

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee 5

BETWEEN

Mr JD

Applicant

AND

Mr RU

Respondent

DECISION

Background

[1] Mr JD is the father of a child victim of an indecent act by an adult. Mr RU acted for the accused.

[2] The incidents out of which Mr JD's complaints arise took place at the [Auckland] District Court when the accused appeared to answer the charges laid against him.

[3] Mr JD complains that Mr RU's conduct on the day breached a number of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. He lists these in his complaint to the Complaints Service of the New Zealand Law Society as follows:

- Chapter 10, s 10 (obligation to promote and maintain proper standards of professionalism in all dealings)
- Chapter 12, s 12 (duty to conduct dealings with third parties with integrity, respect and courtesy)
- Chapter 13, s 13 (overriding duty as an officer of the court to act and behave in a respectful and dignified manner of the court concerned)

- Chapter 13 s 13.2 (obligation to not act in a way that undermines the processes of the court, or the dignity of the judiciary)
- Chapter 13, s 13.2.1 (obligation to treat others involved in the court process with respect)
- Chapter 13.8 (obligation not to attack a person's reputation without good cause in court or in documents filed in court proceedings)
- Chapter 13.8.2 (obligation not to make any allegations against a person not involved in the proceedings unless they are necessary to the conduct of the litigation and reasonable steps taken to ensure the accuracy of the allegations)
- Chapter 13.13(b) (obligation to put before the court any proper defence in accordance with his client's instructions but not misled the court in any way).

I have recorded these as they are contained in Mr JD's complaint, but in some instances the references are not necessarily correct, either by way of the rule number or its summarised content.

[4] Having considered all of the evidence available to it, the Committee recorded its determination in the following way:

"The Committee considered all of the information before it. The Committee noted that this was an example of a case where one party alleges something and the other party denies it. The Committee could not determine whose version of events is correct and the Committee decided that in the absence of sufficient corroborating evidence, the allegation is not proven."

[5] Accordingly the Committee determined to take no further action pursuant to section 152(2)(c) of the Lawyers and Conveyancers Act 2006..

[6] Mr JD has applied for a review of that determination. He asserts that the Standards Committee could have sought evidence from a person who accompanied Mr RU on the day and that the Committee did little if anything by way of exercising its powers of investigation.

[7] He also objects to the fact that that the Standards Committee had rephrased his complaint as being one of a perceived threat to Mr RU's client and therefore considered the complaint on that basis.

Review

[8] It is noted and recorded, that Mr JD's complaint is that Mr RU actions were unbecoming and unprofessional, and that he had brought the profession into disrepute.

[9] Section 241(c) of the Lawyers and Conveyancers Act, repeats the terminology used in section 106(3)(c) of the Law Practitioners Act 1982. Both sections refer to a

degree of incompetence or negligence that is such as to bring the profession into disrepute. They are not terms which can be applied to the conduct complained of in this instance.

[10] In his complaint to the Complaints Service, Mr JD lists a number of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which he considers Mr RU has breached. A breach of the Rules constitutes unsatisfactory conduct by reason of section 12(c) of the Act.

[11] In addition to these Rules, it must be considered whether Mr RU's conduct was conduct which would be regarded by lawyers of good standing as being unacceptable including conduct unbecoming a lawyer or unprofessional conduct, both of which if proved, constitutes unsatisfactory conduct as defined in section 12(b) of the Act.

[12] This review rests largely on a consideration of the available evidence of what occurred in the Court precincts on the day in question.

[13] I met with Mr JD and heard his evidence and submissions on 22 February 2012. Mr JD's nephew JE, had provided a statement to the Complaints Service in support of Mr JD's complaint. Neither he or the family friend who accompanied Mr JD on the day were able to attend the review hearing as they live at a distance from Auckland. Mr JD's partner, who was the other member of his group on the day, was also unable to attend in person for personal reasons. However, both of these persons have provided written statements as to the events that took place on that day.

[14] I then met with Mr RU on 23 February. In the course of that meeting he provided me with the contact details of the law student (Ms X) who had accompanied him on the day, and I met separately with her on 28 February.

[15] The greatest weight must be given to the evidence of those persons who have attended in person at the LCRO Office to provide their version of events and to answer the questions put to them. That is not to suggest however, that the evidence of the three persons who have provided written statements is disregarded. That evidence is useful to help build a picture of the events of the morning. In addition, all three persons have provided telephone numbers and indicated a willingness to be contacted by me. I have not made telephone contact with any of these persons as the findings of fact which I have made do not rely on these statements.

[16] I have also given some consideration as to whether the evidence of Ms X and the two additional persons of Mr JD's group should be provided to the other party for

comment. I have determined not to take this step, because primarily this is a review by myself as LCRO. In addition, the evidence provided either supports or does not support the evidence of the other parties, or adds to the weight of evidence already provided. The fact that the evidence has not been put to the other party is taken into account by me when considering the weight to be afforded to the evidence provided and nothing has turned on any part of this evidence alone.

[17] I also have the Standards Committee file with all correspondence and submissions previously provided by the parties.

Mr JD's evidence

[18] The incident which Mr JD complains of which concerned him directly occurred after the morning tea break in the foyer of the Court. Mr JD advises that he was standing with the members of his party by the vending machine to the left hand side of the foyer, viewed from the entrance used by Mr RU. To establish the location of the various people involved in this incident, I asked Mr JD to draw a diagram of the foyer and the position of the persons involved.

[19] He describes the incident and his reaction in the following way:

“[9] I was therefore shocked and distressed when after the morning tea break, Mr [RU] strode up to me in the public foyer of the District Court with his client and female assistant in tow and rudely and aggressively accosted me; getting very close to my face. He warned me in a very aggressive and loud voice not to hang around his chambers or to follow him. His action drew the attention of the security guard who obviously feared a confrontation and later complimented me on my restraint. My nephew and another family member placed themselves between me and Mr [RU] and he was required to physically retreat.

[10] I was shocked that a member of the Bar would behave so aggressively and provocatively, and show no consideration or sensitivity to the family of a victim of an alleged child sex abuse. It was inflammatory and provocative in the extreme for him to have approached me and my family. After his remark to my nephew had not resulted in the reaction he had apparently hoped, it was obvious he was going to have a “second go” in an attempt to provoke me into a reaction. Mr [RU] was shaking with rage and was visibly uncontrollable. As he spoke, I felt the spit flying from his mouth and striking me.”

[20] He also complains that in a memorandum provided to the Court by Mr RU, he was “vilified” and his character denigrated, but that he was not able to address the Court to correct these impressions.

Mr JD's Submissions

[21] At the review hearing Mr JD submitted that Mr RU's behaviour constituted the offence of behaving in an offensive manner as that term is defined in section 4(1)(c)(i)

of the Summary Offences Act. That subsection defines the offence as using “any threatening or insulting words and being reckless whether any person is alarmed or insulted by those words”.

[22] He refers to [122] of the decision *in Morse v The Police* [2011] NZSC 45 where Anderson J notes as follows:

“Section 4(1)(b) and (c) and section 2 of the Summary Offences Act 1981 proscribe verbal expression in a public place, or, in the case of certain words, within the hearing of a public place, if specified features occur such as intent to threaten, alarm, insult or offend; if the words are actually threatening or insulting and are addressed recklessly as to whether another person is alarmed or insulted; or if the words are indecent or obscene.”

[23] Mr JD contends that Mr RU was at the very least reckless as to whether what he said and the manner in which he said it, would alarm or insult him as the father of the child offended against.

Mr RU’s evidence

[24] Mr RU acknowledges that he addressed Mr JD. He agrees that the diagram provided by Mr JD is largely correct, but that the scale is out of proportion. He describes Mr JD’s party as being more spread across the foyer to the extent that he did not have to deviate significantly from his route to the Courtroom to address Mr JD. This could be viewed as Mr JD’s party placing themselves in such a position as not to actually block the route to be taken by Mr RU and his client, but to be sufficiently close as to ensure that Mr RU’s client in any event, was intimidated by their presence.

[25] Mr RU describes his client as being “as scared as a rabbit” of Mr JD and the members of his group. Whether that was the intention or not, that is how Mr RU’s client felt and Mr RU felt some duty to try to minimise the effect of their presence on his client.

[26] He accepts that he stopped in front of Mr JD and while acknowledging that he had an interest in the matter told him that he did not want Mr JD to enter into his life or be watching his premises. He denies however that he spoke with the degree of aggressiveness and lack of control described by Mr JD.

[27] Mr RU advised that he has spent some thirty six years at the Criminal Bar and that he intuitively formed the view that he was faced with a situation which had to be dealt with firmly and immediately. He did not consider that advising Court security was either necessary or appropriate.

[28] He agreed however that he could have avoided confronting Mr JD and that the situation could have been dealt with differently. He says however that he had no intent to cause any offence and empathised with Mr JD's situation by reason of his own personal circumstances.

[29] He also denies that he used the words "trained asshole" as alleged by Mr JE and that any comments he did make were intended to be heard by his client alone.

JE's evidence

[30] JE is Mr JD's nephew. He attended on the day in question with another family member and Mr JD's partner. JE's evidence with regard to the incident concerning him is as follows:-

"[5] I was standing in the public foyer near the room where Mr [RU] was talking to his client. There was nowhere to sit as the court was crowded and the public seating already taken. I saw Mr [RU] open the door and as he was walking out with his client and the Indian woman, he turned to his client and said in a voice meant for me to overhear, "I see he has got a trained asshole to follow you". Mr [RU] looked directly at me when he said this. I was under no doubt he meant me to hear this remark. I did not respond and he and his party walked by looking at me. I did not follow them but rejoined my uncle."

[31] With regard to the incident where Mr RU addressed Mr JD, JE has this to say: -

"[7] When court was about to be reconvened, my uncle came down and rejoined us. It was then that Mr [RU] walked into the public foyer with his client close behind him, and strode up to my uncle in a very angry manner. I was concerned there was going to be trouble as Mr [RU] was shaking with emotion and his client was staring at my uncle."

[8] Mr [RU] told my uncle to "keep out of his life and not hang around his office" or words very similar to that. He came physically very close to my uncle and I decided to intervene by putting my body between them. I stepped into my uncle, forcing him to take a couple of steps backwards away from Mr [RU]. I felt this appropriate to create some space between them. I had my back towards Mr [RU] and was facing my uncle so I could reassure him. At this point I couldn't see Mr [RU]'s reaction. No one else in my party reacted. I think they were shocked and surprised by Mr [RU]'s unexpected approach. I feel it highly inappropriate, unwise and very inflammatory for defence counsel to approach the victim's father like this. I was amazed a lawyer would do this - especially to a father of a young child who has allegedly been sexually assaulted."

Ms X's evidence

[32] Ms X was a law student at the time of the incident and attended Court with Mr RU and his client for the purpose of observing and gaining experience.

[33] Her recall is that on the day in question, Mr JD's party was verbally abusive towards Mr RU and his client and she admitted being scared. She found Mr JD and his group threatening.

[34] She remembers that some of Mr JD's party were outside the Court building smoking near the entrance when she approached with Mr RU and his client. She advises that Mr RU, his client and herself were walking reasonably quickly into the Court foyer. She recalls that Mr RU did not come to a complete stop but that he turned to address Mr JD and his group as they followed them to Court. She remembers Mr RU telling Mr JD to refrain from speaking to him (Mr RU) in the manner in which they were. She says the encounter was brief and that Mr RU was neither loud nor aggressive.

[35] She does not recall the earlier incident described by JE, and did not hear the words complained of.

[36] She finally advised that there was no discussion between her and Mr RU following their return to his chambers except that she commented to Mr RU that she found the incident scary.

The statement of the Mr JD's friend (Mr J)

[37] Mr J is an experienced mountain safety guide and an entertainment venue doorman. He states that he has a lot of experience dealing with defusing situations and dealing with people who find themselves in stressful, aggressive and dangerous situations.

[38] He says that he attended the hearing to support Mr JD when the accused made his first appearance as the offending had been traumatic for the victim and her family.

[39] He describes the incident where Mr RU confronted Mr JD in the following way:-

“At one point in the morning when Court was about to be reconvened, Mr [RU] re-entered the Court with Mr [AS] close behind him, and strode right up to us in a very aggressive manner and closed in on [JD]. I was surprised by Mr [RU]'s aggression. He was very angry.”

Later he states:-

“I heard Mr [RU] start to loudly make a number of inaccurate accusations, telling [JD] to “keep away from his office.”

At that point I thought [JD] was going to lose control, but [JE] formed a physical barrier buffer between them.”

[40] He reports the incident involving JE in the following way:-

“[JE] rejoined us and said that as Mr [RU] was walking past he spoke to Mr [AS] loudly enough for [JE] to hear him say, “I see he has got the trained arsehole to follow you.” I believe this was a mistaken reference to [JD]'s past career.”

The statement of Mr JD's partner (Ms M)

[41] Mr JD's partner describes the effect of Mr AS's offending as "devastating" for Mr JD and that the matter was made worse by Mr AS's not guilty plea, which meant that the victim was put through the ordeal of a trial and cross examination.

[42] Her evidence with regard to the "name calling" incident is as follows;- "At one point, [JE] came up to us at the Court and said Mr [RU] had called him an obscene name and said [JE] had been employed to follow him and [AS]."

[43] Her description of the events where Mr RU confronted Mr JD is put in the following way:-

"About an hour later, Mr [RU] and Mr [AS] came striding up to us in the foyer. They were accompanied by a young woman who stood some distance back. We were standing opposite the security guard and just outside where people go to pay their fines; there was a vending machine behind us. Mr [RU] was very angry. He spoke with considerable indignation and passion and told [JD] he did not want him intruding in his life or following him." ... "Mr [RU] 'spat out' his remarks directly to [JD]."

[44] She then describes the action taken by JE to prevent any physical confrontation between Mr RU and Mr JD.

The standard of proof and findings

[45] The standard of proof to be applied in disciplinary proceedings is the civil standard of a balance of probabilities, applied flexibly according to the seriousness of matters to be proved and the consequences of proving them (see *Z v Dental Complaints Assessment Committee* [2008] NZSC 55).

[46] The Standards Committee was unable to resolve the matter due to the conflicting versions of the incidents provided by Mr RU and Mr JD. From the evidence I have heard and read I make the following findings of fact:-

- (i) Mr RU's client was intimidated by Mr JD, his nephew and his friend.
- (ii) Mr RU made a decision that Mr JD had to be confronted by him, rather than avoiding contact and / or advising Court security.
- (iii) Mr RU confronted Mr JD. The degree of aggressiveness and anger is disputed, but there is no doubt that Mr RU intended that Mr JD should be left in no doubt that Mr RU's objective was to ensure that Mr JD did not follow or watch him. His message would have been delivered with some force.

- (iv) Mr RU was not intimidated By Mr JD or his supporters.
- (v) The only person who claims to have heard Mr RU describe him as “a trained arsehole” is JE himself. All other evidence is a repeat of what JE says he heard. Mr RU denies that he used this phrase. There is insufficient evidence to the required degree to enable a finding to be made that Mr RU uttered these words.

Discussion

[47] The issue is whether Mr RU’s actions offended any of the Conduct and Client Care Rules or the Lawyers and Conveyancers Act.

[48] Mr JD has referred to a number of Conduct and Client Care Rules which he believes Mr RU has breached. The most relevant of these are:-

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

Rule 10. “A lawyer must promote and maintain proper standards of professionalism in the lawyer’s dealings.”

Other Rules referred to by Mr JD are not directly relevant.

Rule 10 is reflected in section 12(b) of the Lawyers and Conveyancers Act which defines unsatisfactory conduct as “conduct that would be regarded by lawyers of good standing as being unacceptable, including ... (ii) unprofessional conduct.”

[49] I have reflected on whether Mr RU’s actions could be described as merely unwise, or imprudent, which Mr RU acknowledged was probably the case, or whether his conduct was such that it failed to comply with the standards expected of a lawyer by the Rules and the Act.

[50] It is not part of a lawyer’s brief to protect his client from physical harm. In this case that was the function of Court security. In addition, Mr RU could have taken steps to ensure that his client was not unduly subjected to intimidation by Mr JD and his group, by avoiding unnecessary contact with them. It is acknowledged that some contact may have been unavoidable in the circumstances. However, Mr RU was not concerned for himself, and there was no duty on Mr RU to protect his client from the attention of Mr JD and his group.

[51] I have come to the view that, in the circumstances, it was inappropriate for Mr RU to confront Mr JD. Regardless of the actions of Mr JD and his supporters Mr RU should not have instituted any form of direct contact with Mr JD. There were other ways of protecting his client and he did not need to become personally involved in taking such steps. It was even more inappropriate for him to confront the victim's father when he could not help but be aware that feelings were running high, to the extent that it was possible that his actions could have triggered a physical response from Mr JD.

[52] On the basis of the findings above, the contact between Mr RU and Mr JD breached the requirements of Rule 12 to conduct dealings with third parties with integrity, respect and courtesy.

[53] In addition, any form of contact with the father of the victim was unprofessional when acting for the accused, more so when he was accompanied by the accused. This constitutes a breach of Rule 10 and is also a breach of section 12 (b)(ii) of the Act.

[54] Consequently, Mr RU's conduct constitutes unsatisfactory conduct in terms of sections 12(b) and 12(c) of the Act.

[55] Notwithstanding these breaches, there resides in the Standards Committee (or the LCRO) a discretion to take no further action in respect of a complaint, if, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate (section 138(2)).

[56] The Standards Committee was unable to reach a decision because it could not determine "whose version of events is correct." In the course of my meeting with the parties, and Ms X, and seeking further evidence from others present, I have reached the findings recorded in [46]. I do not therefore have the limitations which faced the Committee. The only question for me to determine, is whether the discretion provided by sections 138(2) or 152(2)(c) should be exercised.

[57] In previous decisions of this Office, it has been noted that the exercise of a discretion by the Standards Committee should not be lightly interfered with (see for example *Lydd v Maryport and Maryport* NZLCRO 164/2009.) In *NZLS v ZJ* NZLCRO 200/2010, the LCRO noted that there needed to be good reason to interfere with the exercise of the Standards Committee's discretion to take no further action.

[58] Interference with the discretion of the Committee would in this case, be justified, given that I have made findings of fact which the Committee was unable to. Those findings of fact lead to the conclusion that Rules 10 and 12 of the Conduct and Client

Care Rules, as well as section 12(b)(ii) have been breached. This must inevitably lead to a finding of unsatisfactory conduct unless there are exceptional circumstances which would dictate that no further action be taken.

[59] I cannot find any exceptional circumstances which would support such an approach. The mitigating factors are taken into account in establishing what is an appropriate penalty.

[60] Mr JD submits that Mr RU's conduct constituted offensive conduct from which he invites the inference that it therefore follows that Mr RU's conduct offended the Rules to which he refers.

[61] Neither the Standards Committee nor the LCRO are established to consider whether a criminal offence has been committed or not. The Courts are the proper place for those considerations. The only matter to be decided is whether the conduct breached the Conduct and Client Care Rules or the statute.

[62] With regard to the allegation that Mr RU referred to JE as a "trained arsehole" I have already noted above that the evidence does not reach the requisite degree of proof to support an adverse finding against Mr RU.

[63] Mr JD also complained that Mr RU had vilified him and denigrated his character when addressing the Court. The statements made to the Court arose in the context of the bail application for Mr RU's client. Mr JD was opposed to bail being granted, or at least, opposed without conditions being imposed, and had provided submissions to the Police to present to the Court. The conduct of Court proceedings is within the control of the presiding Judge, and if there was any significance to the comments about Mr JD being made by Mr RU, the Judge would no doubt have called for such response as was considered appropriate. Mr JD may very well have been offended by the comments, but it is not the role of the Standards Committee or the LCRO to determine the validity or otherwise of comments made to the Court. That is within the domain of the presiding Judge.

[64] Consequently, the finding of unsatisfactory conduct relates only to the incident in the Court foyer.

Penalty

[65] In his review application Mr JD seeks that the Standards Committee decision be overturned and the matter reheard. The LCRO has all of the powers of the Standards

Committee with regard to the imposition of penalties and the matter needs to be disposed of.

[66] In his original complaint, Mr JD sought a formal apology, an assurance that Mr RU will not approach Mr JD or members of the victim's family, and a censure. I have considered this submission, as well as considered what other penalties should apply in the circumstances. Mr RU found himself in extenuating circumstances. His client was intimidated by Mr JD and the members of his group, and Mr RU felt the need to directly confront Mr JD to put an end to what he saw could be ongoing harassment of himself and his client. That does not excuse his actions, but it is appropriate to take these circumstances into account when considering what penalty should apply.

[67] There is no power to order that Mr RU not approach Mr JD or members of the victim's family, and it would seem unlikely that this will occur, although given that Mr JD's premises are in the same building as Mr RU's an accidental meeting may be unavoidable. Although an apology would go a long way to repairing relations between the parties, there is no willingness on Mr RU's behalf to consider providing same, and although the matter may have been resolved on that basis without the need for a finding, the time for a meaningful apology has long since passed.

[68] In the circumstances, the appropriate penalty is to censure Mr RU for his actions in inappropriately confronting Mr JD, given the sensitive circumstances surrounding this matter.

Decision

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

Orders

Pursuant to section 156(1)(b) of the Lawyers and Conveyancers Act, Mr RU is censured.

Costs

Mr RU's conduct has been found to constitute unsatisfactory conduct in respect of the incident in the Court foyer. The review application is therefore partially successful and it is appropriate that a costs order be made against Mr RU.

A fully successful review application would result in an order for costs in the sum of \$1,200 in accordance with the Costs guidelines issued by this Office.

Therefore, pursuant to section 210 of the Lawyers and Conveyancers Act, Mr RU is ordered to pay the sum of \$400 by way of costs to the New Zealand Law Society within one month of the date of this decision.

DATED this 22th day of March 2012

O W J 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:

JD as the Applicant
RU as the Respondent
The Auckland Standards Committee 5
The New Zealand Law Society
Secretary for Justice (Redacted)