

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 31

Ref: LCRO 95/2019

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

CM

Applicant

AND

DL

Respondent

DECISION

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

Introduction

[1] Mr CM has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondent, Mr DL.

Background

[2] In 20[XB], Mr CM was sentenced to 15 months imprisonment, following his conviction on several charges of managing businesses whilst an adjudicated bankrupt.

[3] In 20[XX], Mr CM instructed Mr DL to represent him in relation to a number of bankruptcy related criminal charges.

[4] Mr DL was also engaged by Mr CM to carry out some preliminary work with purpose to ascertain whether Mr CM had prospect of successfully mounting an appeal of his 20[XB] convictions.

[5] On 12 January 2018, Mr DL wrote to Mr CM. In that correspondence, he:

- (a) attached an invoice for \$28,750, being Mr DL's fee to research, prepare and file an appeal; and
- (b) confirmed his understanding that Mr CM would secure funds from a third party, to provide funding to enable Mr DL to commence settlement negotiations with the Crown.

[6] Subsequent to forwarding this correspondence, Mr DL made request of Mr CM to deposit \$100,000 into his instructing solicitor's trust account, these funds to lay a foundation for a payment to be made to the Crown, in the event that attempts to settle debts established in the bankruptcy were successful.

[7] On 27 March 2018, an associate of Mr DL (Ms WN) wrote to Mr CM to advise that:

- (a) Mr DL did not consider that there were viable grounds to appeal his conviction,¹ as the sentence issued was "within range and in no way reflects an erroneous understanding of prior convictions"; and
- (b) confirmed that pending charges were proceeding to trial as Mr CM had not deposited settlement funds into Mr DL's trust account; and
- (c) Mr DL had declined to engage in further discussions with Mr CM as all issues of importance for the impending trial had been addressed.

[8] On 5 June 2018, Mr CM instructed new counsel.

[9] An associate of Mr CM, subsequently contacted Mr DL to advise him, that Mr CM sought a refund of a \$3,000 deposit paid to Mr DL.² Mr DL responded to this request to inform Mr CM that he had outstanding invoices with his firm.

¹ On occasions it was difficult to determine from the submissions of both parties, whether a particular submission was addressing matters arising from Mr CM's 20[XB] or 20[XX] convictions.

² As will become apparent later in this decision, the question as to whether Mr CM had paid \$3,000 to Mr DL, whilst seemingly uncontested by the parties during the course of the conduct investigation, became an issue in dispute following the review hearing.

[10] On 21 June 2018,³ Mr DL rendered Mr CM a further invoice for \$5,337.50. This invoice recorded a payment of \$3,000 as having been credited to the account.

The complaint and the Standards Committee decision

[11] Mr CM lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 23 October 2018.

[12] Mr CM makes complaint that:

- (a) the invoice rendered by Mr DL on 21 June 2018 in the sum of \$5,337.50 was “made up” by Mr DL, with purpose to enable Mr DL to access funds that Mr CM had paid to Mr DL’s account; and
- (b) requests of Mr DL to provide a copy of Mr CM’s file had not been complied with; and
- (c) Mr DL had not been authorised to complete any work that was not covered by legal aid; and
- (d) Mr DL had been given clear instructions not to proceed with any work on a possible appeal of the 20[XB] convictions, until an affidavit had been obtained from a court bailiff; and
- (e) in the event of that affidavit being obtained, this would ensure that legal aid would cover any future costs of representation; and
- (f) Mr DL had made errors in the presentation of the court bailiff’s affidavit; and
- (g) Mr DL had offered to negotiate a settlement of Mr DL’s insolvency with the Ministry of Business, Innovation and Employment (MBIE); and
- (h) over a period of 18 months, Mr DL had taken no steps to work on the insolvency matter; and
- (i) as a consequence, Mr DL was ill-prepared to advance his position before the court in the 20[XX] trial; and
- (j) Mr DL had failed to competently advance a bail application for him in the 20[XX] court proceedings;

³ Whilst the invoice was dated 21 June 2018, it was forwarded to Mr CM on 5 July, 2018.

- (k) Mr DL failed to provide competent representation in the 20[XX] trial; and
- (l) his decision to plead guilty to reduced charges in the 20[XX] trial, was taken in circumstances where he had not been fully informed by Mr DL of the consequences; and
- (m) following his conviction, Mr DL had failed to follow instructions to appeal the conviction; and
- (n) incorrect information had been presented to the sentencing judge.

[13] Mr CM forwarded further correspondence to the Complaints Service on 8 December 2018.

[14] In that correspondence, Mr CM submitted that:

- (a) Mr DL had breached the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Trust Account Regulations) and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) multiple times in his dealings with Mr CM; and
- (b) Mr DL had been unable to provide documentation which recorded that Mr CM had authorised him to deduct funds from monies held; and
- (c) Mr DL should provide evidence of the date that funds were deposited into a trust account, and confirm that the date funds were withdrawn, corresponded with the date of the 21 June invoice he had provided to Mr CM; and
- (d) it was his view, that Mr DL had not deposited funds into a trust account, and had not obtained Mr CM's approval to deduct funds; and
- (e) funds provided to Mr DL were provided with purpose for him to cover work in respect to settling his insolvency, not work on a court case.

[15] Mr DL responded to Mr CM's complaint on 18 January 2019.

[16] He submitted that:

- (a) Mr CM's account of events was inaccurate and consistent with a history Mr CM had exhibited of being persistently untruthful; and

- (b) the invoice rendered on 21 June 2018 was for a modest amount, and work completed included obtaining the file, viewing extensive documents, taking instructions and meeting with a witness on three occasions; and
- (c) the invoice forwarded was accompanied by correspondence sent to Mr CM that clarified the work that had been done; and
- (d) Mr CM's file from his previous lawyer had been uplifted promptly; and
- (e) correspondence forwarded to Mr CM on 12 January 2018, confirmed Mr CM's instructions that Mr CM would pay for preliminary work to be completed on the file, specifically with purpose to determine as to whether it was worthwhile to advance an appeal; and
- (f) that correspondence confirmed that if grounds for an appeal were established, attempts would be made to secure a legal aid grant at that point; and
- (g) further correspondence to Mr CM of 16 February 2018, confirmed a fee of \$25,000 plus GST for preliminary work on Mr CM's appeal matter; and
- (h) correspondence of 27 March 2018 recorded that considerable work had been done in scoping grounds for Mr CM's appeal; and
- (i) a full review of Mr CM's bankruptcy file had been completed; and
- (j) difficulties with advancing a bail application arose as a consequence of an inability to locate any person who would be prepared to accommodate Mr CM for any period of time; and
- (k) a competent and detailed bail application was advanced on Mr CM's behalf; and
- (l) Mr CM had received full disclosure and pleas entered were consistent with his admissions and instructions; and
- (m) allegation that Mr DL had failed to follow instructions in appealing his conviction must be measured against Mr DL's assessment that Mr CM's sentence was within range and unassailable.

[17] The Standards Committee identified Mr CM's complaints as being that Mr DL had:

- (a) concocted the invoice of 21 June 2018 in order to access funds that would otherwise be refunded; and
- (b) failed to follow instructions by commencing work on a matter despite Mr CM's request not to do so until an affidavit had been obtained; and
- (c) offered to negotiate a settlement of Mr CM's bankruptcy, despite Mr CM's assertion that he had been "wrongly" bankrupted; and
- (d) failed to obtain a copy of Mr CM's bankruptcy file from MBIE; and
- (e) made errors in the drafting of an affidavit; and
- (f) had acted incompetently in advancing a bail application; and
- (g) had acted incompetently in representing Mr CM at trial; and
- (h) had failed to provide files despite repeated requests; and
- (i) declined to accept phone calls from Mr CM from mid-December 2018 onwards, and had been reluctant to engage with him throughout the retainer.

[18] The Standards Committee summarised the focus of its investigation as being an inquiry into whether Mr DL had breached any of the professional obligations owed to Mr CM.

[19] The Standards Committee delivered its decision on 24 May 2019.

[20] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[21] In reaching that decision the Committee concluded that:

- (a) Mr DL's correspondence of 12 January 2018 clearly detailed the initial steps he was intending to take; and
- (b) an application for legal aid would require supporting evidence of the merits of the proposed appeal which the client would need to fund privately in the first instance; and
- (c) Judge [AB] had made strong judicial criticisms of Mr CM and his ability to objectively present evidence; and

- (d) it was Mr DL's opinion that Mr CM's sentence was within range and unassailable; and
- (e) files had been provided to Mr CM's new lawyer; and
- (f) Mr CM had been informed that whilst his phone calls were not assisting in advancing matters, he was free to continue to raise any concerns in writing; and
- (g) Mr CM's complaint largely concerned the competence of Mr DL in advancing Mr CM's criminal defence; and
- (h) the more appropriate forum for Mr CM to advance concerns that Mr DL had failed to provide him with competent representation, was by way of appeal; and
- (i) the Committee did not consider allegations of a lack of competence to be founded; and
- (j) it did not consider that Mr DL had fabricated an invoice.

[22] In summary, the Committee concluded that it was not established that Mr DL had breached any obligations owed to Mr CM.

Application for review

[23] Mr CM filed an application for review on 10 July 2019. The result sought is for the outcome of the review to be, as he describes it, "in his favour".

[24] Mr CM submits that:

- (a) he had not instructed Mr DL to pursue any appeals; and
- (b) Mr DL could provide no letter of engagement to support contention that he had been asked to progress an appeal; and
- (c) he has seen no written evidence to give indication that Mr DL had ever made contact with MBIE to follow-up on his insolvency matters; and
- (d) nor is there evidence of Mr DL having secured Mr CM's authority to obtain information from MBIE; and
- (e) he had specific grounds which he considered would prove successful in advancing an appeal; and

- (f) there was no legal value in endeavouring to try and settle his bankruptcy; and
- (g) Mr DL was unable to provide evidence of funds received from Mr CM being deposited to an account;
- (h) nor could he provide evidence of work said to have been completed by him; and
- (i) Mr DL unfairly used the sentencing notes of Judge [AB] to attack Mr CM's credibility in advancing his conduct complaint against Mr DL; and
- (j) Mr DL had failed to competently represent him in the 20[XX] trial; and
- (k) Mr DL had never been instructed to negotiate a deal with MBIE; and
- (l) Mr DL failed to competently advance his bail application.

[25] Mr DL was invited to comment on Mr CM's review application. He elected not to do so.

Hearing

[26] The hearing proceeded by way of a teleconference hearing.

[27] On the morning of the hearing, Mr CM advised that he wished to have counsel represent him. He sought an adjournment.

[28] The adjournment was declined. A brief note was issued to the parties, providing reasons for the decision to decline the adjournment application.

[29] Mr CM's counsel, Ms [KT], represented Mr CM at the hearing.

[30] Both parties were in attendance.

Nature and scope of review

[31] 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

⁴ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[32] 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.

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

- (a) Consider all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

Discussion

[34] The issues to consider on review are:

- (a) Was the Committee’s obligation to conduct a fair and independent investigation, compromised by placing reliance on the decision of Judge [AB]?
- (b) Did the Committee identify and address all of the issues of complaint raised by Mr CM?

⁵ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (c) Did Mr DL fail to competently represent Mr CM in the 20[XX] proceedings; and
- (d) did Mr DL fail to follow instructions to appeal the 20[XX] conviction; and
- (e) did Mr DL carry out, and charge for, work on investigating prospects of success in appealing Mr CM's 20[XB] convictions, when Mr CM's strict instructions had been to refrain from working on that matter unless a grant of legal aid was secured; and
- (f) did Mr DL fail to return Mr CM's files; and
- (g) did Mr DL represent that he had made comprehensive enquiries of MBIE in respect to investigating Mr CM's bankruptcy matters, when he had taken minimal steps to make enquiries of MBIE; and
- (h) did Mr DL manufacture an invoice with purpose to access funds that Mr CM had deposited; and
- (i) did Mr DL fail to deposit funds received to a trust account, and did he access those funds in the absence of authority to do so.

Was the Committee's requirement to conduct a fair and independent inquiry, compromised by placing reliance on the decision of Judge [AB]?

[35] The decision referenced by Mr DL was a decision issued by Judge [AB] in the [City] District Court on [XX] March 20[XB].

[36] Mr DL says he was instructed by Mr CM to explore possibility of appealing his 20[XB] convictions.

[37] Judge [AB]'s decision was extremely critical of Mr CM. The decision presents as a stinging denunciation of Mr CM's credibility as a witness.

[38] Mr CM argues that Mr DL's reference to Judge [AB]'s comments were irrelevant to the question as to whether his complaints against Mr DL had been established. He considered that Mr DL referenced the historical decision with purpose to undermine his credibility.

[39] Whilst I accept that Mr DL is within his rights to argue that Mr CM is unreliable, I have some concerns as to whether Judge [AB]'s robust decision should have been given consideration when determining Mr CM's specific conduct complaints.

[40] Judge [AB]’s decision is so vigorously critical of Mr CM (“[REDACTED]”) that it is difficult to see how a Committee on reading that decision, would not find it challenging to put the impression it would likely have formed that Mr CM was a flawed and compulsively dishonest individual, to one side such as to enable it to bring dispassionate judgement to its assessment of the specific conduct complaints it was being asked to consider.

[41] That said, the task of disregarding material which is manifestly prejudicial, whilst difficult, is not one that is beyond the capability of experienced Committee members well versed and experienced in understanding the need to ensure that their inquiry process is fair and even handed, and follows, as required, accepted principles of natural justice.⁶

[42] As a protective jurisdiction, legal disciplinary investigations have different functions and processes to criminal and civil proceedings.

[43] A Standards Committee may receive in evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not the statement, document, information, or matter would be admissible in a court of law.⁷

[44] But it is not the case, as noted in an English disciplinary decision, that “anything goes” such that a paper dart thrown in a window by someone outside could be taken as evidence of anything which “chanced to be written on it”.⁸

[45] Admissibility is generally determined by relevance.

[46] Mr DL argues that he was entitled to produce and rely on the court decision, on the basis that the evidence of the decision was analogous to that of propensity evidence.

[47] In advancing this argument, Mr DL’s approach reflects, in my view, an understanding of process that is more applicable to the traditional adversarial system common to criminal and civil proceedings, than to that of a disciplinary inquiry.

[48] The argument is that as Mr CM was found by the court in 20[XB] to be an unreliable witness, that should be given weight when assessing his credibility in respect

⁶ Section 142(1) of the Act.

⁷ Section 151(1) of the Act.

⁸ *Re A Solicitor* [1997] PNLR 288 (EWHC) at 292.

to the 2018 complaints. Mr DL says as much, when he comments that Mr CM's 2018 complaints "continue in the same vein".⁹

[49] It has been noted, that "procedural fairness or natural justice remains perhaps the greatest factor in determining whether or not a tribunal will admit evidence notwithstanding that it is not bound by the rules of evidence".¹⁰

[50] In expressing concern as to the desirability of the Standards Committee giving weight to the decision of Judge [AB], I do not suggest that the Committee was precluded from considering the decision at all. Rather, I consider it important that if the Committee was to attach relevance to the decision, it was important that the Committee identify why it had considered the decision relevant, and to clarify how the decision had application to the particular conduct issues under investigation.

[51] Considered in isolation, without clarification, explanation, or reference to specific elements of the conduct complaints, Judge [AB]'s decision is a cautionary warning that Mr CM cannot be relied on to provide accurate account of events.

[52] Attention then turns to the weight, if any, the Committee gave to the court decision.

[53] The Committee's decision commences with summary of the background to the complaints and explanation of the parties' respective positions. The decision then proceeds to identify Mr CM's complaints and provide summary of Mr DL's response.

[54] Having then identified what the Committee considered to be the relevant conduct rules engaged by the complaints, the Committee provides explanation for its conclusion that Mr DL had not breached any professional obligations in the course of acting for Mr CM.

[55] Included in the factors listed by the Committee was observation that "Judge [AB] made strong judicial criticism of Mr CM and his ability to objectively present evidence".¹¹

[56] The Committee does not provide clarification as to why it considered the reliance on the judge's decision to be relevant or pertinent to its consideration of a particular element of Mr CM's complaints.

⁹ Mr DL, correspondence to Complaints Service (18 January 2019).

¹⁰ Scott Maclean "Evidence in Legal Profession Disciplinary Hearings: Changing the Lawyers' Paradigm" (2009) 28(2) UQLJ 225 at 238–239.

¹¹ Standard Committee decision (24 May 2019) at [15](c).

[57] Left unexplained, the Committee's stark reference to the fact that it had "noted" Judge [AB]'s decision as one of the factors it considered relevant to its conduct investigation, can only be interpreted as the Committee having concluded that Mr CM's difficulties in objectively presenting evidence in his 20[XB] trial, had a "broad brush" relevance to the 2018 complaints enquiry.

[58] The inference that can be reasonably drawn from the Committee's decision to cite Judge [AB]'s decision as a factor in its reasoning, is that the Committee had concluded that Mr CM's 20[XB] evidence was shrouded in a pall of such dishonesty, that this previous history of unreliability could be properly taken into account when addressing the conduct complaints.

[59] I do not wish to be unfair to the Committee, and I acknowledge that to draw conclusion that the Committee was sceptical of all of Mr CM's evidence would be unfair to the Committee, but in the absence of qualification or explanation, it is difficult to speculate on what weight was given to the judge's decision.

[60] The Committee's decision is, in my view, compromised by referencing, without explanation, Judge [AB]'s decision.

[61] There is strength in Mr CM's argument that he was entitled to have his complaints addressed on their merits without any hint or suggestion that the Committee had prejudged him.

[62] As I have noted, it is difficult to determine what weight the Committee gave to the judge's decision, but it clearly gave it some weight.

[63] I consider the Committee's decision to reference the Court decision unnecessary when the nature of Mr CM's complaints are examined.

[64] Whilst inevitably the process of advancing and responding to complaint frequently engages an assessment of credibility, and not surprisingly Mr DL and Mr CM have conflicting views as to what happened in the course of the retainer, the nature of Mr CM's complaints is such a number of those complaints can be fairly and conscientiously scrutinised by reference to evidence that is independent of the views or opinions of either Mr CM or Mr DL.

[65] For example, Mr CM complains that Mr DL failed to do work that he was instructed to do (across a number of matters) and charged for work that he hadn't done.

[66] Accusation that work was not done is most constructively resolved by an examination of what was done.

[67] But in the absence of evidence of the Committee taking steps to obtain Mr DL's files, it inevitably is forced to rely on Mr DL and Mr CM's recollection of events.

[68] In those circumstances, Mr CM's concern that he was unfairly tarred by the Committee's acknowledgement that it had taken Judge [AB]'s decision into account is understandable.

[69] Mr CM considers that he did not receive the benefit of fair process.

[70] I have given consideration to returning the file to the Committee with a direction to reconsider all of the complaints, but have elected not to do so.

[71] It is the task of a Review Officer to approach each review with fresh eyes, and to bring robust and independent judgement to the process of review. I consider that I am able, particularly with having the benefit (not enjoyed by the Committee) of hearing from the parties, to address all the matters raised on review.

[72] In doing so, I disregard for the reasons explained, the decision of Judge [AB].

Did the Committee identify and address all of the issues of complaint raised by Mr CM?

[73] The Committee considered that Mr CM's complaint largely focused on concerns regarding Mr DL's competence in conducting his criminal defence in the 20[XX] proceedings.

[74] To the extent that the Committee addressed other complaints raised, the Committee noted that it considered that Mr DL had completed work on assessing grounds for an appeal, and did not conclude that Mr DL had fabricated his invoice of 21 June 2018.

[75] The Committee noted that its failure to address each and every element of Mr CM's complaint, was not to be construed as indication of the Committee failing to consider all of the complaints.

[76] I accept that Mr CM was anxious to ensure that all grounds of complaint were thoroughly traversed. There is, to a degree, some overlap between the elements of Mr CM's complaints.

[77] Mr DL did not have his file available to reference at the hearing. That was not helpful. He had, perhaps understandably with the elapse of time, some difficulty recalling the specifics of the instructions he had received.

[78] Mr DL first took instructions from Mr CM in 2017. Those instructions were to defend criminal proceedings that were before the [City] District Court.

[79] What appears to have happened after the conclusion of the 20[XX] trial, is that Mr DL and Mr CM discussed a number of legal matters that Mr CM wished to address including:

- (a) His representation on further criminal charges that were scheduled to be heard in the [City 2] District Court; and
- (b) his prospects of appealing the 20[XB] convictions; and
- (c) his prospects of appealing the 20[XX] sentence; and
- (d) possibility of negotiating a settlement with MBIE regarding historical bankruptcy matters; and
- (e) action to be taken in respect to an injury Mr CM had suffered whilst in the care of the Corrections Service.

[80] It does not appear to be the case that Mr CM's instructions to address this smorgasbord of matters was the subject of formal clarification in a letter of engagement, nor do I see indication of Mr DL providing any indication to Mr CM of what his likely costs would be for conducting an appeal of the 20[XX] sentencing, conducting negotiations with the Crown concerning the impending trial in the [City 2] District Court, or for work engaged in investigating possibility of a claim against the Department of Corrections.

[81] Rule 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 details of the basis on which the fees will be charged, and when payment of fees is to be made.

[82] Rule 3.5A provides that a barrister sole must, prior to undertaking significant work under a retainer, provide the client with a copy of the client care and service information set out in the preface to the Rules.

[83] Rule 3.6A provides that a barrister sole is in compliance with r 3.4A and r 3.5A, in circumstances where the barrister sole has previously provided a client with the information required, and the information remains accurate.

[84] It is clear from Mr DL's correspondence to Mr CM of 12 January 2018, that each of the matters described at [79] above, had been discussed, (it appears extensively), at a meeting between Mr DL and Mr CM.¹²

[85] Mr DL's correspondence of 12 January 2018 provides a summary of the issues discussed at the meeting. His correspondence begins with the explanation "further to our long meeting at MECF and the list of activities identified".¹³

[86] Mr DL's correspondence specifically references:

- (a) steps to be taken in regard to the matter of his historical conviction, including request to uplift files from Mr CM's previous lawyer; and
- (b) Mr DL's intention to obtain an affidavit to support a possible appeal; and
- (c) confirmation that Mr CM would "pay privately" to "scope" and prepare possible grounds for the historical appeal; and
- (d) advice that Mr DL did not wish to be "out of pocket" for work done assessing prospects of success for a possible appeal; and
- (e) confirmation that a legal aid application would be completed if grounds for an appeal were established but "not before"; and
- (f) an estimate to progress preparatory work for the appeal in the sum of \$25,000 plus GST;¹⁴ and
- (g) request of Mr CM to provide a copy of his medical records; and
- (h) reference to Mr CM confirming availability of funds to enable settlement negotiations to progress in respect to Mr CM's insolvency matters.¹⁵

¹² Mr CM suggested at the hearing, that Mr DL's attendances on him at the prison had been relatively brief. I prefer the evidence of Mr DL. His follow-up correspondence gives indication of a broad range of matters having been traversed at the prison meeting.

¹³ MECF is reference to the Mount Eden corrections facility.

¹⁴ I assume this to be work on an appeal of the 20[XX] conviction.

¹⁵ It remains unclear, and the evidence advanced at hearing did not clarify, whether the \$100,000 payment was required to assist in resolving bankruptcy issues with MBIE, or funds to assist in negotiating a possible settlement of the trial matters scheduled to proceed in 20[XZ].

[87] Mr CM provides no evidence of him having raised objection to any of the matters raised in Mr DL's correspondence of 12 January 2018.

[88] Having carefully considered the matters that Mr DL had undertaken to work on for Mr CM, and referencing those matters to the complaints addressed by the Committee, I consider that the Committee should properly have turned its attention to, and addressed in its decision, two issues, being:

- (a) allegation that Mr DL had failed to properly account for monies received from Mr CM; and
- (b) allegation that Mr DL had failed to undertake the work he said he had completed on advancing negotiations with MBIE.

[89] I have noted that the Committee recorded that its failure to refer to a particular ground for complaint was not to be construed as evidence of it having overlooked the complaint, however, in my view, the issues identified above were of sufficient importance that the Committee was required to address those issues in its decision, rather than addressing those matters by simple reference to it having given consideration to all issues.

[90] I will address those two issues in this decision.

Did Mr DL fail to competently represent Mr CM in the 20[XX]proceedings?

[91] Mr CM raises a number of concerns regarding the representation Mr DL had provided to him in 20[XX].

[92] He complains that Mr DL failed to keep him informed, was ill prepared to advance a competent defence, and had neglected to take steps to obtain information from MBIE that would have assisted in advancing his defence. He is also critical of Mr DL for failing to sufficiently inform him as to the consequences of agreeing to plead guilty to some of the charges and contends that Mr DL mismanaged a bail application.

[93] At hearing, Mr CM provided a broader context for his complaints that Mr DL had failed to competently represent him. His submissions at hearing focused on advancing an overview as to how he considered Mr DL had let him down, rather than focusing on the specifics of the individual complaints that he had addressed in the submissions filed.

[94] Viewed through the prism of this broader perspective, it became clear that Mr CM retained a firm conviction that Mr DL's failure to conscientiously follow

instructions to obtain information from MBIE which would, in Mr CM's view, have conclusively established that he had been bankrupted on the back of flawed information, had consequences for, and contributed to, Mr CM's difficulties in adequately defending himself in the court proceedings.

[95] In the course of the hearing, Mr CM endeavoured to bolster his argument by suggesting that lawyers whom he had instructed after Mr DL, had expressed concern at the paucity of the information that was contained in the files obtained from Mr DL, this to suggest that Mr DL had done very little, and had represented him poorly.

[96] Mr NB, who took over from Mr DL and represented Mr CM in proceedings that were scheduled to proceed in 20[XZ] but were heard in [XI] was included in this camp, as was Ms KT who advised the LCRO on the morning of Mr CM's review hearing that she had been instructed to appear for Mr CM at the review hearing.

[97] Mr CM provided no evidence from his lawyers to support his suggestion that they had concerns.

[98] At hearing, Ms KT, appropriately and sensibly, would not be drawn into confusing her role of advocate with that of witness.

[99] I did not find this expansive argument of assistance in clarifying Mr CM's specific concerns regarding the representation he had received from Mr DL.

[100] Mr DL had no involvement with the 20[XB] proceedings. It was his recollection that Mr CM had been critical of the performance of counsel who had represented him in the 20[XB] proceedings.

[101] Nor do I consider that responsibility for the problems Mr CM encountered in his 20[XI] proceedings can be fairly laid at Mr DL's door. Mr CM instructed fresh counsel in June 2018. Responsibility for conduct of the 20[XI] proceedings rested with his then counsel. His new counsel had ample time to address any perceived shortcomings in Mr CM's defence.

[102] I agree with the Committee that the appropriate forum for Mr CM to mount argument that the outcome of his 20[XX] criminal case was materially compromised as a consequence of Mr DL's failure to adequately represent him, was by advancing an appeal in the Court.

[103] In the event that Mr CM was successful with his appeal, and the Court concluded that his case had been materially compromised by failings on the part of his counsel, that would provide reasonable grounds for Mr CM to seek to have the

Complaints Service revisit his complaint that he had not been competently represented by Mr DL.

Did Mr DL fail to follow instructions to appeal the 20[XX] conviction?

[104] Mr CM says that Mr DL forwarded him correspondence on 16 February 2018, advising that he had prepared papers for the “recent sentencing”.

[105] However, he says that he was then advised by Mr DL on 27 March 2018, that there were insufficient grounds to give confidence that an appeal would be successful. Mr CM complains that this advice was given in circumstances where Mr DL had failed to take steps to establish whether it was worthwhile to proceed with an appeal. He is critical of Mr DL’s failure to obtain an audio record of the hearing.

[106] There is insufficient evidence advanced by Mr CM to support conclusion that Mr DL failed to competently advise him in respect to the proposed appeal of the 20[XX] convictions.

[107] I accept that Mr CM was concerned that Mr DL’s advice to him on 16 February 2018 that appeal papers had been prepared for the recent sentencing was followed shortly thereafter with advice on 27 March 2018 that Mr DL had concluded that there were no reasonable grounds for advancing the appeal. However, I do not consider that Mr DL’s advice to Mr CM that he had concluded that his grounds for appeal were not strong, is properly characterised as Mr DL failing to follow instructions to advance the appeal.

[108] I accept Mr DL’s submission that he had concluded on reviewing the judge’s sentencing notes, that any errors that had been made in the nature of that alleged by Mr CM, if established, would not have provided grounds for a successful appeal.

[109] Mr DL’s indication that he had prepared papers for the appeal did not undermine his subsequent advice that he had concluded that the appeal had little prospect of success. It is not uncommon for a lawyer to change their view on the merits of a particular case as the case evolves.

Did Mr DL fail to provide Mr CM with files when requested?

[110] Following the hearing, Mr DL clarified that he was still retaining the files he had uplifted from Mr [EO].

[111] He advised that these files would be released to Mr CM on payment of his account.

[112] This issue should be further considered by the Committee.

Did Mr DL carry out, and charge for, work on investigating prospects of success in appealing Mr Andrew's 2013 convictions, when Mr CM's strict instructions had been to refrain from working on that matter unless a grant of legal aid was secured?

[113] Mr CM submits that he gave clear instructions to Mr DL to refrain from taking any steps to complete work on advancing an appeal against his 20[XB] convictions. He says that he made it abundantly clear to Mr DL, that if an appeal was to be proceeded, it would only be on the basis that he had secured a grant of legal aid to finance the appeal.

[114] Underpinning this complaint, was argument that Mr DL had inappropriately taken funds in the sum of \$3,000 that Mr CM had paid to Mr DL, and recorded those funds in an invoice provided to Mr CM, as representing part payment to an account rendered for work completed on the 20[XB] appeal.

[115] Mr CM made request of Mr DL to return these funds.

[116] Mr DL's correspondence to Mr CM of 12 January 2018, as previously noted, provides a summary of what Mr DL described as "activities identified", following a lengthy meeting with Mr CM at the Mount Eden corrections facility.

[117] In his correspondence, Mr DL confirms his intention to meet with a court bailiff. He notes that "as discussed – the appeal process is about putting all the building blocks together to see if we can launch an appeal. You have confirmed that you will pay privately to 'scope' and prepare the possible grounds – this will ensure I am not out of pocket for the work done before we file a notice of appeal and prospects of success".

[118] Mr DL goes on to say, that "once we have the grounds then a legal aid application will be completed – not before. I don't want to be in the position of spending many days in preparation to find this matter can't proceed and we can't file. On that basis an interim invoice is attached which takes into account the funds already provided. I have met with a private investigator who I want to do some preliminary inquiries – his costs are included in my fees".

[119] An invoice is provided. That invoice makes no reference to funds held of \$3,000, being deducted from the fee charged.

[120] Mr DL's understanding of the basis on which work would be done in respect to a potential appeal of the 20[XB] convictions seems clear. It is his expectation and understanding that Mr CM would privately pay the costs of scoping the appeal. Mr DL

emphasises that he is not prepared to find himself out of pocket for work spent on completing the preparatory work and he reinforces that no application will be made for legal aid unless grounds are established to advance an appeal.

[121] Mr CM provides no evidence to suggest that he challenged, at any point, Mr DL's understanding of the basis on which work would proceed.

[122] I do not conclude that Mr DL acted in conflict with instructions received when he proceeded on an understanding that Mr CM would be liable for costs incurred in traversing the possibility of advancing an appeal.

[123] However, whilst I am satisfied that Mr DL was instructed to explore possibility of appealing the 20[XB] convictions, and am persuaded that he provided clear instructions to Mr CM that he would charge for preliminary work, the Committee's examination of this aspect of Mr CM's complaint should, in my view, have sought evidence of the work that was done by Mr DL, rather than simply reaching conclusion that Mr DL had "completed work on Mr CM's file in assessing grounds for appeal and preparing his defence".¹⁶

[124] There is no evidence on the file to substantiate Mr DL's assertion that he had done \$7,250 of work on the historical appeal matter, other than an incomplete, unsigned, affidavit.

[125] The affidavit presents as a simple straightforward account of efforts made by a court bailiff to serve a summons on Mr CM. It is difficult to see that lengthy attendances would have been required, to gather the minimal information contained in the affidavit. It is an affidavit that could be expected to have been promptly drafted by any lawyer.

[126] I think it would have been appropriate as part of the Committee's inquiry into complaint that the invoice had been "fabricated", to have sought evidence of the work that had been carried out in laying foundation for an account in excess of \$7,000.

Did Mr DL represent that he had made comprehensive enquiries of MBIE in respect to investigating Mr CM's bankruptcy matters, when he had taken minimal steps to make enquiries of MBIE?

[127] Mr CM made complaint that Mr DL had made representations that he had completed a significant amount of work on investigating the possibility of settling his

¹⁶ Standards Committee decision at [18].

bankruptcy matters, when it was his view that Mr DL had made little effort to progress these enquiries.

[128] In responding to this complaint, Mr DL said that a “full and complete review” of Mr CM’s file was undertaken, along with “numerous discussions with the Crown to resolve outstanding debts”.¹⁷

[129] There is no evidence on the file before me as to the work that was undertaken by Mr DL.

[130] The Standards Committee did not seek to obtain Mr DL’s file.

[131] Evidence of the work Mr DL had undertaken, being that he describes a process of fully reviewing files and conducting numerous telephone discussions, could be expected to be properly evidenced from the information on Mr DL’s files, including his time records and file notes.

[132] I consider this aspect of Mr CM’s complaint should be returned to the Committee, with direction that it obtain Mr DL’s files. This will allow the Committee to properly assess the extent of the work completed by Mr DL. The relevant files will be held by Mr CM’s current lawyer.

Did Mr DL fail to properly account for monies received from Mr CM?

[133] The Standards Committee did not address in its decision the question as to whether Mr DL had appropriately managed funds received from Mr CM.

[134] Throughout the progressing of the complaint, Mr DL had not, at any point, disputed that he had received funds from Mr CM.

[135] I cannot be certain as to whether the Committee overlooked this element of complaint that had been clearly signalled by Mr CM, or whether the Committee (in reliance on the decision in *R v Nakhla (No 2)*),¹⁸ had intended that this element of Mr CM’s complaint be included amongst those matters it identified it had addressed, but had not considered necessary to reference in its decision.

[136] Mr CM’s complaint that Mr DL had breached Trust Account Regulations, raises an important issue of professional conduct. It was, in my view, an issue that a Standards Committee should not have considered to have been appropriately

¹⁷ Mr DL, correspondence to Complaints Service (18 January 2019) at [9].

¹⁸ *R v Nakhla (No 2)* [1974] 1 NZLR 453 (CA) at 456.

addressed by general reference to it having given consideration to all aspects of the complaint.

[137] Mr DL practises as a barrister.

[138] In that capacity, he is not permitted to receive and hold funds from a client, and subsequently render an invoice in which funds held are credited to the sum owing.

[139] Funds paid to a barrister on account of fees must be lodged in the barrister's instructing solicitor's trust account.

[140] The issue as to whether Mr DL had appropriately managed funds received by having those funds deposited to his instructing solicitor's trust account, was overtaken following the hearing, by argument that no funds had been paid.

[141] Mr CM is emphatic he paid funds in the sum of \$3,000 to Mr DL. He says that the payment was made in cash.

[142] In the course of advancing his complaints, Mr CM did not provide clarification as to what specific work the \$3,000 payment was intended to be apportioned to. Rather, his complaint focused on accusation that Mr DL had received funds and later produced an invoice which credited the funds received to work recorded which Mr DL had not been authorised to complete.

[143] At hearing, Mr CM was invited to provide explanation for depositing funds in the sum of \$3,000 with Mr DL. If it was not his intention for those funds to be used as contribution to Mr DL's costs, what was his purpose in providing funds to Mr DL?

[144] Mr CM had difficulty providing explanation for his decision to put Mr DL in funds. He had to be pressed to provide explanation and when doing so, said that he had given Mr DL money so that Mr DL could settle various accounts for him.

[145] I did not find this explanation to be convincing. Putting to one side Mr CM's apparent difficulty in clarifying what was a straightforward matter, in the course of filing a number of submissions in the process of advancing his complaint, Mr CM has never made single reference to the \$3,000 paid to Mr DL as being monies paid to Mr DL to put Mr DL in funds so that he could settle accounts for Mr CM.

[146] Nor did Mr CM provide evidence of Mr DL ever having paid any accounts on his behalf.

[147] If Mr CM's argument was that he had given money to Mr DL to pay accounts and Mr DL had misappropriated those funds, it presents as surprising that Mr CM would not have spelt that out in the many occasions he has had to articulate his complaints against Mr DL.

[148] Mr CM has consistently argued that Mr DL was not authorised to charge him for any work done in respect to a possible appeal of the 20[XB] convictions.

[149] I also find this aspect of Mr CM's argument to be unconvincing. It presents as surprising that Mr DL would be expected to complete preliminary work but on the basis that he would not be remunerated for that work.

[150] Mr CM's attempted to overcome that apparent dilemma by argument that Mr DL's instructions were confined to securing an affidavit from a court bailiff that Mr CM considered would be instrumental to his prospects of mounting a successful appeal of the 2013 convictions.

[151] In arguing that the instructions were narrow, Mr CM appears to be suggesting that Mr DL would undertake the work of securing the affidavit without cost to Mr CM.

[152] I see no plausible explanation as to why Mr DL should agree to such a proposition.

[153] In correspondence to the Complaints Service of 8 December 2018, Mr CM sets out his concerns regarding the manner in which Mr DL had managed funds received.

[154] He complained that Mr DL had breached the Trust Account Regulations "multiple times in his dealings with me".

[155] In what was a lengthy exposition of this particular aspect of his complaints, Mr CM makes no reference to him having provided funds to Mr DL with intention that those funds be used by Mr DL to settle Mr CM's accounts.

[156] To the extent that he does provide explanation for depositing funds with Mr DL, Mr CM says at paragraph 4 of his 8 December 2018 correspondence, that "at his request I had given him funds in cash with clear verbal instructions that nothing was to be done until he obtained an affidavit from [City] bailiff, [SM]".

[157] Mr CM goes on to explain, that "in fact it was my bankruptcy I wanted challenged as it would have shown that MBIE had not acted in good faith and would provide a defence to my 20[XB], 20[XX] and 20[XZ] charges".

[158] In the course of responding to Mr CM's complaints, Mr DL has consistently maintained that funds received from Mr CM were funds paid to cover legal costs.

[159] In his correspondence to Mr CM of 12 January 2018, Mr DL renders an invoice to Mr CM and notes that the invoice "takes into account the funds already provided".

[160] Whilst the invoice rendered does not in fact record a credit to the fee of funds received, Mr DL's correspondence would give indication that Mr CM had put him in funds.

[161] On 27 March 2018, Mr DL's associate wrote to Mr CM.

[162] Amongst the issues addressed in that correspondence was a request Mr CM had made of Mr DL to purchase two phone cards to be couriered to Mr CM.

[163] Mr DL's associate responded to that request as follows:

Unfortunately, we are not in a position to fund your phone cards. We note the request you made recently to have DL purchase 2 x \$20 phone cards and send them by courier. DL declined your request – there are no funds of yours held by DL at present. DL did deposit \$50 into your prison account. We have already spent more than three times the work you wanted paid to scope out the appeal and more funds that were promised by you have not yet arrived.

[164] That correspondence would indicate that:

- (a) costs anticipated for scoping the appeal had been exceeded; and
- (b) expectation that Mr CM would provide "more funds" suggests that some funds had been received.

[165] On 14 June 2018, Mr CM's accountant emailed Mr DL to advise that Mr CM had concerns regarding the representation Mr DL had provided, and making request of Mr DL to refund what was described as a \$3,000 deposit made.

[166] Shortly after receipt of that email, Mr DL prepared a note for his personal assistant which recorded the following:

Can you prepare an invoice for CM 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 [EO] Our total to date is \$7250 plus GST of which he has paid – from memory \$3,000. Include in invoice promises he made to pay etc. This will tidy things up if there is a complaint. I will then send it to [J].

[167] On 5 July 2018, Mr DL forwarded correspondence to Mr CM. That correspondence attached an invoice. The invoice was dated 21 June 2018. Mr DL noted that the invoice related to Mr CM's appeal matter, and recorded a deposit of \$3,000 received.

[168] The invoice was rendered in the sum of \$7,250 (excluding GST). The sum of \$3,000, recorded in the invoice as a payment received, was credited to the fee charged, leaving a balance to pay of \$5,337.50.

[169] It is also important to note, that Mr DL had rendered an account to Mr CM on 12 January 2018 in the sum of \$28,750 (GST inclusive) for work described as "preparing grounds of appeal against conviction".

[170] It has been difficult on occasions when conducting this review, to identify and distinguish which particular work/ appeal is being discussed. But in carefully explaining as he does in his correspondence of 12 January 2018, the steps he proposes to embark on in scoping the possibility of advancing an appeal against the 20[XB] convictions, Mr DL at paragraph 6 of that correspondence clearly appears to be invoicing Mr CM for work he proposes to do on that matter. His subsequent invoice of 21 June 2018 appears to replicate the work earlier charged for, and appears to have been rendered by Mr DL in circumstances where he has overlooked the earlier invoice.

[171] In responding to Mr CM's complaint on 18 January 2019, Mr DL confirmed that his invoice rendered on 5 July 2018 "acknowledged \$3,000 received from Mr CM as a deposit for his appeal on the matter of his conviction – and covered work completed to date and in process".

[172] In the course of the hearing, Mr CM indicated that he was unable to specifically recall when he had made payment, but was emphatic that a cash payment had been made to Mr DL.

[173] Mr DL was similarly uncertain as to the circumstances in which he had received the \$3,000 payment. He noted that he "didn't recall receiving a cash payment", and that he would "have to check my bank record for that".

[174] When suggesting that he would need to check his bank records, Mr DL gave no indication that he was intending to ascertain as to whether funds had been paid into an instructing solicitor's trust account.

[175] Mr CM has consistently maintained, that funds (cash) were directly paid to Mr DL.

[176] Following the hearing, I issued a minute in which request was made of Mr DL to provide:

- (a) confirmation of the date funds in the sum of \$3,000 were received from Mr CM; and
- (b) details of the account to which those funds were lodged; and
- (c) details of the date that funds were withdrawn from that account; and
- (d) copies of any letters of engagement held in respect to Mr CM's matters; and
- (e) evidence of the date files were dispatched to Mr NB; and
- (f) confirmation of the date files acquired from Mr EO were forwarded to Mr CM.

[177] In his response to that request, Mr DL advised that;

- (a) he had no record of funds being received from Mr CM; and
- (b) Mr CM had phoned to advise he was depositing funds (and was at the bank in the process of doing that) but this representation appeared to be "fraudulent"; and
- (c) Mr CM had not paid him funds in cash at any time, and had not paid the invoice rendered; and
- (d) files had been forwarded to Mr NB on or around 5 July 2019; and
- (e) Mr EO's files had been received on 21 March 2018, and a copy of the files retained.

[178] Mr DL attached to his correspondence, a letter of engagement.

[179] Mr DL provide further clarification on matters relating to release of files and receipt of funds in correspondence to the LCRO on 26 January 2021.

[180] In that correspondence, Mr DL advised that:

- (a) Mr CM's files had been transferred from his office "around the same time"; and

- (b) in respect to the appeal filed, it was his practice not to transfer files until fees had been paid; and
- (c) he was prepared to assist Mr CM by photocopying and scanning the file retained, on the basis that Mr CM confirmed agreement to pay for work that had been completed, and to cover courier costs; and
- (d) suggestion from Mr CM that Mr DL had received cash from him, or held funds on his behalf, was “nonsense”; and
- (e) the file “noted payment based on Mr CM’s advice that he had – this was subsequently checked on this review process and no funds were deposited into a bank account”; and
- (f) the inquiry would be assisted, if Mr CM was able to provide evidence of which account funds had been paid to.

[181] Mr DL’s indication that he had never received funds from Mr CM, and his most recent explanation that Mr CM had phoned from a bank to report that he was depositing funds but did not do so, presents as surprising when Mr DL has never, from commencement of the conduct inquiry, suggested that he had not received funds from Mr CM. His latest explanation would, even if providing an accurate account of events, indicate that Mr DL had been somewhat cavalier in his management of Mr CM’s file.

[182] I am equally troubled as I have noted, by what I consider was an entirely unconvincing explanation provided by Mr CM at hearing as to the reason why he had paid Mr DL \$3,000. The best I can allow Mr CM, is that his implausible explanation that he had provided funds to Mr DL to enable Mr DL to settle various accounts, was an unwise attempt by Mr CM to divert attention from more likely explanation, being that if Mr CM had paid funds to a barrister, it could be logically assumed that funds paid were for purposes of covering the costs of legal services. Mr CM may have considered that this seemingly obvious explanation did not sit comfortably alongside his argument that Mr DL had completed work that he was not instructed to do.

[183] Nor is Mr CM’s explanation consistent with the explanation he provides in his correspondence to the Complaints Service of 8 December 2018, when he recorded at [4] that “... At his request I had given him funds in cash with clear verbal instructions that nothing was to be done until he obtained an affidavit from a [City] bailiff”. It is difficult to distil from these comments, any construction other than that if Mr CM had paid funds to Mr DL, it was with purpose that those funds be utilised to meet legal costs.

[184] Mr DL's contention that he had never received funds from Mr CM, must be considered in context of his response to requests made to refund funds.

[185] It would reasonably have been expected of Mr DL, that he would have, immediately on receipt of request for the return of funds that he says he did not hold, countered that request with indication that he was not holding funds.

[186] Mr DL had been alerted, well prior to receiving Mr CM's complaint, that Mr CM believed that Mr DL had his money.

[187] Whilst I have been critical of the explanation Mr CM provided as to the reason he says he put Mr DL in funds, I think it reasonable that Mr CM, when instructing his accountant to recover funds, would likely have advanced that request on the back of a then genuinely held belief, that he had paid monies to Mr DL.

[188] It is impossible, on the evidence before me, to discount possibility that Mr CM may have been genuinely mistaken in his recollection that he had paid money to Mr DL, but if allowance is made for the possibility that Mr CM was making in essence a fraudulent demand, it would be somewhat naive to conclude that Mr CM would not have recognised that if his request for refund was spurious, that Mr DL would have been immediately able to challenge Mr CM to provide evidence of funds having been paid.

[189] However, Mr DL did not respond to Mr CM's accountant with explanation that he has not received funds. Rather, he responds with indication that he has done a significant amount of work for Mr CM and will be preparing an invoice.

[190] In response to a question posed at the hearing as to whether funds received from Mr CM had been paid into a trust account, Mr DL advised, "no, this was payment received direct for work already completed". Mr DL emphasised that he was unable to recall having received a payment made in cash.

[191] It is helpful to summarise those occasions (referenced above) in which Mr DL has either acknowledged receipt of funds, or has failed in circumstances when it could be reasonably have been expected of him to do so, to challenge suggestion that he had received funds:

- (a) In January 2018 Mr DL renders an invoice which records in accompanying correspondence, his calculation of having "taken into account fees received".

- (b) Correspondence of 27 March 2018 which references “more funds” not having arrived.
- (c) Mr DL responds to request to refund monies with advice that he would prepare an invoice.
- (d) Mr DL instructing his PA to prepare an invoice in June 2018 with advice to his PA that he was in receipt of funds in the sum of around \$3,000.
- (e) An invoice being prepared which specifically records a payment of \$3,000 having been received.
- (f) Mr DL advising the Complaints Service that his invoice of 5 July 2018 acknowledged the sum of \$3,000 he had received from Mr CM.
- (g) Mr DL failing to advise at the review hearing that he had never received funds from Mr CM.

[192] A lengthy process of inquiry has worked its way to conclusion, with Mr DL consistently acknowledging that he had received funds from Mr CM.

[193] In arguing at last minute that he had never received funds from Mr CM, and, when doing so, criticising Mr CM for what he describes as fraudulent conduct, Mr DL presents as oblivious to the fact that his management of the financial aspects of the retainer appear to have fallen considerably short of what would be expected of a barrister competently managing a client’s file.

[194] It is difficult on review, to establish with certainty as to whether:

- (a) Funds were paid to Mr DL; or
- (b) Whether representations were made to pay funds.

[195] Mr DL was asked to provide a copy of his letter of engagement.

[196] The document he forwarded to the LCRO was of no assistance in clarifying the arrangements made with Mr CM.

[197] The document provided by Mr DL is a pro forma document, drafted in general terms to accommodate those circumstances in which Mr DL represents clients charged with criminal offences.

[198] The letter of engagement does not refer to Mr CM. It is not dated. It does not reference the range of matters that Mr DL was to undertake for Mr CM. It is not signed by Mr CM. The letter of engagement provided by Mr DL is not accompanied by any material that would confirm that Mr CM had been provided with a letter of engagement.

[199] In my view, the question as to whether Mr DL received funds should properly be returned to the Committee for further consideration. That further inquiry should also address whether, in the event it was determined that no funds had been received, Mr DL's conduct in representing that he was in receipt of funds, and drafting an account which recorded funds received, raised issue as to whether Mr DL had managed his practice in a manner that ensured that duties owed to his client were adhered to.

Conclusion

[200] The matter is to be returned to the Committee to consider the following:

- (a) Did Mr DL carry out work investigating possibility of settlement of Mr CM's historical bankruptcy matters; and
- (b) Did Mr CM pay funds in the sum of \$3,000 to Mr DL and, if so, did Mr DL manage funds received appropriately; and
- (c) If it is concluded that Mr DL did not receive funds from Mr CM, did Mr DL'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
- (d) was the fee charged by Mr DL for completing work on the historical (20[XB]) appeal fair and reasonable; and
- (e) was Mr DL required to release the files obtained from Mr EO, and
- (f) if it was determined that Mr DL was able to retain the EO files, is there evidence of Mr DL advising Mr CM of the basis upon which his files would be released?

[201] The Committee's findings are affirmed in respect to complaint that:

- (a) Mr DL had failed to represent Mr CM competently in the 20[XX] proceedings; and

- (b) Mr DL had not been instructed to complete preparatory work on exploring possibility of appealing the 20[XB] convictions; and
- (c) Mr DL failed to advance an appeal of the 20[XX] convictions.

Anonymised publication

[202] 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.

Decision

- (a) Pursuant to ss 209(1)(a) and 209(b)(i)–(ii) of the Lawyers and Conveyancers Act 2006, the Standards Committee is directed to reconsider the following issues:
 - (i) Did Mr DL carry out work investigating possibility of settlement of Mr CM's historical bankruptcy matters; and
 - (ii) Did Mr CM pay funds in the sum of \$3,000 to Mr DL and, if so, did Mr DL manage funds received appropriately; and
 - (iii) If it is concluded that Mr DL did not receive funds from Mr CM, did Mr DL'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 DL for completing work on the historical (20[XB]) appeal fair and reasonable; and
 - (v) was Mr DL required to release the files obtained from Mr EO, and
 - (vi) if it was determined that Mr DL was able to retain the EO files, is there evidence of Mr DL advising Mr CM of the basis upon which his files would be released?
- (b) In all other respects the decision of the Standards Committee is confirmed.

[203] In undertaking that reconsideration, the Standards Committee is to obtain Mr DL's files.

DATED this 9th day of March 2021

R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr CM as the Applicant
Mr DL as the Respondent
Waikato Bay of Plenty Standards Committee 2
New Zealand Law Society