

CONCERNING

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

AND

CONCERNING

a determination of the Wellington Standards Committee 1

BETWEEN

LD
of Wellington
Applicant

AND

VW
of North Island
Respondent

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

DECISION

Introduction

[1] The Wellington Standards Committee 1 declined to uphold a complaint LD (the Applicant) against VW (the Practitioner). The Applicant now seeks a review of that decision.

Background

[2] The Practitioner had represented the Applicant in relation to criminal charges. It appears that he had been charged with male assaults female and burglary. The burglary charge was dropped when the Applicant agreed to plead guilty to the former charge. He was convicted and discharged, and ordered to attend anti-violence counselling.

The complaint

[3] His complaint to the New Zealand Law Society alleged that the Practitioner had failed to sufficiently communicate with him, had not disclosed details of the charges (he denied being aware of the burglary charge), and that the Practitioner had failed to

inform him of the implications of a guilty plea, in particular that it would affect his ability to get a visa and travel to certain destinations. In the Applicant's view the Practitioner's approach had deprived him of the opportunity to defend himself against the charges. A further complaint was that the Practitioner had no documentation to give to his new lawyer in relation to the appeal.

Practitioner's response

[4] The complaint was notified to the Practitioner who responded that she had to rely on her recollection of events, having confirmed that the file went missing when she relocated her office about [some] years ago. She said she had apologised to the Applicant, and genuinely regretted the loss of the file, and told his appeal lawyer at the time.

[5] The Practitioner was of the view that she would have sent a copy of the police disclosures to the Applicant as this was her standard procedure. She said the Applicant called her often with the same complaint, namely that his estranged wife was a bad wife and mother, and that he considered the assault was "a mere scratch". The Practitioner noted that the Applicant did not deny the assault but believed he had done no wrong or caused any significant injury.

[6] The Practitioner claimed she had had discussions with the Applicant at the first call, and on his instructions had entered a 'not guilty' plea. She recalled having seen him at her offices several times prior to the status hearing. The Practitioner explained that prior to the status hearing, the police had indicated they would withdraw the burglary charge if the Applicant pleaded guilty to the male assaults female charge, and that the Applicant agreed. She had sounded out a sentencing indication with the Judge at the status hearing, which included the Applicant attending anti-violence counselling as part of the convict and discharge.

[7] The Practitioner added that the matter was remanded for several months but the Applicant had not liked counselling and ended up having private counselling, but he had not done this to the satisfaction of the Court and he had then voluntarily engaged in further counselling.

[8] She said she told the Applicant that if he wished to appeal his conviction he would need to go to another lawyer. She understood that the Court had dismissed the appeal, and that any issue of her competency had not been raised at the appeal.

Applicant's comments on Practitioner's response

[9] In reply the Applicant repeated that he had received a copy of the police disclosure and was unaware of the burglary charge. He said that the assault charge was not discussed with him in any great detail, he disputed his attack on his wife amounted to assault, and denied that he had met the Practitioner at her office other than briefly before the status hearing. He contended that the Practitioner's recollections of discussions were incorrect. He repeated that the Practitioner had never advised him of the consequences of changing his plea.

Standards Committee decision

[10] The Standards Committee decided to take no further action on the complaint pursuant to section 138 (1)(f) of the Lawyers and Conveyancers Act 2006. This section allows the Standards Committee to take no further action if the Applicant has an alternative avenue to pursue his remedies (other than the right to petition the House of Representatives or a complaint to the Ombudsman). The Standards Committee further noted that any concerns that the Applicant had about privacy should be taken to the Privacy Commissioner.

Review Application

[11] The Applicant was not happy with the Committee's final decision. He said he had been badly advised by the Practitioner, that she had not taken his case seriously, and that this was his first legal experience and he had no idea about what to do. He said that the Practitioner never had an intention to investigate or construct a case, and that she always put off his requests for a meeting.

[12] The Applicant alleged the Practitioner was rude to him when he rang her about the appeal and told him not to call again. He added that she had lost his file (this is not disputed). He denied having been given a copy of the police report, and said that the Practitioner had not phoned him even when he called her about the appeal. He was concerned that nobody believed him.

[13] He repeated that she entered the guilty plea without telling him about the consequences, and had a meeting for five minutes before the final hearing. He concluded that she had never given him a chance and was not truthful about the whole case (presumably about her explanation to the Committee).

[14] A review hearing was held on 22 March 2012, attended by the Applicant, and his support person, Ms Hosking. The Practitioner had the opportunity to attend but was not required to do so.

[15] At the hearing the Applicant explained that he had been forced by the Practitioner to plead guilty. He talked about having made numerous phone calls to the Practitioner but had been unable to get an appointment. He said he had no recollection of any discussion with the Practitioner about the change of plea, and he found it difficult to understand the processes.

[16] It also became apparent that the Applicant held the view that if he had had a chance to defend himself against the charge then there would have been no conviction.

[17] The Applicant explained that he was 'in a bad state of mind', was stressed, and suffered depression by the events following the police involvement, and also suffered a high degree of anxiety.

Considerations

[18] I have considered all of the information on the Standards Committee file, and the information provided by the Applicant for the review, and also heard from him personally at the review hearing. On the basis of all this information, I have concluded that the Standards Committee was correct to have taken no further action in this matter. However, I do not accept the reasons for the Committee's decision as correct, and this review process can address matters that I have identified.

[19] It is important to note from the outset that the events complained of occurred prior to 1 August 2008. The reason that it is important to note this is that the complaint must be considered in terms of the professional standards that applied to lawyers under the (former) Law Practitioners Act. Those standards apply in all cases where the conduct complained of occurred before the commencement of the new Lawyers and Conveyancers Act. This is so even though a complaint may have been brought at a later date, as was the case here.

[20] Under section 351 of the Lawyers and Conveyancers Act, the jurisdiction of a Standards Committee arises only if the conduct complained of could have led to disciplinary proceedings being taken against the Practitioner under the Law Practitioners Act. Before disciplinary proceedings could be taken against a lawyer, the conduct needs to reach a high threshold of wrong doing. It needs to be conduct that can be described as 'misconduct' or 'conduct unbecoming'.

[21] The conduct would need to be capable of being described as 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable'). Or if the conduct involved negligence, that the negligence had to be of a degree of seriousness or frequency such as to reflect on his fitness to practise.

[22] This is the applicable standard against which the complaints need to be measured. I have considered whether the complaints give rise to disciplinary issues against the standards of professional conduct that applied at the time.

[23] One of the Applicants allegations is that the Practitioner forced him to plead guilty. I find this highly improbable. A 'not guilty plea' had been entered in the first instance. It was later changed to a 'guilty' plea. It is highly unlikely that this could have happened without some discussion between the Practitioner and the Applicant about the reasons for, or the implications of, a change of plea. In the absence of a reason for doing so, the change of a plea to guilty would make no sense.

[24] It is in my view highly unlikely that the Applicant could have been unaware of the additional charge of burglary, and that charge being dropped in exchange for the amended plea. Without clear evidence to support the allegation I do not accept that the Practitioner would have changed her client's plea without some discussion with her client. I can find no proper basis for the allegation that the Practitioner forced the Applicant to plead guilty.

[25] The other failures alleged by the Applicant, and which are refuted by the Practitioner, involve issues about communication. The allegations are denied by the Practitioner. It seems to be the case that the Applicant considered that the Practitioner had not adequately communicated with him. That he may feel this to be the case does not necessarily equate to a professional failure by the Practitioner, however.

[26] Of central significance is that even if there was some shortcoming on the part of the Practitioner in terms of the degree of clarity in her communications (and I do not conclude this to be the case), any such failure is not conduct that could reach the threshold sufficient upon which disciplinary proceedings could have been taken against the Practitioner under the Law Practitioners Act.

[27] That is not to say that failures of communication and explanation are to be taken lightly, but simply to say that any failure of this kind would not reach the necessary threshold to have invoked the Standards Committee's jurisdiction. In the circumstances, it is unnecessary to consider them further.

Further observations

[28] It appears that the Applicant considered that, but for his guilty plea, he would have got off the charge. However this was by no means necessarily the case. On the file was a copy of a statement to the police signed by his wife (the complainant in the assault matter), and although the Applicant challenged the truthfulness of his wife's statement, it would nevertheless have been evidence in the Court had the matter gone to trial. It was also clear from the Applicant's account that what may be perceived as 'assault' in NZ was different from his understanding of the kind of conduct could lead to a criminal charge in his country of origin.

[29] At the review hearing the Applicant also explained that he had suffered a great deal of distress and anxiety over this matter. This is hardly surprising, but it is also possible that this left him less receptive to information he was getting. The Applicant had had no prior involvement with the law, was unfamiliar with the NZ legal system and had a different comprehension of what constituted 'assault', and all of these factors may have contributed to creating considerable confusion for him.

[30] There is clearly a significant amount of contested evidence as between the Applicant and the Practitioner which is more readily explained by his unfamiliarity with process than wrongdoing on the part of the Practitioner. A lawyer's culpability is not to be measured only in terms of the client's failure to comprehend, but needs to be decided objectively, and with consideration of all the available evidence.

[31] In this case, I can find no evidence to support the allegation that the Practitioner did not discuss these matters with the Applicant, but at the same time I also accept that there were circumstances which may have affected his full comprehension of everything that was going on at the time.

[32] For the above reasons I conclude that the matters complained of did not reach a threshold for the Standards Committees jurisdiction to have arisen, and for that reason the Standards Committee was correct to have decided that no further action was necessary.

Decision

Pursuant to Section 211 (1)(a) of the Lawyers and Conveyancers Act 2006, the Standards Committee is confirmed. The amended reasons for that decision are noted above.

DATED this 1st day of June 2012

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:

LD as the Applicant
VW as the Respondent
The Wellington Standards Committee 1
The New Zealand Law Society
Secretary for Justice (redacted)