

CONCERNING

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

AND

CONCERNING

a determination of the [XX] Standards Committee 1

BETWEEN

KY

Applicant

AND

DZ

Respondent

DECISION

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

Introduction

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

[2] The complaint concerns Mr DZ's conduct in leaving service copies of Family Court proceedings with someone other than Mr KY at a [specified location].

Background

[3] Mr DZ acted for Mr KY's wife in family matters from or shortly before March 2014.

[4] Mr KY's lawyer was Ms JR.

[5] Mr DZ describes care of the children proceedings in the Family Court from 2012, and relationship property issues that were awaiting final resolution when he was instructed in 2014. Mr DZ communicated with Ms JR over their clients' matters,

including an email he sent on 28 March 2014 in which he proposed two options for progressing resolution of the property disputes: either Mr KY accept Mr DZ's settlement proposal within 10 working days, or he would immediately thereafter file proceedings in the Family Court. Mr DZ asked Ms JR whether she was authorised to accept service of relationship property proceedings (the proceedings) on Mr KY's behalf.

[6] Although further correspondence followed over 2014, Mr DZ says Ms JR did not confirm she was authorised to accept service of the proceedings on Mr KY's behalf.

[7] Disputes over the parties' property were not resolved. Mr DZ says that by April 2015 his client had been separated from Mr KY for nearly three years, so on his client's instructions he filed the proceedings in the Family Court in 2015.¹

Tuesday 5 May 2015

[8] The Family Court returned service copies of the proceedings to Mr DZ under a covering letter dated 5 May 2015, which gave notice of a Registrar's review on 5 June 2015 (the Registrar's letter).² The Registrar's letter records copies of it having also been sent directly to Mr KY and to Mr DZ's client, so they would both have become aware Mr DZ had filed the proceedings shortly thereafter. Nonetheless, as Mr DZ was clearly aware, the Family Courts Rules (FCR) called for the proceedings to be served on Mr KY.

[9] Mr DZ says he understood that Mr KY was [occupation] at [specified location], and says he thought it would be a simple exercise to serve proceedings on Mr KY there. Having decided he would attempt service on Mr KY at [specified location], Mr DZ went there at 10.45 am in the morning of 5 May, shortly after the Family Court had issued service copies of the proceedings.

[10] Given his expectation that service on Mr KY at [specified location] would be easy, Mr DZ says he made the attempt because:

- (a) Ms JR had not told him that she was authorised to accept service on Mr KY's behalf.
- (b) He passed [specified location] daily on journeys to and from his home;
and

¹ FAM-2015-006-000050.

² Letter Family Court to Mr DZ (5 May 2015).

- (c) It would save his client the cost of instructing a process server if he served the proceedings on Mr KY himself.

[11] Mr DZ's handwritten note indicates that his attempt at service actually took about 45 minutes, which suggests his expectation of simplicity was misplaced.

[12] Mr DZ's account of his attempt at service is that when he arrived at [specified location], he asked the security guard if he could be let in to see Mr KY. He says the security guard denied him access on security grounds, but when he said he had documents to give to Mr KY the guard made a phone call. Mr DZ does not know who the call was to.

[13] The security guard then gave Mr DZ the phone number of a Ms XR. Mr DZ telephoned and spoke with Ms XR, who agreed to come to the gate, and duly appeared. Mr DZ says he understood from Ms XR that she was employed as Coordinator. She gave him her card, explained that she was "directly under Mr KY" and said she "could accept and pass the documents on to Mr KY".

[14] Mr DZ handed the documents to Ms XR and she signed a copy of the Family Court's covering letter, confirming she had received the documents at "1110hrs 5/5/15".

[15] Mr DZ left with his signed copy of the Registrar's letter.

Monday 11 May 2015

[16] On 11 May, Ms JR sent an email to Mr DZ. She expressed the view that Mr DZ had not effected service on her client because the documents had not been handed to Mr KY in person, or in accordance with FCR 110. Citing that rule, Ms JR nonetheless said that she now had instructions to accept service by email, time would run from her receipt of the proceedings by that method, and she would request an extension of time for the first Registrar's review.

Tuesday 12 May 2015

[17] Mr DZ responded to Ms JR's email explaining that the guard at the gate had declined him entry, but that he had been told by the Coordinator that she could "accept and pass the documents on to Mr KY who is obviously her immediate boss", and that "Mr KY was not available as [Mr DZ] had not made an appointment to see him". Mr DZ described the events as "all rather trivial behaviour for such a simple process".

[18] Soon after, Mr DZ sent a second email to Ms JR asking that she acknowledge service of the proceeding on behalf of Mr KY and referring to High Court Rule (HCR)

110. Mr DZ expressed the view that “Mr KY was the [occupation] at the time and should or could have made himself available”. Mr DZ said he had been “more than happy to return for an appointment to avoid this unnecessary delay”.

[19] Ms JR acknowledged receipt of the proceedings, Mr DZ asked her to confirm that this “satisfies Service on Mr KY”. Ms JR’s response of “thank you [Name]”, although presumably consistent with her instructions from Mr KY, did not actually constitute a response to Mr DZ’s question.

[20] Mr KY was dissatisfied with Mr DZ’s conduct and laid a complaint to the New Zealand Law Society (NZLS).

The complaint

[21] Mr KY describes Mr DZ’s visit to [specified location] in somewhat different terms to the account provided by Mr DZ. Mr KY is critical of Mr DZ for being demanding, attempting to enter [specified location] without “notification or appointment”, and accusing the guard of being obstructive. He proposes other means by which Mr DZ could have contacted him or delivered documents and includes reference to FCR 110.

[22] The major concern Mr KY expresses in his complaint, however, is that Mr DZ breached his privacy by handing the proceedings to someone other than Mr KY, and without first putting them into an envelope. Mr KY expresses the view that Mr DZ’s failure to protect his privacy, and “the privacy of such matters as directed under the Family Court was totally unprofessional and frankly a disgrace”.

[23] Mr KY proposed that NZLS censure Mr DZ, require him to undertake further training, direct him to follow “correct Family Court procedures and rules” and provide a written apology “to the serviceman concerned by 1 June 2015”, although Mr KY did not explain why that date was of particular significance to him.

[24] Mr DZ responded in the terms set out in the Background section above.³

[25] Mr KY responded to Mr DZ’s reply. Mr KY confirms that Mr DZ has never communicated directly with him. He also says that Mr DZ did not make contact with

³ Mr DZ’s version of events is set out in that way because he was present when the events the subject of Mr KY’s complaint occurred. While there is no reason to doubt that Mr KY has faithfully repeated his understanding of events, I am conscious that he was not present, appears not to have been directly involved in the events Mr DZ describes, and that there is no direct evidence from the guard or Ms XR.

Ms JR “in any form to advise of the documentation to be served”, and that Mr DZ could easily have served him via Ms JR via email.

[26] Given the content of Mr DZ’s email of 28 March 2014, there is clear evidence that he did mention service, albeit quite some time before he attempted service. The perceived failure on Mr DZ’s part to email documents to Ms JR by way of service on Mr KY also lacks any real basis. Lawyers routinely arrange for personal service of proceedings directly on the opposing party to the proceeding, particularly if there has been no signal from that party’s lawyer that he or she is authorised to accept service on the client’s behalf, as is the case on the present facts. The general rule, discussed in more detail below, means that as Ms JR had been representing Mr KY in the matter, Mr DZ should have communicated primarily through her, unless one of the circumscribed exceptions applied.

[27] Mr KY says that Mr DZ conveniently omitted to mention that in driving to [specified location], Mr DZ would also have passed Mr KY’s home. Mr KY makes the point that Mr DZ could have chosen to serve him there. That concern is deprived of what little traction it might otherwise have had for two reasons. First, rule 10.2 of the Lawyers and Conveyancers Act (lawyers: Conduct and Client Care) Rules 2008 restrained Mr DZ from communicating directly with Mr KY because of Ms JR’s involvement. Second, there is nothing objectively unreasonable in Mr KY being served at his place of work. Although I accept that the hours worked by [occupation] may well differ from those of the populace more broadly, Mr DZ could reasonably have expected Mr KY to have been at work by 10.45 am on a weekday.

[28] I take it the cost that Mr DZ refers to is the cost of instructing a process server rather than undertaking the service himself. There is nothing more to be made of that point on the evidence available. Cost is primarily a matter between Mr DZ and his client.

[29] Mr KY says that Mr DZ was formerly a [occupation]. From that, he extrapolates that Mr DZ must have known that [specified location] was subject to security protocols, and what those protocols were. From there, he postulates that Mr DZ must have known his visit would cause “significant interest and concern” at [specified location]. He concludes that Mr DZ, therefore, acted deliberately so as to cause Mr KY maximum embarrassment.

[30] It is difficult to follow the logic of Mr KY’s argument. It is accepted that [specified location] has security protocols, and that those are necessary. It is accepted that anything out of the ordinary is likely to stimulate some level of interest in a

workplace. It is also accepted that [occupation] can be expected to know many things. However, without some more solid evidence, which Mr KY has not provided, the inferences he suggests be drawn do not follow logically from the available information.

[31] Mr KY repeats his view that Mr DZ should have emailed the document to Ms JR, delivered them to Mr KY at home, or communicated directly with Mr KY to arrange a time for delivery. Mr KY says that Mr DZ ignored his privacy and “exacerbated the situation by insisting the employee sign the front page of those documents”. Mr KY adds Mr DZ should “undertake training in regard to the Privacy Act”.

The Standards Committee decision

[32] The Standards Committee delivered its decision on 22 July 2015.

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

[34] In reaching that decision, the Committee determined that:

- (a) Mr DZ had not breached any of his professional obligations.
- (b) It was not shown that he had acted with the intention of causing Mr KY embarrassment or distress.
- (c) It was not shown that any ‘sensitive’ material had been disclosed by having the employee endorse a receipt on the first page of the documents.

Application for review

[35] Mr KY filed an application for review on 15 August 2015. He repeats the view that Mr DZ should be censured, required to provide a written apology and undergo remedial training. He also considers Mr DZ should pay him a fine to reflect the embarrassment and inconvenience he has caused.

[36] Mr KY considers it “totally unacceptable that any lawyer ... can or should pass unsealed sensitive personal Family Court documentation to a third party”. He considers the Committee’s decision “condones this as an acceptable practice by Law Society members”.

[37] Mr KY repeated his views on the alternatives available to Mr DZ, and his concerns about his right to privacy being “ignored” and compounded by having the Coordinator sign the front page.

Respondent’s reply

[38] After being invited to comment on the review application, Mr DZ said:

- (a) He had emailed Mr KY’s lawyer asking whether the lawyer would accept service, but there had been no reply.
- (b) His expectation was that the Coordinator, like legal staff, could reasonably have been expected to respect confidentiality by not reading the documents, noting there was no evidence that she had.
- (c) If he had engaged a process server, the same situation would have occurred, and by attending personally, he was simply seeking to minimise costs for his client.
- (d) The documents were court papers stapled together for service.

[39] Mr KY’s reply included the following:

- (a) Mr DZ had ignored proper process, in particular R110 of the Family Court Rules, and had also breached his privacy under the Privacy Act.
- (b) The Coordinator had no [redacted] or reporting functions to him as [occupation].
- (c) “The issue is not who Mr DZ passed this material to, it is the fact that it is unsealed family court documentation containing personal sensitive information which was openly accessible to whomever it was passed”.
- (d) The fact that Mr KY pursued the matter was evidence of his embarrassment.

Review on the papers

[40] The parties agreed to the review being dealt with on the papers. 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 the information available if the LCRO considers that the review can be adequately determined in the absence of the parties, as in this case I do.

The role of the LCRO on review

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

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

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

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

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

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

[43] Given those directions, the approach on this review is to:

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

Review Issue

[44] Broadly, the question under consideration on review is whether Mr DZ’s conduct fell below proper professional standards in any respect. In particular, the Committee identified particular rules as being applicable. Mr KY’s complaint raises questions around the extent to which lawyers are permitted by the rules to

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

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

communicate directly with clients of other lawyers, and the constraints on lawyers' conduct towards others when acting in a professional capacity.

[45] The particular questions under consideration are:

- (a) Did Mr DZ communicate directly with Mr KY?
- (b) Did Mr DZ, when acting in a professional capacity, conduct his dealings with Mr KY with integrity, respect, and courtesy.

[46] Those questions are considered within the framework of the Act and in light of its purposes, which include maintaining public confidence in the provision of legal services, and protecting consumers of legal services. The Act sets out the fundamental obligations of lawyers, who must, in the course of their practice, comply with the obligations set out in s 4 of the Act. Those include obligations to uphold the rule of law, facilitate the administration of justice in New Zealand, be independent in providing regulated services to their clients and protect the interests of their clients, subject to their overriding duties as an officer of the Court.

Analysis

Rules

[47] The particular rules that apply to the conduct at the centre of Mr KY's complaint are rules 10.2 and 12. Those rules say:

- 10.2 A lawyer acting in a matter must not communicate directly with a person whom the lawyer knows is represented by another lawyer in that matter except as authorised in this rule.
- 12 A lawyer must, when acting in a professional capacity, conduct dealings with others ... with integrity, respect, and courtesy.

The general rule – rule 10.2

[48] Rule 10.2 imposes a general restraint on lawyers impeding direct communication with another lawyer's client. However, FCR 106 says that a document that must be personally served may be served by a party's lawyer or their agent. Lawyers would be wise to give careful thought to rule 10.2, and the exceptions to it, before embarking on personal service of another lawyer's client.

[49] Although Mr DZ went to [specified location] in May 2015 with the intention of communicating directly with Mr KY to effect service of the proceedings, the fact is that

he did not accomplish his aim. Although he clearly intended to personally serve Mr KY, Mr KY did not come to the gate. Mr KY confirms that Mr DZ did not communicate directly with him.

[50] In circumstances where Mr DZ's conduct did not contravene rule 10.2, it is not necessary to undertake a detailed analysis of whether any of the exceptions might have applied.

Rule 12

[51] The major concern expressed in Mr KY's complaint, articulated in of the language of the rules, is that Mr DZ, acting in a professional capacity, did not conduct dealings with Mr KY with respect and courtesy, as rule 12 requires him to. In particular, Mr KY considers that handing the proceedings to the Coordinator without the security of them being contained in an envelope represents a failure to respect his privacy, and demonstrates discourtesy towards him.

[52] Mr DZ helpfully set out his recollection of the facts, and says he abides by the decision of this Office on review.

[53] The front page of the bundle Mr DZ handed to the Coordinator appears to have been the Registrar's letter. It is on Ministry of Justice letterhead. It shows the Family Court number, and in bold print and capital letters is headed "Advice of Registrar's Review". It specifies the Property (Relationships) Act (PRA), mentions the division of relationship property and names the parties. At its foot, Ms XR signed as having received it.

[54] In the context of this review, what Ms XR did or did not do with the Registrar's letter and any attachments to it is irrelevant. The focus of this inquiry is on the professional propriety of Mr DZ's conduct.

[55] Proceedings under the PRA often contain information that is private and personal to the parties, and may well be personal to others, given the involvement of other family members, companies and trusts is not uncommon. The proceedings contained such information.

[56] Mr DZ's evidence indicates that his attempt at service was undertaken in some haste, presumably on his client's instructions. Mr DZ confirms that he did not check the service requirements before attending [specified location]. Given he had first

indicated in March 2014 that he would be serving documents, he could not argue he was so pressed for time he did not have the opportunity to check.

[57] If he had checked he would have identified the particular requirements for service. He would have better served his client. He could have instructed a process server, thereby avoiding the risk of having to give evidence of service, if Mr KY sought to argue he had not been properly served. He might also have saved himself the inconvenience of having to address a complaint from Mr KY.

[58] There is nothing objectionable in ensuring service was attended to promptly, but Mr DZ should, and easily could have checked the FCR and considered his professional obligations. He could have distanced himself from service by arranging for an agent to attend to it, rather than seeking to communicate directly with Mr KY. Mr KY describes other alternatives.

[59] While there is no persuasive evidence to support the inference that Mr DZ deliberately set out to embarrass Mr KY, there is reason to believe he was embarrassed. He may also have been distressed, inconvenienced, and concerned about his reputation, and perhaps occupation. There is no evidence of whether those might have been affected by Mr DZ having served "open copies" of the proceedings. However, it is not unreasonable for Mr KY to be concerned about how those over and under his [supervision] might perceive him. Nor is it unreasonable for him to have sought to demarcate his professional business from the relationship and property issues that arose in his personal life.

[60] Mr DZ was obliged to act on his client's instructions, and those are presumed to have included having the proceedings served without further delay.

[61] However, there was no need for Mr DZ to act with such haste that he had insufficient regard to his obligations to consider his professional obligations towards Mr KY, in particular that he be treated with respect and courtesy. He could easily have taken a moment to put the documents in an envelope. Perhaps of more significance, certainly to Mr KY, is that with Mr KY being unavailable, Mr DZ could have left the documents in "open form" with the [Administrative Officer], whoever that was, had he but known there was a [redacted] rule that allowed him to do so. Mr KY could not reasonably have objected.

[62] Mr DZ's conduct in leaving service copies of the proceedings with the Coordinator in a form which did not protect Mr KY's privacy represents a failure to show a professional level of respect and courtesy towards Mr KY.

[63] In the circumstances, Mr DZ's conduct consisted of a contravention of rule 12.

Unsatisfactory Conduct

[64] The definition of unsatisfactory conduct in relation to a lawyer contained in s 12 of the Act includes conduct consisting of a contravention of practice rules made under the Act that apply to the lawyer.

[65] Rule 12 is a practice rule that applied to Mr DZ. Mr DZ contravened rule 12. His conduct therefore falls within the definition of unsatisfactory conduct.

[66] Section 211(b) of the Act provides a LCRO with the discretion to exercise any of the powers that could have been exercised by the Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised. I am conscious that it is appropriate for me to exercise some particular caution before substituting my own judgement for that of the Committee without good reason, and that findings of unsatisfactory conduct may be made on the basis of an entirely unintentional and minor contravention of one of the rules.

[67] Whatever the FCR might have allowed or required when it came to service, rule 10.2 presented an impediment to Mr DZ communicating directly with Mr KY. Mr DZ does not appear to have considered that aspect of his conduct before embarking on his attempt at service. If he had given the matter of service proper consideration he could have avoided all of the subsequent difficulties that arose from his failed attempt at service, including giving proper consideration to the degree of respect and courtesy Mr KY might reasonably have expected from him as a lawyer.

[68] Although Mr DZ's conduct is a long way from unsatisfactory conduct at its most serious, Mr DZ's contravention of rule 12 is more than trivial.

[69] In all the circumstances, this review is determined on the basis that there has been unsatisfactory conduct on the part of Mr DZ pursuant to s 152(2)(b)(i) because by his conduct he contravened rule 12.

Consequential orders – s 156

[70] Mr KY seeks a range of orders under s 156, including a request that Mr DZ pay him money.

[71] In *Z v Dental Complaints Assessment Committee*⁶ the Supreme Court stated at [98]:

... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

[72] The objectives of imposing orders in a disciplinary context as discussed by the Medical Practitioners Disciplinary Tribunal in *Re Wislang* include:⁷

- (a) To punish the practitioner.
- (b) As a deterrent to other practitioners.
- (c) To reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[73] Although a finding of unsatisfactory conduct is not a penalty in itself, it has a stigmatising effect for lawyers of good standing. The very possibility of such a finding may well act as a deterrent to many, and is consistent with demanding compliance with minimum standards.⁸ However, in some cases, something more than a finding of unsatisfactory conduct is called for.

[74] There is no evidence of loss by Mr KY caused by Mr DZ, leaving documents in "open form" with the Coordinator. Once they left Mr DZ's hands, any loss would be difficult, if not impossible, for this Office to calculate. In the circumstances, although compensation is available pursuant to s 156(d), no order is made.

[75] This Office has the power to order Mr DZ to apologise to Mr KY in accordance with s 156(c) of the Act.

⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [98].

⁷ *Re Wislang* [1999] NZMPDT 102 at [6.12]; upheld in *Wislang v MPDT* DC Auckland No 4554/99, 27 April 2000.

⁸ *MBL v Shadforth* [2016] NZIACDT 37 at [20]–[21].

[76] An apology is not a punishment. An apology recognises wrongdoing, and sincerely given, can help to maintain public confidence in the provision of legal services.

[77] Mr KY is a member of the public. It is consistent with the purposes of the Act that his confidence in the provision of legal services is maintained. It is also appropriate, where proper standards of courtesy and respect have not been shown, to deliver an apology.

[78] In the circumstances, pursuant to s 211(1)(b) and 156(1)(c) of the Act, within 14 days of the date of this decision, Mr DZ is ordered to apologise to Mr KY in writing for not having shown a proper standard of courtesy and respect for Mr KY's privacy by leaving service copies of Family Court documents in open form with the Coordinator at [specified location] on 5 May 2015.

Decision

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

[80] Pursuant to sections 211(1)(b), 152(2)(b)(i) and 12(c) of the Lawyers and Conveyancers Act 2006 this review is determined on the basis that there has been unsatisfactory conduct on the part of Mr DZ.

[81] Pursuant to ss 211(1)(b) and 156(1)(c), within 14 days of the date of this decision, Mr DZ is ordered to apologise to Mr KY in writing for not having shown a proper standard of courtesy and respect for Mr KY's privacy by leaving service copies of Family Court documents in open form with the Coordinator at [specified location] on 5 May 2015.

DATED this 25th day of October 2016

D Thresher
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 KY as the Applicant
Mr DZ as the Respondent
[XX] Standards Committee 1
The New Zealand Law Society
Secretary for Justice