

CONCERNING

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

AND

CONCERNING

a determination of [A North Island] Standards Committee

BETWEEN

MR XH

Applicant

AND

MR BB

Respondent

DECISION

[1] An application was made by Mr XH (the Applicant) for review of the decision of a Standards Committee which declined to uphold complaints he made against Mr BB (the Practitioner). The Committee's decision of 28 August 2012 determined to take no further action pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] The Applicant sought a review of the Committee's decision. The parties were invited to consent to the review being conducted on the papers in accordance with s 206 of the Act. The parties have consented to this process, 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.

Background

[3] The marriage between the Applicant and Ms S ended after [less than a year], and they separated [in 2012]. The Practitioner acted for Ms S in the negotiation of a Separation Agreement and related matters. The Applicant was self-represented.

[4] On 27 March 2012 the Practitioner sent a letter to the Applicant to say that he had been instructed by Ms S. The letter informed the Applicant that Ms S wished "to

resolve this matter amicably” and, with reference to financial and other information, put forward a number of proposals (mostly of a financial nature) “on a strictly without prejudice basis.”¹ The Applicant was invited to confirm (in writing) his acceptance of the proposals, upon which the Practitioner would then prepare a Separation Agreement to record the agreement reached between them.

[5] The same letter also made reference to the Applicant having sent “unpleasant text messages ...” to Ms S and having made “... serious unfounded allegations on her.”² The Practitioner informed the Applicant that Ms S had instructed him to apply for a restraining order if the Applicant continued to send texts of any kind to her.

[6] The Practitioner also sent a copy of this letter to the Applicant’s father.

Complaints

[7] Arising from this background, the Applicant raised two main complaints with the New Zealand Law Society. The first alleged that the Practitioner had breached the privacy of the Applicant in disclosing certain information to the Applicant’s father. He referred to the copy letter sent to his father which contained a number of personal matters, contending that the particulars of financial dealings between him and his wife amounted to a breach of the Applicant’s privacy. The Applicant explained that his father had not been aware of the financial dealings between the couple and was “very disturbed to read of what had been going on between [Ms S] and me. My father was and has continued to be very upset with me.”³

[8] The second complaint concerned the threat of a restraining order. The Applicant wrote that the Practitioner “threatened me with a restraining order if I were to text his client, yet he sent me and continued to send me copies of e-mails from his client to him and copies of e-mails from other person/s to him”.⁴

[9] The Applicant advised the Standards Committee that he had informed the Practitioner of his concerns and had been told that the Practitioner was following the client’s instructions.

[10] The Applicant indicated (to the Standards Committee) a willingness to enter into negotiation, mediation or conciliation as a way to resolve his complaint, but also sought, as an outcome, that the Practitioner should be severely reprimanded for the irreparable damage he had caused.

¹ Letter from Practitioner to Applicant dated 27 March 2012 at para [4].

² Above n1.

³ Complaint to NZLS dated 30 April 2012.

⁴ Above n 3 at para [E].

Practitioner's response

[11] In reply to the complaints the Practitioner explained that Ms S had provided details of circumstances both during, and immediately after the couple had separated including that:⁵

as is customary in Fiji Indian families, the respective parents get involved in disputes between the spouses as it allows and facilitates disputes of such matters to be resolved in an amicable, objective and a civil manner.

[12] He wrote that Ms S, her father and her uncle had all been present at the initial meeting and that he (the Practitioner) was instructed to copy the uncle into all correspondence (Ms S and her father did not have access to emails at the time), and Ms S could then respond in an objective manner.

[13] The Practitioner wrote that the Applicant himself had suggested to Ms S's uncle that this matter could be resolved by family elders and had asked that Ms S's father and family elders get involved in the resolution of this matter. The Practitioner wrote that this was followed by a phone call by the Applicant's mother to Ms S. He added that the Applicant and his parents all live in the same house.

[14] The Practitioner provided a background explanation for the instruction from Ms S to apply for a restraining order when she continued to get texts from the Applicant which she found intimidating, and felt her safety was at risk. He made reference to violence in the Applicant's prior relationships and that he was undergoing psychiatric treatment, presumably information provided by his client.

[15] The Practitioner also informed the Committee that the Applicant had made direct contact with him via emails and phone calls, and that the emails he forwarded to the Applicant were Ms S's responses to emails that the Applicant had sent him.

[16] The Practitioner added that he considered that his client was entitled to instruct him to forward the Applicant's emails to other person(s) and seek their assistance in responding to the Applicant. The Practitioner wrote that he had also sent to the Applicant's father an email that had come from Ms S's uncle, and was in direct response to the Applicant's email, adding that Ms S had instructed him to send it on to her uncle.

[17] With regard to the 27 March letter the Practitioner explained that a copy was

⁵ Letter from Mr BB to NZLS dated 18 June 2012 at para [2.4].

sent, at his client's direction, to the Applicant's father, the Applicant himself having suggested (to Ms S's uncle) that family members, i.e. parents, be involved to resolve this matter as is customary in the Fiji Indian family. He wrote, "It is culturally acceptable in the wider Fiji Indian community for the extended family to be involved in marital issues especially of the recently married, to be at hand to mediate and resolve any issues that may arise."⁶

[18] The Practitioner concluded that the paramount reason for copying the letter to the Applicant's father was to achieve an amicable, speedy and efficient resolution, and also for his client's safety. The Practitioner did not consider there was anything malicious or sinister in the letter and there was no intention to cause any harm to the Applicant, and if any harm had been caused then this in hindsight was regretted and for each he sincerely and unreservedly apologised.

Applicant's response to the Practitioner's letter

[19] The Applicant denied much of what the Practitioner had written to the Standards Committee but materially, wrote:⁷

a sensible lawyer would have sent a covering letter to the father requesting the father to discuss the matter with his son with a view to an amicable resolution. To just post a copy of the letter to a father, Fijian or not, was wrong and extremely unprofessional.

Standards Committee's decision

[20] The Standards Committee described the complaint as an allegation that the Practitioner had disclosed confidential information about his financial and matrimonial affairs to the Applicant's father. The Committee saw the issue as being whether this disclosure breached professional standards.

[21] The Committee noted that both the Applicant and Ms S are of Fijian Indian origin, and referred to the Practitioner's explanation that it was "customary in Fiji Indian families, [for] the respective parents [to] get involved in disputes between the spouses as it facilitates disputes of such matters to be resolved in an amicable, objective and civil manner."⁸ The Committee noted that the Applicant had acknowledged that other parties become involved in such disputes, and concluded that the Applicant could not now complain about any information being sent to his father. The Committee declined

⁶ Above n 5 at para [4.1.5].

⁷ Letter from Applicant to NZLS dated 23 June 2012.

⁸ Above n 5.

to take any further action pursuant to s 138(2) of the Act. No mention was made about the restraining order.

Application for Review

[22] In his application for review of the Committee's decision, the Applicant stated that the Committee appeared to have accepted the Practitioner's "unsworn untested allegations" and "might have breached the requirement to act in accordance with the rules of natural justice under part 4 of the Regulations".⁹ He wondered whether the Committee had overlooked or ignored entirely his response to the Practitioner's explanation (of 23 June), adding that the fact that a New Zealander is of Fijian Indian origin does not mean that the customs of that culture apply in New Zealand. He described the Practitioner's letter as containing "unnecessary threats, obviously intended to intimidate".¹⁰

The Applicant also questioned whether it was right that the Committee accepted the Fijian custom just because they are Fijian Indians, adding "This is NZ, not Fiji".¹¹

Considerations

[23] The review process provides an opportunity for the complaints to be considered anew. I have reviewed all of the information on the Standards Committee file and the information provided for the review.

[24] The question for review is whether the Practitioner was in breach of any professional obligation when he sent to the Applicant's father a copy of his letter to the Applicant, and when he referred to an application for a restraining order.

Natural justice

[25] Dealing first with the suggestion that there was a failure to observe the rules of natural justice, which show the steps taken by the Committee in making available to each party information provided by the other, and allowing the parties a reasonable opportunity to respond. It is the role of a Standards Committee to consider all of the information before it, and in this case there is nothing to suggest that the Committee did not do so. That the Standards Committee may have preferred some evidence and disregarded other evidence is not a failure of due process.

Duty of confidence

⁹ Application for review to LCRO dated 15 September 2012.

¹⁰ Above n 9.

¹¹ Above n 9.

[26] Rule 8 the Rules of Conduct and Client Care states:¹²

a lawyer has a duty to protect and to hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.

[27] The Rule clearly applies to information that a lawyer acquires in respect of his client's information. The duty outlined in the Rule generally is clearly owed to the lawyer's client, and not to a third person. However, Rule 8.8 contemplates the duty of confidence being owed outside of the lawyer-client relationship. There may also be a legal obligation of confidence where a lawyer comes into possession of information which he knows to be confidential. It is not necessary to consider these further as they have no application to the present case.

[28] No complaint has been made by the Practitioner's client, Ms S. The complaint is made by the Applicant who is not the Practitioner's client. Lawyers generally do not owe any professional duty to persons who are not their client.

[29] The Practitioner's professional duties are owed to his client, Ms S. The Applicant has not challenged the Practitioner's evidence that he was acting on the instructions of Ms S in forwarding the letter to the Applicant's father. I accept that the Practitioner was at all times acting on the instructions of his client. This included sending a copy of his letter to the Applicant's father.

[30] There is undisputed evidence that it is customary in Fijian Indian families for senior family members to become involved in the marital difficulties of younger family members. This is supported by evidence that the Applicant himself had approved the involvement of senior family members as an appropriate way to resolve the couple's situation.

[31] I also note that the Applicant's complaint was essentially directed at the Practitioner's 27 March letter that was sent to the Applicant, the objection being that a copy of that letter was also sent to the Applicant's father.

[32] It may be that this complaint rests not so much on the fact that the Applicant's father was sent a letter, but the nature of the information that was contained in the letter. This may be deduced from the Applicant's concern about his father's reaction when getting the Practitioner's letter.

[33] It is understandable that the Applicant was unhappy that his father came to learn

¹² Lawyers and Conveyancers Act (Lawyers: Conduct & Client Care) Rules 2008.

of Ms S's anxieties and concerns about the Applicant's behaviour. However, the concerns were those of Ms S. She had instructed the Practitioner to send a copy of the letter which set out those concerns to the Applicant's father. The Practitioner owed the duty to Ms S to follow her instructions. Given the indications that senior family members would become involved in the resolution of the marital situation faced by the Applicant and Ms S the Practitioner clearly saw no objection to following Ms S's instruction to send a copy to the Applicant's father. Does this act constitute a breach of a professional obligation?

[34] There is no evidence that the Practitioner's actions were for any purpose other than progressing his client's interests, and as such I do not need to consider Rule 2.3 which requires that lawyers:¹³

must use legal processes only for proper purposes. A lawyer must not use or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests or occupation.

[35] The duty of confidentiality is owed to the client. While parts of the Practitioner's letter contained financial information that would not normally be shared outside of those persons immediately involved, the Practitioner has provided an explanation of the circumstances in which he sent a copy of the letter to the Applicant's father. The explanation is consistent with proposals (endorsed by the Applicant) that senior family members customarily become involved in the marital difficulties of younger family members, and I accept he did so at the direction of his client. I have seen no evidence that the Practitioner sent the letter for any purpose other than to achieve "an amicable, speedy and efficient resolution", and "for [Ms S's] safety".¹⁴

[36] Whether or not Fijian Indian customary practices are practices in NZ was not a matter for the Practitioner to determine, nor is it for this Office to decide such matters. The only issue that needs to be decided here is whether any part of the Practitioner's professional attendances amounted to a breach of his professional duties or acceptable professional practice, such that disciplinary consequences should follow.

[37] It is my view that the Practitioner was informed that senior family members would be involved, a practice that was confirmed by the Applicant himself, and that the Practitioner was instructed to send the letter to the Applicant's father. In these circumstances it is difficult to see any proper basis for disciplinary issues arising for the

¹³ Above n 12.

¹⁴ Above n 5.

Practitioner in acting in accordance with those representations.

Restraining order

[38] The Practitioner's letter had informed the Applicant that he had been instructed to apply for a restraining order if the Applicant continued to text Ms S.

[39] I do not agree that the Practitioner's letter amounts to a threat to obtain a restraining order. The Practitioner properly alerted the Applicant to his client's instructions if he continued to send text messages of any kind to Ms S. Presumably any further steps towards seeking such an order would have depended on the Applicant's conduct thereafter. No further information is available and there is nothing to indicate that such an order was in fact sought.

[40] The warning was by no means inconsistent with the Practitioner having on-forwarded to the Applicant the responses of Ms S to issues raised by the Applicant.

[41] There is no part of the Practitioner's conduct that raises disciplinary issues and in my view the Standards Committee was correct to have determined that no further action was necessary.

Decision

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

DATED this 26th 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 XH as the Applicant
Mr BB as the Respondent
Mr BD as a related person or entity
[A North Island] Standards Committee
The New Zealand Law Society