LCRO 237/2010

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 2
BETWEEN	**EA,** Barrister of Lower Hutt Applicant
AND	**ABO (Ms VY)** of Wellington Respondent

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

Background

[1] This complaint arose in the course of a dispute between ABO and Mr and Mrs EA about the quality of an ESOL course offered by ABO in which Mrs EA was enrolled as a student.

[2] Mr EA wrote by email dated 6 May 2010 to ABO expressly identifying himself as Mrs EA's husband and employer, to complain about the course, and to request a refund of the fees (or at least a waiver of the fees). At the foot of the letter he used the automatic sign off that was used by him in conjunction with his practice. This included his name, his designation as a barrister, and standard advice to persons receiving the email who were not the intended recipient.

[3] In a further email dated 11 January, he requested certain information under the Privacy Act and the Official Information Act. With that email he enclosed a form of authority from Mrs EA which authorised the requested information to be released to him.

[4] Ms VY, the CEO of ABO, responded by letter dated 2 February 2010, and advised that she had investigated Mr EA's complaint and found no evidence to justify a fee refund.

[5] After further correspondence, Mr EA made a request for a wide range of information. Included with that request was a request that ABO also provide the approximate costs of complying with the request. He advised that this was required for a pending complaint to the Auditor General against ABO for wasting tertiary funds by not being pragmatic or being willing to compromise.

[6] Other than the first email of 6 January, none of his correspondence included the "auto sign off" that was included with the first email.

[7] At that stage, ABO consulted its solicitor, Mr VX, who wrote to Mr EA on 22 April 2010 raising various matters with regard to the content of the correspondence and his conduct. Mr VX made it clear that the correspondence from him was concerned with Mr EA's conduct and had no bearing on the recovery action by ABO in respect of its fees or Mr EA's complaint about the standard of the course.

[8] There then ensued further correspondence between Mr VX and Mr EA concerning the allegations made by Mr VX, and in which Mr EA raised counter allegations about Mr VX's conduct.

[9] On 3 June 2010 ABO lodged a formal complaint with the Complaints Service of the New Zealand Law Society against Mr EA. That letter raised the following matters for consideration by the Complaints Services:

1) Whether Mr EA had, through his correspondence, either by implication or expressly, threatened to make accusations against ABO (i.e. wasting tertiary funds) so as to place pressure on ABO to accede to his demand that ABO not seek recovery of the fees payable by Mrs EA and so as to obtain a benefit for her.

2) Whether he had sought to use the document disclosure demands in a vexatious manner, designed to cause ABO cost and associated embarrassment.

3) Whether, if the Standards Committee found that he had engaged in the conduct as described or other inappropriate conduct, it was appropriate conduct for a barrister.

4) Whether, if the Standards Committee found that Applicant had engaged in the conduct as described or other inappropriate conduct, that conduct had brought, or risked bringing, the legal profession into disrepute.

5) Whether, in his correspondence at the outset of the matter and prior to Mr VX writing to him, Mr EA had held himself out as a barrister acting for Mrs EA, or could reasonably be viewed as having held himself out as doing so and if so whether (1) he was acting on the basis of instructions from a solicitor; (2) he had the required independence in terms of representation.

6) If, as Mr EA contended, he was not acting as a barrister, whether his conduct in sending the email communication on 6 January 2010 and in providing the signed authority dated 11 January 2010, was misleading and deceptive, and or unprofessional, in that it created the clear impression that he was acting in his professional capacity.

Standards Committee decision

[10] At a hearing on 19 August 2010, the Committee made a finding of unsatisfactory conduct against Mr EA and indicated that no penalty other than publication was proposed. The matter was adjourned for one month to enable the parties to make submissions on the question of publication.

[11] Following presentation of submissions by both parties, the Committee issued its determination on 11 October 2010.

[12] The Committee found that pursuant to sections 152(2)(b) and 142(2) of the Lawyers and Conveyancers Act 2006, Mr EA's conduct constituted unsatisfactory conduct and ordered publication without identifying names or particulars. The reasons provided by the Committee were as follows:

1) In the initial letter to ABO, Mr EA held himself out as a barrister acting for his wife and this was inappropriate.

2) Having done that, Mr EA then dealt with the complaint he was making in a rude, discourteous and unprofessional manner albeit that he was asking for things which his wife was entitled to request.

3) Publication as proposed would act as a reminder to practitioners of the perils of signing correspondence or using the title of barrister and or solicitor when acting in a personal capacity.

[13] The Committee, whilst making this finding against Mr EA, made it clear that it did not view his behaviour as extortion as had been alleged by the ABO.

The Application for Review

[14] Mr EA has applied for a review of the Standards Committee decision on the following grounds:

1. The conduct complained of was not engaged in at a time when Mr EA was providing "regulated services" under the Lawyers and Conveyancers Act 2006 and therefore it fell outside of conduct in respect of which the Standards Committee was empowered to make a finding of unsatisfactory conduct;

2. The Standards Committee erred in fact and law in finding that in the letter of Mr EA dated 6 January 2009 he held himself out as acting as a barrister on behalf of his wife and further erred in finding that the conduct of Mr EA in this regard was inappropriate;

3. The Standards Committee erred in fact and law in finding that the conduct of Mr EA in dealing with ABO was rude, discourteous, or unprofessional;

4. The Standards Committee failed to provide adequate reasons for its decision in that it failed to identify what aspects of the communications it found discourteous;

5. The Committee failed to answer the question of whether Mr EA was providing regulated services which was placed before it by him;

6. The Standards Committee failed to identify the basis of the finding of unsatisfactory conduct in terms of s 12 of the Lawyers and Conveyancers Act; and

7. The Standards Committee failed to adequately put Mr EA on notice as to the nature of the allegations he was facing and/or made findings in respect of allegations which were not put to him.

Review

[15] The Review proceeded by way of a hearing at Wellington on 7 September 2011. Mr EA and Ms VY attended. Mr EA was represented by Mr EB and ABO by Mr VX.

[16] The Standards Committee has found that Mr EA held himself out as a barrister and that this was inappropriate. This suggests that the Committee accepted that Mr EA

was not acting as a barrister and I have assumed that the Committee considered he was in breach of Rule 11.1 of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008. That Rule provides as follows:-" A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice."

[17] I have also assumed that the Committee found that Mr EA's conduct constituted unsatisfactory conduct as that term is defined in section 12(c) of the Lawyers and Conveyancers Act 2006. That subsection provides that conduct consisting of a contravention of the Act, or of any regulations or practice rules made under the Act, constitutes unsatisfactory conduct. The Conduct and Client Care Rules are made pursuant to section 94(e) of the Act.

[18] These assumptions may not be correct but are consistent with the findings of the Committee. It would have been of considerable assistance to myself, and no doubt the parties, if the Committee's reasons had been more explicit.

[19] Whilst the definition of unsatisfactory conduct in sections 12(a) and (b) require that the conduct occur at a time when a lawyer is providing regulated services, the definition in section 12(c) does not contain such a requirement. However, it is Mr EB's contention, that section 12 (c) also requires that the conduct in question occurs at a time the lawyer is providing regulated services. If that is the case, then a lawyer's conduct cannot constitute unsatisfactory conduct by reason of a breach of the Conduct and Client Care Rules if the lawyer is not providing regulated services.

[20] In addition, if the lawyer is not providing regulated services, then a lawyer can not be exposed to a finding of unsatisfactory conduct as that term is defined in sections 12(a) and (b).

[21] There are two issues which arise from this. Firstly, does section 12(c) require that the conduct of the lawyer occur at a time when the lawyer is providing regulated services, and secondly, whether that is the case or not, was Mr EA providing regulated services when pursuing this complaint against ABO.

Section 12 (c) Lawyers and Conveyancers Act 2006

[22] Section 12(c) defines unsatisfactory conduct as being "conduct consisting of a breach of this Act, or of any regulations or practice rules made under this Act that apply to a lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7)."

[23] Sections 12(a) and (b) of the Act apply to “conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services...” There is no such requirement in section 12(c).

[24] Mr EB argues that nevertheless, the section only applies in the same circumstances i.e where a lawyer is providing regulated services. He points to the empowering provision in the Act (section 94) under which the various sets of Rules are made and particularly section 94(e) pursuant to which the Conduct and Client Care Rules are issued. Section 94(e) refers to “standards of professional conduct and client care” which he argues implicitly means that they are to apply only when a lawyer is providing regulated services.

[25] He also refers to section 3 of the Act which sets out the purposes of the Act, one of which is to protect the consumers of legal services and to maintain confidence in the provision of legal services. A lawyer must necessarily be providing regulated services before consumers will require protection.

[26] Mr EB argues that section 7 (which defines “misconduct”) relates specifically to conduct of a lawyer unconnected with the provision of regulated services and argues that the disciplinary processes of the Act should not intrude into the private lives of lawyers unless it reaches the degree of egregiousness such as to indicate that the person is not a fit and proper person to engage in practice as a lawyer.

[27] It has been assumed that section 12 (and by this is meant ss12(a)(b)and(c)) applies only when the person complained against is providing regulated services. Previous decisions of this Office (*Morpeth v Ramsey* LCRO 110/2009) are cited in support of that. That decision involved consideration of whether the conduct in question constituted conduct unbecoming, and was therefore unsatisfactory conduct by reason of section 12(b) of the Act. This arose by reason of the fact that the conduct in question in that review fell to be considered under the transitional provisions of the Act, as the conduct took place prior to the commencement of the Lawyers and Conveyancers Act.

[28] Unlike earlier decisions, this case directly raises the question as to whether a lawyer’s conduct can be found to be unsatisfactory conduct if it is found to be in breach of any of the Conduct and Client Care Rules, notwithstanding that the lawyer is not providing regulated services.

[29] The wording of section 12(c) differs from that of sections 12(a) and (b) and I am mindful of the many judicial strictures against incorporating words into legislation which

are not present. I refer, for example, to the Privy Council decision in *Reid v Reid* [1982] 1 NZLR 147, 150 where it was stated: - "Their Lordships have in mind what was said by Lord Mersey in *Thompson v Goold & Co* [1910] AC 409,420: "It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do.""

[30] It would be wrong to incorporate into section 12(c) a requirement that a lawyer must be providing regulated services before that subsection applies. There can be no suggestion that the difference between ss12(a) and (b), and s12(c) has arisen through oversight or that it is necessary to read these words in to provide meaning to the subsection. The wording of the subsection is clear, and it differs from the wording of the previous subsections.

[31] On that basis, a lawyer may be exposed to a finding of unsatisfactory conduct if his or her conduct is in breach of the Act, or any of the Rules or Regulations, even if he or she is not providing regulated services. Each of the Rules are clear as to the circumstances in which it applies. In some cases there cannot be a requirement that the conduct in question take place while providing regulated services. For example, Rule 2.8 requires a lawyer to report instances of misconduct. The application of this Rule cannot be restricted to circumstances where a lawyer is providing regulated services. Other Rules are specifically prefaced with words indicating that the lawyer must be providing regulated services before the Rule is to apply – see for example Rule 3 which commences with the words "in providing regulated services to a client...". It is important therefore to examine each Rule to determine the circumstances in which it is to apply.

[32] There can only be a finding of unsatisfactory conduct if a specific Rule has been breached. A review of the Rules reveals that this does not permit a Standards Committee to investigate and punish lawyers for conduct outside their professional lives as has been suggested. As noted above, each of the Rules give a clear indication as to the circumstances in which it is to apply, and there is no general "fit and proper" test included in the Rules. The Rules are directed to specific instances of conduct, in contrast to the general "fit and proper" test required by section 7.

[33] A finding that conduct has breached a specific Rule is a matter which is suited to the summary jurisdiction of the Standards Committee (and the LCRO) whereas the "fit and proper" test is something which quite properly deserves to be examined by the New Zealand Lawyers and Conveyancers Tribunal. The consequences of a breach of either section 7 or section 12 (c) are also of course quite different.

[34] In summary, section 12(c) is not restricted to circumstances in which a lawyer is providing regulated services. The words of the section do not provide that and each of the Rules in question will determine the circumstances in which it is to apply.

[35] For these reasons, it was open to the Committee to find that Mr EA's conduct constituted unsatisfactory conduct by reason of a breach of Rule 11.1.

Was Mr EA providing regulated services

[36] Notwithstanding my finding above, the question as to whether Mr EA was providing regulated services or not remains important. If he was, then his conduct also falls to be considered in terms of section 12(b) of the Act. Section 12(a) would also be applicable, but is not relevant in the context of this complaint.

[37] Both parties have made extensive submissions to the Standards Committee and the LCRO in respect of this issue.

[38] Mr EA made it quite clear in the opening words of his email of 6 January 2010 that he was writing on behalf of his wife and as her employer. However, included in his email was the auto sign off for his business correspondence, which included his designation as a barrister and the standard warnings as to the status of the email. It also included reference to the fact that the content of the email was confidential and legally privileged as well as a notification that the name of Mr EA's practice was to change to ACM in the near future.

[39] It has been submitted on Mr EA's behalf that the auto sign off was unintentional. Whether that is correct or not, the result was that the notification of the basis on which Mr EA was writing (i.e as husband and employer), was neutralised by the formal sign off and notifications at the end of the email. Mr EA was identified as a barrister, a fact which was known to ABO in any event, from past dealings with Mr EA.

[40] Mr EA wrote again, reiterating that Mrs EA was his spouse and employee. He made demand for information under the Privacy Act and took issue with a form at the back of ABO's student handbook, citing the Human Rights Act as the grounds for his objection. He also provided an authority from Mrs EA to enable him to obtain personal information concerning her. This authority included the right for Mr EA to advocate on her behalf in various forums, including any Court or Tribunal. Lawyers are not precluded from acting for their spouses or employee's, and only lawyers can appear in Court on behalf of others.

[41] The fact that Mr EA had recorded in his correspondence that Mrs EA was his spouse and employee, did not mean that he could not also write in his capacity as her lawyer, and the tone of his correspondence leaves the overriding impression that he was acting as a lawyer. He may very well have been her spouse and employer but the two roles are not mutually exclusive.

[42] The previous decision of this Office referred to in [27] above is also of assistance in this regard. In that decision, the LCRO stated at [20] that “the words of section 12 must be construed broadly and consistently with the wider purposes of the legislation to include any conduct which occurs with the practice of law.” In that matter, the lawyer argued that his conduct fell outside the regulatory reach of the Law Society because he was not acting as a lawyer at the relevant time. He argued that because he was acting as an immigration consultant he was beyond the reach of the disciplinary process. At [21] the LCRO noted that “where there are overlapping roles there is a strong policy reason for presuming that the professional duties of a lawyer attach if there is any doubt.” Whilst the cases referred to in that decision involve circumstances where the lawyer occupied overlapping roles in relation to the complainant, there is no reason why those principles should not apply to the current position.

[43] The natural response of the recipient of the correspondence from Mr EA would be to treat the complaint, and the matters raised in it, with some concern, particularly when legal challenges to the processes of the recipient were raised. It may be that this was Mr EA’s intention. Whether that was the case or not, Ms VY’s perception was that the correspondence was from a barrister on behalf of Mrs EA, who was also her husband and employer. The fact that Mr EA was also the spouse of the disaffected student meant that Mr EA would not be constrained by cost in pursuing the complaint.

[44] Any protestation from Mr EA that he was not acting as a lawyer could be viewed as pure semantics. It was clear that he was a lawyer and the matters he was raising were legal issues. He was writing on behalf of a third party, albeit that party was his wife and employee.

[45] On 31 March, Mr EA made a formal request for a wide range of information, some of which did not relate to his wife’s complaint. The request was made under the Privacy Act principle 6, and the Official Information Act.

[46] Included in that letter was a request for details of the staff time spent responding to the complaint and its approximate cost. He indicated that this was required for a “pending complaint to the Auditor General of waste of tertiary funds by not being

pragmatic, meeting (an offer that was unfortunately reneged on) and being willing to compromise".

[47] The coupling of the request for the approximate cost of providing the information sought, combined with advice that a complaint to the Auditor General was pending as a consequence of ABO failing to be pragmatic and not being willing to compromise, prompted a response from Mr VX. He put Mr EA on notice that he considered the letter constituted an implied threat and was potentially in breach of Rules 2.3 and 2.7 of the Conduct and Client Care Rules. Mr VX made it quite clear that the concerns he was raising related to Mr EA's conduct and had no bearing on his client's recovery action. It is important that this be noted, as it was submitted on Mr EA's behalf that the complaint lodged by ABO was in response to the proposed recovery action.

[48] Further correspondence ensued between Mr EA and Mr VX, but add little to the question as to whether or not Mr EA was providing regulated services.

[49] The submissions of the parties have focused on the fact that Mr EA formally recorded that he was acting as a husband and employer, and that the capacity in which he was corresponding is determinative of whether or not he was providing regulated services.

[50] It is important however to examine the definition of regulated services. This is contained within a series of definitions in section 6 of the Act.

[51] Regulated services mean legal services. "Legal services" is defined as services that a person provides by carrying out legal work. "Legal work" includes:- a) the reserved areas of work; b) advice in relation to any legal or equitable rights or obligations; (I have not included (c),(d) and(e)). The "reserved areas of work" means the work carried out by a person (a) in giving legal advice to any other person in relation to the direction or management of any proceedings that the other person is considering bringing... before any New Zealand Court or New Zealand Tribunal;.(b) in appearing as an advocate for any other person before any New Zealand Court or New Zealand Tribunal. The remaining parts of the definition are not applicable to these circumstances.

[52] The definition of reserved areas of work as noted above is particularly relevant with regard to the form of the authority provided by Mr EA to ABO with his email of 11 January. In this authority, Mrs EA particularly authorised Mr EA to act as her advocate in any Court or Tribunal. Mr EB dismisses the words used in this authority as being a standard form of authority commonly used by lawyers and that therefore this should not

be used to support the view that Mr EA was providing regulated services. I do not accept that the words used in this authority should be dismissed as Mr EB suggests. Mr EA was known to be a lawyer. It would therefore be fair to assume that Mr EA had paid attention to the form of authority which he provided. The recipient of this authority was entitled to take the words of the authority as meaning what they said.

[53] It was submitted that lodging a complaint with an educational institution does not constitute legal work. I do not agree. In any event Mr EA's requests for information under the Privacy Act and the Official Information Act, as well as to the reference to the Human Rights Act, and the general tenor of the correspondence makes it quite clear that the nature of the work being provided was legal work.

[54] Whether or not a person is providing regulated services, is determined more by the nature of the work being carried out than the capacity in which the work is being undertaken. It is clear that the nature of the work being carried out by Mr EA was legal work as defined in the Act I am therefore more than satisfied that the Mr EA was providing regulated services.

[55] As a result, sections 12(a) and (b) are applicable to Mr EA's conduct. It also brings into consideration other matters raised by ABO.

Can a lawyer be considered to be "holding himself out" as a barrister when providing regulated services.

[56] The Standards Committee has found that Mr EA's conduct constituted unsatisfactory conduct because he held himself out as a barrister and I have inferred from the Committee's decision that it therefore accepted Mr EA was not acting as one. However, I have found above that Mr EA was providing regulated services. The two findings cannot co-exist. Consequently, as a result of my finding that Mr EA was providing regulated services, the finding of the Committee cannot stand.

[57] Mr VX submits that it was misleading and deceptive for Mr EA to communicate on the basis that he was a barrister and then to assert that he was not acting as one. That is a somewhat strained application of the Rule and no one was misled, least of all Ms VY's.

[58] Having found that Mr EA was providing regulated services it follows that Mr EA's conduct cannot be considered unsatisfactory for breaching Rule 11.1 by reason of the fact that he was holding himself out as a barrister.

Options

[59] The following options present themselves for consideration by me:

1) To exercise the discretion to take no further action pursuant to sections 211 (1) (b) and 154 (3) of the Lawyers and Conveyancers Act.

2) To reverse the finding and direct the Standards Committee to reconsider the complaint in the light of my findings.

3) To reverse the finding and come to a determination myself as to whether other Rules or provisions of the Act have been breached; or

4) Confirm the finding on the grounds that Mr EA was rude, discourteous and unprofessional.

[60] To reverse the finding and exercise a discretion to take no further action, would be to dismiss the complaint as having no merit.

[61] The finding of the Standards Committee that Mr EA was rude, discourteous and unprofessional needs to be made with reference to a specific Rule and specific correspondence. Mr VX has referred to the various items of correspondence which he submits are rude and discourteous. However, that correspondence then needs to be related either to a specific Rule, or be found to be conduct unbecoming or unprofessional conduct in terms of section 12(b). This is a decision to be made by the Standards Committee given that it has made the finding. It is not for me to second guess the Committee's thinking.

[62] In all of the circumstances, I am driven to the conclusion that the only option available to me is to reverse the finding of the Standards Committee and return the matter to the Committee to reconsider in the light of the findings made in this review. I come to this decision reluctantly as to do so will mean that the complaint remains unresolved. However, to do otherwise, would be unfair to both parties.

Decision

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

2) Pursuant to section 209 of the Lawyers and Conveyancers Act 2006, for the reasons set out above, the Standards Committee is directed to reconsider the matter generally taking into account the findings in this review.

DATED this 29th day of September 2011

Owen Vaughan
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 EA as the Applicant
Mr EB as the Applicant's Counsel
ABO as the Respondent
Mr VX as the Respondent's Counsel
The Wellington Standards Committee 2
The New Zealand Law Society