LCRO 57/2009

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 No 4
BETWEEN	**COMPLAINANT Y** of Auckland Applicant
AND	**LAWYER R** of Auckland Respondent

DECISION

Background

[1] Lawyer R complained to the New Zealand Law Society regarding the conduct of Complainant Y. The matter was referred to the Auckland Standards Committee 4 for consideration.

[2] The Auckland Standards Committee 4 found that the conduct complained of amounted to conduct unbecoming and censured Complainant Y and order her to pay the costs of the investigation in the sum of $600.00. That decision was notified to Complainant Y on 2 April 2009. Complainant Y sought a review of the decision of the Standards Committee by an application received by this office on 6 May 2009.

[3] Complainant Y indicated that she wished to exercise her right to be heard in person. A hearing was convened in this. Complainant Y attended the hearing on 4 June 2009. She was accompanied by Mr Y, her professional partner who spoke on her behalf. Lawyer R was not required to attend and elected to take no part in the hearing.

Background

[4] Complainant Y acted for Ms L in a relationship property dispute. Lawyer R acted for Mr G, L's former domestic partner. Mr G was a high-worth individual and any settlement was likely to be substantial. It was the view of Complainant Y that Lawyer R was an impediment to the speedy and fair resolution of the dispute. One unusual aspect of this dispute was that the parties appear to have been on relatively friendly terms throughout and would communicate freely with each other including in respect of the matters in dispute. Complainant Y states that on occasions Lawyer R would take what was in her view a very hard line while at the same time G would be making statements and offers which were inconsistent with him having given instructions for Lawyer R to take an aggressive stance.

[5] At the centre of this complaint is a paragraph in an email Complainant Y wrote to her client on 17 December 2007 in the context of this relationship property dispute. That paragraph stated:

> I think you have to understand that Lawyer R may be the problem one he probably thinks G is his best client so he is personally and emotionally involved in retaining G's assets intact and two if he is Gay and divorced he may have a personal reason why he thinks women are greedy and men are hard done by.

[6] It appears that L forwarded the email to G who in turn forwarded it to Lawyer R. Lawyer R complained about the contents of that email. The essence of the complaint was that the content of that paragraph were derogatory and suggested that Lawyer R's sexuality or status as divorced impacted negatively on his professionalism. He suggested that the purpose of the statement was to undermine the relationship between him and his client.

[7] At the hearing Complainant Y objected a part of the complaint which alleged she had suggested that there was a sexual relationship between Lawyer R and his client. I am satisfied that such a suggestion is not implicit in the paragraph complained of and the matter need be taken no further.

[8] I also note that Lawyer R also complained that Complainant Y had said she had received a "pompous fax from (a QC)". I do not consider that there was anything in that statement made by Complainant Y to her client which falls below the minimum acceptable professional standard. That aspect of the complaint need not be taken any further.

Applicable professional standards

[9] This review concerns conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date.

Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date.

[10] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

> of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

[11] It is on the basis of these standards that the conduct of Complainant Y must be examined.

The Standards Committee determination

[12] In the determination of the Standards Committee it was stated that "there has been unsatisfactory conduct on the part of Complainant Y. [The Committee] was of the view that Complainant Y had been guilty of conduct unbecoming".

[13] The decision did not set out the details of the complaint, nor did it set out which aspects of the complaint it upheld. No reasoning as to the manner in which it reached its conclusion was provided for in the notice of determination.

[14] On 9 April 2009 counsel for Complainant Y wrote to the Society and observed that by virtue of s 158 of the Lawyers and Conveyancers Act (the Act) the Standards Committee was obliged to provide reasons for its decision and that the notice of decision did not contain those reasons. In response to that letter the Society responded. That response largely recited the findings of the Committee found in the notice of determination.

[15] Where there is a statutory obligation to provide reasons some basic matters must be addressed in those reasons. Where a statutory standard is being applied (as it is here) reasons must be given as to why that standard was breached or not breached: *Ronberg v*

Chief Executive of the Department of Labour [1995] NZAR 509. A bare statement as to whether the standard was a breach or not will not be enough.

[16] The decision-maker must also identify the material it took into account and what material in particular led it to reach the decision it did. Reasons must address the points which the parties to the action have raised: *Re Poyser & Mills' Arbitration* [1964] 2 QB 467 per Megaw J at p 478. In the decision under consideration there is no reference to the conduct complained of at other than a statement that "the Committee took into account the circumstances of and background to Complainant Y's conduct". It is not clear from this what parts of the material before it was considered relevant in reaching its decision. Another way of putting this can be found *in Re Palmer and Minister for the Capital Territory* (1978) 23 ALR 196 at 206-7. That case states that reasons must enable a party to read the decision and conclude: "even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging". In light of the fact that this office may review decisions of Standards Committees it is important that a decision of a Standards Committee is sufficiently extensive to enable the parties to decide in an informed manner whether or not to seek a review.

[17] Against these principles the nature and role of Standards Committees must be acknowledged. They are tribunals of a summary nature which are expected to determine matters expeditiously (s 120) by a hearing on the papers. They are the "front-line" regulators for lawyers and conveyancers and in some cases have a considerable workload. There is no provision for the payment of lawyer or conveyancer members of the Committees. In light of this there can be no requirement that the reasons of the Committee provide long and detailed analysis. In general it would seem to suffice for the Committee to set out the relevant law or legal standard being applied, the key facts which they relied on their deliberations, and whether (in light of the facts as found) that standard has been breached: *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500; *Patel v Removal Review Authority* [1994] NZAR 419.

[18] I consider that in this case the Standards Committee has failed to provide reasons as it was obliged to by the provisions of the Act.

[19] The Committee concluded that “there has been unsatisfactory conduct”. That is presumably a reference to the standard of unsatisfactory conduct found in s 12 of the Act. That standard has been in force since 1 August 2008. The conduct complained of in this matter occurred on December 17 2007. Section 351 of the Act states that complaints may be made in respect of conduct which occurred prior to 1 August 2008 only relating to ”conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982”. Those standards are found in ss 106 and 112 of the Law Practitioners Act. Accordingly it appears that the Standards Committee may have applied the wrong standards.

[20] I conclude that in these respects the decision of the Standards Committee is flawed.

The arguments for the applicant

[21] The applicant argued that her conduct was not in breach of any professional standard. She made a number of points in support of her argument.

[22] She observed that the comment complained about was made in a confidential communication between herself and her client. That document was clearly privileged. While a suggestion was made that L was not entitled to release the document to G without the consent of Complainant Y, that is clearly not correct. The right of confidence (and privilege) belongs to the client who is at liberty to waive it should they wish (whether that is wise or not and whether it is in the interests of the lawyer or not): *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553. There is no obligation on a client to keep communications confidential.

[23] There is, however, some force in the argument that a statement made in the confines of a confidential lawyer client relationship should be viewed differently from a comment made to another lawyer in general correspondence or elsewhere. It was, however, accepted by Complainant Y that it was not the case that a lawyer could make any statements he or she wished in the confines of the lawyer – client relation. For example it was accepted that unverified allegations of dishonesty against another lawyer would be inappropriate.

[24] The question therefore is where the line of acceptable statements should be drawn. In the present case the issue is whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811) taking into account the fact that statement was made in the confines of the confidential lawyer-client relation. It is not clear that the Standards

Committee took into consideration the importance of the confidential nature of the solicitor-client relation in considering this question.

[25] Complainant Y also suggested that in all of the circumstances she had an obligation to disclose all information she considered relevant to her client in this matter. I note that Complainant Y did not resile from the position that the statement was relevant and properly made. At no time did she acknowledge that the statement was intemperate or inappropriate. The obligation of disclosure is stated in r 1.09 of the (then applicable) Rules of Professional Conduct for Barristers and Solicitors (see now r 7 of the Rules of Conduct and Client Care).

[26] Complainant Y impressed upon me that in her view family law matters were distinct from many other areas of legal practice and that practitioners inevitably brought their own bias to the manner in which they acted for their respective clients. She stated that she considered it her professional duty (given the fraught nature of this particular dispute) to explore with L what attributes of Lawyer R might be hindering the resolution of the matter.

[27] It is not clear that the Standards Committee took into consideration the importance of the duty of frank disclosure in considering this question.

[28] A further argument was that the email was published by L and not by Complainant Y. Complainant Y suggested that because L initiated the wider dissemination of the email in question she ought not be held responsible for it. Implicit in this argument was the suggestion that it was appropriate to make the statement to L in the first place. While it may be accurate to say that Complainant Y cannot be held responsible for the wider dissemination of the offending words, this does not affect the question of whether it was appropriate for her to make that statement to L in the first place. I do not consider there to be any force in this aspect of Complainant Y's argument.

Next steps

[29] It is clear that the conduct complained of could not be termed reprehensible, inexcusable, disgraceful, deplorable or dishonourable and as such does not approach the standard of professional misconduct as set out in ss 106 and 112 of the Lawyers and Conveyancers Act. However, taking into account the points made by Complainant Y, it may be that the conduct does amount to conduct unbecoming in breach of s 106(3)(b) of the Law Practitioners Act 1982.

[30] The Standards Committee considered that the behaviour of Complainant Y amounted to conduct unbecoming. That phrase can be found in both ss 106 and 112 of the Law Practitioners Act and s 12(b)(i) of the Lawyers and Conveyancers Act. If those

standards differ it is the former standard which must be applied in this case. Conduct unbecoming is conduct which fellow right-thinking practitioners would not consider acceptable.

[31] At the hearing Complainant Y argued that I should substitute my own view of whether the behaviour complained of amounted to conduct unbecoming for that of the Standards Committee. I expressed a reluctance to replace the judgement of a single non-practising lawyer for the judgement of a panel of lawyers informed by lay membership. In light of the standard being applied and in light of the nature of this complaint I am of the view that it is proper that whether or not the behaviour complained of amounts to conduct unbecoming is best determined by a Standards Committee.

[32] Pursuant to s 209 of the Lawyers and Conveyancers Act 2006 I direct that the Auckland Standards Committee 4 reconsider the question of whether the conduct of Complainant Y in making the statement in paragraph 5 of this judgement amounted to conduct unbecoming in breach of s 106(3)(b) of the Law Practitioners Act 1982.

Costs

[33] The applicant in this matter has been largely successful. I have also found that the Standards Committee erred in failing to give reasons for its decision and may have applied the inappropriate standard to the conduct in question. I also observe that this matter is to be reconsidered by the Standards Committee which may confirm its earlier decision and may also then impose a costs order on Complainant Y. In that case it would not be appropriate for Complainant Y to bear those costs twice. As such it is appropriate that the costs order made by the Committee be revisited.

[34] I am also of the view that this review may not have been necessary had the Standards Committee provided full reasons and not (apparently) applied the wrong standard. Complainant Y also retained external counsel in respect of the Standards Committee hearing. I take into account that Complainant Y is a legal practitioner, as is Mr Y who assisted her at the hearing. Dealing with the Standards Committee and bringing this application for review consumed their professional time which they would usually be able to spend on their professional practice.

[35] Section 210 of the Act grants me a wide discretion in revisiting costs orders and making new orders. I make the following orders. The order of the Standards Committee that Complainant Y pay the costs of the investigation in the sum of $600 is reversed. The New Zealand Law Society is to pay to Complainant Y the sum of $600 in relation to her costs in the bringing of this review.

Result

[36] The application for review is upheld pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Auckland Standards Committee 4 is reversed. The following orders are made:

- Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act I direct the Auckland Standards Committee 4 to reconsider the question of whether the conduct of Complainant Y in making the statement found in the email of 17 December 2007 amounted to conduct unbecoming in breach of s 106(3)(b) of the Law Practitioners Act 1982.

- The order of the Standards Committee that Complainant Y pay the costs of the investigation in the sum of $600 is reversed.

- Pursuant to s 210(2)(a) the New Zealand Law Society is to pay to Complainant Y the sum of $600 in relation to the costs of this review.

[37] I request that the Auckland Standards Committee 4 provide a follow up report to me when it has complied with this direction pursuant to s 209(1)(c) of the Lawyers and Conveyancers Act.

DATED this 9th day of June 2009

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Duncan Webb

Legal Complaints Review Officer

This decision is to be provided to:
Complainant Y as applicant
Lawyer R as respondent
The Auckland Standards Committee 4
The New Zealand Law Society