LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 044

Ref: LCRO 196/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City] Standards Committee [X]
BETWEEN	**AB** Applicant
AND	**CD** Respondent

DECISION

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

Introduction

[1] Ms AB has applied for a review of a decision by the [City] Standards Committee [X] to take no further action in respect of her complaints concerning the conduct of the respondent, Mr CD.

Background

[2] Ms AB instructed Mr CD to represent her in High Court and Court of Appeal proceedings.

[3] Those proceedings related to issues concerning an easement over a property owned by the [123] trust. Ms AB was a trustee of the trust.

[4] Mr CD undertook work for Ms AB, from January 2019 to the end of December 2019.

[5] Mr CD issued five invoices. Ms AB queried a number of the invoices. Mr CD contended that his fees had been substantially discounted.

[6] Ms AB terminated her retainer with Mr CD around 18 March 2020.

The complaint and the Standards Committee decision

[7] Ms AB lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 9 April 2020. The substance of her complaint was that Mr CD had:

(a) failed to provide her with advice as to how much he would charge for his services, and the basis on which those services would be charged; and

(b) failed to provide advice as to how he would render his invoices; and

(c) failed to provide advice as to his professional indemnity status; and

(d) failed to advise when he raised his hourly fees; and

(e) failed to inform her of his complaints process, once he became aware she had concerns about a number of matters; and

(f) inappropriately charged, and charged for an excessive number of hours worked; and

(g) had completed work he had not been specifically instructed to complete; and

(h) behaved discourteously to her at a meeting held in Mr CD's office; and

(i) had refused to release his file until fees were paid.

[8] In summarising her position, Ms AB submitted that the difficulties that arose with Mr CD's accounts would not have occurred if Mr CD had informed her of his charging regime at the commencement of the retainer.

[9] Mr CD provided a comprehensive response to Ms AB's complaint. He submitted that:

(a) the work he had done for Ms AB had resulted in a "marked improvement in her fortunes"; and

(b) he had provided competent and attentive representation to Ms AB throughout; and

(c) despite minor errors in recording some elements of work in his time sheets (for which allowance had been made), fees charged were fair and reasonable; and

(d) fees charged had been heavily discounted; and

(e) even if fees had not been discounted and charged on the basis of time recorded, the fees would have presented as fair and reasonable.

[10] The Standards Committee identified the issues to address as:

(a) whether the fees charged by Mr CD were fair and reasonable; and

(b) whether Mr CD breached any other of his professional obligations to Ms AB.

[11] In undertaking its investigation, the Committee appointed a costs assessor, Mr EF QC.

[12] The Standards Committee delivered its decision on 8 October 2020.

[13] 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.

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

(a) it was satisfied that the costs assessor appointed, was not conflicted in being able to undertake the cost assessment; and

(b) the report prepared by the costs assessor was comprehensive; and

(c) Mr CD's charge out rate was within the range properly charged by provincial barristers of Mr CD's experience; and

(d) time charged for travel was acceptable; and

(e) time recorded for tasks undertaken was generally appropriate; and

(f) having considered the fee factors in r 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), it considered the fees charged to be fair and reasonable; and

(g) Mr CD's failure to provide a letter of engagement, whilst regrettable, did not require a disciplinary response; and

(h) there was insufficient evidence to establish that Mr CD had been discourteous in a meeting with Ms AB; and

(i) Mr CD's refusal to provide his file in circumstances where he had been prepared to provide a copy of the file on payment of his fees, did not breach any of the conduct rules.

Application for review

[15] Ms AB filed an application for review on 21 October 2020.

[16] She submits that the Standards Committee:

(a) had "cherry picked" information, ignored issues brought to their attention, and delivered a decision that had defended Mr CD; and

(b) failed to adequately address the issue of fees charged, specifically excessive hours recorded and charged; and

(c) unreasonably declined to assign an alternative costs assessor when request had been made of them to do so; and

(d) accepted the costs assessor's report when bias was evident in the report and there was indication that the assessor had adopted a flawed methodology; and

(e) failed to attribute responsibility to Mr CD for the impact his omissions and failures had on her as his client; and

(f) inaccurately recorded that Mr CD had provided regular invoices; and

(g) failed to adequately address Mr CD's threatening behaviour; and

(h) accepted Mr CD's explanation for failing to return her files when Mr CD had no right to retain the files.

[17] By way of outcome, Ms AB sought reimbursement of fees paid in the sum of $10,000, a review to be conducted of Mr CD's practices in respect to his failure to provide information, and a review to be undertaken of her complaint that Mr CD had behaved discourteously to her.

[18] Mr CD was invited to provide a response to the review application. He indicated that he placed reliance on the submissions filed with the Standards Committee.

Review on the papers

[19] 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.

[20] On 7 January 2021, the parties were advised that the Legal Complaints Review Officer considered that the review application could be appropriately dealt with on the papers, and informed that if either wished to comment on, or raise objection to the review being dealt with in that manner, they were to provide submissions to the Legal Complaints Review Officer by 5 pm 3 February 2021.

[21] On 12 February 2021, the parties were advised that as no objection had been received to the proposal to proceed with an on the papers hearing, the hearing would proceed in that fashion.

[22] 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

[23] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … 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.

[24] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

[25] 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

[26] The issues to be determined on review are:

(a) Did the Committee unreasonably decline Ms AB's request to appoint another cost assessor and, as a consequence, did this result in a report

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

being prepared by a costs assessor that had failed to undertake his role with the required degree of independence?

(b) Was Mr CD discourteous to Ms AB during a meeting held at Mr CD's office on 17 March 2020?

(c) Was Mr CD required to provide Ms AB with information in advance on the principal aspects of client service including the basis on which fees would be charged?

(d) Were the fees charged fair and reasonable?

(e) Do any disciplinary issues arise as a consequence of Mr CD refusing to release Ms AB's file.

Did the Committee unreasonably decline Ms AB's request to appoint another cost assessor and, as a consequence, did this result in a report being prepared by a costs assessor that had failed to undertake his role with the required degree of independence?

[27] Prior to instructing Mr CD, Ms AB was represented by Mr GH QC.

[28] Ms AB had lodged a conduct complaint against Mr GH.

[29] Mr GH shares chambers with, and is a friend of, Mr EF.

[30] On 26 June 2020, Ms AB wrote to the Complaints Service, expressing concern at the appointment of Mr EF as a cost assessor. She noted that Mr EF shared chambers with Mr GH, an association which she considered could, "create a situation of bias".

[31] On 14 July 2020, Mr EF wrote to the Complaints Service. In that correspondence Mr EF advised that he had, after reading through an extensive file of some 397 pages, observed that the file contained references to Mr GH. Mr EF confirmed that he shared chambers with Mr GH whom he described as a "long standing personal friend".

[32] Mr EF, anticipating that it would be likely that Ms AB would learn of his close professional relationship with Mr GH, signalled that he would not wish for Ms AB to feel that his investigation had not been properly handled in any respect and made inquiry of the Complaints Service as to whether his close association with Mr GH presented any problems.

[33] After addressing matters with the Standards Committee, the Complaints Service wrote to Ms AB to advise "After discussion with the Committee we are satisfied that there is no risk of bias. Mr EF QC is being asked to make an assessment of Mr CD's fees, and Mr GH's work and his previous role as adviser are not relevant to that assessment. Accordingly, the Committee is satisfied that Mr EF can act as a cost assessor in this matter".[3]

[34] Mr EF proceeded with the cost assessment. His report, when completed, signalled at commencement that he was a personal friend of Mr GH. He went on to observe, "that said, the current complaints by Ms AB have nothing to do with GH. They focus on Mr CD and not on Mr GH. Obviously, I have not discussed this present complaint with Mr GH and I assume that he does not even know that I have been asked to assist."[4]

[35] On receipt of Mr EF's report, the Standards Committee provided copies to Ms AB and Mr CD and invited comment from both.

[36] Ms AB was highly critical of the report. The conclusions reached by the report writer confirmed her worst fears that Mr EF's close association with Mr GH had resulted in him lacking the degree of objectivity required, when undertaking the costs assessment.

[37] In responding to the report, she says this:[5]

> [Mr EF] has presented figures in such a way as to support Mr CD and negate my complaint. Given Mr EF is both a "friend" and colleague of Mr GH it would be very unlikely indeed that confidences were not shared. It is not difficult to imagine how sympathies would naturally be extended to Mr CD.

[38] In advancing her review application, Ms AB comments further on her concern that Mr EF had been influenced by his professional relationship with Mr GH. She notes:

> Mr GH and Mr EF are friends outside of their professional lives, and at work, share barrister's chambers. The probability and possibility of bias obviously existed irrespective of the Committee's decision [that the cost assessment solely involved considering Mr CD's fees].

[39] Ms AB concludes that "[t]he close relationship between Mr GH and Mr EF alone should have been enough for the Committee to seek an alternative assessor. The rejection of my request has compromised the process. Investigating any complaint

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[3] Complaints Service, email to Ms AB (26 June 2020).
[4] Mr EF, costs assessment report (18 August 2020) at pp1–2.
[5] Ms AB, letter to Complaints Service (29 August 2020) at p9.

should be a careful and respectful process, that actively seeks to avoid any likelihood of bias. In this case, no care from the Committee was extended and my request was unreasonably declined."[6]

[40] She complains that Mr EF had exceeded the scope of his brief and expressed personal opinions which were indicative of bias.

[41] It is accusation that a senior and experienced Queen's Counsel has, in undertaking the voluntary and time-consuming task of carrying out a costs assessment of a comprehensive file, violated his fundamental professional obligations to uphold the rule of law and to facilitate the administration of justice. It is submission that demands acquiescence to argument that a lawyer of Mr EF's seniority would disregard a deeply forged and firmly ingrained understanding (which could be expected to be second nature to a Queen's Counsel), of the importance, in any jurisdiction which has responsibility for determining competing interests, of ensuring that the decision-making process is fair and even handed.

[42] The motivation for this egregious abandonment of principle is suggested by Ms AB to be a desire on Mr EF's part to advantage, in ways which are not clearly explained, his colleague, Mr GH.

[43] With every respect to Ms AB, her suggestion that Mr EF was biased in conducting his assessment is more reflective, in my view, of her dissatisfaction with Mr EF's failure to support her objections to Mr CD's account, than it is an evidence-based and reasoned analysis which identifies specific examples of Mr EF falling prey to improper influence.

[44] This is not to suggest that Mr EF's status as a Queen's Counsel, or his considerable experience in the law, inoculates him from criticism.

[45] The process of assessing the reasonableness and fairness of a fee charged can be a difficult one, and one which is frequently the subject of robustly differing opinions both as to the methodology to be adopted when assessing a fee, and differing views as to the weight to be given to the multitude of factors that contribute to the making up of a fee.

[46] But serious accusation that a costs assessor, in undertaking their role, has been motivated by a desire to produce a report favourable to one party, must be supported by credible evidence.

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[6] Ms AB, supporting reasons for the review application at p2.

[47] Ms AB advances her allegation of bias on the back of argument that Mr EF exceeded the scope of his brief by shifting his analysis from what should have been an objective and focused examination of Mr CD's fees, to include reference to opinions he had formed about her as a person.

[48] Specifically, Ms AB is critical of Mr EF's conclusion at [42] of his report where he says "The risk factor was high in my view. I say that because the file gives me the impression that Ms AB was difficult, and Mr CD had taken over the file after two earlier barristers had been dismissed. The risk as noted earlier was that unless Mr CD acted properly and efficiently in all respects, he himself would be dismissed and other counsel instructed".

[49] I consider that Ms AB was justified in taking objection to Mr EF describing her as "difficult" and I disagree with his conclusion that his assessment of her as being "difficult", was a factor of relevance by reference to r 9.1(e).

[50] Rule 9.1(e) provides that a factor to consider when addressing the question as to whether a fee charged is fair and reasonable, is the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved.

[51] Mr EF concludes that the r.9.1(e) had significance, as his reading of the file had left him with impression that Ms AB was a "difficult" client.

[52] It is not precisely explained by Mr EF what he relies on in reaching conclusion that Ms AB was a difficult client, but he notes that Mr CD had "taken over the file after two earlier barristers had been dismissed". The specific risk to Mr CD, as identified by Mr EF, appeared to be that Mr CD would likely face prospect of being dismissed, if he failed to manage Ms AB's file "properly and efficiently in all respects".

[53] Mr EF noted in his report, that "it was critical therefore that Mr CD acted properly and efficiently in all respects on behalf of Ms AB because it was obvious that if he did not do so then he himself was at risk of criticism by her".[7]

[54] Framed in this way, Mr EF's interpretation of r 9.1(e) engages two aspects. Firstly, his analysis proceeds on assumption that a lawyer's interests in ensuring the continuation of a retainer is a risk factor that has significance in the assessment of the lawyers' fees, and secondly, conclusion that a lawyer's requirement to manage a problematic and difficult client, may have demonstrable impact on fees charged.

[7] At p14.

[55] I agree with the second assumption, but not the first.

[56] I do not consider that r 9.1(e), in identifying the element of risk as a fee factor, is intended to encompass a consideration of the lawyer's own interests, such as would include a consideration of the lawyer's vulnerability to having a retainer terminated.

[57] It is my view that r 9.1 is intended to more properly focus not on the interests of the lawyer, but rather on those particular aspects of the retainer itself that may constitute a demonstrable risk to the lawyer, such as would be considered to have relevance to the assessment of the lawyer's fee.

[58] The consequences for Mr CD (as concluded by Mr EF) of him having a "difficult" client, were that "unless Mr CD acted properly and efficiently in all respects, he himself would be dismissed and other counsel instructed".

[59] Mr CD's obligation to act properly and efficiently was no more than what could be properly and expected to be required of him. His duty to act properly and efficiently in all respects, is a "first principal" obligation, and one reinforced by r 3 which directs that "[i]n 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".

[60] The relevance of risk to fee is most commonly encountered when specific elements of the work involved in the retainer (as opposed to particular characteristics of the party providing the instructions) are identified.

[61] Risk assumes especial relevance when the consequences arising from error are severe.

[62] The level of risk may be heightened (as specifically identified in r 9.1 (e), when the value of property engaged in a transaction is significant.

[63] Complexity is specifically addressed by r 9.1(f), and importance of the matter to the client by r 9.1(c).

[64] There may be circumstances where the conduct of the lawyer's client has been a factor in costs escalating beyond what would have been expected.

[65] Those circumstances commonly involve situations where a client's approach has been obstructive rather than supportive of the lawyer's attempts to assist their client.

[66] These problems frequently arise in litigation cases, where, understandably, the emotional and financial toll of the litigation for clients can be considerable.

[67] Clients who become too intensely involved in their case can obstruct its progress.

[68] Unnecessary and unhelpful demands inevitably escalate costs.

[69] Examples of such demands include excessive phone calls and email communications, requests for meetings which are unnecessary, and an obsessive attention to the minutiae of the case.

[70] An obdurate refusal to follow sound advice, an insistence on guiding the litigation down paths that are not recommended by the lawyer, a fondness and preference to be the lawyer rather than the lawyer's client can all be manifestly unhelpful.

[71] When Mr EF says that his reading of the file left him with the impression that Ms AB was "difficult", I think it probable that he had formed this view for two reasons. Firstly, he had concluded that Ms AB had terminated the services of two other lawyers who had worked on the matter that Mr CD had been instructed on, this presumably persuading him that Ms AB had difficulty retaining lawyers. Secondly, after reading the extensive file, he has concluded that Ms AB's interactions with Mr CD were indicative of her being a challenging client to work with.

[72] Mr EF states in his conclusion to his report, that Ms AB had dismissed two barristers (Mr IJ and Mr GH) she had instructed before retaining Mr CD.

[73] Earlier in his report, he had noted that he was "not aware why Mr IJ ceased to act".

[74] Ms AB is critical of Mr EF for reporting that Mr IJ had been dismissed by her, describing this as "an extraordinary assertion". She noted that both Mr IJ and Mr CD's instructing solicitor had recommended that Mr GH be instructed at a point in the proceedings.

[75] It was unfortunate that Mr EF whilst initially indicating that he was unaware of the circumstances that led to Mr IJ ceasing to act, then reported that Mr IJ's retainer had been terminated.

[76] But I do not place great significance on the apparent error, and I certainly do not consider that Mr EF's apparent misdescription of the circumstances in which Mr IJ's involvement with Ms AB came to an end, remotely provides evidence of sufficient weight to establish argument that Mr EF was biased.

[77] If it was Mr EF's intention to suggest that Ms AB had been a difficult client to deal with, I do not agree with that assessment.

[78] An examination of the file gives indication that Ms AB was a very engaged client. She was entitled to be. This was her business, and it was important to her. Her frequent correspondence to Mr CD suggests she was an articulate and informed client, who was anxious to ensure that she understood, and was engaged in, all significant decisions.

[79] Her communications indicate that she had a sophisticated knowledge and understanding of the technical issues involved in the dispute. She had confidence to disagree with Mr CD and on occasions did so. She had little tolerance with attempts to delay or fudge the progress of the proceedings when she thought that was happening. On occasions, her communications were robust in tone.

[80] But I do not consider that the file gives indication of Ms AB engaging in conduct of the nature described at [67]–[69] above.

[81] That said, I am not persuaded that an examination of Mr EF's approach to his consideration of the r 9.1(e) factor supports conclusion that his approach to the costs assessment was contaminated by an underlying bias, prompted from a desire to assist Mr GH.

[82] In undertaking, as I am required to do, an independent examination of Mr CD's fees, I disregard r 9.1(e). I do not consider that rule to have particular relevance in this case.

[83] It is also important to emphasise when considering complaint that Mr EF was unduly influenced as a result of his relationship with Mr GH, that it was not Mr GH who was the subject of the costs assessment. Ms AB's allegation of bias is levelled at arm's length. It demands acceptance of possibility that Mr EF would assist Mr CD, because that would somehow advantage, assist, or lend support to Mr GH.

[84] I do not disregard the importance of perception when considering concerns raised that a party making a decision (as Mr EF was) may be unduly influenced by personal factors, and it is clear that Ms AB identified her concerns early on.

[85] But it was also clear that Mr EF himself was anxious to ensure that Ms AB did not feel that the process was unfair. He identified the possibility that Ms AB may be concerned about his close association with Mr GH. He reported that he did not consider that the circumstances were such that he was unable to carry out the task. But he left the decision to the Committee. And it is important to emphasise that Mr EF was not the ultimate determiner of Ms AB's complaints. He was not the decision maker on the complaint of whether the fees were fair and reasonable. It is not the task of a Committee to abdicate its role to that of its costs assessor and to simply "rubber stamp" a costs assessor's report. It is the task of the Committee to consider the report with all of the evidence, and to give such weight to the report as it considers appropriate.

[86] Having carefully considered Ms AB's complaint that the Committee should have appointed another costs assessor, and addressed her concerns that Mr EF's report gave indication of him being adversely influenced by his association with Mr GH, I am not persuaded that this aspect of her complaints is established.

Was Mr CD discourteous to Ms AB during a meeting held at Mr CD's office on 17 March 2020?

[87] Ms AB had expressed concern to Mr CD about his fees.

[88] On 27 February 2020, she wrote to Mr CD setting out those concerns. She considered that Mr CD had invoiced her for an excessive number of hours, and that he had charged her at rates she believed were unwarranted.

[89] After receiving a response from Mr CD, Ms AB wrote again to him on 16 March 2020. She suggested two options for achieving resolution, "[e]ither we come to a financial agreement whereby I am not disadvantaged by your omission to comply with your obligations (or by the trust I placed in you), or I progress the matter through the formal process". I assume that when Ms AB mentioned possibility of commencing a formal process, she was indicating that she would pursue a conduct complaint against Mr CD.

[90] Ms AB proposed that Mr CD wipe out the balance owing on an outstanding account, and refund her fees paid in the sum of $10,000.

[91] The purpose of the meeting that proceeded on 17 March 2020 was to provide opportunity to discuss the fees issue.

[92] Ms AB complains that Mr CD acted unprofessionally towards her and attempted to bully her during the meeting.

[93] She contends that Mr CD's approach from commencement was intimidatory and inappropriate, exemplified by Mr CD's early indication to her that he considered the settlement offer she had submitted in her correspondence of 16 March 2020 fell within the legal definition of blackmail.

[94] Ms AB complains that she was not given an opportunity to put her position. She says she felt overwhelmed and says that she would have not agreed to meet with Mr CD if she had realised that he would use the opportunity to criticise her.

[95] Mr CD has a different recollection of events. He points to a file note he completed after his meeting with Ms AB, to support his account of what took place at the meeting.

[96] Mr CD does not dispute that he advised Ms AB that he considered her settlement proposal as tantamount to blackmail. That was his view. But he does not accept that Ms AB was in any way intimidated or overwhelmed. He says that Ms AB was forceful in responding to his indication that he considered her proposal to be unreasonable. He says that Ms AB accused him of acting in a manner akin to that of a psychopath. Mr CD says that this brief meeting ended with him wishing Ms AB well, and her responding with indication that she had always had her doubts about him.

[97] It is clear from the accounts of both parties that the meeting did not go well. The atmosphere clearly became unpleasant.

[98] But neither an inability to agree, nor a degree of unpleasantness in atmosphere, translates to establishing grounds for a professional conduct complaint.

[99] Accusation that Mr CD behaved unprofessionally or discourteously to Ms AB can only fairly be measured by an assessment of what was said at the meeting.

[100] It is not possible to determine, in the absence of evidence from third parties, the tone, manner, and attitude of two parties attending a private meeting.

[101] At the nub of Ms AB's complaint, is concern that Mr CD had compared her settlement proposal to blackmail.

[102] It was suggested by Mr CD that her proposal fell within the legal definition of blackmail.

[103] I consider that Mr CD in electing to draw this comparison, adopted an overly legalistic and an exaggerative approach. Ms AB was advancing a proposal. Mr CD would likely have considered that threat to bring a conduct complaint if Ms AB's demands were not met presented as an unpleasant approach to adopt in the negotiations, but a description of her approach as analogous to that of a blackmailer presents as an overreaction.

[104] However, Ms AB's description of her approach to negotiations as reflecting no more than an indication of her advancing a settlement proposal is somewhat disingenuous. She was not simply putting a proposal. Her proposition had a strong element of the "if you don't do this, I will do this" approach to the negotiations. It is not an approach that reflects an entirely good faith-based approach to negotiating. She was attempting to leverage threat of advancing a conduct complaint as a means to achieve a reduction in her fees.

[105] It is clear from Mr CD's file note (not challenged by Ms AB) that she gave Mr CD's accusation of blackmail short shrift. She scythed through that suggestion with a short, forceful, and somewhat colloquial response.

[106] Having given Mr CD firm indication that she would have no truck with his description of her settlement proposal as being an offer tantamount to blackmail, Ms AB proceeded to compare Mr CD's approach to billing, as behaviour that was analogous to that of a psychopath.

[107] I have emphasised that it is not possible to determine at distance, whether a lawyer's body language, tone, or manner were inappropriate in a private meeting involving a client, without concrete evidence.

[108] There is no indication from the versions provided that voices were raised, and certainly no indication of need for Mr CD's assistant to intervene.

[109] I accept Ms AB's evidence that she felt vulnerable in the course of the meeting, and I accept that she, at least momentarily, was disconcerted by Mr CD's suggestion that her offer amounted to blackmail.

[110] But Ms AB's description of her being left feeling particularly vulnerable as a consequence of Mr CD's comment, must be assessed by reference to her immediate

response to the comment. It is also reasonable to measure Ms AB's account of her being disconcerted by Mr CD's approach, by the substantial evidence on the file which gives indication of Ms AB being a very capable, competent and articulate individual, who possessed an undoubted ability to be assertive in advancing matters of importance to her.

[111] When filing her initial complaint, Ms AB argued that Mr CD had, in accusing her of blackmail, breached r 2.7, which states:

> A lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.

[112] The behaviour of which Ms AB makes complaint, does not comfortably fall within the scope of that rule.

[113] Mr CD, in advising Ms AB that he considered her settlement proposal in which she suggested that she would not proceed with a conduct complaint if he substantially reduced his fee fell within the legal definition of blackmail, was not, (even if the comparison was incorrect), making a threat to make accusation or divulge something for an improper purpose.

[114] Ms AB's complaint is more accurately addressed by a consideration as to whether Mr CD had failed to treat Ms AB with courtesy and respect (r 3.1).

[115] Having considered the parties' accounts of the meeting, the issues that have been identified as having been discussed at the meeting, the comments that both Mr CD and Ms AB accept were made at the meeting, and the circumstances which prompted the meeting, I am not persuaded that Mr CD's conduct during the meeting of 17 March 2020 constituted a breach of r 3.1.

Was Mr CD required to provide Ms AB with information in advance, on the principal aspects of client service including the basis on which fees would be charged?

[116] Central to Ms AB's complaints, is argument that Mr CD failed to inform her at the commencement of the retainer of the work that would be undertaken, and the basis on which his fees would be charged.

[117] In the submissions filed by Ms AB both in advancing her complaint and on review, she argues that Mr CD's failure to provide information at commencement, compromised her, as a consequence of which she was significantly overcharged, and charged for work that she had not instructed Mr CD to complete.

[118] Ms AB complains that Mr CD failed to communicate with her throughout the course of the retainer.

[119] Ms AB says that on occasions she was unclear what was happening with her case, its direction being guided independently by Mr CD with little reference to herself. She describes herself as "naïvely" trusting of Mr CD.

[120] Ms AB suggests that by the time she became aware of problems with Mr CD's accounts, the damage had been done.

[121] Ms AB contends that "[a]t the very least Mr CD had a moral and ethical responsibility to ensure he provided me with everything I needed to know about the services he would provide *before* work began. I did not consent or agree to him doing whatever he liked at whatever cost he decided. The Committee have condoned Mr CD's actions in doing this when it is professionally wrong by any measure".

[122] Ms AB submits that in failing to provide her with a letter of engagement at commencement, Mr CD had breached r 3.4A which provides that a barrister sole must in advance, provide in writing to a client, information on the principal aspects of client service including the basis upon which fees would be charged.

[123] Mr CD contends that whilst it was his normal practice to provide parties he represented with terms of engagement, the conduct rules did not require him to do so, as r 3.7 provides an exception to r 3.4A.

[124] Rule 3.7 directs that r 3.4A has no application "where the lawyer is instructed by another lawyer or by a member of the legal profession in an overseas country, unless the fee information or other advice is requested by the instructing lawyer or member of the legal profession, as the case may be".

[125] Both the Committee and the costs assessor agreed with Mr CD, that r 3.7 provided an exception for barristers in the provision of client care information, but both considered that it would have been prudent for him to have provided Ms AB with terms of engagement. Both concluded that a number of the issues and concerns that Ms AB had raised would have been avoided, if Mr CD had clarified at the commencement of the retainer, the basis on which the work was to be undertaken.

[126] Ms AB is severely critical of the Committee's approach, arguing that the conduct rules provided for a "minimum" level of client care and responsibility, and that it was inappropriate for the Committee to have ignored the consequences for her of

"Mr CD not doing for me, what they themselves described as 'prudent' and 'best practice".[8]

[127] Ms AB is correct when she emphasises that the conduct rules set the minimum standards, but it is also important to note that conduct rules are to be applied as "sensibly and fairly as possible."[9]

[128] Mr CD had not breached the rule complained of.

[129] A breach cannot be established on the basis of argument that a rule was breached when the rule hadn't been.

[130] But a scrutiny of Ms AB's concerns regarding what she considered to be Mr CD's failure to provide her with relevant information, is not necessarily confined to an examination as to whether there had been a breach of r 3.4A. Those concerns can reasonably be measured against an assessment as to whether Mr CD had fulfilled his duty to take reasonable care,[10] and by broader reference to s 12 of the Act, where unsatisfactory conduct is defined as to include conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer,[11] and conduct that would be regarded by lawyers of good standing as being unacceptable, including, unprofessional conduct.[12]

[131] In assessing Mr CD's conduct against this broader canvas, it is necessary to examine the consequences that Ms AB says resulted from Mr CD's failure to explain the basis on which the work would be undertaken.

[132] Firstly, Ms AB complains that she didn't understand the nature of the work that was being done. She says that Mr CD failed to provide her with updates of work that was being done outside of the appeal.

[133] I did not find this aspect of Ms AB's argument to be convincing.

[134] Suggestion that she was unaware of the work that was being done (outside of the appeal), is at odds and inconsistent with the abundant evidence on the file of Ms AB having been a highly engaged and involved client.

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[8] Supporting reasons for the review application at p5.
[9] *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].
[10] Rule 3 of the Rules.
[11] Section 12(a).
[12] Section 12(b)(ii).

[135] I agree with Mr GH, that Mr CD's correspondence to the Law Society of 12 June 2020, in which he details the extent of Ms AB's involvement in providing instructions, gives strong indication that "Ms AB was well aware of the additional work that was being done and (tacitly at least) agreed with it …".[13]

[136] Secondly, Ms AB complains that Mr CD's failure to provide her with information resulted in her being unaware as to how she was being charged for work being done.

[137] This issue overlaps with the examination which is to follow of the reasonableness of the fees charged, but I do not find Ms AB's argument that she was quite unaware as to how she was being charged, to be persuasive.

[138] Ms AB rejected suggestion that she was a person experienced in dealing with legal matters.

[139] She says that her two previous lawyers had provided her with a fixed fee estimate of costs.

[140] She says that she had no experience of what she describes as a "'pay-as-you-go, however-much-I-charge' regime".[14]

[141] Suggestion by Ms AB that she was unaware that she was being charged on a time/cost basis does not present as consistent with evidence of a number of events that occurred during the course of the retainer.

[142] Firstly, Ms AB was familiar with the fact that barristers have an instructing solicitor.

[143] She had had confidence in Ms KL who had been her instructing solicitor in two previous retainers.

[144] She would have been aware that barrister's accounts were rendered (as were Mr CD's) through the instructing solicitor.

[145] As Ms AB was her client, it could be assumed that Ms KL would have explained the relationship between instructing solicitor and barrister instructed, and, in particular, fee arrangements.

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[13] Costs assessment report, above n 4 at [32].
[14] Supporting reasons for the review application at p6.

[146] In response to suggestion that she would have been alerted to Mr CD's charging regime if she had received regular invoices from him, Ms AB disputes that invoices were regularly received from Mr CD. She points to a delay at one point, of 3 months.

[147] Five invoices were rendered:

(a) 8 March 2019 in the amount of $2,673.75;

(b) 20 June 2019 in the amount of $3,450;

(c) 16 August 2019 in the amount of $11,871.45;

(d) 31 October 2019 in the amount of $13,500; and

(e) 4 December 2019 in the amount of $9,821.50.

[148] Mr CD says that in correspondence to his instructing solicitor accompanying each of the invoices rendered, it was his custom to invite any queries or concerns regarding the fees.

[149] Mr CD says that on 10 September 2019, Ms AB wrote to him expressing satisfaction with the results achieved in the Court of Appeal hearing.

[150] She advised Mr CD that she was "over the moon" with the results and expressed her thanks to Mr CD for the result achieved.

[151] By this stage, Mr CD had rendered Ms AB three invoices and no objections had been raised by her.

[152] Ms AB suggests that she was, in general, happy with the work that had been done on the Court of Appeal matter, but unhappy with the work completed on matters arising from the High Court proceedings.

[153] When Ms AB became concerned about fees, she raised those concerns with Mr CD.

[154] Invoices were amended.

[155] I do not consider it likely that Ms AB would have received invoices totalling $17,995.20, without understanding that Mr CD was rendering fees on a time cost basis, and that she was being charged for work completed as recorded in the invoices provided.

[156] Ms AB's argument that she did not understand the basis on which Mr CD was charging was not the sole focus of her fee complaint. She considered that Mr CD had employed his time/cost approach to charging for maximum personal benefit, and with insufficient regard to a consideration as to whether the fee arrived at was fair.

[157] A singular feature of the approach Ms AB has adopted in advancing her complaints, is the degree to which (excluding her acknowledgement that she was satisfied with work completed on the Court of Appeal file) she is robustly critical of all aspects of Mr CD's billing.

[158] She allows no credit to Mr CD for electing not to bill her for work completed on her file post October 2019. She suggests that there had been no agreement reached for Mr CD to do any further work post 31 October 2019, saying:[15]

> There was no agreement or arrangement established post 31 October 2019. Accordingly had Mr CD wished to be paid for any quite incidental interactions post that date, then he should have sought that agreement.

[159] Suggestion that Mr CD was not instructed to do further work, or that she had not agreed to reimburse him for any further work completed is starkly contradicted by Ms AB's instructions to Mr CD.

[160] On 4 January 2020, Ms AB emailed Mr CD to advise him that she would be making a payment towards settlement of his invoice. In that correspondence, she informed Mr CD that "[a]s you already know I would very much appreciate you carrying on for me, as specifically instructed, for the work we need you as a barrister to do".

[161] It is clear from exchanges of correspondence between Ms AB and Mr CD that post 31 October 2019, Ms AB was providing instructions to Mr CD and expecting him to act on those instructions. He continued to be required to engage with opposing counsel.

[162] Ms AB suggests that if Mr CD's time records for post October 2019 were scrutinised, this examination would highlight similar concerns to those she considered she had identified when examining his earlier records.

[163] Whilst those time records have not been required to be examined as part of this review, the notations to the time records, and the nature of the work identified as having been completed, indicates that Mr CD had completed a substantial amount of

[15] Ms AB, correspondence to Law Society (29 August 2020) at p1.

work that he had not elected to charge for. He cites an unwillingness to further engage with Ms AB as explanation for the approach he adopted.

[164] But the significance of the explanations provided by Ms AB, is that she advances argument that Mr CD was not specifically instructed to do work, or that he performed work that he had not been instructed to do, when that was clearly not the case. Mr CD has elected not to seek reimbursement of costs incurred for work completed after rendering of his 4 December 2019 account, and that work has not been considered as part of this review, but Ms AB's dismissal of the additional work completed, does not, in summary, provide an accurate account of the total work that had been done.

[165] I agree with both the Committee and its costs assessor, that it would have been preferable if Mr CD had provided Ms AB at commencement with a letter of engagement, but I am not satisfied that his failure to do so, considered in the context of how the retainer evolved, constituted a breach which resulted in Ms AB being ill informed to the extent that she says that she was, or uncertain to the extent that she says she was, as to the approach Mr CD was adopting to billing.

Were the fees charged fair and reasonable?

[166] Referring to the relevant authorities, this Office has observed that considerations to be taken into account when determining whether a fee is fair and reasonable include: [16]

> (a) Setting a fair and reasonable fee requires a global approach;
>
> (b) What is a reasonable fee may differ between lawyers, but the difference should be "narrow" in most cases;
>
> (c) While time spent must always be taken into account it is not the only factor;
>
> (d) It is not appropriate to (as an invariable rule) multiply the figure representing the expense of recorded time spent on the transaction by another figure to reflect other factors.

[167] The High Court has held that it is:[17]

> … the obligation, which is clear from a number of authorities, for a practitioner who is using time and attendance records to construct a bill, to take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the

[16] *Hunstanton v Cambourne* LCRO 167/2009 (10 February 2010) at [22].
[17] *Chean v Kensington Swan* HC Auckland CIV-2006-404-1047, 7 June 2006 at [23].

> amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out.

[168] The process of determining a fair and reasonable fee is "an exercise in balanced judgment - not an arithmetical calculation":[18]

> … different people may reach different conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow.

[169] For that reason, this Office has referred to there being a "proper reluctance to 'tinker' with bills by adjusting them by small amounts," and that it "is therefore appropriate for Standards Committees not to be unduly timid when considering what a fair and reasonable fee is."[19]

[170] Where there is a complaint about a bill of costs there is no presumption or onus either way as to whether the fee was fair and reasonable.[20]

[171] Rule 9.1 specifies "the factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include …". Thirteen factors are contained in paragraphs (a) to (m) of that rule. It is important to note that this list of factors is not exhaustive. Other factors may apply, on a case by case basis.

[172] Rule 9 provides:

> A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

[173] Rule 9.1 provides:

> **Reasonable fee factors**
>
> 9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:
>
> (a) the time and labour expended:
>
> (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
>
> (c) the importance of the matter to the client and the results achieved:

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[18] *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 at 441.
[19] Above n 16, at [62].
[20] At [63].

(d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:

(e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:

(f) the complexity of the matter and the difficulty or novelty of the questions involved:

(g) the experience, reputation, and ability of the lawyer:

(h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:

(i) whether the fee is fixed or conditional (whether in litigation or otherwise):

(j) any quote or estimate of fees given by the lawyer:

(k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and the client:

(l) the reasonable costs of running a practice:

(m) the fee customarily charged in the market and locality for similar legal services.

[174] A starting point is to consider the nature of the retainer, the fee customarily charged for the work involved, the skill and experience of the lawyer, and the time recorded on the file.

[175] These factors having been addressed, attention can then properly turn to a consideration of any remaining factors that present as of particular relevance to a particular case.

[176] It is frequently the case that the starting point for assessing a fee is a consideration of the time recorded by the lawyer as having been spent on the file.

[177] Whilst it has been emphasised that it is inappropriate to place undue reliance on time costing alone,[21] and that time recorded should not on its own determine the reasonableness of the fee, when time is being charged at an hourly rate, it is incumbent on the lawyer to ensure that accurate time records are maintained.[22]

[178] Whilst Ms AB is critical of the report prepared by the costs assessor and has identified what she considers to be demonstrable errors in the assessor's report, I do not agree that the approach adopted by Mr EF reflected a flawed methodology.

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[21] *Chean v Kensington Swan*, above n 17 at [23].
[22] *Property and Reversionary Investment Corp Ltd v Secretary for State of the Environment*, above n 18.

[179] It has been noted that Mr EF is a senior and experienced practitioner.

[180] He observed at the commencement of the report that he had “read and reread the file many times”.

[181] He notes that he had also considered two court decisions relevant to the retainer, to ensure that he was better placed to understand the background to the complaints, and to place the complaints in context.

[182] Mr EF observed that he found the file a “difficult and time-consuming file to deal with (quite apart from its size) or to get into some sort of logical or coherent sequence”.

[183] Like Mr EF, I have spent considerable time reading the file.

[184] I agree with Mr EF in respect of the following issues, and do not propose to expand on those issues further other than to reinforce that I have considered each issue carefully and reached an independent view on them. I agree with Mr EF that:

(a) Mr CD’s hourly rate was within the range that would be properly charged by provincial barristers of Mr CD’s experience; and

(b) that it was appropriate for Mr CD to charge for travel time, and that amounts charged were fair and reasonable; and

(c) that there was nothing untoward in Mr CD’s use of the expression “but say” in his invoicing, to record a reduction in fee to that which would have been arrived at by simple calculation of hours recorded against hourly rate; and

(d) that it would be inappropriate to revise fees upward following completion of a particular task, in the absence of evidence of the practitioner having alerted their client to that possibility; and

(e) that the skill and specialist knowledge required to advance the file was “average” for a practitioner of Mr CD’s experience; and

(f) that the degree of responsibility was “high”.

[185] After addressing the specific rule factors, Mr EF described the process of analysis which involved him standing back and looking at the file “in the round”.

[186] I consider that was the proper and appropriate approach for Mr EF to have adopted.

[187] Ms AB argues that Mr EF's methodology was flawed.

[188] Having examined the individual accounts and the time records, Mr EF calculated hours worked by reference to Mr CD's time records and estimated the hourly fee that had been charged over the course of the retainer.

[189] Ms AB was critical of that approach, as she did not consider that the time records were accurate. She identified specific areas where she concluded that errors had been made in recording time, and overarching her specific criticisms, was complaint that Mr CD had been overly zealous in his time recording, had padded his accounts, and had spent time on work which he had either not been instructed to do, or could more cost effectively, have left to his legal executive to complete.

[190] I agree with Ms AB that an excessively zealous approach to time recording can result in time being inflated beyond what would be considered reasonable.

[191] There were, in my view, matters that could have been better managed by Mr CD.

[192] When a client instructs a lawyer on a litigation matter, they invariably want to know three things; "how much will it cost me, how long will it take, and will I succeed"?

[193] When things do not go well and the client complains that it "cost me more than you said, took longer than you said, and we failed", lawyers frequently seek refuge in the safe harbour of argument that it is impossible to guarantee an assured outcome in litigation, that costs are dependent on the path the litigation takes, and estimating time frames is difficult because of the impossibility of predicting the paths that the litigation has potential to travel.

[194] To a degree, a lawyer responding in terms as described is reasonable and accurate. If it was possible to guarantee outcome in litigation cases, 50 per cent of parties engaged in litigation would be hastening to extricate themselves from the proceedings.

[195] If costs could be accurately calculated to encompass every circumstance that may arise, that would require a degree of prescient thinking on the part of the lawyer entirely at odds with the reality of the unpredictability which characterises a great deal of litigation.

[196] But despite these difficulties, it can be expected of a lawyer that they provide the client with sound advice at commencement of the risks the litigation presents, a measured and considered appraisal of possible outcomes, and a realistic analysis of potential worst-case scenarios.

[197] A client is entitled to expect of the lawyer that the initial assessment of the case is informed and reflects a conscientious understanding of the facts of the case, and a competent understanding of the legal issues involved.

[198] It is also important in litigation cases that the lawyer's client is kept fully informed as the case progresses.

[199] In this case, Mr CD was instructed in litigation which had been ongoing for several years.

[200] Ms AB's opponent was obdurate and seemingly not unreceptive to taking steps which would prolong the dispute.

[201] In these circumstances, it would have been difficult to provide accurate prediction as to how the litigation would proceed, that being dependent to a certain degree, on the steps taken by Ms AB's opponent.

[202] No objection could be taken to Mr CD adopting an approach to his billing, which commenced, as a starting point, with an examination of his time recorded.

[203] But aspects of Mr CD's management of fee issues can be fairly criticised.

[204] If a lawyer places reliance on time records, it is important that the records be accurate.

[205] Ms AB identifies areas in Mr CD's timekeeping where errors were made. She points, for example, to emails having been incorrectly recorded.

[206] I have carefully examined each of the errors identified by Ms AB. They are, in large part, acknowledged by Mr CD, and countered with argument that errors identified have been corrected. Mr CD also contends that any mistakes in recording have been amply offset by time not being recorded.

[207] I do not diminish the importance of accurate record keeping, but it is inevitable, that in any administrative system which relies on a degree of "human input", errors can occur.

[208] Whilst Ms AB was understandably concerned when she identified mistakes in Mr CD's records, when considered in their totality and measured against an assessment of the total fee charged by reference to the hours completed, I do not consider that the errors had any material impact on an assessment as to whether fees charged were fair and reasonable.

[209] Mr CD argued that his hourly rate at commencement was intended to be $465 an hour, rather than $455 which had been initially charged.

[210] He submits that it was his practice to implement a modest increase to his hourly rate annually, to reflect increased costs, but as a consequence of problems with his computer software, the intended changes did not come into effect when anticipated.

[211] This was not Ms AB's problem. If Mr CD had provided Ms AB at commencement with advice as to what his hourly rate was, any difficulties would have been avoided.

[212] Mr CD's decision to split his file for billing purposes into two separate matters was described by Mr EF as a matter of internal management, and an approach that it was open to Mr CD to adopt.

[213] I consider the approach adopted to have been confusing and unnecessary. Ms AB's concerns regarding time spent on the High Court matter, arose when she received advice from Mr CD that he had accumulated hours on the High Court file, that were waiting to be billed. This aroused a degree of suspicion in Ms AB. It germinated a concern that bills she was receiving were overinflated.

[214] If Mr CD was proposing to effectively render accounts under two separate files, it would have been helpful if he had informed Ms AB at commencement of his intention. Alternatively, it would have been a straightforward matter for Mr CD to have simply rendered bills regularly which incorporated all work completed to date, and provided clear explanation in the notations to those accounts, of the specific work that had been completed.

[215] Mr CD could have administratively managed (in respect to his accounts) his files more effectively, but I do not consider that the issues identified above, which were addressed by both the cost assessor and the Standards Committee, viewed in their totality, have such significance as to impact on a consideration as to whether fees charged were fair and reasonable.

[216] Ms AB argues that the cost assessor and the Committee neglected to address what she considered to be the fundamental question, namely whether Mr CD had completed the work charged for. Where she asks, is the analysis of the work done, measured against the number of hours charged?

[217] I do not consider that the Committee's costs assessor neglected to consider and assess the work that had been done. Mr EF noted that he had "read and reread the file many times". In doing so, he also read the relevant decisions from the court, to ensure that he was better able to understand the complaint.

[218] Ms AB accepts that she was happy with the work done by Mr CD on the appeal. Her argument that Mr CD padded his bills, focuses on the High Court work.

[219] There is sufficient information on the file to give a clear indication of the nature of the work that had been done by Mr CD.

[220] In advancing accusation that Mr CD had "padded" his accounts, Ms AB provides no substantive evidence to support that accusation.

[221] The areas identified by her where Mr CD is said to have charged for work that was unnecessary, or where she contends that Mr CD had adopted an overzealous approach to his time recording, engage relatively minor matters, and have been satisfactorily addressed by Mr CD.

[222] Ms AB is particularly critical of the work done by Mr CD in attempting to finalise arrangements which would ensure that the directions made by the court to enable the road that crossed her property to be remediated were put in place.

[223] She suggests that the work involved in the to-ing and fro-ing between Mr CD and opposing counsel, could more properly have been managed by Mr CD's instructing solicitor (Ms KL), at less cost to herself.

[224] But Ms AB did not instruct Ms KL to undertake the work, and it is clear from the directions Ms AB gave when providing, as she did, close supervision and oversight of the negotiations, that she was placing reliance on Mr CD to provide his input.

[225] In addressing the question as to whether the fees charged were fair and reasonable, it is important to step back and look at the fees "in the round" rather than focusing solely on the time records.

[226] Mr CD substantially reduced a number of his accounts.

[227] Ms AB is dismissive of these reductions. She argues that Mr CD's practice of rendering an account, then reducing the account by reference to the "but say" methodology, was a contrivance that was designed to divert attention from the fact that the initial fee charged was excessive.

[228] I do not accept that argument.

[229] It is common practice for lawyers to assess the fee initially by reference to the time spent, and then, as they are required to do, step back and calculate what they consider to be an appropriate fee in the circumstances.

[230] Ms AB is quite correct when she identifies that it would be unreasonable for Mr CD to charge a six minute unit for completing minor administrative tasks such as acknowledging receipt of correspondence and an email, but it is important for a lawyer to record all communications received or sent, and the process of then stepping back and assessing the fee in the round is precisely what Mr CD had done.

[231] Ms AB is critical of the Committee for allowing credit to Mr CD for reductions made to his accounts. She argues that the Committee viewed these reductions as "voluntary and gracious discounts", when in fact they were the result of interventions on her part to "correct things".[23]

[232] As noted, areas identified by Ms AB where errors had been made, were relatively minor.

[233] She does not identify where she had alerted Mr CD to significant and major errors in his accounts, which had prompted him to amend the accounts.

[234] Nor does Ms AB's raising of objection to an account, or Mr CD's preparedness to reduce his accounts, establish that the fee initially charged was unfair or unreasonable.

[235] There may be a number of reasons why a lawyer is prepared to reduce a fee. It may be that the lawyer decides on reflection that his or her account is too high. It may be that the lawyer is prepared to reduce the account rather than become embroiled in a disagreement with their client that may contaminate the lawyer/client relationship.

[23] Supporting reasons for the review application at p6.

[236] As noted, Mr CD says that he elected not to render a final account because his relationship with Ms AB had broken down, and he did not wish, as he put it, to pour fuel on the fire.

[237] Mr CD says, and I accept his evidence on this point, that he reduced his fee on the Court of Appeal matter, because he had, when examining his time records, concluded that he had spent too much time on the matter.

[238] Argument as to whether fees were reduced as a result of Mr CD determining that it was appropriate to amend the fee, or as a consequence of objections raised by Ms AB, are irrelevant.

[239] The question is, whether the fees actually charged by Mr CD were fair and reasonable.

[240] I have carefully considered each of the invoices rendered.

[241] In doing so, I have given careful consideration to:

(a) the hours recorded; and

(b) amendments made to invoices as a consequence of identification of errors; and

(c) reductions to invoices made; and

(d) the GST and disbursement component of the invoices; and

(e) variation to hourly rate charged.

[242] In completing that analysis, I have had both Ms AB and Mr CD confirm agreement as to the amount of the final invoices rendered.

[243] I am satisfied that invoices rendered by Mr CD were (with minor exceptions) calculated at first step by reference to time records which in large part provided accurate account of the time that Mr CD had spent on the file.

[244] I have checked and double checked the time records. I consider that the time records provide a reasonable reflection of the time that Mr CD would have been required to spend on the work that was completed. A significant component of the time recorded, evidences work that Ms AB herself would have record of. A substantial amount of time engages correspondence sent and received.

[245] Ms AB was concerned at the amount of time that Mr CD had recorded as having been spent on perusal and research. I think it probable and not unreasonable that Mr CD would, in light of the issues involved by the long running dispute, have had to have spent a considerable amount of time on work which fell under the umbrella description of perusal and research, but in any event, if time spent on those areas was excessive, I consider that this would be adequately addressed by the evidence that total fees charged were substantially reduced from what would have been charged if the invoices rendered were calculated solely by reference to time recorded. Significant reductions were made to a number of the accounts.

[246] I agree with the costs assessor that Mr CD had achieved a measure of success for Ms AB. The failure to accomplish a final settlement of a dispute that had been fermenting over several years, was not attributable to any failure on the part of Mr CD.

[247] I conclude that the fees charged were fair and reasonable.

Do any disciplinary issues arise as a consequence of Mr CD refusing to release his file?

[248] When Ms AB made request of Mr CD to release her file on 20 March 2020, she had fees outstanding.

[249] A lawyer may, in circumstances where fees have not been paid, assert a lien over the file.[24]

[250] On receipt of request for release of the file, Mr CD advised Ms AB that he would retain the file until outstanding fees were paid but offered to provide her with a copy of her file.[25]

[251] Correspondence on the file dated 19 May 2020 confirms that Mr CD had forwarded files to Ms AB on that date.

[252] Whilst there was some delay in making the files available, I do not consider that the delay was of such significance as to merit consideration of a disciplinary response.

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[24] Rule 4.4.1 of the Rules.
[25] Mr CD, email to Ms AB (19 March 2020).

Conclusion

[253] In completing this review, I have considered each of the issues set out in 1–8 of page 1 of Ms AB's review application.

Publication

[254] 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

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

DATED this 31ST day of March 2021

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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:

Ms AB as the Applicant
Mr CD as the Respondent
[City] Standards Committee [X]
New Zealand Law Society