

CONCERNING

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

AND

CONCERNING

a determination of the Auckland Standards Committee 4

BETWEEN

EU

of Auckland

Applicant

AND

VK

of Auckland

Respondent

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

DECISION

[1] This is an application for review of a decision of the Auckland Standards Committee 4 which considered a complaint by EU (the Applicant) against VK (the Practitioner). The Standards Committee declined to uphold the complaint.

Background

[2] The Practitioner acts (or acted) for the ex husband of the Applicant. The Applicant was represented by her own lawyer. Her complaint stated that she and her former husband were “*currently in the family court in relation to care arrangements for our daughter...*”. The disputes surrounding clothing, school and Easter holidays, birthdays, and other issues, including whether an application should be made for Counsel for the Child. The complaints against the Practitioner largely concerned his correspondence which she perceived as inconsistent with his obligation to promote conciliation.

[3] Her letter of complaint to the New Zealand Law Society was set out in considerable detail and contained many attachments which included copies of correspondence that had been exchanges between the lawyers. Out of these had arisen the specific “issues of concern”. It is not necessary to record each element of the Applicant’s dissatisfaction with arrangements for the above matters. Complaints were also directed at the inclusion of ‘without prejudice’ content in an affidavit, and other matters. The Applicant took the view that the Practitioner had “*a general attitude of judgement and hostility towards me*”, that he promoted “*conflict rather than resolution*”, and encouraged “*anger in his client rather than diffusing it*”.

[4] The Practitioner denied the allegations. He informed the Standards Committee that he was obliged to act in accordance with his clients instructions and considered he had fulfilled his statutory duty under the Family Proceedings Act 1980 to promote conciliation. He said that the Applicant could not possibly know what advice he had given to his client. The Practitioner provided a detailed background to the dispute, and also responded to the specific allegations raised by the Applicant. He wrote, “*I hold nothing against the complainant personally, I am just doing my job as I understand it to be.*”, gave an example of one of the many issues that had arisen between the parties and concluded by denying that he had “*behaved in any way inappropriately in respect of the complainant or the file.*”

[5] The Practitioner’s letter was forwarded to the Applicant for comment. This resulted in lengthy response dated 19 July 2010 under the headings of, “the appropriateness of my complaint”, “family court proceedings”, “accusations and protection order”, “court hearing”, “mediation”, “appointment of lawyer for child”, “holiday schedule”, “direct communication”, “parents as primary caregivers”, “inclusion of non-admissible content in affidavit”, and “who I am”. This document is accompanied by eight appendices (including personal references etc), and several pages setting out and detailing the compensation sought by the Applicant from the Practitioner.

[6] These comments were sent to the Practitioner whose response of 6 September 2010 included comment on several of the matters raised, and in essence submitted that the complaint is misconceived. He acknowledged having made a comment in one letter which he now regretted, included an apology, but denied that this had reached a threshold for censure. He said he had not attended the mediations on the instructions of his client.

[7] On 9 September 2010 the Applicant sent a further letter to the Standards Committee setting out recent action on the file and included with her letter a further six pages of appendices, mostly emails between counsel during the previous four or so weeks.

Standards Committee Decision

[8] In its decision dated 5 October 2010 the Standards Committee referred to the heads of complaint made by the Applicant, referred to the Practitioner's response and also other correspondence it had received. The Committee noted the Practitioner's awareness of the statutory duty to promote conciliation, and further noted that the Practitioner had admitted that he naively emailed both parties to try and help them out and confirms that he 'won't be doing that again'. The Committee also observed that the Practitioner was obliged to act in the best interests of his client. The Committee was of the view that he had done so and that any further action would be unnecessary.

[9] The Committee resolved to take no further action, pursuant to Section 138(2) of the Lawyers and Conveyancers Act 2006. This section provides that a Standards Committee has a discretion to take no further action on a complaint if, in the course of the investigation of the complaint, "*it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate*".

Application for review

[10] The Applicant believed that the Law Society's assessment of the issues was too narrow, and that other lawyers who had been involved in or knew of the case ought to have been contacted. She asked that I take into account the combination of issues in her application, and requested me to speak to the various lawyers who are, or have been, involved in the proceedings.

[11] The Applicant considered that her legal bills had increased due to the Practitioner's conduct. Her desired outcomes which included a written apology from the Practitioner, compensation for legal costs she had incurred over the last three years and that the Practitioner resign as her former husband's lawyer. Her review application was accompanied by a large bundle of documents, many of which had already been provided to the Standards Committee.

[12] The Practitioner was invited to respond to the review application. He sought a dismissal of the complaint, relying on his earlier submissions to the Standards Committee. In rejecting the allegations he stated that he was obliged to take instructions from his client. He added some personal observations about the Applicant which are not pertinent to my review, but he considered that he had not breached any of his professional obligations. He

acknowledged that he had said some things the Applicant did not like, but considered that this was at the time necessary as part of his professional role as a lawyer.

[13] The Applicant was sent a copy of the letter and provided a further response.

[14] The review has been conducted on the papers, that is, on the basis of consideration of all material provided by the parties to the Standards Committee, and the information provided for the review. The review process does not generally involve the LCRO contacting third parties, whether they are lawyers or other individuals. This does not preclude the LCRO from seeking such additional information as may be necessary for the proper consideration of the complaint. In such case the parties would be informed of any additional information that will be sought. In this case I did not consider it necessary to seek further information from other sources.

Considerations

[15] The parties were involved in Care of Child Proceedings in the District Court. Overall the correspondence showed that the parties took a different view of, or approach to, a good many issues. These included interpretation of prior agreements or approaches to resolving their differences. The Standards Committee's view was that no further action was required.

[16] It is my task to review decisions of Standards Committees. This task first involves consideration of whether the Standards Committee decision appears to be correct on the basis of the evidence, interpretation of the complaints, the application of the professional standards, and procedures. If there are errors in any of these matters, the LCRO may either return to the matter to the Standards Committee for further investigation and consideration, or may assume all of the powers of a Standards Committee and commence such further investigation as is considered necessary in order to reach a final decision.

[17] I note that the Standards Committee decision did not refer to each and every matter that contributed to the Applicant's dissatisfaction. This may be the reason why she expressed the view that the Committee perceived the complaint too narrowly. While the inclusion of some more detailed discussion may have assisted the Applicant to feel assured that her concerns had been considered, I have no reason to doubt that the Committee considered all of the information that she provided in support of her complaints.

[18] However, this review provides an opportunity to consider the matters anew. I have carefully read the details of the complaint and the documents and submissions filed in support of them.

[19] The starting point for considering the complaint is the relevant standards by which lawyers are required to practice.

[20] The professional obligations of a lawyer are to promote and protect the interests of their clients. There is no general professional duty on a lawyer towards a third party who is not a client. The rules are clear that the duty owed by a lawyer in litigation is first to the court and then to the client to the exclusion of all others. While there are some exceptions, these arise in limited circumstances that have no application in this matter.

[21] There are rules which impose duties on lawyers in the way they engage with unrepresented parties, but that has no application here. The fundamental principle is that a lawyer has no duty to a person who is represented by their own lawyer.

[22] The evidence shows that the Applicant and her former husband have been involved in domestic-related proceedings for three years at least. A lawyer representing parties in proceedings involving the Family Proceedings Act or the Care of Children Act has a statutory duty to promote reconciliation or conciliation, and is required, in relation to filing a proceeding under either of those Acts, to certify that he or she has made their client aware of the facilities that exist for promoting reconciliation and conciliation; and, or take such further steps as in the opinion of the lawyer may assist in promoting reconciliation or, if reconciliation is not possible, conciliation. It has not been suggested that there was a failure on the Practitioner's part in regard to certification. Rather, I have understood that the complaint is a more general allegation that the way in which the Practitioner represented his client, and the way he corresponded, did not promote conciliation.

[23] I have looked at the correspondence that the Applicant forwarded which was offered as examples of her objections to the Practitioner's approach to the problems she was trying to resolve, and to demonstrate how the Practitioner has acted unprofessionally. From them one can get a fairly clear picture of the problems between the parties, and the approaches taken by their lawyers.

[24] It is clear that the approaches and views of the Applicant and her former husband, as conveyed via their lawyers' correspondence, were at odds with the positions taken by each of them concerning a good many issues. Their failure to reach agreement prolonged matters, and in turn created further tensions and distress which is also recorded in the correspondence. What is clear from the letters, however, is that the Practitioner was conveying the views of his client, and was under instructions in regard to the content. There were clearly differences of views between the Applicant and her former husband, each

seeing matters from an entirely different perspective, each drawing conclusions about the conduct and motives of the other. The letters exchanged between the lawyers demonstrates this very clearly. I am unable to see any evidence that the instructions or views conveyed by the Practitioner did not represent the instructions of his client.

[25] Although some of the language may be described as direct, I do not see that any part of the Practitioner's correspondence crosses the line that establishes the professional standard of conduct. That is ultimately the test that must be applied. That is not to deny that the Practitioner's correspondence was not on occasions forthright, and not to deny that it upset the Applicant. This was inevitable in the circumstances that the respective clients were unable, or unwilling, to reach agreement on many issues involving their daughter. Each perceived the other to be responsible for tensions experienced by the child due to that person's failure to co-operate.

[26] A lawyer's professionalism is not however tested in terms of whether or not letters he or she writes to another lawyer upsets that lawyer's client, or whether lawyers are unable to achieve an agreed outcome on matters of dispute between their clients, or fail to achieve a resolution of disagreements. Unless the Practitioner's language or comments cross a threshold of unacceptability, such that questions could properly arise as to the Practitioner's motives, there can be no adverse finding.

[27] Nor is a lawyer required to persuade a reluctant client to be accommodating. A lawyer cannot compel his or her client to act or respond in any particular manner and if one party to the dispute considers the other to be unreasonable, that ought not to be attributed to the lawyer without the clearest evidence that it is the lawyer, and not the client, who is driving the matter. In this case I accept that the Practitioner was acting on his client's instructions.

[28] It is not my role to comment on the approach of the parties concerning the child care and related arrangements. What is evident here, as so often is the case, is that there are active resentments which have created difficulties for the parties in resolving issues. Many of these involve daily occurrences such as child care arrangements, holiday and birthday arrangements, clothing, etc. Each perceives the conduct of the other as unreasonable. Lawyers who represent the parties in these circumstances are often perceived by the litigants as taking sides in the personal disputes.

[29] The incidents referred to in the documents by both the Applicant and the Practitioner reveal that the dispute underlying the Applicant's complaint is a regrettably deep and difficult one which has caused ongoing distress as well as cost to the parties. It will have been very

demanding on counsel also. Such litigation often exposes parties to a level of “rough and tumble” that is upsetting but sometimes inevitable when counsel are fulfilling their duty to promote and protect their clients interests. While I can understand that the contents and tone of some of the correspondence passing between counsel for the parties in this matter has upset the Applicant, it is an unfortunate fact that prolonged litigation over the care of children often is upsetting.

[30] Having considered all of the material on the file I have found no reason to take a different view to that of the Standards Committee and accordingly the application for review is declined.

Decision

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

DATED this 9th day of August 2011

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:

EU as the Applicant
VK as the Respondent
Auckland Standards Committee 4
The New Zealand Law Society