

**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**

**FR**  
of [South Island]

Applicant

**AND**

**US**  
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 Auckland Standards Committee 4 which considered a complaint by FR (the Applicant) against US (the Practitioner). The Standards Committee resolved to take no further action on the complaint and the Applicant seeks a review of that decision.

**Background**

[2] This matter arises out of the involvement of the Practitioner with proceedings under the Protection of Personal and Property Rights Act 1998 (PPPR Act) with regard to the Applicant's aged father.

[3] The Applicant is the only child of his father and his father's first wife who died some thirty years ago. The father lives in his own home in Auckland, while the Applicant and his family reside in the South Island. The Applicant's father remarried in 1998, that marriage lasting ten years. It seems that the father remains on good terms with his former wife who is also clearly close to her stepson, the Applicant.

[4] It appears that for some years, the Applicant's father had been responding positively to letters he received from overseas which are often described as "scams". There is no detail provided regarding the father sending amounts of money overseas, but according to the Applicant the father's financial position has gone from having significant sums of money in the bank (assisted by the sale of a property) to more recently, borrowing money, and therefore being in debt for over \$100,000.00. More specific detail is provided in the papers filed by the Applicant but suffice to say, the Applicant had concerns about his father's behaviour and "his subsequent dire financial situation". This led him in late 2009 to contact his father's doctor with his concerns. This in turn, led to the father being assessed and diagnosed as having some degree of dementia.

[5] As a result the Auckland District Health Board Mental Health Services for Older People personnel initiated an application to obtain a temporary Property Order pursuant to the PPPR Act. Counsel was appointed to represent the father.

[6] The Applicant assisted the Auckland District Health Board staff members to draft the application for the order, but was surprised when he read the documents prepared for the application. These included details about himself and information provided by him, which he was concerned would damage his relationship with his father.

[7] The application for the temporary Property Order was finalised on 29 March 2010.

[8] About three months earlier the Applicant's stepmother, informed him that the Practitioner, a long time friend of the father and someone known to the Applicant's stepmother, had asked her to pass on her email address and phone number to the Applicant. According to the stepmother the Practitioner offered to "pop in on [the father] from time to time and keep a friendly but discreet eye on things". On 27 January 2010, the Applicant therefore sent a lengthy email to the Practitioner advising her of the situation as he saw it, and encouraged her to make visits to his father.

[9] It seems that both that email and a follow-up one did not reach the Practitioner, but contact was certainly established in early April, a week or two after the temporary Property Order was made. Relations between the two were cordial. In an email from the Practitioner to the Applicant dated 10 April 2010 she provided the Applicant with her private address details, commenting that it was "good to talk and get an assurance that [the father] is being well protected (even if he isn't going to like it) before some real harm comes to him". This email refers to copies of "legal documents or confidential

documents” being sent to her office box number which the Applicant states the Practitioner had requested him to send her. The Applicant states in his complaint that he did not do so because he had concerns “after a couple more emails from her... [that] she would not be able to separate her legal and friendship hats”.

[10] Matters moved on, with the Practitioner at the father’s request becoming his “support person” in terms of the PPPR Act. She attended a meeting with counsel for the father at counsel’s request and also met with him together with the father. It seems that when the father became aware of the ex parte order having been made the Practitioner advised him to contact his Court appointed counsel for advice and to obtain a copy of the papers.

[11] Friendly emails passed between the Applicant and the Practitioner in April 2010 but by mid May into June 2010 the tone had become more formal, and in an email dated 18 May 2010 the Practitioner commented how “appalled [she was] at how badly this whole matter has been managed”. She noted that “it would be difficult to imagine how much worse it could have been. It is simply a disgrace and [the father] deserves better. He needs to know his rights and be supported in enforcing them. I have written to his lawyer...stating exactly that”.

[12] As a result of his father being made aware of the Applicant’s role in instigating the process, and the detail of the information provided by the Applicant to the District Health Board, it would appear that their relationship deteriorated. The Applicant complains that this was largely as a result of the Practitioner imparting information to his father that he had provided to her in confidence.

[13] The Applicant formally complained to the Complaints Service of the New Zealand Law Society on 9 July 2010 that “the Practitioner has used her position and influence as a barrister to convince my father that I am out to get his money and has subsequently caused the destruction of, or at least severely damaged, the relationship between my father and me”. He included the following detail:-

- 1) That the Practitioner had deliberately and unprofessionally ignored the facts to justify her position.
- 2) That she had not been instructed by a solicitor to act for the father and maintained that she was acting as a friend.
- 3) That she had breached the confidences of the Applicant and his father’s former wife to satisfy her own objectives.

- 4) That she had impugned his reputation with the accusation that he was trying to get his father into a rest home and sell his house. The Applicant expressed concern that the Practitioner would attempt to persist with these views in the upcoming judicial conferences and hearings.

[14] He went on to elaborate upon the summary above, and attached relevant correspondence and emails.

[15] The main thrust of the Practitioner's responses on 21 July and 10 August 2010 was, and remains, that she was not, nor purported to be, anything other than the father's support person who had no complaint with the court appointed counsel for the father. She stated in her 21 July response that at counsel's request she was to prepare an affidavit and be a witness in support of the father. She went on to foreshadow that she "[might] seek leave to appear before the Family Court under section 89(1) ("review of welfare guardian's or manager's decisions") and had received instructions to that effect in the event it becomes necessary to give effect to the intention of the Act for such orders to have the 'least restrictive intervention' in the life of the person subject to the order..." (emphasis added). She concluded her response by advising that the father had been one of her referees for admission to the Bar.

[16] The response dated 10 August 2010 was a detailed rebuttal of the Applicant's complaint, to which he replied in equal detail on 28 August. There was no response from the Practitioner to this 28 August reply and it appears from the file that a copy may not have been forwarded to her. This was rectified when the Application for Review of the Standards Committee decision was processed by this Office.

[17] Around late August 2010 there was also a letter received from the father's former wife detailing background matters including the father's physical health problems, the "scams" and the fact that she was owed "a considerable amount of money" by the father.

### **The Standards Committee Decision**

[18] In its determination dated 24 November 2010, the Standards Committee effectively dismissed the Applicant's complaint. It summarised the positions of each party, then expressed its decision as follows: "*The Committee noted that [the father] had independent legal advice from [his court-appointed counsel] and was entitled to elect a support person, in this case [the Practitioner]. This did not raise any professional standards issues*". The Committee resolved pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 to take no further action.

[19] The Committee's reasons for its decision were not sufficiently extensive to enable the Applicant to fully understand why his complaint was dismissed and he has applied for a review of that decision.

### **Application for Review**

[20] In his Application for Review the Applicant submitted that the Standards Committee failed to address the issues he raised in his complaint and "wonder[ed] if they had even read [his] submissions fully"

[21] He went on to set out a number of specific examples of factual matters which he considered had not been addressed by the Committee. He clarified that his objection to the Practitioner assisting his father related to her alleged use of information provided by him which has led to a "communication breakdown" with his father.

[22] He took issue with some of the facts recited by the Standards Committee in its factual summary and added that *"there are, among other things I believe, professional ethical standards that have been breached by the knowledge [the Practitioner] had given to her by myself and [my father's former wife] - prior to the revelation made by my father to her that an order had been made against him. Given what she was aware of I find it utterly disgraceful that she should then decide something that was completely untrue and give my father the impression that I was out to get his money and put him in a home. He still has the impression I desire to see him in a home....."*

### **Review**

[23] Both parties have consented pursuant to section 206(2)(b) of the Lawyers and Conveyancers Act to this matter being dealt with on the basis of the material before me.

[24] The role of the Legal Complaints Review Officer (LCRO) is set out in section 203 of the Act. It is to review the final determination of the Standards Committee and all or any aspects of any inquiry or investigation carried out on behalf of the Standards Committee.

[25] The question to be considered is whether the conduct of the Practitioner constituted "unsatisfactory conduct" as that term is defined in section 12 of the Act. If so, then the Standards Committee (and the LCRO) may impose various sanctions as set out in section 156 of the Act, which include those sought by the Applicant.

[26] Section 12(b) defines “unsatisfactory conduct” as being “conduct of the lawyer ...when he or she is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including –

- (i) conduct unbecoming a lawyer...; or
- (ii) unprofessional conduct.”

[27] Section 12(c) of the Act further defines “unsatisfactory conduct” as being “conduct consisting of a contravention of [the] Act...or any practice rules made under [the] Act...” The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 are practice rules made pursuant to the Act, and a breach of those Rules will therefore constitute unsatisfactory conduct.

### **Was the Practitioner providing “regulated services”?**

[28] The first question to consider is whether the Practitioner was providing “regulated services.” This will determine whether or not section 12(b) is applicable.

[29] Section 6 of the Act sets out a series of relevant connected definitions. “Regulated services” is defined as “legal services”, which in turn “means services that a person provides by carrying out legal work for any other person”. (Note there is no reference in this definition to having to do so for money or reward)

[30] The definition of “legal work” includes “(a) the reserved areas of work; (b) advice in relation to any legal or equitable rights or obligations; and (c) the preparation or review of any document that - (i) creates, or provides evidence of, legal or equitable rights or obligations...”

[31] “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 – (i)...(ii) any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party...”

[32] There is a fundamental difficulty in forming a view as to the impact of the actions taken by the Practitioner because, while her emails are on the file, there is no evidence of what she actually said to the father, or what she may or may not have done in her role as support person after the complaint was lodged. There is no information on file as to what has transpired since with regard to the PPPR proceedings or the state of the relationship between the Applicant and his father.

[33] This means that the complaint against the Practitioner has to be considered and assessed on the contents of her emails and her responses to the NZLS Complaints Service as well as her conduct up until the Applicant lodged his complaint. It may well be that the unfortunate result of her involvement with the father is that the father's relationship with the Applicant has been impaired or worse, but that result in itself cannot justify any negative finding against her.

[34] To determine whether the Practitioner provided regulated services requires an assessment of her actions in light of the relevant definitions set out above. Did she give the father "advice in relation to any legal or equitable rights or obligations"? As noted above, she told him about or facilitated his request for copies from his counsel of the Court papers and suggested that he seek information as to his rights. However, this cannot be objectively described as "giving advice in relation to any legal or equitable rights or obligations". This was the role of his court appointed counsel, as noted by the Committee.

[35] It seems rather, that the Practitioner, having accepted the father's request to be his support person, carried out that role by being helpful in suggesting he contact his court appointed lawyer for information and advice.

[36] Whether she did more, for example, than explaining the effects of the making of the PPPR order, or steps available to set it aside etc, is unknown. The tone of some of her last emails to the Applicant suggest she may have – she was certainly upset about the ex parte court process and its apparent effect on the father - but there is no evidence of what she actually said. Consequently, it is not possible to fairly judge whether she crossed the line from being a helpful support person to actually "giving legal advice".

[37] Did the Practitioner "[prepare] or review any document that – creat[ed], or provid[ed] evidence of, legal or equitable rights or obligations"? In her email to the NZLS dated 21 July 2010 she stated that at the request of the father's court appointed counsel she was going to prepare an affidavit and be a witness in support of his defence of the father. Whether she actually did so is not revealed in the file, but acting in this way would not be anything more than could be expected of a support person. Persons who assist with Court applications very often provide their own version of a proposed affidavit to be used by Counsel as the basis for the document which is finally filed in the Court. In addition, if she provided evidence, this again would be nothing more than could be expected of a support person, rather than the actions of a person providing "regulated services."

[38] The Practitioner advised the Applicant that she had received instructions to seek leave to appear before the Family Court for the father. Lawyers, rather than support persons “receive instructions”. In addition she offered to assist the father’s counsel with his “responsibilities as set out in section 65 of the [PPPR] Act”. It seems she met with him twice, once with the father.

[39] Applying the Practitioner’s written words and contemplated actions referred to above to the relevant definitions leaves a suspicion that the nature of “support” provided (and/or intended to be provided to the father) may have come very close in some instances to providing regulated services. It must be remembered that it is only conduct of the Practitioner up until the date on which the complaint was lodged that can be considered.

[40] Having considered all of the above, I consider, on the balance of probabilities, being the standard of proof required to be applied in disciplinary proceedings (*Z v Dental Complaints Assessment Committee* [2008] NZSC 55) that the Practitioner did not provide regulated services. The consequence of this, is that the Practitioner’s conduct does not fall to be considered within the definition of unsatisfactory conduct as set out in section 12(b) of the Act.

[41] Notwithstanding this conclusion, even if it were to be considered that the Practitioner had provided regulated services, for the reasons expressed in [47] to [49] subsequently, there is insufficient evidence to conclude that the Practitioner’s conduct was such as to amount to unacceptable conduct in terms of section 12(b) of the Act.

#### **Has there been a breach of the Conduct and Client Care Rules?**

[42] This then leaves the question as to whether or not the Practitioner has breached any of the Conduct and Client Care Rules. If so, then the Practitioner’s conduct would constitute unsatisfactory conduct by reason of section 12(c) of the Act.

[43] The complaint arises from the Applicant’s belief that the Practitioner’s actions have damaged or destroyed his relationship with his father. In very brief summary the grounds are that she breached confidences, had a conflict of interest, and impugned the Applicant’s reputation with the accusation that he was trying to get his father into a rest home and sell the house.

[44] Rule 8 requires lawyers to “protect and to hold in strict confidence all information concerning a client...acquired in the course of the professional relationship”. For this rule to apply there has to be a client-lawyer relationship in



existence when information is obtained. There is no sustainable suggestion that the Practitioner was acting for the Applicant or his stepmother. Even if the Practitioner was providing regulated services for the father her obligation related to information about the father, not (in this case) the Applicant and his stepmother.

[45] Rule 6 provides as follows: “*In acting for a client a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.*” The Applicant was not the Practitioner’s client, and if the father was her client, she was then duty bound to “promote and protect” his interests, exactly as she is alleged to have done by resisting the making of a final PPPR order. Consequently, there can be no breach of this Rule.

[46] Having considered all of the facts, I cannot find any aspect of the Practitioner’s conduct that can be said to have breached any of the Conduct and Client Care Rules.

#### **The father’s state of knowledge**

[47] In his letter dated 9 December 2009, the Applicant sensitively and appropriately raised the possibility of the father’s property being sold and him moving into a rest home, among a number of options. The fact that the Applicant had made this suggestion was therefore known by the father well before the PPPR proceedings. If it was mentioned in the PPPR papers the father also would have read it when his counsel supplied those documents to him at his request.

[48] It is not possible to accurately tell from the material on file to what extent, if any, the Practitioner did actually encourage the father to believe that his son wanted him in a home. There is no sustainable evidence that she “*used her position and influence as a barrister to convince [the father] that [the Applicant] was out to get his money*”. She was never intending to act as a lawyer, only as the father’s support person, but in reality as a barrister she brought to the situation a knowledge of the law and sensitivity to the father’s strict rights that would be very unusual with most “support persons”. In supporting the father, her highly regarded former colleague and referee, and ensuring he received the full benefit of his rights, she appears to have derailed the understandable and well-intended efforts of the Applicant to remedy his father’s financial problems. Unfortunately it was probably, as the Applicant feared, inevitable that his father “finding out” about his role in the PPPR Act process would impact on their relationship.

[49] The facts suggest that the Practitioner was not directly responsible for the father learning of his son’s role, nor of the option of the father going into a home but

undoubtedly her “support” was of a level and commitment that may have been in some regards excessive, and certainly affected the intentions of the Applicant and health professionals. From the Applicant’s justified perspective, especially with its relationship consequences, this has been a disaster, but the bottom line is that the Practitioner’s proven actions do not breach the provisions of the Lawyers and Conveyancers Act or the Conduct and Client Care Rules.

[50] Having considered all the material on the file and applied the relevant legal principles I have found no reason to take a different view to that of the Standards Committee. The Practitioner was not acting as a lawyer and her assistance to the father was not “providing regulated services”. In addition, she has not breached any of the Conduct and Client Care Rules. Her conduct cannot therefore constitute unsatisfactory conduct and as a result, no Orders can be imposed against her.

### **Decision**

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

**DATED** this 17<sup>th</sup> day of November 2011

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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:

Andrew FR as the Applicant  
Lee US as the Respondent  
Auckland Standards Committee 4  
The New Zealand Law Society  
The Secretary for Justice (with the Applicants details anonymised)