuss each issue identified in paragraph [40] and first explain whether I have jurisdiction to consider it. If I do have such jurisdiction, I will deal with that issue. I do so on the basis that Mr VN has not applied for review of any of the Committee's findings and orders but that Mr OP's review application necessarily puts all such findings and orders at issue.

The terms of service issue

[52] This issue was raised by Mr OP in his first application for review as an element of his complaint about Mr VN's inappropriate application of the $3,000 payment. It was referred to in paragraph [24(b)] and discussed in paragraphs [80]–[87], [178], [197]–[198] of the first LCRO decision.

[53] The issue is not discussed in the second Committee decision. This is because it was not one of the matters the LCRO directed the Committee to reconsider, and probably also because the Committee is unlikely to have considered it to be material enough to raise of its own motion in the context of the wide range of conduct issues under consideration.

[54] The view Mr OP expressed in his application for review was that Mr VN had breached r 3.4A of the Rules and "to cover this up he committed fraud".

[55] It is implicit in all three decisions to date that Mr VN was accepting Mr OP's instructions directly i.e. not through an instructing solicitor. I make the same assumption.

[56] When a barrister sole accepts instructions directly, r 3.4A of the Rules provides that:

> A barrister sole must, in advance, provide in writing to a client information on the principal aspects of client service including the following:
>
> (a) The basis on which the fees will be charged, and when payment of fees is to be made.
>
> (b) The professional indemnity arrangements of the barrister sole. This obligation is met if it is disclosed that the barrister sole holds indemnity insurance that meets or exceeds any minimum standards from time to time specified by the Law Society. If a barrister sole is not indemnified, this must be disclosed in writing to the client.
>
> (c) The fact that the Lawyers' Fidelity Fund does not provide any cover in relation to a barrister sole as he or she does not hold client's funds.
>
> (d) The procedures in the barrister sole'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.

[57] In addition, r 3.5A provides that:

> A barrister sole 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) any provision in the retainer that limits the extent of the barrister sole's obligation to the client or limits or excludes liability. The terms of any limitation must be fair and reasonable having regard to the nature of the legal services to be provided and the surrounding circumstances.

[58] Rule 14.5.2(d) enables a barrister sole to accept direct instructions to act in representing a person charged with an offence (subject to certain exceptions that are not applicable in this instance) but r 14.7.3 prohibits a barrister sole from doing so unless he or she:

> has provided in writing to the prospective client the information required by rules 3.4A and 3.5A and has informed the prospective client in writing of his or her:
>
> (a) capacity and experience in performing the requested service; and
>
> (b) advocacy experience as a barrister; and
>
> (c) any disadvantage which the barrister believes may be suffered by the prospective client if no instructing lawyer is retained.

[59] It is clear from the discussion at paragraphs [195]–[198] of the first LCRO decision that my colleague was sceptical that Mr VN had ever provided to Mr OP documentation complying with any of rr 3.4A, 3.5A or 14.7.3. Mr OP's position was that he never received any such documentation. There was no evidence from Mr VN that he did. Mr OP's evidence therefore stands unchallenged at this point.

[60] Nevertheless, there was no finding regarding the matter in the first LCRO decision and I consider this was appropriate because it was a fresh complaint raised on review and not in Mr OP's original complaint. Consequently, it was not appropriate for my colleague to make what would have been a finding at first instance of breach by Mr VN of rr 3.4A, 3.5A or 14.7.3 in his dealings with Mr OP.

[61] The Committee not having raised the matter either in its second inquiry process, and although I would prefer to resolve the matter now, it is no more open to me to make a finding of breach of those rules by Mr VN without a standards committee first having considered the matter.

[62] The other observation I make is that my colleague's comment at paragraph [80] of the first LCRO decision that "it does not appear to be the case that Mr OP's instructions to address this smorgasbord of matters was the subject of formal clarification in a letter of engagement" can only have meant "formal" in the sense of compliant with rr 3.4A, 3.5A and 14.7.3.

[63] The letter of 12 January 2018 is plainly a formal record of the nature and scope of the instructions Mr VN considered he had received from Mr OP at their Prison [X] (Prison X) meeting and appears to have been adequate for that purpose.

Alleged slander and consequent breach of rr 2.3 and 2.7

[64] Mr OP alleges that Mr VN breached rr 2.3 and 2.7 of the Rules and slandered Mr OP by alleging, at the December 2020 LCRO hearing, that Mr OP had threatened to kill the [City] bailiff, SU, when there was no basis for such allegation.

[65] Mr OP says that he "challenged this baseless claim with the LCRO via email the next day" and "also raised it with the Law Society in my submissions".

[66] It is not the role of an LCRO to consider fresh complaints that are raised by a complainant on review. Whilst an LCRO has broad powers to conduct an investigation, those powers do not extend to considering fresh complaints that have been raised by an applicant when seeking to review a committee decision.

[67] The review guidelines provided to assist parties with understanding the review process advise parties that no new complaints will be considered at the review stage and that, in general, the LCRO will not accept new information which should have been placed before the Standards Committee.[6]

[68] Accordingly, it is not open to Mr OP to raise an entirely fresh complaint of breach of rr 2.3 and 2.7 of the Rules on review. This is so in principle and is particularly so where the context is a reconsideration by the Committee of specific issues referred back to it by this Office.

Breach of the Legal Services Act 2011

[69] Mr OP alleges breach by Mr VN of the Legal Services Act 2011. This was also not a particular of his original complaint or a matter he raised for consideration at the first

[6] SC v KB [2020] NZLCRO 53.

LCRO hearing. Consequently, for the same reason, I have no jurisdiction to make a finding on the matter.

[70] The underlying facts have nevertheless been extensively traversed. I consider it useful to clarify in this decision whether the factual basis for such a complaint has already been considered.

[71] I will endeavour to distil Mr OP's ever-changing positions regarding the $3,000 payment. Initially, he asserted that the funds were to be applied to settle bankruptcy-related matters. It is clear from the first LCRO decision that my colleague did not consider this explanation to have any credibility.

[72] Mr OP then argued that the funds were on account of fees for Mr VN's work in assessing the prospects for appealing his 2013 criminal convictions and that, because there was no evidence that Mr VN had actually done any work on that matter, the payment should be refunded.

[73] Now, for the first time, he asserts that it was an additional payment for Mr VN's representation of him in the legally-aided 2017 criminal proceedings.

[74] I can find no reference to any record of this proposition ever being put to Mr VN. I consider it to be both opportunistic and disingenuous for Mr OP to be raising this argument at this time.

[75] In paragraph [86] of the first LCRO decision, my colleague recorded that Mr VN's letter of 12 January 2018 to Mr OP specifically referenced:

(a) steps to be taken in regard to the matter of his historical (2013) convictions, including a request to uplift files from Mr OP's previous lawyer, Mr CA;

(b) Mr VN's intention to obtain an affidavit to support a possible appeal;

(c) confirmation that Mr OP would "pay privately" to "scope" and prepare possible grounds for an appeal;

(d) advice that Mr VN did not wish to be "out of pocket" for work done assessing prospects of success for a possible appeal;

(e) confirmation that a legal aid application would be completed if grounds for an appeal were established but "not before";

(f) an estimate to progress preparatory work for the appeal in the sum of $25,000 plus GST; and

(g) potential settlement negotiations with the Crown to resolve Mr OP's bankruptcy.

[76] My colleague further noted that Mr OP provided no evidence of having raised any objection to any of the matters identified in Mr VN's letter of 12 January 2018.

[77] I make the assumption as my colleague did that items (c) to (f) above related to an appeal of the 2017 convictions, not the historical 2013 ones.

[78] Most of those work strands appear to be work Mr OP was engaging Mr VN on privately i.e. not potentially on legal aid.

[79] I consider it abundantly clear that my colleague considered the $3,000 to have been a retainer to enable Mr VN to get going on such of the work streams that were to be undertaken privately.

[80] I also consider it implicit in my colleague's decision that it is artificial to endeavour to distinguish, in terms of cost allocation, between any of those separate strands of work that had been discussed extensively between Mr VN and Mr OP at their meeting in the Prison X and that Mr VN was confirming he proposed to undertake.

[81] As previously stated, I can make no finding as to any possible breach of the Legal Services Act 2011 in these circumstances. I simply observe that, on the information available to the Committee and to my colleague, there did not appear to be a factual basis for such a complaint at the time of either of those decisions.

Mr VN's compliance with Mr OP's instructions

[82] The issue of Mr VN's alleged non-compliance with Mr OP's instructions was a particular of his original complaint. It is discussed in paragraphs [10(b)], [13(b)] and [15] of the first Committee decision.

[83] It is then discussed in paragraphs [12(c), (d), (h) and (m)], [16(g), (h), (i) and (m)], [17(b)], [24(a), (c), (d) and (k)], [78]–[80], [84]–[87], [104]–[109], and [201(b) and (c)] of the first LCRO decision.

[84] The Committee returned to the matter in paragraphs [16(a)] and [41]–[43] of the second Committee decision.

[85] The upshot is that the matter has been dealt with in the first LCRO decision except for the one matter referred back for reconsideration, which was whether Mr VN carried out work investigating the possibility of settlement of Mr OP's historical bankruptcy matters.

[86] The Committee found that he did not and that his representations that he had "were not an accurate statement" and constituted misleading and deceptive conduct. It concluded that Mr VN had breached r 11.1 of the Rules.

[87] Rule 11.1 at that time provided that "a lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice".[7]

[88] The technical difficulty with the Committee's conclusion is that r. 11.1 (now r 10.9), by reason of its limited wording, has generally been considered to apply only to matters of practice administration. A lawyer's misrepresentation to a client of the work done for the client does not relate to practice administration.

[89] Accordingly, misleading or deceptive conduct by a lawyer in providing or relating to the provision of legal services to his or her client does not necessarily equate to a breach of r 11.1 (now r 10.9).

[90] I agree with the Committee that, on the evidence available, Mr VN's representations to Mr OP about what he had done were misleading or deceptive. I will return to discuss the implications of this in terms of an unsatisfactory conduct finding in the later discussion under the heading "Honesty issues".

Alleged incompetence in representation

[91] In paragraphs [10(c)], [16] and [17] of the first Committee decision, the Committee initially found no evidence of incompetence and decided that the appropriate forum for pursuing that issue was an appeal to the Court.

[92] In the first LCRO decision, my colleague discussed the issue in paragraphs [12(f), (j), (k), (l) and (n)], [16(j), (k) and (l)], [17(e), (f) and (g)], [21(g), (h) and (i)], [22], [24(j) and (l)], [34(c)], [73], [91]–[103] and [201(a)]. At paragraphs [102]–[103] and [201(a)], he affirmed the Committee's conclusions.

[93] In the second Committee decision, however, the Committee, having by then had the benefit of reviewing such of the file records as Mr VN was able or willing to provide,

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[7] The Rule number changed from 1 July 2021 and is now r 10.9.

found Mr VN to be in breach of r 3 by virtue of a lack of a proper process, detail and information evidenced by those file records.

[94] In doing so, it observed that:

> … the material and information provided by Mr VN was disorganised, lacked sufficient detail and his advice was not properly recorded. It further noted that Mr VN had no software for recording time and he did not keep time sheets. The committee also observed that the file notes provided to the Committee related to multiple files and different proceedings. The time records related to criminal proceedings in [City] and [City] that were funded by legal aid and the historical matters. It was noted that there was reference to a review if files from CA for the period 2014 to June 2018 but there were very few entries, and it was impossible to decipher which matters the entries related to.
>
> The Committee then considered whether Mr VN had undertaken any work on Mr OP's bankruptcy and appeal matter.
>
> In this regard, it noted that while Mr VN stated that he spent 20 hours of work on the bankruptcy matter, and had meetings with a bailiff, he had failed to provide any evidence to substantiate this claim. The material reviewed did not disclose that Mr VN had undertaken any investigation into the bankruptcy matter except for drafting an affidavit for the court bailiff.
>
> The Committee concluded that, apart from drafting the affidavit, Mr VN had not undertaken any work on Mr OP's bankruptcy matter and had therefore failed to complete the work required to meet his obligations to Mr OP.

[95] On review, Mr OP makes a specific allegation about Mr VN's competence in relation to his 2017 sentencing. I consider that Mr OP has had ample opportunity to raise all potential particulars of Mr VN's alleged incompetence, in the first instance before the Committee and then in the first LCRO hearing.

[96] The Committee's findings in relation to competence in specific issues of representation have been affirmed by my colleague in the first LCRO decision and cannot be revisited.

[97] I identify no reason to disturb the Committee's finding of breach of r 3 by Mr VN in the second Committee decision, which appears to be a generalised finding and accordingly encompasses the particular matter Mr OP raises on review.

[98] I observe that the Committee's generalised finding appears to be consistent with Mr VN's financial management and with his standard of compliance with his regulatory obligations. I observe also that my colleague had reason to express himself in robust terms in the first LCRO decision about the standard of Mr VN's advocacy in his own interests.

[99] The Committee also found breach of "Rule 3.3 and/or Rule 7.1" in the circumstances. This was on the basis that:

> … there was no evidence that Mr VN kept Mr OP adequately updated about the progress on the retainer and the steps taken to implement his instructions in relation to the bankruptcy matters including keeping him updated on any material or unexpected delays.

[100] Rule 7.1 required Mr VN to keep Mr OP informed about progress and to consult him about the steps to be taken to implement his instructions. Mr VN clearly did not do either of those things. It is not so apparent what "material and unexpected delays" occurred for the purposes of r 3.3. that Mr VN needed to inform Mr OP about.

[101] The better view is that Mr VN therefore breached r 7.1 but not r 3.3.

The release or transfer of client files

[102] Mr OP's next ground of review relates to the files withheld by Mr VN after Mr OP terminated his retainer in June 2018.

[103] This matter falls into two parts. The first part relates to the historical files Mr VN had uplifted from Mr OP's previous lawyer, Mr CA. These are referred to in the first LCRO decision, the second Committee decision and the submissions as "the CA files".

[104] The second part relates to what Mr OP now refers to as "other file disputes". He states that:

> One related to VN's refusal to release the file of work to support his invoice for $5,337. Also several [City] trial preparation files were not sighted by the new counsel. Some of this latter material is listed in the June 2019 email sent by LW to VN for my appeal. VN initially ignored this request and then demanded payment to release them. They were not supplied.
>
> VN refused to supply these files as it would have exposed that he had not done work he claimed to have. An example is noted in the 16(1) of the LCRO decision where VN claimed to have completed a full review of my bankruptcy file. The Insolvency Service later advised me that VN had never even requested the file. Mr CA's files from my 2013 case were caught up in this.

[105] At paragraph A(3) of his original complaint, Mr OP had stated that he requested "that Mr VN supply the file of the work he was billing me for" and that "letters from me asking for this were sent in June and July". Later, Mr OP stated that "four years after my request, VN had still not supplied my files to me".

[106] Both the CA files and Mr VN's files were plainly documents held "on behalf of" Mr OP as the client. A client has the right to uplift all such documents when changing lawyers, subject to any rightful claim to a lien. This is reflected in r 4.4.1 of the Rules.

[107] This issue is discussed in paragraphs [10(d)], [11(b)], [15(e)] of the first Committee decision and then in paragraphs [12(b)], [16(d) and (i)], [17(h)], [21(e)], [34(f)],

[110]–[112], [132], [176(e) and (f)], [177(d) and (e)] and [200(e) and (f)] of the first LCRO decision.

[108] At paragraph [34(f)] of the first LCRO decision, my colleague expressed the issue as, "Did Mr VN fail to return Mr OP's files?", without distinguishing between historical files and Mr VN's own files.

[109] He then recorded, at paragraphs [110]–[111] that:

> Following the hearing, Mr VN clarified that he was still retaining the files he had uplifted from Mr CA. He advised that these files would be released to Mr OP on payment of his account.

[110] Although a misunderstanding is possible, the decision does not record any reference being made by Mr VN to the files relating to his own work for Mr OP. A likely implication of Mr VN's post-hearing clarification to this Office is that his own files had already been released. This was the position he had advised to the Committee in response to the original complaint.

[111] The consequent direction by my colleague to the Committee to reconsider this issue therefore referred only to "the files obtained from Mr CA". Consequently, those are the only files referred to in the second Committee decision, which discusses the issue at paragraphs [16(e) and (f)], [17]–[22], [25(d) and (e)] and [50]–[53]. It is open to me to review the Committee's findings regarding those files.

[112] I find the paragraphs [51]–[53] of the second Committee decision on this subject rather confusing. In summary, the Committee found that:

(a) there was evidence of the request from Mr OP's new counsel, Mr LW, for "the files" but no evidence of when Mr VN dispatched the files;

(b) there was not sufficient evidence to conclude whether Mr VN had acted upon Mr OP's request to uplift documents and that he did so without undue delay in terms of r 4.4.1; and

(c) nevertheless, on the balance of probabilities, Mr VN had failed to release the files within a reasonable time and that this constituted unsatisfactory conduct for the purposes of s 12(a) of the Act.

[113] The implication of the last-mentioned finding is simply that Mr VN displayed a lack of diligence in releasing the files to a degree that warranted an unsatisfactory conduct finding.

[114] The Committee makes no reference to any claim of lien that Mr VN might have had at the time, on the basis that his June 2018 invoice was outstanding until the Committee cancelled it in the second Committee decision. Consequently, there is no finding in response to the fifth question posed by my colleague for reconsideration: "Was Mr VN required to release the files obtained from Mr CA?"

[115] I am unable to determine from the context whether the Committee glossed over that issue or assumed the answer was "yes".

[116] The same question arises in relation to the files relating to Mr VN's own work for Mr OP.

[117] A rightful claim of lien would preclude a finding of breach of r 4.4.1.

[118] A rightful claim of lien might also preclude a finding of lack of diligence for the purposes of s 12(a) of the Act but this possibly depends on whether Mr OP's request constituted a request for a copy of personal information for the purposes of the Privacy Act 2020.

[119] A client has a right under that Act to obtain a copy of any file material containing personal information, regardless of any claim of lien. Delay or failure in responding to such a request could be argued to constitute a lack of diligence for the purposes of s 12(a) of the Act.

[120] Mr OP's position in his original complaint was that he requested transfer of his files to Mr LW and that Mr LW made a similar request directly. This potentially engages r 4.4.1. His position on review, discussed below, was that Mr VN's obligation arose under his legal aid contract. In neither case is there any suggestion of a request for a copy of personal information under the Privacy Act.

[121] Mr OP's argument on review was that "as a Legal Aid provider, VN is required under his contract to release all files relating to a client's affairs within 10 working days of a request being made". I presume this argument is premised on the relevant files being files that relate to legally aided work.

[122] I have no information as to whether Mr CA's work was undertaken on legal aid and therefore whether those files might be covered by the legal aid contractual obligation Mr OP refers to.

[123] Nor do I have any information about the terms of Mr VN's legal aid contract.

[124] Based on the 12 January 2018 letter, the only file relating to Mr VN's own work that would clearly fall into the category of work undertaken on legal aid would be Mr VN's file relating to his defence of Mr OP on the 2017 criminal charges. An implication of Mr OP complaint is that either Mr OP and/or Mr LW requested that file and did not receive it.

[125] It is not clear on the materials, however, whether Mr LW was a legal aid provider for the purposes of the instruction from Mr OP and therefore whether Mr VN's contractual obligation, if applicable, was triggered by his request for the files. Mr OP says that he applied to Legal Aid for a change of provider. He does not say that his request was approved.

[126] Summarising the context:

(a) the Committee determined in the first Committee decision that "*Mr VN has provided Mr OP's files to his new lawyer*";

(b) the evidential basis on which that finding was made was not stated but I infer it was on the basis of Mr VN's response to the complaint;

(c) Mr OP asserted, in effect, that there was no factual basis for that finding by the Committee at the time;

(d) Mr VN later (after the LCRO hearing) "clarified" that the finding was incorrect specifically in relation to the CA files;

(e) the Committee's orders for production were issued after the LCRO hearing and before the second Committee decision;

(f) Given that those orders related to Mr VN's own file records and were at least partially complied with and given that there is no suggestion of Mr VN having provided the originals or a copy of any file records to Mr LW, the probable (if not necessary) implication is that Mr VN was still in possession of those files as well.

[127] The main thing that seems to be apparent from all of this is that the general issue of the whereabouts and content of Mr VN's file records seems to have been obfuscated at each step in this process.

[128] It seems that the Committee made no enquiry of Mr LW despite my colleague's suggestion that it do so. Mr OP has adduced no evidence from Mr LW as to what files he received (if any) and when.

[129] It seems also that the Committee was ultimately unable to determine clearly whether or not Mr VN had released his own files (not the CA files) to Mr OP or Mr LW. I am no better informed.

[130] If Mr OP's assertion is correct that Mr VN had still not relinquished the files four years after Mr OP's request, this would seem to be a rather more serious matter than is reflected in the penalties imposed by the Committee in relation to the CA files, subject to whether or not Mr VN had a rightful claim of lien.

[131] There is also no reference in the second Committee decision as to whether or not the file material it eventually received from Mr VN included Mr OP's bankruptcy file. Mr VN submitted to this Office that he had obtained that file and completed a thorough review of it. Mr OP has always maintained that Mr VN never uplifted the file from Government Agency [A]. He says that his accountant eventually obtained a copy of the file from Government Agency [A].

[132] If Mr VN told the Committee he had provided his files to Mr LW and had not done so, that is also a serious matter. There is also the matter of Mr VN's clarification to this Office after the first LCRO hearing about the CA files and the possibility that he misled this Office by intentionally omitting reference to his own files still in his possession.

[133] If either possibility is an actuality, an issue of potential breach of r 10.14 or even a potential offence against s 262(2) of the Act arises, although the latter provision is subject to a two-year time limit.[8] Of potential relevance to the former provision is the fact that the Committee requested specific file material from Mr VN on three occasions and made a further two orders for production under s 147(2) of the Act before being able to progress its second decision.

[134] In relation to Mr OP, there is possibly an issue of either misleading or deceptive conduct or breach of (now) r 10.9 of the Rules, the latter being on the basis that the release of files is arguably an aspect of the administration of a lawyer's practice.

[135] The Committee concluded that there was insufficient evidence to decide whether or not Mr VN had complied with r 4.4.1 of the Rules[9] but nevertheless found unsatisfactory conduct in terms of s 12(a) of the Act. It seems to me that an express finding as to whether or not Mr VN had a rightful claim of lien is necessary before Mr VN can be found to be at fault at least in the former case and arguably in the latter depending on the possible impact of the Privacy Act and/or the Legal Services Act.

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[8] Section 265 of the Act.
[9] The Committee's reference also to r 4.4 of the Rules appears to have been an error.

[136] In its second decision, the Committee cancelled all fees claimed by Mr VN to be outstanding from Mr OP. Mr VN did not seek review of that decision. Consequently, any claim to a solicitor's lien he might have had ceased to have any arguable basis at that time.

[137] In summary, my current understanding is that:

(a) Mr VN initially told the Committee that all files had been provided to Mr OP's new lawyer, Mr LW, and that this was not true.

(b) Mr VN told my colleague at or before the LCRO hearing that all files had been provided to Mr LW, and that this was not true.

(c) Mr VN then "clarified" to this Office after the hearing that he still held the CA files but made no mention of his own files and may thereby have misled this Office.

(d) The Committee found there was no evidence of the files being provided to Mr LW but did not ask Mr LW.

(e) The Committee found there was insufficient evidence to conclude whether or not Mr OP had provided all files to Mr LW but nevertheless found lack of diligence in releasing them.

(f) Whether or not Mr VN was ever in possession of the bankruptcy file of Mr OP that he claimed to have fully reviewed remains entirely unclear.

(g) Critically, the lien question has never been addressed, at least not expressly.

[138] I am driven to the unfortunate conclusion, given the procedural complexity of this overall matter to date and the long time it has taken to get this far, that the Committee has not adequately inquired into this aspect.

[139] In expressing that view, I mean no disrespect to the Committee. In the context of the breadth of Mr OP's complaints, the scattergun nature of the various different work streams and the apparent factual obfuscation of numerous matters, it is easy to regard something as basic as the release of files as being of comparatively minor importance.

[140] Nevertheless, factual clarity is necessary to reach demonstrably fair and considered conclusions as to Mr VN's conduct in relation to the handling of Mr OP's files. It is not appropriate for me to do that effectively at first instance.

[141] I intend to reverse the finding of unsatisfactory conduct under s 12(a) on this ground and return the matter to the Committee for reconsideration. This should not be interpreted as implying a view that the Committee's application of that section to the circumstances is unsound in principle, subject to it making a finding on the lien question and considering the Privacy Act and Legal Services Act issues (if applicable). The facts just need to be clear.

Trust account and fee payment regulatory compliance

[142] Mr OP is critical of the penalties imposed by the Committee, specifically relating to Mr VN's handling of the $3,000 cash payment.

[143] The matter of Mr VN's non-compliance with the Trust Account Regulations is discussed in paragraphs [9]–[10], [14], [24(g)], [34(i)], [114]–[115], [133–199] and [200(b)] of the LCRO decision and in paragraph [(a)(ii)] of the conclusion. My colleague referred the matter back to the Committee for reconsideration.

[144] It is then dealt with in paragraphs [21], [25(a)], [26]–[30] and [56(b)] of the second Committee decision. The Committee made a finding and imposed a penalty. It is open to me to review the finding or the penalty in this decision.

[145] The Committee's findings were that:

(a) Mr VN had received the $3,000;

(b) in receiving or holding money for another person, he had breached r 14.2(e) of the Rules;

(c) in failing to ensure the money was paid promptly into a trust account, he had breached ss 110 (1)(a)(i) and (ii) of the Act;

(d) in receiving funds to cover fees in advance, he had breached reg 9 and/or reg 10 of the TA Regulations and consequently r 9.3 of the Rules;

(e) these breaches constituted unsatisfactory conduct;

(f) there was no basis for the 21 June 2018 invoice.

[146] The Committee ordered Mr VN to cancel his 21 June 2018 invoice and refund the $3,000 to Mr OP.

[147] With reference to these findings, Mr OP stated in his review application that "VN was the one found to have committed fraud". Mr OP exaggerates. The Committee did not find that Mr VN had committed any act of fraud.

[148] This matter has been dealt with comprehensively by my colleague and by the Committee. There is nothing I can usefully add to their analysis of the facts and the application of regulatory instruments to those facts other than to state that a breach of the TA Regulations, the Rules and/or the Act in relation to the handling of money received for fees does not constitute "fraud".

[149] With one exception, I confirm each of the findings made by the Committee summarised in paragraph [145] above. Mr VN can have no complaint with those findings and, to his credit, has not sought to review them.

[150] The applicable TA Regulations and s 110 of the Act exist not only to prevent the misuse of client funds but also to ensure that factual disputes of the kind that that have resulted in this instance in the otherwise unnecessary expenditure of inquiry resources at Committee and LCRO level do not occur.

[151] There must always be an audit trail. A barrister cannot accept a cash payment and pocket it. Mr VN's belated protestations that this did not occur have been found by both my colleague and the Committee not to be credible.

[152] The exception to my confirmation of the Committee's findings is the finding that there was no basis for the 21 June 2018 invoice. The necessary implication of this finding and the consequent cancellation and refund orders is that Mr VN had done no work whatever for Mr OP regarding the proposed appeal of the 2013 convictions.

[153] This may have been correct specifically in relation to that work stream but I consider the outcome to be unduly harsh to Mr VN. The $3,000 was the only sum he received from Mr OP on account of fees for the work that was not subject to a legal aid grant.

[154] It cannot be suggested that Mr VN did no legal work at all for Mr OP. He met with Mr OP at the Prison X, took instructions regarding an array of legal work streams, confirmed those instructions in the 12 January 2018 letter and at least uplifted the CA files, met with the Court bailiff and gave consideration to Mr OP's prospects of appealing the sentence for the 2017 convictions, although possibly not the convictions themselves.

[155] I can well understand the degree of irritation with Mr VN's apparently cavalier and dismissive attitude to his professional obligations and to the complaints and inquiry

process that permeates the decisions to date. The disciplinary response to that conduct must nevertheless be principled.

[156] I do not consider it to be principled to imply, as the Committee's cancellation and refund orders do, that Mr VN's work was worthless.

Honesty issues

[157] Mr OP allegations about Mr VN's probity are touched on initially in paragraphs [10(a)] and [15] of the first Committee decision and are then discussed in paragraphs [12(a)], [17(a)], [21(j)], [24(c) and (h)], [34(g) and (h)], [124], [126], [127]–[132] and [200(a)] of the first LCRO decision.

[158] In the first LCRO decision, my colleague redirected the Committee to reconsider the matter because:

(a) in its first decision, the Committee had found that Mr VN did not "make up" his 21 June 2018 invoice;

(b) Mr OP had expressed the view that Mr VN "had made little effort" to progress enquiries with the Crown to settle bankruptcy matters;

(c) in responding to the complaint, Mr VN represented in writing that a "full and complete review" of Mr OP's file was undertaken along with "numerous discussions with the Crown to resolve outstanding debts";

(d) there was no evidence in the file material available to this Office as to the work that was undertaken by Mr VN;

(e) the Committee did not obtain Mr VN's file(s);

(f) the work Mr VN said he had undertaken could be expected to be evidenced from the information on his file(s).

[159] It can readily be inferred that my colleague considered Mr VN's evidence at hearing about this matter to be unreliable. He directed the Committee to obtain Mr VN's files from his new lawyer and properly assess the work Mr VN had completed. This was on the basis of Mr VN's response to the complaint, and the Committee's consequent finding in the first Committee decision, that Mr VN's files had been delivered to Mr LW.

[160] As matters transpired, this turned out to be "not an accurate statement" on Mr VN's part and the Committee experienced the resulting difficulties in achieving Mr VN's co-operation in obtaining the file information referred to earlier in this decision.

[161] The Committee findings the subject of review now are set out in paragraphs [34]–[36], [41]–[43], [46] and [48] of the second Committee decision. In summary, they were that:

(a) Mr VN falsely claimed to have undertaken 20 hours' work on Mr OP's bankruptcy matter;

(b) The material reviewed did not disclose that he had undertaken any investigation into the bankruptcy matter except for drafting an affidavit for the court bailiff;

(c) Apart from drafting the affidavit, Mr VN had in fact undertaken no work on the bankruptcy matter;

(d) Mr VN's "representations" that he had had "favourable settlement discussions" with the Official Assignee and the Government Agency [A] to progress the bankruptcy matter "were not an accurate statement" and constituted "misleading and deceptive conduct";

(e) This constituted a breach of r 11.1 (at that time) and unsatisfactory conduct;

(f) Mr VN had provided no evidence that he had carried out any substantial work to justify the fee charged and therefore the fee of $3,000 could not be fair and reasonable;

(g) Mr VN's 21 June 2018 invoice "was generated as a result of the complaint and did not relate to any work undertaken by Mr VN for Mr OP".

[162] I note that the Committee stopped short of finding that Mr VN had had no communications whatever with the Crown's representatives. It could not legitimately do so on a hearing on the papers. I would have expected it to be able determine whether or not Mr VN ever uplifted the bankruptcy file.

[163] There is necessarily an overlap between this aspect of review and the complaint of failure to follow instructions. There is also an overlap with the fees complaint. The essence of the matter, however, is that Mr VN claimed to have done legal work that he had not in fact done.

[164] I observe again that Mr VN has not sought review of the Committee's findings. Faced with adverse factual findings fundamental to his professional reputation, it is a

reasonable assumption that he would have done so if he considered the Committee's findings to have been factually unsound.

[165] There is one aspect of the Committee's factual findings summarised above that needs clarification, namely the finding that the June 2018 invoice "was generated as a result of the complaint". Mr OP's complaint was lodged five months later, in October 2018.

[166] The reference to a "complaint" was to an email Mr OP's accountant had sent to Mr VN on 14 June 2018 expressing concerns about Mr VN's representation of him and requesting a refund of the $3,000. Mr VN sent a note to his assistant stating:

> Can you prepare an invoice for OP covering all the separate work unrelated to the legal aid matters – all agreed in relation to the historical appeal matter including attendances, meetings with document server – request and receipt of file from CA. Our total to date is $7,250 plus GST of which he has paid – from memory $3,000. Include in invoice promises to pay etc. This will tidy things up if there is a complaint. I will send it to PL

[167] I consider it is reasonably clear that Mr VN's concern at the time and the reason for his penultimate sentence was that he knew he had accepted the $3,000 months earlier without depositing that sum into a trust account and issuing an invoice for that sum as fees. Whether or not the additional $5,337.50 was justified for the work done is a different issue.

[168] I confirm the Committee's finding that Mr VN engaged in misleading or deceptive conduct but arrive at an unsatisfactory conduct finding by a different route.

[169] Rule 11.1 is not of the same effect as s 9 of the Fair Trading Act 1986. To be captured by r 11.1, misleading or deceptive conduct of a lawyer does not have to be "in trade" but does have to be "on any aspect of the lawyer's practice".

[170] I do not consider r 11.1 to be apposite here. Mr VN's conduct towards Mr OP was not "on an aspect of Mr VN's practice" in terms of that Rule.

[171] It is unnecessary to employ a strained interpretation of r 11.1 and thereby s 12(c) of the Act to establish that misleading or deceptive conduct in or relating to the provision of regulated services outside the context of court proceedings[10] is unsatisfactory conduct.

[172] If a standards committee felt the need to ascribe a particular Rule to conduct of this nature so as to bring it within s 12(c) of the Act, any or all of rr 10 (maintaining professional standards), 10.2 (conduct that tends to bring the profession into disrepute)

[10] Rule 13.1 prohibits a lawyer from misleading or deceiving the court.

and 11(b) (ensuring the reputation of the legal profession is preserved) of the Rules could be employed.

[173] Unsatisfactory conduct is not co-extensive with the specific requirements of the Rules, however. The Rules are regarded as a set of minimum standards.

[174] Personal probity and particularly truthfulness in dealings with one's client are cornerstones of professional life.

[175] The preferable approach is that misleading and deceptive conduct towards a client in the provision of regulated services would necessarily be regarded by lawyers of good standing as unacceptable. It is therefore unsatisfactory conduct for the purposes of s 12(b) of the Act.

[176] In relation to this application of the review, I confirm the Committee's factual findings, except for the two findings about Mr VN's 21 June 2018 invoice, reverse the finding of breach of r 11.1 but confirm that Mr VN's misleading and deceptive conduct towards Mr OP constituted unsatisfactory conduct within the meaning of s 12(b) of the Act.

Fair and reasonable fees

[177] The issue of the fairness and reasonableness of Mr VN's fees was initially touched on in paragraphs [10(a)], [11(a)], [15], [18] and [20] of the first Committee decision. Mr OP's allegation at that point was that Mr VN had "made up" the June 2018 invoice in order to retain the $3,000 that he believed would otherwise be due to be refunded.

[178] This was not technically a fees complaint. Consequently, it was not an issue raised on review and directly canvassed in the first LCRO decision.

[179] It became an issue the Committee was directed to consider because the reasonableness of the fee charged flowed from the issue of whether or not Mr VN had done the work for which he issued the June 2018 invoice.

[180] The Committee's discussion is at paragraphs [25(d)] and [44]–[49] of the second Committee decision and its orders are at paragraphs [56(a) and (b)].

[181] In short, the Committee found there was no evidence that Mr VN had done any of the work for which the invoice was issued other than preparation of a draft affidavit and consequently ordered Mr VN to cancel the $8,337.50 invoice and refund the $3,000 Mr OP had paid.

[182] For the reasons discussed earlier, I consider this outcome unduly harsh to Mr VN. The orders made constitute more of a penalty for other unsatisfactory conduct than an assessment of a reasonable fee.

[183] The Committee overlooked the February 2018 invoice for $28,750. This also needs to be addressed. My colleague thought Mr VN had forgotten about it when issuing the $8,337.50 invoice in July 2018. I am not so sure.

Respect and courtesy

[184] This aspect of the matter has its origin in Mr OP's original complaint in which he asserted:

(a) at section F(1), that after seeing Mr VN once on 22 February 2018, he was advised that phone contact was unacceptable and that only written contact was allowed by Mr VN; and

(b) at the second section D(1), that Mr VN "declined to accept any phone calls from mid-December 2018.[11] We had an AVL on Feb 22 but he did not arrange the agreed follow-up a week later. A letter on March 27th … advised only written contact was acceptable".

(c) After hearing nothing further for two months, Mr OP requested a change of lawyer from Legal Aid.

[185] Although arguable discourtesy in these circumstances does not appear to have been addressed in those terms in the decisions to date, this does not appear to be a live issue on review of the second Committee decision. For avoiding doubt, I find that the issue was encompassed within the Committee's original resolution to take no further action, which was confirmed by the first LCRO decision.

The last two issues on review

[186] The last two issues on review are the most important from Mr OP's perspective. These are the appropriate penalty for Mr VN's unsatisfactory conduct and Mr OP submission that the findings against Mr VN be published. I will address those issues after summarising my findings and this decision.

[11] I presume this reference, which carries through to paragraph [10(e)] of the first Committee decision, was meant to be a reference to mid-December 2017.

Decision

Conduct findings

[187] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, I confirm, modify or reverse the Committee decision dated 13 October 2022 as detailed below:

(a) I confirm the findings of breach by Mr VN of:

(i) r 14.2(e) of the Rules;

(ii) section 110(1)(a)(i) and (ii) of the Act;

(iii) both reg 9 and reg 10 of the TA Regulations and consequently r 9.3 of the Rules;

(iv) r 3 of the Rules;

(v) r 7.1 of the Rules;

(vi) r 9 of the Rules.

(b) I confirm the finding of unsatisfactory conduct in relation to each of the above breaches.

(c) I reverse the finding of breach of r 3.3 of the Rules.

(d) I reverse the finding of breach of r 11.1 by reason of misleading and deceptive conduct on Mr VN's part, confirm the finding of misleading and deceptive conduct and substitute a finding of unsatisfactory conduct under s 12(b) of the Act on that ground.

(e) I reverse the finding of unsatisfactory conduct under s 12(a) of the Act by reason of failing to release files within a reasonable time and direct the Committee to reconsider the matter as detailed in the following paragraph.

Direction to reconsider

[188] Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act 2006, I direct the Committee to reconsider the issues of:

(a) Mr VN's compliance with r 4.4.1 of the Rules, including whether or not he had a rightful claim of lien at the time;

(b) the finding of unsatisfactory conduct under s 12(a) of the Act by reason of failing to release files within a reasonable time, including whether or not he had a rightful claim of lien at the time;

(c) if applicable to its consideration of unsatisfactory conduct for the purposes of s 12(a) of the Act, any relevant breach of the Privacy Act 2020 and/or Legal Services Act 2011, including any relevant breach of Mr VN's legal aid contract (again, if applicable).

Fees

[189] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, I modify the Committee decision dated 13 October 2022 by ordering Mr VN to cancel the January 2018 invoice for $28,750 and to cancel the June 2018 invoice as to $5,337.50 of the total sum charged but not as to the $3,000 initially paid by Mr OP.

Fine

[190] The Committee's $2,000 fine was premised on a conclusion that "the conduct was towards the moderate range of conduct and that a fine was warranted".

[191] In considering penalty, I am first required to consider the parties' submissions. Mr OP's position is simply that the penalty imposed by the Committee does not reflect the gravity of the offending. He expressed himself in robust terms about "a lawyer's fundamental obligation as an officer of the court … to conduct themselves (sic) with scrupulous honesty".

[192] Mr OP described Mr VN's conduct as "a campaign of deceit advanced on multiple fronts over several years" and alleged that Mr VN "lied to his client, the Law Society and the Justice Department to try to hide his behaviour and protect his reputation". I observe that Mr OP tends to express himself in very forthright terms.

[193] Mr VN has chosen not to engage with this review process. He has given no evidence and filed no submissions. Although he is under no obligation to do so, the second Committee decision was adverse to him on numerous fronts and I find his lack of engagement surprising.

[194] I expressly requested an initial response from him by 28 July 2023 and requested specifically that Mr VN respond to Mr OP's November 2022 submissions regarding the withheld files.

[195] Mr VN is legally represented, albeit by counsel who I understand to be his employee.

[196] Mr VN has not responded, either directly or through counsel, other than by way of the brief submission referred to in paragraph [45]. That submission did not address penalty.

[197] Next, I am required to consider the nature and gravity of the conduct. Mr VN's professional failings in this matter are wide-ranging. They encompass issues of competence, diligence, client communication, fees, financial administration, file administration and, most importantly, probity in his professional dealings.

[198] Each of the factual findings made by the Committee and confirmed in this decision would warrant an unsatisfactory finding in isolation. Individually, at least two of them, the breaches of r 3 and the misleading or deceptive conduct, would warrant a finding "in the moderate range". Cumulatively, there is a considerable weight of adverse findings.

[199] I have already described Mr VN as appearing to have a cavalier approach to his professional responsibilities. It would not be a giant leap to use the terms wilful or reckless, although the Committee did not do so, albeit that misleading conduct is necessarily intentional.

[200] Ascertaining the impact of the conduct on the complainant is difficult. Mr OP's focus was originally on issues of alleged incompetence and failure to follow instructions. The Committee found in favour of Mr VN on those matters and these findings were confirmed on review.

[201] Mr OP has a great deal to say about the adverse impact of the unavailability of file information on his subsequent legal representation in his numerous Court cases. That is matter I have referred back to the Committee for reconsideration so is not a factor relevant to penalty here.

[202] There does not appear to be any issue of improper motivation. If anything, the impression I have is that by issuing his January 2018 invoice and declining to accept telephone communications, Mr VN might have been seeking to prompt Mr OP to take his custom elsewhere.

[203] Mr VN has, however, attempted to obscure the fact that work he claimed to have done for Mr OP had not been done. Attempting to mislead the Committee and this Office compounds the original misleading conduct.

[204] Taking all of the above into account, and with due respect to the Committee, the fine it imposed was manifestly inconsistent with a finding of unsatisfactory conduct in the "moderate range". It seems to imply an assessment of Mr VN as being merely hapless and needing to tidy up his mode of practice a little.

[205] Viewed objectively on the basis of all the material I have read and without the benefit of the local knowledge a standards committee can often bring to bear, Mr VN has the appearance of a professional accident waiting to happen and being seemingly oblivious to the fact.

[206] The NZLS Penalty Guidelines for Standards Committees recommend a fine of between $4,000 and $7,000 for matters considered to be within the "moderate range" of unsatisfactory conduct.

[207] I consider a fine of $5,500, being the mid-point in the "moderate" range, to be an appropriate starting point that accords with the Committee's assessment.

[208] I am required to consider any factors, including personal factors, in either aggravation or mitigation. Mr VN has not engaged. At the least, this indicates a lack of willingness either to acknowledge or to address his professional shortcomings as perceived by his peers.

[209] I consider Mr VN's obfuscatory attitude and his apparent unwillingness to acknowledge unethical behaviour to be an aggravating factor.

[210] As Mr VN has not engaged, he has not advanced any factors in mitigation. No such factors are evident from the papers.

[211] In all the circumstances, I consider a fine of $6,750 to be appropriate.

Costs

[212] I consider this matter to have been of average complexity. In accordance with the Costs Guidelines of this Office, a costs order of $1,200 would normally be made. In this instance, this review deals with matters that were not able to be dealt with finally at the first review hearing, which was a live hearing, principally again because of Mr VN's obfuscation.

[213] The review application was properly brought given the inadequacy of the penalties initially imposed, albeit that Mr OP attempted to bring into play fresh issues that were not properly the subject of the review application.

[214] In the circumstances, there will be a 50% uplift from the normal starting point. Mr VN will pay costs of $1,800 on this review.

Enforcement of costs order

[215] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Censure

[216] I consider it surprising that there was no discussion in the second Committee decision of the need for censure. I have already expressed the view that at least the breaches of r 3 and the misleading or deceptive conduct would individually warrant a finding "in the moderate range".

[217] Mr VN is hereby censured for:

(a) failures of competence and diligence in his work for Mr OP, including failing to undertake any work on Mr OP's bankruptcy matter and thereby failing to complete the work required to meet his obligations to Mr OP;

(b) misleading and deceptive conduct in representing that he had undertaken work on that matter that he had not in fact done.

Other orders

[218] There being no continuing rightful clam of lien at this point (regardless of whatever conclusions the Committee reaches on the issue to be reconsidered), Mr VN is ordered:

(a) to take a complete copy of all files in his possession or control relating to Mr OP's legal affairs and to deliver that copy to the NZLS Lawyers Complaints Service for the Committee;

(b) to deliver immediately to Mr OP or at his direction all files in his possession or control relating to Mr OP's legal affairs.

[219] Mr VN is also ordered to produce to the NZLS Lawyers Complaints Service for the Committee a copy of his legal aid contract in force as at June 2018.

Summary of orders

[220] Accordingly, Mr VN is:

(a) censured in the terms set out in paragraph [217] pursuant to s 156(1)(b) of the Act;

(b) ordered to cancel his January 2018 invoice for $28,750 pursuant to 156(1)(f) of the Act;

(c) ordered to cancel his 21 June 2018 invoice as to $5,337.50 of the total fee of $8,337.50 pursuant to 156(1)(f) of the Act;

(d) ordered to pay to the NZLS a fine of $6,750 pursuant to s 156(1)(i) of the Act;

(e) ordered to pay to the NZLS costs of $1,800 towards the cost of this review pursuant to s 210 of the Act;

(f) ordered to deliver the documents referred to in paragraph [218] in accordance with that paragraph pursuant to s 156(1)(h) and/or s 147(2) of the Act;

(g) ordered to produce to the NZLS Lawyers Complaints Service for the Committee a copy of his legal aid contract in force as at June 2018 pursuant to s 147(2) of the Act.

Publication

[221] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification. This is the normal practice of the Legal Complaints Review Officer.

DATED this 10th day of October 2023

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FR Goldsmith
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 OP as the Applicant

Mr VN as the Respondent
Mr JQ as a representative for the respondent
[Area] Standards Committee [X]
New Zealand Law Society