LCRO 97/2010

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	**CM** of Auckland Applicant
AND	**XH** of Auckland Respondent

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

DECISION

[1] Complaints were made by Mr CM (the Applicant) against Mr XH (the Practitioner) who acted for his de facto partner in relation to a separation which involved relationship property and child custody issues. None of the complaints were upheld, the Standards Committee having concluded, pursuant to Section 138(2) of the Lawyers and Conveyancers 2006 to take no further action. This section confers on a Standards Committee a discretionary power to take no further action on a complaint if, in the course of the investigation, it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[2] The Applicant exercised his right to have that decision reviewed. There were a number of reasons why he sought the review, one of the principal reasons being that the Standards Committee had not, in his view, provided reasons for declining to uphold his complaint. From my early assessment of the file, I agreed that the Standards Committee decision was not explained by any clear statement of reasons and the

Standards Committee was requested, pursuant to Section 204(a)(ii) of the Lawyers and Conveyancers Act to provide reasons for its decision.

[3] It is appropriate to remind Standards Committees of their obligation to provide reasons for all of its decisions made pursuant to Section 138. This is a statutory obligation imposed by Section 139(2) of the Act.

[4] The Standards Committee provided a statement of reasons shortly thereafter and this was provided to both parties who were invited to respond and provide any further information as they wished to forward. The Applicant raised a query about whether his review application to this Office had been sent to the Standards Committee. I am able to confirm that this was not done and should he wish to receive a copy of the letter to the Standards Committee, it will be made available to him on request.

[5] This review has been conducted "on the papers" that being on the basis of the materials on the Standards Committee file, which was provided to my Office, and all the information provided by the parties in relation to this review. Section 206 of the Lawyers and Conveyancers Act provides for a review on the papers if the parties consent, and if it appears to the LCRO that the review can be adequately determined in their absence and in the absence of representatives and witnesses. The parties consented to a review on the papers.

Standards Committee Procedures

[6] In addition to raising concerns about the absence of reasons, the Applicant also had raised with the Standards Committee his expectation that he would have been given an opportunity to provide submissions to the Standards Committee for its consideration. He referred to the Standards Committee's letter to him of 22 December 2009 wherein the following paragraph was included.

> All information submitted to the Standards Committee should be in writing and in a form that can be copied to the lawyer concerned. This is because the Lawyers and Conveyancers Act 2006 provides for Standards Committees to conduct their hearings on the papers once the investigation is completed. At that stage your written submissions will be invited.

[7] The Applicant had apparently assumed from the above that there would be a hearing and said that he had every intention of making some written submissions and had been denied the opportunity to do so before the Standards Committee considered the evidence. He had raised this concern with the Standards Committee and received a response the next day with a better explanation of the Standards Committees procedures. In particular, the Applicant was informed that the Committee had not set

the matter down for a "hearing on the papers", having resolved to take no further action.

[8] It is not hard to see how the Applicant may have been confused by the information he had received. It is not altogether clear from the Committee's letter to him that a Standards Committee investigation involves a preliminary assessment, and that a hearing on the papers will be done (and submissions sought) only if the Standards Committee considers that further investigation should be undertaken. If the Committee decided that no further action is necessary or appropriate, it would then issue a decision to dismiss the complaint pursuant to Section 138.

[9] In any event, there is nothing to indicate that the Standards Committee was not in full possession of all the information in relation to the complaints. However, the Applicant has had the opportunity, as part of the review process, to forward any additional information that he considered relevant to the matter.

Background

[10] The Practitioner acted for the Applicant's former de facto partner, R, in separation and relationship property matters in early 2008. The Applicant had his own lawyer. Aside from the initial correspondence with the Applicant, all communications were conducted between the lawyers. There were children of the relationship and also property matters to be dealt with. All matters were eventually settled, making it unnecessary for any proceeding to be filed.

Substantive complaints

[11] There were two principal complaints made by the Applicant. The first concerned an email sent by the Practitioner to the Applicant, informing him of R's wish to separate and other related matters. This email was sent to the Applicant's email address at his work. The Applicant complained that the Practitioner ought to have sent it to his lawyer. He further alleged that the Practitioner had failed to protect his privacy

[12] The second complaint alleged that the Practitioner had failed in his duty to promote reconciliation or conciliation. Much of his information was devoted to describing the consequences of what he perceived as resulting from the Practitioner's failure in this regard.

Applicable standards

[13] The conduct that the Applicant complained of relates primarily to the Practitioner's actions during the period 22 February to 19 May 2008. This is the time-

frame in which the Applicant and R separated, she having consulted the Practitioner and when preliminary steps were taken, leading to the settlement.

[14] The conduct pre-dated the commencement of the Lawyers and Conveyancers Act, which had a commencement date of 1 August 2008. Section 351 of the Lawyers and Conveyancers Act deals with complaints made after the commencement of this Act, about conduct that occurred prior to its commencement. By virtue of section 351, a Standards Committee has jurisdiction to consider such complaints only if the conduct complained of could have led to disciplinary action against the Practitioner under the Law Practitioners Act 1982.

[15] The applicable standards are those found in the Law Practitioners Act and the Rules of Professional Conduct for Barristers and Solicitors, both of which have since been replaced. The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act. The threshold for disciplinary intervention under the Law Practitioners Act 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). For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be breached. That standard is that

> ...the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[16] I note that the above standards had a higher threshold than those now applicable under the Lawyers and Conveyancers Act and its Rules of Conduct and Client Care. In its statement of reasons, the Standards Committee had noted the threshold that applied to the complaints, being of the view that no part of the Practitioner's conduct reached the threshold that could have led to disciplinary action against the Practitioner.

[17] The Applicant disagreed as he considered the Practitioner's conduct was of such a degree to bring the profession into disrepute, and he sought that the Practitioner be censured. I have considered all of the information on the file.

Considerations

Email sent to work address

[18] Shortly after the initial consultation with his client, R, the Practitioner sent an email (on 22 February 2008) to the Applicant at his work address at a major bank in the Corporate Section where the Applicant holds a senior position.

[19] The Applicant stated that the Practitioner knew he was legally represented and that he had been given the details (his lawyer's business card) by R. The Practitioner could not recall this, and informed the Standards Committee that he had believed the Applicant was not represented at the time he sent his 22 February email.

[20] It is by no means uncommon, at the commencement of instructions involving separation, that the party instigating the proceeding will consult a lawyer who will, as a first step, write directly to the partner of his client. There is no reason to conclude that the Practitioner knew that the Applicant had instructed a lawyer, or that he deliberately sought to embarrass the Applicant. This alone could not reach the threshold for an adverse finding under the Law Practitioners Act in terms of the standards set out above.

[21] A further aspect of the complaint concerns the fact that the email was sent to the Applicant's inbox at work. The Applicant stated that the email was not marked as personal or confidential, and he alleges that the Practitioner sent the email to his work address knowing that it would cause him embarrassment, distress or inconvenience in breach of Rule 7.04 of the Lawyers: Conduct and Client Care Rules. In his letter of complaint of 17 December 2009 the Applicant informed the Standards Committee:

> …as my work email address is for normal bank business any other employee can gain unauthorised access, e.g., so urgent matters can be attended to in my absence. As [the Practitioner's] email/letter was of a personal nature, my privacy should have been protected. On receiving [the Practitioner's] email on 22 February 2008 which made an allegation of domestic violence, I felt it appropriate (and did so) to discuss it with my employer. This caused great embarrassment and distress to me that was unnecessary. I had never heard of [the Practitioner] before I received his email/letter of 22 February 2008.

[22] It is noted that those Rules had not come into existence until some six months after the conduct complained of. Any conduct complaints are to be considered against the rules applicable at that time, these being contained in the Law Practitioners Act and the Rules of Professional Conduct for Barristers and Solicitors. Rule 1.08 of that code

required lawyers to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and to not divulge or disclose such information except in circumstances set out in the following 10 circumstances, one of which is where the client expressly or impliedly authorises the disclosure. There is no suggestion that the Practitioner's client, R, did not authorise the information to be conveyed to the Applicant.

[23] The complaint appears to be based on a general duty of confidence owed by the Practitioner to the Applicant. This is not to be found in Rule 1.08, but a general duty is recognised in relation to information known to be confidential, to not disclose that information. I accept that the Practitioner's duty included an obligation to ensure that the information contained in the email was disclosed only to the Applicant.

[24] The question is whether the Practitioner's actions amount to unprofessional conduct by virtue of having sent the letter to the Applicant's work address.

[25] The Applicant's complaint stated that "...*any other employee can gain unauthorised access... ".* The essence of the complaint appears to be that the allegation of breach of privacy arises because the Applicant's inbox is able to be generally accessed by unauthorised individuals.

[26] However, in a later letter to the Standards Committee (15 February 2010) the Applicant wrote that the Practitioner's email was *"indeed read by other* [_ bank] *personnel who had authorised access to my email folders (including my inbox) from other computers."*

[27] There is an important distinction between third parties having unauthorised as opposed to authorised access to a person's inbox. The Applicant provided no information about how personal emails, solicited or unsolicited, are protected within the work environment. Most major banks have a privacy policy concerning personal emails. In this case I took the step of making an (anonymous) enquiry with the _ bank as to its privacy policy and in relation to access to the inboxes of employees and was informed that the inboxes can be accessed only in circumstances where the holder of the inbox expressly authorises another individual to access it. This does not suggest that there is a general right of access to an inbox by third parties.

[28] The Practitioner sent his email to the personal inbox of the Applicant, and there is no evidence to contradict his statement that he believed that this would be received by only the Applicant. The Practitioner said it was marked 'Confidential', but this is denied by the Applicant. The letter itself is not marked confidential.

[29] The Applicant informed the Standards Committee that he considered it appropriate to discuss the Practitioner's email with his employers, as it had raised domestic violence, and that this caused him unnecessary embarrassment and distress to have done so. His later letter to the Committee stated that he felt he had no choice other than to explain these allegations to his employer.

[30] The Applicant has not suggested that any other bank employee in fact read the letter sent to him by the Practitioner by virtue of having gained access (unauthorised or authorised) to his inbox. That is to say, he has no provided no evidence that any third party in fact read the letter as a result of having access to his inbox. He had informed the Standards Committee and this Office that other staff members had read the emails, but this appears to have resulted from the Applicant having himself shown the email to other staff members. The evidence shows that others who became aware of the content of the Practitioner's letter did so because the Applicant showed it to them.

[31] It appears that the Applicant considers that he had little option but to disclose the information to his employer. I find this difficult to accept. He could have immediately removed the email from the system, and made enquiries into whether anyone had in fact accessed his inbox on that day. Instead, he decided to show the email to his employers and provide an explanation; in addition the Applicant continued to keep his employer "*fully appraised throughout*" on how the property matters were progressing. It is difficult to reconcile the complaint against the Practitioner for breach of privacy with the Applicant's readiness to disclose his personal affairs to his employer and continue to do so throughout.

[32] I further note that the Applicant himself used his work email address to communicate with the Practitioner on 13 subsequent occasions. The Applicant compared the content of those emails with that of the Practitioner's on 22 February, adding that this was when he was representing himself in relation to arrangements for the children. The issue, however, concerns the use of the Applicant's inbox as a vehicle for conveying information. If the Applicant had concerns about his privacy due to the authorised or unauthorised access by third parties, this concern is not demonstrated by his continued use of his inbox for subsequent communications with the Practitioner.

[33] This complaint needs to be considered in terms of the standards applying under the former Law Practitioners Act, and whether the Practitioner's conduct was such as could have led to disciplinary action against him. I have seen no evidence that the information was sent by the Practitioner in a manner that could be generally accessed

by third parties at large, or that the Practitioner's actions were responsible for third parties becoming aware of the Applicant's affairs.

[34] In the overall circumstances of the matter it is difficult to see that any part of the Practitioner's conduct in sending a letter to the Applicant's inbox reached the threshold required for disciplinary action to have been taken against the Practitioner.

Lawyer's duty to promote reconciliation and conciliation

[35] The second complaint concerned the Practitioner's obligations under Section 8 of the Family Proceedings Act 1980 which sets out the duty of legal advisors to promote reconciliation and conciliation between spouses, civil union partners, or de facto partners who are, or may become, subject of proceedings under the Act. The obligation is to ensure that the person for whom the lawyer acts is aware of facilities which exist for promoting reconciliation and conciliation, and to take such further steps which in the opinion of the lawyer may assist in promoting reconciliation, or if reconciliation is not possible, then conciliation. A further provision requires counsel acting for such an individual who applies to the Court to have any hearing under that Act or the Care of Children Act 2004, to certify on the application that he or she has carried out his/her responsibilities under Section 1.

[36] The essence of the Applicant's complaint alleged that the Practitioner's confrontational approach to property matters from the outset set the tone for subsequent actions and negotiations, and adversely impacted on the Applicant's relationship with his former partner, the outcome of the property division, and R's health.

[37] The Applicant considered the Practitioner to have been in breach of the above duty. With his original complaint to the New Zealand Law Society the Applicant had included a letter from his counsel dated 28 May 2008 in which his counsel had informed the Practitioner, *"I cannot reconcile your handling of this case with the duties in Section 8".* In that letter the Applicant's counsel expressed concerns about actions taken by R (which were objected to by the Applicant) which were perceived to have done with the knowledge of and approval of the Practitioner.

[38] It is apparent from the exchange of correspondence between counsel that there was a high degree of animosity between the parties. The Practitioner informed the Standards Committee that he was at all times acting on the instructions of his client and if he did not respond to inquiries raised by the Applicant's counsel, this was again on his client's instructions. He denied any breach of his duty under Section 8.

[39] The Practitioner pointed to the evidence showing that the parties had participated in counselling in January 2008, particularly noting that his client had no wish to undertake counselling together with the Applicant, and had no wish to reconcile. The Practitioner also stated that as no proceedings had been filed under any Act, (the matter having eventually settled) the certification issue had not become relevant.

[40] On the file was evidence that both the Applicant and R had been involved in counselling earlier in the year. A letter of 29 January 2008 sent by the Court referred to a request made under the Family Court to arrange for counselling and that the matter had been referred to a counsellor, advising the Applicant that he would be contacted in the near future. It appears that no combined sessions were held at the request of R. On the file there was also a report of the counsellor dated 8 April 2008 which showed that the counsellor had met with R on three occasions and with the Applicant on one occasion. The outcome was that the parties had reached no understanding and had not resolved the dispute.

[41] The above information makes clear that the Practitioner's client (and the Applicant) was aware of the mechanisms whereby reconciliation or conciliation might be promoted, namely through the Family Court mediation or counselling services. In these circumstances it would be difficult to see how the Practitioner failed to inform his client of these opportunities.

[42] The Applicant further contends that the Practitioner's conduct generally contributed to the failure of reconciliation and to the increasing animosity between the parties. The Practitioner, on the other hand, claims he was simply following his client's instructions. The evidence shows that the Applicant continued to cherish a hope of reconciliation. In late March the Applicant's counsel wrote to the Practitioner that the Applicant did not wish the relationship to end, but if that was inevitable, then negotiations should begin for division of property.

[43] The Applicant was critical of the Practitioner in respect of advice given to R, particularly in respect of the division of relationship property, alleging that the Practitioner had given R wrong advice which unnecessarily added to legal costs. He was particularly critical of the Practitioner's alleged failure to have grasped the fact that he (the Applicant) had taken steps to 'ring-fence' his pre-relationship assets in a family trust.

[44] The evidence showed that the Practitioner had originally asserted property rights for his client based on equal division that was shown subsequently to be legally unsustainable. There is no suggestion that he was not, at the time, acting on the instructions of his client in relation to property ownership and pursuing for his client the

share that she felt was due to her. The Practitioner cannot be criticised for taking such steps as he might to advance the interests of his client. The parties eventually came to a settlement in which R's share was substantially less than what the Practitioner had sought for her.

[45] The Applicant disputed the Practitioner's claim that he did not want to give R a fair share of the property, stating that he was willing from the outset *"to make a fair payment to* [R] *in settlement that reflected the circumstances."* The Applicant stated that R's health deteriorated rapidly when she discovered that her entitlement was less than she originally expected, which he attributes to the Practitioner's failure to have properly advised her. In his letters of 15 February 2010 and 15 May 2010 to the Standards Committee the Applicant implied that a better outcome could have been achieved for R had the Practitioner promoted reconciliation or conciliation.

[46] The Applicant provided a significant amount of information about the difficulties now confronting R, both financially and emotionally. I have no reason to doubt that R's circumstances are as difficult as the Applicant has described them to be but I do not overlook the fact that these complaints are made some time after the events occurred. Whether there is any part of the Practitioner's conduct in this matter that could have led to disciplinary proceedings against him is a different question.

[47] The Practitioner rightly pointed out that the division of assets and property was finally settled by agreement. He submitted that if the Applicant had wished to take steps to protect and shield R from the financial disadvantage that resulted from the settlement then it was always open to the Applicant to have been more generous. The Practitioner's view is that the outcome was the result of the Applicant's refusal to give R a greater share.

[48] The Applicant's attitude towards R's claim to property is evidenced in copies of correspondence between counsel at that time these events occurred, and shows the extent to which the Applicant challenged the property claim made by R via the Practitioner. It is also evidenced in an email sent by the Applicant to a friend of R in which he referred to his property division negotiations with R that were occurring in May 2008. The email sent on 25 May recorded the Applicant's criticisms of R and what separation would mean for her financially, making very clear his lack of concern that she may be spending her full relationship property entitlement on legal fees. I mention this only to note that the Applicant himself took a very hard line in negotiating the property issues with R.

[49] Notwithstanding the legal entitlements it was always within the power of the Applicant to agree to give R a larger share that what she could legally claim. The

evidence indicates that steps taken by the Practitioner on R's behalf to achieve a larger share were unsuccessfully essentially because of the Applicant's insistence on enforcing the legal position concerning asset ownership. This calls into question the allegations of the Applicant concerning the Practitioner's role and responsibility in the final in the final outcome of the property settlement.

[50] The Applicant also pointed to the language employed by the Practitioner as a contributing factor. Strong language is not uncommon where there heightened emotions are involved. I note that in any event that the Applicant was represented throughout by his own counsel. It is difficult to avoid concluding that both parties, with the assistance of their counsel, engaged in exchanges which reflected the tensions and stresses at the time in question.

[51] The Practitioner had no professional duty towards the Applicant and there is nothing to indicate that R ever wanted to be reconciled with the Applicant at the time these events unfolded. The Practitioner's duty to his client did not extend to persuading her towards a reconciliation that was not wanted. At that point the only outstanding issues were division of property and care of children. There were clearly difficulties in relation to the matter of chattels but the fact that the Practitioner's client may have removed them did not prevent these items from being brought into account.

[52] Having considered all of the information on the file, I have found no part of the Practitioner's conduct that could have led to disciplinary action being taken against him. I therefore conclude that the Standards Committee was correct in the decision it made.

Decision

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

DATED this 5th day of July 2011

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 CM as the Applicant
Mr XH as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society