

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

[2022] NZLCRO 085

Ref: LCRO 183/2021

**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**

**WB**

Applicant

**AND**

**XD**

Respondent

**DECISION**

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

**Introduction**

[1] Mr WB 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 XD.

**Background**

[2] In July 2020, Mr WB was charged with family violence offences.

[3] He was initially represented by a duty solicitor but subsequently engaged Mr XD.

[4] Mr WB appeared in court on 13 July 2020, at which time he entered guilty pleas to the charges. Bail conditions were varied, which enabled him, subject to conditions, to

return to his home. He was referred to restorative justice, and a report was required to be prepared and made available to the court prior to Mr WB's proposed sentencing date in early September 2020.

[5] A copy of the restorative justice report was made available to Mr XD on 31 August 2020, together with a copy of a provision of advice (PAC) report which had been directed by the court.

[6] Mr XD considered that there were aspects of the reports which presented as problematic for Mr WB. He was concerned at possibility that Mr WB could be facing a sentence of imprisonment.

[7] Mr XD emphasised the importance for Mr WB of him completing an anger management course.<sup>1</sup> Mr WB agreed with the approach suggested.

[8] Mr WB appeared in court on 8 September 2020, at which time his matter was adjourned to 16 October 2020. The presiding judge allowed the adjournment to afford Mr WB an opportunity to complete the anger management course and to enable him to provide the court with necessary information that could assist the court in giving consideration to an electronic sentencing option.

[9] Mr WB was anxious to ensure that the court was provided with a full understanding of the circumstances that had led to the incident at his home.

[10] Mr WB consulted a psychiatrist.

[11] In December 2020, Mr WB terminated Mr XD's retainer and instructed fresh counsel.

[12] Mr WB was subsequently sentenced to supervision and community work.

[13] Mr XD had, in the course of the retainer, rendered two invoices to Mr WB, for fees totalling (inclusive of GST and disbursements) \$4,002.

### **The complaint and the Standards Committee decision**

[14] Mr WB lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 11 February 2021. His complaint provided a comprehensive

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<sup>1</sup> In a second complaint filed by Mr WB (engaging Mr XD) which has also come before the LCRO by way of review, it was made clear that the Court had directed that the Court had issued a protection order on 13 July 2020, following Mr WB's entering of a guilty plea.

explanation as to the events which had transpired subsequent to his arrest, including account of his interactions with staff within the justice system.

[15] Concerns he identified regarding the representation he had received from Mr XD were that Mr XD had:

- (a) failed to present submissions to the court which adequately protected and promoted Mr WB's position; and
- (b) had failed to advance Mr WB's position on the basis of initial advice provided that a conviction could be avoided; and
- (c) had failed to promptly respond to indication from Mr WB of having obtained a psychiatrist opinion which would be helpful to Mr WB's case; and
- (d) had minimised the value of the psychiatrist report; and
- (e) had formed a view of Mr WB as being an emotional and volatile individual, without having evidence to support that view; and
- (f) had failed on occasions to promptly respond to requests; and
- (g) had instructed Mr WB's psychiatrist that Mr WB was resistant to attending an anger management course when that was not the case; and
- (h) had persistently failed to understand Mr WB's instructions and to promote Mr WB's position, such as to leave Mr WB with no option but to terminate the retainer; and
- (i) had failed to inform Mr WB as to the consequences of entering a guilty plea; and
- (j) had failed to discuss the issue of name suppression; and
- (k) had threatened Mr WB that a jail sentence was inevitable if his advice was not followed.

[16] Mr XD responded to the complaint on 19 April 2021. He submitted that:

- (a) on request being made of him by the duty solicitor to indicate as to whether he would be able to represent Mr WB, he had reviewed the

disclosure, the captioned summary and bail opposition, and confirmed his agreement to act; and

- (b) his attendances on Mr WB at court on 13 July 2020 were not peremptory in nature as indicated by Mr WB, but rather addressed a number of issues including discussion regarding the facts of Mr WB's case, a consideration of the police summary, discussion concerning plea options and the traversing of various options which would enable Mr WB to return to his home; and
- (c) in the course of Mr WB's second appearance on 13 July 2020, he had discussed with Mr WB issues relating to choice of plea, possibility of an application for a discharge without conviction, referral to restorative justice, a discussion concerning acceptance of responsibility, these discussions taking "well in excess of an hour"; and
- (d) Mr WB had made a thoughtful and informed decision in respect of his plea; and
- (e) the restorative justice report received was not particularly positive for Mr WB; and
- (f) his interactions with Mr WB had led him to form the view that Mr WB was struggling with accepting responsibility for the events that had led to the charges; and
- (g) he cautioned Mr WB against advancing submission that appeared to apportion blame for the incident to the victim; and
- (h) correspondence received from Mr WB in the course of progressing the matter (16 September 2020) clearly demonstrated that Mr WB had a good understanding and appreciation of the court process; and
- (i) a further court appearance on 16 October 2020 was lengthy and engaged ongoing discussions with Mr WB; and
- (j) he became concerned that Mr WB was entrenching himself in a position that the court would not consider to be indicative of Mr WB indicating either necessary remorse for his actions, or a receptiveness to a rehabilitative process; and

- (k) Mr WB, in his demeanour and approach, could come across as aggressive and intolerant of others' views, this perception reinforced by reports that had been prepared for the court; and
- (l) the outcome achieved by Mr WB after changing his legal representation was, in Mr XD's view, significantly influenced by the work that Mr XD had done on Mr WB's behalf; and
- (m) a considerable amount of time had been spent with Mr WB traversing plea options; and
- (n) he had not disregarded the evidence provided by the psychiatrist, but rather provided Mr WB with his view as to the relevance and effectiveness of that evidence; and
- (o) he had made his best efforts to keep Mr WB "grounded in the realities of the court process and the timeframes involved"; and
- (p) he had acted at all times in accordance with Mr WB's instructions; and
- (q) at the end of the day, he was unable to bring his representation of Mr WB to conclusion as a consequence of Mr WB terminating the retainer; and
- (r) he had not discussed name suppression with Mr WB as Mr WB had not indicated any sensitivity in respect of the possibility of publication and no order had been made following the first appearance in which Mr WB was represented by the duty solicitor; and
- (s) whilst it was correct that on occasions, he had not responded immediately to Mr WB, he had responded when he considered there was need to provide response in a timely manner; and
- (t) he had never threatened Mr WB with prospect of a jail sentence if his advice was not followed; and
- (u) Mr WB had received a fully itemised and substantially discounted account; and
- (v) Mr WB had been a difficult client to deal with.

[17] Mr WB provided a comprehensive response to the reply Mr XD had provided to his complaint on 31 May 2021. I do not propose to address all the submissions raised.

To some extent there is a degree of overlap with submissions filed earlier. Mr WB submitted that:

- (a) Mr XD had not represented him in the first court appearance, but had charged him three units for an appearance; and
- (b) he was unaware that Mr XD would be representing him until the second court appearance; and
- (c) he held to his view that Mr XD had only spent a modest amount of time with him discussing the case at the first meeting; and
- (d) time charged for attendances at court by Mr XD had included time that Mr XD had spent on work for other clients; and
- (e) Mr XD had neglected to respond promptly to communications on a number of occasions; and
- (f) queries Mr XD had made of his staff to clarify as to whether Mr WB was legally aided, would indicate that Mr XD had, six weeks after being engaged, overlooked that Mr WB had instructed him as a private client; and
- (g) correspondence from Mr XD indicated that he continued to ignore instructions, and that he had adopted the “biased” views reflected in the police summary and PAC; and
- (h) Mr XD had repeatedly failed to listen to his instructions and to sufficiently grasp the extent to which the unfortunate circumstances which prompted Mr WB’s arrest had been at least partially attributable to the conduct of his partner; and
- (i) Mr XD had failed to sufficiently explain the intricacies of sentencing options available (for example failure to clarify that electronic monitoring did not necessarily restrict bail options); and
- (j) Mr XD had failed to take steps to clarify aspects of the police summary which were inaccurate; and
- (k) it was inappropriate for Mr XD to have expressed reservations concerning the input provided by the psychiatrist; and

- (l) given that Mr XD had not directly addressed the issue with name suppression with him, it was unhelpful for Mr XD to attribute responsibility for oversight of a legal matter, that fell to him to address, to his client; and
- (m) Mr XD had failed to present all sentencing options to the court; and
- (n) The eventual sentencing outcome achieved, was not attributable to any efforts that had been made by Mr XD; and
- (o) Counsel representing him at sentencing had taken steps to provide the court with evidence from his wife and from a psychologist, steps that would not have been taken by Mr XD; and
- (p) the approach adopted by Mr XD was advanced on the basis that there was slim possibility that Mr WB would not receive a prison sentence; and
- (q) an examination of Mr XD's accounts does not give indication of him having discounted fees charged, but rather reinforces that fees charged were excessive; and
- (r) Mr XD had failed to take into consideration principles reinforced in the Sentencing Act; and
- (s) Mr XD had alienated the psychiatrist who had interviewed Mr WB and his partner; and
- (t) Mr XD had failed to understand Mr WB's situation.

[18] The Standards Committee identified the focus of its investigation as being an inquiry as to whether, in acting for Mr WB, Mr XD had failed to act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care, in accordance with rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[19] The Standards Committee delivered its decision on 4 November 2021.

[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 XD had properly advised Mr WB as to the consequences of entering a guilty plea; and
- (b) it considered that Mr XD had given proper regard to the information provided by Mr WB's psychiatrist, and accepted Mr XD's view that putting that information before the court could potentially prejudice Mr WB's position; and
- (c) Mr XD was not in a position to correct any perceived errors in the police documents, as Mr WB had terminated the retainer before the matter "came to court"; and
- (d) it was satisfied that it had not been provided with any specific examples to support complaint that Mr XD had failed to follow instructions; and
- (e) it was appropriate for Mr XD to alert Mr WB to concerns that the court may have regarding possibility of him serving a sentence at his home; and
- (f) whilst there may have been some delay by Mr XD in responding to Mr WB's enquiries, the delays were not of such significance as to require a disciplinary response; and
- (g) there was no evidence to support Mr WB's contention that Mr XD had threatened Mr WB with possibility of a sentence of imprisonment, if Mr WB refused to follow Mr XD's advice; and
- (h) it considered that Mr XD had acted competently and consistently with the terms of the retainer when acting for Mr WB, and that Mr XD had not breached any professional obligations owed to Mr WB.

### **Application for review**

[22] Mr WB filed an application for review on 12 November 2021. That submission was, as with the submissions filed in support of his initial complaint, comprehensive.

[23] Mr WB submits that:

- (a) his complaint did provide foundation for what he describes as "actionable issues" arising from Mr XD's representation; and



- (b) he would wish for his complaint to be considered by reference to the strategy that had been recommended by Mr XD being assessed alongside the outcome achieved by the lawyer who replaced Mr XD, and
- (c) the outcome achieved on sentence was so dramatically different to that which had been intimated as the likely outcome by Mr XD, that the result achieved must be seen to constitute a “damning indictment” of Mr XD’s conduct; and
- (d) a material result of Mr XD’s “chronic inattention” to communications forwarded, was that this had consequence of preventing Mr WB from pursuing any course of action other than that proposed by Mr XD; and
- (e) Mr XD was not receptive to instructions provided; and
- (f) Mr XD was aware that Mr WB disagreed with the assessments of his character that had been made in various reports, but neglected to provide robust defence to those adverse findings; and
- (g) the Standards Committee had failed to address his complaint with proper consideration to natural justice principles; and
- (h) the Standards Committee’s failed to provide explanation for Mr XD’s disregarding of his instructions; and
- (i) there should be a formal review of the conduct of the Standards Committee, in addition to a review of Mr XD’s conduct.

[24] Mr XD was invited to comment on Mr WB’s review application. He responded with indication that he had nothing further to add to the Standards Committee’s consideration of the complaint, other than to add, for the avoidance of doubt, that Mr WB’s allegations were “completely refuted”.

### **Review on the papers**

[25] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (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.

[26] I record that having carefully read the complaint, the response to the complaint, the Committee’s decision and the submissions filed in support of and in opposition to the

application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. 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**

[27] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>2</sup>

... 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.

[28] More recently, the High Court has described a review by this Office in the following way:<sup>3</sup>

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.

[29] 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.

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<sup>2</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>3</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

## Discussion

[30] The complaints articulated by Mr WB in the comprehensive submissions filed both in advancing his initial complaint, and in progressing his review, can be distilled to three issues. Mr WB expressed concern that:

- (a) Mr XD failed on occasions to respond to communications forwarded; and
- (b) Mr XD adopted a litigation strategy when advising Mr WB, that failed to sufficiently consider the instructions he was receiving; and
- (c) the strategy recommended by Mr XD was poor and would, if followed, have resulted in a seriously adverse outcome for Mr WB.

[31] At the core of Mr WB's concerns, was allegation that Mr XD had failed to provide him with competent advice which adequately reflected the instructions Mr WB had provided.

[32] The conduct rules specifically engaged by the complaints are rr 3 and 3.2.

[33] Rule three provides that in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[34] Rule 3.2 provides that a lawyer must respond to inquiries from their client in a timely manner.

[35] As noted, Mr WB advanced his complaints in a very comprehensive fashion.

[36] He is meticulous and articulate in providing a detailed background of events and, in particular, a thorough explanation as to how he considers that Mr XD fell short in failing to present his position to the court with sufficient robustness and with appropriate cognisance of the instructions that been provided to him.

[37] It is helpful that parties provide a careful exposition of their complaints but with every respect to Mr WB, the extent to which he endeavours to provide detailed analysis and overview of every aspect of Mr XD's representation, at times has consequence of muddying rather than clarifying the argument he is advancing.

[38] Turning firstly to the question as to whether Mr XD provided a competent level of representation, it is important to recognise that, in matters such as those which confronted Mr XD, it fell to Mr XD to exercise his judgement and make decisions which he considered would best serve Mr WB's interests.

[39] In *Auckland Standards Committee 3 v Castles*,<sup>4</sup> it was emphasised by the Lawyers and Conveyancers Disciplinary Tribunal, that it was not the Tribunal's role to "closely analyse and second-guess every move of counsel during each piece of litigation. We consider our role is to take an overview and to look at patterns of behaviour."

[40] A similar approach is adopted by Standards Committees and the LCRO.

[41] When carefully examined, at the nub of Mr WB's complaint that he had not been competently represented by Mr XD, is suggestion that Mr XD had failed to listen carefully to the instructions that Mr WB had provided, and had recommended courses of action which, if followed, would have resulted in an adverse outcome for Mr WB.

[42] In advancing this argument, Mr WB argues that the result achieved by the lawyer that followed Mr XD, supports his contention that Mr XD was off track with the approach he had been promoting.

[43] I do not consider that the outcome ultimately achieved for Mr WB provides, as Mr WB would have it, conclusive evidence to support contention that Mr XD had failed to provide competent advice to Mr WB.

[44] It is important to emphasise, that Mr XD's brief was primarily focused on achieving best outcome at sentencing for Mr WB.

[45] Whilst there is disagreement as to the extent to which Mr XD had provided advice to Mr WB when entering his plea (and that disagreement is not able to be resolved here), I do not take it from the submissions filed by Mr WB that he sought to resile from or criticise Mr XD for, the decision made to enter guilty pleas to the charges.

[46] The evidence to support the charges was strong.

[47] Having entered a guilty plea, Mr WB's focus, understandably, was on how the best outcome could be achieved at sentencing. He was anxious to avoid possibility of a sentence of imprisonment being imposed. The seriousness of the charges enhanced the risk of a prison sentence, and Mr WB's position was not assisted by the recommendations that had been made in the Provision of Advice to Courts report (PAC).

[48] In examining the steps taken by Mr XD, the initial submissions he had prepared, and the overall tenor of the advice that was being proffered, it is compellingly clear that Mr XD was anxious that Mr WB did not compromise his position before the court by endeavouring to shift focus from his responsibility as the party charged with what were

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<sup>4</sup> [2013] NZLCDT 53 at [177].

serious offences, to a broader examination of the context in which the offending had occurred, and in particular, the role that Mr WB considered his partner had played in creating or contributing to the volatile environment in the home.

[49] I hasten to emphasise that Mr WB's desire for the court to be fully informed as to factors which he considered were relevant in providing explanation for what had occurred, was understandable, but Mr XD's concern at possibility that there be undue focus on issues that Mr XD considered had potential to compromise Mr WB's position, was realistic and prudent. It was not an approach which, in my view, would remotely be perceived by lawyers experienced in managing such cases, as falling short of the level of competent representation required.

[50] Mr WB had pleaded guilty to serious charges. There was no escaping the reality that charges of this nature had possibility of being met with serious response from the court.

[51] Mr XD would have been, and clearly was, aware of the need for care when providing the court with a broader context for the offending, of ensuring that submissions focusing on context and background were not perceived by the court as an attempt by Mr WB to shift responsibility for his offending to the victim.

[52] This is not to ignore that there is inevitably a context to all offending, and Mr WB was entitled to be given opportunity to provide explanation to the court for his actions.

[53] But there were obstacles in his path, and these were, despite his protestations otherwise and his conviction that Mr XD had failed to adequately advance his case, obstacles of his own making.

[54] The PAC report recommended a period of imprisonment. The report noted that in the course of his interview, Mr WB at times placed much of the blame for his offending on the victim. Whilst that comment was qualified with explanation that Mr WB had shown some insight into the offending, stark comment that Mr WB was endeavouring to shift responsibility for the assault elsewhere, was damaging, and a conclusion that Mr XD recognised had serious potential to compromise Mr WB's position.

[55] The PAC report noted that when a field officer had attended at Mr WB's home to assess the technical feasibility of Mr WB being electronically monitored, Mr WB had presented as "angry" and "uncooperative".

[56] The PAC report writer had observed that, during the course of the interview, Mr WB had frequently presented as "agitated with his situation". The report referenced

further circumstances which the report writer considered needed to be taken into account and concluded that Mr WB did not seem to appreciate the seriousness of the situation he was in, nor the harm he had inflicted on the victim.

[57] Whilst Mr WB rejected a number of the PAC report writers' conclusions (and he was entitled to), this was the report that Mr XD had to deal with.

[58] Direction was made that Mr WB attend an anger management programme.

[59] Sentencing was adjourned to allow this process to proceed.

[60] Mr WB says that he took steps to address what he considered were misunderstandings in the report that had been prepared for the court. He enlisted the aid of a psychiatrist and considered that the conclusions reached by the psychiatrist were extremely helpful in providing a broader context for the offending and, in particular, providing valuable insight into the views of his partner.

[61] Mr XD did not consider that the brief note he had been provided by Mr WB's psychiatrist was particularly helpful.

[62] Mr WB was extremely critical of what he perceived to be, Mr XD's lukewarm response to the psychiatrist input.

[63] A careful examination of the brief note forwarded to Mr XD, indicates that it was possible that Mr WB's psychiatrist had provided Mr WB with a more expansive and accommodating explanation of the background to the events that had led to Mr WB's conviction, than he had been prepared to commit to in the brief report provided to Mr XD.

[64] The report provided to Mr XD does little to assist Mr WB.

[65] Mr WB himself acknowledged that to be the case, when he emailed Mr XD on 26 November 2020 and noted in that email that "Dr GP stated to my wife and I his conviction that I should not be punished for what happened. This had a strong impact on me, but is unfortunately not borne out in his letter, so will not impact the proceedings".

[66] Mr XD could not be fairly criticised for recognising the limited impact that Dr GP's report would have for the court, nor could his representation of Mr WB be criticised for recognising the importance of ensuring that Mr WB's determined insistence that the court be fully informed as to the extent that he considered his partner's conduct had contributed to the offending, be managed carefully.

[67] Mr WB's complaint is proceeded on a continuing underlying assumption that Mr XD had taken no steps to inform the court as to the context in which the offending had occurred, that Mr XD had been ignoring of the instructions that he had been provided, and that Mr XD (in contrast to the approach adopted by counsel who had succeeded Mr XD) had ignored a fundamental and obvious strategy which could, and should, have been advanced for Mr WB's benefit.

[68] Mr WB is firmly entrenched in this argument, to the extent that he appears persuaded that Mr XD would dictate the outcome of the sentencing.

[69] It fell to the presiding judge to determine outcome, and it is entirely speculative for Mr WB to assume that the outcome he ultimately secured would have been radically different if Mr XD had continued to represent him.

[70] Mr WB is critical of the initial sentencing submissions that had been prepared by Mr XD, it being his view that the submissions failed to give sufficient attention to his views as to "how the defence should be conducted", and arguing that his submissions were "written entirely from the perspectives of the police and Whanau Ora report".

[71] I have given careful attention to those submissions. I consider that experienced criminal lawyers would regard the submissions as professional, careful, and to the extent that they traversed issues commonly required to be addressed in a sentencing matter such as this, entirely conventional.

[72] Mr XD had formed a view that Mr WB faced possibility of imprisonment. It was reasonable for him (particularly when considering the reports that had been prepared) to be concerned at that possibility. It would have been remiss of him to not have confronted Mr WB with the reality of his situation and to have urged that steps (such as compliance with the directed anger management programme) be taken to try and mitigate possibility of a sentence of imprisonment being imposed.

[73] Mr WB, in advancing his complaint, characterises Mr XD's cautious apprehension about possibility of a prison sentence being imposed, as a failure on his part to recognise that the court would, if Mr WB's preferred strategy was followed, have inevitably discounted the possibility of a prison sentence. As noted, Mr WB considered that the outcome achieved was "so dramatically different from Mr XD's prognosis that it constitutes a damning indictment of him. Had I received his sentence, I would have been caused tremendous stress, yet he would have considered me lucky not to have gone to prison".

[74] With every respect to Mr WB, this entirely misrepresents Mr XD's position.

[75] It was not Mr XD's "sentence".

[76] Nor was it the case that Mr XD was promoting an approach that would have inevitably resulted in a prison sentence being imposed. Clearly, he was focused on attempting to avoid that outcome. Nor was he oblivious to argument that Mr WB's conduct had to be assessed in the context of the events that were taking place in the home. The submissions prepared in expectation that the court would be attending to sentencing, make that clear.

[77] Mr WB was scheduled to be sentenced on 16 October 2020. At this point in the proceedings, it is clear that the court was considering imposition of a prison sentence. In his minute recording the sentencing hearing, the judge noted, that there were two potential outcomes. Firstly, imposition of a custodial sentence with leave to apply for home detention. Secondly, adjourning the proceedings to enable opportunity for Mr WB to complete a programme.

[78] These were not potential outcomes that were dictated or determined by a failure on Mr XD's part to provide the court with the explanation of events which Mr WB appeared convinced would persuade the court to discount possibility of a term of imprisonment being imposed.

[79] The presiding judge's careful minute emphasised that the sentencing issues were "problematic", particularly when considering the volatile relationship between Mr WB and his partner.

[80] The judge's minute also noted the particular issues relevant to the relatively new strangulation offence.

[81] Mr WB submits, that the judge's reservations in respect to allowing Mr WB to be bailed to his home address, "followed on from the train of thought that Mr XD had established".

[82] This is both incorrect and ignoring of the judge's obligation to consider all of the relevant factors, and to make a determination based on the judge's assessment of the circumstances of the case.

[83] Whilst the judge's sentencing minute recorded the obstacles that were faced by Mr WB, it also provided him with grounds for optimism. The judge noted that he was "prepared to adjourn sentencing because the sentence of last resort would be a full-time custodial sentence. You had never before been before the court and you have led an



otherwise blameless life. In my view, a full-time custodial sentence would be a sentence of last resort and not the least restrictive outcome appropriate in the circumstances”.

[84] Mr WB had a clear path forward and one that should have given him a degree of optimism that if the right steps were taken, a prison sentence could be avoided. But it was both prudent and required of Mr XD, that he not minimise the seriousness of the circumstances that Mr WB was confronting.

[85] Mr XD’s focus on encouraging Mr WB to complete programmes that would enhance his position before the court, and his advice to Mr WB to avoid over emphasising submission to the court that could encourage the court to the view that Mr WB was endeavouring to shift responsibility to his partner, was prudent and indicated a recognition of the risk commonly understood by lawyers, of having clients facing charges involving domestic violence, compromise their position with the court by focusing on submission that could be construed by the court as an attempt by the lawyer’s client, to avoid responsibility for their actions.

[86] Mr XD was obliged to follow his client’s instructions, but he was also required to exercise his judgement and to recommend the approach which, in his professional view, he considered would produce the best outcome for Mr WB.

[87] The strategy adopted by lawyers in matters such as these can vary. Different lawyers may have different views as to what approach will best serve their clients’ interests.

[88] In looking carefully, as I have, at all of the information on the Standards Committee file, and having given careful consideration to Mr WB’s articulate and comprehensive submissions, I am not persuaded that when the steps taken by Mr XD are carefully examined, that it can reasonably be argued that his advice fell below the standard of competency required. I consider the advice proffered by him to have been entirely conventional, and consistent with that which would have been adopted by many experienced criminal lawyers confronted with similar circumstances.

[89] With respect to Mr WB, his argument that the lawyer he had instructed after Mr XD acutely picked up on the approach that Mr WB had been consistently instructing Mr XD to follow (an argument that Mr WB maintains was ignored by Mr XD in preference for an approach which acquiesced without resistance to possibility if not inevitability of a prison sentence being imposed), pays insufficient regard to the benefit that Mr WB had received from the steps that had been taken by Mr XD.

[90] Whilst Mr WB maintains that the different approach adopted by his fresh counsel turned the tide, that submission in my view ignores two critical factors. Firstly, it is impossible to determine what shape Mr XD's final submissions may have taken. Those submissions may well, with the elapse of time and change in circumstances, have encouraged Mr XD to adopt a different approach to that which had been initially signalled. And it is the passage of time that is entirely ignored by Mr WB in advancing argument that he had been represented more competently by the lawyer who had replaced Mr XD.

[91] The steps taken to have the sentencing adjourned to allow opportunity for Mr WB to complete his course, would have worked significantly in Mr WB's favour. By the time he returned to court, Mr WB had been given ample opportunity to demonstrate to the court that any risk of further offending had diminished. The fact that Mr WB was able to point to a continuing period of stability in the home would have likely played a significant part in persuading the court that a custodial sentence was not required. This factor was not the result of masterful advocacy, or the court being brought to an understanding of the circumstances that Mr WB maintained were significant in providing explanation for the conduct that had brought him to the door of the court. It was the consequence of Mr WB having opportunity to provide compelling evidence to support his argument that he did not present an ongoing risk to his partner.

[92] I accept that Mr WB considered that the lawyer he had engaged to replace Mr XD was more receptive to following his instructions, but Mr WB's disgruntlement with what he perceived to be Mr XD's failure to follow the strategy that Mr WB considered would best enhance his position with the court does not, on a considered analysis of the steps taken by Mr XD, support argument that Mr XD had breached his obligations to act competently and take reasonable care in his representation of Mr WB.

[93] Complaint that Mr XD failed to provide competent advice is not established.

[94] Turning to complaint that Mr XD failed on occasions to respond promptly to inquiries from Mr WB, I consider that there were occasions when Mr XD could have responded more conscientiously to Mr WB. Mr WB's explanation for these omissions is unconvincing.

[95] Mr XD concedes that on occasions he did not respond immediately to Mr WB but noted that he had "a very busy practice and where I have been unable to respond my staff have generally taken calls from him. I have however responded where I felt there was a need to respond and in as timely a manner as I was able".

[96] Mr WB complains that on occasions there was a lengthy delay in receiving a response from Mr XD. For example, he notes that he had forwarded an email to Mr XD

on 20 July 2020, which was not responded to until 3 September 2020. Mr XD says that whilst he did not personally respond to the 20 July 2020 correspondence, a member of his staff had.

[97] I am unable to resolve, on the evidence before me, exactly what transpired in respect of the 20 July 2020 email, but I am satisfied on considering the submissions filed by Mr WB, that Mr XD failed on occasions to respond promptly to Mr WB.

[98] Mr XD's explanation for his lack of response is inadequate. Argument that a lawyer operates a "busy" practice, is argument that can be advanced by all successful lawyers. Nor is Mr XD's explanation that he would respond when he felt there was "a need to respond" either professional or courteous.

[99] These were matters of serious concern for Mr WB. He was 66 years of age. He had never appeared before the court. The charges he faced were serious. He would have understandably been distraught at the possibility of facing a prison sentence. He would have had many concerns and queries that he would wish to raise with his lawyer. He would have been seeking both information and looking for reassurance that his matters were in good hands. If the extent of his enquiries approached the level of the onerous or excessive (and there was no evidence that they did), then it would have been open to Mr XD to suggest to Mr WB that he limit his communications.

[100] Mr XD's response to this aspect of Mr WB's complaint would have been best met not just with an acknowledgement that his communications could have been better, but with apology for failure to be as attentive to responding as he could have been.

[101] In considering this issue, I am not however persuaded that the evidence to support complaint that Mr XD failed to communicate with his client is sufficiently extensive to merit the imposition of a disciplinary sanction.

[102] Not every breach, if established, demands a disciplinary response.

[103] The Standards Committee, in identifying what it described as the "key issue" arising from the complaint filed by Mr WB, emphasised the question as to whether Mr XD had failed to act competently, and in a timely manner consistent with the terms of the retainer and a duty to take reasonable care, as being the issue of pivotal concern.

[104] I agree with the Committee.

[105] In articulating his position on review, Mr WB traversed a variety of issues (all of which have been considered) but at the nub, was concern that advice Mr XD had provided in respect to the strategy adopted for sentencing, was inadequate.

[106] On review, Mr WB identified a number of provisions of the Lawyers and Conveyancers Act 2006 and made specific reference to a number of the conduct rules.

[107] I have, as noted, given careful consideration to all of the submissions advanced on review by Mr WB.

[108] I have not in this decision addressed every specific issue raised on review by Mr WB, but a failure to do so is not to be interpreted by him as reflecting an oversight or lack of attention to the concerns raised.

[109] It is only right that applicants, seeking a review of a Standards Committee decision, should be able to understand what has led the LCRO to the outcome reached. But that does not mean that an LCRO is obliged to refer to, let alone discuss, every aspect of each party's case.

[110] This Office has previously said on this topic:

[33] Mr ZA submits there is a mandatory obligation to consider and respond to every submission made by a complainant, or, in this case, an applicant. By not doing so, he submits, the Standards Committee breached the requirements of natural justice. I do not agree. In *R v Nakhia*<sup>5</sup> the Court said:

As to the complaints in the motion that the Court did not deal with certain submissions ... it may be observed that a belief on the part of counsel ... that his argument has not been fully understood or adequately discussed is by no means uncommon .... The Court is not obliged in giving its reasons for judgment to discuss every aspect of argument.

[111] Those principles apply equally, if not more so, to determinations by a Standards Committee (and this Office) where arguments and submissions, are frequently advanced in a comprehensive fashion.

[112] I am satisfied that the Committee was correct to focus its inquiry on the question as to whether Mr XD had competently advised Mr WB.

[113] I see no grounds which could persuade me to depart from the Committee's decision.

*Anonymised publication*

[114] 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.

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<sup>5</sup> *R v Nakhia (No 2)* [1974] 1 NZLR 453 (CA).

**Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

**DATED** this 22<sup>ND</sup> day of JULY 2022

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**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 WB as the Applicant  
Mr XD as the Respondent  
Ms YF as a Related Person  
[Area] Standards Committee [X]  
New Zealand Law Society  
Secretary for Justice