

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee

BETWEEN

MR WC

Applicant

AND

MR AU

Respondent

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

DECISION

Introduction

[1] Mr WC, a barrister, seeks a review of a decision of the Auckland Standards Committee that found he had acted inappropriately in dealing with Mrs AV, a client of Mr AU's. Mr AU is also a barrister, and was also the original complainant to the Standards Committee. Mrs AV was a client who was funded through the Legal Aid system.

Background

[2] On 18 June 2010, Mr AU was instructed by the then Legal Services Agency (LSA) to act for Mrs AV, who was remanded in custody at the Auckland Women's Prison. In March 2011, Mrs AV was granted bail. In August 2011 the bail conditions were varied to allow her to reside at a different address.

[3] On or about 12 October 2011, Mrs AV was arrested and charged with further offences. Mrs AV was committed for trial in the High Court, due to commence in April 2012. On 18 October 2011 Mr AU was instructed by the Legal Aid Ministry of Justice (LAMJ) to also act for Mrs AV in relation to the fresh charges.

[4] In October 2011 Mr WC spoke by telephone with Mrs AV (Mr AU says there was a meeting but this is not material) whilst she was in custody at the Women's Prison. It appears Mrs AV was referred to Mr WC by another prisoner and she therefore contacted him. In the course of that conversation Mr WC says Mrs AV raised concerns about Mr AU. As a consequence of that discussion Mrs AV sought from the LAMJ that Mr WC be appointed in Mr AU's stead. The making of that application was facilitated by Mr WC who forwarded the application to LAMJ on 3 November 2011.

[5] Mr AU then received a letter from LAMJ, advising him that in relation to the instructions of June 2010, Mrs AV had requested a change of counsel "due to personal conflict".¹ Mr AU replied to that letter on 21 November 2011 and was subsequently advised by the LAMJ, on 28 November 2011, that Mrs AV's application to have counsel reassigned was refused.

[6] Mr WC also says that in the course of his dealings with Mrs AV she raised the prospect of obtaining bail. Mr WC agreed to file a bail application for Mrs AV. In particular Mr WC says that on 4 November 2011, Mrs AV rang him in a "very distressed state"² because Mr AU had failed to attend court and she wanted to be granted bail so that she could spend Christmas with her son. Mr WC agreed to file her application on a pro bono basis "[b]ased entirely on Mrs [AV's] level of desperation".³ It is also clear that Mr WC expected to be assigned by LAMJ to act for Mrs AV (although this in fact did not eventuate).

[7] On or about 24 November 2011, Mr AU's office was advised by the High Court at Whangarei that an application for bail with electronic monitoring had been made. Mr AU subsequently received a copy of the application, which showed that it had been made by Mr WC who was holding himself out as the lawyer for Mrs AV. Mr AU also notes that he followed up with Mrs AV as to whether she wished to instruct him to pursue that application, those instructions were not forthcoming.

[8] Mr AU complained to the Lawyers Complaints Service that:

- a. Mr WC was not assigned counsel on a criminal legal aid basis when he filed the bail application for Mrs AV;

¹ Letter from Mr AU to NZLS, 21 December 2011.

² Letter from Mr WC to NZLS, 7 February 2012.

³ Above n 2.

- b. Mr WC appeared not to have any instructions from an instructing solicitor; and
- c. Mr WC was purporting to act for Mrs AV when he knew, or ought to have known, that she was represented by Mr AU.

[9] The complaint is in essence that Mr WC acted for Mrs AV when she was represented by other counsel and without an instructing solicitor.

[10] It is pertinent to note that Mrs AV has (understandably) not provided any information in respect of her instructions to Mr WC or to Mr AU.

Determination by the Standards Committee

[11] The Standards Committee concluded that Mr WC was at all times aware that Mrs AV was represented by Mr AU, but nonetheless decided to submit an e-bail application on her behalf. As there was no certainty at that point that he would be reassigned as counsel, the Committee concluded that it was unsatisfactory conduct for Mr WC to act when he knew that Mr AU was representing Mrs AV on a Legal Aid basis.

[12] The Committee further decided that Mr WC was in breach of the intervention rule, provided in particular in Rule 14.6,⁴ and that this constituted unsatisfactory conduct as defined in s12(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[13] Finally, the Committee decided that Mr WC had not inappropriately communicated with Mrs AV and there was no breach of Rule 10.2.⁵ This conclusion was reached because Mr WC was not “acting” in the matter when he communicated with Mrs AV, despite him realising that she was represented by Mr AU.

[14] Mr WC was reprimanded pursuant to s 156(1)(b) of the Act and ordered to pay \$900 in costs.

[15] The Committee decided that publication was not necessary or desirable in the public interest.

Review Application

[16] Mr WC seeks a review of that decision on the basis that at all times he was of the view that Mrs AV’s application for him to be reassigned as counsel would be

⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

⁵ Above n 4.

successful and he is somewhat perplexed as to why it was not. Furthermore, Mr WC believed that if he had not filed the e-bail application, Mrs AV would have been significantly disadvantaged by the delay in having the application heard and therefore it was proper for him to take those steps to preserve Mrs AV's position.

[17] Mr WC also notes in his application for review that he considers that he acted appropriately in rendering assistance to Mrs AV in circumstances where it is conceivable that prejudice would result if he did not take steps on her behalf. He notes that in his view his actions were consistent with an overriding obligation to assist people who request assistance.

[18] Mr WC does not consider the Committee's finding of unsatisfactory conduct to be correct and seeks that it to be reversed, along with the Order for costs of \$900 and the reprimanding pursuant to s156(1)(b) of the Act.

Analysis and Review

[19] At the heart of this matter is the question of whether Mr WC acted inappropriately in dealing with Mrs AV including seeking to be assigned as her counsel and in making a bail application on her behalf while she was represented by Mr AU. While this can be considered in terms of whether a particular Rule has been breached, there is also the residual question of whether the conduct (either in its totality or part of it) was "conduct that would be regarded by lawyers of good standing as being unacceptable" in terms of s 12(b) of the Act. I will consider the question of whether there has been a breach of Rule 14.4 before returning to that question.

Intervention rule

[20] Mr WC clearly undertook legal work for Mrs AV – in particular the filing of the bail application. He did not have an instructing solicitor when he did that work. Rule 14.4 provides:⁶

a barrister sole must not accept instructions to act for another person other than from a person who holds a practising certificate as a barrister and solicitor.

[21] There are a number of exceptions to that Rule in Rule 14.6 which provides a list of circumstances in which a barrister can accept instructions from a person who does not hold a practising certificate as a barrister and solicitor. While that list does exempt

⁶ Above n 4.

a lawyer who is acting “in criminal proceedings where the client is legally aided”⁷ that clearly applies only to the lawyer who is appointed to act by the LAMJ on the grant of aid.

[22] It is also of note that the fact that Mr WC did not act for a fee also appears irrelevant. While there is an exception where the lawyer is “providing assistance to a legal advice service operating on a non-profit basis or acting pro bono on work referred by such a service”,⁸ that does not apply here as no intervening legal advice service exists. None of the other exceptions appear to be relevant.

[23] Mr WC stated that at the time he submitted the e-bail application “it appeared that it was more than likely that I would be reassigned as [Mrs AV’s] counsel.”⁹ Mr WC also stated his view that had he not made the e-bail application Mrs AV would have been significantly disadvantaged. While there is no reason to doubt that Mr WC held these views it does not of itself change the fact that in undertaking legal work for Mrs AV, Mr WC did so without the intervention of an instructing solicitor.

[24] Accordingly because none of the exceptions apply to the circumstances in which Mr WC acted for Mrs AV when he submitted the e-bail application there has been a breach of Rule 14.4.

[25] Mr WC’s therefore constitutes unsatisfactory conduct, as defined in s 12(c) of the Act which provides that:¹⁰

In this Act, unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, 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 incorporated firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7)

Communicating with another lawyer’s client

[26] The Committee considered whether Mr WC acted inappropriately in contacting a person who was represented by another lawyer. In doing so it considered Rule 10.2

⁷ Above n 4 at Rule 14.6(f)(i).

⁸ Above n 4 at Rule 14.6(f)(iii).

⁹ Above n 2.

¹⁰ Section 12(c) Lawyers and Conveyancers Act 2006.

which provides:¹¹

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.

[27] That rule is intended to prevent a lawyer acting on one side of a matter from contacting the opposing client directly and thereby circumventing the lawyer advising that client (and the protections that go with that advice). The Committee concluded that there was no breach of Rule 10.2 because when Mr WC communicated directly with Mrs AV he was not acting in the same matter as Mr AU. It is my view that this conclusion is correct.

[28] For completeness I note that there will be instances where it is inappropriate for a lawyer to contact a person who is represented where the purpose of that communication is to solicit business. Those circumstances are set out in Rule 11.2 which provides:

A lawyer must not directly contact a prospective client—

- (a) in a way that is intrusive, offensive, or inappropriate; or
- (b) if the lawyer knows or should know that the physical, emotional, or mental state of the person is such that the person could not exercise reasonable judgement in engaging a lawyer, or the lawyer is aware that the prospective client does not wish to be contacted by the lawyer.

[29] There is no evidence that this Rule was breached by Mr WC in his dealings with Mrs AV.

Wider matters

[30] I have concluded that the Standards Committee was correct to conclude that the conduct of Mr WC constituted a breach of Rule 14.4. I consider that it is important to undertake a wider view (or more informally to “stand back” and take a global view) for two reasons. First, if on balance the conduct of Mr WC was not of a nature where a sanction ought to be imposed it may be a situation where the Standards Committee might have exercised its discretion to take no further action on the complaint pursuant to s 138 of the Act.

¹¹ Above n 4 at Rule 10.2.

[31] Second, as prefaced above, if this is not the case it is also appropriate to consider whether the conduct of Mr WC was “conduct that would be regarded by lawyers of good standing as being unacceptable” and therefore unsatisfactory in terms of s 12(b) of the Act. I note in particular that in finding that it was inappropriate for Mr WC to act when he was not assigned as counsel on a criminal legal aid basis (and therefore unsatisfactory conduct) the Standards Committee did not refer to any particular rule or standard. I consider that s 12(b) is the proper standard to apply and that the analysis of the Committee is consistent with a finding that the conduct of Mr WC was “conduct that would be regarded by lawyers of good standing as being unacceptable”.¹²

[32] A consistent thread in the material provided by Mr WC is that he was motivated in his actions to ensure that Mrs AV received appropriate legal assistance in a timely way. While there is no reason to doubt that he held those views (regarding need and urgency, etc), it is not entirely clear that they were reasonably held.

[33] For example it is difficult to see how there was a great deal of urgency in respect of the bail application. Mr WC received the phone call from Mrs AV on 4 November 2011. Mr WC states that he submitted the e-bail application on her behalf because she wanted to spend Christmas with her son and Mr WC feared that Mrs AV would be significantly disadvantaged had he not done so. As Christmas was some seven weeks away when Mrs AV rang Mr WC, it is difficult to see how she would be significantly disadvantaged had he not filed the e-bail application and had instead discussed the matter with Mr AU, who could then have taken the appropriate action as Mrs AV’s legally-aided representative.

[34] There is no evidence that Mr WC made any attempt to contact Mr AU to discuss the situation after he received Mrs AV’s phone call, or thereafter to inform Mr AU of his earlier contact with Mrs AV and the fact that he had sent her documentation to enable her to apply for a change of representation in favour of Mr WC. While it is not the role of the Standards Committee to enforce standards of mere etiquette, it would seem usual to raise these matters with the other counsel not only as a matter of courtesy, but also to ensure that the interests of the client are properly protected and there is no duplication (such as the two Legal Aid applications) or confusion.

[35] It is clear that there is no property in a client and that a client may change lawyers should they choose to do so. It was therefore not inappropriate of itself for Mr

¹² Above n 10.

WC, when asked, to provide assistance in respect of a possible reassignment of counsel appointed on a Legal Aid grant. The difficulties arise because before he was appointed counsel (in fact he was never appointed counsel) he applied for bail on Mrs AV's behalf as if he were counsel. This is notwithstanding that, by his own admission, it was not proper for him to act as her lawyer until either she appointed him on a private retainer, or he was assigned as counsel through the Legal Aid process.

[36] I therefore concur with the view of the Standards Committee that it was unreasonable for Mr WC to submit the e-bail application, rather than liaise with Mr AU and wait for the outcome of Mrs AV's application for the reassignment of counsel.

[37] In light of this, and notwithstanding the apparently proper motives of Mr WC I consider that the Committee was correct to conclude that the conduct was "conduct that would be regarded by lawyers of good standing as being unacceptable"¹³ and therefore to make a finding of unsatisfactory conduct and not to exercise its discretion to take no further action on the complaint under s 138 of the Act.

[38] Accordingly I agree with the position taken by the Standards Committee in all respects.

Decision

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

DATED this 6th day of June 2013

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:

Mr WC as the Applicant
Mr AU as the Respondent
The Auckland Standards Committee 1

¹³ Above n 10.

The New Zealand Law Society