

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

RT

Applicant

AND

MX

Respondent

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

DECISION

Introduction

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

Background

[2] The Practitioner was acting for a woman who had been in a relationship with the Applicant. It seems that the Practitioner's client had provided a guarantee to a bank in respect to the Applicant's indebtedness. When the relationship ended the Practitioner's client was required to pay the guaranteed sum in full to the bank when she wished to carry out some refinancing herself.

[3] The Practitioner was instructed by his client to recover the money which she had been required to pay the bank to cover the Applicant's debt.

[4] The Applicant was representing himself and, according to the Practitioner, the two men were communicating directly by email and letters. Matters were not

progressing so the Practitioner was provided by his client with a contact phone number for the Applicant. After unsuccessfully ringing during the day he phoned him around 9:00 p.m. *“with a view to ascertaining what the issue was with respect to the situation to see if any disputed matters could be resolved.”*

[5] The complaint makes it clear that the Applicant took exception to the call. Among the matters of concern was that the Practitioner had phoned on his unlisted/confidential phone number, that he was accused of owing *“a fair amount of money”* without proof, that action was going to be taken against him, and that the Practitioner’s general tone was *“threatening”*.

[6] The Practitioner responded that he was not aware that the phone number was confidential and that it was given to him by his client for the purpose of contacting the Applicant. The Practitioner described his correspondence and the telephone conversation as being *“of a professional kind”*. The Practitioner said he introduced himself (to the Applicant), made it clear he acted for his client and wished to talk about what was at issue. He stated that when it became clear that the Applicant was not willing to discuss matters the call was concluded. His phone records show that the call lasted three minutes and five seconds.

Standards Committee Decision

[7] The matter was referred by the New Zealand Law Society (NZLS) Complaints Service to Wellington Standards Committee 1. Its decision set out in some detail the position of both parties before deciding to take no further action for the following reasons.

- 1) (The Practitioner) acted appropriately in initially contacting (the Applicant’s) former solicitors who advised him that they had no instructions and were no longer required;
- 2) (The Applicant) communicated directly with (the Practitioner) in responding to correspondence in emails and (the Practitioner) was instructed to telephone (the Applicant) after work by his client;
- 3) While (the Applicant) may have felt threatened by (the Practitioner) that call was not made for any improper purpose other than to try and resolve the problem of indebtedness for his client.

Application for Review

[8] This review has been conducted on the papers in accordance with section 206(2)(b) of the Lawyers and Conveyancers Act 2006 with the consent of both parties.

[9] It is the task of this office to review decisions of Standards Committees. The review includes consideration of how the Standards Committee dealt with the complaint and whether its decision is soundly based on the evidence before the Committee. Committee's are made up of experienced lawyers, together with a non lawyer representative of the community.

[10] The Applicant sought a review of the Committee's decision and requested that *"the lawyer (be) disciplined for inappropriate behaviour and an apology offered for his inappropriate phone call and remarks."* His expanded submissions in support of his review application largely repeated the essence of his original complaint, and added some personal details.

[11] The Practitioner in response indicated that he largely relied on his submissions to the Standards Committee, but he also added some further comments reiterating the time and nature of his call. He advised that proceedings between his client and the Applicant have now been issued and the matter is progressing through the District Court.

Discussion

[12] Lawyers professional responsibilities are set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). Chapter 12 of the Rules sets out a lawyer's obligation to third parties as follows:

12. A lawyer must, when acting in a professional capacity, conduct dealings with others, including self represented persons, with integrity, respect and courtesy.

[13] Also relevant is Rule 2.3 which states;

- 12.3 A lawyer 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.

[14] Several examples of breaches of this Rule are provided in the text including issuing a statutory demand under the Companies Act knowing that it is genuinely disputed, and serving documents on a person in a way that causes unnecessary embarrassment or damage to a person's reputation, interests, or occupation.

[15] Underpinning the incident complained about is the assertion that, despite ongoing contact with the Applicant (who had not instructed solicitors) the Practitioner was not making useful progress in clearly ascertaining the Applicant's position, and generally resolving the issue between him and the Practitioner's client. He had

previously ascertained that the Applicant's former solicitors had no instructions from him regarding the matter.

[16] There are several elements in the complaint. The first concerns the Practitioner's use of an unlisted phone number. The number was provided by the Practitioner's client for the purpose of telephoning the Applicant, and appears to have been unaware that was an unlisted number. However, regardless of such knowledge, I cannot see that any disciplinary issues arise by the Practitioner calling the Applicant on an unlisted phone number.

[17] The second element concerns the Practitioner contacting the Applicant directly. The Applicant did not have his own lawyer at that time, and in those circumstances a lawyer making direct contact with a third party in the interests of attempting to progress a matter is common and acceptable practice. The rules only prohibit a lawyer contacting a person known to be presented by another lawyer. Although the Applicant may not have been expecting a phone call from the Practitioner, there can be no objection to a self-represented party being contacted by the lawyer on the opposing side. In this case no reasonable progress was being made in resolving a matter and a direct phone call is not an improper step to take in the circumstances. Nor could such contact amount to an improper use of "legal processes". No breach of the rule arises as a result of the contact.

[18] A third element, and perhaps the main aspect of the complaint, concerns the nature and content of the brief discussion. The Applicant described the call as "*an accusation*" having been made against him that he owed (the Practitioner's client) a fair amount of money with no proof being provided, and being told that legal action would be taken.

[19] There is no dispute that the call was made around 9:00 p.m. and lasted a fraction over three minutes. There is no record of what was said and how it was said but since it was in the Practitioner's interests (or that of his client) to achieve a positive outcome if possible from the call, doing or saying anything likely to upset the Applicant would have made little sense. The Practitioner explained that he had hoped the matter could be resolved, but when he realised the Applicant was unwilling to discuss the matter the call was concluded.

[20] There can be no objection to the Applicant having been informed about the claim, or that legal action could follow. That the Applicant may have objected to having distasteful options outlined to him, or may have felt pressured by this prospect, is not

sufficient to support a disciplinary complaint. In due course, failing a private resolution, the question of 'proof' would inevitably arise, but the point of the call was obviously to inform the Applicant about the fact of the claim, and to seek his response. It was part of the Applicant's complaint that the Practitioner had not let him have his side explained in a court of law. This somewhat misses the point that the purpose of the call was to try and avoid litigation.

[21] I have read the Applicant's lengthy letter which responded to the Practitioner's explanation to the Standards Committee, and have little doubt that he was unhappy about the Practitioner's call, but the main focus on the merits of claim by his ex partner suggested that the prospect of the claim was the major reason he was upset by the call.

[22] In any event I have considered all of the information and conclude that there is no credible evidence that the Practitioner breached his professional obligation to conduct dealings with third parties "with integrity, respect, and courtesy". There is no evidence to show that there was a breach of Rule 12. I am therefore of the view that the Committee's decision is correct.

Decision

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

DATED this 12th day of October 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:

RT as the Applicant
MX the Respondent
The Wellington Standards Committee 1
The New Zealand Law Society