

**CONCERNING**

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the [South Island] Standards Committee

**BETWEEN**

**JQ**

Applicant

**AND**

**QM**

Respondent

**DECISION**

[1] This is an application for review of a decision of the [South Island] Standards Committee which considered a complaint by JQ (the Applicant) against his former solicitor QM (the Practitioner). The Standards Committee declined to uphold the complaint, resolving that any further action was inappropriate. The Applicant seeks a review of that decision.

**Background**

[2] The Practitioner's firm had acted for the Applicant and another person, K, in connection with the sale of a business. Subsequently they (the Applicant and K) brought court proceedings against the Practitioner's firm.

[3] In this proceeding the Applicant and K were represented by a solicitor and it appears that the Practitioner's firm was also represented by a solicitor.

[4] The evening before a settlement conference was due to take place the Practitioner telephoned several people, including the Applicant, in relation to the proceedings being brought against his firm. The Applicant's recollection is that the Practitioner said to him:

*I'm [QM], [...], do you know who I am. What sort of person are you stabbing a man in the back that can't defend himself. [This apparently referred to one of his partners who was ill.] You had better walk away from this, [...] is a small place and I'm not going to back off.*

[5] The Applicant said that he felt “*very intimidated*”, and asserted that he and his colleague did not produce all their evidence at the settlement conference, nor mention the Practitioner’s call, and that ultimately they “*agreed to a very low settlement figure because [they] wanted to get it over and out of there*”. It is noted from the Applicant’s letter to this office dated 7 August 2011 that the telephone calls were not mentioned at the settlement conference on their lawyer’s advice “*because he [their new lawyer] doubted [the Practitioner] made the calls.*”

[6] The Practitioner’s Counsel responded to the complaint, stating that the Practitioner did not take issue with the fact of the telephone call or specifically the content but informed the Committee that the Practitioner denied that his tone or language was intimidating or inappropriate. It was claimed that the Practitioner was ringing in his personal capacity as a defendant, not in his professional capacity as a lawyer. Counsel submitted that in these circumstances the Lawyers: Conduct and Client Care Rules 2008 (“the Rules”) did not apply.

[7] In the course of the Standards Committee enquiry the Practitioner was asked to specifically address whether or not the test of misconduct set out in section 7(1)(b)(ii) applied to him. This request arose from the Committee’s tentative acceptance that the Practitioner was not supplying regulated services at the time of his telephone call to the Complainant, and that (by implication) section 12 did not apply.

[8] In reply, Counsel for the Practitioner in essence argued that the language used was “*moderate*”, that its content was “*something that one might expect from a litigant addressing their adversary even in controlled circumstances*”, and that the Practitioner’s comments were limited to an attempt to have the Complainant (and fellow plaintiffs) take into account the wider implications of their proceedings, being the effect on another member of the firm who was seriously ill. Counsel reiterated that a lawyer as a party had the same rights as any other litigant, but there was acknowledgment that the Practitioner’s behaviour was not conducive to settlement of the claims, a view Counsel said was now shared by the Practitioner himself. Counsel concluded with submissions as to why sections 12(a) and (b) did not apply to personal conduct, adding that section 12(c) did not apply as there had been no breach of any of the Rules.

[9] The Standards Committee agreed that the telephone call was unconnected to the Practitioner providing regulated services, and therefore fell outside the Committee’s jurisdiction in terms of section 12 of the Lawyers and Conveyancers Act.

[10] The Committee's view was that the conduct could be considered only in terms of section 7 which made provision for the conduct of lawyers that occurred outside of the provision of the legal service. Noting the high threshold for a finding of 'misconduct' under this section, the Committee concluded that the conduct did not reach the threshold that rendered the Practitioner unfit for legal practice.

[11] There is nothing on the Standards Committee's file to show that Counsel's further submission was provided to the Complainant for his comment but arguably that is not significant because the Applicant's position was made very clear in his complaint and so the Committee had the views of both parties when it decided the matter.

### **Standards Committee Determination**

[12] The Standards Committee determined that any further action was inappropriate because the conduct complained about did not occur at a time when the Practitioner was providing regulated services. The Committee considered that the level of the Practitioner's conduct did not reach the threshold for a finding of misconduct as required by section 7(1)(b)(ii) of the Act which applies to the conduct of lawyers outside of the provision of regulated services. (This would have required a finding that the Practitioner was not to be a fit and proper person or one unsuited to engage in practice as a lawyer).

[13] The Committee also concluded that the conduct occurred outside the provision of regulated services and therefore did not fall within the section 12 definition of unsatisfactory conduct, and was therefore outside of the Committee's jurisdiction.

[14] The Committee nevertheless added that it was "*most unimpressed*" as the Practitioner was noted to be a senior lawyer.

### **Application for Review**

[15] The Complainant did not accept the Committee's decision, considering it "*biased*" and "*lawyers protecting their own*". He stated that despite he and his colleague feeling let down by the Practitioner's firm as their lawyers, ultimately they had the local Law Society "*say [the Practitioner] did nothing wrong*". He concluded by alleging that the matter "*was being ignored until [he] put pressure on*".

[16] For the review that the Applicant elaborated upon the factual background, the financial consequences for him and his business partner of their decision to settle their claim at the settlement conference, and confirmation that on their Counsel's advice they did not raise the Practitioner's phone calls at the conference.

## Discussion

[17] I accept as correct that the conduct did not occur while the Practitioner was providing regulated services.

[18] The first issue to consider concerns the Standards Committee's jurisdiction to consider complaints about conduct that is unconnected with the provision of regulated services.

[19] The only explicit statutory reference to such conduct is to be found in section 7(1)(b)(ii) of the Act which gives a Standards Committee jurisdiction to consider that conduct if it would justify a finding that the lawyer is not a fit and proper person to practice law, or is otherwise unsuited to engage in practice as a lawyer.

[20] In this case the Standards Committee considered that the conduct complained of did not reach that threshold. I consider that the Committee was correct in taking this view.

[21] A further opportunity to consider a complaint about conduct that is unconnected with the provision of regulated services arises in section 12(c) of the Act. This results from an absence of any requirement that the conduct must have occurred while legal services were being provided (as is required by subsections (a), (b) and (d)). In such event, it must be shown that there has been a breach of the Act or any of the regulations or practice rules made under the Act. If that occurred then in such case a finding of 'unsatisfactory conduct' could be made. The exception is created by section 12(c) provides:

*[U]nsatisfactory conduct, in relation to a lawyer ... means –*

*(c) conduct consisting of a contravention of this Act or of any regulations or practice rules made under this Act that apply to the lawyer ..., or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7).*

[22] In this case the Committee concluded that the conduct could not amount to 'unsatisfactory conduct' pursuant to section 12 of the Act because that section was perceived to apply only in relation to conduct that occurred when the Practitioner was providing regulated services. The Committee was correct insofar as section 12(a), (b) and (d) were concerned, but there is nothing to indicate that the Committee considered whether subsection (c) could apply.

[23] As noted, for an adverse finding to be made against the lawyer under this subsection the conduct must involve the breach of a professional standard as set out in the Lawyers and Conveyancers Act or the Rules of Conduct and Client Care, and I have considered whether the conduct complained of could amount to a breach of the Rules. The Rules I considered were:

- Rule 2.2 (“A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice”). I do not see that there was a breach of this Rule because the Practitioner’s words in the phone call are not threatening or in the category of acts which are usually associated with interfering with the course of justice. A warning that a defendant won’t be backing off from defending the claim is not, in my view, a breach of the professional rule when the warning is made by a lawyer who is a party of a proceeding.
- Rule 2.3 (“A lawyer must use legal processes for proper purposes”) does not apply for the same reason.
- There is no breach of client confidentiality (chapter 8), nor of chapter 10 (“Professional dealings”) because the Practitioner is a party to the proceedings, not acting as a lawyer in them. This latter comment also applies to the Rules in chapters 11, 12 and 13.
- The Rule which appears to be relevant in this case is Rule 12 covering third parties. That Rule states that “[a] lawyer must, when acting in a professional capacity, conduct dealings with others, including self represented persons with integrity, respect and courtesy”. However, the rule applies when a lawyer is ‘acting in a professional capacity’. This clearly contemplates the lawyer providing regulated services. It is doubtful that the rule could apply in the present circumstances where the Practitioner’s behaviour was connected to his personal involvement as a party to litigation.

[24] I have been unable to identify any Rule that could apply in this case, and therefore must therefore conclude that there is no basis upon which the Practitioner could be disciplined.

[25] Given that Standards Committees, and this Office, are required to exercise their powers within the statutory parameters of their jurisdiction, I do not agree that this is a case of “lawyers protecting their own”. That the Committee took the complaint seriously is demonstrated by it having obtained a legal opinion to assist its

considerations. Moreover, it is clear that the Standards Committee was most unimpressed by the Practitioner's behaviour and said as much in its decision.

**Decision**

Pursuant to section 211(1) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed (for different reasons).

**DATED** this 28<sup>th</sup> day of August 2012

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Hanneke Bouchier  
**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:

JQ as the Applicant  
QM as the respondent  
[South Island] Standards Committee  
The New Zealand Law Society